

# Real Estate Update

## Volume 4

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Dear Licensee:

As a licensee, you owe it to yourself to keep abreast of the changes in the industry. Some practices that were common in the past are now illegal. Others have become outdated and obsolete as changes continue to come to our industry.

REAL ESTATE UPDATE VOLUME 4 is information updated from our previous volumes. Just as our earlier volumes I, II and III gave you new insight into the ever-changing industry we are involved in, REAL ESTATE UPDATE VOLUME 4 has new and additional information as well. We have added web pages for your perusal, expanded on sales and technical information and redesigned our course to better serve the professionals in the real estate industry such as yourself.

As part of your continuing education requirements, this course has been approved in your state. Simply follow the instructions enclosed to fulfill the necessary requirements for your state.

We at *D&D* School of Real Estate have spent numerous hours collecting the information and data assembled on these pages. It is our hope that you find this course informative and helpful in your career. Any questions or comments will be most appreciated. Thank you for using *D&D* School of Real Estate as your provider of continuing education.

Sincerely,

Richard J. Clemmer  
President

# 6Hr. Real Estate Update Vol. 4: Answer Sheet

## ***D&D* School of Real Estate**

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Date Completed: \_\_\_\_\_ R.E. License# (or Social Security): \_\_\_\_\_

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Phone #: \_\_\_\_\_ Fax#: \_\_\_\_\_

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**Charge me \$100: I am taking a combination of 16 hours**

**Charge \$45 for just this 6 hour Real Estate update volume 4 Course.**

METHOD OF PAYMENT: VISA MASTER CARD DISCOVER CHECK-OR-MONEYORDER

C.C. NUMBER: \_\_\_\_\_ EXP. DATE: \_\_\_\_\_

### Chapter 1 Quiz

1. A B C D
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### Chapter 2 Quiz

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### Chapter 3 Quiz

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### Chapter 4 Quiz

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# RENEW YOUR REAL ESTATE LICENSE IN 4 EASY STEPS

## **STEP ONE**

Study the manual at your own pace and complete the progress quizzes and the end of each chapter.

## **STEP TWO**

Answer all chapter quizzes.

## **STEP THREE**

Transfer all your answers to the answer sheet at the front of the manual, complete the additional information on the answer sheet then mail or fax the answer sheet in for grading.

## **STEP FOUR**

After receiving your notification of successful completion of this course and your required core law course for this licensing period, send your renewal fee to the state before your deadline.

*A licensed instructor will be available during normal business hours if you have any questions regarding the course material. No assistance on the final exam questions and answers can be given. For assistance call: 423-232-1811 or email your questions to [quickhelp@ddschoolofrealestate.com](mailto:quickhelp@ddschoolofrealestate.com).*

Work at your own pace! Complete the course and send in your answers for grading. **We do the rest.** We will notify the state of your successful completion of the course. Thank you for using D&D School of Real Estate.

# Real Estate Update Volume 4

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# Chapter 1

## TENNESSEE REAL ESTATE LAW

### Law Changes and Updates

From time to time it is necessary to update or modify the laws and the rules of the Tennessee Real Estate Commission. As our business progresses it is the responsibility of the Commission to review and update the rules and laws and bring them current with the industry practices.

The purpose of the law is to protect the public health safety and welfare; therefore the updates are designed to do just that. Our industry must maintain its professionalism and the law sets the standard we must abide by to insure that professionalism to our clients and customers.

As a part of the law and rule making process there are motions passed by the Commission as to what changes need to be made. After the Commission has made the motions to make changes, there is a time where the motions (that would be Rules and Laws) are brought to legislative and executive committees. The time frame it may take to have the legislature change the law is not known. We work under the assumption that these changes are in the works since it is the will of the Commission to have them made.

There are a number of areas that we should review on a regular basis. Following is a review of 62-13-12, discipline – refusal, revocation or suspension of license – downgrading of licenses – automatic revocation

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## **62-13-312 Discipline – Refusal, revocation or suspension of license – downgrading of licenses – Automatic revocation.**

This section of the Tennessee real estate licensing law is important for review on a regular basis to ensure licensees are familiar with proper procedures. The following discussion of this rule will help in the understanding of the law and how it applies to daily practices of a real estate licensee in Tennessee. We have included a copy of this portion of the law in section four of this course beginning on page 60. Please remember this is a study of and an interpretation of the law as understood by the author and is not meant to be a legal interpretation or legal advice as to the Tennessee Real Estate law. Please contact your attorney for any and all legal advice as to this set of laws presented here.

The commission has the power to reprimand, suspend or revoke a real estate license after ascertaining the facts of a verified complaint and holding a hearing to determine the guilt or innocence of a licensee.

In dealing with discipline 62-13-312's 21 paragraphs deal with many different areas.

62-13-312(1) Substantial and willful misrepresentation. Licensees must be diligent in all representations they make to insure their statements are truthful or factual. Misrepresentation is not tolerated under the law.

62-13-312(2) False promises. Any promise made that was intended to influence a party to a contract to enter into a contract that the licensee did not intend to keep is a violation of the law. Agents must be careful, words do count and promises made must be kept or the intentions must have been to keep the promise when it was made if at all possible.

62-13-312(3) and (4) Continued and flagrant misrepresentation or making of false promises through others or any advertising medium is not an acceptable practice. Although most agents do not openly pursue this path it has and continues to occur in the market place. It is further more, each agent's duty to report violations to the Commission. If in your market place you see this practice going on, you should collect the evidence and pass it along to the Commission. Advertising is always the responsibility of the principal broker and should any misrepresentative advertising be noticed, the principal broker should immediately be notified. Further more the use of a trade name, or an association name, being used by one who is not a member is illegal under the law.

This paragraph is also quoted in Commission policy statement number 2000-CPS-004, dated April 5, 2000. In this statement rule 1260-2-.12 and the annotated code 62-13-312 is referred to as to Internet advertising. The advertising is to be under the direct supervision of the principal broker and that misrepresentation or misleading advertisement is a breach of the code.

Advertising on the Internet is not to lead the consumer to believe the advertiser is operating in this state or a portion of this state when they are not. This was further revised on June 7, 2001 regarding MLS listings advertised on the Internet. Generally, when advertising listings that are not the owner of the websites listing the requirements are as follows:

1. Owner of the website's firm name and telephone number must appear on each page including pages referenced in paragraph 3 below.
2. For web pages displaying "thumbnails" of listings, a disclaimer must be displayed indicating that some or all of these listings may not belong to the firm whose website is being visited. A "thumbnail" shall refer to a summary of a listing containing no more than five selection criteria describing the property. If any information regarding the listing agent is given in the "thumbnail" however, the listing firm's name and telephone number must also be displayed.
3. For web pages displaying a detailed listing containing greater than five selection criteria describing the property, the listing firm's name and telephone number must be displayed and clearly identified as such.

62-13-312(5) failing to remit within a reasonable time, moneys or other valuable consideration coming into the licensee's possession belonging to others is a violation. Under rule 1260-2-.0(2) the Commission requires all monies to be turned over immediately to the principal broker. Remember the rules are the Commissions interpretation of the law and must be adhered to.

62-13-312(6) failing to preserve records for three years relating to real estate transactions following its consummation is another requirement of the law.

62-13-312(7) Acting for more than one party to a transaction without the knowledge and consent in writing of all parties for whom the licensee acts. Although there is no place in the Tennessee real estate license act that specifically approves dual agency, this paragraph sets out the instructions necessary to be a dual agent in a transaction.

62-13-312(8) Failing to furnish a copy of any contract relevant to a real estate transaction to all signatories at the time of execution is a violation of the law. This is probably the most abused paragraph in the law. We are to furnish copies of contracts at the time of execution, not a day or two later. To the letter of the law this means to furnish copies at the time a signature is obtained.

Realizing that the contract is not a contract until acceptance by all parties does not, in our opinion, relieve the agent from the responsibility of supplying copies whenever a signature is obtained. Further, this requirement obliges the agent to return to the signatory immediately and furnish a copy of the contract when signed by any other party, whether a contingency, counter offer or acceptance of said offer. Common practice of relaying counter offers by phone, fax or other electronic method does not seem to fulfill the letter of the law.

62-13-312(9) Termination dates of any contract used in real estate is a must under the law. Contracts that automatically extend are a violation of this section of the law. Common contract law makes this quite clear; all contracts must have a beginning and ending date to be valid.

62-13-312(10) Substituting a contract, for the personal gain of the agent or for malicious purposes, for an existing contract is against the law. If by chance someone you have spent a lot of time with suddenly enters into a contract using another agent, that's too bad, but under the law to replace that existing contract with a new one just to collect the commission is not allowed under Tennessee law.

62-13-312(11) Accepting a commission, or any valuable consideration for the performance of any acts covered by the law from anyone except the broker with whom you are affiliated is a breach of the law. This makes it quite clear who we can accept commissions from. In the case of an agent leaving one firm and becoming affiliated with another firm, the first broker may, still pay any commissions earned at the first firm and not as yet paid at the time of transferring firms. The agent was so affiliated at the time the commission was earned, when the contract was accepted. This paragraph further can be interpreted to mean that any gifts of value (bonuses, dinners, money, or presents) given to an agent for the excellent work they performed for a client or customer must be given to the broker and then at the broker's discretion passed on to the agent. Check with your broker to be sure you understand your company's policy.

62-13-312(12) Conviction of many offenses or pleading nolo contendere is also reason for revocation or suspension of a license. Consult the law if you feel this could apply specifically to you.

62-13-312(13) Discrimination is a breach of the Tennessee license law. A breach of local, state or national laws constitutes a breach of the Tennessee real estate broker's license act. Further violation of any rule adopted by the Commission or any order entered by the Commission constitutes a violation.

62-13-312(15) Brokers must exercise adequate supervision over the activities of licensees affiliated with them. They must additionally complete any administrative measures required by the Commission within a reasonable time period. The rules require immediate action in the case of an agent moving his/her license to another firm.

62-13-312(17) Paying or accepting, giving or charging any undisclosed commissions, rebates or compensation for profit is a violation. Failing to disclose your intention as an agent in a transaction to property owners, whether you purchase directly or indirectly through a third party is a violation. When purchasing property be sure and disclose your licensure to all parties to a transaction, it is good practice to disclose even when assisting a relative and a must when representing a company you may have interest in.

62-13-312(19) We must remember that we are not attorneys and therefore may not give legal advice. There are eight different areas of the law we travel through as a licensed real estate agent and we know something of all areas, however, without being licensed as an attorney we may not give legal advice. This is an area we easily cross into without careful consideration of what we say and advise.

62-13-312(20) To sum up this section of the law, paragraph 20 generally covers all other aspects of improper, fraudulent or dishonest dealing. This catch-all paragraph gives leeway to the Commission in their decisions as to a breach of the law.

62-13-312(21) Paragraph 21 covers the violation of the Tennessee Time-share act, which is a different title and chapter of the Tennessee code annotated, as a violation of the real estate brokers act.

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Although this is just a part of the license law, practitioners should be aware of the law and any changes that are made. Every month the Commission meeting minutes are posted on their website for your review. A brief scan of the minutes will help each licensee stay abreast of changes that may occur. To access the commission website we recommend going to D&D School of Real Estate's website ([www.ddschoollre.com](http://www.ddschoollre.com)) and clicking on the link to the Tennessee Real Estate Commission.

## **Rule Changes**

In addition to the Tennessee Code, chapter thirteen which contains the laws of our state, the Real Estate Commission additionally has the authority to pass rules which are intended to help further clarify the laws in chapter thirteen. Chapters 1260-1 and 1260-2 were certified in 1974 under Chapter 491 of the public Acts of 1974. Additional amendments to the rules have occurred in 1977, 1978, 1979, 1980, 1983, 1984, 1985, 1987, 1988, 1989, 1990, 1991, 1992, 1994, 1998, 1999, 2006 and 2008. As you can see our Commission has been busy keeping our rules in step with the ever-changing services of the real estate industry. We will discuss the 2008 changes below.

**1260-2-.37 SEPTIC SYSTEM INSPECTION LETTERS.** A licensee preparing an offer to buy shall provide in the offer and make the buyer aware that, for a fee, a septic system inspection letter is available through the Tennessee Department of Environment and Conservation, Division of Ground Water Protection.

**Authority:** T. C. A. §§ 62-13-203 and 62-13-403. **Administrative**

**History:** Original rule filed December 3, 2007; effective February 16, 2008.

This new rule was filed in December of 2007 and became effective February 16, 2007. It seems to be self explanatory in that it is the duty of an agent now, in an offer to purchase, make the buyer aware that the Tennessee Department of Environment and Conversation; Division of ground water protection; has available for a fee, a septic system inspection and letter for said buyer. This of course would be a requirement for properties that are not on a public sewer system only. This is the only new rule indicated on the state website.

There are additional rule changes as noted below.

**1260-1-.01 APPLICATIONS FOR EXAMINATIONS.**

(1) Affiliate Brokers. Applicants for the affiliated brokers examination must follow the procedures published by the testing vendor approved by the Tennessee Real Estate Commission concerning appointments for testing information required, and deadlines for submission of examination applications.

(2) Brokers. Applications for the broker's examination must follow the procedures published by the testing vendor approved by the Tennessee Real Estate Commission concerning appointments for testing, information required, and deadlines for submission of examination applications.

(3) An applicant who passes an examination is not necessarily qualified for licensure.

(4) No person shall be eligible for examination or be considered for licensure unless two (2) years have passed from the date of expiration of probation, parole or conviction, or from the date of release from incarceration, whichever is later in time. This restriction shall apply to all felonies, and to misdemeanors which involve the theft of money, services, or property. An applicant who appears before the Commission requesting licensure and who is denied will not be eligible for reconsideration for six (6) months from the date of denial.

**Authority:** T.C.A. §§ 62-13-112, 62-13-203, 62-13-301, 62-13-303, and 62-13-312. **Administrative History:** Original rule certified June 7, 1974. Repeal and refiled March 3, 1980; effective April 27, 1980. Repeal and new rule filed April 17, 1985; effective May 17, 1985. Amendment filed September 16, 1987; effective October 31, 1987. Amendment filed November 21, 1988; effective January 5, 1989. Amendment filed June 17, 1991; effective August 11, 1991. Amendment filed July 31, 2006; effective October 14, 2006. Amendment filed December 3, 2007; effective February 16, 2008.

Paragraph four above was added to the rule and became effective February 16, 2008. This rule is self-explanatory and effects new applicants for a real estate license. This is also a change that should be important to a Principal Broker when considering persons interested in a career in real estate in the state of Tennessee.

