

WEBSITES, SOCIAL MEDIA AND THE DOS ENFORCING THE ADVERTISING REGULATIONS

By John Dolgetta, Esq.

Posting on social media platforms, such as Facebook, Instagram or Twitter, has become commonplace for real estate professionals. Every day agents post new listings, photos, open houses and much more on their social media sites, and may not even realize that they are engaging in advertising. It is important to be aware that any advertisement, in whatever form or medium, is subject to New York State's Advertising Regulations ("DOS Regulations" or "Regulations") (*see* <https://on.ny.gov/2rtdBV3>).

There is no distinction made under the Regulations regarding advertising through a website, conducting email campaigns or posting on social media sites. All of these forms of advertising are subject to the DOS Regulations and all licensees are required to adhere to them. Licensees should always have the latest copy of the Real Estate License Law at their disposal, a copy of which can be found on the New York State Department of State website (*see* <https://on.ny.gov/2wpekvl>).

NYSAR Tools and Guidance Relating to Advertising

New York State Association of Realtors® ("NYSAR") counsel, S. Anthony Gatto, Esq., explains that real estate advertising is "[a]nything done by a licensee where the intent is to promote your ability to provide licensed services as a means to solicit potential consumers to utilize your services...." NYSAR provides extremely useful resources on its website relating to the DOS Regulations and how to deal with issues relating to internet and social media advertising (*see* <https://bit.ly/2wnLTOj>). Recently, Attorney Gatto indicated that "NYSAR has been informed that the New York State Department of State Division of Licensing Services ("DOS") has begun auditing broker websites for compliance with the Regulations. It is NYSAR's understanding that the audits are initiated by the DOS and are not based upon consumer complaints." The DOS seems to be departing from past practices and taking a more proactive approach.

NYSAR recommends that "[b]rokers should make a thorough review of their websites for compliance with the advertising regulations" and further notes that "...any website operated by a broker or an associated licensee of the broker qualifies as a broker website, since only a broker is authorized to place an advertisement." Brokers must ensure that all of their agents and teams established by these agents are in compliance with the DOS Regulations.

NYSAR points out that the review should include such things as the proper use of license types (i.e., "broker", "associate broker" or "licensed real estate salesperson), ensuring that the name and the address or phone number of the brokerage firm appear on the advertisement, and that there is a link directing a consumer back to the brokerage firm's main website. While the DOS Regulations reference websites, it is important to note that they apply equally to all forms of social media sites (i.e., Facebook pages, and Twitter and Instagram posts).

One of the most effective marketing tools for licensees in this fast-paced, ever growing technological environment is no longer posting a “for sale” sign or holding open houses, but rather, with one click of the mouse, sharing a listing or advertisement through a social media site or via an email. However, when doing so, it is important that licensees understand they must adhere to the DOS Regulations, which are in place to protect consumers.

NAR Guidance on Advertising and the Code of Ethics

The National Association of Realtors® (“NAR”) also provides guidance and has issued its own NAR Internet Advertising Policy and Model Internet Advertising Rule ([see https://bit.ly/2I3f4rv](https://bit.ly/2I3f4rv)) which is to be used in conjunction with the DOS Regulations. The NAR Model Rule details the specific information that is to be included on all internet advertising, such as, among other things, the city in which the property is located, the firm’s exact name (as registered with the DOS or applicable state agency), where the firm and agent are licensed and the address of the brokerage office. One important requirement under the NAR Model Rule (Paragraph 8) is that “[l]icensed entities may display and distribute, electronically or otherwise, information about properties listed by other licensed entities [or individuals] *only* [emphasis added] with the authorization of the listing broker.” Therefore, agents must exercise care when sharing listings on a website or social media site, so as to not share listings that belong to other brokerage firms.

Article 12 of NAR’s Code of Ethics states, in part, that “REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional.” With the tremendous growth of online marketing, especially Facebook and other social media platforms, agents and brokers must be certain to adhere to the DOS Regulations, and, where REALTORS® are involved, to NAR’s requirements and its Code of Ethics.

Section 175.25 – Advertising Regulations Revisited!

Section 175.25(a) defines “[a]dvertising” or an “advertisement” as a “...promotion and solicitation related to licensed real estate activity, including but not limited to, advertising via mail, telephone, websites, e-mail, electronic bulletin boards, business cards, signs, billboards, and flyers.” For purposes of the DOS Regulations, although not specifically mentioned, all social media sites are included within the above definition and are treated as websites. Section 175.25(b) clarifies that “advertising” or an “advertisement” does *not* include commentary made by a licensee “...that is not related to promoting licensed real estate activity.” Therefore, opinions or commentary relating to the general real estate industry or profession and not made specifically in connection with “promotion” or “solicitation” of specific properties or specific real estate transactions are not subject to the Regulations.

