

E-COMMERCE: BEWARE THE E-GIFT BEFORE YOUR E-GATES!

by J. Robert Eckley

I've been saying it in seminars in Arizona and all over the country for the last decade. I've written about it at length in this publication and others more times than anyone probably cared to read. *And as far as I know, nobody in the organized real estate industry has ever believed me.* Not the local real estate trade organizations or their attorneys, not MLS systems, not NAR, not the brokerages or their counselors. *They likely still don't.* But vindication sometimes comes to those who persist! And the cavalry who rode to my rescue during the last year has the artillery, brass and banners to command far more attention from this crowd than I do.

My foxhole is now occupied by the likes of the Association of Real Estate License Law Officials (ARELLO), composed of most state commissioners of real estate across the country, the drafters of the Uniform Electronic Transaction Act (UETA) (backed by the biggest Wall Street and legal lobbies in the country, a version now having passed in California and being presently before the U.S. Congress) and even the Arizona Department of Real Estate (in passing Rule R4-28-502 [L]), as well as numerous state legislatures governing licensing and commerce. Good company to have in a show down!

The rallying point? My proposition that most e-commerce in real estate as it is currently conducted is either illegal, unenforceable, or on such "fuzzy" legal grounds as to be positively spooky! That's what I said! "Going global"--leaving your state of licensure and substantive law--which is precisely what you do in fact when you e-lectrify your real estate practice, carries with it both terrific market promises...and some truly awesome new legal challenges and ramifications. They are the same hurdles that faced real estate and banking lawyers twenty years ago when the deregulated real estate and financial community they served left it's traditional local forums and swept across state lines in search of business, accidentally catapulting the services of it's local professionals into states in which they were not licensed. As a more telling commentary: To date, no bar association has yet been capable of clearly identifying what constitutes pure "*local practice.*" And if the lawyers can't figure it out for their own licensees, can the real estate profession figure it out for theirs?

Well, to its credit, the real estate authorities are giving it a mighty try right now and you need to know the ground rules that have been laid so far. A good shorthand for them is found in the ARELLO "Internet Policy" statement now at www.arello.org and in the thinking behind the UETA.

First, soliciting properties or one's real estate services on the internet IS seeking to practice the real estate profession EVERYWHERE THE INTERNET CAN REACH (including states and countries in which one is not licensed) unless one makes it clear in writing in the medium used that the solicitation is purely for properties found or services to be rendered in one's state(s) of licensing (and identifying that or those). A licensee has an affirmative duty to disclose that limitation in every single one of their solicitations and exchanges in the e-medium.

Second, the licensee should avoid professional communication with anyone obtained through the e-medium from outside their state(s) of licensing unless the above notices and disclosures are

first given in writing in the medium to which the respondent is responding. The licensee should avoid rendering professional work for client or customers regarding a property outside of his state of licensing unless he associates a licensee from the state where the property is situate which complies with the laws of both his state of licensing and the state where the property is situate.

Third, the notices and disclosures above should be on every page of the e-medium and in every communication to the respondent of any kind promoted by it, whether expressly or by a link to a separate notice and disclosure page.

Fourth, the licensee should fully disclose all material aspects of a listing and should update it within 72 hours of any change.

Fifth, a licensee should not advertise any other licensee's listing and should not in any event alter the other licensee's online display or information without express, in advance written permission from that licensee. Licensees should avoid whenever possible displaying ANY listing information that is not directly controlled by them.

Sixth, ALL e-displays or e-communication to commence or further professional purposes (listing, general advertising of real estate product or services, newsgroup appearances, on-line chats, bulletin boards, voice over net (VON) is considered "advertising" and will be tested for "truth-in-advertising." This means not only the initial publications, but also all follow-ups, as long as they originated from an e-solicitation or contact.

Seventh, local jurisdictions have authority over any media available in their jurisdiction if it appears to target land, customers or clients in the jurisdiction. That means the laws of licensure and conduct and the reach of the local courts to offenders will apply. Jurisdiction will be deemed expressly granted if that locale is not expressly EXCLUDED in the media making the contact or if, notwithstanding the express exclusion, there is any appreciable impact on property or people inside the jurisdiction. For an Arizona rendition of at least part of that principle, see the new R4-28-502 (L) of the Commissioner's Rules. It provides that electronic real estate transmissions impacting Arizona residents (apparently regardless of where the property is located) will be tested under the fairly astringent advertising statutes. As an interesting anecdote to R4-28-502 (L): Would the MLS--an "electronic media" we formerly thought of as "purely our own"--not now be subject to the tough "truth and disclosure" tests of the Arizona consumer advertising statutes?

Eighth, e-contracts may not be enforceable unless the state in which both sides reside have laws which validate them. Arizona has tended to enforce them, but half the states and a lot of foreign countries won't. The UETA before Congress and a number of the states is trying to fix that for the very obvious reason that if it isn't then all e-commerce would come to a screeching halt.

Ninth, absent written consent in advance to do otherwise, there is a duty and a liability to clients and even to casual e-customers to keep their e-communications and e-information with you confidential. You probably do not even have the right to plant "cookies" in a respondent's inquiry. You need to be able to show serious anti-hacking and other e-programming steps having

been undertaken to protect your site and to avoid invasion of the respondent's. Side inquiry: And where on earth does one get those at this point?

The ARELLO guidelines and the UETA are not law....yet. They are, however, national-level policy bellwethers brought on by the entirely-plausible spectacle of economic, legal and privacy e-chaos in the immediate future without some uniform ground rules: Rules that balance local rights with national commerce, rules that facilitate the huge multi-state demographic movements of our time; rules that do not change every time someone logs on a local e-listing randomly pulled down by a shopper in Chicago or e-mails a proposal to a prospect in Pasadena. In the e-world, these people are no further than "across the street" and when the world is now this compressed, the functional law a little more than an arm's length to the keyboard should not so drastically change.

If Congress is already on this one--a body usually earmarked as the last bastion for innovation ("D.C." being commonly suspected as the abbreviation for "Darkness and Confusion")--it's probably time for your real estate lawyer to review your entire e-site. That means language, displays, and particularly your jurisdiction disclosures, acknowledgement and consent recording methods, e-links and staff manual of e-procedures!

And as to those brokers, lawyers or organizational spokespeople who continues even after the current evidence to see nothing more than a Trojan Horse before your professional gates?
'Nuff said!.

=====

J. Robert Eckley is a construction lawyer, licensee, Realtor and builder. His local number is (602) 952-1177.