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EMERGING LEGAL ISSUES OF SOCIAL NETWORKING “To Tweet or Not to Tweet”

Social networking sites, such as Twitter, LinkedIn, MySpace and Facebook, have rapidly become popular in the professional real estate community and are changing the way many real estate agents communicate with their clients and prospective clients. Social networking sites provide many benefits, but also raise multiple issues of potentially increased duties and risk of legal liability for agents and brokers. This Special Report discusses some key issues that real estate agents and brokers should be aware of when deciding whether to “tweet” or use other social networking sites. We also suggest some steps that should be taken by agents and brokers to reduce their exposure to liability and protect themselves and their business when using social networking sites.

Traditional Responsibilities and Duties Apply

Social networking is relatively new, and the laws and ethical standards pertaining to use of social networking sites are still developing. However, communicating through a social networking site does not change a real estate agent’s responsibilities regarding real estate communications. Brokers, agents and REALTORS® remain bound by California Real Estate Law, the California Department of Real Estate (DRE) regulations, the Code of Ethics (Article 12), and the Standards of Practice of the National Association of REALTORS® (NAR) and the rules of conduct of the local REALTOR® association and Multiple Listing Services where they hold membership. All marketing, even on social networking sites, is subject to the same general rules that apply to traditional marketing. All real estate communications must be truthful. Being unaware of a violation is not a defense. Brokers are responsible for supervising their agents’ actions. Therefore, brokers should be aware of the potential risks of liability, establish written office policies and monitor their agents’ and employees’ use of social networking sites to protect themselves and their businesses.

No Privacy and Potential Common Law Liability

Privacy is a main concern when using social networking sites. Maintaining a client’s confidential information is part of a broker/agent’s fiduciary duty. Voluntarily posting information on social networking sites can be deemed to be a waiver of any right to privacy the user may otherwise have. In *Moreno v. Hanford Sentinel*, a recent California Court of Appeals case, a college student posted a rant about her hometown on her private MySpace page. A local newspaper republished the post without permission. The student author of the rant brought a lawsuit claiming primarily a violation of her right of privacy. The court rejected her privacy claim and held that the act of affirmatively posting the rant on a hugely populated internet site erased any reasonable expectation of privacy she may have had. It should be noted that she did not raise a copyright infringement claim. Agents and brokers should remember that almost anyone can see the profiles and



information posted on a social networking site. Posting derogatory material could result in defamation or copyright infringement liability.

Duty of Buyer's Agent to Investigate

An agent has a general duty to disclose material facts relating to a transaction. Some may argue that an agent representing a buyer has an affirmative duty to investigate social networking sites to determine if negative comments are being made about a particular property. The California court in the 1998 case *Field v. Century 21 Klowden-Forness Realty*, explained the broker's fiduciary duty:

"The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. ... This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered."

A buyer's agent may be required to investigate certain issues in order to be able to provide material information and professional advice to the client. Given the rapidly increasing use of social networking sites, it is possible that this investigation could include searching social networking sites. Brokers and agents should be aware of this potential expansion of their fiduciary duty and protect themselves by clearly communicating to their clients whether or not the agent will check social networking sites for negative comments. Whether or not social networking sites will be or have been checked should be put in writing, either by including language in the Buyer-Broker Agreement or some other document executed by the client. Use of CAR's Buyer/Broker Representation Agreements is recommended.

DRE Regulations

The DRE requires agents to place their license numbers on all first contact advertising and marketing materials and to include in an MLS listing certain information, such as the name of the REALTOR®'s firm in a reasonable and readily apparent manner. Violations of these regulations, including omitting the firm name or the agent's license number on every posted advertisement or listing on a social networking site, could result in the agent and broker being held liable.

NAR Code of Ethics

The Code of Ethics applies to all real estate licensees who are members of NAR, CAR and/or local associations. Unfortunately, users of social networking sites do not have the same protections that the social networking sites themselves have under the law. Not only are brokers and agents subject to liability as users of the social networking site, they also have the added risk of liability under the Code of Ethics. REALTOR® members should carefully comply with the Code of Ethics at all times, including on social networking sites.

Article 12, Code of Ethics – True Picture in Advertising

REALTORS® have an obligation to present a true picture in their advertising, marketing, and representations. Article 12 of the NAR Code of Ethics states, in pertinent part: "REALTORS® shall be



honest and truthful in their real estate communications (emphasis added) and shall present a true picture in their advertising, marketing, and other representations.” Multiple Listing Service (MLS) Rules and Regulations have similar rules and also require the listing data be accurate. The listing information should not be presented in a way that produces a deceptive or misleading result due to the use of Internet lingo (i.e. “lol”), abbreviations, keywords, or symbols that might mislead consumers.

Article 15 – Statements About Competitors

Article 15 spells out the duty of REALTORS® to not knowingly or recklessly make false or misleading statements about their competitors, their businesses, or their business practices. NAR recently amended and adopted Standard of Practice 15-2, which states:

“The obligation to refrain from making false or misleading statements about competitors, competitors’ businesses and competitors’ business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false and misleading.”

Under this amendment, a REALTOR® will be required to take some affirmative action, instead of just refraining from doing something. With the use of social networking sites, it is not only easier for a REALTOR® to post a statement that may be misleading or false, but it is also easier for the competitor to become aware of the misleading or false statement. That increases the risk of liability to agents and brokers. Brokers and agents need to be careful and always act appropriately when posting messages, information, or files to social networking sites.

Client Confidentiality

A broker or agent should never disclose confidential information shared by clients. Brokers and agents should obtain the consent (preferably in writing) of the client before posting any information related to the client on a social networking site.

Protect the Firm Image and Reputation

Brokers and agents must recognize that the information they post on social networking sites shapes the public image of the individual and the firm. Brokers and agents should manage their online reputation by being alert and by staying aware of what information is being posted about them and their firm. Social networking sites, if not used properly, increase the risk of possible liability. Ultimately, a broker may be responsible for the information disseminated from the firm and for the image of the firm portrayed to the public.

Establish Policies

Brokers should establish and circulate written policies regarding social networking use by their employees and independent contractors, whether or not the firm facilitates, allows, or encourages its employees and agents to use social networking as a way to stay connected with clients, vendors, customers, and business associates. A written electronic media and social networking policy should be established as part of the firm’s employee handbook or its employment or independent contractor agreements. The policy should identify what information the firm deems confidential and set forth the procedures and disciplinary actions that will be taken if an employee violates the policy.



To Tweet or Not to Tweet

Every firm is unique, and the social networking policy should be designed to fit that firm's needs. Brokers and agents who understand the emerging technology and put it to use in their businesses while remaining in compliance with applicable laws, meeting their professional duties, and managing their exposure to risk, will have the competitive advantage.

If you have questions about the information in this Special Report or need assistance in establishing policies for your firm, contact attorneys John V. Giardinelli, Kelly Neavel, or Sylvia J. Simmons at the phone numbers or email address below.

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