



White Paper

Social Media

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Introduction

REALTORS® are increasingly using social media sites such as Facebook, Twitter, LinkedIn, and Instagram to market their listings as well as their services as a REALTOR®. While sites such as these are an effective marketing tool, there are legal and ethical requirements that must be complied with to avoid potential violations. In addition, some social media posts can also expose REALTORS® to civil liability in certain situations.

The purpose of this white paper is to identify the provisions in both Ohio license law and the National Association of REALTORS® Code of Ethics that apply to the use of social media and to also discuss other areas of risks for REALTORS® when using this medium.

Social Media as Advertising

Ohio license law defines advertising as any method or medium used by a real estate licensee to:

- Promote their services as a licensee, or
- Make properties known to the public that are available for sale or lease.

Under this definition, if a licensee posts information about an available property on social media or uses social media to promote his/her services as a real estate agent or broker, it will be considered advertising. This includes even general posts by an agent such as, "Interest rates are still low! It's a great time to buy!"

If a licensee advertises on social media, the same license law requirements that apply to traditional advertising will apply to the licensee's social media posts. And these requirements apply not only to posts made on the licensee's business page, but also to those made on a personal social media page or posted to private groups.

These license law requirements are discussed below.

Disclosure of Brokerage Name

Under Ohio license law, advertising by a licensee must include the name of the licensee's brokerage. This applies to all forms of marketing, including print ads, yard signs, business cards, car wraps, radio and TV spots, brokerage and agent websites, and social media. Therefore, any social media post that promotes listed properties or relates to real estate services must include the brokerage name.

The Division of Real Estate and Professional Licensing, however, recognized that the format of certain social media sites may make it challenging to include the brokerage name. For this reason, the Division adopted a rule permitting use of a direct link to display the brokerage name, but only in two limited circumstances. They are:

- (1) the advertisement is on a site that limits the information or characters a licensee can display (i.e., Twitter);
- (2) The advertisement is on a website not owned or controlled by the licensee or brokerage and that website's terms of use limit the licensee's ability to display the brokerage name.

It should be noted that unless one of these two exceptions apply, the brokerage name is required to be displayed on internet or social media advertising. For example, there is nothing in Facebook's terms of use that limits an agent from including the name of the brokerage on the agent's Facebook page or that limits the number of characters. Therefore, the above exceptions would not be applicable, and an agent would be required to include the brokerage name on his Facebook page when engaging in advertising. A simple way to comply with this requirement is naming your Facebook page "Jane Doe at ABC Realty."

Prominence Rule

Ohio license law also requires that the name of the brokerage be displayed in at least equal prominence with the name of the salesperson in all forms of advertising, including social media. This basically means that the agent's name cannot be more prominent than that of the brokerage.

When evaluating the prominence of a name, the font size and style, as well as the placement of the names in the ad may be considered by the Ohio Division of Real Estate. It should be noted that because a franchise name is not part of a brokerage's licensed name, it is not factored when determining the prominence of the agent's name in relation to that of the brokerage.

The license law does provide for one exception to the equal prominence rule with respect to the internet. Under this rule, the equal prominence requirement does not apply if *both* of the following apply:

- The ad is on a website that is not owned or controlled by the licensee or his brokerage; and
- The terms of use or the format of the website or other advertising medium does not allow the licensee to control the size and prominence of the brokerage and salesperson names.

Thus, if an agent is engaging in advertising on a social media site that does not allow the agent to control the size of the agent's name in relationship to that of the brokerage, the prominence rule will not apply.

However, if the agent can control the size of the names, then the agent is required to make sure the brokerage name is at least as prominent as the agent's name. Again, naming your Facebook page "Jane Doe at ABC Realty" is a simple way to comply with the prominence rule.

Team Advertising on Social Media

Teams are defined under Ohio license law as any group of two or more associated real estate licensees affiliated with the same brokerage and/or other non-licensed professionals (such as administrative assistants and other professionals specializing in real estate related fields) that advertise together. This basically means you must have at least two licensees who advertise together to be a team.

Although the Division of Real Estate and Professional Licensing does not license teams, Ohio license law does allow licensees to advertise as a team if certain requirements are met. These requirements apply to all forms of advertising, including social media. Under the team advertising rule, a team or group must:

- 1) Include in the advertisement the full name of at least one licensee that is a team member. This requirement is met if the full licensed name of a team member is included the team name (i.e., The Mary Smith Team);
- 2) Include the brokerage name;
- 3) Identify as non-licensed any unlicensed team member whose name is included in the ad;
- 4) Display the name of the brokerage in equal prominence with the name of the team; and
- 5) Display the name of the brokerage in equal prominence with the name of any salesperson in the advertisement.

Therefore, if a team has a Facebook page or other social media presence, it cannot solely use the team name. Instead, it must also include the name of at least one of the licensees affiliated with the team, the brokerage name and follow the other requirements set forth above.

With respect to posting photos of your team on social media, this can be done without disclosing all of the team members by name, but only if all of the above requirements are met.

