

The
MISADVENTURES



of C. TRIPP SLADE Realty
and other worst case scenarios

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The opinions expressed by the author of this course are not necessarily those of the Real Estate Commission. The information presented in this course should not be used as a substitute for competent legal advice.

I. Introduction

A. Police Power

In this section you will learn:

- ☐ - what police power is.
- ☐ - the purpose of legislation.
- ☐ - how legislation is limited.

Overview: As discussed in this chapter, license law was enacted to protect the public against actions of unscrupulous real estate agents. Each state has exercised its right of police power to require the licensing of real estate agents. In doing so, each state has recognized numerous practices whereby a licensee may have his license revoked or suspended.

To many laypersons “police power” means that power exercised by police officers and police departments. It is however much more than the business of detecting crime and criminals, maintaining public order and tranquility. It is almost as broad as the power of the people to govern through their chosen representatives. It is, therefore, more a policy power.

Since the real estate license law is upheld under the police power it is important to know more about it. A full and satisfactory definition of police power is not easily given and courts and writers rather declare its nature and extent. A quotation from an opinion from the United States Supreme Court gives a comprehensive description:

By means of it, the legislature exercises a supervision over matters affecting the commonwealth and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the state may prescribe regulations promoting the health, peace, morals, education and good order of the people, and legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity.

In short it is the power in the state to enact laws within constitutional limits to promote the order, safety, health, morals and general welfare of the commonwealth.

This power does not give the legislature arbitrary authority of regulation or permit it to pass laws arbitrarily taking the life, liberty or property of the citizen. Each statute must be justified as necessary and proper for the protection or advancement of a genuine public interest.

Under our system the United States Government has only those powers granted to it by the federal Constitution and this includes all powers necessary and proper to carry into effect the powers expressly granted. This latter doctrine of implied powers is necessary for the federal government to function and they have been vastly increased in late years by all three branches of the federal government.

The states have all powers of sovereignty except those exclusively granted to the United States, those prohibited to them by the federal Constitution or limited by their own respective constitutions. Hence the legislative branch is possessed of the entire police power of the state except as so limited.

The ten amendments to the United States Constitution, all adopted in 1791, expressly provide that “the powers not delegated to the United States by the Constitution nor prohibited to it by the states are reserved to the states respectively or to the people.” It is these ten amendments that are commonly known as the Bill of Rights. They are limitations solely upon the power of the United States and not upon the power of the states.

In no country do the citizens have more liberty than here. Yet liberty does not mean license to do as one pleases. Each person must so use one’s own property so as not to injure another. Where our liberty is circumscribed, it is in the public interest and this power of legislation in behalf of public morals, health, safety and general welfare is called the police power.

Before specifically referring to the real estate license law, a mention should be made of well-known

examples upheld as the legitimate exercise of legislative discretion: establishment of fire limits within which no wooden building may be erected; zoning in cities so that neighborhoods may be kept free of objectionable businesses; limitation of districts in which cemeteries, slaughterhouses, boiler factories and the like may be excluded; speeding and other careless driving upon the highways; prohibiting adulteration or selling impure goods; garbage disposition; vaccination of school children; regulation or prohibition of liquor, prostitution and gambling; requiring safety devices at places of employment. All these, and many others, will be recognized as useful in promoting public health, safety and morals.

This right to legislate on behalf of public safety, comfort, health and morals includes the right to place restrictions upon the conduct of lawful occupations and businesses. This right cannot be taken away under the guise of regulation, but regulation that is reasonable and in aid of public safety, health and morals is upheld.

From time immemorial the more learned professions such as law, medicine and dentistry have been regulated, and in later years many other professions, businesses and occupations have been subject to regulation beyond that of mere licensing for revenue purposes. In this class falls the regulation of real estate and each state's department of real estate.

In this section you should have learned that:

- ☐ - Police power is the power of the people to govern through their chosen representatives.
- ☐ -The purpose of legislation is to promote order, safety, health, morals and general welfare.
- ☐ -Legislature is limited by the Bill of Rights so that they cannot pass laws arbitrarily taking the life, liberty or property of the citizen.

B. Real Estate License Law

In this section you will learn:

- ☐ - why real estate license law was enacted.
- ☐ - if license law is constitutional.

Opponents of each state's license law have claimed that such a law was an unreasonable interference with the right of every citizen to engage in a legitimate and useful occupation and that the power given to regulatory boards was arbitrary. But brokers and salespersons are agents and representatives of others. They act largely in a confidential and fiduciary capacity. They are trusted by a large portion of the community. States seek to justify that trust and confidence by prescribing certain moral and educational requirements and subjecting to discipline those who violate that trust. The public has an interest in seeing that all brokers and salespersons have the qualification of honesty and truthfulness. Many of the original states creating a real estate license law did not require an examination as to any amount of education or knowledge of the business. Since that time however, law-making bodies have held that a person acting in the capacity of a broker or salesperson should have certain special knowledge qualifications.

The power given to a regulatory board is not arbitrary. It is not without control or guidance. If the regulatory board finds that the applicant for a license is not honest and truthful, that finding must be based upon facts which reasonably justify this conclusion. If the applicant in fact has the qualifications required by the law, the license must be issued.



