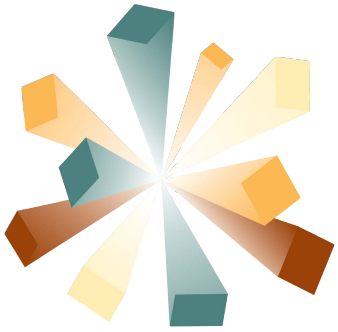


GRADUATE, REALTOR® INSTITUTE

GRI 402

Staying in Business

& Out of Court

TREEF
TENNESSEE REAL ESTATE EDUCATION FOUNDATION

TENNESSEE REALTORS®

TREEF
TENNESSEE REAL ESTATE EDUCATION FOUNDATION

The material contained within this course, including this handout, was developed exclusively for the Tennessee Real Estate Educational Foundation, LLC. (TREEF) in cooperation with Tennessee REALTORS®. The material is for the sole use of course instructors approved by the Tennessee Real Estate Commission and TREEF. Any unauthorized use is strictly prohibited.

Course Introduction

This one-day course will cover common legal pitfalls of all types that are encountered in real estate practice, the most frequent causes of lawsuits, the often misunderstood aspects of agency law, compensation issues in the light of federal and state laws, several Real Estate Commission rules and regulations, and other legal and risk reduction topics – including the penalties for violations of various state and federal laws.

GRI 402 Learning Objectives

Upon completion of this course, participants will be able to:

1. Recognize common legal pitfalls …and how to avoid them
2. Identify the most common causes of lawsuits in the nation involving REALTORS®
3. Identify the exclusions to most E & O insurance policies – which things are NOT covered
4. Differentiate between the various forms of agency possible under Tennessee law, as well as common misconceptions and misunderstandings about agency & agency relationships
5. Change agency status legally
6. Identify the minimum service requirements under TN law that apply to all licensees
7. Recognize what is and is not permitted under the Real Estate Commission's advertising rules and regulations for the Internet
8. Recognize what gifts, prizes and other considerations a REALTOR may pay under state law
9. Recognize good practices for managing licensed and unlicensed assistants
10. Identify the potential penalties for violating various state and federal laws, rules, and regulations
11. Identify protected classes in Fair Housing Law and the Code of Ethics

Course Content

Part 1 Common Legal Pitfalls

a. Common Causes
b. E & O Insurance
    i. Most Frequent Claims in Tennessee*
        1. What is Fraud
        2. What is Misrepresentation
        3. What is Negligence
    ii. Claims commonly not covered in Tennessee
c. Tips to Reduce Risk
    i. Property Disclosure
    ii. Home Inspection
    iii. Home Warranties
    iv. Always use approved forms
    v. Never give legal advice
    vi. Septic Tanks
    vii. Wire Transfers

Part 2 TREC

d. Agency Status
e. Minimum Services
f. Unlicensed assistants
g. Advertising / Gifts and Prizes
h. Teams
i. Electronic Records

Part 3 Federal Issues

j. Antitrust
k. Fair Housing
    i. Article 10 versus Title VIII of the Civil Rights Act and Tennessee Human Rights Act of 1968
l. Lead Base Paint
m. Americans With Disabilities Act
n. RESPA

Appendix 1: Case Studies
A**ppendix 2**: Unlicensed Employee or Assistant Rules and a Summary of Agency Law
Appendix 3: Legal Cases
Appendix 4: Website Recommendations that Provide Neighborhood & Community Information
Appendix 5: RESPA

Part 1: Common Legal Pitfalls

- Zoning
- Forged or altered contracts (use Power of Attorney)
- Selling wrong property
- Seller financing
- Recommendation of other services
- Failure to update property disclosure forms
- Document problems-not having the required documents or not putting it in writing
- Selling the same property to two purchasers
- Poorly worded contingencies
- Foreclosed properties
- Previous property disclosure forms

E&O Policy

NOTE: Exclusions

This insurance does not apply to any claim alleging, arising from or related to:

1. **Fraudulent, dishonest, criminal or malicious acts** committed by the Insured, at the Insured's direction or with anyone for whose acts the Insured is legally responsible;
2. Bodily injury, sickness, disease, mental anguish, pain or suffering, emotional distress or death of any person.
3. Physical injury to, destruction or loss of use of tangible property.

These exclusions show why you need a **Commercial General Liability Policy** in addition to your professional liability policy.

4. Professional services relating to property:

Developed or constructed by, or
More than 10% owned by, or
Purchased or attempted to be purchased by

An Insured or by the spouse of the insured or by any entity, corporation, partnership, or trust in which the insured or spouse of the insured owns or controls more than 10% financial interest.

NOTE: This exclusion does not apply to:

Transactions in which:

- The property is listed by an insured who is not the property owner, builder, or developer, and
- The property is advertised, marketed, and promoted by an insured who is not the property owner, builder or developer, and:
- All professional services related to the transaction, including the sale or closing on the property, are conducted by an insured who is not the property owner, builder or developer.

5. Environmental, including mold.
6. Injury or damage expected or intended.
7. Disputes over commissions, fines or penalties.

The **most common claims reported for no coverage in Tennessee** from January 1, 2003 until March 22, 2016 (more than thirteen years)

- **Personal Interest- due to the owned property exclusion.**

  The reason for this common exclusion is that coverage for this type of claim would put the insured in a position to benefit from his/her own negligence. For example- An entity sold an office building which was listed by one of its owners. The owner failed to disclose that the property needed repairs. If the needed repairs had been disclosed, the purchasers would have requested they be repaired to reduced their offer, so the seller entity (and its owner) benefitted from the lack of disclosure. Tennessee licensees may purchase to add coverage for claims relating to the listing and sale of residential property owned by the licensee, the licensee's spouse, or an entity owned by the licensee or spouse, under certain conditions. The endorsement's conditions are intended to reduce the risk commonly associated with agent-owned transactions.

- **Expired insurance policy (2nd)**

  The 2nd most common reason Tennessee claims have not been covered is because they were first made after the licensee's insurance expired. If a licensees does not have a policy in effect at the time the first claim is made, there is no policy to apply. There may be optional extended reporting 1,2,or 3 years after a policy end date.

- **Bodily injury or property damage (3rd and 7th)**

  Real Estate E&O policies are not designed to cover bodily injury or property damage. These are addressed by health, general liability, or property/home owner's insurance policy.

- **Matters reported do not arise to a claim (6th and 11th)**

Either because the allegations do not relate to services as a real estate licensee or because there is no allegation of a negligent act, error, or omission.

- **Late reporting/prejudice (8th), Claim made prior to effective date (9th), Not reported within policy period (16th), admission of liability (25th)**

- **Failure to collect/pay escrow (14th), Discrimination (15th), and Mold (19th)**

  Some coverage for these issues was added in 2013 for Tennessee licensees.

- **Fraud (18th)**

  There are only (7) files that have not been covered since January 1, 2003 due to the sole allegation of fraudulent or intentional acts. Some of the claims coded "Every Allegation is Excluded" may also include an allegation of fraud. As an initial matter, neither fraud nor intentional acts are negligent, so if only fraud or intentional acts are alleged, there is no allegation of a negligent act, error, or omission, so that matter would not meet the definition of a claim to fall within the policy's scope of coverage. Of course, it is against public policy to provide coverage for fraudulent and intentional acts. When there is an allegation of fraud and other covered allegations and damages, the insurance carrier will defend the insured against the entire action, but reserve its rights not to pay any damages relating to fraud.

Non-covered costs:

- Worry time
- Time spent with lawyer, depositions, discovery, hearings, and trials
- Damage to reputation regardless of outcome.
- **Negligence**- an error in action, calculation, opinion, or Judgment caused by poor reasoning, carelessness, insufficient knowledge.
- **Misrepresentations** – falsify, distort, partially disclosed, and withheld: to share the sense of presenting information in a way that does not accord with the truth.
- **Fraud** - deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage.

Other Common Claims made against Tennessee licensees

- Sewer or septic tank issues
- Title issues (restrictive covenants, easements, encroachments, etc.)
- Zoning
- Forged or altered contracts (use Power of Attorney)
- Selling wrong property
- Seller financing
- Recommendation of other services

Tips to Reduce Risk:

a. **Always have sellers fill out the property disclosure form**.

b. **Always recommend home inspections**. If the buyer declines, have them sign a form confirming their decision.

c. **Recommend home warranties**, but do not over sell them.

d. **Always use current approved sales contract**.

e. **Never give legal advice!** TCA 62-13-312(b)19

f. Have **client use their best judgment** in making the ultimate decision on requesting a **septic letter**.

g. **Wire transfers**- in respect to TILA-RESPA integrated disclosure, the contract and loan product are separated and the client should be in direct communication with the closing agent.

h. **Title Policies** cover issues that could cost a buyer time and money later to correct.

RISC™
RICE INSURANCE SERVICES COMPANY, LLC

Tips To Avoid Real Estate Errors and Omissions Claims

While even the most diligent licensee may be the victim of a frivolous claim, diligent business practices help decrease risk. Even if these procedures do not prevent a claim, they may greatly enhance the chance of a successful defense.

