

**Ethics, Agency,  
Trust Funds &  
Fair Housing**  
12 CE HOURS

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## PREFACE

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This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. Although a great deal of care has been taken to provide accurate and current information, the ideas, suggestions, general principles and conclusions presented in this text are subject to local, state and federal laws as regulations, court cases and any revisions of same. The reader is urged to consult legal counsel regarding any points of law. This publication should not be used as a substitute for competent legal advice.

Real Estate agents are urged to refer to two indispensable reference sources: “**Real Estate Law**” and “**Real Estate Reference Book**” published by California Department of Real Estate. Please visit DRE’s website, [www.dre.ca.gov](http://www.dre.ca.gov). Or you may order via our school’s web site.

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### PREFACE

This course is about the fundamentals basic real estate ethics and regulations. It covers mandated topics required by Department of California Real Estate, in the area of Ethics, Agency, Trust Funds and Fair Housing.

This book has been written primarily for the prospective real estate broker or sales-person, but it will also be of interest to the people who wish to become a real estate professional.

### How to Use This Book

It is difficult to overestimate the growing importance of the Internet to the real estate industry. The resources available there have brought together the interests of agents, consumers and investors. Throughout this book you will find addresses on the World Wide Web, a collection of computer sites referred to in this book as the **web**.

The web has made the Internet easily accessible to anyone with a computer and modem or, in some cases, a television set coupled with a phone line and wireless keyboard. There are web sites sponsored by government agencies, sites run by private trade groups and others that are commercial enterprises yet offer a great deal of free information that is both interesting and useful.

We encourage you to explore the sites mentioned in this book to expand on what you read here. To make it easy to find site references, they are highlighted in the margins of the text. There is also a complete list of all site references in the Internet Appendix at the back of the book. As with any resource, you are cautioned to use good judgment when considering the validity of the information you find on the Internet.

Read the text of each chapter, at the end of each chapter are chapter test that will require you to use what you have learned to solve problems involving practical applications of the topics covered. After you complete a test, you can check the answer key by looking at the back of the book.

### DISCLAIMER

“This course is approved for continuing education credit by the California Department of Real Estate. However, this approval does not constitute an endorsement of the views or opinions which are expressed by the course sponsor, instructor, authors or lectures.”



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# COURSE 1: ETHICS AND PROFESSIONAL CONDUCTS



## Preview

This material is presented to and prepared for all real estate licensees for complying with continuing education requirements.

This course consists of coverage of the excerpts from the Business and Profession Code , Code of Ethics and Professional Conduct of the California Real Estate Commissioner, the Code of Ethics and Standards of Practices of the National Association of Realtors.

Most of the material presented is derived from Professional Conduct and Legal Aspects of Real Estate as mandated by Business and Professional Code 10170.5(a). It is important to realize the law is in a state of constant change and that is of utmost importance for the licensee to stay current with the law and to adapt to changing conditions.

This course is in compliance with DRE's requirement and successful completion will yield 3 hours of Continuing Education Credit (Section 10170.5 (a) Business and Professions Code).

## ETHICS AND PROFESSIONAL CONDUCT

The concept of ethical conduct is paramount to your success. Carefully review the following concepts and their applications.

Following is the revised Code of Ethics and Suggestions for Professional Conduct from the Commissioner's Regulations. The code became effective June 10, 1990 and is applicable to all real estate licensees.

*Ethics must be expressed as a set of principles or values, a standard of conduct by which the individual guides his or her own behavior and judges that of others.*

### A. PROFESSIONAL CONDUCT

In order to enhance the professionalism of the California real estate industry, and maximize protection for members of the public dealing with real estate licensees, whatever their areas of practice, the following standards of professional conduct and business practices are adopted:

#### (a) Unlawful Conduct In Sale, Lease and Exchange Transactions

Licensees when performing acts within the meaning of Section 10131 (a) of the Business and Professions Code shall not engage in conduct which would subject the licensee to adverse action, penalty or discipline under Section 10176 and 10177 of the Business and Professions Code including, but not limited to, the following acts and omissions:

1. Knowingly making a substantial misrepresentation of the likely market value of real property to:
  - (A) Its owner, either for the purpose of securing a listing or for the purpose of acquiring an interest in the property for the licensee's own account.
  - (B) A prospective buyer for the purpose of inducing the buyer to make an offer to purchase the real property.
2. Representation to an owner of the real property that the soliciting licensee has obtained a bona fide written offer to purchase the property, unless at the time of the representation the licensee has possession of a bona fide written offer to purchase.
3. Stating or implying to an owner of real property during listing negotiations that the licensee is precluded by law, regulation or by the rules of any organization, other than the broker

## ETHICS

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- firm seeking the listing, from charging less than the commission or fee quoted to the owner by the licensee.
4. Knowingly making substantial misrepresentations regarding the licensee's relationship with an individual broker, corporate broker, or franchised brokerage company or that entity's/person's responsibility for the licensee's activities.
  5. Knowingly underestimating the probable closing costs in a transaction in a communication to the prospective buyer or seller of real property in order to induce that person to make or to accept an offer to purchase the property.
  6. Knowingly making a false or misleading representation to the seller of real property as to the form, amount and/or treatment of a deposit toward purchase of the property made by an offeror.
  7. Knowingly making a false or misleading representation to the seller of real property as to the form, amount and/or treatment of a deposit toward the purchase of the property made by an offeror.
  8. Making an addition to or modification of the terms of an instrument previously signed or initialed by a party to a transaction without the knowledge and consent of the party.
  9. A representation made as principal or agent to a prospective purchaser of a promissory note secured by real property about the market value of the securing property without a reasonable basis for believing the truth and accuracy of the representation.
  10. Knowingly making a false or misleading representation or representing, without a reasonable basis for believing its truth, the nature and/or condition of the interior or exterior features of a property when soliciting an offer.
  11. Knowingly making a false or misleading representation or representing, without a reasonable basis for believing its truth, the size of a parcel, square footage of improvements or the location of the boundary lines of real property being offered for sale, lease or exchange.
  12. Knowingly making a false or misleading representation or representing, without a reasonable basis for believing its truth, that the property can be used for certain purposes with the intent of inducing the prospective buyer or lessee to acquire an interest in the real property.
  13. When acting in the capacity of an agent in a transaction for the sale, lease or exchange of real property, failing to disclose to a prospective purchaser or lessee facts known to the licensee materially affecting the value or desirability of the property, when the licensee has reason to believe that such facts are not known to, nor readily observable by a prospective purchaser or lessee.
  14. Willfully failing when acting as a listing agent, to present or cause to be presented to the owner of the property any offer to purchase received prior to the closing of a sale, unless expressly instructed by the owner not to present such an offer, or unless the offer is patently frivolous.
  15. When acting as the listing agent, presenting competing offers to purchase real property to the owner by the listing broker in such a manner as to induce the owner to accept the offer which will provide the greatest compensation to the listing broker, without regard to the benefits, advantages, and/or disadvantages of the owner.
  16. Failing to explain to parties or prospective parties to a real estate transaction the meaning and probable significance of a contingency in an offer or contract that the licensee knows or reasonably believes may affect the closing date of the transaction, or the timing of the vacating of the property by the seller or its occupancy by the buyer.
  17. Failing to disclose to the seller of real property in a transaction in which the licensee is acting in the capacity of an agent, the nature and extent of any direct or indirect interest that the licensee expects to acquire as a result of the sale. The prospective purchase of the property by a person related to the licensee by blood or marriage, purchase by an entity in which the licensee has an ownership interest, or purchase by any other person with whom the licensee occupies a special relationship where there is a reasonable probability that the licensee could be indirectly acquiring an interest in the property, shall be disclosed to the seller.
  18. Failing to disclose to the buyer of real property in a transaction in which the licensee is an agent for the buyer the nature and extent of a licensee's direct or indirect ownership interest in such real property. The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage, by an entity in which licensee has an ownership interest, or by any other person with whom the licensee occupies a special relationship shall be disclosed to the buyer.

19. Failing to disclose to a principal for whom the licensee is acting as an agent any significant interest the licensee has in a particular entity when the licensee recommends the use of the services or products of such entity.
20. The refunding by a licensee, when acting as an agent or subagent for seller, of all or part of an offeror's purchase money deposit in a real estate sales transaction after the seller has accepted the offer to purchase, unless the licensee has the express permission of the seller to make the refund.

**(b) Unlawful Conduct When Soliciting, Negotiating or Arranging a Loan Secured by Real Property or the Sale of a Promissory Note Secured by Real Property.**

Licensees when performing acts within the meaning of subdivision (d) or (e) of Section 10131 of the Business and Professions Code shall not violate any of the applicable provisions of subdivision (a), or act in a manner which would subject the licensee to adverse action, penalty or discipline under Section 10176 and 10177 of the Business and Profession Code including, but not limited to, the following acts and omissions:

- (1) Knowingly misrepresenting to a prospective borrower of a loan to be secured by real property or to an assignor/endorser of a promissory note secured by real property that there is an existing lender willing to make the loan or that there is a purchaser for the note, for the purpose of inducing the borrower or assignor/endorser to utilize the services of the licensee.
- (2) (a) Knowingly making a false or misleading representation to a prospective lender or purchaser of a loan secured directly or collaterally by real property about a borrower's ability to repay the loan in accordance with its terms and conditions;  
(b) Failing to disclose to a prospective lender or note purchaser information about the prospective borrower's identity, occupation, employment, income and credit date as represented to the broker by the prospective borrower;  
(c) Failing to disclose information known to the broker relative to the ability of the borrower to meet his or her potential or existing contractual obligations under the note or contract including information known about the borrower's payment history on an existing note, whether the note is in default or the borrower in bankruptcy.
- (3) Knowingly underestimating the probable closing costs in a communication to a prospective borrower or lender of a loan to be secured by a lien on real property for the purpose of inducing the borrower or lender to enter into the loan transaction.
- (4) When soliciting a prospective lender to make a loan to be secured by real property, falsely representing or representing without a reasonable basis to believe its truth, the priority of the security, as a lien against the real property securing the loan, i.e., a first, second or third deed of trust.
- (5) Knowingly misrepresenting in any transaction that a specific service is free when the licensee knows or has a reasonable basis to know that it is covered by a fee to be charged as part of the transaction.
- (6) Knowingly making a false or misleading representation to a lender or assignee/endorsee of a lender of a loan secured directly or collaterally by a lien on real property about the amount and treatment of loan payments, including loan payoffs, and the failure to account to the lender or assignee/endorsee of a lender as to the disposition of such payments.
- (7) When acting as a licensee in a transaction for the purpose of obtaining a loan, and in receipt of an "advance fee" from the borrower for this purpose, the failure to the borrower for the disposition of the "advance fee".
- (8) Knowingly making false or misleading representation about the terms and conditions of a loan to be secured by a lien on real property when soliciting a borrower or negotiating the loan.
- (9) Knowingly making a false or misleading representation or representing, without a reasonable basis for believing its truth, when soliciting a lender or negotiating a loan to be secured by a lien on real property about the market value of the securing real property, the nature and/or condition of the interior or exterior features of the securing real property, its size or square footage of any improvements on the securing real property.

## B. SUGGESTIONS FOR PROFESSIONAL CONDUCT

As part of the effort to promote ethical business practices of real estate licensees, the Real Estate Commissioner has issued the following Suggestions for Professional Conduct as a companion to the Code of Professional Conduct (Section 2785, Title 10, California Code of Regulations):

**(a) Suggestions for Professional Conduct in Sale, Lease, and Exchange Transactions. In order to maintain a high level of ethics and professionalism in their business practices, real estate licensees are encouraged to adhere to the following suggestions in conducting their business activities:**

- (1) Aspire to give high level of competent, ethical and quality service to buyers and sellers in real estate transactions.
- (2) Stay in close communication with clients or customers to ensure that questions are promptly answered and all significant events or problems in a transaction are conveyed in a timely manner.
- (3) Cooperate with the California Department of Real Estate's enforcement of, and report to that department any evident violations of, the Real Estate Law.
- (4) Use care in the preparation of any advertisement to present an accurate picture or message to the reader, viewer, or listener.
- (5) Submitting all written offers in a prompt and timely manner.
- (6) Keeping oneself informed and current on factors affecting the real estate market in which the licensee operates as an agent.
- (7) Make a full, open, and sincere effort to cooperate with other licensees, unless the principal has instructed the licensee to the contrary.
- (8) Attempting to settle disputes with other licensees through mediation or arbitration.
- (9) Advertise or claim to be an expert in an area of specialization in real estate brokerage activity, e.g., appraisal, property management, industrial sitting, mortgage loan, etc., only if the licensee has had special training, preparation or experience in such area.
- (10) Strive to provide every opportunity for quality housing and a high level of service to all persons regardless of race, color, sex, religion, ancestry, physical handicap, material status or national origin.
- (11) Base opinions of value, whether for the purpose of advertising or promoting real estate brokerage business, upon documented objective data.
- (12) Make every attempt to comply with these Guidelines for Professional Conduct, and the Code of Ethics of any organized real estate industry group of which the licensee is a member.
- (13) Obtain written instructions from both parties to a transaction prior to disbursing a purchase money deposit to a party.

**(b) Suggestions for Professional Conduct when Negotiating or Arranging Loans Secured by Real Property or Sale of a Promissory Note Secured by Real Property.**

In order to maintain a high level of ethics and professionalism in their business practices, when performing acts within the meaning of subdivisions (d) and (e) of Section 10131 and Sections 10131.1 and 10131.2 of the Business and Professions Code, real estate licensees are encouraged to adhere to the following suggestions, in addition to any applicable provisions of subdivision (a) in conducting their business activities:

- (1) Aspire to give high level of competent, ethical and quality service to buyers and sellers in real estate transactions.
- (2) Stay in close communication with clients or customers to ensure that questions are promptly answered and all significant events or problems in a transaction are conveyed in a timely manner.
- (3) Keep oneself informed and current on factors affecting the real estate market in which the licensee operates as an agent.
- (4) Advertise or claim to be an expert in an area of specialization in real estate brokerage activity, e.g., appraisal, property management, industrial sitting, mortgage loan, etc., only if the licensee has had special training, preparation or experience in such area.
- (5) Strive to provide every opportunity for quality housing and a high level of service to all persons regardless of race, color, sex, religion, ancestry, physical handicap, material status or national origin.

- (6) Base opinions of value in a loan transaction, whether for the purpose of advertising or promoting real estate mortgage loan brokerage business, on documented objective data.
- (7) Respond to reasonable inquiries of a principle as to the status or extent of efforts to negotiate the sale of an existing loan.
- (8) Respond to reasonable inquiries of a borrower regarding the net proceeds available from a loan arranged by the licensee.
- (9) Make every attempt to comply with these Guidelines for Professional Conduct, and the Code of Ethics of any organized real estate industry group of which the licensee is a member.

The conduct suggestions set forth in subsections (a) and (b) are not intended as statements of duties imposed by law nor as grounds for disciplinary action by the Department of Real Estate, but as guidelines for elevating the professionalism of real estate licensees.

### C. BUSINESS & PROFESSIONS CODE

Section 10176 and 10177 of the Real Estate Law constitute the foundation for most license suspensions or revocations. The various grounds for disciplinary action against a licensee are:

#### B & PC SECTION 10176

The commissioner may, upon his own motion, and shall, upon the *verified complaint in writing of any person*, investigate the actions of any persons engaged in the business or acting in the capacity of a real estate licensee within this state, and he may *temporarily suspend or permanently revoke a real estate license* at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

##### Section 10176 (a) Misrepresentation

The majority of complaints allege misrepresentation by the agent. A cause for discipline is the failure of the agent to disclose material facts which the principal should know. If the misrepresentation was not important and the principal would have proceeded with the transaction anyway, the misrepresentation probably would not be material.

##### Section 10176 (b) False Promise

A false promise and a misrepresentation differ. A *misrepresentation* is a false statement of fact. A *false promise* is a false statement about what the promisor is going to do in the future. A false promise may be proved by showing that the promise was impossible of performance and that the person making the promise knew it was impossible.

##### Section 10176 (c) Continued Misrepresentation

The right to discipline a licensee for “a continued and flagrant course of misrepresentation or making of false promises through real estate agents”.

##### Section 10176 (d) Divided Agency

*Acting for more than one party in a transaction without knowledge or consent of all parties is divided agency*. A licensee is required to inform all principals if licensee is acting as agent for more than one party in a transaction.

##### Section 10176 (e) Commingling

*Commingling is when a broker has mixed the funds of principals with broker's own money*. Commingling differs from conversion. Conversion is misappropriating and use. Conversion can be a more serious offense.

##### Section 10176 (f) Definite Termination Date

A specified termination date is required for all exclusive listings in transactions which require a real estate license including loan authorizations, bonds, exclusives for sale, purchase or exchange of real estate and business opportunities. If a definite date is specified, or if a definite period of time is indicated, the requirement is satisfied. If it cannot be determined from the listing itself when it expires, then the listing does not meet the requirement.

### **Section 10176 (g) Secret Profit**

A secret profit usually arises when an agent, who already has a higher offer from another buyer, makes a low offer through a “dummy” purchaser. The difference is the secret profit.

### **Section 10176 (h) Listing Option**

If a licensee uses a form which is both an option and a listing, he is required to inform the principal of the profit he will make and to obtain the principal’s written consent before he may exercise the option. This is not applicable to an option only.

### **Section 10176 (i) Dishonest Dealing**

Dishonest Dealing is a catch all similar to Section 10177(f). This section differs in that the acts must have been those of a licensee.

## **B & PC SECTION 10177**

The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following:

### **Section 10177 (a) Obtaining License by Fraud**

A licensee may be disciplined for misstatements of fact in a license application and for having procured a license by fraud, misrepresentation, or deceit.

### **Section 10177 (b) Convictions**

A licensee may be disciplined after a criminal conviction for either a felony or a misdemeanor which involves moral turpitude. *Moral turpitude* is “**everything done contrary to justice, honest, modesty, or good moral**”.

### **Section 10177 (c) False Advertising**

Licensee who are parties to a false advertising are subject to disciplinary action in subdivision sales as well as general property sales.

### **Section 10177 (d) Violations of Other Sections**

The Department of Real Estate has the authority to proceed against the licensee for violation of any of the other sections of the Real Estate Law, the regulations of the commissioners, and the subdivision laws.

### **Section 10177 (e) Misuse of Trade Name**

Only active members of the national association or local associations of real estate boards are permitted to use any term or insignia of any real estate organization. No licensees may advertise or hold themselves out as “Realtors” without proper entitlement.

### **Section 10177 (f) Conduct Warranting Denial**

Almost any act which involves crime or dishonest will fall within this section since a key requirement to issuance of a license is the honest and truthfulness of an applicant any acts which establish the contrary are a cause for disciplinary action.

### **Section 10177 (g) Secret Profit**

Demonstrated negligence or incompetence is cause for disciplinary action. A licensee is careless or unqualified if allowing him to handle a transaction would endanger the interests of either clients or customers.

### **Section 10177 (h) Supervision of Salespersons**

A broker is subject to disciplinary action if he fails to exercise reasonable supervision over his salesperson’s activities.

### **Section 10177 (j) Other Dishonest Conduct**

Any other conduct which constitutes fraud or dishonest dealing may result in license suspension or revocation.

## Section 10177 (k) Restricted License Violation

The violation of any terms, conditions, restrictions contained in a restricted license is grounds for disciplinary action.

## Section 10177 (l) Inducement of Panic Selling

The solicitation or inducement of the sale, lease, or listing for sale or lease, or residential property on the ground of loss of value, increase in crime, or decline of the quality of the schools due to the entry of persons of another race, color, religion, ancestry or national origin into a neighborhood is a cause for disciplinary action.

## D. LEGAL APPLICATIONS

To help you integrate the Commissioner's Code of Ethics, this section provides illustrative legal cases.

### 1. FULL DISCLOSURE

In a 1984 California landmark case, "Easton Vs Strassburger", widened the liability of real estate agents. Agents are now required to be aware of all material facts negatively influencing the value of a property, whether obvious or not, and must disclose these facts to all prospective buyers. In the Easton case, the appellate judge stated that a real estate broker has a "... duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal. "

The Easton decision has broadened the agent's duties in that agents can not only be held liable for defects they know about but for defects about which they should have known. Real estate agents must carefully inspect properties to determine obvious defects or red flags. A "red flag" warns a reasonably observant agent that there may be an underlying problem. The agent is responsible for disclosing this fact to the seller and any prospective buyers. The Easton Case is presented in its entirety here

The facts of the Easton case involved the sale of a house built on a landfill which was not properly engineered and compacted. The sellers did not disclose to the listing broker, the buyer's broker, or the buyer that there was landslide activity and that corrective measures were taken. The listing broker's agent were aware that the house was built on a landfill, that netting was on the slope to prevent further slides, and that the guest house floor was uneven. However, none of these "red flags" were investigated or brought to the buyer's attention. After the buyer's purchase, the land problems worsened, the buyer sued, and the jury held the seller, listing broker and selling broker liable for \$197,000.

According to the Easton case, a property cannot be sold "as is" without a complete disclosure. "As is" clauses and written disclaimers are unenforceable and will not eliminate the agent and seller's liabilities to the buyer.

As a result, an agent should take the following precautions against liability according to Easton:

1. The agent should ask the seller directly if any hidden problems exist which might affect the property's value. Any defects should be thoroughly investigated.
2. The agent should physically inspect the property to uncover any flaws. Agents have an obligation to be knowledgeable of the factors influencing value in order to properly inspect the property.
3. The seller should be notified of any problems discovered and given sufficient time to correct them. An agent should simply point out a suspected problem and recommend that the seller contact an expert.
4. The agent should make a full disclosure to the potential buyer and seller of any items discovered which affect value and if any action has been taken to correct them. Professional inspection reports should be presented to both parties. If neither the buyer nor seller wishes to further investigate the problems, the agent should obtain a written confirmation that they were properly notified, and are aware of the agent's recommendations, and chose to disregard them.

### 2. BROKER AS PURCHASER

It is imperative that in any transaction in which an agent is purchasing or selling property, he must reveal his status to all persons involved.

Invariably, the failure to inform others participating in transaction of his status will come back to haunt the agent.

The courts have gone to great lengths to protect unknowing parties, even though the transaction appears fair and reasonable at the time of the original agreement.

Whenever a licensee is involved as a principal in a transaction, he should reveal his status as a licensee. The licensee must reveal to others involved in the transaction that, for example, he is related to a prospective purchaser or seller, has an interest in the corporation which is attempting to buy or sell property, or is a partner in a firm which is buying or selling property.

In the case of “Whitehead vs. Gordon”, the degree of accountability of a licensee in this area was clearly illustrated. In that case, the agent submitted an offer on a probate sale on behalf of his brother-in-law. He did not reveal to the probate court that the purchaser was, in fact, his brother-in-law. After the sale of the property was confirmed by the court, an escrow was opened to complete the sale to the agent’s brother-in-law. At the time, a second escrow was opened to transfer the property into a corporation in which the agent held an interest.

Because the agent did not reveal to the probate court or to the representative of the estate that the property would ultimately be purchased by a corporation in which the agent held an interest, the agent was disciplined with the suspension of his license. The fact that the agent had no exclusive listing with the estate for the sale of the property, but was merely acting pursuant to an open listing, was no defense to the charges levied against the agent.

Those charges included violations of Business and Professions Code Section 10176 (a), (d) and (i) and (j), dealing with misrepresentation, concealment of compensation, acting for more than one party, and dishonest dealing.

### **3. SECRET PROFITS**

Obtaining secret profits is usually associated with net listings. Specifically, a “net listing” is an agreement wherein the agent’s commission is calculated as the excess of the purchase price over and above a stated amount which is to be paid to the seller. For example, a broker and seller may agree in a net listing agreement that the seller shall receive \$200,000 in sales proceeds upon the sale of property and the broker shall receive all other amounts received in the sale as his commission. Thus, if the property sells for \$250,000, the broker would receive \$50,000.

Of course, net listings are perfectly proper, legal, and ethical so long as all parties concerned are informed of the nature of this listing. Underlining this is the fact that the agent owes his principal, usually the seller, the fiduciary duty of full and fair disclosure of all pertinent facts as well. While the extent of disclosure of net listing agreements to a prospective purchaser who makes a direct inquiry as to commission arrangements is unclear, the agent is nevertheless obligated to answer truthfully and honestly when he does speak. However, from the agent’s perspective, as well as from the seller’s perspective, such disclosure may give added leverage or bargaining power to the prospective purchaser.

Notwithstanding the apparent conflict in duties owed by a listing agent to a prospective purchaser and to the seller, it is clear that the agent may not obtain any benefit or advantage in a transaction in which his client or the purchaser is not fully informed.

Thus, in the court case “Ward vs. Taggart”, the prospective purchasers were able to recover from the agent for secret profits made by the agent at the expense of such prospective purchasers. The secret profits resulted from the agent falsely representing to another agent, representing the purchasers, that the first agent had an exclusive listing with the owner of the property for sale. Thereafter, the prospective purchasers submitted an offer to purchase the subject property at \$5000 per acre to the “listing” agent.

Such an offer was never delivered by the agent to the owner. Instead, the agent went to the owner and purchased the property for \$4000 per acre. The agent then turned around and sold the port to the prospective purchasers for \$5000 per acre. The court held, in the first instance, that since the agent had no listing with the seller, there was no breach of fiduciary duty between the agent and the seller.

However, the court further held that the profit made by the agent was nevertheless unlawful and that the prospective purchasers were entitled to recover the difference of \$1000 per acre from the agent. The court suggested that the agent had the obligation to truthfully disclose to the buyers that he was not the exclusive listing agent for the property. Because of his failure to do so, the agent had to return \$1000 per acre profit.

While the court in Ward vs. Taggart did not specify any regulations or statutes that were violated by the agent, such conduct would appear violate numerous provisions of the California Real Estate Law. For example, Section 2785 (1) and (3) of the Commissioner’s Regulations, prohibiting an agent from misrepresenting the value of property and concealing from buyer material facts of the transaction, would



appear to have been violated. Also, Section 10176 (a), (d), and (i) of the Business and Professions Code, dealing with dishonest dealings secret profits and misrepresentation, would also have been violated.

A parallel situation which led to disciplinary measures was discussed in the case of “Ratray vs. Scudder”. In that case, an agent was employed by the owner of certain real property to sell the property for \$13,000. Thereafter, the agent informed the owner that the property could not be sold for that amount because it was not worth that much. It could, however, be sold for a net profit of \$10,000 to the owner. The agent then offered to buy the property for \$10,250. Relying upon the representations of the agent, the owner sold the property to the agent for \$10,250.

During the course of the negotiations between the agent and the owner of the property, the agent had negotiated with a prospective purchaser for the sale of the property. Immediately after the owner of the property sold to the agent, the agent turned around and, unknown to the owner, sold the property to the prospective purchaser for \$13,500. Thus the agent made over \$3000 in “secret profits” on the transaction. In discussing the transactions leading up to the eventual discipline of the agent, the court emphasized that the agent was under a duty to disclose to the seller of the property the nature and existence of the negotiations with the prospective purchaser. The agent’s failure to do so led to disciplinary proceedings, and ultimately to the revocation of his license.

Specifically, the court in “Ratray vs. Scudder” based its decision on the broad provisions of Business and Professions Code Sections 10176 and 10177, prohibiting any conduct which constitutes “fraud or dishonest dealing”. These provisions are something of a “catch-all”, allowing the Commissioner and the courts to discipline agents for unethical conduct which does not fit neatly within any of the more specific sections or provisions of the California Real Estate Law.

It should be noted that even though the form of agreement might negate the existence of a listing or agency relationship, the courts will disregard the form of agreement and find such an agency relationship where the basic fact so indicates. Thus, in “Richards Realty Co. vs. Real Estate Commissioner”, the agent obtained title to property previously owned by his client. The conveyance of the property was supposedly on the oral promise of the agent that the property would thereafter be sold and the agent would then deliver a portion of the purchase price back to the client.

Though none of the documents indicated such an arrangement and showed only a straight sale of the property to the agent, the court still found that the relationship was one of agency and not vendor/purchaser. As such, the court held that the agent’s refusal to return a portion of the sales proceeds to the prior owner constituted the obtaining of secret profits. For such misconduct, the agent had his license suspended by the Real Estate Commissioner. Such conduct was held to violate Section 10176 of the Business and Professions Code, dealing with the obtaining of secret or undisclosed commission or profit. Additionally, the agent was held in violation of Business and Professions Code 10177 by acting in a manner “which would have warranted the denial of his application for a real estate license.”

In essence, full disclosure of all aspects of the transaction should be made to avoid liability for obtaining secret profits. The Commissioner and the courts will enforce this responsibility.

#### **4. MISREPRESENTATION**

It needs no elaboration that an agent faces substantial civil liability as well as disciplinary action for making a substantial misrepresentation in a real estate transaction that leads to a party’s loss. As indicated below, however, no such loss is necessary before an agent will be disciplined by the Commissioner for misrepresentation. Also, the courts strictly enforce statutes and regulations prohibiting misrepresentation and concealment.

For example, in the case of “Rhoades vs. Savage”, the agent abandoned efforts to negotiate a sale of the property of behalf of the seller. Apparently the agent was aware the property was in foreclosure. The court ruled that the concealment by the agent of his abandonment of efforts to sell the property constituted fraud upon the seller under the Real Estate Law of California. As such, the agent’s license was suspended for 30 days.

Another example of the court’s holding an agent responsible for what was deemed “fraudulent” conduct can be seen in the case of “Marks vs. Watson”. In that case, the agent orally agreed with the seller of the property to attempt to sell the property on an open listing basis. However, the agent had the vendor sign an exclusive listing agreement providing for the agent to receive a 5% commission upon the sale of the property by any agent. Thereafter, a different agent procured a purchaser for the property. The listing agent then attempted, by suit, to obtain his full 5% commission from the seller. The court held that the conduct of the agent in filing the suit against the seller was fraudulent and violated the California Real Estate Law. As such, the court found that the agent had violated Business and Profession Code, the making of a

substantial misrepresentation; dishonest dealings; and acting in a manner which would have warranted the denial of his application for a real estate license.

### 5. MISLEADING ADVERTISING

As in the case of false representation in a real estate transaction, the California Real Estate Law strictly proscribes any misleading advertising by agents. Of course, in many situations, misleading advertising also constitutes fraudulent misrepresentation, and the agent can face disciplinary action under both sections.

For example, in “Dyer vs. Watson”, the agent was conducting a business in rentals. More particularly, the agent would charge prospective tenants a fee for supplying such prospective tenants with lists of rental properties. However, among the various properties on such lists were ones which had already been rented, were not for rent or had not been listed with the broker. The agent failed to reveal such prospective tenants that she lacked knowledge of the availability of each and every rental property on her lists. By such “concealment” of her lack of knowledge, the agent was found in violation of those sections of the California Real Estate Law dealing with dishonest practices. Interestingly, the agent, while being charged with misleading advertising, was never specifically convicted of that charge. Nevertheless, the agent’s license was revoked.

It cannot be emphasized enough that an agent owes a client, whether it be a prospective buyer, seller, or tenant, the duty of fair and honest disclosure, if not full and complete revelation of all relevant matters. While such obligations very often will interfere with the business of the agent, such obligations will be strictly enforced.

### 6. LISTING AGREEMENTS DATES

Under California law, an agent may not claim, demand, or receive compensation or a commission under an exclusive listing for the sale of property where such agreement does not contain a definite date of final and complete termination.

This requirement does not apply to lease agreements. Beyond the penalty of not being able to receive a commission in such situations, the Commissioner has the authority to suspend or revoke a real estate license of one who attempts to claim, demand, or receive a fee or commission under such exclusive listing that does not contain a definite date of final termination.

It should however, be noted that in this area, the courts have not construed the requirement of final termination date as strictly or harshly as in other areas of the California Real Estate Law. For example, in Summers vs. Freeman, the court indicated that the requirement of a final and specific termination date does not operate in listings other than exclusive listings. For example, an agent may still recover a commission and will escape any disciplinary measures if the listing is an open listing.

