Real Estate Brokerage: Affirmative Advertising Disclosure Requirement

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On April 19, 2016, the New York Department of State, in an opinion letter, amplified its advertising requirements for real estate brokers, associate real estate brokers, and real estate salespersons (collectively "real estate brokers"). [1] The statute at RPL §441-c empowers the Department of State to discipline real estate brokers for "dishonest or misleading advertising." The regulation at 19 NYCRR 175.25 sets forth all of the real estate brokers' advertising regulations. Subsection (c)(9) of the regulation provides, in relation to the topic of property description requirements, that "[a]dvertisments shall include an honest and accurate description of the property to be sold or leased." However, until April 19, 2016, it was unclear if real estate brokers were responsible, and subject to Department of State discipline, for omissions rather than affirmative misstatements within their advertisements. We now know that they are.

On April 19, 2016, the Department of State opined that "a licensee who fails to include in an advertisement or otherwise disclose that a property is defective also commits an error of omission and fails to deal equitably and competently with the public." The Department of State explained that "where a broker has actual knowledge that a property lacks a permit or is otherwise illegal (i.e., illegal conversion), such information must be affirmatively disclosed." Still further, the Department of State recommended "that the best practice for all licensees is to make a reasonable effort to verify the legal status of the properties they are offering." However, the Department made clear in the opinion letter that it does not permit "an agent to be ignorant of the legal status of a property which is being marketed." In fact, the Department cited the First Department's holding in *23 Realty Associates v. Teigman* for the rule that "[a] real estate broker should have a working knowledge of the legal status of the property he is marketing."[2] So, ignorance is not bliss.

Now, real estate brokers should understand that their licensed duty is to affirmatively disclose any known defects (i.e., zoning violations) concerning their listed property in all of their advertisements. In fact, such brokers must have a working knowledge of the property's defects and cannot feign ignorance. However, there is no express definition of the term "working knowledge" in the opinion letter, statute, or regulation. In fact, *23 Realty Associates*, the cited case for the Department of State's adopted working knowledge standard, does not define the term either. In that case, the working knowledge at issue was knowledge that leasehold space of rent-stabilized apartments could not be available in a hotel unless the owner applied to the Division of Housing and Community Renewal ("DHCR") for reclassification of the premises. If comparable knowledge to understanding DHCR standards for rent-stabilized hotels is being required of real estate brokers, the Department of State is placing an onerous burden, which borders on the unauthorized practice of law, on its licensees.

Irrespective of the onerous nature of the burden, the exposure for non-compliance by real estate brokers makes it imprudent for them to ignore the Department of State's amplified disclosure duty on real estate brokers. The Department of State's disciplinary power, at RPL §441-c, includes license revocation or suspension, fines not exceeding $1,000, or reprimand. Furthermore, the opinion letter advised that a brokerage commission is jeopardized from non-compliance. Still further, the opinion letter, while citing to *McDermott v. Related Assets, LLC*, suggested that "publishing inaccurate information regarding a property being marketed" subjects a real estate broker to a cause of action for "negligence in exercising duty diligence."[3]

Accordingly, it is expected that the April 19, 2016 opinion letter will rock the real estate brokerage world and usher in an era of professionalism for real estate brokers in the macro. Yet, does any of this really protect buyers in real estate transactions in the micro? Beyond potentially avoiding a commission, which a buyer typically does not pay on Long Island as a matter of practice anyway, the buyer is stuck with caveat emptor. Therefore, it is suggested that it remains the job of buyer's counsel to protect his buyer client from any errors of omission in real estate advertisements.

It is suggested that a contract rider paragraph is requested by buyer's counsel representing that all advertisements by the real estate broker are true and accurate. An example of such a paragraph is set forth as follows: "Seller warrants that all representations made on the listing set forth at/on the _____ listing are true and accurate. Should any representations be false, the Purchaser in its sole discretion may unilaterally cancel this contract upon written notice to Seller."

