

# Residential Core Law

ISSUES IN REAL ESTATE



# STAGNARO, SABA & PATTERSON, Co., L.P.A.



- Real Estate
  - Tax Valuation Appeals
- Wills, Trusts, Estate Planning & Administration
- Corporate
- General Litigation
  - Business Disputes
  - Personal Injury & Medical Malpractice
  - Labor & Employment Law
  - Creditor's Rights

















# THE FINE PRINT



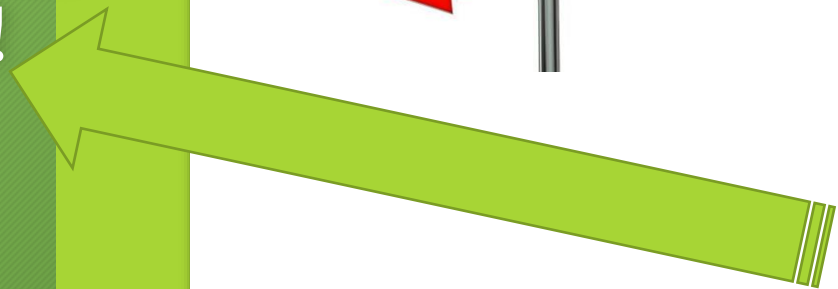
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# Topics

 <p><b>Realtor® Liability</b> EVERYONE GETS SUED!</p>	 <p><b>disclosure</b> <small>dis-clu-sure</small> Use disclosure in a sentence noun Disclosure is defined as the act of revealing or something that is hidden. An example of disclosure is the announcement of a family secret. An example of a disclosure is the family secret which is told.</p>	 <p><b>Skeletons in the Closet</b> WHEN CAN THEY CREATE REALTOR® LIABILITY?</p>	 <p><b>Contemporaneous Offers</b></p>	 <p><b>Principal Broker</b> Management Level Associate</p> <p><b>Broker / Agency Duties</b></p>
 <p><b>Independent Contractor Status</b></p>	 <p><b>Saba</b></p> <p><b>Broker can use multiple trade names</b></p>	 <p><b>Return of Earnest Money</b></p>	 <p><b>Good Funds Law</b></p>	 <p><b>Copyright Issues &amp; Photos in MLS</b></p>
 <p><b>Advertising</b> ADMINISTRATIVE RULES IN THE INTERNET AGE</p>	 <p><b>Electronic Signatures</b> UNIFORM ELECTRONIC TRANSACTION ACT</p>	 <p><b>Fast Track Foreclosures</b> ME 463: VACANT &amp; ABANDONED HOMES</p>	 <p><b>Fraud</b></p> <p><b>Statute of Frauds</b></p>	<p><b>Thank you for coming.</b></p>

# Realtor® Liability

EVERYONE GETS SUED!



# R.C. 4735.62 — AGENCY DUTIES



- Confidentiality
- Full disclosure
- Follow lawful instructions of principal
- Advance interests of principal
- Due diligence
- Fiduciary responsibilities

# R.C. 4735.621 — WAIVER

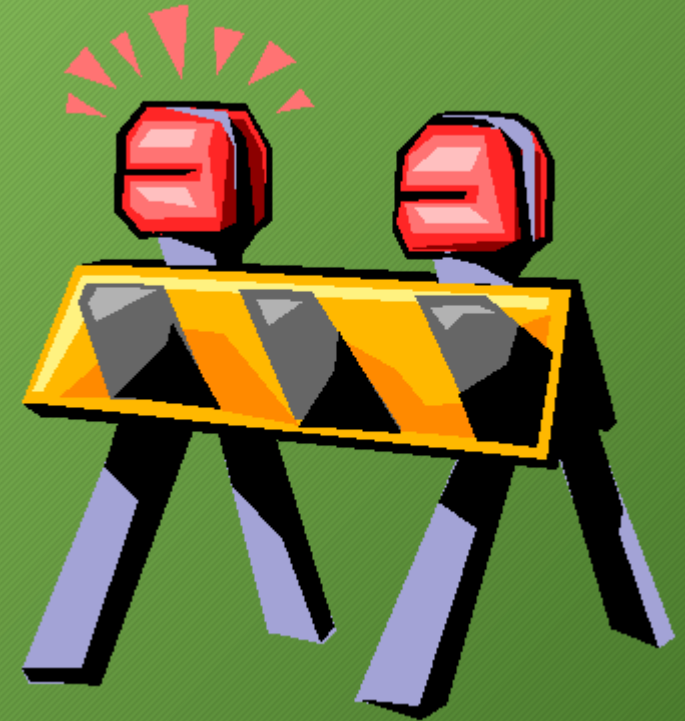


- Ohio House Bill 150
  - Minimum Services Bill (October 9, 2006)
  - Licensee owes full fiduciary duties in R.C.
- Duties that can be waived (R.C. 4735.63 & 4735.65)
  - Answering questions about steps clients must take to fulfill contract
  - Presenting, accepting delivery of, answering questions about, and assisting client in developing & presenting offers/counteroffers

