Risk Management

CE 3-HOUR

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Preface

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.

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TAKE CONTROL OF YOUR RISK

A guide to help avoid lawsuits and other real estate agent landmines

LESSON 1: THE BASICS OF RISKS AND RISK MANAGEMENT

A. I'M A CAREFUL AGENT. WHAT RISKS DO I POSSIBLY HAVE?

Risks are everywhere, and every occupation has them. An undercover C.I.A. agent has the risk of getting caught for spying. An engineer at a nuclear power plant has the risk of getting fried by radiation. However, just because the risks a real estate agent face are less dramatic does not mean they are any less "real." Even boring, nondramatic risks must be dealt with appropriately.

The dictionary defines a risk as "the possibility of suffering harm or loss."[i] So what kinds of *harm* or *loss* are possible for an agent? Figuring out this range of possibilities is the first step in evaluating risk. Most people don't like to dwell on the negative possibilities in life. As such, agents might only consider the one big harm that can be a disaster to your pocketbook: lawsuits. Sure, as far as *harms* go, maybe an agent might twist an ankle from uneven cement when showing a house—or maybe get a very nasty paper cut. Agents don't have to worry about getting executed for spying, or getting fried by radiation. So get an insurance policy to cover lawsuits and some health insurance to cover crutches and band-aids, and you're done, right? Not even close. The risks that you encounter in your real estate profession are much more varied and complicated than that.

The risks that agents encounter professionally are more than meets the eye. Let's consider the many ways you can sustain a *harm* or a *loss* in the real estate agent line of work.

1. Losing money through lawsuits. We read in newspapers and magazines that we live in one of the most lawsuit-prone countries in the world.[ii] Lawsuits are just a fact of life here. Naturally, lawsuits are probably the first things that pop into agents' minds when they think about risks in their line of work. Unfortunately, as we will explore in this course, the list of reasons for which agents can be sued is long. However, there are many more ways to sustain losses than just through lawsuits. And there are many more losses to consider than just money.

2. Losing money because of higher insurance premiums. Every time your insurance company raises its rates, it's a loss to you. Every extra dollar you spend on insurance is one less dollar you can spend on something you'd rather spend money on, like clothes or a great restaurant. Also, the higher the cost of insurance, the more work you have to do in order to make a profit. So you lose time and money when your insurance rates go up.

The rising cost of agents' insurance coverage has been a hot topic in real estate circles.[iii] The kind of insurance coverage that agents need to cover themselves professionally is typically called "errors and omissions" insurance, often shortened to "E&O insurance." E&O insurance, as you might guess from its name, covers errors (clerical or judgment errors) and "omissions." What "omissions" mean here is another type of error, but an error not based on what you do, but what you *don't* do. An omission is when you don't do something that you should have done. For example, if you fail to inform a buyer of some information that is legally required to be disclosed, this technically called an "omission." However, a mess up is a mess up, and it doesn't matter what its label is. Simply put, E&O insurance is coverage for when you mess up professionally.

Not surprisingly, insurance companies are out to make a profit. The only way they can make a profit is if all the premiums they collect (the money agents pay for coverage) is more than the amount they have to pay out. Every time one of the agents they cover gets sued, they have to pay, often quite a lot. Enough agents get sued, and soon insurance companies are raising their premiums to cover their costs. So you, as an agent, are paying more for your insurance just because agents in generally are getting sued left and right. Even the most careful agent who never gets sued is paying indirectly for all those agents who do get sued.

In addition, just like "high risk" drivers, "high risk" agents have to pay even higher insurance premiums. The worst part is that you might get stuck into a "high risk" category through no fault of your own. We have all heard enough stories about unjustified lawsuits to know that you don't need to do something wrong in order to get sued. Fortunately, insurance companies rate your risk category on more than just lawsuit statistics. One factor that is commonly considered is whether an agent has taken a class on risk management. By taking this class, you are doing your part in lowering insurance premiums. (If only all agents were as responsible as you in taking this course, think about how many lawsuits would be avoided.)

In sum, one loss agents face in their occupation is higher insurance premiums. This loss will be higher if you tend to get sued a lot, but rising insurance rates affect all agents, even if you are a "low risk," careful type of agent. Unfortunately, most agents have no choice but to get E&O insurance because it would only take one bad lawsuit to wipe out an entire life's savings. However, as you will see in the next lesson, even if you get E&O coverage, you cannot blindly depend on insurance to cover you. Insurance policies are never an automatic safety net. There are giant holes in this kind of safety net, and there are also other problems with blind reliance on insurance.

3. Injury to your reputation. Most agents depend heavily on referrals and repeat customers. These sources of business are often the best kind because you don't often have to persuade these customers of your worthiness. In other words, you get these

types of clients because of your reputation. An injury to your professional reputation can affect your future ability to get referrals and repeat customers. Further, your peace of mind may be affected, as few people take an injury to their reputation lightly. To top it all off, a poor reputation will ultimately lead to a loss in your pocketbook.

4. Losses due to licensing trouble. Nearly every state has an agency in charge of overseeing the activities of real estate agents. Your state agency creates rules and regulations under which agents must operate. It is up to the agents to keep track of these rules and to obey them. Saying, "I didn't know" is never a good enough excuse.

Your state regulatory agency can punish agents who don't follow the guidelines. The punishments can range from a "public reproval" (a public scolding) to revocation of licenses. Receiving "public reproval" may not harm an agent's profitability in the short run. But over the long run, the kind of activity that caused the public scolding will eventually damage the agent's professional reputation, which will deeply affect profitability over the course of many years. Further, information about an agent's history of discipline is becoming readily accessible on the internet, and clients are becoming more inclined to utilize the internet for research. It's a matter of time before disciplined agents begin to feel a drop off in clients. Further, reports of discipline are often widely read by real estate professionals, and an agent's status among peers will be tarnished. Your reputation among peers can be just as significant in affecting business flow as your reputation among past clients.

State agencies will suspend real estate licenses for bad violations of their rules and regulations, or for repeat lesser violations. A suspension of license, of course, stops an agent from making a living in real estate, and not being able to pursue your livelihood is very serious. Further, much more than being publicly reproved, a suspension hurts your future prospects even if your license is later reinstated. In fact, it could make even finding another real estate job very difficult, let alone finding new clients.

As bad as losing your livelihood is, in the most egregious cases, you can lose your freedom by being punished by jail time. Although most state agencies do not have the ability to press criminal charges, they often forward information on improperly-acting agents directly to prosecutors for possible criminal charges.

5. Losses due to criminal charges. Short of death, jail time and criminal penalties are the ultimate loss an agent can suffer professionally. You can think of the losses due to jail time as adding up all of the other losses discussed in this section together, plus the high cost of legal defense, plus the loss of freedom (which of course is immeasurable).

Fortunately for most agents, the risk of jail time is remote. However, the risk of an agent inadvertently breaking the law is very real. The brokering of property is a complex legal transaction, and each transaction is usually worth from a hundred thousand to millions of dollars. Property transactions are most often the most expensive and significant transaction in your clients' lives. Accordingly, the number of laws affecting property transactions can staggering. These laws can come from a variety of areas. Some laws deal with how to obtain and maintain a real estate license. Others deal with what actions and transactions an agent can and cannot do. Others deal with what information needs to be disclosed in a transaction. Others deal with the financing of property transactions. The list goes on and on. Unfortunately, there is not one section of the law that is labeled "Real Estate Agents" that you can read and know everything there is to know (laws are written in arcane language that will put you to sleep before you finish the first page anyway). There are many different laws and they are scattered in different sections. To complicate things further, some laws come from the federal level, some from the state level, and other rules and regulations come from your state agency that oversees real estate activities.

This discussion about laws is not meant to depress you. Agents generally know the enormous amount of rules that are at stake in their profession. What is important to note, however, is that it is fairly easy to run afoul of laws inadvertently, even by the most seasoned of professionals. Laws are diverse, there are a lot of them, and they change all the time. An agent must be *proactive* in staying on top of them, which is why continuing education courses (like this one) are so important. You simply cannot rely on what is "common practice" by real estate agents around you. What is common practice is actually illegal more often than you would imagine. By following these practices, all it means is that you have a lot of company in breaking the law. As will be discussed in later lessons, you cannot assume you know the laws in every situation you encounter, no matter how much you have studied the law, and no matter how many years experience you have. Whenever you have the slightest doubt, or whenever you encounter any type of unusual situation, you must utilize your resources to find out the best course of action. Your first resource is your responsible broker, however there are many other resources (as will be discussed later).

6. Losses from Physical Injury. Lastly, losses that come from physical injury cannot be discounted. Being a real estate agent may not be thought of as a hazardous job. However, there is definitely more at stake than papercuts. One major source of potential injury is driving. Real estate agents typically spend a great deal of time on the road going from one house to another, or on a million errands to a million different places. Combine the sheer amount of driving, with the fact that many agents want to talk on the phone or take notes while driving, and that adds up to a major risk of an accident.

Another potential source of physical injury is the fact that it is in an agent's job description to be at a large number of stranger's homes, either to investigate them on behalf of clients, or to show them off to potential buyers. First, any time people are on a property, especially one to which they are not accustomed, they might get hurt. There might be a loose stair that has been overlooked, a low hanging beam in the basement that is inviting a collision with a head, a nail that sticks out of a board, an uneven patch of ground in the backyard, or perhaps a loose dog that likes to bite. Second, unfortunately, there have been some cases of agents getting attacked when showing houses. Although these cases are rare, even one case is too many.

This is not a course on physical safety. It is better described as a "legal safety" course. While it is very wise for agents to take precautions for their own safety, it is doubly wise for agents to ensure the physical safety of their clients. It is a common practice for agents to drive clients around town when searching for a house to buy. To an agent, getting into a car accident can mean pain, hospital bills, and lost income from not being able to work. Getting into a car accident *with a client in the car* means all of the above for *both* the agent and the client, plus a possible lawsuit (and mostly likely a lot of guilt).

Conclusion: This section is a reminder that there is much that that can go wrong in the real estate profession, and it takes much more than buying a few insurance policies to cover your risks. Your actions as an agent can directly hurt your wallet through paying higher insurance premiums and through loss of customers through a poor reputation. Your actions can also get you in trouble with the state agency in charge of real estate activity, which can hurt your wallet in the most severe way: not being able to make a living as an agent anymore. Further, you can suffer losses that are much more than just economic if you run into legal trouble. Lastly, not only your own physical safety, but the safety of clients can be at stake.

B. WHAT IS "RISK MANAGEMENT" ANYWAY?

Risk Management is simply managing your risks. Sounds simple, but you have to figure out what your "risks" are before you can effectively "manage" them. A risk is more than a list of what kind of loss you can have. The first part of Risk Management is determining what risks you face, which is based upon the list of potential losses that you sustained. Once risks are determined and prioritized, then you manage them by matching an appropriate course of action to each risk. Thus, Risk Management boils down to three basic steps: (1) Figuring out what kind of losses you could have and how bad the losses could be; (2) Figuring out how likely those losses are to occur; and (3) Taking a strategy in light of all the information.

Step 1: How bad will the loss be?

We just finished discussing what kind of losses an agent could sustain and we also discussed briefly how bad it would be to encounter these losses. A rough ranking of these losses, from lowest to highest in terms of impact on an agent's life, might be:

- High insurance premiums — not terribly bad;
- Loss of Reputation — bad, but not the end of the world;
- Licensing Trouble — always bad, and could be very bad
- Criminal Charges — extremely bad
- Physical Injury (to self and client) — anywhere from "not terribly bad" to "extremely bad"

In this course we will call how bad each loss could be the "*impact*" of each type of loss. Thus *criminal charges* would have an *extremely high impact* on an agent. Please keep in mind that this ranking of impact is very general, and also this list of losses is not exhaustive. Every agent's situation is different.

However, this ranking of impact omitted the most obvious type of loss encountered by agents: lawsuits. What is the "impact" of lawsuits? A lawsuit is a wildcard. It is always unpleasant, but the range of impact is like that for "Physical Injury" losses: anywhere from "not terribly bad" to "extremely bad," depending on how the lawsuit proceeds against you.

Step 2: How often will it happen?

The next step in Risk Management is figuring out how likely each loss is going to occur. This can be relatively simple in some cases. For example, if you see your E&O insurance bill going up each year, you can predict fairly well that the premiums will continue to rise, or at least stay at their current high level for a while. In other cases, it is very difficult to assess the likelihood of a loss. If you have never had trouble with your real estate license before, how can you state how likely this kind of loss is to occur? The best an agent can do is to try and look objectively at his or her actions and behaviors, and see if these behaviors make it more likely or less likely that the loss will occur. Agents that keep on top of rules and regulations and make concerted efforts to maintain their licenses in good order can state that losses from licensing problems are not very likely.

The results of an evaluation of how likely a loss will occur have many different labels, such as the "*probability of risk*." However, for this course, we will simply call it the "**likelihood**" of a loss.

Combining the results of step 1, the *impact* of each loss, with the results of step 2, the *likelihood* of each loss, gives you your "**risk**." The highest risks are those losses with high impacts and high likelihoods of occurrence, and the opposite is true for the lowest risks. However, it rarely turns out that high impact losses have a high likelihood of occurrence. (If that were the case, no one would ever want to become an agent.) Instead, there is a "sliding scale." The higher impact losses can have low likelihoods and still be considered high risks. The idea is that, even though the likelihood may not be very high, the impact would be so great that it is unacceptable. Imagine that, because of your actions as an agent, you had a 5% chance each year of getting thrown in jail. This would be, for most agents, an unacceptably high risk, even though there is a fairly low chance of occurrence.

Conversely, even rather *low* impact losses that have *high* likelihoods are also considered high risks. An example of this would be if you faced a $50 fine by the state because your actions as an agent violated some minor rule. Now $50 is not a large amount of money, and it would not have a huge negative impact on your life. However, if the state checked on this violation every week in your office, and you faced this fine every week, you probably would consider this a high risk.

Step 3: What can I do about it?

Once your risks are determined, you can then figure out a strategy to manage them. In general, there are four basic strategies you can employ towards risks:

- <u>Do your best to *avoid* the risk</u>. This is the first strategy that most people consider. Avoiding a risk all together might be practically impossible (for example, no matter how carefully you drive, it is impossible to completely be free of the risk of an accident). So, you employ a strategy of *avoiding the risk as much as is practical* (avoid using a cell phone while driving, staying alert, etc.).

- Attempt to *transfer* the risk. Agents have only one practical method of transferring risk: **insurance** (in other industries, there are more ways, but they are not practical solutions for agents). Purchasing insurance transfers the risk of loss from the agent to the insurance company. For example, if an agent gets sued for some action covered by his E&O insurance, the judgment against him should be paid by the insurance company. In other words, *the impact is transferred from the agent to the insurance company*. Of course, there are limits to this strategy, as a complete transfer is not possible. Potential problems with insurance are covered later in this lesson.

- Attempt to *reduce the impact* of the risk. Even if it is impossible to eliminate a risk, you can minimize the impact of the risk as much as possible. An example is an agent purchasing a car with the highest crash rating possible. Avoiding accidents completely is impossible, but a safe car will minimize injuries when an accident does occur.

- *Accepting* some or all of the impact of a risk. This is the default if nothing is done about a risk. It is a strategy when nothing is done on purpose, rather than if it is done out of negligence (negligence here means, "I meant to do something about it, but I just forgot").

  Sometimes the cost to avoid or reduce a risk is too much compared to the impact of the risk. Imagine in your office that you often get shocked by static electricity every time you touch something metal. Also assume that the only way to avoid this risk is to get rid of all the carpeting in the office, because walking on the carpet is what generates the static electricity. However, this solution would be undesirable because the cost of removing all the carpet is enormous, and it would get too cold in the office during the winter. The strategy to employ in this case might be to simply accept the risk and put up with the static electricity shocks.

