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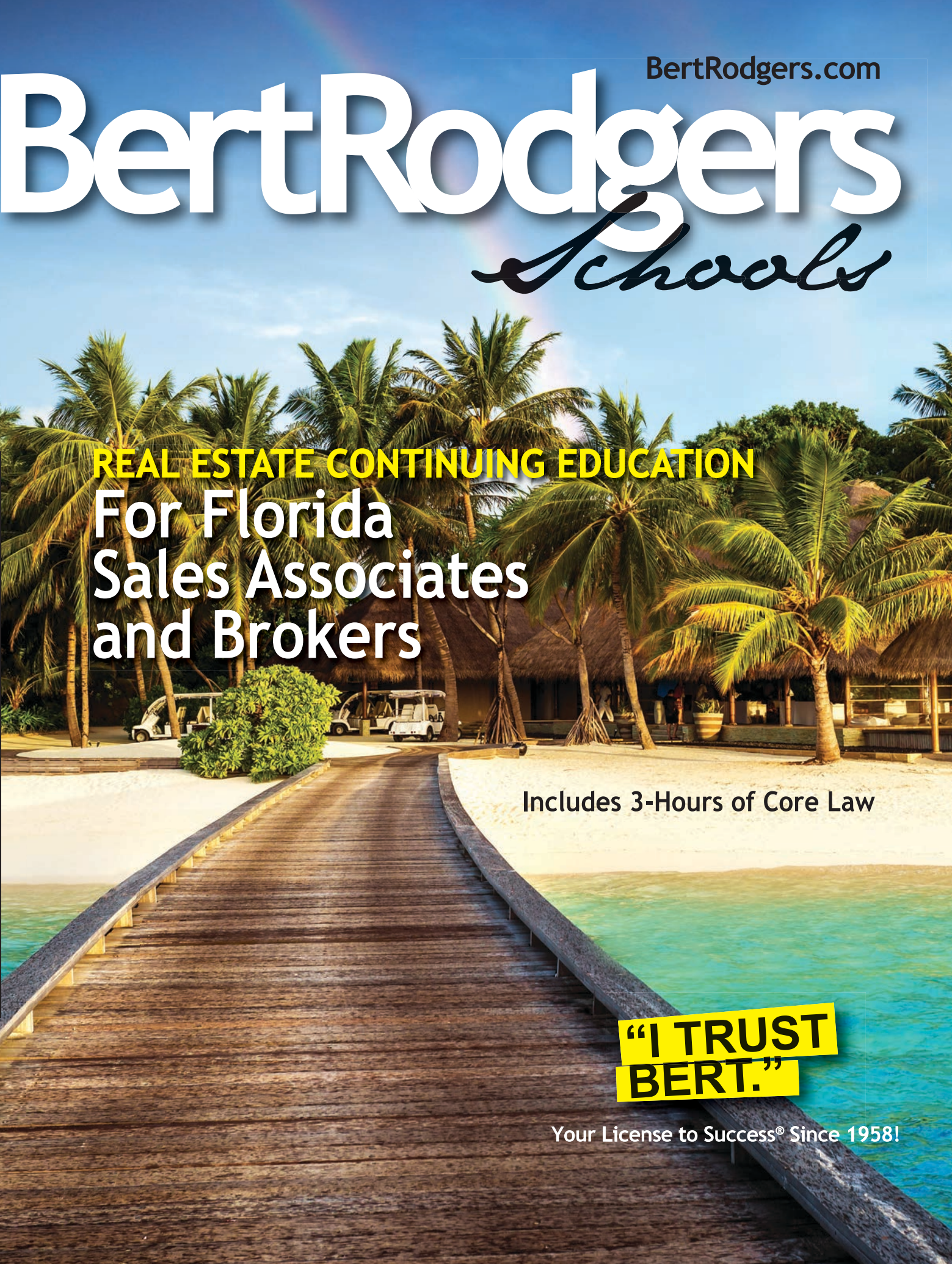

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Acknowledgements

With great pleasure we announce that Bert Rodgers Schools has become part of the Gold Coast Schools family. Gold Coast is one of the country's largest providers of traditional classroom and distance learning in the fields of real estate, appraisal, mortgage, insurance, and construction education. The joining of two of Florida's leading family-owned education providers is an outstanding opportunity to pool resources and provide the best educational offerings in Florida to an expanded audience. Both companies will continue to operate under their respective brands and provide high quality courses and a superior student experience.

We are fortunate to have industry leaders contribute to the 17th edition of this continuing education course for real estate professionals. In the same order as the modules they authored appear in our course, we thank Randy Schwartz, JD, Kenneth Harney, Deborah Long, PhD, and Denise Oyler for sharing their expertise with our students.

As always, the publishing team deserves a hearty round of applause for a job well done:

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Warm Regards,

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Bert Rodgers Schools

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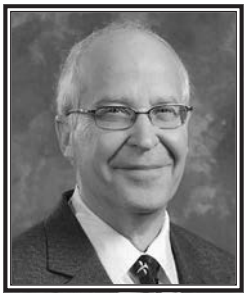
Real Estate Core Law

Recent Law and Rule Changes

This module satisfies the 3 hours of Core Law required by the FREC.



By Randy Schwartz

Randy Schwartz has over 40 years' experience as an attorney in the real estate field. He was Bureau Chief for the Real Estate Bureau of the Orlando Office of the Florida Attorney General and also served as the General Counsel for the Florida Association of REALTORS® for over 20 years. Randy has spoken at local, state, and international conferences on all aspects of real estate regulation and brokerage law and served as an adjunct professor at UCF and FAMU Law Schools. For several years he was on the Executive Committee of the Real Property Section of the Florida Bar. Randy is the coauthor of the Florida Bar's book, 'Florida Real Property Sales Transactions 8th edition.' He is currently in private practice in the Orlando area.

Glossary

Moral turpitude—conduct that is considered contrary to community standards of justice, honesty, or good character

Prima facie—a matter that appears to be self-evident upon initial observation; the evidence presented to support a legal claim

Funds—money in hand or available for the payment of a debt, claim, or expense

Promulgate—the formal act of announcing a statute or rule of court

Latent material defect—a defect that has a significant adverse impact on the value of a real property and is not observable by a visual inspection

PART I: REAL ESTATE LICENSE LAW—THE FLORIDA STATUTES

LEARNING OBJECTIVES

Upon completion of Part I, the student will be able to:

1. Review key definitions of Florida real estate license law.
2. Distinguish among the different forms of representation offered by a licensee.
3. Examine the real estate licensing requirements and exemptions for brokers, broker associates, and sales associates.
4. Discuss the renewal and continuing education requirements for licensees.
5. Consider the effect of relocating a brokerage office without notifying the DBPR.
6. Identify the safest, fastest, and least expensive method to resolve an escrow dispute.

INTRODUCTION

Chapter 475, Part I, F.S., is the relevant section of law dealing with real estate matters such as licensees, real estate business entities, and real estate schools. The following are some of the most important sections of the law that real estate licensees should be familiar with.

DEFINITIONS

Broker:

a licensed person who, for another, and for compensation, or with the intent to receive compensation, acts as an agent for others in the performance of one or more services of real estate; this includes transactions involving business enterprises or opportunities. As set forth in Chapter 475, F.S., the term broker also includes:

1) any person who advertises rental property information or lists

2) any person who is a general partner of a brokerage partnership, or an officer or director of a brokerage corporation if they perform brokerage activity. An unlicensed person can be an officer or partner of a real estate entity as long as they do not engage in brokerage activity, and

3) any person or entity who lists, advertises for sale, promotes, or sells by any means whatsoever one or more time-share periods per year on behalf of others, except as otherwise provided by law

In simpler terms, just about anyone who performs services of real estate *for another, for compensation* in Florida must have a Florida real estate license. One area that the Florida Real Estate Commission is still struggling with is property management. Unfortunately it is a term that is used in the industry but not defined in the law. Therefore does a property manager need a license? It depends on activity. There are a few exemptions which are covered in this section.