**1260-1-.12 FEES.** The following fees shall apply:

- (1) For each examination, a fee to be paid to the testing vendor as set by state contract;
- (2) For the issuance of an original license, a fee to be paid to the Commission of one hundred dollars (\$100.00);
- (3) For each renewal of a license, a fee to be paid to the Commission of eighty dollars (\$80.00);
- (4) A fee to be paid to the Commission for the following:
  - (a) Change of firm address, fifty dollars (\$50.00);
  - (b) Change of Principal Broker, twenty-five dollars (\$25.00);
  - (c) Transfer of affiliation or transfer in or out of retirement status, twenty-five dollars (\$25.00);
  - (d) Commission manual, ten dollars (\$10.00);
  - (e) Certified copies, one dollar (\$1.00) per page;
  - (f) Copies, twenty-five cents (\$.25) per page;
  - (g) Printouts of licensee information, charges will be based upon the cost of producing said printout;
  - (h) Certification of licensure, twenty-five dollars (\$25.00);
  - (i) Printouts of licensee continuing education, ten dollars (\$10.00);
  - (j) Change of name, ten dollars (\$10.00);
  - (k) Duplicate license, ten dollars (\$10.00);
  - (l) Bad Checks must be made good within five (5) days after the licensee is notified. Any bad check not made good within sixty (60) days of the notification will be subject to a one hundred dollar (\$100.00) fee for collection.
- (5) A penalty fee of fifty dollars (\$50.00) per month, or portion thereof, for failing to timely renew a license if the licensee reinstates the license within the sixty (60) day time frame set forth in T. C. A. §62-13-319(a); provided however, the Commission shall have the discretion to waive or lower said fee for good cause shown.

**Authority:** T.C.A. §§62-13-203, 62-13-307, 62-13-308, and 62-13-319.

**Administrative History:** Original rule filed July 14, 1989; effective August 28, 1989. Amendment filed June 17, 1991; effective August 11, 1991. Amendment filed October 1, 1998; effective December 15, 1998. Amendment filed December 8, 1999; effective February 21, 2000. Amendment filed December 3, 2007; effective February 16, 2008.

Paragraph 5 has been added to this rule. This fee for failing to renew in a timely fashion has been established as \$50.00, however the Commission, at its discretion, may waive or lower this late fee. According to Tennessee Code 62-13-319 the fee described above is within the limits of said law. The 60-day rule for reinstatement after a missed renewal date is still the outside limit for reinstatement. After that date any person desiring reinstatement must reapply for licensure. This would entail reexamination. Paragraph (a)(1) and (2) expands the Commission's ability to waive reexamination or additional education requirements or set reasonable conditions in to penalty fees of not more than \$100.00 per month or portion there of.

### **1260-1-.15 ERRORS AND OMISSIONS INSURANCE COVERAGE**

It shall be a requirement for an active licensee to carry errors and omissions insurance to cover all activities contemplated under the Tennessee Real Estate Broker License Act unless the Commission is unable to obtain coverage pursuant to T.C.A. §62-13-112(g) which would void the requirement of coverage under the applicable contract period.

(1) A licensee who places his license in an inactive or retired status is not required to carry errors and omissions insurance until such time as his license is activated.

(2) New licensees, licensees who activate their license from an inactive or retired status, and licensees who reinstate their license from an expired status at a time other than the beginning of the licensing period shall pay a prorated premium in accordance with a schedule provided by the insurance provider.

(3) The Commission shall perform random audits to assure that licensees have met the requirements of this rule.

(4) Any independently obtained errors and omissions insurance policy shall, at a minimum, be issued upon the same terms and conditions as the policy obtained by the Tennessee Real Estate Commission pursuant to T.C.A. § 62-13-112, including, but not limited to, the limits of coverage, the permissible deductible, the permissible exemptions and the term of the policy.

**Authority:** T.C.A. §§62-13-203 and 62-13-212. **Administrative**

**History:** Original rule filed October 15, 1990; effective November 29, 1990. Amendment filed October 1, 1998; effective December 15, 1998. Amendment filed December 3, 2007; effective February 16, 2008.

Paragraph (4) above has been added to further clarify errors and omissions policies other than the policy obtained by the Real Estate Commission. This rule is referenced to Tennessee Code 62-13-112(g)

**1260-2-.33 GIFTS AND PRIZES.**

February, 2008 (Revised) 1

(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.

**Authority:** T.C.A. §62-13-203 and 62-13-203(b). **Administrative**

**History:** New rule filed September 16, 1987; effective October 31, 1987.

Amendment filed October 1, 1998; effective December 15, 1998.

Amendment filed December 3, 2007; effective February 16, 2008.

Paragraph (2) [No cash rebates, cash gifts, or cash prizes may be paid to any person who does not hold a real estate license.] has been eliminated from the rules of the Commission.

**1260-5-.01 PURPOSE.** The Tennessee Real Estate Broker License Act of 1973 (as amended) requires satisfactory completion of certain courses in real estate by applicants for, and holders of, licenses as a broker or affiliate broker. ~~The purpose of chapter is to specify standards and procedures governing the establishment and operation of courses, programs, and schools which are designed to satisfy such educational~~

~~requirements.~~ This chapter establishes standards and procedures governing the establishment and operation of courses, programs, and schools which are designed to satisfy such educational requirements. This chapter further establishes guidelines and requirements to be fulfilled by licensees in obtaining required education.

**Authority:** T.C.A. §§62-13-106, 62-13-203, and 62-13-309.

**Administrative History:** Original rule filed March 3, 1980; effective April 27, 1980. Amendment filed September 30, 1980; effective December 15, 1980. Amendment filed December 3, 2007; effective February 16, 2008.

We have provided the old wording (strikeout) so you can better understand this change. The last sentence in the paragraph was additionally added. Noted below are the changes made to this chapter of the rules of the Tennessee Real Estate Commission.

### **1260-5-.03 REQUIREMENTS FOR COURSES.**

(1) The applicant shall demonstrate to the satisfaction of the Commission that each course submitted for approval will:

- (a) Cover subjects which are reasonably related to the practice of real estate and ~~suitable~~ suitably advanced to benefit and enrich the students enrolled;
- (b) Be conducted in a facility which contains adequate space, seating, and equipment;
- (c) Consist of no fewer than two (2) classroom hours; and
- (d) Incorporate appropriate methods for determining whether a student has successfully

completed such course. Such methods shall include, but not be limited to:

1. A minimum attendance requirement of eighty percent (80%), except that such requirement shall be one hundred percent (100%) if the course consists of eight (8) or fewer classroom hours.
2. Provisions to make up for all classes missed by a student; and
3. A minimum passing requirement of seventy percent (70%) and a comprehensive final examination (or equivalent measure of achievement), if the course consists of more than eight (8) classroom hours. However, courses taken by affiliate brokers or brokers of eight (8) classroom hours or less may be approved for continuing education or post licensing credit without a comprehensive final examination being given.

(2) Each hour of classroom instruction required by *T.C.A. §62-13-303* shall consist of fifty (50) minutes of actual instruction.

(3) There shall be a sixty (60) hour course in basic principles required of all applicants for an affiliate brokers license under *T.C.A. §62-13-303*. The "basic principles of real estate" course required of applicants for affiliate broker's licenses by *T.C.A. §62-13-303* shall include significant instruction in the following areas:

- (a) The real estate business
- (b) The agency relationship
- (c) Contracts (listings; leases; sales)
- (d) Governmental controls on real estate, including the Tennessee Real Estate Broker License Act
- (e) Legal aspects of real estate
- (f) Real estate mathematics
- (g) Real estate valuation
- (h) Real estate finance
- (i) Listing, offer to purchase and settlement forms
- (j) Tennessee real estate laws, rules, practice, etc.
- (k) Fair housing
- (l) Any additional subject which the Commission may require by reasonable written notice

To course sponsor and/or instructor.

(4) The "office or brokerage management" course required of applicants for broker's licenses by *T.C.A. §62-13-303* shall include significant instruction in the following areas:

- (a) Overview of theories, processes, and functions of management
- (b) Review of contracts and closing statements
- (c) Transition to management role
- (d) Planning; policy-making; setting objectives
- (e) Organizing and staffing
- (f) Recruiting, selecting, training, and retaining sales and office personnel
- (g) Written instruments; policy and procedures manual; contract between independent contractor and broker, and contract between salesperson-employee and broker
- (h) Financial systems and records
- (i) Processes, procedures, and methods of control
- (j) Stages of development in real estate firms
- (k) Market analysis
- (l) Horizontal and vertical expansions
- (m) Mergers and acquisitions

(n) Governmental controls on real estate including the Tennessee Real Estate Broker

License Act

(o) Any additional subject whom the Commission may require by reasonable written notice of the course sponsor and/or instructor.

(5) (a) Effective January 1, 1993, the content of all courses approved by the Commission for continuing education shall be directly related to the following topics:

1. Valuation of Real Estate
2. Construction-Property condition, energy
3. Contracts
4. Agency
5. Financing Real Estate
6. Investment Real Estate
7. License Law and Rules
8. Property Management
9. Taxation of Real Estate Transaction
10. Closing and Settlement Procedures
11. Land Use, Planning and Zoning
12. Time-shares
13. Type of Property (condo, dom, pud, zero lot line, single, pud, etc.)
14. Fair Housing
15. Antitrust
16. Ethics in Real Estate
17. Professional Liability

(b) The Commission may add or delete any subject by means of reasonable written notice to the course sponsor and/or instructor.

(6) A candidate for an affiliate broker license shall be deemed to have completed the 60-hour course described in paragraph (3) above if:

(a) the candidate holds a college or university degree with a major or concentration in real estate and the candidate's transcript shows successful completion of at least one 3

hour (30 hours or more of classroom instruction) course in the principles/fundamentals

of real estate and at a minimum two more courses totaling at least 60 hours of

classroom instruction in real estate as evidenced by the title or description of the course; or

(b) The candidate holds a law degree and the law school transcript evidences successful

completion of at least one 3 hour course (30 hours or more of classroom instruction) in real property and at least 60 other hours of classroom instruction in contracts and agency.

**Authority:** T.C.A. §§62-13-106, 62-13-203, and 62-13-303.

**Administrative History:** Original rule filed March 3, 1980; effective April 27, 1980. Amendment filed September 30, 1980; effective December 15, 1980. Amendment filed May 11, 1984; effective June 10, 1984. Amendment filed April 17, 1985; effective May 17, 1985. Amendment filed November 17, 1987; effective January 1, 1988. Amendment filed November 21, 1988; effective January 5, 1989. Amendment filed September 13, 1989; effective October 28, 1989. Amendment filed November 4, 1991; effective December 20, 1991. Amendment filed March 24, 1994; effective June 7, 1994. Amendment filed October 1, 1998; effective December 15, 1998. Amendments filed December 3, 2007; effective February 16, 2008.

There is a typo correction in paragraph (1)(a) as indicated by the strikeout. Additionally the rules concerning qualification for prelicensing through a college degree have been changed dramatically in paragraph (6). The old paragraph has been stricken and the above new paragraph has been added.

#### **1260-5-.07 RECORDS.**

(1) The sponsor of any course(s) approved by the Commission shall maintain accurate and permanent records on all students enrolled in such course(s). The records shall include all information and ratings considered in determining whether students successfully complete such course(s). ~~The records shall include all information and ratings considered in determining whether students successfully complete such course(s).~~ Such records shall be made available upon request by the Commission or its authorized representative.

(2) It shall be the responsibility of each licensee to provide his file identification number at the time of registration for any Tennessee Real Estate Commission approved continuing education course for affiliate brokers, or post licensing course for brokers. If the licensee

fails to provide his file identification number to the sponsor, he may not receive credit for the course from the Tennessee Real Estate Commission. (3) Each sponsor of any Commission approved continuing education course for affiliate brokers, or post licensing course for brokers, shall submit to the Commission, within ten (10) working days of the completion of the course, a roster of all students who successfully complete each course. The roster shall include the name ~~social security number~~ and license/file identification number of each student. This information shall be provided in a roster format approved by the Commission.

**Authority:** T.C.A. §§62-13-106, 62-13-203, and 62-13-303.

**Administrative History:** Original rule filed March 3, 1980; effective April 27, 1980. Amendment filed May 11, 1984; effective June 10, 1984. Amendment filed February 3, 1992; effective March 19, 1992. Amendment filed December 3, 2007; effective February 16, 2008.

The strikeout shows the information that has been eliminated from the above rule of the Commission.

### **1260-5-.11 CORRESPONDENCE COURSES.**

(1) The term "distance education" shall be used interchangeably with the term "correspondence courses" and shall include all education in which instruction does not take place in a traditional classroom setting but rather through other media where the teacher and student are separated by distance and/or by time. Distance education courses approved by the Commission shall be completed within one (1) year of the date of enrollment in order for continuing education to be granted to the licensee. Distance education may include, but is not necessarily limited to the following categories of learning materials and/or transmission modes:

(a) Printed Material. A distance education course using printed materials may be approved by the

Commission if:

1. Students will be provided manual or other printed materials;
2. A comprehensive course outline, requirements for successful completion of the course and information regarding availability of faculty to students are provided;
3. It contains at least six (6) written exercises which are to be submitted periodically to the instructor, graded and returned to the student; and

4. If the class provides more than eight (8) hours of credit, a comprehensive final examination or equivalent measure of achievement is executed prior to the sponsor submitting the roster to the Commission indicating successful completion of the course for any and all students.

(b) Computer Based/Disk/Online Material. A distance education course using these materials and/or formats may be submitted to the Commission for analysis and possible approval if the course is certified by the Association of Real Estate License Law Officials (ARELLO), or other certifying body at the discretion of the Commission, as to technology, support of the technology, interactivity and course design.

1. The Commission will review these certified courses on a case by case basis to determine whether the curriculum will meet Commission education requirements.
2. Any course which would provide more than eight (8) hours of continuing education shall include a final examination which shall be executed prior to submission to the Commission for education credit.
3. Approval of a course under this paragraph will be automatically withdrawn should certification by the respective certifying body be discontinued for any reason.

**Authority:** T.C.A. §§62-13-106, 62-13-203, and 62-13-303.

**Administrative History:** Original rule filed May 11, 1984; effective June 10, 1984. Amendment filed November 17, 1987; effective January 1, 1988. Repeal and new rule filed December 3, 2007; effective February 16, 2008.

This rule change further clarifies the standards that must be met for correspondence courses used in continuing education requirements approved for either pre or post license education. Correspondence education has become a standard in our state for most continuing education. The reasons for this vary but from our

point of view we see the timesavings for Tennessee Agents, without sacrifice of quality education, as the primary benefit.

### **1260-5-.16 COURSE APPROVAL PERIODS.**

February, 2008 (Revised) 1

(1) Effective January 1, 1993, the Commission will approve courses based upon a four (4) year review cycle of all courses. Each cycle will end on December 31st of the fourth year. The first four (4) year period of approval will end December 31, 1996.

(2) Each course approval shall remain effective until the end of the review cycle notwithstanding the date upon which it was approved.

(3) All course providers shall be required to resubmit their courses for approval at least one hundred twenty (120) days prior to the applicable expiration date. Failure to meet this deadline may result in the non-approval of a course.

**Authority:** T.C.A. §§62-13-106, 62-13-203, and 62-13-303.

**Administrative History:** Original rule filed February 3, 1992; effective March 19, 1992. Amendment filed March 24, 1994; effective June 7, 1994. Repeal and new rule filed December 3, 2007; effective February 16, 2008.

