



LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

Real Estate Advertising Content

Every REALTOR® knows the importance of advertising. Licensees advertise listed properties and market themselves. Clever and efficient advertisement is often essential to succeeding in the competitive real estate industry. The savvy REALTOR® can engage in attractive, interesting advertising without crossing the lines and issuing advertising that potentially violates the laws protecting the public from deception.

The laws and regulations that impact real estate advertising come from many sources. Federal, state and local laws as well as rules and ordinances regulate who can advertise, the authority required to advertise on behalf of another, when the advertising may be performed, where the advertising may appear, the content of the advertising and the audience for the advertising.

This *Legal Update* will address primarily the content of real estate advertising, including the basic rules for all advertising, the regulations pertaining to advertising different sorts of listings and property information, the guidelines for advertising that includes credit terms and fair housing advertising rules. The *Update* concludes with Legal Hotline questions and answers regarding advertising practices. Part 2 of the discussion of real estate advertising, focusing primarily on the methods and techniques used for communication of marketing content, will be found in the October 2015 *Legal Update*.

General Real Estate Advertising Rules

Advertising and promotion are among the key services a broker provides. Advertising may be communicated via the MLS, email, thumbnails, text messages, Facebook, Twitter, Pinterest, Tumblr, Instagram, Google+, pictures, websites, outdoor advertising signs, billboards, television, radio, magazines, periodicals, leaflets, brochures, telephone calls, letters, homes magazines, sales presentations, public speeches, graphics, facsimile transmissions, PowerPoint, face-to-face conversations and other media. Wisconsin licensees should keep in mind that the basic rules and laws governing real estate advertising apply to all of these.

Basic advertising rules

The basic advertising rules for all media come from Wisconsin license law and in most cases are echoed in the REALTOR® Code of Ethics. Wis.

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Admin. Code § REEB 24.04 states four cardinal rules that all Wisconsin licensees must follow when engaging in any advertising, regardless of whether it is written, verbal or electronic.

1. Advertising cannot be false, deceptive or misleading

Licensees are prohibited from advertising in a manner that is false, deceptive or misleading. Article 12 of the REALTOR® Code of Ethics similarly provides that REALTORS® must present a true picture in their advertising and representations to the public. The bottom line is that the law does not tolerate advertising that misleads consumers into engaging a broker or buying a property based upon false representations. The truth is always best.

2. Advertising must include the firm name

A real estate licensee – a broker or salesperson – working for a licensed sole proprietor broker or a licensed real estate company with a licensed broker entity license – a firm – must advertise under the supervision of and in the name of that firm. All advertising must include the firm’s name, as it appears on its license, or a trade name on file with the Wisconsin Department of Safety and Professional Services (DSPS). Note that disclosure of the firm’s name is the only required element – there is no rule requiring that the office telephone number, address, website or any other licensee or firm information be included. Licensees should, however, check company policy to see if other information is required by the firm in advertising.

A similar rule found in Standard of Practice 12-5 in the REALTOR® Code of Ethics allows for the identification of the firm via linked materials

in instances where the small size of an electronic display such as a tweet makes disclosure of the firm name impractical:

“REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®’s firm in a reasonable and readily apparent manner. This Standard of Practice acknowledges that disclosing the name of the firm may not be practical in electronic displays of limited information (e.g., “thumbnails”, text messages, “tweets”, etc.). Such displays are exempt from the disclosure requirement established in this Standard of Practice, but only when linked to a display that includes all required disclosures. (Adopted 11/86, Amended 1/11)”

There also are a few exceptions when even the firm name is not required under § REEB 24.04(2):

- When a licensee is advertising his or her own real estate for rent, there are no restrictions: no firm name must be included in the advertisement.
- An ad for the sale of the licensee’s property, provided that such sales are infrequent, or for the solicitation of real estate for purchase by the licensee, may be placed only if the licensee identifies him or herself as a real estate licensee in the ad.

Standard of Practice 12-6 similarly provides that REALTORS® advertising personally owned, unlisted property shall disclose their status as owner or landlord and as a REALTOR® or real estate licensee.