This definition does not mean if you receive a commission, you automatically need a license. The license requirement is determined more by your actions than how you are paid. Each situation must be independently reviewed.

Broker Associate:

a person who has earned a broker's license but chooses to be licensed as a broker associate and operate as a sales associate registered with a broker.

Reminder: Broker associates and sales associates cannot hold multiple licenses nor can they be an officer or director of a brokerage entity.

Sales Associate:

a person who performs any act specified in the definition of **broker,** but who performs such act under the direction, control, or management of another person. Chapter 61J2-6.006, of the *Florida Administrative Code* further states that a sales associate or broker associate may only be employed by one broker or by one owner-developer.

Even though the definition refers to "employment" of a sales associate or broker associate by a broker or owner-developer, most brokers enter into independent contractor agreements with their sales associates and broker associates.

When the terms *employ, employment, employer,* and *employee,* are used in Chapter 475, they describe the relationship between a broker and a sales associate or broker associate and include an independent contractor relationship when such relationship is intended by and established between a broker and a sales associate.

Fiduciary:

a broker in a relationship of trust and confidence between that broker as **agent** and the seller or buyer as **principal.** The duties of the broker as a fiduciary are:

- Loyalty
- Confidentiality
- Obedience
- Full disclosure
- Accounting for all funds, and
- The duty to use skill, care, and diligence

In today's real estate practice, the vast majority of brokers operate as transaction brokers. Transaction brokers do *not* owe fiduciary duties. Only single agents owe full fiduciary duties to the parties they represent. This is why the term *agent* is not appropriate to use unless the broker, and thereby their associates, enter into a single agent relationship.

It is important to remember that *only brokers may enter into agency* and *nonagency relationships with buyers and sellers.* As noted in the definition of broker above, a broker performs services of real estate for another, for compensation. Sales associates and broker associates operate under their broker and cannot enter into agency relationships on their own and cannot be paid directly by customers or clients.

Principal:

the party with whom a real estate licensee has entered into a single agent relationship. When a real estate broker represents a buyer or seller (or a lessor or lessee) as a single agent and thereby a fiduciary capacity, the party represented is the broker's principal.

Customer:

a member of the public who is or may be a buyer or seller of real property and may or may not be represented by a real estate licensee in an authorized brokerage relationship.

Single Agent:

a broker who represents only one buyer or seller (or lessee or lessor) per transaction, as a fiduciary, but not both in the same transaction.

In a single agent relationship, a broker is a fiduciary and owes these duties to their principal:

- Loyalty
- Confidentiality
- Obedience
- Full disclosure
- Accounting for all funds, and
- The duty to use skill, care, and diligence

The most important distinction between a single agent and a transaction broker is their representation of and loyalty to only one party. Single agents must keep *all* information confidential and work solely for the benefit of their principal, the buyer or seller or lessor or lessee.

Transaction Broker:

a broker who provides limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent. In a transaction broker relationship, *a buyer or seller is not responsible for the acts of a licensee.* Additionally, the parties to a real estate transaction are giving up their rights to the undivided loyalty of a licensee. This aspect of limited representation allows a licensee to facilitate a real estate transaction by assisting both the buyer and the seller, but a licensee cannot work to

represent one party to the detriment of the other party when acting as a transaction broker to both parties.

In Florida, all licensees are presumed to be transaction brokers unless another relationship is established in writing. This is the most prevalent form of brokerage relationship in our state. In a transaction broker relationship the broker (and their sales associates and broker associates) owes these duties:

- Dealing honestly and fairly
- Accounting for all funds
- Using skill, care, and diligence in the transaction
- Disclosing all known facts that materially affect the value of residential real property and are not readily observable to the buyer
- Presenting all offers and counteroffers in a timely manner, unless a party has previously directed the licensee otherwise in writing
- Limited confidentiality, unless waived in writing by a party. This limited confidentiality will prevent disclosure that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, of the motivation of any party for selling or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential, and
- Any additional duties that are mutually agreed to with a party

Did you notice the line in the definition of transaction broker that says the buyer or seller is not responsible for the actions of the broker? That language is there because a buyer or seller in a single agency relationship with a broker *is responsible for the actions of the broker* within the scope of the services performed. Interesting! This exists due to common law in the area of agency.

Designated Sales Associate:

in a commercial transaction in which both the buyer and seller are working with the same real estate licensee, the broker may allow different sales associates of the same firm to act as designated sales associates to represent the buyer and seller as single agent as long as the following conditions are met:

- The request must be made by the buyer *and* seller
- The transaction must involve only commercial real estate, and
- The buyer and seller each must have assets of $1 million or more

Designated sales associates have the same duties of a single agent including disclosure requirements.

No Brokerage Relationship:

in a no brokerage relationship, even though a customer is not represented, the following duties are still owed by a real estate licensee:

- Dealing honestly and fairly
- Disclosing all known facts that materially affect the value of the residential real property that are not readily observable by the buyer, and
- Accounting for all funds entrusted to the licensee

A licensee who has no brokerage relationship with a buyer or seller must fully describe and disclose the relationship in writing to the buyer or seller. The disclosure must be made before the showing of property.

Disclosure Requirements

Chapter 475, F.S., requires disclosure of agency and nonagency relationships. The disclosures apply *only* to residential transactions. Notice must be provided in writing using specific forms.

See §475.278 or go to **http://www.flsenate.gov/Laws/Statutes/2014/475.278** for full details.

Review

Single Agency: Fiduciary relationship with a buyer or seller who is the broker's principal.

Transaction Broker: Limited Representation and limited duties, not a fiduciary relationship.

No Brokerage Relationship: The customer is not represented by the broker but the broker must deal honestly, disclose known material facts, and account for all funds.

FYI Did you know that in 2016 there were 328,955 licensees in Florida, including brokers, broker associates, and sales associates? A real estate license is not always required.

Review the exemptions below.

LICENSE REQUIREMENT EXEMPTIONS

§475.011. The licensing requirements for Florida real estate brokers, broker associates, sales associates, and schools do *not* apply to any:

- Person acting as an attorney-in-fact for the purpose of the execution of contracts or conveyances only; as an attorney-at-law within the scope of her or his duties; as a certified public accountant, as defined in Chapter 473, within the scope of her or his duties; as the personal representative, receiver, trustee, or general or special magistrate under, or by virtue of, an appointment by will or by order of a court of competent jurisdiction; or as trustee under a deed of trust, or under a trust agreement, where the ultimate purpose and intent is charitable or philanthropic.

Many Florida attorneys are under the mistaken belief that they are totally exempt from license law. The exemption does not allow attorneys to take listings or get paid to find buyers.

- Individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its own real property. This exemption is not available if an agent, employee, or independent contractor paid a commission or other compensation *strictly on a transactional basis* is employed to make sales, exchanges, or leases to or with customers in the ordinary course of an owner's business of selling, exchanging, or leasing real property to the public.

Just because an employee is paid on a commission basis they are not automatically excluded from this exemption. For example, the office manager's job is to have everyone come to work on time. The office manager can receive a bonus for this. This is true if no brokerage activity is performed by the office manager. No license activity was performed therefore no license is required.

- Salaried employee of an owner, or of a registered broker for an owner, of an apartment community who works in an onsite rental office of the apartment community in a leasing capacity.
- Person employed for a salary as a manager of a condominium or cooperative apartment complex as a result of any activities or duties which the person may have in relation to the renting of individual units within such condominium or cooperative apartment complex *if rentals arranged by the person are for periods no greater than one year.*
- Person, partnership, corporation, or other legal entity which, for another and for compensation or other valuable consideration, rents or advertises for rent, for transient occupancy, any public lodging establishment licensed under Chapter 509, F.S.