This rule change further clarifies the process necessary for course providers to follow in order to renew existing courses.

## **Policy changes by the Commission**

There have been two recent policy changes by the Commission. Additionally the Commission has deleted a number of policies over the past two years as a house keeping measure. Those policies deleted were either changed or replaced with a rule change or a new policy. The new policies are discussed below.

### **Policy # 07-002**

Established that principal brokers will be fined \$1,000.00 for failing to supervise affiliate brokers under T.C.A. 62-13-312(b) (15) when said affiliate brokers are not insured with Errors and Omissions insurance when licensed. This fine will be per uninsured affiliate broker under the principal broker's supervision. This policy does not preclude the Commission from other legally authorized means of recourse available to them.

### **Policy number 2008-CPS-001**

This policy has to do with the renewal of a license more than 60 days after the expiration date of the license as authorized by T.C.A. 62-13-319

1. If reinstatement is requested due to medical reasons the Commission may reinstate with Doctor statements and licensee statement explaining the lapse. Any late penalty fees would not be assessed if reinstatement were granted under this policy.

2. In the event the failure to renew is due to lack of required continuing education, errors and omissions insure renewal or renewal fees, the licensee must sign a Consent Order agreeing to comply with the following requirements:

1. Provide proof of compliance with all prerequisites or conditions, including payment of the renewal fee;

2. Penalties

a) For a license expired more than 60 days, but less than 120 days: Pay a penalty fee of \$50.00 per 30-day period, or portion thereof, from the time the license expires;

b) For a license expired more than 120 days but less than one year: Pay an additional fee of \$150.00 per 30-day period or portion thereof, beginning on the 121<sup>st</sup> day, and,

3. Conditions:

a) Attend one regularly scheduled two-day meeting of the Tennessee Real Estate Commission within 6 months of the date of Consent Order. Licensee will receive 8 hours of continuing education credit for the attendance.

b) In lieu of attending meetings pay a civil penalty of \$1500.00 within 30 days of the date of the Consent Order.

If the licensee seeking reinstatement executes a Consent Order but fails to complete any one of the requirements, an additional civil penalty of \$2500.00 will be assessed. Penalties accrue until all requirements are met. Penalty fees will begin accruing on the first

day following the license expiration date and will be assessed every 30 days at the above rate.

Reinstatement sought after more than one year from expiration must either reapply for license and meet current education requirements and pass all required examinations or reapply and personally appear before the Commission to request waiver for reexamination. Any appeals for reinstatement must be made in writing and appear before the Commission with their principal broker.

# Chapter 1 Quiz

**Answer all the questions and transfer your answers to the answer sheet included in this course.**

1. According to the Tennessee Code Annotated Title 62 chapter 13 the Tennessee Real Estate Commission has which of the following powers in the event a licensee violates the law?

- a. Suspend, revoke a real estate license or advise the courts of a recommended prison sentence.
- b. Suspend, revoke, reprimand or downgrade a broker to an affiliate broker.
- c. Suspend, revoke, fine and or recommend prison sentencing to the Chancery courts.
- d. Fine, revoke or downgrade a licensee.

2. If you have a web page and display listing information belonging to a different firm than yours, which of the following is true?

- a. You only need to mention the listing broker's office name.
- b. The maximum number of selection criteria describing the property is five.
- c. Only the listing agent must be recognized in the information displayed.
- d. There are no guidelines for this type of web-based advertising.

3. When an agent receives earnest money along with an offer to purchase contract, the law states which of the following?

- a. An agent is required to hold the money and is responsible for its safety until an accepted offer is completed and then turns the offer and the money over to the broker at that time.
- b. The agent may hold the money until the next time they are in the office as long as it is a reasonable time.
- c. The agent must follow the company policy manual as to the time to turn in the money to the broker
- d. The money must be turned over immediately to the Principal Broker

4. Automatic extensions of listing contracts are described in the law. Which of the following statements is true?

- a. 62-13-312(9) specifically states that automatic extensions are a violation.
- b. Automatic extensions are allowed as long as the seller agrees in writing before the listing is signed.
- c. Automatic extensions must be covered by company policy and clearly specify the terms and conditions necessary in the company policy manual according to rule 1260-3-.05.
- d. Contracts must have a beginning date but the ending date is not as explicit as the beginning date.

5. Agent Jones sold a house and the closing date was set at October 14<sup>th</sup>. On September 25<sup>th</sup> agent Jones moved to a new firm. At closing from whom does agent Jones receive her commission?

- a. The commission would still be paid by her previous broker to her new broker and the agent will then be paid by the new broker as agreed to when she signed on with the new broker.
- b. Because agent Jones moved she must negotiate with her previous broker as to how much commission she is entitled to since the law clearly shows the broker owns the commissions and the agent loses all rights to them when they move.
- c. She will be paid commission by her previous broker according to the terms of her employment agreement with that original broker.
- d. The commission paid to an agent can come from any broker so long as they are the principal broker of a firm.

6. Agent Bob has done a great job showing the Throckmortons around. They have found many properties they like but they just couldn't make up their minds as to what to buy. After 2 weeks of looking they have decided to go back to Florida and re-think their move. They are very appreciative of Bob and his time and want to show their appreciation so by giving Bob some remuneration. Which of the following is correct?

- a. What ever they give Bob can accept.
- b. What they wish to give must pass through Bob's broker and the broker must then give it to Bob
- c. It would be best if Bob only accepted cash.
- d. What they wish to give must pass through Bob's broker and the broker will determine what amount Bob receives.

7. According to the Rules of the Tennessee Real Estate Commission who is responsible to provide in the offer and make the buyer aware that a septic system inspection is available from the Tennessee Department of Environment and Conservation?

- a. The agent preparing the original offer
- b. The seller of the property
- c. The listing agent
- d. All agents involved in the transaction bear equal responsibility

8. The fine for not renewing your license on time is

- a. \$1500.00 plus \$25.00 per month or part there of until license is renewed
- b. \$50.00 plus an additional 16 hours of continuing education
- c. \$50.00 per month or part they're of within 60 days of the expiration date
- d. \$100.00 per month or part there of within 60 days of expiration date

9. Which of the following is covered under 62-13-312?
- a. To hold the agent only liable for not carrying the proper errors and omissions insurance.
  - b. To hold the agent and their broker liable for flagrant misrepresentation.
  - c. To fine principal brokers \$1,000.00 per agent under T.C.A. 62-13-312(b)(15) who are not insured for errors and omissions insurance.
  - d. To fine agents only \$1,000.00 under T.C.A. 62-13-312(b)(16) for not carrying errors and omissions insurance when licensed.
10. The Tennessee Real Estate Commissions policy on failing to renew a license timely contains which of the following penalties?
- a. Provide proof of compliance with all prerequisites or conditions including payment of renewal fee.
  - b. If license is expired more than 60 days but less than 120 days: pay a penalty fee of \$50.00 per 30 day period or part thereof from the time the license expired.
  - c. If a license expired more than 120 days but less than one year pay an additional fee of \$150.00 per 30 day period or portion thereof beginning on the 121<sup>st</sup> day and attend one regularly scheduled two-day meeting of the Tennessee Real Estate Commission within 6 months of the date of the consent order.
  - d. All of the above.

# Chapter 2

## FAIR HOUSING LEGISLATION AND THE AMERICANS WITH DISABILITIES ACT

### Learning Objectives

- Laws In Fair Housing
- Laws Of The Americans With Disabilities Act

### **Myths & Facts Of The A.D.A**

Real estate agents are responsible to understand, implement, monitor and comply with Federal Fair Housing laws. Licensees who are found guilty of violating Federal Fair Housing laws, even unintentionally, will suffer the legal consequences. Parties who file discrimination complaints or civil suits must prove that discrimination has occurred, but do not have to prove knowledge or specific intent on the part of the agent. It is the responsibility of real estate practitioners to maintain a fair and balanced housing market. People are to be able to live where they want and not be limited based on their national origin or membership in any of the protected classes as listed below.

After the civil war in 1865 the thirteenth amendment to the Constitution abolished slavery. In 1868, the fourteenth amendment was passed which guaranteed all people equal rights and protection under the law. Since that time several Federal Fair Housing laws have passed and are listed below:

- ❖ The Civil Rights Act of 1866 prohibits discrimination on the basis of race only. This Act was interpreted by the courts to apply to public or governmental instances of discrimination only. The Act was undermined by the "separate but equal" doctrine of 1869. In the Plessy vs. Ferguson decision the courts ruled the legalization of separation of races in everything from schools to public accommodations. The facilities were certainly separate but rarely equal. That was not overturned until the landmark court battle, *Brown v. the Topeka Board of Education* in 1954 that banned all forms of government-endorsed segregation, the court made it clear that this violated the fourteenth amendment.

- ❖ The Civil Rights Act of 1964 prohibits discrimination in federally funded housing programs as well as other areas on the basis of race, color, religion or national origin.
- ❖ Title VIII of the Civil Rights Act of 1968 makes it illegal for any real estate practitioner to discriminate against any person(s) because of race, color, religion, or national origin. This is also known as the Fair Housing Act, which is of special concern to real estate practitioners.
- ❖ The Community Housing and Development Act of 1974 added gender as a factor that could not be used to discriminate.
- ❖ The 1988 Amendment to the 1968 Act extended coverage of the Act by adding the protected classes of the “disabled” and “familial status”.

The Fair Housing Act prohibits discrimination in housing because of race, color, national origin, religion, sex, familial status, (meaning children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18), and disability.

The Fair Housing Act covers most housing. In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members.

No one may take any of the following actions based on race, color, national origin, religion, sex, familial status or disability:

- Refuse to rent or sell housing,
- Refuse to negotiate for housing,
- Make housing unavailable,
- Deny a dwelling,
- Set different terms, conditions or privileges for sale or rental of a dwelling,
- Provide different housing services or facilities,
- Falsely deny that housing is available for inspection, sale, or rental,
- For profit, persuade owners to sell or rent (blockbusting), or
- Deny anyone access to or membership in a facility or service (such as a multiple listing service) related to the sale or rental of housing.

In mortgage lending, no one may take any of the following actions based on race, color, national origin, religion, sex, familial status or disability:

- Refuse to make a mortgage loan,
- Refuse to provide information regarding loans,
- Impose different terms or conditions on a loan,
- Discriminate in appraising property,
- Refuse to purchase a loan, or
- Set different terms or conditions for purchasing a loan.

In addition, it is illegal for anyone to threaten, coerce, intimidate or interfere with anyone exercising a fair housing right or assisting others who exercise that right; or to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or disability. This prohibition against discriminatory advertising applies to single-family and owner-occupied housing that is otherwise exempt from the Fair Housing Act.

The Fair Housing Act also provides protection for the disabled, defined as:

- A person with a physical or mental disability (including hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS Related Complex and mental retardation) that substantially limits one or more major life activities.
- A person with a record of such a disability or who is regarded as having such a disability.

A landlord may not refuse to allow reasonable modifications to a dwelling or common use areas, at the tenant's expense, if that is necessary for the disabled person to use the housing. (Where reasonable, the landlord may permit changes only if the tenant agrees to restore the property to its original condition when he moves.) A landlord may not refuse to allow reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing. For example, a building with a "no pets" policy must allow a visually impaired tenant to keep a guide dog. Another example: an apartment complex that offers tenants ample, unassigned parking must honor a request from a mobility-impaired tenant for a reserved space near his/her apartment if necessary to assure that he/she can have access to the apartment.

However, housing need not be made available to a person who is a direct threat to the health or safety of others or who currently uses illegal drugs.

In buildings that were ready for first occupancy after March 13, 1991, and have an elevator and four or more units, the following facilities must be available:

- Public and common areas must be accessible to persons with disabilities.
- Doors and hallways must be wide enough for wheelchairs.
- An accessible route into and through the units.
- Accessible light switches, electrical outlets, thermostats and other environmental controls.
- Reinforced bathroom walls to allow later installation of grab bars.
- Kitchens and bathrooms that can be used by people in wheelchairs.

Unless a building or community qualifies as housing for older persons, it may not discriminate based on familial status. Housing for older persons is exempt from the prohibition against familial status discrimination if:

- The HUD Secretary has determined that it is specifically designed for and occupied by elderly persons under a Federal, State or local government program or
- It is occupied solely by persons who are 62 or older or it houses at least one person who is 55 or older in at least 80 percent of the occupied units; it must have significant services and facilities for older persons; and it adheres to a published policy statement that demonstrates an intent to house persons who are 55 or older. The requirement for significant services and facilities is waived if providing them is not practicable and the housing is necessary to provide important housing opportunities for older persons.

There are some specific practices of special concern to real estate practitioners that are illegal under Fair Housing Laws. Evidences of these practices are often gathered through the use of testers.

**PANIC SELLING** – This is the practice of inducing fear among property owners in a neighborhood. Turnover may occur due to this practice as a result of the introduction of a minority into a neighborhood. This is also known as “blockbusting”, and the intention is for someone to take advantage of the high turnover to buy property at a drastically reduced price and then resell at an inflated price. An agent can be found guilty of panic selling by making comments about the crime rate going up in a certain community.

**RACIAL STEERING** – It is illegal to steer certain individuals toward or away from certain geographic areas of potential housing for discriminatory reasons. The real estate agent must be particularly careful because this is an illegal practice even if the customer *requests* a particular neighborhood due to its racial or minority group make-up.

RED LINING – This is the refusal to service a certain geographical area of the community. It is usually intended to prevent lenders from refusing to lend in certain areas of a community. The lender can refuse to lend to an individual based upon their personal credit worthiness or lack thereof, but not upon the location of the property.

A 1972 amendment to the 1968 Act requires a “Fair Housing Practice Poster” to be displayed in every office of all persons who: sell or rent residential housing or lots; advertise the sale or rental of housing; originate residential real estate loans; and/or provide real estate brokerage services.

## FEDERAL FAIR HOUSING LAWS IN REAL ESTATE ADVERTISING

Complying with Federal Fair Housing laws in advertising is an important issue for Real Estate practitioners. Section 804(c) of the Fair Housing Act prohibits the making, printing and publishing of advertisements which state a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. The prohibition applies to publishers, such as newspapers and directories, as well as to persons and entities who place real estate advertisements. To the extent that either the Advertising Guidelines or the case law do not state that particular terms or phrases (or closely comparable terms) may violate the Act. A publisher is not liable under the Act for advertisements which, in the context of the usage in a particular advertisement, might indicate a preference, limitation or discrimination, but where such a preference is not readily apparent to an ordinary reader. Therefore, complaints will not be accepted against publishers concerning advertisements where the language might or might not be viewed as being used in a discriminatory context. What does this mean? Whether or not an advertisement violates the Act will be determined by how an *ordinary reader* would interpret the advertisement.

Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e., white family home, no Irish) is illegal. Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e. no Jews, Christian home). Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or those which contain a religious symbol, (such as a cross), standing alone, may indicate religious preference. Advertisements containing descriptions of properties (apartment complex with chapel) or services (kosher meals available) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the Act.