1. Resolve problems far before the closing date. Don't wait until the last minute to address problem issues. When people are rushed to resolve matters, they are more likely to make mistakes or overlook items.
2. Don't try to be an expert at everything. Involve key professionals, such as attorneys, home inspectors, termite inspectors, appraisers, lenders, and surveyors when needed. Provide a list of several names or a copy of the yellow page listings but do not recommend a specific individual or firm! Keep a copy of the list you provide.
3. It is generally a good idea to require agency disclosure on every transaction. Be familiar with your state's laws regarding when a written agency disclosure is required, at what stage it must be completed, and who must be provided with signed copies. Typically, agency relationships should be disclosed as soon as possible, but in any event, prior to providing specific assistance to the client. For example, buyers should be advised if the licensee showing them the house is the seller's agent.
4. Document conversations, recommendations, and activities in a log. It is also often helpful to document conversations by sending a brief follow up email. Keep organized, detailed records of all real estate transactions. This is often required by state law, will assist you in recalling details, and will be helpful to an attorney if a defense is needed in the future.
5. Brokers should have regular meetings with their firms' licensees and remain informed as to their activities. Establish consistent guidelines and make sure everyone in the firm understands and complies with them.
6. Listing agents should have the seller complete any required property disclosure form. This form should never be filled out by the real estate licensee. Additionally, if any issues arise while the property is listed, advise the seller to update the disclosure form accordingly.
7. Recommend that buyers obtain a home warranty and retain written evidence of the recommendation.
8. Recommend that buyers obtain a home inspection. If they decline, have them sign a form confirming this decision.
9. Many states and associations have standard contract forms. It is wise to address items that are outside of standard form language with the client's legal counsel, or else the real estate licensee risks the unauthorized practice of law.
10. When information is obtained from a third party, it is often a good idea to disclose the source when making representations, because sometimes information from what appears to be a valid source turns out to be inaccurate. For example, if you believe a property is on city sewer based on a prior listing or a statement by the city utility office, disclose the source of your representation.

Note these are examples of types of claims encountered by Rice Insurance Services Company, LLC in the handling of real estate errors and omissions claims in numerous states. Specific facts and circumstances may have been altered.

This information is for illustrative purposes only and is not a contract. Nothing herein should be construed as legal advice or advice regarding any applicable standard of care. Rather, this information is intended to provide a general overview of certain products, services, and situations encountered in the course of our business. This information does not amend any E&O policy in any way. Only the policy can provide actual terms, coverages, amounts, conditions, and exclusions. The E&O program described herein is only available in certain states, and the information contained herein may not apply to your geographic area. In the event of a claim, the nature and extent of coverage is determined based on the claim's facts, circumstances, and allegations and application of the relevant policy's terms, conditions, and exclusions.

Prepared by Rice Insurance Services Company, LLC © 2015

Part 2: TREC

Traditional vs. Designated Agency

Traditional Agency § 62-13-401

A real estate licensee may provide real estate services to any party in a prospective transaction, with or without an agency relationship to one (1) or more parties to the transaction. Until such time as a licensee enters into a specific written agreement to establish an agency relationship with one (1) or more parties to a transaction, such licensee shall be considered a facilitator and shall not be considered an agent or advocate of any party to the transaction. An agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship. The negotiation and execution of either an exclusive agency listing agreement or an exclusive right to sell listing agreement with a prospective seller shall establish an agency relationship with the seller.

Designated Agency § 62-13-406(a)(b)(c)

A licensee entering into a written agreement to represent any party in the buying, selling, exchanging, renting or leasing of real estate may be appointed as the designated and individual agent of this party by the licensee's managing broker, to the exclusion of all other licensees employed by or affiliated with such managing broker. A managing broker providing services under the provisions of the Tennessee Real Estate Broker License Act of 1973 shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction.

The use of a designated agency does not abolish or diminish the managing broker's contractual rights to any listing or advertising agreement between the firm and a property owner, nor does this section lessen the managing broker's responsibilities to ensure that all licensees affiliated with or employed by such broker conduct business in accordance with appropriate laws, rules and regulations. There shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation.

Changes to Agency Status § 62-13-405

Any change in agency status in a given transaction must be discussed and approved in advance with your customer or client and should be confirmed in writing. Some listing agreements provide for permission to change agency status during the life of the agreement. When this occurs make sure there is notification that the event is happening and receive written approval at the time of the occurrence.

Minimum Service Requirements Under Agency Law § 62-13-404(3)

Unless the following duties are specifically and individually waived, affirmatively acknowledged in writing by a client, a licensee shall assist the client by:

a.) Scheduling all property showings on behalf of the client;

b.) Receiving all offers and counter offers and forwarding them promptly to the client;

c.) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the licensee's expertise; and

d.) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.

Upon waiver of any of these duties, a consumer shall be advised in writing by the consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of these duties.

Common Myths & Misconceptions about Agency in Tennessee

1. T or F: An agency relationship can be "implied", created "accidentally", or created simply by a licensee's actions, statements, or behavior?

This may have been true in Tennessee prior to 1996, but it has not been true since then! Moreover, even if a licensee completes a written disclosure form – such as the commonly used "Confirmation of Agency Status" – the licensee does NOT become an agent. Agency law in Tennessee states that an agency relationship does not exist without a bilateral, written agency agreement between the licensee and the buyer or seller. An agency disclosure form, or confirmation of agency status, is NOT an agreement!

To represent a seller, a "bilateral, written agency agreement" would be the listing agreement: an Exclusive Right to Sell listing or an Exclusive Agency listing. [These two types of listing agreements have served as a bilateral written agreement to establish an agency relationship since 2006. Other types of listing agreements (e.g., open listings) may also establish an agency relationship with the seller, although these are not specified in the agency law itself.]

To represent a buyer, a "bilateral, written agency agreement" would be a Buyer Representation Agreement, a negotiated contract for agency representation.

IF a licensee simply "declares" (to a consumer or to another licensee) that he or she represents a buyer or is a buyer's "agent", but has not negotiated and signed a written buyer agency agreement with that buyer, then this licensee is NOT a Buyer's Agent. This licensee is still a Facilitator (or Transaction Broker) regardless of what he or she says; to represent himself or herself as a buyer's agent is misrepresentation! It's still misrepresentation even if the licensee gives somebody a disclosure form that says he/she is a buyer's agent, but the licensee hasn't negotiated an actual buyer representation agreement that the buyer has signed.

Until an actual buyer agency agreement is signed, it's appropriate for a licensee to tell others (including other companies when he/she is setting up showings, etc.) that the licensee is "working with" a buyer …but the licensee should refrain from saying that he/she represents the buyer or is a buyer's agent until this is actually true. The intent to get an agreement signed doesn't make a licensee someone's agent!

The law is very clear: an agency relationship can be created in only one way – through a written agency agreement with a consumer. The law states very clearly that an "agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship." The law ALSO states – very clearly – that "the disclosure of agency or facilitator status ...shall not be construed as, or be considered a substitute for, a written agreement to establish an agency relationship between the broker and a party to a transaction...."

Without an agency relationship to either the seller or to a prospective buyer for the seller's property,

a licensee is a facilitator, pure and simple, and represents nobody in the prospective transaction.

With the above myth, many people falsely believe that a licensee cannot give advice to a consumer unless the licensee represents that consumer as an agent. Nothing in Tennessee law requires facilitators to remain "on the sidelines, offering no advice." Giving advice does not create an agency relationship. As the legal definition of facilitator states: "A facilitator may advise either or both of the parties to a transaction but cannot be considered a representative or advocate of either party." [emphasis added] While professional advice is always permitted, if a licensee is the sole licensee in a transaction, serving as a facilitator between an unrepresented seller and an unrepresented buyer, the licensee should be extremely careful not to promote or advocate one party's interests over the other's.

2. T or F: You can be a seller's agent (the listing agent) and a facilitator for the buyer at the same time?

Wrong! A licensee can only wear one "agency hat" at a time in a given transaction. A licensee cannot be working as a seller's agent for a seller whose property the licensee has listed and simultaneously represent himself/herself as a facilitator to an unrepresented buyer who might like to purchase that property! At best, this practice is deceptive and an obvious effort to gain or keep everyone's trust without telling them the truth. A licensee has only one agency status at a time in a transaction.

If the licensee is the listing agent, for example, and a buyer approaches the licensee regarding this property, then normally the licensee would disclose to this buyer that he/she represents the seller. There is nothing in Tennessee law that prevents a seller's agent from assisting this buyer, completing an offer to purchase for the buyer (if that's what the buyer wants to do), presenting that offer, etc., while the licensee remains a seller's agent ...as long as the buyer knows that the licensee represents the seller and is going to promote the seller's best interests.

Some Tennessee firms have adopted office policies that call for their salespeople to default to facilitator status automatically if they have listed a property and an unrepresented buyer approaches them regarding their listing. The listing agreement used by these offices typically includes language by which the seller gives prior consent for their listing agent's default to facilitator status if an unrepresented buyer comes along. If a licensee's office policy dictates this kind of action, the licensee is STILL obligated to go back to the seller at the time he/she defaults to facilitator and communicate to the seller that the licensee no longer represents him/her (confirming this subsequent disclosure in writing).

Once a licensee tells any party or prospective party to a transaction that the licensee is a facilitator, the licensee is saying, "I don't represent anybody – seller or buyer – as an agent in this transaction!"

"Facilitator" status is not a type of agency status or agency relationship; it's the lack of an agency relationship. At one time, some people in Tennessee believed that a licensee needed to have agency relationships with both seller and buyer before the licensee could legally default to facilitator.

This is not true. With their attorney's support, the Tennessee Real Estate Commission voted 9 to 0 in December of 2005 "that Tennessee Code Annotated §62-13-102(9)(B) does not require a written agency relationship with both parties prior to default to facilitator status."