The *property* must be registered under Chapter 509, not the person.

- Property management firm or any owner of an apartment complex for the act of paying a finder's fee or referral fee to an unlicensed person who is a tenant in such apartment complex provided the value of the fee does not exceed $50 per transaction. Unlicensed persons are not authorized by this law to advertise or promote this service.

FYI Generally, salaried employees performing duties within the scope of their employment for the owner and where a commission or bonus are not paid are exempt from Chapter 475, F.S.

REGISTRATION AND LICENSING

General Partners, Members, Officers, and Directors of a Firm

§475.15. Each partnership, limited liability partnership, limited liability company, or corporation which acts as a broker must register with the Commission and must renew the licenses or registrations of its members, officers, and directors for each license period. However, if the partnership is a limited partnership, only the general partners must be licensed brokers or brokerage corporations registered pursuant to this part. If the license or registration of at least one active broker member is not in force, the registration of a corporation, limited liability company, limited

liability partnership, or partnership is canceled automatically during that period of time.

A sales associate *cannot* be an officer or director of a brokerage corporation but a sales associate *can* own all the stock or shares of the corporation.

COMPREHENSION QUESTION 1

Secretary Olivia mailed the license renewals to the DBPR for all three general partners of Bamboo Realty one week before the deadline. Unfortunately, the envelope was damaged and they were delayed in the mail. The status of all three broker licenses became involuntarily inactive for five days until they were successfully renewed online. What was the status of the partnership's registration during those five days?

_____

_____

Broker Associates and Sales Associates

§475.161. The Commission must license a broker associate or sales associate as an individual or—if the licensee provides the Commission with authorization from the Department of State—as a professional corporation, limited liability company, or professional limited liability company. A license will be issued in the licensee's legal name only and, when appropriate, must include the entity designation. This section does not allow a broker associate or sales associate to register or be licensed as a general partner, member, manager, officer, or director of a brokerage firm.

Post-license Education

§475.17. The first time a license is renewed, post-license education is required: 45 hours for sales associates and 60 hours for broker associates and brokers. If the post-license education is not completed by the initial renewal deadline, the license becomes null and void. To obtain a new sales associate license, the individual must meet the pre-license requirements again. Brokers and broker associates can revert to a sales associate license if they satisfactorily complete the 14-hr continuing education course within six months after the license expiration. To operate as a broker, the licensee must repeat the broker pre-license requirements.

Post-License Education Requirements

Before First License Renewal - §475.17

Sales Associates	45 hours
Brokers and Broker Associates	60 hours

LICENSE RENEWAL: CONTINUING EDUCATION

§475.182. After the first license renewal sales associates, broker associates, and brokers are required to complete 14 hours of Commission-approved continuing education during each two-year license period. The education may be completed online, by correspondence, or in a classroom. Licensees must certify that they have completed the required continuing education during the license period. A license is renewed when the department receives the renewal application and fee.

The required education may be completed any time during the two-year license period *but* the DBPR only accepts renewal applications and fees 90 days prior to the expiration of the license.

Licensees may choose active or inactive license status. If you are performing services of real estate, your license must be active. Sales associates and broker associates must have their license registered with a broker to be active. Changing your license status is fairly simple.

Go online to **www.myfloridalicense.com,** print DBPR Form RE 11, and follow the directions on the form.

Voluntarily Inactive

Toni experienced some life changing events and needed to leave the real estate profession for a few years. To have the option to return to her career at a later date, she completed the forms as required by the DBPR to change the status of her license from current active to current inactive. According to the Florida Statutes, Toni's license will become voluntarily inactive once the status change forms are processed by the DBPR.

Involuntarily Inactive License

§475.183. Any license that is not renewed at the end of the license period prescribed by the department will automatically revert to *involuntarily inactive status*. Under current Commission rule, a license may remain involuntary inactive for up to 24 months. Remember, if you are performing services of real estate, your license must be active and sales associates and broker associates must have their license registered with a broker to be active.

Licensees may reactivate a license that has been involuntarily inactive for 12 months or less by satisfactorily completing at least 14 hours of approved continuing education and paying late renewal fees. If the license has been involuntarily inactive for more than 12 months but fewer than 24 months, they must complete a Commission-approved 28-hour education course. A renewal fee plus any late fees must be paid to the DBPR for each renewal period in which the license was involuntarily inactive.

Any license that has been involuntary inactive for more than two years will automatically expire. After that, the license becomes **null and void.** For example, Sales Associate Ali did not renew her license in September of 2014 and again in September 2016. On October 1, 2016, her license status became null and void.

COMPREHENSION QUESTION 2

If your license expires on March 31 and you do not complete the renewal requirements on time, what is the status of your license on April 1?

_____

_____

MULTIPLE LICENSES

§475.215. A licensed broker may be issued additional licenses as a broker whenever it is clearly shown that the requested additional licenses are necessary to the conduct of real estate brokerage business (e.g., one for a main corporation and one for a referral corporation). Sales associates and broker associates may *not* be issued additional licenses because they cannot have more than one registered employer at any one time.

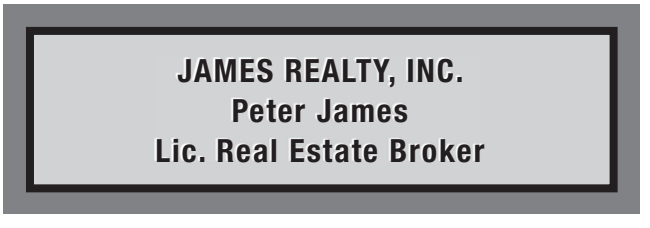
At the current time, multiple broker licenses are more closely reviewed than ever before. What was at one time a routine matter has now been subject to closer scrutiny. The FREC wants to prevent the practice of brokers lending their license to entities. The FREC has discussed limiting the number, but such limitations would probably require legislative action.

BROKER OFFICE AND SIGN REQUIREMENTS

§475.22. Each active broker must maintain an office consisting of at least one enclosed room in a building of stationary construction. Each active broker must maintain a sign on or about the entrance of her or his principal office and each branch office. The sign must be easily observed and read by any person about to enter the office. Each sign must contain the name of the broker and the broker's trade name, if any. For a partnership or corporation, the sign must contain the name of the firm or corporation or trade name of the firm or corporation, and the name of at least one of the brokers. At a minimum, the words "licensed real estate broker" or "lic. real estate broker" must appear on the office entrance signs. See Figure 1.1.

Brokers who do not want to pay the extra expense of having an outside office may use a room in their house as an office. This is permissible as long as the proper signage outside the entrance to the room is not a violation of local zoning laws.

Figure 1.1:
Requirements of a Corporation Office Sign



If a broker's registered office is located outside the State of Florida, prior to registering this office or branch office, the broker must agree in writing to cooperate with any investigation initiated in accordance with this chapter or commission rules. Cooperation includes promptly supplying documents requested by authorized representatives of the department and personally appearing at any designated office of the department or other location in the state or elsewhere as reasonably requested by the department. Failure to comply with a request to provide documents or appear as requested is a violation of the license law.

CHANGE OF BUSINESS ADDRESS

It is not uncommon to move your office space as well as your home in today's mobile economy. It is a big job! Remember to update your address with the DBPR within 10 days.