More information on teams can be found in Ohio REALTORS®' White Paper on Teams.

Advertising Property Listed with Another Brokerage

A common advertising violation occurs when licensees post information on social media about property that is on the market but listed with another brokerage.

For example, agent Mary sees that listing agent Bob, who is licensed with another brokerage, has a post on his Facebook page about one of his listings. To attract potential buyers for this property, Mary re-posts it on her Facebook page, stating "New on the market! Call me today for a showing!" Bob files a complaint alleging that the agent did not have the authority to advertise the property and that the post misleads the public to believe she is the listing agent. In this case Bob's complaint may very well have merit.

Ohio license law sets forth requirements that a licensee must meet to advertise property that is either listed with another brokerage or that is being offered for sale directly by an owner (a "FSBO" property.) These requirements apply to any form of marketing, including social media marketing. They are:

1. The licensee must first obtain the written permission of the owner's authorized agent (i.e., the listing agent or broker), or in the case of a FSBO, the written consent of the owner; and
2. If written consent is obtained from the listing agent or broker, the listing broker's name must be included in the ad in at least the same size font that is used to describe the property.

Therefore, in the scenario above, the agent who posted information on her Facebook page about the other brokerage's listing needed to first obtain the written permission of the listing agent or broker. If written consent was not given, the post violated Ohio license law. If the listing agent or broker gave consent, then the post was required to include the listing brokerage's name in a font size at least equal to that used to describe the property.

As to a FSBO property, a licensee is not permitted to advertise such properties on social media or elsewhere without the owner's written consent. If consent is given, the licensee must make sure that the post does not make it appear that the property is listed for sale or lease with the licensee or his brokerage, as this could be considered misleading advertising by the Ohio Division of Real Estate.

Defamation and Negative Social Media Posts

While social media is a useful marketing tool, it can also be a platform for making negative comments regarding other REALTORS® and professionals and their business practices. In some instances, these posts or tweets can expose REALTORS® to potential defamation claims for libel. In addition, such posts could also violate the NAR Code of Ethics and possibly the license law.

First, let's address posts about other REALTORS® and other professionals. Article 15 of the NAR Code of Ethics provides that REALTORS® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses or business practices. Standard of Practice 15-2 clarifies that this Article is also violated when a REALTOR® knowingly or recklessly publishes, repeats, retransmits or republishes false or misleading statements, whether this is done in person, in writing, by technological means such as the internet, or otherwise.

Thus, not only could a REALTOR®'s false or misleading post or tweet violate the Code, but sharing or re-tweeting a comment made by someone else about another real estate professional could also violate Article 15 if it was done with knowledge that the statements were false or misleading or were made in a reckless manner, meaning they were made with disregard for whether the statements were true.

In certain instances, Ohio license law may also be violated by false posts involving other real estate licensees or professionals. The license law specifically prohibits a licensee from making any knowing misrepresentations or publishing any advertising, which is "misleading or inaccurate in any material particular." This could include social media posts that are false or misleading. For example, a tweet by a licensee falsely claiming by that another real estate agent has had their license suspended could be considered a violation of Ohio license law violation if the licensee who made this statement knew or should have known that it was false.

Finally, REALTORS® who make false statements about other real estate professionals or their practices on social media could also be subject to a civil claim for defamation if it can be proven that the statement was:

- False;
- Made with some degree of malice; and
- Resulted in injury to the other person's reputation or damaged their business.

Such a defamation claim for damages would be a civil matter handled through the courts.

Hate Speech

On Nov.13, 2020, the NAR Board of Directors adopted Standard of Practice 10-5 which provides:

“REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.”

Definitions of the terms “harassing speech”, “hate speech”, “epithets”, and “slurs” are included in the NAR Code of Ethics and Arbitration Manual to assist Grievance and Professional Standards Committees when evaluating complaints involving this Standard of Practice.

Policy Statement 29 in the Code of Ethics and Arbitration Manual was also amended to make the Code of Ethics applicable to any activity engaged in by a REALTOR®, not just real estate related activity. Thus, a REALTOR®’s use of hate speech or harassing speech that is prohibited under Standard of Practice 10-5 could result in a violation of Article 10, even if the subject matter or context does not involve real estate. Both Standard of Practice 10-5 and the amendments to Policy 29 became effective on Nov. 13, 2020, the date they were adopted by the NAR Board of Directors.

Although Standard of Practice 10-5 is not limited to speech engaged in only on social media, social media is probably the medium most recently associated with hate and harassing speech. Posts made on Facebook, Twitter, or other social media sites that fall under S.O.P.10-5 could be a basis for an ethics charge regardless of whether the statements were made by a REALTOR® on their business page, personal page or on a private group page.

A commonly asked question is whether Standard of Practice 10-5 infringes on a REALTOR®’s First Amendment right of free speech under the U.S. Constitution. The First Amendment provides that “Neither the United States Congress nor any state may abridge the freedom of speech of American citizens.” Because NAR is a private association that is supported by dues from members – not a government entity - the First Amendment does not preclude NAR from imposing this ethical duty as a condition of membership.

