

Statute prohibiting real estate brokers from using promotions involving "prizes" did not deprive broker that wished to use merchandise coupon program of property without due process. *Coldwell Banker Residential Real Estate Services, Inc. v. New Jersey Real Estate Com'n*, 242 N.J.Super. 354, 576 A.2d 938 (A.D.1990).

Commingling trust monies and failing to maintain separate account for escrow funds, as well as other violations, warranted revocation of broker's license, suspension of salesperson's license, and assessment of fine. *New Jersey Real Estate Commission v. Woods*. 92 N.J.A.R.2d (REC) 25.

11:5-6.2 Contracts of sale, leases and listing agreements

(a) The following paragraphs specify licensees' obligations to obtain written confirmation of the intentions of, and to deliver copies of documents to, parties to a real estate transaction.

1. Where a licensee memorializes the terms of an offer or counter-offer on a writing which will itself become an "instrument" as defined in (a)3 below, the licensee shall deliver to the maker of such an offer or counter-offer a clear copy of the executed offer or counter-offer immediately upon its being signed, and initialed if necessary as provided in this section, by the maker of the offer or counter-offer. Any addition, deletion, or other change in any such offer or counter-offer shall be initialed by the party proposing such a revision and, if accepted, by the other party to the transaction.

2. Where a licensee records the terms of an offer or counter-offer on a writing which is not intended to be binding upon either party, and which so states on its face, in the event that the licensee secures the signature and/or initials of any party on such a writing, the licensee shall provide to the signing and/or initialing party a clear copy of the writing as signed and/or initialed by them.

3. As used in this subsection, the term "instrument" means any complete and fully executed written contract of sale, lease, option agreement, or other writing affecting an interest in real estate, or any complete and fully executed addendum or amendment to any such contract, lease, option agreement or writing. The term instrument as used in this subsection does not include listing agreements and buyer brokerage agreements.

4. Licensees shall immediately deliver to all parties to any fully executed instrument a clear copy with original signatures of any such fully executed instrument. Licensees shall provide their clients with a fully executed copy of any sale or exclusive sale or rental listing contract at the time of execution thereof.

5. Licensee-prepared revisions or additions reflected on the instrument itself shall be initialed by all parties to the transaction. Licensee-prepared revisions or additions to an instrument not memorialized by changes on the instrument itself shall be reflected on amendments or addenda to the instrument signed by all parties to the transaction.

i. Licensees shall immediately deliver to the party proposing a revision or addition to an instrument a clear copy of any proposed revised instrument initialed by that party and a clear copy of any proposed amendment or addendum signed by that party.

ii. All revisions, amendments and addenda to any fully executed instrument which are prepared by licensees must comply with New Jersey law as it pertains to the attorney review of contract and lease documents prepared by real estate licensees.

6. This rule is to ensure prompt communication of the executed evidence of a transaction to all interested parties.

(b) No listing agreement or contract for the sale of real property, or any interest therein, shall contain a prescribed or predetermined fee, commission rate, or commission amount; nor shall any such writing contain a commission clause or provision which suggests (such as with a small blank space and percent sign) to a seller that the commission is a prescribed rate or amount.

(c) The commission clause or provision in all listing agreements for the sale of one to four family dwelling units or interest therein, or in all contracts for such sale, if there is no listing agreement, shall contain in print larger than the predominant size print in the writing, the language: "As seller you have the right to individually reach an agreement on any fee, commission, or other valuable consideration with any broker. No fee, commission or other consideration has been fixed by any governmental authority or by any trade association or multiple listing service." Nothing herein is intended to prohibit an individual broker from independently establishing a policy regarding the amount of fee, commission or other value consideration to be charged in transaction by the broker.

(d) Upon request, the listing broker shall advise the seller of the rate or amount of any commission split or distribution.

(e) All listing agreements of any licensed individual, partnership, firm or corporation which provide for the listing of property with any real estate multiple listing service operation shall specify the complete name of that listing service.

(f) No licensed individual, partnership, firm or corporation shall enter into a "net listing" contract for the sale of real property, or any interest therein. A "net listing" is defined as an agency agreement in which a prospective seller lists real estate for sale with an authorization to a broker to sell at a specified net dollar return to the seller, and which provides that the broker may retain as commission the difference between the specified dollar return to the seller and the actual sales price.