§475.23. Until a new address has been reported to the DBPR, a license will expire and cease to be in force when:

- a broker changes her or his business address
- a sales associate working for a broker or an instructor working for a real estate school changes employer, or
- a real estate school operating under a permit changes its business address

Licensees must notify the commission of the change no later than 10 days after the change, on a form provided by the commission. When a broker or a real estate school changes the business address, the brokerage firm or school permit holder must file with the commission a notice of the change of address, along with the names of any sales associates or instructors who are no longer employed by the brokerage or school. Such notification will also fulfill the change of address notification requirements for sales associates who remain employed by the brokerage and instructors who remain employed by the school.

Any time a licensee changes their address, they should make and keep a computer record of when, to whom, and how the change of address was submitted to the DBPR. Remember the burden could be on the licensee to establish it was done properly.

Counting Days

Days are usually counted as calendar days unless the law, rule, or agreement contains language that states otherwise. Some organizations recognize when a time period ends on a day other than a business day and will allow the last day of the time period to be the next business day. To avoid unwanted consequences, address the issue at the beginning of the time period or when the agreement is written.

BRANCH OFFICE FEES

§475.24. Whenever any licensee desires to conduct business at some other location, either in the same or a different municipality or county than where she or he is licensed, the additional place of business shall be registered as a branch office, and an annual registration fee prescribed by the commission, in an amount not exceeding $50, shall be paid for each additional office. Any office is considered to be a branch office if the name or advertising of a broker having a principal office located elsewhere is displayed in such a manner as to reasonably lead the public to believe that the office is owned or operated by that same broker. As you can see whether or not a location is a branch office is a rather subjective area.

DISCIPLINE

Section 475.25 is probably the most important section of the license law not only because violating this section could result in loss of your license; it also establishes how you are to conduct your business.

The Commission has broad powers that include:

- Denying an application for licensure, registration, or permit, or renewal thereof
- Placing a licensee, registrant, or permittee on probation
- Suspending a license, registration, or permit for a period not exceeding 10 years
- Revoking a license, registration, or permit
- Imposing an administrative fine not to exceed $5,000 for each count or separate offense
- Issuing a reprimand

The Commission may choose any or all of the above actions if it finds that the licensee, registrant, permittee, or applicant has:

- been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme

to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public. Please note that culpable negligence is a higher degree of negligence then simple negligence.

- advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content. The commission may adopt rules defining methods of advertising that violate this paragraph. Advertising by real estate team names is an area of concern of FREC. Currently there is no prohibition for individuals to advertise as teams, but is such an ad misleading to the public? This is an issue to watch for in the future.

COMPREHENSION QUESTION 3

A licensee was found guilty of misrepresentation and breach of trust. His fine was $10,000. Why was the fine more than $5,000?

_____

_____

FREC may impose any of the disciplinary actions above if it finds that the licensee, registrant, permittee, or applicant has:

- failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, funds, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not by law or equity entitled to retain under the circumstances.

However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee must promptly notify the commission of such doubts or conflicting demands and will promptly:

- request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property, or
- submit the matter to arbitration with the consent of all parties, or
- seek adjudication of the matter in court by interpleader or otherwise, or
- submit the matter to mediation with the written consent of all parties

The Department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee must promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties.

In **mediation,** a professionally trained neutral third party facilitates a discussion between the buyer and seller. The mediator does not have the ability to render a decision. If the buyer and seller reach a mutually agreeable solution it is not binding unless they sign a written mediation settlement agreement.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission must set forth by rule, a licensee may disburse property from the licensee's escrow account

without notifying the commission or employing one of the procedures listed above. For example, the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by section 718.503, F.S., or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed above.

RECAP

Escrow Dispute Options

If, in good faith, the licensee is unsure of who should receive a disbursement, the licensee must promptly notify the commission and request either:

- an escrow disbursement order—the commission decides who receives the escrow
- arbitration—a neutral third party decides the outcome
- adjudication in court—litigation
- mediation—the buyer and seller work with a neutral third party to reach a mutually agreeable solution.

The commission may impose punishment if it finds that the licensee, registrant, permittee, or applicant:

- has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract that requires the deposit money to be placed in an escrow account and to be applied to the purchase price if the sale closes.
- has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales associate, or involves moral turpitude or fraudulent or dishonest dealing. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state will be admissible as prima facie evidence of such guilt.
- has had a broker's or sales associate's license revoked, suspended, or otherwise acted against, or has had an application for such licensure denied, by the real estate licensing agency of another state, territory, or country.
- has shared a commission with, or paid a fee or other compensation to, a person not properly licensed as a broker, broker associate, or sales associate under the laws of this state, for the referral of real estate business, clients, prospects, or customers, or for any one or more of the services set forth in section 475.01(1)(a), F.S. For the purposes of this section, it is immaterial that the person to whom such payment or compensation is given made the referral or performed the service from within this state or elsewhere; however, a licensed broker of this state may pay a referral fee or share a real estate brokerage commission with a broker licensed or registered under the laws of a foreign state (i.e., a state or government that is not Florida), so long as the foreign broker does not violate any law of this state.
- is temporarily incapacitated from acting safely and capably as a broker or sales associate for investors or those in a fiduciary relation with her or him because of drunkenness, use of drugs, or temporary mental derangement; but suspension of a license in such a case will be only for the period of such incapacity.
- has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds must be kept until disbursement thereof is properly authorized; or has failed, if a sales associate, to immediately place with their registered employer any money, fund, deposit, check, or draft entrusted to them by any person dealing with her or him as agent of the registered employer. The commission must establish rules to provide for records to be maintained by the broker and the manner in which such deposits will be made. A broker may place

and maintain up to $5,000 of personal or brokerage funds in the broker's property management escrow account and up to $1,000 of personal or brokerage funds in the broker's sales escrow account. A broker will be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no significant threat to economically harm the public. It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or brokerage funds that may be present in the escrow account.

RECAP **Brokers Maximum Personal Funding Allowance**

Escrow Account	Amount
Property Management	$ 5,000
Sales	$ 1,000

Table 1.1: The Administrative Complaint Process

Step 1 Complaint is filed

Step 2 Notification sent to licensee

Step 3 Investigation

Step 4 Report to prosecutor

Step 5 Prosecutor recommendation to Probable Cause Panel:
a. dismiss, or
b. administrative complaint

Step 6 If disputed, a hearing occurs

Step 7 Administrative Law Judge – recommended order

Step 8 Final Order – FREC minus the probable cause panel members

- is confined in any county jail, post adjudication; is confined in any state or federal prison or mental institution; is under home confinement ordered in lieu of institutional confinement; or, through mental disease or deterioration, can no longer safely be entrusted to competently deal with the public.
- has failed to inform the commission in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony.
- has failed in any written listing agreement to include a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal(s); and has failed to give the principal(s) a legible, signed, true, and correct copy of the listing agreement within 24 hours of obtaining the written listing agreement. The written listing agreement cannot contain a provision requiring the person signing the listing to notify the broker of the intention to cancel the listing after such definite expiration date.
- has failed, if a broker, to direct, control, or manage a broker associate or sales associate employed by such broker. A rebuttable presumption exists that a broker associate or sales associate is employed by a broker if the records of the department establish that the broker associate or sales associate is registered with that broker. A record of licensure which is certified or authenticated in such form as to be admissible in evidence under the laws of the state is admissible as prima facie evidence of such registration.

An administrative complaint against a broker, broker associate, or sales associate must be filed *within five years after the time of the act* giving rise to the complaint or within *five years after the time the act is discovered* or should have been discovered with the exercise of due diligence.

SCENARIO 1

Customer A finally has the nerve to file a complaint against the biggest broker in town. The customer says the broker misled him in 2005. Why was the case dismissed by the FREC?

The case was filed beyond the 5 years statute of limitation.

