Legal Line

SUMMARY OF 2024 HOTLINE QUESTIONS

By:

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The following is a summary of the questions and answers from the 2024 Hotline. The Louisiana REALTORS® maintains a hotline for their Brokers to answer questions affecting the real estate industry as a whole. The hotline does not provide legal advice but provides general information. It is important to note that the laws and court decisions affecting these responses to these questions may change as new laws are passed and new court decisions are published. We cannot comment on or provide advice with respect to specific transactions. These responses are for general information only.

Note that some of the responses provided herein were generated prior to the National Association of Realtors ("NAR") Settlement going into effect. That is, on August 17, 2024, several practice changes affecting compensation and communication in residential real estate transactions went into effect.

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AGENCY INQUIRIES

1. **In property management we were discussing agency disclosure and then dual agency disclosure. We were wondering the specific requirements of both and at what point in a rental should each be disclosed. As it does not make sense to try and present and obtain a signature of 12 or sometimes more people that might view an available rental and 12 + are real numbers for some of our properties.**
   We then looking at the disclosures noted that it reads: "A dual agency relationship shall not be construed to exist in a circumstance in which the licensee is working with both landlord and tenant as to a lease which does not exceed a term of three years and the licensee is the landlord." which talks about the "landlord" in 3rd person as though it's someone else but ends with "the licensee is the landlord." So, I'm trying to understand in rental situations when it's prudent to request Dual Agent disclosure be disclosed and signed?

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

LA R.S. 9:3897 addresses dual agency in real estate transactions, and La. 9:3897(C) provides that the written consent required for dual agency situations "shall be obtained by a licensee from the client at the time the brokerage agreement is entered into or at any time before the licensee acts as a dual agent."

As you have pointed out, the disclosure document copies the language in La. R.S. 9:3891(10) and 9:3897(G), which states in part that: "A dual agency shall not be construed to exist in a circumstance in which the licensee is working with both landlord and tenant as to a lease which does not exceed a term of three years and the licensee is the landlord." This language indicates that the dual agency would not exist only if both the lease is for 3 years or less and the licensee is also the landlord. Therefore, any time that those two specific conditions do not exist, you have the potential of a dual agency relationship.

So, the disclosure form and written consent are required in most situations where a licensee represents both the landlord and tenant (other than the limited exception mentioned above) and that consent must be obtained before the licensee acts as a dual agent. The key issue is: when are you are considered to be "acting as a dual agent." The law very broadly states in La. R.S. 9:3891(10) that Dual agency means an agency relationship in which a licensee is working with … both landlord and tenant in the same transaction. We interpret this to mean that the disclosure and informed consent must be presented a soon as you become aware that there is a potential

transaction (i.e., a lease) between your respective clients, landlord and tenant, because you must get that consent before you act as dual agent. Otherwise, you can withdraw from representing either landlord or tenant in the relevant transaction.

We understand that this imposes a burden from a practical perspective, but the rules and laws regarding dual agency are written broadly to ensure the protection of the clients. We would expect that they are also interpreted broadly to require the disclosure and consent in situations like the one you described.

2. **If I am the developer of a property and am the owner/agent, I know to disclose to Buyer and to write "Seller is a Licensed Real Estate Agent in Louisiana" in the contract and noted in the MLS public remarks. My question is: If the buyer does not have an agent, can I put my name as Listing Agent and Selling Agent but just not check the Dual Agency box on the Louisiana Purchase Agreement?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

No, we are of the opinion that you cannot claim to be an agent of the buyer without first establishing an agency relationship with the buyer. Since a transfer of immovable property must be in writing, a mandate/establishment of an agency relationship to do the same must also be in writing. LA Civ. Code art. 3897. Furthermore, Louisiana law provides that "[a] licensee may act as a dual agent only with the informed consent of all clients." LA R.S. 9:3897. Therefore if you are not the buyer's agent, established pursuant to written consent of the buyer, you should not check a box that claims to be the buyers agent.
Additionally, if you do establish an agency relationship with the buyer, Louisiana law mandates that you present and have the buyer execute the Disclosure and Consent to Dual Agent form provided by the Louisiana Real Estate Commission. This form is required by LA R.S. 9:3897, and, once executed, would require you to check the "Dual Agency" box on the Louisiana Purchase Agreement.

3. **I am working a sales contract representing the buyer. The seller's agent tells me that the seller has given power of attorney to an entity to represent her interests. I'm told the term for this is "novation". I vaguely recall this term, but never heard of it's use by anyone. Should I be concerned, or do I proceed as with any other transaction? The seller is also requesting that the buyer use her settlement attorney.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

A novation is the extinguishment of an existing obligation by the substitution of a new one. LA Civ. Code. art. 1879. You would typically see a novation in a lending situation where debts are involved. What you have described above is not a novation.

Instead, what you have described is known under Louisiana law as a contract of mandate. The contract of mandate is defined in the Louisiana Civil Code as an act by which one person gives power to another to transact for him one or several affairs. LA Civ. Code art. 2689. That power, or authority, may be given for the interest of the person granting it only, or for the joint interest of both parties, or for the interest of a third person, or for the joint interest of the party granting it and a third person, or even for the interest of the person receiving it and a third person.

A contract of mandate typically is not required to be in any particular form. However, if the law prescribes a particular form for an act, the contract of mandate conferring the authority to engage in that act must be in the same prescribed form. LA Civ. Code art. 2993. Since the sale of an immovable must be made by an authentic act or an act under private signature, LA Civ. Code art. 2440, therefore the contract of mandate conferring authority to engage in the purchase or sale of an immovable for another must also be in the same form. This means it must be in the form of a signed writing.

You should ensure that the power of attorney (contract of mandate) is in writing and has been signed. If so, you can generally assume it is valid and you can proceed with the transaction.

If you are worried about the substance or the authenticity of the power of attorney, we encourage you to engage your own attorney for review. Furthermore, we would e expect that any settlement attorney (whether selected by the seller or buyer) would review and confirm that the power of attorney is appropriately drafted and executed to ensure that all parties executing the closing documents are duly authorized to do so.

Although it is not applicable to your question posed, it is notable to mention that LA R.S. 37:1431 provides that a "listing agreement" is a document "signed by all owners of real estate or their authorized attorney in fact authorizing a broker to offer or advertise real estate…" The statute goes on to provide that a listing agreement is only valid if signed by all owners or their authorized attorney in fact. An attorney in fact is another term for the person granted authority under a power of attorney, so the listing agreement can be valid if it is signed pursuant to a power of attorney. *See McLemore v. Landry*, 898 F.2d 996 (5th Cir. 1990).

4. **Does Agency matter in a Procuring Cause case. Is it relevant with regard to who receives compensation.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

As we understand it, procuring cause refers to the series of events initiated by a real estate agent who ultimately helped the buyer close on the purchase of a home. If the buyer uses more than one agent, determining procuring case, and ultimately who is entitled to commission on the sale, becomes difficult.

NAR's Arbitration Guidelines, created pursuant to Article 17 of the REALTOR® Code of Ethics, define procuring cause as "the uninterrupted series of causal events which results in the successful transaction." In practice, the broker whose efforts set off that unbroken chain of events will be regarded as procuring cause.

We are unsure what your reference to "agency" means. Pursuant to Louisiana law, agency – or mandate— "is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal." LACC art. 2989. You certainly need an agency/mandatary relationship between the buyer and the real estate agent before the real estate agent would have a claim to compensation related to the purchase of a home.

If, however, you have two+ real estate agents who entered into a mandatary relationship with the buyer, things get tricky. Article 17 requires REALTOR® principals to submit procuring cause disputes to mediation and arbitration. An arbitration hearing panel will consider all relevant details of the underlying transaction, guided by a number of factors to determine procuring cause. Those may include:

- The nature and status of the transaction.
- Roles and relationships of the parties.
- Initial contact with the buyer.
- Continuity and breaks in continuity.

What's important to keep in mind is that it's the interplay of these fac tors that indicates procuring cause. One factor alone will not decide a case. https://www.nar.realtor/magazine/real-estate-news/law-and-ethics/hold-on-thats-my-client. Because of the interplay of all these factors, we cannot say whether "agency" would "matter," but it certainly seems to be relevant.

5. **Do I need to get an e-signature on a buyer agency agreement through a company like Authentisign or docusign? Or can a fillable form be used where the buyer just types his name in a field be used? (Example: Your Signature- Joe Smith). If a buyer types his name in on that field, can that be used as a legal signature?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Your question is governed by the Louisiana Uniform Electronic Transactions Act ("LUETA"), as provided in R.S. § 9:2601 et seq. Under LUETA, an "electronic signature" is defined as a symbol

"attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record." We interpret this to mean that typing your name would be a valid electronic signature when done so with the requisite intent.

LUETA does not require that you use certain programs such as DocuSign to obtain such electronic signature. Furthermore, "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form." LA R.S. 9:2607(A). If the law requires a signature, an electronic signature generally satisfies the law. LA R.S. 9:2607(D).

It is important to note that LUETA applies only when all of the parties to a transaction have consented to conduct the transaction by electronic means. The parties may agree to use electronic signatures in writing, orally, or by electronic means; the context and surrounding circumstances, including the conduct of the parties, may also determine whether the parties have agreed to conduct a transaction by electronic means. While no formal agreement between the parties is required, the critical element is the intent of a party to allow electronic signatures. This is generally a fact-based inquiry, and can vary based on the terms of a specific agreement or the conduct of particular parties to a transaction. LA R.S. 9:2605.

Note that there are certain documents that are exempt from LUETA, as noted in LA R.S. 9:2603. Generally, the exceptions do not apply to a contract unless a notary or witnesses are required under other applicable Louisiana law. The type of contract you described does not require notary or witnesses to be effective.

6. **I have a young man that is operating a property management company under my license. I recently got a concerning phone call from someone he manages for saying that they have not been paid money owed to them. After further investigation I have found that he is not making disbursements as scheduled. I would like some guidance on what my liability is in this situation and the best way to end this business relationship. This gentleman is not licensed. Any help is greatly appreciated!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

If this man is acting on your behalf pursuant to an agreement between the two of you (written or oral), he is likely acting as your agent, and therefore you are held responsible for his actions done within the scope of that authority pursuant to Louisiana law. Accordingly, if you are contractually bound to disperse these payments and you or your agent fail to do so, you could face liability for breach of contract.

You can terminate the business relationship in any manner provided, but we recommend you do so in writing and expressly state he no longer has any authority to act on your behalf.

We highly encourage you to contact your own attorney to ensure you sufficiently terminate the relationship and insulate yourself from further liability.

BROKER-TO-BROKER AGREEMENT INQUIRIES

7. **If my seller has agreed to pay our listing fee of 8 apples and acknowledges that we will be offering 4 Apples to the co-op buyers agent and we market the co-op commission with a Broker To broker agreement to pay buyers agent 4 apples. First questions is: Is there anything wrong or not in compliance? Second question is: If the Listing broker refuses to sign or Broker to Broker agreement but instead puts on the offer to purchase that the seller agrees to pay the buyers agent 3 apples. How do we handle the offer? A. Should we counter that the listing broker will agree to pay the buyer's agent 3 apples? B. Respond that the seller is going to pay 3 Apples? The problem we are running into is the seller is a little confused when we receive the offer and ask questions like by agreeing to directly pay the buyers broker 4 apples does that contractually obligate them to still pay 8 apples to the listing agent. This is causing just a little confusion in the contract language. With a broker-to-broker agreement, should the compensation still be on the purchase agreement?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We address each of your questions in turn below.

Q1: If my seller has agreed to pay our listing fee of 8 apples and acknowledges that we will be offering 4 Apples to the co-op buyers agent and we market the co-op commission with a Broker To broker agreement to pay buyers agent 4 apples. first questions is: Is there anything wrong or not in compliance?

Response: We do not see any provision of Louisiana law or any NAR policy or procedure that would prohibit this practice.

Q2: second question is: If the Listing broker refuses to sign or Broker to Broker agreement but instead puts on the offer to purchase that the seller agrees to pay the buyers agent 3 apples. How do we handle the offer? A. Should we counter that the listing broker will agree to pay the buyer's agent 3 apples? B. Respond that the seller is going to pay 3 Apples?

Response: We do not see a provision of Louisiana law or NAR policy or procedure that dictates what route you should take in this situation. Instead, the route would be a business decision. But, your acceptance of the counter for 3 apples would bind all parties to the 3 apple compensation as countered by seller.

Q3: The problem we are running into is the seller is a little confused when we receive the offer and ask questions like by agreeing to directly pay the buyers broker 4 apples does that contractually obligate them to still pay 8 apples to the listing agent. This is causing just a little confusion in the

contract language. With a broker-to-broker agreement, should the compensation still be on the purchase agreement?

As we understand your question, you are asking about both compensation paid to buyers agent and to listing agent. If you are contractually obligated to pay the listing agent 8 apples, it is of no consequence how much is paid to buyers agent – the seller owes listing agent 8 apples + whatever amount of apples seller agreed to pay buyers agent as well.

8. **Need someone to look at a broker to broker compensation form. Some other brokers here have issues with it so wanted some clarity. Thanks so much!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Because we do not represent you individually, we cannot give a specific opinion as to the enforceability of the Real Estate Broker to Broker Compensation Agreement executed between Jeri Little and Jessica Oliver on July 27, 2024. We have reviewed the agreement generally, however, and made the following observations:

- The NAR Settlement FAQs do not contain any prohibition that would render a provision of this agreement unenforceable.
- The contract presumes that the Listing Broker has authorization from the seller to offer such compensation. It may be advisable to add a statement to such effect into the agreement.
- The listing broker and buyer broker may negotiate and agree to an offer of compensation prior to the buyer broker and buyer touring the home through a Broker-to-Broker agreement. Keep in mind that pursuant to the NAR Settlement practice changes, a buyer broker cannot accept compensation from any source that is more than the amount agreed to between the buyer broker and the buyer. It may be advisable to ensure that the buyer agreement complies with the stated compensation in this agreement.
- The term “sales incentive” is used but its unclear if that is meant to be the sole and total compensation payable to the Cooperating Broker. You should consider adding a statement that “The Listing Broker agrees to pay the Cooperating Broker a payment representing the total compensation payable by Listing Broker to Cooperating broker in the amount of …” and use the term “payment” or “compensation” as opposed to “sales incentive.”

BUYER BROKER COMPENSATION INQUIRIES

9. **When addressing Buyer's Broker Compensation on an offer to purchase, is it acceptable to refer to it as: "Seller agrees to pay (insert percentage or flat fee) to Buyer's Broker"? Or must it read along the lines of "Seller agrees to pay (insert percentage or flat fee) in Buyer Concessions to satisfy Buyer's contractual obligation to his/her Broker? It actually seems to me that either one is ok, but I'd like a little reassurance. I have marked this request as "High Priority" since The**

Realtor Association of Acadiana removed all references to compensation from our MLS yesterday morning and I want to be sure I'm advising my agents on compliance correctly. Thank you.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We are not aware of any NAR policy or procedure, or any provision of Louisiana law that would render either of your proposed provisions illegal or unethical, and accordingly are of the opinion that either provision may be used.

10. **Language clarification. In the upcoming rule and new documents that I am receiving from others concerning Broker to Broker Compensation. It appears that folks are using "Broker" in the document with Sales Agents name. Is this correct? I view Broker meaning, designated broker as broker. Also the new law signed by governor also says broker. I am needing to know if there is a new meaning for broker or if I am taking this to literal?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

LA R.S. 37:1431, as amended by Act 690 effective August 19, 2024, defines broker as "a licensed real estate broker performing activities as an individual real estate broker, a sponsoring broker or designated qualifying broker, or a corporation, partnership, or limited liability company which has been granted a real estate license through a designated qualifying broker." The "broker" is notably different from the "agent," which is defined as "a licensee acting in accordance with the provisions of this Chapter in a real estate transaction." If the contract used requires the "broker" name be used, it should be the real estate broker who is party to the contract, not the individual agent.

11. **I have a Seller who is willing to pay Buyer's Broker commission. Agent A shows this listing. Agent A writes an offer and does not ask for compensation. Is the Seller still obligated to pay Buyer's Broker commission?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Just because a seller was willing to pay buyer's broker commission does not mean the seller is obligated, unless the seller agrees so contractually. If the offer to purchase – which becomes the contract between the buyer and the seller- did not bind the seller to pay for such compensation, the

seller is not obligated to pay the buyers broker compensation. An obligation on the seller should have been included in the offer to purchase.

We have also been advised by Kim Callaway that you have inquired about NAR Settlement FAQ #36. We have posted that FAQ and NAR's response below for your review:

36. Can buyers and buyer brokers rely on an offer of compensation that was on an MLS prior to the effective date of the MLS policy changes?

1. If the sales contract is executed before the MLS policy change, the buyer broker should be able to rely upon the offer of compensation even if closing occurs after the date of the policy change.

2. But if a sales contract is not executed before the date the participant's MLS implements the policy changes, the offer on an MLS will not be valid and buyers and buyer brokers may wish to protect themselves in writing with the listing broker or seller through a broker agreement or by including the offer of compensation in the sales contract.

12. **RE: Commission minus marketing fee Brokerage / Agents: Are they able to subtract from Buyer Brokers Commission paid for by the SELLER on the Purchase Agreement a Marketing Fee?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

This is a matter of negotiation to be dealt with in the offer when you ask for compensation from the seller. There is no provision of Louisiana law that would preclude this, and the seller can certainly agree to pay x% minus a marketing fee.

13. **"I had a buyers broker in place. Another agent showed my buyer a home and told my buyer to fire me then put him under contract as a dual agent. The buyers lender called today to tell me. We showed them over 15 homes." How is this situation handled with the new NAR regulations? Code of Ethics? Would procuring cause still apply? Does it matter if they had an "exclusive" buyer agency or showed that specific property?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The rights of the buyers broker would depend on the language of the contract used between the buyer and the broker. If the contract provided that compensation would be owed for a period post-

termination, then the buyers broker would still have a claim for compensation even if the contract was terminated and another agent represented the buyer in a subsequent transaction.

The form buyer-broker agreement promulgated by Louisiana REALTORS provides that the contract can be terminated at any time, so it does not matter if the contract was "exclusive." However, the form also provides that compensation is owed for 180 days post-termination, so if the buyer closes on residential property during that window, the original broker is still entitled to compensation, and if he is not properly compensated, he would have a claim against the buyer for breach of contract.

This situation could also give rise to a Code of Ethics violation. The NAR Code of Ethics, Article 16, provides that "REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients." And, Standard of Practice 16-5 provides "REALTORS® shall not solicit buyer/tenant agreements from buyers/ tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a REALTOR®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the REALTOR® may contact the buyer/tenant to secure such information and may discuss the terms upon which the REALTOR® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement."

Without more specific facts and circumstances, we cannot say whether this article was violated, but it certainly seems to give rise to an inquiry under the Code of Ethics.

14. **I am instruction the agents in my brokerage to use the following terms when asking for buyer broker commission to be paid by the seller in a purchase agreement. Please let me know if I have this wording correct..... For example should my agents use this wording as a template to ask for compensation - " Seller to pay 3% of the sales price of the home towards buyers brokers commission at act of sale. " Of course that can say a flat fee or whatever is decided in negotiations and on the buyer broker agreement of course.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We cannot say whether your proposed language is or is not "correct." We would encourage you to run this language by your own attorney for such an opinion. However, we can give you general information regarding a request for compensation.

NAR Settlement FAQ #40 asks "Does Standard of Practice 16-16 prohibit the negotiation of buyer broker compensation in a buyer's purchase offer?" NAR's response is:

> No. A buyer can always ask their buyer broker to make it a term of an offer to purchase that the seller pay certain compensation to the buyer broker.

Standard of Practice 16-16 prohibits a REALTOR® from attempting to modify the terms of a listing agreement through the terms of an offer because the listing agreement is a contractual matter between the seller and the listing broker. However, the seller and the listing broker may independently choose to amend the listing agreement or take any other action they deem appropriate based on the seller's negotiations with the buyer. Standard of Practice 16-16 also prohibits a REALTOR® from delaying or withholding delivery of a buyer's offer while attempting to negotiate a buyer broker compensation.

NAR does not otherwise address how an offer must request compensation, nor does Louisiana law.

15. **1. Do the expense estimates that we submit to our buyers and sellers upon preparing an offer to purchase Require the statement " Compensation is negotiable and not set by law."? 2. Can wording be inserted in the broker agreement that the broker has the right to automatically lower or raise the stated commission In the buyer agreement thus not requiring an addendum to the agreement? 3. We are seeing a lot of brokers inserting "0" % compensation in the buyer agreement and then amending the agreement once a purchase Agreement is presented or accepted. Is this a permissible practice? 3. Are we to insert the wording " Compensation is negotiable and not set by law."? To the current tLREC agency disclosure and dual agency disclosure? 4. Is it acceptable to insert in a buyer agreement a fee to be paid on top of the stated % of the gross sales price? 5. Is it acceptable to insert in a buyer agreement the compensation to the buyer agent will automatically decrease to the amount stated in the accepted Offer to purchase? 6. If an agent or broker refuses to share the compensation a seller is offering to the buyer's agent then is it acceptable for the broker to call the seller and inquire same?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We answer each of your questions in turn below.

1. Pursuant to NAR Settlement FAQ #55, only active listing agreements and buyer agreements must contain the language via a conspicuous disclosure that compensation is not set by law and is fully negotiable? Active agreements can either be amended or a separate disclosure can be provided to satisfy the requirement. Expense estimates appear to be outside the purview of this requirement.

2. No, this would be impermissible. NAR FAQ #58 provides that buyer agreements must contain: The written agreement must include:
    a. A specific and conspicuous disclosure of the amount or rate of compensation the Participant will receive or how this amount will be determined, to the extent that the Participant will receive compensation from any source.

b. The amount of compensation in a manner that is objectively ascertainable and not open-ended.
c. A term that prohibits the Participant from receiving compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer; and
d. A conspicuous statement that broker fees and commissions are not set by law and are fully negotiable.

Giving the broker to option to unilaterally change compensation would violate both requirements a and b.

3. In light of NAR FAQ #58, it appears that inserting "0%" is an objectively ascertainbale and not open-ended amount of compensation. The risk of doing this, however, is that you cannot require the buyer to amend the broker agreement once the seller agrees to pay buyer broker compensation. Therefore you may have a buyer broker that is in fact stuck with 0% commission.

4. Yes, as long as the buyer broker commission is specific, and objectively ascertainable and not open-ended, you can include a calculation however you would like.

5. No, this would not be permissible because then the compensation is not objectively ascertainable, and it becomes open-ended. An amendment would be required to decrease the compensation to be paid to the buyer broker.

6. This may violate the Code of Ethics. Article 16 of the Code of Ethics provides "REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients." And, Standard of Practice 16-13 provides "All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client." We are therefore of the opinion that unless the listing broker gives you permission to contact the seller, doing so would likely constitute an ethics violation.

16. <u>Good Morning- Just need a quick clarification. Prior to August 2024 when a Realtor got paid by more than one party both parties had to be notified. Has this changed with the mandatory Buyer Representation? Does the buyers agent have to notify the seller and buyer in writing/ If so when is the time to do it. Surely not at closing if disclosure is even required. Please clarify. Would like to let my office know the right procedure if its even necessary. Thanks</u>

<u>Response:</u>

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Real estate licensees must "…advise all parties to a real estate transaction **in writing** of compensation being received from any source in connection with that real estate transaction."[1] The statute requiring notice of compensation does not set forth a specific time within which the notice must be given; presumably, the licensee should take steps to provide the notice within a reasonable time after compensation has been agreed to. The NAR settlement (mandating buyer representation agreements) has not removed this general rule. The settlement has, however, imposed additional requirements, as discussed below.

The NAR settlement sets forth certain requirements surrounding written buyer agreements. Specifically, written buyer agreements must include:

1. A specific and conspicuous disclosure of the amount or rate of compensation the MLS Participant will receive or how this amount will be determined, to the extent that the Participant will receive compensation from any source.

2. The amount of compensation in a manner that is objectively ascertainable and not open-ended.

3. A term that prohibits the Participant from receiving compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer; and

4. A conspicuous statement that broker fees and commissions are not set by law and are fully negotiable.

Under Louisiana law, it is permissible for a buyer agreement to provide that sources of broker compensation include funds from a buyer, a seller, a listing agent, or any combination thereof.[2] Also, as mentioned above, it is important to remember that buyer brokers cannot accept compensation from any source that is more than the amount agreed to between the buyer broker and buyer.

Ultimately, it is important to understand the nature of any payments that a broker is receiving in connection with a real estate transaction, as different rules may apply depending on the nature of the payment. For example, Louisiana law imposes certain requirements for having a buyer broker's compensation be included in closing costs paid by the Seller:

> Buyer broker compensation shall not be included as part of closing costs paid by the seller, unless such compensation is disclosed in a written offer and accepted by the seller, which specifically states the amount of compensation being paid to the licensee.[3]

More information surrounding broker compensation can be found at the following NAR resources: https://www.nar.realtor/magazine/real-estate-news/sales-marketing/compensation-commission-and-concessions; https://www.nar.realtor/the-facts/broker-to-broker-agreements-101

[1] La. R.S. 37:1455(A)(22).
[2] La. R.S. 37:1448.4(A)(3).
[3] Louisiana Administrative Code Title 46, Part LXVII, Section 3503.