License law was enacted for the states listed in the given years:

Alabama 1927	Kansas 1947	North Dakota 1957
Alaska 1957	Louisiana 1920	Ohio 1925
Arizona 1928	Maine 1937	Oklahoma 1949
Arkansas 1929	Maryland 1939	Oregon 1919
California 1919	Michigan 1919	Pennsylvania 1929
Colorado 1925	Minnesota 1955	Rhode Island 1959
Connecticut 1953	Mississippi 1954	South Carolina 1956
Delaware 1927	Missouri 1943	South Dakota 1955
Dist. of Columbia 1937	Montana 1921	Tennessee 1951
Florida 1927	Nebraska 1935	Texas 1939
Georgia 1925	Nevada 1923	Utah 1921
Hawaii 1933	New Hampshire 1959	Vermont 1930
Idaho 1921	New Jersey 1921	Virginia 1924
Illinois 1921	New Mexico 1941	Washington 1925
Indiana 1949	New York 1922	West Virginia 1937
Iowa 1930	North Carolina 1957	Wisconsin 1920
		Wyoming 1921

A number of states have declared license law unconstitutional but then later enacted license law. An example would be California which said license law was unconstitutional in 1917 but enacted it as constitutional in 1919. Oklahoma declared license law unconstitutional in 1924 but later enacted it in 1949. Much the same could be said for Kentucky and North Carolina.

Cases firmly establishing license law include: Arkansas, State v. Hurlock 49 S.W. 2d 611; California, Riley v. Chambers 185 P. 855; Connecticut, Cyphers v. Allen 142 Conn. 699; Florida, State v. Rose 122 So. 225; Kentucky, Sims v. Reeves 261 S.W. 2d 812; Louisiana, Zerlin v.

Louisiana Real Estate Board 103 So. 528; New Mexico, State v. Spears 75 N.M. 400; New York, Groetzinger v. Forest Hills Terrace Corp. 205 N.Y.S. 125; North Carolina, State v. Warren 114 S.E. 2d 660; Ohio, Hall v. Geiger-Jones Co. 242 U.S.539; Pennsylvania, Young v. Dept of Public Instruction 105 Pa. Super.Ct.153; Tennessee, Davis v. Halley 227 S.W. 1021; West Virginia, State v. Jackson 120 W.Va. 521; Wisconsin, Payne v. Volkman 198 N.W. 438.

In this section you should have learned that:

- ☐ - Real estate license law was enacted to protect the public.
- ☐ - License law is constitutional since the commissions which make and enforce these standards are doing so to prevent fraud and other wrongs against the public.

C. Discipline of a Real Estate Agent

In this section you will learn:

- ☐ - that there are many reasons for which a real estate licensee may be investigated or have his license revoked or suspended.

Very often each state's real estate commission or regulatory board may revoke or suspend a license for reasons such as the following:

1. Fraud in procuring a license.
2. Professional incompetency.
3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.
4. Habitual intoxication or addiction to the use of

drugs.

5. Conviction of an offense included in section 543B.15, subsection 3. For purposes of this section, "conviction" means a conviction for an indictable offense and includes a guilty plea, deferred judgment from the time of entry of the deferred judgment until the time the defendant is discharged by the court without entry of judgment, or other finding of guilt by a court of competent jurisdiction. A copy of the record of conviction, guilty plea, deferred judgment, or other finding of guilt is conclusive evidence.

6. Fraud in representations as to skill or ability.

7. Use of untruthful or improbable statements in advertisements.

8. Willful or repeated violations of the provisions of this Act.

9. Noncompliance with insurance requirements under section 543B.47.

10. Noncompliance with the trust account requirements under section 543B.46.

11. Revocation of any professional license held by the licensee in this or any other jurisdiction.

The revocation of a broker's license shall automatically suspend every license granted to any person by virtue of the person's employment by the broker whose license has been revoked, pending a change of employer and the issuance of a new license. The new license shall be issued upon payment of a fee in an amount determined by the commission based upon the administrative costs involved, if granted during the same license period in which the original license was granted.

A real estate broker or salesperson who is an owner or lessor of property or an employee of an owner or lessor may have the broker's or salesperson's license revoked or suspended for violations of this section or section 543B.34, except subsections 4, 5, 6 and 9, with respect to that property.

The real estate commission may upon its own motion and shall upon the verified complaint in writing of any person, if the complaint together with

evidence, documentary or otherwise, presented in connection with the complaint makes out a prima-facie case, request the department of inspections and appeals to investigate the actions of any real estate broker, real estate salesperson, or other person who assumes to act in either capacity within this state, and may suspend or revoke a license issued under this chapter at any time if the licensee has by false or fraudulent representation obtained a license, or if the licensee is found to be guilty of any of the following:

1. Making any substantial misrepresentation.

2. Making any false promise of a character likely to influence, persuade or induce.

3. Pursuing a continued and flagrant course of misrepresentation, or making of false promises through agents or salespersons or advertising or otherwise.