Although not required by license law, a company’s office policy manual may mandate that all of a licensee’s personal sales, purchase and rental transactions go through the company. This would mean that a salesperson cannot sell, buy or rent on their own but rather must list all properties to be sold or rented with the company and work through the firm when buying properties. When the licensee’s personally owned property is listed with his or her firm, this is treated as a normal listing requiring the inclusion of the firm name. Additional disclosures, such as “licensee-owner,” are not required in these ads. Local MLS rules, however, generally require that any licensee ownership interest be disclosed in the MLS data sheet and listing.

3. Property may be advertised only with the consent of the owner

Wis. Admin. Code § REEB 24.04(3) indicates that brokers must obtain the consent of the owner before advertising the property. Standard of Practice 12-4 prohibits REALTORS® from advertising a property without authority.

Historically, a listing contract was required to provide real estate brokerage services. However, due to the 2006 modifications to Wisconsin agency law, a broker may provide brokerage services without a client or subagency relationship on a pre-agency basis per Wis. Stat. § 452.134(1). A licensee only needs an agency agreement prior to negotiating on behalf of the party in a real estate transaction; it is not required for advertising provided other advertising rules are met. Presuming there is owner consent, preferably in writing to meet the Wis. Admin. Code § REEB 24.08 requirements, an agent could advertise a property without a listing contract.

Under Wis. Admin. Code § REEB 24.04 and Article 12 of the Code of Ethics, a property may be advertised for sale or rent only with the permission of the owner, and such advertising cannot mislead the public and other licensees into thinking that a listing contract exists. Whenever

possible agreements regarding real estate transactions should be committed to writing per § REEB 24.08 and Article 9 of the Code of Ethics.

4. Owner must agree upon advertised price

Brokers can advertise a property only at the price agreed upon with the owner per Wis. Admin. Code § REEB 24.04(4) and Standard of Practice 12-4.

Complaints regarding advertising in violation of these basic precepts can be made to the local REALTORS® Association or the Real Estate Examining Board/Department of Safety and Professional Services, which regulates all real estate licensees.

Attribute the source

A major challenge in advertising is selecting words that will precisely convey the intended message. Consumers tend to rely upon stated data as the absolute truth unless the statement is specifically qualified.

A Wisconsin licensee can be found liable to a buyer for inaccurate statements made by the broker that appear to the buyer to have been made from the broker’s own personal knowledge. In Wisconsin, the law provides that an inexperienced buyer should be entitled to rely on the factual statements made by a professional. Accordingly, when a broker receives data from the seller, the city treasurer’s office, or another third party and restates the information in the MLS data sheet or in other advertising as if it were fact, the broker may be responsible for the accuracy of the information. Accordingly, REALTORS® are recommended to specifically attribute data used in advertisements, such as acreage, square footage and assessed values, to its source, and/or use general disclaimers. Disclaimers may not, however, provide certain and absolute protection in all cases.

REALTORS® should consider general disclaimers on all advertisements to avoid the presumption that all statements made by a licensee have been verified and are personally known to be true by the licensee. It is generally recommended that disclaimers contain language to the effect that the stated information was provided by the seller and other third parties and has not been verified by the broker unless otherwise indicated.

Photographs

Photographs are subject to copyright law. Copyright protection exists from the time a work, such as a photograph, is created. There is no requirement to register the photograph, and reproduction by anyone other than the creator, without the creator’s permission, is a violation of U.S. copyright law. The copyright of the work immediately becomes the property of the author, here the photographer, who created the work. Only the author or those deriving their rights through the author can rightfully claim copyright.

The 1976 Copyright Act generally gives the owner of copyright the exclusive right to do, and to authorize others to do, the following:

- Reproduce the work.
- Modify the work.
- Distribute copies of the work to the public by sale or other transfer of ownership, or by rental or lease.
- Display the copyrighted work publicly.

The terms of use of the MLS allow limited use of the photographs of

other MLS participants and subscribers. They do not allow copying for future listings or the advertising of sold property.

