

SENATE BILL NO. 243

INTRODUCED BY K. REGIER

A BILL FOR AN ACT ENTITLED: "AN ACT PROHIBITING DISCRIMINATION BASED ON THE FREE EXERCISE OF RELIGION OR THE FREEDOM OF SPEECH AND EXPRESSION IN THE REAL ESTATE INDUSTRY AND OTHER LICENSED PROFESSIONS OR OCCUPATIONS; PROVIDING THAT REQUIRING MEMBERSHIP IN AN ORGANIZATION TO ACCESS A MULTIPLE LISTING SERVICE IS AN UNFAIR METHOD OF COMPETITION; PROHIBITING THE INVESTIGATION OF A COMPLAINT AGAINST A LICENSED PROFESSIONAL FOR UNPROFESSIONAL CONDUCT BASED ON THE LICENSED PROFESSIONAL'S FREE EXERCISE OF RELIGION OR FREEDOM OF SPEECH AND EXPRESSION; PROVIDING THAT IT IS NOT UNPROFESSIONAL CONDUCT TO ENGAGE IN THE FREE EXERCISE OF RELIGION OR THE FREEDOM OF SPEECH AND EXPRESSION; PROVIDING THAT IT IS UNPROFESSIONAL CONDUCT TO AID OR ABET ANY PERSON OR ORGANIZATION IN TAKING ADVERSE ACTION AGAINST A LICENSED PROFESSIONAL BASED ON THE LICENSED PROFESSIONAL'S FREE EXERCISE OF RELIGION OR FREEDOM OF SPEECH AND EXPRESSION; AND AMENDING SECTIONS 28-10-103, 37-1-308, 37-1-316, 37-1-402, 37-1-410, AND 37-51-321, MCA."

WHEREAS, the First Amendment to the United States Constitution protects the free exercise of religion and the freedom of speech and expression; and

WHEREAS, Article II, section 5, of the Montana Constitution also protects the free exercise of religion; and

WHEREAS, Article II, section 7, of the Montana Constitution protects the freedom of speech and expression; and

WHEREAS, the United States Supreme Court has held that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); and

WHEREAS, the United States Supreme Court has held that "[t]he protection given speech and press

1 was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes
2 desired by the people.... All ideas having even the slightest redeeming social importance—unorthodox ideas,
3 controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the
4 guaranties," *Roth v. United States*, 354 U.S. 476, 484 (1957); and

5 WHEREAS, the United States Supreme Court has held that under the First Amendment, a government
6 "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'
7 Content-based laws—those that target speech based on its communicative content—are presumptively
8 unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve
9 compelling state interests," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Department of*
10 *Chicago v. Mosley*, 408 U.S. 92, 95 (1972); and citing *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 395 (1992);
11 and *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115, 118
12 (1991)); and

13 WHEREAS, the United States Supreme Court has held that "the First Amendment protects expression,
14 be it of the popular variety or not," *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000); and

15 WHEREAS, the United States Supreme Court has held that "the [First] Amendment embraces two
16 concepts, — freedom to believe and freedom to act," *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), and
17 that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious
18 doctrine one desires," *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S.
19 872, 877 (1990), and that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of
20 religious beliefs or restricts practices because of their religious nature," *Fulton v. City of Philadelphia*, 141 S. Ct.
21 1868, 1877 (2021); and

22 WHEREAS, the United States Supreme Court has explained that "[o]ur federal system prizes state
23 experimentation, but not 'state experimentation in the suppression of free speech,' and the same goes for the
24 free exercise of religion," *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting
25 *Boy Scouts of America*, 530 U.S. at 660); and

26 WHEREAS, the rights of free exercise of religion and freedom of speech and expression of all licensed
27 professionals are vulnerable to restrictive requirements from licensing associations and organizations; and

28 WHEREAS, the National Association of Realtors has declared that a realtor's exercise of the rights of

1 free exercise of religion and freedom of speech and expression by, for example, sharing one's beliefs on
2 current social issues or even reciting Bible verses, can constitute "hate speech" and subject the realtor to
3 onerous investigations, litigation, and discipline, even when such recitation occurs outside of business.

