

ETHICS, PROFESSIONAL CONDUCT, AND THE REAL ESTATE LAW

Ethics is a set of principles, rules, and standards of conduct by which an individual guides his or her own behavior. A professional code of ethics outlines and defines the duties and obligations a member of a profession owes to the public, his clients, and other members of his profession.

In addition, the creation of a professional code of ethics fosters the feeling on the part of the public that they will be treated honestly and fairly in business dealings with members of that profession. A code of ethics, whether personal or professional, is a *voluntary* commitment which defines a course of conduct that *should be* observed. The law determines a course of conduct that *must be* observed.

THE REAL ESTATE LAW

The legal conduct of real estate licensees in California is strictly regulated by the provisions of the Real Estate Law. The Real Estate Law sets forth the legal requirements that licensees must observe or face the possible suspension or revocation of their licenses. **Sections 10176 and 10177** of this law set forth the foundation for violations that represent unlawful conduct and can lead to license suspensions or revocations.

This chapter underscores certain sections of the real estate law and sets forth specific examples and case histories to illustrate the areas of the law that are discussed. In addition, it attempts to interpret the law as a minimum standard of conduct through the use of illustrations representing the type of ethical conduct that all real estate licensees should adhere to as their own personal and ethical conduct code.

ETHICAL CONDUCT

Real estate licensees need to be aware of, however, that conducting themselves in an ethical manner in the daily application of their real estate activities goes beyond conduct imposed because it **must be** observed. The essence of ethical conduct consists of doing those things that **should be** observed **in addition** to what **must be** observed.

Ethical conduct is not guided by lawful duties imposed by a set of laws. It is based on setting a high standard of ethical conduct and professionalism in performing those activities for which a real estate license is required. In short, ethical conduct entails adhering to the Golden Rule in all of a licensee's real estate activities.

NAR'S CODE OF ETHICS

The National Association of Realtors® first adopted its REALTORS® Code of Ethics in 1913. This code clearly identifies the type of ethical behavior that all licensees, whether members of the National Association of Realtors® or not, should strive for and emulate. Only through an attempt to achieve the level of service detailed in this code can the best interests of real estate sellers, buyers, lenders, third parties, and the general public be best served.

FIDUCIARY DUTY

When a licensee enters into an agency relationship with a principal, it creates duties and obligations which are owed by the agent to his or her principal. These basic fiduciary duties include:

- *Duty to Use Reasonable Care and Skill*
- *Full Disclosure of All Material Facts*
 - *Loyalty and Confidentiality*
 - *Duty of Utmost Good Faith*
 - *Duty to Obey*

The fiduciary duties and obligations imposed on an agent are the most significant aspects of the agency relationship. A salesperson, employed by the broker, owes the same duties and obligations as the broker to the broker’s clients.

Based on their professional status, brokers and salespeople have a duty to advise and counsel their principals so that the principal can make a wise, informed, intelligent decision in a real estate transaction whether it be to sell, lease, exchange, borrow, or lend.

An agent has a fiduciary duty to his or her client to obtain the best possible price and terms for the client’s property. It would clearly be unethical, as well as unlawful, to attempt to secure a listing by deliberately misleading an owner as to the likely market value of the client’s property. It is also a violation of an agent's fiduciary duty to misrepresent the likely value of a property to a prospective buyer for the purpose of inducing the buyer to make an offer to purchase real property.

NON-DISCLOSURE OF MATERIAL FACTS

Case law holds that where a seller of real estate knows of facts materially affecting the value or desirability of a property that are known or accessible only to him, and also knows that such facts are not known to, or within the reach of the buyer, the seller is under a duty to disclose these facts to the buyer. The seller’s failure to do so constitutes actual fraud.

CASE HISTORY**Smith v. Zak
(1971), 20 C.A. 3d 785****FACTS:**

1. Seller (Smith) owned a parcel of land that he wished to place on the market for sale.
2. The parcel of land was located near to a proposed freeway that was to be built by the state. The seller contacted the state to see if his property was to be condemned. The seller was advised by the state that they would be interested in acquiring some or all of his property, but not for at least five years.
3. The seller did not want to wait that long to sell and contacted a broker (Zak) to discuss the sale of the property. The broker recommended a listing price of \$15,950. The seller and the broker reached an oral agreement at this time that \$15,950 would be the listed price.
4. Thereafter, the broker opened an escrow giving his own name as the prospective purchaser and began to correspond with the state concerning the use of the property as a storage yard.
5. The broker then prepared a six-month exclusive listing agreement and presented it to the seller who signed it. The listing price was \$15,950, which was the figure previously recommended by the broker.
6. After a few months, the broker informed the seller that he had a prospective purchaser (Martin) at a price of \$13,000. The broker advised the seller that this was the best offer he could get and advised the seller to sell at that time. The seller accepted the offer. Martin was, at the time of the sale, a personal acquaintance of the broker. The seller was never informed of this fact.
7. While in escrow, the broker had his and his wife's name inserted on the deed as the purchasers. The transaction closed and the deed was recorded with revenue stamps indicating a purchase price of \$40,000.
8. The state condemned the property within two years of the sale. The broker asserted to the state that the property had been purchased for \$40,000 and now had a fair market value of \$100,000 or more.

SUMMARY:

The facts of the case would seem to indicate that a substantial misrepresentation of the likely market value was committed for the purpose of acquiring an interest in a property for a licensee's own account.

In addition, the facts of the Smith v. Zak case history would seem to indicate a breach of a licensee's duty and obligation to protect and promote the best interests of the client. **Ethical conduct requires a licensee to consider a client's interest as paramount, while at the same time treating all parties to the transaction in a fair and honest manner.**

An agent, in the same situation, is under the same duty of disclosure of such known defects as is the principal. If the other parties to the transaction make no disclosure of a defect to the buyer, the agent becomes jointly and severally liable with the seller for the full

amount of damages. In addition to incurring liability for damages to the buyer, an agent guilty of overt misrepresentations or failure to disclose material facts may be subject to license discipline by the California Department of Real Estate (DRE)

REAL ESTATE LAW
Grounds for Revocation or Suspension

Section 10176 - The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate, the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation
- (b) Making any false promises of a character likely to influence, persuade or induce
- (c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salespeople

THE ETHICAL APPROACH

Real estate licensees, who are acting in an ethical manner, will avoid any type of false statements, misrepresentations, or concealment of facts that are relevant to the real estate transaction. It is important to remember that it is sometimes difficult to distinguish whether an action that is taken, or about to be taken, is illegal or unethical. This fact of life should encourage licensees to strive to keep their conduct beyond reproach and to build their business relationship on the basic precept of the Golden Rule.

When attempting to get a listing, it is unethical for a real estate licensee to tell an owner that the licensee already has a bona-fide written offer from a buyer for the property. Unless, of course, that the licensee does have such a listing.

EXAMPLE:

A real estate broker receives an inquiry from a prospective purchaser regarding real estate for sale in a particular community. The real estate broker then contacts several owners of property in this particular area and tells them he has a firm, written offer on their property. This is done to induce the owners to list with the broker when, in fact, no written offer has actually been received.

CASE HISTORY
Lingsch v. Savage

(1963), 213 C.A. 2d 729

FACTS:

1. An action for damages for fraud was brought against the sellers of a certain piece of property located in San Francisco and the broker who handled the transaction for the sellers.
2. The suit alleged that prior to the sale that both the sellers and broker knew the building was in a state of disrepair, that units contained there were illegal, and that the building had been placed for condemnation.
3. The suit also contended that although these facts were known to the defendants that they were unknown to the plaintiffs (Lingsch). And, furthermore, that the defendants “willfully and fraudulently failed to reveal this information to the plaintiffs”; that the plaintiffs purchased the property “justifiably relying on said defendants’ non-disclosure of these facts, and in the belief that the property was in legal tenantable and properly repaired condition, as required by law” and that the defendants knew that they relied on the non-disclosure in reaching their decision to acquire the property.
4. It was also alleged that the actual market value of the property was actually \$5,000 less than the sales price represented to plaintiffs had the true facts been revealed. The plaintiffs contended that the defendant’s non-disclosure of these facts represented a misrepresentation of a material fact.
5. The defendants filed a demurrer asserting that the complaint failed to state facts sufficient to constitute a cause of action. The trial court agreed with the defendants and dismissed the plaintiff’s complaint. The plaintiff’s appealed and the appeals court found that sufficient case law existed to support their complaint and ordered the trial court to allow the plaintiffs to amend their complaint and resubmit it for consideration.
6. The appeals court observed that if fraud were present, it would be based on the possible non-disclosure of material facts. This would constitute negative fraud to the degree that it represents a suppression of facts that it is one's duty to declare.

Not only would the conduct in the previous example be unethical, it could, under most circumstances, also be in violation of the Real Estate Law. The same conclusion would be equally true if a licensee knowingly made a substantial misrepresentation of the likely value of a property to an owner for the purpose of acquiring an interest in the property for the licensee's own account.

Real estate licensees, in an agency relationship, pledge themselves to protect and promote the client's best interests. This means that the agent is ethically required to protect the information given to him or her, in confidence, by the client. This information cannot ethically be revealed to a third party. An agent, who suggests to a potential buyer that his client might be willing to accept less than the listed price for the property, is acting unethically and is in violation of the duties imposed by the agency. Nor, can the agent use confidential information to the detriment of the client. The ethical and moral obligation to not reveal a client's confidential information that was obtained while the agency was in effect continues

even after the agency ceases to exist. An agent, who later uses confidential information that was gained through the agency relationship, is breaching his or her fiduciary duty.