Anyone who violates any of the exclusive rights of a copyright owner is an infringer and may be liable for damages. Courts also have the power to issue an injunction to prevent or restrain copyright infringement. A party may seek to protect his or her copyrighted photographs and other material against unauthorized use by filing a civil lawsuit in federal district court. If the REALTOR® believes that she has copyright rights that have been infringed, she may consult an attorney.

① MORE INFORMATION

- See www.copyright.gov for information from the United States Copyright Office.
- “Best of the Legal Hotline: Technology Issues,” in the October 2005 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Oct05/Hotline.
- The April 2014 *Legal Update*, “Avoiding Liability for Copyright and Patent Infringements,” at www.wra.org/LU1404.

Drones

The use of drones is generally regulated by the Federal Aviation Administration (FAA), which is part of the U.S. Department of Transportation and oversees all aspects of commercial aviation, including airports, airlines and air traffic control. According to the FAA Modernization and Reform Act of 2012, the use of drones for recreational purposes is allowed as long as certain safety guidelines are met, such as:

- The drone may not weigh more than 55 pounds.
- The drone does not interfere with any manned aircraft.
- The drone is flown within the visual site of the operator.
- If the drone is flown within five miles of an airport, the operator must notify the airport operator and air traffic controller.

Wisconsin's Drone Privacy Protection Act (2013 Wis. Act 213) restricts the use of drones to protect personal privacy and safety. The law generally prevents the use of drones for weaponry purposes and limits the ability of law enforcement officers to use drones to gather

evidence. Moreover, the law prohibits using drones with the intent to photograph, record or otherwise observe an individual in a place or location where the individual has a reasonable expectation of privacy. Violation of the law is a Class A misdemeanor, which includes a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both.

Despite these restrictions, some REALTORS® have found ways to use drones as part of their business. As long as drones are used inside a building, they are not subject to FAA regulations, but indoor drone use must still comply with Wisconsin's Drone Privacy Protection Act. Thus, drones can be used as an effective marketing tool to fly through homes or buildings with the intention of showing various internal features of the property.

However, commercial use of drones to photograph or video the outside of a property is still prohibited by the FAA unless a waiver is received. The FAA issued guidelines to specifically clarify that a real estate agent flying a drone “to photograph a property that he is trying to sell and using the photos in the property's real estate listing” is considered an unlawful commercial use. However, the FAA is committed to quickly finalizing the new federal rules for the commercial use of drones in national airspace. Until that time, REALTORS® can apply for a Section 333 waiver, which provides a limited-use permit to the applicant, comes with many safety restrictions on use of the machine and requires that the operator hold a pilot's license or have a pilot who will fly the drone. The waiver is a stop-gap measure for limited commercial drone use until the FAA's proposed rules become final.

In the meantime, NAR does not recommend members use drones to take pictures or video of a property for a listing, or hire a third party to take pictures or video until the FAA has clear regulations for the use of drones or the user has received a waiver from the FAA.

① MORE INFORMATION

“Should You Pursue Drone Technology?” at www.realtormag.realtor.org/technology/feature/article/2015/05/should-you-pursue-drone-technology.

“REALTORS® Eagerly Await A-OK to Fly UAVs,” at www.realtor.org/news-releases/2015/05/realtors-eagerly-await-a-ok-to-fly-uavs.

NAR Drone resources at www.realtor.org/topics/drones.



Rules for Advertising Different Listings and Information

The source of property information that is included in advertising as well as the agency authority of the broker to share the information on behalf of the owner may impact a broker's marketing practices. This section addresses rules for advertising other brokerage firms' listings, "coming soon" properties, MLS exclusive listings and credit terms.

Advertising other firms' listings

With regard to listings from other brokers or firms, the agent first must have the permission of the other firms. If the information is obtained from the MLS, it may only be used with authority or consent per the MLS rules. If the listing broker and seller have given consent, the agent must clearly indicate that the agent is not the listing agent.