Moving forward, it is noted that opinion letters of the Department of State are not statutes, regulations, or case law, and as such, are not binding authority, but instead such opinions only serve as guidance of the Department of State's position in addressing future license law complaints. With respect to the newly understood requirement of having a "working knowledge," it is suggested that a precise definition be provided for what specific knowledge satisfies this requirement before any license law violations are pursued against real estate brokers by the Department of State. Otherwise, real estate brokers are expected to defend a prospective license law complaint by arguing that the new regulatory framework is void for vagueness. Additionally, it is suggested that such a game changing duty to affirmatively disclose defects in advertise-

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ENCRYPTION ...

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Encryption software likely came with your operating system, however, such as BitLocker in Microsoft Windows[11] and FileVault in Apple OS X.[12]

These programs and third-party software can also encrypt desktop, laptops, and portable hard drives.[13] Smart phones or tablets can even more easily be encrypted,[14] and cloud storage apps can even be set to require their own passcode, a valuable feature when devices are shared. Encryption is particularly important for personal computers and devices, as these are more easily stolen or lost. Indeed, before encrypting devices firms should consider which confidential information, if any, should even be stored other than on the server.

Firms that use cloud storage services should verify that their provider is already automatically encrypting data to contemporary standards. Any reputable vendor should tell you where your data will be stored, what security mechanisms are in place, and how they will ensure data security, reliability, and availability.[15] Dropbox, for example, offers pages of detail about its security architecture and certifications of reliability.[16]

Encrypting "Data in Motion"

Anyone can set up a wireless network with a store-bought router, but that network might not be encrypted by default, or even password-protected. Whether your network is DIY or professionally administered, it should be set to require a strong password and to encrypt traffic with the latest protocols, either WPA (Wireless Protected Access) or WPA2.[17]

Encrypting e-mails is somewhat more involved, at least at the outset, because the recipient is likely outside of your network. Once set up, however, users can easily and routinely use encrypted e-mails with clients and even opposing counsel.

To encrypt an e-mail, sender and recipient must each have encryption keys expressly for e-mail. These can be obtained from commercial entities or generate by users with third-party software.[18] Before e-mails can be sent, sender and recipient must exchange their encryption keys, also known in the e-mail context as "public keys," and save them in their respective e-mail address books. As explained below, users should never exchange their e-mail decryption keys, also known as "private keys."

The sender encrypts the e-mail with the recipient's public key, and "signs" the e-mail with their own private key. The recipient then uses the sender's public key to verify the sender, and decrypts the e-mail with their own public key. Since the public keys have been exchanged, all this should happen "in the background." The private keys here are effectively each party's password to secure the message, and therefore must be kept secret.

E-mail browsers like Microsoft Outlook and Mozilla's Thunderbird allow users to incorporate their encryption keys, and then encrypt individual messages with a few clicks or encrypt all messages by default.[19] Web-based e-mail services like Gmail may encrypt messages in transit, but for "end-to-end" encryption, where e-mails are still secure in the recipient's inbox, users will have to install third-party "plugins" in their web browsers.[20]

Encryption and the Paperless Practice

Encryption should put to rest any concerns about paperless document storage. Wherever they keep their data, attorneys can use encryption to keep confidential information secure. Indeed, online storage may be more secure than paper documents: are your file cabinets always locked?

Similarly, encryption should also overcome any concerns about sharing electronic documents, paving the way for paperless discovery. Attorneys could post their public keys on their web sites or with a public key server, essentially an online directory for public keys.[21] Counsel could then stipulate to accept discovery production at specified addresses, and then exchange discovery demands and responses via e-mail.

While we may gradually migrate to a paperless office, and with e-filing be forced into paperless litigation, paperless discovery will not arrive without cooperation among opposing counsel, and some convincing of less tech-savvy practitioners. If enough attorneys see the benefits of encryption, however, then one day document discovery could be as easy and inexpensive as sending an e-mail, and more secure than ever.