A listing broker must ethically submit all offers received for a client's property in a timely manner. The broker should also continue to deliver to the seller all offers and counteroffers received until a sale closes. Unless, of course, the seller has given a written confirmation to the listing broker to cease the acceptance of any further offers.

AGENT'S PROPERTY DISCLOSURES

A listing agent, ethically and legally, has a duty to make a full disclosure to a potential buyer of any material fact that might affect the value or desirability of a property. In California, agents are required to make an inspection of a property they are marketing to uncover potential hidden defects. An agent's duty under the transfer disclosure laws is to make a reasonably competent and diligent visual inspection of the property being transferred and to disclose the property's condition and any deficiencies uncovered by this "visual inspection" in the appropriate sections of the Transfer Disclosure Statement.

The agent's inspection is limited to those areas of the property that are "accessible" to the agent. The agent is not charged with a duty or responsibility to investigate details that may exist beyond the boundary lines of the property or in the public records. Of course, any material fact that is known to the agent affecting the value of desirability of the property should be disclosed regardless of the nature of the information.

A California court case (Robinson v. Grossman - (1997) 57 C.A. 634) more clearly defines the limits of an agent's duty in this area.

CASE HISTORY
Robinson v. Grossman
(1997) 57 C.A. 4th 634

This case involved the sale of a hillside home near San Diego. The home had been built and owned by the present owners (Helms and Grossman) for about two years before they listed the property with a local broker for sale. The house was subsequently purchased by the Robinsons with the assistance of their real estate agent. Helms and Grossman completed a transfer disclosure form and both the listing and selling agents in the transaction conducted a visual inspection of the property and made their disclosures on the transfer document.

Prior to the closing of escrow and during her inspection of the property, the listing agent noticed hairline stucco cracks, ceiling and wall water stains, and peeling paint in several areas of the house. When the listing agent questioned the sellers about these conditions, she was told that the cracks were cosmetic and that the peeling had been caused by a leak that had since been repaired. The listing agent did not write any of these items

down on her portion of the TDS. Nor, did the sellers express any awareness of any foundation-related defects on their portion of the document.

On the buyer's side, both the buyers and their real estate agent observed the cracks and other conditions noted above. The selling agent noted the cracks in her portion of the TDS and advised the Robinsons to get a geologic report. The buyers, as a result of these conditions, had a general home inspection performed which satisfied them that the foundation was stable and opted not to bring in their own engineer for an inspection. They then proceeded to close escrow. A few weeks later, when the Robinsons attempted to have a swimming pool installed on the property, the excavation collapsed requiring backfilling and recompaction.

The Robinsons sued the sellers and listing agent and others for professional negligence and negligent and intentional misrepresentation. The trial court dismissed the fraud and negligence charges against the listing broker and agent. The court found that even though the listing agent had made material statements that were inaccurate, she had a reasonable basis for believing they were true.

The appellate court upheld the trial's courts findings. In the opinion of the appeals court, an agent's duty requires that a listing broker conduct a reasonably competent and diligent inspection of the property. It does not require that the listing agent verify the seller's representations. Given no evidence to the contrary, it is reasonable for an agent to accept the seller's representation as truthful and accurate. Thus, a listing agent's representations, even though false, may not create any liability on the part of the agent to the buyers, if the representations were made with a reasonable basis, such as a statement from the agent's principal, that they were true. The court's statement regarding this point was:

"under the post-Easton statutory scheme, once the sellers and their agent make the required disclosures, it is incumbent upon the potential purchasers to investigate and make an informed decision based thereon. In making the required disclosures, the sellers' agent is required only to act in good faith and not convey the seller's representations without a reasonable basis for believing them to be true."

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ETHICS REVIEW QUIZ

1. Which of the following is a true statement regarding a professional code of ethics?

- (a) It is a set of principles, rules, and standards of conduct
 - (b) It defines duties and obligations a member of a profession owes to the public
 - (c) It fosters the feeling on the part of the public that they will be treated honestly and fairly
 - (d) All of the above
2. All of the following are correct statements regarding the fiduciary duties an agent owes to his or her principal except:
- (a) They are the most significant aspects of the agency relationship
 - (b) Salespeople do not owe the same fiduciary duties to a principal as does the broker
 - (c) An agent has a duty to obtain the best possible price and terms for a client's property
 - (d) Licensees must fully disclose all material facts to a principal
3. Broker Moreno purposely overstates the likely market value of a prospective seller's property in order to obtain the seller's listing. Under these circumstances, which of the following is most likely true?
- (a) The broker's actions are unethical
 - (b) It is slightly unethical, but it would probably just be considered as "puffing"
 - (c) Could be construed as misrepresentation and, therefore, be unlawful
 - (d) Both (a) and (c) above
4. Seller Johnson gives a listing on his home to Agent Franklin. The property is listed at \$349,500. Johnson relates to Franklin that there is a certain urgency to sell the house quickly and that he would be willing to accept a lower price from a qualified buyer. All of the following are true statements regarding this information that has been given in confidence to Agent Franklin except:
- (a) It cannot ethically be revealed to a third party
 - (b) The agent cannot use this information to the detriment of the client
 - (c) This information ceases to be confidential when the agency relationship ends
 - (d) It is unethical if the agent misuses the information
5. An agent, who is aware of a hidden defect in a property but fails to tell the buyer about it, may have committed:
- (a) Constructive fraud
 - (b) Actual fraud
 - (c) Negligent misrepresentation
 - (d) None of the above

Answers to quizzes 1-5

1. D page 1
2. B page 2
3. D page 3
4. C page 5, 6

5. A page 8

MISREPRESENTATION

Misrepresentation may be fraudulent or negligent. An agent may be subject to license suspension or revocation and liable for civil damages to parties involved in real estate transactions in either case. An owner/seller of a property can be held liable for civil damages for acts of his or her agent even where the seller was not the source of the erroneous information.

Actual fraud is a representation that is false, made by a person who knows the representation is false, and with the intent to deceive. Negligent misrepresentation may also be construed by the courts as being actual fraud. Such as a situation in which a licensee makes a representation that is false, but believes it to be true. This is the type of falsehood that results from carelessness or negligence rather than an intention to deceive.

Constructive fraud, however, is a representation that is false but is not made with the intent to deceive. An agent who is aware of a hidden defect in a property but fails to tell the buyer about it may have committed constructive fraud.

Section 10176 of the California Real Estate Law contains a number of provisions dealing with a breach of fiduciary duty and a misrepresentation of material facts as illustrated in the following case history.

CASE HISTORY:

Jorgensen v. Beach "N" Bay Realty, Inc.
(1981) 125 C.A. 3d 155

FACTS:

1. Jorgensen listed a residential property close to her own home with an acquaintance of hers who worked for a broker in the local area. This was the agent's first listing so he teamed with another agent with an agreement that they would divide the commission if the property was sold. The property was listed for \$214,500.

2. While employed by Jorgensen to sell her property, the agents met a buyer from Mexico who was looking to purchase residential investment properties in Southern California. The two agents began to act as agents for this buyer and showed them a number of commercial and investment properties. The buyer indicated that he would be interested in purchasing additional properties at a future time.

3. The buyer showed little interest in the properties that were shown to him but liked the Jorgensen property. Based on this, the agents prepared an offer for the buyer to buy the Jorgensen property for \$200,000.

4. The agents then presented the offer to Jorgensen. They informed Jorgensen that in this transaction they were representing both the seller, Jorgensen, and the buyer. And, then went on to tell Jorgensen the buyers were “nice” people and would make “good neighbors” even though they knew that the property was being purchased for investment purposes.

5. Jorgensen wanted to counteroffer at \$205,000 but the agents dissuaded her by telling her that the buyer and his family were leaving town that night and the higher price would risk losing the deal. Jorgensen did counteroffer leaving the price at \$200,000 but shortening the escrow period. The counteroffer was accepted promptly.

6. Nine days later, and before escrow closed on the Jorgensen transaction, one of the agents went to Mexico and obtained an exclusive listing agreement from the Mexican buyer to resell the property at \$234,500. When the Jorgensen escrow closed, the agents promptly put the property back on the market where it soon sold for \$227,000. During and after this time, the agents handled other real estate transactions for the real estate investor who originally purchased the Jorgensen property.

Upon learning of the resale of the property and the price that it sold for, Jorgensen filed a court action against the broker and the two agents alleging, fraud, misrepresentation, breach of fiduciary duty, and negligence. Jorgensen admitted that she had been told that the agents would be representing both parties in the transaction but that she had been led to believe that the buyers would be residing in the property.

The trial court entered a judgment of nonsuit meaning that the plaintiff, Jorgensen, was unable to prove her case. Later, the Court of Appeals reversed the trial court’s decision holding that: **(a)** Agents had a duty to disclose all material facts within their knowledge that might have affected Jorgensen’s decision to accept the buyer’s offer and **(b)** The evidence appeared to indicate a breach of fiduciary duty.

In reaching its decision to remand the case for a new trial, the Appeals court cited well established case law that sets forth that:

- The law imposes on a real estate broker and the broker’s agents, the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.
- An agency relationship imposes upon the broker the duty of acting in the highest good faith toward the principal that precludes the agent from obtaining any advantage over the principal by virtue of the broker’s agency.
- An agent is charged with the fullest disclosure of all material facts concerning the transaction that might affect the principal’s decision.
- And, that when the acts of an agent have been questioned by his or her principal, the burden is cast upon the agent to prove that the agent acted with the utmost good

faith toward the principal, and that the agent made a full disclosure prior to the transaction of all facts relating to the transaction under attack.