The MLS rules provide that MLS property listing data may be distributed based upon the interest of prospective purchasers. It is intended that listing data be provided to prospective purchasers with a bona fide interest in purchasing. Consider whether the information is being used in a "pull" or "push" scenario. "Pull" is when a prospective purchaser has expressed interest in a specific property or type of property; the broker may pull out MLS information in response to the purchaser's property parameters. "Push" is when the broker is selecting information about properties for a general promotion or marketing piece. The broker should not arbitrarily push MLS information because this does not comply with the reproduction restrictions in the MLS rules.

When a broker submits listing information to the MLS, it is for the clearly defined and limited purpose of disseminating that information to other MLS participants. The MLS allows participants, upon the request of a potential purchaser or tenant, to provide information obtained from the MLS. See the Use of Copyrighted MLS Compilation provisions on pages 70-72 of the NAR Handbook on Multiple Listing Policy at www.realtor.org/handbook-on-multiple-listing-policy.

The Internet Data Exchange (IDX) allows a limited electronic display of other MLS participants' listings. When operating a public website or applications for mobile devices, the participant must comply with IDX rules. The IDX rules do not apply to the use of other brokers' listings on a Facebook page or other social media. See Internet Data Exchange (IDX) on pages 77-81 of the NAR Handbook on Multiple Listing Policy at www.realtor.org/handbook-on-multiple-listing-policy.

Coming soon

What does it mean to advertise a property as "coming soon"? The answer to that seemingly simple question varies among agents, brokers, MLSs and state regulators nationwide. While the real estate industry has not agreed on a definition of "coming soon," one thing is certain and consistent – a broker's decision to market a seller's property as "coming soon" must always be made based on the client's informed determination of what best serves the client's interests.

"Coming soon" is a recent phenomenon whereby a property that is not yet listed is nonetheless advertised under the expectation that the property will be available for purchase in the foreseeable future. Or there may be an executed listing contract in place but it is not effective for another week or two and thus not yet eligible for inclusion in the MLS. In these situations, the agent wants to market the property via social

media such as agent websites and Facebook, or with "coming soon" signage, but not enter the property in the MLS.

"Coming soon" is a recent trend that makes many uneasy. Essentially under pre-agency, a broker can, with written consent from the owner, advertise property without having an agency contract. On the other hand, a listing contract that does not commence until a date in the future arguably does not authorize such early marketing. However, the listing contract potentially could be modified to include the authority to advertise other than on the MLS prior to the effective start date of the listing.

Putting "coming soon" advertising in the MLS typically does not work if the MLS requires a listing contract, but putting it on social media may be possible. MLS rules commonly require agents to place listings on the MLS within a few days of receiving a signed agreement. Failure to do so violates MLS rules, often garnering the agent significant penalties and fines. Of course, sellers can always elect not to have their property included in the MLS. In these instances, agents typically must have the seller sign an MLS opt-out form evidencing the seller's direction not to have the property placed on the MLS.

In all events, the broker would have to make sure there is a listing in place before negotiating with any buyers who make contact. There also may be a concern that a buyer will do an end-around and go to the seller directly, essentially cutting out the broker. Before engaging in such advertising, the agent may have the broker and private legal counsel review any contract used and the "coming soon" advertisement to assure compliance with office policy, the law and the Code of Ethics.

For most sellers, getting the highest possible price on the best terms is their best interest, and maximizing exposure of their property to potential buyers advances that interest. Failing to act in the client's best interest and failing to disclose the pros and cons of a limited marketing plan, such as "coming soon" advertising, can violate state real estate license laws and regulations, MLS policies and the REALTOR® Code of Ethics.

① MORE INFORMATION

"'Coming Soon' Properties Can Create Consumer Confusion," at www.realtor.org/news-releases/2014/06/coming-soon-properties-can-create-consumer-confusion and "'Coming Soon' - Is it in the Seller's Best Interest?" at www.realtor.org/articles/coming-soon-is-it-in-the-seller-s-best-interest.

MLS office exclusive

A pocket listing, off-MLS, or "office exclusive" listing as it is sometimes called, generally refers to a listing in which an agent has a listing agreement and the seller does not authorize the placement of the listing on the MLS. Instead, the agent markets the property through informal networks or online platforms.