# R.C. 4735.62 — DUTIES THAT CANNOT BE WAIVED



- Exercise reasonable skill and care
- Perform terms of written agency agreement
- Follow lawful instructions
- Maintain loyalty
- Comply with laws, statutes, rules, regulations
- Disclose material facts
- Advise client to seek expert advice
- Account in a timely manner for money

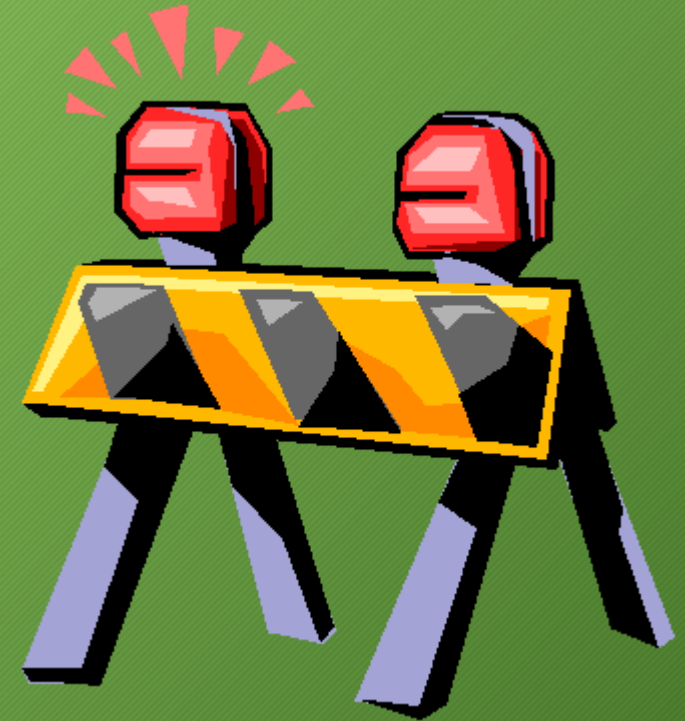




# R.C. 4735.62 — DUTIES THAT CANNOT BE WAIVED



- Confidentiality - Realtor® Code of Ethics
  - Obligation to preserve confidential information
- Email mistakes can become violations
  - Forwarding wrong document
  - Reply all
- Slow down!



# R.C. 4735.70 — DUAL AGENCY



- How dual agencies arise
- Hazards
- Dual-Agency Disclosure (R.C. 4735.57)
  - Timing at auction sales (R.C. 4735.58)
  - To purchaser at first contact (R.C. 4735.60)
- Broker and management level licensee duties
  - R.C. 4735.72



2. a thing  
**disclosure** dis·clo·sure

Use **disclosure** in a sentence

noun

Disclosure is defined as the act of revealing or something that is

a. An example of disclosure is the announcement of a family secret  
An example of a disclosure is the family secret which is told.

# Agency Duty of Full Disclosure

# R.C. 4735.67 — DISCLOSURES TO PURCHASER



- Material facts of which licensee has actual knowledge that purchaser would not discover by reasonably diligent inspection
  - Material defects in the property
  - Environmental contamination
  - Info that statute or rule requires be disclosed
  