DUAL AGENCY

It is a violation of the Real Estate Law for a real estate licensee to act for more than one party in a transaction without the knowledge and consent of all parties to the transaction. A dual agency arises when a listing agent, who is actually representing the seller, becomes also the agent of the buyer. This would apply whether the licensee's agency with the buyer was actual or ostensible.

The use of dual agency can be controversial and can lead to misunderstandings. However, it is perfectly legal as long as both the seller and buyer consent to it. Dual agency is a relatively common practice in California. However, a broker or licensee who represents both parties must proceed with the utmost care. In a dual agency situation, a broker, or a broker's sales associate, owes a fiduciary duty of loyalty and confidentiality to both principals. This can be difficult to do particularly when negotiating price and terms between a seller and buyer or negotiating loan amount and terms between a borrower and a lender.

The California Supreme Court has held that an undisclosed dual agency is grounds for rescission by any principal without any necessity of showing injury. Even when the dual agency position is known and consented to by all parties, the agent owes to each party the same duty of utmost good faith, honesty, and loyalty in the transaction. The agent also has a duty to disclose any material fact that would affect the judgment of either party. This rule of agency is specifically mentioned in the California Real Estate Law and its violation is cause for revocation or suspension of a real estate license.

AGENCY DISCLOSURE

In California, it is a legal requirement that agents provide a written agency disclosure statement to all parties in the sale, purchase, or exchange of 1-4 residential units and mobile homes to avoid misunderstandings as to "who represents who" in the transaction. The listing agent can elect to be either the seller's agent or a dual agent. A listing agent cannot, however, elect to be the buyer's agent only. This would be in conflict with the fiduciary duty owed to the seller. The selling agent however, can elect to be a seller's agent, a buyer's agent or a dual agent

The election as to who the agent will represent in the transaction may be made orally, but the relationship selected must be confirmed in writing. The written confirmation may be made in either the:

- Purchase contract and receipt for deposit agreement; or
- In a separate writing

The objective of a statute requiring a disclosure prior to signing the listing agreement is to allow the seller to make a more intelligent decision about whether to sign. The full measure of protection that the Legislature intended to provide to the seller cannot be achieved if the listing agent fails to provide a disclosure form prior to entering into the listing agreement. Adhering to the requirement that a “selling agent” provide a disclosure form as soon as practicable prior to presenting the seller with an offer to purchase does not relieve a selling agent, who is also a listing agent, from complying with the advance disclosure required by the law.

CASE HISTORY
Huijers v. Demarrais
(1993) 11 C.A. 4th 676

In this case, a listing agent failed to present an agency disclosure form to a seller prior to entering into a listing agreement with the seller as is required by Civil Code 2079.12-2079.24. The failure to deliver the disclosure rendered the listing agreement voidable at the seller’s option. In this case, the real estate broker who took the listing was previously working with a buyer to locate property for the buyer. Once the property was found, the broker then proceeded to take a listing from the seller. The agency disclosure form was presented to the seller, not at the time of taking the listing but, instead, at the time the purchase contract was signed.

The courts shed light in their ruling as to what constitutes substantial compliance with the agency disclosure laws. In this case, they ruled that a real estate agent, who signs an exclusive right to sell listing agreement with a property owner without first providing the seller with an agency disclosure form that tells the property owner that a broker can act as a dual agent, does not substantially comply with the disclosure law. This is true even though the agent did provide the disclosure form at the time the purchase contract was signed.

The objective of a statute requiring a disclosure prior to signing the listing agreement is to allow the seller to make a more intelligent decision about whether to sign. The full measure of protection that the Legislature intended to provide to the seller cannot be achieved if the listing agent fails to provide a disclosure form prior to entering into the listing agreement. Adhering to the requirement that a “selling agent” provide a disclosure form as soon as practicable prior to presenting the seller with an offer to purchase does not relieve a selling agent who is also a listing agent from complying with the advance disclosure required by the law.

The law requires that the selling agent disclose the election of the agency representation desired as soon as is practicable. Once again, good business practice dictates that the selling agent disclose his or her election as soon as possible after the mandatory delivery of a disclosure form to both the buyer and the seller.

It was clearly the intent of the state legislature in enacting agency disclosure legislation to clear away the confusion as to “who is representing who” in a typical real estate transaction. The longer that either a selling agent or listing agent delays in making their election known, the greater the risk is of allegations of improper representation arising as the transaction progresses.

COMMINGLING

Section 10176 (e) of the Real Estate Law states that a licensee who is found guilty of “commingling” may face a suspension or loss of his or her real estate license. Commingling is the mixing of a principal’s funds with a licensee’s own personal monies.

Commingling occurs when:

- Personal or company funds are deposited into the trust fund bank account. This is a violation of the law even if separate records are kept.
- Funds received from the licensee’s principal are deposited into the licensee’s general or personal bank account rather than into the trust fund account.
- Commissions, fees, or other income earned by the broker and collectible from the trust account are left in the trust account for more than 30 days from the date they were earned.

Licensees should be familiar with the distinction between commingling and conversion. Commingling involves the mixing of a principal’s funds with a broker’s own money. Conversion is the misappropriation and using of the principal’s funds.

A broker, who upon receipt spends the principal’s deposit without the principal’s authorization is converting. Conversion is the more serious of the two offenses.



CASE HISTORY
Bell v. Watson
(1957) 148 C.A. 2d 684

The act of commingling has long been held by case law as grounds for the revocation of a real estate license as illustrated in the following case:

FACTS:

1. Broker Bell’s license was revoked for several violations of the Real Estate Law among them a violation of Section 10176 (e). Bell filed an appeal to have the revocation of his broker’s license set aside.

2. Regarding the charge of commingling, Bell received a \$500 deposit check on the purchase price of a property owned by Bell from Mr. and Mrs. Fontes. Bell did not place the money into his trust fund or with an escrow company but commingled it with his own money and converted it to his own personal use. He did not account for these funds to the Fontes for a period of 34 days.

3. Bell’s son testified that the deposit money had been placed by him into the general account by mistake. And, that his father had no knowledge of this being done.

4. The court held that the actions taken constituted a violation of Section 10176 (e) which warranted a temporary suspension or permanent revocation of Bell’s real estate broker’s license.

It was determined, also, that Bell had acted in a manner that would have warranted the denial of an application for a real estate license. This additional violation fell under Section 10177 (f), which embraces conduct that would warrant the denial by the state of a real estate license in the first place.

An essential requirement to the issuance of a real estate license is that the applicant be honest and truthful. If any act of a licensee establishes that a licensee does not possess these characteristics, then Section 10177 will apply.

DEFINITE TERMINATION DATE - Section 10176 (f)

An exclusive listing is a contract in which an owner/seller “hires” one broker on an exclusive basis to find a buyer for his or her property. The seller agrees to pay the broker a commission if the broker finds a buyer who is “ready, willing, and able” to buy the property on terms that are acceptable to the seller. Most real estate listing agreements are written on an exclusive basis.

There are two types of exclusive listings:

- 1. Exclusive agency listing
- 2. Exclusive right to sell listing

Section 10176 (f) makes it a violation of the Real Estate Law to write an exclusive listing that does not contain a definite, specified date of final and complete termination. The failure of an agent to insert a definite termination date on an exclusive listing agreement is grounds for the suspension or revocation of an agent’s license. If the contract set forth a definite termination date, but the agent had added verbiage such as, “or until either party

gives a 5 day written notice," the termination date would be considered to be indefinite and in violation of the law.

Section 10142 of the Real Estate Law requires that an agent give a copy of the listing agreement to the owner/seller at the time that the owner's signature is obtained. The fact that an agent failed to have an owner/seller sign an exclusive listing does not render the listing agreement void. It does, however, subject the agent to disciplinary action. Most listing agreements contain an acknowledgment statement to the effect that the seller has read and understands the listing agreement and has received a copy of the contract signed by both the seller and the broker. This statement provides written verification of the receipt of the listing contract and protects the broker against a later claim by the seller that he or she did not receive a copy of the document

NET LISTINGS

In this type of listing, the amount of the commission to be paid to the broker is not set forth in the terms of the listing. This type of listing usually contains a clause which provides that the agent may retain as compensation, for the agent's services, all sums received over and above a net amount to be received by the owner. Both the exclusive listings and open listing discussed previously in the text can be "net listings." This means that both exclusive and open listings retain their key features as related previously. They are also "net listings" however, because they have the added distinguishing characteristic of a seller who agrees to accept a set amount as the sales price of his or her property and agrees that the agent is entitled to any amount above that set figure.



CASE HISTORY
Nystrom v. First National Bank of Fresno
(1978) 81 C.A. 3d 759

The facts of this case centered upon the legality of a definite termination date contained in an exclusive listing. These facts are summarized as follows:

First National Bank initiated foreclosure proceeding on an apartment building when the owner/borrower defaulted on the bank's loan. First National then entered into a letter agreement with Nystrom, a real estate broker, to act on their behalf to collect rents and obtain renters for the property. For this service, Nystrom was to receive a 5% commission on the rents collected which was to be paid when the property was sold through the proceedings of a trustee's sale or the default was cured. The agreement further provided that if the property was sold at the trustee's sale, the bank would give Nystrom an exclusive listing to sell the property for a minimum of 90 days. The agreement specified a 6% commission be paid on the sale.