  Another situation in which the strategy of doing nothing is done on purpose is if the impact of a risk is so huge that it cannot be insured against (in other words, transferred) as a practical matter. Losses from a terrorist attack or from a war are examples of risks that you have no choice but to accept because it is simply not practical to buy insurance against these kinds of losses.

Unfortunately, once you figured out which strategy would best match each risk you've identified, you cannot wave a magic wand and have all your strategies implemented perfectly and instantaneously. Implementing a Risk Management Plan is a constant battle with constraints of time and resources. It takes a disciplined approach to implement risk management strategies efficiently and effectively.

Lesson 1- Quiz

1. Even if you are not sued as a real estate agent, your insurance premium may still go up because:
   - A “high risk” agents have to pay higher insurance premiums
   - B you are paying indirectly to cover the costs of those agents who do get sued
   - C insurance companies raise rates when there are changes in the law
   - D you can get sued not only for actions you do, but also actions you neglect to do

2. There is a real risk of an agent inadvertently breaking the law because:
   - A buying and selling real estate involve complex, legal transactions.
   - B there are many laws covering the real estate agent profession
   - C laws covering real estate transactions change all the time
   - D all of the above

3. One way an agent may incur a physical harm is:
   - A getting into a car accident
   - B getting injured while investigating a property
   - C both (a) and (b)
   - D none of the above

4. A “risk” can be determined by:
   - A combining the impact of a loss with the likelihood of a loss occurring
   - B applying a “sliding scale”
   - C creating a list of what kind of losses an agent could sustain
   - D evaluating how bad it would be to sustain each type of loss

5. The strategy of doing nothing about a risk is best taken when:
   - A the impact of a risk is favorable, and it is best to accept it
   - B the risk is the type that is easily forgotten
   - C the cost to avoid or reduce the risk is not worth it
   - D it is complicated to insure against it

Answers: 1-B, 2-D, 3-C, 4-A, 5-C

LESSON 2: IMPLEMENTING A RISK MANAGEMENT PLAN

So now you have an idea of what types of risks you have, which means you have an understanding of the *impact* of each potential type of loss you can encounter and the *likelihood* of encountering each of these losses. Further, you know that you can generally employ the strategies of *avoiding* the risk, *transferring* the risk, *reducing the impact* of the risk, or simply *accepting* the risk.

How do you begin to employ these strategies in the real world? In other words, exactly which strategies do you employ, and which strategies do you focus on first? You will answer these questions yourself by creating a **Risk Management Plan**.

Creating a Risk Management Plan is hard work; you have to analyze a lot of information and you have to make a lot of tough decisions. Further, it is hard work communicating your policies and strategies in a clear and consistent manner. Although it is hard work, it is necessary work. If you do nothing, as we saw in Lesson 1, you will by default end up accepting the risk of losing money (lots of it), losing your livelihood (your ability to work as an agent or broker), or even your freedom (possible jail time from criminal charges).

A. CREATING A RISK MANAGEMENT PLAN

There are three steps to creating a Risk Management Plan: write it down, prioritize your risks and, finally, figure out what strategy or strategies to employ. Each step is detailed below.

Step 1: ***Write it down.***

Your Risk Management Plan should be a written document. The level of formality for it depends on who will be following it. If it is your personal plan, it can be informal with just enough detail for you to be able to review it and understand it. However, if you are responsible for multiple agents or assistants, or if you run an office, you should prepare a formal written document that clearly states your risk management policies and details the strategies you are employing. **Each real estate company, big or small, should adopt an office Risk Management Plan that outlines the company's official policies, strategies and procedures**.

Why does your Risk Management Plan need to be written? In part because it is important and in part because it is such hard work. Because it is important, it needs to be written down and distributed to everyone who should be following it. It needs to be constantly accessible and obvious. An email can get buried by the hundreds or thousands of other emails in everyone's inbox. Any type of oral communication is usually quickly forgotten. Informal notes tend to get misplaced and do not carry the weight of a formalized written plan.

Because the plan is hard work, you want it to be written down and distributed so others do not accidentally duplicate your work because they did not know about it. Further, you want your reasoning behind every action to be documented. If your strategies are ever questioned, and they inevitably will be if things go wrong, you want it to be known that you took a reasoned approach in deciding a strategy, and that your decisions were logically based upon the best information you had at the time.

Step 2: ***Prioritize the risks***.

It is unwise to begin implementing strategies without figuring out which risks should be addressed first. There is never enough time, money or other resources to minimize all risks completely. You must allocate your resources on your highest and most important risks. Spending too much time, money and energy on strategies for one risk can lead you to ignore more important risks. Further, it is likely that if you try to cover every risk, either you will cover them in a poor fashion, or you will not have enough resources left to actually run a business!

From your list of risks, you must order each risk by level of importance, so you know which risks to address first. An actual numerical order is not necessary—just label each risk with a rank. For example, you might place your highest risks into a category "A." Other risks that are important, but not as high as "A" can be categorized as "B," and so on.

How do you know which risks are highest and most important? This is not an exact science. Often your evaluation of your risks will be based upon ballpark estimates. It is important that you gather as much data from credible sources as possible when making your evaluations. Insurance agents, your responsible broker, attorneys for your office or other experts, even other agents are good sources of information. You will want as complete information as possible when evaluating your risks.

Once you have gathered information, we learned in Lesson 1 ("What is Risk Management Anyway?") then we can apply a simple formula:

impact × likelihood

Remember that *impact* is the expected loss, or how bad the loss will be, and *likelihood* is how often this loss is expected to occur.

Let's apply this to a practical example in more detail. Suppose you want to compare two possible risks: Risk #1: the risk that your office is burglarized and your office equipment is stolen; Risk #2: the risk that you have to pay late charges on some rental equipment because you are often too busy to return them on time.

First, you would need to estimate how much money you would expect to lose. For Risk #1, you would have to replace the stolen equipment, say $5,000. However, it is important to include all realistic losses, so you must also consider the lost time in having to clean up the office, replace the locks, purchase new equipment and set it up, file police reports, etc. Suppose the lost time is expected to be around 4 days, which might cost you $1,000 in lost revenue and other expenses. For Risk #2, suppose you know from past experience that you usually get charged around $50 every time you return the equipment late.

Second, you would need to estimate the likelihood of incurring a loss for each type of risk. These estimates are sometimes difficult and often you would have to rely upon an outside, expert source. For instance, for Risk #1, you might speak with the police or with an insurance agent who covers theft claims in the area. Suppose your best estimation based on these talks is that an attempted theft might occur every five years. For Risk #2, suppose you review your receipts and find that you average about one late fee every two weeks.

Based upon these assumptions, your risk comparison would look like this, based upon a one year time period:

Risk #1 Your office equipment gets stolen	Risk #2 You have to late fees on rented equipment
<u>Expected money loss</u>: $5,000 lost equipment $1,000 lost revenue <u>Likelihood</u>: Once every 5 years, or 0.2 times per year <u>Risk Value</u>: $6,000 total × 0.2 times per year **= $1,200 per year**	<u>Expected money loss</u>: $50 per late fee <u>Likelihood</u>: Once every 2 weeks, or 26 times per year <u>Risk Value</u>: $50 × 26 times per year **= $1,300 per year**

Economically, Risk #2 is a higher priority risk because you expect to lose $1,300 per year from that risk as opposed to $1,200 per year for Risk #1. On pure economics alone, you would rank Risk #2 higher than Risk #1.

If there were no other negative ramifications from returning equipment late all the time, Risk #2's impact essentially only monetary in nature. However, an impact of a risk is not always confined to monetary losses. For example, few people would consider the losses from a burglary to be only money. Even if you assign a monetary figure to lost revenue, as we did in our example, that does not cover the emotional trauma and stress associated with a break in. Further, a burglary would likely make a mess of all the records and paperwork in the office. The loss or damage to records and general paperwork organization is not covered by monetary loss figure.

Thus, even though Risk #2 has a higher economic loss, most people would likely rank Risk #1 as more important due to the emotional trauma and loss of paperwork considerations. Other important non-monetary considerations we've seen before in Lesson 1 are the possibility of having criminal charges filed against you and the possibility of physical injury to you or your client. Very often risks with these types of impacts will be listed as your "A" risks, even if they have a low likelihood of occurrence.

Step 3: ***Figure out which strategy or strategies to employ***.

There are often many ways to handle a risk. For your "A" risks, you would likely want to employ as many strategies as possible, within reason. For instance, most agents would consider the risk of being sued for professional negligence an "A" risk. What could be done about this risk? A strategy to avoid this risk would definitely be in order. Policies such as using standard forms and procedures, and utilizing proper resources for advice would help avoid this risk. These practices and procedures are discussed in detail in Lesson 4.

What other strategy could be employed against the risk of being sued for professional negligence? A strategy of transferring the risk, in other words, buying E&O insurance, could also be employed just in case the strategy of avoiding the risk fails. Purchasing E&O insurance, or any insurance, should almost never be the primary strategy against a risk. The strategy of transferring risk should be run concurrently with the strategy of avoiding risk. Just like you wouldn't leave your car door unlocked because you have car insurance, you shouldn't fail to take precautions, or take paperwork shortcuts, just because you have E&O insurance.

☞ *Side Note: Don't Depend on Insurance to Bail You Out*

Dependence on E&O insurance to bail you out of trouble is bad for several reasons. First, your coverage may not be as complete as you think it is. There are sometimes very technical reasons why your insurance policy may fail to cover you. If you have ever taken the time to read an insurance policy, you would see that it is full of conditions and qualifications. You can never be sure that you will fall out of a loophole in your policy.

For example, your policy will only cover certain transactions and for a certain period of time. You cannot assume that a claim will be covered just because you are currently covered by a policy. Claims may arise years after a transaction has closed. If you have changed policies over the years, your current policy may not cover acts and transactions that occurred before the current policy started (you would have to have special "prior acts" coverage). In addition, all policies exclude certain types of lawsuits. You can expect dishonest or criminal behavior to excluded, plus lawsuits related to contamination, damage to property or death. Some exclude lawsuits over mold infestation. You cannot depend 100% on insurance as a safety net. Prudent precautions and procedures to avoid the risk should always be your primary strategy against important, high risks.

A second reason that you should not depend on insurance as a primary strategy is that, even if insurance covers you when something goes wrong, you may end up paying higher premiums afterwards. Just like a person's car insurance goes up if that person constantly causes accidents, your E&O premiums will surely rise if you constantly need to be bailed out by your insurance company.

A final reason is that insurance will only cover economic losses. There is no way that insurance can cover other types of losses such as emotional trauma or lost time. For example, your E&O insurance coverage might pay for your economic losses if you get sued, but you still have to endure the unpleasant experience of going through the litigation process. Further, there is no way to regain the lost time from meeting with your attorneys, going to court, preparing for testimony, etc.

As a final note, an agent likely needs additional coverage besides Errors and Omissions. For example, agents often drive clients around in their personal vehicles. If agents do not specify to their car insurance company that they will be using the car for business (as opposed to just personal use), then the insurance company may resist covering an accident that occurs during a business-related trip with a client. Also, if agents hire a personal assistant, they may need to purchase workers compensation insurance for their assistant. Agents should thoroughly explain their situation to an insurance broker or other insurance representative in order to purchase the right type of insurance and the right type of coverage.

Remember, in addition to avoiding the risk and transferring the risk, you can *reduce the impact of a risk* and you can *choose to accept some or all of the risk*. Very often you know that you cannot completely avoid a risk, and that the impact of the risk may almost be inevitable. Reducing the impact of a risk is a strategy in which you take precautionary measures so when the impact does happen, it won't be as severe. An example of this is backing up the data on your computer frequently so that when it crashes, your work will be minimally interrupted.

Choosing to accept some or all of a risk means that you consciously decide that you will just accept and deal with the impact of a risk should it occur. In other words, you choose to do nothing about a risk. Doing nothing is never a good thing if done out of laziness, forgetfulness or procrastination. However, sometimes this is a rational strategy if (1) you have no choice (for example, you typically have to accept the risk of a terrorist attack), or (2) the risk is so low that it is not worth it for you to do anything about it (the impact is too low—for example, the risk of a static electric shock—or the likelihood is too remote, for example the risk of being hit by a meteorite).

After the completion of the above three steps, you should have a written Risk Management Plan. You should now be ready to implement it.

B. IMPLEMENTING YOUR RISK MANAGEMENT PLAN

There are two basic steps to implementing your new Risk Management Plan. First, you must employ strategies, starting with those for your highest "A" category risks, while making the best use of your resources available. Second, you must review and revise your plan periodically.

***Step 1: Begin employing strategies according to rank, making the best use of your resources*.**

You have limited resources such as time, money and energy. Chances are you don't have all day to work on strategies for risk reduction. Further, it is infeasible to blow your entire operating budget on risk reduction, or to burn out doing risk reduction strategies so that you can't focus on your core real estate work. Yet, it is important that you employ as many strategies for your most important risks, using the resources available to you.

Even if you have clear priorities for your risks, it is not always practical or possible to implement strategies for them in strict accordance with priorities. For example, buying insurance for one of your "A" risks is a relatively fast process, so you would do this first. Further, you would prioritize money in your budget for this type of insurance. However, what if one of your strategies for an "A" risk is to have a system of standard procedures and checklists for paperwork? If you don't have such standard procedures and checklists yet in place, it would take time to develop them. Of course, you would not wait until this process is done before starting to implement strategies for "B" risks, especially relatively fast and easily implemented strategies for "B" risks. You would work steadily on the standard procedures and checklists, but would take time to implement other strategies in the meantime, such as buying insurance for a "B" risk. Your highest "A" risks are your priorities, but it is not always possible to fully implement strategies for them before you move on to strategies for your "B" risks list.

If you have a limited budget, you would have to make a determination as to how to best spend your money and obtain optimum results. Suppose you were able to finance all of your "A" risk strategies, but you do not have money to finance your next most important strategy in the "B" list. In this case, you might choose to finance less important strategies now rather than wait until you gain enough money for the next most important strategy. Your end goal is to implement as many of your prioritized strategies as possible. However, a lack of resources may dictate that you implement the strategies in an order different from the ideal originally conceived in your Risk Management Plan.

Step2: Review and revise your plan periodically.

It might take a long time to finally implement all the strategies you highlighted in your Risk Management Plan. However, once everything is implemented, your job is not done. You must set apart time to periodically review your plan and make changes in order to constantly improve it.

Remember that your strategies will often be based upon estimations. Even estimates based upon the best sources and most complete information at the time will be off. Further, changes in the law or in your insurance policy coverages may dictate an amendment to your plan. It is vital, especially in the first year of implementation to repeatedly review the efficacy of your strategies because they may be based on faulty estimates or outdated information or assumptions.

How often should a Risk Management Plan be reviewed? It should be reviewed if any part of a policy is called into question. If an improvement is identified, the plan should be immediately revised so that it accurately reflects the most current procedures and information. Further, a Risk Management Plan should at least be reviewed once a year. An annual date should be set for this review, perhaps coinciding with the renewal period for E&O insurance policies or other major insurance policies.

Also at least annually, you should review whether people fully understand the policies and strategies contained within the plan. Even a perfect Risk Management Plan is useless if its contents are not clearly communicated to the agents and employees who should be following it. Risk management is an ongoing process and it depends not only upon the Risk Management Plan itself, but also upon proper training, supervision and enforcement. It is the responsibility of brokers, office managers and supervisors to educate and train agents and employees on the policies and strategies contained with the Risk Management Plan, and also to supervise the implementation of such strategies and policies.