CASE STUDY 1

Respondent violated Florida Statute Section 475.25(1)(b) by giving the property inspector the wrong email address for the buyer in a real estate purchase transaction, giving the buyer an altered report instead of the inspector's report, and by telling the buyer that the inspection company would refund the cost of the inspection when it never offered to make the refund. By stipulation, the Respondent agreed to the following penalty: 30 days of suspension beginning six months after the effective date; administrative fine of $1,000; investigative costs of $251.25; and restitution to buyer in the amount of $25,130.

CASE STUDY 2

Respondent violated Florida Statute Section 475.25(1)(b) by committing an act of breach of trust by converting his client's earnest money deposits for his own personal usage; Section 475.25(1)(d)1 by failing to account and deliver his client's earnest money deposits on demand; Section 475.42(1)(d) for collecting money in connection with a real estate brokerage transaction in a name other than that of his registered employer; and Section 475.25(1)(e) through a violation of Florida Administrative Code Rule 61J2-14.009 by failing to deliver escrow deposits to his registered Broker no later than the end of the next business day. Penalty: revocation; administrative fine of $4,000; investigative costs of $561.

BROKERAGE RELATIONSHIP: AGENCY OR TRANSACTIONAL

§475.255. Without consideration of the related facts and circumstances, the mere payment or promise to pay compensation to a licensee does not determine whether an agency or transactional brokerage relationship exists between the licensee and a seller, landlord, buyer, or tenant.

THE BROKERAGE RELATIONSHIP DISCLOSURE ACT (BRDA)

§475.2701. This legislation was enacted in 1997 to create the role of the transaction broker, allowing a licensee to provide limited representation to both parties in the same transaction. It is further explained in sections 475.272-.2801, F.S.

The Purpose of BRDA

§475.272. In order to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions, the Legislature determined the intent of the Brokerage Relationship Disclosure Act is to provide that:

1. Disclosed dual agency as an authorized form of representation by a real estate licensee in this state is expressly revoked
2. Disclosure requirements for real estate licensees relating to authorized forms of brokerage representation are established
3. Single agents may represent either a buyer or a seller, but not both, in a real estate transaction, and
4. Transaction brokers provide a limited form of nonfiduciary representation to a buyer, a seller, or both in a real estate transaction.

Required Relationship and Transaction Disclosures

§475.278. There are *four types* of authorized brokerage relationships a real estate licensee may have with a buyer or seller:

- Transaction Broker—the most common form of representation
- Single Agent
- No Brokerage Relationship
- Designated Sales Associate

In Florida, it is presumed that all licensees are operating as transaction brokers unless a single agent or no brokerage relationship is established ***in writing*** with a customer. A licensee may change from single agent to a transaction broker as long as the buyer and seller, or both, gives consent as required by section 475.278(3)(c)2, F.S., prior to the change and the appropriate written disclosure of duties is made to the buyer and seller.

While the duties of authorized brokerage relationships apply in all brokerage activities, the disclosure requirements of BRDA apply only to residential sales.

Whenever a licensee is representing a buyer or seller in a capacity other than a transaction broker or if they are transitioning from one type of authorized relationship to another, disclosure must be provided before, or at the time of, entering into a listing agreement or an agreement for representation or before the showing of property, whichever occurs first. The disclosure must be made in writing and fully describe the duties of the specified type of brokerage relationship being entered into.

CONTRACTS BY AN UNLICENSED PERSON

§475.41. A contract for a commission or compensation for any act or service is not valid unless the broker or sales associate has complied with this chapter in regard to issuance and renewal of the license ***at the time the act or service was performed.***

For example: John had a valid sales associate license when he earned a commission from his last closing. Before his broker issued the commission check, John's license was revoked by FREC due to an unrelated matter. Can John's broker still pay him? Yes, because his license was valid at the time he performed the services. The key is license status *at the time of the service,* NOT the license status at the time of payment.

LICENSE VIOLATIONS AND PENALTIES

§475.42. Any person who violates any of the provisions below is guilty of a misdemeanor of the second degree unless the punishment is prescribed in this chapter.

- A person may not operate as a broker or sales associate without being the holder of a valid and current active license; therefore, any person who violates this paragraph commits a felony of the third degree, punishable as provided in sections 775.082 or 775.083, F.S., or, if a corporation, as provided in section 775.083.
- A person licensed as a sales associate may not operate as a broker or operate as a sales associate for any person not registered as her or his employer.
- A sales associate may not collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate sales associate, whether the holder of a valid and current license or not, will commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer at the time the sales associate performed the act or rendered the service for which the commission or compensation is due.
- A broker or sales associate may not place, or cause to be placed, upon the public records of any county, any contract, assignment, deed, will, mortgage, affidavit, or other writing which purports to affect the title of, or encumber, any real property if the same is known to her or him to be false, void, or not authorized to be placed of record, or not executed in the form entitling it to be recorded, or the execution or recording whereof has not been authorized by the owner of the property, maliciously or for the purpose of collecting a commission, or to coerce the payment of money to the broker or sales associate or other person, or for any unlawful purpose. However, nothing in this paragraph will be construed to prohibit a broker or a sales associate from recording a judgment rendered by a court of this state or to prohibit a broker from placing a lien on a property where expressly permitted by contractual agreement or otherwise allowed by law.
- A person may not operate as a broker under a trade name without causing the trade name to be noted in the records of the commission and placed on the person's license, or so operate as a member of a partnership or as a corporation or as an officer or manager thereof, unless such partnership or corporation is the holder of a valid current registration.

COMPREHENSION QUESTION 4

Which violation of real estate license law is a third degree felony?

_____

_____

CASE STUDY 3

Respondent violated Florida Statute Sections 475.25(1)(d) for failure to account or deliver; 475.25(1)(b) for fraud; 475.24(1)(k) for failure to place funds received with his employer; and 475.25(1)(d) for collecting money in a real estate transaction not in the name of the employer and without the express consent of the employer. The Respondent received wired money into his personal account from a client for a real estate transaction. He did not have the consent of the employer to receive these monies in his personal account, did not turn the funds over to his employer, did not account for, nor deliver the deposit to the client upon demand, and committed fraud in the transaction. Penalty: revocation; investigative costs of $584.10.

ADVERTISING BY REAL ESTATE SCHOOLS

§475.4511. No person representing a real estate school offering and teaching real estate courses under this chapter will make, cause to be made, or approve any statement, representation, or act, oral, written, or visual, in connection with the operation of the school, its affiliations with individuals or entities of courses offered, or any endorsement of such, if such person knows or believes, or reasonably should know or believe, the statement, representation, or act to be false, inaccurate, misleading, or exaggerated.

A school cannot use advertising of any nature which is false, inaccurate, misleading, or exaggerated. Publicity and advertising of a real estate school, or of its representative, must be based upon relevant facts and supported by evidence establishing their truth. One of the areas that FREC is wrestling with is can a school advertise its pass-fail rate. Can a school do such or is it misleading per se? Would this information be important so a member of the public knows which school is best for his or her chances to pass the exam? This is an area to watch to see if upcoming legislation gives more guidance.

No representative of any school or institution coming within the provisions of this chapter will promise or guarantee employment or placement of any student or prospective student using information, training, or skill purported to be provided, or otherwise enhanced, by a course or school as an inducement to enroll in the school, unless such person offers the student or prospective student a bona fide contract of employment agreeing to employ the student or prospective student.

