

## **Minimum Services White Paper<sup>1</sup>**

An ongoing struggle between REALTOR® associations with the primary goal of seeking to implement standards for all licensees to adhere to certain minimum standards in their professional scope of services and The Department of Justice (DOJ) and Federal Trade Commission (FTC), who are advocating for the interests of limited service brokers under the guise of supporting consumer interests, has recently received much public media coverage and created a buzz in the real estate community of local and national prominence. The core of this dispute involves efforts of state legislatures and REALTOR® associations to pass laws that define what specific duties are owed to clients by licensed real estate brokers. In response, limited service brokers have expressed fear that these certain laws, if passed, will affect their businesses substantially.

The substance of the limited-service brokers' argument is based on the consumers' best interest in real estate transactions, as well as antitrust violations and implications. Conversely, state and local REALTOR® associations stress the importance of fiduciary duties owed to consumers by their hired brokers; protecting the consumer provides requiring some assurances to them that they are entitled to and will receive full and candid services. In addition, these associations have exposed current problems that arise as a result of the co-existence of limited service and full service brokers. This memo will

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<sup>1</sup> Paper prepared by Robert Quentin Whitwell, Jr., Legal Counsel to the Northwest Mississippi Association of REALTORS®, upon request of the Local Board and Association Issues Task Force of the Association Executives Forum Committee. The information was gathered from multiple sources, memoranda, and briefings prepared by the National Association of REALTORS®.

address both sides of the dispute, explain what mechanisms are available to local associations, discuss the efforts that certain States have taken in response to the DOJ and FTC investigations, and propose a reasonable solution to the problems affecting Mississippi.

### **I. Limited Service Brokers' Arguments**

The DOJ and FTC have recently sent letters to two states outlining their positions on proposed legislation that will, in essence, define and specify the real estate broker's responsibilities under "exclusive brokerage agreements." These letters represent the first major investigation by the DOJ and FTC of the real estate industry in over 25 years. One of these letters was sent to the Texas Real Estate Commission (TREC), which urged the commission to reject proposed legislation that would place "restrictions on the ability of Texas real estate professionals to offer flexibility (fee-for-services, MLS-entry-only) in brokerage services." The DOJ argued that the proposed legislation would decrease consumers' choices for real estate services that fit their particular needs; therefore, the services may cost the consumer more money. In other words, the DOJ claimed that in passing legislation of this nature the consumer will be forced to pay for and receive services from the brokers that are unnecessary.

Furthermore, the DOJ and FTC alleged that the legislation proposed in Texas could result in federal antitrust violations. The letter stated that the "proposed regulation would restrict the beneficial competition created by these limited-service brokers." This position was further explained in the letter by saying that the

proposed legislation would prohibit limited-service brokers from offering separate services because the services would be "bundled together . . . into a mandatory package."

Similarly, On April 11, the DOJ sent a letter to the Oklahoma state legislature that mirrored the letter sent to the TREC. The lack of available choices for consumers and increase in cost of services were again the two primary reasons that the DOJ urged the legislature to reject regulation laws. Moreover, the basis of this letter was an expansion of the alleged antitrust violations in the Texas letter. According to the letter, consumers would be forced to purchase services they may not need, therefore costing them "thousands more to buy or sell a home." As a result, the traditional, full-service package costs would increase due to lack of competition from limited-service brokers. Additionally, the DOJ claimed that little evidence is present that shows that a wide selection of services caused any consumers harm.

One state that appears to have followed the suggestions of the DOJ and FTC is Wisconsin. The Wisconsin REALTORS® Association has approved legislation that allows MLS entry-only services as long as the client consents after receiving full and candid disclosure of such services. Wisconsin, however, is in the minority of states regarding this issue. Additionally, an assorted variety of agency relationship options are available via statute to the Wisconsin consumers, allowing for more flexibility in the services brokers can offer. Still, most states are pressing to confine the discount brokerage model and

encourage real estate professionals to provide the services the public has come to expect.

## **II. State and National Association Arguments**

The coexistence of full-service brokers, who offer complete services to their client, and limited-service brokers, who only enter their client's listing on the Multi-Listing Service, has created a number of problems in the current real estate industry. Not only does the limited-service brokers' lack of services provided create uncertainty in the minds of consumers, it also affects the relations between buyer's agents and seller's agents.