Shortly after the signing of the letter agreement with the bank, Nystrom was advised by an officer of the bank that the property was going to be “deeded back” to the bank and that he should proceed to find a buyer for the property. Nystrom found such a buyer and submitted an offer to the bank. The bank declined to accept the offer. The bank told Nystrom that the party in possession of the property had refused to give them a deed. And, that they had obtained the title to the property through a deed in lieu of foreclosure about three weeks prior to the date the property was to be sold at the trustee’s sale. The bank then proceeded to sell the property through another broker without notifying Nystrom there had been any changes.

A lawsuit followed in which the bank contended that the agreement with Nystrom regarding the exclusive listing never became operative inasmuch as it was conditioned on the property being sold through a trustee’s sale that never occurred. The bank also contended that the exclusive listing agreement was illegal and unenforceable since it did not contain a definite termination date. Section 10176 (f) of the Real Estate Law states that it is unlawful for a broker to fail to include a definite, specified termination date in an exclusive listing. The exclusive listing must be clear as to its date of expiration. The trial court gave a summary judgment to the bank. Nystrom appealed.

The appeals court reversed the trial court's decision and ruled in favor of Nystrom. The appeals court summarized that:

- The letter agreement had an uncertain beginning date but a definite termination date and was therefore not illegal or in violation of Section 10176.
- The manner of acquisition of title could not make any difference to the parties and the rights and obligations of the parties were not dependent upon the occurrence of the trustee's sale.

Net listings are legal but are rarely used by agents in California. The major reason for their lack of use in real estate activities is that net listings can easily lead to charges of misrepresentation and fraud from the agent’s principal.

The following account of the facts, as presented in a past disciplinary hearing before the Real Estate Commissioner, give evidence to this possibility: The Administrative Law Judge, who presided at the hearing, found the following facts:

1. The real estate agent, in this case, obtained a net listing from a seller authorizing the sale of property. The net listing agreement provided that the seller would receive \$10,000 net from the sale, and that the agent would receive any excess over \$10,000 as a commission.
2. After determining the value of the property, the agent set the price and advertised it for sale at \$13,950.

3. The agent subsequently received an offer from a buyer to purchase the property for \$12,950.
4. The agent refused to present the \$12,950 offer to the seller by falsely representing to the buyer that the seller had turned down other offers for that same amount.
5. Subsequently, the agent received another offer from the same buyer for \$13,950 and began the steps necessary to transfer title to the buyer and to pay the seller the agreed upon amount of the sales price of \$10,000. The agent did not present the \$13,950 offer directly to the seller.
6. In addition, the agent failed to reveal to the seller the amount of compensation that he expected to realize from the transaction before the seller signed the documents relinquishing the title of the property to the buyer. The seller only learned the amount of the agent's compensation after title had been transferred to the buyer.

The facts of the case, as determined by the administrative judge indicated a clear violation of Section 10176 (g) of the Real Estate Law and were grounds for the revocation or suspension of a real estate license. This provision requires an agent to disclose the amount of the agent's compensation in a net listing to the seller prior to or at the time the principal binds himself or herself to the transaction. An agent must keep in mind that legally required disclosure requirements apply to agency relationships and all listings agreements including a net listing.

SECTION 10176 (G) - REAL ESTATE LAW

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

SECRET PROFITS

The courts have unequivocally held that an agent cannot acquire any secret interests in a transaction that are unknown or adverse to the principal. An agent cannot lawfully make a secret personal profit out of the agency relationship. If an agent conceals that

agent’s interest in the property being conveyed or encumbered, the agent is liable to the principal for all secret profits made by the agent.

Cases of secret profit (Section 10176(g) of the Real Estate Law) usually arise when the broker, who already has a higher offer from another buyer, makes a low offer through a "dummy" purchaser. The broker then sells the property to the interested buyer for the higher price. The difference is the secret profit.

CASE HISTORY

**St. James Armenian Church of Los Angeles v. Kurkjian
45 C.A. 3d 547**

FACTS:

1. The St James Armenian Church of Los Angeles was contemplating selling its present site and acquiring a new site for the building of a new church. The chairman of the administrative body of the church, Kurkjian, was given the task of advising the council concerning the acquisition of the new church property.

2. Kurkjian had a friend, Hallaian, who was a licensed real estate broker. Hallaian was not a member of the church and did not hold any official position within the church. When another church in the area expressed an interest in purchasing the St James Armenian Church’s property, Kurkjian represented the church assisted by Hallaian.

3. An offer was made by the Mt. Sinai Baptist Church, the prospective buyer, for \$750,000. The proposal also included a 5% commission of \$37,500 to be paid to the Foster Price Realty Co. Foster Price was the broker representing the buyer in this transaction. Kurkjian did not disclose to the parish council of his church, and in fact the evidence established that he actively concealed from the council, the fact that by separate agreement Foster Price had agreed to pay Hallaian the sum of \$22,500 out of the \$37,500 commission. The council approved the transaction and it was ultimately consummated with Hallaian receiving the \$22,500 commission as had been agreed upon by the two brokers.

4. At a later date, Kurkjian and Hallaian met with the representatives of the Los Angeles Investment Co. to discuss the possible purchase of certain unimproved property owned by the company. At the meeting, Hallaian disclosed that he was, in fact, a broker and inquired if a 5% broker’s commission would be paid in the purchase. The agreed upon purchase price was \$554,785.

5. The parish assembly later met to approve the purchase as recommended by Kurkjian. At that meeting, Kurkjian stated to the persons present that Hallaian had been of great assistance in obtaining and locating the property and that no broker’s commission was to be paid to Hallaian. The transaction was subsequently consummated and Hallaian received a broker’s commission of \$27,739.

6. The church later discovered the true facts concerning the payment of commission to Hallaian in both of the real estate transactions and initiated a lawsuit to recover damages. Kurkjian and the estate of Hallaian, who had died in the meantime, were named as the defendants in the lawsuit. The court rendered a judgment in favor of the church and awarded money damages to the plaintiff, the St. James Armenian Church of Los Angeles.

7. The trial court in its written findings found that in both negotiations Kurkjian and Hallaian were the church's agents and fiduciaries. And, that for the purpose of inducing the church to approve the transactions, they conspired together to conceal from the church the fact that Hallaian was receiving a commission in each of these transactions. The court concluded that both Kurkjian and Hallaian were jointly and severally liable for the amount of the commission secretly paid.

8. Kurkjian maintained that he should not be held liable inasmuch as he was not acting in a fiduciary manner for the church and that he had not received any of the commissions. He appealed the verdict. His petition for a rehearing was later denied.

The court's summary of the preceding Case History contains several very relevant legal opinions such as:

- A fiduciary who, in breach of his duty of disclosure, causes secret profits to flow to a third party, may be held liable for those benefits even though he did not personally receive any part of them.
- A person, though himself not a fiduciary, is liable for the breach of a fiduciary duty if he colludes with a disloyal fiduciary.
- The Civil Code: "Charges an agent with the fullest disclosure of all material facts concerning the transaction in question that might affect the principal's decision." This rule is applicable to gratuitous agents as well as compensated agents.

"CATCH ALL" PROVISION

Section 10177 applies to situations where the affected party was not necessarily acting in the capacity of an agent or as a real estate licensee. The vast majority of brokers and salespeople are honest and perform their services in a straightforward manner. Section 10177, however, allows the Real Estate Commissioner either to deny a license to an individual or revoke an existing license if a person has been guilty of acts or conduct that reflect on the person's honesty or character. Section 10177(j) of the Real Estate Law is a provision that may be widely interpreted. It covers a broad range of possible violations that could fall under this section all of which are unlawful. It states, "Any **other** conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing" is grounds for license suspension or revocation.

CASE HISTORY
Realty Projects, Inc. v. Smith
(1973) 32 C.A. 3d 204

FACTS:

1. Realty Projects, Inc. was a licensed mortgage loan broker. Through several of its employees, it negotiated and obtained loans from private individual lenders for borrowers who employed Realty as their agent. The borrowers paid Realty a commission for this service. The loans were secured by trust deeds on real estate usually owned by the borrowers.

2. In January 1967, Realty adopted the practice of sometimes taking its commission from the borrower in the form of a promissory note secured by a junior trust deed on real estate. During 1967, Realty negotiated 100 to 150 loans of this type.

3. In sales meetings, the loan officers were told to encourage a borrower to request higher loan amounts on their loan applications than might be actually needed so that Realty Projects might receive the highest commissions possible. If Realty's employees negotiated an unregulated loan (a loan which did not fall under the provisions of Article 7 of the Real Estate Law), they received additional compensation in the form of 10% of the commission Realty Projects charged. The regular commission for each loan negotiated was \$150.

4. The loan officers received no instructions on whether they should advise prospective borrowers of the limits on loans beyond which Realty's compensation was unlimited by law. Accordingly, the loan officers made no such disclosure to any prospective borrower.

5. The loan officers were instructed by the officer in charge of the day-to-day operations of Realty Projects to include credit life and disability insurance in their loans whenever possible. This same officer was a minor shareholder in the corporation through which the credit insurance was sold. His sister and brother-in-law were the majority shareholders.

6. The prime and controlling cause of the amount of each of the loans was the desire by Realty Projects and its loan officers to place the amount of the loan above the statutory limits for regulated loans. By doing so, the various borrowers could be charged fees substantially in excess of those permitted on regulated loans. There was no other economic justification for pushing these loans up into the unregulated areas.

