

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.210.641 unprofessional)
conduct)

TO: All Concerned Persons

1. On December 24, 2008, the Board of Realty Regulation (board) published MAR Notice No. 24-210-33 regarding the public hearing on the proposed amendment of the above-stated rule, at page 2580 of the 2008 Montana Administrative Register, issue no. 24.

2. On January 16, 2009, a public hearing was held on the proposed amendment of the above-stated rule in Helena. Several comments were received by the January 26, 2009, deadline.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: A number of commenters asked the board to amend the statutory definition of "negotiations" at 37-51-102(15), MCA, and suggested the board delete sections (a) and (b) from the definition.

RESPONSE 1: The board notes that the amendments to ARM 24.210.641 were proposed through the administrative rulemaking process. Statutory amendments are beyond the scope of this notice and must be accomplished through the legislative process.

COMMENT 2: Two commenters stated their general support of the amendments.

RESPONSE 2: The board appreciates all comments made in the rulemaking process.

COMMENT 3: Several commenters requested clarification of when an agent begins acting as a buyer agent and therefore is required to have a signed buyer broker agreement. Some commenters believe the requirement begins when negotiations commence and others suggested that negotiations only begin upon the occurrence of certain actions. Commenters stated that the proposed language regarding having a signed buyer broker agreement prior to acting as a buyer agent is ambiguous.

RESPONSE 3: The board previously determined there is confusion concerning the requirement for a signed buyer broker agreement. A buyer agent is defined in statute as someone acting as an agent of the buyer pursuant to a buyer broker

agreement. Including the act of serving as a buyer agent without a buyer broker agreement as unprofessional conduct merely reinforces the requirement to have a buyer broker agreement.

COMMENT 4: A few commenters objected to the limited time they had to respond to the proposed amendments.

RESPONSE 4: The board notes that the amendments have been on the board's agenda and discussed by the board for a significant period of time before being proposed as a rule change. This is the second time this issue has been noticed for public comment. The board has complied with all statutory rulemaking timelines and has concluded that adequate opportunity for comment and input has been allowed.

COMMENT 5: Several commenters requested the board further clarify the definition of "negotiations" and suggested the board adopt a dictionary definition to eliminate confusion or ambiguity when acting as a buyer's agent.

RESPONSE 5: The board notes that the definition of "negotiations" is set forth in statute at 37-51-102(15), MCA. The board proposed the rule amendments to clarify the negotiation requirements and the ability of a consumer to waive the duties owed by an agent. The board determined that further clarification is unnecessary.

COMMENT 6: One commenter stated that the board should not amend the rule as proposed as the amendments are unnecessary and will confuse consumers and licensees. The commenter used the board's decision on a declaratory ruling petition to support the position, claiming that the board concluded that definitions do not establish duties and do not prohibit a licensee from entering into agreements for services less than those included in a definition. The commenter opined that it is then difficult to understand why the board would now enact rules that require an agent to participate in negotiations after determining there is no mandatory duty to negotiate.

RESPONSE 6: The board considered the comment and disagrees. The board determined that this unprofessional conduct rule would establish duties where definitions cannot. This rule establishes duties, but also identifies how clients can opt out of the duties required of an agent. The board concluded that these two positions are not inconsistent.

COMMENT 7: One commenter encouraged the board to retain all sections of 37-51-102(15), MCA, and not delete sections (a) and (b).

RESPONSE 7: The board acknowledges the comment and notes again that statutes can only be amended via the legislative process.

4. The board has amended ARM 24.210.641 exactly as proposed.

BOARD OF REALTY REGULATION
CINDY WILLIS, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 4, 2009