- No duty to investigate

# DISCLOSURES — CODES & STANDARDS

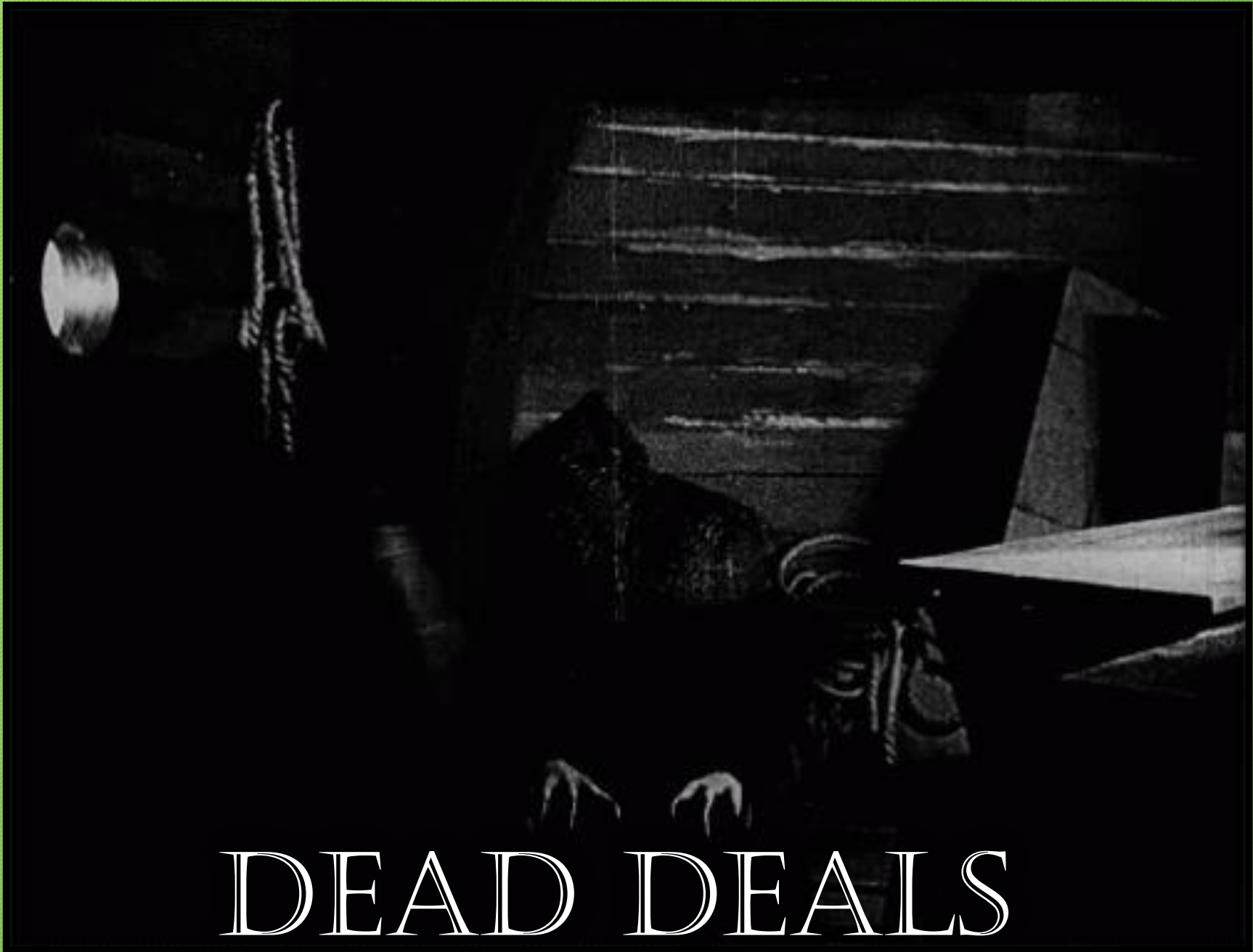


- Article 1
  - Protect & promote the interests of the client
  - Obligation to client doesn't relieve Realtor® of obligation to treat all parties honestly.
- Article 12
  - Realtors® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations.
  - Article 12-8
    - Obligation to present a true picture includes information presented, provided, or displayed on websites.



# Skeletons in the Closet

WHEN CAN THEY CREATE REALTOR® LIABILITY?



# DEAD DEALS

**SSP**  
STAGNARO  
SABA &  
PATTERSON

BYLLIK201  
2017 8

# *HUBBARD V. TNT LAND HOLDINGS*

- Realtor®/Brokerage lists property for sale
  - Thereafter, Realtor® acts as dual agent
- Owner receives and accepts an offer
- Atypical inspection identifies problems
  - Short inspection - less than 2 hours
  - Not in typical binder
  - Never give Realtor® name of inspector





