

HOUSE BILL NO. 443

INTRODUCED BY K. SEEKINS-CROWE, B. KEENAN, F. NAVE, S. GALLOWAY, C. HINKLE, R. MARSHALL,
M. YAKAWICH, J. ETCHART

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; 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."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 28-10-103, MCA, is amended to read:

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

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

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

6 (b) Failure of a health care provider providing independent professional services to comply with a
7 policy or practice implementing subsection (3)(a) constitutes unprofessional conduct pursuant to ~~37-1-316(17)~~
8 37-1-316(1)(q) and 37-2-304."
9

10 **Section 2.** Section 37-1-308, MCA, is amended to read:

11 **"37-1-308. Unprofessional conduct -- complaint -- investigation -- immunity -- exceptions. (1)**

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

15 (2) If the department receives a written complaint or otherwise obtains information that a licensee
16 or license applicant may have committed a violation of this part, the department may, with the concurrence of a
17 member of the screening panel established in 37-1-307, investigate to determine whether there is reasonable
18 cause to believe that the licensee or license applicant has committed the violation. However, if the written
19 complaint or information that a licensee or license applicant may have violated a requirement of this part is
20 based on the LICENSEE OR LICENSE APPLICANT'S EXERCISE OF RIGHTS PROTECTED UNDER THE FREE EXERCISE
21 CLAUSE OR THE FREE SPEECH CLAUSE OF ~~free exercise of religion or the freedom of speech and expression as~~
22 ~~protected under the Montana constitution and OR the United States constitution, then the investigation of the~~
23 licensee or license applicant must cease immediately and the complaint must be dismissed ~~unless the alleged~~
24 ~~violation results from conduct that is not the free exercise of religion or the freedom of speech and expression.~~

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

27 (4) A person under legal custody of a county detention center or incarcerated under legal custody
28 of the department of corrections may not file a complaint under subsection (1) against a licensed or certified

1 provider of health care or rehabilitative services for services that were provided to the person while detained or
2 confined in a county detention center or incarcerated under legal custody of the department of corrections
3 unless the complaint is first reviewed by a correctional health care review team provided for in 37-1-331.

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

8

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

10 **"37-1-316. Unprofessional conduct.** (1) The following is unprofessional conduct for a licensee or
11 license applicant governed by this part:

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

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

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

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

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

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

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

- 1 ~~(8)~~(h) failure to comply with a term, condition, or limitation of a license by final order of a board;
- 2 ~~(9)~~(i) revealing confidential information obtained as the result of a professional relationship without
- 3 the prior consent of the recipient of services, except as authorized or required by law;
- 4 ~~(10)~~(j) use of alcohol, a habit-forming drug, or a controlled substance as defined in Title 50, chapter 32,
- 5 to the extent that the use impairs the user physically or mentally in the performance of licensed professional
- 6 duties;
- 7 ~~(11)~~(k) having a physical or mental disability that renders the licensee or license applicant unable to
- 8 practice the profession or occupation with reasonable skill and safety;
- 9 ~~(12)~~(l) engaging in conduct in the course of one's practice while suffering from a contagious or
- 10 infectious disease involving serious risk to public health or without taking adequate precautions, including but
- 11 not limited to informed consent, protective gear, or cessation of practice;
- 12 ~~(13)~~(m) misappropriating property or funds from a client or workplace or failing to comply with a board
- 13 rule regarding the accounting and distribution of a client's property or funds;
- 14 ~~(14)~~(n) interference with an investigation or disciplinary proceeding by willful misrepresentation of
- 15 facts, by the use of threats or harassment against or inducement to a client or witness to prevent them from
- 16 providing evidence in a disciplinary proceeding or other legal action, or by use of threats or harassment against
- 17 or inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from
- 18 being filed, prosecuted, or completed;
- 19 ~~(15)~~(o) assisting in the unlicensed practice of a profession or occupation or allowing another person or
- 20 organization to practice or offer to practice by use of the licensee's license;
- 21 ~~(16)~~(p) failing to report the institution of or final action on a malpractice action, including a final decision
- 22 on appeal, against the licensee or of an action against the licensee by a:
- 23 ~~(a)~~(i) peer review committee;
- 24 ~~(b)~~(ii) professional association; or
- 25 ~~(c)~~(iii) local, state, federal, territorial, provincial, or Indian tribal government;
- 26 ~~(17)~~(q) failure of a health care provider, as defined in 27-6-103, to comply with a policy or practice
- 27 implementing 28-10-103(3)(a);
- 28 ~~(18)~~(r) conduct that does not meet the generally accepted standards of practice. A certified copy of a

1 malpractice judgment against the licensee or license applicant or of a tort judgment in an action involving an act
2 or omission occurring during the scope and course of the practice is conclusive evidence of but is not needed to
3 prove conduct that does not meet generally accepted standards.