The use of secularized terms or symbols relating to religious holidays such as Santa Claus, Easter Bunny, or St.Valentine's Day images, or phrases such as Merry Christmas, Happy Easter, or the like does not constitute a violation of the Act.

Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or discrimination based on sex. Use of the term master bedroom does not constitute a violation of either the sex discrimination provisions or the race discrimination provisions. Terms such as "mother-in-law suite" and "bachelor apartment" are commonly used as physical descriptions of housing units and do not violate the Act.

Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on a disability (i.e., no wheelchairs). Advertisements containing descriptions of properties (great view, fourth-floor walk-up, walk-in closets), services or facilities (jogging trails) or neighborhoods (walk to bus stop) do not violate the Act. Advertisements describing the conduct required of residents ("non-smoking", "sober") do not violate the Act. Advertisements containing descriptions of accessibility features are lawful (wheelchair ramp).

Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples, or singles. Advertisements describing the properties (two bedroom, cozy, family room), services and facilities (no bicycles allowed) or neighborhoods (quiet streets) are not discriminatory and do not violate the Act.

When giving directions to a property for sale or rent, or when describing an area of town, the agent should be careful to avoid using terms that may imply discriminatory preference. For example, mentioning a synagogue or church may indicate a religious preference. Mentioning a significant racial or ethnic landmark is also unwise. It is prudent for the agent to avoid referring to any club or school that is known for its exclusiveness on the basis of race or sex, like an all-white country club or an all-boys school. A helpful rule of thumb to remember when writing advertisements is to always describe the property, not the desired buyers or renters.

HUD has determined that selective advertising violates the Fair Housing Act. This includes strategically placing billboards so only a certain segment of the community will see them, or a direct mail campaign aimed at a limited area, or only advertising in newspapers with a limited circulation that reach a specific segment of the community. In addition, the Fair Housing Act provides that where human models are used in advertising, that minorities, women, and families with children be equally represented.

## FAIR HOUSING ENFORCEMENT AND LEGAL CONSEQUENCES

A victim of housing discrimination has one year after an alleged violation to file a complaint. They are required to inform HUD of their name and address, the name and address of the person the complaint is against (the respondent), the address of the housing involved, a short description of the alleged violation and the date(s) of the alleged violation.

After a complaint has been filed, HUD will notify the alleged violator of the complaint and permit that person to submit an answer. They will investigate the complaint and determine whether there is reasonable cause to believe that the Fair Housing Act has been violated.

HUD will try to reach an agreement with the person the complaint is against (the respondent). A conciliation agreement must protect both the alleged victim of discrimination and the public interest. If an agreement is signed, HUD will take no further action on the complaint. However, if HUD has reasonable cause to believe that a conciliation agreement is breached, HUD will recommend that the Attorney General file suit.

If immediate help is needed to stop a serious problem that is being caused by a Fair Housing Act violation HUD may be able to assist as soon as a complaint is filed. HUD may authorize the Attorney General to go to court to seek temporary or preliminary relief, pending the outcome of the complaint, if irreparable harm is likely to occur without HUD's intervention or there is substantial evidence that a violation of the Fair Housing Act has occurred.

For example: A builder agrees to sell a house but, after learning the buyer is black, fails to keep the agreement. The buyer files a complaint with HUD, who may authorize the Attorney General to go to court to prevent a sale to any other buyer until HUD investigates the complaint.

If, after investigating the complaint, HUD finds reasonable cause to believe that discrimination occurred, the case will be heard in an administrative hearing within 120 days, unless the alleged discrimination victim or the respondent want the case to be heard in Federal district court. If the case goes to an administrative hearing, HUD attorneys will litigate the case on the behalf of the alleged victim of discrimination. An Administrative Law Judge (ALJ) will consider evidence from the alleged victim and the respondent. If the ALJ decides that discrimination has occurred, the respondent can be ordered:

- To compensate the victim for actual damages, including humiliation, pain and suffering.
- To provide injunctive or other equitable relief; for example, to make the housing available to the victim.
- To pay the Federal Government a civil penalty to vindicate the public interest. The maximum penalties are \$11,000 for a first violation, \$27,500 for a second violation within five years and \$55,000 for a further violations within seven years.
- To pay reasonable attorney's fees and costs.

If the alleged victim or the respondent choose to have the case decided in Federal District Court, the Attorney General will file a suit and litigate it on behalf of the alleged victim. Like the Administrative Law Judge, the District Court can order relief, and award actual damages, attorney's fees and costs. In addition, the court can award punitive damages.

## FAIR HOUSING SOLUTIONS

In an effort to find ways to promote fair housing opportunities for minorities and protected classes, the National Association of Realtors and the United States Department of Housing and Urban Development negotiated the Voluntary Affirmative Marketing Agreement (VAMA). This outlines a program of voluntary compliance in which REALTORS® voluntarily agree to the following activities and programs:

- Acquaint the community with the availability of equal housing opportunity
- Establish office procedures to ensure that there is no denial of equal professional service
- Make materials available which will explain this commitment
- Work with other groups within the community to identify and remove barriers to fair housing.

The challenge for real estate professionals to respond correctly and fairly to customers' questions and needs, while promoting fair housing standards at the same time. The following helpful examples of proper responses to fair housings situations come from Doing the Right Thing, A Real Estate Practitioner's Guide to Ethical Decision Making, by Deborah H. Long:

*What should I say to my sellers if they refuse to sell to certain minority groups?*

"Mr. and Mrs. Seller, the Civil Rights Act of 1968 prohibits me from marketing your home based on a buyer's race. No real estate broker can market your home on that basis. If I were to follow your instructions, I would be limiting the number of people who could afford your home ... and any kind of buying restriction would increase the time it takes to sell your home." [If the sellers keep insisting]: "I cannot take this listing under these circumstances. Please understand that any buyers who feel discriminated against on the basis of their race could file charges with HUD against you and my company. It is not worth taking your listing if I lose my real estate license or see you in court facing a \$100,000 fine."

*My listing client is a condominium homeowner. He told me that his apartment could only be sold to older people.*

Ask the condo owner, "Are 100% of the occupants of this complex 62 years old or more, or are at least 80% 55 years old? Does your complex have special facilities designed for the elderly? Does your condo have clearly published guidelines to this effect?"

*After I showed an apartment to my customer, the manager called me to say that he would not rent the unit to her because she was disabled. He said he didn't want to depress the other tenants. What should I do?*

Under the law, the manager is not obligated to rent to someone who would be a threat to the health and safety of others. The reaction of others to a disabled person, however, is not a threat, nor is it the disabled person's responsibility. You should advise the manager that he is violating the Civil Rights law and warn him of the possible consequences. It is also illegal for the manager to inquire about the nature of a person's disability. He can deny an apartment to someone who is dangerous, but is not allowed to ask questions that would determine if that individual is dangerous. A standard rental application form that provides references is one way managers can obtain this kind of information.

*What if my buyers ask, "I know you can't tell me, but what kind of people live in the neighborhood?"*

Your buyers are right. You cannot tell them what kind of people live in the neighborhood if they are asking you to characterize the neighborhood regarding the resident's race, color, religion, national origin, gender, age, disability, or family status. However, you may respond: "The residents here are middle-class professionals," "The neighborhood is working class," or "The people here are upper income." You may describe the neighborhood in terms of its economics, but you cannot describe the neighborhood by the predominance of one ethnic, racial or religious group, or of the color, gender, disability, or family status of the residents. Never use the expression, "This neighborhood is in transition," or "The neighborhood is mixed," or "It's a salt-and pepper area." The courts interpret these euphemisms as overtly discriminatory.

*What if my buyers say, "I belong to a particular religious group (or ethnic group), and I want to be with people of my own kind"? May I assist these buyers?*

Absolutely not. They are asking you to describe the neighborhoods only in terms of affordability and economics. Let the buyers decide for themselves which neighborhoods have the "right" kind of people.

*What if my buyers say, "We want to live within one mile of our synagogue/church"? May I assist these buyers?*

Of course. They are not asking you to choose homes in a particular ethnic neighborhood, but rather a neighborhood with a particular amenity.

*What if my buyer asks, "Is there crime in this neighborhood?"*

It would be best not to answer this question unless you have *current, specific information*.

*My buyers ask, "How are the schools in this area? What kind of children attend the schools?"*

There are a number of problems in dealing with this question. For one, you may sell the buyers on a home because it is in a particular school district. What happens if next year, the school boundary lines change and that home now is served by another school? Ultimately, you may be liable. If you claim the schools are excellent, by what standards are you measuring those schools? Rather than answer as an expert on the schools, defer to the experts – in this case, the buyers themselves. Let them research which schools offer the

programs they want. Remember, you should never characterize a school by saying, "The schools here are bad." The courts will interpret that remark as, "The schools here are integrated," a discriminatory and unacceptable remark. Again, refer the buyers to the experts on the schools system: other parents, the school board, principals, teachers, and guidance counselors.

Staying abreast of the changes in Fair Housing Laws will assist the real estate practitioner in staying within federal guidelines. It is important to remember these regulations in your day-to-day activities and relationships with customers and clients.

## THE AMERICANS WITH DISABILITIES ACT

Over 43 million Americans with physical or mental impairments that substantially limit daily activities are protected under the ADA. These activities include working, walking, talking, seeing, hearing, or caring for oneself. People who have a record of such an impairment and those regarded as having an impairment are also protected. Barriers to employment, transportation, public accommodations, public services, and telecommunications have imposed staggering economic and social costs on American society and have undermined our well-intentioned efforts to educate, rehabilitate, and employ individuals with disabilities. By breaking down these barriers, the Americans with Disabilities Act will enable society to benefit from the skills and talents of individuals with disabilities. It will allow us all to gain from their increased purchasing power and ability to use it, and will lead to fuller, more productive lives for all Americans. The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications. Fair, swift, and effective enforcement of this landmark civil rights legislation is a high priority of the Federal Government.

### TITLE I

The Americans with Disabilities Act consists of five titles. Title I of the ADA prohibits discrimination in employment against people with disabilities. It requires any employers with 15 or more employees to make reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee, unless such accommodation would impose an undue hardship on the employer. Reasonable accommodations include such actions as making work sites accessible, modifying

existing equipment, providing new devices, modifying work schedules, restructuring jobs, and providing readers or interpreters. The Equal Employment Opportunity Commission is the enforcement agency for Title I.

Employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if he/she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected. The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he/she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use. While a current illegal user of drugs is not protected under ADA if an employer acts on the basis of such

use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if he/she is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Title I also prohibits the use of employment tests and other selection criteria that screen out, or tend to screen out, individuals with disabilities, unless such tests or criteria are shown to be job-related and consistent with business necessity. It also bans the use of pre-employment medical examinations or inquiries to determine if an applicant has a disability. It does, however, permit the use of a medical examination after a job offer has been made if the results are kept confidential; all persons offered employment in the same job category are required to take them; and the results are not used to discriminate. Employers are permitted, at any time, to inquire about the ability of a job applicant or employee to perform job-related functions.

## TITLE II

Title II of the ADA requires that the services and programs of local and State governments, as well as other non-Federal government agencies, shall operate their programs so that when viewed in their entirety are readily accessible to and usable by individuals with disabilities.

Title II entities:

- Do not need to remove physical barriers, such as stairs, in all existing buildings, as long as they make their programs accessible to individuals who are unable to use an inaccessible existing facility.
- Must provide appropriate auxiliary aids to ensure that communications with individuals with hearing, vision, or speech impairments are as effective as communications with others, unless an undue burden or fundamental alteration would result.
- May impose safety requirements that are necessary for the safe operation of a Title II program if they are based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

In addition, Title II seeks to ensure that people with disabilities have access to existing public transportation services. All new buses must be accessible. Transit authorities must provide supplementary paratransit services or other special

transportation services for individuals with disabilities who cannot use fixed-route bus services, unless this would present an undue burden. State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication.

## TITLE III

Title III deals with public accommodations including the broad range of privately owned entities that affect commerce, including sales, rental, and service establishments; private educational institutions; recreational facilities; and social service centers. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the Title III requirements for public accommodations.

In providing goods and services, a public accommodation may not use eligibility requirements that exclude or segregate individuals with disabilities, unless the requirements are "necessary" for the operation of the public accommodation. As an example, restricting people with Down's Syndrome to a certain area of a restaurant would violate Title III. It also requires public accommodations to make reasonable modifications to policies, practices, and procedures, unless those modifications would fundamentally alter the nature of the services provided by the public accommodation.

Title III also requires that public accommodations provide auxiliary aids necessary to enable persons who have visual, hearing, or sensory impairments to participate in the program, but only if their provision will not result in an undue burden on the business. Thus, for example, a restaurant would not be required to provide menus in Braille for blind patrons if it requires its servers to read the menu. The auxiliary aid requirement is flexible. A public accommodation may choose among various alternatives as long as the result is effective communication.

With respect to existing facilities of public accommodations, physical barriers must be removed when it is "readily achievable" to do so (i.e., when it can be accomplished easily and without much expense). Tax write-offs are available to minimize the costs associated with the removal of barriers in existing buildings or in providing auxiliary aids, including interpreters for the deaf. Modifications that would be readily achievable in most cases include the ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

However, all construction of new building facilities and alterations of existing facilities in public accommodations, as well as in commercial facilities such as office

buildings, must comply with the ADA Accessibility Guidelines (ADAAG) so they are accessible to people with disabilities. New privately owned buildings are not required to install elevators if they are less than three stories high or have less than 3,000 square feet per story, unless the building is a shopping center, mall, or a professional office of a health care provider. The ADA does not cover strictly residential private apartments and homes. If, however, a place of public accommodation, such as a doctor's office or day care center, is located in a private residence, those portions of the residence used for that purpose are subject to the Title three requirements.

Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a "pattern or practice" of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed \$50,000 for a first violation or \$100,000 for any subsequent violation.

## TITLE IV

Title IV of the ADA amends the Communications Act of 1934 to require that telephone companies provide telecommunication relay services. The relay services must provide speech-impaired or hearing-impaired individuals who use TTYs or other non-voice terminal devices opportunities for communication that are equivalent to those provided to other customers.

## TITLE V

Title V addresses such issues as the ADA's relationship to other laws. This includes the Rehabilitation Act of 1973, requirements relating to the provision of insurance, regulations by the Access Board, prohibition of State immunity, inclusion of Congress as a covered entity, implementation of each title, promotion of alternative means of dispute resolution, and provision of technical assistance.

## MYTHS AND FACTS

The following excerpt is taken from *Myths & Facts About the Americans with Disabilities Act*:

*MYTH: ADA suits are flooding the courts.*

FACT: The ADA has resulted in a surprisingly small number of lawsuits -- only about 650 nationwide in five years. That's tiny compared to the 6 million businesses; 666,000 public and private employers; and 80,000 units of state and local government that must comply.