Even where the listing agreement is made exclusive, an agent is not completely without remedy. In “Nichols vs. Boswell Alliance Construction Corporation”, a listing agreement relative to the sale of units in a subdivision did not contain a specific date of termination. Nonetheless, the court allowed the agent to recover commissions for those units that the agent had actually sold, but not for units unsold.

The courts are too lenient in this area, the case of “Dale Vs. Palmer” should be reviewed. In it, a listing agreement provided that the listing would start when the construction on a subdivision commenced and would continue until 30 days after the notice of completion had been filed. The court held that such listing agreement was void as violating the requirement that the listing agreement provide a specific and definite termination date.

The courts in this state and the Real Estate Commissioner have apparently operated under the idea that the loss of the commission, especially where it has been earned by the sale of the property, is a sufficient deterrent to agents failing to specify a definite termination date. Thus, no case could be found wherein sanctions were imposed in terms of revocation or suspension of the agent’s license for failure to specify a definite termination date.

### 7. COMMINGLING

The mixing of an agent’s funds with the client’s is expressly prohibited by law. You should realize that any loss to a client occasioned by the commingling of funds will be the responsibility of the agent. Further disciplinary action is also possible.

### 8. CONFLICTS OF INTEREST

The California Real Estate Law expressly precludes an agent from acting for more than one party in a transaction without the knowledge or consent of the other parties. Once again, the law in this state seeks to

discourage dealings by an agent which are not revealed to the parties. The policy behind such law is to insure that the public can place confidence and trust in their agents.

The case of “Ohanesian vs. Watson” clearly shows the lengths to which the courts will go to insure that an agent’s dealings are open and honest, even where no loss results to the principal in the transaction. In that case, the agent had obtained an exclusive listing from the owner of a ranch. During the course of the listing, the agent was approached by purchaser “X”, who himself owned a home. Purchaser “X” who wanted to buy the ranch with the proceeds from the sale of his home, listed his home with the agent. Thereafter, the agent represented to “X” that a third party was interested in buying the ranch and that a \$500 deposit by such a third party had been accepted by the agent. At that point, “X” canceled his listing with the agent. Thereafter, “X” was approached by a buyer for his home. An escrow was opened. The agent, learning of this escrow on the home of “X”, made arrangements to have the ranch sold to “X” rather than to the third party who had submitted the deposit.

Among the arrangements made and required by the agent was that “X” pay the agent a commission through the escrow opened on the sale of the home. Thus, the agent was receiving commission from “X” as well as a commission from the owner of the ranch. However, since the agent failed to reveal to the owner of the ranch that he was also receiving a commission from “X”, the agent was held to be in violation of the requirement of full disclosure to all parties that he was acting for more than one party to the transaction. As such, the agent suffered the suspension of his license for 90 days.

The conduct of the agent described above was held to violate not only the rule against conflict of interest, but also the claiming of secret or undisclosed profit or compensation, dishonest dealings, and acting in a manner which would have warranted the denial of his application for real estate license.

It is also instructive on the violation of the provision that the agent disclose any potential conflict of interest. In that case, the agent, a mortgage broker, failed to disclose to potential borrowers that one of the lenders was an employee of the agent’s. The other lender was a sister of the agent. While this violation constituted a failure to reveal a potential conflict of interest, it also was a violation of the requirement that the agent reveal the relationship or potential interest that he himself had in the transaction.

As can be seen by these cases, the rule of full disclosure is applied in a wide variety of transactions. In effect, it is common practice for the agent to reveal all facts, however detrimental to the success of the transaction, which could in any way affect the willingness of the parties to consummate the transaction.

## 9. NEGLIGENCE

An aspect of California Real Estate Law which will undoubtedly receive attention in the future is the area of negligence or incompetence in the performance of an agent’s duties.

Inevitably, an agent will be held civilly liable in damages for his negligence or incompetence which causes the loss to the principal in a transaction. The length to which the courts will find such liability as against an agent seems to be greater than in other business transactions. For example, the court found in the case of “Walters vs. Marler” that an agent was civilly liable for the attorney’s fees of a principal of the transaction using a little known rule of law. The theory of the court was that the agent, as fiduciary of the principal, was responsible for all loss caused to the principal for breach of the fiduciary relationship. Such breach did not consist of actual fraud or concealment.

Instead, it dealt with the negligent representations concerning the boundary lines of the subject property. The principal’s lawsuit includes request for his attorney’s fees. Normally, such requests are denied. However, in this case, the court held that the agent’s breach of fiduciary duty constituted a “constructive fraud” on the principal, allowing for the recovery of attorney’s fees as being included in the items of loss by the principal.

With the advent of creative financing techniques, similar cases requiring formal litigation to correct the mistakes of agents can be expected. Penalties in the form of attorney’s fees can also be expected to be assessed against agents in such a position. Further, revocation or suspension of licenses for gross incompetence or repeated acts of negligence can be safely predicted.

As a general rule, an agent should not structure a transaction that he does not feel comfortable in structuring. More specifically, whenever the slightest question of propriety or format arises, you should not hesitate to retain legal counsel either for yourself or for a client. Your failure to do so will be held against you in a court of law. It can also be seen that such failure could lead to the loss or suspension of your license.

## 10. SUPERVISION OF SALESMEN

California Real Estate Law places the requirement on all brokers to exercise reasonable supervision over the activities of salespeople.

A broker will generally be held civilly liable for the negligence or misconduct of his agents working under him. Such liability will exist whether or not the broker can show that he exercised reasonable supervision over the activities of the salesman.

In terms of disciplinary action, however, it is conceivable that a broker could escape punishment by the Real Estate Commissioner even where the salesman was negligent if the broker could show that such negligence was not a result of the broker's lack of supervision over the salesman.

The relationship between brokers and salesperson was explained in the case of "Grand vs. Griesinger". The court stated that salesmen and brokers belonged indistinctly different categories in that the broker, because of his superior knowledge experience, and proven stability, is entitled to deal with the public. The rights to contract with members of the public and collect money from them are included in such dealings. On the other hand, salespersons are treated strictly as agents of the broker.

A salesman cannot make contracts in his own name nor accept compensation from any other than the broker under whom is licensed. Indeed, it is deemed a misdemeanor for a salesman, as well as anyone else except a broker to pay or deliver or accept compensation for services for which a real estate license is required.

## 11. MISCELLANEOUS CONSIDERATIONS

### (a) Handling a Deposit

Subsection 2785(a)(9) and (10) of the Commissioner's Regulations proscribe the following conduct by real estate licensees.

- §(9) Knowingly making a false or misleading representation to the seller of real property as to the form, amount and/or treatment of a deposit toward purchase of the property by an offeror.
- §(10) The refunding by a licensee, when acting as an agent or sub-agent for seller, of all or part of an offeror's purchase money deposit in a real estate sales transaction after the seller has accepted the offer to purchase, unless the licensee has the express permission of the seller to make the refund."

To illustrate these regulations, consider the following example. Broker "B", listing agent relative to the sale of owner "O"'s residence, procures an offer from prospective purchaser "P". Along with such offer, "P" delivers to broker "B" a deposit check in the amount of \$1,000. The offer provides for the contingency that the transaction will not close until purchaser "P"'s contractor has inspected and approved the structural aspects of the residence. The offer further provides that the owner may keep the \$1000 deposit if the purchase and sale of the residence is prevented by a breach on the part of the buyer.

After owner "O" accepts the offer and an escrow is opened, purchaser changes his mind before any inspection by his contractor is made and decides that he does not want to purchase the subject residence. Purchaser "P" informs broker "B" that he no longer wishes to continue with the purchase of the property. Purchaser further demands the return of his deposit and threatens to go to his attorney if the \$1000 is not promptly returned to him. Acting on the threat, broker "B" informs owner "O" that purchaser "P" has canceled the escrow because of a structural problem found by party "P"'s contractor. Because of the failure of the contingency in the offer and acceptance, broker "B" was required to return the deposit.

Broker has committed violations of the cited regulations in that he refunded the money to party "P" after the seller's acceptance without the express permission of the seller. Further, broker "B" falsely represented to the seller that he had no choice but to return the deposit to the prospective purchaser because one of the contingencies in the offer and acceptance had not been met.

The proper conduct for broker "B" in that instance would have been to relate the substance of purchaser "P"'s conversation regarding his change of mind to owner "O".

Beyond that, broker "O" should have exercised extreme caution in advising owner "O" of his rights and liabilities, in as much as any such advice might constitute the unauthorized practicing of law. Broker "B" should not have taken it upon himself to refund the deposit to the purchaser until such time as he had express permission from owner "O".

### (b) Trust Deed Note

Effective July 31, 1983, regulations were adopted which proscribed the making of certain representations in the sale of trust deed notes. More specifically, a licensee may not represent the fair market value of property used to secure a trust deed without having a reasonable basis for believing the truth and accuracy of such valuation.

The following example exemplifies the applicable conduct. Broker "B" has a listing on owner "O"'s residence. Purchaser "P" submits an offer to purchase the residence for the full list price of \$100,000. The terms of the offer call for party "P" to assume the existing \$75,000 first trust deed on the property, to give new second trust deed secured by both the subject residence and certain other unrelated real property in the amount of \$19,000 to the owner, and to give to the broker a new \$6,000 trust deed note on the subject property for the broker's commission.

The offer is accepted and after the close of escrow, the broker attempts to sell his third trust deed to "C". During these negotiations with "C" regarding the sale of the \$6,000 trust deed note, "B" represents to "C" that the fair market value of the property is \$125,000 so that such third trust deed note is well-secured. Relying on such representations of value, purchases the third trust deed note. Thereafter, purchaser "P" defaults on all of the trust deed notes, owner forecloses, and "C"'s position is thereby compromised.

In the forgoing example, a violation of Section 2785 (a)(12) occurred during the negotiation stage between "B" and "C" when "B" represented the value of the property to be \$125,000. A sale of the property had just occurred for the purchase price of \$100,000. Clearly, "B" had no reasonable basis for believing that the value of the property was \$125,000.

### **(c) Inducing owner to accept offer**

Subsections 2785(a)(6), (7), and (8) prohibits licensees from:

- §(6) Presenting competing offers to purchase real property to the owner by the listing broker in such a manner as to induce the owner to accept the offer which will provide the greatest compensation to the listing broker, without regard to the benefits, advantages, and/or disadvantages to the owner.
- §(7) Knowingly underestimating the probable closing costs in a transaction in a communication to the prospective buyer or seller of real property in order to induce that person to make or to accept an offer to purchase the property.
- §(8) Failing to explain to the parties or prospective parties to a real estate transaction the meaning and probable significance of a contingency in and offer of contract that the licensee knows or reasonably believes may affect the closing dates of the transaction, or the timing of the vacating of the property by the seller or its occupancy by the buyer. The following example illustrates how this might occur. Immediately upon advertising a property for sale, broker obtains two offers from prospective purchasers. One of the offers is submitted through another agent, "A". The offer submitted through agent "A" provides that the six percent commission shall be split between two brokers. The offer submitted by the other prospective purchaser was submitted directly through broker "B" and provides for a full six percent commission to broker "B". Such offer also provides that the consummation of the purchaser and sale shall be contingent upon the sale of the home of such prospective purchaser, while the offer submitted through agent "A" has no such contingency. Additionally, the offer submitted agent "A" does not require or otherwise provide for a termite clearance, whereas the other offer obligates the seller to provide such termite clearance.

In presenting the two offers, broker emphasizes that, because he procured the prospective purchaser, the offer submitted through the broker should be accepted because he will have greater control over the escrow to make sure that the transaction closes. Broker "B" fails to point out to the owner that the offer submitted through broker "B" is contingent on the sale of the purchaser's residence and also fails to disclose to the owner that the owner's costs in escrow relative to the termite clearance would be less if the owner accepted the offer through agent "A". Obviously, broker would have a greater interest in the acceptance of the offer submitted through his own efforts.

Even if the owner accepts the offer submitted through agent "A", violations have occurred. One infraction occurs at the point that the broker has sought to induce the owner to accept the offer submitted through broker because of the greater compensation payable to broker "B".

A further violation has occurred at the point that the broker knowingly fails to reveal the greater closing costs in his offer as opposed to the offer submitted through agent "A". A third violation has occurred in broker "B"'s failure to explain to the owner the effect of the

contingency on this offer relative to the sale of the prospective purchaser's residence, which very likely could extend the closing date of the transaction.

### (d) Misrepresentation when licensee is seeking listing

Section 2785(a)(4) of the Commissioner's Regulations makes it illegal for an agent, when seeking a listing, to make "a representation to an owner of the real property that the soliciting licensee has obtained a bona fide written offer to purchase the property, unless at the time of the representation, the licensee has possession of a bona fide written offer to purchase".

A common situation arises where an agent has shown numerous properties to a prospective purchase in a given tract of homes.

If the agent has contact with a homeowner in that tract who has not listed his home for sale, such agent may be tempted convey to such homeowner that the prospective purchasers r ready, willing, and able to purchaser such home owner's residence. A violation of section 2785(a) (4) would exist if, for example, the agent falsely represented that he had been given the authority or *power of attorney* to transact such a purchase and sale, or that such agent had the right to complete a sale on behalf of the prospective purchaser on any home in said tract. It should further be noted, of course, that even if a sale occurs which is beneficial to the homeowner, the agent would still be in violation of such regulation if he did not, in fact, have such a written offer or have an actual written authorization from the prospective purchaser to conclude such a sale.

### (e) Quoting of Commission by licensee

Section 2785(a)(2) of the Commissioner's Regulations makes it fraudulent and dishonest for a licensee to communicate to an owner of real property "that the licensee is precluded by law, regulation, or by the rules of any organization, other than the commission of fee quoted to the owner by the licensee".

By way of example, if an agent tells an owner during listing negotiations that it is a rule among all members of the Board of Realtors of which the licensee is a member that no listing can be accepted unless the commission rate is six percent of the sales price, or that the law of the State of California requires that the licensee charge a six percent commission rate, a violation of the above regulation has occurred.

## 12. UNETHICAL CONDUCT

Prohibitions contained in subsection (a) of Section 2785 of the Commissioner's Regulations deal with unlawful activities.

The following address unethical behavior and should be avoided.

### (a) Excessive embellishment

Section 2785(b)(1) makes it unethical for an agent to "*represent without reasonable basis the nature and/or condition of the interior or exterior features of a property when soliciting an offer is unethical*".

One of the more widely utilized practices of real estate agents is the art of "puffing". While the simple embellishment of a good feature of a residence does not constitute unethical conduct, such embellishment should not be used without a reasonable basis. For example, advertising a residence with a small yard as an "easy to care for yard" is not unethical conduct. On the other hand, representing to a prospective purchaser that there is new plumbing throughout the house when, in fact, the agent only knows that plumbing fixtures in one bathroom have been recently replaced, would constitute unethical conduct.

### (b) Failure of an adequate response

Section 2785 (b) (2) makes it unethical for an agent to "*fail to respond to reasonable inquiries of a principal as to the status or extent or efforts to market property listed exclusively with the licensee*".

During the "boom" of the late 1970's, agents who were able to obtain listings were almost assured of sales with the multitude of qualified buyers looking for homes. However, in the early 1980's, obtaining a listing was only a small step towards the eventual sale of the property. Much hard work on the part of the agent was needed to successfully market a property. Often times, the effort and expense required is greater than an agent is willing to expend.

The failure of the agent to respond to inquiries of a seller regarding the efforts made by the agent is a convenient way for the agent to avoid having to admit that he is not doing all he should be doing to successfully market the property.

As a means of encouraging the expenditure of sufficient effort on the part of agents, the Real Estate Law deems it unethical for an agent to fail to respond to inquiries made by an owner regarding the status of the property and efforts made to market it.

**(c) Misrepresenting a fee charge**

Section 2785 (b) (3) makes it unethical for an agent to *“represent as an agent that any specific service is free when, in fact, it is covered by a fee to be charged as part of the transaction”*.

A prime example of such conduct relates to escrow charges. In attempting to minimize the closing costs, an agent might very well say that a particular escrow company does not charge for the drafting of deeds and/or notes. Needless to say, when the owner receives the closing statement showing charges for such drafting, he/she will be unhappy.

**(d) Choosing an escrow agent**

Section 2785 (b) (5) makes it unethical for an agent to *“Recommend by a salesperson to a party to a real estate transaction that a particular lender or escrow service be used when the salesperson believes his broker has a significant beneficial interest in such entity without disclosing this information at the time the recommendation is made”*.

It is not infrequent that a broker will operate an escrow company or be a part owner in one. When that broker's agents are ready to turn transaction into escrow, the buyer and seller will normally have no particular choice for an escrow agent. In such situations, the principals to the transaction will normally leave it to the agent to select the escrow agent. The above cited regulation makes it unethical for an agent simply to choose an escrow agent without informing the buyer and seller that the agent's broker has a beneficial interest in the escrow company.

When an agent is representing a buyer, the agent will automatically list the escrow agent to be utilized as part of the offer. If the matters of selecting the escrow agent and disclosing any interest of the agent's broker in the escrow company are not discussed, unethical practice will result.

**(e) Improperly claiming to be a specialist**

*Section 2785 (b) (6) makes it unethical for an agent to “claim to be an expert in an area of specialization in real estate brokerage, e.g., appraisal, property management, industrial sitting, etc., if, in fact, the licensee has had no special training, preparation or experience in such areas”*.

By way of example, if an agent seeking to solicit listings advertises that he is willing to appraise the properties of homeowners without obligation on the part of the homeowners, a potential violation of the above cited section can occur if he cannot perform such service. If the agent further advertises that he is qualified appraiser or has otherwise undertaken extensive appraisals in the area in which he is advertising, if in fact he has not done so, a violation has definitely occurred.

**(f) Breach of appraisal requirements**

Section 2785 (b) (7) makes it unethical for an agent to *“use the term ‘appraisal’ in any advertising of offering for promoting real estate brokerage business to describe a real property evaluation service to be provided by the licensee unless the evaluation process will involve a written estimate of value based upon the assembling, analyzing and reconciling of facts and value indicators for the real property in question”*.

By way of further example, if a broker advertises that his services will include the marketing and appraisal of property, he must do more than just glance at recent multiple listing service books. He must be able to thoroughly appraise the property but utilizing the market data approach, the cost approach, and the income approach.

**(g) Failure to disclose improper conduct**

Section 2785 (b) (8) makes it unethical for an agent to *“failure to disclose to the appropriate regulator agency any conduct on the part of a financial institution which reasonably could be construed as a violation of the Housing Financial Discrimination Act of 1977 (anti redlining)”*.

Because of the close working relationship between agents and loan representatives, a representative will often make an ‘off hand’ remark regarding the location of a property in an “undesirable” neighborhood. While not every such remark constitutes a violation of the Housing Financial Discrimination Act, it could constitute evidence of discrimination if the subject loan is denied and there are no solid business reasons for the denial. This regulation obligates a licensee

to make such disclosure when such remarks are made in situations where financial assistance or loans are denied for no apparent reason.

**(h) Misrepresenting a relationship with entity**

Section 2785 (b) (9) makes it unethical for an agent to “represent to a customer or prospective customer that because the licensee or his or her broker is a member of, or affiliated with, a franchised real estate brokerage entity, that such entity shares substantial responsibility, with the licensee, or his or her broker, for the proper handling of transactions if such is not the case”.

The most frequent type of franchise arrangement involves separate legal entities, namely the ‘broker franchisee’ and the franchiser. Again, the most important aspect of such franchise arrangement is that the broker is purchasing the right to utilize the name of the franchiser and, in exchange thereto, the franchiser advertises extensively such name for the benefit of the ‘brokers franchisees’.

A violation of this section occurs when an agent represents to a customer that because his “company” is a nationwide operation (as is commonly understood to be the case from television advertisements), such operation is more responsible and solid than individual brokers of the community. In reality, most franchisers have no responsibility for the acts, conduct or transactions of its ‘brokers franchisees’.

**(i) Improperly charging a commission**

Section 2785 (b) (10) makes it unethical for an agent to “Demand a commission or discount by a licensee purchasing real property for one’s own account after an agreement in principle has been reached with the owner as to the terms and conditions of purchase without any reference to price reduction because of the agent’s license status.”

For example, if an agent and owner have an oral agreement wherein the agent agrees to purchase the property without any mention of a commission, this provision makes it unethical for the agent to later claim a commission. While the agent is not technically bound to purchase the property unless his commission is included, such conduct would be deemed to be unethical.

**NEW REGULATIONS: 10153 & 10170**

**A. 10153.4**

Section 10153.4 of the Business & Professions Code is amended to read:

- (a) Every person who is required to comply with Section 10153.3 to obtain an original real estate salesperson license shall, prior to the issuance of the license, or within 19 months after issuance, submit evidence, satisfactory to the commissioner, of successful completion, at an accredited institution of two of the courses listed in Section 10153.2 other than real estate principles, advanced legal aspects of real estate, advanced real estate finance, or advanced real estate appraisal.
- (b) A salesperson who qualifies for a license pursuant to this section shall not be required for the first license renewal thereafter to complete the continuing education pursuant to Article 2.5, except for the courses specified in subdivisions (a) and (b) of Section 10170.5.
- (c) The salesperson license issued to an applicant who has satisfied only the requirements of Section 10163.3 at the time of issuance shall be automatically suspended effective 18 months after issuance if the licensee has failed to satisfy subdivision (a). The suspension shall not be lifted until the suspended licensee has submitted the required evidence of course completion and the commissioner has given written notice to the licensee of lifting of the suspension.
- (d) The original license issued to a salesperson shall clearly set forth the conditions of the license and shall be accompanied by a notice of the provisions of this section and of any regulations adopted by the commissioner to implement this section.
- (e) The commissioner shall waive the requirements of this section for any person who presents evidence of admission to the State Bar of California, and the commissioner shall waive the requirement for any course for which an applicant has completed an equivalent course of study as determined under Section 10153.5.

**B. 10170.5**

Section 10170.5 of the Business & Professions Code is amended to read:



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Except as otherwise provided in sections 10153 and 10170.8, no real estate license shall be renewed unless the commissioner finds that the applicant for license renewal has, during the four-year period preceding the renewal application, successfully completed the 45 clock hours of education provided for in Section 10170.4 including all of the following:

- (a) A three (3) hour course in ethics, professional conduct, and legal aspects of real estate, which shall include, but not be limited to relevant legislation, regulations, articles, reports, studies, court decisions, treatises, and information of current interest.
  - (b) A three (3) hour course in agency relationships and duties in a real estate brokerage practice, including instruction in the disclosures to be made and the confidences to be kept in the various agency relationships between licensees and the parties to real estate transactions.
  - (c) Not less than 18 clock hours of courses or programs related to consumer protection, and designed by the commissioner as satisfying this purpose in his or her approval of the offering of these courses or programs, which shall include but not be limited to, forms of real estate financing relevant to serving consumers in the marketplace; land use regulation and control; pertinent consumer disclosures; agency relationships; capital formation for real estate development; fair practices in real estate; appraisal and valuation techniques; landlord-tenant relationship; energy conservation; environmental regulation and consideration; taxation as it relates to consumer decisions in real estate transactions; probate and similar disposition of real property; governmental programs such as revenue bond activities, redevelopment, and related programs; business opportunities; and mineral, oil, and gas conveyancing..
  - (d) Other courses and programs which will enable a licensee to achieve a high level of competence in serving the objectives of consumers who may engage the services of licensees to secure the transfer, financing, or similar objectives with respect to real property, including organizational and management techniques which will significantly contribute to this goal.
- Any denial of a license pursuant to this section shall be subject to Section 10100.

### C. OTHER AMENDMENTS

The following are amended to read:

- 10201: The holder of a license who fails to renew it prior to the expiration of the period for which it was issued and who has otherwise qualified for such license, may renew it within *two years* from such expiration upon proper application and the payment of a late renewal fee in an amount equal to 1 1/3 times the regular renewal fee in effect at the time the license is reinstated.

### SPECIFIC DISCLOSURES & RESPONSIBILITIES IN ASSEMBLY BILL 1034

The Connelly-Grisham Assembly Bill No. 1034 becomes operative January 1, 1988. It requires listing and selling agents in real estate transactions to provide both buyers and sellers with specified written and oral disclosures. A specified written disclosure form must be given to the seller prior to the time of listing by the listing agent and the selling agent must deliver the same disclosure to the buyer as soon as practicable, but prior to the execution of an offer. The various forms of agency relationships between buyers and sellers and real estate licensees, and the duties owed by these licensees, depending on their agency relationship to the buyer and seller are set forth on the disclosure form. Both the buyer and seller are to sign for receipt of the disclosure.

Connelly-Grisham No. 1034 will also require the licensees to orally disclose to the buyer and seller, as soon as practicable, whether he is acting as the buyer's agent, the seller's agent or a dual agent. The licensees will have to confirm the agency relationship in writing in a contract to purchase or lease or in a separate writing executed by the seller, buyer and the selling agency. The law applies to real property transactions involving one-to-four residential units.

Specific important provisions include:

- (1) Existing law provides that in an action on a contract, if the contract provides for an award of attorney's fees and costs to a party, then the prevailing party shall be entitled to attorney's fees and costs. Existing law provides that if a defendant alleges that he or she has tendered that full amount due and deposits in the court that amount and the allegation is found true, then the defendant shall be deemed to be prevailing party.

## ETHICS

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- This bill would permit a court to order the deposit of that amount in an insured, interest-bearing account, as specified.
- (2) This bill would, on and after January 1, 1988, require persons acting as listing and selling agents as defined, to provide sellers and buyers with a disclosure form, as prescribed, containing general information on agency relationships in specified residential real property transactions. These requirements would be applicable to transactions involving sale or exchange of certain estates of inheritance or perpetual estates, life estates, and leaseholds exceeding one year's duration in residential real property constituting or improved with 1 to 4 dwelling units or involving sale or exchange of mobile homes through a real estate licensee.
  - (3) This bill would require contracts in these transactions to specify (a) whether the listing agent represents the seller exclusively or both the buyer and seller and (b) whether the selling agent represents the buyer exclusively, the seller exclusively, or both the buyer and seller.
  - (4) This bill would specify, with respect to transactions covered by the bill, that neither the payment of compensation nor the obligation of a buyer or seller to pay compensation to a real estate agent is necessarily determinative of a particular agency relationship. The bill would specify that associate real estate licensees owes a duty to any principal or to any buyer or seller who is not a principal, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.
  - (5) This bill would with respect to transactions covered by the bill, expressly preclude such a dual agent from disclosing specified price information to the other party to the transaction without consent, but would not affect existing law as to disclosure of other confidential information. The bill would specify that a listing agent is not a dual agent solely by reason of being the selling agent, and would expressly preclude a listing agent from acting as an agent for the buyer only. The bill would also permit real estate brokers to enter into forms of agency relationships not either described or prohibited by the bill if certain disclosures are made.
  - (6) The bill would, with respect to transactions covered by the bill, specifically authorize contracts between principal and agent to be modified to change the agency relationship before performance of the act that is the object of the agency, by the written consent of the parties to the agency relationship.
  - (7) This bill would specify that it shall not be construed to diminish any duty of disclosure owed by real estate agents and their sub-agents, associate licensees, and employees to buyers and sellers or to relieve them of liability for conduct in connection with acts governed by the bill or breaches of fiduciary duty or of any duty of disclosure.

### MISC.

Licensing fees have been changed and when renewing your license, send in the correct amount to the DRE.

When applying for renewal of your real estate license, you must include with the application a properly completed R/E Form 251 (Continuing Education Course Verification Form). Various information taken from your Continuing Education Attendance Certificates must be included on the RE Form 251.

It has been noted many licensees are incorrectly using the "date of issuance" shown on their certificates instead of date completed. Two dates are generally shown: the date the particular offering was "attended or completed and the date of "issuance". To have your renewal application processed, the date you actually "completed" the offering must be shown, not the date of issuance. Use the date of issuance will cause delays in the renewal of your license.

## APPENDIX A: CODE OF ETHICS: NATIONAL ASSOCIATION OF REALTORS

### Preamble

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. The REALTOR should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interest impose obligation beyond those of ordinary commerce. They impose grave social responsibility and patriotic duty to which the REALTOR should dedicate himself, and for which he should be diligent in preparing himself. The REALTOR, therefore, is zealous to maintain and improve the standards of his calling and shares with his fellow REALTORS, a common responsibility for its integrity and honor. The term REALTOR has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of his obligation, a REALTOR can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever you would that men should do to you, do you even so to them.

Accepting this standard as his own, every REALTOR pledges himself to observe its spirit in all of his activities and to conduct his business in accordance with the tenets set forth below:

### **Article 1**

The REALTOR should keep himself informed on matters affecting real estate in his community, the state, and the nation so that he may be able to contribute responsibly to public thinking on such matter.

### **Article 2**

In justice to those who place their interests in his care, the REALTOR should endeavor always to be informed regarding laws, proposed legislation, governmental regulations, public policies, and current market conditions in order to be in a position to advise his clients properly.

### **Article 3**

It is the duty of the REALTOR to protect the public from fraud, misrepresentation, and unethical practices in real estate transactions. He should endeavor to eliminate in his community any practices which could be damaging to the public or bring discredit to the real estate profession. The REALTOR is charged with regulating the practices of brokers and salesmen in his state.

### **Article 4**

The REALTOR should seek no unfair advantage over other REALTOR and should willingly conduct his business so as to avoid controversies with other REALTORS.

### **Article 5**

In the best interests of society, of his associates, and his own business, the REALTOR should willingly share with other REALTOR the lessons of his experience and study for the benefit of the public, and should be loyal to the Board of REALTORS of his community and active in its work.

### **Article 6**

To prevent dissension and misunderstanding and to ensure better service to the owner, the REALTOR should urge the exclusive listing of property unless contrary to the best interest of the owner.

### **Article 7**

In accepting employment as an agent, the REALTOR pledges himself to protect and promote the interests of the client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve the REALTOR of the obligation to treat fairly all parties to the transaction.

### **Article 8**

The REALTOR shall not accept compensation from more than one party, even if permitted by law, without the full knowledge of all parties to the transaction.

### **Article 9**

The REALTOR shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose.

### Article 10

The REALTOR shall not deny equal professional services to any person for the reasons of race, creed, sex, or contrary of national origin. The REALTOR shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.

### Article 11

A REALTOR is expected to provide a level of competent service in keeping with the Standards of Practice in those fields in which the REALTOR customarily engages.

The REALTOR shall not undertake to provide specialized professional services concerning a type of property or service that is outside his field of competence unless he engages the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any person engaged to provide such assistance shall be so identified to the client and his contribution to the assignment should be set forth.

The REALTOR shall refer to the Standards of Practice of the National Association as to the degree of competence that a client has a right to expect the REALTOR to process, taking into consideration the complexity of the problem, the availability of expert assistance, and the opportunities for experience available to the REALTOR.

### Article 12

The REALTOR shall not undertake to provide professional services concerning a property or its value where he has a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

### Article 13

The REALTOR shall not acquire an interest in or buy for himself, any member of his immediate family, his firm or any member thereof, or any entity in which he has a substantial ownership interest, property listed with him, without making the true position known to the listing owner. In selling property owned by himself, or in which he has any interest, the REALTOR shall reveal the facts of his ownership or interest to the purchaser.

### Article 14

In the event of a controversy between REALTOR associated with different firms, arising out of their relationship as REALTOR, the REALTORS shall submit the dispute to **arbitration** in accordance with the regulations of their board or boards rather than litigate the matter.

### Article 15

If a REALTOR is charged with unethical practice or is asked to present evidence in any disciplinary proceeding or investigation, he shall place all pertinent facts before the proper tribunal of the member board or affiliated institute, society, or council of which he is a member.

### Article 16

When acting as agent, the REALTOR shall not accept any commission, rebate, or profit on expenditures made for his principal-owner, without the principal's knowledge and consent.