If a licensee has represented either a buyer or a seller and subsequently defaults to facilitator status in the transaction, this licensee is simply terminating the agency relationship with his/her client …with the client's permission of course.

3. T or F: If you're not sure what your agency status is at the time you submit a written confirmation of agency status, then it's probably safest to check several boxes …since one of them is sure to be correct!

Wrong! Since a licensee can only wear one agency hat at a time in a transaction, then checking more than one box on a confirmation of agency status means that only one box is correct. [We're hoping, of course, that one of the boxes checked represents the licensee's true agency status.] Anything else that is checked constitutes a false statement. It may be done in ignorance – which doesn't speak well for the licensee's professionalism – but it is still a misrepresentation of facts.

If a licensee's office policy dictates this kind of action, the licensee is STILL obligated to go back to the seller at the time he/she defaults to facilitator and communicate to the seller that the licensee no longer represents him/her (confirming this subsequent disclosure in writing).

4. T of F: You can't sell your own listing without changing your agency status in the transaction (to facilitator)?

While this restriction may be true according to some office policies (and every licensee should be familiar with and abide by his/her office policies), nothing in Tennessee law or the REALTOR Code of Ethics requires a change of status in this situation.

A seller's agent can assist and even advise a prospective buyer in almost every way, throughout a transaction, to help that buyer purchase the agent's listing …as long as the seller's agent remains loyal to the seller and does not compromise or ever work against his/her seller-client's best interests. The buyer, of course, needs to be told that the seller's agent represents the seller and is bound to promote the seller's interests.

5. T of F: Designated agency is intended solely for in-house transactions?

Wrong again. Before explaining why this is untrue, it's important to understand traditional (i.e., non-designated) agency. In the absence of designated agency, any agency relationship that one person in an office establishes – with either a buyer or seller – makes every licensee in the office an agent of that buyer or seller …even if they never have any contact with, or even know the name of that buyer or seller. Unintended dual agency and rampant conflicts of interest can therefore occur. Designated agency changes this. With designated agency, the agency relationship exists solely between the licensee and his/her client, to the exclusion of all other licensees in his/her office.

Designated agency was created simply to accommodate a quite proper practice that reflects the real-world operation of most real estate transactions ...in which an individual agent (and not usually an entire office or company) functions as the advocate for his/her client, regardless of whether the other party in the transaction is represented by someone in another firm or someone in the same firm.

From the earliest discussion of the designated agent status, to its implementation in law, there was never any assumption or intent that it would only be used for in-house transactions. That's the primary reason for the language "or by written company policy" in 62-13-406(a). It was the intent from the original crafting of the legislation that many firms would implement company policies calling for the practice of designated agency from the outset, for both buyers and sellers, regardless of whether or not the transaction ever involved an in-house showing or sale.

To illustrate why this practice has been so popular with companies:
Assume that a licensee has entered into a buyer agency agreement with a prospective buyer – but NOT as a designated buyer's agent. The licensee then makes a list of ten properties to show that client, and sets up appointments to do so. Properties number 3, 5, and 8 on that list are actually listed by members of the licensee's own firm …and this means that the buyer's agent is also an agent of the seller. Conflict of interest! Therefore, before showing each of these particular properties, the licensee changes his/her agency status and notifies the buyer of the changed status, because the licensee ALSO represents the seller on those properties! Then, after showing those properties, the licensee changes status again, back to a buyer's agent, to show properties listed by other firms. The Tennessee Real Estate Commission wants to see written documentation of any change in agency status ...and this licensee may need to change agency status multiple times in a single day of property showings. This situation makes little sense, and will frustrate both the licensee and his/her buyer-client. Members of the firm could avoid it altogether with the use of designated agency status from the outset, for both buyers and sellers.

6. T of F: The managing broker remains a dual agent even if the buyer and seller are each represented by different designated agents in the broker's office?

This too is incorrect. Some other states with a designated agency provision in their laws make the managing broker of the office a dual agent in this situation. There is no national, standardized definition of designated agency. NAR, the "Internet," and other states may choose to define it in any way they wish, but their definition is neither binding nor (in this case) applicable to Tennessee.

The designated agency provision in Tennessee's law was drafted specifically to protect the managing broker and avoid any unnecessary liability for the broker or the firm. That's the reason for the following provision: "A managing broker …shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction." The law

also states that there “shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation.”

7. T of F: An office-wide agency policy is unnecessary. Each licensee should just select the type of agency (or non-agency) relationship that works best for him or her.

This is extremely dangerous from a legal standpoint. The possibilities for unintended misrepresentations and conflicts of interest in this situation are almost endless. Consider just one example:
Any traditional, non-designated agency relationship with a buyer or seller actually obligates everyone in the office to represent that buyer or seller, whether the other licensees in the office realize it or not. Let’s assume that one of the licensees in the office has negotiated a listing agreement as a non-designated agent. Another licensee in the office then tells a potential buyer that he/she is a facilitator in a transaction when in fact the licensee unknowingly represents the seller whose property this buyer wants to purchase. This is misrepresentation. [Even if it never gets to the point of a contract to purchase, misrepresentations of agency status can occur simply in showing properties when agency relationships are chosen at licensees’ individual discretion.]

If each of the licensees in the office simply “does his or her own thing” in regard to agency, the managing broker and the licensees in that office are all risking legal problems and their reputations unnecessarily. Every real estate office in Tennessee should have a written, clear, and consistent agency policy for the entire office, with periodic training for everyone to ensure that they understand and follow the policy.

8. T of F: Licensees in Tennessee are still subject to the common law of agency?

Prior to 1996, application of the common law of agency – which embodies a set of general principles rather than specific guidance – led to both licensee confusion and even inconsistent rulings in various court cases in Tennessee. “Common law” represents the accumulation of court cases across the nation, not all of which ever agree. Since decisions in those cases have not always been consistent, clear answers to some licensee questions about agency were impossible. Tennessee’s law, however, now specifies that it “shall supersede common law to the extent common law is inconsistent with the provisions of this part.”

Instead of a very general list of fiduciary duties to clients, Tennessee’s law was drafted with a more specific list of duties to all parties, as well as a few specific duties to clients. Also, in lieu of the accidental agency relationships so prevalent under common law, Tennessee’s law ensures that these relationships are intentional, with all parties fully informed and protected.

A major goal in supporting enactment of Tennessee’s agency law was to implement agency by statute so that everyone can reference one set of guidelines for most situations.

Things You Should Know About Tennessee Agencies

1. A licensee's delivery of a written disclosure, or confirmation of agency status, saying that he/she is an agent does not make the licensee an agent. [A unilateral disclosure is not a bilateral agreement.]

2. Designated agency establishes an agency relationship between only one real estate licensee in the office (to the exclusion of everyone else in the office, including the managing broker) and a buyer or seller.

3. An office policy of designated agency from the outset – in all transactions (whether in-house or not) – is a common practice and perfectly legitimate agency office policy in Tennessee.

4. Every change in agency status during the course of working with a consumer must be fully disclosed to the consumer at the time status is changed and should be documented, even if the consumer gave prior consent to changes of status should they occur.

5. An agency relationship is not required in order for a licensee to receive a commission; a facilitator may usually receive a commission as easily as a buyer's agent. [The listing agent's payment of a commission to a selling agent compensates the selling agent for procuring a willing and able buyer, not for his/her agency representation of the buyer.]

6. Every real estate office in Tennessee should have a written agency office policy.

7. Dual agency is still legal in Tennessee (if it is fully disclosed to both parties and both parties consent to it). Disclosed dual agency, however, is rarely practiced. Most legal experts still believe that it greatly increases legal liability for both the licensee and his/her firm and the potential for complaints to the Tennessee Real Estate Commission.

What may an unlicensed employee, assistant or secretary do?

1. T or F Show property to a prospective buyer.

2. T or F Unlock a door for a prospective buyer as requested by the listing agent.

3. T or F Negotiate the terms and conditions of a contract to purchase

4. T or F Write the terms and conditions of a contract to purchase as directed by the listing agent

5. T or F Receive compensation as a percentage of the sales price of the property

6. T or F Receive, record, and deposit earnest money under the direct supervision of the Principal Broker

7. T or F Answer the phone and give information about the listing as directed by the broker

8. T or F Fill out and submit listing to the MLS

9. T or F Be paid a referral fee

10. T or F Place signs on the property

11. T or F Give advice to a client

12. T or F Have keys made to a listing

13. T or F Assemble documents for closing

14. T or F Act as a designated agent exclusive of all other employees in the firm

TREC's Rules for the General and Internet Advertising

General Principles of Advertising

1. No licensee shall advertise to sell, purchase, exchange, rent, or lease property in a manner indicating that the licensee is not engaged in the real estate business.
2. All advertising shall be under the direct supervision of the principal broker and shall list the firm name and telephone number.
3. No licensee shall post a sign in any location advertising property for sale, purchase, exchange, rent or lease, without written authorization from the owner of the advertised property or the owner's agent.
4. No licensee shall advertise property listed by another licensee without written authorization from the property owner. A statement on the listing agreement must evidence written authorization.
5. No licensee shall advertise in a false, misleading or deceptive manner.