Lesson 2 - Quiz

1. Creating a risk management plan, although difficult, is necessary because:
   - A if you don't create one, you might end up accepting the impact of a lot of risks
   - B written documents are always necessary in any organization
   - C transferring the risk is the default strategy
   - D the impact of a lot of risks are unknown

2. Economic losses should not be the only losses considered in ranking risks because:
   - A non-economic losses can be roughly converted into economic losses
   - B economic losses alone are not important
   - C impact multiplied by likelihood is only one possible formula in evaluating risks
   - D non-economic losses, such as emotional costs, are often very significant

3. All of the following are reasons you should not depend on your insurance coverage entirely EXCEPT:
   - A Only economic losses are covered typically
   - B You may end up paying higher premiums if you are sued or otherwise use your coverage
   - C Reducing the impact of a risk is more efficient than using insurance
   - D Prudent precautions to avoid risks should always be a primary strategy for important risks

4. Strategies in your risk management plan:
   - A should be done with strict priority for your most important risks
   - B should be done making the best uses of your resources
   - C should not take up more than 10% of your resources
   - D should be done without regard to available resources

5. A review of your risk management plan should be done at least once a year because:
   - A it is required by law
   - B changes might be necessary due to outdated information or faulty assumptions
   - C the renewal period for E&O insurance coverage is set at once a year by most companies
   - D all of the above

Answers: 1-A, 2-D, 3-C, 4-B, 5-B

LESSON 3: IMPORTANT PRINCIPALS

In the previous two lessons, we looked at what risk management means and how to implement a Risk Management Plan. In this lesson, we will discuss some important principals and concepts that will give you a framework on how to think about risk reduction everyday in your real estate practice. A good understanding of these principals and concepts are instrumental to understanding how to manage your risk in a real estate practice.

A. AGENCY: REPRESENTING SOMEONE ELSE

The first important legal concept is “agency.” It is of primary importance because the concept of agency describes what it means to be an “agent.” *So this concept literally defines what it means to be a real estate agent.*

Most people know that being an agent for someone means that you are acting on their behalf. Movie stars hire agents to negotiate movie deals for them. Companies have “sales agents” and “customer service agents” who act on behalf of the company to sell things or help out customers. Perhaps you’ve heard of a situation where someone is out of town or too sick to complete a transaction. That person can sign a legal document called a “power of attorney” which gives someone else, like a son or daughter, the authority to act on their behalf for that transaction. All these situations have in common the concept of agency, in which someone is acting as a representative for someone else (or a company). The representative is called the *agent*, and the person being represented is called the ***principal***.

Agency is a legal relationship and, as such, there are many legal ramifications when you enter an agency relationship. The concept of agency is worthy of an entire course, and many of you may have already studied this concept. However, as a summary, or as a review, we will cover two basic ideas here under the concept of agency: *authority* and *fiduciary duties*.

1. AUTHORITY

First, let’s discuss “authority.” Authority means the scope of the power that an agent has to act on behalf of the principal. If you have a client that happens to be an actress, you should help her complete her real estate transaction, but you don’t have the right to negotiate her next role with a movie studio. In other words, your *authority* is limited to real estate transactions. Further, your authority may be even more limited to either listing her house (listing agent), or helping her find a house (buyer's agent), depending on what agency contract you have entered into.

☞ *Side Note: Sign Agency Contracts and Understand What They Mean*

A thorough understanding of your authority, or what you may or may not do on behalf of your client, is essential. The agency contract you sign with your clients is a vital document. You should go over it carefully with any client, so that everyone has a clear understanding of what kind of relationship is expected. If you are not in the habit of signing an agency contract with your clients before starting any significant work, you should change this habit. In addition, if you tend to put off signing an agency contract with a repeat customer, this habit should also be changed. Most customers should not mind signing this contract once it is explained that it is important to have a clear understanding of expectations. If this type of extra professionalism does not fit the style of relationship you have with a particular client, another approach is to state that it is your office's policy to sign these documents right away, as your office's policy should be. In either case, you should understand the terms of any agency contract you are to sign, and you should take the time to go over the contract with your client. However, you should not do any legal interpretation. If your client has any questions that relate to a specific legal term or concept, you should not attempt to answer the legal question. Instead you should explain that you are not a lawyer and you should refer the client to legal help, or to your broker.

There are three basic distinctions in agency contracts that every agent should understand. The first distinction is whether the agency agreement is for listing a property (selling side), or to helping to find a property (buying side). This distinction is usually well understood, but if a client hires you to both list a property and also help find a property to purchase, but sure to sign two separate agency agreements (unless your office has an agency agreement that specifically covers this situation).

The second distinction is *exclusivity*. Exclusivity means whether you will be the only agent working for this particular transaction, or whether the principal may hire others simultaneously. This distinction can become a huge source of dispute, usually when two or more buyers agents expect to receive a commission from a principal after a transaction closes. Most states and real estate organizations require that an agent be the "procuring cause" of the transaction's completion in order to be awarded commission. The definition of "procuring cause" and its interpretation varies from state to state. It is a good idea to be well aware of how this phrase is interpreted in your area.

The third distinction is whether an agent should be paid commission if the sellers of the property find a buyer on their own, independently from the efforts of the agent. This distinction is found among exclusive listing agreements. The distinction is usually expressed by having a different name of the contract. For example, an "Exclusive Agency Listing Agreement" might mean that the sellers can find a buyer on their own and not pay a commission to the listing agent, whereas an "Exclusive Right to Sell Listing Agreement" might mean that the sellers have to pay a commission, even if they find the buyers on their own. Read and know each type of contract carefully!

Agents must never overstep their authority

The authority given to a real estate agent by a principal is always limited. It may be limited to a specific action (for example, to find a house for a buyer) or by time (for example, the agent's listing will last for 90 days), or both. There are many reasons why agents must be careful to not overstep their authority. First, it protects the agent. If the agent is doing what is expect under the terms of the agency agreement, the agent should not be held responsible for any losses that occur if the transaction goes wrong. For example, you list a property and a purchase contract is signed during your listing. The sellers subsequently decide not to sell the property, which makes the buyers quite upset. The buyers should not have any recourse against you because your actions were within the scope of your authority as an agent. Rather, the buyers would look to the sellers (your principals) for any damages due to the transaction falling through.

Second, acting within the scope of authority gives an agent the right to compensation. If the agent fulfills all the terms of the agency contract which require an agent to get paid, the agent will have the legal right to payment. In the example in the previous paragraph, you should have a valid claim for payment of commission, even though the transaction fell through. You would also have a claim for repayment of any reasonable expenses you incurred during this transaction. In contrast, suppose in this example that you also found a buyer for a different property owned by the same sellers. The sellers once mentioned that they might want you as an agent for this property as well, but you and the sellers never formalized any agency agreement regarding the second property. As it turns out, the sellers also do not want to sell this second property. In this situation, you would not be entitled to any compensation for commission or for any repayment of expenses incurred towards this second property. Instead, you might find yourself in trouble for doing these types of unauthorized actions.

What if agents overstep their authority?

As discussed in the previous paragraph, an agent that oversteps authority does not have a claim for compensation. However, there is a much more serious legal ramification for the agent who oversteps authority: *The principal of the agent will be responsible for the actions of an agent if it reasonably appears to outsiders that the agent is acting with authority*. In other words, if someone reasonably thinks you are acting in the scope of your authority, your principal will be on the hook for anything you do, regardless of whether you actually had authority. As an example, imagine that you are a listing agent for a house, and a couple who is touring the house decides not to put an offer on the house. Instead they offer to buy the living room couch for a certain price. You are not authorized to sell any furniture, but the couple has the impression that you do. If the couples make an offer on the couch and you accept on behalf of the principal (the seller of the house), the seller must either honor the contract, or be responsible for compensating the couple for backing out of the sale. So there is an enormous responsibility any time you are acting as an agent. Overstepping over authority can implicate your client (who is your principal), and then your client can go after you for any losses he or she incurred because of your irresponsible actions.

How do you make sure you do not overstep your authority?

First, you must know the agency agreement you signed with your client (see "Side Note: Sign Agency Contracts and Understand What They Mean"). This will give you the basic framework of your authority. Second, you must take *written* notes of every instruction given to you by a client. Do not rely on your memory. These written notes should be part of your client's file and readily accessible to you anytime you need to discuss the property. You must follow the instructions of your client unless doing so is illegal or unethical. If your client says, "I only want you to show my house on Sundays," then you must follow these instructions. However, if your client says, "I only want you to show my house on Sundays because the train nearby doesn't run on Sundays," and, "Don't mention anything about the very loud train," then you cannot obey these instructions. You must explain to your client that it is illegal to try and hide this kind of fact from potential buyers, and that you must alert all potential buyers of the train. If the client refuses to allow you to discuss the train, you have no choice but to cancel the listing. It is better to lose one client than to be sued and to potentially lose your license.

In addition to this, you must remember that every day in your business you act and speak on behalf of another. *Your words and actions are directly attributable to your client.* This means that every misstatement you make can cause liability for your client. This means that you must always take the utmost care with your words and actions. You should never give opinions outside your area of expertise (more about this in Lesson 4) and if you are depending on another source for your information, always make sure you state so. For example, suppose your client tells you that some remodeling work was done two years ago on a home you are listing. Of course, it would be best to ask for receipts of the remodeling, and also obtain copies of the permits, if they were necessary. However, if permits weren't necessary and your client cannot find the receipts, then you have to rely on your client's word. In this case, anytime a potential buyer asks about the remodeling, you should state that *your client believes* it was two years ago. This is especially important in written disclosures, including emails and faxes.

2. FIDUCIARY DUTIES

Along with authority, understanding *fiduciary duties* is essential to understanding agency. What are fiduciary duties? Fiduciary duties are obligations that are legally assigned whenever someone acts as an agent. The word "fiduciary" comes from a Latin word meaning "faith." So, in essence, fiduciary duties are duties that you must adhere to whenever a principal puts *faith* in you as an agent.

Fiduciary duties are often described in many ways, but they can be categorized into three main duties: *loyalty*, *good faith* and *fair dealing*.

The Duty of Loyalty. The duty of loyalty means that an agent must remain loyal to the principal; an agent must represent the interests of the principal at all times, and not represent interests of others opposed to the principal. Buyers of a property and sellers of a property have opposite interests. The sellers naturally want to maximize the sale price and want to sell the property in "as-is" condition. Buyers want to pay as little as possible, and want the property delivered in as best condition as possible. Can an agent represent both the interests of the buyers and the sellers in a transaction? Often it is done, as long as both sides agree to let the agent represent both sides to a transaction. However, these "dual agency" situations, as they are called, are precarious for the agent. Dual agents must be extremely careful, or they will violate the duty of loyalty.

Whenever dual agents do something that goes against the interest of either the buyers or the sellers, they will have violated the duty of loyalty. One example is a situation where a dual agent gives advice on the subject of price. If the dual agent tells the sellers that she believes that the buyers will go higher on the price, she has violated the duty of loyalty with the buyers. Conversely, the dual agent cannot give advice on what the buyers should offer the sellers, because she has the duty to get the buyers the lowest price and the duty to get the sellers the highest price. This is an impossible task, so the best course of action a dual agent can take is to remain neutral and to not give either side the benefit of "insider information" from the other side. In this manner, the agent may not violate the duty of loyalty. However, buyers and sellers usually rely heavily on agents' advice, especially on price. A dual agent, remaining neutral, does not violate the duty of loyalty, but she does take away one of the important services she provides to clients: good advice and insight.

Even though frowned upon, agents often like the role of a dual agent because the financial reward might be greater (you don't have to split a commission with another agent). Even if technically legal, an agent is better served in the long run by avoiding dual agency situations. If buyers want to make an offer on your listing and they do not have an agent, you can take one of two actions to avoid a dual agency: (1) encourage the buyers to get an agent on their own, even recommending a few agents that you know that will do a good, honest job for them; (2) do the transaction on your own, but let it be perfectly clear that you will provide the buyers with the basic assistance, but that you will not be representing them or their interests. In this situation, you would best served to first encourage the buyers to get their own agent, and only take the second action if the buyers decided not to get their own agent. If the buyers go forward without an agent, you must always keep in mind that you represent the sellers only, and you should have the buyers sign documentation that they are aware of this fact. You can do things that will *aid the transaction in general*, such as getting buyers the appropriate forms to fill out, but you can never do anything that would be adverse to the sellers' interests.

***The Duty of Good Faith*.** The second fiduciary duty is the duty of good faith. "Good faith" means that an agent does things in an honest manner and, furthermore, that the agent makes a sincere effort to "do the right thing." Real estate agents are often called *sales agents* for a good reason. Real estate agents must show things in a positive light in order to sell their listings, and even to sell themselves to potential customers as a quality agent. However, the sales portion of an agent's job must never interfere with the agent's duty to be candid and sincere professionally.

There are many opportunities for an agent to be less than honest, or less than sincere, especially when money is at stake. There are small examples and major examples of agents violating their duty of good faith. A small example might be if an agent agrees in a contract to have at least two open houses for a particular listing. Suppose the agent does the required open houses on two different days, but puts no effort into them. She puts up no signs and does no promotion of the open house. Furthermore, she has the open house for only 45 minutes before she leaves to have an open house for a more expensive listing, one that she puts all her attention towards. The agent in this case may have technically followed the requirements of the contract, but she has not acted in good faith.

A more serious example of violating the duty of good faith is unfortunately uncommon when agents are attempting to close a sale. There is a fine line between *promoting* a property and *misrepresenting* property value or property conditions. For example, it would be very good selling points if an agent advertised a house as “in the best school district” and as having a roof “that should last decades.” However, this type of advertising is bordering more on misrepresentation than promotion. Why? First, can it be proven that the school district the best? Best where? In the area? In the city? In the world? Even if the school district happens to be ranked #1 in the state according to a few prestigious sources, it would be more accurate to state that the house is “in a highly ranked school district” or even “in a school district ranked #1 in the state.” Secondly, the advertisement that the roof “should last decades” is an opinion of the agent, who probably is not the best source to be stating such an opinion. An agent wanting to make such a statement should obtain the services of a roofing expert. (More about utilizing experts in Lesson 4). Better yet, an agent should just stick to the facts, stating something like, “House was re-roofed two years ago.”

Another time agents may violate the duty of good faith is when agents are attempting to gain new listings. Sellers naturally want the highest price for their properties, and thus tend to hire agents who best assure them of obtaining the highest price. Agents might entice sellers to give them listings by misrepresenting the value of the property or by misrepresenting market conditions. For example, an agent might pick and choose comparable home sales data to show potential sellers. The data, as presented, could falsely give the sellers the belief that their house can get a price that is higher than is actually justified. Further, the agent could state that the housing market is at a peak and that the buyers should sell now to maximize their proceeds. This type of behavior may give the agent an edge in getting the listing from the sellers, but it violates the duty of good faith.

You could argue in the last example that the agent’s actions in trying to get the listing could not be a violation of the duty of good faith, because the sellers were not yet clients of the agent at the time of the illegal and unethical action. Yes, fiduciary duties are owed by agents to their clients, and the sellers were not clients yet. However, agents have a responsibility to the public in general to be decent and honest. People who want to act as real estate agents must first obtain a license from their state. Holding this license, means that agents must be “custodians of public trust” when acting as agents. A “custodian of public trust” means that you must take care not to break the trust of the public. So, when doing activities as an agent, you must not do things like make false advertisements or make misrepresentations in general. As a licensed real estate agent, you also have an obligation to not do things that will harm the general public.

☞ *Side Note: Information on the Internet and Your Fiduciary Duties*

In many ways, the Internet and electronic communications has made the job of the real estate agent easier. For example, having listing information online has facilitated agents' searches for properties for their client. In addition, the Internet has opened up an entire new approach to marketing. Further, with electronic communications, such as email, communicating with clients has never been easier.