(g) Licensees shall comply with the following provisions:

1. All contracts prepared by licensees for the sale of residential real estate containing one to four dwelling units and for the sale of vacant one-family lots in transactions in which the licensee has a commission or fee interest shall contain, at the top of the first page and in print larger than the predominant size print in the writing, the following language:

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.

2. The contract shall also contain the following language within the text of every such contract.

ATTORNEY REVIEW:

1. Study by Attorney

The Buyer or the Seller may choose to have an attorney study this contract. If an attorney is consulted, the attorney must complete his or her review of the contract within a three-day period. This contract will be legally binding at the end of this three-day period unless an attorney for the Buyer or Seller reviews and disapproves of the contract.

2. Counting the Time

You count the three days from the date of delivery of the signed contract to the Buyer and the Seller. You do not count Saturdays, Sundays or legal holidays. The Buyer and the Seller may agree in writing to extend the three-day period for attorney review.

3. Notice of Disapproval

If an attorney for the Buyer or the Seller reviews and disapproves of this contract, the attorney must notify the Broker(s) and the other party named in this contract within the three-day period. Otherwise this contract will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by certified mail, by telegram, or by delivering it personally. The telegram or certified letter will be effective upon sending. The personal delivery will be effective upon delivery to the Broker's office. The attorney may but need not also inform the Broker(s) of any suggested revisions in the contract that would make it satisfactory.

3. The contract shall also contain the names and full addresses of all persons to whom a Notice of Disapproval must be sent in order to be effective as provided in item three of the Attorney Review Provision.

4. All leases prepared by licensees for a term of one year or more for residential dwelling units in transactions in which they have a commission or fee interest shall, at the top of the first page and in print larger than the predominant size print of the writing, contain the following language:

THIS IS A LEGALLY BINDING LEASE THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE LEASE. SEE SECTION ON ATTORNEY REVIEW FOR DETAILS.

5. The lease shall also contain the following language within the text of every such lease.

ATTORNEY REVIEW:

1. Study by Attorney

The Tenant or the Landlord may choose to have an attorney study this lease. If an attorney is consulted, the attorney must complete his or her review of the lease within a three-day period. This lease will be legally binding at the end of this three-day period unless an attorney for the Tenant or the Landlord reviews and disapproves of the lease.

2. Counting the Time

You count the three days from the date of delivery of the signed lease to the Tenant and the Landlord. You do not count Saturdays, Sundays or legal holidays. The Tenant and the Landlord may agree in writing to extend the three-day period for attorney review.

3. Notice of Disapproval

If an attorney for the Tenant or the Landlord reviews and disapproves of this lease, the attorney must notify the Broker(s) and the other party named in the lease within the three-day period. Otherwise this lease will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by certified mail, by telegram, or by delivering it personally. The telegram or certified letter will be effective upon sending. The personal delivery will be effective upon delivery to the Broker's office. The attorney may but need not also inform the Broker(s) of any suggested revisions in the lease that would make it satisfactory.

6. The lease shall also contain the names and full addresses of all persons to whom a Notice of Disapproval must be sent in order to be effective, as provided in item three of the Attorney Review Provision.

7. The failure of any licensee to include such language in any such contract of sale or lease agreement prepared by the licensee shall be construed by the Commission as engaging in the unauthorized practice of law and shall be considered by the Commission as conduct which demonstrates the licensee's unworthiness and incompetency, thereby subjecting the licensee to sanctions pursuant to N.J.S.A. 45:15-17(e).

Amended by R.1977 d.84, effective March 10, 1977.

See: 9 N.J.R. 91(d), 9 N.J.R. 178(a).

Amended by R.1977 d.391, effective October 19, 1977.

See: 9 N.J.R. 344(a), 9 N.J.R. 536(a).

Amended by R.1979 d.461, effective November 26, 1979.

See: 10 N.J.R. 499(a), 12 N.J.R. 44(b).

Amended by R.1980 d.51, effective January 31, 1980.

See: 12 N.J.R. 127(e).

Amended by R.1980 d.214, effective May 14, 1980.

See: 12 N.J.R. 342(d).

Amended by R.1980 d.274, effective June 19, 1980.