4
5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
6

7 **NEW SECTION. Section 1. Prohibited practices -- denial of access to multiple listing services.**

8 (1) It is an unfair method of competition under 30-14-103 for a real estate brokers' organization or any other
9 organization that controls, governs, owns, manages, or operates a multiple listing service to require
10 membership in the organization as a condition for a licensed broker or a salesperson as defined in 37-51-102 to
11 enjoy the full use of the multiple listing service.

12 (2) Access to any multiple listing service must be offered to all licensed brokers and salespersons
13 on an equal basis without regard to membership status in any organization.
14

15 **Section 2.** Section 28-10-103, MCA, is amended to read:

16 **"28-10-103. Actual versus ostensible agency -- limitation.** (1) An agency is either actual or
17 ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible
18 when the principal intentionally or by want of ordinary care causes a third person to believe another to be the
19 principal's agent when that person is not really employed by the principal.

20 (2) Except as provided in subsection (3), for purposes of a malpractice claim, as defined in 27-6-
21 103, liability may not be imposed on a health care provider, as defined in 27-6-103, for an act or omission by a
22 person or entity alleged to have been an ostensible agent of the health care provider at the time that the act or
23 omission occurred.

24 (3) (a) Subsection (2) is not applicable unless the health care provider has instituted a policy or
25 practice requiring persons providing independent professional services to have insurance of a type and in the
26 amount required by the rules and regulations of the medical staff, by the medical staff bylaws, or by other
27 similar health care facility rules or regulations. The insurance provided for in this subsection must be in effect
28 for the period of time during which a medical malpractice action must be brought as provided in 27-2-205.

(b) Failure of a health care provider providing independent professional services to comply with a policy or practice implementing subsection (3)(a) constitutes unprofessional conduct pursuant to ~~37-1-316(17)~~ 37-1-316(1)(q) and 37-2-304."

Section 3. Section 37-1-308, MCA, is amended to read:

"37-1-308. Unprofessional conduct -- complaint -- investigation -- immunity -- exceptions. (1)

Except as provided in subsections (4) and (5), a person, government, or private entity may submit a written complaint to the department charging a licensee or license applicant with a violation of this part and specifying the grounds for the complaint.

(2) If the department receives a written complaint or otherwise obtains information that a licensee or license applicant may have committed a violation of this part, the department may, with the concurrence of a member of the screening panel established in 37-1-307, investigate to determine whether there is reasonable cause to believe that the licensee or license applicant has committed the violation. However, if the written complaint or information that a licensee or license applicant may have violated a requirement of this part is based on the free exercise of religion or the freedom of speech and expression as protected under the Montana constitution the United States constitution, then the investigation of the licensee or license applicant must immediately cease and the complaint must be dismissed unless the alleged violation results from conduct that is not the free exercise of religion or the freedom of speech and expression.

(3) A person or private entity, but not a government entity, filing a complaint under this section in good faith is immune from suit in a civil action related to the filing or contents of the complaint.

(4) A person under legal custody of a county detention center or incarcerated under legal custody of the department of corrections may not file a complaint under subsection (1) against a licensed or certified provider of health care or rehabilitative services for services that were provided to the person while detained or confined in a county detention center or incarcerated under legal custody of the department of corrections unless the complaint is first reviewed by a correctional health care review team provided for in 37-1-331.

(5) A board member may file a complaint with the board on which the member serves or otherwise act in concert with a complainant in developing, authoring, or initiating a complaint to be filed with the board if the board member determines that there are reasonable grounds to believe that a particular statute, rule, or

1 standard has been violated."

2

3 **Section 4.** Section 37-1-316, MCA, is amended to read:

4 **"37-1-316. Unprofessional conduct.** (1) The following is unprofessional conduct for a licensee or
5 license applicant governed by this part:

6 ~~(1)~~(a) conviction, including conviction following a plea of nolo contendere, of a crime relating to or
7 committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or
8 theft, whether or not an appeal is pending;

9 ~~(2)~~(b) permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to
10 licensure or certification;

11 ~~(3)~~(c) fraud, misrepresentation, deception, or concealment of a material fact in applying for or
12 assisting in securing a license or license renewal or in taking an examination required for licensure;

13 ~~(4)~~(d) signing or issuing, in the licensee's professional capacity, a document or statement that the
14 licensee knows or reasonably ought to know contains a false or misleading statement;