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

7 (2) Notwithstanding the provisions of this section or any other provision of this title governing
8 unprofessional conduct of a licensee or a license applicant under this title, it is not unprofessional conduct for a
9 licensee or a license applicant under this title to engage in THE EXERCISE OF RIGHTS PROTECTED UNDER the free
10 exercise of religion CLAUSE or the freedom of speech and expression as protected under FREE SPEECH CLAUSE
11 OF the Montana constitution or the United States constitution."

12

13 **Section 4.** Section 37-1-402, MCA, is amended to read:

14 **"37-1-402. Unprofessional conduct -- complaint -- investigation -- immunity.** (1) A person,
15 government, or private entity may submit a written complaint to the department charging a licensee or license
16 applicant with a violation of this part and specifying the grounds for the complaint.

17 (2) If the department receives a written complaint or otherwise obtains information that a licensee
18 or license applicant may have violated a requirement of this part, the department may investigate to determine
19 whether there is reasonable cause to believe that the licensee or license applicant has committed the violation.
20 However, if the written complaint or information that a licensee or license applicant may have violated a
21 requirement of this part is based on the LICENSEE OR LICENSE APPLICANT'S EXERCISE OF RIGHTS PROTECTED UNDER
22 THE FREE EXERCISE CLAUSE OR THE FREE SPEECH CLAUSE OF THE MONTANA CONSTITUTION OR THE UNITED STATES
23 CONSTITUTION, THEN THE INVESTIGATION OF THE LICENSEE OR LICENSE APPLICANT MUST CEASE IMMEDIATELY AND THE
24 COMPLAINT MUST BE DISMISSED ~~free exercise of religion or the freedom of speech and expression as protected~~
25 under the Montana constitution or the United States constitution, then the investigation of the licensee or
26 license applicant must cease immediately and the complaint must be dismissed unless the alleged violation
27 results from conduct that is not the free exercise of religion or the freedom of speech and expression.

28 (3) A person or private entity, but not a government entity, filing a complaint under this section in

1 good faith is immune from suit in a civil action related to the filing or contents of the complaint."

2

3 **Section 5.** Section 37-1-410, MCA, is amended to read:

4 **"37-1-410. Unprofessional conduct.** (1) The following is unprofessional conduct for a licensee or
5 license applicant in a profession or occupation governed by this part:

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

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) committing fraud, misrepresentation, deception, or concealment of a material fact in applying
12 for or 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) making a misleading, deceptive, false, or fraudulent advertisement or other representation in
16 the 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) receiving a denial, suspension, revocation, probation, fine, or other license restriction or
21 discipline against a licensee by a state, province, territory, or Indian tribal government or the federal
22 government if the action is not on appeal or under judicial review or has been satisfied;

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

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

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

1 (14)(k) interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts,
2 failure to respond to department inquiries regarding a complaint against the licensee or license applicant, or the
3 use of threats or harassment against or inducement to a client or witness to prevent them from providing
4 evidence in a disciplinary proceeding or other legal action or use of threats or harassment against or
5 inducement to a person to prevent or attempt to prevent a disciplinary proceeding or other legal action from
6 being filed, prosecuted, or completed;

7 (14)(l) assisting in the unlicensed practice of a profession or occupation or allowing another person or
8 organization to practice or offer to practice the profession or occupation by use of the licensee's license;

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

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

15 (2) Notwithstanding the provisions of this section or any other provision of this title governing
16 unprofessional conduct of a licensee or a license applicant under this title, it is not unprofessional conduct for a
17 licensee or a license applicant under this title to engage in the EXERCISE OF RIGHTS PROTECTED UNDER THE FREE
18 EXERCISE CLAUSE OR THE FREE SPEECH CLAUSE OF THE MONTANA CONSTITUTION OR THE UNITED STATES
19 CONSTITUTION~~free exercise of religion or the freedom of speech and expression as protected under the Montana~~
20 ~~constitution or the United States constitution."~~