4. Acting for more than one party in a transaction without the knowledge of all parties for whom the licensee acts.

5. Accepting a commission or valuable consideration as a real estate broker associate or salesperson for the performance of any of the acts specified in this chapter, from any person, except the broker associate's or salesperson's employer, who must be a licensed real estate broker. However, a broker associate or salesperson may, without violating this subsection, accept a commission or valuable consideration from a corporation which is wholly owned, or owned with a spouse, by the broker associate or salesperson if the conditions described in subsection 9 are met.

6. Representing or attempting to represent a real estate broker other than the licensee's employer, without the express knowledge and consent of the employer.

7. Failing, within a reasonable time, to account for or to remit any moneys coming into the licensee's possession which belong to others.

8. Being unworthy or incompetent to act as a real estate broker or salesperson in such manner as to

safeguard the interests of the public.

9.a. Paying a commission or any part of a commission for performing any of the acts specified in this chapter to a person who is not a licensed broker or salesperson under this chapter or who is not engaged in the real estate business in another state or foreign country, provided that the provisions of this section shall not be construed to prohibit the payment of earned commission to any of the following:

(1) The estate or heirs of a deceased real estate licensee when such licensee had a valid real estate license in effect at the time the commission was earned.

(2) A citizen of another country acting as a referral agent if that country does not license real estate brokers and if the Iowa licensee paying the commission or compensation obtains and maintains reasonable written evidence that the payee is a citizen of the other country, is not a resident of this country, and is in the business of brokering real estate in that other country.

(3) A corporation pursuant to paragraph “b”.

b. A broker may pay a commission to a corporation which is wholly owned, or owned with a spouse, by a salesperson or broker associate employed by or otherwise associated with the broker, if all of the following conditions are met:

(1) The corporation does not engage in real estate transactions as a third-party agent or in any other activity requiring a license under this chapter.

(2) The employing broker is not relieved of any obligation to supervise the employed licensee or any other requirement of this chapter or the rules adopted pursuant to this chapter.

(3) The employed broker associate or salesperson is not relieved from any personal civil liability for any licensed activities by interposing the corporate form.

10. Failing, within a reasonable time, to provide information requested by the commission as the result of a formal or informal complaint to the commission which would indicate a violation of this chapter.

11. Any other conduct, whether of the same or different character from that specified in this section, which demonstrates bad faith, or improper, fraudulent, or dishonest dealings which would have disqualified the licensee from securing a license under this chapter.

Any unlawful act or violation of any of the provisions of this chapter by any real estate broker associate or salesperson, employee, or partner or associate of a licensed real estate broker, is not cause for the revocation of the license of any real estate broker, unless the commission finds that the real estate broker had guilty knowledge of the unlawful act or violation.

In this section you should have learned that:

- ☐ - there are many reasons a regulatory agency may investigate a licensee. A licensee failing to comply with the above rules and regulations may have his license revoked, suspended or have other disciplinary actions taken against him.

As you can see, there are many activities which can trigger a complaint to the real estate commission causing an investigation. The balance of this course is devoted to looking at some of these activities. Please note that when an agent was guilty on one point, he was often guilty on several points each of which could have caused the revocation or suspension of his license.

II. Misrepresentation and Substantial Misrepresentation

In this section you will learn:

- ☐ - what type of information must be properly represented to the buyer.
- ☐ - what happens when the agent plays more than one role.
- ☐ - what the agent must tell the lending agency.
- ☐ - who needs to know when the deposit is other than cash.

Overview: As mentioned in the previous chapter, real estate agents may have their licenses suspended or revoked for misrepresentation. This chapter presents real life business transactions demonstrating broker and salesperson misrepresentations and substantial misrepresentations.

A. Misrepresentation to the Buyer

Question #1:

Is a broker relieved of responsibility regarding what he says about a property because the buyer inspects it?

Answer:

No. The agent is obligated to speak truthfully concerning the property even if the buyer inspects it.

Most purchasers place trust in the licensee showing them the property. The purchaser trusts the licensee to reveal property defects such as cracked basement walls, faulty wiring and deteriorated roofing, to name a few. Additionally, purchasers expect an honest presentation of an income property's profit and loss statement. Misrepresentation of such income could result in the revocation or suspension of license.

Case Study Answer #1

A California broker listed a ranch which was to be exchanged for other income producing property.

The broker sold to the ranch owners a motel described by the broker as being "a real money-maker", fully occupied and having gross annual income of \$27,000.00. The ranchers made a complete personal inspection of the motel before signing the sales agreement.

After owning the property for a short time, it became obvious to the purchasers that the descriptive statements made of the motel were false. The units were only one-half full; the income for the first six months of their ownership was only \$6,600.00!

When the broker's license was revoked, the broker appealed the decision to the District Court of Appeal which reasoned:

The Business and Professions Code states "a real estate license may be suspended or revoked if a licensee makes any substantial misrepresentations." It was apparent that from the evidence given by the ranch owners that the broker did misrepresent the motel to them. The motel was represented as being fully occupied when less than half of the units were occupied. The inspection made by the man of the motel did not release the broker from his obligation to represent clearly and truthfully any property that he professionally represented.