7. Realty Projects and its loan officers knew both the limits of regulated loans and the consequences of exceeding those limits in possible commissions Realty could lawfully charge their borrowers. Nevertheless, Realty and its loan officers failed to disclose these facts to their prospective borrowers before they authorized the obtaining of the loans suggested to them by Realty.

The California Department of Real Estate (DRE)" found that the foregoing conduct constituted substantial misrepresentations, fraud, and dishonest dealings in violation of

Section 10176, subdivision (a) and (i) and Section 10177, subdivision (j) of the California Real Estate Law. The DRE also found that appellants willfully disregarded the provisions of the Real Estate Law in violation of Section 10177, subdivision (d) and that they conducted themselves in a manner that would have warranted the denial of real estate licenses to them under Section 10177, subdivision (f).

EXAMPLES OF UNETHICAL & UNLAWFUL CONDUCT

In a sale, lease, or exchange transaction, conduct such as the following would most certainly be unethical and could result in license discipline under Sections 10176 or 10177 of the Business and Professions Code:

1. Knowingly making a substantial misrepresentation of the likely value of real property to:
 - Its owner either for the purpose of securing a listing or for the purpose of acquiring an interest in the property for the licensee's own account
 - A prospective buyer for the purpose of inducing the buyer to make an offer to purchase the real property.
2. When seeking a listing, to state to the owner that the agent is not allowed by law or regulation to charge a commission fee of less than the one that the agent is quoting to owner.
3. Knowingly underestimating the probable closing costs in a communication to the prospective buyer or seller of real property in order to induce that person to make or to accept an offer to purchase the property.
4. Knowingly making a false or misleading representation to a seller of real property as to the form, amount, and/or treatment of a deposit toward the purchase of the property made by an offeror.
5. Knowingly making a false or misleading representation to a seller of real property, who has agreed to finance all or part of the purchase price by carrying back a loan, about the buyer's ability to repay the loan based on the loan's terms and conditions.
6. Making an addition to or modification of the terms of an instrument previously signed or initialed by a party to a transaction without the knowledge and consent of the party.
7. Making a representation, as a principal or agent, to a prospective purchaser of a promissory note secured by real property about the market value of the securing property without a reasonable basis for believing the truth and accuracy of the representation.

8. Knowingly making a false or misleading representation, or representing without a reasonable basis for believing its truth, the nature and/or condition of the interior or exterior features of a property when soliciting and offer.

9. Knowingly making a false or misleading representation, or representing without a reasonable basis for believing its truth, the size of a parcel, square footage of improvements or the location of the boundary lines of real property being offered for sale, lease, or exchange.

10. Knowingly making a false or misleading representation, or representing to a prospective buyer or lessee of real property without a reasonable basis to believe its truth, that a property can be used for certain purposes with the intent of inducing the prospective buyer or lessee to acquire an interest in the real property.

11. When acting in the capacity of an agent in a transaction for the sale, lease or exchange of real property, failing to disclose to a prospective purchaser or lessee facts known to the licensee materially affecting the value or desirability of the property, when the licensee has reason to believe that such facts are not known to nor readily observable by a prospective purchaser or lessee.

12. Willfully failing, when acting as a listing agent, to present, or cause to be presented to the owner of the property, any written offer to purchase received prior to the closing of a sale, unless expressly instructed by the owner not to present such an offer, or unless the offer is patently frivolous.

13. When acting as the listing agent, presenting competing written offers to purchase real property to the owner in such a manner as to induce the owner to accept the offer that will provide the greatest compensation the listing broker without regard to the benefits, advantages, and/or disadvantages to the owner.

14. Failing to explain to the parties or prospective parties to a real estate transaction for whom the licensee is acting as an agent the meaning and probable significance of a contingency in an offer or contract that the licensee knows or reasonable believes may affect the closing date of the transaction, or the timing of the vacating of the property by the seller or occupancy by the buyer.

15. Failing to disclose to the seller of real property in a transaction in which the licensee is an agent for the seller the nature and extent of any direct or indirect interest that the licensee expects to acquire as a result of the sale. The licensee should disclose to the seller:

- Prospective purchase of the property by a person related to the licensee by blood or marriage
- Purchase by an entity in which the licensee has an ownership interest

- Purchase by any other person with whom the licensee occupies a special relationship where there is a reasonable probability that the licensee could be indirectly acquiring an interest in the property
- 16.** Failing to disclose to the buyer of real property in a transaction in which the licensee is an agent for the buyer the nature and extent of a licensee's direct or indirect ownership interest in such real property such as:
- The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage
 - By an entity in which the licensee has an ownership interest
 - By any other person with whom the licensee occupies a special relationship
- 17.** Failing to disclose to a principal for whom the licensee is acting as an agent any significant interest licensee has in a particular entity when the licensee recommends the use of the services or products of such entity.

UNETHICAL & UNLAWFUL CONDUCT IN LOAN TRANSACTIONS

Conduct such as the following when soliciting, negotiating, or arranging a loan secured by real property or the sale of a promissory note secured by real property would be unethical and may result in license discipline:

- 1.** Knowingly misrepresenting to a prospective borrower of a loan to be secured by real property or to an assignor/endorser of a promissory note secured by real property that there is an existing lender willing to make the loan or that there is a purchaser for the note, for the purpose of inducing the borrower or assignor/endorser to utilize the services of the licensee.
- 2.** Knowingly making a false or misleading representation to a prospective lender or purchaser of a loan secured directly or collaterally by real property about a borrower's ability to repay the loan in accordance with its terms and conditions.
- 3.** Failing to disclose to a prospective lender or note purchaser information about the prospective borrower's identity, occupation, employment, income, and credit data as represented to the broker by the prospective borrower.
- 4.** Failing to disclose information known to the broker relative to the ability of the borrower to meet his or her potential or existing contractual obligations under the note or contract including information known about the borrower's payment history on an existing note, whether the note is in default, or the borrower in bankruptcy.
- 5.** Knowingly underestimating the probable closing costs in a communication to a prospective borrower or lender of a loan to be secured by a lien on real property for the purpose of inducing the borrower or lender to enter into the loan transaction.

6. When soliciting a prospective lender to make a loan to be secured by real property, falsely representing or representing without a reasonable basis to believe its truth, the priority of the security, as a lien against the real property securing the loan (such as a first, second, or third deed of trust.).
7. Knowingly misrepresenting in any transaction that a specific service is free when the licensee knows or has a reasonable basis to know that it is covered by a fee to be charged as part of the transaction.
8. Knowingly making a false or misleading representation to a lender or assignee/endorsee of a lender of a loan secured directly or collaterally by a lien on real property about the amount and treatment of loan payments, including loan payoffs, and the failure to account to the lender or assignee/endorsee of a lender as to the disposition of such payments.
9. When acting as a licensee in a transaction for the purpose of obtaining a loan, and in receipt of an advance fee from the borrower for this purpose, failure to account to the borrower for the disposition of the advance fee.
10. Knowingly making a false or misleading representation about the terms and conditions of a loan to be secured by a lien on real property when soliciting a borrower or negotiating the loan.
11. Knowingly making a false or misleading representation or representing without a reasonable basis for believing its truth, when soliciting a lender or negotiating a loan to be secured by a lien on real property, about the market value of securing real property, the nature and/or condition of the interior or exterior features of the securing real property, its size or square footage of any improvements on the securing real property.

THE COMMISSIONER'S REGULATIONS

The Real Estate Commissioner has the authority to adopt regulations to aid in the administration and enforcement of the Real Estate Law and the Subdivided Lands Law. The Regulations of the Real Estate Commissioner have the same force and effect as the law itself. Licensees and prospective licensees should have a thorough knowledge of these regulations.

PRINCIPLES OF ETHICAL CONDUCT

In order to maintain a high level of ethics and professionalism in their business practices, real estate licensees are encouraged to adhere to the general concepts of ethical conduct that are covered in the following section of this course.

SERVICE IS KEY

All licensees should aspire to give a high level of competent, ethical, and quality service to buyers and sellers in real estate transactions. Real estate licensees should strive,

at all times, to protect and promote the interests of their clients. The real estate business is a “referral business.” It is good business to do the very best you can for your principal who will often reward you with repeat business and referrals. Aspiring to provide professional and ethical service to your principal is paramount to fulfilling your role as a fiduciary for the person who you are representing. The following examples exhibit the type of service and ethical conduct licensees should aspire to incorporate in their activities.

- (1) Licensees have an ethical responsibility to treat all parties to a transaction fairly and honestly. Whether serving a buyer, seller, landlord, tenant, or any other party in a non-agency capacity, licensees are obligated to treat all parties honestly.

EXAMPLE:

Broker Garcia had an exclusive listing to sell a centrally located home, that was within one block of a bus stop. This feature was highlighted in Garcia’s advertising of the property. Garcia showed the property to a physically handicapped buyer who needed to have easy availability to public transportation. The buyer liked the property in general, but the easy access to the bus stop was a key buying motive for him. Based on the existing feature of the property, the buyer made an offer to purchase the property and gave Garcia a deposit.

A short while after the offer had been accepted by the seller, but before the close of escrow, Broker Garcia learned that the bus route that stopped within one block of the property was being re-routed and would no longer stop near the property.

After giving the matter consideration, Garcia concluded that this change in transportation materially changed the basic characteristics of the property. In addition, based on the buyer’s physical handicap and the fact that bus accessibility had been predominantly featured in advertising the property for sale, Garcia felt that in aspiring to treat all parties to a transaction honestly required him to inform the buyer of this development.