15 ~~(5)~~(e) a misleading, deceptive, false, or fraudulent advertisement or other representation in the
16 conduct of the profession or occupation;

17 ~~(6)~~(f) offering, giving, or promising anything of value or benefit to a federal, state, or local
18 government employee or official for the purpose of influencing the employee or official to circumvent a federal,
19 state, or local law, rule, or ordinance governing the licensee's profession or occupation;

20 ~~(7)~~(g) denial, suspension, revocation, probation, fine, or other license restriction or discipline against
21 a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is
22 not on appeal, under judicial review, or has been satisfied;

23 ~~(8)~~(h) failure to comply with a term, condition, or limitation of a license by final order of a board;

24 ~~(9)~~(i) revealing confidential information obtained as the result of a professional relationship without
25 the prior consent of the recipient of services, except as authorized or required by law;

26 ~~(10)~~(j) use of alcohol, a habit-forming drug, or a controlled substance as defined in Title 50, chapter
27 32, to the extent that the use impairs the user physically or mentally in the performance of licensed professional
28 duties;

1 ~~(11)(k)~~ having a physical or mental disability that renders the licensee or license applicant unable to
2 practice the profession or occupation with reasonable skill and safety;

3 ~~(12)(l)~~ engaging in conduct in the course of one's practice while suffering from a contagious or
4 infectious disease involving serious risk to public health or without taking adequate precautions, including but
5 not limited to informed consent, protective gear, or cessation of practice;

6 ~~(13)(m)~~ misappropriating property or funds from a client or workplace or failing to comply with a board
7 rule regarding the accounting and distribution of a client's property or funds;

8 ~~(14)(n)~~ interference with an investigation or disciplinary proceeding by willful misrepresentation of
9 facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from
10 providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against
11 or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from
12 being filed, prosecuted, or completed;

13 ~~(15)(o)~~ assisting in the unlicensed practice of a profession or occupation or allowing another person or
14 organization to practice or offer to practice by use of the licensee's license;

15 ~~(16)(p)~~ failing to report the institution of or final action on a malpractice action, including a final decision
16 on appeal, against the licensee or of an action against the licensee by a:

17 ~~(a)(i)~~ peer review committee;

18 ~~(b)(ii)~~ professional association; or

19 ~~(c)(iii)~~ local, state, federal, territorial, provincial, or Indian tribal government;

20 ~~(17)(q)~~ failure of a health care provider, as defined in 27-6-103, to comply with a policy or practice
21 implementing 28-10-103(3)(a);

22 ~~(18)(r)~~ conduct that does not meet the generally accepted standards of practice. A certified copy of a
23 malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act
24 or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to
25 prove conduct that does not meet generally accepted standards.

26 ~~(19)(s)~~ the sole use of any electronic means, including teleconferencing, to obtain the information
27 required for the written certification and accompanying statements used to apply for a registry identification card
28 pursuant to Title 16, chapter 12, part 5.

(2) Notwithstanding the provisions of this section or any other provision of this title governing unprofessional conduct of a licensee or a license applicant under this title, it is not unprofessional conduct for a licensee or a license applicant under this title to engage in the free exercise of religion or the freedom of speech and expression as protected under the Montana constitution or the United States constitution."

Section 5. Section 37-1-402, MCA, is amended to read:

"37-1-402. Unprofessional conduct -- complaint -- investigation -- immunity. (1) A person, government, or private entity may submit a written complaint to the department charging a licensee or license applicant with a violation of this part and specifying the grounds for the complaint.

(2) If the department receives a written complaint or otherwise obtains information that a licensee or license applicant may have violated a requirement of this part, the department may investigate to determine whether there is reasonable cause to believe that the licensee or license applicant has committed the violation. However, if the written complaint or information that a licensee or license applicant may have violated a requirement of this part is based on the free exercise of religion or the freedom of speech and expression as protected under the Montana constitution or the United States constitution, then the investigation of the licensee or license applicant must immediately cease and the complaint must be dismissed unless the alleged violation results from conduct that is not the free exercise of religion or the freedom of speech and expression.

(3) A person or private entity, but not a government entity, filing a complaint under this section in good faith is immune from suit in a civil action related to the filing or contents of the complaint."