The District Court of Appeals upheld the decision of the Division of Real Estate to revoke the broker's license.



Conclusion:

When a purchaser inspects income producing property, it is important the inspection includes 100% of the property. For a licensee to say, "You see one motel unit, you see them all," can only result in problems for the licensee who discourages inspection of the entire property.

The licensee should also encourage the buyer to inspect the property for substantiation of the occupancy representation over a long period of time. (A simple inspection of a sparsely filled motel parking lot could indicate a low volume of business performed by the motel!)

The competent professional will suggest the prospective purchaser verify all income before selecting a property.

There are several methods of income verification.

They are:

#1) Audited financial statements completed by a certified public accountant.

#2) Financial statements completed without audit with records supplied by the owner.

#3) Owner records.

#4) Broker supplied records.

All of the above methods of income verification are suspect except #1. The owner supplied all income records for methods #2 and #3 above. The broker might inflate or shade his income report in #4. The C.P.A. audited financial statement income verification method should be suggested to all income property purchasers.

Question #2:

What should the broker disclose about property zoning?

Answer:

The agent must give all the facts concerning zoning and temporary permits on a property.

Case Study Answer #2

A trailer park in Florida was sold through the services of a real estate broker. He had placed an advertisement in the local paper which read: "Property fronts on busy street zoned commercial with room to build stores." With this information, the prospective buyer viewed the property and a contract for sale was signed. The buyers discovered from the local courthouse that the zoning was only residential and that the previous owners had operated their trailer park with the permission of a temporary permit. At a meeting which had been arranged between the parties, the buyers refused to go through with the transaction because the property was not zoned commercial as represented. The sellers decided to hold the buyers to the contract.

A complaint was made to the real estate commission and the broker was charged with being guilty of misrepresentation.

At the hearing, the broker explained that the portion of the newspaper advertisement which read, "Property fronts on busy street zoned commercial with room to build stores," involved a misprint, since the word "stores" should have been "storage," and that the meaning intended was that the street was a commercial one and that there was room for storage space or buildings on the property described.

The broker took the matter to the District Court of Appeals. It was clear that the broker had misrepresented to the buyers that the property was indeed zoned for commercial use. The broker well knew that the property was residentially zoned, since it was he who was instrumental in procuring the conditional use permit in order that the sellers might, subject to that permit, operate a trailer park.

The court of appeals ordered the real estate commission to modify the length of the broker's suspension after due consideration of the matter.

Conclusion:

The broker in this case could not hide behind his illogical "explanation" of the advertisement concerning the property. It was his duty to fully

explain the zoning to the buyers.

Because zoning laws may be difficult to understand, it is important that the buyer's proposed use be approved by the zoning commission. One broker was commended by a court judge for literally transporting his customers to the zoning commission office for a face-to-face conference with the zoning commissioner.

Another agent said he made an honest mistake when promising his customers the zoning permitted a certain use. The court commented, "When one has a duty to know the truth, it is no excuse he is honestly mistaken." His "honest mistake" cost him \$29,000.00.

B. Misrepresentation about the Agent's Roles

Question #3:

Is it necessary for a broker to tell the buyers that he (the licensee) is also the seller?

Answer:

Yes. The agent must disclose his position as seller and licensee when selling his own property.

Case Study Answer #3

The Georgia Real Estate Commission found a certain broker had violated a statute which requires a broker who is selling his own property "to insert a clause disclosing his position as seller rather than as broker in the contract of sale."

The commission found the broker had "demonstrated unworthiness or incompetency to act as a real estate broker ...in such a manner as to safeguard the interest of the public." The broker's license was revoked.

Conclusion:

It is necessary to warn the public of a seller's status if he is also a real estate licensee. Real estate agents have expertise in the marketplace because of their training, knowledge and experience. The public

may find themselves on unequal footings when negotiating with a licensee. When the agent inserts notification in the sales contract regarding his professional status, the public is warned to seek legal counsel to counter balance a pathetic or weak bargaining position.

The wise licensee will seek legal review of all contracts for which he is a principal. The review will reveal any contract disclosure difficiencies pertaining to license law. The attorney will also suggest proper wording to fulfill the requirements of the law.

Question #4:

Are there any limitations on a broker buying and selling land?

Answer:

Yes. Once an agent agrees to search for a suitable property for a buyer, he may not break his fiduciary duties. In other words, he may not step out of his role as an agent to buy property with the intent of selling it to his client at a higher price.

