March Notes from the MAR Legal Hotline

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Q. Can an email or text message from an agent bind a client to a transaction?

A: The short answer is yes, but there are many considerations that need to be accounted for in determining whether an agent's actions have bound their client.

The first question to address in the analysis is whether the agent had authority to bind their client. The agent may have express actual authority, which means that the client has explicitly indicated through words and or actions that the agent may act to bind the client. There could also be apparent authority, which is determined by analyzing the actions of the client and whether those actions would cause a third party to reasonably believe that the client intended to be bound by the actions of the agent.

The second half of the analysis comes into play *if* it has been determined that the agent did in fact have the authority to bind their client. The question then becomes, does the electronic communication satisfy the statute of frauds? The statute of frauds is a legal doctrine that requires contracts for the sale of land to include all essential terms and be in writing signed by the party against whom enforcement is sought. Emails or text messages from an agent laying out the specific terms of a deal may be sufficient to satisfy the requirements of the statute of frauds. In fact, even incorporating by reference to a document containing the essential terms may be sufficient.

With the prevalence of using technology in negotiating today's real estate transactions, it is easy to see how an agent could easily bind a client. The simplest way to avoid this potential pitfall is to preface email and text messages regarding a transaction with a simple statement that the communication is for negotiation purposes only and that anything said by the agent does not create a binding transaction. It is also advisable to have a similar disclaimer attached to all email communications. Best Practice is to negotiate in person or over the phone.

Q. I represent the seller in a deal that fell through due to an unfavorable home inspection report. What do I need to disclose to future prospective purchasers?

A: Chapter 93A provides that it is a violation when an agent, "fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction." Disclosure is limited to facts *actually known* by an agent, not suspicions or rumors. Chapter 93A requires that a real estate agent volunteer these facts, even if not asked. It is recommended that these disclosures be made in writing, so it is clear as to when and to whom the disclosures were made.

When an individual, such as a licensed home inspector, provides information regarding a specific issue or defect based upon their education, training and experience, this information generally rises to the level of "facts" that need to be disclosed. If a potential buyer backs out of a deal due to an unsatisfactory home inspection, but fails to provide specific details, the seller agent has no duty to obtain the inspection report and determine the defects.

For more information regarding these topics authorized callers should contact the MAR legal hotline at 800-370-5342 or e-mail at legalhotline@marealtor.com.