See: 12 N.J.R. 423(d).

Amended by R.1980 d.408, effective September 23, 1980.

See: 12 N.J.R. 340(b), 12 N.J.R. 665(c).

(c) substantially amended.

Amended by R.1980 d.409, effective September 24, 1980.

See: 12 N.J.R. 665(d).

(c) compliance date amended from November 1, 1981 to January 2, 1981.

Amended by R.1983 d.471, effective November 7, 1983.

See: 15 N.J.R. 1343(a), 15 N.J.R. 1865(c).

Time limits on compliance deleted.

Amended by R.1987 d.159, effective April 6, 1987.

See: 18 N.J.R. 1677(a), 18 N.J.R. 2112(a), 19 N.J.R. 551(a).

Added (g).

Amended by R.1987 d.359, effective September 8, 1987.

See: 19 N.J.R. 503(b), 19 N.J.R. 1646(a).

Added (h) "Agreement to Honor".

Invalidity Annotation

N.J.A.C. 11:5-1.16(h) held invalid as an intrusion upon the State Supreme Court's constitutional authority to regulate the practice of law. *Carmagnola v. Hann*, 233 N.J.Super. 547 (App. Div. June 12, 1989), 559 A.2d 478.

Amended by R.1989 d.539, effective October 16, 1989.

See: 21 N.J.R. 2438(b), 21 N.J.R. 3299(a).

Subsection (h) deleted due to Appellate Court decision — N.J.Super. —, Dkt. No. A-2211-88T2F (App.Div.1989).

Amended by R.1993 d.10, effective January 4, 1993.

See: 24 N.J.R. 3485(a), 25 N.J.R. 179(a).

Text at (a) substantially amended to specify licensees' obligations to parties in a real estate transaction involving offers or counter-offers. *Petition for Rulemaking*.

See: 25 N.J.R. 4523(c), 26 N.J.R. 505(b).

Case Notes

Purchaser's attorney's letter to vendors stating that attorney did not approve of residential sales contract in its present form, but that he would approve it with specified modifications, was sufficient to terminate contract under its attorney review clause; thus, purchasers were thereafter free to show and sell property in question to third party. *Gaglia v. Kirchner*, 317 N.J.Super. 292, 721 A.2d 1028 (A.D.1999).

Statute giving terminated agents full commission rights if they continued to service policies would prevail over strict terms of contract settlement between insurance company and terminated agents. *Matter of Terminated Aetna Agents*, 248 N.J.Super. 255, 590 A.2d 1189 (A.D.1990), certification denied 126 N.J. 319, 598 A.2d 880.

Regulation requiring that all real estate contracts subject to attorney review contain an "agreement to honor," was void. *Carmagnola v. Hann*, 233 N.J.Super. 547, 559 A.2d 478 (A.D.1989).

11:5-6.3 Broker insurance placement provision

Where a contract provided by a real estate broker contains a provision to the effect that such broker, in his capacity as a licensed insurance agent or broker, is authorized to place or procure insurance on the property being sold, the licensee benefitting by such a provision shall obtain separate written reaffirmation of such provision by the prospective insured not less than five days prior to the closing of title.

11:5-6.4 Obligations of licensees to public and to each other

(a) All licensees are subject to and shall strictly comply with the laws of agency and the principles governing fiduciary relationships. In accepting employment as an agent, the licensee pledges himself to protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent; this obligation of absolute fidelity to the client's or principal's interest is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction.

(b) Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom he or she submits an offer to his or her client or principal. Information about social conditions and psychological impairments as defined in (d) below is not considered to be information which concerns the physical condition of a property.

1. A reasonable effort to ascertain material information shall include at least:

- i. Inquiries to the seller or seller's agent about any physical conditions that may affect the property; and
- ii. A visual inspection of the property to determine if there are any readily observable physical conditions affecting the property.

2. As used in this section, information is "material" if a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

(c) Licensees shall disclose all information material to the physical condition of any property which they know or which a reasonable effort to ascertain such information would have revealed to their client or principal and when appropriate to any other party to a transaction. Licensees shall also disclose any actual or potential conflicts of interest which the licensee may reasonably anticipate.