Case Study Answer #4

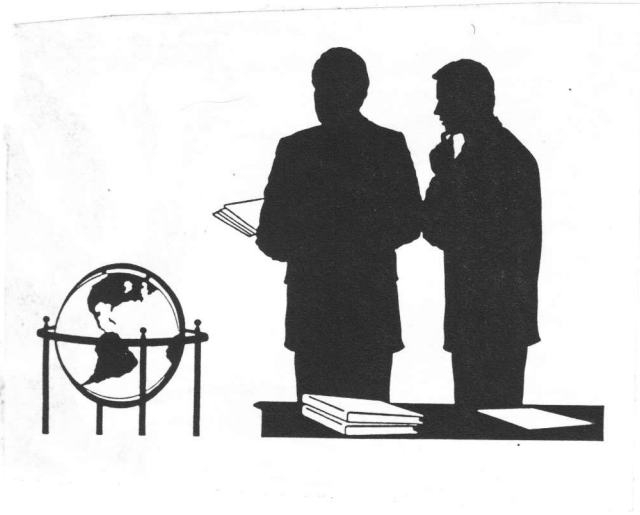
Broker C. Tripp Slade (so named by the author), of Wisconsin, was engaged by a member of a charitable agency which wanted to purchase a piece of property. The charitable agency expressed their desire that Slade's commission not exceed six to eight per cent of the final selling price.

Slade was successful in his attempt to find a building which in itself was too small, but with the addition of two adjacent lots was suitable for the charity's needs.

Unknown to the charity, the C. Tripp Slade obtained the option to purchase the adjacent lots for himself for \$30,000 per lot. The price for each option was \$1.00.

The sellers conveyed to broker Slade for \$30,000 for each lot and revenue stamps were purchased for that amount. C. Tripp Slade then purchased additional revenue stamps to make each lot appear that it sold for \$37,500.

A sale later took place with the charitable agency for \$75,000. At no time did broker Slade inform any representative of this agency that the he had



purchased the lots for \$60,000.

C. Tripp Slade testified that he put excess revenue stamps on the deeds because he had no obligation to disclose his purchase price. His logic was to this effect: if the difference between what the property could be purchased for and the amount the purchaser would pay was small, the broker would act as an agent for the purchaser and collect a commission for services; if the amount was substantial and in excess of the customary commission, the broker would act as principal and sell to the purchaser as an owner.

The commission concluded that the broker had agreed to act as an agent and limit his commission to six to eight percent; that placing additional stamps on the deeds constituted a material misrepresentation; and that his failure to disclose the purchase price constituted a breach of duty and a violation of his statutory obligations as a real estate broker. The Wisconsin Supreme Court agreed with the conclusion of the real estate commission to revoke the broker's license.

No principle in the law of agency is better settled than that the agent may not deal in the business of his agency for his own benefit. All profits made and

advantage gained by the agent in the execution of the agency belong to the principal, and it matters not whether such profit or advantage is the result of the performance or of the violation of a duty of the agency if it be the fruit of the agency. All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as an agent, and though the loss, if one had occurred, would have fallen on the agent, will, wherever they can be regarded as the fruit or outgrowth of the agency, be deemed to have been acquired for the benefit of the principal.

The broker's license was revoked.

Conclusion:

A broker must keep in mind the best interest of his clients. If he finds a suitable property at a price below what the buyer was willing to spend, he should gladly pass on this good fortune to his clients even though it may mean a lower commission for himself.

The charitable agency clearly wanted to purchase real estate. The broker was contacted in the first instance because he was a real estate broker. When he understood the task of obtaining real estate for it under the circumstances described in the record he became an agent in his capacity as a real estate broker. As such agent he subjected himself to the fiduciary duties of an agent, and to the statutory standards of business conduct.

Affixing additional revenue stamps to the deeds could be only for the purpose of misrepresenting the actual purchase price or concealing it from his principal. It could not have been done to influence anyone other than the charitable agency. To say he expended his own funds for unnecessary revenue stamps without any purpose is incredible.

The conclusions that the broker made a substantial misrepresentation by placing additional revenue stamps on the deeds, and that he failed to disclose a \$15,000 profit to his principal, demonstrated untrustworthiness to act as a broker in such a manner as to safeguard the interest of the public, and that the broker was guilty of conduct which constitutes

improper or dishonest conduct.

C. Misrepresentation to the Lending Agency

Question #5:

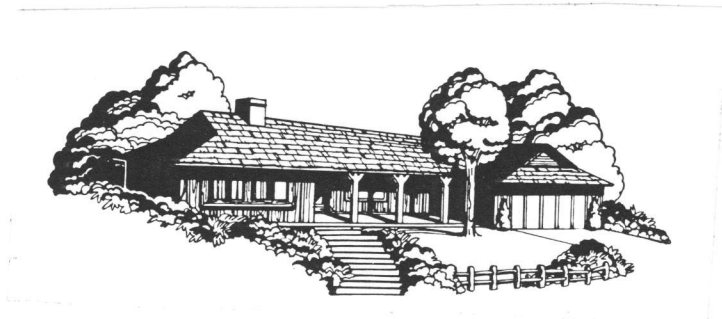
Is it wrong for a licensee to misrepresent the true value of the purchaser's assets to the financial institution?

Answer:

Because the lender often makes a major monetary contribution toward the transaction, sometimes lending upwards of 95% of the purchase price, the lender can be found in a risky position should the buyer not make loan payments as agreed. If the purchaser submits a large downpayment, the risk to the lender is reduced. If the agent misrepresents the true value of the purchaser's downpayment, the lender will be in a more precarious position than thought to be. To preserve the integrity of the financial institution, the buyer's assets must be honestly represented. Some states allow the courts to imprison anyone who falsely represents the purchase price (and consequently the real downpayment) to the lender.