RENTAL INFORMATION

§475.453. Each broker or sales associate who furnishes a rental information list to a prospective tenant, for a fee, must provide the tenant with a contract or receipt. The contract or receipt must contain a provision for the repayment of any amount over 25% of the fee to the prospective tenant if he or she does not obtain a rental. If the rental information list provided by the broker or sales associate is not current or accurate in any material respect, the full fee must be repaid to the prospective tenant upon demand. A demand from the prospective tenant for the return of the fee, or any part thereof, must be made within 30 days following the day on which the real estate broker or sales associate has contracted to perform services. The contract or receipt must also conform to the guidelines adopted by the Commission. Violation of these provisions is a misdemeanor of the first degree. In addition to the penalty, the license of any broker or sales associate who participates in any rental information transaction which is in violation of the provisions of section 475.453(1), F.S., is subject to suspension or revocation by the Commission. Figure 1.2 is an example of the notice required by F.A.C. 61J2-10.030.

NOTICE PURSUANT TO FLORIDA LAW:

If the rental information provided under this contract is not current or accurate in any material aspect, you may demand within 30 days of this contract date a return of your full fee paid. If you do not obtain a rental you are entitled to receive a return or 75% of the fee paid, if you make demand within 30 days of this contract date.

Figure 1.2: Rental Information Notice

If a prospective tenant paid $50.00 for a rental information list and did not obtain a rental, he or she can receive a $37.50 refund (50x75%=37.50), if the refund is requested within 30 days.

BROKERAGE BUSINESS RECORDS

§475.5015. Each broker must keep and make available to the department books, accounts, and records that enable the department to determine whether the broker is in compliance with the provisions of this chapter. Each broker must preserve at least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business *for at least five years* from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least five years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. If any brokerage record has been the subject of or has served as evidence for litigation, relevant books, accounts, and records must be retained for at least two years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than a total of five years as set above. There is nothing in the law that specifically mentions emails or text messages. Representatives of the State have stated it's not required, however it might be needed to avoid a prosecution in some particular case. In other words maintaining such documents might be wise for a licensee's own protection.

SCENARIO 2

An investigator from the DBPR comes to inspect the office of Broker A. The Investigator asks to see business records. The broker does not have copies of all emails and texts. Is he in violation?

Nothing in the law says emails and texts have to be kept for five years, however if the texts and emails are necessary for the broker to avoid liability, the broker would be well advised to maintain these as records. In other words he is not required do so, but the emails and texts could be needed for the broker to defend a specific action against him.

AUTHORITY TO INSPECT AND AUDIT

§475.5016. Duly authorized agents and employees of the Department have the power to inspect and audit in a lawful manner at all reasonable hours any broker or brokerage office licensed under this chapter for the purpose of determining if any of the provisions of this chapter, Chapter 455, F.S., or any rule of either chapter is being violated.

SCENARIO 3

Broker A is in his office and a DBPR investigator arrives unannounced and requests to review all business records. The broker agrees to give the investigator access to the records but at a later, more convenient time. Is broker in violation?

Yes, the law states that the DBPR has the power to inspect and audit in a lawful manner at all reasonable hours any broker or brokerage office licensed under Chapter 475, Florida Statutes. In most cases, unless there is an emergency, the investigator will notify the broker well ahead of the visit.

Audit numbers are up! Be prepared. The length of any inspection depends on whether the brokerage company keeps an escrow account. To avoid the requirement to perform a monthly reconciliation many brokerages do not have an escrow account. Instead they choose to have earnest money held by an independent entity.

CASE STUDY 4

Respondent violated Florida Statute Sections 475.5015 by failing to be present for a scheduled office and escrow audit inspection and failing to make her brokerage's escrow accounts available to the Department; 475.25(1)(e) and Florida Administrative Code Rule 61J2-5.019 by operating as the qualifying broker of a corporation that did not hold a current and active license. Penalty: investigative costs of $660; attendance at two complete FREC meetings; 10 years of probation, during which Respondent is to manage no licensees, maintain no escrow accounts, and is not to manage rental properties.

FLORIDA REAL ESTATE COMMISSION (FREC)

§475.02. The Commission consists of seven members appointed by the Governor, subject to confirmation by the Senate. Four members must be licensed brokers, each of whom has held an active license for the five years preceding appointment; one member must be a licensed broker or a licensed sales associate who has held an active license for the two years preceding appointment; and two members must be persons who are not, and have never been, brokers or sales associates. At least one member of the commission must be 60 years of age or older. The current members may complete their present terms unless removed for cause.

In 2010, the Department determined that a licensed real estate broker or sales associate who holds an active real estate school permit, chief administrator permit, school instructor permit, or any combination of such permits issued by the DBPR may serve on the Florida Real Estate Commission (FREC). Members are appointed to four-year terms and may serve no more than two consecutive terms.

PART II: FLORIDA REAL ESTATE COMMISSION RULES

LEARNING OBJECTIVES

Upon completion of Part II, the student will be able to:

1. Explain the changes in a brokerage partnership when the general partner withdraws.
2. State the real estate licensing restrictions for officers and directors of a Florida real estate brokerage corporation.
3. Discuss the factors that determine if a location qualifies as a branch office which must be registered with the FREC.
4. Review the Commission's requirements for advertising by real estate firms.
5. Recall the five forms of disciplinary actions imposed by the FREC.

INTRODUCTION

The Florida Statute section 475.05 authorizes the Real Estate Commission to adopt rules pursuant to Chapter 120, Laws of Florida. Below is a review of the Commission rules most relevant to your daily practice of real estate. The complete list of FREC's rules can be found in Chapter 61J2 of the *Florida Administrative Code* (F.A.C.) online at:

https://www.flrules.org/gateway/division.asp?DivID=283

CHAPTER 61J2-4; PARTNERSHIPS

Real estate brokerage partnerships must be registered with the Florida Real Estate Commission. The partnership must contain at least one licensed or registered active real estate broker. In addition, each partner that deals with the public must hold a valid real estate broker license. Under general partnership law, when a general partner dies or withdraws, the partnership is *automatically dissolved* and a new partnership must be created. However, for FREC purposes, *if the business is continued by two or more*

persons, one of whom is an active real estate broker, the partnership will be able to continue. In this scenario, it is only necessary to cancel, issue, or reissue registration or licenses reflecting the change in the organization.

CHAPTER 61J2-5; CORPORATIONS

Corporations must have a legal existence with the State of Florida before being registered with the FREC. A registration will *not* be granted or renewed for any corporation:

- if it appears that the individual(s) having control of the corporation has been denied, revoked, or suspended and not reinstated, or
- if a person having control of the corporation has been convicted of a felony in any court and has not had civil rights restored for at least five years, or
- if an injunction has been entered against the individual for operating as a real estate licensee without a license

When applying this rule, a person is deemed to be in control of a corporation when the person or their spouse, children, or member of the household owns or controls, directly or indirectly, more than 40% of the voting stock.

All officers and directors of a corporation must be registered with the FREC. An officer or director can be either a real estate broker or member of the general public. However, a real estate sales associate or a broker associate may not be a director or officer of a real estate corporation. Even though a real estate sales associate or broker associate cannot hold the titles of either director or officer, they are allowed to own 100% of the stock of the corporation.

61J2-5.018 Vacancies of Office.

(1) A brokerage shall have at all times registered the name(s) of its officer(s) and director(s). In the event that a brokerage has but one active broker, and such broker dies, resigns, or is unexpectedly unable to remain in the position as the active broker, then, in such event, such vacancy shall be filled within 14 calendar days during which no new brokerage business may be performed by the brokerage or a licensee registered with the brokerage until a new active or temporary broker is appointed and registered with the brokerage.

CASE STUDY 5

Respondent violated Florida Statute Section 475.25(1)(b) by operating as a broker without the requisite license and by operating as a sales associate for a company not registered as his employer; Section 475.25(1)(k) by failing to place a deposit in an escrow account and failing to place a deposit with his registered broker; Section 475.42(1)(d) for collecting money in a name other than his employer; Section 475.25(1)(e) through a violation of Rule 61J2-10.038, Florida Administrative Code, for failing to notify the Department of a change in his mailing address within 10 days after the change; and Rule 61J2-14.009, Florida Administrative Code, for failing to deliver a deposit to his broker no later than the end of the next business day. Penalty: Revocation; administrative fine of $1,000; investigative costs of $577.50.