Internet Advertising

- The listing firm name and telephone number must conspicuously appear on each page of the website.
- Each page of a website which displays listings from an outside database of available properties must include a statement that some or all of the listings may not belong to the firm whose website is being visited

Gifts and Prizes

Any offer, claim, etc. cannot contain unsubstantiated selling claims or misleading statements or inferences. If you make an offer to persuade someone to do business with you, it must be in writing and disclose all pertinent details on the face of the advertisement.

" A real estate licensee shall not give or pay cash rebates, cash gifts or cash prizes in conjunction with any real estate transaction." § 62-13-302(b)

Rule 1260-02-.33

(1) A licensee may offer a gift, prize, or other valuable consideration as an inducement to the purchase, listing, or lease of real estate only if the offer is made:

(a) Under the sponsorship and with the approval of the firm with whom the licensee is affiliated; and

(b) In writing, signed by the licensee, with disclosure of all pertinent details, including but not limited to:

1. accurate specifications of the gift, prize, or other valuable consideration offered;
2. fair market value;
3. the time and place of delivery; and
4. any requirements which must be satisfied by the prospective purchaser or lessor.

Teams

Rule 1260-02.41

TREC has provided some clarification when regulating teams and similar groups.

(1) Licensees who hold themselves out as a team, group, or similar entity within a firm must be affiliated with the same licensed firm and shall not establish a physical location for said team, group, or similar entity within a firm that is separate from the physical location of record of the firm with which they are affiliated.

(2) No licensees who hold themselves out as a team, group or similar entity within a firm shall receive compensation from anyone other than their principal broker for the performance of any real estate acts as defined in the Brokers Act.

(3) The principal broker shall not delegate his or her supervisory responsibilities to any licensees who hold themselves out as a team, group, or similar entity within a firm, as the principal broker remains ultimately responsible for oversight of all licensees within the principal broker's firm.

(4) No licensees who hold themselves out as a team, group, or similar entity within a firm shall represent themselves as a separate entity from the licensed firm.

(5) No licensees who hold themselves out as a team, group, or similar entity within a firm shall designation members as designated firm agents, as this remains the responsibility of the licensed firm's principal broker.

- Teams (or similar groups) cannot establish a separate location from their firm.
- Team members must by paid by their principal broker, not their team leader.
- Principal broker cannot delegate supervisory responsibilities to anyone on the team. The PB is responsible for the supervision of ALL agents in the firm.
- Teams cannot hold themselves out as being separate from their firm.
- Only the principal broker can designate an agent as the designated agent.

Electronic Records

Rule 1260-02.40

- According to TREC, a licensee must preserve any real estate records for (3) three years following the consummation of a real estate transaction.

- TAR recommends that records be kept at least (7) years because a breach of contract claim can be brought for six (6) years. (See "**Purchase and Sale Agreement - Exhibits and Addenda"** below.)

- To keep records electronically, you must have the following in place:

    - Records must be accessible in an organized way within 24 hours of request for inspection
    - Must develop and use a retention schedule that maintains the security, authenticity, and accuracy of records.
    - Must maintain the software and hardware that will allow the information to be accessed in a readable format.

Statue of Limitations: Purchase and Sale Agreement Exhibits and Addenda

The TAR attorneys have recommended NOT attaching any document to the Purchase and Sale Agreement unless the documents specifically state they are *exhibits, amendments, or addenda* to the agreement (ex. VA/FHA Addendum, standard addendums, occupancy agreements, etc.) By attaching documents that are not part of the agreement the statute of limitations increases and any information contained in the documents will make them a part of the contract.

Many of the requirements of the Tennessee Real Estate Broker License Act of 1973 (such as disclosure of agency, compensation agreements, etc.) only have a statute of limitations of one year. (Agency forms should not be listed as part of the agreement. They are not a part of the agreement between the seller and buyer.) However, real estate contracts have a statute of limitations of six years. Therefore, by attaching documents that deal with issues required by the Broker's Act, you are potentially increasing the time in which you could be sued by SIX times. This is also true of the Property Condition Disclosure Form. It generally has a statute of limitations of one year. If attached to the Purchase and Sale Agreement it increases the seller's liability from one year to six years.

Also, **never attach the MLS information printout** as part of the contract as the information noted on it could become part of the contract. As we all know, information in the MLS is "deemed accurate but not guaranteed."

The following are examples of what to attach and what not to attach to the Purchase and Sale Agreement:

RECOMMENDED Exhibits/Addenda

- VA/FHA Addendum
- Seller's Right to Continue to Market Property
- Temporary Occupancy Agreements
- "Get a Home Inspection and Property Survey"
- Water Supply and Waste Disposal Notification
- Assumption Agreement Addendum
- Lead Based Paint Disclosure

NON-RECOMMENDED Exhibits/Addenda

- Property Condition Disclosure or Exemption
- Confirmation of Agency
- Septic Disclosure
- Compensation Agreement
- RESPA Disclosure
- Disclaimer

Source: 4-28-15 TAR DIGEST – Tennessee REALTORS®

Part 3: Federal Issues
Avoiding Antitrust Risk

"For more than 100 years, federal antitrust laws have existed as a way to promote competition and prevent monopolies in business operations. Because real estate brokers and salespeople frequently cooperate with one another in the sale of properties, they have numerous opportunities to engage in conduct that might be construed as violations of the antitrust laws." **NATIONAL ASSOCIATION OF REALTORS®.**

Antitrust Traps to Avoid

Although the subject of avoiding possible antitrust violations covers many areas, a few of the most sensitive antitrust concerns include:

Price Fixing - Where businesses charge similar prices for the same services as their competitors.

In most businesses, including real estate, many competitors may charge similar prices for the same services. This isn't illegal as long as each competitor sets prices independently. An antitrust violation occurs when you discuss and actually agree to charge the same prices or offer exactly the same terms as one or more of your competitors.

Avoid problems by: Establishing your company's fees, commission splits, and listing terms independently and without any discussion with competitors. Even informal conversations where you have no intention of actually setting prices could be misinterpreted as the basis of a price-fixing agreement.

Avoid problems by: Documenting your decisions to focus on certain property types with marketing and demographic studies.

Boycott - Occurs when a group of businesses agree not to do business with a particular party.

A typical group boycott allegation in the real estate brokerage business involves a claim that two or more brokerages have agreed to refuse to cooperate, or to cooperate on less favorable terms, with a third brokerage company. The intent is to eliminate that company as a competitor or to force it to abandon certain practices. Another form of boycott would occur if several companies collectively determined not to use a particular service provider, such as a certain newspaper.

Avoid problems by: Making decisions on whether to do business with other real estate companies or service providers based on your company's own judgments, goals, and experiences.

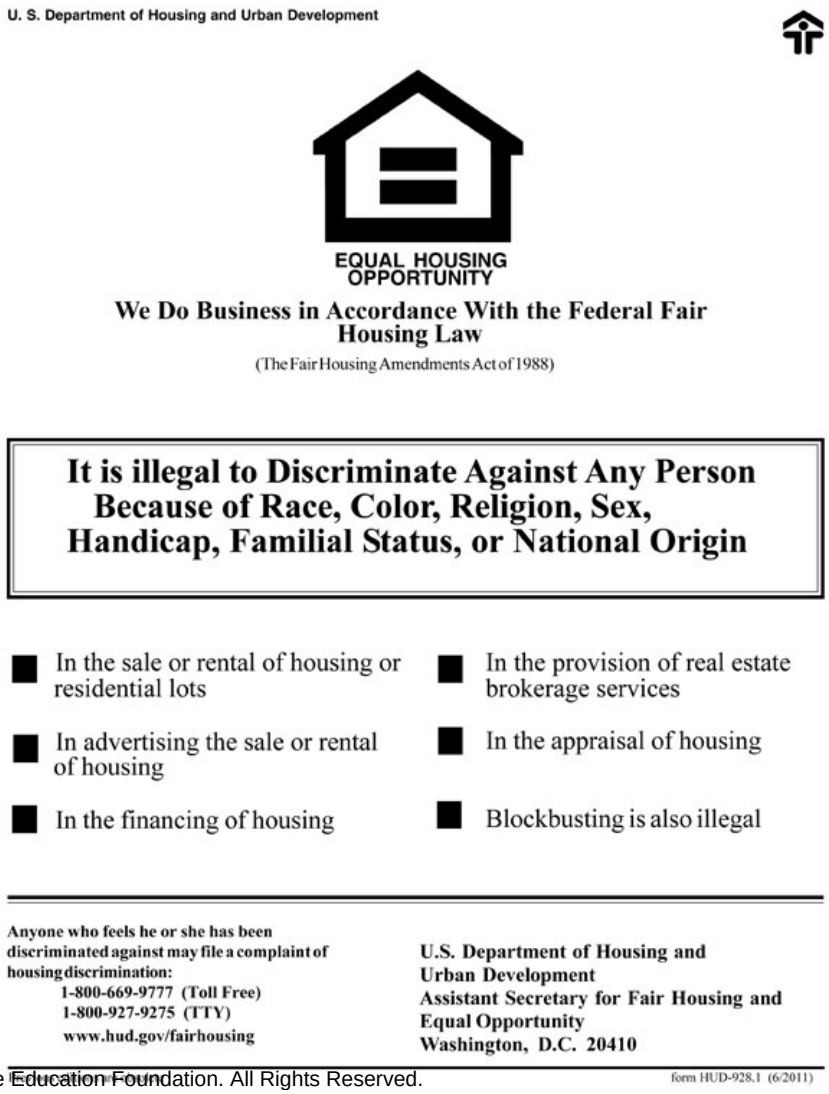
Assembles, Functions, or Meetings - When groups of competitors come together to discuss mutual interests and often then use identical practices. These are groups of competitors who come together to promote their common business interests. As such, they are vulnerable to allegations that agreements by members to use identical business practices are illegal conspiracies.