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1. netdocuments, *File Sizes and Types,* at http://bit.ly/2bOviEG (estimating 10,000 PDF pages per gigabyte). A one-terabyte hard drive, holding 1,000 gigabytes, can be had at Staples for $59.99
2. "PDF" (Portable Document Format) is the recommended file format for document storage because it embeds in each file all the fonts and formatting needed for viewing on any computer. "PDF/A," a subspecies of PDF with added features for archival purposes, is the required format for e-filing. *See* 22 NYCRR §§ 202.5–b(d)(1)(i).
3. NYSBA Comm. on Prof. Ethics Op. 1019 (Aug. 6, 2014)(listing ethics opinions approving cloud storage and e-mail).
4. Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal,* The Wall Street Journal, Mar. 29, 2016, http://on.wsj.com/1MzYlN2; *A Single Stolen, Unencrypted Laptop Can Cost Entities Millions of Dollars,* wyatthitechlaw.com, http://bit.ly/2bOvT9y.
5. David G. Ries, John W. Simek, *Encryption Made Simple for Lawyers,* GPSolo, v. 29 no. 6, Nov./Dec. 2012, http://bit.ly/SAaU0v.
6. Randy Garland, *Encryption vs. Password Protection: A Matter of Acceptable Risk,* http://bit.ly/2c2cGTA.
7. *Id.*
8. Don Lee, *Is Encryption Required by HIPAA? Yes.,* http://bit.ly/2bPLrLT.
9. Ries & Simek, *supra* n.5.
10. Amazon Web Services, *Securing Data at Rest with Encryption,* http://bit.ly/2bGhuNZ.
11. TechNet, *Windows BitLocker Drive Encryption Step-by-Step Guide,* http://bit.ly/2bPd3mZ.
12. Apple Support, *Use FileVault to encrypt the startup disk on your Mac,* http://apple.co/1SZKQIL.
13. Eric Griffith, *How to Encrypt Data on External Drives,* http://bit.ly/2bTbGkS.
14. Chris Smith, *How to encrypt iPhone and Android, and why you should do it now,* http://bit.ly/2bz8VY3.
15. Arun Taneja, *Ten questions to help compare cloud storage services,* http://bit.ly/2bPerSh.
16. *E.g.,* Dropbox Business Trust Guide, http://bit.ly/2bO4aXe.
17. Becky Waring, *How to Secure Your Wireless Network,* http://bit.ly/2bS2rmp.
18. Ries & Simek, *supra* n.5; Gina Trapani, *How to encrypt your e-mail,* http://bit.ly/XCMxl6.
19. Microsoft Office Support, *Encrypt e-mail messages,* http://bit.ly/1ES6amL; Microsoft Office Support, *Secure messages with a digital signature,* http://bit.ly/2bKlfAw; Mozilla Support, *Digitally Signing and Encrypting Messages,* at https://mzl.la/1lAQlMJ.
20. Instructables.com, *Encrypt your Gmail Email!,* http://bit.ly/2bJRKmU.
21. *E.g.,* keyserver.pgp.com.

NATURALIZING ...

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While many individuals are able to navigate the naturalization process themselves, others, especially those with an arrest history, may require the assistance of an experienced immigration attorney. Certain convictions may not only result in the denial of the naturalization application, but in the applicant being taken into ICE custody and placed into deportation proceedings.[12] "Convictions," in an immigration context, includes cases involving deferred adjudications of guilt, as well as certain treatment court types of dispositions, involving an initial guilty plea, even where it may subsequently be vacated. Review by an attorney prior to applying to naturalize can avoid much heartache and expense. In some instances, counsel may be able to find a legal basis for reopening or vacating a prior, problematic conviction. Vacatur of a criminal conviction will only be given legal force and effect where it is based upon some substantive legal error in the underlying criminal proceedings, and not simply to avoid the harshness of U.S. immigration law.[13]

Most importantly, a person who plans to apply to naturalize should be sure to avoid the use of a "notario," or representative of a "multi-service" agency, or any other person practicing law without a license. Frequently, unlicensed individuals improperly complete immigration applications, make false or inaccurate statements, or material omissions, resulting in not only the denial of the application, but also in a finding of fraud.[14] This finding, can bar future immigration benefits and result in referral for deportation proceedings. Historically, these predators are notorious not only for giving erroneous legal advice, but also for disappearing with their clients' money.