Another mistaken belief is that Standard of practice 10-5 regulates all speech, including political speech. This is not true. Instead, for a violation of Article 10 to be found, the following two elements must both be proven:

- 1.) The speech must be found to involve “harassing speech, hate speech, epithets, or slurs”; and
- 2.) The speech must be based on one of the protected classes under the NAR Code of Ethics. These are: race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

Thus, posts espousing a political view or criticizing those of others, even though hateful or harassing, would not violate Article 10. The only exception to that would be if the post also included hate speech, epithets or slurs based on one of the protected class identified under the NAR Code of Ethics.

Unauthorized Photos/Videos

The use of photos or videos on social media can also pose a problem when the REALTOR® posting such images does not own the photos or video, does not have the consent to post them, or are does so in derogatory manner.

Copyright laws are designed to protect creative works, including photos and videos. To publish or use a photo or video, a REALTOR® must either have ownership rights to the image (i.e., the REALTOR® took the photo or video) or the REALTOR® must have the consent of the owner of the image to use it.

In many cases, the owner of the copyrighted photos is a professional photographer or videographer, who grants a license to another person to use their work product. This is typically provided for in a licensing agreement that outlines the permitted use of that image, which in many situations is limited.

Copyright infringement by REALTORS® can occur in different ways on social media. The most common is when a listing agent posts photos or video on social media that were taken by another REALTOR® who previously had the property listed or by a professional photographer hired by that REALTOR®. Unless the current listing agent obtained the right to use these photos or videos, that agent and their brokerage could be sued for copyright infringement by the owner of those works.

Another area of concern under both the Code of Ethics and the license law is REALTORS® who take photographs or videos of a property without the consent of the owner or the listing agent and then posts them on social media. This is especially so when the post also includes derogatory comments about the seller's property, perhaps mocking the condition of the property, the owner's decorating style, or features of the property. Such posts have resulted in disciplinary action against licensees by the Ohio Real Estate Commission, even in instances where the address of the property was not included in the post or the comments were made in a "closed" Facebook group.

Social Media and Antitrust

Antitrust can be another serious area of risk when agents or brokers post, share and/or comment on commission issues on social media in an inappropriate manner.

The Sherman Act prohibits any "contract, combination or conspiracy in restraint of trade". A violation can occur if it is shown that two or more persons or business entities participated in a common plan or scheme and the effect of that plan or scheme was to restrain trade.

One of the most common antitrust violations involves price fixing. As most REALTORS® know, a violation of the antitrust laws occurs if two or more brokers agree or conspire regarding the amount that will be charged consumers for their services. Often such violations are proven through circumstantial evidence.

To avoid the appearance that listing fees are the result of such an agreement, licensees should avoid posting anything on social media that suggests that fees are the product of an agreement between brokers (i.e., the "prevailing rate" or a "standard" commission).

It is important to note that the antitrust laws do not prohibit a brokerage from advertising the commission rate or fee they charge. Brokerages are free to advertise the cost for their services on social media or elsewhere but should be careful not to imply that this is the result of some agreement between brokerages or in any way suggest that others should charge the same amount.

Another way price fixing can occur is with respect to compensation offered to cooperating REALTORS®. Posts by brokers or agents that suggest or imply some sort of agreement between brokers to pay the same compensation to cooperating REALTORS® can potentially be evidence of an illegal agreement or conspiracy to fix “co-op” fees. An example of this would be a post that says, “In our Board, it’s understood that we will all split our commissions 50/50.”

In addition to price fixing, the antitrust laws also prohibit group boycotts. A group boycott exists when two or more competitors discuss or agree on how they will treat a competitor, usually with an intent to drive that party from the marketplace or force them to conform to how they conduct their business.

Often, this involves a brokerage perceived as having a different business model or commission structure. An example of a group boycott would be where REALTORS® engage in conversations via Facebook or other social media sites suggesting or agreeing that REALTORS® refrain from doing business with a brokerage based on its commission structure or other practices.

A boycott could also involve posts by agents suggesting or encouraging other agents and brokerages not to work with another professional such as a builder, lender, appraiser, or home inspector.

Here are some examples of posts that could put REALTORS® at risk of an allegation of an illegal boycott:

“I am so sick of these brokers that aren’t splitting commissions 50/50. You all know who I mean. We need to do something about this! I don’t know about you, but I am done showing their listings!”

“Whatever you do, don’t work with ABC Builders. They don’t pay the standard referral fee like all the other builders in the area.”

“Are you having the same problems I am with John Doe Appraiser? If so, do what I’m doing.... I’m calling lenders that use him and pressuring them not to assign him any more of my deals anymore.”

When other REALTORS® take the action proposed in such posts or indicate their agreement to such posts by commenting favorably on the post, “liking,” sharing or otherwise repeating or republishing the posts, their conduct can be considered evidence of participation in the group boycott.

The information presented in this White Paper is not intended to be--and should not be construed as--legal advice. Before applying this information to a specific legal problem, readers are urged to seek advice from their own legal counsel.