The Placement of Ads

As indicated above, it is important to note that under Section 175.25(b) “[o]nly a real estate broker is permitted to place, or cause to be placed, advertisements.” This means that the broker must review and approve all advertisements that are published on the web, social media platforms, websites, or any other media by any licensee affiliated with the brokerage firm and any teams operated by licensees affiliated with the brokerage.

In addition, Section 175.25(b) states that “[a]dvertisements placed or caused to be published by an associate real estate broker, a real estate salesperson or a team for the sale or lease of property listed with or represented by a real estate broker are not permitted except where the property is listed with or represented by the real estate broker with whom the associate real estate broker, real estate salesperson or team placing the ad is associated and said real estate broker approved placement of the advertisement.” Accordingly, all ads must relate to properties listed by the principal broker or brokerage firm and, again, the ads must be approved by the principal broker of record or a manager in the firm.

The Authorization Required to Place Ads and Copyright Issues

Another important element that may be overlooked is the fact that all ads must be placed with the consent of the property owner or, in the case of a listing held by another broker under an exclusive listing, with the written consent of such broker. Many times, agents will post ads on a social media site in connection with the sale of a property, an open house, or some other aspect of a transaction, and may do so spontaneously and without the knowledge of the owner. Even sharing the link of a listing held with another brokerage is prohibited under the Regulations.

Liability can also arise from copyright infringement. It is presumed that the individual who takes a picture owns the copyright to that photograph. The rights can then be assigned by the owner, in whole or in part, on a limited or unlimited basis, to any third party. It is important to note that when an agent creates an account on a social media site, the agent must agree to that site’s “Terms of Use,” which many times includes an assignment of rights in photographs posted on these sites.

If a licensee would like to post a photograph of a particular property which he or she did not take or has no rights to, the licensee must contact the individual who took the photograph or the owner of the copyrighted materials and obtain express written consent from the owner. Section 175.25(b)(2)(c) specifically provides that “[p]hotographs of property that are posted on a real estate broker’s website shall not be used or reproduced without written permission from the copyright holder of such photographs.” Exposure to copyright infringement claims exists when agents share photos on Facebook, Twitter or other media. This is extremely important as technology allows users to instantaneously share another person’s listing or copyrighted materials with just one click.

The “Content of Advertisements”

Section 175.25(c)(1) requires that all ads must “...indicate that the advertiser is a real estate broker and provide the name of the real estate broker or real estate brokerage and either: (i) the full address of the real estate broker or real estate brokerage or, (ii) the telephone number

of the real estate broker or brokerage.” It is important to note that this requirement not only applies to all of the web pages of a website but also applies to each and every social media page or post.

The Regulations, as they currently stand, do not specifically allow an agent to include a hyperlink that would direct a consumer to the above information. Rather, each page or posting must include the required information. Of course, this may be difficult or nearly impossible especially where the social media platform limits the number of characters one can use in a post or ad. Until the DOS provides specific guidance, or the Regulations are amended, a real estate licensee or brokerage firm has no choice but to adhere to the Regulations. We are hopeful that the DOS will address this issue in the near future and recognize the need for reasonable flexibility.

Salespersons and Teams: Web-Based Advertising Requirements Under the DOS Regulations

Section 175.25(3) specifically deals with the use of web-based advertising and provides that “[w]ebsites created and maintained by associate real estate brokers, real estate salespersons and teams are permitted, provided that said associate real estate brokers, real estate salespersons and teams are duly authorized by their supervising real estate broker to create and maintain such websites and such websites remain subject to the supervision of the real estate broker with whom the licensees are associated while the website is live. Such websites shall be directly linked to the website of the broker with whom the licensees are associated unless the broker does not have a website.” Section 175.25(3)(b) also requires, as indicated previously, that “[e]very page of such a website shall include the information required by these rules and regulations.”

The Ever-Changing Advertising Landscape on the Web and Social Media

While a licensee may feel that it is necessary to post every aspect of a real estate transaction on a website, or a social media web page such as Facebook, Twitter or Instagram, one must be cognizant that these posts are a form of advertisement and subject to the Regulations. Licensees are required to ensure that any advertisement complies with the New York State Real Estate License Law and DOS Regulations, and to the extent applicable, the NAR Code of Ethics and Copyright laws. Further, the broker is required to supervise and approve all advertising before it goes live. Brokers should implement specific office policies that govern how associate brokers, licensed real estate salespersons and teams engage in advertising, especially in light of the potential risks if the DOS begins to actively audit websites. Rest assured that there will be an inevitable treasure trove of violations which will cost brokers and agents thousand of dollars in fines and potential legal expenses.

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