*MYTH: The ADA is rigid and requires businesses to spend lots of money to make their existing facilities accessible.*

FACT: The ADA is based on common sense. It recognizes that altering existing structures is more costly than making new construction accessible. The law only requires that public accommodations (e.g. stores, banks, hotels, and restaurants) remove architectural barriers in existing facilities when it is "readily achievable", i.e., it can be done "without much difficulty or expense." Inexpensive, easy steps to take include ramping one step; installing a bathroom grab bar; lowering a paper towel dispenser; rearranging furniture; installing offset hinges to widen a doorway; or painting new lines to create an accessible parking space.

*MYTH: The government thinks everything is readily achievable.*

FACT: Not true. Often it may not be readily achievable to remove a barrier -- especially in older structures. Let's say a small business is located above ground. Installing an elevator would not, most likely, be readily achievable -- and there may not be enough room to build a ramp -- or the business may not be profitable enough to build a ramp. In these circumstances, the ADA would allow a business to simply provide curbside service to persons with disabilities.

*MYTH: Sign language interpreters are required everywhere.*

FACT: The ADA only requires that effective communication not exclude people with disabilities -- which in many situations means providing written materials or exchanging notes. The law does not require any measure that would cause an undue financial or administrative burden.

*MYTH: The ADA forces business and government to spend lots of money hiring unqualified people.*

FACT: No unqualified job applicant or employee with a disability can claim employment discrimination under the ADA. Employees must meet all the requirements of the job and perform the essential functions of the job with or without reasonable accommodation. No accommodation must be provided if it would result in an undue hardship on the employer.

*MYTH: Accommodating workers with disabilities costs too much.*

FACT: Reasonable accommodation is usually far less expensive than many people think. In most cases, an appropriate reasonable accommodation can be made without difficulty and at little or no cost. A recent study commissioned by Sears indicates that of the 436 reasonable accommodations provided by the company between 1978 and 1992, 69% cost nothing, 28% cost less than \$1,000, and only 3% cost more than \$1,000.

*MYTH: Businesses must pay large fines when they violate the ADA.*

FACT: Courts may levy civil penalties only in cases brought by the Justice Department, not private litigants. The Department only seeks such penalties when the violation is substantial and the business has shown bad faith in failing to comply. Bad faith can take many forms, including hostile acts against people with disabilities, a long-term failure even to inquire into what the ADA requires, or sustained resistance to voluntary compliance. The Department also considers a business' size and resources in determining whether civil penalties are appropriate. Civil penalties may not be assessed in cases against state or local governments or employers.

*MYTH: Many ADA cases involve frivolous issues.*

FACT: The Justice Department's enforcement of the ADA has been fair and rooted in common sense. The overwhelming majority of the complaints received by the Justice Department have merit. Our focus is on fundamental issues related to access to goods and services that are basic to people's lives. We have avoided pursuing fringe and frivolous issues and will continue to do so.

*MYTH: Everyone claims to be covered under the ADA.*

FACT: The definition of "individual with a disability" is fraught with conditions and must be applied on a case-by-case basis.

*MYTH: The ADA protects people who are overweight.*

FACT: Just being overweight is not enough. Modifications in policies only must be made if they are reasonable and do not fundamentally alter the nature of the program or service provided. The Department has received only a handful of complaints about obesity.

*MYTH: The ADA is being misused by people with "bad backs" and "emotional problems."*

FACT: Trivial complaints do not make it through the system. And many claims filed by individuals with such conditions are not trivial. There are people with severe depression or people with a history of alcoholism who are judged by their employers, not on the basis of their abilities, but rather upon stereotypes and fears that employers associate with their conditions.

Fair Housing laws and the Americans with Disabilities Act are two examples of the important issues facing real estate practitioners today. Agents are expected to understand and implement these laws in order to ensure fair and just treatment to their clients.

# Chapter 2 Quiz

Transfer your answers to the answer sheet

1. Attempting to induce fear among property owners in a neighborhood by introducing a minority into a neighborhood is known as:
  - a) Red Lining
  - b) Racial Steering
  - c) Panic Selling
  - d) Fear Mongering
  
2. The following language in advertising would be unacceptable under the Federal Fair Housing laws:
  - a) "Happy Easter"
  - b) "adults-only"
  - c) "bachelor apartment"
  - d) "walk-in closet"
  
3. Which of the following is not an objective of VAMA?
  - a) Acquaint the community with the availability of equal housing opportunity
  - b) Establish office procedures to ensure that there is no denial of equal professional service
  - c) Racially integrate area schools
  - d) Work with other groups within the community to identify and remove barriers to fair housing.
  
4. Title IV addresses issues related to:
  - a. Telecommunications
  - b. Miscellaneous provisions
  - c. Employment
  - d. Public services of state and local government

5. Title I is enforced by the EEOC.
- a. True
  - b. False
6. Examples of businesses which are covered by Title III include theaters, retailers, hotels and medical offices.
- a. True
  - b. False
7. Restaurants must always provide menus in Braille.
- a. True
  - b. False
8. Which law added gender as a category that could not be used to discriminate?
- a. Civil Rights Act of 1964
  - b. The 1988 Amendment to the 1968 Act
  - c. Title VIII of the Civil Rights Act of 1968
  - d. The Community Housing & Development Act of 1974
9. A person who uses illegal drugs is protected under the Americans with Disabilities Act.
- a. True
  - b. False
10. Racial steering is the practice of refusing to service a certain geographical area of the community by a lender.
- a. True
  - b. False

# Chapter 3

## ENVIRONMENTAL ISSUES AND PROPERTY INSPECTION PROBLEMS

Real estate practitioners must now face a myriad of environmental issues that concern their industry. No longer does the term “let the buyer beware” apply to real estate transactions. Real estate practitioners need to learn how to spot problem areas and situations in the properties they are involved with in order to correctly disclose them to their clients and customers.

### LEAD-BASED PAINT

Although many older homes have historic value, class, charm and style, they often have a serious lead problem. These older homes were built to last much longer than today’s modern homes, but the lead in the paint, dust, and soil can be dangerous if not managed properly.

Sellers and landlords now have to disclose to potential homebuyers or renters if their home contains lead-based paint, or if they are aware of any lead-based paint hazards that may exist. Sales contracts now include a “Lead Warning Statement” about lead-based paint in the building. Buyers will have up to 10 days to check for lead hazards. The United States Department of Housing and Urban Development warns that 3 out of 4 homes built prior to 1978 have lead-based paint.

Lead exposure can harm young children and babies even before they are born. Even children that seem healthy can have high levels of lead in their bodies. Lead poisoning can cause paralysis, brain damage and convulsions. According to HUD, high concentrations of lead in the body can:

- Cause major health problems, especially in children under 7 years old
- Damage a child’s brain, nervous system, kidneys, hearing, or coordination

- Affect learning
- Cause behavior problems, blindness, even death
- Cause problems in pregnancy and affect a baby's normal development

People can get lead in their bodies by breathing or swallowing lead dust, or eating soil or paint chips with lead in them. There are many options for reducing lead hazards. In most cases, lead-based paint that is in good condition is not a hazard. But, removing lead-based paint improperly can increase the danger to your family. Only a qualified professional can determine if the paint in a home contains lead, and give counsel as to how to deal with it.

Where is lead likely to be a hazard? Peeling, chipping, chalking or cracking lead-based paint is a hazard and needs immediate attention. The following areas should be checked: windows and windowsills, doors and doorframes, stairs, railings, and banisters, and porches and fences. Lead can also show up in drinking water that passes through lead pipes.

The EPA lead pamphlet "Protect Your Family From Lead In Your Home" must be given to new tenants, or existing tenants when they renew their lease. If the landlord knows there is lead-based paint in his rental units, including common areas, he must disclose this information at the time that the pamphlet is provided. The landlord is not required to remove lead-based paint.

Children are especially susceptible to the hazard of lead paint, and particularly vulnerable to its effects. Lead dust from deteriorating lead paint which may be chipping, peeling, cracking or just slowly rubbing away easily finds its way onto things such as toys which young children regularly put in their mouths. Children are also more likely to directly contact the lead paint by chewing on various things in the house, such as windowsills, that have been painted with lead paint.

Whereas lead paint is a potential health hazard to all, it is especially so to children. High content of lead in the blood during the developmental stages of children can interrupt the normal growth and development patterns of young cells. Some effects from lead poisoning are not detected until learning defects and disabilities can be seen.

In his article, "Lead: A Hidden Danger in Many Older Homes", Stuart Leiberman, Esq. writes:

Prudence therefore suggests that all home purchasers determine whether the home they are buying contains lead. It is very common practice for homes to be sold with "contingencies". The most common contingencies are an acceptable termite inspection and radon inspection. But there are few rules in real estate, only customs. Parties are free to adjust their contracts as they deem fit. In the case of an older home purchase, cautious purchasers --especially those with young children, may wish to consider an acceptable lead inspection as one of the purchase contingencies. In the last ten years there has been a tremendous amount of litigation nationwide over injuries allegedly attributed to lead contamination. Older paint manufacturers, distributors and retailers have been included in these mammoth cases, and plaintiffs' attorneys have collected a sizable war chest of shared information. Their clients, often people who came into prolonged contact with lead as children, are alleged to be suffering from irreversible brain damage. Home purchasers never are interested in buying into these kinds of horrifying lawsuits. They might therefore consider confronting this issue before the purchase. If you already own a house with this problem, a professional should be consulted to evaluate your particular situation and define your available options.

## ASBESTOS

There are several types of asbestos fibers that may be found in a home. In the past, asbestos fibers were added to a variety of products to add durability, insulation properties and fire resistance and can be found in many types of building materials, products and insulation. You can't tell whether a material contains asbestos simply by looking at it, unless it is labeled. However, a qualified asbestos professional can positively identify asbestos materials with a special type of microscope. The use of asbestos as an insulation was banned in 1978.

Asbestos, once known as the "miracle mineral", was used in products for four reasons: 1) to strengthen the product material; 2) for thermal insulation within a product; 3) for thermal or acoustical insulation or decoration on exposed surfaces; and 4) for fire protection. Asbestos type materials can be found on, or in: heating equipment, fireplaces, wood/coal burning stoves and their components, resilient floor tiles, their backings and adhesives, cement sheets, millboards and paper used as insulation around fireplaces and stoves, soundproofing or decorative materials sprayed on walls and ceilings, patching and joint compounds for walls and ceilings, textured paints, roofing and siding shingles, and artificial ashes and embers in gas fired fireplaces.

The mere presence of asbestos materials in a home is usually not a serious problem or hazard. The danger is that asbestos materials may be, or become damaged, or disturbed over time. Damaged asbestos may release asbestos fibers and become a health hazard. Asbestos materials that would crumble easily if handled, or that has been sawed, scraped or sanded into a powder, is most likely to be a health hazard. According to the Environmental Protection Agency, "the best thing to do with asbestos materials in good condition is to leave them alone. Disturbing it may create a health hazard where none existed before". Naturally, asbestos materials first need to be identified evaluated and determined to be in GOOD CONDITION by a qualified asbestos professional before leaving it alone. The use of asbestos in buildings has been banned since 1978, so any home built prior to that year should be evaluated for asbestos danger.

Studies have shown that breathing high levels of asbestos fibers can lead to an increased risk of: lung cancer, mesothelioma (cancer of the lining of the chest and abdominal cavity) and the lungs being scarred with fibrous tissue. The risk of these cancers increases with the number of asbestos fibers inhaled. Smokers are even more at risk when inhaling these fibers. The symptoms of the diseases do not usually appear until 20 to 30 years after the first exposure of the inhaled asbestos fibers. People who get asbestosis have usually been exposed to high levels of asbestos fibers for a long time. Most people are exposed to small amounts of asbestos fibers daily and usually do not develop these health problems.

## **RADON**

Radon is the second leading cause of lung cancer after smoking. The radioactive gas can enter a home through cracks and openings in floors and walls that are in contact with the ground. Radon can also seep into well water. Radon comes from the decay of uranium, a natural radioactive element commonly present in soils and rock. Each year an estimated 14,000 people die from lung cancer caused by prolonged exposure to radon in air. Clearly, the presence of elevated radon levels in a home's air is a risk to human health.

Millions of homes and buildings contain high levels of radon gas. As a means of prevention, EPA and the Office of the Surgeon General recommend that all homes below the third floor be tested for Radon. Because Radon is invisible and odorless, a simple test is the only way to determine if a home has high radon levels.

The HUD Section 203(k) mortgage-financing program is the primary tool for rehabilitating and improving single-family homes. This program allows homebuyers to finance the purchase and repair or improvement of a home using a single mortgage loan. Part of the 203(k) mortgage proceeds must be used to pay the costs of rehabilitating or improving a residential property. To qualify, the total cost of the eligible repairs or improvements, including fixes to reduce radon levels, must be at least \$5,000. The 203(k) program is an important tool for expanding home ownership, revitalizing homes, neighborhoods and communities, and for making homes healthier and safer for those who occupy them.

## **RESOURCE CONSERVATION AND RECOVERY ACT**

The history of RCRA begins in 1965 when Congress passed the Solid Waste Disposal Act. This law was amended in 1970 with the Resource Recovery act. Congress again revisited these measures in 1976, this time to create and pass the Resource Conservation and Recovery Act. Since then, Congress has amended RCRA twice, once in 1980 and in 1984. The 1984 amendments are the most significant, dealing with Hazardous and Solid wastes. RCRA gave EPA the authority to control hazardous waste from the "cradle-to-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous wastes.

RCRA has four main goals: to decrease the amount of hazardous waste produced; to encourage the efficient use and conservation of energy and natural resources; to prevent harm to people and to the environment; and to see that hazardous materials and wastes are properly handled and disposed of in a safe manner.

The 1984 amendments to RCRA enabled EPA to address environmental problems that could result from underground tanks storing petroleum and other hazardous substances. RCRA focuses only on active and future facility and does not address abandoned or historical sites.

RCRA subtitle C pertains to the storage, transportation, labeling, listing and identification of hazardous wastes. However, it is often difficult to determine what is and what is not a hazardous waste as defined and regulated by RCRA.

Upon attempting to determine if a waste is hazardous by RCRA's standards, it must first be determined if the substance is considered a "solid

waste" by RCRA. All hazardous substances regulated by RCRA are also first considered to be "solid waste." However, determining what a solid waste is can be difficult as well. First, the term "solid" can be misleading, for "solid waste" can come in almost any form: solid, semi-solid, liquid, or gaseous state.

It also requires EPA regulated tests to determine if the material is to be considered a waste or a product. Such tests are not always clear, but depend upon the nature of the substance and the type of management required in handling it. Many recycled materials specified by EPA are regulated as solid wastes by RCRA.

There are two primary ways to determine if a substance is a regulated hazardous waste by RCRA. The first is if the substance is listed by RCRA as a controlled waste. The second way is to test it for one of four characteristic properties: Ignitability, Reactivity, Corrosively, or Toxicity.

There are two other categories of waste that are regulated by RCRA: solid waste that has been mixed with hazardous waste, and solid waste that is from a storage, treatment or disposal facility. There are also some exemptions from these categories: "materials that are disposed of in public sewer systems, industrial discharges that are subject of Clean Water Act permitting requirements, residues from fossil fuel combustion, and certain "mining" wastes."<sup>1</sup>

## UNDERGROUND STORAGE TANKS

The year 1998 marks the deadline by which all underground storage tanks installed before 1988 must either meet government standards or be removed or abandoned. By December 22, 1998 all UST owners and operators who have tanks that do not meet EPA standards under Subtitle I of RCRA will be subject to heavy fines and penalties. The regulations apply to tanks holding 110 or more gallons of petroleum products or other hazardous substances.