Section 6. Section 37-1-410, MCA, is amended to read:

"37-1-410. Unprofessional conduct. (1) The following is unprofessional conduct for a licensee or license applicant in a profession or occupation governed by this part:

~~(1)(a)~~ being convicted, including a conviction following a plea of nolo contendere and regardless of a pending appeal, of a crime relating to or committed during the course of practicing the person's profession or occupation or involving violence, the use or sale of drugs, fraud, deceit, or theft;

~~(2)(b)~~ permitting, aiding, abetting, or conspiring with a person to violate or circumvent a law relating to licensure or certification;

1 ~~(3)~~(c) committing fraud, misrepresentation, deception, or concealment of a material fact in applying
2 for or assisting in securing a license or license renewal or in taking an examination required for licensure;

3 ~~(4)~~(d) signing or issuing, in the licensee's professional capacity, a document or statement that the
4 licensee knows or reasonably ought to know contains a false or misleading statement;

5 ~~(5)~~(e) making a misleading, deceptive, false, or fraudulent advertisement or other representation in
6 the conduct of the profession or occupation;

7 ~~(6)~~(f) offering, giving, or promising anything of value or benefit to a federal, state, or local
8 government employee or official for the purpose of influencing the employee or official to circumvent a federal,
9 state, or local law, rule, or ordinance governing the licensee's profession or occupation;

10 ~~(7)~~(g) receiving a denial, suspension, revocation, probation, fine, or other license restriction or
11 discipline against a licensee by a state, province, territory, or Indian tribal government or the federal
12 government if the action is not on appeal or under judicial review or has been satisfied;

13 ~~(8)~~(h) failing to comply with a term, condition, or limitation of a license by final order of the
14 department;

15 ~~(9)~~(i) having a physical or mental disability that renders the licensee or license applicant unable to
16 practice the profession or occupation with reasonable skill and safety;

17 ~~(10)~~(j) misappropriating property or funds from a client or workplace or failing to comply with the
18 department's rule regarding the accounting and distribution of a client's property or funds;

19 ~~(11)~~(k) interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts,
20 failure to respond to department inquiries regarding a complaint against the licensee or license applicant, or the
21 use of threats or harassment against or inducement to a client or witness to prevent them from providing
22 evidence in a disciplinary proceeding or other legal action or use of threats or harassment against or
23 inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from
24 being filed, prosecuted, or completed;

25 ~~(12)~~(l) assisting in the unlicensed practice of a profession or occupation or allowing another person or
26 organization to practice or offer to practice the profession or occupation by use of the licensee's license;

27 ~~(13)~~(m) using alcohol, an illegal drug, or a dangerous drug, as defined in Title 50, chapter 32, to the
28 extent that the use impairs the user physically or mentally in the performance of licensed professional duties; or

(14)(n) exhibiting conduct that does not meet generally accepted standards of practice. A certified copy of a judgment against the licensee or license applicant or of a tort judgment in an action involving an act or omission occurring within the scope of practice and the course of the practice is considered conclusive evidence of but is not needed to prove conduct that does not meet generally accepted standards.

(2) Notwithstanding the provisions of this section or any other provision of this title governing unprofessional conduct of a licensee or a license applicant under this title, it is not unprofessional conduct for a licensee or a license applicant under this title to engage in the free exercise of religion or the freedom of speech and expression as protected under the Montana constitution or the United States constitution."

Section 7. Section 37-51-321, MCA, is amended to read:

"37-51-321. Unprofessional conduct -- sanction of license. (1) The following practices, in addition to the provisions of 37-1-316 and as provided in board rule, are considered unprofessional conduct for an applicant or a person licensed under this chapter:

(a) intentionally misleading, untruthful, or inaccurate advertising, whether printed or by radio, display, or other nature, if the advertising in any material particular or in any material way misrepresents any property, terms, values, policies, or services of the business conducted. A broker who operates under a franchise agreement engages in misleading, untruthful, or inaccurate advertising if in using the franchise name, the broker does not incorporate the broker's own name or the trade name, if any, by which the office is known in the franchise name or logotype. The board may not adopt advertising standards more stringent than those set forth in this subsection (1)(a).