The Article 3 duty to "cooperate with other brokers except when cooperation is not in the client's best interest" is rooted in the premise that broad exposure and cooperative marketing often produce the best results for sellers. Legal risk concerning pocket listings arises when agents or brokers keep listings off the MLS for reasons that are not in the best interest of the client. For example, unlike MLS listings, pocket

listings are more likely to result in the agent representing both the seller and the buyer, which may generate a higher commission for the agent. This in itself is not illegal or unethical, but if the prospect of a higher commission is the reason an agent suggests a pocket listing to the client, then this could violate the Code of Ethics, MLS rules and license law.

On the other hand, pocket listings may be appropriate in certain situations. For example, high-profile individuals may not want the public to know they are selling their property. Another seller may not want a lot of people coming through the property for privacy reasons. In these cases, a pocket listing may make sense to protect and maintain the client's privacy.

MLS rules commonly require agents to place listings on the MLS within two days of receiving a signed agreement. Failure to do so violates MLS rules, garnering the agent significant penalty and fines. Of course, sellers can always elect not to have their property included in the MLS. In these instances, agents must have the seller sign an MLS opt-out form evidencing the seller's direction not to have the property placed on the MLS. Section 5 of the NAR Handbook on Multiple Listing Policy, at www.realtor.org/sites/default/files/policies/2015/2015-HMLP.pdf, addresses Office Exclusive Listings (Policy Statement 7.63): "If a seller withholds consent for a listing to be published in an MLS compilation of current listings, such listings shall be filed with the MLS but not disseminated to other participants. As a matter of local discretion, certification may be required from the seller or from the listing broker that the listing is being withheld from the MLS at the direction of the seller. (Adopted 11/04)."

“The main purpose of the Truth in Lending Act (TIL) is to assure the meaningful disclosure of consumer credit and lease terms, including those in advertisements, so that consumers can easily compare terms and shop wisely for credit.”

also disclose other major terms, including the annual percentage rate. This rule is intended to ensure that all-important terms of a credit plan, not just the most attractive ones, appear in an ad.

The triggering terms are:

(1) The amount or percentage of any downpayment in a credit sale, expressed as either a percentage or dollar amount. Examples include: "Only 5% down," "as low as \$3,000 down," or "total move-in costs of \$800."

Note: The use of the term "downpayment," by itself in an ad does not trigger the Reg Z disclosure requirements unless the transaction is a "credit sale." A "credit sale" occurs when the seller is offering seller financing and the seller has provided similar financing in residential transactions more than five times in the current or preceding calendar year. Mortgages from banks and other lenders involve loans and not credit sales. Thus, an ad by a real estate agent containing only the down payment percentage for a mortgage available through a lender is not

subject to the Reg Z disclosure requirements.

(2) The amount of any payment, expressed as either a percentage or dollar amount. Examples include: "Pay \$23.44 per \$1,000 borrowed," or "\$500,000 loan for just \$1,650 per month."

(3) The number of payments or the period of repayment. Examples include: "360 monthly payments," or "30-year mortgage available."

(4) The amount of any finance charge. Examples include: "\$50,000 mortgages, 2 points to the borrower" or "less than \$1,200 interest."

General statements, such as "take years to pay," "no down payment," or "no closing costs," do not trigger further disclosures because they do not state or suggest the period of repayment or downpayment cost.

Required disclosures

If an ad for financing uses a triggering term, it also must include the following information:

(1) The amount or percentage of the down payment. The amount or percentage of the "down payment" need not be shown directly as long as it can be determined from the ad. For example, "10% cash required from buyer" is a sufficient disclosure.

(2) The terms of repayment. The "terms of repayment" may be expressed in a variety of ways, as long as they convey the required information. For example, the length of a loan can be expressed as the number of payments or the time period of the loan. In an advertisement for credit secured by a dwelling, when any series of payments varies because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, the fact that payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher. If a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement, the advertisement must state with equal prominence and in close proximity to the minimum payment statement the amount

① MORE INFORMATION

See "Law & Policy: Professionalism and pocket listings," at www.realtor.org/articles/law-policy-professionalism-and-pocket-listings.