However, there are significant exemptions from this. In "1998 Underground Storage Tank Upgrade Requirements Loom Large" Stephen Ricca writes, "EPA's program exempts tanks containing RCRA wastes, storm or wastewater collections systems, and farm or residential tanks of up to 1100 gallon capacity. Also exempt are heating oil tanks for on-site consumption, septic tanks, certain pipeline facilities, surface impoundments, pits, ponds, lagoons, flow-through process tanks, liquid traps or associated gathering lines directly related to certain oil, gas operations and storage tanks in basements and other underground areas."

Since 1988 all new USTs and connected piping have to be constructed out of fiberglass-reinforced steel or plastic, or cathodically protected steel. Some older tanks require upgrades including interior lining, or cathode protection, or a combination of the two. See an expert for specific details that pertain to tank upgrading and to find any state laws pertaining to UST upgrading.

All new USTs are also required to have fail-safe devices ranging from catch basins, overflow protection, and leak detection to pipe leak monitoring. Many older tanks may also have to be upgraded and retrofitted with the above devices. Again, see an expert for details about tank upgrading and installation and other state laws that may apply.

The alternative to upgrading old tanks is removing them from the ground, or filling and sealing the tank and abandoning it. There are federal and state regulations concerning removal and abandonment of USTs. See a specialist to make sure you meet all of these requirements if you choose to remove or permanently abandon a UST.

Purchasing property with an old UST that is not in compliance with the new EPA standards could possibly incur liability on the purchaser to perform the costly measures required to bring the tank into compliance or to remove or abandon it. It is wise to make a thorough inquiry and on-site investigation to determine if there are any USTs and to determine if they require attention according to RCRA Subtitle I. There is no guarantee that the seller would be liable for not disclosing an old UST. However, sellers should also be aware that if the tank would not be discovered upon a reasonable inspection by the buyer, you might have a duty to disclose it to any potential buyer.

Again, the deadline for having all USTs in compliance with RCRA is December 22, 1998. If you discover a UST on property that you are assisting a buyer of a seller, you may want to seek expert advice to determine if and how it should be brought into compliance with the RCRA regulations.

## **COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA)**

Passed in 1980, CERCLA is sister to the RCRA. CERCLA is one of the farthest-reaching and most important of the environmental laws concerning real estate. The law is designed to provide means for cleaning up environmental hazards that pose a threat to people and the environment. It enforces financial liability of responsible parties, and provides a fund to pay for the clean up of hazardous sites if no responsible party can be found or compelled to pay for the

clean up. For this reason the law is also known as "Superfund." CERCLA also established the National Priority List of environmental hazard sites.

Potentially liable parties include:

1. Generators of the hazardous material.
2. Those who arranged for the transportation of the material to the site.
3. Present owners of the land where the hazardous material was found.
4. Former owners or operator of the land (if that party owned the land when the hazardous material was left at the site).

"A responsible party's liability is strict, joint and several, and retroactive. Strict liability means that the government does not need to prove that a [Potentially Responsible Party] caused the hazardous condition. Joint and several liability means that any single PRP can be held responsible for the entire cost of cleanup at a site regardless of the quantity of hazardous substances he actually contributed to the site. All the government need prove is that the PRP contributed some quantity of the hazardous substance to the site-requiring cleanup. Retroactive liability simply means that if the PRP disposed of some hazardous waste before the CERCLA statute was enacted in 1980, it would currently be liable under CERCLA even if the disposal was in compliance with the law that existed prior to 1980."<sup>2</sup>

There are two primary defenses that may be taken against CERCLA liability: the third party defense, and the innocent landowner defense. The third party defense rests on proving that the hazardous material was brought to the site by an act or omission of a third party totally unrelated to the landowner. For this defense to be taken, the third party can have had no contractual agreement or relationship with the landowner. The landowner must also demonstrate that he took reasonable precautions in preventing the material from becoming located on his land. If an employee, agent, or tenant of the landowner put the material there, then the third party defense is invalid.

One court has even found the generator of hazardous waste liable for contamination caused by a transporter due to the nature of the business relationship held between the generator and the transporter. This is so even if the owner arranged to have the waste transported to one site and it was taken to another without authorization. (*O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988), *aff'd*, 883 F. 2d 176 (1<sup>st</sup> Cir. 1989)).

The innocent landowner defense was added to CERCLA in 1986 in order to provide some relief to landowners and expand the Superfund. Now owners that can prove that they did not contribute to any of the hazardous waste, and did not know about the hazardous waste at the time of purchase are not liable under CERCLA. Owners must also demonstrate that they made a reasonable effort to ascertain if the property was contaminated at the time of purchase, and acted promptly and responsibly once the hazardous material was discovered.

Government agencies that acquire contaminated property through condemnation or owners who acquire the contaminated property through inheritance are also not liable.

However another condition that must be met is the diligence done in ascertaining the prior owners use of the land. A responsible inquiry must be made by the purchaser to insure that the property does not contain hazardous waste contamination. The courts consider several factors when determining if this has been done in line with common good business practice.

1. Any specialized knowledge or experience of the new landowner
2. The relationship of the purchase price to the value of the property if uncontaminated
3. Commonly known or reasonably ascertainable information about the property
4. The obviousness of the presence or likely presence of contamination at the property
5. The ability to detect such contamination by appropriate inspection<sup>3</sup>

Even so, relatively few landowners have been able to successfully invoke either of these defenses in court.

A large issue in corporate CERCLA liability is that of "piercing the corporate veil". Piercing the corporate veil refers to holding parent corporations responsible for actions, and in this case hazardous contamination, done by a subsidiary corporation. The EPA looks at various factors when determining when to pierce the corporate veil such as officers acting for both corporations and oversight and involvement in the subsidiary's finances by the parent. It depends generally upon the overall involvement and control of the subsidiary by the parent. In specific circumstances the officers of a company may be held personally liable depending on the officer's ownership of company stock, power

and authority in the management of the company, and authority over waste handling and disposal.

Successor companies have also been held liable for the contamination done by a company they have bought out.

Lenders can be held liable for contamination that happens on the property of the borrower if it can be shown that the lender is in practice and is the owner and operator of the property or has "participated in the management of the property." Lenders may attempt to plead the "Security Interest Exemption" which holds that lenders are not liable if they have simply maintained proper interest in their loan collateral as long as they have not directed the management of the property as well.

Lenders, parent corporations, and successor corporations need all be aware of the possible significant liability for cleanup of hazardous waste they may bear even toward other companies and the land to which they have an interest.

## **PROPERTY INSPECTION PROBLEMS**

The following excerpt is from Red Flags Property Inspection Guide by James C. Prendergast:

Real estate brokers and agents have always been responsible for faithfully representing the condition of a property without concealing any known defects. Recently, the courts and legislatures of various states have given brokers and agents the additional duty of inspecting a property for any visible defects (Red Flags) that may affect its value or desirability, and of disclosing them to prospective buyers. This is a growing trend and real estate professionals nationwide will soon be required to inspect properties for Red Flags.<sup>4</sup>

Real estate practitioners need to school themselves on recognizing these visual signs or indications of defects known as "red flags". "Often, problems cost many thousands of dollars to correct, or they adversely affect a home's resale value, or an unsafe condition may contribute to an injury. In such cases, a buyer often looks for someone to blame and files suit against the seller, usually including the real estate brokers involved in the purchase."<sup>5</sup>

The following are some common causes for structural defects:

- Expansive Soils – When exposed to water, these soils, usually clay, absorb the water and swell. In dry conditions they shrink. This swelling and shrinking can damage the foundation of a home. Check the soil on your property. “If soil is black, soft, and sticky during the wet season, or if cracks appear on the ground in the dry season, the soil is probably expansive”.<sup>6</sup>
- Fills – This is soil that has been moved and placed artificially, common in hillside developments, building tracts on level ground, and adjacent to bays, lakes, rivers, and marshes. If done correctly, fills are very dense and not a red flag. However, poorly and loosely constructed fills will settle when they get wet or are built upon.
- Freezing Ground – “Since water expands when it freezes and shrinks when it thaws, if structures built in frigid areas are not designed to withstand the pressure of freezing ground, their foundations may be subject to movement and damage.”<sup>7</sup> A basement allows the builder to extend the home’s foundation below the freeze level so that movement is minimal. But, if drainage is poor and water is allowed to find its way into the basement, some freezing damage can occur to the foundation. Prendergast points out, “Damage caused by freezing ground is likely to occur within the first few years, and grows more and more severe each winter.”<sup>8</sup>
- Collapsing Soils, Sinkholes, and Voids – Common in southern states, these occur when soft and loose soils are subjected to heavy loads, like a house, and small voids and large caverns develop beneath the earth, which can collapse and cause sinkholes.
- Land sliding – Although most common in the west, landslides can occur anywhere steep slopes are combined with weak rock structures. They happen when the ground is saturated with water and usually are slow moving.
- Poor Drainage – When water is allowed to pool next to the foundation of the house and seep under or bleed through the basement walls, structural damage can occur. Real estate practitioners should look for drainage pipes that empty out at the base of the house instead of away from the house as a potential drainage problem.
- Structural Defects – These construction defects are the underlying cause of distress in many properties. “Undersized beams, improper nailing, and improper construction procedures in general cause defects in a structure. Such defects are usually very difficult to isolate. Where evidence of distress

is observed and no specific causes can be identified, a structural or construction defect may be the reason."<sup>9</sup>

Besides latent structural defects, the real estate practitioner must be on the lookout for red flags on the exterior and interior of the home, as well as problems on the surrounding property and structures. James C. Prendergast notes the following examples:

- Cracks in sidewalks, driveways and decks: Hairline cracks are not a problem, but any crack wide enough to stick a pencil into indicates a defect. Any crack raised enough to trip over is a safety hazard and an indication of uneven ground movement.
- Cracks in foundations: There will always be some cracks in every foundation. Real estate practitioners should look for several severe cracks, or one crack showing suspicious foundation movement, or many hairline cracks clustered in one place. Horizontal cracks, although ugly, are not considered red flags because they are cold joints. This occurs during construction when all the concrete is not poured at the same time.
- Visually distorted structure: When a structure has been affected by foundational movement, walls will move and be visually out of line. Garage doors and front doors will not fit correctly in their frames and stick and bind. Wall bulges, cracks at the corners of windows and doors, shimmied doors show that there has been significant movement.
- Drainage: When water gathers in puddles next to the foundation, it can seep under the home, causing basement flooding, wood rot, damage to heat ducts and swelling of wood floors. Water should be transported away from the house through gutters and downspouts leading out to the driveway or street. The ground should slope *away* from the house to prevent puddling.
- Roof, window and flashing leakage: Any wood and wall staining is evidence of leakage and is a red flag. On the roof, green moss, missing or curling and separating shingles, erosion, blisters, etc. are signs of leakage. If any areas on the ceiling or around the windows have recently been painted over, there may be water stains underneath.
- Hazardous vegetation: Good sized trees and bushes less than five feet from the house or large trees less than fifteen feet away can be hazardous. Their roots can grow under the foundation and cause damage. Dead or unhealthy trees can topple onto the house during a storm.

- Septic systems: Indications of a malfunctioning system include a strong sewage smell of discolored water ponding near the location of the system.
- Retaining walls: These walls are built to hold soil that would otherwise fall down. Wood, rock, or concrete walls should last 100 years or longer. Untreated wood or Douglas fir walls will only last about 10 to 20 years. A wall that bulges or tilts indicates that water is building up behind it and pushing it forward.
- Swimming pools and spas: If the water is not level, this indicates that the pool is tilted and is a red flag. There should be no cracks other than a few minor or hairline cracks.
- Illegal additions: This is a common red flag. Many of these structures are built without permit, and often the electrical, plumbing and other elements are not safe or built to code. "If there is an indication of an illegal or non conforming addition, research city or county files for building permits. Any discrepancy or omission of information that comes to your attention during the research should be well documented for disclosure purposes."<sup>10</sup>
- Basements and crawl spaces: Check the inside of the foundation from the basement for cracks using the same criteria as the outside. Watch out for white, powdery deposits on the walls as well as water stains. These mineral deposits are an indication of repeated occurrences of moisture seepage. If there is a "sump pump", it most likely was installed due to incoming water. This evidence of previous water damage or previous flooding needs to be appropriately disclosed.
- Wall cracks: "Almost every home has a few hairline cracks, caused by shrinkage of wood. However, differential movement of the structure may occur, caused by foundation movement, or structural defect which can cause significant wall cracking."<sup>11</sup> Look for cracks hidden behind curtains.
- Concealed red flags: It is common for an owner to paint and patch up homes before selling. Sometimes red flags like cracks, stains, and sticking doors and windows are concealed. Patched surfaces with a different texture from the rest of the walls, or cracks that can be felt underneath wallpaper are suspect.
- House alignment: Floors should not slope. Shuffle walking across the floor or rolling a ball can reveal sloping. Sticking doors and windows are symptoms that the shape of the window, door or frame has been altered by the movement of the walls and floors. An uneven space at the top or bottom of a door indicates that the frame is distorted.

- Sagging beams: Any sagging that is obvious to the real estate practitioner is a red flag and needs inspection.
- Electrical System: Burn marks near switches or plugs are red flags. Extension cords underneath carpets or stapled along baseboards are also hazardous. There should not be any exposed wiring.
- Water Heater: There should be a temperature/pressure relief valve to allow overheated water to be released. Gas heaters located in the garage should be mounted at least 18 inches off the floor to minimize the chance of gasoline fumes building up near the floor and being ignited by the water heater pilot light.
- Stairways: Staircases with undersized steps, or single steps between rooms are a tripping hazard and red flag.

Peter G. Miller writes in Worth magazine/Advisor, "WHO WINS WITH DISCLOSURE? Pitfalls in the tell-all movement in real estate."

When it comes to buying a home, no one wants to walk away with a lemon. The question is, how much information about a home's defects must be disclosed by law?

As a matter of practice, homeowners and their brokers looking to sell a property typically reveal "material" defects to a prospective buyer, such as termites feasting on the home's foundation. But judging what is or is not a material defect, proving what is actually known, or even determining what should be known are hardly clear-cut matters. The result: Courts nationwide are now clogged with lawsuits filed by homebuyers.

To resolve the problem of excessive litigation, mandatory seller disclosure forms are now required by law in 25 states. "On balance, the forms will reduce litigation," says Ralph Holmen, senior counsel for the National Association of Realtors. Already, says Holmen, a number of major real estate brokers are reporting fewer suits as use of the disclosure forms has spread.