### Article 17

The REALTOR shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

### Article 18

The REALTOR shall keep in a special account in an appropriate financial institution, separated from his own funds, moneys coming into his possession in trust for other persons, such as escrows, trust funds, clients moneys, and other like items.

### Article 19

The REALTOR shall be careful at all times to present a true picture in his advertising and representations to the public. He shall neither advertise without disclosing his name nor permit any person associated with him to use individual names or telephone numbers, unless such person's connection with the REALTOR is obvious in the advertisement.

### **Article 20**

The REALTOR for the protection of all parties, shall see that the financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties. A copy of each agreement shall be furnished to each party upon his signing of such agreement.

### **Article 21**

The REALTOR shall not engage in any practice or take action inconsistent with the agency of another REALTOR.

### **Article 22**

In the sale of property which is exclusively listed with a REALTOR, the REALTOR shall utilize the services of other brokers upon mutually agreed upon terms when it is in the best interests of the client.

Negotiations concerning property which is listed exclusively shall be carried on with the listing broker, not with the owner, except with the consent of the listing broker.

### **Article 23**

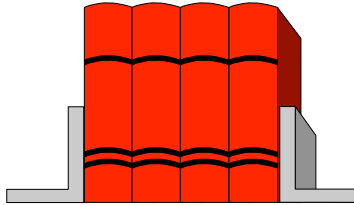
The REALTOR shall not publicly disparage the business practice of a competitor nor volunteer an opinion of a competitor's transaction. If his opinion is sought and if the REALTOR deems it appropriate to respond, such opinion shall be rendered with strict professional liability and courtesy.



## COURSE 2: AGENCY LAW, LIABILITIES, RELATIONSHIPS & DISCLOSURES

### Preface

This material is presented to and prepared for all real estate licensees for complying with the continuing



education requirements.

This course covers a variety of topics relating to agency relationships and laws and gives a general overview of what agency should be in relation to the Buyer, Seller and Broker. A review of duties, the required disclosures, confidences, and required forms, provides a thorough understanding of your professional requirements, responsibilities and obligations.

Due to the number of abuses of the agency relationship, the Senate Bill 491 was enacted. This state legislation requires real estate licensees to take three (3) course hours of agency law.

This course is prepared explicitly to cover “*Agency Relationships, their Duties to the public (principal and third party), their liabilities, and Disclosures required from them*”.

Agency law can be quite complex in its applications. Some situations may arise that might cause confusion as to what the law commands of you. If this occurs to you, you should consult an attorney for legal advice.

This course is in compliance with DRE’s requirement and successful completion will yield 3 hours of Continuing Education Credit (Section 10170.5 (b) Business and Professions Code).

### AGENCY

**Agency** is the authority to act for a principal (client) in a specified capacity for a stated period of time.

An **agent** is one who is authorized to represent his or her principal in business dealings with third persons. This places the agent in a position of highest good faith towards the principal and creates a “**fiduciary**” (**entrusted**) **relationship**. The Statute of Frauds dictates that a contract that authorizes an agent to find a purchaser or lessee (for more than one year) of real estate - a Listing Agreement-be in writing. The California Real Estate Law requires that the employment agreement between a real estate broker and a salesperson be in writing. An **agency** is the relationship between a principal and an agent whereby the agent represents the principal in dealing with a third party.

### INDEPENDENT CONTRACTOR VS. EMPLOYEE

Real estate agents generally act as *independent contractors* in their dealings with clients as well as in their dealings with each other.

An **independent contractor** sells results rather than time, is under no supervision, and his or her conduct is not subject to the control of another.

An **employee**, on the other hand, works under the direct control and supervision of the employer.

An independent contractor gets paid by commission (lump sum of money), whereas an employee gets paid by salary.

The California Real Estate Law will always treat a salesperson as an employee of a broker in considering his or her rights and responsibilities to buyers, sellers and other parties of a real estate transaction, even if broker and salesperson work responsibilities and compensation are structured as those of an independent contractor.

This makes the broker responsible and liable for the activities of the salesperson.

## AUTHORIZATION TO SELL

The name of the usual agency contract between a broker and a seller is called **Authorization to Sell** or commonly known as **listings** by realtors. It is an employment contract by which a principal employs an agent to do certain things for the principal. All real estate transactions originate from one form or another of listing contracts. This may authorize the agent to sell, lease, exchange or negotiate a loan. There are three basic types of listings used in California, they are (1) Exclusive right to sell, (2) Exclusive agency, and (3) Open listing.

### 1. EXCLUSIVE RIGHT TO SELL

This form **entitle the listing broker to a commission regardless who sells the property** during the listing period including the owner. This is the most widely used listing in the United States. The advantage to the broker is that the money and effort the broker expends on advertising and showing the property will be to the broker's benefit. The advantage to the owner is that the broker will more likely put more effort into selling a property if the broker holds an exclusive right to sell than if the broker has other forms. See Form 2-2 Exclusive Authorization and Right To Sell.

### 2. EXCLUSIVE AGENCY

This listing is similar to the exclusive right to sell, except that the owner may sell the property himself during the listing period and not owe a commission to the broker. The broker, however, is the only broker who can act as an agent during the listing period. The broker is less enthusiastic and may not expend as much effort on advertising and showing the property as with an exclusive right to sell.

### 3. OPEN LISTING

Open listing carries no exclusive rights. An owner can give an open listing to as many brokers at the same time, and the owner can still find a buyer and without paying commission. A commission is earned only if the broker is the one who actually procures the buyer and makes the sale. Normally, brokers are reluctant to accept open listing, since the broker can spend money and effort and only to discover no commission is earned because another broker has found the buyer, or the property is sold by the owner.

 *An oral agreement between brokers for a division of commission is valid.*

## CREATION OF AGENCY

Agency can be created by three different methods, namely agreement, ratification and estoppel.

### AGREEMENT

This is the most common form of agency relationship in real estate. The basic principles of contract law apply, however, consideration is not always essential.

Agency is generally created by agreement between a seller and an agent. The agreement can be formed with an express contract or an implied arrangement. However, an implied arrangement authorizing an agent to purchase or sell real property for compensation is not enforceable. Therefore, most real estate agency contracts are created by express contract.

If the principal offers compensation for a service and the agent provides the service in a real estate agreement, the contract is classified as "**unilateral**". The contract is "**bilateral**" if the agent makes the counter promise to "**use due diligence**".

Consideration is not legally mandatory in order to create an agency relationship. However, under the California Real Estate Law, acts must be performed for or in expectation of compensation in order to have a "licensed" agency agreement. Minors, insane people or other people who are legally incompetent may not appoint agents and enter into agreement.

### RATIFICATION

A real estate agent may occasionally overstep the bounds of his authority or may act on behalf of a principal without an understanding between the two parties. This occurs when a principal accepts the benefits of a contract negotiated by someone who was not an agent. If the principal is made aware of all



material facts of the transaction when the contract is accepted, the principal becomes bound by the statements of the ratified agent.

The principal is only bound by the action of an agent who is acting within the scope of actual or ostensible authority (see Authority of Agents). Of an agent acts beyond the scope of authority, the principal is not bound. A third person who reasonably relied on the agent's statement that the agent had sufficient authority may sue for damages, claiming the agent breached an "**implied warranty of authority**".

The following requirements must be met in order to complete the ratification process.

1. The principal must have the power to authorize the act.
2. The principal must ratify the entire act of the agent and not just a portion of it.
3. In the area of real estate, the ratification must be in writing.
4. The principal must intend to ratify.
5. The principal must profess to act as the representative of the principal.
6. The principal must be cognizant of all relevant facts.
7. The ratification must take place before the third party withdraws from the transaction.

## ESTOPPEL

The third form of agency relationship is created by estoppel.

"**Estoppel**" is a legal doctrine that holds that a person is barred from asserting or denying a fact that is inconsistent with a previous position or representation. In the area of real estate, a principal cannot deny that an agency relationship existed with the agent if the principal has previous knowledge that an agent was acting on his behalf and did nothing to correct the representation. When the third person relies in dealing with the supposed agent, the principal will be estopped to deny the agency.

## FORMS OF AGENCY

There are three forms of an agency, *universal*, *general* and *specific*.

### UNIVERSAL AGENCY

In a universal agency, the principal gives the agent legal power to transact all types of matters on the principal's behalf. An example is an unlimited power of attorney. This is rare.

### GENERAL AGENCY

In a general agency, the agent is given the power to bind the principal in a particular business. An example is a salesperson is a general agent of the employing broker.

### SPECIAL AGENCY

In a special agency there are two ways that an agent can be authorized to act on behalf of principal.

The listing agreement is the primary form. It is generally referred to as an "authorization to sell". It empowers the agent to find a purchaser for the property. However, it does not authorize the real estate agent to actually negotiate the sale of the property.

The other form of agency agreement is the "**power of attorney**". With it, a person is granted the authority to act as an agent for another. The power of attorney can be general or limited in nature. A general power of attorney grants blanket authority to carry out the business of the principal. A limited power of attorney places restrictions on the power being vested.

When an agency relationship is created, many legal and ethical effects are instituted. The broker or salesperson is placed in a position to incur a great deal more legal responsibility than before the relationship was created. Since a broker or salesperson cannot possibly fulfill professional real estate responsibilities without becoming an agent of a client, the enormous legal and ethical effects cannot be avoided.

Specifically, the agent must act in a manner which is in the best interests of the client. Because of the nature of agency, it is quite possible to exploit the position of agent. Many safeguards have been instituted to protect the public from this.

## LAWS OF AGENCY

Whenever one person represents another in a business transaction, the Law of Agency applies. The Law of Agency defines an agent's duties and responsibilities and is found in the California Civil Code. Further, since the broker is a licensed real estate agent, he or she must comply with the laws and regulations of the California Department of Real Estate.

### AUTHORITY OF THE AGENT

#### Actual vs Ostensible Authority

There are two types of authority that can be granted, actual and ostensible.

**Actual authority** is that power which is intentionally conferred upon the agent by the principal. Therefore actual authority is that which is expressly or implied given by the principal. The principal is bound by contracts made within the scope of the agent's actual authority.

An **Express actual authority** is communicated to the agent in express oral or written terms. An implied actual authority is an authority which is implied as necessary to the performance of an express authority. It can be conferred by the conduct of the principal, or by the custom or usage of the trade. An agent has the implied authority to act as necessary to perform the duties expressly authorized in the agency agreement, unless expressly restricted by the agency agreement.

**Ostensible authority (also known as implied authority)** is that power which the principal allows or causes a third party to believe the agent possesses. With this type of authority, the principal is liable to third parties who have exercised good faith and have suffered detrimental effects.

Ostensible authority results from either (a) when a principal manifests that another is his agent to a third person rather than to the agent himself, or (b) when the principal has intentionally or negligently caused or allowed a third person to believe that his agent has authority to do that which he is not authorized to do, and the third person detrimentally relies so that it would be unjust to allow the principal to deny the agent's authority.

The principal will be bound by the acts of the agent who performed within the scope of the agent's ostensible authority. The declarations of the agent alone or the mere impression by a third party that the agent is authorized cannot establish the ostensible authority. However, if the principal is aware of the agent's declarations or acts or remains silent and makes no effort to denounce the authority, then the ostensible authority is established.

### WARRANTY OF AUTHORITY

An agent warrants to do everything necessary to effect the purpose of the agency, and to make representations of fact on behalf of the principal.

As an agent, the broker warrants that he or she has the authority to represent another person. If there is a written listing between the seller and the broker, he or she has an *expressed warranty of authority*. When a broker has no listing contract and offers to sell a property to a buyer, who relies on the fact that the agent has certain authority, the broker could be liable for this untrue representation. A broker gives *implied warranty of authority* to act for a seller by the mere fact that he or she shows the seller's property.

The amount of authority warranted to an agent can greatly vary from one principal to another. For that reason, an agent must always be aware of the extent of the warranty. If it is exceeded, the agent is liable for any damages that result from exceeding the limits of the vested authority.

Occasionally, a principal is not capable of contracting because of incompetency or infancy. In this situation, the agent is not liable for the incapacity of the principal unless the agent has expressly guaranteed capacity or purposely concealed the incapacity of the principal from the buyer. It is clearly advisable that the agent should always inform the third party that the capacity of the principal is not guaranteed.

#### Authority to Receive Deposits

As a generalization, no such authority exists unless there is a stipulation in the initial contract between seller and agent stating that the agent has the express authority to receive an earnest deposit from a buyer on behalf of the seller. The express authority to negotiate a sale of property is not a substitute for this legal requirement.

## AGENCY

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The principal is not liable for any loss if an agent's authority is abused in the preceding manner. To avoid any problem in this area, almost all listing contracts include a provision granting the express authority of the broker to receive deposits. You should make sure that your agreements do the same.

An earnest money deposit is never the property of the agent. It cannot be deposited into the agent's **personal account**. If this occurs, the agent is guilty of commingling. All deposits must be placed in a separate trust account of the agent's, a neutral escrow depository, or in the hands of the seller.

### Restrictions

According to the California Civil Code, an agent does not have the authority, either actual or ostensible, to conduct a transaction when the person with whom the agent is dealing with knows or suspects fraud upon the principal.

There is no implicit authority given to the agent to modify or cancel a transaction once consummated if the agency relationship is to sell real property. A usually agency relationship only empowers the agent to find a purchaser and not to enter into a binding contract on behalf of the principal. Without prior approval, an agent cannot accept goods for payment in lieu of cash.

An agent who negotiates a loan between principal and borrower cannot collect from the borrower unless the agent has possession of the security and the principal is aware of the possession.

### Emergency Situations

When an emergency arises, an agent's authority increases to include more than was previously agreed upon. A real estate agent can directly disobey a client's instructions if the interest of the client can be best served by doing so and if there is no time to receive the permission of the client.

### Duty of a Third Party

If the principal has not acted in such a manner as to give the agent ostensible authority, a principal is not responsible for unauthorized acts made by an agent. A third party cannot collect on any loss incurred from the principal in the above situation. It is the duty of the third party to ascertain the exact scope of an agent's authority before completing a transaction.

## TERMINATION OF AGENCY

An agency is ordinarily terminated by the acts of one or both of the parties, or by operation of law. *It may be terminated by the expiration of its term, extinction of its subject matter, or the death or incapacity of either party.*

### Consent of Both Parties

If both parties, the broker and seller, wish to terminate the agency, the agreement is considered ended by mutual agreement.

### Revocation by the Principal

This power is absolute unless interest is coupled with agency. The relationship must be initially created for the benefit of the agent or a third party. If the principal cancels the agency without good cause, the principal may be liable for expenses incurred by the agent's pursuit of a buyer before revocation. If the broker produces a ready, willing, and able buyer prior to expiration of the agency's term, the principal may be liable for the commission.

In an open listing with no fixed term the listing may be revoked at any time without liability prior specified termination date, the listing is unenforceable by the agent and any claim for fee by the agent is a cause for disciplinary action against the agent's license.

### Denouncement by the Agent

The broker/agent may refuse to fulfill the listing agreement at anytime but may be subject to damages for breach of contract. The agent is liable for damages that result from the breach but the principal may not demand specific performance of the contract. Since the contract is a personal services contract, whereby the agent agrees to provide personal and professional skills, the courts will not force the agent to perform.

### Dissolution due to Special Circumstances

This can include extinction of the subject matter, expiration of the term of the agreement, or the incapacity or death of either the principal or agent.

## LIABILITIES OF AN AGENT TOWARD THE PRINCIPAL

In an agency relationship, there are many opportunities for an agent to incur legal liability. We will examine those situations and methods for limiting subsequent liability.

### Contract

An agent often has occasion to sign for a principal. If done in an incorrect fashion, liability may incur. As a general rule, if the principal's name does not appear in a document signed by an agent, the agent will accept personal responsibility for the agreement. To prevent this, always make sure the name of your principal is included in any applicable documents.

When signing a document, some agents simply sign their own name. This might incur additional responsibility. To avoid this, sign a contract in the following manner.

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(Principal's name) by (Your name)

Finally, you can be held legally liable for breach of contract. If you sign an agreement with a principal, failure to fulfill any promised actions can result in breach of contract. Therefore, before signing any contract, make sure that you are capable and willing to fulfill the agreement.

### Misrepresentation

A misrepresentation may be material or immaterial whether or not it has a measurable affect on the people relying on it. An agent who misrepresents his authority to act as an agent for someone else may be liable to the person who relies on it. When this happens, the resulting misrepresentation can cause severe legal consequences. Civil, criminal and administrative penalties are all possible.

The three types of misrepresentation are *innocent misrepresentation*, *negligent misrepresentation*, and *fraudulent misrepresentation*.

**Innocent misrepresentations** are false statements that are not known to be false at the time made. These statements can cause a rescission of a contract whereby all parties involved would be reinstated to their original positions. *An agent is generally not held legally liable for such statements.*

**Negligence misrepresentations** are statements believed to be true but are false since made without responsible grounds. An agent is legally liable for negligent statements made to buyers or sellers. Such statements are in effect deceit.

**Fraudulent misrepresentations** are statements made when an agent knows the statements are false. A contract made while influenced by fraudulent information may become void. An agent making such fraudulent statements may be liable for civil or criminal penalties.

The failure to disclose a material fact about a property is known as ***misrepresentation by silence***. Civil liability and disciplinary action against a licensee may result from a failure to disclose. Duties to disclose is discussed in detail elsewhere.

A principal who authorizes an agent to deal on his behalf in transactions where representations are customarily made, the principal is deemed to have implicitly authorized the representations unless authority was specifically withheld. The principal will be held liable unless the third party knows that the representations are unauthorized. The broker is deemed to have implied authority to make representations concerning the property involved and the seller is liable for any misrepresentation made by the broker whether or not express authority was given. This implies authority is "***incidental***" or a natural part of the broker's authority to sell property.

Principals, in an attempt to avoid liability for misstatements made by brokers, insist on "***exculpatory provisions***" in their contracts such as, "*representations not contained herein are not part of our agreement, and shall be given no effect*". Such provisions will normally relieve the principal from liability for damages for fraudulent statements made by his agent. However, if the principal knew of the agent's misstatements, when the contract was executed, he may also be liable for damages.

### Breach of Fiduciary Duties

As an agent, you act as the principal's fiduciary. This places you in a position of trust. An agent's fiduciary duties may be properly fulfilled by (a) performing his duties diligently, (b) by following the principal's instructions, and (c) by making a full disclosure of all material facts.

The most common areas of agency violations in California are misrepresentation, false promise, commingling and/or conversion, secret profits and dual agency. The agent's violation of his fiduciary duty is both a breach of contract and a tort (fraud).

If you do not meet those fiduciary duties, several courses of action are possible against you. A principal can sue to force compliance. The suit can include damages. Any applicable criminal charges may be brought. You can be punished by the Real Estate Commissioner.

### Negligence

Under general principles of agency law, an agent is required to use "*reasonable care*" in execution of his duties to his principal. "**Negligence**" is the failure to use a prescribed measure of care. There are three degrees of care.

**Slight negligence** is the least severe of the three types. The possible legal ramifications are usually very slight.

**Ordinary negligence** is the failure to use the degree of care that an ordinary person would utilize. Ordinary negligence is more severe in the eyes of the law.

**Gross negligence** is the failure to exercise even slight care. **Gross negligence can be considered a criminal offense.**

When an agent makes an innocent misrepresentation believing it to be true, and without the intent to deceive, the principal is generally not liable for any tort damage, since tort liability requires knowledge of falsity and intent to deceive. Neither the agent nor the principal can be held liable without both conditions present. However, if the principal knows that the agent is not unaware of the true facts, and permits the agent to innocently misrepresent him, the principal is directly responsible for damages to an innocent third person from reliance on the misrepresentations.

### Consequences of Professional Liability

As a general rule, judicial and administrative repercussions are totally separate. You can be subject to both types of punishment at the same time. One does not negate the other. As an example, a severe infraction could result in civil damages, a fine and/or imprisonment, and revocation of real estate license. With these types of penalties possible, it is highly recommended that you be extremely careful in fulfilling your duties.

## LIABILITIES TOWARD THIRD PARTIES

The principal is liable for the principal's own acts, as well as those of the agent performed on the principal's behalf. The principal is liable for torts (physical injury or property damage) committed by an agent who is an employee (not an independent contractor), and is acting in the scope of the employment.

An agent will be liable to third persons for any tort or other act such as a fraudulent misrepresentation that the agent performs. The agent also will be liable for tortious or other acts of the principal in which the agent "**acquiesces**" (**silences**) whether the agent does so by act or omission.

The agent would be liable for:

- ◆ Injury to the victim's property or person, negligent and fraudulent misrepresentation
- May be a statement made recklessly and carelessly without sufficient knowledge to justify the statement.
- May be from "**silence**" or known material facts that the broker should disclose whether asked or not. If the principal supplies the agent with false information and the agent repeats such misrepresentations, the agent is not liable.
- ◆ An "**As Is Clause**" in the deposit receipt does not eliminate the agent to conduct an inspection nor the duty to disclose material facts.
- ◆ An agent incurs no liability if agent fails to disclose (not a material fact) that:
  - Occupant died in the house more than three years before;
  - Previous occupant had or died of AIDS.
  - An occupant's death from AIDS or AIDS-related illness, or any other contagious disease, is a highly emotional issue. Brokers must strive to balance the principle of full disclosure against the right to privacy. Disclosing casually that an occupant or former occupant died, or is dying, from AIDS, might very well be in violation of that person's civil rights and might expose the broker to civil or criminal penalties. By law, sellers, brokers and landlords have no liability for failure to disclose a prior occupant's death or its cause after three years.

- ♦ The broker does not have to disclose cause of death unless there is a direct inquiry.
- ♦ If a broker misrepresents a property to a buyer, he or she could cause the buyer to be subjected to a rescission of the contract and a civil suit for damages because of the fraud.
- ♦ If a broker relies on false information given by a seller and a buyer rescinds, a broker is entitled to a full commission and indemnity from legal action by the buyer.

## DELEGATION OF AUTHORITY

An agent may wish to delegate authority to another party. This party is known as a “*sub-agent*”. Before such a delegation can occur, the principal must provide express authorization.

Delegation can occur in any of the following cases:

1. When it is common practice
2. When the delegated act is purely mechanical.
3. When the agent cannot perform the act and the sub-agent can lawfully perform it.
4. When the act is specifically authorized by the principal. The agent appointing the sub-agent is only liable for improperly selecting the sub-agent. The sub-agent is liable for damages sustained by the principal.

## RIGHTS OF THE AGENT

The primary right of an agent is the payment of compensation. Most agency relationships are established for business purposes. Therefore, a commission is normally payable. The initial contract should specify the amount of payment. If such a clause is not included, the exact amount of required compensation might be difficult to determine. It is clearly to your advantage to always indicate the amount of commission you expect when an agency agreement is first drafted. This will prevent any future complications.

An agent also maintains the right of no intentional interference. A principal cannot intentionally disrupt an agent’s prospective economic advantage when no formal listing agreement exists. Special conditions must be present.

## DUTIES OF AN AGENT OWED TO A PRINCIPAL

The agency relationship is a *fiduciary relationship* whereby the agent is a fiduciary with respect to the principal. As a fiduciary, the agent must act within the standards of loyalty and good faith because the relationship is based on trust and confidence.

Under California law, the real state agent also owes a special duty to the buyer in transactions of one to four unit dwellings.

- ☞ *The agent has the duty to make a reasonably through inspection of the property and to disclose to the buyer all facts that materially affect the property’s value and desirability, even if the property is sold under “as-is” condition.*

Following are duties owed by the agent toward the principal:

### Duty to Disclose

An agent must provide full disclosure of all material facts to a principal. It is not left up to the discretion of the agent. An exception to this requirement of full disclosure occurs, according to the California Attorney General, in matters concerning race, creed, or color that are not considered to be material facts.

### Duty of Loyalty

The agency relationship is based on confidence and loyalty is a must. The agent must place the principal’s interests above the interests of a third party. The broker must disclose to the principal any direct or indirect conflicts of interest. The agent is under a duty not to compete himself, or to act for persons who are in competition with his principal, unless he has the consent of the principal.

### a. Failure to disclose the agent’s role as a purchaser

The agent cannot buy the principal’s property without the knowledge and consent of the principal. If the broker attempts to buy such property through a nominee, dummy, straw buyer or corporation, the principal may avoid paying a commission or have the agreement of sale set aside. If the property has been resold by the agent, the principal can hold the agent liable for its value and any profits realized by the agent. The

exception to the rule against self-purchase is that it does not generally apply in a net listing where the agent is authorized to sell property for a certain net price.

### b. Secret Profits

An agent must also comply with the legal prohibition of secret profits. An agent is guilty in performing, or attempting to perform any of the following acts:

“The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee’s compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this charter or compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by another or different procedure.”

### c. Dual Agency

Normally, an agent only represents one principal to third parties in an agency relationship. If another principal enters into that particular relationship, divided agency can occur. The law strictly prohibits this activity. An agent cannot represent two principals in negotiations with each other unless all parties are notified of such an arrangement.

### Duty to Submit All Offers

When a real estate agent learns of an offer on a principal's property, his duty is to submit the offer in a timely fashion, *unless the offer is blatantly frivolous*. An offer should be presented whether it is in writing or oral. The listing broker should inform the seller of an oral offer and give the cooperating broker a reasonable time period within which the oral offer can be written. When a second offer appears, before the first is presented to the principal, both offers should be presented, or seller being made aware of both.

### Duty of Faithful Performance & Reasonable Care

A real estate broker must perform as promised in the listing contract or can be held liable for any loss caused by the failure to obey the principal's instructions. Failure to perform gives the owner legal grounds to terminate the listing. Faithful performance also means not to depart from principal's instructions.

A real estate agent is also deemed to have professional knowledge and skills in the real estate and is under an obligation to exercise greater care and skill than ordinary person. He will be held to a higher standard of care and is liable for negligence or incompetence in the performance of his duties. The real estate law is designed “*to protect the public not only from the conniving real estate salesperson but also from the uninformed, negligent, or unknowledgeable salesperson*”.

### Ethical Duties

An agent also has certain ethical duties owed to a principal. The principal expects that an agent will perform to his fullest capabilities. Anything **less** is a breach of this ethical responsibility. **The broker owes the principal the degree of care that a reasonable prudent real estate licensee would exercise**. Also, an agent should due great of care as possible in the performance of professional duties. Negligence acts can be construed to be unethical. Gross negligence can also be a breach of legal responsibility. Finally, an agent owes the principal full disclosure and absolute loyalty. Anything less is unethical. You should note that this may be nullified if the principal is involved in illegal activities. Total loyalty could result in criminal liability. To illustrate this situation, consider a case where a principal requests you to knowingly misrepresent certain key facts concerning the subject property such as the building has been condemned. The seller has done certain cosmetic repairs to hide this fact. If you do not reveal this to any potential buyers, you could be guilty of misrepresentation and fraud.

## DUTIES OF AN AGENT OWED TO A THIRD PARTY

A real estate agent and the the principal owe certain duties to third persons. Both must disclose all material facts and defects affecting the desirability of the property. Both must inspect the property and reveal its condition to the potential buyer. The agent must not make a secret profit at the expense of a third person, and must be careful when puffing, or exaggerating, the benefits of a property.

California State law nevertheless makes certain demands on the agent in relation to third parties dealt with on behalf of the principal. **Paramount duties owed to third parties are honesty, integrity, fair business dealing, and the absence of negligence.**

As of January 1, 1987, the seller of residential property of 1 to 4 units must provide the buyer with a written **Real Estate Transfer Disclosure Statement** detailing the mechanical and structural health aspects of the property.

### Disclosure

An agent must make full disclosure of pertinent facts to any third parties. Failure to provide this disclosure can result in legal ramifications.

The case of “Reed vs. King”, dealt with the question of agent disclosure to a third party. In the case, the agent did not disclose to the third party of a purchase that murders occurred previously on the property. This led to a drop in the property value. The court concluded, “Concealment is a term of art which includes mere nondisclosure when a party has a duty to disclose. Reed’s complaint reveals only nondisclosure despite the allegation King asked a neighbor to hold his peace. There is no allegation the attempt at suppression was a cause in fact of Reed’s ignorance. Accordingly, the critical question is: does the seller have a duty to disclose here Resolution of this question depends on the materiality of the fact of the murders.”

In general, a seller of real property has a duty to disclose: “Where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer”. This broad statement of duty had led one commentator to conclude: The **ancient doctrine, *caveat emptor* (let the buyer be aware) has little or no application to California real estate transactions.**

Whether information “is of sufficient materiality to affect the value or desirability of the property depends on the facts of the particular case”. Materiality is a question of law, and is part of the concept of the right to rely or justifiable reliance.

Accordingly, the term is essentially a label affixed to a normative conclusion. Three considerations bear on this legal conclusion: The gravity of the harm inflicted by nondisclosure; the fairness of imposing a duty of discovery on the buyer as an alternative to compelling disclosure, and the impact on the stability of contracts if recession is permitted.

### Contracts

It is imperative that the agent carefully present the sales contract to the buyer. The agreement must reveal the existence of an agency relationship between the agent and the principal. The name of the principal must be on the contract. If this is not done, the agent may face personal liability.

## AGENCY RELATIONSHIP DISCLOSURE REQUIREMENTS

### AGENCY REQUIREMENTS AND PROHIBITIONS

The law states the following requirements and prohibitions:

The agent is required to:

- Give the client/customer a copy of the terminology (Section 2373) used in the real estate business.
- Disclose his or her role as agent.
- Obtain a receipt (Prescribed) from the client/customer.

☞ ***The agent is prohibited from disclosing specified price information to the buyer without the seller’s consent.***

Interestingly, the law recommends that the consumer (buyer and/or seller) should study the items on the Terminology List in order to obtain the meaning of the terms used in the real estate transaction process.

In conclusion, the agency law does not change the general law of agency, nor does it diminish any previous duty of disclosure owed by the real estate agent or their subagents.



## SECTION 2373 TERMINOLOGY

The following terms are commonly used in many real estate transactions and are appropriate for both consumers and agents. The consumer will be asked to acknowledge having received it. Section 2373, as used in this article, the following terms are defined with the following meanings:

- a) **Agent** - means a person acting under provisions of this title in a real property transaction, and includes a person who is licensed as a real estate broker, and under whose license a listing is executed or an offer to purchase is obtained. *In a normal broker/seller relationship the broker is considered the agent.*
- b) **Associate Licensee** - means a person who is licensed as a real estate broker or salesperson and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.  
  
The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent, when associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.
- c) **Buyer** - means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.
- d) **Dual Agent** - means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.
- e) **Listing Agreement** - means a contract between an owner of real property and an agent, by which the agent has authorized to sell the real property or to find or obtain a buyer.
- f) **Listing Agent** - means a person who has obtained a listing of real property to act as an agent for compensation.
- g) **Listing Price** - is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.
- h) **Offering Price** - is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.
- i) **Real Property** - means any estate specified by subdivision (1) of 27 of Section 761 in property which constitutes or is improved with 1 to 4 dwelling units, any leasehold in this type of property exceeding one year's duration, and mobile homes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Profession Code.
- j) **Offer to Purchase** - means a written contract executed by a buyer acting through a selling agent which becomes the contract for the sale of the real property upon acceptance by the seller.
- k) **Real Property Transaction** - means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.
- l) **Sell, Sale, or Sold** - refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of a real property sales contract with the meaning of Section 2985, and transactions for the creation of leasehold exceeding one year's duration.
- m) **Seller** - means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.
- n) **Selling Agent** - means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtain a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.
- o) **Subagent** - means a person to whom an agent delegates powers as provided in Article 5

(Commencing with Section 2349) of Chapter 1. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.

## ASSEMBLY BILL 1034

Assembly bill 1034 was introduced on February 27, 1985 by Members Connelly and Grisham. To better address the relevant problems, this bill went through Assembly amending on January 7, 1986.

AB 1034: Contracts: attorney's fees and costs; real estate agency.