COMPREHENSION QUESTION 5

Who is prohibited from being an officer or director of a real estate corporation?

_____

_____

CHAPTER 61J2-10; BUSINESS OPERATIONS

Brokerage Offices

A real estate brokerage must have an office. This office may be located in a residential location as long as it is not in violation of local zoning ordinances and must still have a sign on or about the entrance of the office—not necessarily on the front door of the house. A broker may also have a branch office, which is required to be registered with the FREC.

While there is no clear cut definition of what constitutes a branch office, a mere temporary shelter, on a

subdivision being sold by the broker, for the protection of sales associates and customers and at which transactions are not closed and sales associates are not permanently assigned, is not deemed to be a branch office. The permanence, use, and character of activities customarily conducted at the office or shelter will determine whether it must be registered.

Gifts and Kickbacks

An issue that frequently arises is whether a real estate licensee can give a gift to a member of the general public. Permissibility is determined by the reason the gift is given. For example:

- A real estate licensee refers a buyer to a moving company and in return receives compensation. This kickback or rebate, is permissible *if* the buyer has been told all the details of this arrangement ahead of time.
- A real estate licensee can share part of their commission with a party of the transaction if full disclosure is made to all interested parties.
- A real estate licensee is usually *not* allowed to compensate a nonlicensee for the referral of real estate brokerage business. The only exception can be found on page 5 of this module (i.e. property manager and a finder's fee).

SCENARIO 4

Broker A recommends to a new buyer to use ABC moving company, and discloses to the buyer orally ahead of time that for every referral the broker gets $100. The new buyer files a complaint against the broker when ABC drops his antique piano. Result: no violation of the licensing law.

While it would have been wise to disclose the relationship in writing, the Rule does not say it must be in writing. So there is no violation.

Advertising

Advertising by real estate firms must be designed so that a reasonable person knows they are dealing with a real estate licensee. It must always include the registered name of the brokerage firm. If a licensee's name appears in the advertisement, the name must be the same as licensed with the Commission.

Informally, the FREC has allowed nicknames to appear in advertisements as long as they are not considered to be misleading. When advertising on a site on the Internet, the brokerage firm name must be placed adjacent to or immediately above or below the *point of contact information.* **Point of contact information** refers to any means by which to contact the brokerage firm or individual licensee including all mailing addresses, physical street addresses, email addresses, telephone numbers, and facsimile telephone numbers.

In regard to nicknames, the use of Tom instead of Thomas would be acceptable. Remember, the allowance is not official and cannot be misleading, so a prudent person would refrain from using nicknames such as Skippy or Fair Fiona.

COMPREHENSION QUESTION 6

Is it misleading per se for a sales team to have a team name that does not include their last name? For example the "Sunshine Realty A-team."

_____

_____

Trade Names

The FREC will *not* issue a license containing a trade name that is the same as the real or trade name of another licensee. Further, no individual partnership or corporation may be registered under more than one trade name.

COMPREHENSION QUESTION 7

When are nicknames allowed to be used in advertising?

_____

_____

CHAPTER 61J2-14; FUNDS ENTRUSTED TO BROKERS - DEPOSITS AND ESCROWS

Once the parties have entered into a sales contract, usually the buyer puts down a deposit toward the purchase of real property. If the deposit is to be held in escrow by an attorney or a title company, the sales contract must contain their name, address, and telephone number.

Be aware of the timeline:

- *Within 10 days of the due date* for every deposit specified in the sales contract, the buyer's broker must request in writing that the attorney or title company verify that the deposit was received (unless the seller or the seller's agent selected the attorney or title company to hold the deposit).
- *Ten days after the written request was made,* the buyer's broker must provide the seller's broker with a copy of the written verification or written notice that no verification was received.
- If the seller is not represented by a broker, then the buyer's broker must notify the seller directly in the same manner described above.

The FREC allows a broker to place a limited amount of the broker's personal money in the real estate brokerage escrow account. The amount is $1,000 in the sales escrow account, and $5,000 in the property management escrow account.

Note: *A broker is not required to maintain an escrow account and most brokerage do not; however, if a broker does maintain an escrow account, the brokerage must prepare a monthly reconciliation statement.* The statement must then be reviewed, signed, and dated by the broker. This is the primary reason many brokerage firms do not keep escrow accounts.

The role of escrow agent may be one of the most important roles that a real estate broker undertakes. Not only is the broker entrusted with the monies of another, but the broker is required to timely deposit the funds in an appropriate institution, maintain the funds until properly instructed as to how and to whom to disburse, and perform the regular reconciliation of the escrow account to ensure the proper accounting of the funds being maintained.

Table 1.2: Monthly Escrow Reconciliation Statement Required Information

- Date the reconciliation was undertaken
- Date used to reconcile the balances
- Name of the bank(s)
- Name(s) of the account(s)
- Account number(s)
- Account balance(s) and date(s)
- Deposits in transit
- Outstanding check identified by date and check number
- Itemized list of the broker's trust liability

Include any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds.

If a broker holding funds in their escrow account receives ***conflicting demands*** from the parties or if the broker has ***good faith doubts*** as to who is entitled to the escrow funds, the broker must follow Chapter 61J2-10.032, F.A.C., which states:

- Within 15 business days of receiving the last party's demand or of having good faith doubts, the broker must report ***in writing*** the dispute or doubts to the FREC.
- Within 30 business days of the last demand or of having good faith doubts, the broker must institute a settlement procedure and notify FREC of that action.

Many brokerages feel that the best recourse in this situation is to request an escrow disbursement order from FREC. It can be a safe, quick, and inexpensive way to have the matter decided.

CHAPTER 61J2-24; DISCIPLINARY MATTERS

This chapter contains the disciplinary guidelines that the FREC follows when licensees are guilty of violating Chapter 455 or Chapter 475. These guidelines give the FREC wide discretion in imposing penalties and provide for a range of penalties, including differentiation between first time violations and second

and subsequent violations. The order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial.

The FREC may choose to impose any of the following disciplinary sanctions:

- **Notice of Noncompliance:** A violation is considered a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. The notice of noncompliance shall only be issued for an initial offense of a listed minor violation.
- **Citations:** A citation will be issued for violations that are not a substantial threat to the health, safety, and general welfare of the public.
- **Mediation:** the process whereby a mediator appointed by the DBPR acts to encourage and facilitate resolution of a legally sufficient complaint. It is an informal process with the objective of assisting the complainant and subject of the complaint to reach a mutually acceptable resolution.
- **Revocation:** revocation of a license is permanent except for a few specific violations.
- **Probation:** Unless otherwise stated in the final order a term of probation shall be ninety days, beginning thirty days after the filing of the final order.

Of all the violations that go before the FREC, improper handling of escrow funds is considered the most serious. When the public has entrusted their money to a broker and the broker mishandles the funds or fails to properly reconcile the account, the FREC does not hesitate to take the appropriate and sometimes harsh action to not only discipline the broker, but to send the message to the licensee community that escrow violations will not be treated lightly.

CHAPTER 61J2-26; NONRESIDENT LICENSURE

An individual does not have to be either a Florida resident or a United States citizen to qualify for a Florida real estate license. Applicants are expected to be knowledgeable in Florida law, statutes, and administrative rules. They must meet education, experience, and examination requirements comparable to the requirements for Florida resident applicants as prescribed in sections 475.17(2), (6), and 475.175, F.S.