REALTOR® associations across the nation have recognized that limited-service brokers fail to provide due diligence to their clients, which has resulted in the client being ill informed about many important aspects of the transaction. Moreover, the lack of services provided by limited brokers has also caused conflicts between buyer's agents and seller's agents. Many times under limited-service agreements, the seller expects the buyer's broker to assist with negotiations, explain the terms of the contract, or assist the seller at closing, even though no compensation is provided to the buyer's broker for such services. In fact, such assistance by the buyer's broker can lead to violations of dual agency law. In opposition, if the buyer's broker refuses to assist the seller with the sale, the transaction may not reach closing. Therefore, the current state of limited-service brokerage models creates problems for consumers as well as other brokers.

Even though the state REALTOR® associations are quick to point out the current problems with the limited-service brokers, many do acknowledge that the existence of "discount" services are not inherently flawed simply by breaking from the traditional real estate brokerage model. In fact, REALTOR® associations promote a variety of services to be offered to consumers; they just believe that the services offered by "discount" or limited-service brokers should have a minimum standard applied for the protection of the consuming public.

The National Association of REALTORS® (NAR), through their general counsel Laurie Janik, has commented on the DOJ's attack. Janik described the letters sent to state associations as free "lobbying" efforts on behalf of limited-service brokers, rather than threats to sue. In fact, the DOJ does not have authority to sue any state legislature or commission that is explaining a rule enacted by the state's legislature. Furthermore, Janik placed great importance in consumer protection as she defended the proposed regulations on limited-service brokers. More specifically, she acknowledged that licensing laws may be considered "anticompetitive," but necessary. Such laws guarantee that consumers receive competent services from brokers that are obligated to perform certain duties.

The NAR has also addressed the issue of antitrust violations by state legislatures, state real estate commissions, and lobbying efforts by REALTORS®. In doing so, Janik drew three conclusions which rebut the allegations. First, the United States Supreme Court held that statutes enacted by state legislatures are immune from scrutiny under federal antitrust laws, even if the result of such laws is

anticompetitive. *Parker v. Brown*, 317 U.S. 342 (1943). Therefore, the DOJ and FTC may *recommend* that certain regulations should or should not be passed by state legislatures, but once these certain laws or regulations are passed, no action is available to the federal agencies.

Second, antitrust immunity extends to state regulatory agencies if the particular state agency's regulatory scheme follows the legislature's intent. *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 62-64 (1985). As a result, even if a state real estate commission adopts a regulation pursuant to the legislature's intent that replaces competition with regulation, the commission is immune from federal antitrust scrutiny. For example, a regulation by the Louisiana State Board of Certified Accountants that prevented Louisiana CPAs from receiving commissions withstood an antitrust challenge. The United States Court of Appeals held that the state board was immune because the regulation articulated the legislature's intent to regulate the state's accountants. *Earles v. State Bd.*, 139 F.3d 1033 (5<sup>th</sup> Cir. 1998). Furthermore, the Court stated that the legislature's allowance of "broad rulemaking authority over the profession" warranted the board's immunity against antitrust allegations. *Id.* at 1044; See also *Porter Testing Lab v. Board of Regents*, 993 F.2d 768, 772 (10<sup>th</sup> Cir. 1993).

Third, lobbying efforts by REALTORS® and REALTOR® associations are protected by the First Amendment. This protection is ensured by what is known as the *Noerr-Pennington doctrine*, which allows individuals or groups to request assistance from state legislatures or

regulatory agencies, despite the effect possibly being anticompetitive. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Workers v. Pennington*, 381 U.S. 657 (1965). However, the REALTOR® associations do not intend to claim that minimum duty regulations are anticompetitive. To the contrary, the associations support these regulations for the interests of the real estate market and the interests of consumers, which are two key aspects of healthy competition in the real estate industry.

The defenses outlined by Laurie Janik on behalf of the NAR have strong states' rights implications and serve to inform state associations that minimum service legislation is safe, as long as it follows legislative intent and statute. Therefore, it follows that many states, in addition to Texas and Oklahoma, have actively responded to this issue and are in the right for doing so.

### **III. Local Board's Response**

Local boards realize that the nature of the Multiple Listing Service cooperative structure offered is being undermined as discount brokerages fail to provide adequate services for their clients and are disturbed to see the information being disseminated without any controls. Limited service business models that publish listings of residential property on an MLS often leave the buyer's agent assisting the seller in order to attain the end result of a sale. That assistance can be implied or interpreted by the seller as an agency relationship, which thus can create undisclosed dual agency. This growing problem only has one known remedy, full and timely disclosure that creates appropriate expectations on behalf of all parties.

Therefore, local boards have been forced to protect their members who end up in these touchy situations but are confined to holding education courses and posting disclaimers to the public explaining what should be expected of their REALTOR®. As a result, real solutions are needed.