Case Study Answer #5

A real estate firm in Nebraska had the exclusive listing with a developer on recently built properties. A sales promotion was used by the brokerage and the development whereby the seller would



purchase an "insignificant" piece of personal property from the buyer for the sum of \$1,000. No exchange of cash took place, but the seller then credited the buyer with \$1,000 against the purchase price for the downpayment.

A prospective buyer was told that the purchase price was \$25,900, but with the sale of some item, in this case a canceled rent receipt, the price was in effect lowered to only \$24,900. Submitting an additional \$400, the total earnest money deposit was now \$1,400. The purchaser's offer to purchase the property was contingent upon obtaining a 95% loan. The licensee then referred the purchaser to a building and loan association which took the information regarding the purchase price and the earnest money deposit from the purchase agreement. The loan was made in reliance on the purchase agreement and the transaction was closed. This was repeated with another client later on during the next year.

The real estate commission alleged that in the transactions involved, they had all violated a federal statute which makes it unlawful to knowingly make any false statement or representation, or unlawfully overvalue any land upon any application or purchase agreement for the purpose of influencing in any way the action of any institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation. Under Nebraska statutes, the real estate commission has the power to revoke or suspend any

license if the licensee had been found guilty of any of numerous specified unfair trade practices, including the violation of any rule or regulation promulgated by the commission in the interest of the public, or actions demonstrating unworthiness or incompetency to act as a broker or salesman. One such rule provides that actions demonstrating unworthiness shall include, but not be limited,

"Representing to any lender, guaranteeing agency, or any other

interested party, either verbally or through the preparation of false documents, an amount in excess

of the true and actual sale price of the real estate or terms differing from those actually agreed upon.”

The commission suspended the license for 31 days. The District Court overruled this decision, however, and the commission appealed to the Supreme Court. Here, the court decided that the evidence was of a substantial nature and hence the decision of the commission was upheld. “The commission acted within the scope of its authority, and its action was not arbitrary, capricious, or unreasonable. The judgment of the District Court is reversed and the order of the State Real Estate Commission suspending appellee’s license is reinstated.”

Conclusion:

The agent must properly represent the financial position of the buyer to the lending agency. He may not re-write the numbers in order to make the buyer appear to be in better condition than he is.

Question #6:

Can an agent arrange for a second loan to cover payments toward a property which are above the loan limits?

Answer:

The agent must not coerce buyers into falsely certifying their payments above loan limits to the lending agency.

Case Study Answer #6

A couple in Wyoming saw a newspaper advertisement for a house which they liked and contacted the real estate agent as a result. They made an offer for the house, subject to their obtaining a Veteran’s Administration loan. The wife understood that it was important to have a high enough appraisal such that the V.A. loan would cover most of the purchase price. They found it difficult to secure such a high appraisal and the broker told them that the sellers were willing to accept a note for the difference of \$2,800, the difference between the purchase price and the loan from the V.A. However, when the wife

spoke directly with the wife of the selling couple, it was discovered that the sellers were totally unaware of any promissory note. Indeed, they needed the money themselves for a purchase of their own. When she attempted to discuss the matter with the licensee, he refused to talk about it--”he verbally threw me out of the office.” At no time did the sellers either verbally or in writing accept the idea of a note in part payment.

The broker was reported to the real estate commission and the commission suspended his license. He was charged with making “misrepresentations and act[ing] in a manner demonstrating bad faith, dishonesty, untrustworthiness and incompetency.”

*The commission may upon its own motion, and shall upon verified complaint in writing of any person setting forth a cause of action under this section, ascertain the facts and if warranted hold a hearing for the suspension or revocation of a license. The commission shall have power to refuse a license for cause or to suspend or revoke a license where it has been obtained by false representation or where the licensee in performing or attempting to perform any of the acts mentioned herein is found guilty of: “(i) making any substantial misrepresentation; or***** (ix) any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness or incompetency.”*

The district court upheld the decision of the commission and the broker appealed to the Supreme Court. It was found that the testimonies of the buying and selling couples were substantial and provided the evidence needed to convict the broker of the charges above. He clearly misrepresented the fact about the promissory note and further intended to mislead the buyers “into falsely certifying to the Veterans Administration.”

The broker’s license was suspended for six months.

Conclusion:

Here, the evidence is clear that the licensee misrepresented to the buyers that the sellers would

accept a one-year promissory note for \$2,800.00, the difference between the appraised value--\$76,200.00--and the agreed upon price--\$79,000.00. But even worse than that, the licensee would have led the buyers into falsely certifying to the Veterans Administration. Before that agency approves eligibility for a loan, the veteran must certify that any difference between the approved loan and the purchase price must be paid for out of cash from the veteran's own resources.

D. Misrepresentation to the Seller

Question #7:

Does an agent's fiduciary responsibilities include notice to the seller of the nature of an earnest money deposit?

Answer:

Yes. An agent may normally accept as a deposit cash or an immediately cashable check. An agent has a duty, not only to make no misstatements of fact regarding this deposit, but also to disclose to the principal all material facts fully and completely.