The Internet has also allowed the public to have access to real estate information like never before. Information that was once exclusive to real estate agents is now accessible on the Internet, and Internet-savvy clients have become much more informed. Of course, it is a benefit to have knowledgeable clients; they can make better decisions and know more about what's going on with their real estate transaction. However, the public's access to information has in many ways also fueled competition between real estate agents. Potential clients can better compare the services of different agents and thus have more information with which to negotiate lower commissions. Further, clients can put enormous pressure on agents to follow up with the latest listing they find on the Internet. Information flows at a much faster pace with the Internet, and agents are often expected to be at the forefront of the latest information stream.

The increased competition between agents and the added pressure brought on by clients could cause agents to be more aggressive in their marketing and in their attempts to gain new clients. For example, an agent will have increased incentive to push the limits between promoting a property and misrepresenting it. Or an agent might feel more compelled to be a bit more "optimistic" about the projected selling price of a house, in order to land a client.

In these situations, it is even more imperative for agents to be mindful of their fiduciary duties. On a moral level, of course, it is the right thing to do. Agents have to be able to feel good about their actions at the end of the day. Further, on an economic level, it is not rational to take short cuts with fiduciary duties. Any economic benefits an agent will gain in the short run from less-than-honest behavior will ultimately be outweighed by the cumulated effects of this behavior in the long run. Agents who do not take their fiduciary duties seriously trade in short term benefits for long term success. Their reputations with their client base will eventually suffer. Further, any licensing trouble these agents run into is often published on the internet for all potential clients to see. Needless to say, a negative report from your state licensing department can have long-lasting negative repercussions on your reputation. An agent must be careful; if infractions are reported on an agent, the internet often makes it possible for the entire public to see them.

The final component of an agent's fiduciary duties is the duty of *fair dealing*. Fair dealing means that you must make profits from doing business with your client in a fair way. In other words, your business deals must be fair. One way your business deal may not be fair is if you have "conflicts of interest." A conflict of interest is any situation in which you are impeded from being able to act objectively because you personally stand to gain economically or personally by making one choice over another.

Often it is not the primary business deal with your client that is at issue, but rather, the *side business deals* that always accompany a real estate transaction. It is in these side deals that agents often have conflicts of interest, and thus violate their duty of fair dealing. For example, suppose you are a buyer's agent in search of a house for your clients. Your main business deal is to find a house for your clients, and if you are successful, you expect to be paid by the commission. Of course, you must be fair and honest in this main business deal. However, many agents may also seek to make an additional profit in the way of referral fees, also known as "*kickbacks*."

Kickbacks and RESPA

Whether called a "referral fee," "finder's fee" or some other name, any time you might receive an additional source of money through a real estate transaction, you must be weary of whether the additional compensation is illegal. At a minimum, because of your duty of fair dealing, you must disclose to your client any type of additional money you receive because of their real estate transaction.[iv] Further, federal and state laws make it illegal to receive these profits under a broad range of situations. Even if it is known in your area as "common practice" to receive these kickbacks, do not be fooled into thinking that it must be legal because so many agents do it. In many situations it is illegal to receive money from outside vendors and third parties under federal law. Further, state law makes it illegal in many of the situations not covered by federal law. In other words, there is hardly any time when a real estate agent can legitimately make additional income from a kickback.[v]

In any real estate transaction, there is usually a multitude of services and goods needed to complete the transaction. One might need to hire someone to hang a "for sale" sign in the front yard, or someone to fix a broken fence. A mortgage broker might be brought in to find financing. Often the services of an escrow company or a title insurance company are needed. Of course, there is also a multitude of reports from outside experts that might be purchased: general home inspection reports, roof inspection reports, pool inspection reports, sewage system inspection reports, and of course multi-functional "statutory disclosure" reports.[vi] If one of these goods or service providers gives you receive a "referral fee" or some other benefit, whatever the label, and even if the benefit is not monetary in nature, it is likely illegal under a federal law called the Real Estate Settlement Procedures Act, or "RESPA."[vii]

R.E.S.P.A. covers most residential real estate transactions.[viii] The criminal penalties for violating R.E.S.P.A. include a $10,000 fine and imprisonment for 1 year. Further, you can be sued in civil court (a lawsuit by a private citizen, instead of a criminal proceeding) and end up being liable for a significant judgment.[ix] Under a risk assessment analysis, it is easy to see that marginal benefits of receiving kickbacks are heavily outweighed by the severe penalties attached to violating R.E.S.P.A., not to mention any applicable state law.

In summary, any time an agent receives a referral fee, kick back or any other type of compensation from referring a client to service related to the main real estate transaction, the agent must be careful that such a payment is not illegal according to federal or state law, or unethical according to membership organization the agent belongs to, such as the National Association of Realtors. Breaking the law of course can get you fined or jailed, and breaking a code of ethics can get you kicked out of the membership organization. An agent should not believe that kickbacks are legal or justified just because the practice of receiving kickbacks is so widespread. The topic of kickbacks is covered by federal and mostly likely state law, as well as rules pertaining to membership organizations. Further, kickbacks may be a violation of the fiduciary duty of fair dealing. It is very unlikely that a particular kickback will not be a violation of some law, rule or regulation, and even if it is not, the kickback would have to be handled appropriately so as not to violate a fiduciary duty. The best option for most agents would be to focus on the main transaction and avoid kickbacks altogether.

☞ *Side Note: Predatory Lending*

One of the primary motivations for the creation of R.E.S.P.A. was to prohibit payments between agents or brokers for the referral of customers for loans. This practice was made illegal by R.E.S.P.A. because these types of kickbacks often lead to bad types of loans being pushed onto customers. Mortgage brokers, anxious to recoup the kickback they had to pay for a client (and anxious to make a huge profit), would "steer" a client towards a more expensive loan than was justified by the client's credit risk. "Steering" is only one example of a category of behavior called "predatory lending" practices, which are targeted by R.E.S.P.A. and often state law.[x]

The types of predatory lending practices are only limited by the imaginations of unscrupulous mortgage brokers. They come in many shapes, styles and forms. A common theme among them is that they are unfair to the borrower, and often take advantage of vulnerable people such as the elder, unsophisticated or those in desperate economic situations. An indicator of predatory lending is the inclusion of unfair terms into the loan agreement, such as a high prepayment penalty, or a long term amortization with a relatively short term balloon payment. Further, negative amortization or non-amortization loans, loans in which the outstanding balance remains the same or even rises each month, are often associated with predatory lending.

The law, your fiduciary duties and common decency mandate that you not only avoid participating in these predatory lending practices, but also keep clients as far away from them as possible.

B. RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE: "VICARIOUS LIABILITY"

Every good employee tries to represent his or her company in a positive way. Any time an employee interacts with a client, he or she is the face of the company to that client. In the same manner, your clients look at you as the representative of your real estate brokerage company. It is not just clients that associate your actions with your company, the law does as well.

An employer is legally responsible for its employees. That means that if an employee does something wrong while acting as an employee, the employer is responsible for those actions. This is called ***"vicarious liability"***; the entire company as a whole is liable for the actions of a single employee. The idea behind this rule is the similar to the reason why parents are responsible for the actions for their child: A company is in the best position to control the actions of its employee, the same way that parents are in the best position to control the actions of their child. If the employee or child does something wrong, the company or the parents are responsible because of a failure to control adequately.

If you are an agent working for a real estate brokerage company, your real estate company has the responsibility to make sure that you comply with all laws and regulations while on the job. Of course, "on the job" includes when you are working from home or when are out driving around, not just when you are in the official office. As long as you are acting as a real estate agent (as opposed to driving around for personal errands), where ever you are, your company is responsible for you. Because of this, whenever making a decision involving risk, you must always keep in mind whether your company would approve of the level of risk you are thinking of taking. Another consideration that arises because of vicarious liability is how employers should manage employees. A final issue is that vicarious liability not only applies between an agent and his or her company, but also between and agent and his or her personal assistant. All of these issues and considerations will be discussed in turn in this section.

1. Always Consider Whether Your Company Would Approve

Different people have different levels of acceptable risk. Some people are very safe and try to be conservative with their risk taking. Others like to take chances. Whatever your risk taking preference, you must always consider whether your company would like to take the same risks as you.

Your company is riding beside you with every decision you make because your company is ultimately responsible for your actions. Of course, your company is not looking over your shoulder on every decision you make, so it is up to you to be reasonable with your risk preference. For example, if you take a certain listing, both you and your client might have to preference to market it aggressively, using bold assertions on flyers and on other advertising. Despite the fact that both you and your client agree on these tactics, there is another point of view you must consider, your company's. If your company does not want to accept the same level of risk that you and your client do, you must alter your strategy.

How can an agent know what level of risk his or her company would want to accept? First, an agent should look to any training, policies or guidelines given to the agent by the company. Often companies will train their agents on specific areas such as advertising and writing contracts. These trainings and policies are invaluable for agents, and agent should often refer to them for guidance. If you have any questions, or if you need any clarification, ask the person who originally gave you the training, or ask your responsible broker.

Second, if you never received training that is specific to your issue, you should always ask your question directly to a person responsible for your training (if there is one), or your responsible broker. Agents may feel reluctant to contact their broker for everyday issues such as how to word advertising for a certain listing. Perhaps an agent might feel that the issue is too mundane, and the broker is too busy to deal with these types of issues. Or perhaps an agent doesn't want to ask too many questions for fear of appearing incompetent. However, most brokers would probably attest that they prefer being asked too many questions rather than too few. A good broker should have clear lines of communication available to agents. If you feel that your broker is too inaccessible, try to establish some system of communication because it is mutually beneficial to both the agent and the company. Even a simple, quick email correspondence with a broker can be of tremendous help to the agent, and can avoid a lot of trouble down the road for the company.

Whose advice should an agent **not** rely on? Despite being very valuable in other areas, the advice of other agents in the office must not be relied upon when it comes to risk management. It is natural that agents look to each other for advice, especially if friendships develop, or if there are experienced agents in the office whom other agents greatly respect. However, an agent must look directly to a trainer or the responsible broker in order to get advice when it comes to risk assessment and management. No matter how experienced fellow agents are, they cannot speak on behalf of the company when it comes to making decisions about risk. Further, another agent, trying to be helpful, may want to relay the advice given to him or her by the broker. An agent should not rely on this "secondhand" advice, either. First of all, the advice given by the broker to one agent is not always applicable to a different agent. Each agent's circumstance is different and you cannot assume that the same advice will apply. Second, because the information is secondhand, an agent should seek out the original source of the information so as to avoid misunderstandings or mistranslations. Lastly, in case something goes wrong, it is generally good policy for a trainer or a responsible broker to be ones dispensing advice, not fellow agents.

Of course, agents do not need to preclude asking advice from fellow agents all together. Advice from other agents is an extremely valuable source of information in many different areas. Advice from other agents regarding decisions involving risk can still be helpful. It is just important that an agent not depend entirely upon the advice of other agents for these decisions. Other agents' advice must be confirmed by a company trainer or a responsible broker, and, of course, the advice of the trainer or responsible broker takes precedent over the advice of other agents.

☞ *Side Note: "Independent Contractor" versus "Employee"*

The typical employment situation in a real estate office is that each real estate agent is supposed to be acting as an "independent contractor." Whether a person is considered an *independent contractor* or an *employee* has many legal ramifications. There are a number of tax and employee benefit issues that depend on the distinction. (An obvious example is that an employer does not withhold taxes from the pay check of an independent contractor.) Further, significantly, an employer does not usually have vicarious liability for the actions of an independent contractor. The problem is, however, that a person's status as an independent contractor is not always secure.

The difference between an *employee* and an *independent contractor* in the eyes of the law in general depends upon how much control the employer has over the job done by the person hired. If the employer has a tremendous amount of control over someone hired, that person will be considered an employee. This makes sense: if someone is hired by a company, typically the company will have a lot of rules that the employee must follow, such as when to arrive and leave, what duties to do, what kind of clothes are appropriate to wear, etc.

On the other hand, if someone hires a person to do a specific task and does not have much control over how it is done, then the person hired is typically considered an independent contractor. An example is if you hire someone to install a window in your house. Sure, you may decide on the placement of the window, but after that you typically just stand back and let the installer do the job. The installer is not your employee; you just pay a fee for a particular task to be completed.

The problem is that there is not a clear dividing line between what is an employee and what is an independent contractor. For example, real estate agents have a lot of independence to achieve their task of completing real estate transactions, and yet the real estate companies for whom agents work typically do retain some control over them. Judges and courts look at a number of factors. Depending on the state, the factors a court looks at can be 20 or more. As mentioned previously, a prominent theme among these factors is the level of control the employer has over the person hired. For example, if a person is expected to be in the office between certain set hours, that is a factor towards designating that person as an "employee" because the employer is exerting control. This, however, would be only one of many factors considered.

What is not a factor, however, is the label given to you by your company. In other words, just because you are called an "independent contractor" by your company, or just because you sign a contract with the words "independent contractor" on top, does not mean that a court of law will agree with the label. To confuse things further, one governmental agency might consider you an employee, while another might treat you as an independent contractor. The bottom line is that you and your company cannot be sure whether your company will be held to be vicariously liable for your actions. It is always best to be safe and to always consider the possibility of vicarious liability.

2. Office Management: How should Employers Manage Employees?

In the previous section, we discussed the importance of clear lines of communication between a broker and agents. If an agent is expected to look for the proper advice in times of making decisions involving risk, the office management should be expected to make the proper sources of advice available to agents. The relationship between employer and employee is two-sided. In an ideal world, both sides put in enough resources and effort in order for the employment relationship to be healthy and prosperous. Of course, this is often not the case, and one side must prod the other to keep up their side of the relationship. It is expected that employers keep after their employees if the employees fail to follow company procedures and advice. However, it should be recognized that it is just as valid for employees to keep after their employers if the employers are failing to provide sufficient guidance. Not only is the employer-employee relationship two-sided, but it is a two-way street.

It should be recognized by employer and employee alike that the dispensing and acceptance of proper advice and guidance is mutually beneficial to both sides. As such, it does not matter who initiates the process of fixing a faulty channel of communication or who presses the issue of a lack of guidance. Because employers are responsible for the actions of their employees, employer must be able to keep tabs on what is going on in the office so as to be able to cut off any potentially damaging behavior or actions before it becomes problematic. A poignant example of problematic behavior that needs to be dealt with quickly and decisively is sexual harassment, which unfortunately still plagues the workplace. Communication is equally vital to employees, because guidance as to what is expected in the workplace is always needed.

The bottom line is that there should be in place a system for advice and guidance, and a proper set of resources should be available, such as standard forms and procedures. Getting these established in the office is everyone's responsibility, regardless of power dynamics and regardless of who writes the checks for whom. A discussion of the proper resources that should be available to agents in an office, such as standard forms and procedures, is discussed in further detail in Lesson 4.

3. Personal Assistants and Vicarious Liability

It should be noted that vicarious liability applies to *any* employer-employee relationship. Not only is a company responsible for the actions of their employees, but if you have an employee yourself, such as an assistant, you are legally responsible for the actions of your employee. It is very common for busy agents to hire personal assistants, often people working towards getting a real estate license, or newly-licensed agents.

If you have an assistant, you should keep in mind that everything discussed in this section also applies to the relationship between you and your assistant. You should oversee all the activities of your assistant and should be at all times make sure that the assistant follow not only your rules and procedures, but also those of the office. An assistant should not be given the responsibility of making decisions that will bear risk upon you or your company. An assistant must seek the proper guidance from you, and you, in turn must have the proper guidance from the office. As a last note, if your assistant is unlicensed, it is imperative that you know which activities require a real estate license and which do not. Of course, you must do any activity in which a license is required, and you cannot leave it to an unlicensed assistant.