In terms of education to the average member, a buyer's representative should know to counsel his buyer/client in the same way he would about any property, keeping in mind the best interests of his buyer/client. The following tips can protect buyer's representatives from potential problems or liability:

1. The buyer's representative should counsel the buyer about compensation issues if there is a representation agreement that obligates the buyer to pay her representative's commission if the seller's agent or the seller does not.

2. A buyer's representative should tell the seller that she only represents the buyer and cannot advise the seller about the value of her property, about negotiation strategies, or about anything else that might be contrary to the interests of the representative's buyer/client.

3. The buyer's representative should also suggest that the seller contact the listing agent if the seller needs additional guidance.

4. The buyer's representative should carefully and quickly disclose her agency relationship with her buyer/client, refuse to provide any service offered by the seller's listing broker, and refer the seller to his listing broker. Avoiding becoming a dual

agent when the seller, who is represented by an MLS-entry-only broker, is a difficult task but attainable.

The consumers do not see the tangled web that entraps the buyer's representative. Instead, they want what real estate professionals have -- access to other professionals. But they do not want to pay these other brokers the professional courtesies for which they are entitled. In effect, these brokers are supplying for-sale-by-owner-minded consumers with the equipment to use a business-to-business oriented MLS as a consumer marketplace. In essence, the consumers think they are beating the system by hiring brokers to let them enter their homes in the MLS and acquire a sign placed in their yard. That consumer receives the bargain, while everyone else has to pay the price. As a result, consumers show their own homes, and in many cases, skip paying cooperating broker fees. Although REALTOR® associations maintain enough flexibility to accommodate consumers' needs by providing a variety of tools; the MLS is not one of those. The MLS is a cooperative tool for professionals to interact. When consumers wanted to view homes online, the industry didn't upend the MLS. Instead, it created online resources for listing brokers to present listings in an attractive way to the public. However, a line should be drawn where the MLS system is concerned.

An MLS is a cooperative, created by and for brokers, to share listings and cooperating fees. The analogy that follows illustrates the above problem. Everyday consumers were not meant to visit an apparel market showroom where clothing buyers go to see lines of samples. Consumers cannot simply buy off the rack, but should go

through retailers who serve as intermediaries by buying the lines to present to the public in a consumer-friendly environment with dressing rooms, lights and mirrors. Showrooms do not have items for the public to buy.

Although it is the nature of consumerism to attempt to beat the system, doing so causes costs to drop to the point where consumers' choices become endangered. For example, air travel can become unsafe if ticket prices drop to the point that maintenance issues are not handled. Likewise, retail marketplaces can become ghost towns and the values of homes can plummet. One of the greatest solutions provided by the MLS is that real estate professional's work with other professionals, and those professionals are expected to behave as such. It isn't proper for one broker to profit while insisting that cooperating brokers deal with an amateur seller. The MLS system has allowed rules which must be maintained to keep the system working effectively. A chaotic market will make matters impossible for anyone to navigate.

#### **IV. States' Responses**

Texas and Oklahoma are not alone with their approach to this dilemma. Missouri, Ohio, Alabama, Michigan, Pennsylvania and Illinois are involved in different phases of legislation to modify existing licensing laws. In fact, Illinois recently updated their licensing law of 2000. Chapter 225/15-75 of Illinois Compiled Statutes specifies what minimum services a broker must provide to his client under an exclusive brokerage agreement. Under the statute, a broker must:

- 1) Accept and alert the client to all offers and counteroffers to buy, sell, or lease the client's property or the property the client wants to purchase or lease;
- 2) Help the client develop, communicate, negotiate, and present offers, counteroffers, and notices that relate to the offers and counteroffers until a lease or purchase agreement is signed and all contingencies are satisfied or waived; and
- 3) Answer all questions relating to the offers, counteroffers, notices and contingencies of the client.

Furthermore, the statute defines "exclusive brokerage agreement" as "a written brokerage agreement that provides that the sponsoring broker has the sole right, through one or more sponsored licensees, to act as the exclusive designated agent or representative of the client and that meets the requirements of Section 15-75 of this act."

Michigan has yet to modify existing license law, but has interpreted case law on this subject. The Michigan Association of REALTORS® does not classify an agreement to only enter a listing on a listing service as a "listing agreement," according to their interpretation of case law. Likewise, the Missouri Association of REALTORS®' legislation was introduced on January 5, 2005 to require all brokers to provide minimum services to their clients. After a hard fought battle and a grassroots campaign to gain support from their Governor, the REALTORS® were successful. The legislation passed and was signed into law. The legislation included duties to alert clients of all offers and counteroffers, assist in all phases of

negotiations, and answer any and all questions posed by the client regarding the transaction.