BUYER REPRESENTATION AGREEMENT INQUIRIES

17. **We are training in preparation of the August 17, 2024 deadline to comply with signing a buyer representation agreement with our buyers. We are using the Exclusive Buyer Representation Agreement dated 5.1.24 and have a question concerning paragraph 1. Do we insert the sponsoring broker in this paragraph or the brokerage in this paragraph.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We are unfamiliar with a form dated 5.1.24 but Louisiana REALTORS has previously prepared and circulated a form titled Exclusive Buyer Representation Agreement. Section 1 of that form states:

PURPOSE. Broker hereby appoints and Buyer accepts _____ (broker) to act as Buyer's exclusive real estate broker and agent to assist Buyer in locating and negotiating the Purchase ("Purchase") of immovable property in the parish (or parishes) of _____ ("Property"). Property shall be understood to be residential immovable property if not specified herein and in Louisiana if the parish or parishes are not specified herein.

Section 1 requires that the name of the broker be inserted. It is a bit duplicative because the name of the broker is also listed in the blanks above but the purpose is to distinguish between the "brokerage" as the company with whom the broker is affiliated and the actual "broker" with whom the buyer will be working. In addition, the buyer and broker can list a "Designated Agent" with whom the buyer would work directly. That is in Section 5 of the form agreement.

18. **1. When we speak to buyers are we allowed to ask them if they want to only be shown houses that will offer a co op compensation to satisfy the signed buyers agreement? I didn't know if this was considered steering. 2. On listing appointments can we still advise the sellers to pay a co op commission as we currently do now but just not advertise it on the MLS. 3. Is a buyers agency agreement a unilateral form that can be terminated by either buyers broker or buyer at any time as long as notice is given?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

1. The Settlement Agreement dated March 15, 2024 relating to the Sitzer-Burnett class-action lawsuit (the "Settlement Agreement") states that each MLS participating in the settlement must implement certain practice changes, which include a requirement that "MLS participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients

based on the existence or level of compensation offered to the broker assisting the buyer." While seeking input from your client on whether your client prefers to be shown only houses that offer cooperative compensation is not expressly prohibited, you could be deemed to be in violation of that MLS rule if you only show your client listings that involve an offer of compensation to the buyer or buyer's broker.

Additionally, the National Association of Realtors® ("NAR") Settlement FAQs[4] related to the Settlement Agreement address your question. Specifically, FAQ #46 states the following:

- Under NAR's Code of Ethics, steering buyers based on the amount of broker compensation is prohibited.
- REALTORS® MUST pledge themselves to protect and promote the interests of their client, putting their client's best interests before their own. A REALTOR® must never put broker compensation before their client's interests.
- REALTORS® MUST be honest and truthful in their real estate communications and MUST NOT exaggerate, misrepresent, or conceal pertinent facts relating to the transaction, including facts about broker commissions.
- If a REALTOR® does anything to put their own (or another broker's) compensation before her client's interests, they are violating this primary code of ethics and potentially violating the broker's fiduciary duties to their client (depending on the broker-buyer relationship and state law). (Added 5/29/2024).

Additionally, the NAR Code of Ethics ("Code") prohibits "steering." NAR provides:

> "Steering" is the practice of influencing a buyer's choice of communities based upon one of the protected characteristics under the Fair Housing Act, which are race, color, religion, gender, disability, familial status, or national origin. Steering occurs, for example, when real estate agents do not tell buyers about available properties that meet their criteria, or express views about communities, with the purpose of directing buyers away from or towards certain neighborhoods due to their race or other protected characteristic. If a client requests a "nice," "good," or "safe" neighborhood, a real estate professional could unintentionally steer a client by excluding certain areas based on his or her own perceptions of what those terms means.[5]

Because your inquiry addresses listings to be shown that satisfy compensation, and compensation is not a protected characteristic under the Fair Housing Act, we are of the opinion that offering such is not considered steering. However, as noted above, this could run afoul of the Settlement Agreement requirements. Further, you could also violate the Code if you put your economic interests before your client's interest. Best practice would be to show your client all houses that meet your client's criteria, and to communicate with your client regarding all aspects of a potential transaction, including compensation.

2. It is not clear what is meant by "listing appointments" but we believe your question is whether offers of cooperative compensation can still be made, and if so, how they should

[4] Available at https://www.nar.realtor/the-facts/nar-settlement-faqs.
[5] https://www.nar.realtor/fair-housing-corner/steer-clear-of-steering

be communicated. Advertising commission rates will continue to be permitted outside of the MLS. That would include social media, websites, etc. The FAQs issued by NAR related to the Settlement Agreement addressed two similar questions as follows:

> 34. How will offers of compensation be communicated if brokers can't use MLSs? Doesn't this just make broker compensation less transparent?

Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS (for example—concessions that can be used for buyer closing costs).

The settlement does not change the ethical duties that NAR members owe their clients.

REALTORS® are always required to protect and promote the interests of their clients and treat all parties in a transaction, honestly (Article 1, COE).

NAR members will continue to use their skill, care, and diligence to protect the interests of their clients.

> 49. Can a listing broker explain to a seller that the buyer will know who is paying the commissions?

Yes, Articles 2 and 12 of NAR's Code of Ethics apply equally to brokers working with sellers.

The listing broker should explain to her client the benefits and costs of the various types of marketing that can be done for a listing, and how potential buyers might respond to such marketing—including any buyer costs that the listing broker or seller may offer to pay.

A listing broker should inform the seller about costs the buyer will incur, how the buyer might react to those costs, and how the seller can market a house considering the buyer's costs; but a listing broker must not tell a seller that a broker will steer buyers based on the amount that broker is compensated. (Added 5/29/2024).

3. A "buyers agency agreement" is not a standardized form promulgated by LREC, and, accordingly, we cannot advise as to how such an agreement can be terminated since there could be many variations of such an agreement. However, Louisiana Realtors® ("LR") has provided its members with a Sample Exclusive Buyer Representation Agreement (the "Agreement").[6] The Agreement is merely a sample and is neither mandated nor required. **Note that the Agreement is NOT compliant under the terms of the NAR Settlement, and is being referenced solely for informational purposes**. Under the terms of this sample Agreement, specifically Section 11, only the buyer is afforded the right to terminate the Agreement, and if buyer terminates, the broker's right to compensation remains for a period of time after such termination. While that sample Agreement does not include a provision that allows the broker to terminate, we are not aware of any prohibition on including any such termination right in favor of the broker.

[6] Available at Microsoft Word - LR BSW Exclusive Buyer Representation Agreement Sample Form 11.-15-2023.docx (cdn-website.com).

19. **1. When we speak to buyers are we allowed to ask them if they want to only be shown houses that will offer a co op compensation to satisfy the signed buyers agreement? I didn't know if this was considered steering. 2. On listing appointments can we still advise the sellers to pay a co op commission as we currently do now but just not advertise it on the MLS. 3. Is a buyers agency agreement a unilateral form that can be terminated by either buyers broker or buyer at any time as long as notice is given? 4. How will it be handled when 2 agents show the same house and both have buyer reps signed by the same person. will this dispute be handled in the same fashion as procuring cause or will this be handled via the court system? 5. Do residential leases , commercial leases, and commercial sales sales have to have a buyers rep form? 6. Can you list co op commission in mls for commercial leases, residential leases and commercial sales?**

Response:

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1. The Settlement Agreement dated March 15, 2024 relating to the Sitzer-Burnett class-action lawsuit (the "Settlement Agreement") states that each MLS participating in the settlement must implement certain practice changes, which include a requirement that "MLS participants and subscribers must not filter out or restrict MLS listings communicated to their customers or clients based on the existence or level of compensation offered to the broker assisting the buyer." While seeking input from your client on whether your client prefers to be shown only houses that offer cooperative compensation is not expressly prohibited, you could be deemed to be in violation of that MLS rule if you only show your client listings that involve an offer of compensation to the buyer or buyer's broker.

Additionally, the National Association of Realtors® ("NAR") Settlement FAQs[7] related to the Settlement Agreement address your question. Specifically, FAQ #46 states the following:

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- REALTORS® MUST be honest and truthful in their real estate communications and MUST NOT exaggerate, misrepresent, or conceal pertinent facts relating to the transaction, including facts about broker commissions.
- If a REALTOR® does anything to put their own (or another broker's) compensation before her client's interests, they are violating this primary code of ethics and potentially violating the broker's fiduciary duties to their client (depending on the broker-buyer relationship and state law). (Added 5/29/2024).

[7] Available at https://www.nar.realtor/the-facts/nar-settlement-faqs.

Additionally, the NAR Code of Ethics ("Code") prohibits "steering." NAR provides:

> "Steering" is the practice of influencing a buyer's choice of communities based upon one of the protected characteristics under the Fair Housing Act, which are race, color, religion, gender, disability, familial status, or national origin. Steering occurs, for example, when real estate agents do not tell buyers about available properties that meet their criteria, or express views about communities, with the purpose of directing buyers away from or towards certain neighborhoods due to their race or other protected characteristic. If a client requests a "nice," "good," or "safe" neighborhood, a real estate professional could unintentionally steer a client by excluding certain areas based on his or her own perceptions of what those terms means.[8]

Because your inquiry addresses listings to be shown that satisfy compensation, and compensation is not a protected characteristic under the Fair Housing Act, we are of the opinion that offering such is not considered steering. However, as noted above, this could run afoul of the Settlement Agreement requirements. Further, you could also violate the Code if you put your economic interests before your client's interest. Best practice would be to show your client all houses that meet your client's criteria, and to communicate with your client regarding all aspects of a potential transaction, including compensation.

2. It is not clear what is meant by "listing appointments" but we believe your question is whether offers of cooperative compensation can still be made, and if so, how they should be communicated. Advertising commission rates will continue to be permitted outside of the MLS. That would include social media, websites, etc. The FAQs issued by NAR related to the Settlement Agreement addressed two similar questions as follows:

> 34. How will offers of compensation be communicated if brokers can't use MLSs? Doesn't this just make broker compensation less transparent?

Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS (for example—concessions that can be used for buyer closing costs).

The settlement does not change the ethical duties that NAR members owe their clients.

REALTORS® are always required to protect and promote the interests of their clients and treat all parties in a transaction, honestly (Article 1, COE).

NAR members will continue to use their skill, care, and diligence to protect the interests of their clients.

> 49. Can a listing broker explain to a seller that the buyer will know who is paying the commissions?

Yes, Articles 2 and 12 of NAR's Code of Ethics apply equally to brokers working with sellers.

[8] https://www.nar.realtor/fair-housing-corner/steer-clear-of-steering

The listing broker should explain to her client the benefits and costs of the various types of marketing that can be done for a listing, and how potential buyers might respond to such marketing—including any buyer costs that the listing broker or seller may offer to pay.

A listing broker should inform the seller about costs the buyer will incur, how the buyer might react to those costs, and how the seller can market a house considering the buyer's costs; but a listing broker must not tell a seller that a broker will steer buyers based on the amount that broker is compensated. (Added 5/29/2024).

3. 3. A "buyers agency agreement" is not a standardized form promulgated by LREC, and, accordingly, we cannot advise as to how such an agreement can be terminated since there could be many variations of such an agreement. However, Louisiana Realtors® ("LR") has provided its members with a Sample Exclusive Buyer Representation Agreement (the "Agreement").[9] The Agreement is merely a sample and is neither mandated nor required. **Note that the Agreement is NOT compliant under the terms of the NAR Settlement, and is being referenced solely for informational purposes**. Under the terms of this sample Agreement, specifically Section 11, only the buyer is afforded the right to terminate the Agreement, and if buyer terminates, the broker's right to compensation remains for a period of time after such termination. While that sample Agreement does not include a provision that allows the broker to terminate, we are not aware of any prohibition on including any such termination right in favor of the broker.
4. 4. When two agents have a signed buyers representation agreement from the same buyer, and end up showing the same house, and the agreement provides for an exclusive listing, we would assume that the buyer made misrepresentations to one of the agents. That is, if the buyer entered into an *exclusive* agreement with agent #1, he could not enter into an *exclusive* agreement with agent #2 for the same property during the same time period. If this occurs, agent #2's recourse would be in court against the buyer for breach of contract. We would also assume that agent #1 could seek recourse under the NAR Code of Ethics against agent #2, although we cannot speculate what the outcome would be. Again, this assumes the agreements entered into with both agents are exclusive; if the agreements with both agents are not exclusive, there would be no breach of contract by the buyer and thus no legal recourse.

5. 5. Louisiana Real Estate House Bill No. 366, which has been enrolled as Act No. 690, provides the new Louisiana law on buyer agreements. It requires agreements be entered into between "buyers" and "brokers." The Act defines a "buyer" as "a person who utilizes the services of a real estate licensee in connection with the purchase, or the submission of an offer to purchase, a home, or who utilizes, or seeks to utilize, the services of a real estate licensee with the objective or purported objective of entering into a contract to purchase a home." However, the requirements do not apply "(1) [w]hen a person leases or seeks to lease a home with the services of a real estate licensee [or] (2) [w]hen a person leases or

[9] Available at Microsoft Word - LR BSW Exclusive Buyer Representation Agreement Sample Form 11.-15-2023.docx (cdn-website.com).

purchases, or seeks to lease or purchase, property other than a home with the services of a real estate licensee.

Based on the definition of "buyer" and the 2 exceptions provided in the Act, it appears that Louisiana law will not mandate a buyer agreement be used for any commercial transaction – sale or lease, or any residential lease.

6. 6. We have not seen any authority that addresses whether or not you can list coop commission in an MLS for commercial or residential leases, or commercial sales. The scope of recent authority has been focused on residential sales. We therefore cannot give an opinion on this issue.

20. With regard to the NAR Settlement mandate that Realtors enter into a Buyer Agreement with a buyer client "prior to showing the buyer any property," what happens if the buyer simply refuses to sign my Buyer Agreement? If a buyer refuses to sign my Buyer Agreement, does that mean I am not allowed to work with that buyer? If a buyer refuses to sign my Buyer Agreement, can I simply make a notation on the Buyer Agreement that the buyer has refused to sign the Agreement (just as I do on the Agency Disclosure form if a buyer refuses to sign that form) and continue to work with the buyer? Please advise. Thank you.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

At present, there is no requirement that you enter in a buyer agreement, so if your buyer refuses to sign, you are legally and ethically allowed to proceed with working with that buyer. However, this will change in August 2024. On August 17, 20214, the NAR Requirements/Prohibitions for Written Agreements between Realtors® and Buyers go into effect, and these require, among other things, that written and signed buyer agreements are required before a buyer tours a home for sale listed on the MLS. Additionally, on August 19, 2024, Act 690 goes into effect in Louisiana, making it a requirement of Louisiana law that all real estate licensees and buyers of residential homes enter into a written buyer agreement. Notably, the Louisiana law does not state when the agreement has to be executed (unlike NAR, which says it must be executed prior to a showing), but best practice would be to have the buyer execute the agreement before any services are rendered.

21. We are reviewing the Basic Buyer Agreement dated 07.15.2024 and have a question. The end of the agreement allows for two different buyers to sign the document but lines 65-67 Buyers states if there is more than one buyer a separate matching agreement must be executed. Does that mean it is required that you have two of the same agreements signed with each one addressing the individual buyer separately or is it acceptable to have both buyers referenced and sign on one document. We are concerned it will be difficult for some buyers

to understand that they do not each pay the buyer compensation fee but combined as a whole.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Lines 65-67 of the Basic Buyer Agreement provide: "If one than one person or entity is named as Buyer in this Agreement, separate matching Agreements or amendments or addendums to this Agreement shall be executed by each Buyer individually, and the copies taken together shall be the full and complete Agreement between the Buyer and the Broker." The purpose of these lines addresses questions that often arise about how multiple buyers sign a document when there are only so many places for them to sign. Lines 65-67 answers that question and serves as an acknowledgement by the parties that this is permissible according to the BBA.

We are of the opinion that if there are 1-2 buyers, they can sign the same BBA, and Lines 65-67 are only invoked if there are 3+ buyers and extra space is needed for signatures. Because the transaction would involve other buyers pursuant to a separate but related agreement, it is clear that multiple related agreements represent one transaction and thus one commission fee owed.

22. **With all of the changes coming shortly with the NAR Settlement, I have a specific question as it relates to the requirement that the buyer representation agreement include verbiage that states "buyer's broker may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the buyer." I attended NOMAR's Broker Summit and have been involved in many discussions with fellow brokers. I think there is somewhat of an unknown/differing opinions as to whether an amendment can be made to the buyer representation agreement to increase the commission for a specific property in the event the seller is offering a commission amount that is higher than what was agreed to in the buyer representation agreement. What is legal counsel's opinion as to whether doing an amendment to the buyer representation agreement is appropriate and/or allowed as it relates to this specific new rule? I want to ensure that I am training our agents on the correct actions to take in representing their buyers and remaining in compliance with the new rules. In my opinion, I think an amendment is undermining what NAR's intention is with this rule, but I would like legal counsel's guidance on this matter. Thank you for your help!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

NAR Settlement FAQ #74 states "MLS Participants may not receive compensation for services from any source that exceeds the amount or rate agreed to in the buyer agreement. Does this mean that brokerages can only have one agreement with the buyer?" The response provided by NAR is:

- No. The practice change empowers buyers and brokers to negotiate and agree to services and compensation that work for them. MLS Participants should work with consumers to ensure they fully understand the options available. Compensation continues to be negotiable and should always be negotiated between MLS Participants and the buyers with whom they work.

- At times, a new or amended buyer agreement may be appropriate, and the buyer and broker may agree to amended terms. However, amended agreements must also meet the requirements of the practice changes. The practice changes must be implemented fully and in good faith in the service of promoting consumer empowerment, choice, and healthy competition.

- NAR policy does not dictate:

    - What type of relationship the professional has with the potential buyer (e.g., agency, non-agency, subagency, transactional, customer).

    - The term of the agreement (e.g., one day, one month, one house, one zip code).

    - The services to be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers).

    - The compensation charged (e.g., $0, X flat fee, X percent, X hourly rate). (Updated 7/31/2024)

We are of the opinion that this FAQ does allow for an amendment to increase compensation. However, REALTORS® must take note, however, that asking a buyer to amend their agreement with a broker to allow the broker to receive a higher amount of compensation from a seller may potentially violate the Code of Ethics because the broker could be said to be putting their interest above that of their client's interest. For example, the seller may be willing to sell the home at a lower price or provide additional pre-paids with the difference between what the seller is offering in buyer broker compensation and what the buyer agreed to compensate his broker. However, a buyer may feel pressured to not negotiate for this if the buyer's broker requests that the buyer amend their agreement because the seller is offering allowances to the buyer broker in excess of what the buyer and broker initially negotiated for buyer broker compensation. Some have also mentioned that amending a buyer agreement to allow a buyer broker to be compensated at a higher rate based upon what a seller is offering in buyer broker compensation could be interfering with a broker's relationship with a seller.

23. **On the Exclusive Buyer Representation Agreement under compensation section A. % of sales price at closing B. Flat fee $. Other - Not to exceed 3% of sales price at closing The question is - under the Other block ...is this acceptable .... Because we know the concession paid by seller will likely be unknown at times and likely negotiated often.... if we cap the buyer at not to exceed 3% then he knows what his maximum exposure is going to be. plus it gives us flexibility to accept whatever the seller offers and protect our buyer . most buyers will not have funds to pay a buyer broker . concession is going to negotiated just like closing**

cost are now. We don't want to scare our buyer into thinking they will owe 3% or whatever number is selected. By putting NOT TO EXCEED and explaining we will take whatever seller offers.... they are not in a panic. Seller concession to buyer broker is going to be written into every offer to purchase - so everyone knows what seller is paying . Protects Buyer Broker and the agent writing the offer.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The provisions below establish a compensation amount that is open-ended since the amount is not fixed in advance. The NAR settlement clearly states that the amount of compensation must be objectively ascertainable and not open-ended. Therefore, this provision could be deemed to be contrary to the requirements of the settlement.

24. **We have some agents that have signed an Independent Contractors agreement with us using their LLC. Should we use their personal name as well as their LLC on the Buyers Agreement. We are getting mixed answers on this. We are hearing they should be signing all listing paperwork, contracts, etc in their name and LLC. Please clarify.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We assume your question involves who will sign the Buyer Representation Agreement (the "Agreement"). Louisiana law, pursuant to Act 690, requires a "" written document signed by a broker and a buyer detailing the services to be provided by the broker to the buyer." "Broker" is defined in LA RS 37:1431 as "means a licensed real estate broker performing activities as an individual real estate broker, a sponsoring broker or designated qualifying broker, or a corporation, partnership, or limited liability company which has been granted a real estate license through a designated qualifying broker."

We read this to mean that the "broker" is the one who should sign the agreement. If the broker is an individual, the individual signs; if the broker is an LLC, the LLC signs. If the LLC signs, the "manager" of the LLC would sign as the manager of the LLC. For example, if the broker is ABC Realty, LLC and the manager is John Doe, the signature block would look like this:

ABC REALTY, LLC

By: _____
John Doe, Manager

25. **If I have a land listing and showing the property along with the Seller (for boundary line and property detail purposes) to a Buyer that called from the advertising of the property by my yard sign, would I need to have a Buyer Rep Agreement signed? I will not be representing the Buyer. I am simply showing the property. From my understanding the answer is no but looking for confirmation. Thanks!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Louisiana law does not require you to execute a buyer agreement under these circumstances where you will not be representing the buyer.

However, the terms of the NAR settlement require that all MLS Participants working with a buyer enter into a written agreement before the buyer tours any home. MLS participants must comply with the rule regarding timing – you must enter into a written agreement before the buyer tours any home. See the FAQs below from NAR that further explain these concepts:

61. The practice change requiring written agreements with buyers is triggered by two conditions: it only applies to MLS Participants "working with" buyers and is triggered by "touring a home." What does it mean to be "working with" a buyer?

The "working with" language is intended to distinguish MLS Participants who provide full or limited brokerage representation or services for the buyer (including transaction brokerage)—such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS Participants who simply market their services or just talk to a buyer—like at an open house or by providing an unrepresented buyer access to a house they have listed.

If the MLS Participant is working only as an agent or subagent of the seller, then the Participant is not "working with the buyer." In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.

Authorized dual agents, on the other hand, work with the buyer (and the seller).

A written buyer agreement is required prior to a buyer "touring a home." An MLS Participant "working with" a buyer can enter into the written buyer agreement at any point but must do so by no later than prior to the buyer "touring a home," unless state law requires a written buyer agreement earlier in time (See FAQ "What does it mean to tour a home?"). (Updated 8/6/24)

62. What does it mean to tour a home?

Written buyer agreements are required before a buyer tours a home.

Touring a home means when the buyer and/or the MLS Participant, or other agent, at the direction of the MLS Participant working with the buyer, enter the house. This includes when the MLS Participant or other agent, at the direction of the MLS Participant, working with the buyer enters the home to provide a live, virtual tour to a buyer not physically present.

A "home" means a residential property consisting of not less than one nor more than four residential dwelling units.

So, under FAQ 61, as long as you are solely working with the seller, you would not be required to have an agreement executed under the NAR Rules as well.

26. **Hello, We need help with this issue. We have an elderly client that has signed a Buyer's Agreement with us. However, she is not able to physically go out to view properties. She wants her son to do that with us. Do we need a Buyer's Agreement with him? Or is there something we need to modify? or ???**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The terms of the NAR settlement (as a result of the Sitzer-Burnett case) require that all MLS Participants working with a buyer enter into a written agreement with the buyer **before the buyer tours a home**. This agreement is referred to as a "written buyer agreement," and essentially outlines the services that the real estate professional will provide to the buyer.

In this instance, the Buyer is unable to tour any homes, but wishes to have someone (her son) do that on her behalf. First, we see no reason why the son would enter into a separate buyer representation agreement since he is not the intended buyer or client. He is merely acting at the request of the buyer on her behalf. You may consider amending the existing Buyer's Agreement to add a provision indicating that the Buyer has granted her son the authority to tour homes on her behalf. This would likely implicate Louisiana mandate law. A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal. La. Civ. Code art. 2989. Although a contract of mandate is generally not required to be in any particular form (La. Civ. Code art. 2993), a written form is often used.

Here, you can consider adding a statement to the Buyer's Agreement (or a separate writing included as an attachment to the Buyer's Agreement) that grants the Buyer's son the authority to "tour homes" on the Buyer's behalf. This provision should be clear in that it is limited to the power to tour homes on behalf of the Buyer – and not to any additional powers (such as making purchases on behalf of the Buyer).

27. **I have a client that wants to cancel our Buyer's Representation Agreement. I asked to be compensated for my time, research and negotiations in the amount of $2500. The buyer wants to pay me $250. I said the lowest I would accept was $1500. Who enforces this or what are my options. Thanks**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Without seeing the Buyer's Representation Agreement in its entirety, we cannot opine on the specific options available when there is a dispute over the amount owed by the buyer.

Generally, the termination clause within the Buyer's Representation Agreement will outline the circumstances that allow either party to legally end the agreement. It may be necessary to consult this portion of the agreement to determine whether the buyer has appropriately cancelled the Buyer's Representation Agreement. Further, the language of the termination clause may dictate how disputes over payment are to be handled. Generally, the termination of the Buyer's Representation Agreement would not terminate the Broker's right to any earned and owed compensation.