To accept a postdated check without the seller's knowledge or permission could jeopardize the seller's position. A postdated check may indicate a buyer who is not financially able to immediately purchase the seller's property.

Even though the seller may be so desperate to sell he would even accept a postdated check as the earnest deposit, the broker must notify and receive permission for such arrangements. The broker must never substitute his judgment for the seller's judgment in such matters.

Case Study Answer #7

"Las Vegas, Nevada, October 24, 1969. Received from Mary Nicosia the sum of One Thousand-

----(\$1,000.00) Dollars,..."

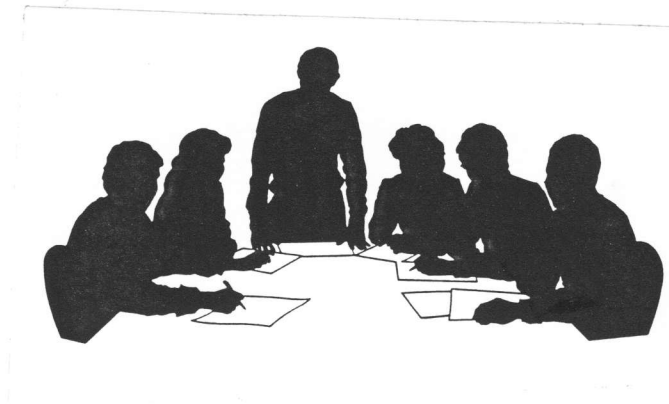
Brokerage 2 told brokerage 1 that they had received an offer and "told them we got a thousand dollars." In truth and fact they had not received a thousand dollars from the buyers, but they had received a check postdated to November 1, 1969, for that amount.

The owners of the property were notified of the offer and acceptance and promptly accepted the same.

Broker 2 deposited the check on or about October 28, 1969; on or about October 31, 1969, the buyers advised Broker 1 that they did not want the home, and they stopped payment on the check. The check was returned to Broker 2 on or about November 7, 1969, stamped "Payment Stopped."

The sale never closed, and in spite of the sellers' demand that Broker 2 pay them one-half of the

\$1,000 deposit as provided in the offer and acceptance agreement, Broker 2 refused to do so.



During the hearing before the Commission, Broker 2 was frank to admit that a post-dated check was in essence a

promissory note, and the sellers testified that if he had been told the check was postdated he would not have signed the offer and acceptance agreement.

The Nevada Supreme Court held that a real estate licensee is a fiduciary and that he owes the duty of absolute honesty and fullest disclosure to his client. "Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's

decision.” In the language of the Restatement of Agency:

Before dealing with the principal on his own account***an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material *** if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account ***, but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal.

Applying the rule of full disclosure to this case, it is clear that the broker failed to abide by the standards prescribed in the statute and by this court. When a licensee asks a seller to accept an offer for his property and represents to the seller that the buyer has made a \$1,000 deposit, where in truth and fact the buyer has offered a postdated check that is nothing more than a promise to pay in the future, that licensee has failed to meet the prescribed rule of full disclosure.

Conclusion:

The agent must inform the principal of the nature of the earnest money deposit. If it is not cash or an immediately cashable check, the agent must acknowledge this to the principal.

Some might argue that a postdated check is still a negotiable instrument and merchants often accept such checks.

It is true that some merchants are willing to accept postdated checks under certain circumstances, i.e., when they have confidence in the maker. There is no showing in this study that the seller knew the maker or that he had confidence in him. But more importantly, it was the brokers, and not their principal, who made the decision to accept the postdated check without authority from or knowledge of their principal. The principal, rather than his broker, should determine whether the reason for the

buyer's not paying cash is satisfactory. He, rather than his broker, should determine whether he is satisfied that a promissory note be accepted as a payment.

Question #8:

What responsibility may be imputed to the broker for the unprofessional actions of his salespersons?

Answer:

The broker is responsible to his principal for the actions of his salespersons.

“Unless otherwise agreed, an agent is responsible to the principal for the conduct of a subservant or other subagent with reference to the principal's affairs entrusted to the subagent, as the agent is for his own conduct; and as to other matters, as a principal is for the conduct of a servant or other agent.” (from Restatement Of the Law, Agency 2d, 405, American Law Institute, 1958).

Situations imputing responsibility to the broker could be:

- 1) the broker was aware of the salesperson's unprofessional activities but took no steps to correct them;
 - 2) the broker was unaware of such illegal activities because he did not give proper supervision to his salespeople.
- In summary, there are three rules regarding broker responsibility for the actions of his/her salespersons:
- 1) The broker is responsible for the actions of salespersons.
 - 2) The broker is responsible for the actions of salespersons.
 - 3) The broker is responsible for the actions of salespersons.

Case Study Answer #8

A broker engaged the services of eight salesmen in his office. Two of these men persuaded a couple to give the broker an exclusive listing on their two

properties for three months. About two months later, unknown to the broker, the salesmen offered the couple a written contract for their properties which acknowledged the receipt from the buyer of a deposit for \$3,000. The salesmen stated that the money had been given in cash and would be “forfeited as liquid damages upon the failure of the buyer to complete settlement.” At that point in time, no cash had been received from the buyer and only on a date after that upon which the salesmen had contacted the sellers did a buyer’s note appear, made payable to the brokerage.