Garcia also disclosed this information to the seller and suggested that it was only fair to return the buyer’s deposit in view of the change of circumstances. The seller, after deliberation, agreed with Garcia and the sale was canceled through mutual agreement of the seller and the buyer.

- (2) Stay in close communication with clients or customers to ensure that questions are promptly answered and all significant events or problems in a transaction are conveyed in a timely manner.

EXAMPLE:

Amy Chung, a real estate licensee, is very diligent in her efforts to keep her customers aware of her activities on their behalf. She makes it a point to return all phone

calls in a timely manner, sends faxes, and e-mail promptly to maintain close communications with her clientele. In this manner, she can handle problems as they arise. She realizes that she will build goodwill and future business by keeping her buyers and sellers involved.

(3) Use care in the preparation of any advertisement to present an accurate picture or message to the reader, viewer or listener.

EXAMPLE:

A real estate broker or licensee, who prepares advertising, should be sensitive to the accuracy of statements and facts used to describe a property. If a broker were to use certain facts and figures in his or her advertisement, as supplied by the seller without verifying these facts, it could be looked upon as unprofessional conduct on the part of the broker. Statements like "owner forced to sell" or "divorce forces sale at below market prices" should be avoided unless, of course, these are the facts and have been verified and can be substantiated by the broker or licensee.

A few general principles of ethical advertising would include:

- Avoid any advertising in which the advertisement can be interpreted a number of different ways. If you are not willing to stand behind or live with all possible interpretations, you should not use the ad.
- Avoid "half-truths" or inflated claims. The courts have consistently held that "half-truths" are equivalent to lies. If you are not prepared to defend any claim made in your advertising, you should not make the claim.
- Set forth clearly any limitations you intend to impose on offers made in your advertising. If, for example you intend the \$500 rebate offered to someone listing their house for sale with you to be given only if you are the sole broker involved in the sale, you must include that limitation in your advertising.
- Give some thought and pay some attention to the advertising you intend to use. The California courts (People v. Superior Court 96 C.A. 3d 181) have held that negligent as well as intentional misleading ads violate the law.

Advertising is an important part of business. However, real estate licensees should recognize and avoid false or misleading advertisements. Failure to do so could result in license disciplinary action and civil penalties.

(4) Submit all written offers in a prompt and timely manner.

The National Association of Realtors® Code of Ethics requires REALTORS® to submit offers and counter-offers objectively and as quickly as possible. Listing agents should also continue to submit all offers and counter-offers to sellers until an offer has been accepted by the seller. Licensees have no ethical obligations to continue to market a property after an offer an offer has been accepted by the seller unless otherwise agreed to in writing.

EXAMPLE:

Broker Jones represented Seller Gonzalez as the listing broker in the sale of Gonzalez's residence. Jones presented to Gonzalez an offer that was \$15,000 less than the property's listed price. The property had been on the market for some time and had not generated much buyer interest. Jones felt that the offer was good one, under the circumstances, and urged Gonzalez to accept it. Gonzalez decided to accept the offer and the sale ultimately closed.

Two months after the sale had closed, Gonzalez discovered that there had been another offer on the property that Jones had received that was \$5,000 higher than the offer he had accepted. Gonzalez also discovered that although he had accepted the first offer, the second offer was received prior to closing of escrow on the first offer. Based on these developments, Gonzalez filed a complaint with the Board of Realtors stating that Jones had violated his ethical obligation to protect the best interests of his client.

At a subsequent hearing, Jones submitted a copy of the original listing agreement which stated in writing that his obligation to continue to present offers to Gonzalez terminated upon Gonzalez's acceptance of a bona fide offer. Jones submitted that he had explained this contract provision to Gonzalez in the listing presentation and that Gonzalez had then proceeded to sign the listing agreement. Gonzalez remembered the discussion of this provision but still felt that the second offer should have been presented to him since it was for a higher price.

The board, after a presentation of all the facts, concluded that Jones was not in violation of his duty as the listing agent inasmuch as he had covered this contract provision with the seller and that Jones' responsibilities ceased when the first offer had been accepted.

(5) Keep informed and current on factors affecting the real estate market that the licensee operates in as an agent.

EXAMPLE:

A real estate agent regularly attends classes, seminars, and board meetings to keep abreast of legal and statutory changes that are occurring in the real estate industry. These activities are entered into even though the agent has completed the legal requirements of forty-five hours of continuing education required to renew his or her license. The agent looks upon these educational opportunities as a way to achieve a higher professional status and render a better service to clients.

(6) Make a full, open and sincere effort to cooperate with other licensees, unless the principal has instructed the licensee to the contrary.

A licensee is ethically bound to cooperate with other brokers and subagents in attempting to sell a client's property unless it is not in the client's best interests to do so. Licensees should make it a practice to disseminate exclusive listings into the local multiple listing services as quickly as possible. Agents are duty bound to promote their clients best interests by obtaining the sale of the client's property in a timely manner.

It would be unethical for a listing agent to fail to fill reasonable requests from sub-agents for information needed to achieve a faster sale of a principal's property. Most certainly, a failure to promptly communicate all offers received by sub-agents to the principal in a prompt manner would represent a breach of an agent's ethical responsibilities. By the same token, subagents have an obligation to promptly disclose all pertinent facts to a principal's listing agent.

EXAMPLE:

Broker Chan receives an exclusive listing on a property. In consideration of her ethical obligation to render the best possible service to her clients that she can, Broker Chan makes sure her seller's property receives equal exposure to all brokers in an effort to sell the property at the price and on terms acceptable to her seller. She holds open house for cooperating brokers and makes every attempt to present her clients property at local board meetings.

(7) Attempt to settle disputes with other licensees through mediation or arbitration. The best interests of the real estate business are served when licensees seek to resolve disputes between themselves through mediation or arbitration rather than going to court.

Mediation and arbitration are both processes that have gained widespread use and popularity as alternatives to litigation in real estate matters. These processes are known as "Alternative Dispute Resolution (ADR)" methods. In 1988, the California Association of Realtors began to advocate the use of arbitration in dispute resolution. Several years later, CAR added a "mediation clause" to their contract in the event the parties to the contract chose not to use arbitration as the method to be used to handle conflicts between them.

Mediation and arbitration are two different and distinctive processes. Real estate licensees have a real need to become more knowledgeable on the mechanics, benefits, and limitations of both of these ADR processes. Real estate licensees must be in a position to discuss these methods with their clients and advise them of the key points and differences that exist between the two methods.

In addition, if conflicts arise that cannot be resolved through negotiation between the parties to a contract, real estate agents may well find themselves involved in a mediation or arbitration proceeding. For these reasons, licensees should become familiar with ADR methods and their use in the real estate field.

MEDIATION

In this process, an impartial third party (mediator) assists the parties, who are in conflict, in resolving their dispute. Negotiation is a central theme in the mediation process. The negotiator can meet with the parties, who are in conflict, together as well as individually. The negotiator is not empowered to reach a final decision that will then bind the parties and be enforceable in a court of law. The negotiator's role is to assist and guide the parties to reach a mutually acceptable compromise or solution between themselves.

Mediation services are available through the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services, Inc. (JAMS). There are other local services provided by legal associations. The mediators that staff these providers are often retired judges, lawyers, or attorneys who are currently practicing in the real estate field.

Most of the published purchase agreements in use in California today specify that buyer and seller agree to mediate any dispute arising out of the real estate contract before resorting to arbitration or court action. Remember, however, that the mediation clause is optional as a part of the contract. It can be waived by the parties to the contract if they elect to do so. If the clause remains as part of the agreement between the parties, they are then bound by its requirements.

One of the important benefits of mediation in dispute resolution is that it is a voluntary process. The parties elect to use this method because they do not want to get involved in the more time consuming and costly processes of arbitration or litigation. Other benefits of mediation (as compared to arbitration or litigation) include: **(1)** Mediation is a low cost ADR when compared to other alternatives **(2)** The parties do not lose control of the outcome. Each party is actively involved in reaching a mutually agreeable settlement **(3)** The process is confidential **(4)** Saves time and money because it is faster than arbitration or litigation **(5)** Parties still retain the right to later go to arbitration or litigation if the mediation is not successful.

ARBITRATION

Arbitration is a nonjudicial process in which an arbitrator is chosen to settle the dispute between the parties who are in conflict. The use of arbitration in place of litigation to settle real estate contractual disputes is increasing in use. The arbitrator is empowered to render a ruling to settle any disputes between the parties. The arbitrator's decision is legally binding and enforceable in the State of California.

MECHANICS OF ARBITRATION PROCESS

The arbitration process starts when the parties to a contract agree to settle disputes through arbitration. This act is known as “submission.” Submission can be accomplished in two ways. One method is for the parties to proceed forward with the contract and, if a dispute arises, to agree in writing at that time to submit the issue to arbitration for resolution.

The other method would be to place a clause, known as an arbitration clause, in the original contract that, if signed or initialed by both parties, forms an agreement to submit any disputes that may arise to arbitration.

If the purchase agreement used in a real estate transaction has an arbitration clause, and both parties initial this clause, they are agreeing in advance to submit any future disagreements or conflicts to arbitration for resolution. In this paragraph, the parties agree to first use mediation to settle their disputes if any arise. If mediation doesn't provide a satisfactory resolution, to then submit their differences to arbitration for a binding resolution of the dispute. It is well to keep in mind that the arbitration clause is optional. If the parties

do not initial the clause or it is struck out, the arbitration clause does not apply to the contract.