1. With respect to off-site conditions which may materially affect the value of the residential real estate, in all sales contracts involving newly constructed residential real estate they prepare, licensees shall include a statement as set forth below. By including this statement in a contract of sale prepared by the licensee, the licensee shall be deemed to have fulfilled his or her disclosure obligations under (c) above with respect to such off-site conditions. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

**"NOTIFICATION REGARDING
OFF-SITE CONDITIONS"**

Pursuant to the New Residential Construction Off-Site Conditions Disclosure Act, P.L. 1995, c.253 (C.46:3C-1 et seq.), sellers of newly constructed residential real estate are required to notify purchasers of the availability of lists disclosing the existence and location of off-site conditions which may affect the value of the residential real estate being sold. The lists are to be made available by the municipal clerk of the municipality within which the residential real estate is located and in other municipalities which are within one-half mile of the residential real estate. The address(es) and telephone number(s) of the municipalities relevant to this project and the appropriate municipal offices where the lists are made available are listed below. Purchasers are encouraged to exercise all due diligence in order to obtain any additional or more recent information that they believe may be relevant to their decision to purchase the residential real estate. Purchasers are also encouraged to undertake an independent examination of the general area within which the residential real estate is located in order to become familiar with any and all conditions which may affect the value of the residential real estate.

The purchaser has five (5) business days from the date the contract is executed by the purchaser and the seller to send notice of cancellation of the contract to the seller. The notice of cancellation shall be sent by certified mail. The cancellation will be effective upon the notice of cancellation being mailed. If the purchaser does not send a notice of cancellation to the seller in the time or manner described above, the purchaser will lose the right to cancel the contract as provided in this notice.

Municipality _____
Address _____
Telephone Number _____"

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

2. In all residential real estate sale contracts they prepare except contracts for newly constructed residential real estate, licensees shall include a statement as set forth below. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

"NOTICE ON OFF-SITE CONDITIONS"

Pursuant to the New Residential Construction Off-site Conditions Disclosure Act, P.L. 1995, c.253 the clerks of municipalities in New Jersey maintain lists of off-site conditions which may affect the value of residential properties in the vicinity of the off-site condition. Purchasers may examine the lists and are encouraged to independently investigate the area surrounding this property in order to become familiar with any off-site conditions which may affect the value of the property. In cases where a property is located near the border of a municipality, purchasers may wish to also examine the list maintained by the neighboring municipality."

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

i. Licensees who possess actual knowledge of an off-site condition which may materially affect the value of residential real estate other than newly constructed properties shall disclose that information to prospective purchasers of such residential real estate affected by the condition. That disclosure shall be made prior to the signing of the contract by a prospective purchaser.

ii. In cases where the licensee did not possess actual knowledge of the presence of an off-site condition which might materially affect the value of the residential real estate, by virtue of including the foregoing statement in a contract of sale prepared by him or her, the licensee shall be deemed to have fulfilled his or her disclosure obligations under (c) above with respect to such off-site conditions.

3. As used in this subsection, the following words and terms shall have the following meanings:

i. "Newly constructed" means any dwelling unit not previously occupied, excluding dwelling units constructed solely for lease and units governed by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5402 et seq.

ii. "Off-site conditions" refers to the following conditions as set forth in the New Residential Construction Off-Site Conditions Disclosure Act, N.J.S.A. 46:3C-3 (P.L. 1995 c.253), or as amended:

(1) The latest Department of Environmental Protection listing of sites included on the National Priorities List pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. §§ 9601 et seq.;

(2) The latest sites known to and confirmed by the Department of Environmental Protection and included on the New Jersey master list of known hazardous discharge sites, prepared pursuant to P.L. 1982, c.202 (N.J.S.A. 58.10-23.15 et seq.);

(3) Overhead electric utility transmission lines conducting 240,000 volts or more;

- (4) Electrical transformer substations;
- (5) Underground gas transmission lines as defined in 49 C.F.R. 192.3;
- (6) Sewer pump stations of a capacity equal to, or in excess of 0.5 million gallons per day and sewer trunk lines in excess of 15 inches in diameter;

- (7) Sanitary landfill facilities as defined pursuant to section 3 of P.L. 1970, c.39 (N.J.S.A. 13:1E-3);
- (8) Public wastewater treatment facilities; and