Also, under the terms of the NAR settlement, any compensation agreed to in a written buyer agreement must be objectively ascertainable and not open-ended. Therefore, there may be a provision in the agreement that the parties can resort to in order to precisely calculate the amount of compensation owed, based on the services rendered.

You would be responsible for enforcement of the agreement. It is a contract between you and the buyer. You can enforce that contract through appropriate legal remedies. You will likely need to consult with an attorney to discuss the appropriate next steps.

28. Zillow now has a "Touring Agreement" which is pre buyer rep agreements. Is this allowed? Is it legal? Thanking you in advance.

Response:

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One of the requirements of the NAR settlement is that all MLS Participants working with a buyer must enter into a written agreement with the buyer prior to touring a home. This agreement is often referred to as a "written buyer agreement," and essentially outlines the services that the real estate professional will provide to the buyer.

In response to the NAR settlement, Zillow has drafted state-specific "Touring Agreements" for use between the buyer and broker.[10] A Touring Agreement covers touring activities only and lays the foundation for an agent to discuss compensation and exclusivity with the buyer at a later date.

According to Zillow, the Touring Agreement was created to provide potential buyers and agents a solution to get to their first tour with a signed agreement in place. Zillow has described the Touring Agreement as an "introductory agreement," and anticipates that buyers and agents will sign a longer-term agreement that outlines compensation/exclusivity terms, if they choose to work together throughout the buying process. According to Zillow, the Touring Agreement is not the same as an Exclusive Buyer Agency Agreement; the Touring Agreement simply allows the buyer

[10] https://delivery.digitalassets.zillowgroup.com/api/public/content/LA-StandardTouringAgreement_pdf.pdf?v=795fcdf1

to take a tour and does not include representation of the buyer in the purchase transaction. Moreover, it is not mandatory for participating agents to use Zillow's Touring Agreement.[11]

The question asks whether Zillow's Touring Agreement is legal. Whether Zillow's Touring Agreement is "legal" would depend solely on whether it complies with Louisiana law. An additional question is whether it complies with the requirements set forth in the NAR settlement.

I. Does Zillow's Touring Agreement Comply with Legal Requirements?

As detailed above, the NAR settlement requires all MLS Participants working with a buyer to enter into a written agreement with the buyer prior to touring a home. This requirement for a written buyer agreement does not mean that MLS Participants and buyers must enter into a written *agency* agreement. NAR policy does not dictate the type of relationship the real estate professional has with the potential buyer. Instead, MLS Participants and buyers are able to enter into any type of professional relationship permitted by state law. Therefore, the fact that Zillow's Touring Agreement is not the same as an Exclusive Buyer Agency Agreement does not automatically preclude Zillow's Touring Agreement from being construed as a "written buyer agreement."

However, certain provisions must be included in a written buyer agreement pursuant to the NAR settlement. Specifically, pursuant to paragraph 58(vi) of the NAR proposed settlement agreement, written buyer agreements must:

- Specify and conspicuously disclose the amount or rate of any compensation the MLS Participant will receive from any source, or how this amount will be determined;

- The amount of compensation must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer");

- Include a statement that MLS Participants may not receive compensation from any source that exceeds the amount or rate agreed to with the buyer;

- Disclose in conspicuous language that broker commissions are not set by law and are fully negotiable; and

- Include any provisions required by law.

Moreover, the newly enacted Louisiana law (La. R.S. 37:1431(35) and La. R.S. 37:1448.4) regarding buyer agreements defines a "Buyer Agreement" as a written document signed by a broker and a buyer detailing the services to be provided by the broker to the buyer. The statute does not dictate what services shall be provided (e.g., ministerial acts, a certain number of showings, negotiations, presenting offers) nor does it state what type of relationship the broker has with the buyer (e.g., agency, non-agency, subagency, transactional, customer). The statute does provide, however, that the buyer agreement "shall include the amount of compensation payable to the broker or the manner in which the amount of compensation payable to the broker shall be

[11] https://www.zillow.com/agent-resources/blog/zillow-touring-agreement-nar-settlement/; https://www.zillow.com/premier-agent/touring-agreement/#:~:text=Is%20it%20mandatory%20for%20participating,prior%20to%20touring%20a%20property.

calculated." Louisiana law, in contrast to the NAR settlement, does not dictate a particular time by which the agreement must be signed.

Whether a Zillow Touring Agreement would be deemed the "written buyer agreement" depends on the language of the Touring Agreement, and whether the requirements above are met. If the Touring Agreement utilized does not meet the criteria for the written buyer agreement, and no separate agreement is entered prior to touring a home, then the agent risks the possibility of violating the requirements of the NAR settlement.

Arguably, the Zillow Touring Agreement could be deemed to violate the requirements regarding a written buyer agreement in the NAR settlement. For example, Paragraph 58 (vii) of the NAR settlement agreement notes that NAR must "prohibit REALTORS and REALTOR MLS Participants from representing to a client or customer that their brokerage services are free or available at no cost to their clients, unless they will receive no financial compensation from any source for those services." Section 4(a) of the Zillow Touring Agreement provides that the buyer shall not owe the broker any fee for the touring services detailed in the agreement. If the broker intends to receive compensation for services at any point in the home buying process, perhaps after the touring services are completed, then entering a Zillow Touring Agreement may be deemed to be a misrepresentation as to the expectations of the broker regarding payment. That is not a clear violation, but it poses a potential risk.

It is also worth highlighting that Section 4(c) of the Touring Agreement provides that: "If Broker is going to provide Buyer with brokerage services beyond the Touring Services, Buyer and Broker will enter into a *separate agreement* for such additional brokerage services." This reference to a separate agreement suggests that Zillow itself distinguishes between its Touring Agreement and a formal "written buyer agreement." This may eliminate the risk referenced above.

Section 4(c) of the Zillow Touring Agreement goes on to state, in bold: "The fee or commission the parties agree to for [broker services beyond the touring services] are not set by law, are fully negotiable, and shall be documented in [a separate] agreement." It is arguable whether reference to a future agreement to determine compensation comports with the NAR settlement's requirement that "the amount of compensation reflected must be objectively ascertainable and may not be open-ended." The bolded portion of the Zillow Touring Agreement would also seem to fall short of La. R.S. 37:1448.4, which, as described above, requires that the buyer agreement "shall include the amount of compensation payable to the broker or the manner in which the amount of compensation payable to the broker shall be calculated."

As such, brokers and agents should be very cautious in utilizing the Zillow Touring Agreement as their "written buyer agreement," because the parties run the risk of violating the NAR settlement and Louisiana law.

II. Can the Zillow Touring Agreement be utilized at all?

A limited service-agreement such as a Touring Agreement is permissible under Louisiana law. But if an agent and buyer are utilizing a Touring Agreement with the intent to later enter a written buyer agreement, the parties should take certain precautions. For example, a Touring Agreement should expressly disclaim and clarify that no services other than showing or touring a home are being provided by the broker and potentially that no agency relationship is created. Specifically, the

Touring Agreement should: (i) indicate that the buyer is not a customer or client as these terms are defined by Louisiana agency law; (ii) state that it does not establish an agency relationship between the buyer and the broker; (iii) dictate the nature of the relationship between buyer and broker; and (iv) detail the services to be provided by the broker to the buyer.

29. **I have a question concerning the buyer's agreement. We have noticed agents inserting in the buyer agreement Seller to pay buyer's agent commission in lieu of inserting a fee or % of the sales price. Is that a valid phrase to insert in the agreement? Thank You.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Pursuant to the NAR settlement agreement, written buyer agreements must:

- Specify and conspicuously disclose the amount or rate of any compensation the MLS Participant will receive from any source, or how this amount will be determined;

- The amount of compensation must be objectively ascertainable and may not be open-ended (e.g., "buyer broker compensation shall be whatever amount the seller is offering to the buyer");

- Include a statement that MLS Participants may not receive compensation from any source that exceeds the amount or rate agreed to with the buyer;

- Disclose in conspicuous language that broker commissions are not set by law and are fully negotiable

Importantly, NAR policy will not dictate the type or amount of compensation charged; as such, compensation continues to be negotiable between buyers and buyer brokers. However, as pointed out above, under the settlement, any compensation agreed to in the written buyer agreement must be objectively ascertainable and not open-ended. For example, a written buyer agreement cannot have a commission that is "buyer broker compensation shall be whatever amount the seller is offering to the buyer" or "between X and Y percent."[12]

The question states that agents have been completing buyer agreements by inserting phrases such as "Seller to pay buyer's agent commission" in lieu of inserting a specific fee or a percentage of the sales price. A phrase such as "Seller to pay buyer's agent commission" contradicts the requirements of the NAR settlement (as described above).

This is because, if a buyer agreement states the buyer broker will only be compensated by the seller for the services provided to the buyer, then it is not possible to clearly and objectively ascertain

[12] https://www.nar.realtor/the-facts/nar-settlement-faqs; see #87.

the amount of compensation the buyer broker will receive, nor is it possible to disclose how that amount would be determined. As such, the buyer agreement may not include language indicating that buyer broker compensation is limited to what the buyer broker may receive in compensation from a seller.

CONTRACT FORMATION/OFFER & ACCEPTANCE INQUIRIES

30. **Scenario: A buyer makes an offer, seller counters shortly after the original offer expires. Buyer accepts the counter. Buyer posts deposit; applies for the loan; seller provides access for inspections and appraisal; both parties proceed in good faith. After all contingencies have expired or been resolved, buyer changes their mind and wants to cancel the Agreement. The buyer's attorney states that since the counteroffer was signed by the seller after the expiration of the buyer's offer, the Agreement is null and void and unenforceable. We had heard of this interpretation 15-20 years ago. In the meantime, we understood that since counter-offer forms include a new expiration date; all parties sign; and acceptance is communicated back to the other party before the counteroffer expires, then the Agreement as countered is binding and enforceable. (not to mention that all parties proceed as though there is a binding Agreement). In the last year or so we have heard the "null and void" interpretation more often. Most local title attorneys we have consulted state that the Agreement is binding, and not null and void. One title attorney (who also litigates and likes to help buyers get out of contracts) claims that in similar circumstances, the Agreement is actually null and void. 1. What is the correct answer? 2. Is this explicitly addressed in the LREC Agreement to Buy / Sell? 3. Is there case law on this? 4. Is there tacit acceptance when, even if there is a mistake or defect in the Agreement, the parties nevertheless proceed in good faith as though there is a binding Agreement? 5. Do prudence and best practice dictate that we should never counter after the original offer has expired? 6. What happens if there are two counteroffers? The second counter is almost never signed before the expiration of the initial offer. If a second counter is made, then the first counter is null and void…. Correct? 7. Did a previous version of LREC's agreement state specifically that the Agreement was null and void if not accepted before expiration?**

Response:

We cannot comment on specific transactions. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific transaction, it is recommended that you consult with your attorney.

1 and 2. The Louisiana Residential Agreement to Buy or Sell (the "Purchase Agreement") provides the following related to deposits: "Upon acceptance of this offer, or any attached counter offer, the SELLER and the BUYER shall be bound by all terms and conditions of this

Agreement…"[13] By virtue of this statement, the Purchase Agreement makes clear that once a counter offer is accepted, the parties are bound by the terms of the counter offer.

3. We found 2 Louisiana cases that address the issue of counteroffers in the residential sale context. In *Kent v. Hogan*,[14] defendants, Sarah and Eddie Hogan, listed a 2–1/2 acre tract of land located in Tangipahoa Parish, Louisiana for sale through their real estate agent, Darita Richardson. On December 10, 2001, plaintiff, Warren Kent, Jr., offered to purchase the land for $52,500. After the Hogans indicated they were receptive to the offer, it was reduced to writing in a document labeled "Agreement To Purchase or Sell", and was signed by Kent that day. By its terms, the offer expired at 3:00 p.m. on December 11, 2001, and contained the following language regarding deadlines: "Time is of the essence and all deadlines are final except where modifications, changes, or extensions are made in writing and signed by all parties." Ms. Richardson scheduled a meeting for 2:00 p.m. on December 11 to present the Hogans with the written offer. When they failed to appear, she telephoned plaintiff's real estate agent, Nadine Lagarde, and asked if plaintiff would extend the offer. Ms. Lagarde contacted plaintiff, who agreed to a two-day extension. On December 12, Ms. Richardson prepared a document labeled "Addendum To Agreement To Purchase or Sell" (hereinafter the "Addendum") that referenced the original offer, stating it was to remain binding and irrevocable until 3:00 p.m. on December 13. That afternoon she conveyed the original offer, together with the "Addendum," to the Hogans, who signed both documents sometime before 9:00 a.m. on December 13. Thereafter, at the request of Ms. Richardson, Ms. Lagarde met Mr. Hogan outside a restaurant near his home to pick up the documents. She then brought the documents to plaintiff's office, where he signed the "Addendum" sometime before 11:00 a.m. Ms. Richardson picked up the two documents at Ms. Lagarde's office sometime after 3:00 p.m. on December 13, which was after the time for expiration provided in the "Addendum." Noticing that the Hogans had not dated or timed their signatures on the "Agreement to Purchase or Sell," she arranged to meet them later that afternoon to complete that information. Before leaving her office, she made copies of the documents. When the Hogans were given the "Agreement to Purchase or Sell" to date and time, one of them wrote the date and 4:48 p.m. on the document and refused to give it back to Ms. Richardson, because they had changed their minds about the sale.

After the closing date of December 21, 2001, failed, plaintiff filed a suit for specific performance. Following trial, the court rendered judgment in favor of plaintiff. The court concluded that, while the verbal extension of the offer was invalid because not in the requisite written form, the actions of the Hogans in signing the "Addendum" and "Agreement To Purchase or Sell" after the expiration of the original offer constituted a counteroffer to plaintiff. The court further concluded the counteroffer was accepted by plaintiff when he signed the "Addendum" on the morning of December 13, and that the acceptance was timely received (before 3:00 p.m. on December 13) by the Hogans when the signed documents came into the hands of Ms. Lagarde, who was acting as an assistant of Ms. Richardson, the Hogans' realtor.

On appeal, the First Circuit reversed. The court noted that the time limit in plaintiff's original offer was clearly a term of that offer, and an attempt to change that time limit was a counteroffer because the acceptance was not in conformity with the original offer. And, the acceptance of an irrevocable offer is effective only when it is received by the offeror within the time named in the offer. La.

[13] Purchase Agreement at Lines 110-112.
[14] 897 So. 2d 68 (La. App. 1 Cir. 10/29/04).

C.C. art. 1934 & Official Comment (b). And because the record was devoid of any evidence that the Hogan's were notified of plaintiff's acceptance within that time, there was no valid contract.

The *Kent* case is notable because it addresses how acceptance of a purported counteroffer by a prospective purchaser was not effective and thus no contract was formed. But it must be read in light of Louisiana Civil Code art. 1943, which provides that an acceptance not in accordance with the terms of the offer is deemed to be a counteroffer. To the extent a "counter" is made after the terms of an original offer expires, it becomes a new offer that requires independent acceptance. If acceptance is made, there is a legally binding contract between the parties.

The second case is *LaSalle v. Cannata Corp.*, where the Louisiana First Circuit held that lack of acceptance of a counter offer precluded finding a valid purchase agreement.[15] The facts are as follows: on January 30, 2002, plaintiff LaSalle, signed a "Residential Agreement to Purchase and Sell," in which he offered to purchase the property for $43,000.00. This document provided that the sale would be conditioned upon the following: LaSalle's ability to obtain a conventional mortgage and borrow the sum to be determined by the lender at a fixed per annum rate of interest, an appraisal being equal to or greater than the sales price, and acceptance in writing by Cannata with notice given to LaSalle. The document is signed by LaSalle. The listing agent, Robert Businelle, Jr., signed the document as having been received by him at 2 p.m. on January 30, 2002. LaSalle gave Businelle a check in the amount of $1,000.00 as a deposit on the purchase of the property on January 30, 2002, and Businelle deposited the check into the account of A.F. Sauls Real Estate at that time. There is no signed acceptance, nor any evidence of a verbal acceptance of this offer. Then, on March 18, 2002, LaSalle prepared another document entitled "Seller's Counter Offer to Agreement to Purchase and Sell." This document provides that "the 'Residential Agreement to Purchase and Sell' is acceptable, provided PURCHASER agrees to the following changes: new sales price to be $45,000.00." This "counteroffer," which was signed only by LaSalle, further stated that "ALL OTHER TERMS REMAIN UNCHANGED." Cannata never signed either document, nor is there any evidence of a verbal acceptance.

LaSalle sued for specific performance, and asserted that Cannata's signing of the listing agreement for the price of $45,000 cash was an offer to sell the property for $45,000 cash, which LaSalle asserted he accepted in his counter proposal of March 18, 2002. The court found that because neither the original or counter conditions were ever accepted by Cannata, there could not have been an agreement formed. Although this case does not squarely answer the question posed in your inquiry, it illustrates what is necessary for a counteroffer to form the basis of an agreement – acceptance of the terms of the counteroffer.

4. Typically there cannot be tacit acceptance for a contract to sell immovable property because a transfer of immovable property or a contract to sell immovable property must be in the form of an authentic act or an act under private signature.[16] However, a jurisprudential exception to this statutory requirement exists when only one party has signed an agreement and the other party has availed himself of the agreement or taken actions evidencing his acceptance thereof. See La. Civ. Code art. 1837 - 1984 Revision Comment (b); *Stevens Constr. & Design, LLC v. Hillman*, 19-1329 (La. App. 1 Cir. 6/12/20), 2020 WL 3109444. For example, in *Succession of Jenkins v. Dykes*, 91 So.2d 416 (La.App. 2nd Cir.1956), a transfer of immovable property in return for the transferee's assumption of a mortgage was held enforceable against a transferee who had not signed the act of

[15] 878 So. 2d 622 (La. App. 1 Cir. 4/2/04).
[16] La. Civ. Code arts. 1839 and 2623.

transfer, but who had later granted a mineral lease on that property. And in *Saunders v. Bolden*, 155 La. 136, 98 So. 867 (1923), the court said: "It is well settled in the jurisprudence of this state that written acceptance of a contract or an act of sale is not necessary, but may be established by acts clearly indicating acceptance. In *Balch v. Young*, 23 La.Ann. 272, it was said that the law does not require that the acceptance of a contract must be expressed on its face, nor is it essential that the act be signed by the party in whose favor it is made. The acceptance may result from his acts in availing himself of its stipulations, or in doing some act which indicates his acceptance." 98 So. at 869.

5. We cannot offer advice on how you should conduct business. However, in light of the jurisprudence cited above, it appears that a counter offer tendered after an offer expires constitutes a new offer that requires independent acceptance.

6. Louisiana Civil Code art. 1943 provides that an acceptance not in accordance with the terms of the offer is deemed to be a counteroffer. To extent the counteroffer is countered, the second counter becomes the new "standing offer," and governs the terms of the contract once accepted. A counteroffer acts as a rejection of the standing offer, so it makes the existing offer null and void.

7. There are multiple iterations of the standard form purchase agreement adopted by the Louisiana Real Estate Commission. We are not aware that any prior version stated expressly that that the Agreement was null and void if not accepted before expiration, but most versions had language similar to the current form, such as "This offer is binding and irrevocable until _____, 20____ at _____ AM PM NOON."

31. <u>I am sitting on a forms task force and there seems to be some differences from board to board on the practice and use of addendums and amendments. In my personal practice I use an addendum form to "add something to original offer" and I use an amendment form to make a change to an already accepted contract. Further, I do not use any "acceptance by/expiration date" on the amendment, again, because the contract has already been accepted. Through the forms task force research, I also see that our neighboring boards are using an addendum form only to add to, or make changes to an accepted contract. Can you shed any light on what should be proper or if using the addendum should be used interchangeably as an amendment or best practices there. Thank you!</u>

<u>Response:</u>

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

An addendum typically provides additional information without altering the terms of the original agreement, whereas an amendment is usually put in place to alter the original terms. We typically see addenda as attachments to the original agreement, such as being used for exhibits, schedules, etc., whereas amendments are usually created after the original contract is drafted and executed, and there is a need to somehow modify the agreement. So to the extent the original offer is being changed, we would expect to see an amendment, not an addendum.

DEPOSIT INQUIRIES

32. **Deposit dispute. One of my agents is representing a seller in a transaction with the property being a Condo. A Cash offer was accepted on the property. No condo addendum was written. Buyer has since decided to back out, outside of their inspection period. In reading the LA Residential Purchase Agreement, I could find no reasonable explanation as to why the buyer would get their deposit back and in my belief, the buyer could be considered to be in default. I gave notice to all parties that it was my intent to release the deposit to the seller in 10 days time. The buyer responded and referenced this language in the Louisiana code. https://legis.la.gov/legis/Law.aspx?p=y&d=106586. The problem is none of that language is in our Louisiana Residential purchase agreement and the addendum wasn't filled out so I'm not sure who is right/wrong. The buyer was given some of those condo docs from the association in a timely manner but it was only whatever the association had, not the certificate containing those 8 items.**

Response:

We cannot comment on specific transactions. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific transaction, it is recommended that you consult with your attorney.

Whether the Buyer or Seller is entitled to a deposit pursuant to a purchase agreement that did not proceed to act of sale generally depends on the reason the act of sale did not occur. Lines 138-162 of the Louisiana Residential Agreement to Buy or Sell (the "Purchase Agreement") address scenarios where the buyer is entitled to return of the deposit:

1. If the Purchase Agreement is declared null and void by the Buyer pursuant to the Due Diligence and Inspection Period as set forth in the Purchase Agreement;
2. If the Purchase Agreement is subject to Buyer's ability to obtain a loan and the loan cannot be obtained, and the Buyer has made good faith efforts to obtain the loan;
3. If the Seller declares the Purchase Agreement null and void for failure of Buyer to comply with any written document requirements;
4. If Buyer conditions the Sale Price on an appraisal and the appraisal is less than the Sale Price and Seller will not reduce the Sale Price;
5. If Buyer timely terminates the Purchase Agreement after having received the leases or assessments as set forth in lines 165 through 169 of the Purchase Agreement;
6. If the Seller is unable to timely deliver to Buyer an approved sewerage and/or water inspection report;
7. If the Seller chooses not to repair or replace the sewer systems pursuant to the Septic/Water Well Addendum and the Buyer terminates as a result thereof; and
8. If the Seller chooses not to repair or replace the private water well system pursuant to the Septic/Water Well Addendum and the Buyer terminates as a result thereof.

Notably, reason #5, which addresses special assessments, is defined in Lines 166-167 of the Purchase Agreement to mean "assessments levied on Property to pay the cost of local

improvements imposed by local governmental/governing authority." We are of the opinion that, as currently written, this does not implicate any assessments from a condominium association.

Accordingly, if the Buyer does not terminate pursuant to the 8 stated reasons above, the Buyer is in default and, pursuant to Lines 319 of the Purchase Agreement, the Seller would generally be entitled to retain the deposit.

Additionally, the Condominium Addendum is not a mandatory form, and therefore failure to attach it to the Purchase Agreement does not vitiate the Purchase Agreement.

However, LA RS 9:1124.107 obligates the seller of a condominium unit to provide certain information to the buyer, and if the statutory requirements are not met, "the contract to purchase is voidable by the purchaser." The statute does not mention damages or any remedy for the Seller in the event a contract is cancelled pursuant to this statute. Importantly, it does not reference whether any deposit paid by the buyer is refundable to the buyer upon "voiding" the contract. The few Louisiana cases that directly address this statute do not involve situations similar to the one in your inquiry. Because the cited statute is state law, we are of the opinion that it would supersede any language in the Purchase Agreement to the contrary, and, accordingly, a buyer may "void" the Purchase Agreement if the requirements set forth in LA RS 9:1124.107 are not satisfied. A separate question is whether the seller is entitled to the deposit once a buyer has voided the Purchase Agreement. It is possible that a court were to determine that the terms of the Purchase Agreement are controlling - meaning that a seller is entitled to retain the deposit even if the Purchase Agreement is voided by the buyer because the Purchase Agreement was not terminated for the reasons stated in the Purchase Agreement.

We think its more likely that a court would order the return of the deposit to the buyer if the Purchase Agreement were "voided" pursuant to an applicable statute such as 9:1124.107. Unfortunately, we have no cases that directly address this issue that we can rely upon, but the Louisiana Civil Code does address effects of dissolution of a contract, and states that "[u]pon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made." La. Civ. Code Art. 2018. A court could apply this provision once the Purchase Agreement is voided by directing the return of the deposit, which would restore the parties to their respective positions before the Purchase Agreement was executed.
Also note that if a dispute exists as to the return of the deposit, the broker holding the funds is subject to the requirements described in §§ 2715 and 2901 of the Louisiana Real Estate Commission Rules and Regulations.

33. **In a commercial transaction, a question has arisen regarding merchantable title. Purchaser wishes to cancel, Seller wants to proceed to the sale. If we place the deposit in the registry of the court, am I susceptible to liability?**

Response:

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If you are depositing the funds in the court registry, you are initiating a concursus proceeding. Concursus is a procedural device through which two or more persons having competing or

conflicting claims to money, property, or mortgages or privileges on property may be required to assert their respective claims contradictorily in a single proceeding. By invoking concursus, a potential judgment debtor may avoid multiple liability for the same debt and may cumulate two or more conflicting claims against him in the same forum. Louisiana Code of Civil Procedure articles 4651 through 4662 govern concursus proceedings in state court.