# HANDWRITTEN ADDENDUM



- Buyers give Realtor® handwritten list of problems
  - Unnamed inspector estimates repairs >\$30,000
  - Realtor® assumes “negotiating tool”
- Realtor® handwrites addendum to contract
  - Names issues found by “*qualified home inspector*”
    - Back turret had no footer
    - Doors in spiral staircase pad had settled
    - SW corner of home under master bedroom settling
    - Garage floor needed substantial repair for settling

# FIRST OFFER FALLS THROUGH

- Deal falls apart
- Owner begins repair work
  - Installation of retaining walls
  - Fresh concrete beneath turret room
  - Fresh stucco over concrete pad
  - Handmade shims to stabilize garage wall
    - Skim coat to cover cracks and shims
  - Garage floor replaced with fresh concrete



## 2<sup>ND</sup> OFFER (DURING CONSTRUCTION)



- New Purchaser tours house
  - Construction work ongoing
  - Walks through 3 times, once with architect
- Realtor® acts as Dual Agent for successful sale
  - Purchaser signs “as-is” purchase contract
  - Inspection addendum
    - Permits inspection / credit for repairs
  - Purchaser never obtains inspection

# LIABILITY RE DISCLOSURES



- Purchaser discovers earth movement issues, sues
  - Verdict against Seller ~ \$352,000 (house was \$320,000)
- Brokerage fights under doctrine of caveat emptor
- Verdict against Brokerage/Realtor®
  - Breach of Fiduciary Duty/Negligence
    - Knowledge was attributable to Realtor®
    - Fiduciary duty to Purchaser

# RESIDENTIAL PROPERTY DISCLOSURE FORM



- Buyer relies upon:
  - Its own examination
  - Seller's certification in the RPDF
  - Inspections (requested/required)
- Not upon representation(s) of Realtor®
  - “The statements contained in this form are made by the owner and are not the statements of the owner’s agent or subagent.”

# ROGUE INSPECTOR



- Inspector notes code violation/structural problem
  - But inspector is not a structural engineer
- Now what?
  - a) fix the “problem”
  - b) get a second opinion
  - c) disclose everything
- **Gatekeeper has privileges**
  - No duty to investigate
  - If not dual agent, do not ask for report



# STIGMATIZED HOUSES

# *BRANNON V. MUELLER REALTY & NOTARIES*



- Property unoccupied
  - Buyers asked agent whereabouts of owners
  - Agent said family moved after father died of heart attack
- In reality, he had committed suicide in the house
- Buyers sued for fraud
  - Court held “not material in a legal sense”
  - No duty to disclose
  - No liability
- We encourage you to Disclose! Disclose! Disclose!



# *SPINELLI V. BLAIR*



- Previous owners raped/murdered their own children in the house
  - Buyers asked agent why property had lingered on the market, if a murder or something horrible had happened there
  - Agent said property was “too pricey”
- Court found that agent had no duty to reveal history
  - History was not material to transaction
  - “Psychological stigma” not a material defect
- We encourage you to Disclose! Disclose! Disclose!

# DISCLOSURE OF OFF-SITE CONDITIONS



- Condominiums - amenities & common areas not off-site
  - Undivided interest (as tenant in common)
  - Within purview of “property”
- Off-Site Conditions
  - Clogs in sewer beyond property line
  - Crime statistics

# REALTOR® CODE OF ETHICS — ARTICLE 1



- 1-6: Submit offers & counter-offers as quickly as possible
- 1-8: Buyer's agent must submit all offers until acceptance
  - Should recommend buyers/tenants obtain legal advice if question as to whether pre-existing contract has been terminated
- 1-9: Preservation of confidential information
- 1-15: Disclosure re existence of other offers

# ACCEPTING/DELIVERING OFFERS

- Via text
  - Enforceable?
  - Who's responsible?
  - Authority & apparent authority
  
- Via email





# Contemporaneous Offers

# CONFLICT IN CURRENT LAW



- R.C. 4735.65(B):

A licensee does not breach any duty or obligation to the purchaser by showing the same properties to other purchasers or by acting as an agent or subagent for other purchasers...except that any dual agency relationship must be disclosed to a client pursuant to section 4735.71 of the Revised Code.

- But dual agency defined as buyer-seller, not buyer-buyer

- Ohio Canons of Ethics Article 10:

A licensee should not enter into an agency relationship with a party whose interests are in conflict with those of the licensee or another client represented by the licensee without fully disclosing the potential conflict and obtaining the informed consent of all parties.

- So what about buyer-buyer situations?