The eventual winners of this tell-all movement? Real estate brokers may come out on top. State and local chapters of the NAR lobbied heavily for disclosure rules in order to reduce a broker's liability in lawsuits based on nondisclosure problems. Since the new disclosure rules focus on sellers, premiums for what's known as "errors and omissions" insurance, a kind of malpractice coverage for real estate

brokers, are expected to fall. So far these premium costs have held steady, but experts say the rules will have an impact in the future.

But even as disclosure standards become increasingly common, buyers and sellers nationwide still need to tread carefully. State laws governing disclosure vary widely, creating much confusion as to what a buyer and seller must know to arrive at a handshake. Examples from around the country show that, depending on the state; disclosure can pose problems for buyers and sellers alike:

- \* Wisconsin sellers must disclose under penalty of law "defects in [a home's] roof." But unless there is a glaring, visible problem, most roof damage, like rotted wood, can go undetected. Few owners (or brokers) are trained as roofers, engineers, builders, or architects.

- \* Rose Pothier, a Santa Ana attorney, points out that in California, disclosure statements do not have to be completed by sellers when a property faces a foreclosure or government sale, or when it is held by an estate or trust.

- \* Virginia owners need not complete disclosure forms if they sell properties in "as is" condition. But this means savvy buyers there should discount their offer for an "as is" property. Virginia owners must also tell buyers if there are "any substances, materials, or environmental hazards (including but not limited to asbestos, radon gas, lead-based paint, underground storage tanks) on or affecting the property." Yet even if an army of inspectors combs the real estate, how can they possibly know about conditions next door that may "affect" the owner's domain?

- \* In at least one state, disclosure has created more lawsuits. The Agency Law Quarterly reports: "The state with the most disclosure has had the highest number of claims. California lawyers have learned that disclosure does not guarantee a fail-safe transaction. In fact, disclosure, as practiced on the West Coast, typically raises buyer expectations to unrealistic levels." Says ALQ publisher Frank Cook: "Disclosure gives lawyers something to go to court with. Where things were gray before, suddenly they are black and white."

How should disclosure be handled by buyers and sellers alike? There are some basic rules that should be followed:

- \* Buyers should always stipulate that home inspections are a condition of the sale. Home inspectors are critical since they act as independent professionals in documenting the condition of a house. If

the inspection is not satisfactory, the buyer can ditch the transaction and get his or her deposit back.

\* Sellers should not fill out disclosure forms or write contract clauses themselves. They should enlist the aid of a real estate attorney or broker. By doing it right upfront, they'll avoid costly battles down the road.

\* Sellers who live in states where disclosure is mandated by law should take care when completing generic questionnaires--laws vary as to what can be stated. For example, Wisconsin permits sellers to answer questions by marking "See expert's report," while Texans may choose "Unknown." In cases like these, sellers should rely on expert reports. Disclosure then becomes part of an inspector's purview, thereby reducing seller liability--that is, if sellers have answered truthfully.

\* Consider escrow accounts and home warranties to pay for any repairs if you're selling. To cut costs if there is a problem that cannot be resolved before closing, a contract can limit seller repair costs to just those funds placed in an escrow account. Limited home warranties, which owners generally purchase through real estate brokers, can also provide protection against major structural defects and system failures, such as clogged plumbing, that occur after the sale. Before setting up an account, sellers should check with a local real estate lawyer to find out if these accounts are allowed in their state.

\* Include a mediation clause in the sales agreement. Real estate mediation panels don't prohibit one person from suing another, but buyers and sellers should check first how local panels are conducted. Panels stacked with local real estate brokers can compromise mediation, since brokers work with one another and share information. They also, by the way, use mediation hearings to identify potentially lucrative future transactions.

Robert N. Bass, a Phoenix attorney with a large real estate practice, says that many Arizona contracts require mediation by an outside intermediary in the event of a dispute between buyers and sellers or between buyers, sellers, and brokers. "I have had several situations where broker clients have received 'demand' letters from attorneys threatening litigation," Bass notes. "It has given me some pleasure to remind them of their client's obligation under the contract to first try mediation with a view toward settling before litigation is filed."

The real estate practitioner must stay updated on the environmental issues that affect his/her business. Lead-based paint, asbestos, radon, and the many environmental regulations as well as property inspection red flags are important concerns to real estate professionals. By being aware of the legal requirements, agents can provide quality service to their clients and customers.

# Chapter 3 Quiz

**Transfer your answers to the answer sheet**

1. "Let the buyer beware" is now the rule-of-thumb real estate professionals should go by in regards to property inspection.
  - a. True
  - b. False
2. How long do potential homebuyers have to check for lead hazards according the "Lead Warning Statement" in the sales contract?
  - a. 2 weeks
  - b. 10 days
  - c. 2 months
  - d. 12 months
3. The use of asbestos in buildings has been banned since:
  - a. 1976
  - b. 1980
  - c. 1978
  - d. 1878
4. The HUD Section 203(k) mortgage-financing program is the primary tool for rehabilitating and improving single-family homes, which includes the cost of reducing radon levels.
  - a. True
  - b. False

5. Which is not a goal of the Resource Conservation and Recovery Act?
- a. to decrease the amount of hazardous waste produced
  - b. to prevent harm to people and to the environment
  - c. to see that hazardous materials and wastes are properly handled and disposed of in a safe manner.
  - d. to discourage the efficient use and conservation of energy and natural resources.
6. Heating oil and septic tanks are not included in the 1998 UST deadline.
- a. True
  - b. False
7. When soil expands in wet conditions and shrinks during dry spells, thus damaging the home's foundation, it is called:
- a. Fills
  - b. Collapsing Soils
  - c. Expansive Soils
  - d. Landslides
8. Which of the following is a red flag that the building structure is poorly aligned?
- a. Sloping floors
  - b. Sticking doors and windows
  - c. An uneven space at the top of bottom of a door
  - d. All of the above

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<sup>1</sup> Dennison, 9-11.

<sup>2</sup> *Ibid.*, 3.

<sup>3</sup> *Ibid.*, 6.

<sup>4</sup> Prendergast, v.

<sup>5</sup> *Ibid.*, v.

<sup>6</sup> *Ibid.*, 5.

<sup>7</sup> *Ibid.*, 5.

<sup>8</sup> *Ibid.*, 6.

<sup>9</sup> *Ibid.*, 7.

<sup>10</sup> *Ibid.*, 30.

<sup>11</sup> *Ibid.*, 30.

# Chapter 4

## ISSUES IN AGENCY LAW

- *Agency Law*
- *Duties to clients and customers*
- *Agency Ethics*
- *Buyer Agency issues and understandings*

What is an agency relationship? It is defined as a legal relationship in which one person, the agent, acts for and on behalf of another, the employer, otherwise known as the principal. The agency relationship is founded on an express or implied contract between the parties. What does that mean exactly? An agency relationship is usually one of trust and confidence between the two parties, a fiduciary relationship. The concept of agency gives the real estate agent his/her identity because it involves the rights, duties, and liabilities of three parties: the principal, or employer; the agent, or broker; and a third party, the customer or client. The National Association of Realtors Code of Ethics describes the agency relationship this way: "When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly."

## AGENCY RELATIONSHIPS

How are agency relationships created? When the principal gives authority to the broker to act or perform as his "special agent", and the broker agrees to the delegation of authority to act, an agency relationship has been created. For example, a listing contract is a broker's employment contract and gives him/her the primary responsibility to find a ready, willing and able buyer for the property. This contractual relationship creates a "special agency." The agency relationship does require a written contract in Tennessee but not that the agent be compensated by the principal.

The following are methods of creating agency relationships:

- Expressed – the agency has been clearly stated, either in writing or orally, in words.
- Implied – when the real estate practitioner has allowed the appearance of representation.
- Ratification – when agency is later acknowledged or restated in an implied relationship.

Showing listed properties that meet the buyer's criteria concerning size, location, or price does *not* create an agency relationship. Describing the amenities of a property and making factual representations pertaining to its condition does *not* create an agency relationship. An agency relationship is *not* created by preparing a standard "Offer to Purchase" form by inserting the terms of the buyer's offer into the blank spaces on the form. An agency relationship is *not* created by promptly transmitting any and all offers made by the buyer to the seller or the seller's broker or agent. An agency relationship *is* created when an agent steps beyond providing market information to facilitate the completion of a transaction, and instead becomes a *negotiator* for the buyer. At that point, an implied agency has been created. However, as mentioned above the Tennessee law requires a written, bilateral agreement to create agency relationships.

The agency relationship also does *not* require that the agent be compensated by the principal in order for an agency relationship to exist.

When an agency relationship has been created, the real estate practitioner owes a specific set of duties to the client. At this point, it will be helpful to clarify the difference between clients and customers. A customer is a person who purchases property with the assistance of a real estate practitioner who is not his agent. The customer is not being represented and does not have the protection of the fiduciary relationship. The agent owes the customer honesty and fairness in dealing. A client, however, is the person who has employed the agent to perform a service for a fee. Your initial contact with the potential customer or client can determine what sort of relationship will be beneficial to all parties. The following categories of buyers should become clients:

- Business associates
- Friends and relatives
- Previous clients
- Buyers with whom the agent has a planned future business relationship
- Buyers who desire representation as clients

Buyers met through an open house or who call for information on a listing should be given only customer-level service. To help you recognize agency relationships, remember that you can give advice to clients but only information to customers.

Your firm should have a developed policy that specifies all the alternative agency relationships it intends to provide to the public.

## **SINGLE AGENCY**

This is the practice of representing either the seller or buyer, but never both in the same transaction. The seller agency, where all sellers are clients and all buyers are customers, is the most common.

Since the broker is trying to find a ready, willing and able buyer for the seller, the buyers must understand that the sales associate showing properties to them represents the seller and cannot advise them. The broker is representing the seller in a fiduciary capacity and it is the broker's responsibility to inform the prospective buyer as soon as possible. The priority at a seller brokerage is to get listings. These firms may work with buyers as customers, but never for them, as clients.

There have been scores of lawsuits brought against real estate practitioners, and licenses have been revoked because buyer customers believed the seller-agent was "on their side". It is very important to disclose to a buyer-customer who you really work for *as soon as possible*. Since the buyer probably begins to place trust in the real estate practitioner towards the beginning of the relationship, you must be prompt in providing them with all the information they need to decide how much trust to place in you. Additionally, prior to signing any contract the customer needs to sign an agency disclosure form indicating their knowledge of agency relationships of the parties involved in the transaction.

## **SUBAGENCY**

This is the practice of acting as the cooperating agent of another agent (the listing agent) in a real estate transaction. It used to be common practice for the listing contract to authorize the appointment of subagents through the use of the Multiple Listing Service of the local real estate board or association. By making listed properties available through the MLS system, all participants had the opportunity to show the property to potential purchasers. With the unilateral agreement of subagency the seller knew that the practitioner showing his property was, in fact, representing him. This system was great for sellers because it allowed a much broader market of buyers who might be interested in purchasing their property.

In 1992 the National Association of Realtors changed its MLS policy to read:

*NAR's multiple listing policy shall be modified to delete the mandatory offer of subagency and make offers of subagency optional. Participants submitting listings to the MLS must, however, offer cooperation to other MLS participants in the form of subagency or cooperation with buyer agents or both. All offers of subagency or cooperation made through an MLS must include an offer of compensation.*

Each market is different, you will want to be sure you understand the practices of the local market you are participating in.

## **DUAL AGENCY**

The practice of representing both the seller and buyer in the same (or related) transaction with the knowledge and consent of all parties prior to representation is called dual agency. If the broker acts for both the seller and the buyer without knowledge or consent of both parties, he/she is an undisclosed dual agent and is considered to be in breach of the license law. Undisclosed dual agency can result from any one of the following:

- A cooperating broker, who is a subagent and owes fiduciary duties to the seller, represents the buyer in the transaction.
- A broker purchases property listed with his/her firm without the knowledge and consent of his/her principal.
- An in-house sale, in which different salespersons from the listing office represent the seller and buyer. (Each state has, in some cases, different interpretations of dual agency. Be sure to consult your state law book for the interpretation in your area.)

Real estate practitioners must be careful not to make statements that, in the heat of the deal, might be taken as advice and lead the buyer into believing there is representation. A good rule

of thumb to avoid accidental undisclosed dual agency is to tell buyers not to discuss anything with you that they would not tell the seller directly.

If undisclosed dual agency has occurred, the seller can seek any or all of the following remedies:

- Rescission – a legal remedy that terminates a contract and attempts to restore the parties to their original positions before the transaction occurred.
- Forfeiture of commission – an agent who breaches his/her fiduciary duties is not entitled to be paid and can be compelled to return any compensation or real estate commission received.
- Damages - includes the difference between the sales price and the price specified in a higher offer that the practitioner failed to present to the seller, or any profits made by a broker who purchased his/her principal's property and resold it for a profit without the knowledge and consent of the seller. The good news in Tennessee is that our agency law is so written that undisclosed dual agency cannot occur. 62-13-401 clearly indicates that agency relationships must be in writing to be valid.

## **NO AGENCY**

This is the practice of acting as a middleman or consultant to render certain specific services in a real estate transaction without an agency relationship with any party (facilitator concept). The practitioner's task is to bring both parties to the table and get an agreement. The practitioner must be cautious to not unduly influence either party or otherwise facilitate the transaction. This concept may also be referred to as a "transaction broker" in some locations. In most states written acknowledgement by the unrepresented parties is required prior to the signing of any contract.

## **DUTIES TO YOUR CLIENT**

A real estate practitioner who becomes an agent of a seller or buyer is considered a fiduciary, which is a person who holds something in trust for another, and owes six specific duties to the client: Loyalty, Obedience, Disclosure, Confidentiality, Reasonable Care, Due Diligence, and Accounting. Any failure on the part of the agent to faithfully perform these duties can constitute fraudulent and dishonest dealings.

### **LOYALTY**

This duty obligates an agent to act at all times solely in the best interest of the client to the exclusion of all other interests, including his own. The duty of loyalty prohibits the real estate practitioner from acting for more than one party in a transaction. The parties in such a real estate transaction have adverse interests and the practitioner could not be loyal to both parties.

### **OBEDIENCE**

The agent must obey all *legal* instructions of his/her client. If these instructions are, in the opinions of the agent, contrary to the best interests of his/her client, then it is the agent's responsibility to disclose the facts and opinions upon which his/her belief is based. This being done, the agent must then follow the client's decision. If the client insists on instructing the agent to an *illegal* action, the agent should immediately withdraw representation.

## **DISCLOSURE**

The agent must reveal to his/her client all material facts, reports and rumors known by the agent that could have a reasonable effect on the decision of the client about the property or transaction. Specifically this means that an agent must disclose the following to the seller/client:

- All facts that affect the value of the seller's property
- Any relationships of the agent to a prospective buyer
- All information concerning the ability or willingness of the potential buyer to complete the sale or offer at a higher price

The agent must avoid a personal interest in the client's property unless he/she obtains the client's permission, and the agent discloses all pertinent information that could influence the client's decision to deal with that agent, and all parties involved understand that the agent is dealing for his/her own benefit.