The party provoking the concursus may deposit the disputed funds into the registry of the court, and may make subsequent deposits of any additional sums becoming due pending the resolution of the concursus. The costs of court thereafter are deducted from the deposit; however, the court may award the successful claimant judgment against any other claimant for the costs of the proceeding which have been deducted from the money on deposit. In cases where the plaintiff does not deposit funds into the registry of the court, the judge is given complete discretion in assessing costs.

When a party deposits sums in a concursus proceeding with a court, the depositing party is relieved of all liability to all of the defendants (i.e. the buyer and seller) for the money so deposited. LA Code Civ. Proc. Art. 4658. Thus if you deposit the funds with the court, you are relieved of liability to those who are making claims to the funds so deposited.

34. <u>At any time is it legal to use a deposit to pay commission on a rental? For example: commission will be half the deposit and paid once the deposit is received? Is this legal for a non-licensed person to do? Is this legal for a licensed person to do? This is what I believe a deposit for residential rental can be used for in Louisiana: Louisiana landlord-tenant law allows the landlord to deduct from the security deposit for unpaid rent, damage to the unit, or failure to comply with the lease agreement. It is essential to note that deposits cannot be used to cover normal wear and tear. As a license Realtor, Section 2717 Funds received in real estate sales, leases or management transaction shall be deposited in the appropriate sales escrow checking account, rental trust checking account or security deposit trust checking account of the listing or managing broker unless all parties having an interest in the funds have agreed otherwise in writing.</u>

<u>Response:</u>

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No, we are of the opinion that, pursuant to LA RS 9:3251, you cannot use any portion of a lessee's deposit to fund a commission. LA RS 9:3251 states:

> Any advance or deposit of money furnished by a tenant or lessee to a landlord or lessor to secure the performance of any part of a written or oral lease or rental agreement shall be returned to the tenant or lessee of residential or dwelling premises within one month after the lease shall terminate, except that the landlord or lessor may retain all or any portion of the advance or deposit which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises. If any portion of an advance or deposit is retained by a landlord or lessor,

he shall forward to the tenant or lessee, within one month after the date the tenancy terminates, an itemized statement accounting for the proceeds which are retained and giving the reasons therefor. The tenant shall furnish the lessor a forwarding address at the termination of the lease, to which such statements may be sent.

The statute does not distinguish between licensees and non-licensees, and applies to all landlords, regardless of license status, equally. And, notably, any waiver of the rights of a lessee under the statute are expressly prohibited.

35. **I have the seller in a contract. The buyer voluntarily quit his new job resulting in his loan being denied. The deposit is being held by the buyers Title Attorney's office. My seller believes that he should get the $500 deposit. The buyer disagrees. How do I terminate the contract now without having the deposit issue resolved?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Lines 63-95 of the Residential Agreement to Purchase or Sell ("Purchase Agreement") address a financing condition being made part of an agreement to purchase residential real estate. Pursuant to lines 93-95, if the Buyer is unable to secure financing, the Seller has a right to provide all or part of the mortgage loans under the terms stated in the Purchase Agreement. These lines, however, do not address return of the deposit if Buyer is unable to obtain financing.

The Purchase Agreement addresses both the circumstances under which the deposit shall be returned to a Buyer, as well as when the Seller is entitled to retain the deposit. Lines 151-169 of the Purchase Agreement enumerates specific circumstances under which the deposit shall be returned to the Buyer. Such circumstances include, but are not limited to:

- the Buyer terminated the Purchase Agreement during the inspection and due diligence period- this can generally be for any reason even if the Seller is willing to make repairs;
- the sale was subject to Buyer's ability to obtain a loan, and Buyer made a good faith effort to obtain a loan but was unable to obtain the loan; and
- the Buyer conditioned the sale price on an appraisal, the appraisal is less than the sale price, and the Seller will not reduce the sale price. See Lines

In each of the circumstances above, "the Deposit shall be returned to the Buyer and the Purchase Agreement declared null and void without demand." See Purchase Agreement, Lines 151-152.
If the Buyer is unable to obtain financing, pursuant to a denial letter, and the Seller does not wish to exercise his right to finance the sale pursuant to Lines 93-95 of the Purchase Agreement, it appears that the Buyer would be entitled to return of the deposit and the contract is automatically null and void without any further action. The Purchase Agreement does not include any provision that the Buyer must maintain his current employment, or that the Buyer is prohibited from quitting his job. While Louisiana law generally imposes a duty of good faith and fair dealing in connection with contracts, cessation of employment would not, on its face, be deemed bad faith or unfair dealing.

36. **Lessee's Deposit: So I represented the lessor of a property and the homewoners had to evict the tenant for a breach on contract (had multiple people staying at the property that wasn't listed as occupants). They had there day in court with JOP (Ascension parish) and judgement was in his favor of the landlords. Question is: Do they have to give the deposit back or is that retained? I've read through RS 9:3251, regarding deposits, and it looks like he could recover some expenses like his travels/flight/rental car for having to be in court today. Can you elaborate on what can be retained from deposit, if any? The tenant has paid rent for the month and must be out by Monday, 10/21. We are using the Greater Baton Rouge Association of Realtors Lease form.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

An evicted tenant is not necessarily precluded from receiving his deposit back (we came across at least one case where the court awarded a return of a security deposit to a tenant who was evicted from his lease: *Trapani v. Morgan*, 426 So. 2d 285 (La. Ct. App.), *writ denied*, 433 So. 2d 165 (La. 1983)). Instead, whether an evicted tenant is entitled to a return of his deposit depends on the terms of the lease agreement and the Lessee's Deposit Act.

Without having been made aware of the complete set of facts surrounding this lease, nor having seen the lease agreement itself, we cannot comment specifically on what portions of the security deposit may or may not be retained by the lessor in this instance. Instead, a general overview of the laws governing a lessee's deposit is below.

The Lessee's Deposit Act "is a set of laws meant to protect lessees from the arbitrary retention of their security deposits by the lessors." *Growe v. Johnson* (La. App. 4 Cir. 2/17/21), 314 So. 3d 87. Further, it has been stated that the statutes governing a lessee's deposit are "penal in nature and must be strictly construed." *Nwokolo v. Torrey* (La. App. 2 Cir. 1/20/99), 726 So. 2d 1055.

La. R.S. 9:3251 provides in pertinent part:

> A. Any advance or deposit of money furnished by a tenant or lessee to a landlord or lessor to secure the performance of any part of a written or oral lease or rental agreement shall be returned to the tenant or lessee of residential or dwelling premises within one month after the lease shall terminate, except that the landlord or lessor may retain all or any portion of the advance or deposit which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises. If any portion of an advance or deposit is retained by a landlord or lessor, he shall forward to the tenant or lessee, within one month after the date the tenancy terminates, an itemized statement accounting for the proceeds which are retained and giving the reasons therefor. The tenant shall furnish the lessor a forwarding address at the termination of the lease, to which such statements may be sent.

Additionally, La. R.S. 9:3252 provides in pertinent part:

> A. The willful failure to comply with R.S. 9:3251 shall give the tenant or lessee the right to recover any portion of the security deposit wrongfully retained and three hundred dollars or twice the amount of the portion of the security deposit wrongfully retained, whichever is greater, from the landlord or lessor, or from the lessor's successor in interest. Failure to remit within thirty days after written demand for a refund shall constitute willful failure.

Finally, La. R.S. 9:3253 states that:

> In an action brought under R.S. 9:3252, the court may in its discretion award costs and attorney's fees to the prevailing party.

Ultimately, in accordance with La. R.S. 9:3251, a landlord may retain all or part of the deposit "which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises." In an action to recover a deposit, it will be up to the trial court to determine the portion of the deposit that is "reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises." Our review of the caselaw suggests that there is no precise definition as to what will qualify. In fact, courts seem to occasionally have differing views as to the types of expenses that a landlord will be allowed to apply towards a deposit. The determination will ultimately depend on the terms of the lease and the facts at hand.

Typically, the qualifying expenses for which a landlord seeks to apply against a deposit would include expenses related to the physical repair/maintenance to the leased premises. We did not identify any sources suggesting that a landlord can apply travel costs related to court appearances against the security deposit. Of course, if the lease itself provides for the reimbursement of travel costs, then the terms of the lease would likely control in that situation.

Here are some examples:

The Louisiana Fourth Circuit Court of Appeal has held that costs for painting materials generally fall outside of acceptable reasons for withholding a lessee's security deposit because they are considered ordinary wear and tear. See *O'Brien v. Becker*, 332 So.2d 563, 564 (La. App. 4th Cir. 1976). General cleaning expenses have also been considered normal wear and tear expenses that are outside of the scope of acceptable reasons to withhold a lessee's security deposit. See *Growe v. Johnson*, (La. App. 4 Cir. 2/17/21), 314 So. 3d 87 (noting the trial court determined some expenses – such as a general cleaning fee – were the result of wear and tear not subject to withholding). As such, in *Devall*, the Louisiana Fourth Circuit Court of Appeal affirmed a trial court's finding that paint and cleaning expenses that landlord listed in its itemized statement to tenant were expenses for ordinary wear and tear to the property, and thus landlord was not entitled to apply such expenses against the deposit. *Devall v. Home Finders Int'l, Inc.*, (La. App. 4 Cir. 5/8/23), 368 So. 3d 125.

In *Growe*, the landlord was not allowed to apply the following expenses against the deposit: prorated rent for 4 days; parking fees; cost of drip pans; general cleaning fee; refrigerator cleaning; and pest eradication supplies. *Growe v. Johnson* (La. App. 4 Cir. 2/17/21), 314 So. 3d 87.

Examples of expenses for which a landlord *was* entitled to reimbursement include: (1) the cost of repainting a rear porch due to fire damage from the lessee's barbeque grill; (2) the cost of

replacing a broken windowpane; (3) the cost of removing glue from a number of windows. *Provosty v. Guss*, 350 So. 2d 1239 (La. Ct. App. 1977).

In *Vinson*, the Louisiana Second Circuit Court of Appeal held that only $50 of a deposit could be applied to the replacement of a carpet at the leased premises, given the testimony that a professional cleaning of the carpeted areas would have cost approximately $63, and rental of an ozone machine would have cost approximately $45. *Vinson v. Henley* (La. App. 2 Cir. 1/28/04), 864 So. 2d 894.

In *Green* (an unpublished opinion), after the landlord did not return a $300.00 deposit to the tenant, the Louisiana Second Circuit Court of Appeal determined that the deposit was to be used to offset the cleaning or furniture removal costs that landlord had claimed. In other words, the landlord was allowed to retain the portion of the deposit which was applied towards cleaning and furniture removal costs. *Green v. Erwin* (La. App. 2 Cir. 7/13/11).

Note also that the landlord must, within one month after the date the tenancy terminates, send an itemized statement to the tenant accounting for the portion of the deposit that is retained and giving the reasons for that retention.

DUE DILIGENCE AND INSPECTION INQUIRIES

37. **client is claiming that a house is being misleading and false advertising by claim a 4 bedroom when the 4th is not a bedroom according to an appraiser. She is also questing an "as is" in the agent remarks. She is claiming that her buy sells is illegal because of this. She is trying is use this as a way to get leverage to make the seller come down on the price, but we have a signed contract. We are supposed to see it Wednesday but she wants an answer today. Help!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

If your client wishes to terminate the agreement, and you are still within the due diligence and inspection period, the Louisiana Real Estate Commission ("LREC") Louisiana Residential Agreement to Buy or Sell (the "Purchase Agreement") gives the buyer the full and exclusive right to terminate the Purchase Agreement and declare the entire Purchase Agreement null and void. Your client could also ask for a price concession in lieu of termination, but the seller is not obligated to comply.

We did not find any statutes or case law supporting an assertion that the sale is illegal because an appraiser deems a claimed bedroom to not be such. We would encourage your client to explore her options under the Purchase Agreement.

38. **My agent is representing the buyer in a transaction where they submitted an inspection response and the seller did not respond. Buyer waited for a response**

from the seller beyond 72 hours and since they did not respond they want to declare the agreement Null and void. Buyer is outside inspection response period of seller not responding due to them waiting for a response. Lines 233-236 says the agreement is null and void except for return of deposit. We need a ruiling on what happens with the deposit. Buyer wants deposit back held by title company but not sure how this line reads and if buyer gets deposit back. You would think they would since seller didn't respond to inspection response. Please advise.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Please note that we are not a governing body of Louisiana REALTORS® and we cannot provide "a ruling on what happens with the deposit." The information contained in this hotline response is informative only and has no authoritative weight.

The inspection period list of issues is governed by Lines 198-253 of the Residential Agreement to Buy or Sell ("Purchase Agreement"). Your specific inquiry invokes option 2, which occurs when, after inspection, the buyer sends seller a list of deficiencies and desired remedies. Lines 224-227 provide that seller's response to buyer's list must occur within 72 hours of sellers receipt. Lines 228-230 provide that if seller does not timely respond, buyer then has 72 hours from the expiration of seller's 72 hour period to notify seller in writing that the buyer will either accept the property in its current condition or terminate the Purchase Agreement. If buyer elects to terminate the agreement, the Purchase Agreement becomes null and void and the deposit must be returned to the buyer. If buyer does not make this written notice to seller within buyers 72 hour period, the Purchase Agreement stands as is.

For purposes of this hotline response, we assume your buyer provided a timely written notice of election to terminate the Purchase Agreement to seller. If that is the case, then, pursuant to Line 236, the deposit shall be returned to the buyer. If, however, the buyer did not provide seller a written notice that buyer was terminating the agreement within 72 hours after the expiration of seller's initial 72 hour response period, the Purchase Agreement is null and void.

39. **I am listing agent. Buyer agent submitted inspection response two days after due diligence and inspection period ended without requesting extension of inspection period. Purchase agreement states that if buyer does not submit termination or response timely that the buyer accepts the property in the current condition. My seller would like to submit a seller response offering money in lieu of repairs. Is this in effect extending DDI period and giving the buyer the option to terminate agreement since the Seller is not agreeing to all repairs? Seller has until 9am Saturday 9-28-24 to respond if they do respond.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The Standard Form Louisiana Residential Agreement to Buy or Sell provides for a Due Diligence and Inspection Period (starting at line 183).[17] The Standard Form's Due Diligence and Inspection Period expires on **the earlier of** the agreed upon date set forth in the agreement or the date that the buyer submits its written list to the Seller of the deficiencies discovered, along with the desired remedies.

And lines 193-196 of the Standard Form state that the buyer's failure to timely provide an inspection response **prior** to the expiration of the Due Diligence and Inspection Period shall be deemed as acceptance by the buyer of the property's current condition.

You are correct - if the buyer submitted the inspection response **after** the Due Diligence and Inspection Period ended, then the buyer's failure to timely provide the proper inspection response prior to the expiration of the Due Diligence and Inspection Period is deemed to be the buyer's acceptance of the property's current condition.

We believe that your question is whether the a seller's offer of money in lieu of repairs in this case would be a tacit or implicit waiver of the seller's right to force the buyer to accept the property in its current condition and/or a tacit or implicit amendment to the purchase agreement. Courts in Louisiana in some instances have held that contractual provisions and defaults can be tacitly waived by the conduct of the parties. If the seller were to respond by making such an offer, then the seller should clarify that the response is not a waiver of any rights that seller has under the purchase agreement or a waiver of any of the contractual provisions, including the buyer's failure to timely submit its list of repairs. Further, the seller may want to clarify that the offer is being made as an accommodation to the buyer and shall not serve as an amendment to the purchase agreement. Otherwise, the offer by the seller could be considered an extension of the Due Diligence and Inspection Period, thus giving the buyer the option to terminate the purchase agreement.

This conclusion seems further supported by LREC's "Buyer Option Flowchart," a flowchart that details the buyer's options at the end of the Due Diligence and Inspection Period.[18] As per the flowchart (a copy of which is on the next page), when a buyer has taken no action at the expiration of the Due Diligence and Inspection Period, the property is deemed accepted in its current condition.

The question states that the seller is planning to send a "seller response" offering money in lieu of repairs. A "SELLER'S Response" – as that term is defined in the Standard Form at line 227 – is only necessitated once the buyer presents a written list to the Seller of the deficiencies and desired remedies, and only if the buyer submits such a list *prior* to the expiration of the Due Diligence and Inspection Period.

As described starting at line 237 of the Standard Form, if a seller states in its "SELLER'S Response" that it refuses to remedy deficiencies listed by the buyer, then the buyer will receive additional time in which to take certain actions – one of which is to elect to terminate the agreement.

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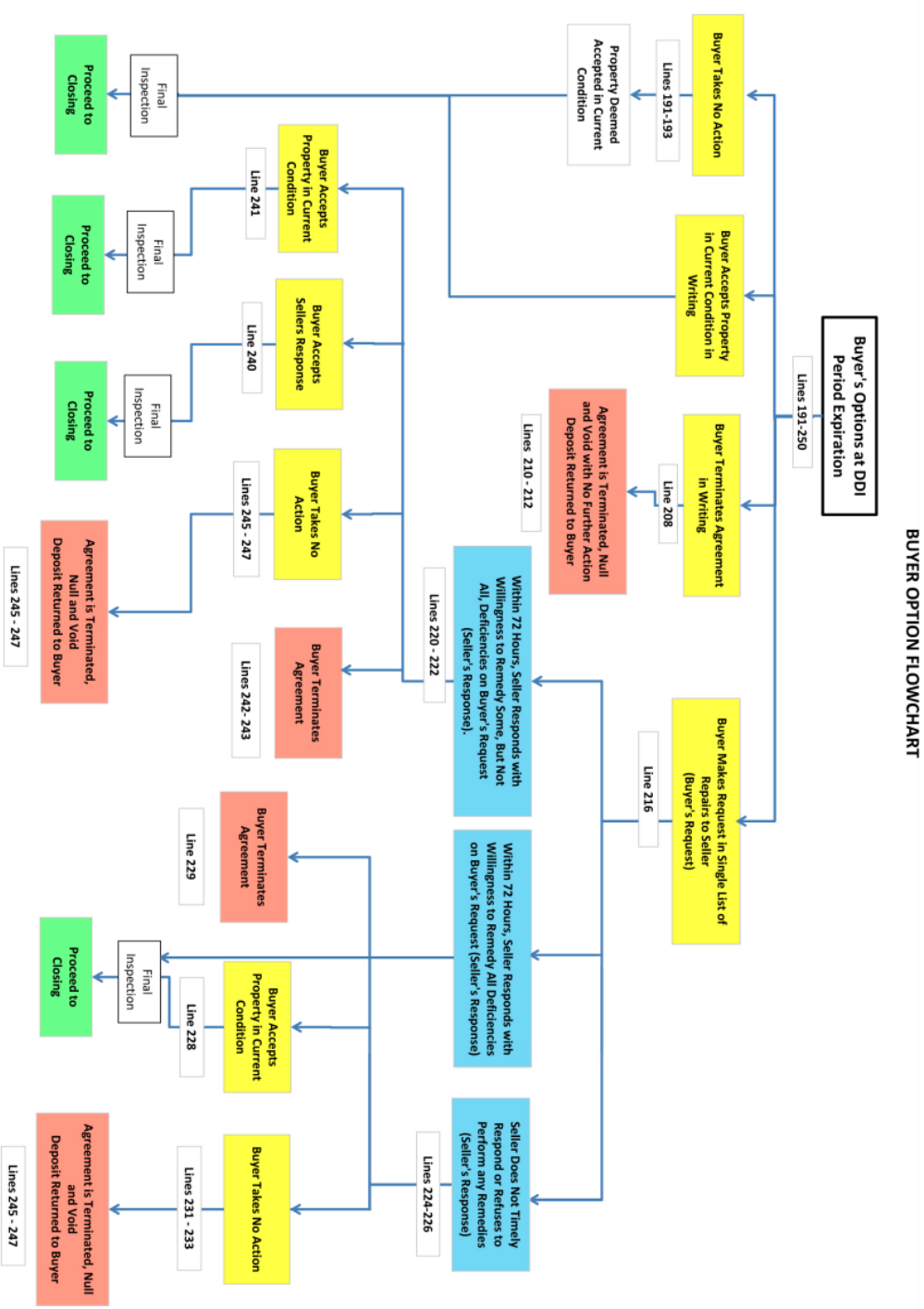
[17] https://lrec.gov/wp-content/uploads/2023/12/2024-Residential-Agreement-to-Buy-or-Sell-with-Revised-Date-Added-PRINT-VERSION.pdf

[18] https://lrec.gov/wp-content/uploads/2022/02/DDI-Period-Decision-Flowchart-02-2022.pdf

While not entirely clear, offering cash in lieu of repairs could trigger the additional time for the buyer because that could be deemed a "SELLER's Response" even though it does not technically meet the definition of a "SELLER's Response" as set forth in the Standard Form.

In making the "offer" to buyer, the seller may want to clarify that the "offer" is not a "SELLER's Response" and that seller retains the right to require that buyer accept the property in its current condition.



FEES, COMMISSIONS & OTHER RECEIPTS INQUIRIES

40. **Hi. I own a property management company. I employee a W2 employee who has their real estate license. Am I able to pay any real estate commissions they earn through their LLC or do those commissions need to be included in payroll and W2? Thanks!**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Pursuant to LA RS 37:1446(A), "[n]o payment of a commission or compensation shall be made by any licensee or registrant to any person who has not first secured a license or registration" under Louisiana Real Estate License law. And, subpart G of the same statute provides "[a]ssociate brokers and salespersons may assign or direct that commissions or other compensation earned in connection with a real estate transaction be paid by their licensed sponsoring broker to… an unlicensed limited liability company of which the associate broker or salesperson is the sole manager." If your employee is the sole manager of the LLC, subpart G indicates that payment to the LLC would be permissible. If the LLC does not meet these qualifications, then you would need to render commission payments directly to the licensed employee.

We cannot provide advice relating to this specific payment but generally, if the commission payment were paid to the employed individual, that would be treated as W2 wages, and would subject to required withholding like normal payroll.

41. **I am seeking clarification regarding the timing and approach for establishing the commission agreement or co-op when there is no pre-agreed compensation via the MLS in a residential real estate transaction. Specifically, I am inquiring about the appropriateness of including compensation details in the original offer to the seller versus negotiating the commission before submitting the initial offer. I am interested in how this pertains to NAR rules and ethics.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Pursuant to the Code of Ethics and Standards of Practice of the National Association of Realtors ("Code") Standard of Practice 16-16, "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's

agreement to modify the offer of compensation. (Amended 1/04)." Therefore it would be inappropriate for you to use the offer as a vehicle to negotiate your compensation because an offer of that nature is thought to be inconsistent with your fiduciary duty to your client.

NAR has published resources on the interpretation of Standard of Practice 16-16, and made clear that this does not mean you must negotiate the compensation prior to a showing or an offer. The NAR Code Comprehension provides that "[e]xcept for the fact that you cannot make an offer to purchase contingent upon an increase in the compensation paid to you by the listing broker, you can negotiate your commission with the listing broker at any time during the transaction…In fact, Standard of Practice 3-3 expressly authorizes the listing broker and cooperating broker to come to an agreement to change cooperative compensation, and that can happen before a property is shown, after showing, or even after an offer is accepted."

42. **With the upcoming settlement agreement and NAR moving forward to requiring a buyers' agency agreement, will there be a grandfathering of compensation offered on pending transactions when the rules change in July/August of this year? Do brokers need to implement compensation agreements to guarantee the commission being offered in the MLS for listings that will not close until after these dates?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

NAR's FAQ's, found at https://www.nar.realtor/the-facts/nar-settlement-faqs, somewhat address your question. Question 30 in the FAQs asks how the settlement affects listing agreements. NAR provides: "After the new rule goes into effect, listing agreements should be amended to reflect that offers of compensation cannot be communicated via the MLS. The settlement expressly provides that sellers may communicate seller concessions — such as buyer closing costs — via the MLS provided that such concessions are not conditioned on the use of or payment to a buyer broker."

What is not explicitly addressed, however, is exactly how the settlement will affect pending transactions. We are not able to find any information on whether pending transactions with compensation agreements would be grandfathered in/exempt from the new rules. We would advise it to be best practices to implement a compensation agreement for transactions that will straddle the settlement date to ensure that compensation arrangements are honored.

43. **am a broker in louisiana, i have a question about buyer representation. if a seller is offering a 2% co op commission and im representing a buyer who i have a buyers agreement with for 3%. do i have to ask the seller to up the 1% to make it 3% to fufill my agreemenet with the buyer or does the buyer have to pay the extra 1% or do i just have to accept what the seller is offering which is 2%. i thoguht i heard on a townhall meeting you have to accept what the seller is offer at co op.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

You are permitted to ask the seller to increase your compensation to the agreed-upon 3% commission, but there is no requirement in law or contract that would require the seller to agree to such an increase. You should also be careful not to imply that any increased commission is paired with a promise to provide an offer to buy.

However, because you do have a written agreement with the buyer for a 3% commission, you are entitled to seek recourse from the buyer for any commission that falls below that 3%. That is, if the seller provides 2%, you are entitled to seek the remaining 1% from your buyer as the buyer is contractually obligated to see that you receive a 3% commission. If you do not want to enforce that right, you are certainly permitted to accept only the 2% offered by seller. Again, you are not required to accept the sellers offer, but may do so voluntarily.

44. **We had an agent pass away. I called to notify the commission and board and commission mentioned the agent's commissions possibly needing to go to her estate. If I appoint another agent to take over the remaining contracts, would this mean that agent would not be paid, as the agent that passed away, would still receive it? Please advise. Thank you,**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

If the agent that passed away had already "earned" the commission, then the commission becomes property of the estate. This appears to be a factual question that could be addressed under procuring cause.