- (1) Existing law provides that in an action on a contract, if the contract provides for an award of attorney's fees and costs to a party, then the prevailing party shall be entitled to attorney's fees and costs. Existing law provides that if a defendant alleges that he or she has tendered that full amount due and deposits in the court that amount and the allegation is found true, then the defendant shall be deemed to be prevailing party.  
This bill would permit a court to order the deposit of that amount in an insured, interest-bearing account, as specified.
- (2) Nothing in existing law requires real estate licensees to make general informational disclosures concerning agency relationships in real estate or mobile home transactions. This bill would, on and after January 1, 1988, require persons acting as listing and selling agents as defined, to provide sellers and buyers with a disclosure form, as prescribed, containing general information on agency relationships in specified residential real property transactions. These requirements would be applicable to transactions involving sale or exchange of certain estates of inheritance or perpetual estates, life estates, and leaseholds exceeding one year's duration in residential real property constituting or improved with 1 to 4 dwelling units or involving sale or exchange of mobile homes through a real estate licensee.
- (3) Nothing in existing law requires the contract of the parties to these transactions to contain any acknowledgment concerning the role of the real estate licensees in the transactions. The bill, on and after January 1988, would require contracts in these transactions to specify (a) whether the listing agent represents the seller exclusively or both the buyer and seller and (b) whether the selling agent represents the buyer exclusively, the seller exclusively, or both the buyer and seller.
- (4) Under existing law, the relation of principal and agent may be created without any payment or other consideration.  
This bill would specify, with respect to transactions covered by the bill, that neither the payment of compensation nor the obligation of a buyer or seller to pay compensation to a real estate agent is necessarily determinative of a particular agency relationship. The bill would specify that associate real estate licensees owes a duty to any principal or to any buyer or seller who is not a principal, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.
- (5) Under existing judicial decisions, a real estate broker must refrain from dual representation in a sale transaction unless the agent obtains the consent of both principles after full disclosure. Existing judicial decisions have also stated the rule that such dual agency relationship is permitted with the full knowledge and consent of the parties.  
This bill would with respect to transactions covered by the bill, expressly preclude such a dual agent from disclosing specified price information to the other party to the transaction without consent, but would not affect existing law as to disclosure of other confidential information. The bill would specify that a listing agent is not a dual agent solely by reason of being the selling agent, and would expressly preclude a listing agent from acting as an agent for the buyer only. The bill would also permit real estate brokers to enter into forms of agency relationships not either described or prohibited by the bill if certain disclosures are made.
- (6) Under existing law, an agency relationship may be created and powers conferred upon an agent by precedent authorization or subsequent ratification. Existing law requires any agreement to pay a real estate broker a commission for procuring a buyer or seller of real estate or for procuring a lessor or lessee, where the lease is for longer than a year, to be in writing. Under existing law, with certain exceptions, such a contract can only be modified by written agreement of the parties.  
The bill would, with respect to transactions covered by the bill, specifically authorize contracts between principal and agent to be modified to change the agency relationship before performance of the act that is the object of the agency, by the written consent of the parties to the agency relationship.

- (7) Existing law imposes various obligations upon agents in general and real estate licensees in particular. This bill would specify that it shall not be construed to diminish any duty of disclosure owed by real estate agents and their sub-agents, associate licensees, and employees to buyers and sellers or to relieve them of liability for conduct in connection with acts governed by the bill or breaches of fiduciary duty or of any duty of disclosure. Vote: majority. Appropriation: no. Fiscal committee: no. State mandated local program: no.

## DUAL AGENT

- ☞ ***Is the listing agent a “dual agent” has troubled agents as well as consumers for many years. Does the listing agent represents the seller exclusively or both the buyer and seller? Or Does the selling agent represent the buyer exclusively, the seller exclusively, or both the buyer and seller?***

A listing agent is not a dual agent solely by reason of being the selling agent. Naturally, the law expressly precludes a listing agent from acting as an agent for the buyers only. An agency relationship may be created and powers conferred upon an agent by precedent authorization or subsequent ratification. Real estate brokers may enter into other forms of agency relationships neither described nor prohibited by the law, if appropriate disclosures are made to the parties concerned.

Under numerous, judicial decisions, and Section 10176(d) of the Real Estate Law, a real estate broker needs to refrain from dual representation in a sales transaction unless the agent obtains the consent of both principals after full disclosure. Judicial decisions also state the rule that such a dual agency relationship is permitted, only with the full knowledge and consent of the parties. Keep in mind that the **Agency Law** does not attempt to rewrite the basic law of agency.

In the past, the relationship of principal and agent could be created with or without payment or other consideration. The new law specifies, with respect to transactions covered, that:

- ☞ ***“neither the payment of compensation nor the obligation of a buyer or seller to pay compensation to a real estate agent is necessarily determinative of a particular agency relationship”.***

In addition, any agreement to pay a commission to a real estate broker for procuring a buyer or seller of real estate or for procuring a lessor or lessee, when the lease is for longer than a year, must be in writing. With certain exceptions, such a contract can only be modified by written agreement of the parties.

In respect to fiduciary duty, the law further states that:

- ☞ ***“associate real estate licensees (salespersons) are agents of the real estate broker and when an associate real estate licensee owes a duty to any principal or to any buyer or seller who is not principal, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions”.***

## BROKER RESTRICTED AS DUAL AGENT

In the past, a dual agent was required to “inform all” to both parties he represented, acting as a sort of “open book.” The buyer and seller legally and literally had no secrets withheld from each other.

Their intentions regarding the pricing, terms of payment, financing, use of the property, ability to close escrow, personal finances or other factors which provided strength or weakness in the negotiating process were properly passed on by the dual agent broker.

The dual agent was a “conduit” through which all facts affecting negotiations or closing would pass to the other side.

However, under the new agency disclosure law, the legislature did much more than establish rules requiring disclosure of broker-client agency relationship. The law controlling the “conduct” of dual agents was changed.

Now, when a dual agency results and both sides of a transaction are represented by the same broker, the broker (and his agents) may not pass from one party to the other party any information relating to the price.

## AGENCY

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What the buyer may be willing to pay or the seller may be willing to accept must remain the undisclosed knowledge of the dual agent.

Thus, the dual agent is now a “secret agent” - he must keep secret the pricing sought by the seller or obtainable from the buyer.

Before a dual agent broker may relay confidential pricing information to the other party, he must have written authority to release it.

For instance, if the seller will accept less than the listed price, this information cannot be released to the buyer by a dual agent unless written consent is received from the seller.

Conversely, if the broker knows the buyer will pay more than his initial offer, the dual agent cannot now release this information without written consent from the buyer.

The decision not to release pricing information must be made and maintained from the moment the dual agency arises - an event which always occurs before the Agency Confirmation Statement is prepared. (See Form 2-2 Agency Confirmation Statement)

While at first glance pricing disclosures may seem unnecessary, negotiations do frequently require some inducement to generate a counter offer when the prior offer or counter offer is unacceptable. Then the written authority to release pricing information is necessary.

## AGENCY DISCLOSURE LAW

Real Estate licensees after January 1, 1988 are required to make written disclosures concerning their agency relationships with buyers/customers, and sellers/clients of real estate or mobile home properties. The State Legislature, in the interest of consumer protection, promulgated this new law, which changed the statute quo.

The new law, requires licensees prior to acting as listing and/or selling agents, to provide sellers and buyers with a “**Prescribed Uniform Disclosure Form**” containing general information on agency relationships including its terminology. Civil code 2374 outlines which agent(s) is(are) responsible for preparing and providing the disclosure form.

These requirements are applicable to transactions involving sale or exchange of certain estates of inheritance or perpetual estates, life estates, and leaseholds exceeding one year’s duration in residential real property constituting or improved with 1 to 4 dwelling units or involving sale or exchange of mobile home through a real estate licensee.

The “**agency disclosure law**” or sometimes called the “**Rules-of-Agency Disclosure Law**” requires that the agent openly disclose which party he/she represents prior to contracting or prior to negotiating an offer in the sale or listing of real estate. The word “**prior**” is emphasized to indicate that a note or instruction to escrow evidently will not suffice.

It also specifically authorizes contracts between principal and agent to be modified to change the agency relationship, before performance of the act which is the object of the agency, by the written consent of the parties of the agency relationship.

The legislatively-pronounced purpose for these real estate agency disclosures is to help buyers and sellers to better understand the duties a broker owes to them. The method for disclosure is straightforward, once the basic agency rules and definitions are learned.

The broker, himself or through his agents, achieves the rules-or-agency disclosure and his agency confirmation at two different stages:

- Prior to obtaining a listing from a seller or landlord, the broker provides the prospective client with a Agency Relationship Disclosure and
- When obtaining an offer or acceptance from a buyer or seller, tenant or landlord, the broker provides each party with both an Agency Confirmation Statement and the Agency Relationship Disclosure. [CC §§2079.14; 2079.17]

Interestingly, buyer and seller also mean tenant and landlord, respectively, when a lease of four-or-less residential units or mobilehomes for more than one year is involved.

Agency rules put the broker in control of his duties - if he understands the rules, implements them and consistently applies them from the outset of solicitations and negotiations.

## AGENCY RELATIONSHIPS DISCLOSURE FORM

The Agency Relationship Disclosure Form defines and explains, in general terms, many of the words and phrases commonly used in the real estate industry to express the agency relationships of:

- Brokers to the parties
- Broker to broker and
- Salesmen/agents to their broker

The two sections on the front of the Agency Relationship Disclosure entitled “Seller’s agent” and “Buyer’s agent” state in broad legal terms generally accepted principles of law governing brokers and their conduct with the parties in a transaction.

Although the Agency Relationship Disclosure does not apply these longstanding agency principles to specific brokerage activities, two categories of brokers’ obligations are noted:

- The primary duties owed by a broker to his client
- The general duties owed by each broker to all parties to the transaction.

The purpose for the Disclosure is to provide members of the public with information to better understand the consequences of working with a broker and his agents in a real estate transaction.

### **Applicable Use of the Agency-Relationship Disclosure**

The Agency-Relationship Disclosure must be used with the following documents relating to a controlled residential property:

- Seller’s Listing
- Authorization to Lease
- Deposit Receipt Offer and Acceptance
- Exchange Agreement
- Counter offer
- Residential Lease Agreement
- Agency Confirmation Statement, whenever required. [CC §§2079.14; 2079.17]

Transactions and negotiations concerning buyer’s listings, property management, options, financing and month-to-month rental agreements do not yet require statutory disclosure of the broker’s agency to each party.

### ***Form 2-1 Disclosure Regarding Real Estate Agency Relationships***



**CALIFORNIA  
ASSOCIATION  
OF REALTORS®**

**DISCLOSURE REGARDING  
REAL ESTATE AGENCY RELATIONSHIPS**

(As required by the Civil Code)  
(C.A.R. Form AD-11, Revised 10/01)

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

**SELLER'S AGENT**

A Seller's agent under a listing agreement with the Seller acts as the agent for the Seller only. A Seller's agent or a subagent of that agent has the following affirmative obligations:

To the Seller:

A Fiduciary duty of utmost care, integrity, honesty, and loyalty in dealing with the Seller.

To the Buyer and the Seller:

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.
- (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

**BUYER'S AGENT**

A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and the Seller:

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.
- (c) A duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.

**AGENT REPRESENTING BOTH SELLER AND BUYER**

A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Seller or the Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect his or her own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Sections 2079.13 to 2079.24, inclusive, of the Civil Code set forth on the reverse hereof. Read it carefully.

**I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE.**

BUYER/SELLER \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_  AM  PM

BUYER/SELLER \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_  AM  PM

AGENT \_\_\_\_\_ (Please Print) By \_\_\_\_\_ (Associate-Licensee or Broker Signature) Date \_\_\_\_\_

**THIS FORM SHALL BE PROVIDED AND ACKNOWLEDGED AS FOLLOWS (Civil Code §2079.14):**

- When the listing brokerage company also represents the Buyer, the Listing Agent shall give one AD-11 form to the Seller and one to the Buyer.
- When Buyer and Seller are represented by different brokerage companies, then the Listing Agent shall give one AD-11 form to the Seller and the Buyer's Agent shall give one AD-11 form to the Buyer and one AD-11 form to the Seller.

**SEE REVERSE SIDE FOR FURTHER INFORMATION**

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Reviewed by \_\_\_\_\_  
Broker or Designee \_\_\_\_\_ Date \_\_\_\_\_



**AD-11 REVISED 10/01 (PAGE 1 OF 1)**

**DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS (AD-11 PAGE 1 OF 1)**

JF 2373 S Hacienda Blvd, Hacienda Heights CA 91745  
Phone: (626)336.6191 Fax: (626)336.8565 jerry fung

T5933855.ZFX

**AGENCY DISCLOSURE ADDENDUM**

To the Buyer and Seller:

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.

## AGENCY

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- (c) A duty of disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.

An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

**BUYER'S AGENT:** A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive compensation for services rendered, either in full or in part from the Seller. An agent acting only for a Buyer has the following affirmative obligations:

To the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.

To the Buyer and Seller:

- (a) Diligent exercise of reasonable skill and care in performance of the agent's duties.
- (b) A duty of honest and fair dealing and good faith.
- (c) A duty of disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties. An agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.

**AGENT REPRESENTING BOTH SELLER AND BUYER:** A real estate agent, either acting directly or through one or more associate licensees, can legally be the agent of both the Seller and Buyer in a transaction, but only with the knowledge and consent of both the Seller and Buyer.

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either Seller or Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections. In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interest. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent in your specific transaction.

This disclosure form includes the provisions of Article 2.5 (commencing with Section 2373) of Chapter 2 of Title 9 of Part 4 of Division 3 of Civil Code set forth on the reverse hereof. Read it carefully.

\_\_\_\_\_  
Associate Licensee (Signature) Date

\_\_\_\_\_  
Buyer/Seller (Signature)

\_\_\_\_\_  
Date

## CONSUMER RESPONSIBILITIES

The above duties of the agent in a real estate transaction do not relieve a Seller or Buyer from the responsibility to protect their own interests. Consumers should carefully read all agreements to assure that they adequately express their understanding of transaction. A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, a competent professional should be consulted.

Through out the real property transaction the buyer or seller may receive more than one disclosure form, depending upon the number of agents assisting in the transaction. Each agent with whom the consumer has more than a casual relationship must present the disclosure form. The buyer and/or seller should read

## AGENCY

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its contents each time it is presented and, consider the relationship between the real estate agent and disclosure form must include the terminology under the provisions of Article 2.5 commencing with Section 2373. A proper receipt would identify the agent, associate licensee, the buyer and or the seller such as:

---

Agent (Signature)	Date	Buyer/Seller (Signature)	Date
-------------------	------	--------------------------	------

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Associate Licensee(signature)	Date	Buyer/Seller (Signature)	Date
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## LISTING AND/OR SELLING AGENT'S DISCLOSURE

### Selling Agent

c.c. (2375) (a) As soon as practicable, the selling agent shall disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincidentally with execution of that contract by the buyer and the seller, respectively.

### Listing Agent/Dual Agent

c.c. (2375) (b): As soon as practicable, the listing agent shall disclose to the seller whether the listing agent is acting in the real property transaction exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller.

This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing expected or acknowledged by the seller and the listing agent prior to or coincidentally with the execution of that contract by the seller.

c.c. (2375) (c) The confirmation required by subdivisions (a) and (b) above, shall be in the following form:

c.c. (2375) (d) The disclosure and confirmation required by this section shall be in addition to the disclosure required by section 2374.

### *Form 2-2: Agency Confirmation Statement*





CALIFORNIA ASSOCIATION OF REALTORS®

CONFIRMATION REAL ESTATE AGENCY RELATIONSHIPS (As required by the Civil Code)

Subject Property Address . . .

The following agency relationship(s) is/are hereby confirmed for this transaction:

LISTING AGENT: is the agent of (check one): [ ] the Seller exclusively; or [ ] both the Buyer and Seller. SELLING AGENT: (if not the same as Listing Agent) is the agent of (check one): [ ] the Buyer exclusively; or [ ] the Seller exclusively; or [ ] both the Buyer and Seller.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS CONFIRMATION.

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Seller \_\_\_\_\_ Date \_\_\_\_\_ Buyer \_\_\_\_\_ Date \_\_\_\_\_

Listing Agent \_\_\_\_\_ (Please Print) By \_\_\_\_\_ (Associate Licensee or Broker-Signature) Date \_\_\_\_\_

Selling Agent \_\_\_\_\_ (Please Print) By \_\_\_\_\_ (Associate Licensee or Broker-Signature) Date \_\_\_\_\_

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OFFICE USE ONLY Reviewed by Broker or Designee Date



## AGENCY CONFIRMATION STATEMENT

An Agency Confirmation Statement (Form 2-2) is prepared by each broker involved in the negotiations for the sale, exchange or over-one-year lease of a one-to-four unit residential property or mobilehome - controlled properties.

The agency confirmation exists in one of two written formats:

- A separate Agency Confirmation form; or
- A pre-printed provision contained in the purchase agreement between the parties.

An agency confirmation discloses the broker's agency with the different parties to the transaction, determination of the actual agency created is made by each broker involved. Each broker must state whether he is acting as the agent for one, or the other, or both parties to the transaction - and confirm the agency being disclosed by the signature of all parties.

The agency confirmation is first made prior to or simultaneous with the signing of the deposit receipt by each the buyer and the seller.

However, one broker need not disclose to the parties the agency relationship of any other broker involved in the transaction. For example, the buyer's selling broker need not include the agency of the sellers listing broker on the agency confirmation statement he prepares. [CC §2079.17(a)]

The seller's listing brokers' use of the Agency Confirmation Statement is peculiarly controlled by different rules from the buyer's selling broker's confirmation.

Both brokers must confirm their agency to their respective clients and obtain their client's signature acknowledging the broker's agency.

However, the buyer's selling broker must further obtain the signatures of the sellers on his agency confirmation statement.

Thus, whether the "selling" broker is only the buyer's selling broker or both the buyer's selling broker and the seller's listing broker, both parties must sign his Agency Confirmation Statement - even when the broker is the "exclusive" agent of the buyer. [CC §2079.17(a)]

Conversely, the listing broker's statement is only signed by the listing broker and the seller - unless the broker is also acting as a "selling agent" or "dual agent." [CC §2079.17(b)]

Chaos can arise should a buyer's selling broker select the listing broker's agency with the parties. The agency designated may not exist or may not be acceptable to the seller and his broker. A counter offer would be necessary since the Agency Confirmation is either in the body of the deposit receipt/purchase agreement or attached as an addendum. The counteroffer's only purpose might well be to correct the agency confirmation. [CC §2079.23]

## GENERAL INFORMATION FOR AGENTS AND CONSUMERS REGARDING OTHER PROVISIONS OF THE CIVIL CODE

### Listing agent can not represent buyers only

c.c. 2376: No selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.

👉 **Commission or fee not determinative of agency.**

c.c. 2377: *The payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer.* A listing agent and a selling agent may agree to share any commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.

### Independent contractor

c.c. 2378: Nothing in the article prevents an agent from selecting, as a condition of the agent's employment, a specific form of agency relationship not specifically prohibited by this article if the requirements of Section 2374 and Section 2375.5 are complied with.

c.c. 2379: A dual agent shall not disclose to the buyer that the seller is willing to sell the property at price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price without the express written consent of the buyer.

This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.

c.c. 2380: Nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent.

c.c. 2381: A contract between the principal and agent may be modified or altered to change the agency relationship at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship.

c.c. 2382: Nothing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, subagents, and employees or to relieve agents and their associate licensees, subagents, and employees from liability for their conduct in connection with acts governed by this article of for any breach of a fiduciary duty or a duty of disclosure.

## SPECIAL BROKERAGE RELATIONSHIPS

There are several brokerage relationships that deem special consideration.

### IN-HOUSE SALES

An agent may find that representation is necessary on a sale that is "in-house". When this situation occurs, great care must be exercised. Full disclosure must be given even though the parties are well-known. It must be treated like any other agency relationship.

The legal requirements specified before all apply to in-house sales. Though a transaction may seem "informal" to you, any principal is entitled to your full compliance with agency law.

### COOPERATIVE SALES

This type of agreement occurs when two or more brokers work together to sell real property. It is entirely legal and ethical. You should note, however, that an agreement initiating this agreement does not form a partnership or joint venture.

When the listing broker sells the property, the commission normally goes to him. If a cooperative broker sells the property, the entire commission normally goes to him. However, any type of special commission split is possible. However, the listing broker is only responsible for conveying any commission if the principal pays a commission.

### BUSINESS OPPORTUNITY TRANSACTIONS

Even though no special license exists, these types of transactions are handled by brokers who specialize in them. If you are interested in such an endeavor, make sure to use great care in evaluating the business before taking the listing. There is lots more involved with selling it than with a single family residence. Also be aware that you have an additional responsibility to properly inform any potential buyer of the various facets of the business such as financial history of the business potential future income stream, and any governmental requirements.

However, some agents go too far in giving financial and legal advice. You must be aware of the limitations imposed upon you in this regard. Unless you are a competent attorney, do not give any legal advice. If you are not a qualified accountant, do not give financial advice.

Your role is to represent the pertinent facts to the buyer. Are there any liens on the business? Is the business located in a good commercial area? Can the buyer expect an adequate income stream? The last consideration is probably the most important for any buyer of a business opportunity. You must remember that most people that buy into a small business sink all their money into it. They desire to know the entire financial picture. Now is not a good time to over-embellish the applicable facts. The legal consequences

could be even more severe than with residential property because of the increased value.

## COMMERCIAL / INDUSTRIAL TRANSACTIONS

Most real estate agents only handle small residential property. They are relatively simple. However, representing commercial or industrial property can become very complicated. The mere determination of value can be very tricky. Property of this type has so many variables that it is often difficult to accurately represent all of the facts. Assistance from qualified professionals should be used whenever necessary. The most important thing to remember is that an error on a million dollar piece of property can yield a much greater degree of liability than a cheap parcel.

## ESTATE OF A DECEDENT

A real estate broker may occasionally represent entities that are governed by a set of specific rules. These relationships require special consideration. The first of these relationships is the estate of a decedent.

The legal requirements covering this type of relationship are contained in the California Probate Code. We will examine the most pertinent ones. According to Section 780, "Notice of the time and place of sale of real property must be published pursuant to Section 6063a of the Government Code in a newspaper published in the county in which the land or some portion thereof lies, if there is one so published; if none, then in such paper as the court or judge may direct, prior to the day of sale, or, in the case of a private sale, prior to the day on or after which the sale is to be made.

When however, it appears from the inventory and appraisal that the value of the property to be sold does not exceed one thousand dollars (\$1000), the executor or administrator may in his discretion dispense with the publication, and in lieu thereof post a notice of the time and place of sale at the courthouse of the county in which the land or some portion thereof lies for 10 days prior to the day of the sale, or, in case of a private sale, prior to the day on or after which the sale is to be made. The property proposed to be sold must be described with particularity in the notice. In addition to describing the property with particularity, the notice shall describe the property by giving its street address, if any, or other common designation, if any; but, if a legal description of the property is given, the validity of the notice shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

## NEW REGULATIONS: LOAN DISCLOSURE REQUIREMENTS

### FORM AND CONTENTS OF DISCLOSURE; MULTIPLE ARRANGERS

In a transaction for the purchase of a dwelling for not more than four families in which there is an arranger of credit, which purchase includes an extension of credit by the vendor, a written disclosure with respect, to that credit transaction shall be made, as required by this article 3 of the Civil Code Section 2956 of Chapter 2 of Title 14 of Part 4 of Division 3.

- (a). To the purchaser, by the arranger of credit and the vendor, with respect to information within the knowledge of the vendor.
- (b). To the vendor, by the arranger of credit and the purchaser with respect to information within the knowledge of the purchaser.

If there is more than one arranger for credit and one of those arrangers has obtained the offer by the purchaser to purchase the property, that arranger shall make the disclosure, unless the parties designate another person in writing.

### MORTGAGE LOAN DISCLOSURE STATEMENT

What is a disclosure statement required by the Real Estate Law and the Commissioner's regulations in a mortgage loan transaction

#### To A Borrower

For several years prior to January 1, 1981, a disclosure statement was required to be provided to a borrower only in the case of a loan subject to Article 7 of Chapter 3 of the Real Estate Law ( B & P Code section 10240). Simply stated, the disclosure statement had to be provided by a broker to the prospective borrower of a loan secured by a first deed of trust in the amount of less than \$20,000 or a loan secured by a junior deed of trust of less than \$10,000. The broker was required to furnish this statement to the prospective borrower prior to the borrower becoming obligated to complete the loan transaction.

Assembly Bill 3201 which became law on January 1, 1981, amended Sections 10240 and 10245 of Article 7 to require delivery of a mortgage loan disclosure statement to the borrower in all real property loan transactions, regardless of amount negotiated by a real estate licensee acting as an agent. Regulation 2840 contains the approved form of the disclosure statement required by Section 10240 of the Real Estate Law.

There is no express requirement for a disclosure statement to be given to a borrower in a situation in which the broker is the lender. If a broker, particularly one who advertises and holds himself out to the public as a mortgage loan broker, contemplates funding loans secured by real property on either an interim or permanent basis, DRE recommends that the broker fully disclose significant information about the loan to the borrower as much as he would if he were acting as an agent. When acting as a lender, the broker may use the approved form of disclosure in Regulation 2840 as a guide, but he should omit from the form anything and everything and that might suggest to the borrower that the broker is acting as his agent. To comply with Regulation 2845 which requires that a broker who holds himself out to the public as an agent for the negotiation of loans secure the express written consent of the borrower to the lending of broker controlled funds, the following statement should be included in the disclosure instrument:

“(Name of Lender) is a real estate broker, but is the lender in this transaction and is not acting as the agent of the borrower”.

If the funds loaned to the borrower are not the funds belonging to the broker, but funds controlled by him, the disclosure statement should be modified accordingly. “Broker controlled funds” is defined in Regulation 2845 as funds owned by the broker, or an entity in which the broker has an ownership interest of 10 percent or more, or funds of a person related to the broker by blood or marriage.

Interested licensees may obtain a copy of DRE’s recommended form of disclosure instrument for a transaction in which the broker acts in the capacity of a lender from the mortgage loan broker desk at the Department’s Los Angeles office.

In a loan transaction in which the broker is a permanent or interim lender, the limitations on prepayment penalties specified in Section 2954.9 of the Civil Code rather than those specified in Business and Professions Code Section 10242.6 apply.

DRE is proposing legislation this year to expressly require that written disclosure along the lines of that required by Regulation 2840 be given to a borrower in a loan transaction in which a mortgage loan broker provides permanent or interim funding to the borrower. If the bill is enacted into law it will eliminate the uncertainty that currently exists in the minds of many mortgage loan brokers who lend their own funds when funds from an independent lender are not immediately available. Under the terms of the proposed legislation, a broker anticipating that the loan to the borrower may be made wholly or in part from broker controlled funds must include a statement to that effect in the mortgage loan disclosure instrument given to the prospective borrower. Moreover if an when the broker elects to make the loan to the borrower from broker controlled funds, he must so advise the borrower not later than the next business day but in any case before the close of the loan transaction.

## To A Lender / Purchaser

Effective January 1, 1982, Assembly Bill 1212 became law. It added Sections 10231.2, 10232, 10232.1, 10232.2, 10232.4 and 10232.5 among others to Article 5 of Chapter 3 (B & P Code Sections 10230).

Section 10232 establishes a special category for real estate brokers who in any successive 12 months negotiate a combination of **20 or more real property loans** or trust deed sales with an aggregate dollar volume of more than **\$2,000,000**. Sales and exchanges of trust deeds and real property sales contracts by a broker acting as principal for his own account are to be included in determining whether a broker falls within this special category.

The statute also establishes a rebuttable presumption that a broker meets the 20/\$2,000,000 threshold based upon his or her business activity during any successive three-month or six-month period.

A broker who does meet the threshold of business activity established by Section 10232 must provide a prospective lender or purchaser with a completed disclosure statement in most transactions. The disclosure statement need not be given by a broker who meets the threshold only if (1) the “lender” is the seller of real property taking back a promissory note secured by the real property as a method of financing the purchase or (2) the loan or sale is made under authority of a permit issued by DRE or the Department of Corporations or (3) the loan or sale is made pursuant to an exemption from the requirement of a permit under which a disclosure statement must be given as a condition to the sue of the exemption.

The content of the disclosure statement to be given in the case of a real property loan origination is set

## AGENCY

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forth in subdivision (a) of Section 10232.5. The content of the disclosure to be used in the sale of a sales contract or promissory note is prescribed in subdivision (b). The Real Estate Commissioner has proposed the adoption of Regulation 2846 to establish the form and content of a disclosure statement that will be acceptable to DRE. The proposed regulation further provides however that the format of disclosure under Regulation 2846 is not necessarily the only format that will satisfy the statute.

Section 10231.2 imposes a special disclosure requirement upon every broker who proposes to solicit funds through advertising or representations that he or she is acting in an agency capacity in negotiating mortgage loans or trust deed sales if the broker intends to directly or indirectly have the personal use or benefit of the funds borrowed. In these circumstances the broker must furnish the completed disclosure statement to the prospective lender or purchaser and to DRE not less than 24 hours before the purchaser/lender delivers funds to the broker or executes any contract committing to make the loan or purchase. The disclosure statement provided to the lender/purchaser must include a detailed statement of the broker's intended use and disposition of the funds and an explanation of the nature and extent of the benefits that the broker expects to derive either directly or indirectly. A broker soliciting funds for his personal use and benefit must furnish the prescribed disclosure statement whether or not he meets the 20/\$2,000,000 threshold criteria of Section 10232.

Brokers who met the section 10232 threshold as of January 1, 1982, were required by the terms of that statute to register with DRE on or before February 1, 1982. Brokers who did not meet the criteria on January 1, 1982, but who do so after that date must notify the Department in writing within 30 days after determining that they do meet the criteria.

## DISCRIMINATORY ACTS

Section 125.6 of the B & P Code states that a licensee is subject to discipline if it is found that there has been discrimination because of material status and physical handicap among other reasons of prejudice.

Prohibited discriminatory conduct by a real estate licensee under 2780 does not include acts based on a person's material status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

## TIMESHARE INTEREST

Time Share Plans are classified under the Sub-Divided Lands Act. They are considered sub-divisions when there are 12 or are for 5 years or more. Section 11024 of the B & P Code provides for a purchaser's cancellation of a time share interest by written notice on or before midnight of the 3rd day following purchase.

Regulation 2810.3 of the California Administrative Code Title 10 states the pre-sale requirements for closing. It states that funds for time share interests be deposited in an escrow until the commissioner deems that there is sufficient pre-sales to justify closing sale of units concurrently. 2813.12 and 2813.13 also govern the rescission rights and the Notice of Rescission.

## COURSE 3: TRUST FUNDS



### Preview

In the **normal** course of **every day business**, **real estate brokers** often find themselves in situations where they have to handle their client's money should it be leasing, or purchasing a property.

Funds belonging to others which a broker handles in the course of business are called trust funds. Brokers and salespersons must handle, control, and account for these trust funds according to current law.

This course discusses the legal requirements for receiving and handling trust funds in real estate transactions as set forth in the Real Estate Law and the Commissioner's Regulations.

Trust funds examples include:

- A buyer's good-faith deposit submitted with an offer to purchase
- Rents and deposits collected under a property management agreement
- Fees and costs handed to the broker in advance of his or another's performance of the agreed services.

Trust funds must never be treated casually. State law and DRE regulations impose strict requirements on a broker's handling of funds belonging to others.

This course will cover the requisites for maintaining a trust fund bank account and the precautions a licensee should take to ensure the integrity of such an account. It will also explain and illustrate the trust fund record keeping requirements under the Business and Professions Code.

The majority of this course's materials is taken directly from Department of Real Estate's publication on "Trust Funds", dated October 2000. Students are urged to visit DRE's web site periodically to check for new or updates on their publications.