- Duty of confidentiality to one v. duty to disclose material facts to other

# “CONTEMPORANEOUS OFFER”



- R.C. 4735.51(G): two or more clients submitting offer on same property that will be considered at same time
- Pursuant to R.C. 4735.65(B):
  - Licensee shall give notification of situation to all buyer-clients prior to preparing offer(s) to purchase
    - Written, unless cannot be delivered in timely manner - then verbal
    - Can be via text, email
  - Identities/terms of offer cannot be disclosed
  - If party objects, must refer to another licensee
  - Disclosure of existence of contemporaneous offers does not breach duty of confidentiality

# ESCALATION CLAUSES

- Basic components of addendum:
  - Original offer
  - Amount to step up
  - Max amount (“cap”)
- Triggered by competing offer
  - Hot market situations



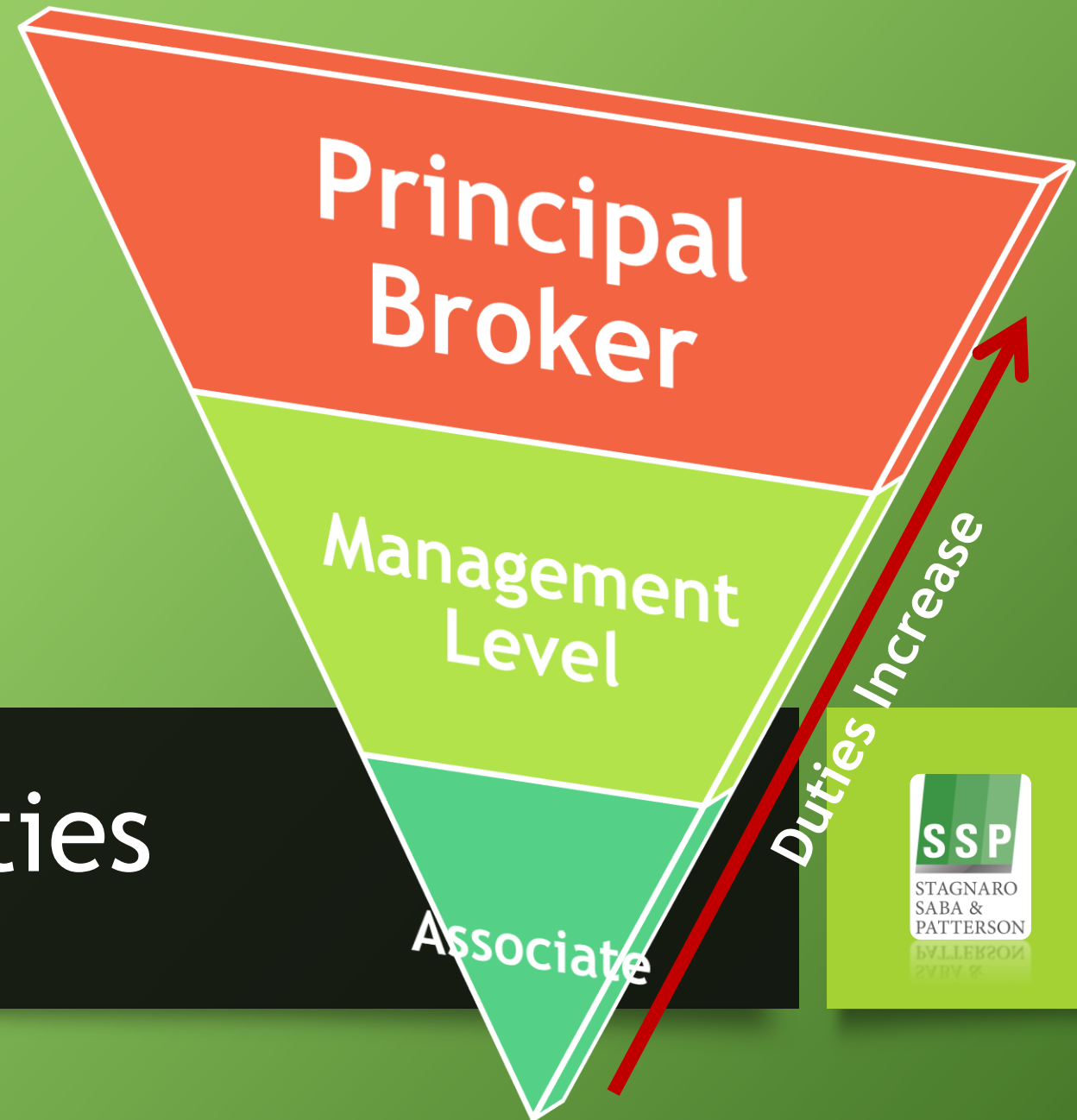


# EXERCISE CAUTION



- Buyer giving up some negotiating power
  - Only use in multiple-offer situations
  - If only offer submitted, technically remains at original price,
  - BUT - seller will know to counteroffer
  - Consider appraisal contingency
- Ensure that legitimate competing offer does exist
  - Review proof to avoid seller fraud
  - Examine the numbers (e.g., closing costs paid by seller reduces price)