The broker had no knowledge of his salesmen’s activities in obtaining this agreement but within a week following September 12, read the agreement and then learned that while the agreement recited the receipt of \$3,000 that this “deposit” was represented only by a note. He instructed his salesmen immediately to obtain cash from the buyer in replacement of the note. The salesmen were not successful. The broker did not then nor did he at any time prior to the buyer’s failure to settle for the property on December 12, inform the sellers that he had no cash deposit, that the “deposit” was in the form of a note, or that the buyer would not put up cash in place of the note. On December 12, having heard nothing further from anyone connected with the broker’s office, the sellers inquired of one of the salesmen as to the status of the transaction and were told that the buyer could not pay for the property and would not make settlement. When they asked about the deposit they were told to communicate with the broker. The sellers contacted the broker through their attorney and accused the broker of leading their attorney in believing that there was \$3,000 cash in hand from the first inquiry made by the sellers until March of the following year.

The real estate commission looked at the evidence and “concluded that these facts established misrepresentation through the salesmen, failure to account for and pay over money and bad faith.”

Conclusion:

A broker is responsible for the unprofessional activities of his/her salespersons and must take steps

to correct them. Obviously the original misrepresentations were not made by the broker but by the salesmen. The broker erred from the time he discovered that the buyer’s note was not redeemable. The broker’s conduct was improper from the time he discovered and failed to inform the sellers that, contrary to the implication of the agreement and the representations of the salesmen, there was no cash deposit in hand.

Real estate brokerage is an ancient, honorable and useful occupation. It is, however, a pursuit full of pitfalls, one of the most subtle of which is the temptation to switch allegiance from one’s principal, usually the seller, either to the buyer or to the transaction itself. And the temptation is especially strong when it is only a matter of not disclosing bad news which may improve. However, it is an agent’s imperative duty to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security. The broker’s breach of his duty to inform the sellers that he had no cash deposit, as they supposed, that the buyer would not supply a cash deposit and that the buyer was unable to complete settlement in accordance with the terms of the agreement were demonstrations of bad faith on the broker’s part.

In this section you should have learned that:

- ☐ - The agent must give the buyer complete and truthful information concerning the property he wishes to purchase.
- ☐ - The agent must inform all parties involved of his roles, particularly when he is the seller or when he is performing as an agent for the buyer and the seller. Once he accepts the role as agent, he may not purchase property with the intent of selling it at a higher price to his client.
- ☐ - The agent must tell the lending agency the details of the financial arrangements and truthfully represent payments.
- ☐ - The agent should report postdated checks and promissory notes received for the

downpayment rather than letting the sellers assume that he has cash.

- ☐ - The broker is responsible for the actions of her/his salespersons.



III. Concealment, Dishonest Dealings and Fraud

In this section you will learn:

- ☐ - what constitutes concealment.
- ☐ - how dishonesty can occur with legal documents.
- ☐ - when advertising is dishonest.
- ☐ - how personal dishonesty affects an agent.
- ☐ - the value of a good reputation.
- ☐ - the reasons for rapidly depositing the buyer's earnest money into trust.

Overview: This chapter warns the licensee against concealment, dishonest dealings and fraud. As these true life scenarios unfold, the student will be reminded of the public harm caused by a broker or salesperson whose business is characterized by such practices.

A. Concealment

Question #9:

Can a licensee receive discipline for activities for which a real estate license is not required?

Answer:

Because of the fiduciary relationship present in real estate transactions, the agent must be of high moral character. Dealings, whether real estate or not, can reflect the licensee's character. If such dealings show bad faith and dishonesty, they may accurately predict how this person may act when in a fiduciary relationship. Such dealings may be used to deny renewal or the granting of a real estate license.

Case Study Answer #9

A broker in Florida had an agreement with another broker to split their commission on sales. The first broker persuaded the other to release him from the contract, and shortly thereafter he was involved in the sale of the piece of property covered under the prior agreement. He collected the full commission for himself and refused to give anything to the other broker. He was charged with "fraud, concealment, dishonest dealing, trick, scheme or device." This was due to the fact that he knew of the sale prior to his breaking the agreement with his colleague. The broker's license was suspended.

Upon appeal, the broker attempted to quash the complaint information filed reasoning the broker was not, at the time the release was obtained, acting as a real estate broker, and that therefore, the Real Estate Commission would not have jurisdiction over the transaction or the complained of act.

The court responded to this appeal argument by stating *Blakeley v. Miller*, 232 Iowa 980, 7 N.W.2d 11:

In the *Blakeley* case, the court commented:

One could think of many good reasons why it would be better to have the actions outside of his conduct in acting as a real estate agent apply to his right to hold a real estate license, but this is for the legislature to say and not for the court to write into the statute.

It is noticeable that our statute obliges an applicant for the license to furnish to the Commission evidence of good moral character...Compare, applicant for