## TRUST FUNDS

*Revised October 2000*

*Gray Davis  
Governor*

*Maria Contreras-Sweet  
Secretary of the Business, Transportation & Housing Agency*

*Paula Reddish Zinnemann  
Real Estate Commissioner*

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### INTRODUCTION

Real estate brokers and salespersons receive trust funds in the normal course of doing business. They receive these funds on behalf of others, thereby creating a fiduciary responsibility to the funds' owners. Brokers and salespersons must handle, control and account for these trust funds according to established legal standards. While compliance with these standards may not necessarily have a direct bearing on the financial success of a real estate business, non-compliance can result in unfavorable business consequences. Improper handling of trust funds is cause for revocation or suspension of a real estate license, not to mention the possibility of being held financially liable for damages incurred by clients.

This chapter discusses the legal requirements for receiving and handling trust funds in real estate

transactions as set forth in the Real Estate Law and the Regulations of the Real Estate Commissioner. It describes the requisites for maintaining a trust fund bank account and the precautions a licensee should take to ensure the integrity of the account. It explains and illustrates the trust fund record keeping requirements under the Business and Professions Code and the Commissioner's Regulations.

The discussions and examples in this chapter involve real property sales and property management trust account transactions. Other types of real estate activities involving trust funds, although subject to the same laws and regulations, may also have to comply with additional legal and regulatory requirements. While these other types of transactions may require records significantly different from those illustrated, the record keeping fundamentals still apply.

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## GENERAL INFORMATION

### DEFINITION

### TRUST FUNDS AND NON-TRUST FUNDS

Current law mandates that trust funds must be handled in a specific manner. For this reason, a licensee must be able to distinguish trust funds from non-trust funds.

*☞ A trust fund is an account set up by a broker in a depository (generally a bank) in which funds entrusted to the agent by the principal or others are kept.*

Since trust funds must be handled in a special manner, a licensee must be able to distinguish trust funds from non-trust funds. Trust funds are money or other things of value that are received by a broker or salesperson on behalf of a principal or any other person, and which are held for the benefit of others in the performance of any acts for which a real estate license is required. Trust funds may be cash or non-cash items. Some examples are: cash; a check used as a purchase deposit (whether made payable to the broker or to an escrow or title company), a personal note made payable to the seller, or even an commonly automobile's "pink slip" given as a deposit.

### WHY A TRUST ACCOUNT?

A trust account is set up as a means to separate trust funds from non-trust funds. Although it can certainly be argued that keeping trust funds in a trust account will not prevent a dishonest broker from misusing the funds, separating client's funds from the broker's own funds provides a better physical and accounting control over the trust funds.

An important reason for designating a trust fund depository as a trust account is the protection afforded principals' funds in situations where legal action is taken against the broker or if the broker becomes incapacitated or dies. Trust funds held in a true trust account cannot be "frozen" pending litigation against the broker or during probate.

### TRUST FUND HANDLING REQUIREMENTS

A typical trust fund transaction begins with the broker or salesperson receiving trust funds from a principal in connection with the purchase or lease of real property. According to Business and Professions Code Section 10145, trust funds received must be placed into the hands of the owner(s) of the funds, into a neutral escrow depository, or into a trust account maintained pursuant to Commissioner's Regulation 2832 not later than **three** business days following receipt of the funds by the broker or by the broker's salesperson.

An **exception** to this rule is when a check is received from an offeror in connection with an offer to purchase or lease real property. As provided under Commissioner's Regulation 2832, a deposit check may be held uncashed by the broker until acceptance of the offer if the following conditions are met:

1. The check by its terms is not negotiable by the broker, or the offeror has given written instructions that the check shall not be deposited or cashed until acceptance of the offer; and
2. The offeree is informed, before or at the time the offer is presented for acceptance, that the check is being held.



If the offer is later accepted, the broker may continue to hold the check undeposited only if the broker receives written authorization from the offeree to do so. Otherwise, the check must be placed, not later than **three business days** after acceptance, into a neutral escrow depository or into the trust fund bank account or into the hands of the offeree if both the offeror and offeree expressly so provide in writing.

According to Business and Professions Code Section 10145, a real estate salesperson who accepts trust funds on behalf of the broker under whom he or she is licensed must immediately deliver the funds to the broker or, if directed **to do so** by the broker, place the funds into the hands of the broker's principal or into a neutral escrow depository or deposit the funds into the broker's trust fund bank account.

### IDENTIFYING THE OWNER(S) OF TRUST FUNDS

A broker must be able to identify who owns the trust funds and who is entitled to receive them, since these funds can be disposed of only upon the authorization of that person. The person entitled to the funds may or may not be the person who originally gave the funds to the broker or the salesperson. In some instances the party entitled to the funds will change upon the occurrence of certain events in the transaction. For example, in a transaction involving an offer to buy or lease real property or a business opportunity, the party entitled to the funds received from the offeror (prospective buyer or lessor) will depend upon whether or not the offer has been accepted by the offeree (seller or landlord).

**Prior** to the acceptance of the offer, the funds received from the offeror belong to that person and must be handled according to his/her instructions. If the funds are deposited in a trust fund bank account, they must be maintained there for the benefit of the offeror until acceptance of the offer. Or, as discussed in the previous section, if the offeror wishes, his/her check may be held uncashed by the broker as long as he/she gives written instructions to the broker to do so and the offeree is informed before or at the time the offer is presented for acceptance that the check is being so held.

**After** acceptance of the offer, the funds shall be handled according to instructions from the offeror and the offeree as follows:

- An offeror's check held uncashed by the broker before acceptance of the offer may continue to be held uncashed after acceptance of the offer, only upon written authorization from the offeree. [Commissioner's Regulation 2832(d)]
- The offeror's check may be given to the offeree only if the offeror and offeree expressly so provide in writing. [Commissioner's Regulation 2832(d)]
- All or part of an offeror's purchase money deposit in a real estate sales transaction shall not be refunded by an agent or subagent of the seller without the *express written permission* of the offeree to make the refund.

🔗 **SPECIAL NOTE: (Broker Acting As Principal)**

*A real estate broker who is acting as a principal in the business of buying, selling or exchanging real property sales contracts or promissory notes secured directly or collaterally by liens on real property, must place all funds received by him/her in a neutral escrow depository unless delivery of the note or contract is made simultaneously with receipt of the funds.*

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## TRUST FUND BANK ACCOUNTS

### TRUST ACCOUNT WITHDRAWALS

According to Commissioner's Regulation 2834, withdrawals from the trust account may be made only upon the signature of one or more of the following:

1. The broker in whose name the account is maintained
2. The designated broker-officer if the account is in the name of a corporate broker
3. If specifically authorized in writing by the broker, a salesperson licensed to the broker, or
4. If specifically authorized in writing by the broker who is a signatory of the trust account, an unlicensed employee of the broker covered by a fidelity bond at least equal to the maximum amount of trust funds to which the employee has access at any time.

No arrangement under which a person named in items 3 or 4 is authorized to make withdrawals from a broker's trust fund relieves an individual broker or the broker-officer of a corporate broker licensee from

responsibility or liability as provided by law in handling trust funds in the broker's custody.

### TYPES OF TRUST ACCOUNTS

#### NONINTEREST-BEARING ACCOUNTS

Trust fund monies should not be deposited in interest-bearing accounts for which prior written notice for withdrawal can be required by the financial institution.

*☞ Trust money must be kept in demand deposits (checking accounts) for which NO prior notice of withdrawal is required by either law or regulations of the financial institution.*

Trust money for multiple beneficiaries can be kept in a broker's general noninterest-bearing trust account.

#### INTEREST-BEARING ACCOUNTS

There are rare situations where trust funds can be in interest-bearing:

##### Request

Trust funds may be placed in an **interest-bearing** account if requested by the owner of the funds, and the broker agrees to do so. However, the broker is under no obligation to comply with a request to place the trust funds in an interest-bearing account if the broker notifies the owner of the trust funds he will not do so. [B&PC §10145(e)]

If the broker agrees with the owner of the trust funds to place the trust funds in an interest-bearing trust account:

- A separate trust account must be established to hold the owner's trust funds;
- The trust account must be in the name of the broker as trustee for the owner as the specified beneficiary;
- The trust account must be insured by FDIC; and
- The broker and his agents cannot receive any interest earned by the trust account even if agreed to by the owner of the trust funds. [B&PC §10145(d)]

Also, if the funds are to be placed in an interest-bearing account, the broker must disclose:

- How interest is calculated on the account;
- Who will receive the interest;
- Who will pay bank service charges; and
- Any penalties or notice requirements for withdrawal. [B&PC §10145(d)]

### ADVANCE FEES

An advance fee is a fee paid to a broker for a service not yet rendered. It is often a charge for advertising. **Advance fees are considered to be trust funds and not the funds of the broker.**

Some brokers may wish to collect a fee before any services are rendered. Specifically, it is a practice of some brokers to obtain a nonrefundable fee from the seller in advance to cover the advertising of properties or businesses for sale while giving no guarantee that a buyer will be found. Such fees are called advance fees."

Any licensee who collects an advance fee from any person must deposit said fee in a trust account with a bank or other recognized depository when collected.

**Amounts may be withdrawn from the trust account only when actually expended for the benefit of the principal.**

The commissioner may issue rules regulating advance fee accounting. However, each principal must be furnished a verified copy of such accounting at the end of each calendar quarter and when the contract has been completely performed. The Real Estate Commissioner shall, upon demand, be furnished a verified copy of any or all accounts.

When advance fees are not handled in accordance with the above procedures, it shall be assumed that the agent has violated the Penal Code.

The principal may recover treble damages for amounts misapplied and is entitled to reasonable attorney fees required to recover the damages.

### ADVANCE FEE TRUST FUND HANDLING

All advance fees received by the broker are trust funds and not the broker's funds. They must be placed in a trust account until they are expended for the benefit of the principal. If they are not placed into a trust account it is presumed that the agent has embezzled the funds, and the principal can recover treble damages and the attorneys' fees incurred in prosecuting the suit for collection.

Once the advance fee has been placed in the trust account, the funds cannot be withdrawn except for the benefit of the principal. The funds cannot be withdrawn for the benefit of the agent until the agent's services are completed, the agent has prepared an accounting, and five days have expired after the accounting has been mailed to the principal.

### ADVANCE FEE ACCOUNTING

In addition to the regular trust fund accounting requirements a broker must follow when accepting advance fees, the broker must send the client a verified copy of the advance fee accounting no later than at the end of each calendar quarter, and at the time the contract between the broker and the client is completely performed.

The amounts placed in the trust account may be withdrawn when used for the benefit of the client, or five days after the verified accounting is mailed to the client. [B&PC §101461]

The accounting for the advance fees must include:

- The name of the broker
- The name of the client
- A description of the services rendered or to be rendered
- An identification of the trust fund account and where the advance fee is deposited
- The amount of the advance fee collected [DRE Reg. §2972(a)]

In addition, the accounting must include the amount allocated for each of the following:

- Providing the agreed to services
- Commissions paid to field agents and representatives
- Overhead costs and profits. [DRE Reg. §2972(f)]

If a disbursement from the account is made for advertisement, the verified accounting must include:

- A copy of the advertisement
- The name of the publication in which the advertisement appeared
- The number of ads published and the dates they appeared [DRE Reg. §2972(g)]

Also, if the advance fee is for the arrangement of a loan, the verified accounting must include a list of the names and addresses of the persons to whom the information pertaining to the loan requirements was submitted, and the dates the information was submitted. [DRE Reg. §2972(h)]

### APPROVAL OF ADVANCE FEE AGREEMENTS

All solicitations, advertising and agreements used by a broker to obtain an advance fee from a client must be submitted to the commissioner of the Department of Real Estate for approval at least 10 calendar days prior to their use. [DRE Reg. §2970]

If the commissioner determines within 10 calendar days of receiving the material that the material would tend to mislead clients, he may order the material not be used by the broker. [B&PC §10085]

To be approved by the commissioner, the advance fee agreement and any materials to be used with the agreement must:

- Contain the total amount of the advance fee and the date or event the fees will become due and payable as earned
- List a specific and complete description of the services to be rendered to earn the advance fee
- Give a definite date for full performance of the services described in the advance fee agreement
- Contain no false, misleading or deceptive representations. [DRE Reg. §2970(b)]

Also, the advance fee agreement may not contain:

- A guarantee the transaction involved will be completed

## TRUST FUNDS

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- A provision relieving the broker from an obligation to perform verbal agreements made by employees or agents of the broker. [DRE Reg. §2970(b)]

### COMMINGLING PROHIBITED

*☞ Commingling is mixing broker or personal funds with trust funds.*

Commingling is improper, except as authorized by DRE regulations.

A broker is permitted to appropriately commingle his personal or business funds with trust funds in only two situations:

- The broker may maintain a deposit of up to \$200 of his own funds in the trust account to cover bank charges on the account
- Fees or reimbursement for costs due the broker from trust funds may remain in the trust account for up to 25 days before disbursement to the broker. (DRE Reg. §2835)

*☞ A broker's improper/unlawful mixing of trust funds and personal or business funds subjects the broker to revocation or suspension of his license.*

### CONVERSION

Conversion is the unlawful withdrawal and use of a client's funds by the licensee.

A common form of conversion takes place when a broker withdraws what he or she considers to be the commission from the trust account prior to a closing. It makes no difference what the broker's intention was, the act is considered conversion as the broker was not entitled to the money until closing. This type of conversion is likely to be discovered when a sale fails to close.

### TRUST FUND LIABILITY

Trust fund liability arises when funds are received from or for the benefit of a principal. The aggregate trust fund liability at any one time for a trust account with multiple beneficiaries is equal to the total **positive** balances due to all beneficiaries of the account at the time. Note that beneficiary accounts with negative balances are not deducted from other accounts when calculating the aggregate trust fund liability.

Funds on deposit in the trust account must always equal the broker's aggregate trust fund liability. If the trust account balance is *less* than the total liability a *trust fund shortage* results. Such a shortage is in violation of Commissioner's Regulation 2832.1, which states that the written consent of every principal who is an owner of the funds in the account shall be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of the funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds. Conversely, if the trust account balance is *greater* than the total liability, there is a *trust fund overage* and the broker may be in violation of Business and Professions Code Section 10176(e) for commingling.

**A trust fund discrepancy of any kind is a serious violation of the Real Estate Law. Many real estate licenses have been revoked after a DRE audit disclosed a trust account shortage.** To ensure that the balance of the trust account always equals the trust fund liabilities, a broker should implement the following procedures:

1. Deposit intact and in a timely manner to the trust account all funds that are not forwarded to escrow or to the funds' owner(s) or which are not held uncashed as authorized. This practice, required under Commissioner's Regulation 2832, lessens the risk of the funds being lost, misplaced, or otherwise not deposited to the trust account. A licensee is accountable for all trust funds received whether or not they are deposited. DRE auditors have seen numerous cases where trust funds received were properly recorded on the books but were never deposited to the trust account.
2. Maintain adequate supporting papers for any disbursement from the trust account. Record the disbursement accurately in both the Bank Account Record and the Separate Beneficiary Record. The broker must be able to account for all disbursements of trust funds. Any unidentified disbursement will cause a shortage.
3. Disburse funds from a beneficiary's account only when the disbursement will not result in a negative or deficit balance (negative accountability) in the account. Many trust fund shortages are caused by disbursements to a beneficiary in excess of funds received from or for account of that beneficiary. The excess disbursements are, in effect, paid out of funds belonging to other beneficiaries. A shortage occurs because the balance of the trust

- fund bank account, even if it is a positive balance, is less than the broker's liability to the other beneficiaries.
4. Ensure that a check deposited to the trust fund account has cleared before disbursing funds against that check. This applies, for example, when a broker who has deposited an earnest money check for a purchase transaction has to return the funds to the buyer because the offer is rejected by the seller. A trust fund shortage will result if the broker issues the buyer a trust account check and the buyer's deposit check bounces or for some reason fails to clear the bank.
  5. Keep accurate, current and complete records of the trust account and the separate record for each beneficiary. These records are essential to ensure that disbursements are correct.
  6. On a monthly basis, reconcile the cash record with the bank statement and with the separate record for each beneficiary or transaction.

## ACCOUNTING RECORDS

### GENERAL REQUIREMENTS

An important aspect of the broker's fiduciary responsibility to the client is the maintenance of adequate records to account for trust funds received and disbursed. This is true whether the funds are deposited to the trust fund bank account, sent to escrow, held uncashed as authorized under Commissioner's Regulation 2832, or released to the owner(s) of the funds. These records:

1. Provide a basis upon which the broker can prepare an accurate accounting for clients.
2. State the amount of money the broker owes the account beneficiaries at any one time. (This is especially important when there are a large number of transactions.)
3. Prove whether or not there is an imbalance in the trust account. Some brokers audited by DRE have disagreed that their trust accounts had a shortage or an overage in the amount disclosed by the audit, but could not provide documentation to support their position.
4. Guarantee that beneficiary funds deposited in the trust account will be insured up to the maximum FDIC insurance coverage.

There are two types of accounting records that may be used for trust funds: columnar records in the formats prescribed by Commissioner's Regulations 2831 and 2831.1; and records other than columnar that are in accordance with generally accepted accounting practices *which include details specified in subdivision (a) of the Regulations and are in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2*. Regardless of the type of records used, they must include the following information:

1. All trust fund receipts and disbursements, with pertinent details, presented in chronological sequence;
2. The balance of the trust fund account, based on recorded transactions;
3. All receipts and disbursements affecting each beneficiary's balance, presented in chronological sequence; and
4. The balance owing to each beneficiary or for each transaction.

Either manually produced or computerized accounting records are acceptable. The type and form of records appropriate to a particular real estate operation as well as the means of processing transactions will depend on factors such as the nature of the business, the number of clients, the volume of transactions, and the types of reports needed. For example, manual recording on columnar records might be satisfactory for a broker handling a small number of transactions, while a computerized system might be more appropriate and practical for a large property management operation.

### COLUMNAR RECORDS

A broker may decide to use the columnar records prescribed by Commissioner's Regulations 2831 and 2831.1. The records required will depend on whether the trust funds received are deposited to the trust account or are forwarded to an escrow depository or to the owner of the funds. These records are:

1. Columnar Record of All Trust Funds Received and Paid Out - Trust Fund Bank Account (DRE form RE 4522);
2. Separate Record for Each Beneficiary or Transaction (DRE form RE 4523); and
3. Record of All Trust Funds Received - Not Placed in Broker's Trust Account (DRE form RE 4524).

The first two records are required when trust funds are received and deposited to the trust fund bank

account.

The third record is required when trust funds received are not deposited to the trust account, but are instead forwarded to the authorized person(s).

If the trust fund account involves clients' funds from rental properties managed by the broker, the Separate Record for Each Property Managed (DRE form RE 4525) may be used in lieu of the Separate Record for Each Beneficiary or Transaction.

A broker who has an escrow division pursuant to Financial Code Section 17006(a)(4) must keep the above mentioned records for escrow funds. (Commissioner's Regulation 2951)

### RECORD OF ALL TRUST FUNDS RECEIVED AND PAID OUT - TRUST FUND BANK ACCOUNT

This record is used to journalize all trust funds deposited to and disbursed from the trust fund bank account. At a minimum, it must show the following information in columnar form: date funds were received; name of payee or payor; amount received; date of deposit; amount paid out; check number and date; and the daily balance of the trust account.

All transactions affecting the trust account are entered in chronological order on this record regardless of payee, payor or beneficiary. If there is more than one trust fund bank account, a different columnar record must be maintained for each account, pursuant to Commissioner's Regulation 2831.

### SEPARATE RECORD FOR EACH BENEFICIARY OR TRANSACTION

This record is maintained to account for funds received from or for the account of each beneficiary, or for each transaction, and deposited to the trust account. With this record, the broker can ascertain the funds owed to each beneficiary or for each transaction. The record must show the following in chronological order: date of deposit; amount of deposit; name of payee or payor; check number; date and amount; and balance of the individual account after posting transactions on any date.

A separate record must be maintained for each beneficiary or transaction from whom the broker received funds that were deposited to the trust fund bank account. If the broker has more than one trust account, each account must have its own set of beneficiary records so that they can be reconciled with the individual trust fund bank account record required by Commissioner's Regulation 2831.2.

### RECORD OF ALL TRUST FUNDS RECEIVED - NOT PLACED IN BROKER'S TRUST ACCOUNT

This record is used to keep track of funds received and not deposited to a trust fund bank account. In this situation, the broker is handling the funds and must keep records of same. Examples are:

1. Earnest money deposits forwarded to escrow;
2. Rents forwarded to landlords; and
3. Borrowers' payments forwarded to lenders.

This record must show the date funds were received, the form of payment (check, note, etc.), amount received, description of property, identity of the person to whom funds were forwarded, and date of disposition. Trust fund receipts are recorded in chronological sequence, while their disposition is recorded in the same line where the corresponding receipt is recorded.

Transaction folders usually maintained by a broker for each real estate sales transaction showing the receipt and disposition of undeposited checks are not acceptable alternatives to the Record of Trust Funds Received But Not Deposited to the Trust Fund Bank Account.

An exception to this record keeping requirement is provided in Commissioner's Regulation 2831(e), which states that a broker is not required to keep records of checks made payable to service providers, including but not limited to escrow, credit and appraisal services, when the total amount of such checks for any transaction does not exceed \$1,000. However, a broker shall retain for **three years** copies of receipts issued or obtained in connection with the receipt and distribution of such checks and, upon request of the Department or the maker of the checks, a broker must account for the receipt and distribution of the checks.

## SEPARATE RECORD FOR EACH PROPERTY MANAGED

This record is similar to, and serves the same purpose as, the Separate Record for Each Beneficiary or Transaction. It does not have to be maintained if a separate record is already used for a property owner's account. The Separate Record for Each Property Managed is useful when the broker wants to show some detailed information about a specific property being managed.

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## OTHER ACCOUNTING SYSTEMS AND RECORDS

A broker may use trust fund records not in the columnar form as prescribed by Commissioner's Regulations 2831 and 2831.1. Such records must be in accordance with generally accepted accounting principles *and must include detail specified in subdivision (a) of these Regulations and be in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2*. Whether prepared manually or by computer, they must include at least the following:

1. A **journal** to record in chronological sequence the details of all trust fund transactions.
2. A **cash ledger** to show the bank balance as affected by the transactions recorded in the journal. The ledger is posted in the form of debits and credits. (In some cases the cash ledger may be combined with the journal.)
3. A **beneficiary ledger** for each of the beneficiary accounts to show in chronological sequence the transactions affecting each beneficiary's account, as well as the balance of the account.

To comply with generally accepted accounting principles, there must be one set of journal, cash ledger, and beneficiary ledger for each trust fund bank account.

## JOURNAL

A journal is a daily chronological record of trust fund receipts and disbursements. A single journal may be used to record both the receipts and the disbursements, or a separate journal may be used for each. To meet minimum record keeping requirements, a journal must:

1. Record all trust fund transactions in chronological sequence.
2. Contain sufficient information to identify the transaction such as the date, amount received or disbursed, name of or reference to payee or payor, check number or reference to another source document of the transaction, and identification of the beneficiary account affected by the transaction.
3. Correlate with the ledgers. For example, it should show the same figures that are posted, individually or in total, in the cash ledger and in the beneficiary ledgers. The details in the journal must be the basis for posting transactions on the ledgers and arriving at the account balances.
4. Show the total receipts and total disbursements regularly, at least once a month.

## CASH LEDGER

The cash ledger shows, usually in summary form, the periodic increases and decreases (debits and credits) in the trust fund bank account and the resulting account balance. It can be incorporated into the journal or it can be a separate record, for example a general ledger account. If a separate record is used, the postings must be based on the transactions recorded in the journal. The amounts posted on the ledger must be those shown in the journal.

## BENEFICIARY LEDGER

A separate beneficiary ledger must be maintained for each beneficiary or transaction or series of transactions. This ledger shows in chronological sequence the details of all receipts and disbursements related to the beneficiary's account, and the resulting account balance. It reflects the broker's liability to a particular beneficiary. Entries in all these ledgers must be based on entries recorded in the journal.

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## RECORDING PROCESS

Keeping complete and accurate trust fund records is easier when specific procedures are regularly

## TRUST FUNDS

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followed. The following procedures may be useful in developing a record keeping routine:

1. Record transactions daily in the trust fund bank account and in the separate beneficiary records.
2. Use consistently the same specific source documents as a basis for recording trust fund receipts and disbursements. (For example, receipts pertaining to real estate resales will be recorded based on the Real Estate Contract and Receipt for Deposit form, and disbursements will always be recorded based on the checks issued from the trust account or debit notices from the bank.)
3. Calculate the account balances on all applicable records at the time entries are made.
4. Reconcile the records monthly to ascertain that transactions are properly recorded on both the bank account record and the applicable subsidiary records.
5. Reconcile the trust records to the trust account bank statement on a monthly basis to ascertain that amounts per the bank are in agreement with amounts per the trust fund records.
6. If more than one trust fund bank account is maintained, keep a different set of properly labeled columnar records (cash record and beneficiary record) for each account.

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## RECONCILIATION OF ACCOUNTING RECORDS

### PURPOSE

The trust fund bank account record, the separate beneficiary or transaction record, and the bank statement are all interrelated. Any entry made on the bank account record must have a corresponding entry on a separate beneficiary record. By the same token, any entry or transaction shown on the bank statement must be reflected on the bank account record. This applies to columnar as well as to other types of records.

The accuracy of the records is verified by reconciling them at least once a month. Reconciliation is the process of comparing two or more sets of records to determine whether their balances agree. It will disclose whether the records are completed accurately.

For trust fund record keeping purposes, two reconciliations must be made at the end of each month:

1. Reconciliation of the bank account record (RE 4522) with the bank statement
2. Reconciliation of the bank account record (RE 4522) with the separate beneficiary or transaction records (RE 4523).

### RECONCILING THE BANK ACCOUNT RECORD WITH THE BANK STATEMENT

The reconciliation of the bank account record with the bank statement will disclose any recording errors by the broker or by the bank. If the balance on the bank account record agrees with the bank statement balance as adjusted for outstanding checks, deposits in transit, and other transactions not yet included in the bank statement, there is more assurance that the balance on the bank account record is correct. Although this reconciliation is not required by the Real Estate Law or the Commissioner's Regulations, it is an essential part of any good accounting system.

### RECONCILING THE BANK ACCOUNT RECORD WITH THE SEPARATE BENEFICIARY OR TRANSACTION RECORDS

This reconciliation, which is required by Commissioner's Regulation 2831.2, will substantiate that all transactions entered on the bank account record were posted on the separate beneficiary or transaction records. The balance on the bank account record should equal the total of all beneficiary record balances. Any difference should be located and the records corrected to reflect the correct bank and liabilities balances. Commissioner's Regulation 2831.2 requires that this reconciliation process be performed monthly except in those months when there is no activity in the trust fund bank account, and that a record of each reconciliation be maintained. This record should identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries or transactions.



## UNEXPLAINED TRUST ACCOUNT OVERRAGES

When a broker performs a reconciliation pursuant to Commissioner's Regulation 2831.2, the broker may find an unexplained overage. An unexplained overage is defined as funds in a real estate broker's trust account which exceed the aggregate trust fund liability of such account where the broker is unable to determine the ownership of such excess funds.

Unexplained trust account overages are trust funds and unless the broker can establish the ownership of such funds, the funds must be maintained in the broker's trust fund account or in a separate trust fund account established to hold such funds.

Unexplained trust account overages may not be used to offset or cover shortages that may exist otherwise in the broker's trust account.

A broker must keep a separate record of unexplained trust account overages including a separate subsidiary ledger to record the potential trust fund liability. Such records must include the date of recording and the date on which such funds became an unexplained trust account overage. A broker holding unexplained trust account overages must perform a monthly reconciliation of such funds in accordance with Commissioner's Regulation 2831.2.

*☞ Ultimately, the excess funds escheat to the state, unless the ownership of the excess unexplained overage is determined within **seven years** of the discovery of the overage. [Calif. Code of Civil Procedure §1500 et seq.]*

## SUGGESTIONS FOR RECONCILING RECORDS

The following is a general discussion on how to perform the trust account reconciliations.

1. Before performing the reconciliations, record all transactions up to the cut-off date in both the bank account record and the separate beneficiary or transaction records.
2. Use balances as of the same cut-off date for the two records and the bank statement.
3. For the bank account reconciliation, calculate the adjusted bank balance from the bank statement and from the bank account record. (Brokers commonly err by calculating the adjusted bank balance based solely on the bank statement, ignoring the bank account record. While they may know the correct account balances, they may not realize their records are incomplete or erroneous.)
4. Keep a record of the two reconciliations performed at the end of each month, along with the supporting schedules.
5. Locate any difference between the three sets of accounting records. A difference can be caused by:
  - Not recording a transaction
  - Recording an incorrect figure
  - Erroneous calculations of entries used to arrive at account balances
  - Missing beneficiary records
  - Bank errors

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## AUDITS AND EXAMINATIONS

Because of the importance of trust fund handling, the Commissioner has an ongoing program of examining brokers' records. As necessary, audited licensees are made aware of deficiencies in trust fund handling and record keeping. If an audit discloses actual trust fund imbalances or money handling procedures which may cause monetary loss, appropriate disciplinary proceedings are initiated.

Section 10148 of the Business and Professions Code provides that a real estate broker *shall retain for **three years** copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by or obtained by the broker in connection with any transaction for which a real estate broker license is required.* The retention period shall run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After notice, such books, accounts and records shall be made available for examination, inspection and copying by the Commissioner or a designated representative during regular business hours, and shall, upon the appearance of sufficient cause, be

subject to audit without further notice, except that such audit shall not be harassing in nature.

### MISUSE OF TRUST FUNDS

Strict requirements are imposed on a California real estate broker who handles funds entrusted to him by others. The broker must deposit the trust funds as instructed when handed the funds, keeping them separate from his personal funds, and scrupulously account for the trust funds.

Above all, a broker must not convert to his personal use any funds entrusted to him.

The trust fund handling requirements are backed up by a variety of penalties and consequences which apply when a broker misuses trust funds, including:

- Civil liability for money wrongfully converted
- Disciplinary action by the DRE
- Income tax liability
- Criminal sanctions for embezzlement

The penalties depend partly on the nature of the funds which the broker misuses. For example, penalties for a broker's misuse of advance fees held in trust accounts are specifically fixed by statute.

The advance fees statute allows a client to recover treble damages, as well as attorneys fees, from a broker who mishandles advance fees. Also, a broker who fails to account for advance fees is presumed to be guilty of embezzlement. [B&PC §10146]

However, the existence of specific statutory provisions relating to the misuse of advance fees does not mean the misuse of other types of trust funds will go unpunished. Penalties for misuse of trust funds for other purposes fall under more general statutory schemes.

### DRE DISCIPLINE

If the commissioner of the Department of Real Estate determines a broker has or is about to violate trust accounting rules, the commissioner may file an action and obtain an injunction against the broker to stop or prevent the violation.

In the action, the commissioner may include a claim for restitution on behalf of individuals injured by the broker's actions. [B&PC §10081(b)]

Also, if the Department of Real Estate conducts an audit of the broker's trust account and discovers the broker has commingled or converted to his own use more than \$10,000 of trust funds, the broker's license may be suspended pending a formal hearing.

After the hearing, a receiver may be appointed to oversee the broker's business. The receiver is allowed to exercise any power the broker may have had, and may file a bankruptcy petition on behalf of the broker. [B&PC §10081.5]

Inappropriate commingling of trust funds is grounds for suspension or revocation of the broker's license. [B&PC §10176(e)]

In addition, the Commissioner of Real Estate has statutory authority to seek an injunction against a broker he believes is misusing trust funds. The injunction may include suspending the license of the broker and placing his business in the hands of a receiver. [B&PC §10081.5]

*☞ Each year licensees disciplined by the DRE for trust fund violations, represent a **high percentage** of all licensee violations.*

### CIVIL LIABILITY

*☞ A broker is responsible for trust account losses due to the actions of his employees.*

At the very least, a broker who misuses trust funds must reimburse the owner of the funds for the amount wrongfully converted. Any person who is deprived of property by a broker is entitled to recover an amount of money which will compensate him for the loss. [Calif. Civil Code §3281]

However, a principal's right to recover money from a broker who misuses trust funds is not limited to the amount or value of the funds the broker has wrongfully converted.