Advertising credit terms

The main purpose of the Truth in Lending Act (TIL) is to assure the meaningful disclosure of consumer credit and lease terms, including those in advertisements, so that consumers can easily compare terms and shop wisely for credit. The TIL regulations for advertising consumer credit, including mortgage loan terms offered by lenders or sellers, are found in Regulation Z (Reg Z). Real estate licensees who place an advertisement that promotes consumer credit, for example, mortgage loan terms available from a lender, must comply with TIL and Reg Z, not just the creditors themselves. This includes any commercial message in any medium that promotes consumer credit. All such advertising disclosures must be clear and conspicuous.

Triggering terms

If an ad for available financing uses a "triggering term," the ad must

and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

(3) The “annual percentage rate,” using that term or the abbreviation “APR.” If the annual percentage rate may be increased after consummation of the credit transaction, that fact also must be stated.

Advertising finance rates

If an ad shows the finance charge as a rate, that rate must be stated as an “annual percentage rate,” using that term or the abbreviation “APR.” The ad must accurately state the APR, even if it is the same as the simple interest rate. The APR may be higher than the simple interest rate because the APR reflects the total cost of credit including interest and other credit charges. The advertisement must state that the rate is subject to increase after consummation if that is the case, but the advertisement need not describe the rate increase, its limits, or how it would affect the payment schedule. As long as an ad includes the APR, a simple annual rate, a periodic rate or both may also be included, provided that the simple annual or periodic rate is not more conspicuous in the ad than the APR.

① MORE INFORMATION

There are additional specific rules. See the FTC’s “How to Advertise Consumer Credit and Lease Terms,” at assets.complianceexpert.com/fileservers/file/19307/filename/Appendix%20E.pdf and the applicable rules at www.consumerfinance.gov/eregulations/1026-24/2013-30108_20140118.

Fair Housing Advertising

Section 804(c) of the federal Fair Housing Act makes it unlawful to make, print or publish any notice, statement or advertisement with respect to the sale or rental of a dwelling that indicates a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination. Wisconsin law adds marital status, ancestry, lawful source of income, sexual orientation, age, and status as a victim of domestic abuse, sexual abuse or stalking to the list of protected classes and offers similar protections. Local municipalities may develop their own fair housing ordinances, so it is important to become familiar with the local provisions in a particular area. Local ordinances tend to offer broader protections and may have more protected classes than federal or state law.

The cardinal rule for avoiding fair housing liability in advertising is to describe the property and property features – not the buyer or tenant!

HUD guidance for real estate advertising

The United States Department of Housing and Urban Development (HUD) has provided guidance regarding whether certain words and phrases commonly used in real estate advertising violate the Federal Fair Housing Law.

Race, color and national origin

Real estate advertisements may not state a discriminatory preference or limitation based on race, color or national origin. Nor may such advertisements use words describing the housing, the current or potential residents, neighbors or neighborhood in racial or ethnic terms (such as white family home or no Irish). Do not use Negro, black, Caucasian, Oriental, Indian, white or colored. However, it is not unlawful to use facially neutral phrases such as “master bedroom,” “rare find” or “desirable neighborhood” which are deemed to be “neutral” on their face.

Religion

Advertisements that contain an explicit preference, limitation or discrimination based on religion are prohibited (such as no Jews, Christian home). Do not use Protestant, Christian, Catholic, Jewish or Muslim. If an advertisement uses the legal name of an entity or landmark that contains a religious reference, for example, Roselawn Catholic Home, or a religious symbol like a cross, a religious preference could be implied. If the advertisement contains an appropriate disclaimer against such preference or limitation, it will not be held in violation of Federal Fair Housing Law.

Descriptions of the property (apartment complex with chapel) or the services (kosher meals available) are permissible. Use of terms (Merry Christmas), symbols (Santa Claus or the Easter Bunny) or images (St. Valentine’s Day graphics) relating to certain religious holidays does not violate the law.