Avoid problems by: Remaining alert to discussions at meetings relating to commission rates, pricing structures, listing policies, or marketing practices of other broker.

Fair Housing

The Fair Housing Act prohibits discrimination in housing because of:

- Race or color
- Religion
- Sex
- Sex
- Disability
- National Origin
- Familial status (including children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18)



U. S. Department of Housing and Urban Development

EQUAL HOUSING OPPORTUNITY

We Do Business in Accordance With the Federal Fair Housing Law

(The Fair Housing Amendments Act of 1988)

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

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

Anyone who feels he or she has been discriminated against may file a complaint of housing discrimination:
1-800-669-9777 (Toll Free)
1-800-927-9275 (TTY)
www.hud.gov/fairhousing

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

form HUD-928.1 (6/2011)

Lead Base Paint

United States Environmental Protection Agency | Prevention, Pesticides, and Toxic Substances (7404) | EPA-747-F-96-002 March 1996 (Revised 12/96)

EPA HUD

FACT SHEET

EPA and HUD Move to Protect Children from Lead-Based Paint Poisoning; Disclosure of Lead-Based Paint Hazards in Housing

SUMMARY

The Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) are announcing efforts to ensure that the public receives the information necessary to prevent lead poisoning in homes that may contain lead-based paint hazards. Beginning this fall, most home buyers and renters will receive known information on lead-based paint and lead-based paint hazards during sales and rentals of housing built before 1978. Buyers and renters will receive specific information on lead-based paint in the housing as well as a Federal pamphlet with practical, low-cost tips on identifying and controlling lead-based paint hazards. Sellers, landlords, and their agents will be responsible for providing this information to the buyer or renter before sale or lease.

LEAD-BASED PAINT IN HOUSING

Approximately three-quarters of the nation's housing stock built before 1978 (approximately 64 million dwellings) contains some lead-based paint. When properly maintained and managed, this paint poses little risk. However, 1.7 million children have blood-lead levels above safe limits, mostly due to exposure to lead-based paint hazards.

EFFECTS OF LEAD POISONING

Lead poisoning can cause permanent damage to the brain and many other organs and causes reduced intelligence and behavioral problems. Lead can also cause abnormal fetal development in pregnant women.

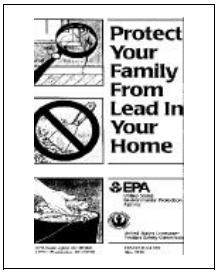
BACKGROUND

To protect families from exposure to lead from paint, dust, and soil, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X. Section 1018 of this law directed HUD and EPA to require the disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of most housing built before 1978.

WHAT IS REQUIRED

Before ratification of a contract for housing sale or lease:

- Sellers and landlords must disclose known lead-based paint and lead-based paint hazards and provide available reports to buyers or renters.
- Sellers and landlords must give buyers and renters the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CPSC), titled *Protect Your Family from Lead in Your Home*.



- Home buyers will get a 10-day period to conduct a lead-based paint inspection or risk assessment at their own expense. The rule gives the two parties flexibility to negotiate key terms of the evaluation.
- Sales contracts and leasing agreements must include certain notification and disclosure language.
- Sellers, lessors, and real estate agents share responsibility for ensuring compliance.

WHAT IS NOT REQUIRED

- This rule does not require any testing or removal of lead-based paint by sellers or landlords.
- This rule does not invalidate leasing and sales contracts.

TYPE OF HOUSING COVERED

Most private housing, public housing, Federally owned housing, and housing receiving Federal assistance are affected by this rule.

TYPE OF HOUSING NOT COVERED

- Housing built after 1977 (Congress chose not to cover post-1977 housing because the CPSC banned the use of lead-based paint for residential use in 1978).
- Zero-bedroom units, such as efficiencies, lofts, and dormitories.
- Leases for less than 100 days, such as vacation houses or short-term rentals.
- Housing for the elderly (unless children live there).
- Housing for the handicapped (unless children live there).
- Rental housing that has been inspected by a certified inspector and found to be free of lead-based paint.
- Foreclosure sales.

EFFECTIVE DATES

- For owners of more than 4 dwelling units, the effective date is September 6, 1996.
- For owners of 4 or fewer dwelling units, the effective date is December 6, 1996.

THOSE AFFECTED

The rule will help inform about 9 million renters and 3 million home buyers each year. The estimated cost associated with learning about the requirements, obtaining the pamphlet and other materials, and conducting disclosure activities is about $6 per transaction.

EFFECT ON STATES AND LOCAL GOVERNMENTS

This rule should not impose additional burdens on states since it is a Federally administered and enforced requirement. Some state laws and regulations require the disclosure of lead hazards in housing. The Federal regulations will act as a complement to existing state requirements.

FOR MORE INFORMATION

- For a copy of *Protect Your Family from Lead in Your Home* (in English or Spanish) , the sample disclosure forms, or the rule, call the National Lead Information Clearinghouse (NLIC) at (800) 424–LEAD, or TDD (800) 526–5456 for the hearing impaired. You may also send your request by fax to (202) 659–1192 or by Internet E-mail to ehc@cais.com. Visit the NLIC on the Internet at http://www.nsc.org/nsc/ehc/ehc.html.
- Bulk copies of the pamphlet are available from the Government Printing Office (GPO) at (202) 512–1800. Refer to the complete title or GPO stock number 055–000–00507–9. The price is $26.00 for a pack of 50 copies. Alternatively, persons may reproduce the pamphlet, for use or distribution, if the text and graphics are reproduced in full. Camera-ready copies of the pamphlet are available from the National Lead Information Clearinghouse.
- For specific questions about lead-based paint and lead-based paint hazards, call the National Lead Information Clearinghouse at (800) 424–LEAD, or TDD (800) 526–5456 for the hearing impaired.
- The EPA pamphlet and rule are available electronically and may be accessed through the Internet.

Electronic Access:

Gopher: gopher.epa.gov:70/11/Offices/PestPreventToxic/Toxic/lead_pm
WWW: http://www.epa.gov/opptintr/lead/index.html
http://www.hud.gov
Dial up: (919) 558–0335
FTP: ftp.epa.gov (*To login, type "anonymous." Your password is your Internet E-mail address.*)

ADA – Americans with Disabilities Act

Title II of the Americans with Disabilities Act of 1974 prohibits discrimination based on disability in programs, services, and activities provided for or made available by public entities.

How does ADA impact your real estate business?

Is your public office ADA accessible?

Have you made your office readily accessible?

This readily achievable standard might include:

- Installing curb ramps
- Rearranging tables, chairs, vending machines and other furniture
- Lowering the paper towel dispenser in the bathroom
- Removing high-pile, low-density carpeting
- Widening doorways
- Creating and designating handicapped parking spaces
- Installing grab bars in toilet stalls

Need guidance? Learn more about ADA requirements at www.ada.gov.

Real Estate Settlement Procedures Act (RESPA)

Prohibition of Referral Fees – or "prohibits receiving a thing of value" for a referral. If a real estate agent is getting virtually anything worthwhile in exchange for a referral, that agent is in danger of violating RESPA.

The Five Key Elements of a potential Violation

1. **Federally related** mortgage
2. **Referral**
3. **Agreement** or **understanding**
4. **Thing** of value
    a. Money or fees
    b. Discounts
    c. Services or special rates
    d. Trips or payments of another person's expenses
    e. Stock, dividends
5. For the referral of **settlement services**

Prohibition Against Splitting Unearned Fees

This section prohibits a person from a.) giving and receiving any portion, split, or percentage of any fee charged or received b.) for a real estate settlement service in connection with a federally related mortgage loan, c.) Unless the portion of the fee is for services actually performed,

Exceptions to the Rule of Anti-Kickback Prohibitions

1. Cooperation agreements between listing and selling real estate brokers.
2. Payments to an attorney for services actually performed.
3. Payments by Title company to duly appointed agent for performing title examination and issuance of title policy.
4. Payments by a lender to its duly appointed agent for services performed in the making of a loan.
5. Payments by an employer to an employee.
6. Payments for services actually rendered or goods actually provided.
7. Payments among affiliated business arrangements (AfBA).

Enforcement of RESPA

- Civil and criminal penalties
- Imprisonment for up to one year
- A fine of up of $10,000
- Both imprisonment and a fine
- Treble damages

For more RESPA information, see Appendix 5.

APPENDIX 1: Case Studies

Case Study: “Coming Soon!”

My seller and I would like to market a new listing with a “Coming Soon!” rider on top of my for sale sign. Is this allowed?

There is not anything inherently illegal or unethical about “Coming Soon” signs. However, one must do them correctly.

First, TREC Rule 1260-2-.12(2)(c) states that “No licensee shall post a sign in any location advertising property for sale without written authorization from the owner of the advertised property or the owner’s agent.” Therefore, the agent must have written permission of the seller to place a sign in the yard. If the sign is a “Coming Soon” sign, then the agent still must have the permission of the seller to do so.

You will need to check with your local MLS to determine whether they have any rules concerning “Coming Soon” listings and/or signs, including time frames. Keep in mind that a listing agreement is not required for a “Coming Soon” sign but it does require written permission of the seller. Additionally, this sign should not be on the property for an extended period of time as it would be misleading and ineffective for the seller. There is no rule aside from common sense on how long is too long for a “Coming Soon” sign.