The arbitration proceeding involves a hearing at which the parties and arbitrator or arbitrators are present. Each party is allowed to present their evidence and any testimony is heard. The arbitrator then considers the evidence presented, deliberates, and then renders a decision. The arbitrator’s decision, known as the “award” is binding and legally enforceable in a court of law.

The fact that the arbitrator can reach a decision that is final and binding on the parties is one of the advantages of the arbitration process. However, it is also one of the major disadvantages inasmuch as an arbitrator’s decision is final. This process offers only a limited right of review. There is no appeal of the arbitrator’s award. The courts will not review the arbitration proceedings nor reverse any decisions.

The Code of Civil Procedures provides that certain types of real property transactions in areas involving court supervision or jurisdiction are not subject to resolution of disputes by arbitration. This would include: (1) Probate (2) Unlawful detainer actions (3) Eminent domain proceedings (4) Marital dissolution and (5) Foreclosure liens

ADVANTAGES OF ARBITRATION

In general, the advantages of the resolution of real estate disputes through the process of arbitration can be beneficial to all parties to the agreement for these reasons:

- Faster and less costly than litigation.
 - It is conclusive - a decision is reached and finalized.
 - The process is usually much faster than litigation saving both time and money.
 - It is private.
 - Less formal than court cases
 - Choice of an impartial arbitrator who is usually experienced in areas
 - It is focused on the particular real estate dispute being arbitrated
- (8) Advertise or claim to be an expert in an area of specialization in real estate brokerage activity e.g., appraisal, property management, industrial siting, or mortgage loans, etc. only if the licensee has had special training, preparation, or experience in such areas.

Real estate brokers and salespeople should not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence. The only exception to this standard of conduct might be to engage a person who is competent in the type of property or service under consideration and then only after making a full disclosure to the client.

CASE HISTORY

Santos v. Wing
1961 C.A. 2d 678

Santos owned 100% of the stock of the Woodland Avenue Corporation, whose sole asset was an apartment house in Menlo Park, California. Santos gave a listing for the sale of the apartment building to a broker named Carl Horvitz. After the listing, Santos received several offers through Horvitz to exchange the property but no offers to buy the property.

After the property had been on the market for awhile, Horvitz and Wing, who was a salesperson for Horvitz, made an offer to jointly purchase the property. When the sales agreement was executed, it included an acknowledgment clause to the effect that the seller was aware of the fact that both the prospective buyers held real estate licenses. The offer was made as an offer for the outright purchase of the property. No mention was made of exchanging the property. In addition, at the time of the signing of the final documents, evidence existed that Santos had an attorney and there was also evidence that Santos had previously been advised in tax matters by an accounting firm.

About 15 months after the sale, it was discovered that Santos had a tax liability of \$16,000. The tax liability could have been avoided if the sale had been made in the form of the sale of all the stock in the corporation that owned the property to the buyers rather than the corporation selling the property outright to the buyers.

Santos sued to have the sale overturned and for a reconveyance of the property back to him. Santos charged the defendants with a failure to exercise the care and skill standard in the locality for the kind of work the defendants were expected to perform. Santos charged that the defendants owed him a duty to fairly investigate and give him preliminary advice on the method by which this transaction should be carried out from a tax liability standpoint. The trial court ruled in favor of the defendants, Horvitz and Wing, and found that there was no violation of any fiduciary relationship on the part of the defendants.

Santos appealed. The appeals court found that there was ample evidence to support the trial court's findings and affirmed its judgment. The appeals court ruled that there was no evidence suggesting that the broker, or his salesperson, had any knowledge of the

appellant's tax situation. There was no evidence showing that the respondents tried to give Santos any tax advice. On the contrary, the evidence supported the fact that they urged Santos to seek expert advice. Also, that Santos did have both an attorney and an accountant to give him advice.

All licensees are held to a standard of reasonable skill in their real estate activities. A licensee, however, who claims to be an expert in a specific area, is held to a much higher standard. As an example, a licensee who performs a comparative market analysis to help a seller arrive at a realistic listing price is quite a different situation than a licensee claiming to be an "expert appraiser" and, attempting to appraise a "special purpose property."

Licenses should also avoid engaging in activities that constitute the unauthorized practice of law. If the interests of a licensee’s client dictate that legal help is required, recommend to the client that professional help be sought. The same would apply to advice on tax matters.

(9) Strive to provide equal opportunity for quality housing and a high level of service to all persons regardless of race, color, sex, religion, ancestry, physical handicap, familial status, marital status or national origin.

EXAMPLE:

Broker Caruso was contacted by a prospect regarding a home that had recently been advertised in the local newspaper. Upon learning that the advertised property had already been sold, the prospect, who happened to be a divorced woman with two children, asked to be shown other properties in her price range that had three bedrooms and were located near to schools and playgrounds. Based on the prospect’s stated requirements as to the price, size and location preferred, Broker Caruso found and then proceeded to show the prospect a number of homes.

A short while later, the prospect filed a complaint with the local Board of Realtors® stating that she did not feel that she had received equal professional services that she would have received had she been a male prospect in similar circumstances and with the same property criteria.

After the complaint was received and evaluated by the Grievance Committee, a hearing was held. At the hearing, the prospect expressed her complaint and concluded that she felt that she had been discriminated against because she was a woman and that she didn’t feel that Broker Caruso had showed a great deal of interest in helping her find a home.

Broker Caruso presented to the Hearing Panel samples of a contact report which he used that provided him with information on each prospect as to the price range, type of house and location preferred by prospect, and records the houses shown to the prospect with information on the price, type, and location of each home shown. Caruso also showed the panel his contact card on the prospect which showed that several homes shown to her met the data as supplied by her. The Hearing Panel concluded that Broker Caruso’s documented evidence did, in fact, establish a clear position in which equal professional services had been offered and that no violation of discrimination standards had occurred.

(10) Make a full disclosure to sellers and buyers of any ownership interest or position that the licensee, any member of his or her immediate family, or the licensee’s firm may have in any sale or purchase of a piece of property in which the licensee is representing one or both of the parties to the transaction.



CASE HISTORY
Abell v. Watson
(1957) 155 C.A. 2d 158

FACTS:

1. Abell is a licensed salesperson employed to sell Hubbard's dwelling house.
2. Hubbard said he wanted \$17,500 net to him. Abell arranged an escrow in which the purchaser named was Abell's sister or nominee. The escrow was closed by payment of the purchase price and a deed conveying the property to Abell's wife.
3. Abell did not tell Mr. Hubbard that the purchaser was to be either his sister or his wife.
4. The Real Estate Commissioner charged Abell with fraud and dishonest dealing as defined in the Real Estate Law.
5. A hearing examiner from the DRE heard the charges, found them true and recommended the suspension of Abell's license for three months.

SUMMARY

The appeals court stated that the facts of the case would not sustain a finding of fraud or dishonest dealing by Abell in the generally accepted meaning of these words. But the record does sustain a finding of breach of fiduciary duty by Abell to his client even though Hubbard later stated he didn't care whether or not the property was sold to Abell's sister or his wife as long as he got \$17,500 which was all he wanted.

A breach of fiduciary duty comes within the definition of fraud and dishonest dealing as used in the Real Estate Law. In the circumstances of this case, a full disclosure prior to the sale of the property to Abell's wife should have been made to Hubbard.

To hold otherwise, would be to approve a practice by which a real estate broker or salesperson could himself or herself purchase a client's property without the seller's knowledge, by having it conveyed to the spouse or other relative of the broker or salesperson. This would open the door to all sorts of chicanery and double dealing, and would be contrary to the purpose and intent of the Real Estate Law.



APPENDIX
Grounds for Revocation or Suspension

SECTION 10176: The commissioner may, upon his own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee with this state, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation.
- (b) Making any false promises of a character likely to influence, persuade or induce.
- (c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salespeople.
- (d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.
- (e) Commingling with his own money or property the money or other property of others which is received and held by him.
- (f) Claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination.
- (g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other different procedure.
- (h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing such licensee to sell, buy, or exchange real estate or a business opportunity for compensation or commission, except when such licensee prior to or coincident with election to exercise such option to purchase reveals in writing to the employer the full amount of licensee's profit and obtains the written consent of the employer approving the amount of such profit.
- (i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.
- (j) Obtaining the signature of a prospective purchaser to an agreement which provides that such prospective purchaser shall either transact the purchasing, leasing renting or exchanging or a business opportunity property through the broker obtaining such signature, or pay a compensation to such broker if such property is purchased, leased rented or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer such property for sale, lease, exchange or rent.