C. HOW CAREFUL THE LAW EXPECTS YOU TO BE: "STANDARD OF CARE"

You are a professional. Your clients and your company expect you to act like a professional when representing clients. It should be no surprise that the law also expects you to have acted like a professional when on the job.

A lawsuit is essentially a determination of who was at fault, and who owes whom money because of being at fault. The legal word "*negligent*" describes the person who was at fault. A person is negligent if he or she did something wrong, or failed to do what he or she was supposed to do. The legal term "*standard of care*" describes what a person is supposed to do in a certain situation. The law expects different things depending on the person and the situation. For example, the law does not expect a child to be very careful. In other words, a child has a *low standard of care*.

On the other hand, a real estate agent has specialized training and should be an expert on various aspects of real estate. The law recognizes this, and thus agents often have a *high* standard of care. In other words, agents often have high expectations of them in the eyes of the law. When agents fail these expectations, they are considered to have "breached" their standard of care and are thus negligent.

It is not important that an agent know this legal terminology. However, it is important, that agent realize that the law has high expectations of him or her as a real estate professional. This means that an agent must be extra careful in everything he or she does professionally. Even if an agent is not very detailed or careful in his or her personal life, as soon as the agent steps into a professional role, his or her level of care should rise appropriately.

What are some examples of an agent raising his or her level of care? One example is being careful when driving clients around looking at properties. Agents who have clients in their car should drive especially cautiously and should refrain from being distracted from their driving, such as by using a mobile phone. Further, agents should be sure that their car is in good working order and that the clients are using their safety belts. The law mandates extra precaution, and an agent should expect it out of himself or herself as a professional.

Another example is a listing agent using a very high level of care when showing a listed property to prospective buyers. Potential buyers who are invited onto a property for business reasons are supposed to be shown the utmost care in the eyes of the law. This means that listing agents must make sure there are no hazards or dangerous conditions that might injure a prospective buyer touring the property. Loose railings, trip hazards and the like should ideally be fixed prior to showing the property. In cases where it is impractical or impossible to fix a hazard, for example a low hanging beam in the basement, agents should clearly mark the hazard and give people as much warning as possible. Also, pets should always be properly restrained. Listing agents should also check with the property owners to make sure the owners' insurance policies will cover injuries sustained during a showing.

The number of examples of how an agent should show the amount of care expected of him or her as a profession is nearly limitless. As a summary, an agent must always bear in mind that he or she is a licensed specialist in an important and often complicated field. An agent must remember that a holding a real estate license represents a lot of hard work in attaining knowledge and training, and thus an agent should exhibit a level of professionalism accordingly. The public has expectations of quality and trust from holders of real estate licenses. Agents owe it to the public to uphold those expectations while conducting real estate activities.

Upholding a higher standard of care means that you, as an agent, should take the extra time to do a job correctly. Of course, extra care means that you cannot do as many transactions as you could if you instead chose to cut corners. However, holding yourself to a high standard of care is a recipe to maintain long term success, especially in today's environment where clients seem to continually demand greater and greater value from an agent's services. In the long run, clients will appreciate you upholding a high standard of care.

D. DISCLOSURE AND THE DOCTRINE OF "BUYER BEWARE"

The last principal we will discuss in this section is *disclosure*. Disclosure, in general, is making sure that potential buyers have all the information they should have about a property. You can also call any one item of information that is being made available a "disclosure." Agents deal with disclosures every day. Listing agents put together filled out forms, reports and other pieces of information about their listed property into "disclosure packages" to hand out to potential buyers.

1. "Buyer Beware"

Why do listing agents put such effort into creating disclosure packages? The idea behind disclosure is that buyers should not be able to later complain (or bring a lawsuit) about anything they were warned about. Perhaps you've heard of the phrase "Buyer beware." This is an expression of an ancient legal doctrine that states it is the responsibility of a buyer to thoroughly check out the item being purchased before completing the transaction. According to that ancient doctrine, once the transaction is over, it is too late to complain.

Over the course of history, people realized that this doctrine was sometimes unfair to buyers. There are many situations where the buyer is not at fault and yet would not be able to complain. For example, sellers could easily lie about items they sell, or they could intentionally hide flaws. Imagine that you buy a vase from someone. The seller told you that he bought the vase new only a week ago and that he took very good care of it. When you get home, you put flowers in it and fill it with water. The vase then starts to leak badly from very tiny cracks—obviously the vase had been broken but carefully glued back together.

***Exception #1: Misrepresentation*.**

In the above situation, you should have the right to complain to the seller. Modern law does give such a right. A basic exception to the "buyer beware" doctrine is a situation in which the seller "misrepresents" a fact about the item being sold. *Misrepresentation* means simply to represent something falsely. There are many ways to misrepresent. The most obvious way is to lie about it; in the vase example, the statement that the seller bought the vase only a week ago and "took very good care of it" was likely a lie considering its leaky condition. Another way to misrepresent is to intentionally make something appear better than it actually is. Carefully gluing together the vase and passing it off as in new condition is misrepresentation.

Lastly, a less obvious way to misrepresent is to *not* say something or to *not say enough*. Imagine instead that the seller did not state anything at all about the vase. However, when you asked him, "Is this vase water-tight?" he simply rolled his eyes at you. Now, he didn't lie to you with actual words, but anyone who witnessed your question would interpret his response as "of course the vase is water-tight." In this case, under the circumstances, his lack of a response is misrepresentation. In the same manner, a listing agent does not actually have to say anything to commit a misrepresentation. If a listing agent remains silent in a situation in which such silence would reasonably be construed as "nothing is wrong," the listing agent is misrepresenting by failing to speak up and disclose whatever needs to be disclosed.

☞ *Side Note: Examples of Misrepresentation and Statements for Which There is No Basis of Fact*

Courtrooms all across America are filled with examples of misrepresentation in real estate transactions. One example of misrepresentation was discussed in Lesson 3 regarding the duty of good faith: misrepresentation of a value of a property. Agents, anxious to land a listing, might be tempted to skew data in order to make it appear to potential sellers that their house will sell for more than is truly expected by the agent. Of course, this type of misrepresentation—and all misrepresentation in general—should be avoided at all costs.

Further, agents must keep in mind that clients take their advice very seriously. Statements made by agents must have some basis. It is not enough for an agent to avoid intentionally lying; an agent must also take care to make sure his or her statements can be verified. An agent can misrepresent something about a property without intending to do so. This situation usually arises when an agent makes an assertion about a topic in which he or she does not have the proper expertise. For example, an agent should not comment on the good quality of a foundation of a house unless that agent is also a contractor or has some specific, formal training on foundations. Remember, a real estate agent is a trained specialist in real estate, and is expected to have a high level of professionalism, but is not expected to know everything there is to know about every real estate related topic. In this situation, an agent would exhibit a high standard of care by knowing to *not comment* on the house's foundation, and instead defer to the opinion of experts. We discuss knowing the limits of your advice in the next lesson.

Exception #2: Mandatory disclosures.

Buying a house is a big deal for most people. In fact, real estate transactions are usually the single largest financial transactions that people will complete in their lives. State and federal governments have recognized this fact and have created the second exception to the "Buyer beware" doctrine: mandatory disclosures. The basic idea behind mandatory disclosures is that the government thinks real estate transactions are important enough to make sure that sellers provide buyers will at least some minimum amount of information about the property before the transaction can be completed. The government is essentially protecting buyers by telling them, "If sellers don't provide you with these important pieces of information, then you can sue them." So, in addition to being able to sue a seller on the basis of misrepresentation, buyers have an additional route to suing sellers.

Sellers of real estate, and their agents, have to disclose certain minimum facts about the condition of the property. There are disclosures required by federal law, which pertain to all real estate transactions in America. Further, there are other types of disclosure that vary state by state. Many of these state disclosures are very specific and detailed, and an agent should be well trained the disclosures required in his or her home state. Although a thorough discussion of all the disclosure laws is beyond the scope of this course, there are two broad concepts related to mandatory disclosure that are important to discuss here: "Material" facts and sensitive facts.

2. Mandatory Disclosure Concepts: "Material Facts" and "Special Facts"

"Material facts" are those facts that must be disclosed about a property. The word "material" means basically "important." More specifically, a material fact is any fact that would influence the decision made by an average person. Note that this definition says *influence* the decision, not *change* the decision. What is important enough to influence a decision? Ultimately, of course, that decision would have to be made by a judge or jury. However, if you want to avoid the inside of a courtroom, you will have to rely on your common sense to make that determination on your own. It is all right to use your common sense judgment on this issue: Juries are made up of ordinary people like you and me, and people on juries largely rely on their common sense. However, you will want to build in an extra layer of safety when making your determination of what is material. People's ideas and judgments are varied, and an extra layer of safety will help to protect you against this natural variation.

The best way to build in an extra layer of safety is to be conservative when deciding whether a fact is material. If you are on the fence about whether someone might think a certain fact is important, include it in your disclosure. If you can conceive at all that someone might consider a fact as material, include it in your disclosure. Remember that people's ideas of what is important can be drastically different from yours. Further, your goal is to avoid any kind of dispute to begin with. Remember, even if you ultimately win in court, you will lose out in many other respects: you will have lost time, your health may suffer due to stress, and your relationship with clients may suffer regardless of the actual outcome of a lawsuit. In general, you should whenever possible try to be extra inclusive when deciding if something should be disclosed to avoid these disputes.

There is one major exception to the above advice about being extra inclusive: certain facts about properties will require special care and delicacy. These "special facts" must be disclosed or not disclosed according to the laws that apply to them. (There is no legal category called "special facts"; it is just a name I am using in this course to describe particular types of fact that the law handles in a specific manner.) When encountering special facts, you must be knowledgeable on how to handle them according to the law. This is not always a straightforward proposition. These types of facts usually involve sensitive issues and tend to cause controversy, which is why laws are made specifically for them. The proper disclosure of special facts often is a balance of a buyer's right to know the truth and another important right, such as a person's right to privacy.

☞ *Side Note: Privacy and HIV/AIDS*

The world is an ever interconnected place with the proliferation of the Internet and electronic communications. This interconnectedness has made people's lives vastly more convenient, but it has also made the issue of *privacy* a growing concern. Information is spread more easily and conveniently than ever before, but some information, like people's medical information or financial data, should not be disseminated with the same ease as other information. State and federal laws have tried to tackle this concern by restricting how sensitive information is handled. The result is that there are now numerous laws covering how to care for all sorts of types of sensitive information, electronically stored or otherwise.

These laws may affect agents in a variety of situations. For example, agents commonly will want to throw away out old files pertaining to transactions long past. These files undoubted contain some sort of personal information on people, such as names, addresses, work history, financial data, or social securities numbers. For example, in some states, agents must destroy these records in a manner such that the personal information is unreadable or "undecipherable through any means."[xi] As a reminder, your state licensing agency may require you to retain records for a set period of time (for example, 3 years in California). Further, it is prudent to retain records for as long as it is still possible to be sued on the transaction, which may be as long as ten years, depending on the type of claim and the jurisdiction. Best yet, you can condense the records to an electronic format and keep it almost forever with the most minimal of space requirements.

HIV/AIDS. Another example is the special circumstance in which an agent's client has HIV/AIDS. An agent in this situation may be faced with the decision of whether to disclose this special fact to potential buyers. Under federal law, it is almost never proper for a listing agent to disclose that a client has HIV/AIDS. The best and safest course of action is to not ever disclose such a fact. If directly asked about HIV/AIDS by potential buyers, the National Association of Realtors recommends this answer:

It is the policy of our firm not to answer inquiries of this nature one way or the other since the firm feels that this information is not material to the transaction. In addition, any type of response by me or other agents of our firm may be a violation of the federal fair housing laws. If you believe that this information is relevant to your decision to buy the property, you must pursue this investigation on your own.

It is imperative to recognize whenever you are in the control of disseminating or handling a person's sensitive data that privacy laws may also apply to your actions. Make sure you are cognizant of the laws in these situations, especially if you live in a state that assigns a lot of weight to its citizen's right to privacy.

Fair Housing and HIV/AIDS. Since 1988, federal law has made it illegal to discriminate against those with HIV/AIDS in the sale or rental of housing. The Fair Housing Act makes it illegal to discriminate on the basis of race, color, religion, national origin, sex, familial status and disability. The Department of Housing and Urban Development has classified those afflicted with HIV/AIDS as disabled for the purposes of this anti-discrimination. Now, just like any other protected group, people cannot discriminate against those with HIV/AIDS by:

- Refusing to sell or rent after a bona fide offer has been made;
- Discriminating on the terms, conditions or privileges of a sale or lease, or in providing services or facilities;
- Indicating any preference in advertising or statements, oral or written;
- Making false representations about the availability of a dwelling unit;
- Attempting to persuade owners to sell or rent a dwelling by making representations about the entry into the neighborhood of certain classes of people.

Special facts vary from state to state, county by county, sometimes even city by city. However, one prevalent subject for a special fact is HIV or AIDS. The confusion about whether someone having HIV or AIDS is a material fact has caused many states to write specific laws on what is appropriate to disclose. For example, some state law specifically states that a seller or agent cannot be sued for failing to disclose that an occupant of property was "afflicted with, or died from" HIV/AIDS.[xii] This law seems to clear—you don't have to disclose about HIV/AIDS—and yet it is not always so simple. What if a person with AIDS moved back into his parents' house just before his death, so his parents could care for him on his final days. Was he an "occupant"? What if a person officially dies from pneumonia, but probably wouldn't have died except that AIDS made that person so weak? Is this a death "from" AIDS? You cannot make assumptions, because judgments in lawsuits can turn based on small nuances.

There are several things to keep in mind when dealing with special facts. First, be sure to be able to immediately identify a special fact. Your office should have a list of situations which require special treatment for disclosure, with HIV/AIDS at the top of the list. Get to know this list very well, and, if there isn't a list, research and prepare a list yourself. It is that important. Second, be sure to be very well informed on *what to do* when encountering a special fact <u>before</u> you are faced with having to take action. You should *immediately* inform your responsible broker whenever you encounter a special fact, so that you can formulate a proper strategy jointly. Do not ever take action with regard to a special fact without prior preparation, and often the first step in preparing is to seek guidance from office resources. If you do find yourself in a situation where you don't know how to handle a particular question, do not answer it, but instead make sure you have a polite response ready, such as "I will get back to you on that shortly." (Of course, you should be sure to follow up as soon as possible with the appropriate response.) Do not say, "I don't know" if you actually do know the answer.

A third thing to keep in mind is that just because it is *legal to not disclosure* a fact does not mean that it is *legal to hide* that fact. In other words, the standard rules against misrepresentation still apply. For example, if a potential buyer asks a listing agent or a seller *directly* whether an occupant of the listed property has AIDS, under no circumstances can the seller or listing agent lie or otherwise give a deceitful answer. The law protects a refusal to answer that question, but it will never protect a misrepresentation.

A final thing to keep in mind is that laws might allow listing agents to not disclose certain special facts, but this does not mean that a listing agent *should not* disclose them. In other words, listing agents are allowed to disclose these special facts if their clients so choose. <u>A strong word of warning here: this does not pertain to HIV/AIDS disclosure</u>. HIV/AIDS is a type of special fact in its own category. It is covered by numerous state and federal laws, and any disclosure in this area must be handled with the utmost care (see "Side Note: Privacy"). However, other less controversial special facts, such as a death on the property, may be protected from having to be disclosed, but may nonetheless be disclosed regardless.