NAR's Arbitration Guidelines, created pursuant to Article 17 of the REALTOR® Code of Ethics, define procuring cause as "the uninterrupted series of causal events which results in the successful transaction." In practice, the broker whose efforts set off that unbroken chain of events will be regarded as procuring cause.

If, however, you have two+ real estate agents who entered into a mandatary relationship with the buyer, things get tricky. Article 17 requires REALTOR® principals to submit procuring cause disputes to mediation and arbitration. An arbitration hearing panel will consider all relevant details of the underlying transaction, guided by a number of factors to determine procuring cause. Those may include:

The nature and status of the transaction.

Roles and relationships of the parties.

Initial contact with the buyer.

Continuity and breaks in continuity.

What's important to keep in mind is that it's the interplay of these factors that indicates procuring cause. One factor alone will not decide a case. https://www.nar.realtor/magazine/real-estate-news/law-and-ethics/hold-on-thats-my-client. We would certainly advise you to apprise the agents

succession representative that there may be commissions due to the estate, and consult with a succession attorney.

45. **Termination:** If we discover that the buyer cannot pay the fee they agreed to in the Buyer Agency Agreement (BAP) and we have already made an offer on a property or are under contract, can we cancel the agreement and walk away? **Settlement:** Does the settlement agreement mention anything about handling payments from the seller? I want to confirm: Can I customize the language to specify how the seller will pay the total commission, including the BAP? Do I have to use the new Listing agreement to satisfy the settlement arrangements. Ie. Say, total compensation to be "x" and seller agrees to pay up to "%" for BAP. **listing broker to selling broker Compensation Agreement:** The form asks for the buyer's name. Instead of listing my client's name, can I simply write "in file"?**

Response:
We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

If you discover a buyer cannot pay a fee in the buyer agreement, you have a few options: first, you could sue the buyer for breach of the agreement because the buyer is contractually bound to pay you the agreed upon fee. In the alternative, you could amend the agreement for a lesser fee. If you are using the Buyer Representation Agreement for Residential Property promulgated by Louisiana REALTORS, you could also terminate the agreement pursuant to Section 12 and give five (5) days' written notice; this agreement, however, provides that buyers obligation to compensate the broker survives termination. Therefore you would still have a claim for compensation during the original term of the agreement.

The NAR Settlement Agreement FAQ's, specifically FAQ #41, allows the buyer to request the listing broker pay compensation to the buyer broker. Additionally, your listing agreements post-August 17, 2024 must, pursuant to FAQ #53, include the following:

- MLS Participants working with sellers must disclose in conspicuous language that broker commissions are not set by law and are fully negotiable.

- MLS Participants must include the disclosure in the listing agreement, if the listing agreement is not a government-specified form. If the listing agreement is a government-specified form, a separate disclosure would satisfy the requirement. *(Added 5/29/2024)*

So while you need not use a specific listing agreement form, you need to ensure you comply with the NAR Settlement requirements.

And, in the Compensation Agreement, you need to list the actual name of the party to the agreement and the underlying transaction. It would not be prudent practice to simply refer to a file.

46. **One of my agents was gifted $2000 by one of her clients. This was NOT in connection with a sale or commission. Do I need to run that through the brokerage or not?**

Response:
We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Whether the "gift" must be run through the brokerage will depend on the true nature of the gift. If the payment is truly a gift – and was not made in connection with a sale, commission, referral, or other real estate activity as stated above – then the payment would likely fall outside of any rules promulgated by the Louisiana Real Estate Commission and would not need to be run through the brokerage. However, we have not addressed, and cannot address, the specific obligations of the agent and broker pursuant to any written agreement amongst them. That agreement, for example an independent contract agreement, may dictate how that payment is handled by the agent and broker.

If, however, the payment was in connection with real estate activity, then the payment would likely need to first go through the brokerage pursuant to the LREC rules regarding payments, which state that an active real estate licensee shall not accept a commission or other valuable consideration for the performance of real estate activities from any person, except their sponsoring or qualifying broker. La. Stat. § 37:1446(F).

The recommended course of action would be to determine the true nature of the "gift" that the agent received. We cannot give specific guidance on the "gift" at issue because we are not privy to the surrounding facts and circumstances. If there is any doubt or ambiguity about the gift, then it would likely be best to have the payment made to the broker who can then determine how the payment should be disbursed, which may be dictated by the agreement between the broker and the agent.

We did not find anything that would suggest that an agent is prohibited from receiving gifts from a client. The National Association of REALTORS Member Policies includes a "Gifts and Favors Policy" applicable to NAR Members.[19] The policy is geared primarily towards the giving of gifts and other favors between NAR's members and its employees. The policy does not prohibit an agent's receipt of a gift from a client. We also could not find anything under Louisiana law that would prohibit an agent from receiving a gift from a client.

LEASING/RENTALS/PROPERTY MANAGEMENT INQUIRIES

47. If an agent is doing a lease purchase or rent to own, can the verbiage be that the 10,000.00 DEPOSIT be non-refundable? In the agreement is says deposit NOT down payment. Do you have any resources with guidelines for lease purchases/rent to own contracts?

[19] https://www.nar.realtor/sites/default/files/documents/nar-member-policies-08-08-2023.pdf?_gl=1*y6n2cb*_gcl_au*MjA1MzM5OTkzMi4xNzI1MzgzNTY3

Response:

We cannot comment on specific transactions. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific transaction, it is recommended that you consult with your attorney.

Louisiana has recognizes two different types of transactions that involve a "lease purchase:" 1)a lease with an option to purchase and 2) a conditional sale disguised as a lease.

The distinction between a valid "lease with option to purchase" and a disguised "conditional sale" is that in the former, there is an option to give additional consideration in order to purchase the leased item at the end of the contract term, while in the latter, there is an obligation to pay the full price regardless of whether the option is exercised or not. *Pastorek v. Lanier Systems Co.*, 249 So.2d 224 (La.App. 4th Cir.1971).

A contract by which a party binds himself to pay in installments a certain sum for the use of a thing, with the privilege of becoming owner thereof upon paying a further sum, for which he has not bound himself absolutely, is simply a lease with an option to purchase, and is not a sale. An alleged lease, in which at the end of the term the lessee is to become owner of the thing leased, in consideration of the rent to be paid, is in fact a sale translative of the property from its very inception. *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1928); *Bamma Leasing Co., Inc. v. Secretary, Dept. of Rev. and Taxation*, 93–881, pp.4–5 (La.App. 5 Cir. 9/14/94); 646 So.2d 917, 920, writ denied, 94–2505 (La.12/9/94); 648 So.2d 380.

If the contract immediately transfers ownership of the "leased" property, and is indeed a disguised sale, then there are no rules that regulate whether the "deposit" can be nonrefundable. In this situation it would make sense for the "deposit" to be nonrefundable because ownership is being conveyed and the remaining sales price paid out over a series of installments disguised as "lease payments."

If the contract is a true lease with an option to purchase, LA R.S. 9:3251 provides that "[a] ny advance or deposit of money furnished by a tenant or lessee to a landlord or lessor to secure the performance of any part of a written or oral lease or rental agreement shall be returned to the tenant or lessee of residential or dwelling premises within one month after the lease shall terminate, except that the landlord or lessor may retain all or any portion of the advance or deposit which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises." This statue implies that you cannot make a true deposit nonrefundable in a traditional residential lease situation. You can, however, have other non-refundable fees. Landlords are required to disclose any non-refundable fees in the lease agreement, and these fees cannot be used to cove damages caused by the tenant.

48. One of my managers recently had an eviction in Orleans parish and the new judge (not sure of name) advised the court room she doesn't care about contracts and waiver of notice - ALL hearings in her court room will require a minimum 30 day notice - is this legal and what if anything can be done?

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

La. C.C.P. Art. 4701 addresses "Termination of lease; notice to vacate; waiver of notice" and states:

> When a lessee's right of occupancy has ceased because of the termination of the lease by expiration of its term, action by the lessor, nonpayment of rent, or for any other reason, and the lessor wishes to obtain possession of the premises, the lessor or his agent shall cause written notice to vacate the premises to be delivered to the lessee. The notice shall allow the lessee not less than five days from the date of its delivery to vacate the leased premises.
>
> If the lease has no definite term, the notice required by law for its termination shall be considered as a notice to vacate under this Article. If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term.
>
> A lessee may waive the notice requirements of this Article by written waiver contained in the lease, in which case, upon termination of the lessee's right of occupancy for any reason, the lessor or his agent may immediately institute eviction proceedings in accordance with Chapter 2 of Title XI of the Louisiana Code of Civil Procedure.

While it is not clear, we have assumed that the Judge's comments are addressing this particular article, which allows for notice of five (5) days in certain instances and requires 30-day notice in other instances. The article also allows for a waiver of those notice periods. Depending on the facts and circumstances, Article 4701 should be enforceable in regards to notice periods for eviction and termination of a lease. If a party feels that Article 4701 has not been properly applied, then an appeal may be appropriate (see below).

However, if the eviction hearing is delayed and this is not an issue of enforcement of Article 4701, but rather about scheduling of hearings, there may be a different result. The typical recourse for a delayed hearing depends on what venue you are in – if you are before a justice of the peace, you would take an appeal to the parish district court. LA C.C.P. Art. 4924.

If you were in district court, your recourse depends on what exactly happened. If the judge dismissed the case because the proper time for notice had not elapsed, you would take an appeal and file it in the appellate court encompassing the district. For example, if you were in New Orleans court, you would file an appeal with the Louisiana 4th Circuit. If, however, the judge did not issue a "final judgment," and instead just delayed the hearing, you could file a writ with the same reviewing appellate court, and seek early intervention on the matter.

If you believe that the judge has engaged in judicial misconduct, you could also file a complaint with the Judiciary Commission of Louisiana. The Code of Judicial Conduct[20] details what

[20] https://lasc.org/Court_Rules?p=CJC

constitutes judicial misconduct. The complaint form can be found at this link: https://judiciarycommissionla.org/Documents/Judicial_Complaint_Form.pdf.

49. **Hi, I am asking this question as a Broker for a property management company: We are trying to understand if there are any occupancy laws regarding renting in Baton Rouge. Is there an occupancy limit for single family dwellings in Baton Rouge? I have tried contacting Fair Housing, Baton Rouge City Hall, etc. and have not been given a clear answer. Is there any advise y'all can provide? For example, if there is a 2 bedroom and there are 5 occupants wanting to rent/live in this house, is that allowed? Please advise. Thank you so much.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

For short term rentals in East Baton Rouge Parish, the total occupancy for non-owner occupied rentals shall be two people per bedroom plus two additional people.[21] A short term rental is "the rental of all or any portion of a residential dwelling unit for dwelling, lodging, or sleeping purposes to one party with a duration of occupancy of less than 30 consecutive days."[22]

We were not able to find any specific information relating occupancy for non-short term rentals in East Baton Rouge Parish. The sources we came across suggest that the ordinances on short-term rentals are relatively new and have been created in response to noise complaints from neighbors when units are rented on short-term rental apps like AirBNB. Therefore we do not find it ununsual for there to be no regulating ordinances on non-short term rentals. If you wanted to proceed out of an abundance of caution, you could adopt a policy that complies with the short-term rental ordinances.

50. **Are there any rules on using criminal background to deny a possible applicant/tenant? If you run a credit check on an applicant/ tenant, do you have to give them a copy? In Louisiana are you required to send a written statement as to why the applicant/tenant is being denied? Are there any legal requirements that have to be on all applications for housing? Are there any laws in regards to pet deposits/pet rent? Can a licensed real estate agent accept an application fee (for a property they do not own) and not give it to their brokerage? If an agent is accepting an application fee and they own the company running the background/ credit check or have any percentage of ownership or will make any profits off the company, do they have to disclose this?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

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[21] https://www.brla.gov/3014/Short-Term-Rentals#:~:text=The%20total%20occupancy%20for%20the,used%20for%20short%2Dterm%20rental.

[22] https://www.brla.gov/DocumentCenter/View/13511/Short-Term-Rental-Summary-PDF?bidId=

Q1: Are there any rules on using criminal background to deny a possible applicant/tenant?

Louisiana real estate license law does not address using a background check on potential rental applicants or tenants.

However, the Fair Housing Act prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status or national origin. The Fair Housing Act applies to all housing and prohibits both intentional housing discrimination and housing practices that have an unjustified discriminatory effect because of race, national origin or other protected characteristics. Very limited exemptions to the Fair Housing Act are available for owner-occupied buildings with no more than four (4) units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members.

On April 4, 2016, the Department of Housing & Urban Development (HUD) released the Office of General Counsel Guidance ("HUD Guidance") concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions. Specifically, the HUD Guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual's criminal history. The HUD Guidance concluded: "Because of widespread racial and ethnic disparities in the U.S. criminal justice system, criminal history-based restrictions on access to housing are likely disproportionately to burden African Americans and Hispanics. While the Act does not prohibit housing providers from appropriately considering criminal history information when making housing decisions, arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification. Thus, a discriminatory effect resulting from a policy or practice that denies housing to anyone with a prior arrest or any kind of criminal conviction cannot be justified, and therefore such a practice would violate the Fair Housing Act."

Therefore while you can certainly use a background check, you should proceed with caution in adopting a policy that automatically denies rentals to those with convictions in an effort to comply with the Fair Housing Act.

Note that you also need the applicants consent to run a background check.

Q2: If you run a credit check on an applicant/ tenant, do you have to give them a copy?

Like background checks, you will also need the applicants consent to run a credit check. The Fair Credit Reporting Act ("FCRA") governs the collection, sharing and subsequent use of consumer credit information. Louisiana law, at LA R.S. 9:3571.1, provides that "[e]ach credit reporting agency shall, within five business days of receipt of a written request from a consumer, mail, first class, to that consumer a copy of his credit report, including the nature and substance of any information being provided to credit reporting agency customers of the agency." The relevant statutes do not address whether you, as the screening agency, must provide the applicant with a copy.

Q3: In Louisiana are you required to send a written statement as to why the applicant/tenant is being denied?

Generally, no, there is no Louisiana law that requires you to explain why an applicant has been denied the opportunity to rent. However, there we found one exception to this rule. Under Louisiana law, if a criminal background check report reveals negative information about a household member and admission is denied due to an individual's criminal history, the subject of the record (and the applicant, if different) must be provided to the applicant in a detailed notice of the proposed adverse action and an opportunity to dispute the accuracy of the record and/or appeal the determination of the application.

Q4: Are there any legal requirements that have to be on all applications for housing?

We did not find any Louisiana law that applies blanket requirements for typical leases. Of course, if you are in a unique situation, such as participating in the low-income housing tax credit program, there are certain requirements. We encourage you to engage your own attorney for review of a rental application.

Q5: Are there any laws in regards to pet deposits/pet rent?

Yes, you cannot charge a pet deposit or fee for a qualifying service animal or emotional support animal.[23] There are not, however, specific Louisiana laws that address a pet deposit specifically.

Q6: Can a licensed real estate agent accept an application fee (for a property they do not own) and not give it to their brokerage?

This question implicates the relationship between the agent and his/her brokerage. You would need to review the agreement you have with your brokerage to see if doing this would run afoul of any obligations owed to the brokerage.

Also note that LA RS 37:1447(F) does state that "[a]n active real estate licensee shall not accept a commission or other valuable consideration for the performance of any [real estate activity], or for performing any act relating thereto, from any person, except their sponsoring or qualifying broker." And, engaging in leasing of property would be considered a real estate activity under LA RS 37:1431(23). We read this to require that any compensation you receive needs to run through your broker.

Q7: If an agent is accepting an application fee and they own the company running the background/ credit check or have any percentage of ownership or will make any profits off the company, do they have to disclose this?

If you are involved in any part of the rental application process, including being involved in a background or credit check process that is required as part of the application, it would appear you may be engaging in a "real estate activity," which is defined in LA RS 37:1431 to be "any activity relating to any portion of a real estate transaction performed for another by any person, partnership,

[23] U.S. Department of Justice and U.S. Department of Housing and Urban Development, "Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act," (May 17, 2004) (http://www.hud.gov/offices/fheo/library/huddojstatement.pdf).

limited liability company, association, or corporation, foreign or domestic, whether pursuant to a power of attorney or otherwise, who for a fee, commission, or other valuable consideration or with the intention, in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration." Accordingly, because you may be considered to be involved on multiple sides of a transaction, we would advise it as best practice to disclose such.

51. **I have a Tenant (Military member) and Owner that are having a major issue regarding a deposit, pet fee, and a lease. The tenant attempted to get the power turned on at an address while he was out of state. The tenant rented the house through a sight unseen disclosure. They scheduled power on 4/24/24 to be turned on for the lease beginning date of 5/1/24. The tenant sent his wife on the 3rd of May to come take a look. She was displeased with the home overall and then got a message from the owner who unfortunately does reach out to tenants from time to time and shared that he was the maintenance coordinator which, in fact is true, but he is also the owner. The tenant shared that the power could not be turned on without an inspection from the parish. He shared that with the owner, the owner coordinated the inspection. then called the owner back and said he didn't need an inspection, but in fact he did. If power has been disconnected longer than 6months the home needs an inspection to restore power. This would be a task the owner would perform and keep up. The tenant and owner coordinated again and found out they did need an inspection. The power was not able to be restored until mid month and the tenant is frustrated and does not want to continue with the home. I have shared this with the owner and the owner is demanding the tenant pay rent and that the pet fee, and security deposit are to remain in effect. The Soldier and his wife are on the way to Louisiana and need a place to live. The owner has offered to clean the home, to give credit for just a few days of rent, but the tenant is not pleased with that. They would like all fees back and to move on to another home. In addition to the power issue, they have presented orders for deployment which has them reporting for duty 6/20/24. The owner is requesting along with all fees that we bill them through the 30th of June. Please advise.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The Louisiana Supreme Court has held that a lease contract itself is the law between the parties and that the lease defines the parties' respective rights and obligations so long as the agreement does not affect the rights of others and is not contrary to the public good. *Carriere v. Bank of Louisiana*, 95-3058 (La. 12/13/96); 702 So.2d 648, *on reh'g* (Nov. 3, 1997). Therefore, the terms of the lease generally control a party's rights. When the lease is silent on a matter, however, the Civil Code articles and Revised Statutes regulate the relationship between lessor and lessee. *Tassin v. Slidell Mini-Storage, Inc.*, 396 So.2d 1261 (La. 1981).

As to a Lessee's deposit to secure a lease, Louisiana Revised Statute § 9:3251 provides that, "[a]ny advance or deposit of money furnished by a tenant or lessee to a landlord or lessor to secure the performance of any part of a written or oral lease or rental agreement shall be returned to the tenant or lessee of residential or dwelling premises within one month after the lease shall terminate,

except that the landlord or lessor may retain all or any portion of the advance or deposit which is reasonably necessary to remedy a default of the tenant or to remedy unreasonable wear to the premises."

Because the tenant in question is a Military member, the Service Members Civil Relief Act (SCRA) is also applicable. The SCRA provides for the termination of residential leases by service members. 50 U.S.C.A. § 3955.

The SCRA specifies which leases are covered under the SCRA, when a lessee under a lease covered by the SCRA may terminate the lease, the manner of terminating a lease and delivery of required notices, the effective date of a lease termination, treatment of arrearages and other liabilities, and treatment of any rent paid in advance. A summary of the relevant provisions is provided below.

Leases covered by the SCRA include leases of premises occupied by a servicemember for a residential purpose if the servicemember, while in military service, executes the lease and thereafter receives military orders[24] for a permanent change of station or to deploy with a military unit (or in support thereof) for a period of not less than 90 days.

In general, the lessee on a lease covered by the SCRA may, at the lessee's option, terminate the lease at any time after the date of the lessee's military orders requiring a permanent change of station or deploying the lessee with a military unit for a period of not less than 90 days.

Termination of a lease is made by the lessee's delivery of written notice of such termination, and a copy of the servicemember's military orders, to the lessor or to the lessor's agent. Delivery of notice may be accomplished in a variety of manners, including by hand delivery, by private business carrier, by electronic means, or by placing the written notice in an envelope with sufficient postage and with return receipt requested, and addressed as designated by the lessor or to the lessor's agent, and depositing the written notice in the United States mails.

Termination of the lease of real property that provides for monthly payment of rent is effective 30 days after the first date on which the next rental payment is due and payable after the date that the notice is given (in other words, to determine the effective date of lease termination under the SCRA: (1) identify the date that notice of termination is given; (2) identify the first date - after notice has been given - on which the next rental payment is due and payable; and (3) identify the date that is 30 days after the date the next rental payment is due and payable).

Generally, rent amounts that are unpaid for the period preceding the effective date of the lease termination shall be paid on a prorated basis. The lessor may not impose an early termination charge, but any taxes, summonses, or other obligations and liabilities of the lessee in accordance with the terms of the lease, including reasonable charges to the lessee for excess wear, that are due and unpaid at the time of termination of the lease shall be paid by the lessee.

[24] The term "military orders", with respect to a servicemember, means official military orders (including orders for separation or retirement), or any notification, certification, or verification from the servicemember's commanding officer, with respect to the servicemember's current or future military duty status.

Rents or lease amounts paid in advance for a period after the effective date of the termination of the lease shall be refunded to the lessee by the lessor within 30 days of the effective date of the termination of the lease.

52. Regarding Rental Trust Accounts...if an owner wants the rental income to be deposited directly into their account from a property manager's system. Does it still have to be a rental trust account per Louisiana law? The rent would still be collected by the property management system, but automatically deposited into the owners bank account rather than the property managers rental trust account.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

§LXVII-2701 of Title 46 of the Louisiana Administrative Code provides:

B. A resident broker, including corporations, partnerships and limited liability companies, engaged in the management of property owned by other persons shall open and maintain a rental trust checking account in a financial institution in the state of Louisiana. All rental trust accounts shall be titled in the identical wording as stated on the broker's license and the wording "Rental Trust Account" shall be imprinted on all checks and bank statements issued in connection with this account. Except as otherwise provided in this Chapter, all funds collected as rental payments from or on behalf of clients in connection with the management of properties owned by other persons shall be deposited into this account.

C. A resident broker, including corporations, partnerships and limited liability companies, engaged in the collection of rental security or damage deposits in connection with property management activities on behalf of clients shall open a security deposit trust checking account in a financial institution in the state of Louisiana. All security deposit trust accounts shall be titled in the identical wording as stated on the broker's license and the wording "Security Deposit Trust Account" shall be imprinted on all checks and bank statements issued in connection with this account. Except as otherwise provided in this Chapter, all funds collected as rental security or damage deposits from or on behalf of clients shall be deposited into this account.

Our understanding of the question is that you are referring solely to the rental income and not to security deposits. Therefore subsection (B) is applicable in this case. Based on the facts you provided, the broker will be acting as a property manager and collecting rental income and then turning that money over to the owner. We are unaware of any applicable exception to the general rule stated above, which requires the broker acting as property manager to collect the rental income into the rental trust account.

53. I have a client that has a lease that was executed with a non-Realtor (non-agent also) property owner. They used a NOMAR members only lease. Does that have any implication on the validity of the leases? I would imagine it would be a copyright infringement potentially. Is there any penalty for using a form as such?

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We cannot comment on the use of the specific form in question, as we have not seen it and are not fully aware of the circumstances surrounding its creation and distribution. Therefore, we cannot say for certain whether the use of the mentioned form would constitute a copyright infringement. As discussed below, however, a non-REALTOR's use of publicly available lease forms will not void a lease agreement.

New Orleans Metropolitan Association of REALTORS®, Inc. (NOMAR) makes a variety of contract forms available online, and these forms are generally available for public use. The contract forms are generally provided as an aid and not as legal advice. Although certain forms might be intended for use primarily by licensed REALTORS, the use of such form by a non-REALTOR would not void the agreement. Therefore, so long as the requirements for a lease agreement are met, the use of a REALTORS' only lease by a non-REALTOR would generally not void the agreement.

REALTOR members will typically assume no responsibility for unauthorized use of publicly available lease forms. Thus, a non-REALTOR who uses public forms assumes all risks associated with its use.

LISTING AGREEMENT INQUIRIES

54. We have a mls complaint about a possibly invalid listing agreement. I believe this is a legal question that is outside the MLS Committee' scope. The listing agent submitted a listing agreement signed by a deceased owner. She provided the Power of attorney and Last Will and Testament for the executor of estate to be his sister. The issue is that the listing agreement is signed by the deceased owner as per the complainant and the listing agent. The question we need to have answered is this a valid listing agreement since the gentleman is deceased? Does the listing agent need to get a listing agreement signed by the presumed executor of estate?

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The answer to your inquiry likely depends upon whether the decedent's obligations under the listing agreement are considered strictly personal or heritable. If his obligations are strictly personal, upon his death his obligations ceased. If they are heritable, they continue on and the listing agreement survives death – meaning, it remains enforceable by and against the estate of the deceased. According to the Louisiana Civil Code, an obligation is strictly personal "when its performance can be enforced only by the obligee, or only against the obligor." LACC art. 1766.

An obligation is heritable "when its performance may be enforced by a successor of the obligee or against a successor of the obligor." LACC art. 1765. Furthermore, Civil Code Article 1765 states that "every obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract." We are not able to find any specific cases dealing with the heritability of listing agreements, but the courts have previously held that a "contract of sale" (i.e., a purchase agreement) is not personal and is thus heritable. *See* *Rogers v. Read*, App. 2 Cir.1978, 355 So.2d 46.