Similarly, Pennsylvania's current Real Estate Licensing and Registration Act and the Real Estate Commission lay out minimum services that a broker must provide to her client. These "duties" include notifying the client of all offers and counteroffers in a timely manner, alerting the client of the status of the transaction, advising the client of what must be done to complete the transaction, and being available to assist in document preparation. 63 P.S. § 455.606.a, as amended. Texas, in similar fashion, proposed minimum service regulations in 2004 that reflect those specified in the Illinois statute. In addition, the proposed regulations prohibit a broker in an exclusive agency agreement from authorizing another broker to negotiate directly with the seller. The Nebraska Real Estate Commission, in a brilliant maneuver, simply stated that the fiduciary responsibilities of brokers imply a duty to assist a client in this regard. According to Nebraska, performance of these common law duties installed years ago into their license law and in States like Mississippi (i.e. obedience, loyalty, reasonable skill and care, disclosure, accounting, etc.), requires performance of the minimum standards described above.

Clearly, the services offered by minimum-listing brokers do not satisfy those articulated through enacted and proposed legislation across the country. In fact, brokers wishing to follow the law should demand the function of minimum services by their agents to clear the hurdle of general common law duties and those prescribed by law in

every license law in the Country. One clear example of the conflicts which arise is when the listing agent refuses to examine an offer or counteroffer because he is not being paid to do so. Therefore, measures must be taken by the states to eradicate this and other conflicts that are present because of the coexistence of full-service and limited-service brokers.

#### **V. Mississippi's Response**

The many problems that are associated with the coexistence of full-service brokers and limited service brokers can and should be corrected. Mississippi law needs to define "exclusive brokerage agreements" to provide that such agreements must specify that the broker will provide, at a minimum, certain services to his client. The failure to provide such services should be construed as illegal. Since exclusive brokerage agreements limit the ability of other brokers to perform services for a particular client and limit the contact that other brokers may have with the client, this change will ensure that a client can rely on getting certain critical services from their exclusive broker.

Another reason to consider making these changes now is because the law may one day compel it in another fashion. Common law brokerage for a State like Mississippi requires the highest fiduciary standards, beyond any statutory law ever crafted. Recent Mississippi Supreme Court cases can be interpreted as driving home high expectations of brokers who deal with consumers. Less than two years ago, the Court stated, "a professional assumes a heightened responsibility when assuming to act on behalf of parties who have

opposing interests." *Lane v. Oustalet*, 873 So. 2d 92 (Miss. 2004). Additionally, the Court commented on dual agencies by saying, "they are fraught with special problems and require a heightened standard of conduct on the part of the agents in assuring that both masters are well served and the agents' responsibilities are fully performed as to all." *Id.*

Allowing brokers to parcel off services the Court expects the professionals to adhere to will open up the flood gates to possible litigation against the licensees. Moreover, persons objecting to compelling licensees to provide minimum services may discover that the very persons they wish to provide freedoms for are being placed in jeopardy because of their own actions. Giving guidance to brokers now is better than seeing them suffer later. Further, the required fiduciary responsibilities consumers expect from REALTORS® demands the provision of these minimum standards. Common sense holds that the Nebraska commission was right. The duties of real estate professionals include the ones being exhaustively argued in this paper. A statement stating thus is sufficient.

For those persons afraid to take the problem head on, there is a challenge. The real estate market has been the pivotal foundation of our economy. Creating a consumer-driven scheme that destroys the control of the professionals and staff managed support systems, like the MLS, steals away the functionality of the entire industry. While times are good, some consumers might have the ability to join in the playground sandbox. However, when times change, as they inevitably will, there must be a guiding light. Now is the time to define

responsibilities licensees owe to their clients. The preservation of the security of the housing market is at stake. Enabling ourselves to protect the consumer for the long haul and not for their craving appetites in today's bustling market is a must. These safeguards will never be possible in an environment where consumers are ill informed about services provided to them by limited-service brokers, where buyer's agents are open to liability for assisting an abandoned seller simply to ensure that their own client finalizes the transaction, and where consumers attempt to take control of the MLS. Therefore, prevention of future problems by enumerating what services licensees must provide to their clients, and enabling our future generations to enjoy the benefits and opportunities that the modern real estate industry provides is the duty that must be faced today.