An initial tactic for listing agents dealing with special facts might be to discuss the possibility of disclosure with their clients. As always when discussing options with clients, it is imperative that you provide a fair and balanced view of whether to disclose a special fact. Especially when dealing with these facts that are generally sensitive in nature, clients should never feel pushed towards any decision, and they should be given enough time to reflect before providing their final decision. In many cases, clients may determine that the potential benefits of not disclosing something is far outweighed by the potential trouble the non-disclosure may lead to. Perhaps there will be a smaller pool of potential buyers if some people are scared off by some special fact, but the potential buyers that remain will be *the right type of buyers*; in other words, they will be informed buyers who will be less likely to sue or otherwise complain down the road. The law protects agents from non-disclosure for certain special facts, but that will not diminish the shock felt by the buyers when they hear about the special fact at a neighborhood barbecue. Shock is never a good element in a transaction, and this can lead to a loss of reputation for the agent, or even a lawsuit, even if a baseless one.

Of course you also want to careful to avoid any shock felt by the sellers. Once a decision is made by the sellers to disclose a special fact, you should make sure it is crystal clear to the sellers that you are, indeed, going to disclose that special fact per their decision. Do not rely on the sellers to remember that they agreed to the disclosure in some past conversation with you. Document and confirm their decision in writing (a formal, signed document is best, but a simple email might also be enough). Further, make sure that the decision to disclose is the group decision of all sellers and of all the people who would be affected by the disclosure. This type of carefulness is appropriate in every transaction (more about record keeping care in Lesson 4), but it is especially warranted in transactions with special facts.

3. Putting Disclosure into Context

You should now understand the two basic exceptions to the “Buyer beware” doctrine: misrepresentation and mandatory disclosures. You should also understand there are a few issues regarding mandatory disclosures, namely what is a “material fact” and how do you handle “special facts.”

Looking at the big picture, if you’re a listing agent, the ultimate goal of disclosure is to make sure that none of the exceptions get in the way of having “Buyer beware” apply to your real estate transaction. You disclose in order to avoid misrepresenting, either intentionally or unintentionally, the property in any way. Further, you make sure you disclose everything the law requires, including anything that might be considered a material fact, and sometimes you endeavor to even disclose special facts if your client so agrees. After all the appropriate disclosures have been given, the “Buyer beware” doctrine can happily apply once again. On the other hand, if you’re a buyers’ agent, the ultimate goal of disclosure is to make sure that your clients have every proper disclosure available so that they can make the best educated decisions with regard to their important purchase. An agent on the buyers’ side must make sure that the buyers read and understand all the proper disclosures, because generally once they have received all the proper disclosures, their ability to complain, and successfully sue, is cut off.

Disclosure is such an important and broad topic, it touches upon many of the other important principals discussed in this lesson. Another way of putting the concept of disclosure into perspective is to consider it vis-à-vis with these other principals.

Disclosure and Agency: According to the principal of agency, a listing agent is acting and speaking on behalf of the sellers. As such, the agent cannot disclose anything the sellers do not want disclosed, even if the disclosure is required by law. If there is a conflict between what the agent feels must be disclosed and what the sellers are willing to disclose, the agent must take action. First, the agent should try to convince the sellers to change their minds and disclose the information. If the sellers continue to refuse, the agent must then cancel the listing. If the agent does not cancel the listing, at some point during the transaction he must choose to either break the law by failing to properly make a disclosure, or act beyond the scope of his agency authority by making a disclosure that wasn't approved by the sellers. Neither choice is acceptable: whatever path the agent chooses can lead to a loss of reputation, licensing trouble and even lawsuits.

Disclosure and Fiduciary Duties: There can an underlying conflict between *selling* and *promoting*, on the one hand, and disclosing fully on the other. Listing agents have the obligation to give sellers their very best effort in promoting and selling their listings. This naturally makes listing agents want to cast any information about their listings in the best light possible. They may not want to discourage potential buyers by providing negative information about their listings, but yet they have a legal and ethical responsibility to disclose all material information, positive or negative. How can these opposites be reconciled?

First, the discussion above regarding the disclosure of special facts, even when it is not required, is equally applicable here. Negative information should not be distorted or masked. Potential buyers may be scared away by the negative information, but the potential buyers that do remain will tend to be more suitable buyers: they are informed and are willing to pursue the transaction anyway. They will not be shocked later after the transaction closes.

Second, full disclosure is mandated by an agent's fiduciary duties. Specifically, the duty of good faith requires that an agent act in an honest manner at all times during the transaction, even when the honest behavior benefits people other than clients. In other words, all disclosures must be truly *honest*, not just "good enough" to avoid misrepresentation. Fortunately, full disclosure is not incompatible with being an effective salesperson. For example, loud noise due to a property being in an airport flight path is likely a material fact. If an agent were to tell potential buyers, "It's not really that bad," this would not only be contrary to his duty of good faith, but would probably be very ineffective at soothing the concerns of the potential buyers. Rather than stating a subjective feeling that may be misleading, an agent could instead simply provide the airport noise data (if available) and suggest to potential buyers that they ask the opinions of neighbors about the noise. There is a good chance that many of the neighbors might be used to the noise, and thus could honestly tell potential buyers that it does not affect them too much. The disclosure given by the agent in this manner would be professional, compliant with the duty of good faith, and, most of all, effective because the opinion of an unbiased neighbor would likely carry much more weight than the seemingly biased agent who stands to make money in the transaction.

Disclosure and Standard of Care: Agents are typically required to conduct inspections of properties being sold, and must disclose their findings in writing to both parties. The results of these inspections are important disclosures which must reflect a level of real estate knowledge and sophistication expected of real estate agents. In other words, the results of the inspections will be held to a higher standard of care.

Agents should utilize a thorough checklist and should take the time to carefully inspect each item on the checklist. If the results of an inspection are ever at issue in a lawsuit, the court will expect the inspections to have been done in a more competent and diligent manner than if an ordinary person was doing it. Anything less can be considered negligence.

In the same manner, agents are expected to have a better understanding of what facts need to be disclosed than their clients. One of the important functions of listing agents is to research and investigate the existence of material facts on behalf of their clients. The average homeowners do not have a clear idea of what material facts are, and they cannot be expected to come up with a thorough list of material facts on their own. It is up to their agent to find out and ultimately disclose all material facts regarding a property. This can only be done by thoroughly interviewing occupants and by competently researching and investigating any particularities with regard to the property. Clients rely on the expertise and experience of their agents. If a material fact is forgotten or never uncovered and is thus not disclosed, clients will bear the brunt of the conflict or lawsuit along with their agents.

The proper disclosure of material facts requires diligence and hard work by a competent and knowledgeable agent. It is not merely a process of merely passing along information provided by the homeowners. Material facts must be actively sought. If any information is obtained by expert third parties, such information should be thoroughly studied by the agent. The agent must be able to synthesize information from all sources, and should be center of information flow between homeowners and outside experts providing written reports on specific items. The agent will then be in the best position to analyze what material facts must be disclosed.

Lesson 3 - Quiz

1. Using and understanding agency contracts are important because:
    - A. it is important that everyone understands the limits of an agent's authority
    - B. there is potential for misunderstanding whether other agents can get involved
    - C. there is potential for misunderstanding when an agent is entitled to compensation
    - D. all of the above

2. All of the following are ways to not overstep authority EXCEPT:
    - A. always keeping a copy of your agency agreement with you for reference
    - B. always understanding the content of your agency agreement
    - C. always taking written notes of instructions from clients
    - D. always keeping in mind that your words and actions are attributable to your client

3. Fiduciary duties are obligations that:
    - A. require you to represent only one client in each transaction
    - B. require you to be loyal, except in cases of dual agency
    - C. are automatically assigned to you whenever you act as an agent
    - D. have changed with the advent of the Internet and electronic communications

4. All of the following are true about "kickbacks" EXCEPT:
    - A. They can be illegal even if the practice is widespread as "common practice"
    - B. They are usually illegal under the federal law RESPA
    - C. They can violate an agent's fiduciary duties
    - D. They can be the subject of state law and federal law, but not ethical guidelines

5. An agent should NOT rely on:
    - A. the advice of other agents, even experienced ones
    - B. the answers given by a responsible broker
    - C. the person responsible for agent training
    - D. all of the above

6. If you hire a personal assistant:
    - A you are legally responsible for his or her actions
    - B the assistant should not do actions requiring a license, unless also licensed
    - C the assistant should must always seek proper guidance from you
    - D all of the above

7. The law has higher expectations for agents because:
    - A the transactions agents are involved in usually involves a lot of money
    - B agents are professionals and have specialized training in real estate
    - C agents sign contracts with the government accepting the higher expectations
    - D agents take an oath when obtaining a license

8. An agent when making statements must:
   A avoid intentionally lying
   B take care that the statements can be verified
   C avoid giving opinions entirely
   D both (a) and (b) are correct

9. Clients of agents might generally want to err on the side of too much disclosure rather than too little (except in special cases) because:
   A Too much disclosure can overwhelm buyers
   B You can never be sure whether a fact is “material,” and it’s best to avoid shock in a transaction
   C The minimum mandatory disclosures imposed by law are never enough
   D It is unimportant whether there is too much information disclosed, only whether there is not enough

10. Disclosure overlaps with other important concepts such as:
   A agency, because agent should disclose facts required by law even if clients refuse
   B fiduciary duties, because agents must act in an honest manner at all times, even when it is not directly beneficial to clients
   C standard of care, because the law expects agents to discover all material facts, even if hidden
   D all of the above

Answers: 1-D, 2-A, 3-C, 4-D, 5-A, 6-D, 7-B, 8-D, 9-B, 10-B

LESSON 4: SPECIFIC PRACTICES AND PROCEDURES TO HELP AVOID RISKS

In Lesson 1, we discussed what kind of losses an agent faces professionally. You may suffer losses from a multitude of sources, such as lawsuits, higher insurance premiums, injury to your reputation, licensing trouble, criminal charges and, finally, physical injury. These losses, when factored with the likelihood of them occurring, are the “risks” you face as a real estate agent. *Risk Management* is this process of determining your risks and then matching an appropriate strategy to each risk. The ultimate goal of Risk Management is decrease your overall risk level, starting with your most important risks, in the most efficient manner possible.

In Lesson 2, we discussed how to take the information gained in your Risk Management analysis and put it into tangible action. First, you must create a written Risk Management Plan in which you assign one of the following strategies to each risk: *avoid* the risk, *transfer* the risk, *reduce the impact* of the risk, or *accept* the risk. Second, you implement your Plan, utilizing your available resources for the most efficient reduction in risk possible. Lastly, you review your Risk Management Plan regularly, updating and improving as needed.

In Lesson 3, we discussed several basic concepts, an understanding of which should help you reduce your risk level generally. Of course, of the four possible strategies for risk reduction, *to avoid* the risk is the most ideal. Although it is impossible to avoid all risks, having a greater understanding of the basic ideas in Lesson 3 will give you a great head start to lowering your overall risk profile.

In this final lesson, we will build upon the general concepts of Lesson 3 and discuss specific strategies and actions. Strategies discussed in this Lesson 4 should aid in the creation of your Risk Management Plan. However, because resources of time, money and energy are always limited, you likely will not be able to implement the strategies for every topic discussed in this Lesson. Some strategies in this lesson are quite easy to implement; they are pieces of advice that only need to be read and heeded. Others, such as the development of standard forms and procedures, will likely be an ongoing process for a while. It is important that you create and implement your Risk Management Plan in a manner that will most efficiently decrease your overall risk levels, focusing especially on your higher prioritized risks.

A. AVOID GIVING NEGLIGENT ADVICE

In Lesson 3, we discussed how agents, with specialized knowledge in the field of real estate, are held to a *higher standard of care*. This means that the law expects from an agent a higher than average level of carefulness and competence. Everything you do professionally is expected to be done according to a higher standard. If a court finds that you failed to meet these expectations, you will be considered to have acted with "negligence." So, if you give advice that is not up to the standards expected of a real estate agent, you are giving "negligent advice." Every group has its bad apples, and of course there are bad agents who simply give bad advice.

Fortunately, most agents meet the professional standards expected of them. *However, even a careful and well-informed agent can still commit negligence*. How is this possible? By attempting to do too much. The issue in these cases is not that the agent is less knowledgeable or careful than other agents, but rather that the agent overstretched his level of expertise.

Know Your Limits.

As a trusted real estate agent, your customers look to you for a variety of advice. Clients may ask you questions on topics ranging from schools, room designs and roofs, to mortgages, taxes and contracts. Some questions are easily within your field of expertise and you can comfortably answer them. Other questions, however, are more appropriate for other experts, such as an accountant, building contractor or attorney. These types of questions require specialized knowledge that is beyond what is expected of real estate agents. Any opinion you give a client with regard to these questions may be considered *negligent advice*. Even good agents can give negligent advice when they answer questions and give opinions on inappropriate topics.

Knowing where the limits of your advice should end and where other experts' advice should begin is a very valuable skill that can keep you out of trouble. Even if you know the answer to a particular question, it is not always a question of knowledge but rather whether the question is appropriate for you, as a real estate agent, to answer. There are often questions that both you and another expert *could* answer, but it often best to leave it to the person with the specialized expertise in the particular field of the question. For example, if you find some damaged drywall during an inspection of a property, you should of course disclose this condition in your inspection report. However, if your client asks you how much you think the repair would cost, or how extensive the damage might be, you should not give an opinion, even if you have a lot of knowledge in this area. You should let a licensed contractor or other construction expert to answer these types of questions. You owe it to your clients to provide them with the best advice possible. Often the best advice will be from a source other than you.

It is impossible to have a complete library of knowledge in the field of real estate, and you should never feel inadequate if an issue arises for which you need outside help. Whenever you identify a situation in which another expert's advice would be more suitable (and this may happen regularly) you should have a standard answer stating that it would be best to have an expert in the area give the advice. Most clients should not take this as an indication of inadequacy, but rather of professionalism. Your job at that point is to make sure that the lines of communication between your client and the expert are clear. You should also follow up to make sure that your client receives the expert's advice in a timely manner.

B. DEVELOP AND USE STANDARD FORMS, PROCEDURES AND TERMS

In the previous lessons we discussed a number of situations in which it would be a good idea to have standard forms, documents that are ready-made for a specific purpose. One example is the situation in which agents must conduct an inspection of a property. A thorough checklist of items to inspect and conditions to look for is instrumental to doing a good job. In this situation, the standard form is the inspection checklist. Another example is the situation in which a "special fact" is present, and an agent must be able to immediately identify it. Responsible brokers should maintaining an accurate list of possible special facts, and ensure that agents learn this list thoroughly. The standard form in this situation is the list of special facts. In both situations, the standard forms must be constantly updated and improved, and they must also be customized to fit the needs of a particular office or region.

Standard forms are a useful tool to aid agents in maintaining a high level of quality across every transaction. However, standard forms are only one of several tools that agents may utilize. *Standard procedures* are another tool. "Standard procedures" describe a practice of having consistent and predictable approaches to handling particular tasks. They are often intertwined with standard forms, which is why they are often mentioned together as *standard forms and procedures*. For example, the use of a standard inspection checklist discussed above is actually another way of describing a standard procedure. The consistent and predictable approach is for the agent to follow the checklist item by item while conducting the inspection.

Another tool to aid agents in maintaining a high level of quality is having *standard terms* available. Standard terms are pieces of pre-made language, which are ready to be inserted into contracts and documents for certain situations. Agents regularly encounter situations in which additional language is needed to be written into a contract. Because of this, a responsible broker should work with an attorney in order to create "pre-approved" terms for agents to use in their contracts.

1. *Developing and Using Standard Forms and Procedures*.

Developing standard forms and procedures is not a one-step process. Agents typically will use standard contracts created by a membership organization, such as the National Association of Realtors. The membership organization will typically release regular updates to these contracts to incorporate improvements and to incorporate new information, such as law changes.