## **CONFIDENTIALITY**

The real estate agent is the safeguard of his client's confidence and secrets. The agent may not disclose any information that could weaken or damage his/her client's bargaining position. Confidentiality extends even beyond the initial transaction; the agent may never use any harmful information about the client in the future. Of course, confidentiality does not mean the agent can withhold any known material facts concerning the condition of the property from the potential customer or misrepresent the condition of the property in any way.

## **REASONABLE CARE AND DUE DILIGENCE**

This duty is best summarized by saying the agent is wise to always have the best interests of the client in mind, to be reasonable in the showing of the client's property, and to be diligent in his/her representation of the client's position.

## **ACCOUNTING**

According to the Rules of Conduct, the agent is bound by law to account for all money or property entrusted to him/her that belongs to the client. The real estate practitioner must safeguard any moneys, deeds, or other documents in his/her possession that relates to real estate transactions.

## **TERMINATING AGENCY RELATIONSHIPS**

The following are methods of terminating agency relationships:

- Expiration of the agency contract
- Completion of the task contemplated by the agency
- Impossibility of completion
- Rescission by either party
- Agreement of the parties

## **AGENCY ETHICS**

Agency law was at one time neither complex nor mysterious. It functioned effectively for many years to define and protect the rights of principals, brokers, and the public. However, with the emergence of buyer brokerage, and the increasing problems with undisclosed dual agency, it is becoming more difficult to make the agency relationship clear. Deborah H. Long, author of Doing the Right Thing, a Real Estate Practitioner's Guide to Ethical Decision Making, writes,

“Few professionals work so closely with two adversarial parties as do real estate agents. Agents who work *for* sellers frequently work *with* buyers, and almost as often, agents who work *for* buyers also work *with* sellers – in the same transaction”.<sup>i</sup> According to the Association of Real Estate License Law Officials, there were 26,000 complaints against real estate agents in 1993 resulting in over 3,700 agents losing their licenses through suspension or revocation, or paid an administrative fine.<sup>ii</sup> In the issue of agency relationships, real estate practitioners have to be very clear and cautious to make ethical decisions. Long points out, “We often have a difficult time doing the right thing for a few reasons: first, confusing, complex, and sometimes contradictory laws, rules, and codes of conduct govern real estate practitioners; and second, practitioners lack decision-making experience confronting ethical dilemmas”.<sup>iii</sup> She describes four methods by which people make ethical decisions.

## **END RESULT ETHICS**

This person, when faced with an ethical dilemma, will make a list of the “pros and cons of the situation, see which list is longer, and act accordingly. An end-results thinker does not see things as ‘right’ or ‘wrong’, but as ‘desirable’ or ‘undesirable’. If an action leads to the greatest possible balance of good consequences or to the least possible balance of bad consequences, the action is ethical”.<sup>iv</sup> An end results thinker is primarily concerned with their own happiness and avoiding punishment when they make decisions.

## **RULE OR LAW ETHICS**

Long writes, “The rule thinker is primarily concerned with the importance of rules or laws of a society, believing that effective laws apply to everyone and to all circumstances and are based on the fundamental moral truths”.<sup>v</sup> A rule or law ethics person is primarily concerned with “being a good citizen.” Law ethics become complicated when several laws contradict each other, as they often do in real estate.

## **SOCIAL CONTRACT ETHICS**

Long says “Individuals who consider their community’s best interest when making an ethical decision are using social contract ethics”.<sup>vi</sup> Real estate practitioners belong to several communities, their firm, and the local association of REALTORS®, as well as the community they live in, each with its own set of rules, customs and ethics. An individual concerned with social contract ethics responds to society when making his decisions.

## **TRANSFORMATIONAL ETHICS**

Long writes, “The term ‘transformational ethics’ suggests that each person brings a unique perspective to an ethical dilemma. Unlike the other philosophies, which focus on the outer world – on consequences, rules and societal norms – transformational ethics focuses on what lies within each person conscience. Conscience may be defined as the ‘voice from within’.”<sup>vii</sup> A person using this ethical system would try to respect the rights of all people in making his/her decision. The obvious limitation to transformational ethics is that it is highly personal and subjective.

It is very important for real estate practitioners to maintain high ethical standards in their agency relationships. Your business ethics reveal your core values and principles and your commitment to doing the right thing.

## **BUYER AGENCY**

National surveys have indicated that most Buyers of real estate thought that the sales agent represented them in the transaction. “Buyers assumed that real estate agents worked for the buyer when showing properties. This assumption on the part of the buyer prompted them to treat the real estate agent as a friend and confidant throughout the transaction. Not only did this situation do

the buyers a disservice but it also placed the agent at great risk of undisclosed dual agency".<sup>viii</sup> Traditionally, the agent has always represented the seller's best interest of getting the highest price and best terms. Times are changing. Some of the reasons that buyer/client representation is a growing trend:

- The increasing complexity of real estate transactions;
- The rise of consumer protection laws and the decline of caveat emptor – "buyer beware";
- Buyers are more educated about the effects of customer or client representation;
- The rising tide of litigation.<sup>ix</sup>

## **BUYERS AGENCY DUTIES TO THE CLIENT**

Buyer Representation entitles the prospective homebuyer to client level services such as:

### **UNDIVIDED LOYALTY**

The agent must always act in the buyer's best interest.

### **OBEDIENCE**

The agent must obey all lawful instructions of the client.

### **FULL DISCLOSURE**

The agent must investigate and reveal facts to the buyer such as:

- The seller's motivations
- Existence of other offers
- Status of earnest money
- Seller's financial condition
- Property's true worth/value
- Commission split with other brokers
- Legal effect of important contract provisions
- Relationships between the other agent and the principal

*\*Refer to state law to determine its interpretation of these duties.*

## REASONABLE SKILL & CARE

The buyer agent should:

- Analyze market data to determine the property's true value and arrive at a reasonable purchase price and advise the buyer.
- Discover material facts and disclose them to the buyer.
- Investigate these material facts to determine their impact on the property's value.
- Develop a negotiating strategy to assist the buyer (to purchase the property).

## CONFIDENTIALITY

This prohibits the Buyer's agent from disclosing any facts or information that was given to or acquired by the agent to any other party. Information gained must be kept confidential forever unless the Client releases the Agent. Because of this responsibility of confidentiality the agent should refrain from collecting confidential information such as financial information about the customer, before the agency agreement has been discussed completely and signed.

## ACCOUNTABILITY

When a buyer chooses to work with a buyer's agent, he/she should expect the agent to:

- Develop a list of homes that meet the buyer's specifications and price range.
- Provide detailed printouts of information about those homes.

- Perform a Comparative Market Analysis (CMA).
- Ask a number of questions on the buyer's behalf to determine why the seller is selling and how long the home has been on the market.
- Recommend other trustworthy professionals such as lenders, mortgage brokers, closing attorneys and property inspectors.
- Protect the buyer's bargaining position and negotiate aggressively for the buyer.
- Seek advantageous financing for the buyer.

## **REPRESENTATION FORMS**

The concept of agency is becoming increasingly more complex as more customers seek buyer representation. The buyer agency can be a lucrative alternative to the traditional seller representation. However, the new dynamic obscures the traditional identity of the real estate agent, making him/her vulnerable to many risks including: failing to appropriately disclose agency relationships, undisclosed dual agency, and conflicts of interest like a buyer/customer or a seller/client becoming interested in one of the broker's listings. It is paramount that agents protect themselves from these risks by thorough training and education in agency relationships, and through use of concise disclosure forms required by your state licensing board. A buyer agency agreement specifies what each party is responsible for in the relationship. "The majority of disputes between agents and client result from an 'expectation gap'. Quite frequently the buyer-client expected to receive more services than the agent delivered. This expectation can be created by an ambitious presentation on the benefits of representation or the buyer may perceive that he will receive more than the agent is promising."<sup>x</sup>

## **BUYER REPRESENTATION IN REAL ESTATE**

In Buyer Representation in Real Estate, Dianna Wilson Brouthers and Roger Turcotte emphasize the importance of gaining informed consent in order to minimize the risk:

Rule #1: Disclose significant facts. “We must provide consumers with all the information they require in order to ask for their informed consent to act as their agent.”

Rule #2: Offer alternatives. “An agent must tell a consumer all of the alternatives when asking for their informed consent. An agent must be very careful not to sell the buyer on one alternative over another. Agency choices must be presented objectively.”

Rule #3: Confirm the buyer’s understanding of their decision.<sup>xi</sup>

Several types of buyer agency relationships are described:

*Exclusive Right to Represent:* This written agreement grants a broker the exclusive right to represent a buyer. The buyer agent is entitled to compensation if the buyer purchases a property from anyone at any time during the period of the agreement. This form of representation is known as an exclusive buyer agency agreement.

*Exclusive Agency:* This is an agreement giving a broker the right to represent a buyer for a specified period of time. However, the buyer reserves the right to purchase a property, without the use of a buyer agent, directly from the seller. This form of representation is known as an exclusive agency buyer agency agreement.

*Open Agency Agreement:* An agreement that allows a buyer to work with a number of agents at the same time. The buyer is only required to compensate the broker who actually sells him/her property. This is known as an open buyer agency agreement.

It is also important that the buyer understand that they have certain responsibilities to the agent. Brouters and Turcotte point out these responsibilities:

- The buyer should not call other agencies for property information. If they do, they must notify the agent that they are working with a buyer's agent.
- If a buyer visits an open house unaccompanied by their agent, they should inform the agent holding the open house that they have an exclusive representation agreement with a buyer's agent.
- A buyer should not call for property information from private sellers. If they do, they must inform the property owner that they are represented exclusively by a buyer's agent.<sup>xii</sup>

The buyer should be aware that contacting other agencies or FSBOs without their buyer agent hinders the agent's ability to successfully represent them. Also, the buyer must know that they may be responsible for paying the buyer agent's commission regardless of whether the buyer purchases the home directly from the seller or through another agent. "Although a buyer agent fee can be paid from different sources, the buyer clients must understand that they are responsible for ensuring that their agent is paid the fee agreed to in the buyer agency agreement."<sup>xiii</sup> The fee can be financed through the sales contract, or directly paid to the agent outside of the transaction, thus removing the fee issue from the negotiations. Also, the seller or seller's agent can pay the fee.

## **PAYMENT OF FEES**

There are several types of fees that a buyer's agent can negotiate:

- Contingency fee – the agent is paid only if the client buys a property during their relationship.
- Non-contingency fee – the agent is paid regardless of whether the client buys a property.

- Consultant fee – the agent charges a fee based on the performance of a task, assisting the buyer in the purchase.

These fees can be computed on the basis of a percentage of the selling or list price, a flat fee, or an hourly fee.

The following excerpt is from International Real Estate Digest, “*Alternative Methods of Compensation; Buyer Agency Fee Structure*”, by Corey Scholtka:

In buyer representation, the buyer and the buyer's agent determine the commission fee, rather than the seller. The fee may be determined from several options, including:

- Percentage of the total purchase price (fixed or open-ended)
- Hourly fee (normally non-refundable)
- Flat fee

Many buyers' agents are offering a flat fee in response to consumer demand. The flat fee is advantageous to the buyer in that the agent will be paid a fixed amount no matter at what price the home is purchased, or any incentives the broker offers. This cooperative fee may be more or less than the fee the buyer and his/her broker have agreed to, so a credit or debit may need to be applied at closing.

Although compensation from a seller or listing agent does not mean a buyer's broker owes any duties to the seller, there is a growing trend among buyer representatives of respectfully declining the cooperative fee from the listing broker. Consumer advocates claim that knowledgeable buyer brokers do not accept the cooperative split.

For legal and accounting reasons, it is best to disburse the real estate fees from the purchase price at closing. This practice removes any doubt that the buyer's agent has any relationship with the seller or listing company. The Buyer has additional protection when the buyer's agent is paid from the transaction, rather than the listing company after closing. The buyer (who has a contract with, and owes a commission to the buyer's agent) is assured that his/ her agent has been paid in full at closing.

In this scenario the buyer's agent takes the fee directly through the transaction (instead of the cooperative fee). The listing agent takes the same amount that he/she would have taken had this been a cooperative fee split, and the seller receives the same net price. The fee is more appropriately distributed, so neither buyer or seller pay additional commission.

In summary, it is important for the buyer broker to understand that the relationship created is as important as the traditional relationships that have been created with sellers. The buyer has the right to expect total allegiance from the agent he/she has employed. The compensation received by the agent is for services rendered and agents need to be sure that the service has in fact been rendered. As our market continues to change these relationships will also continue to change. By keeping abreast of the latest changes in state law as they relate to agency and buyer representation the practitioner can better serve in the capacity of buyer representation.

# Chapter 4 Quiz

**Transfer your answers to the answer sheet**

1. A person who, when faced with an ethical dilemma, will make a list of the “pros and cons of the situation, see which list is longer, and act accordingly” is an example of someone who uses which type of ethical system:
  - a. Social Contract Ethics
  - b. Rule or Law Ethics
  - c. End Results Ethics
  - d. Transformational Ethics
  
2. Which of the following creates an agency relationship?
  - a. Showing listed properties that meet the buyer’s criteria concerning size, location or price.
  - b. The real estate practitioner enters into a written contract with a client.
  - c. Preparing a standard “Offer to Purchase” form by inserting the terms of the buyer’s offer into the blank spaces.
  - d. Transmitting any and all offers made by the buyer to the seller or the seller’s broker or agent.
  
3. Which of the following should not be given client-level services?
  - a. business associates
  - b. friends and relatives
  - c. previous clients
  - d. buyer met through an open house

4. The practice of acting as a middleman by bringing both parties to the table to get an agreement is known as undisclosed dual agency.
- a. True                      b. False
5. The real estate practitioner must safeguard his/her client's confidence even beyond the initial transaction.
- a. True                      b. False
6. Which of the following can constitute an agency relationship?
- a. Unintentional actions or conduct by the real estate practitioner  
b. A written contract  
c. Compensation  
d. All of the above
7. The practice of representing either the seller or the buyer, but never both in the same transaction is called single agency.
- a. True                      b. False
8. Acting as the cooperating agent of another agent in a real estate transaction is known as:
- a. Subagency  
b. Cooperative agency  
c. Buyer agency  
d. Dual agency

9. Which of the following can the seller seek if undisclosed dual agency has occurred?
- a. damages
  - b. forfeiture of commission
  - c. rescission
  - d. all of the above
10. The real estate practitioner must obey all *legal* instructions of the client, even if, in the opinion of the real estate practitioner, they are contrary to the best interests of the client.
- a. True
  - b. False

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<sup>i</sup> Long, 55.

<sup>ii</sup> ibid., 1.

<sup>iii</sup> ibid., ix.

<sup>iv</sup> ibid., 22.

<sup>v</sup> ibid., 25.

<sup>vi</sup> ibid., 26.

<sup>vii</sup> ibid., 29.

<sup>viii</sup> Brouthers, 11.

<sup>ix</sup> “History of Buyer Agency”

<sup>x</sup> Brouthers, 35.

<sup>xi</sup> ibid., 33.

<sup>xii</sup> ibid., 22.

<sup>xiii</sup> ibid., 23.