## TRUST FUNDS

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The principal can also recover money losses and penalties based on a breach of the broker's agency relationship with the client. Since the broker is acting as the principal's agent, and using the principal's money, any profits earned by the broker's misuse of the funds are presumed to belong to the principal.

Thus, the principal is entitled to recover the funds wrongfully converted, plus any gain the broker has derived from the use of the funds

For example, a broker representing a seller of real estate offered the property to a buyer at a price above the seller's asking price. The buyer accepted the offer and gave the broker a check for the purchase price agreed to between the buyer and broker.

However, the broker never communicated the buyer's offer to the seller. Instead, after accepting the buyer's check, the broker himself purchased the property from the seller at the seller's lower sales price, deeded the property to the buyer, and kept the difference between the sales price and the purchase price as a profit.

The buyer sought to recover from the broker the money difference between the price he paid the broker, and the price the broker paid the seller. The broker claimed the buyer was not entitled to recover the difference since the property the buyer acquired was worth at least what he paid for it.

However, the buyer's recovery was not limited to his out-of-pocket losses, since the broker used the buyer's money to make a secret profit for himself. Thus, the buyer was entitled to recover the profits realized by the broker.

Additionally, *a broker who wrongfully converts trust funds may be liable for punitive damages*. Punitive damages, also called exemplary damages, can be awarded to a principal when the broker has wrongfully obtained assets from the principal, such as trust funds, by fraud or with malice. [CC §3294]

Any wrongful use of trust funds is automatically fraudulent, since the broker's breach of his agency duty is defined by statute as constructive fraud. [CC §1573]

Thus, any broker misusing trust funds is potentially liable to the principal for punitive damages as well as reimbursement of the funds taken or misused. Whether punitive damages are awarded depends on the severity of the broker's misconduct and the agency relationship undertaken by the broker.

For example, a seller and a broker enter into a listing agreement employing the broker to sell a property. Under the agreement, the broker's fee will be any amount above the net sales price sought or agreed to by the seller.

The broker alters the fee provision in the listing agreement to provide a 33% fee after the seller signs it.

The broker accepts funds from a buyer in connection with the purchase of the property. The broker retains one third of the funds as a fee and hands the balance to the seller at closing. The amount handed the seller is less than the net amount agreed to in the listing agreement.

The seller was awarded exemplary damages, based not only on the wrongful conversion of gross sales proceeds held in trust for the seller, but on the broker's fraudulent conduct, since the broker could not honestly believe he was entitled to a 33% fee.

In cases where actual damages are small, exemplary damages are sometimes awarded as a deterrent to fraudulent activity.

Thus, even if the actual losses inflicted by a broker's wrongful conversion of trust funds are minor, the broker might be required to pay exemplary damages to discourage him from misusing trust funds in the future.

*The broker who misappropriates advance fees held as trust funds may be liable for damages of up to three times the amount of the missing trust funds, plus interest and attorneys fees.* [B&PC §10146]

## THE REAL ESTATE RECOVERY ACCOUNT

If an individual sues a broker for trust account violations and receives a judgment, the individual can satisfy the judgment through the state Real Estate Recovery Account if:

- The broker is insolvent
- The losses are directly related to the brokers conduct

However, the individual's recovery is limited to **\$20,000** per transaction. [B&PC §10471]

For example, an owner of income producing real estate enters into a property management agreement with

a broker.

Under the property management agreement, the broker collects rents from the tenants, and arranges and pays for maintenance of the real estate. The owner gives the broker a cash advance to cover maintenance expenses.

The broker deposits the cash advance into his personal account. Tenants pay their rents to the broker in cash, and the broker also deposits the cash into his personal checking account. The broker issues a check on his personal account payable to the owner for all funds due the owner.

The check is rejected by the broker's bank due to insufficient funds. The owner demands the broker pay the owner the rents collected and return the cash advanced for maintenance, or account for the funds if they have been disbursed.

The broker refuses to account to the owner. The owner sues the broker and is awarded a judgment for:

- Three times the amount of rents collected by the broker and not paid to the owner
- Three times the amount of the cash advanced for maintenance as no evidence exists showing the broker expended the funds for the benefit of the owner
- Pre-judgment interest at the legal rate on the rents and advance from the date they were received by the broker
- Post-judgment interest until the judgment is satisfied
- Costs
- Attorneys fees

The owner attempts to collect on the judgment but is unable to do so *since* the broker is insolvent.

Can the owner collect all of his judgment against the broker for the misuse of trust funds from the Real Estate Recovery Account?

No! The owner can only recover his "actual and direct" losses from the Recovery Account, up to the sum of \$20,000. Thus, the owner's recovery is not only limited by the \$20,000 ceiling, but is limited to the actual amount of his lost rents and the cash advanced for maintenance. The tripled amount cannot be recovered from the Recovery Account as they represent punitive damages.

Also, no attorneys fees award can be recovered from the Recovery Account as attorneys fees are not direct losses.

However, the owner can recover the interest and court costs awarded in the judgment from the Recovery Account as part of the \$20,000 maximum recovery.

## INCOME TAX

Taxes must be paid on all income, from whatever source, including income derived from illegal activities such as embezzlement.

Thus, a broker who converts trust funds to his personal use exposes himself to penalties if he fails to report the converted funds as income and pay the appropriate taxes.

Further, embezzled money must be reported as income even if it is paid back. Thus, a broker embezzling trust funds cannot escape income tax liability by returning the funds and characterizing the embezzlement as an unauthorized loan.

In addition, no deductions of any kind are allowed to offset income derived from illegal activities. The broker is responsible for reporting the full amount of the income he has derived from converting trust funds, undiminished by his related expenses and costs.

## EMBEZZLEMENT

A broker who uses funds entrusted to him for any purpose other than as authorized may be held guilty of embezzlement.

Whether the broker is merely "borrowing" the funds and intends to return them is of no importance. The return of the funds misused may be a factor mitigating the broker's sentence, but he is still guilty of embezzlement.

## TRUST FUNDS

### SAMPLE TRANSACTIONS

To demonstrate the record keeping requirements discussed in this chapter, we have simulated trust account records for typical real estate transactions occurring over a thirty-day period. To set the stage, let us assume that James Adams, a real estate broker, owns and operates a one-man real estate office specializing in residential sales and property management. Broker Adams has one trust fund bank account. We will look at the trust account activity for this office for the month of *May, 2000*.

The use of columnar records to record these transactions is illustrated in Exhibits 1 - 10 at the end of this chapter. As previously discussed, a broker may use other types of records as long as they meet generally accepted accounting standards.

2000 TRANSACTIONS				
May 1	Opened a trust account with First County Bank, and deposited \$100 of his own money to cover bank service charges.			
May 1	Entered into agreements to manage the following rental properties:			
	Address	Owner's Name	# of Units	
	a. 1538 South Ave. Anycity, CA	T. Eddie	1	
	b. 3490 Tower St. Anycity, CA	L. Stewart	4	
	c. 9152 High Way Anycity, CA	W. Allen	4	
	d. 2351-2353 Kingston Way Anycity, CA	S. Manly	2	
	e. 7365 Meadow Cir. Anycity, CA	J. Bird	1	
May 3	Deposited the following rents received from tenants of managed properties:			
	Property	Tenant's Name	Rent Received	
	a. 1538 South Ave.	B. Hamns	\$600	
	b. 3490 Tower St., Unit 1	R. Robertson	350	
	c. 2351 Kingston Way	I. Warren	450	
			\$1,400	
May 5	Received a \$2,000 check payable to broker from Mr. and Mrs. Dennis White as deposit for their offer to buy a house at 615 Lake Drive, Anycity, owned by Mr. and Mrs. Richard J. Jensen. Buyers' offer instructed broker to hold the check uncashed until their offer was accepted by the Jensens.			
May 5	Received and deposited \$750 from T. Sundance representing rent of \$500 for September 5 to 30, and \$250 security deposits for 7365 Meadow Circle.			
May 5	Was notified by the Jensens that they accepted the offer on their property.			
May 6	Deposited the \$2,000 check from Mr. and Mrs. White.			
May 8	Obtained an exclusive listing to sell a six-plex at 915 Galaxy St., Anycity, owned by R. Jays.			
May 9	Received \$1,000 from W. Allen, owner of 9152 High Way, to cover anticipated expenses for the property. Amount was deposited the same day.			
May 10	Issued the following checks to pay for various expenses connected with the managed properties:			
	Check No.	Payee	Purpose	Amount
	1001	ABC Mortgage Co.	Mortgage payment for 1538 South Ave.	\$450
	1002	Anycity Treasury	Utilities for 1538 South Ave.	35
	1003	Professional Cleaners	Cleaning for 3490 Tower St.	55

## TRUST FUNDS

	1004	Mr. Handyman	Minor repairs on 2351 Kingston	25
			TOTAL	\$565
May 14	Received a \$4,000 check from B. Sun, payable to Title Escrow Company, with an offer to buy the 915 Galaxy property.			
May 15	Received R. Jays' acceptance of the buyer's offer on 915 Galaxy Street.			
May 16	Delivered the \$4,000 check from B. Sun to Title Escrow Company.			
May 19	Issued check number 1005 for \$2,000 to First Title Co. for account of Mr. and Mrs. White, buyers of the 615 Lake Drive property.			
May 22	Received an offer and a \$3,000 check as deposit from R. Olive to buy a single family house at 31009 Technology Street owned by T. Evans.			
May 24	Returned R. Olive's check after seller rejected the offer.			
May 31	Charged property management fees to the following accounts and issued check number 1006 for \$330 payable to himself:			
	Property Owner	Management Fee		
	T. Eddie	\$45		
	L. Stewart	100		
	W. Allen	80		
	S. Manly	60		
	J. Bird	45		
		Total \$330		
May 31	Sent statement of account to each owner of the managed properties.			

## BACKGROUND INFORMATION

James Adams keeps four types of columnar records:

1. Record of all Trust Funds Received and Paid Out - Trust Fund Bank Account (hereinafter referred to as "Bank Account Record"). This record is required under Commissioner's Regulation 2831 for each trust account a broker has.
2. Record of all Trust Funds Received - Not Placed in Broker's Trust Account (hereinafter referred to as "Record of Undeposited Receipts"). This is required under Commissioner's Regulation 2831.
3. Separate Record For Each Beneficiary or Transaction (hereinafter referred to as "Separate Beneficiary Record"). This is required under Commissioner's Regulation 2831.1.
4. Separate Record For Each Property Managed (hereinafter referred to as "Separate Property Record"). This serves the same purpose as the Separate Beneficiary Record.

To illustrate the recording process, listed below are the entries made on the books by James Adams as well as the documents prepared or obtained as support for each transaction. The actual entries are shown on the forms/exhibits at the end of this chapter.

Note that:

Each entry to any record shows all the pertinent information of the transaction, such as the date, name of payee, name of payor, amount, check number, etc.

- The daily *bank balance* is computed and posted on the Account Record after recording the transactions.
- The balance owing to the client is computed and posted on the Beneficiary Record or Separate Property Record, after posting transactions.
- Any entry made on the Bank Account Record has a corresponding entry on a Beneficiary Record or a Separate Property Record, and vice versa.
- All records except the Record of Undeposited Receipts show entries in chronological sequence regardless of transaction type. The Record of Undeposited Receipts shows the

## TRUST FUNDS

disposition of a trust fund in the same line as the receipt is entered, rather than in chronological sequence.

### STEP-BY-STEP NARRATIVE OF TRUST ACCOUNT ENTRIES

(Actual recording shown on Exhibits 1 - 10 at end of chapter.)

Transaction Date	Documentation	Entries
May 1	Deposit slip prepared by broker.	Record the deposit on: 1. The Bank Account Record. Balance is \$100. ( <a href="#">Exh. 1</a> ) 2. A newly prepared Separate Beneficiary for James Adams. Balance is \$100. ( <a href="#">Exh. 2</a> )
May 1	Management agreements signed by property owners and broker.	No entries needed since there was no receipt nor disbursement of trust funds.
May 3	Collection receipts Nos. 2, 3 and 4 issued to B. Hamns, R. Robertson, and I. Warren, respectively.	Record the \$1,400 receipt on: 1. The Bank Account Record. New balance is \$1,500. ( <a href="#">Exh. 1</a> ) 2. Newly prepared Separate Beneficiary Records for: T. Eddie - balance is \$600 ( <a href="#">Exh. 4</a> ) L. Stewart ?bal. is \$350 ( <a href="#">Exh. 5</a> ) S. Manly - balance is \$450 ( <a href="#">Exh. 6</a> )
May 5	Real Estate Purchase Contract and Receipt for Deposit signed by Mr. and Mrs. White. Collection receipt No. 1 issued to the Whites.	Enter transaction on the Record of Undeposited Receipts. ( <a href="#">Exh. 3</a> ) No Separate Beneficiary Record is necessary since the check was not deposited.
May 5	Collection receipt No. 5 issued to T. Sundance. Receipt showed that \$500 of the \$750 was for rent and the other \$250 was for security deposit.	Record the \$750 deposit on: 1. The Bank Account Record. ( <a href="#">Exh. 1</a> ) 2. Separate Beneficiary Records for: J. Bird - Sundance's Security Deposit, bal. is \$250. ( <a href="#">Exh. 7</a> ) J. Bird - balance is \$500. ( <a href="#">Exh. 8</a> )  (Since security deposits will be accounted to the tenant in the future, James Adams keeps a separate record for deposits. Total liability to the owner is the sum of the two records - one for security deposits, another for rents and other transactions.)
May 5	Real Estate Contract and Receipt for trust funds were received for Deposit signed by Mr. and Mrs. Jensen.	No entries were made since no trust funds were received or disbursed.

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May 6	Deposit receipt prepared by broker.	Record \$2,000 deposit on: <ol style="list-style-type: none"> <li>1. Bank Account record. New balance is \$4,250. <a href="#">(Exh. 1)</a></li> <li>2. A newly prepared Separate Beneficiary Record - Mr. and Mrs. White/Mr. and Mrs. Jensen. Account balance is \$2,000. <a href="#">(Exh. 9)</a></li> <li>3. Record of Undeposited Receipts. <a href="#">(Exh. 3)</a> Shows disposition of check previously entered on the record.</li> </ol>
May 8	Exclusive Listing Agreement signed by sellers and broker.	
May 9	Collection receipt No. 6 issued to W. Allen.	Record receipt on: <ol style="list-style-type: none"> <li>1. The Bank Account Record. New balance is \$5,250. <a href="#">(Exh. 1)</a></li> <li>2. A newly prepared Separate Beneficiary Record - W. Allen. Balance is \$1,000. <a href="#">(Exh. 10)</a></li> </ol>
May 10	Checks issued by broker. Supporting papers for each check.	Record disbursements on: <ol style="list-style-type: none"> <li>1. Bank Account Record. New Balance is \$4,685. <a href="#">(Exh. 1)</a></li> <li>2. Separate Beneficiary Records for:  <ul style="list-style-type: none"> <li>T. Eddie - New balance is \$115. <a href="#">(Exh. 4)</a></li> <li>L. Stewart - New balance is \$295. <a href="#">(Exh. 5)</a></li> <li>S. Manly - New balance is \$425. <a href="#">(Exh. 6)</a></li> </ul> </li> </ol>
May 14	Real Estate Purchase Contract and Receipt for Deposit signed by B. Sun.	Record receipt on the Record of Undeposited Receipts. <a href="#">(Exh. 3)</a>
May 15	Real Estate Purchase Contract and Receipt for Deposit signed by R. Jays.	No entry was needed since there was no receipt or disbursement of funds.
May 16	Receipt issued by Title Escrow Company.	Note disposition of check on the Record of Undeposited Receipts. <a href="#">(Exh. 3)</a>
May 19	Check issued by broker. Receipt issued by First Title Company.	Record disbursements on the: <ol style="list-style-type: none"> <li>1. Bank Account Record. New balance is \$2,685. <a href="#">(Exh. 1)</a></li> <li>2. Separate Beneficiary Record - Mr. and Mrs. White/Mr. and Mrs. Jensen. New balance is \$0. <a href="#">(Exh. 9)</a></li> </ol>
May 22	Real Estate Purchase Contract and receipt for Deposit signed by R. Olive.	
May 24	Real Estate Purchase Contract and Receipt for Deposit rejected by T. Evans.	Post the return of check on the Record of Undeposited Receipts. <a href="#">(Exh. 3)</a>
May 31	List showing the breakdown of the check amount, showing the charge to each owner.	Record disbursements on the: <ol style="list-style-type: none"> <li>1. Bank Account Record. New balance is \$2,685. <a href="#">(Exh. 1)</a></li> </ol>



## TRUST FUNDS

		2. Separate Beneficiary Records for:			
	(NOTE: A list is necessary as support for a check disbursement chargeable to a number of beneficiaries. Posting the entries on the separate records without such a list is not sufficient.)		New Owners	Balance	
			T. Eddie	\$70	
			L. Stewart	\$195	
			W. Allen	\$920	
			S. Manly	\$365	
			J. Bird	\$455	

After recording the daily transactions, the next step in the trust fund accounting process is the reconciling of records at the end of the month. James Adams prepared reconciliation schedules by comparing the bank balance on the Bank Account Record with the bank statement balance (the bank reconciliation) and also with the total of the Separate Beneficiary Records balances (the reconciliation report).

The bank statement and reconciliations are shown on the next two pages.

<b>FIRST COUNTY BANK STATEMENT</b>				
MAIN BRANCH 5 Main Avenue ANYCITY, CA 90002				
		PAGE 1 of 1		
DATE OF THIS STATEMENT 05/31/00				
		JAMES ADAMS TRUST ACCOUNT 8310 ORANGE AVENUE ANYCITY, CA 90002		
CHECKING ACCT. 123456		CUSTOMER SINCE 1995		
SUMMARY: PREVIOUS STATEMENT BALANCE ON 04/30/00.				00.00
TOTAL OF 5 DEPOSITS FOR				5,250.00
TOTAL OF 4 CHECKS FOR				2,540.00
TOTAL OF 1 OTHER DEBIT FOR				7.00
STATEMENT BALANCE ON 05/31/00				2,703.00
CHECKS/OTHE R DEBITS	CHECKS			
		CHECK NUMBER	DATE POSTED	AMOUNT
		1001	5/14	450.00
		1002	5/16	35.00
		1003	5/16	55.00
		1005	5/21	2,000.00
	OTHER DEBITS			
	DATE POSTED			
				AMOUNT
	05/31	SERVICE CHARGE		7.00

**TRUST FUNDS**

DEPOSITS/ OTHER CREDITS	DEPOSITS			
			DATE POSTED	AMOUNT
			5/1	100.00
			5/5	1,400.00
			5/5	750.00
			5/6	2,000.00
			5/9	1,000.00
DAILY BALANCE	DATE	AMOUNT	DATE	AMOUNT
	5/1	100.00	5/14	4,800.00
	5/5	2,250.00	5/16	4,710.00
	5/6	4,250.00	5/21	2,710.00
	5/9	5,250.00	5/31	2,703.00

<b>James Adams Bank Reconciliation</b> First County Bank May 31, 2000		
Balance per bank statement, 5/31/00		\$2,703.00
Add deposits in transit		-0-
Less outstanding checks:		
check #1004		\$25.00
#1006	330.00	<355.00>
Adjusted bank balance, 5/31/00		\$2,348.00
Balance per books, 5/31/00		\$2,355.00
Less May bank service charge		<7.00>
Adjusted balance, 5/31/00		\$2,348.00

<b>James Adams Reconciliation Report</b> First County Bank Account No. 123456 May 31, 2000	
Beneficiary	Balance
James Adams (Broker)	\$93.00
W. Allen	920.00
J. Bird	250.00
J. Bird	455.00
T. Eddie	70.00
S. Manly	365.00
L. Stewart	195.00

## TRUST FUNDS

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Total per subsidiary records	\$2,348.00
(Agrees with bank account record balance.)	

### QUESTIONS AND ANSWERS REGARDING TRUST FUND REQUIREMENTS AND RECORD KEEPING

Q. Are security deposits on rental units the property of the owner or should they be held in trust by the broker for the tenant?

A. They are trust funds. As such, control and disbursement of the security deposits are at the instruction of the property owner.

Q. Am I permitted to wait until checks deposited to my trust account have cleared before I issue a trust check to fund a customer's check?

A. Although the Real Estate Law is silent on this, good business practice dictates that you wait until a customer's check deposited to your trust account has cleared prior to the issuing of your trust check as a refund.

Q. How should I handle an earnest money check which is to be deposited into escrow upon acceptance of the offer?

A. Such a check may be held until the offer is accepted and then placed in escrow but only when directed to do so by the buyer, provided you disclose to the seller the fact the check is being held in uncashed form. In such cases, it is good practice to include such a provision in the deposit receipt. You must keep a columnar record of the receipt of the check, the name of the escrow company and the date the check was forwarded to the escrow.

Q. As a broker-owner of rentals, do I have to put security deposits in a trust account?

A. Money you receive on your own property is received as a principal, not as an agent. As such, these are not trust funds and should not be placed in the trust account.

Q. Must I keep a deposit receipt signed only by the buyer and rejected by the seller?

A. Yes. Such a record must be maintained for three years.

Q. May I maintain one trust fund account for both collections from my property management business and deposits on real estate sales transactions?

A. Since property management funds usually involve multiple receipt of funds and several monthly disbursements, it is suggested that separate trust fund accounts be maintained for property management funds and earnest money deposits. However, all trust funds can be placed in the same trust fund account as long as separate records for each trust fund deposit and disbursement are maintained properly and the account is not an interest-bearing account.

Q. If the buyer and seller decide to go directly to escrow and the buyer makes out a check to the escrow company and hands it directly to the escrow clerk, do I have to maintain any records of this check?

A. No. You must maintain records only of trust funds which pass through your hands for the benefit of a third party.

Q. How long must I keep deposit receipts?

A. Deposit receipts must be maintained for three years.

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### SUMMARY

We might say this chapter presents the three R's of trust funds: **Responsibility, Requirements and Records.**

It is a real estate broker's responsibility to protect clients' funds at all times and keep clients fully informed of the nature and disposition of all trust funds.

To aid brokers in carrying out this responsibility, the Real Estate Commissioner's Regulations include

TRUST FUNDS

requirements concerning trust funds. A real estate broker also needs to meet other requirements from a practical business point of view. To protect clients' funds adequately and in the business-like fashion expected, the broker must keep accurate records.

For complete copy of this publication you may download from <http://www.dre.ca.gov/trstfnds.htm>

**COLUMNAR RECORD OF ALL TRUST FUNDS RECEIVED AND PAID OUT  
TRUST FUND BANK ACCOUNT**

2000 (w/) Date Received	From Whom Received or To Whom Paid	Description	Received		Date of Deposit	Reference	Amount Paid (Out)	Paid Out		Date of Check	XX Check	Date of Check	XX Check
			Amount Received	XX Deposit				Check Number	Amount				
5-1-00	James Adams	Open TA Account	100.00		5-1-00								100.00
5-3	B. Harris	Rent: 1538 South Ave.	600.00		5-3	#2							700.00
5-3	R. Robertson	Rent: 3490 Tower St, Unit 1	350.00		5-3	#3							1,050.00
5-3	I. Warren	Rent: 2351 Kingston Way	450.00		5-3	#4							1,500.00
5-5	T. Sundance	Rent: \$500; Dep. \$250.											
5-5	Mr. & Mrs. Dennis White	7365 Meadow Circle	750.00		5-5	#5							2,250.00
5-9	W. Allen	Deposit: 615 Lake Drive	2,000.00		5-6								4,250.00
		Owner Contribution	1,000.00		5-9	#6							5,250.00
	ABC Mortgage Co.	Mtg. Pmt. 1538 South Ave.					450.00	1001		5-10			4,800.00
	Anycity Treasury	Utilities: 1538 South Ave.					35.00	1002		5-10			4,765.00
	Professional Cleaners	Cleaning: 3490 Tower St.					55.00	1003		5-10			4,710.00
	Mr. Handyman	Repairs: 2351 Kingston					25.00	1004		5-10			4,685.00
	First Title Co.	Deposit: 615 Lake Drive					2,000.00	1005		5-19			2,685.00
	James Adams	Mgmt. Fees: See Schedule					330.00	1006		5-30			2,365.00
	First County Bank	May Bank Service Charge					7.00	DM		5-31			2,348.00

EXHIBIT 1

RE 4522 (Rev. 2/99)

TRUST FUNDS

SEPARATE RECORD FOR EACH BENEFICIARY OR TRANSACTION FOR CLIENT'S FUNDS PLACED IN TRUST FUND BANK ACCOUNT

IDENTIFICATION OF TRANSACTION (NUMBER, ADDRESSES, ACCOUNT NUMBERS, ETC.)

James A. Adams

Trust Fund Balance - Broker

DESCRIPTION	DISCHARGE OF TRUST ACCOUNTABILITY FOR FUNDS PAID OUT			TRUST ACCOUNTABILITY FOR FUNDS RECEIVED		ACCOUNT BALANCE
	Date of Check	Check Number	Amount	Date of Deposit	Amount	
Open TA Account				5-1-00	100.00	100
May '00 Bank Service Charge	5-31-00	SM	7.00			93

RE 4523 (Rev. 2/94)

EXHIBIT 2

**RECORD OF ALL TRUST FUNDS RECEIVED — NOT PLACED IN BROKER'S TRUST ACCOUNT**  
*(Include Notes and Uncashed Checks Taken As Deposits)*

2000 (6/4) DATE RECEIVED	Form or Receipt (Check, note, etc.)	Amount	Received From	Description of Property or Other Instrument	Description of Future (To escrow, power of attorney account, or retained)	Date Dis- bursed
5-5-00	check	2,000.00	Mr. & Mrs. Xannis White	615 Lake Drive	To Trust Account upon acceptance	5-6-00
5-14	check	4,000.00	B. Sun	915 Galaxy	To Title Escrow Company	5-16
5-22	check	3,000.00	R. Olive	31009 Technology Street	Returned to Buyer	5-24

EXHIBIT 3

RE 4524 (Rev. 2/99)

SEPARATE RECORD FOR EACH PROPERTY MANAGED

T. Eddis		Deduction		\$			
6439 Alverta Way, Anycity		MONTHLY RENT		\$			
1538 South Ave. Anycity		Commissions:		\$			
B. Hamms		LEASER		\$			
		COLLECTION		\$			
		MANAGEMENT		\$			
DATE	RECEIVED FROM OR PAID TO	DESCRIPTION	RECEIPT/ CHECK NO.	AMOUNT RECEIVED	DATE DEDUCTED	AMOUNT DEDUCTED	BALANCE
5-3-00	B. Hamms	Rent - May 00	#2	600.00	5-3-00		600.00
5-10	ABC Mortgage Co.	Mortgage Payment	1001			450.00	150.00
5-10	Anycity Treasury	Utilities	1002			35.00	115.00
5-31	James Adams	Management Fee	1006			45.00	70.00

EXHIBIT 4

F 4525 (Rev. 2/94)

**TRUST FUNDS**

**SEPARATE RECORD FOR EACH PROPERTY MANAGED**

		Deposit	\$
<u>L. Stewart</u>			
<u>10037 Airline Place, Anycity</u>		MONTHLY RENT	\$
<u>3490 Tower St., Anycity</u>		COMMISSION	\$
<u>R. Robertson</u>		LEASES	\$
		COLLECTION	\$
		MANAGEMENT	\$

Date	Received From or Paid To	Description	Receipt Check No.	Amount Received	Date Debit	Amount Debit	Balance
5-3-00	R. Robertson	Rent - May/00	#3	350.00	5-3-00		350.00
5-10	Professional Cleaners	Cleaning	1003			55.00	295.00
5-31	James Adams	Management Fee	1006			100.00	195.00

EXHIBIT 5

RE: 4/5/25 (Rev. 2/94)















## COURSE 4: FAIR HOUSING

### PREVIEW



This course will bring the licensee up to date with regard to the history and basics of the law, and will review the new amendments of handicap and familial status.

This course is designed to provide real estate licensees with knowledge of federal and state fair housing laws relating to the sale and rental of real estate; knowledge of selected federal and state civil rights and anti-discrimination laws relating to real property transactions and business establishments.

Emphasized in this course is both the federal and state housing laws which relate to the sale and rental of property such as prohibition against redlining, discriminatory advertisement, refusing to show properties and blockbusting.

On completing this course, a real estate licensee will be familiar with the requirements and restrictions against discriminatory housing practices and has the ability to avoid any practice which could be construed as discriminatory in commercial and residential transactions and facilities.

Let us all put our efforts in fair housing and build a color blind neighborhood in our daily living.

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### FAIR HOUSING

☞ *One must understand that fair housing does not mean equal housing. Fair Housing means “Equal Housing Opportunity”. It is housing opportunity with the absence of discrimination.*

To enforce Fair Housing, we have laws both of the Federal level, state level and the state regulatory agency. Here California Department of Real Estate’s (DRE) Professional Codes of Ethics.

### FEDERAL FAIR HOUSING ACTS

There are three main parts of Federal Fair Housing legislation, they are:

1. Civil Rights Act of 1866
2. Civil Rights Act of 1968
3. American Disabilities Act

☞ *A broker is responsible for ensuring his employees comply with state and federal anti-discrimination laws.*

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### THE CIVIL RIGHTS ACTS OF 1866

The Civil Rights Acts Of 1866, established the “**concept of Fair Housing.**” It provided for equal housing opportunity by prohibiting discrimination on “racial grounds” in contracts.

Section 1981 states “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extraction’s of every kind, and to no other.”

The Civil Rights Act of 1866:

1. Applies to race only
2. Applies to all types of property transactions (inheritance, purchase, lease, sale, and

## FAIR HOUSING

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- convey)
3. Applies to both real property and personal property.

Unlike later acts which applied to residential property only, this act was not limited to residential property. The Civil Rights Act of 1866 could be enforced through a civil lawsuit by a party discriminated against.

Remedies include:

- ♦ An injunction (an order to cease and desist)
- ♦ Actual damages (compensation)
- ♦ Punitive damages (to punish the wrongdoer)

Note: President Andrew Johnson was a moderate, presiding in a radical nation. He felt that the Civil Rights Act of 1866 was an unconstitutional extension of federal powers, because it had not been covered in the constitution. President Johnson considered civil rights to be a matter for the states, therefore, he vetoed the Civil Rights Act of 1866. The veto was overridden. Congress was angry with President Johnson, not just for his veto of the 1866 Act, but for his moderate views toward punishing the South. This led to his impeachment by the House of Representatives. (The only other U.S. president to face an impeachment trial was William Jefferson Clinton.)

## ENFORCEMENT - CIVIL RIGHTS ACT OF 1968

☞ *HUD is enforcement authority*

☞ *HUD can initiate complaints on its own. HUD frequently uses testers to investigate complaints.*

When the violation is also a violation of state or local law, HUD will allow the state or local agency to bring appropriate action.

Private individuals can file discrimination complaints with HUD (NOT limited to person discriminated against.)

Besides administrative remedies, an aggrieved party can file a civil action in state or federal district court within 2 years after the occurrence or the termination of the alleged discriminatory action.

Administrative and civil remedies include:

1. Injunction
2. Compensatory damages
3. Punitive damages (unlimited amount)
4. Attorney fees and court costs (civil only)

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## 1968 CIVIL RIGHTS ACT – TITLE VIII

The Civil Rights Act of 1968, which became fully operational in 1970, is often referred to as the Open Housing or the Fair Housing laws. Congress attempted to establish that in the sale and rental of housing, all persons are to be treated equally. All people are to be “**color blind**” in matters involving the sale or rental of such housing.

☞ *Brokers CANNOT discriminate against buyers, sellers, lessors or lessees.*

An agent may not refuse to show, rent, or sell based upon a false representation that the property has been sold, leased or is otherwise unavailable.