Similarly, a brokerage company should regularly update the standard forms and procedures their agents use. "Standard" does not mean inflexible and unchanging. The forms and procedures are "standard" only in that all agents are using the same forms and procedures at any given time. However, the forms and procedures should change over time to incorporate improvements and new information. If you are using an old form photocopied from a photocopy from a photocopy, you may want to check if your office is using a different version now. A standard form or procedure should always reflect the best information or the best way to do a transaction known at the time.

Changes are made incrementally, one piece at a time, as ways for improvement are discovered, and lessons are learned as to what works well and what does not.

At a minimum, every real estate company should develop at least the following standard forms and procedures:

- A standard set of forms that include the main purchase agreement and all possible amendments and other attendant forms. Often a basic set of standard forms are available from a real estate membership organization. However, the set must be tailored to fit the needs of each office. For example, certain disclosures, especially ones are local in nature, may not be included and may have to be developed or acquired separately.
- A standard procedure for a broker to review an agent's proposed offer or contract, ideally prior to the contract becoming finalized. Experienced agents might be allowed to consummate routine transactions without prior review, but the contract should nonetheless be reviewed as quickly as possible after signing. Despite an agent's comfort level with legal contracts, contracts are not always so straightforward, especially when there are contingencies or when there are multiple offers and counter offers made.
- A standard procedure to ensure that all the terms of a contract and all steps of a transaction are carried out in an effective and timely manner. This usually requires the use of a standard checklist. A standard checklist should include all documents and actions needed for each transaction, with details such as deadline dates and contact information for each person or company associated with the transaction. A final review of the checklist should be taken by a responsible broker prior to the close of each transaction, done early enough so that there is sufficient time to fix any last minute deficiencies.
- A standard procedure that allows an agent to alert a responsible broker of any unusual situation that arises at any time during a transaction. Any situation that deviates from a typical transaction should be reported as soon as the agent becomes aware of it. Examples of unusual situations that should be reported include (a) any situation that might affect the desirability of a property (for example, a recent death on the property); (b) any atypical financing or economic situation (for example, if there is going to be seller-financing involved); (c) if there are any unusual economic relationships involved in the transaction (for example, if the agent's brother is going to be the buyer, or if the agent is going to represent both sides to the transaction); and (d) if there is unusual damage or contamination of the property (for example, there is mold infestation or there were toxic chemicals stored on the property). It would be a poor idea for any agent, no matter how experienced, to try and handle such situations alone, without input from a broker. It is nearly impossible to anticipate every unusual situation that might arise. When reporting unusual situations to a broker, agents should take the approach that over-reporting is better than under-reporting. Responsible brokers should understand this as well and should encourage over-reporting rather than under-reporting. Brokers, after getting a report from an agent, should be prepared to give (or obtain from a suitable expert) the appropriate information on how to handle the unusual situation.

☞ *Side Note: Are Your Contracts Being Properly Terminated?*

One example in which standard forms and procedures could be exceptionally helpful is upon the termination of a contract. Too often when a transaction goes wrong, the sellers and the buyers are only concerned about who gets the earnest money held in escrow. Once that determination is made, they sign instructions to release the funds to one party or another and each side simply walks away. However, this is not how you terminate a contract, and the parties end up walking away with a technically still valid contract on the table. Instructions to release earnest money funds from escrow do not, by themselves, end the contract. Agents typically do not have the incentive to properly wrap-up the loose ends of a contract, because a transaction falling through means commissions falling through also.

One resolution of this common problem is for agents to have to follow a standard transaction checklist all the way through an ultimate conclusion of a transaction. At the end of the checklist are either forms and procedures pertaining to a transaction closing, or forms and procedures pertaining to a termination of a contract. One procedure or the other must be followed. Hopefully the transaction will close as planned, but if not, there are still procedures to follow.

If the transaction terminates without closing, the parties must agree to the terms of the termination. This usually means only having to decide if the sellers get to keep any part of the buyers' deposit as compensation for the transaction falling through. Once the terms are decided, the parties should sign a standard amendment to the purchase contract which (1) terminates the contract; (2) states the terms of termination, such as to whom the deposit money will be released; and (3) provides specific releases for each party, meaning that the parties agree not to sue each other over the transaction. Instructions to release money from escrow may also be provided in the amendment, but don't have to be. (They could be a separate document.) In any case, the amendment is the first and most important document to be signed; the instructions (if a separate document) should be signed only after the amendment is signed.

Every real estate office should have standard forms and procedures for properly completing a transaction. Standard terms should be ready to be inserted into contract termination amendments, just in case a transaction falls through. Having these standard forms, procedures and terms are beneficial to everyone involved in the transaction. If the transaction is going as planned, agents of course do everything necessary to make sure the transaction closes properly. If the transaction falls apart, agents should nonetheless make sure that the contract is properly terminated. With a proper termination, all parties involved in the transaction are protected from the possibility of a dispute arising in the future, and the agents are known for their professionalism, whether in good times and in bad.

What if the parties cannot agree on the terms of a termination? In this case, a contract termination amendment cannot be signed, and all people involved in the transaction are vulnerable to the dispute erupting into a lawsuit. Before the dispute gets out of hand, agents should strongly suggest the use of "alternative dispute resolution" services. These services are ways to resolve a conflict outside of the court system. They often provided by membership organizations, such as an agent's local or state real estate board. Sometimes these services are free of charge, or have very reasonable rates.

One type of alternative dispute resolution services is called "mediation." This is a procedure where a neutral person is provided to referee the conflict while the two sides talk their way to a resolution. Mediation is often the first step in trying to resolve a conflict. A more formal method of resolving conflicts is called "arbitration." This is a process in which an outside company is hired to conduct a "mini-trial," utilizing a judge (often a retired actual judge) and a formal set of procedures. These alternative dispute resolution methods often successfully resolve a conflict without the stress, expense and time commitment of an actual lawsuit.

All agents working in an office should utilize the same set of standard forms and procedures, maintained by the responsible broker. This helps to ensure consistency across all transactions handled by the office. Further, it helps the responsible broker maintain proper broker supervision, and it gives the responsible broker a method of introducing improvements and change.

Broker Supervision: Broker supervision is crucial to risk management. A responsible broker must see that every transaction by every agent is handled correctly. The only way to do this effectively is through a uniform system of standardized forms and procedures. However, the best standard forms and procedures are useless if they are not utilized correctly. Thus, a responsible broker must oversee agents to make sure the system is being followed correctly. A responsible broker must continually advise and train agents regarding the changes made to the standard forms and procedures. Many state licensing agencies monitor this duty of brokers very seriously. For example, your state Department of Real Estate may suspend a broker's license for failure to "exercise reasonable s supervision over the activities of salespersons."[xiii] Although responsible brokers must oversee agents, this does not mean that communication is only one way from broker to agent. Input by agents as to what works in the system and what doesn't should an important force that drives revisions to the standard forms and procedures.

2. *Standard Terms*. Buyers making an offer on a property may want to add new terms to the standard contract. Sellers typically will counter by adjusting the new terms in some manner. Real estate agents on their own routinely write these terms into the contract on behalf of their clients. However, this is a dangerous practice for agents.

Agents who write language into contracts may be illegally practicing law. Any time agents are required to write their own phrases or terms on blank lines in a document, a red flag should be raised in their minds. The agent (unless also a licensed attorney) may be technically committing the crime of practicing law without a license, risking fines and even imprisonment. An agent should seek help in any situation in which the agent must write language that may become legally binding (as opposed to just filling in data such as names and dates). This includes writing any extra phrases or sentences into the main offer or contract, as well as into a number of other documents that are technically part of the contract, even though written as separate documents. Examples of documents that are technically part of the main contract are documents that remove contingencies, and any document labeled "addendum."

Of course, it is impractical to have an attorney do the writing every time an agent needs to add language to a contract. Every real estate office could instead have a list of phrases and terms that are appropriate to use by their agents. The office's responsible broker, working with an attorney, would develop a list of pre-approved language to fit many common situations. Once the list is compiled, it can be used by agents as reference for language that has already been approved by the broker and an attorney.

A real estate company should have a system in place so that agents do not have to draft their own language into contracts. A real estate company should, at a minimum, have the following available to their agents:

- A list of "pre-approved" terms and phrases that are routinely added to offers and other contracts. These terms and phrases should have been drafted by an attorney and should also be periodically reviewed by an attorney.
- A method of getting in touch quickly with a broker and/or the company's attorney to aid with contract drafting and to answer questions that might arise during the course of negotiations. The broker and/or attorney would ideally also be available on weekends and after work hours, when many transactions are consummated.

There are two caveats to having a pre-approved list of language. First, the attorney that writes the pre-approved language must be made aware that the language will be used in the future as a template by agents. This is necessary so the attorney knows to make the language fit for general use and easy for agents to use. This is also necessary in order to get the attorney's permission to use the language later. (Unless otherwise specified, an attorney's work in writing something is only valid for use one time.) Second, it is important that all agents understand which pre-approved language is suitable for which situation. Agents should not take language meant for one situation and try to convert or stretch it to cover another situation. This would have the same problems as agents writing the language themselves. Instead, if the pre-approved list does not have language to fit a particular situation, the office's responsible broker or attorney should be contacted. If the office does not have an attorney available to help with these matters, or if agents feel that the overall system is inadequate, agents should work with their brokers towards getting the proper resources in place. As an initial step, brokers and agents might into whether a local real estate board or another membership organization offers legal help.

☞ *Side Note: Agents writing contracts problematic for clients, too*

Agents that write terms into contracts for their clients may face legal trouble for practicing law without a license. In addition, these agents may be doing their clients a great disserve. Clients deserve to have any terms added to a standard form approved by an attorney prior to the terms becoming legally binding. An offer, once accepted, becomes a legally binding contract, and every term contained in the contract is very important. There are two legal doctrines that work against a client whose agent writes terms into the contract improperly: (1) any ambiguity in the contract terms may be interpreted against the client; and (2) issues may arise due to a legal doctrine called the *Statute of Frauds*.

Ambiguity in the contract terms. It is a legal doctrine that courts will generally interpret any ambiguity in the language of a contract against the person who wrote the language. If the buyers agent writes a term in the contract on behalf of the buyers, and that term is disputed in a lawsuit, then the court might interpret the term in a way that least favors the buyers. For example, suppose the buyers agent wrote in the contract, "Buyers will have 5 days to deposit $10,000 into escrow," and the fifth day happened to land on a Sunday. The buyers might have wanted to deposit the money on Sunday, but the escrow office was closed, so they deposited the money on Monday instead. If there is a dispute whether this action was allowed, a court may well decide against the buyers because the term, as written by the buyers agent, did not specify that the fifth day had to land on a day when businesses are open.

Statute of Frauds. The second legal doctrine that may work against a client whose agent writes terms into a contract improperly is the Statute of Frauds. The Statute of Frauds is a legal doctrine written into the laws of nearly every state that requires all contracts for real property to be in writing.[xiv] Nothing that is said orally between the buyer and seller can be considered part of the contract according to the Statute of Frauds. In the example above, the buyers deposited money into escrow on Monday instead of Sunday because the escrow office was closed on Sunday. Suppose the buyers agent realized this problem and had called the listing agent and the sellers on Sunday to ask for an extension of the deadline. Further suppose that the listing agent (on behalf of the sellers) gave such permission over the phone and extended the deadline to Monday. If subsequently the parties have a dispute over the timing of the deposit, the permission given orally, over the phone, cannot be considered part of the contract according to the Statute of Frauds. The buyers agent, unaware of the Statute of Frauds, failed to properly write the terms of the deadline extension into the contract. In this scenario, the buyers would suffer the consequences of not having attorney-written terms in their contract.

C. KEEP EXCELLENT RECORDS

Good record keeping is one of the simplest, but most effective techniques in reducing an agent's risk. Although it is tedious to create and maintain proper records, an agent who keeps fastidious records is less likely to miss an important deadline or overlook an important issue. Further, whenever an issue does arise, an agent's record keeping can make the difference between being on the winning side or the losing side of a dispute.

If you are not the best at keeping records, how do you improve? Good record keeping is not a genetic trait—it can be learned. The following basic strategies can dramatically improve the quality of an agent's record keeping.

1 *Always get it in writing*.

As discussed before, the Statute of Frauds requires that any contract for the sale of real property be written down. Keeping this in mind, whenever anything is discussed or negotiated regarding a transaction, agents should take organized, written notes and store them in the transaction's main file. Standard forms should help agents in this regard: there should be standard forms like a "telephone log" to write down the content of telephone conversations, and an "action journal" to write down each action done for a particular transaction. Even the most mundane of details should be recorded. An agent never knows what tiny detail may become at issue in a dispute.

If an agent recommends a certain action, and the client does not heed the recommendation, it is especially important to record the details of the recommendation and its subsequent rejection. If a very important recommendation is rejected, an agent should attempt to get a waiver signed by the client that states that the client understands the recommendation but deliberately chooses not to take it.

Most states consider email as "writing." For example, email is considered writing in California, and agents can use it as a valuable recording tool. Whenever an agent has an oral discussion (for example, he or she just got off the phone with a client), a good practice is to shoot off an email confirming the contents of the oral discussion. The agent should be sure to print out all of the emails pertaining to a particular transaction and store them with the file. Further, whenever possible, all emails should be electronically categorized and stored on a more permanent medium such as a CD or DVD.

2. *Make it a habit*.

Good record keeping should be viewed as an essential component to closing transactions. An agent's written notes are just as valuable as any other document in the file. Fortunately, most transactions close and no issues arise afterwards. However, if an agent practices for long enough, it is inevitable that some issue or dispute will arise as to a transaction. If it is a transaction that occurred some time ago, an agent will often only have his or her notes to rely upon, as the details from any transaction fade from memory. In these cases, an agent's first and, sometimes, only defense is what he or she recorded in the file. Agents cannot predict when they will need to have detailed notes in their files. The only way to be sure that you *will* have detailed notes is to make sure that you take detailed notes for *every* transaction that you are a part of. Make detailed and careful recording a habit every time. It will serve you today by better organizing your current transactions, and it may serve you in the future if you ever need to rely on your notes to get you out of trouble.

3. *Don't write on originals*.

Whenever you are in receipt of an original document, you should immediately make a photocopy of it. One reason for this, of course, is in case the original is lost or destroyed. A second, less obvious reason is so that you may take person notes on the copy instead of the original. If you need to take notes on a document, you should do so on a copy of the document, and not the original itself. This not only keeps the original document in good shape, but should the document ever become the subject of a dispute, you don't have to produce a document that has potentially damaging notes all over the document. The original copies of all documents should be preserved as though they might get called upon for a lawsuit.

4. *Retain your records.*

The length of time records need to be retained and stored is usually determined by the longer of (a) what your state licensing agency requires and (b) the length of time you are at risk of being sued.

Your state licensing agency will likely require you to retain the records of transactions for a set length of time. For example, most states require that brokers maintain records for a minimum of 3 years. This length of time is determined from the closing date of the transaction, or, if there is no closing date, from the date of the listing of the property. During this time period, your state agency may require you to produce the records for inspection.

Alternatively, you should retain your records for however long you can possibly be sued for a transaction. This length of time is determined by the *statute of limitations* for any particular lawsuit. “Statute of limitations” is a legal term meaning how long a person has to file a lawsuit. After the statute of limitations has run out for a particular type of lawsuit, a person is barred from suing. Each type of lawsuit can have a different length statute of limitation, and each state designates its own statutes of limitations for each type of lawsuit action. For example, in California, a lawsuit for a breach of contract must be filed within 4 years; a lawsuit for a breach of a lease must be filed within 4 years; and a lawsuit for construction defects must be filed within 10 years.