Case Study: Pocket Listings

Pocket listings are not illegal in Tennessee. However, they are not necessarily permitted, safe, or in the best interests of the seller, either.

In order to advertise any property for sale in Tennessee, one must have the written permission of the seller to do so under both the Tennessee law and the NAR Code of Ethics.

TREC Rule 1260-2-.12(2):

(c) no licensee shall post a sign in any location advertising property for sale, purchase, exchange, rent, or lease, without written authorization from the owner of the advertised property or the owner's agent.

(d) no licensee shall advertise property listed by another licensee without written authorization from the property owner. Written authorization must be evidenced by a statement on the listing agreement or any other written statement signed by the owner.

IF the agent is a Realtor®, then there may be a violation of the Code of Ethics.

Article 12:

REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertisings, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)

Standard of Practice 12-4:

REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord. (Amended 1/93)

The second consideration issue is whether there is a written listing agreement in place. A local board may have rules which state that the listing agreement must be entered into the MLS within a standard set of days. An agent should check with the MLS and/or local board to determine what the rules are in a particular area. Another issue arises that if there is no listing agreement, then the agent is at a high risk of not being paid a commission since there is no agreement documenting compensation. A cautious agent will always stress the importance of allowing a property to be marketed. If the seller does not wish their property to be visible on the open market, an agent should have the seller sign a waiver which states that they have been advised of the risks and agree to forego adverting the property for sale.

Case Study: Services We Provide

Lillian Anderson, Realtor® a newcomer to your city and your board, is relocating from Los Angeles, California where she owned and operated an ultra successful real estate firm. She is relocating to be near her ailing father where she can more effectively tend to his health needs. She is opening a real estate firm that she calls "cutting edge" and has named her firm New Age Realty. Her business model is to place seller client's properties in the MLS for a fixed fee, but provide limited services to her client, beyond the MLS exposure. For example, she provides blank real estate forms that will be needed in the sale but provides no assistance in filling the forms out. She provides yard signs, but does not conduct open houses. She does not accept or present offers to her clients, provides no advice or counsel and does not present counter offers.

Billy Roberts is a long time member of the Association and a stickler for ethical actions of all his agents as well as those with whom he cooperates on sales. Billy served as President of the Association several years ago and is held in high esteem by all the members of the Association. He prides himself in the fact that his firm is known far and wide for the complete and thorough customer service that he provides on all his listings.

It has come to his attention that a new member of the Association, Lillian Anderson of New Age Realty, only places listings for individuals in the computer, which then gives their listing full access to all Realtors® across the nation. This member will not show the property they list, will not offer advice to the sellers, will not present offers or make counter offers.

Billy is concerned that Lillian Anderson still calls her sellers, her "clients," even though she provides so little service. Billy also questions the ethics of a company that provides so little service being a part of the MLS, but understands the legalities involved in this discussion.

You are a newly elected member of the board of the Association and Billy has come to you to see if you would present his issues before the Board of Directors at your next meeting.

Can you use the term "client" when offering so little service?

Can the Board provide a special category for the listings of firms who are members of the MLS but provide so little service? This would put the "rest of us" on notice that additional work may be required on our part.

Case Study: Keeping It Confidential

Keith Aukerman, agent with Dayton Realty has a property listed for sale at 428 East Main Street for $145,000.00. Gerald Johnson, agent with Lexington Realty, presents an offer on a property for $129,500. Within two hours of receipt of Johnson's offer, Danny, agent with Sisco Land and Home, presents an offer on behalf of his buyer client on the same property for $135,000. Keith Aukerman then calls Gerald Johnson and informs him of the fact that he now has an offer from another agent for $135,000 and wants to know if his client can come up to meet or beat this offer. After consultation with his client, Gerald Johnson informs Mr. Aukerman that they agree to come up to $136,000. Mr. Aukerman then calls Danny with Sisco Land and Home and says he now has an offer for $136,000 and wants to know if Danny's client will meet or beat this offer. After consultation with his client, Danny informs Mr. Aukerman that his client will pay $138,500, but insists on this amount being held confidential by the selling agent.

Mr. Aukerman then contacts Mr. Johnson and tells him he now has an offer for $138,500 and wants to know if his client will meet or beat that offer. After consultation with his client, Mr. Johnson informs Mr. Aukerman that his client has informed him that $136,000 was the most that they felt they could pay, and since that has been rejected; they desire to withdraw their offer.

Mr. Aukerman then gets back with Mr. Sisco to obtain the finalization of the $138,500 counter offer in writing and Mr. Sisco says his clients have changed their mind as the feel as if the were being used to obtain an above-market price and wants to withdraw their counter offer.

Was it unethical for Mr. Aukerman to share the price of Mr. Sisco's client with another potential buyer?

Were any of Mr. Aukerman's actions, on behalf of his seller, unethical? If he acted alone? If he acted under the direction of his seller client?

What Standard of Practice covers this situation?

Case Study: Agency Dilemma

Mark, agent with ABC is the listing agent for the property at 428 Elm Street. Judy with Reasonable Realty is the buyer's agent for Mr. and Mrs. Smith. The Smith's, after viewing the property on Elm Street express an interest in purchasing the property. They ask Judy to prepare an offer that is $5000.00 below the current list price.

Judy calls Mark to see where she can deliver the offer and he indicates it will be fine to bring it to his office, but he advises her that he has two other offers on the property to present this evening. Judy calls her clients to relay this information and they indicate that they want to raise their offer to the full list price.

Judy then calls Mark to see if she can be present when the offers are presented tonight and after checking with his clients this approval is obtained. "But only when you present your offer may you be with my clients." To which Judy responds, "Yes, of course that will be fine."

As Judy presents the offer, the sellers comment, "thank you so much for bringing us this offer, we have not had any offers on the property since we listed it for sale."

Upon hearing this information from the sellers what should Judy do?

APPENDIX 2: Unlicensed Employee or Assistant Rules and Summary of Agency Law

WHAT MAY AN UNLICENSED EMPLOYEE, ASSISTANT OR SECRETARY DO?

1. Answer the phone, forward calls and give information contained only on the listing agreement as limited by the broker
2. Fill out and submit listings and changes to any multiple listing services
3. Follow up on loan commitments after a contract has been negotiated and generally secure status reports on the loan progress
4. Assemble documents for closing
5. Secure public information from courthouses, utility districts, etc;
6. Have keys made for listings
7. Place ads, which have been approved by the Principal Broker;
8. Receive, record and deposit earnest money, security deposits and advance rents under the direct supervision of the Principal Broker
9. Type contract forms for approval by licensee and Principal Broker
10. Monitor licenses and personnel files
11. Calculate, print or distribute commission checks
8. Place signs on property
9. Order repairs as directed by the licensee
10. Prepare for distribution fliers and promotional information, which have been approval by the Principal Broker
11. Deliver documents and pick up keys
12. Place routine telephone calls on late rent payments
13. Gather information for a comparative market analysis (CMA)
14. Unlock property under the direction of a licensee
15. Disclose the current sales status of a listed property

What activities require a license?

Any person who performs or offers, attempts or agrees to perform any single act defined in TCA 62-13-102, is required to be licensed.

Can I pay an unlicensed assistant?

The licensee for all clerical and secretarial activities conducted on behalf of the licensee can pay unlicensed assistants. An unlicensed assistant cannot be compensated for the performance of duties that require a license.

I have a licensed assistant. How can I pay him for activities that require a license?

A person engaged in activities that require a license must have a valid active license and be affiliated with a licensed real estate firm. The licensed real estate firm must pay compensation received for activities that require a license where the assistant is affiliated.

APPENDIX 3: Legal Cases

CASE #1

A property is listed by an agent with an expiration date of July 15 and a carry-over period of 90 days, which will expire on October 15. A cooperating agent calls on July 15th to make an appointment to show the property the next day, July 16th. The listing agreement states, "This constitutes the entire agreement and that no oral or implied agreement exists. Any amendments to this agreement shall be made in writing signed by both parties, and shall be attached to this original agreement and all copies hereof."

The listing agent calls the owner on the 15th of July asking for permission to show the property the day after the listing expiration and is give verbal permission to do so. The call for permission was done as a "fail safe courtesy" since it was felt the listing agent was protected under the "carry-over period" language of the contract anyway.

Subsequently the property is sold to the purchaser who viewed the property on July 16. The seller refused to pay a commission to the listing agent as the showing and the sale occurred after the listing agreement expired.

The listing agent sued claiming the property was sold due to the efforts of the listing agent during the listing period and shown during the carry-over period with verbal permission from the owner.

THE DECISION

"The parties agree that this contract constitutes their entire agreement and that no oral or implied agreement exists. Any amendments to this agreement shall be made in writing signed by both parties, and shall be attached to this original agreement and all other copies hereof." This language is in the listing agreement provided by the listing agent. Their testimony indicates their failure to follow the very agreement they authored. In addition, the agent has not demonstrated the property was shown, submitted, or offered to the sellers prior to the expiration of the listing.

Crye-Leike, Inc. v. Sarah A. Carver, March 23, 2011

CASE #2

A developer who was also a builder constructed a house on a lot in a subdivision he developed. As part of the construction he obtained a permit to construct a septic system for the house. When the completed septic system was inspected it was noted by the county inspector that it was constructed within the set back area and too close to the street. The inspector noted that, if septic problems occurred, the property owners would be required to install a pump-to-pump beyond the setback to the rear of the lot.