If the U.S. Attorney General would have reasonable cause to believe that any group of persons has been denied any of the rights granted by this law and where this denial raises an issue of general public importance, he may take action in the appropriate United States district court. If HUD reports a violation, the attorney general must take action.

Again, later in 1968, in the case of Jones vs. Mayer, the United States Supreme Court reaffirmed the constitutionality of what is now recalled as the Civil Rights Act of 1966. This earlier legislation was founded on an interpretation of the Thirteenth Amendment to the United States Constitution which abolished slavery in this country.

The Open Housing Laws of 1968 give administrative authority in matters involving discrimination in the sale and rental of housing to the Department of Housing and Urban Development (HUD). This federal law establishes that complaints of violations are to be made to HUD within 180 days of the alleged discriminatory act.



## FAIR HOUSING

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If the complaint is not acted upon within 30 days of being filed with the Secretary, then the aggrieved party may commence a civil action in any appropriate United States district court against the party named in the complaint, as long as there would be no state or local fair housing laws which provide remedies similar to those provided by this federal law.

This federal law also provides that the injured party may act to enforce the rights it bestows on private persons by initiating a civil action in any appropriate federal, state or local court to recover damages for the alleged discriminatory act. Under this federal law, the aggrieved parties might recover such actual damages which they are found to suffer, plus not more than \$1,000 in additional punitive damages together with court costs and reasonable attorney fees. Since this is a civil action, no criminal penalties are available.

**☞ If an owner asks the listing broker the ethnic background of a person offering to buy the property, the broker is prohibited by law from disclosing this fact.**

To mention that a property is close to a minority area or a place with a minority connotation would be discriminatory. To mention that a property is for “females” or even “females preferred” would be discriminatory.

Key points of the Civil Rights Act of 1968, as amended, are:

1. Applies to housing only (not nonresidential property);
2. Applies to discrimination on basis of national origin, color, religion, race, sex (1974); familial status (1988); and handicapped (1988);
3. Exemptions from discrimination:
  - a. Religious organizations as to members only in the lease or sale of nonprofit housing if the religious organization is open to membership without discrimination.
  - b. Private clubs as to lease or sale of housing to members only for non-commercial purposes.
  - c. One-to-four unit owner-occupied units renting if a real estate agent is not involved and advertising is not discriminatory.
  - d. Persons owning no more than 3 single-family homes if they are not in the business of renting, an agent is not involved and advertising is not discriminatory.

While it applies to race only, the above exemptions could not be used in cases of race discrimination. The more restrictive law (1866) takes precedence.

### Equal Housing Opportunity Poster

Department of Housing and Urban Development (HUD) requests that all real estate agents display the identifying logo shown below as identification that they cooperate with the rules and regulations of the department.

Brokers should display the Equal Housing Opportunity Poster. The burden of proof is shifted from the person making the complaint to the broker, if a broker fails to post this poster at his or her place of business (Figure 4-1). In other words, the broker could be placed in the position of having to prove that he or she did not discriminate rather than having the complaining party having to prove discrimination.

It should be noted here that acts of discrimination should not be confused with acts of good business. For example: Should a broker refuse to take a listing from a member of a minority group because the seller wanted to list the property well above the market, this would not be an act of discrimination.

**Figure 4-1: Equal Housing Opportunity Poster**

U.S. Department of Housing and Urban Development



**We Do Business in Accordance With the Federal Fair Housing Law**

(The Fair Housing Amendments Act of 1988)

**It is Illegal to Discriminate Against Any Person Because of Race, Color, Religion, Sex, Handicap, Familial Status, or National Origin**

- In the sale or rental of housing or residential lots
- In advertising the sale or rental of housing
- In the financing of housing
- In the provision of real estate brokerage services
- In the appraisal of housing
- Blockbusting is also illegal

Anyone who feels he or she has been discriminated against may file a complaint of housing discrimination:  
1-800-669-9777 (Toll Free)  
1-800-927-9275 (TDD)

**U.S. Department of Housing and Urban Development**  
**Assistant Secretary for Fair Housing and Equal Opportunity**  
**Washington, D.C. 20410**

Previous editions are obsolete

form HUD-928.1A(8-93)

**EQUAL CREDIT OPPORTUNITY ACT**

In 1975, Congress passed the Equal Credit Opportunity Act. The purpose of this law is to forbid mortgage lenders from discriminating against borrowers in making loans because of the person's race, color, religion, national origin, sex, marital status or because all or part of the applicant's income is from a public assistance program.

## FAIR HOUSING

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*☞ This federal act prohibits discrimination in providing “credit” based on race, color, religion, national origin, sex, marital status, age or because the source of income is **public assistance**.*

If a lender denies credit, the lender must provide the refused applicant the reasons why credit was denied or explain that the applicant has a right to obtain the reasons for credit denial. Creditors may not ask applicant questions as to childbearing intentions.

This law is implemented through Regulation B of the Board of Governors of the Federal Reserve and it is often referred to only as Regulation B. Certain inquiries cannot be made of borrowers. Lenders may not automatically reject part-time income when establishing a prospective borrowers total income. They must make a judgment as to the possibility of the part-time income continuing in the future.

Lenders are not allowed to assume that pregnancy will prevent a woman’s employment. This law, in effect requires lenders to give equal weight to a woman’s income when considering loan approvals. Borrowers must be made aware of their rights in these matters prior to submitting their application for credit. The applicant must be notified of the lender’s action within 30 days after receiving the completed credit application and if credit is denied, the applicant must be notified of the reason for rejection.

### FEDERAL FAIR HOUSING ACT - 1988 AMENDMENTS

Section 804 of Title VIII of the Fair Housing Act states that it shall be unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion or national origin. Further, the discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or nation” is prohibited.

Section 805 Under Title VIII of the Fair Housing law finally addressed the problem of discriminatory lending practices. It is now illegal, to deny a loan or other financial assistance to a person applying for a loan or to discriminate against him in the fixing of the amount, interest rate, duration, or their terms or conditions of such loan.

The phrase race, color, religion or national origin was expanded to include sex, handicap, and familial status.

Other exemptions occur under Section 807 of the Act which gives the right to any religious organization, association, or society or any nonprofit institution or organization that is ancillary to a religious organization to sell or rent the dwellings which it owns or operates for other than a commercial purpose to persons of the same religion

Compliance with the Act is satisfied when a builder meets the requirements of the American National Standard for Buildings and Facilities for-the-Handicapped or when there is compliance with state laws that incorporate the Act’s handicapped standards.

Because California has a fair housing law that is substantially equivalent to federal law, the enforcement of the law is through the State Department of Fair Employment and Housing (DFEH) not the Department of Housing and Urban Development (HUD).

*☞ The 1988 Amendments extended coverage of the 1968 civil Rights Act to “handicapped” as well as “familial” status.*

### Handicapped

Handicapped includes physical as well as mental handicaps. Included among handicapped are persons with visual, auditory, speech and mobility impairments, as well as those suffering from alcoholism, AIDS, HIV virus, cancer and mental problems.

*☞ Drug addiction is NOT considered a handicap.*

Persons who have communicable diseases or whose mental state is such that property and other persons would be endangered are not protected. As an example, a landlord need not rent to a person who has violent rages.

*☞ Real estate agents may NOT ask prospective tenants if they are handicapped.*

## Support Animals

- ☞ *A landlord may NOT refuse a tenant or charge an increase in rent or security deposit because a tenant has a “guide dog” or “support animal.”*

## Modification of Unit

Handicapped persons can modify their units, as well as common areas, at their own expense in order to enjoy the same reasonable use and enjoyment of their unit as a non-handicapped tenant would expect.

- ☞ *The landlord may NOT charge an “increased” security deposit because of “reasonable use” modifications made by a handicapped individual.*

The landlord can require that the tenant agree to restore the unit at the termination of the tenancy if the modification would not be desirable to a non-handicapped tenant. The tenant need not restore modifications to common areas.

The landlord must reasonably accommodate the needs of handicapped tenants to allow them the enjoyment of the premises. (Example: allowing a parking space close to the entrance door.)

## New Units (Construction)

- ☞ *Four or more residential units constructed after March 13, 1991, must be “readily accessible” for the handicapped and wheelchair accessible in public and common areas.*

There also must be an accessible route through the unit. Bathroom walls must be capable of supporting grab bars. Thermostats and light switches must be accessible.

## Familial Status (with minor or pregnant woman)

The 1988 Amendments extended protection to persons under the age of 18 living with a parent or guardian, pregnant women, and persons in process of obtaining legal custody of a minor. As an example, a landlord cannot refuse to rent to a family with children unless the units fall under an elderly person housing exemption.

- ☞ *A landlord is precluded from designating certain units for children and other units for adults. Unless otherwise exempt, children under the age of 18 must be allowed in all units.*

A landlord cannot charge an increased security deposit because tenants have children.

- ☞ *While a landlord CANNOT prohibit children, a landlord can have reasonable rules as to the “number of occupants” based on the “size” of the unit.*

## Elderly Housing” Exemptions

Housing under a governmental program (state or federal) specifically for senior citizens.

Housing occupied entirely by persons 62 years or older qualify for an exemption.

- ☞ *Housing in which 80 percent of the units have one person age 55 or older may also qualify for an exemption.*

☞

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## AMERICANS WITH DISABILITIES ACT OF 1990

President Bush on July 26, 1990 signed “The Americans With Disabilities Act.” The law addresses areas of public accommodations and commercial facilities. When it comes to defining commercial buildings, the law is very thorough. It lists twelve types of facilities that are included within the definition of “public accommodations” and further defines “commercial facilities” whose operations will affect commerce. The Act leaves nothing that is not residential from its scope.

This act protects those with physical and mental disabilities. It requires owners, operators, lessees and managers of commercial facilities to make their facilities accessible to the extent that is readily achievable. The reasonableness of providing access would be based on the difficulty of achieving access and the expense involved considering the total property value and the financial ability of the person responsible.

## FAIR HOUSING

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☞ *The Americans With Disabilities Act makes it discriminatory to deny equal enjoyment of accommodations in an existing place of public accommodation (non-residential).*

This would include stores, offices and service providers.

☞ *New construction must be “accessible for the handicapped” (unless structurally impractical).*

Two-story structures of less than 3,000 square feet need not have elevators unless they are for health providers or shopping centers.

☞ *An owner CAN charge more for sale or lease of handicapped accessible facilities.*

To comply with the act, a real estate office might have to:

1. Provide handicap parking close to an office
2. Ramp the curb or steps
3. Lower a front counter for wheelchair access
4. Move furniture to provide wheelchair access
5. Add a paper cup dispenser by a water fountain
6. Install grab bars in washrooms.

Any other reasonably achievable action that will allow full use and enjoyment of facilities by the handicapped.

The Americans with Disabilities Act also applies to accessibility to employees. Employers with 15 or more employees (which would include many real estate offices) cannot discriminate as to employing the disabled. If a person has the skill and ability to perform the job, reasonable accommodations must be made. In considering what a reasonable accommodation is, the cost of the accommodation and the size of the firm would be considered.

If the accommodations would be an undue hardship for the firm, compliance would not be required. The enforcement authority is the Equal Employment Opportunity Commission.

This law directly affects those who spend their working day in and around a real estate office, those who are engaged in property management, mortgage banking and even those who occupy the local Board of Realtors office. Even if part of a private residence is used for business purposes, that portion of the home is covered by Title III requirements.

Perhaps the most important aspect is the barrier removal portion of the law is the fact that “architectural and communication barriers” that would affect those with disabilities. It has come to denote any barrier that would “impede reasonable access to any facility.” The barriers that must be removed are those where such removal is “readily achievable” or “easily accomplishable”.

Many times the removal of a barrier refers to the building of something that will “aid the handicapped to achieve accessibility”. A ramp built over or around a staircase is one such example.

When a building is remodeled or given any physical alteration, the building must be made readily accessible to disabled individuals “to the maximum extent feasible.” If one area of the facility is scheduled for alteration, other areas of the building may also have to be upgraded. These additional areas are referred to the “path of travel” areas and consist of the bathrooms, telephones, drinking fountains, etc.

All new construction of any public building or commercial facility must be readily accessible and usable by disabled individuals.

Opposition to the Americans With Disabilities Act was initially very strong so the Internal Revenue Code was amended to allow for certain tax incentives to help owners.

☞ *Special “tax credits” are available to small businesses for the costs associated with compliance with the Americans With Disabilities Act.*

### Enforcement of the Americans With Disabilities Act

Enforcement of the Americans With Disabilities Act has not been consistent. This situation was foreseen by those who framed the law and, as a result, provisions were made to give disabled individuals the right to sue privately with the court being able only to award injunctive relief. But if the U.S. Attorney General brings suit, *the court may award equitable relief, monetary damages and civil penalties of up to \$50,000 for the first violation and up to \$ 100,000 each subsequent violations including the payment of attorney’s fees.*

The US Supreme Court extended the Disabilities Act to cover not just individuals who are incapacitated by a

disease like **AIDS** but also whose lives are substantially affected because of their medical condition.

The one million Americans who are infected with the virus that causes AIDS are protected from discrimination at work, in medical care, housing, and their use of public services.

## CALIFORNIA ANTI-DISCRIMINATION LAWS

There are three legislative Acts in California that prohibit discrimination in the sale, leasing, and financing of real estate. The three are:

1. Unruh Civil Rights Act
2. California Fair Employment and Housing Act (Rumford Act)
3. Housing Financial Discrimination Act (Holden Act)

☞ *A broker is responsible for ensuring his employees comply with state and federal anti-discrimination laws.*

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### UNRUH CIVIL RIGHTS ACT - 1959

The Unruh Civil Rights Act provides that “all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever (CC § 51).” The act also prohibits discrimination against a disabled person by denying or interfering with admittance to, or enjoyment of, any public facility.

☞ *The Unruh Civil Rights Act is a California law that prohibits discrimination by a “business” and is enforced by civil court.*

A real estate office is a business and discrimination by brokers, salespersons and property managers are covered by the act. The act has been interpreted liberally and the courts have held that it includes age discrimination.

☞ *Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin...is liable for each and every offense for the actual damages and two hundred and fifty dollars (\$250) in addition thereto, suffered by any person.*

### BLINDNESS & PHYSICAL DISABILITIES

The Unruh Act does not intend to require a property owner to build, alter or modify any new or existing structure to accommodate any disability by a person who may rent or use the premises, nor does the owner have to treat any blind or disabled person any differently than a person who does not have a disability (CC § 54.1(b)(4)).

### SPECIAL NOTE:

When a landlord refuses to accept tenants with dogs, he/she does not have to accept a person who has a dog except that he or she must accept a blind or visually handicapped person, deaf person, or physically handicapped person who has a trained guide or service dog. (CC § 54.1 (b)(5)) The owner does have the right in this case to establish certain terms in the rental or lease agreement that regulate the presence of guide dogs. In addition, the landlord cannot impose an additional charge to a disabled tenant because he or she has a trained guide or service dog, but the tenant is liable for any damages caused by the dog.(CC § 54.1(b)(5), 54.2(a))

Also, under the Unruh Act, a disabled person cannot be denied the opportunity to rent merely because he or she relies on the income of his or her spouse. The landlord, however, can apply normal credit standards to the combined income of the tenants. (CC § 54.1(b)(6))

### ENFORCEMENT OF THE UNRUH ACT

Civil action may be brought by any aggrieved party against the persons alleged to have engaged in discriminatory conduct in violation of the Unruh Act.

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The only remedy expressly provided by the Unruh Act is the recovery of actual damages suffered by the plaintiff, plus such additional amount as may be determined by a jury or a court sitting without a jury, up to a maximum of three times the amount of actual damages, but in no case less than \$1,000, plus attorney's fees. (94 ALS 535 (SB 1288) amends CC § 52)

However, if the act or acts which caused the complaint include violence, or intimidation by threat of violence, committed against the aggrieved parties or their property because of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, each person who aids or incites such conduct, is liable for the aggrieved party's actual damages plus an amount equal to three times such damages, plus a civil penalty of \$25,000, together with attorney's fees, for each offense. (CC § 52(b))

The Unruh Act also permits the Attorney General, and any district attorney, county council, or city attorney to bring an action for injunctive relief against persons engaged in discriminatory practice. (CC § 52(c), (d))

## CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (RUMFORD ACT)

*The Rumford Act is a California law that prohibits "housing discrimination" based on race, sex, color, religion, marital status, ancestry or national origin.*

The Rumford Act was passed prior to the Federal Fair Housing Act and the 1988 Fair Housing Amendments Act.

12901. There is in the state government, in the State and Consumer Services Agency, the Department of Fair Employment and Housing. The department is under the direction of an executive officer known as the Director of Fair Employment and Housing, who is appointed by the Governor, subject to confirmation by the Senate, and who holds office at the pleasure of the Governor. The annual salary of the director is provided for by Chapter 6 (starting at Section 11550) of Part I of Division 3 of Title 2.

Definitions 12927. As used in this part in connection with housing accommodations, unless a different meaning clearly appears from the context:

- (a) "Affirmative actions" means any activity for the purpose of eliminating discrimination in housing accommodations because of race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability.
- (b) "Conciliation council" means a nonprofit organization, or a city or county human relations commission, which provides education, fact-finding, and mediation or conciliation services in resolution of complaints of housing discrimination.
- (c) (1) "Discrimination" includes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when that housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provision of inferior terms, conditions, privileges, facilities, or services in connection with those housing accommodations; includes the cancellation or termination of a sale or rental agreement; includes the provision of segregated or separated housing accommodations; includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear), and includes refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.
- (2) "Discrimination" does not include either of the following:
  - (A) Refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household, and the owner complies with subdivision (c) of Section 12955, which prohibits discriminatory notices,

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- statements, and advertisements.
- (B) Where the sharing of living areas in a single dwelling unit is involved, the use of words stating or tending to imply that the housing being advertised is available only to persons of one sex.
- (d) “Housing accommodation” means any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families and any vacant land that is offered for sale or lease for the construction thereon of any building, structure, or portion thereof intended to be so occupied.
- (e) “Owner” includes the lessee, sublessee, assignee, managing agent, real estate broker or salesperson, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof.
- (f) “Person” includes all individuals and entities that are described in Section 3602(d) of Title 42 of the United States Code, and in the definition of “owner” in subdivision (e) of this section, and all institutional third parties, including the Federal Home Loan Mortgage Corporation.
- (g) “Aggrieved person” includes any person who claims to have been injured by a discriminatory housing practice or believes that the person will be injured by a discriminatory housing practice that is about to occur.
- (h) “Real estate-related transactions” include any of the following:
- (1) The making or purchasing of loans or providing other financial assistance that is for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or that is secured by residential real estate.
  - (2) The selling, brokering, or appraising of residential real property.
  - (3) The use of territorial underwriting requirements, for the purpose of requiring a borrower in a specific geographic area to obtain earthquake insurance, required by an institutional third party on a loan secured by residential real property.

### PROHIBITIONS 12955. IT SHALL BE UNLAWFUL:

- (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of that person.
- (b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability of any person seeking to purchase, rent or lease any housing accommodation.
- (c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability or an intention to make any such preference, limitation, or discrimination.
- (d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, to discriminate against any person on the basis of sex, color, race, religion, ancestry, national origin, familial status, marital status, disability, or on any other basis prohibited by that section.
- (e) For any person, bank, mortgage company or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance.
- (f) For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner’s dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, has testified or assisted in any proceeding under this part, or has aided or encouraged a person to exercise or enjoy the rights secured by this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.



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- (g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.
- (h) For any person, for profit, to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, marital status, ancestry, disability, familial status, or national origin.
- (i) For any person or other organization or entity whose business involves real estate-related transactions to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of race, color, religion, sex, marital status, national origin, ancestry, familial status, or disability.
- (j) To deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service because of race, color, religion, sex, marital status, ancestry, disability, familial status, or national origin.
- (k) To otherwise make unavailable or deny a dwelling based on discrimination because of race, color, religion, sex, familial status, disability, or national origin.
- (l) To discriminate through public or private land use practices, decisions, and authorizations because of race, color, religion, sex, familial status, marital status disability, national origin, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.

*The only exceptions to the act are a person renting a room within their own dwelling unit and nonprofit religious, charitable and fraternal organizations.*

### Enforcement

*It is enforced by administrative proceedings.*

Any person claiming to be a victim of an alleged violation of the Fair Housing Act may file a verified complaint with the Department of Fair Employment and Housing alleging a violation of the Act. (CC § 12980) The complaint must be in writing and verified, and it must include the name and address of the person who allegedly committed the violation of the Act, the particulars of the violation, and such other information as may be required by the Department. (CC § 12980(a), (b))

The complaint must be filed within 60 days from the date the alleged violation occurred. This period may be extended for an additional period not to exceed 60 days following the expiration of the initial 60 days if the complainant first obtained knowledge of the facts of the alleged violation after the expiration of the initial 60 days from the date of its occurrence. (CC § 12980(b))

If after a verified complaint has been filed with the Department and a preliminary investigation finds that the respondent has engaged in an unlawful practice as defined in the Act, the respondent will be served with an order to cease and desist from such practice and to take one of the following affirmative actions:

The sale or rental of the housing accommodation to the aggrieved person, if it is still available.

The sale or rental of a like accommodation, if one is available, or the next vacancy in a like accommodation.

If the Department determines that neither of the remedies under subparagraphs 1 or 2 are available, it can order the payment of actual damages and punitive damages not to exceed \$1,000. (CC § 12987(1), (2))

However, if the Department finds that a respondent has not engaged in any discriminatory practice as defined by the Act, it must state its finding of fact and serve on the complainant an order dismissing the accusation. (CC § 12980(d), 12987)

### Commission's Actions - Penalties 12987.

- (a) If the commission, after hearing, finds that a respondent has engaged in any unlawful practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the practice and to take such actions, as, in the judgment of the commission, will effectuate the purpose of this part, including, but not limited to, any of the following:
  - (1) The sale or rental of the housing accommodation if it is still available, or the sale or rental

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of a like housing accommodation, if one is available, or the provision of financial assistance, terms, conditions, or privileges previously denied in violation of subdivision (f) of Section 12955 in the purchase, organization, or construction of the housing accommodation, if available.

- (2) Affirmative or prospective relief, including injunctive or other equitable relief.
  - (3) The payment to the complainant of a civil penalty against any named respondent, not to exceed ten thousand dollars (\$10,000) unless, in a separate accusation, the respondent has been adjudged to have, with intent, committed a prior violation of Section 12955. If the respondent has, in a separate accusation, been adjudged to have committed a prior violation of Section 12955 within the five years preceding the filing of the complaint, the amount of the civil penalty may exceed ten thousand dollars (\$10,000), but may not exceed twenty-five thousand dollars (\$25,000). If the respondent, in separate accusations, has been adjudged to have, with intent, violated Section 12955 two or more times within the seven-year period preceding the filing of the complaint, the civil penalty may exceed twenty-five thousand dollars (\$25,000), but may not exceed fifty thousand dollars (\$50,000). All civil penalties awarded under this provision shall be collected by the department. The commission may award the prevailing party, other than the government, reasonable attorneys' fees and costs.
  - (4) The payment of actual damages to the complainant.
- (b) No remedy shall be available to the aggrieved person unless the aggrieved person waives any and all rights or claims under Section 52 of the Civil Code prior to receiving a remedy, and signs a written waiver to that effect.
  - (c) The commission may require a report of the manner of compliance.
  - (d) If the commission finds that a respondent has not engaged in any practice which constitutes a violation of this part, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent.
  - (e) Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

## PART 6. FINANCIAL DISCRIMINATION

Sections 35800 through 35833 of the California Health and Safety Code (The Housing Financial Discrimination Act of 1971.)

## THE HOUSING FINANCIAL DISCRIMINATION ACT OF 1971 – HOLDEN ACT

### CHAPTER 1. FINDINGS AND DECLARATIONS OF PURPOSE AND POLICY

35800. This part shall be known and may be cited as the Holden Act.

*The Housing Financial Discrimination Act (Holden Act), is a California law that prohibits discriminatory practices by "financial institutions".*

Lenders may not discriminate in making construction, improvement, purchase or refinance loans because of race, color, national origin, ancestry, sex, religion or marital status.

Discrimination would include different loan terms as well as loan refusals. The lender may not use loan criteria other than the credit of the applicant and the value of the property. The act applies to one-to-four residential units.

*The Holden Act is a California law that prohibits "redlining" (also prohibited in 1968 Civil Rights Act).*

**Redlining** is the refusal of a lender to loan within a particular designated area because of racial or ethnic composition

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35801. The Legislature finds and declares:

- (a) The subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of the state.
- (b) A healthy housing market, where residents of this state have a choice of housing opportunities and where the housing consumer may effectually choose within a free market place, is necessary to achieve a healthy state economy.
- (c) The equities that California residents accumulate in family homes must be protected and conserved.
- (d) The Legislature has the responsibility to direct the discontinuance of injurious practices.
- (e) With respect to certain geographic areas, financial institutions have sometimes denied financial assistance or approved assistance on terms less favorable than are usually offered in other geographic areas, regardless of the creditworthiness of the applicant or the condition of the real-property security offered, and this practice has the following effects:
  - (1) Contributes to the decline of available family housing in such areas and is likely to continue to do so.
  - (2) Limits the choice of housing opportunities and inhibits the operation of a healthy housing market in such areas.
  - (3) Leads to the abandonment of such areas.
  - (4) Adversely affects the health, welfare, and safety of the residents of this state.
  - (5) Undermines the value of the equity of current owners of property in such areas.
  - (6) Inhibits the granting of amortized loans.
  - (7) Perpetuates racially and economically segregated neighborhoods and geographic areas.
- (f) The practice of denying mortgage loans or adversely varying the terms of such loans because of conditions, characteristics, or trends in a neighborhood or geographic area that are unrelated to the creditworthiness of the applicant or the value of the real property security offered is against public policy.

### Purpose

35802. The purposes of this part include the following:

- (a) To prevent discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the security property.
- (b) To encourage increased lending in neighborhoods or geographic areas in which conventional residential mortgage financing has been unavailable.
- (c) To increase the availability of housing accommodations to creditworthy persons.
- (d) To ensure the supply of decent, safe housing.
- (e) To prevent the abandonment and decay of neighborhoods and geographic areas. 35803. This part shall be deemed an exercise of the police power of the state for the protection of the health, welfare, and peace of the people of this state.

## CHAPTER 2. DEFINITIONS

35805. As used in this part:

- (a) “Agency” means the Business, Transportation and Housing Agency.
- (b) “Fair market value” means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledge-ably, and assuming the price is not affected by undue stimulus. The use of this definition of fair market value by a financial institution in an appraisal made at any time on or after July 1, 1986, does not violate the provisions of this part.
- (c) “Financial institution” includes any bank, savings and loan association, or other institution in this state, including a public agency, that regularly makes, arranges, or purchases loans for the

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purchase, construction, rehabilitation, improvement, or refinancing of housing accommodations.

- (d) “Housing accommodation” includes any improved or unimproved real property, or portion thereof, that (1) is used or is intended to be used as a residence, and (2) is or will be occupied by the owner, and (3) contains not more than four dwelling units. “Housing accommodation” shall also include any residential dwelling containing not more than four dwelling units where the owner thereof, whether or not the owner will occupy the property, applies or has applied for a secured home improvement loan from a financial institution, the proceeds of which loan will be used to improve the security property.
- (e) “Secretary” means the Secretary of the Business, Transportation and Housing Agency.

### CHAPTER 3. PROHIBITIONS AND ENFORCEMENT

 *The State Secretary of the Business, Transportation, and Housing Agency is empowered to issue rules, regulations and guidelines for enforcement of the Holden Act.*

35810. No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations due, in whole or in part, to the consideration of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the housing accommodation, unless the financial institution can demonstrate that such consideration in the particular case is required to avoid an unsafe and unsound business practice.

35811. No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving or refinancing housing accommodations due, in whole or in part, to the consideration of race, color, religion, sex, marital status, national origin, or ancestry.

35812. No financial institution shall consider the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area surrounding a housing accommodation or whether or not such composition is undergoing change, or is expected to undergo change, in appraising a housing accommodation or in determining whether or not, and under what terms and conditions, to provide financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing a housing accommodation. No financial institution shall utilize appraisal practices that are inconsistent with the provisions of this part.

35813. Nothing in this part shall (1) require a financial institution to provide financial assistance if it is clearly evident that occupancy of the housing accommodation would create an imminent threat to the health or safety of the occupant, or (2) be construed to preclude a financial institution from considering the fair market value of the property which will secure the proposed loan.

35814. The secretary shall issue such rules, regulations, guidelines, and orders as are necessary to interpret and enforce the provisions of this part and to affirmatively further the provisions of this part. The secretary may delegate the responsibilities imposed by this section to one or more departments within the agency that license persons or organizations engaged in a business related to, or affecting compliance with, this part.

35815.

- (a) The secretary or the secretary’s designee shall monitor and investigate the lending patterns and practices of financial institutions for compliance with this part, including the lending patterns and practices for housing accommodations which are not occupied by the owner. If a finding is made that such patterns or practices violate the provisions of this part the secretary or the secretary’s designee shall take such action as will effectuate the purposes of this part. In addition to other remedies provided by this part or other provisions of law, the secretary may recommend to the Treasurer that state funds not be deposited in a financial institution where the secretary has made a finding that such financial institution has engaged in a lending pattern and practice which violates this part.
- (b) The secretary shall annually report to the Legislature on the activities of the appropriate regulatory agencies and departments in complying with this part. The report shall include a description of any actions taken by the secretary or the secretary’s designee to remedy patterns or practices the secretary determines are in violation of this part.

35816. The secretary shall adopt regulations applicable to all persons who are in the business of originating residential mortgage loans in this state, including, but not limited to, insurers, mortgage bankers,

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investment bankers and credit unions and who are not depository institutions within the meaning of subsection (2) of Section 2802 of Title 12 of the United States Code. The regulations for residential mortgage loans shall impose substantially the same reporting requirements by geographic area and loan product as are imposed by the federal Home Mortgage Disclosure Act of 1975, as amended (12 U.S.C. Sec. 2801 et seq.).

This section does not apply to subsidiaries of depository institutions or subsidiaries of depository institution holding companies which are currently reporting to a federal or state regulatory agency as provided by the Home Mortgage Disclosure Act of 1975, as amended (12 U.S.C. Sec. 2081 et seq.) or are subject to substantially the same reporting requirements by geographic area and loan product pursuant to an act of a federal or state regulatory agency.

### CHAPTER 4. COMPLAINT RESOLUTION

35820. Any applicant for a real estate loan in connection with a housing accommodation claimed to be aggrieved by an alleged violation of Chapter 3 (commencing with Section 35810) of this part, or any rule or regulation adopted there under, may file a complaint with the secretary.

35821. Immediately upon receipt of the complaint, the secretary shall endeavor to eliminate any alleged unlawful practice by conference, conciliation, or persuasion.

35822. If, in accordance with procedures established for the resolution of complaints by the secretary, and within 30 days of receiving the complaint, the secretary finds that a financial institution has engaged in any unlawful practice as defined in this part, the secretary shall state in a written decision his or her findings of fact and shall cause such financial institution to be served with a copy of the decision and an order issued by the secretary requiring it to cease and desist from such practice and to take one of the following steps as, in the judgment of the secretary, will effectuate the purposes of this part:

- (a) The making of the financial assistance or the making of the financial assistance on nondiscriminatory terms; or
- (b) The payment of damages to the complainant in an amount not to exceed one thousand dollars (\$1,000), if the secretary finds that effective relief under subdivision (a) is no longer available.

The secretary may require a report of the manner of compliance.

If the secretary finds that a financial institution has not engaged in any practice which constitutes a violation of this part, the secretary shall issue a written decision incorporating his findings of fact and shall cause to be served upon the complainant and the financial institution involved a copy of the decision.