# Broker / Agency Duties



# 3 TYPES OF BROKERS



- Associate Broker (new status) - R.C. 4735.01(AA)
  - No oversight responsibilities - functionally, salesperson/agent
- Management Level Licensee- R.C. 4735.01(FF)
  - Oversees main office, branch, or division & supervises other licensees
- Principal Broker- R.C. 4735.01(GG)
  - Brokerage must designate at least one principal - R.C. 4735.081(A)
  - With one exception, no new duties - just consolidated

# PRINCIPAL BROKER'S DUTIES



- **Oversee/Direct operations - R.C. 4735.081(C)(1)**
  - Duties can be delegated to management - R.C. 4735.081(D)
- **Comply with office requirements - R.C. 4735.081(C)(2)**
  - Brokerage must have regular place of business - R.C. 4735.13
    - Real address - not P.O. Box
  - Additional locations must be licensed as branch offices - R.C. 4735.16
    - With Broker/Agent designated in charge
    - Must have office sign (even if just business card at entrance)

# PRINCIPAL BROKER'S DUTIES



- Display Fair Housing pamphlet/poster - R.C. 4735.081(C)(3)
  - Double check that both are up to date
  - Poster displayed in same area with licenses
- Maintain Licenses - R.C. 4735.081(C)(4) & (5)
  - Company, Branch Offices, Salespersons - R.C. 4735.13 & 4735.16
    - Brokerage license in entrance/reception area
    - Branch office license at that branch
    - Agents' licenses must be available for inspection
    - Replace lost/destroyed licenses
- Return terminated licenses - R.C. 4735.081(C)(6)

# PRINCIPAL BROKER'S DUTIES



- Maintain trust account - R.C. 4735.081(C)(7)
- Manage record keeping - R.C. 4735.081(C)(8)
  - Transactions & trust account records for 3 years
- Develop/maintain written policies - R.C. 4735.081(C)
  - Company policy on agency relationships, Brokerage policy on agency
- Pay affiliate licensees - R.C. 4735.081(C)(11)
  - Earned share within reasonable time (not defined) - R.C. 4735.18
- No payment for unlicensed activity - R.C. 4735.081(C)(12)
- Establish/monitor advertising practices - R.C. 4735.081(C)(13)
  - Ensure compliance with regulations

# R.C. 4735.081(C)(14) — EXPANSION OF DUTIES



- Ensure agents perform only within area of competency
- If agent wants to branch out:
  - Agent should discuss with Principal
  - Principal must decide if agent has competency or needs to work with affiliated licensee who has necessary expertise

# VICARIOUS LIABILITY



- Principal bound by action taken on its behalf by agent acting within scope of her authority
- Principal not vicariously liable unless agent acted within scope of agency
  - Agent not within scope of agency once clearly and completely departs from services/jobs hired to do



# AUER V. PALIATH



- Salesperson takes Buyer to several properties
  - Claims extensive work has been done
  - Buyer tours interior of only one property
- Buyer purchases 5 investment properties
  - Contracts with Salesperson's companies
    - Property management
    - Construction work
- Buyer receives no income from properties
- Subsequently visits properties
  - Properties uninhabitable - need extensive work

# AUER V. PALIATH



- Buyer sues Salesperson and Brokerage
  - Salesperson: fraud - inducement in sale
  - Brokerage: vicarious liability
    - Brokerage's name listed on Buyer's contracts and agency disclosure forms
    - Brokerage received commissions from transactions
  
- Case ultimately settles



# Independent Contractor Status

# INDEPENDENT CONTRACTOR STATUS



- HB 532 added language to clarify
  - Agents/brokers can be affiliated as either employee or independent contractor - R.C. 4735.091
  - Broker's duty to supervise agents, on its face, does not create employee relationship - R.C. 4735.081(F)
- IRS Test to determine if independent contractor
  - Must be licensed
  - Must have an agreement that you are an independent contractor for federal tax purposes
  - Substantially all of licensee's remuneration must come from sales