The developer/builder and his wife moved into the house and after a year, his wife, a REALTOR placed the house on the market for sale. As part of the marketing of the listing, a Tennessee Residential Property Condition Disclosure statement was completed by he owners stating they were unaware of any defects of malfunctions in the septic system. Prior to the closing, the purchasers had a home inspection, which included a dye test of the septic system, which revealed no leaks in the septic system.

After moving into the house the purchasers noticed odorous fluid seeping around the septic tank. An inspection by a septic tank company noted the septic tank was within the set back area and was malfunctioning.

The purchasers sued for recession of the contract and requested compensation and punitive damages.

THE DECISION

We have determined that (1) the Tennessee Consumer Protection Act applies to sellers under the facts of this case, and (2) that sellers violated the Act by failing to provide the purchasers with all the information they possessed regarding the septic system.

The court ordered recession of the contract, refund of all costs including purchase price, cost to purchase and all attorney fees.

Gwen Fayne et al. v. Teresa Vincent et al., December 11, 2009

APPENDIX 4: Website Recommendations that Provide Neighborhood & Community Information

General Websites

- Bureau of Economic Analysis – Offers GDP by State and Metropolitan Area, State and Local Area Personal Income (http://www.bea.gov/)
- U.S. Census Bureau – Offers fact sheets on housing, data on homeownership, and housing affordability (http://www.census.gov/hhes/www/housing.html)

Demographic Information Websites

- ZIPskinny – Enter your ZIP code to see U.S. Census data and comparisons with neighboring ZIPs. (http://zipskinny.com/)

- City-Data – This website has “graphs of latest real estate prices and sales trends, recent home sales, home value estimator, hundreds of thousands of maps, satellite photos, stats about residents (race, income, ancestries, education, employment...), geographical data, state profiles, crime data, registered sex offenders, cost of living, housing, religions, businesses, local news links based on our exclusive technology, birthplaces of famous people, political contributions, city government finances and employment, weather, tornadoes, earthquakes, hospitals, schools, libraries, houses, airports, radio and TV stations, zip codes, area codes, air pollution, latest unemployment data, time zones, water systems and their health and monitoring violations, comparisons to averages, local poverty details, professionally written city guides, car accidents, fires, bridge conditions, cell phone and other towers, mortgage data” (http://www.city-data.com/)

- National Relocation – Visitors can research and compare neighborhoods in the United States. The website provides city data information, crime rates, demographics like population, educational attainment, employment information, income statistics, colleges, parks, churches, and more. (http://profiles.nationalrelocation.com/)

- Policy Map – Provides maps, data, and market studies on areas in the United States. While they do provide a free trial, a subscription is required after 7 days, and for one user it costs $200/month or $2,000/year. (http://www.policymap.com/)

- Cubit – Produces a demographic report in minutes. While they do provide a free trial, subscriptions are required and range from $20/month to $250/month, depending on the need of the user. (http://www.cubitplanning.com/)

- Neighborhood Navigator – Detailed population, education, financial, environment, and crime information for over 30,000 communities in the United States. (http://www.onboardnavigator.com/WebContent/OBWC_Search.aspx?AID=102&CD_SID=CO001)

- Yahoo! Real Estate – The Neighborhood Info tab allows visitors to search cities and zip codes to find neighborhood profiles, cost of living information, school statistics, and more. (http://realestate.yahoo.com/neighborhoods)

Sex Offender Websites

- NSOPW (National Sex Offender Public Website) – Coordinated by U.S. Department of Justice, website hosts public sex offender registries. (http://www.nsopr.gov/Core/Portal.aspx)
- Family Watchdog – Find offenders by location or name. (http://www.familywatchdog.us/)
- Map Sex Offenders – Locate offenders in your area (http://mapsexoffenders.com/)
- Criminal Check – Search by name or zip code (http://www.criminalcheck.com/)
- National Alert Registry – Identify registered offenders that live near you (http://www.registeredoffenderslist.org/)
- Megan's Law and Sex Offender Community Notification Information – (http://www.megans-law.net/)

Crime Statistics Websites

- CrimeReports – Criminal incidents displayed on a map by area searched. (http://www.crimereports.com/#)
- Neighborhood Scout – Find crime rates and data by city or town. (http://www.neighborhoodscout.com/neighborhoods/crime-rates/)

- Spot Crime – Comprehensive online source of crime information. (http://spotcrime.com/)
- Sperling's Best Places – Compare crime rates and view national crime statistics. (http://www.bestplaces.net/crime/)
- CrimeMapping – (http://www.crimemapping.com/)
- United States Crime Rates 1960-2009 – (http://www.disastercenter.com/crime/uscrime.htm)
- FBI Crime Statistics – Collects and publishes crime statistics (http://www.fbi.gov/news/stories/2010/november/ucrtool_112910/ucrtool_112910/)

APPENDIX 5: RESPA

NAR has compiled below a list of questions that we commonly receive about the Real Estate Settlement Act, or "RESPA", for both real estate professionals and REALTOR® associations. Note the opinions below do not constitute legal advice and it is recommended that you consult with an attorney if you have questions about how to comply with RESPA.

A. Real Estate Professional FAQ

I. Referral fees

QUESTION: A real estate agent is sponsoring an open house for other agents. A local title agency reimburses the real estate agent for the cost of a luncheon and the title agency does not market its title services at the open house. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. By reimbursing the real estate agent for the cost of the luncheon, the title agency has given the real estate agent a thing of value in consideration for the referral of business. Both the title agency and the real estate agent could be held responsible for the RESPA violation. If, however, the title company attends the open house to make a presentation or to otherwise market its services, such payments may be lawful under RESPA.

QUESTION: A real estate broker and a mortgage lender agree to jointly place a full-page advertisement in a local newspaper. Each company gets exactly one-half of the page to advertise its services. Each company pays one-half of the cost of the advertisement. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. As long as the advertising costs paid by each party are reasonably related to the value of the goods or services received in return (i.e., the amount of advertising), no violation exists. In the past, HUD stated that "nothing in RESPA prevents joint advertising" but "if one party is paying less than a pro rata share for the brochure or advertisement, there could be a RESPA violation." Without guidance to the contrary, we assume the CFPB would agree with HUD's statement.

QUESTION: The owner of a title agency meets the owner of a real estate brokerage firm for dinner at a local restaurant. The purpose of the dinner is for the two individuals to discuss future marketing opportunities. After the discussion has ended, the owner of the title agency pays for the real estate broker's dinner. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. The owner of the title agency can pay for dinner and not violate RESPA because the purpose of the dinner was business related and was not a payment for the referral of business.

QUESTION: A mortgage lender devises a contest among local real estate agents where the real estate agent who refers the most customers to the lender will receive a vacation cruise to Alaska. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. The vacation cruise is a thing of value in exchange for the referral of business and violates Section 8's anti-kickback provisions. Both the mortgage lender and the real estate professionals can be held responsible for the violation under RESPA.

QUESTION: A title company places a fax machine in the office of a real estate broker to expedite the process of placing title orders with the title company. The title company expects that the real estate broker will refer business to the title company if the broker can quickly send information to the title company. The fax machine is used only for communication between the real estate broker and the title company. The real estate broker has a separate fax machine for general business. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. The title company provides the fax machine in exchange for actual services from the real estate broker and the fax machine is dedicated to business conducted only with the real estate broker. If, however, the real estate broker uses the fax machine both for business with the title company and its general real estate business, this may constitute a violation of RESPA.

QUESTION: A settlement provider conducts real estate closings in the conference room of the real estate broker with the expectation that the real estate broker will refer closing business to the settlement agent. The settlement agent pays fair market value to rent the conference room for each closing. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. A settlement service provider may rent a conference room or other office space from another settlement service provider, as long as it pays fair market value to rent the space. Fair market value should be based on what a non-settlement service provider would pay for the same amount of space and services in the same or a comparable building.

QUESTION: A real estate broker pays its real estate agents $20 for each referral the agents make to the real estate broker's affiliated mortgage company. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. Although RESPA provides an exception for payments made from an employer to its employees, payments between a real estate broker and its salespeople do not qualify for this exception. Real estate professionals are considered independent contractors, rather than employees of the real estate broker. As a result, the $20 payments described above constitute payments in return for the referral of business in violation of RESPA.

QUESTION: A homeowner's insurance company gives a real estate broker marketing materials, such as desk calendars, pens, and notepads, all of which promote the homeowner's insurance company's name. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. RESPA regulations provide an exception to Section 8 for normal promotional and educational activities that are not conditioned on the referral of business and that do not defray expenses that otherwise would be incurred by persons in a position to refer settlement service business.

QUESTION: Do RESPA's prohibitions on referral fees apply to all settlement service providers?

ANSWER: Yes, RESPA applies equally to all settlement service providers and does not distinguish among different types of settlement providers. A settlement service includes any service provided in connection with a real estate settlement including, but not limited to, title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, home warranty companies, services rendered by a real estate professional, the origination of a federally related mortgage loan, and the handling of the processing and closing or settlement.

This list is broad, but not all-inclusive.

QUESTION: Can a title/mortgage company sponsor a luncheon for real estate professionals and offer CLE?