(b) making any false promises of a character likely to influence, persuade, or induce;

(c) pursuing a continued and flagrant course of misrepresentation or making false promises through agents or salespersons or any medium of advertising or otherwise;

(d) use of the term "realtor" by a person not authorized to do so or using another trade name or insignia of membership in a real estate organization of which the licensee is not a member;

(e) failing to account for or to remit money coming into the licensee's possession when the money belongs to others;

(f) accepting, giving, or charging an undisclosed commission, rebate, or profit on expenditures

1 made for a principal;

2 (g) acting in a dual capacity of broker and undisclosed principal in a transaction, including failing to
3 disclose in advertisements for real property the person's dual capacity as broker and principal;

4 (h) guaranteeing, authorizing, or permitting a person to guarantee future profits that may result
5 from the resale of real property;

6 (i) offering real property for sale or lease without the knowledge and consent of the owner or the
7 owner's authorized agent or on terms other than those authorized by the owner or the owner's authorized
8 agent;

9 (j) inducing a party to a contract of sale or lease to break the contract for the purpose of
10 substituting a new contract with another principal;

11 (k) accepting employment or compensation for appraising real property contingent on the reporting
12 of a predetermined value or issuing an appraisal report on real property in which the broker or salesperson has
13 an undisclosed interest;

14 (l) as a broker or a salesperson, negotiating a sale, exchange, or lease of real property directly
15 with a seller or buyer if the broker or salesperson knows that the seller or buyer has a written, outstanding
16 listing agreement or buyer broker agreement in connection with the property granting an exclusive agency to
17 another broker;

18 (m) soliciting, selling, or offering for sale real property by conducting lotteries for the purpose of
19 influencing a purchaser or prospective purchaser of real property;

20 (n) as a salesperson, representing or attempting to represent a real estate broker other than the
21 employer without the express knowledge or consent of the employer;

22 (o) failing voluntarily to furnish a copy of a written instrument to a party executing it at the time of
23 its execution;

24 (p) unless exempted, paying a commission in connection with a real estate sale or transaction to a
25 person who is not licensed as a real estate broker or real estate salesperson under this chapter;

26 (q) intentionally violating a rule adopted by the board in the interests of the public and in conformity
27 with this chapter;

28 (r) failing, if a salesperson, to place, as soon after receipt as is practicably possible, in the custody

1 of the salesperson's supervising broker, deposit money or other money entrusted to the salesperson in that
2 capacity by a person, except if the money received by the salesperson is part of the salesperson's personal
3 transaction;

4 (s) demonstrating unworthiness or incompetency to act as a broker, a salesperson, or a property
5 manager;

6 (t) conviction of a felony;

7 (u) failing to meet the requirements of part 6 of this chapter or the rules adopted by the board
8 governing property management while managing properties for owners;

9 (v) failing to disclose to all customers and clients, including owners and tenants, the licensee's
10 contractual relationship while managing properties for owners; ~~or~~

11 (w) failing to maintain continuous professional liability insurance coverage that meets the
12 requirements of 37-51-325; or

13 (x) aiding or abetting a person or organization in taking an adverse action against a licensee or a
14 license applicant resulting from speech unrelated to a real estate transaction that, if the action had been taken
15 by a state actor, would violate the free exercise of religion or the freedom of speech and expression as
16 protected under the Montana constitution or the United States constitution.

17 (2) (a) It is unlawful for a broker or salesperson to openly advertise property belonging to others,
18 whether by means of printed material, radio, television, or display or by other means, unless the broker or
19 salesperson has a signed listing agreement from the owner of the property. The listing agreement must be valid
20 as of the date of advertisement.

21 (b) The provisions of subsection (2)(a) do not prevent a broker or salesperson from including
22 information on properties listed by other brokers or salespersons who will cooperate with the selling broker or
23 salesperson in materials dispensed to prospective customers.

24 (3) The license of a broker, salesperson, or property manager who violates this section may be
25 sanctioned as provided in 37-1-312."

26
27 **NEW SECTION. Section 8. Codification instruction.** [Section 1] is intended to be codified as an
28 integral part of Title 30, chapter 14, part 2, and the provisions of Title 30, chapter 14, part 2, apply to [section 1].

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- END -