In short, it’s difficult to know exactly how you remain at risk of a lawsuit for any one transaction. The typical period is anywhere from 1 to 6 years, although construction defect lawsuits may have a longer statute of limitations, and, in many states, a lawsuit for fraud can theoretically occur decades later because the statute of limitations begins to run only after discovery of the fraud. Generally, six years should be sufficient, unless you are dealing with newly built homes, or you are committing fraud (hopefully not!). Of course, the absolute best practice is to keep the records forever. With electronic storage, this is quickly becoming a real possibility.

☞ *Side Note: Record Keeping for Trust Funds*

One extremely important area in which you *must* keep good records is “trust funds.” Trust funds are sums of money that you hold on behalf of someone else. When someone gives money over to you “in trust,” the law immediately assigns you duties that you must uphold (this is similar to the fiduciary duties assigned to you as an agent discussed in Lesson 3). It is important that you handle these trust funds very carefully, and in accordance with all applicable laws and regulations.

Agents and their brokers receive trust funds on behalf of their clients on a regular basis. Unfortunately, agents and brokers often do not handle these trust funds appropriately, which is why trust fund handling is one of the most common sources of licensing discipline. The reasons for violations typically are due to ignorance of the requirements or because a broker delegates the responsibility to office staff without proper supervision. A more serious reason for licensing discipline is the deliberate use of trust funds for personal use.

Agents and brokers must keep in mind that trust fund handling and record keeping, although mundane and tedious tasks, are very high profile areas in the eyes of licensing agencies. Real estate deposits are often very large amounts of money, which naturally draws attention. Further, clients are quickest to complain whenever it's their hard-earned money at stake. Because trust funds belong to clients, the utmost care must be to deposit the funds into escrow or another acceptable institution in a timely manner, and ensure that the person funds of a broker or agent and the client trust funds never mix (called "commingling"). Further, access to the trust funds may have restrictions.

You may be required to show your trust fund records during an audit. It is easy to fall behind on this record keeping, especially when you are busy dealing with clients and closing transactions. However, despite it seeming like "busywork," trust fund records should be properly maintained for the simple reason that your license can be suspended, even revoked, if you fail to keep proper records.[xv] In other words, you are able to be busy with clients and to close transactions *only because you maintain a license*, and you maintain a license *only because you keep proper trust fund records*. Thus, it is the record keeping that allows you to make your living, and it should be given the proper attention accordingly.

D. USE PROPER RESOURCES

Agents often work alone, but this doesn't mean that they don't have help available to them. We already discussed how your responsible broker and even an office-affiliated attorney should aid you with your contract preparation. Even more than this, you often have more resources available to you than you realize, and you should take should take full advantage of them.

Membership organizations. Many membership organizations have a wealth of information available to their members. They may offer helpful pamphlets, books and seminars on confusing subjects, and even hotlines with experts available to answer your questions. Agents are already paying for many these resources through membership dues, so the resources are often free or at least reasonably priced.

Home warranty programs. A home warranty program is a type of insurance against home appliances breaking down. They are often purchased in conjunction with a single family house transaction. For a certain price at the close of escrow, a home warranty company will promise to repair certain appliances for a small fee. The cost of the home warranty depends on what appliances are covered and how long of a warranty period is desired. A very high percentage of conflicts in single family housing transactions arise over broken appliances. Home warranty programs can offer a solution to these conflicts before they arise. Because they are relatively low in price in comparison to the cost of a home, they can be negotiated into a contract. Often the sellers will have an incentive to buy these home warranty programs so that they won't have to deal with future appliance problems. If the sellers don't wish to purchase them, sometimes agents will offer to purchase them out of their commissions.

Insurance companies. An agent's insurance company has a lot of incentive to keep agents out of lawsuits. These companies often have training and other resources available. An agent's insurance broker or claims agent should have information on this. Insurance brokers can also be available resource in making sure that an agent is adequately covered. Remember, an agent cannot assume that because they have purchased an Errors and Omissions policy that they will be covered in case of a conflict (see "Side Note: Don't Depend on Insurance to Bail You Out" in Lesson 2).

If you are ever served with a lawsuit, you should immediately contact your responsible broker and your E&O insurance carrier. Your responsible broker and insurance carrier should have step-by-step protocols of what you should do. One of the worst things you can do in this situation is to contact the persons who are suing you (the plaintiffs). Unfortunately, often agents' natural reaction is to want to contact the plaintiffs immediately. However, in this time of great stress, agents might make the wrong statements, which will be regretted later when presented as evidence in court. The appropriate action is to properly record everything the agent can recall about the case or transaction, and to follow the instructions set forth by the responsible broker and insurance carrier. The broker or insurance carrier should then refer you to a specific attorney, or they should assist you in hiring your own attorney.

E. STAY EDUCATED

As noted before, most agents are very knowledgeable in many areas in order to service their clients. Good agents are always students of real estate. Agents have to constantly keep up with changes in technology, laws, rules and market conditions, and there is always more material than time to learn everything. Agents should take advantage of bulletins and memos made available to them through their membership and trade organizations, and they should always study on their own topics that they don't thoroughly understand. For example, a thorough knowledge of the standard forms used by your real estate company is essential. If new forms are introduced, you should be sure to learn how to use them, whether through a company seminar, or on your own.

Many state licensing agencies require agents to study a certain amount of hours over a period in order to maintain their license. For example, the Main Department of Real Estate requires 21 hours of education for every licensing period. This education requirement is not to try to make you an expert on all things related to real estate. We already mentioned that it is practically impossible to know everything there is to know about real estate. *So why bother?* Staying current on real estate topics and taking courses like this one are important for one main reason: having a broad knowledge of real estate allows an agent to "issue spot."

Issue spotting is the ability of an agent to "spot" when there might be an issue or problem that can arise. The agent may not necessarily know immediately know what to do about the issue or problem, but the most important fact is that the agent is aware of its existence. Once the issue is spotted, the agents can approach his or her broker, or another expert, for advice on how to work towards a solution. Without a broad knowledge of the real estate practice, an agent might never spot the issue to begin with. It would then go unnoticed until it became a full fledged problem, even a lawsuit.

1. *Anti-trust Example.*

One example which might demonstrate the usefulness of issue spotting could be in the area of “anti-trust.” Most people have never heard of anti-trust before, and only some have a vague notion of what it’s about it. Perhaps you’ve heard about it in the context of two giant corporations joining together. Anti-trust laws are laws that try to encourage competition; they might prevent two huge competitors becoming one gigantic company because the government does not want monopolies—situations where there is only one company dominating a market. Having competition is better than having monopolies because competition encourages innovation and keeps prices reasonable.

OK, so that’s fine, but what does this have to do with real estate agents? A typical agent without specific education in this field would ask this question, and rightfully so. It is hard to imagine a connection between this topic and real estate agents. However, those agents who have taken the time to study this area would know that, in fact, there is a strong concern about anti-trust issues in the real estate community. Anti-trust laws are not just for giant corporations. The main federal law applies to any situation where (1) there is a conspiracy that (2) constrains trade. A conspiracy is when two or more people group together to agree on something, and to “constrain trade” generally means to restrict competition.

So when do two or more agents group together to restrict competition? There are two main situations in which anti-trust concerns crop up. The first is called *“Price Fixing.”* Price fixing is when two or more companies conspire to set a price on what they are selling. This applies to real estate companies because the government does not want real estate companies setting prices either. Real estate companies sell their services in buying and selling real estate. They are paid in commissions. So if two or more real estate companies agree to not set their commissions below a certain level, they have broken anti-trust laws. Real estate companies cannot make *any* kind of agreements with regard to commissions—whether how much total commission they charge clients for listing a property, or how much they will share with cooperating brokers for bringing a buyer. Each real estate company is supposed to set their prices independently, and competition in the marketplace is supposed to set pricing levels.

The second main situation for agents in which anti-trust concerns crop up is an *economic boycott*. Boycotting has been a common way to indirectly pressure competitors into setting higher prices. For example, suppose a new real estate company opens up in town and offers deep discounts to clients for listing properties. The older, established real estate companies do not want to offer the same kind of discount and are threatened by pricing of the new company. They group together and agree to not do business with the new company—in other words, they will steer their buyers away from the new company’s listings. This is a boycott that attempts to restrain competition. If enough pressure is applied to the new company, it will either go out of business, or it will be forced comply with the old companies and raise its commission rates.

There are both federal and state anti-trust laws, and the penalties for breaking them are severe, including criminal and civil penalties. Governmental enforcement of anti-trust laws may focus on real estate agents because agents can belong to very large and extensive membership organizations, like the National Association of Realtors. The government may feel that membership organization meetings and other networking functions are prime opportunities for agents and brokers to conspire about price fixing and economic boycotts. Because agents sometimes have a spotlight on them for anti-trust issues, it is important that agents do not talk to each other about how their companies set commissions. Further, the two main scenarios discussed above are not the only ways that agents and brokers can break anti-trust laws. Agents and brokers working in different offices should not make *any* type of economic or market agreements between them, such as agreements to divide up territories or types of customers. Each office must make all economic and market decisions independently.

2. *Advertising example.*

There has been a flurry of new laws within the last several years that have changed how agents can advertise. Those agents who have kept up with these communications-based laws would realize that advertising strategies that worked in the past would be problematic now.

Telephone communications. Federal law made effective in 2004 (the Do-Not-Call Implementation Act of 2003) changed the rules for telephone solicitations. This federal law set up a national database of telephone numbers for people whom agents, considered “telemarketers,” or people who solicit goods or services, are barred from calling, except under certain conditions. Agents can no longer “cold call” telephone numbers that are on the national Do-Not-Call list. The only time a person whose number is on the Do-Not-Call list can legally be contacted is if the agent has written, signed permission, or if the agent has an “established business relationship” or a “personal relationship” with that person.

The written permission and “personal relationship” exceptions are straightforward. The “established business relationship” exception means that the person and the agent had a business transaction together within the last 18 months, or the person made an inquiry with the agent within the past 3 months.

Email communications. The federal law called the CAN-SPAM Act of 2003 similarly changed the rules for email solicitations. Just as agents can no longer “cold call” telephone numbers in the same manner as before, agents must be very careful with their email solicitations. If an agent is sending out an advertisement or a solicitation for business, as opposed to an email for a current transaction or for a personal message, then the email is considered a “commercial email” and a number of rules apply. Every unsolicited commercial email sent by an agent must have (a) an opt-out mechanism, with which people who don’t want future emails can remove their email address from the agent’s list; (b) a valid subject line and header information, instead of deceptive information which “spam” senders typically use; and (c) the legitimate physical address of the agent.

Fax communications. The federal law called the Junk Fax Prevention Act of 2005 changed the rules for fax solicitations. This law amended the Telephone Consumer Protection Act of 1991 to make it illegal for agents to send unsolicited advertisements to any fax machine, whether businesses or residential, without the recipient’s prior permission. However, like the Do-Not-Call Implementation Act of 2003, an agent can send fax advertisements to people with whom the agent has an established business relationship, as long as the fax number was provided voluntarily by the recipient. All fax advertisements must have an “opt-out” feature as well.

Lesson 4 Quiz

1. It is important to know when you should NOT give advice to clients because:
   - A. it is sometimes better to let persons with more specialized training answer questions
   - B. it is impossible to know everything about real estate and sometimes other persons' advice is more suitable
   - C. it may be an inappropriate topic for an agent, such as tax advice or legal advice
   - D. all of the above

2. Standard forms and procedures:
   - A. means that all agents in an office are using the same forms and procedures at a given time.
   - B. should be kept the same for at least a year, unless there is a very important reason to change them
   - C. are predictable and consistent, but should be tailored to the needs of each agent
   - D. means that an office uses all the forms and procedures recommended by a national organization

1. The following are recommended to be included in an office's standard forms and procedures, EXCEPT:
   - A a standard set of forms, tailored to the needs of each office
   - B a standard checklist of all documents and actions needed in transactions
   - C a standard list of description for all listings of a company
   - D a standard procedure for broker review of offers and contracts

2. All of the following are reasons agents should have a standard list of terms to add to contracts, EXCEPT:
   - A It is faster and more efficient
   - B Agents should not risk inadvertently practicing law
   - C Poorly written terms can be interpreted by courts against the party who wrote them
   - D Agent-written terms might have problems, such as with the Statute of Frauds

3. One reason keeping excellent records can make the difference between winning a dispute or losing a dispute is:
   - A The Statute of Limitations requires contracts to be written if they are related to real estate
   - B Written records will last even when you've forgotten the details of a transaction
   - C Original records are always better evidence than photocopies
   - D Commingling your personal records with business records is illegal

4. All of the following are reasons agents should constantly stay educated, EXCEPT:
   - A Technology, laws, rules and market conditions are constantly changing.
   - B Continuing education is often required to maintain your license.
   - C It is necessary for agents to be experts on every topic related to real estate

D It helps agents realize that an issue exists, even if agents don't necessarily know the answer to the problem

5. Which is the following actions can an agent do legally according to the laws discussed on this page?:
   A Deciding not to do business with a new company in town that is charging discount rates
   B Sending an email to solicit business from a former client whose transaction closed last year
   C Discussing over cocktails what is a good rate to charge clients with agents from other offices
   D all of the above

Answers: 1-D, 2-A, 3-C, 4-A, 5-B. 6-C, 7-B

[i] *www.dictionary.com*, as of July 2006.
[ii] See, for example, "Litigation Valley," by David S. Jackson, Time Magazine, November 4, 1996. See, also, U.S. Chamber of Commerce stating that litigation costs in 2005 were equivalent to $880 per person in America. (http://www.uschamber.com/press/actualities/2006/061220_tort_cost.htm)
iii See, for example, "Rapid Hike in Omissions Insurance One Price of Sales Boom," by Sharon Simonson, San Jose Business Journal, June 17, 2005.
iv Fiduciary duties, such as the duty of reporting all profits, can be incorporated into state law. For example, California Business and Professions Code §10176(g) forbids "undisclosed …compensation, commission or profit"
[v] A situation in which two real estate brokers are sharing a commission, or in which one broker is paying a referral fee to another broker is usually not considered a kick back.
[vi] For example, in California, these reports include: the Real Estate Transfer Disclosure Statement (Cal. Civ. §1102.4) with a possible Local Option (§1102.6a); Natural Hazards Disclosure (Cal. Civ. §§1103 et seq.); Mello-Roos Bonds and Taxes Disclosure (Cal. Civ. §1102.6b); Property Taxes Disclosure (Cal. Civ. §1102.6c); Military Ordnance Locations (Cal. Civ. §1102.15); Window Security Bars Disclosure (Cal. Civ. §1102.16); Industrial Use Disclosure (Cal. Civ. §1102.17); Illegal Controlled Substances Disclosure (Cal. Health &Safety § 25400.10 et seq.). Other disclosures include: California Earthquake Guide, California Environmental Hazards Pamphlet, Smoke Detector Statement of Compliance, Lead-Based Paint Hazards, Registered Sex Offenders, and Toxic Mold.
[vii] 12 U.S.C. §1607(a).
[viii] R.E.S.P.A. covers transactions for one to four residential units utilizing a "federally related mortgage loan." Because most loans are considered "federally related mortgage loans," R.E.S.P.A. covers most residential real estate transactions. There are exceptions, however, including the situation in which a broker also owns a mortgage company. With proper disclosure, a broker can receive mortgage brokering fees in addition to real estate commissions in the same transaction. 12 U.S.C. §§2602(7) and 2607(c)(4).
[ix] 12 U.S.C. 2607(d).
[x] At least 24 states have passed some type of anti-predatory lending laws. There are also other federal laws in addition to R.E.S.P.A. that address predatory lending in some manner.