# PRINCIPAL FOR MULTIPLE BROKERAGES



- Broker may be permitted to act as principal for multiple brokerages - R.C. 4735.081(E)
  - Must have permission of Superintendent
  - Criteria for approval currently being finalized
  - Only applies to principal broker
- Example
  - Has residential brokerage
  - Wants to get into property management
  - Creates separate entity, usually for liability purposes

# REPORTING BROKER STATUS



- Designation of status with Division of Real Estate
  - On April 6, all brokers will be categorized as principal
  - End of April, Division sends out broker assessment form
  - If not principal, indicate as such
- Change in principal broker status
  - Must be reported to Division within 15 days of change
  - There will be a form for this



Broker can use multiple trade names



# R.C. 4735.06(B)(3) — MULTIPLE TRADE NAMES



- Superintendent may approve more than one trade name
- Criteria for Approval
  - Name clearly distinguishable from other broker/brokerage
  - If not, written consent of other broker
  - Name can't be misleading/likely to mislead public
  - Not more than 5 trade names
  - Some commonality
    - Saba Residential Realty / Saba Property Management
  - Name registered with Ohio SoS as fictitious name





# Return of Earnest Money

# EARNEST MONEY



- If transaction doesn't close, the following is required to return earnest money:
  - Written/Signed agreement, or
  - Court order specifying how funds must be disbursed
- Recent confusion re relying on preprinted language in purchase contract
- Signed agreement regarding disbursement of earnest money must be separate document - R.C. 4735.24(A)(2)
  - Cannot be based on language in purchase contract, unless Broker waits 2 years to disburse and no one objects during that time - R.C. 4735.24 (C)(1)
  - Typically signed release



# Good Funds Law

# CHANGES AS OF SEPTEMBER 29, 2017



- Cash, personal or business checks, certified checks, cashier's checks, official checks or money orders (aggregate limit of \$10,000)
- ~~Funds transferred electronically via real time gross settlement system provided by Federal Reserve Banks~~



# Copyright Issues & Photos in MLS



# LISTING PHOTO REQUIREMENTS (7.11.2)



- Must include photo within 72 hours
  - Including front of the building
  - Or “Seller Prefers No Photo” image (authorization on file)
- No added text overlay
  - Embedded data not prohibited (time stamps/floorplans, etc.)
- Branding with any info or images prohibited
  - Including “for sale” signs posted on property

# SUBMITTING PHOTOS ON MLS (11.5)



- Must have right to display/reproduce & authority to grant MLS subscribers that right
  - Subsequent listing agent must have prior written authorization
- Copyright ownership (11.6)
  - All right, title, and interest in each copy of every MLS compilation created and copyrighted by the MLS, and in the copyrights therein, shall at all times remain vested in the MLS.
  - The MLS shall have the right to license such compilations or portions thereof to any entity pursuant to terms agreed upon by the Board of Directors.

# EMERGING TECHNOLOGY: DRONES



- Commercial use currently prohibited - MLS must remove
  - Always comply with federal, state, local laws
- Section 333 Waivers can be issued for real estate marketing
  - Look for company that has waiver, insurance, indemnification clause
- FAA Regulations may change