21
22 **Section 6.** Section 37-51-321, MCA, is amended to read:
23 "**37-51-321. Unprofessional conduct -- sanction of license.** (1) The following practices, in addition
24 to the provisions of 37-1-316 and as provided in board rule, are considered unprofessional conduct for an
25 applicant or a person licensed under this chapter:

26 (a) intentionally misleading, untruthful, or inaccurate advertising, whether printed or by radio,
27 display, or other nature, if the advertising in any material particular or in any material way misrepresents any
28 property, terms, values, policies, or services of the business conducted. A broker who operates under a

1 franchise agreement engages in misleading, untruthful, or inaccurate advertising if in using the franchise name,
2 the broker does not incorporate the broker's own name or the trade name, if any, by which the office is known in
3 the franchise name or logotype. The board may not adopt advertising standards more stringent than those set
4 forth in this subsection (1)(a).

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

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

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

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

12 (f) accepting, giving, or charging an undisclosed commission, rebate, or profit on expenditures
13 made for a principal;

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

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

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

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

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

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

1 another broker;

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

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

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

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

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

12 (r) failing, if a salesperson, to place, as soon after receipt as is practicably possible, in the custody
13 of the salesperson's supervising broker, deposit money or other money entrusted to the salesperson in that
14 capacity by a person, except if the money received by the salesperson is part of the salesperson's personal
15 transaction;

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

18 (t) conviction of a felony;

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

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

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

25 (x) aiding or abetting a person or organization in taking an adverse action against a licensee or a
26 license applicant BECAUSE OF SPEECH OR CONDUCT THAT IS NOT MADE IN THE LICENSEE'S OR LICENSE APPLICANT'S
27 PROFESSIONAL CAPACITY THAT, HAD THE ADVERSE ACTION BEEN TAKEN BY A STATE ACTOR, THE SPEECH OR CONDUCT
28 WOULD HAVE BEEN PROTECTED UNDER THE FREE EXERCISE CLAUSE OR THE FREE SPEECH CLAUSE OF THE MONTANA

1 ~~CONSTITUTION OR THE UNITED STATES CONSTITUTION resulting from speech unrelated to a real estate transaction~~
2 ~~that, if the action had been taken by a state actor, would violate the free exercise of religion or the freedom of~~
3 ~~speech and expression as protected under the Montana constitution or the United States constitution.~~

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

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

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

13
14 COORDINATION SECTION. SECTION 7. COORDINATION INSTRUCTION. IF BOTH HOUSE BILL NO. 303 AND
15 [THIS ACT] ARE PASSED AND APPROVED AND IF BOTH CONTAIN A SECTION THAT AMENDS 37-1-308, THEN THE SECTIONS
16 AMENDING 37-1-308 ARE VOID AND 37-1-308 MUST BE AMENDED AS FOLLOWS:

17 **"37-1-308. Unprofessional conduct -- complaint -- investigation -- immunity -- exceptions. (1)**
18 Except as provided in subsections (4) and (5), a person, government, or private entity may submit a written
19 complaint to the department charging a licensee or license applicant with a violation of this part and specifying
20 the grounds for the complaint.

21 (2) (a) If the department receives a written complaint or otherwise obtains information that a
22 licensee or license applicant may have committed a violation of this part, the department may, with the
23 concurrence of a member of the screening panel established in 37-1-307, investigate to determine whether
24 there is reasonable cause to believe that the licensee or license applicant has committed the violation.

25 (b) Except as provided in subsection (2)(c), if the written complaint or information that a licensee or
26 license applicant may have violated a requirement of this part is based on the licensee or license applicant's
27 exercise of rights protected under the free exercise clause or the free speech clause of the Montana
28 constitution or the United States constitution, then the investigation of the licensee or license applicant must

1 cease immediately, and the complaint must be dismissed.

2 (c) If the complaint alleges an activity by a licensee whose free speech rights are protected under
3 [section 6 of House Bill No. 303], the department or licensing board receiving the complaint must comply with
4 the notification requirements of [section 6 of House Bill No. 303].

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

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

12 (5) A board member may file a complaint with the board on which the member serves or otherwise
13 act in concert with a complainant in developing, authoring, or initiating a complaint to be filed with the board if
14 the board member determines that there are reasonable grounds to believe that a particular statute, rule, or
15 standard has been violated."

16 - END -