Although we have not reviewed your specific listing agreement, it is likely that the listing agreement is heritable. That would be more likely if it has a provision indicating that the obligations are heritable and enforceable, such as the following: all obligations herein assumed, shall inure to the benefit of and be binding upon the heirs, successors and assigns of the respective parties thereto." *See* *Tucker v. Woodside*, 53 So. 2d 503 (La. Ct. App. 1st Cir. 1951).

Again, we cannot provide a specific conclusion without knowing all facts and reviewing the agreement. If possible, out of an abundance of caution, we would recommend you obtain a new listing agreement signed by the properly appointed estate representative in order to remove any doubt about enforceability.

55. We would like to know if there is anything in this agreement that is not allowed by LA Law. (LA) EXCLUSIVE REAL ESTATE LISTING AGREEMENT [provisions included in hotline inquiry].

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Because we can only provide general advice, we cannot go line by line and comment on the legality of your listing agreement. However, we will provide a general list of what is and is not permitted in a listing agreement pursuant to Louisiana law. To the extent you want your proposed document reviewed for legal compliance, we encourage you to engage your own attorney.

In general, a listing agreement is an agreement between the seller and the listing agent's broker, rather than the seller and listing agent. Louisiana law defines such as "a written document signed by all owners of real estate or their authorized attorney in fact authorizing a broker to offer or advertise real estate described in such document for sale or lease on specified terms for a defined period of time. A listing agreement shall only be valid if signed by all owners or their authorized attorney in fact." LA RS 37:1431(16). This definition indicates the following items must be present in order to have a valid listing agreement:

- The document must be in writing;
- All owners, or their duly authorized agents, must have signed the agreement;
- It specifically authorizes a broker (not an agent) to offer or advertise the property;
- It has a definite period of time.

Note that in order for someone to be duly authorized to act as an agent, or "attorney in fact," the act appointing that person as the real estate owners agent must be in writing; it need not be notarized, however. *See* LA Civ Code arts. 2993 and 2440.

Additionally, the LREC Rules and Regulations, § 1801(C) provides that a listing agreement must be solicited under the name of the brokerage corporation or supervising broker, and shall be signed by the broker or by a sponsored licensee acting under written authority of the sponsoring broker. And, note that pursuant to LREC Rule § 1803(A)(2), a broker must retain a listing agreement in its records for no less than five (5) years.

We found no other statutory or regulatory requirements that are specific to listing agreements. This leads us to the conclusion that you can include any other type of provision that does not run afoul of Louisiana law. For example, you could include a provision about scope of services to be provided by the listing brokerage, but you could not include a provision that says the listing agreement shall be in effect indefinitely since LA RS 37:1431(16) requires a specific period be stated.

56. How would the listing amendment on commission for foreclosure properties be handled?

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The NAR Settlement FAQ's, specifically FAQ #53, provide that listing agreements must be amended as of August 17, 2024 to address the following:

- MLS Participants working with sellers must disclose in conspicuous language that broker commissions are not set by law and are fully negotiable.

- MLS Participants must include the disclosure in the listing agreement, if the listing agreement is not a government-specified form. If the listing agreement is a government-specified form, a separate disclosure would satisfy the requirement. *(Added 5/29/2024)*

There is no special method to address commission on property in foreclosure, but, pursuant to prong 2, if you are using a government form for the commission, you would need to have a separate disclosure that is executed between all parties that discloses "broker commissions are not set by law and are fully negotiable."

MLS DATA INQUIRIES

57. I have a property listed and the Seller wants to advertise in public remarks and agents remarks that they will owner finance at 6 percent interest rate with 10 percent down or 6.5 percent interest rate with 5 percent down. Is this permission to advertise with the new laws effective August 17th.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

To be clear, disclosure of information on MLS is not set by law. Rather, it is set by rules and policies adopted by the applicable MLS. The practice changes that go into effect August 17, 2024 prohibit "offers of compensation" on an MLS. The offer of compensation referred to is compensation to be paid to a broker in a residential real estate transaction. Owner financing does not fall within the scope of this new prohibition, and accordingly the statement above would be permissible despite the practice changes being implemented August 17, assuming it is not otherwise prohibited by the applicable MLS.

58. **I've observed that MLS information is critical for both buyers making purchasing decisions and appraisers analyzing comparable properties. However, there are frequent inaccuracies in MLS listings, particularly with the reported living area and other property details. While MLS sheets include a disclaimer stating that "Information is deemed reliable, but not guaranteed," I'm curious whether this disclaimer sufficiently protects realtors and brokers from potential lawsuits if the information is incorrect. Could you clarify if there is any legal precedent, either in our state or others, where realtors have faced legal action due to inaccuracies on MLS, particularly for failing to perform adequate due diligence? Additionally, is it advisable for realtors to rely solely on the property owner's statements regarding living area without supporting documents like house plans or a professional sketch?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The notice on MLS data typically indicates that the data is deemed reliable but is not guaranteed accurate *by the MLS*. Realtors and brokers can still be held accountable for providing inaccurate information. A purchaser's remedy against a real estate agent or broker is generally limited to damages for negligent misrepresentation or for fraud. These claims are described on the following pages.

There is some jurisprudence in Louisiana dealing with a realtor/agent's potential liability due to inaccuracies on MLS or in other information provided to the purchaser. A sample summary of cases is provided below.

A real estate broker stands in a fiduciary relationship to his client and is bound to exercise reasonable care, skill, and diligence in the performance of his duties. *Casbon v. K.W.E.J., LLC* (La. App. 5 Cir. 10/4/23), 375 So. 3d 524. The duties of a real estate agent are generally limited to those which can be analogically drawn from the Louisiana Real Estate License Law, from the customs and practices of real estate agents in general, and from La. R.S. 9:3891-3899, entitled "Agency

Relations in Real Estate Transactions," which sets forth the obligations and liabilities between agents, clients, and other people involved in real estate transactions. *Smith v. Grantham* (La. App. 1 Cir. 9/4/24). Ultimately, the precise duties of a real estate agent must be determined by an examination of the nature of the task the agent undertakes to perform and by the agreements the agent makes with the parties involved. *Casbon v. K.W.E.J., LLC* (La. App. 5 Cir. 10/4/23), 375 So. 3d 524.

Unless otherwise agreed to by the parties, the buyer is generally responsible for working through the due diligence process. As such, unless an agent/realtor has knowledge that the information is incorrect, an agent/realtor can generally rely on the property owner's statements regarding the property, without the need to perform additional due diligence. As described below, an agent/realtor's potential liability will generally only arise under an intentional misrepresentation or a knowing conveyance of false information/nondisclosure of known material defect.

Negligent Misrepresentation

A real estate broker or agent owes a specific duty to communicate accurate information to the seller and the purchaser and may be held liable for negligent misrepresentation. *Osborne v. Ladner* (La. App. 1 Cir. 2/14/97), 691 So. 2d 1245. However, the duty to disclose any material defects extends only to those defects of which the broker or agent is aware. *Id.*

Revised formulations of the *Osborne* rule are now in the revised statutes. Louisiana Revised Statute § 9:3893(D) states: "A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false." In addition, Louisiana Revised Statute § 9:3894 (B) states: "A licensee shall not be liable to a customer for providing false information to the customer if the false information was provided to the licensee by the licensee's client or client's agent and the licensee did not have actual knowledge that the information was false."

A broker also has a duty to disclose known material defects regarding the condition of real estate of which the broker has knowledge. La. R.S. 37:1455(A)(27). Furthermore, real estate agents do not have a higher duty than the seller to supply accurate information. That would create a situation where the agent had to independently verify information before conveying it to the buyer. *Smith v. Grantham*, 2023-0881 (La. App. 1 Cir. 9/4/24).

Finally, the elements that a plaintiff must prove in order to recover under negligent misrepresentation are: (1) a legal duty on the part of the defendant to supply correct information; (2) a breach of that duty; and (3) damage to the plaintiff caused by the breach. *Smith v. Grantham*, 2023-0881 (La. App. 1 Cir. 9/4/24).

Fraud

In addition to negligent misrepresentation, a purchaser's remedy against a real estate agent can also be based in fraud. *Chmielewski v. Sowell* (La. App. 2 Cir. 11/15/23), 374 So. 3d 404, *reh'g denied* (Jan. 4, 2024). Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. La. Civ. Code art. 1953. Fraud may also result from silence or inaction. *Id.*

The elements for the tort of fraud are a misrepresentation of material facts made with the intent to deceive where there was reasonable and justifiable reliance by the plaintiff and resulting injury. *Dunlap v. Empire Trading Grp., LLC* (La. App. 1 Cir. 10/18/21), 331 So. 3d 932.

Where Neither Claim is Available

Where the alleged misrepresentation relates to defects which are apparent and discoverable on simple inspection, and where the buyer inspects the property before the sale, the buyer cannot then complain of fraud or negligent misrepresentation. *Chmielewski v. Sowell* (La. App. 2 Cir. 11/15/23), 374 So. 3d 404, *reh'g denied* (Jan. 4, 2024).

Sample Cases

In *Smith*, a real estate agent incorrectly listed a residence within the MLS as containing 2547 square feet of *living* area when in fact the home contained 2547 of *total* area. The court dismissed a negligent misrepresentation claim against the agent because the plaintiffs had not proven any actual property damage based on the fact that the plaintiffs paid $143,000.00 for the property and the property was appraised for $144,000.00; in other words, plaintiffs failed to prove that the breach of the defendants' duty caused damage to the plaintiffs (the third element of a negligent misrepresentation claim). The plaintiffs' fraud claim was also dismissed because the court determined there was no evidence of intentional misrepresentation on the part of the real estate agent. *Smith v. Remodeling Serv., Inc.*, 94-589 (La. App. 5 Cir. 12/14/94), 648 So. 2d 995.

In *Casbon*, an initial appraisal report indicated that a home had 2912 square feet of living area, which was similar to the square footage attested to by the seller on the MLS. An appraisal report completed two years later indicated that the home only included 2450 square feet of living area. The new appraisal report had excluded an enclosed patio from the living area square footage because it did not qualify as living area based on ANSI standards. Purchaser sued her real estate agent, claiming that the agent was negligent because she failed to confirm the accuracy of the square footage of the living area. Accordingly, the Louisiana Fifth Circuit Court of Appeal had to determine whether the real estate agent owed a duty to the Purchaser to inform her that the enclosed sunroom was different than the rest of the home and that it may not be included in the living area square footage of the home.

The *Casbon* court determined that the agreements entered by the parties showed that the agent did not owe a duty to Purchaser to verify the accuracy of the living area square footage listed by the sellers and their agent. Rather, the governing agreements shifted the burden to Purchaser to hire a third party to verify the accuracy of the total and living area square footage of the home during the inspection period.[25] The court also pointed out that the applicable law only requires agents to disclose material defects of which the agent is *aware* and does not require independent investigation of all disclosures provided by the property sellers. Therefore, because Purchaser did not provide any positive evidence that the agent was aware that a potential issue existed regarding the accuracy of the living area square footage of the home, Purchaser failed to establish that the

[25] The Buy/Sell Agreement notified Purchaser that defendant did not provide any warranties or representations regarding the accuracy of the square footage of the home. And the Property Inspection and Due Diligence Notice explained that Agent was not authorized to measure either the total or the living area square footage and that Purchaser would need to obtain an inspection to verify these measurements.

agent owed her a duty that was breached. *Casbon v. K.W.E.J., LLC*, 23-321 (La. App. 5 Cir. 10/4/23), 375 So. 3d 524.

In *Tres' Chic in a Wk.*, the MLS listing for the property at issue incorrectly listed the total square footage of the home as the living area square footage. The home buyers argued that the agent representing them was liable because her agency previously listed the home for sale five years prior to their purchase and therefore, should have known the living area square footage provided in the listing was inaccurate. The appellate court recognized that language in the buy/sell agreement placed the burden on the buyer to determine the accuracy of the square footage and therefore, the buyer's agent was not liable.[26] The court mentioned, however, that a broker's duties to his client can be drawn from the customs and practices of real estate brokers in general. The court determined that the record did not establish whether the customs and practices of real estate brokers in general required that the buyer's agent research the MLS history for the property in question. The court noted that, if the customs and practices of real estate brokers in general did impose such a duty, then the agent breached the duty in this case, which would have potentially made the agent liable to the purchasers for negligent misrepresentation. *Tres' Chic in a Wk., L.L.C. v. Home Realty Store* (La. App. 1 Cir. 7/17/08), 993 So. 2d 228.

In *Rabalais*, purchasers argued that the seller's real estate agent had a duty to ensure that the flood insurance information she volunteered to purchasers was correct. The Louisiana Fifth Circuit Court of Appeal relied primarily on La. R.S. 9:3894(B) in rejecting the purchasers' argument. The court stated:

> … the clear language of La. R.S. 9:3894 strongly suggests that the legislature did not intend to confer on an agent an independent duty to verify information conveyed to the agent directly by his client before relaying that information to a customer. The statute is clear and unambiguous that the licensee "shall not be liable" and does not impose any such duty upon the licensee. If we were to read such a duty into the statute, the protections of the statute to the agent would essentially be rendered moot and would undoubtedly lead to absurd and unreasonable consequences. It is equally clear, however, that the statute does not protect an agent who relays information received from a client to a customer if the agent has "actual knowledge" of the falsity of the information. Requiring the agent's "actual knowledge" of falsity as a predicate to liability, however, falls far short of conferring an affirmative duty on the agent to independently verify the accuracy of all information received from a client before relaying that information to a customer.

Accordingly, the purchasers' claim was dismissed. *Rabalais v. Gray*, 14-552 (La. App. 5 Cir. 12/16/14), 167 So. 3d 101.

In *Romano*, the Louisiana Fourth Circuit Court of Appeal found that a buyer's agent did not owe a duty to verify or investigate the accuracy of zoning information provided by the seller.

[26] The purchase agreement stated that the indicated property measurements, square footage, and room dimensions made by the real estate brokers involved in the subject transactions were not warranted or assured to be accurate. In the agreement, the purchasers acknowledged that the property was being purchased as seen, waiving any and all inconsistencies or omissions in such measurements, determinations, or square footage by brokers. In turn, the purchasers were granted the right to perform an inspection for "verification of square footage" within the 10–day period after the execution of the purchase agreement.

The purchasers of property brought a negligent misrepresentation claim against their agents, alleging they had relied upon the agents' representation that applicable zoning regulations would allow the property to continue to be used as an automobile body shop after the sale of the property. After the sale, however, the purchasers were advised by the City of New Orleans that the property was not zoned for use as a body shop. Relying in part on La. R.S. §§ 9:3894(B) and 9:3893(D), the court determined that the purchasers failed to establish that the agents had a duty to do anything more than pass on the information they had received from the sellers regarding the zoning of the property. In other words, the purchasers failed to establish that the defendants had a legal duty to independently check the accuracy of the zoning information. *Romano v. GBS Properties, LLC*, 2007-1102 (La. App. 4 Cir. 3/5/08).

In a similar case, the Fifth Circuit held that where the real estate agent and the appraisers were under the mistaken belief that a lot up for sale was zoned "C–2 Commercial," the agent was not liable for negligent misrepresentation to the buyers, who after the sale were informed that only a small portion of the lot was so zoned. The purchasers had originally informed the agent that they intended to use the lot for commercial purposes. The agent and the broker informed the purchasers the lot was zoned C–2 Commercial, even though it was later discovered that only 10 feet of the lot was zoned C–2 Commercial. In addressing whether the agent and/or broker were negligent in failing to determine the proper zoning, the court found that the agent and broker were both under the mistaken belief the lot was zoned C–2 Commercial (there was even evidence showing that at the time the broker-owner acquired the lot it had been represented to him by his vendor and his attorney that the lot was zoned C–2 Commercial). Thus, the agent was laboring under a mistake of fact rather than engaging in a willful or negligent misrepresentation of the zoning classification at the time he informed the purchaser the lot was zoned for C–2 Commercial. Therefore, purchasers' claims were dismissed. *Dawley v. Sinclair*, 419 So. 2d 534 (La. Ct. App. 1982).

In a negligent misrepresentation claim against the seller's real estate agent (alleging the agent had personal knowledge that the property had previously flooded), the court granted the real estate agent's motion for summary judgment because the agent did not have actual knowledge of the property's flooding issues and damages. The agent was able to produce text messages to show that during her discussions with the prior owner's real estate agent, she asked the agent if the home had ever flooded, and the agent told her the home had never flooded. *Smith v. Grantham*, 2023-0881 (La. App. 1 Cir. 9/4/24).

In a negligent misrepresentation claim where the agent and seller were the same person, the court found that the agent had breached his duty to provide correct information to the buyers – and therefore negligently misrepresented a water intrusion issue – when the agent transmitted a disclosure that he knew was not accurate. *Chmielewski v. Sowell*, 55,317 (La. App. 2 Cir. 11/15/23), 374 So. 3d 404, *reh'g denied* (Jan. 4, 2024).

Where home purchasers presented no factual support to prove that the seller's real estate agent had knowledge of the home's flooding history, purchasers' fraud claims against the real estate agent were dismissed. *Dunlap v. Empire Trading Grp., LLC* (La. App. 1 Cir. 10/18/21), 331 So. 3d 932.

In *Cormier*, the Louisiana Third Circuit Court of Appeal found no evidence of negligent misrepresentation on the part of the selling agent where Plaintiffs failed to produce any evidence which proved that the alleged discrepancy in the property was known to the agent or represented

by him to Plaintiffs. Without proof that the agent knew the property in question was 1.6 acres instead of 2.3 acres, a duty to disclose this fact to Plaintiffs could not be established. *Cormier v. Coldwell Banker*, 2014-360 (La. App. 3 Cir. 11/5/14), 150 So. 3d 557.

In *Osborne*, a listing agent was not liable to purchasers for negligent misrepresentation where the agent disclosed information she had been given about leaks in the stucco to the purchasers, and did not have knowledge at the time of the sale of the condition of additional interior structural problems caused by termite damage. The court found that the listing agent was provided with information about the leaks in the stucco by Seller/Seller's husband, which the agent, in turn, disclosed to the real estate agent for the purchasers. There was no evidence that the listing agent knew more than what she was told by Seller or Seller's husband. Accordingly, the listing agent did not breach her duty to supply the correct information to the purchasers. *Osborne v. Ladner*, 96-0863 (La. App. 1 Cir. 2/14/97), 691 So. 2d 1245.

NAR Code of Ethics

The National Association of REALTORS® Code of Ethics[27] also helps define the Realtor's role in disclosing information related to the property. Under Article 2:

> REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law.

Standard of Practice 2-1 elaborates:

> REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines.

Article 12 provides, in part, that "REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations…"

PROPERTY DISCLOSURE INQUIRIES

59. Good morning, I just want to verify that commercial units 5+ do not need a property disclosure form.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

[27] https://www.nar.realtor/sites/default/files/documents/2024-nar-coe-standards-of-practice-2023-12-21.pdf

The Louisiana Real Estate Commission ("LREC"), pursuant to Louisiana statutory law, proscribes numerous mandatory forms that must be used in residential real estate transactions. LA R.S. 37:1449.1. This includes, among other forms, a Property Disclosure Document. Pursuant to LREC Rules and Regulations, § 3601, "unless exempted [pursuant to Louisiana statute], the seller of residential real property shall complete a property disclosure document." LA R.S. 9:3196 defines "residential real property" as "real property consisting of one or not more than four residential dwelling units, which are buildings or structures each of which are occupied or intended for occupancy as single family residences." Accordingly, a five unit building would not fit within the definition of "residential real property," and thus would not be subject to the LREC Property Disclosure Document requirement.

60. **On exemption #7 of the exemption page of the Property Disclosure Document, can heirs who own the property in their individual names (the property is no longer in the succession or estate) take the #7 exemption? This is an issue that needs to be clarified for all Louisiana Realtors and Brokers since there are varying opinions. Local real estate attorneys have advised me that heirs should not and that #7 can only be taken if the Succession or Estate is still in possession of the property. Please advise the correct way to handle this to ensure we follow best and legal practices.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The Property Disclosure Exemption Form provides, at box 7, that "Transfers from the succession executor or administrator pursuant to testate or intestate succession" are "exempt from the requirement to provide a Property Disclosure Document." This is a limited exception that applies solely to the transfer of property out of a succession. This exception does not carry down to the property recipient who then sells the property. Accordingly, once the heirs receive the property, the exception "vanishes" and if the heirs sell the property, they must furnish a Property Disclosure Document unless one of the other stated exceptions applies.

61. What is the best course of action if father owns home but is in care facility and son from out of town has POA and is selling home for Father. Father cannot fill out PCD because he is that mentally incapacitated and son states he has no knowledge of home.

Response:
We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

The completion and submission of the required property disclosure document (PCD) is set forth in La. R.S. 9:3196, et seq. The specific issue you raised is addressed, in part, by La. R.S. 9:3198(B)(1), which states:

B. (1) The seller shall complete the property disclosure document in good faith to the best of the seller's belief and knowledge as of the date the disclosure is completed and signed by the

seller. If the seller has no knowledge or information required by the disclosure document, the seller shall so indicate on the disclosure statement and shall be in compliance with this Chapter.

First, the PCD is always completed to the best of seller's belief and knowledge. If there is no knowledge regarding the condition of a property, the seller can indicate that on the PCD. You have the unique case of the seller possibly having knowledge but another individual (not the seller) is actually signing the PCD on behalf of the seller (see below). In such a case, the person signing should clearly indicate the capacity in which such person is signing and also clarify that such individual has no knowledge of the property's condition. There are exemptions to the requirement that a PCD be submitted but this particular situation does not meet one of those exemptions.[28]

In order for the son to be properly authorized to act for his father in completing the PCD, the father must grant that authority to his son. Preferably, such authority would be express and specific. In Louisiana, one of the ways in which a person can be granted the authority to represent another is through a *procuration*. A procuration is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations.[29] In Louisiana, the term "procuration" refers to the same contractual relationship that is known as a "power of attorney."[30] And because the principal may confer general authority on the representative to do "whatever is appropriate under the circumstances,"[31] there is a very broad range of activity that a representative would be allowed to undertake on behalf of the principal. Therefore, it would seem that a principal would be permitted to grant a representative the authority to sign a Property Disclosure Document on the principal's behalf.

Although no particular form is required for a procuration, when the law prescribes a certain form for an authorized act, the procuration must be in the same form (this is known as the equal dignities rule). For example, the authority to *alienate* a thing must be given expressly, and a *sale* of real estate must be in writing.[32] Therefore, a procuration that authorizes a representative to offer real estate for sale must be made express, and in writing.

As a PCD is a physical writing which requires a signature, a procuration which grants a representative the authority to sign the document should arguably be in writing as well. As an additional measure, a notice that the Property Disclosure Document was signed by a representative of the seller can be attached to the Property Disclosure Document, along with a copy of the procuration granting the representative the authority to sign the document.

PROPERTY LISTING INQUIRIES

62. Scenario: Seller signs an assignable contract to sell an unlisted property with Buyer. Seller also gives Buyer Attorney in Fact authorization (in writing) to list the property for sale. Is there any prohibition for a Realtor to listing this property for sale, with that Attorney in Fact Buyer (as the Seller)?

Response:

[28] See La. R.S. 9:3197
[29] La. Civ. Code art. 2987.
[30] Matter of Succession of Frazier, (La. App. 2 Cir. 9/21/22), 349 So. 3d 634.
[31] La. Civ. Code art. 2994.
[32] La. Civ. Code arts. 2996 & 2440.

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We did not locate any Louisiana law or NAR rule or regulation that specifically addresses the described scenario. Based on the material below, it is possible that the Realtor would be permitted to list the property for sale – but we cannot specifically opine on the issue.

Louisiana Civil Code article 2642 states "[a]ll rights may be assigned, with the exception of those pertaining to obligations that are strictly personal." A contract to sell is therefore assignable, so long as the contract to sell is not strictly personal and so long as there is no restriction against assignment in the contract to sell.

Moreover, a vendor is not required to own the property at the time he executes an agreement to sell the property. *Noel v. Pelican Well Logging Serv., Inc.*, 640 So.2d 529 (La. Ct. App.1994). Therefore, a vendor is generally not precluded from entering a contract to sell before the vendor actually owns the property. However, if the vendor/promisor does not acquire ownership by the time specified to complete the sale, the vendor/promisor cannot deliver title to the property at the closing. If the vendor/promisor fails to deliver a title, the purchaser may have the right to demand the return of any deposit.

Also note that the Louisiana Real Estate Commission requires brokers to obtain written authorization from the owner of property before advertising the property for sale. Specifically, Chapter 25, § 2503(A) of the Rules and Regulations states:

> No broker or licensee sponsored by said broker shall in any way advertise property belonging to other persons as being for sale or rent or place a sign on any such property offering the property for sale or rent without first obtaining the written authorization to do so by all owners of the property or their authorized attorney in fact.

Therefore, before a broker lists any property for sale, the broker should obtain written authorization from the current owner of the property, or from the owner's authorized attorney in fact.

In addition, the REALTOR® would also need to comply with the NAR Code of Ethics, which would include making an honest and truthful representation in all advertising of properties.