Sex

It is unlawful to advertise for single-family dwellings or separate units in multifamily dwellings in a manner that explicitly indicates preference, limitation or discrimination on the basis of sex. It is permissible to use the terms “master bedroom,” “mother-in-law suite,” and “bachelor apartment,” which are commonly used as architectural terms or physical descriptions of housing units. Gender may be specified if the housing involves shared living space.

Handicap (disability)

Real estate advertisements may not contain exclusions, limitations or other indications of discrimination based on disability (i.e., no wheelchairs, no service animals). It is lawful to describe the property (great view, fourth-floor walk-up, walk-in closets), the services or facilities (jogging trails) or the neighborhood (walk to the bus stop). It is also permitted to describe the conduct required of residents (nonsmoking, sober). Advertisements may contain descriptions of accessibility features, such as a wheelchair ramp.

Familial (family) status

Advertisers may not discriminate on the basis of familial status. For example, advertisements that limit the number or ages of children, or state a preference for adults unless the property meets a housing for older persons exemption), couples or singles are prohibited. On the other hand, descriptions of the property (two bedroom, cozy family room or immaculate, like new), services and facilities (exercise room or no bicycles allowed) or neighborhoods (quiet streets) are not discriminatory on their face and therefore do not violate the law.

Other facets of an advertisement may influence the reader’s perception of what is being said or what is being implied.

Ordinary reader test

Whenever there is a question whether particular terms or phrases violate fair housing law, the “ordinary reader” test may be applied. The courts frequently use this standard to determine whether real estate ads violate fair housing law. This objective test asks whether the advertisement suggests to an ordinary reader that a particular class is preferred or “dispreferred” for the advertised housing. The “ordinary reader” is a reasonable person who is neither the most suspicious nor the most insensitive reader. There generally will be no liability if no potential preference is apparent to the ordinary reader. On the other hand, a violation may be found where there was no overt discrimination or intent, but the ad still happens to read in a way that an ordinary reader might find discriminatory.

Use of human models

Human models in photographs, drawings or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status or national origin, and is not for the exclusive use of one such group.

Prohibited selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed to other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others. Similar care must be exercised in advertising in publications or other media directed at one particular sex, or at persons without children. Such selective advertising may involve the use of human models of members of only one sex, or of adults only, in displays, photographs or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

Additional fair housing advertising pointers

- Avoid strategies that target less than the whole market.
- Do not direct an ad to only one segment of the community.
- Do not advertise in a limited geographic area.
- Do not use particular publications or editions of newspapers.
- Do not use only small circulation publications that are designed primarily to certain religious or ethnic groups.
- Do not use only selected sales offices.
- Use the Equal Housing Opportunity slogan or logo in real estate advertising to alert consumers to the concept of fair housing, show the broker’s commitment to fair housing and demonstrate and intent to abide by the fair housing law.

Test: What is the real message of the ad? Does it exclude any groups? Does it describe the property and not the target market?

Liability for discriminatory advertisements can extend to anyone who participated in the publication of the ad, including the agent who

wrote the copy, the supervising broker, the publisher (newspaper, MLS) and the property owner.

① MORE INFORMATION

For further information about avoiding fair housing discrimination in advertising, see the April 2007 *Legal Update*, “Avoiding Discrimination in Advertising and Racial Steering,” at www.wra.org/LU0704, and the April 2005 *Legal Update*, “Diversity and Fair Housing,” at www.wra.org/LU0504.

Hotline Questions and Answers: Advertising Content

An agent received an email inquiry regarding a listing. The person asked about the ethnic diversity in this neighborhood. How should the agent respond?

Fair housing laws impact what licensees may or may not say in advertising property for sale or rent. The federal Fair Housing Act makes it unlawful to make, print or publish any notice, statement or advertisement with respect to the sale or rental of a dwelling that indicates a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin, or an intention to make any such preference, limitation or discrimination. Wisconsin statutes add sexual orientation, marital status, lawful source of income, age, ancestry, and status as a victim of domestic abuse, sexual abuse or stalking to the list of protected classes.