35823. The decision of the secretary shall be final unless, within ten days from the date of receipt thereof, the complainant or financial institution files a written request with the secretary for a formal administrative hearing. Upon receipt of such a written request, the secretary shall file a copy thereof with the Office of Administrative Hearings. Within 20 days of receipt of the copy of such request, the Office of Administrative Hearings shall commence a hearing on the merits pursuant to the provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code, except that the decision of the hearing officer shall be a final decision and binding upon the secretary. The decision shall be in accordance with the provisions of Section 35822 and shall be rendered within 45 days of receipt of the copy of the request for a hearing by the Office of Administrative Hearings. The secretary shall represent the complainant at such hearing if the secretary's decision rendered pursuant to Section 35822 was in favor of the complainant.

Judicial review may be obtained by the complainant or the financial institution by filing a petition for writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure. In any such judicial proceeding, the court may exercise its independent judgment on the evidence included in the record of the administrative hearing and may additionally consider evidence which was improperly excluded by the hearing officer and any other relevant evidence not included in the record of the administrative hearing which the court finds the offering party could not, in the exercise of reasonable diligence, have produced at the administrative hearing. The court may in its discretion award costs or reasonable attorney fees, or both, to the complainant if the complainant is the prevailing party, without regard to whether such judicial action is brought by the complainant or by the financial institution.

### CHAPTER 5. MISCELLANEOUS

35830. In order to further the purposes of this part, financial institutions shall notify all applicants at the time of written application for financial assistance of the prohibitions enumerated in Chapter 3 (commencing with

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Section 35810) and of the right of review provided by Section 35820. Such notice shall include the address of the secretary, or the secretary's designee, and where complaints may be filed and questions may be asked. Such notice shall be in at least 10-point type and shall also be posted in a conspicuous place for public inspection.

35831. The provisions of this part, including rules, regulations, guidelines, and orders issued pursuant to this part, shall not affect the validity of any prohibitions or requirements pertaining to the activity of financial institutions that arise from other provisions of law relating to discrimination in lending. Rules, regulations, guidelines, and orders issued pursuant to this part shall not be in any manner contrary to, or inconsistent with, the purposes of this part.

35832. The provisions of this part shall be liberally construed in order to effectuate the purposes of this part.

35833. If any clause, sentence, paragraph, or part of this part or application thereof to any person, financial institution, or circumstance shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons, financial institutions or circumstances but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, financial institution, or circumstance involved.

### AGE DISCRIMINATION IN HOUSING PROHIBITED

Since 1982, it has been unlawful to discriminate against children by refusing to provide housing either through rental or sale, **except** when such housing is designed to meet the needs of senior citizens. Generally, Federal law preempts State law. The Federal law, however, is not significantly different from California law and in some instances is more specific. The topic of age discrimination will be discussed more thoroughly later in this section under Federal Fair Housing Law.

#### Definitions Related to Senior Citizen Housing

- 51.3. (a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.
- (b) The Legislature finds and declares that different age limitations for senior citizen housing are appropriate in recognition of the size of a development in relationship to the community in which it is located.
- (c) For the purposes of this section, the following definitions apply:
- (1) "Qualifying resident" or "senior citizen" means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development.
  - (2) "Qualified permanent resident" means a person who meets all of the following requirements:
    - (A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.
    - (B) Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.
    - (C) Has an ownership interest in, or is in expectation of an ownership interest in, the dwelling unit within the housing development that limits occupancy, residency, or use on the basis of age.
  - (3) "Senior citizen housing development" means a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that meets any of the following requirements:
    - (A) At least 70 dwelling units, built prior to January 1, 1996, or at least 150 dwelling units built on or after January 1, 1996, in a metropolitan statistical area, as defined by the Federal Committee on Metropolitan Statistical Areas, with a population of at least 1,000 residents per square mile or 1,000,000 total residents, based on the 1990 census.
    - (B) At least 100 dwelling units in a metropolitan statistical area, as defined by the Federal Committee on Metropolitan Statistical Areas, with a population not to

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exceed 999 residents per square mile and not to exceed 399,999 total residents, based on the 1990 census.

(C) At least 35 dwelling units in any other area.

The number of dwelling units within a development includes all dwelling units developed, whether in single or multiple phases. Developments commenced after July 1, 1986, shall be required to have been issued a public report as a senior citizen housing development under Section 11010.05 of the Business and Professions Code.

- (4) "Dwelling unit" or "housing" means any residential accommodation other than a mobilehome.
- (5) "Cohabitant" refers to persons who live together as husband and wife.
- (6) "Permitted health care resident" means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident.
- (d) The covenants, conditions, and restrictions or other documents or written policy shall not limit occupancy, residency, or use on the basis of age more proscriptively than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same dwelling unit may be required to be a qualified permanent resident.
- (e) The covenants, conditions, and restrictions or other documents or written policy shall permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 45 years of age for periods of time, not less than 60 days in any year, that are specified in the covenants, conditions, and restrictions or other documents or written policy.
- (f) Upon the death or dissolution of marriage, or upon hospitalization, or other prolonged absence of the qualifying resident, any qualified permanent resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident.
- (g) The condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential rental property shall have been developed for, and initially been put to use as, housing for senior citizens, or shall have been substantially rehabilitated or renovated for, and immediately afterward put to use as, housing for senior citizens, as provided in this section.
- (h) The covenants, conditions, and restrictions or other documents or written policies applicable to any condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential property that contained age restrictions on January 1, 1984, shall be enforceable only to the extent permitted by this section, notwithstanding lower age restrictions contained in those documents or policies.
- (i) Any person who has the right to reside in, occupy, or use the housing or an unimproved lot subject to this section on January 1, 1985, shall not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of this section.
- (j) The covenants, conditions, and restrictions or other documents or written policy of the senior citizen housing development shall permit the occupancy of a dwelling unit by a permitted health care resident during any period that the person is actually providing live-in, long-term, or hospice health care to a qualifying resident for compensation.

## SENIOR CITIZEN HOUSING

51.4. (a) The Legislature finds and declares that the requirements for senior housing under Sections 51.2 and 51.3 are more stringent than the requirements for that housing under the federal Fair Housing Amendments Act of 1988 (Public Law 100-430) in recognition of the acute shortage of housing for families with children in California. The Legislature further finds and declares that the special design requirements for senior housing under Sections 51.2 and 51.3 may pose a hardship to some housing developments which were constructed before the decision in *Marina Point Ltd. V. Wolfson* (1982), 30 Cal. 3d 72. The Legislature further finds and declares that the requirement for specially designed accommodations in senior housing under Section 51.2 and 51.3 provides important benefits to senior citizens and also ensures that housing exempt from the prohibition of age discrimination is carefully tailored to meet the compelling societal interest in providing senior housing. Therefore, it is the intent of the Legislature to permit a narrow, time-limited exception to the requirement that senior housing be specially designed.

(b) A housing development constructed before February 8, 1982, shall be exempt from Section 51 to the extent specified in Section 51.2 if (1) it meets the requirements of Sections 51.2 and 51.3, other than the requirement that the housing be specially designed to meet the physical and social needs

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of senior citizens, (2) it is not practicable to meet that requirement in the relevant geographic area where the housing development is located, and (3) the housing development is necessary to provide important housing opportunities for senior citizens. As used in this section, "relevant geographic area" has the same meaning as that term is used in Section 100.304 of Title 24 of the Code of Federal Regulations.

- (c) In any action under Section 51, the exemption under this section shall be sustained only if it is demonstrated through credible and objective evidence that application of a requirement for specially designed accommodations to meet the physical and social needs of senior citizens would result in depriving senior citizens in the relevant geographic area of needed and desired housing. The factors to be considered by the court in determining the applicability of this section shall include, but not be limited to, all of the following:
- (1) Whether the owner or manager of the housing facility has endeavored to provide specially designed accommodations to meet the physical and social needs of senior citizens persons either directly or by some other entity. Demonstrating that these accommodations would be expensive to provide is not alone sufficient to demonstrate their impracticability.
  - (2) The amount of rent charged for dwellings in the housing development seeking an exemption under this section if the dwellings are rented, or the price of the dwellings if they are offered for sale.
  - (3) The income range of the residents of the housing development.
  - (4) The demand for housing for senior citizens in the affected geographic area.
  - (5) The range of housing choices for senior citizens within the relevant geographic area.
  - (6) The availability of other similarly priced housing for senior citizens in the relevant geographic area. If similarly priced senior citizen housing with specially designed accommodations is reasonably available in the relevant geographic area, then the housing facility does not meet the requirements for exemption under this section.
  - (7) The vacancy rate of the housing development.
- (d) Any person who resided in, occupied, or used the housing subject to this section prior to January 1, 1990, shall not be deprived of the right to continue that residency, occupancy, or use as the result of this section.
- (e) This section shall not apply to the County of Riverside.
- 51.10. (a) Section 51 shall be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age. A business establishment may establish and preserve housing for senior citizens, pursuant to Section 51.11, **except** housing as to which Section 51.11 is preempted by the prohibition in the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and implementing regulations against discrimination on the basis of familial status.
- 51.11. (a) The Legislature finds and declares that this section is essential to establish and preserve housing for senior citizens. There are senior citizens who need special living environments, and find that there is an inadequate supply of this type of housing in the state.
- (b) For the purposes of this section, the following definitions apply:
- (1) "Qualifying resident" or "senior citizen" means a person 62 years of age or older, or **55 years of age or older in a senior citizen housing development**.
  - (2) "Qualified permanent resident" means a person who meets all of the following requirements:
    - (A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.
    - (B) **Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.**
    - (C) Has an ownership interest in, or is in expectation of an ownership interest in, the dwelling unit within the housing development that limits occupancy, residency, or use on the basis of age.
  - (3) "Qualified permanent resident" also means a permanently physically or mentally impaired or terminally ill adult who is a dependent child of the qualifying resident, senior citizen, or qualified permanent resident as defined in paragraph (2) of this subdivision, unless the board of directors or other governing body of the senior citizen housing development determines that there are special circumstances to disallow this particular dependent child as a qualified permanent resident. Special circumstances means a condition wherein this dependent child is or may be harmful to himself or herself or others.



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- (4) “Senior citizen housing development” means a residential development developed with more than 20 units as a senior community by its developer, zoned as a senior community by a local governmental entity, or characterized as a senior community in its governing documents, as these are defined in Section 1351, or qualified as a senior community under the federal Fair Housing Amendment Act of 1988, as amended. Developments commenced after July 1, 1986, and before January 1, 1997, shall be required to have been issued a public report as a senior citizen housing development under Section 11010.05 of the Business and Professions Code. However, developments may elect to amend their governing documents to become a senior citizen housing development after the expiration date of the public report.
  - (5) “Dwelling unit” or “housing” means any residential accommodation other than a mobilehome.
  - (6) “Cohabitant” refers to persons who live together as husband and wife.
  - (7) “Permitted health care resident” means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident.
- (c) The covenants, conditions, and restrictions or other documents or written policy shall not limit occupancy, residency, or use on the basis of age more restrictively than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same dwelling unit may be required to be a qualified permanent resident or permitted health care resident.
  - (d) The covenants, conditions, and restrictions or other documents or written policy shall permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 55 years of age for periods of time, not more than 60 days in any year, that are specified in the covenants, conditions, and restrictions or other documents or written policy.
  - (e) Upon the death or dissolution of marriage, or upon hospitalization, or other prolonged absence of the qualifying resident, any qualified permanent resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident.
  - (f) The covenants, conditions, and restrictions or other documents or written policies applicable to any condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential property that contained age restrictions on January 1, 1984, shall be enforceable only to the extent permitted by this section, notwithstanding lower age restrictions contained in those documents or policies.
  - (g) Any person who has the right to reside in, occupy, or use the housing or an unimproved lot subject to this section on or after January 1, 1985, shall not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of this section by Senate Bill 2097 of the 1995-96 Regular Session.
  - (h) A housing development may qualify as a senior citizen housing development under this section even though, as of January 1, 1997, it does not meet the definition of a senior citizen housing development specified in subdivision (b), if the development complies with that definition for every unit that becomes occupied after January 1, 1997, and if the development was once within that definition, and then became noncompliant with the definition as the result of any one of the following:
    - (1) The development was ordered by a court or a local, state, or federal enforcement agency to allow persons other than qualifying residents, qualified permanent residents, or permitted health care residents to reside in the development.
    - (2) The development received a notice of a pending or proposed action in, or by, a court, or a local, state, or federal enforcement agency, which action could have resulted in the development being ordered by a court or a state or federal enforcement agency to allow persons other than qualifying residents, qualified permanent residents, or permitted health care residents to reside in the development.
    - (3) The development agreed to allow persons other than qualifying residents, qualified permanent residents, or permitted health care residents to reside in the development by entering into a stipulation, conciliation agreement, or settlement agreement with a local, state, or federal enforcement agency or with a private party who had filed, or indicated an intent to file, a complaint against the development with a local, state, or federal enforcement agency, or file an action in a court.
    - (4) The development allowed persons other than qualifying residents, qualified permanent residents, or permitted health care residents to reside in the development on the advice of

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counsel in order to prevent the possibility of an action being filed by a private party or by a local, state, or federal enforcement agency.

- (i) The covenants, conditions, and restrictions or other documents or written policy of the senior citizen housing development shall permit the occupancy of a dwelling unit by a permitted health care resident during any period that the person is actually providing live-in, long-term, or hospice health care to a qualifying resident for compensation.

### SPECIFIC DISCLOSURE LAWS REGARDING AIDS

Rules on disclosing whether a prior occupant has AIDS or died because of AIDS can be found in the California Civil Code Section 1710.2. It reads as follows:

- (a) No cause of action arises against an owner of real property or his or her agent, or any agent of a transferee of real property, for the failure to disclose to the transferee the occurrence of an occupant's death upon the real property or the manner of death where the death has occurred more than three years prior to the date the transferee offers to purchase, lease, or rent the real property, or that an occupant of that property was afflicted with, or died from Human T-Lymphotropic Virus Type III Lymph-adenopathy-Associated Virus. As used in this section, "agent" includes any person licensed pursuant to Part I (commencing with Section 10000) of Division 4 of the Business and Professions Code. As used in this section, "transferee" includes a purchaser, lessee, or renter of real property.
- (b) It is the intention of the Legislature to occupy the field of regulation of disclosure related to deaths occurring upon real property and of Aids in situations affecting the transfer of real property or any estate or interest in real property.
- (c) This section shall not be construed to alter the law relating to disclosure pertaining to any other physical or mental condition or disease and this section shall not relieve any owner or agent of any obligation to disclose the physical condition of the premises.
- (d) Nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property.

### CALIFORNIA CIVIL CODE SECTION 54-55.1 BLIND AND OTHER PHYSICALLY

#### Disabled Persons

- (a) Individuals with disabilities have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.
- (b) "**Disability**," as used in this part, means any of the following with respect to an individual:
  - (1) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.
  - (2) A record of such an impairment.
  - (3) Being regarded as having such an impairment.
- (c) A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.

54.1. Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by the standards of Titles II and III of the Americans with Disabilities Act of 1990 and federal regulations adopted pursuant thereto.

Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the

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conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing rented premises if the modifications are necessary to afford the person full enjoyment of the premises. However, any modifications under this paragraph may be conditioned on the disabled tenant entering into an agreement to restore the interior of the premises to the condition existing prior to the modifications. No additional security may be required on account of an election to make modifications to the rented premises under this paragraph, but the lessor and tenant may negotiate, as part of the agreement to restore the premises, a provision requiring the disabled tenant to pay an amount into an escrow account, not to exceed a reasonable estimate of the cost of restoring the premises.

Any person renting, leasing, or otherwise providing real property for compensation shall not refuse to make reasonable accommodations in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises.

It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired on the basis that the individual uses the services of a guide dog, an individual who is deaf or hearing impaired on the basis that the individual uses the services of a signal dog, or to an individual with any other disability on the basis that the individual uses the services of a service dog, or to refuse to permit such an individual who is blind or visually impaired to keep a guide dog, an individual who is deaf or hearing impaired to keep a signal dog, or an individual with any other disability to keep a service dog on the premises.

These persons shall ensure that the dog is on a leash and tagged as a guide dog, signal dog, or service dog by identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Division 14 of the Food and Agricultural Code. In addition, the person shall be liable for any provable damage done to the premises or facilities by his or her dog.

A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

54.2. Every individual with a disability has the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for the purpose, in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the individual shall be liable for any damage done to the premises or facilities by his or her dog.

Individuals who are blind or otherwise visually impaired and persons licensed to train guide dogs for individuals who are blind or visually impaired pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code or as defined in regulations implementing Title III of the Americans with Disabilities Act of 1990 (Public Law 101-336), and individuals who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and individuals with a disability and persons who are authorized to train service dogs for the individuals with a disability may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs in any of the places specified in Section 54.1 without being required to pay an extra charge or security deposit for the guide dog, signal dog, or service dog. However, the person shall be liable for any damage done to the premises or facilities by his or her dog. These persons shall ensure the dog is on a leash and tagged as a guide dog, signal dog, or service dog by an identification tag issued by the county clerk, animal control department, or other agency, as authorized by Chapter 3.5 (commencing with Section 30850) of Title 14 of the Food and Agricultural Code.

A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and nothing in this section shall be construed to limit the access of any person in violation of that act.

It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired, an individual who is deaf or hearing impaired, or other individual with a disability on the basis that the individual with a disability is partially or wholly dependent upon the income of his or her spouse, if the spouse is a party to the lease or rental agreement. Nothing in this subdivision, however, shall prohibit a lessor or landlord from considering the aggregate financial status of an individual with a disability and his or her spouse pursuant to Chapter 9.5 (commencing with

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Section 7200) of Division 3 of the Business and Professions Code or guide dogs as defined in the regulations implementing Title III of the Americans with Disabilities Act of 1990. (Public Law 101-33)

54.3. Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars (\$1,000), and attorney's fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in Sections 54, 54.1, and 54.2. "Interfere," for purposes of this section, includes, but is not limited to, preventing or causing the prevention of a guide dog, signal dog, or service dog from carrying out its functions in assisting a disabled person.

Any person who claims to be aggrieved by an alleged unlawful practice in violation of Section 54, 54.1, or 54.2 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code. A person may not be held liable for damages pursuant to both this section and Section 52 for the same act or failure to act.

54.4. A blind or otherwise visually impaired pedestrian shall have all of the rights and privileges conferred by law upon other persons in any of the places, accommodations, or conveyances specified in Sections 54 and 54.1, notwithstanding the fact that the person is not carrying a predominantly white cane (with or without a red tip), or using a guide dog. The failure of a blind or otherwise visually impaired person to carry such a cane or to use such a guide dog shall not constitute negligence per se.

54.5. Each year, the Governor shall publicly proclaim October 15 as White Cane Safety Day. He or she shall issue a proclamation in which: (a) Comments shall be made upon the significance of this chapter. (b) Citizens of the state are called upon to observe the provisions of this chapter and to take precautions necessary to the safety of disabled persons. (c) Citizens of the state are reminded of the policies with respect to disabled persons declared in this chapter and he urges the citizens to cooperate in giving effect to them. (d) Emphasis shall be made on the need of the citizenry to be aware of the presence of disabled persons in the community and to keep safe and functional for the disabled the streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort, and other places to which the public is invited, and to offer assistance to disabled persons upon appropriate occasions.

It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state and to engage in remunerative employment.

Each zoo or wild animal park that does not permit service dogs to accompany individuals with a disability shall provide free transportation to individuals with a disability on any mode of transportation provided for a member of the public in cases 26 where the person uses a wheelchair and it is readily apparent that the person is unable to maintain complete or independent mobility without the aid of the service dog.

54.8. Each county shall have at least one portable assistive listening system for use by any court within the county. The system shall be in a location jointly determined by the county board of supervisors and the judges. The Judicial Council shall develop and approve official forms for notice of the availability of assistive listening systems and computer-aided transcription systems for individuals who are hearing impaired. In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted pursuant to that act.

55. Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, Chapter 7 (commencing with Section 4450) of Division 5 of Title I of the Government Code, or Part 5.5 (commencing with Section 19955) of Division 13 of the Health and Safety Code may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees.

55.1. In addition to any remedies available under the federal Americans with Disabilities Act of 1990, Public Law 101-336 (42 U.S.C. Sec. 12102), or other provisions of law, the district attorney, the city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General may bring an action to enjoin any violation of Section 54 or 54.1.

## BLOCKBUSTING

For profit, a broker may not induce or attempt to induce a person to sell or rent a dwelling by representing for discriminatory reasons the entry of certain classes of people into the neighborhood, called *blockbusting*.

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Further, an actual profit is not necessary for discrimination provided profit was a motive for the blockbusting activity.

Examples of blockbusting activities include:

- Actions, for profit, which convey the neighborhood is undergoing or is about to undergo a change in the race, color, religion, sex, handicap, familial status or national origin of its residents in order to encourage a person to offer a dwelling for sale or rent
- Encouraging a person to sell or rent a dwelling by making the assertion the entry of persons of a particular race, color, religion, sex; familial status, handicap or national origin will result in undesirable consequences for the neighborhood or community and increase criminal activity, or cause a decline in the schools and other facilities.

This form of discrimination has been practiced since the early 1930's. It takes on many forms, the most basic of which is the persuasion of homeowners in a given neighborhood to sell because buyers of a different racial or ethnic heritage were moving into the area.

The practice, in the early days went so far as to have an unscrupulous agent actually sell a home to a large family of a racially different heritage a home in a totally Caucasian neighborhood. When the neighbors saw the children playing in the street they sold in panic, believing that their home values would radically drop. The agent would then buy the "panic sold" homes then move the blockbusting family out of the property they had occupied.

## STEERING

*☞ Steering is directing persons based on race, religion, national origin, etc., toward or away from an area.*

**Steering** involves the restriction of a person seeking to buy or rent a dwelling in a community, neighborhood or development in a manner which perpetuates segregated housing patterns.

## REAL ESTATE COMMISSIONER 'S REGULATIONS

CALIFORNIA DEPARTMENT OF REAL ESTATE COMMISSIONER'S REGULATIONS - SECTIONS 2780-2782

The Commissioner's regulations address **discrimination**.

*☞ [www.dre.ca.gov/relaw\\_pdf/Regs.pdf](http://www.dre.ca.gov/relaw_pdf/Regs.pdf) (Real Estate Commissioner's Regulations)*

## COMMISSIONER OF REAL ESTATE

*☞ Commissioner's Regulation 2780 prohibits discrimination.*

Regulation 2780 and following subsections. These regulations describe discriminatory conduct by a real estate licensee.

The Commissioner has made clear that discriminatory conduct is not limited to those activities described in the Regulations. An understanding of the preceding material will make it evident that one discriminatory act could violate more than one state and federal law and regulation.

### 2781 - Panic Selling as the Basis for Disciplinary Action

Prohibited discriminatory conduct includes, but is not limited to, soliciting sales or rental listings, making written or oral statements creating fear or alarm, transmitting written or oral warnings or threats, or acting in any other manner so as to induce or attempt to induce the sale or lease of real property through any representation, express or implied, regarding the present or prospective entry of one or more persons of another race, color, sex, religion, ancestry, marital status or national origin into an area or neighborhood.

### Discriminatory Conduct as the Basis for Disciplinary Action.

#### Article 10. Discrimination and Panic Selling

2780. Prohibited discriminatory conduct by a real estate licensee based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin includes, but is not limited to, the following:

- (a) Refusing to negotiate for the sale, rental or financing of the purchase of real property or otherwise

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making unavailable or denying real property to any person because of such person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

- (b) Refusing or failing to show, rent, sell or finance the purchase of real property to any person or refusing or failing to provide or volunteer information to any person about real property, or channeling or steering any person away from real property, because of that person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin or because of the racial, religious, or ethnic composition of any occupants of the area in which the real property is located.

It shall not constitute discrimination under this subdivision for a real estate licensee to refuse or fail to show, rent, sell or finance the purchase of real property to any person having a physical handicap because of the presence of hazardous conditions or architectural barriers to the physically handicapped which conform to applicable state or local building codes and regulations.

- (c) Discriminating because of race, color, religion, sex, ancestry, physical handicap, marital status or national origin against any person in the sale or purchase or negotiation or solicitation of the sale or purchase or the collection of payment or the performance of services in connection with contracts for the sale of real property or in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

- (d) Discriminating because of race, color, religion, sex, ancestry, physical handicap, marital status or national origin against any person in the terms, conditions or privileges of sale, rental or financing of the purchase of real property.

This subdivision does not prohibit the sale price, rent or terms of a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

- (e) Discriminating because of race, color, religion, sex, ancestry, physical handicap, marital status or national origin against any person in providing services or facilities in connection with the sale, rental or financing of the purchase of real property, including but not limited to: processing applications differently, referring prospects to other licensees because of the prospects' race, color, sex, religion, ancestry, physical handicap, marital status or national origin, using with discriminatory intent or effect, codes or other means of identifying minority prospects, or assigning real estate licensees on the basis of a prospective client's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

- (f) Representing to any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin that real property is not available for inspection, sale or rental when such real property is in fact available.
- (g) Processing an application more slowly or otherwise acting to delay, hinder or avoid the sale, rental or financing of the purchase of real property on account of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of a potential owner or occupant.
- (h) Making any effort to encourage discrimination against persons because of their race, color, sex, religion, ancestry, physical handicap, marital status or national origin in the showing, sale, lease or financing of the purchase of real property.
- (i) Refusing or failing to cooperate with or refusing or failing to assist another real estate licensee in negotiating the sale, rental or financing of the purchase of real property because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of any prospective purchaser or tenant.
- (j) Making any effort to obstruct, retard or discourage the purchase, lease or financing of the purchase of real property by persons whose race, color, sex, religion, ancestry, physical handicap, marital status or national origin differs from that of the majority of persons presently residing in a structural improvement to real property or in an area in which the real property is located.

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- (k) Performing any acts, making any notation, asking any questions or making or circulating any written or oral statement which when taken in context, expresses or implies a limitation, preference or discrimination based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin; provided, however, that nothing herein shall limit the administering of forms or the making of a notation required by a federal, state or local agency for data collection or civil rights enforcement purposes; or in the case of a physically handicapped person, making notation, asking questions or circulating any written or oral statement in order to serve the needs of such a person.
- (l) Making any effort to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of such person's having exercised or enjoyed, or on account of such person's having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by a federal or state law, including but not limited to: assisting in any effort to coerce any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin to move from, or to not move into, a particular area; punishing or penalizing real estate licensees for their refusal to discriminate in the sale or rental of housing because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of a prospective purchaser or lessee; or evicting or taking other retaliatory action against any person for having filed a fair housing complaint or for having undertaken other lawful efforts to promote fair housing.
- (m) Soliciting of sales, rentals or listings of real estate from any person, but not from another person within the same area because of differences in the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of such persons.
- (n) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin in informing persons of the existence of waiting lists or other procedures with respect to the future availability of real property for purchase or lease.
- (o) Making any effort to discourage or prevent the rental, sale or financing of the purchase of real property because of the presence or absence of occupants of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin, or on the basis of the future presence or absence of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin, whether actual, alleged or implied.
- (p) Making any effort to discourage or prevent any person from renting, purchasing or financing the purchase of real property through any representations of actual or alleged **community opposition** based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin.
- (q) Providing information or advice to any person concerning the desirability of particular real property or a particular residential area(s) which is different from information or advice given to any other person with respect to the same property or area because of differences in the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of such persons.

This subdivision does not limit the giving of information or advice to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

Refusing to accept a rental or sales listing or application for financing of the purchase of real property because of the owner's race, color, sex, religion, ancestry, physical handicap, marital status or national origin or because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of any of the occupants in the area in which the real property is located.

- (r) Entering into an agreement, or carrying out any instructions of another, explicit or understood, not to show, lease, sell or finance the purchase of real property because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.
- (s) Making, printing or publishing, or causing to be made, printed or published, any notice, statement or advertisement concerning the sale, rental or financing of the purchase of real property that indicates any preference, limitation or discrimination because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin, or any intention to make such preference, limitation or discrimination.

This subdivision does not prohibit advertising directed to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

## FAIR HOUSING

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- (t) Using any words, phrases, sentences, descriptions or visual aids in any notice, statement or advertisement describing real property or the area in which real property is located which indicates any preference, limitation or discrimination because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

This subdivision does not prohibit advertising directed to physically handicapped persons for the purpose of calling to the attention of such persons the existence or absence of housing accommodation services or housing accommodations for the physically handicapped.

- (u) Selectively using, placing or designing any notice, statement or advertisement having to do with the sale, rental or financing of the purchase of real property in such a manner as to cause or increase discrimination by restricting or enhancing the exposure or appeal to persons of a particular race, color, sex, ancestry, physical handicap, marital status or national origin.

This subdivision does not limit in any way the use of an affirmative marketing program designed to attract persons of a particular race, color, sex, religion, ancestry, physical handicap, marital status or national origin who would not otherwise be attracted to the real property or to the area.

- (v) Quoting or charging a price, rent or cleaning or security deposit for a particular real property to any person which is different from the price, rent or security deposit quoted or charged to any other person because of differences in the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of such persons.

This subdivision does not prohibit the quoting or charging of a price, rent or cleaning or security deposit for a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

- (w) Discriminating against any person because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin in performing any acts in connection with the making of any determination of financial ability or in the processing of any application for the financing or refinancing of real property.

Nothing herein shall limit the administering of forms or the making of a notation required by a federal, state or local agency for data collection or civil rights enforcement purposes. In any evaluation or determination as to whether, and under what terms and conditions, a particular lender or lenders would be likely to grant a loan, licensees shall proceed as though the lender or lenders are in compliance with Sections 35800 through 35833 of the California Health and Safety Code (The Housing Financial Discrimination Act of 1977).

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

- (x) Advising a person of the price or value of real property on the basis of factors related to the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of residents of an area or of residents or potential residents of the area in which the property is located.

- (y) Discriminating in the treatment of, or services provided to, occupants of any real property in the course of providing management services for the real property because of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of said occupants.

This subdivision does not prohibit differing treatment or services to a physically handicapped person because of the physical handicap in the course of providing management services for a housing accommodation.

- (aa) Discriminating against the owners or occupants of real property because of the race, color, sex, religion, ancestry, physical, handicap, marital status or national origin of their guests, visitors or invitees.

- (bb) Making any effort to instruct or encourage, expressly or implied, by either words or acts, licensees or their employees or other agents to engage in any discriminatory act in violation of a federal or state fair housing law.

- (cc) Establishing or implementing rules that have the effect of limiting the opportunity for any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin to secure real property through a multiple listing or other real estate service.

- (dd) Assisting or aiding in any way, any person in the sale, rental or financing of the purchase of real property where there are reasonable grounds to believe that such person intends to



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discriminate because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

### INTERNET WEB LINKS

<a href="http://www.courtinfo.ca.gov">www.courtinfo.ca.gov</a>	California Courts information
<a href="http://www.leginfo.ca.gov/calaw.html">www.leginfo.ca.gov/calaw.html</a>	California Law
<a href="http://www.fairhousing.com">www.fairhousing.com</a>	National Fair Housing Advocate
<a href="http://www.dre.ca.gov">www.dre.ca.gov</a>	Department of Real Estate - California
<a href="http://www.ada-infonet.org">www.ada-infonet.org</a>	American Disabilities Act
<a href="http://www.hmhc.org">www.hmhc.org</a>	List apt designated for disabled
<a href="http://www.usdoj.gov/crt/ada/adahom1.htm">www.usdoj.gov/crt/ada/adahom1.htm</a>	US Justice Dept
<a href="http://www.multiimedia.calpoly.edu">www.multiimedia.calpoly.edu</a>	Cal Poly Univ. with resources on Fair Housing
<a href="http://www.uncg.edu">www.uncg.edu</a>	University of North Carolina - Greensboro
<a href="http://www.hud.gov">www.hud.gov</a>	Dept. of Housing and Urban Development
<a href="http://www.mindspring.com/~fairhous">www.mindspring.com/~fairhous</a>	Fair Housing Institute