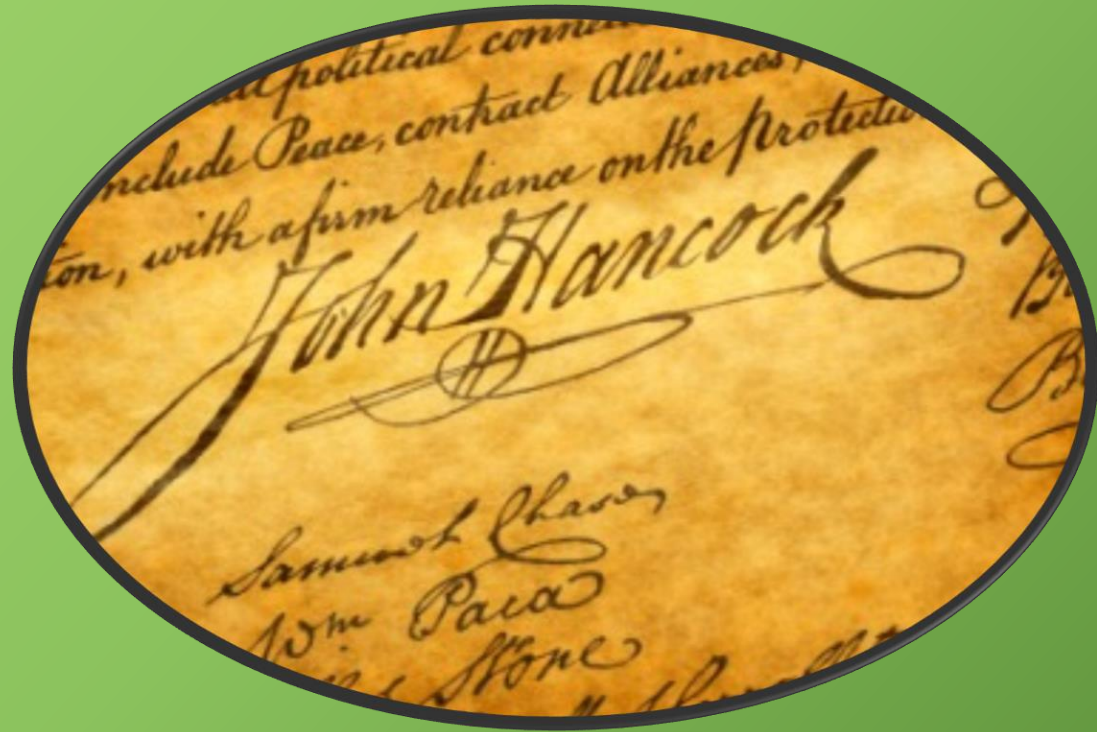
# Advertising

ADMINISTRATIVE RULES & THE INTERNET AGE

# R.C. 4735.16 — HIGHLY REGULATED



- Broadly defined - including, but not limited to:
  - Brochures, Business cards, Newsletters, Fliers, Yard signs, Magnets, Door hangers
- Wide range of liability for Agent & Broker
- Name as it appears on License
  - “Realty” or “Real Estate” & insignias may be used
  - Name of Broker the Salesperson is licensed under
  - Equal prominence for Broker & Salesperson



# Electronic Signatures

UNIFORM ELECTRONIC TRANSACTIONS ACT



# R.C. 1306.06 — SATISFIES LEGAL REQUIREMENTS



- Signature may not be denied legal effect because electronic
- Contract may not be denied legal effect because electronic record used in formation
- If law requires written record, electronic record satisfies
- If law requires signature, electronic signature satisfies

# R.C. 1306.07 — MUST BE CAPABLE OF RETENTION



- If law requires person to send information in writing to another, requirement is satisfied if information is sent in record capable of retention by recipient at time of receipt
- Electronic record is not capable of retention if sender or its information processing system inhibits ability of recipient to print or store

# R.C. 1306.16 — ENFORCEABILITY AGAINST CONSUMER



- A provision of a non-electronic contract involving a consumer and to which a state agency or county office is not a party that authorizes conducting of transaction by electronic means is unenforceable against consumer, *unless consumer separately signs provision.*
- Consumer's agreement to electronic transaction shall not be inferred solely from fact that consumer has used electronic means to pay account or register purchase or warranty.
- Cannot be varied by agreement



# Fast Track Foreclosures

HB 463: VACANT & ABANDONED HOMES



# HB 463: VACANT & ABANDONED HOUSES



- County prosecutor can petition court to start sale process if sale isn't underway within 12 months of foreclosure
- Judgment creditors can use private selling officer rather than sheriff
- State will create website to manage & conduct sales
- Criminal mischief liability for homeowners who destroy property after foreclosure initiated





# Statute of Frauds

# *OBLH, LLC V. O'BRIEN*



- Dad and stepmom own 114 acres
  - Dad tells sons to form LLC so he can gift interest
  - Sons form LLC and have deed drafted
- Dad hospitalized
  - Stepmom verbally promises to honor dad's wishes
- Dad dies; Stepmom takes sole ownership

# OBLH, LLC V. O'BRIEN



- Stepmom reserves mineral rights on 114 acres
  - Enters into oil & gas lease
- Sons sue: breach of contract & unjust enrichment
  - District Court dismisses claims under statute of frauds
  - Appellate Court reverses & remands: Part Performance
- Moral of the Story?
  - Reduce to writing & Sign ASAP

Thank you for coming.