63. I have what I believe to be a wholeseller wanting to list a property on behalf of the seller. The wholeseller has a document electronically signed by the seller labeled "authorization to sign listing documents and offers." The document gives the wholeseller the authority to sign and list the specific property. Typically we have required a notarized power of attorney in the past, and I read the LREC guidelines which states authorized attorney in fact in the definitions S1431. My question is an authorized attorney in fact a notarized power of attorney instead of an e-signed authority to sign listing documents and offers? Thank you in advance for your guidance.

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

I. Representation in Louisiana

In Louisiana, the authority of a person to represent another may be established either by the unilateral act of *procuration* or the bilateral contract of *mandate*.

A *procuration* is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations. La. Civ. Code art. 2987. In Louisiana, the term "procuration" refers to the same contractual relationship that is known as a power of attorney. *Matter of Succession of Frazier*, (La. App. 2 Cir. 9/21/22), 349 So. 3d 634.

A *mandate* is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal. La. Civ. Code art. 2989.

A procuration is subject to the rules governing mandate to the extent that the application of those rules is compatible with the nature of the procuration. La. Civ. Code art. 2988. The difference between procuration and mandate lies primarily in that a procuration is a unilateral act whereby the principal unilaterally confers authority on the representative. A mandate is a bilateral contract, whereby the principal confers authority on the mandatary, and the mandatary accepts such authority.

The representative and mandatary, generally speaking, function the same. The representative and the mandatary are also often referred to as an "attorney-in-fact" or as an "agent." All of these terms are generally used to refer to an individual authorized to act on behalf of another person.

II. Authority to Enter Listing Agreement

Louisiana Revised Statute § 37:1431(16) provides that a "Listing agreement" is:

> … a written document signed by all owners of real estate or their authorized **attorney in fact** authorizing a broker to offer or advertise real estate described in such document for sale or lease on specified terms for a defined period of time.

As can be seen, a real estate owner's "attorney-in-fact" can sign a listing agreement on the owner's behalf. Moreover, the language of the statute suggests that the "attorney in fact" can arise from either a procuration or a mandate. Therefore, it is to the parties' own discretion as to whether to create an attorney in fact via a procuration or a mandate.

Although no particular form is required for a procuration or contract of mandate, when the law prescribes a certain form for an authorized act, the procuration or contract must be in the same form (this is known as the *equal dignities rule*).

A listing agreement authorizes a broker to offer real estate for sale. And, according to the Civil Code, the authority to alienate a thing must be given expressly, and a sale of real estate must be in

writing. La. Civ. Codes arts. 2996 & 2440. Therefore, a procuration/mandate authorizing a broker to offer real estate for sale must be made express, and in writing. It is not required to be notarized (see below).

The question describes an authorization that was done electronically, and which grants authority to "sign and list" specific property. without having reviewed the particular document in question, it is not possible for us to tell you if the express language in that document is sufficient to authorize the execution of the listing agreement on behalf of the seller. An express statement would be a statement that clearly and explicitly authorizes the "wholeseller" to take the proposed action – signing a listing agreement for example. That being said, an electronically signed document is considered to be enforceable generally in accordance with the Louisiana Uniform Electronic Transactions Act. Whether you choose to accept that electronically signed document would be in your discretion based on the facts and circumstances, including the degree to which the wholeseller is "expressly authorized by the owner/seller.

An additional consideration may be the authenticity of the document provided. As a fraud prevention measure, you may consider verbally confirming with the owner/seller. There are certainly instances of bogus and fraudulent documents being delivered to real estate agents. Taking some simple steps to prevent that type of fraud may be useful.

III. Is a Notarized Power of Attorney Required?

A "notarized power of attorney" (referred to in Louisiana as a power of attorney executed under authentic act) is not required in this case. However, the parties may still wish to utilize one.

In general, a "notarized power of attorney" is a power of attorney document that has been officially witnessed and verified by a notary public. In Louisiana, a notarized power of attorney is more specifically referred to as a power of attorney constituting an "authentic act." Louisiana Civil Code article 1833 sets forth the procedure for an authentic act. Executing a document via an authentic act carries certain benefits, one being that the document will constitute full proof of the agreement as against the parties. La. Civ. Code art. 1835. So, although it does not seem that a notarized power of attorney is required in order to enter into a listing agreement, a notarized power of attorney does carry certain benefits for all parties involved. It would help verify the authenticity and be easier to enforce in the future.

64. <u>May a seller restrict showings to prohibit a former spouse from gaining access to their listed property through a showing appointment when the circumstances include a history of violence between the two parties? The current situation is that this couple have been divorced for several years, they now live in separate states, and the seller has had no recent contact with the former spouse. A restraining order is no longer active. And if this is allowed, then would it be acceptable to include the restriction in private remarks in the MLS and/or how else would you communicate such?</u>

<u>Response:</u>

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

One of the main rights attaching to property is the right to exclude others. *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). Therefore, a homeowner has a general right to prohibit others from entering the home.

Certain limitations on the right to exclude might arise in the context of selling a home. For example, the Fair Housing Act sets forth regulations designed to protect people from discrimination when they are renting or buying a home. Under the act, it is illegal discrimination to refuse to sell housing to someone because of race, color, religion, sex, disability, familial status, or national origin. However, the Fair Housing Act also states that a dwelling need not be made available to an individual whose tenancy would constitute a direct threat to the health or safety of others or whose tenancy would result in substantial physical damage to the property of others. 42 U.S.C. § 3604.

Louisiana has also adopted the Louisiana Equal Housing Opportunity Act. The Louisiana law, like the Fair Housing Act, makes it unlawful to refuse to sell a dwelling to any person because of race, color, religion, sex, familial status, national origin, or natural, protective, or cultural hairstyle. However, Louisiana law does not require that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. La. Stat. § 51:2606.

We are not privy to all of the pertinent details related to the parties in question, and therefore cannot give specific advice on this matter. However, the question seems to indicate that the restriction in showings would not be based on factors like race, religion, or national origin. Moreover, as the question indicates a history of violence between the parties, it would seem possible that the ex-spouse's presence would constitute a direct threat to the health or safety of others. As such, it is possible that restricting the ex-spouse's access to the house (by refusing to make showings available to the ex-spouse) would not violate the Fair Housing Act or the Louisiana Equal Housing Opportunity Act.

We are not familiar with the particular MLS in question or its related rules and regulations. You should likely consult the MLS directly to inquire whether such remarks are permissible. Generally, the *Private Remarks* section on the MLS is used for agent communication regarding information like showing instructions and other information about the seller's situation. As such, it is conceivable to put a notice in the *Private Remarks* to exclude individually named prospective purchasers from showings, so as to make any listing agent/broker aware, but again, that would be subject to the MLS rules. It may be advisable to make the house available for showing by appointment only in order to more indirectly address this issue.

PURCHASE AGREEMENT INQUIRIES

65. **How long does a buyers agent/broker have to return a cancellation request? I've been waiting over a week for it to be. signed and returned. The buyers broker is stalling.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

We did not find any provision of Louisiana law that stipulates a time period for return of a cancellation *request* made by a seller. The Louisiana Residential Agreement to Buy or Sell ("Purchase Agreement") likewise does not address cancellation requests. If, however, the buyer defaulted under the Purchase Agreement, the Purchase Agreement provides, at lines 325-333, that one option of the seller is to terminate the agreement with no further demand. If your buyer is, in fact, in default, you do not need a signed request to cancel the agreement. If, however, the buyer is not in default and the seller merely just wishes to cancel, it appears that the buyer's signature, and the timeline on which the buyer provides such, is at the sole and absolute discretion of the buyer.

66. **Does a denial letter from a lender allow a Buyer to cancel the contract and have the deposit returned regardless of lines 82-87? The Seller is stating the Buyer agreed to cover all costs and refuses to sign the cancellation with the Buyer receiving the deposit back.**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Lines 63-95 of the Residential Agreement to Purchase or Sell ("Purchase Agreement") address a financing condition being made part of an agreement to purchase residential real estate. Pursuant to lines 93-95, if the Buyer is unable to secure financing, the Seller has a right to provide all or part of the mortgage loans under the terms stated in the Purchase Agreement. These lines, however, do not address return of the deposit if Buyer is unable to obtain financing.

The Purchase Agreement addresses both the circumstances under which the deposit shall be returned to a Buyer, as well as when the Seller is entitled to retain the deposit. Lines 151-169 of the Purchase Agreement enumerates specific circumstances under which the deposit shall be returned to the Buyer. Such circumstances include, but are not limited to:

- the Buyer terminated the Purchase Agreement during the inspection and due diligence period- this can generally be for any reason even if the Seller is willing to make repairs;
- the sale was subject to Buyer's ability to obtain a loan, and Buyer made a good faith effort to obtain a loan but was unable to obtain the loan; and
- the Buyer conditioned the sale price on an appraisal, the appraisal is less than the sale price, and the Seller will not reduce the sale price. See Lines

In each of the circumstances above, "the Deposit shall be returned to the Buyer and the Purchase Agreement declared null and void without demand." See Purchase Agreement, Lines 151-152.

If the Buyer is unable to obtain financing, pursuant to a denial letter, and the Seller does not wish to exercise his right to finance the sale pursuant o Lines 93-95 of the Purchase Agreement, it appears that the Buyer would be entitled to return of the deposit.

67. **What happens when a buyer leaves his agent out of a purchase agreement and goes around the listing broker and goes straight to the owners?**

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

Unless the buyer has a signed buyer-broker agreement whereby the buyer contractually obligates himself to use the broker for residential purchases during a stated period of time, the buyers agent would have no recourse in this situation. If there is a signed agreement, and the buyer breaches the agreement, the buyers agent would have a course of action against the buyer to recover the compensation owed pursuant to the buyer-broker agreement.

The recourse available to the listing agent largely depends on the terms of the individual listing contract. If the listing agreement likewise binds the seller to go through the agent during a specified period of time, and the seller goes around the agent to sell the property, the listing agent would also have a course of action against the seller pursuant to the individual terms of the listing agreement. We would advise that if you are in this situation, you have your individual agreements reviewed by an attorney to advise on your best course of action.

68. **Scenario: We represent the seller. The 2024 Buy Sell Agreement (BSA) was used. The buyer conducted DDI and submitted an inspection response, with a credit request for property deficiencies. The seller instructed our agent to contact the buyer's agent and see if the buyer would accept a lesser concession. The buyer's agent advised that was unacceptable, and thus the buyer elected to cancel and move on to another property. Buyer's agent asked our listing agent to prepare a cancellation. This attempted negotiation and buyer's agent response were via text message between the agents, and neither written nor signed by the seller. The seller then instructed our agent to prepare the formal written response to the buyer's inspection response. (the "Seller's signed, written response" as provided in the BSA line 226) The seller agreed to all of the buyer's requested remedies (the full credit) and signed the response, which was delivered to the buyer's agent within 72 hours of receipt of the buyer's inspection response. The buyer has not signed the seller's response, nor presented a cancellation. Questions: 1 As the seller agreed to all of the buyer's remedies, does any of section 2, lines 247-239 apply at all? In other words, does the buyer have the right to cancel even if the seller agrees to *all* of buyer's requested remedies? 2 Must the buyer provide a written acknowledgment of the seller's PIR response if the seller agreed to all of buyer's requested remedies. (Even if it would be cooperative to do so). 3 Seems like you have answered very similar questions in the "2020-2021 Legal Hotline Year in Review," especially Q 41 starting on page 68. The answers reference the 2019 BSA. Would the answers to Q41 change with the 2022 version of the BSA, which has some significant changes vs 2019, notably that the buyer's DDI clearly ends once the PIR request is received by the seller? 4 Are text messages between the agents sufficient to bind either party concerning the PIR response process, or is the BSA clear enough that the party's responses must be "signed?" 5 (by the way) Will LR publish a legal hotline review for 2022-23?**

Response:

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We look to the terms of the Louisiana Residential Agreement to Buy or Sell (the "Purchase Agreement") to answer your questions in turn.

1. Pursuant to lines 237-249 of the Purchase Agreement, Buyer is only afforded a right to terminate the Purchase Agreement if "SELLER in the SELLER'S Response refuse[s] to remedy any or all of the deficiencies listed by the BUYER." The Purchase Agreement affords no right to terminate if the Seller remedies all of the deficiencies identified by the Buyer.

2. The Purchase Agreement does not mandate the Buyer provide a written acknowledgment of the seller's PIR response if the seller agreed to all of buyer's requested remedies. We likewise found no other provision of Louisiana law that would require the Buyer to provide such an acknowledgement.

3. Our responses to the Hotline inquiries are based on the most current version of the Purchase Agreement. Specifically, we are working off of the Purchase Agreement revised 01/01/2024. Since the documents and law have changed since 2019, and even 2022, we are not in a position to comment on what would have occurred in years prior.

4. Whether text messages can legally bind a party to a contract gives rise to a question under the Louisiana Uniform Electronic Transactions Act (LA R.S. 9:2601 et seq.) (the "Act"). If a signature is required, and the text message contains an electronic signature that meets the requirements of Louisiana law, it could be binding under the Act. A mere text message, however, without a conforming electronic signature, would not be sufficient. The Act provides that "If a law requires a signature, an electronic signature satisfies the law." LA RS 9:2607(D). An "electronic signature" is defined in LA RS 9:2601(8) as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Without more facts and analysis, we cannot say whether a text message would suffice. However, we do note that an actual signature must have been present in the text message for it to have the possibility of legal weight.

5. This is in process.

69. <u>One of our agents has a seller that accepted an offer with a contingency that the buyer has to sell their home. The closing date on the offer is January 2025. The seller received another offer that did not ha[ve] a contingency and could close sooner. The listing agent made the buyer's agent of the first offer (contingent offer) aware that the seller received another offer and their 72 hour period to decide to either remove their contingency or withdraw their offer. The buyers decided to remove their contingency and move forward. The seller is requesting that the buyers close before January 2025. The buyer's lender is a[b]le to close earlier than January. The buyers have chosen to keep the closing date in January. The buyer's agent stated that the buyers want the extra time to try to sell their home although they removed the contingency. The seller feels that since the contingency has been</u>

removed that the closing date should be earlier than January. The listing agent feels that negotiations have been re-opened since the contingency has been removed and would like to re-negotiate the closing date. The listing agent is looking at the situation just as when an appraisal comes in low where negotiations are re-opened if the buyer is asking the seller to adjust the sales price and, also when repairs are requested due to an inspection report. The negotiations are reopened due to the request for repairs. Once the buyer decided to remove the contingency, are negotiations re-opened to where the closing date can be re-negotiated? If re-negotiation of the closing date is possible, and the buyer will not change the closing date, can the seller give back the deposit to the buyer? Will all parties need to sign a cancellation form? If the buyers refuse to sign a cancellation form, what happens?

Response:

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Without reviewing the purchase agreement in question, we cannot comment on the precise nature of the contingency in question. The relevant law is summarized in part below; however, the parties should review their purchase agreement to determine whether any specific terms regarding the contingency have been agreed to.

I. Contingency as Suspensive Condition

Under the Louisiana Civil Code, "A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive."[33]

Suspensive conditions, in other words, are conditions that suspend a party's obligation under a contract until the occurrence of the condition. This means that a party has no duty to perform its own obligation(s) until the suspensive condition is satisfied. There is also no right to enforce another party's obligation under a contract until the suspensive condition is satisfied. In real estate contracts, such suspensive conditions are often referred to as "contingencies." Therefore, the contingency referenced in the question – that the sale is contingent on the sale of other property by the buyers – is regarded as a suspensive condition under Louisiana law.[34]

II. Waiver of Contingency/Suspensive Condition

A suspensive condition may generally be waived by the party in whose favor it has been established. The question indicates that the buyers waived the suspensive condition in question.

[33] La. Civ. Code art. 1767.

[34] For example, see Boudreaux v. Elite Homes, Inc., 259 So. 2d 669 (La. Ct. App.), writ denied, 261 La. 1061, 262 So. 2d 42 (1972) (where a contract to buy property was predicated upon the prospective purchaser's sale of another home, there was sufficient evidence to establish a suspensive condition).

Generally, when the party whose performance is subject to a suspensive condition waives performance of the condition, the contract remains enforceable despite the nonoccurrence of the condition. The waiving party's obligation to perform is thereby made unconditional, and performance of the duty originally subject to occurrence of the condition becomes due. See *Williston on Contracts* (4th ed.).[35]

Therefore, once the buyers decided to waive/remove the contingency, the buyers' obligation to perform was made unconditional, i.e., performance became due under the terms of the agreement. Moreover, the contract, as originally agreed to, remains enforceable. This means that the originally agreed-to closing date of January 2025 is likely to remain in effect.

III. Application to LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL

The question references two situations where negotiations are typically re-opened: (1) when an appraisal comes in low, and negotiations are re-opened so that the buyer can ask the seller to adjust the sales price; and (2) when an inspection report shows a need for repairs, and negotiations are re-opened to allow a request for repairs. It is important to note, however, that these situations are typically governed by the LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL.

For example, there is an option within the LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL to indicate that the sale is "conditioned" on an appraisal of the property. The form further provides that if the appraised value is less than the sales price, then the buyer can request that the seller reduce the sale price. Further, the agreement may be voided if the parties cannot agree on a new price. The language within the agreement, providing the parties an opportunity to re-negotiate a purchase price, is what controls in such an instance.

Similarly, the LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL provides for a Due Diligence and Inspection Period. The language within the agreement, providing the parties an opportunity to re-negotiate necessary repairs, and the opportunity to void the agreement should repairs not be agreed to, is what controls during this period.

Although the language of the LOUISIANA RESIDENTIAL AGREEMENT TO BUY OR SELL is what controls the parties' agreement, it can be said that the appraisal and the due diligence repairs operate as suspensive conditions themselves. That is, the sale of the property is subject to the suspensive conditions that the appraised value of the home equal the sales price (and if not, then a new price must be agreed to) and that any needed repairs discovered during the Due Diligence and Inspection Period are agreed to. If the appraised value of the property is too low and a new price cannot be agreed to, or if the necessary repairs are not agreed to, then these conditions are considered to have *failed* – which is different from a condition being *waived*.

Where a suspensive condition fails or is not fulfilled due to no fault of the parties, the obligations imposed by the agreement are not binding upon the parties; the agreement is null and the parties are released from their obligations to perform. Thus, the failure of a suspensive condition would allow for the opportunity to re-negotiate the contract or enter a new contract.

[35] § 39:17. Waiver of conditions, 13 Williston on Contracts § 39:17 (4th ed.).

IV. Conclusion

A contract will generally remain enforceable when the party whose performance is subject to a suspensive condition waives performance of the condition. Therefore, the closing date of January 2025 appears likely to remain in effect.

However, because the buyers have waived the contingency, the buyers can no longer use the failure to sell their home as a means of voiding the purchase agreement. In other words, the buyers will be bound by the terms of the agreement regardless of whether they find a purchaser for their home.

70. <u>Buyer is insisting on using their appraisal which is $10,000.00 less than the lender's appraisal. Which one would you advise our client to accept.</u>

<u>Response:</u>

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

While the question posed in your hotline response is not one that we can answer, Kim Callaway let us know that your specific question is whether or not the purchase agreement language pertains to the lender's appraisal or an independent appraisal and if there is any case law interpreting this because in your situation, the buyer did an independent appraisal, and the lender did an appraisal. The bank's appraisal came in at the purchase price and the buyer's appraisal came in $10,000 lower. The buyer now wants to use the lower appraisal and if not wants the deposit back.

The Louisiana Residential Agreement to Buy or Sell (the "Purchase Agreement") does not appear to address this particular issue. It states only:

> 101 APPRAISAL: This sale is NOT conditioned on appraisal. This sale IS conditioned on the appraisal of the Property being not less than 102 the Sale Price. The SELLER agrees to provide the utilities and access for appraisals. If the appraised value of the Property is equal to or greater 103 than the Sale Price, the BUYER shall pay the Sale Price agreed upon prior to the appraisal. If the appraised value is less than the Sale Price, the 104 BUYER shall provide the SELLER with a copy of the appraisal within _____(#_____) calendar days of receipt of same, along with 105 the BUYER'S written request for the SELLER to reduce the Sale Price. Within _____(#_____) calendar days after the SELLER'S 106 receipt of such written documentation of the appraised value, the BUYER shall have the option to pay the Sale Price agreed upon prior to the 107 appraisal or to void this Agreement unless the SELLER agrees in writing to reduce the Sale Price to the appraised value or all parties agree to a 108 new Sale Price.

We did not find any case law that addresses what happens where there are two appraisas with differing values. However, the interpretation of a real estate contract is subject to the rules concerning the interpretation of contracts generally. *Schroeter v. Holden*, 499 So. 2d 309 (La. Ct. App. 1st Cir. 1986). An ambiguous provision is construed against the seller of the property. La. Civ. Code Ann. art 2474. Therefore, the buyer may be able to argue that the ambiguity in the appraisal provision (as to whether it involves a lender's or an independent appraisal) should be

construed against the seller, thereby allowing the buyer to argue for the use of his lower appraisal, and if that appraisal is less than the purchase price, it would trigger the buyers right to reduce the purchase price or void the contract.

If a dispute exists as to the return of the deposit, LREC Rules and Regulations, § 2901 applies. This rule provides that when a dispute exists in a real estate transaction regarding the ownership or entitlement to funds held in a sales escrow checking account, the broker holding the funds shall send written notice to all parties and licensees involved in the transaction. Within 60 days of the scheduled closing date or knowledge that a dispute exists, whichever occurs first, the broker shall do one of the following:

1. disburse the funds upon the written and mutual consent of all of the parties involved;

2. disburse the funds upon a reasonable interpretation of the contract that authorizes the broker to hold the funds. Disbursement may not occur until 10 days after the broker has sent written notice to all parties and licensees;

3. place the funds into the registry of any court of competent jurisdiction and proper venue through a concursus proceeding;

4. disburse the funds upon the order of a court of competent jurisdiction.[36]

The broker is also generally required to notify all parties and licensees in writing prior to disbursement of the funds. Without knowing all of the facts, we recommend that you notify all parties of your intention to return the deposit to the Buyer in advance, request written consent from both Buyer and Seller before dispersing the funds back to the Buyer. If you do not receive their consent, you should contact an attorney to specifically address this issue to ensure compliance with the rules and laws set forth above.

71. I have a client who purchased a new construction in July 2023. The buyer has continued to have issues with the home that is falling under the New Home Warranty Act. He reaches out to the seller (who is also the builder) and gets no resolution. When the buyer contacts me for assistance, I've been able to get the seller's agent and broker to assist in reaching him. An issue with the home is happening once again and I've emailed the seller, broker and agent to please reach out to the buyer to help resolve it. I need to get advice on how to get the builder to respond and get the work done timely. Thanks in advance

Response:

We cannot comment on specific transactions, occurrences or statements. This response is for general information only; it is not legal advice. For legal advice pertaining to this specific occurrence or statement, it is recommended that you consult with your attorney.

[36] LREC Rules and Regulations, § 2901.

We cannot provide advice on how to "get the builder to respond and get the work done timely" because we do not represented members of Louisiana Realtors in any legal capacity. We encourage you to hire an attorney to help move this matter along.

However, we can provide general guidance on the New Home Warranty Act. Purchasers of a newly constructed home have the right to hold the builder accountable for most construction defects for a specified period of time after purchasing under the Louisiana New Home Warranty Act (the "Act"). The Act requires builders to make certain warranties "defining the responsibility of the builder to [the] purchaser and subsequent purchasers." Although the duration of the warranty cannot be extended, the Act permits transfer of the warranty to anyone who purchases the home within the warranty period. The warranty period begins on either the date that the legal title to the home is conveyed to the purchaser or the date that the purchaser first occupies the home, whichever occurs first.

There are three different warranties the builder statutorily provides—each differs in the substance warranted and the time period for which the warranty lasts.

For one year from the commencement date, the builder warrants that "the home will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards." In addition to violations of applicable building codes, deviations from the plans and specifications for construction of the home are also recoverable under the Act. Thorn v. Caskey, App. 2 Cir.1999, 745 So.2d 653, 32,310 (La.App. 2 Cir. 9/22/99).

One instance where an appellate court found noncompliance with building standards stemmed from evidence of smoke damage from fireplace where the fireplace came with installation manuals containing detailed standards, and contractor admitted these were "installation procedures" for fireplace that were not followed. Craig v. Adams Interiors, Inc., App. 2 Cir.2001, 785 So.2d 997, 34,591 (La.App. 2 Cir. 4/6/01). Likewise, another court found there was sufficient evidence that recently built home contained defects caused by noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards to support recovery for breach of warranty under the Act when an expert in home construction who conducted inspection testified that home was built out of level, causing walls to lean, chimney to slant, and sheetrock to crack, and that there were serious problems with the foundation system. Sowers v. Dixie Shell Homes of America, Inc., App. 2 Cir.2000, 762 So.2d 186, 33,390 (La.App. 2 Cir. 5/15/00), writ denied 768 So.2d 1286, 2000-1770 (La. 9/22/00).

For two years from the relevant commencement date, the builder warrants "the plumbing, electrical, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment will be free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards." This warranty takes the one-year warranty, and extends it to specific issues related to plumbing, electrical, heating, cooling and ventilating systems. To the extent a purchaser seeks to recover under this warranty, the same standard required for recovery on the one-year warranty applies.