ANSWER: Maybe—this would need to be evaluated on a case-by-case basis. A title company or mortgage company can sponsor an educational event as a way to promote its services, so long as the costs associated with the event do not defray expenses that the real estate agent would otherwise encounter and are not conditioned on the referral of business. Note, however, that a rule of reason should be applied. An educational event hosted by a mortgage lender that was held at a local hotel and provided a lunch would be quite different from an educational event held in Hawaii in which one hour was dedicated to education and the remainder of the event was directed toward recreation. Additionally, the title/mortgage company would need to be promoting its services during the event as well in order to qualify for the advertising exception.

QUESTION: Can real estate professionals distribute to prospective buyers flyers containing current loan rate information branded by the mortgage lender?

ANSWER: Yes, the flyers appear to comply with RESPA. The providing of current rate information is consistent with the real estate professional's responsibility to provide information to his or her client about the current real estate market and no particular benefit flows to the mortgage lender. However, the real estate professional may not accept from lenders flyers which also promote the listed property, since that would result in the lender bearing a portion of the real estate professional's advertising expenses. Also note that the MAP Rule would apply to the providing of this information.

QUESTION: In my business model, I pair buyers with real estate professionals in different geographical areas based upon information I received from consumers and from participating real estate professionals. I receive a referral fee from the other broker when a deal settles (I am a licensed broker). Can I expand my business model to pair real estate agents with mortgage brokers (and collect a fee) without violating RESPA?

ANSWER: No, this would violate RESPA. Section 8(c) of RESPA contains exceptions to RESPA's prohibitions on kickbacks. One of the exceptions is cooperative fees paid between real estate

licensees, including referral fees. However, no such exception exists for payments made to mortgage brokers and so this would not be a permissible practice.

QUESTION: Is it a RESPA violation for the agent to refer her clients to the Bank's loan officer knowing that her receipt of future REO listings from the Bank may be dependent on the referrals she sends to the Bank?

ANSWER: Yes, this may violate RESPA. Section 8(a) prohibits payments for referrals, and providing a listing in exchange for referrals is a thing of value. It also requires an agreement between the parties for the referral arrangement, but this arrangement can be implied from the conduct of the parties and does not necessarily need to be reduced to writing. If the conduct of the parties could demonstrate that there was a referral arrangement, then this would violate RESPA. For example, if it could be shown that the REO listings given to the real estate professional was in direct proportion to the number of referrals received by the real estate professional, then it is likely that an agreement could be implied and this would violate RESPA.

II. Splitting Unearned Fees

QUESTION: A real estate broker charges a seller a $250 administrative fee and does not split the fee with anyone. Is this a violation of Section 8 of RESPA?

ANSWER: No, according to the U.S. Supreme Court, this is not a violation of RESPA. In Freeman v. Quicken Loans, the Supreme Court held that a single party cannot violate Section 8(b) of RESPA with its own, unilateral charges.

QUESTION: A mortgage lender occupies an office in a real estate broker's business in order to prequalify customers for mortgage financing. Occasionally, real estate agents take loan applications from their customers and receive $40 in return for each application. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this may be a violation of RESPA, according to HUD. Although the CFPB is now responsible for RESPA, HUD took the position that to be compensated as a mortgage broker; a person must take a loan application and perform at least five additional services in order to receive payment. Thus, assuming the CFPB agrees with HUD's position, if a real estate agent takes the loan application, but does not perform any other function; he or she cannot receive payment under RESPA.

QUESTION: Is there a way to structure a marketing services agreement ("MSA") that complies with RESPA?

ANSWER: RESPA permits the marketing of other settlement services by another settlement service provider so long as the payments made for these services represents the fair value for the services provided. A lawful MSA will need to contain the following elements: first, the real estate professional can perform services for other companies in the same field of business (i.e., the agreement is not exclusive); the compensation is not based on the volume of business, but rather on the value of the services provided by the real estate professional; a written contract between the parties which

documents the services to be provided pursuant to the agreement; and a written disclosure is provided to the consumer describing the real estate professional's role in selling the third-party service. That said, CFPB has been active in initiating enforcement actions in this area and appears to take the view that these agreements are going to almost always be an improper referral fee, so anyone entering into a MSA will need to be exercise extreme caution.

III. Affiliated Business Relationship FAQ

QUESTION: "A" is a real estate broker who refers business to its affiliate title company "B." "A" provides its customers with an affiliated business disclosure that lists the range of charges that "B" will charge for title services, states that "A" has a financial interest in "B," and notifies the customer that he or she is not required to use "B" for title services. Does this violate Section 8 of RESPA?

ANSWER: No, this complies with RESPA. The referrer of business to an affiliated entity is required to provide a written disclosure to each consumer that identifies the affiliated relationship, provides the charges or range of charges that the joint venture generally charges, and notifies the consumer that he or she is not required to use the affiliated business.

QUESTION: Real estate broker "A" and title insurance company "B" create an affiliated title agency "C." "C" pays annual dividends to "A" and "B" in proportion to the amount of business that each refers to "C" during the year. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. An affiliated business may only pay its partners or investors a proportionate share of the profits based on their ownership interest in the affiliate. So if they own 50% of the business, they may receive 50% of the profits in annual dividends that are based on the amount of stock held by the partners. RESPA prohibits the payment of dividends based on the amount of business referred or expected to be referred to an affiliated business.

B. Association RESPA Issues

QUESTION: Can a REALTOR® association solicit sponsorships from affiliate members who provide settlement services for association functions that are not education-related, such as awards and recognition ceremonies and association fundraisers?

ANSWER: Maybe—this will need to be examined on a case-by-case basis. While the association is not a settlement service provider, the subsidizing of the costs of the event for real estate professionals could be seen as conferring a benefit upon the members in return for referrals, as the members may not have to pay the costs normally associated with such an event. In order for the event to not violate RESPA, the affiliate would need to qualify for the advertising exception in Section 8(c) and so the affiliate member would need to advertise its services during the event and there would need to be a reasonable relationship between the costs of sponsorship and the advertising.

QUESTION: Can affiliate members who are settlement service providers sponsor continuing education or new-member orientation classes?

ANSWER: Maybe—this will need to be examined on a case-by-case basis. It will depend on whether some of the expenses a real estate professional would otherwise bear are defrayed by the affiliate member and whether the sponsorship would qualify for the RESPA advertising exception. In the case of an orientation course, there is probably no problem because new members pay an application fee that is likely the same whether an affiliate sponsors the course or not. If the affiliate member is simply recognized as a sponsor, it is similar to an affiliate running an advertisement in the association paper and would be considered normal marketing activity. Sponsorship of continuing education is more likely to be a violation because members normally have to pay a fee to attend such programs. If the cost of the course is underwritten by the affiliate so that the agents need not pay fees that they otherwise would have to pay, such sponsorship could be interpreted as a thing of value received by the agent for RESPA purposes.

QUESTION: Is it legal for settlement providers to put on education courses about the services the affiliate member provides to real estate professionals?

ANSWER: Yes, settlement service providers may put on classes about their business, since such informational programs are consistent with the marketing of the settlement service provider's business.

IV. Other Questions

QUESTION: A prospective buyer's credit union has told her that in order to qualify for a special package of services, she must use certain settlement service providers, including specific real estate professionals. Does RESPA allow this? Also, the real estate professionals appear to be required to rebate a portion of their commission to the buyer through this program- can real estate professionals provide such a rebate?

ANSWER: Yes, those arrangements could be legal under Section 8 of RESPA. The credit union can offer the consumer a package of settlement services at a reduced cost to the consumer if the consumer elects to use certain settlement service providers for settlement services, even if those providers are affiliates of the credit union. The credit union also could require a consumer to use a particular provider for settlement services without the offering of a discount, as long as the credit union and settlement service provider are not affiliates. However, the credit union cannot require the consumer to use an affiliate settlement service provider. The credit union's offering of a package of services at a discount tied to the use of an affiliate provider is not considered required use, as long as the consumer is notified of his/her option to shop for settlement services and the discount is a true discount to the consumer that is not made up elsewhere in the cost of the transaction. A real estate professional can also agree to rebate a portion of his/her commission to a consumer. However, note that some states do have laws prohibiting the payments of rebates to unlicensed individuals, and so this would not be legal in those jurisdictions.

QUESTION: A seller has stated that in order for an offer to be accepted, a buyer must agree to pay for a title company selected by the seller. Doesn't that violate RESPA? What if the seller required the

buyer to pay for a third-party short sale negotiator? What if the seller was bank-owned REO?

ANSWER: Yes, this does violate RESPA. Section 9 of RESPA prohibits a seller from requiring the use of a particular title insurance company when the buyer will pay for the title insurance. This prohibition applies to any seller, whether a private individual, a home builder, or a lender with REO properties. This prohibition also applies only when the buyer will pay for the cost of title insurance. If a seller were to pay the full cost of title insurance on the buyer's behalf, the seller could require that the title insurance be issued by a particular company. Finally, this prohibition only applies to title insurance. It does not prohibit a seller, for instance, from requiring a buyer to pay for a particular third-party short sale negotiator, as long as that negotiator is not also the company issuing title insurance or the seller's affiliate company. It also does not prohibit a seller from requiring a buyer to use a particular settlement or escrow company, as long as the settlement agent does not control the issuance of title insurance and is not the seller's affiliate company.

QUESTION: Is it permissible, under RESPA, for a buyer's lender to say they won't finance the transaction based solely on the amount of the commission the real estate brokers are to receive, even though the commission is being paid by the Seller?

ANSWER: RESPA does not regulate the amounts that settlement service providers can receive, and so would not address this practice.