The agent should be careful to not answer any questions in a manner that would indicate a preference, limitation or discrimination with regard to any protected class. In addition, Standard of Practice 10-1 provides that, “When involved in the sale or lease of a residence, REALTORS® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood nor shall they engage in any activity which may result in panic selling, however, REALTORS® may provide other demographic information. (Adopted 1/94, Amended 1/06)” Thus, the agent may provide reports that include data from responsible sources such as the Department of Public Instruction or direct the person to a website where reliable demographic data may be obtained.

The agent wants to advertise that attendees at her open houses are entered into a raffle drawing at the end of each month for a gift certificate for a dinner for two. The agent would post the winners’ names on her Web page. Can the agent legally do this?

The issue is whether such a drawing would be an illegal lottery under Wis. Stat. §§ 945.04(5) & 945.02. A contest is generally defined as a lottery if one must give consideration to enter, and the award is determined by chance. Consideration is anything that would give a financial or commercial advantage to the promoter, with some exceptions, such as send in coupon or visiting a store.

For example, a contest where every licensee who showed one of a broker’s listings is eligible to enter a drawing for a vacation trip at the end of the year is arguably an illegal lottery. The fact that the agents are showing the broker’s listings is consideration to the broker, and the

drawing is by chance.

On the other hand, the statutes provide that visiting a business location without being required to pay admittance or buy anything is not consideration. Thus a drawing for a prize may be held at an open house provided everyone who attends is eligible to enter the drawing.

① MORE INFORMATION

See the Department of Agriculture, Trade & Consumer Protection's Guide to Contests and Promotions at datcp.wi.gov/Consumer/Top_Ten_Complaints/Guide_to_Contests_and_Promotions/index.aspx, the Wisconsin Department of Administration handout regarding contests, sweepstakes and sales promotions at www.doa.state.wi.us/documents/DOG/Charitable/ContestsSweepstakesPromotions.pdf and the handout regarding raffles at www.doa.state.wi.us/Documents/DOG/Charitable/Raffle/Raffle%20Frequently%20Asked%20Questions.pdf.

A licensee is going to list a home and wants to advertise that he will give a television to whoever buys the home. Is this permissible and is there a limit on the value?

Incentives may be offered to sellers or buyers to induce them to sell or purchase real estate. Seller or buyer incentives can be offered in any amount as cash or as personal property such as a home warranty plan, a savings bond, a gift certificate, an appliance or some other item. Such incentives must be clearly documented in advance – prior to closing. The party should have a clear and thorough understanding of the incentive's terms and conditions. This advance documentation is necessary to establish that the incentive is not a fee-splitting arrangement with a non-licensee, which would be illegal under Wisconsin law.

Standard of Practice 12-3 of the REALTOR® Code of Ethics provides that, "REALTORS® shall be careful at all times to present a true picture in their advertising and representations to the public." Standard of Practice 12-3 states, "The offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the REALTOR® making the offer. However, REALTORS® must exercise care and candor in any such advertising or other public or private representations so that any party interested in

receiving or otherwise benefiting from the offer will have clear, thorough, advance understanding of all the terms and conditions of the offer."

This standard assumes the omission of even one detail may cause the advertisement to present less than a true picture. This may be disputable should someone bring an ethics complaint concerning an ad for party incentives that does not contain every detail – the issue will be whether there is a true picture of the offered incentive in the ad. An ad that states, "See broker for details," however, is like a red flag waving in the face of a competitor who abides by the Standards of Practice – it may be seen as an admission that less than a true picture has been disclosed in the ad.

For more about incentives from sellers and listing brokers, see the October 2006 WRA *Broker Supervision Newsletter*, "Selling Incentives," at www.wra.org/bsnOct06.

Sources

For additional advertising and marketing resources visit the following sites:

- NAR Field Guide to Marketing Tips for REALTORS®: www.realtor.org/field-guides/field-guide-to-marketing-tips-for-realtors.
- NAR Field Guide to Effective Online Marketing: www.realtor.org/field-guides/field-guide-to-effective-online-marketing.
- NAR Field Guide to Do Not Call and Do Not Fax Laws: www.realtor.org/field-guides/field-guide-to-do-not-call-and-do-not-fax-laws.
- FTC Advertising FAQs: A Guide for Small Business: www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business.

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