For five years from the commencement date, the builder warrants that "the home will be free from major structural defects due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards." Louisiana law defines "major structural defect" to mean "any actual physical damage to the following designated load-bearing

portion of a home caused by the failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable: (a) Foundation systems and footings; (b) Beams; (c) Girders; (d) Lintels; (e) Columns; (f) Walls and partitions; (g) Floor systems; [and] (h) Roof framing systems."

It is important that a purchaser looking to recover under this five-year warranty pay close attention to the definition of "major structural defect." Courts will readily distinguish between what falls under the one- and two-year warranties and what is a "major structural defect" triggering the five-year warranty. For example, one court held that the one-year warranty against defects in materials of workmanship in a new home, rather than the five-year warranty against major structural defects, applied to homeowners' claim that defective outdoor fireplace caused fire that destroyed their home because the alleged cause of the fire was defect in workmanship or materials surrounding the construction and installation of the outdoor fireplace, and there was no evidence that the fire was caused by a major structural defect in the home. Shields v. Alvin R. Savoie & Associates, Inc., App. 1 Cir.2017, 214 So.3d 27, 2016-0825, 2016-0826 (La.App. 1 Cir. 2/1, writ denied 220 So.3d 750, 2017-0506 (La. 5/19/17). On the other hand, another court found the five-year period applied to a purchasers' claim against a builder, even though that claim involved plumbing (which would generally trigger the two-year warranty), given that the alleged defect was the failing foundation, which was a major structural defect, and the plumbing repairs were a consequence, or resulting damages, from that defect. Campo v. Sternberger, App. 5 Cir.2015, 179 So.3d 908, 15-52, 15-53 (La.App. 5 Cir. 11/19/15), rehearing denied, writ denied 190 So.3d 1196, 2016-0085 (La. 3/24/16).

Each of the three warranties identified above contemplate defects "due to noncompliance with buildings standards or due to other defects in materials or workmanship not regulated by buildings standards." The purchaser or owner of the home may not waive the required warranties, and the builder may not reduce them, by contract or otherwise. That is, these three warranties exist by operation of law and cannot be derogated.

The same statute that lists out the warranties also provides an exhaustive list of items that, unless the builder specifically agrees to warrant, are exempt from the warranties provided under the Act. This list includes items such as fences and landscaping, normal wear and tear, normal deterioration, insect damage, or any damage caused or made worse by someone other than the builder or an employee, agent, or subcontractor of the builder. It is notable to mention that the exclusions listed in Footnote 10 are mere statutory exclusions from the minimum warranties required – because the Act provides minimum required warranties, it does not prohibit a builder from agreeing to increase, rather than reduce, his warranties to the owner of a new home; thus, a builder may contractually assume greater obligations or warranties than those afforded by the Act, and under those circumstances, the owner presumably has a separate cause of action based on the breach of those specific contract provisions rather than breach of the Act itself. Allemand v. Discovery Homes, Inc., App. 1 Cir.2010, 38 So.3d 1183, 2009-1565 (La.App. 1 Cir. 5/28/10).

If a builder fails to make a required warranty, the purchaser/owner of the home has a legal cause of action against the builder and may be entitled to actual damages, including attorney's fees and court costs. Damages for all defects may not exceed the home's purchase price, and damages for a single defect are limited to the reasonable cost to fix the defect by repair or replacement. La. Rev. Stat. § 9:3149(A).

Again, we encourage you to contact to your attorney to see if you have a claim under the Act.

REFERRAL INQUIRIES

72. I am a broker and also co-own a construction company. If an agent refers us a client and we offer a Referral Fee, does that fee have to be written to their Broker or can it just be written to the agent? Does same rule apply for renovation referrals?

Response:

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We understand that your question encompasses two sub questions – one about referrals and referral fees between brokers and the other about referrals and referral fees between a broker and a construction company. First, all legally permissible referral fees must be paid directly to the broker. LA R.S. 37:1446(F) provides that "[a]n active real estate licensee shall not accept a commission or other valuable consideration for the performance of any act herein specified, or for performing any act relating thereto, from any person, except their sponsoring or qualifying broker." We found no exceptions to this statutory rule.

Second, your question could implicate the Real Estate Settlement Procedures Act (12 U.S.C. §§ 2601-2617) ("RESPA"). The intent of RESPA is to provide consumers with improved disclosures of settlement costs and to reduce the costs of closing by the elimination of referral fees and kickbacks.

Section 8(a) of RESPA prohibits paying or receiving any fee or other thing of value (even a referral) in return for the referral of "settlement services" (e.g. mortgage, title, or insurance services, appraisals, surveys, real estate brokerage services, etc.) in a financed residential transaction. Paying or receiving a fee or a thing of value for the referral of business related to the settlement of a federally related mortgage loan without rendering a service is illegal under RESPA, as is receiving compensation simply for referring a buyer, seller, or other person to a settlement service provider. One exception to this anti-referral fee rule is for broker-to-broker referrals: RESPA does not prohibit the payment of referral fees between real estate licensees. But, because you are inquiring about payment of a referral fee by the construction company (non-licensee) to a broker or agent, we caution you that RESPA may be implicated. Of course, the construction services to be provided by the company may not be considered "settlement services" because they are not directly involved in the settlement of a real estate transaction, and therefore not subject to RESPA. We have not analyzed that particular question.

Finally, LA R.S. 37:1446(A) provides that "[n]o payment of a commission or compensation shall be made by any licensee or registrant to any person who has not first secured a license or registration under the provisions of this Chapter." We understand that the intention is to have the construction company pay a referral fee to a licensee, and not the other way around but we wanted to raise this issue just in case our understanding is incorrect. This statute prohibits the payment by the licensee to the construction company.

73. <u>There are a lot of Realtors that are also Builders. They list their houses for Sale in the MLS wearing the "Realtor hat" with full disclosure they are builder/agent owner And do not want to be dual agent. Several of these Realtors/Builders refer the buyer to another agent. Question: What is implication of Builder/Agent receiving a referral fee from the Buyer's Agent. Another scenario, is the Builder is married to the listing agent. The builder can pay his wife/agent her commission - obviously all of this is disclosed. But what is the implication of the wife/agent now representing the buyers side. We've always been told you can't list your own personal house. I feel like this is a grey area.</u>

<u>Response:</u>

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The National Association of REALTORS® (NAR) Code of Ethics and Standards of Practice prohibits REALTORS® from receiving a referral fee for recommending real estate related products or services to clients without the client's knowledge and consent. Thus, a builder/agent REALTOR® would be required to disclose the referral fee to his or her client in advance; otherwise, the REALTOR® would not be permitted to receive the referral fee, under the NAR Code of Ethics.

We did not located any Louisiana law or NAR rule or regulation that addresses the spouse of a builder representing a buyer. Of course, the REALTOR® would need to comply with the NAR Code of Ethics, which would include acting to protect and promote his/her clients interest. It is possible this could give rise to a conflict of that interest, but we cannot specifically opine on the issue.

<u>SETTLEMENT INQUIRIES</u>

74. <u>If</u> a broker has referral company in Louisiana and the broker is a member of NAR, will agents of the referral company be covered under the NAR settlement.

<u>Response:</u>

The following question was presented on a call with NAR attorneys:

> Q: If a broker has a referral company in Louisiana and the broker is a member of NAR, will agents of the referral company be covered under the NAR settlement?
>
> A: NAR responded that if agents are members, then yes. The agents cannot just be released because the broker is a member.

I believe but am not certain that this is because the REALTOR® with an interest in the referral company annually files a form with a list of the licensees affiliated with the referral entity certifying that the licensees are not engaged in listing, selling, leasing, managing, counseling, or appraising of real property but only referrals. Those named on the form are deemed not to be licensed with the REALTOR® for purposes of calculating Designated REALTOR® dues and are not included in calculating the annual dues of the designated REALTOR®.

However, I do need to follow up with NAR to inquire about licensees named on these lists for some years covered by the settlement and not others.

75. Hello! I have a house listed with our sign out front. A prospect called and asked if she and her husband could see it tomorrow. We set a time and when I hung up the phone, I thought I'd better reread the information on the new Buyer's Agent rules sent out by the Realtors Association of Acadiana. Since I am only going to be showing them this one home, am I now, technically, a "Buyer's Agent" and need to put a "Buyer's Agent Agreement" in place? If the answer to that question is no, that I would be the Seller's Agent; what if they want me to put together an offer to submit to the Seller. In which case, I would then be a Dual Agent. Though, I do not see anything on Dual Agency in the documentation I have on the new Buyer Agent rules. Please advise, as those I have talked to at our various associations do not have a remedy for me. Thanks!!

Response:

NAR FAQ #61: The practice change requiring written agreements with buyers is triggered by two conditions: it only applies to MLS Participants "working with" buyers and is triggered by "touring a home." What does it mean to be "working with" a buyer?

- The "working with" language is intended to distinguish MLS Participants who provide full or limited brokerage representation or services for the buyer (including transaction brokerage)—such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS Participants who simply market their services or just talk to a buyer—like at an open house or by providing an unrepresented buyer access to a house they have listed.

- If the MLS Participant is working only as an agent or subagent of the seller, then the Participant is not "working with the buyer." In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.

- Authorized dual agents, on the other hand, work with the buyer (and the seller).

- A written buyer agreement is required prior to a buyer "touring a home." An MLS Participant "working with" a buyer can enter into the written buyer agreement at any point but must do so by no later than prior to the buyer "touring a home," unless state law requires a written buyer agreement earlier in time (See FAQ "What does it mean to tour a home?"). (Updated 8/6/24)

If the licensee is solely showing the home to the prospective buyers while acting as agent or subagent for the seller, then no buyer representation agreement is needed. However, if the licensee subsequently agrees to represent the buyer, whether in connection with an offer to purchase the home or otherwise, then the licensee would need to enter into a written buyer representation agreement. Further, that licensee would still be subject to the same dual agency rules that have also applied in Louisiana. In the example provided, the licensee would need to disclose the dual agency

relationship to the buyer and seller if the licensee intended to represent the buyer in connection with a potential purchase of the subject property.

76. One of my Agents asked this question: If you are sending out property searches from the MLS are you required to have a buyer's contract signed. This particular client has not been physically shown a property, has not been prequalified by a lender, and has not signed an agency agreement. Thanks for your attention to this matter.

Response:

FAQ # 61: The practice change requiring written agreements with buyers is triggered by two conditions: it only applies to MLS Participants "working with" buyers and is triggered by "touring a home." What does it mean to be "working with" a buyer?

- The "working with" language is intended to distinguish MLS Participants who provide full or limited brokerage representation or services for the buyer (including transaction brokerage)—such as identifying potential properties, arranging for the buyer to tour a property, performing or facilitating negotiations on behalf of the buyer, presenting offers by the buyer, or other services for the buyer —from MLS Participants who simply market their services or just talk to a buyer—like at an open house or by providing an unrepresented buyer access to a house they have listed.

- If the MLS Participant is working only as an agent or subagent of the seller, then the Participant is not "working with the buyer." In that scenario, an agreement is not required because the participant is performing work for the seller and not the buyer.

- Authorized dual agents, on the other hand, work with the buyer (and the seller).

- A written buyer agreement is required prior to a buyer "touring a home." An MLS Participant "working with" a buyer can enter into the written buyer agreement at any point but must do so by no later than prior to the buyer "touring a home," unless state law requires a written buyer agreement earlier in time (See FAQ "What does it mean to tour a home?"). (Updated 8/6/24)

Louisiana law does not require an earlier time. In fact, it does not require the buyer representation agreement to be entered into at any specific time. Therefore, the agreement must be entered into prior to "touring a home." However, we recommend entering into that agreement once you have begun to "work with" a buyer, which would include identifying potential properties.

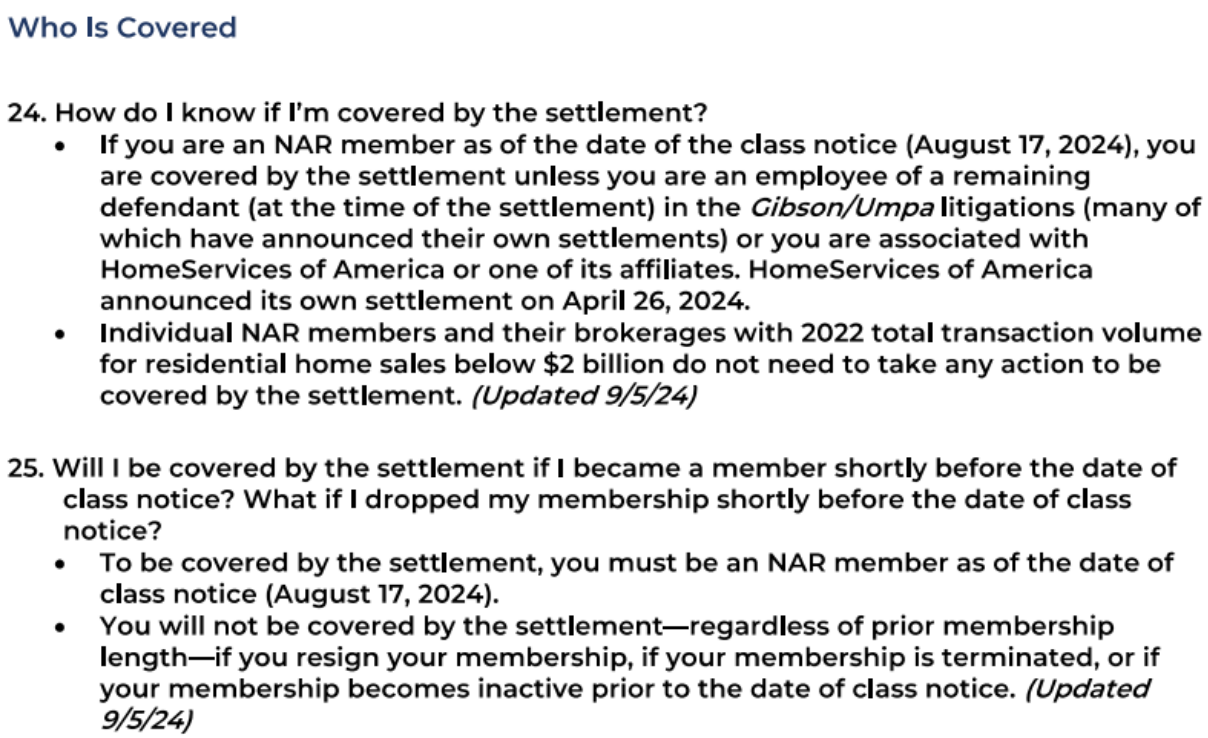
77. If I go inactive am I still protected in the settlement? In other words, I will not be an agent or a Realtor any longer.

Response:

The National Association of REALTORS® (NAR) has published Settlement FAQs that help address your question.

Per the NAR Settlement FAQs, to be covered by the settlement, a Realtor must be an NAR member as of the date of class notice - August 17, 2024. An individual will not be covered by the settlement if her membership becomes inactive prior to the date of class notice.

Therefore, if you were an NAR member as of the date of the class notice – August 17, 2024 – then you may be covered by the settlement. But please also refer to the NAR Settlement FAQs for more information as to who is and is not covered by the settlement (https://www.nar.realtor/the-facts/nar-settlement-faqs). A screenshot from the NAR Settlement FAQs is also included on the next page.



Who Is Covered

24. How do I know if I'm covered by the settlement?
    - If you are an NAR member as of the date of the class notice (August 17, 2024), you are covered by the settlement unless you are an employee of a remaining defendant (at the time of the settlement) in the *Gibson/Umpa* litigations (many of which have announced their own settlements) or you are associated with HomeServices of America or one of its affiliates. HomeServices of America announced its own settlement on April 26, 2024.
    - Individual NAR members and their brokerages with 2022 total transaction volume for residential home sales below $2 billion do not need to take any action to be covered by the settlement. *(Updated 9/5/24)*

25. Will I be covered by the settlement if I became a member shortly before the date of class notice? What if I dropped my membership shortly before the date of class notice?
    - To be covered by the settlement, you must be an NAR member as of the date of class notice (August 17, 2024).
    - You will not be covered by the settlement—regardless of prior membership length—if you resign your membership, if your membership is terminated, or if your membership becomes inactive prior to the date of class notice. *(Updated 9/5/24)*

MISCELLANEOUS INQUIRIES

78. procuring cause: I have a list agent received a sign call and showed the property to non represented buyers; there is no dual agency signed and no buyer rep agreement signed. List agent provided information to buyers and answered questions. The next day an agent within the 1 Percent Lists franchise although from a different brokerage submitted a showing request and spoke with list agent and asked questions. List agent asked buyers names and determined it was the same buyers she showed the property to previously. List agent thinks she is procuring cause however I don't think so because: 1. buyers need to agree to dual agency 2. dual agency form was not signed with list agent 3. contract was not written by list agent 4. buyers likely thought by asking list agent to show home and answer questions list agent was simply doing their job 5. it is not for us (brokerage or agent) to determine why the buyer said they were not represented if they in fact are. The list agent is researching procuring cause and states that no where in the rules and regs does it state that if you would be acting in a dual agency capacity then you cannot be procuring cause.

Response:

This is a facts and circumstances inquiry that we cannot give a specific opinion on because it would depend on the exact facts that would need to be brought to light. However, we have provided some general information on procuring cause below.

NAR's Arbitration Guidelines, created pursuant to Article 17 of the REALTOR® Code of Ethics, define procuring cause as "the uninterrupted series of causal events which results in the successful transaction." In practice, the broker whose efforts set off that unbroken chain of events will be regarded as procuring cause. Most procuring cause issues arise when two cooperating brokers claim they're entitled to the buyer's side commission. Article 17 requires REALTOR® principals to submit procuring cause disputes to mediation and arbitration. An arbitration hearing panel will consider all relevant details of the underlying transaction, guided by a number of factors to determine procuring cause. Those may include:

- The nature and status of the transaction.
- Roles and relationships of the parties.
- Initial contact with the buyer.
- Continuity and breaks in continuity.

What's important to keep in mind is that it's the interplay of these factors that indicates procuring cause. One factor alone will not decide a case.

Notably, we did not find any provision of Louisiana law or any NAR rule or regulation that states you cannot be procuring cause if you are acting in a dual agency capacity.

79. Is 19 Condos being sold from 1 business to another, that was not actively listed, considered commercial or residential real estate? We sold 19 Condos that were sold in a B3 zone to an investor we are trying to confirm that we are correct to treat this as commercial property not residential.

Response:

Zoning ordinances vary from jurisdiction to jurisdiction. Without knowing which particular jurisdiction the condos are in, and without knowing what specific use the condos are put to, we cannot provide specific advice as to the nature of classification of the condos in question.

The Louisiana Real Estate Commission has adopted Rules and Regulations which serve as an extension of the Real Estate License Law. Chapter 26, § 2601defines Residential Real Property as real property consisting of one or not more than four residential dwelling units, which are buildings or structures each of which are occupied or intended for occupancy as single-family residences.

The Louisiana Third Circuit Court of Appeal has also elaborated on the general distinction between "residential" and "commercial" property. The court stated:

> 'Residential' is defined in Merriam Webster's Collegiate Dictionary, 996 (10th ed.1993), as 'used as a residence or by residents'; 'restricted to or occupied by residences'; and 'of or relating to residence or residences.' 'Residence' is defined as 'a building used as a home.' Id. 'Commercial' is defined as 'occupied with or engaged in commerce or work

intended for commerce.' Id. at 231. Blacks Law Dictionary, 270 (6th ed.1990), defines 'commercial' as '[r]elates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce.'

Considering these definitions, we find that residential property pertains to property used for residences or dwellings, whereas commercial property applies to areas where trade or business is conducted.

Stevens v. Bruce, 2004-133 (La. App. 3 Cir. 6/2/04), 878 So. 2d 734.

Ultimately, when classifying property as either commercial or residential, it is customary to consider the primary purpose of the property. As described by the Third Circuit, if the property is used for residences or dwellings, the property is likely residential, whereas if the property is used for trade or business, the property is likely commercial.

80. We have been subpoened for records that one of my agents was a part of as a buyers agent (We are NOT named in the suit, defense attorneys just need records). The case is seller vs insurance company. My question is: Is it OK to release these our records to the defense attorneys? Nothing of what we have has any personal identifiable information like social security number, etc. Just the normal docs that are part of a transaction. Specifically, the purchase agreement, property disclosure, agency disclosure, inspection report, buyers inspection and due diligence response and cancellation.

Response:

The subpoena in question appears to be a subpoena duces tecum. A subpoena duces tecum is an order of court commanding a person to produce at a trial, hearing or deposition designated books, papers, documents or other tangible things within the person's control. Generally, so long as a subpoena duces tecum is properly issued by a court and the information requested is not protected by a privilege (like the attorney-client confidentiality privilege), then a person may respond to the subpoena duces tecum without issue. We are not aware of any privilege that would protect you from providing the requested information. A handful of considerations are below:

- A person who, without reasonable excuse, fails to obey a subpoena may be adjudged in contempt of the court which issued the subpoena.[37]

- A subpoena duces tecum can be challenged on the grounds that it is "unreasonable or oppressive."[38] A subpoena may be unreasonable or oppressive if it seeks production of irrelevant or privileged matter, does not provide a reasonable time for production, or requires production of an unreasonably large volume of material.

- Louisiana courts have held that a subpoena duces tecum must be "limited to information that is relevant or necessary to the case before the court."[39] Moreover, the party issuing a

[37] La. Code Civ. Proc. art. 1357.
[38] La. Code Civ. Proc. art. 1354.
[39] Bank of New Orleans and Trust Co. v. Reed Printing & Custom Graphics, Ltd., 399 So.2d 1260, 1261 (La. App. 4 Cir. 1981) (citing In Re Kohn, 357 So.2d 279 (La. App. 4 Cir. 1978); Keiffe v. La Salle Realty Co., 163 La. 824, 112 So. 799 (1927)).

subpoena duces tecum must show good cause for its issuance, and failure to demonstrate good cause provides a basis for the court to modify or vacate the subpoena.[40]

We cannot comment more specifically on the subpoena in question as the subpoena has not been made available to us. If there are additional questions surrounding the nature/enforceability of the subpoena in question, it is recommended that the subpoena and the requested documents be reviewed by an attorney.

81. I am the owner/broker of my current company and have a 50/50 partner who is also a licensed agent. Without getting in to a ton of detail, it may no longer be in my best interest continuing on with this company with him as a partner and wanted to see if there would be any legal recourse for starting my own brokerage. We have no operating agreements, etc in place and wanted to make sure that if I were to start my own company I wouldn't be violating anything that I may or may not be aware of. Your guidance is most appreciated. Please help.

Response:

We are not aware of any generally applicable laws which would prevent you from leaving/terminating your current company and starting your own brokerage. However, as the nature of this issue depends on the particular circumstances surrounding your company, it is recommended that you consult an attorney to help you navigate the specific steps that should be taken to help you avoid legal recourse for starting your own brokerage. Because we are not fully aware of the nature of your company, we can only provide the general information below. Please also note that, in addition to the information below, there may be various tax and financial considerations to bear in mind as well.

If it is no longer in the parties' best interest to continue operating the currently existing entity, then it is recommended that the parties take all necessary steps to ensure the entity is fully terminated and/or dissolved.

In the absence of any contrary agreement, a partnership generally is terminated by (1) the unanimous consent of its partners; (2) a judgment of termination; (3) the granting of an order for relief to the partnership under Chapter 7 of the Bankruptcy Code; (4) the reduction of its membership to one person; (5) the expiration of its term; or (6) the attainment of, or the impossibility of attainment of the object of the partnership.[41] Most of the events described do not require judicial, or even formal, action.[42] The partnership terminates by operation of law upon the occurrence of any of the listed terminating events. An LLC may also be dissolved in a variety of ways. The general methods for LLC dissolution are set forth in La. R.S. 12:1334, et seq.

In terminating the current entity and creating a new one, the parties should also be aware of any "non-compete" or other similar agreement restraining future real estate activity. Non-compete law in Louisiana is now governed by La. R.S. 23:921. This provision presumes non-compete agreements are unenforceable unless they meet one of eight narrowly construed exceptions. If,

[40] See Cousins v. State Farm Mut. Auto. Ins. Co., 258 So.2d 629, 633-34 (La. App. 1 Cir. 1972).
[41] La. Civ. Code art. 2826.
[42] The judgment of termination and the granting of relief under Chapter 7 of the Bankruptcy Code require judicial action.

however, the parties have not entered into any such agreement, then this matter should not be an issue.

If applicable, please also bear in mind that any corporation, limited liability company, or partnership, which has been granted a real estate broker's license by the Louisiana Real Estate Commission, must notify the commission within five calendar days of its dissolution (accompanied by notice of the termination of the broker license, as provided in R.S. 37:1441, for each sponsored licensee).[43]

If the matter in question involves the termination of a sponsorship of an associate broker/salesperson or the termination of an association between a designated qualifying broker and a partnership, limited liability company, association, corporation, or other legal entity, then refer to La. Stat. § 37:1441 for the appropriate steps to be taken.

DISCLAIMER

These materials are to be used for informational purposes and should not be construed as specific legal advice. These materials are not designed to cover every aspect of a legal situation for every factual circumstance that may arise regarding the subject matter included.

This publication is for reference purposes only and association members or other readers are responsible for contacting their own attorneys or other professional advisors for legal or contract advice. The comments provided herein solely represent the opinions of the authors and are not a guarantee of interpretation of the law or contracts by any court or by the Louisiana Real Estate Commission.

[43] La. Stat. § 37:1437.2.