A lawful permanent resident gains many important, concrete, benefits by naturalizing. Perhaps, however, what is most important, is what an individual's decision to naturalize actually represents: a conscious decision on the part of the immigrant to fully incorporate himself into the nation which he has made his home. Each time that decision is made--out of the many, from many--we become one: a stronger and more diverse nation.

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1. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *See* INA § 240 (setting forth procedures governing deportation-removal proceedings).
2. Federal Bureau of Investigation, Crime in the United States, 2014 Report, https://www.fbi.gov/news/stories/latest-crime-stats-released.
3. 8 USC § 1226 (providing the authority for ICE to take into custody, and to hold during the pendency of deportation, non-citizens convicted of an extremely wide variety of criminal offenses).
4. *See* 8 USC § 1229(b) (setting forth requirements for eligibility for cancellation of removal).
5. *See* 8 USC § 1182 (a)(2)(A) (setting forth criminal grounds of inadmissibility for individuals seeking legal admission to the U.S., including lawful permanent residents who have traveled abroad and are seeking readmission); 8 U.S.C. §1227(a)(2)(A) (setting forth criminal grounds of deportability). The criminal grounds of deportability include, by reference, a conviction for any offense classified as an aggravated felony, as defined at 8 U.S.C. §101(a)(43)(A)-(U).
6. 8 USC § 1101(a)(43)(A)-(U).
7. 8 USC § 1451(a) (stating that concealment of material evidence or willful misrepresentation during the application process may later result in denaturalization).
8. An "immediate relative" is defined as a parent, spouse or child.
9. Child Citizenship Act, 8 USC § 1431.
10. Under 8 CFR § 316.10 (a)(1), an applicant for naturalization must be of good moral character during the statutory period (5 years) prior to applying, during the application process, as well as during the period between examination and the oath ceremony. *See* 8 USC § 1101(f) (setting forth statutory eligibility for good moral character).
11. 8 USC § 1423(b)(2).
12. 8 USC § 1101(a)(48) (defining "conviction").
13. *See Matter of Pickering*, 23 I & N Dec. 621, 624 (BIA 2003); *but see Padilla v. Kentucky*, 559 U.S. 356 (2010) (vacating a non-citizen's criminal conviction after finding ineffective assistance of counsel due to defense counsel's failure to advise his non-citizen client that his plea of guilty would render him deportable).
14. *Keaik v. Dedvukay*, 557 F. Supp. 2d 820 (E.D. Mich. 2008) (finding that failure to reveal and produce all records of traffic violations amounts to "false testimony," barring good moral character under 8 USC § 1101(f)); *see also Aboud v. INS*, 876 F. Supp. 938 (S.D. Ohio) (denying naturalization for false testimony, and for failure to disclose prior arrests and prior work history on application and subsequent interview).

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ments would have more legitimacy if it were passed by the legislature, or even through the regulatory process by the New York State Board of Real Estate, rather than simply by the Department of State in an informal opinion letter.

In all, real estate brokers should heed the direction of the Department of State and make the affirmative advertising disclosures irrespective of the legitimacy of the opinion letter because so acting will strengthen our communities as a whole. As a result of compliant disclosures, there will be more transparency in the real estate industry where zoning compliance will no longer be a mystery for buyers. However, in fulfilling their obligation to affirmatively disclose known defects in advertising, real estate brokers should warn their sellers that code enforcement can also read these advertisements. In such instances, a real estate broker's compliance with the opinion letter will direct code enforcement that a given property is non-compliant with the local zoning code. This places real estate brokers in a catch-22 where fulfilling their advertising requirement could breach their fiduciary duty, absent informed consent, to their clients by placing their clients in exposure to tickets from code enforcement. Because of this great dilemma created by the April 19, 2016 opinion letter, it is suggested that the legislature should confirm, modify, or limit this opinion letter because it virtually places real estate brokers in the involuntary role of citizen code enforcement. Such a decision should have the legitimacy of being determined by our duly elected representatives before being enforced.

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1. Opinion Letter from New York Department of State to Lieb School (April 19, 2016) (on file with author).
2. 213 A.D.2d 306 (1st Dept. 1995).
3. 45 Misc.3d 1205(A) (Civ Ct, Richmond Cty. 2014).