FURTHER GROUNDS FOR DISCIPLINARY ACTION

SECTION 10177. The commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done, or may suspend or revoke the license of, or deny the issuance of a license to, a corporate applicant if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done, any of the following:

- (a)** Procured, or attempted to procure, a real estate license or license renewal for himself or herself or any salesperson, by fraud, misrepresentation or deceit or by making material misstatement of fact in an application for a real estate license, license renewal or reinstatement.
- (b)** Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.
- (c)** Knowingly authorized, directed connived at, or aided in the publication, advertisement, distribution, or circulation of any material false statement or representation concerning his or her business, or any business opportunity or any land or subdivision offered for sale.
- (d)** Willfully disregarded or violated the Real Estate Law or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law.
- (e)** Willfully used the term “realtor” or any trade name or insignia of membership in any real estate organization of which the licensee is not a member.
- (f)** Acted or conducted himself or herself in a manner which would have warranted the denial of his or her application for a real estate license, or has either had a license denied or a license issued by another state, or the federal government, revoked or suspended for acts which if done by a real estate licensee would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act, and only upon an express finding of a violation of law by the agency or entity.
- (g)** Demonstrated negligence or incompetence in performing any act for which he or she is required to hold a license.
- (h)** As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.
- (i)** Engaged in any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.
- (k)** Violated any of the terms, conditions, restrictions, and limitations contained in any order granting a restricted license.
- (l)** Solicited or induced the sale, lease, or the listing for sale or lease, of residential property on the ground, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools, due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry, or national origin.
- (m)** Violated the Franchise Investment Law or regulations of the Commissioner of Corporations pertaining thereto.
- (n)** Violated the Corporations Code or the regulations of the Commissioner of Corporations relating to securities as specified in Section 25206 of the Corporations Code.
- (o)** Failed to disclose to the buyer of real property in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee’s direct or indirect ownership interest in that real property. The direct or indirect ownership in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee occupies a special relationship shall be disclosed to the buyer.



ETHICS - COURSE HIGHLIGHTS

ETHICS, PROFESSIONAL CONDUCT & THE REAL ESTATE LAW

Ethics: A set of **principles, rules, and standards of conduct** by which an individual guides his or her own behavior. A professional code of ethics outlines the duties and obligations a member of a profession owes to the public.

Real Estate Law: **Legal conduct of real estate licensees in California is regulated by Real Estate Law.** Violations of law call for **possible revocation or suspension of license.** **Sections 10176 and 10177 contain violations of Real Estate Law that all licensees must observe.**

Ethical Conduct: The **essence of ethical conduct consists of doing those things that should be observed (ethical conduct) in addition to what must be observed (Real Estate Law).** Ethical conduct entails **adhering to the Golden Rule in all real estate activities.**

- (1) It is unethical for a licensee to tell an owner that the licensee already has a bona-fide written offer from a buyer on an owner's property unless the licensee actually does have the offer.
- (2) It is unethical for an agent to suggest to a potential buyer that his client (seller) might be willing to accept less than the listed price for a property.
- (3) **Licensees pledge themselves to promote client's best interests.** Ethically, licensee must **protect client's information given in confidence and submit all offers to seller in a timely manner.**

Fiduciary Duties: When licensee enters an agency relationship with a principal, it creates **fiduciary duties and responsibilities** that are owed by the agent to his or her principal. **These fiduciary responsibilities are the most significant aspect of the agency relationship.** **Agent must also treat all other 3rd parties in the transaction: 1) Fairly & 2) Honestly**

Property Disclosures: A listing agent has an **ethical and legal duty** to make a **full disclosure** to a **potential buyer** of any **material fact that might affect the value or desirability of a property.**

- (1) Agent's duty under the transfer disclosure laws is to make a **reasonably competent and diligent inspection** of the property being transferred and to disclose the property's condition and any deficiencies uncovered by this "visual inspection" in the **Transfer Disclosure Statement.**
- (2) Agent's inspection is **limited to those areas of property that are "accessible" to the agent.**
- (3) **Agent is not charged with a duty to investigate details that may exist beyond the boundary lines of a property or in the public records.**

Misrepresentation: May be fraudulent or negligent. **If principal later questions acts of agent, the burden of proving agent acted in utmost good faith to principal falls on the agent.**

- (1) **Actual Fraud:** A representation that is false, made by a person who knows the representation is false, and with the intent to deceive.
- (2) **Constructive Fraud:** A representation that is false but is not made with intent to deceive. **An agent who is aware of a hidden defect in a property but fails to tell the buyer about it may have committed constructive fraud.**

Agency Disclosures: It is a legal requirement that agents provide a written agency disclosure statement to all parties in the sale, purchase or exchange of 1-4 residential units and mobile homes to avoid misunderstandings as to "who represents who" in a real estate transaction. **Written disclosure of agency relationship must be made by licensee in the (1) Purchase contract and receipt for Deposit, or (2) A separate writing.**

Commingling: **Mixing of a principal's funds with a licensee's own personal monies.** **Conversion is the misappropriation and using of a principal's funds (Broker receives deposit from buyer and**

spends it without principals authorization). **Conversion is the most serious offense.**

Definite Termination Date: An **exclusive listing** is a contract in which an owner/seller "hires" one broker on an exclusive basis to find a buyer for his or her property. Seller agrees to pay commission if agent finds buyer who is "**ready, will an able to buy on terms acceptable to seller.**"

Two Types of Exclusive Listing: 1) Exclusive Agency Listing 2) Exclusive Right to Sell
Exclusive Listings: Must have a **definite termination date.** **Real Estate Law also requires agent to give a copy of the listing to seller at time owner/seller signs the listing.**

Net Listings: A listing in which seller agrees to sell at a **set price.** This type of listing usually contains a clause that provides that the agent may retain as compensation **all sums received over and above the net amount received by owner.**

(1) Net listings are legal but rarely used by agents in California. (2) Reason for lack of use is net listings **can easily lead to charges of misrepresentation and fraud.**

Secret Profits: Agent cannot legally acquire **any secret interests in a transaction that are unknown or adverse to principal.**

(1) Agent cannot lawfully make a secret personal profit out of the agency relationship.

(2) If agent conceals agent's interest in property being conveyed, **agent is liable to principal for all secret profits made by agent.**

ETHICAL CONDUCT: Licensee should aspire to give a high level of competent, ethical, and quality service to buyers and sellers in real estate transactions. **Licensees should strive at all times to protect and promote the interests of their clients.**

Concepts of Ethical Conduct:

- (1) Licensees have ethical responsibility to **treat all parties to a transaction fairly and honestly.**
- (2) Licensees should **stay in close communication with clients** to ensure that questions are promptly answered and all significant problems in a transaction are conveyed in a timely manner.
- (3) Licensees should **use care in the preparation of any advertisement** to present an accurate picture or message to the reader, viewer, or listener.
- (4) **Submit all offers in a prompt and timely manner.**
- (5) **Keep informed and current** on factors affecting the real estate market that the licensee operates in as an agent.
- (6) **Make a full, open and sincere effort to cooperate with other licensees,** unless the principal has instructed the licensee to the contrary.
- (7) **Attempt to settle disputes with other licensees through mediation or arbitration.**

MEDIATION AND ARBITRATION: These two processes have gained widespread use and popularity as alternatives to litigation in real estate matters. The two processes are known as "**Alternative Dispute Resolution (ADR) methods.**"

Mediation: An impartial third party (mediator) assists the parties in conflict in resolving their dispute. Negotiator's role is to assist and guide parties to reach a mutually acceptable compromise or solution between themselves.

- (1) Mediator is **not empowered to reach a final decision** that will bind parties and be enforceable.
- (2) Mediation is a **voluntary process.** The parties elect to use method because they do not want to get involved in more time consuming and costly processes of arbitration or litigation.

Benefits of Mediation: 1) Low cost 2) Parties do not lose control of outcome 3) Process is confidential 4) It is faster than other methods and saves time and money 5) If not successful, parties still have right to go into arbitration or litigation.

Arbitration: An **Arbitrator** is chosen to settle the dispute between the parties in conflict. **Arbitrator is empowered to render a ruling to settle any disputes between the parties.** Arbitrator's decision is legally binding and enforceable. **Advantages:** 1) Faster and less costly than litigation 2) Decision

is final **3)** Faster than going to court **4)** Less formal than court cases **5)** Choice of an impartial arbitrator who is usually experienced in area of dispute.

6. Regarding an agency relationship:
 - (a) It imposes on the agent the duty of acting in the highest good faith toward the principal
 - (b) It precludes the agent from obtaining any advantage over the principal
 - (c) It charges the agent with the fullest disclosure to his or her principal of all material facts concerning the transaction
 - (d) All of the above

7. Broker Lee withdraws \$5,000 from her trust account for emergency purposes. She realizes that she is using funds that legally belong to her clients. However, she intends to replace these funds from a large commission that she will be receiving from an escrow that closes in a few days. Which of the following is true?
 - (a) She is guilty of commingling
 - (b) She legally has 30 days within which to repay these funds plus interest
 - (c) She is guilty of conversion
 - (d) All of the above

8. Knowingly making a substantial misrepresentation of the likely value of real property to a prospective buyer for the purpose of inducing the buyer to make an offer to purchase the property is:
 - (a) Unlawful
 - (b) A little on the unethical side but acceptable
 - (c) The customary practice of most successful real estate agents
 - (d) Ethically acceptable if the property is in a rapidly appreciating area

9. Licensees have an ethical responsibility to treat all parties in a real estate transaction:
 - (a) Fairly
 - (b) Honestly
 - (c) Equally since an agent's fiduciary duties extend to both seller and buyer
 - (d) Both (a) and (b) above

10. Which of the following is correct regarding an agent's ethical responsibility to submit written offers to his or her principal?
 - (a) All written offers should be submitted in a prompt and timely manner
 - (b) Licensees have no ethical obligations to continue to market a property after an offer has been accepted
 - (c) Both (a) and (b) above
 - (d) Neither (a) or (b) above

Answers to quizzes 6-10

6. D page 10,11

- 7. C page 13,14
- 8. A page 3,21,22
- 9. D page 25,26
- 10. C page 27

1-5 questions and answers page 8