Prior to May 4, 2012, Florida nonresident licensees were required to sign an Irrevocable Consent Form that would allow legal actions against the licensee to commence in any county in the State of Florida where the plaintiff resided. When the governor approved House Bill 693 during the 2012 legislative session, the Irrevocable Consent Form requirement was eliminated.

PART III: STATE AND FEDERAL LAWS AFFECTING REAL ESTATE

LEARNING OBJECTIVES

Upon completion of Part III, the student will be able to:

1. Describe the purpose for the energy-efficiency rating, radon gas, Residential Swimming Pool Safety Act, and property tax disclosures.
2. Explain when the lead-based paint, homeowners' associations, condominiums, and property condition disclosures are required.
3. Give examples of material facts that must be disclosed to the seller.
4. Recognize special laws that apply to contracts for military personnel.
5. Explain the proper handling and disposition of deposit money or advance rent as required in the Florida Landlord Tenant Act.

INTRODUCTION

In this section we review state and federal laws such as Community Development Districts, the Residential Swimming Pool Safety Act, contracts with military personnel, and landlord/tenant regulations. Various disclosure requirements are addressed including radon gas, lead-based paint, property tax, homeowners' associations, condominiums, property conditions, and energy-efficiency.

COMMUNITY DEVELOPMENT DISTRICT (CDD)

A Community Development District, commonly known as a CDD, is a local special-purpose government authorized under the Uniform Community Development Act of 1980 by Chapter 190 of the *Florida Statutes* and is an alternative method for managing and financing infrastructure required to support community development.

CDDs are legal entities and possess several powers such as: the right to enter into contracts; the right to own both real and personal property; adoption of by-laws, rules, regulations, and orders; the right to sue and be sued; to obtain funds by borrowing; to issue bonds; and to levy assessments.

Legal overview of a CDD

- A CDD provides a mechanism to finance, construct, and maintain community or subdivision infrastructure improvements. Infrastructure includes water and sewer collection systems, roads, sidewalks, drainage and storm water systems, parks, boardwalks, community areas, landscaping, and wetlands mitigation.
- A CDD is organized as a special-purpose unit of local government and operates as an independent taxing district.
- Because a CDD is an independent special district, the governing body establishes their own budget and operates independently of the local governmental entity within the scope of specific and very limited powers.
- A CDD does not have police powers and cannot regulate land use or issue development orders; those powers reside with the local general-purpose government (city or county).
- The primary function of a CDD is to issue tax-exempt bonds to construct infrastructure such as roads, water and sewer lines, recreational facilities, etc.
- CDDs are designed to pay for themselves. Theoretically, the cost of growth is allocated proportionately by levying special assessments on the lands which receive the benefit of the improvements.
- Under ideal circumstances, the CDD provides a more efficient method of paying the operation and maintenance expense of infrastructure and related

services. However, there are inherent risks, especially during the recent economic downturn. If a CDD goes into foreclosure or only sells a small percentage of lots, owners could find themselves paying disproportionately high fees.

- CDDs may replace HOAs, but have board powers. As is true for all communities, the professionalism of the board members directly contributes to or detracts from the operation and harmony of the neighborhood.

Required Disclosure Language

Subsequent to the establishment of a district under Chapter 190, F.S., each contract for the initial sale of a parcel of real property and each contract for the initial sale of a residential unit within the district must include, immediately prior to the space reserved in the contract for the signature of the purchaser, the following disclosure statement in boldfaced and conspicuous type which is larger than the type in the remaining text of the contract:

COMMUNITY DEVELOPMENT DISTRICT DISCLOSURE- F.S. section 190.048

THE (Name of District) COMMUNITY DEVELOPMENT DISTRICT MAY IMPOSE AND LEVY TAXES OR ASSESSMENTS, OR BOTH TAXES AND ASSESSMENTS, ON THIS PROPERTY. THESE TAXES AND ASSESSMENTS PAY THE CONSTRUCTION, OPERATION, AND MAINTENANCE COSTS OF CERTAIN PUBLIC FACILITIES AND SERVICES OF THE DISTRICT AND ARE SET ANNUALLY BY THE GOVERNING BOARD OF THE DISTRICT. THESE TAXES AND ASSESSMENTS ARE IN ADDITION TO COUNTY AND OTHER LOCAL GOVERNMENTAL TAXES AND ASSESSMENTS AND ALL OTHER TAXES AND ASSESSMENTS PROVIDED FOR BY LAW.

ENERGY-EFFICIENCY RATING

A prospective buyer of a building must be provided with a copy of an information brochure notifying the buyer of the option for an energy-efficiency rating on the building. The brochure must be given at the time of or prior to the buyer's execution of the contract for sale and purchase pursuant to section 553.996, F.S. The Department of Community Affairs provides free copies of this brochure.

RADON GAS

A radon disclosure must be provided at the time of, or prior to, the execution of the sale or purchase of any building as well as prior to the execution of a rental agreement for any building. This disclosure is not required for residential transient occupancy provided the occupancy is for 45 days or less in duration as further discussed in Section 509.013 [12].

RADON GAS

Radon is a naturally occurring radioactive gas that when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department (Chapter 404.056(5), F.S.).

LEAD-BASED PAINT DISCLOSURE

Many houses and apartments built before 1978 have paint that contains lead (called lead-based paint). Lead from paint, chips, and dust can pose serious health hazards if not taken care of properly.

Federal law—Lead-Based Paint Hazard Reduction Act of 1992,42 U.S.C Section 4852d—requires that individuals receive certain information before renting or buying pre-1978 housing:

- Landlords must disclose known information on lead-based paint and lead-based paint hazards before leases take effect. Leases must include a disclosure form about lead-based paint.
- Sellers must disclose known information on lead-based paint and lead-based paint hazards before selling a house. Sales contracts must include a disclosure form about lead-based paint. Buyers have up to 10 days to check for lead hazards.

Housing excluded from the disclosure requirement:

- housing built after 1977 (Congress chose not to

cover post-1977 housing because the Consumer Product Safety Commission (CPSC) banned the use of lead-based paint for residential use in 1978)

- zero-bedroom units, such as efficiencies, lofts, and dormitories
- leases for less than 100 days, such as vacation houses or short-term rentals
- housing for the elderly (unless children live there)
- housing for the handicapped (unless children live there)
- rental housing that has been inspected by a certified inspector and found to be free of lead-based paint
- foreclosure sales

PROPERTY TAX DISCLOSURE

A prospective purchaser of residential property must be given the following disclosure summary at or before the execution of the contract regardless of the age of the dwelling. Pursuant to section 689.261, F.S., it must either be included in the contract or must be provided by the seller.

PROPERTY TAX DISCLOSURE SUMMARY

BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

HOMEOWNERS' ASSOCIATION DISCLOSURE

A purchaser who is buying in a community that mandates membership in a homeowners' association (HOA) must be given a disclosure of said requirement prior to the execution of the contract for sale and purchase. This disclosure must be provided by either the developer or the seller. If the required disclosure is not given to the buyer prior to the execution of the contract, the buyer has the option to void the contract in writing within three days after receipt of the disclosure summary or prior to closing, whichever occurs first. The buyer's right may not be waived by the buyer but terminates at closing. The exact language of the disclosure can be found in Section 720.401, F.S.

COMPREHENSION QUESTION 8

Is an HOA disclosure required prior to contract execution for *all* residential property sales within a HOA community?

_____

_____

CONDOMINIUM DISCLOSURE

Chapter 718, F.S., requires a developer and a nondeveloper unit owner disclosure prior to the sale of a condominium. While the language of these disclosures vary between a developer and nondeveloper, both require that the disclosure be given prior to the execution of the sales contract. The language of both forms is contained in section 718.503, F.S. If a real estate licensee provides to, or otherwise obtains for, a prospective purchaser the documents described in this subsection, the licensee is not liable for any error or inaccuracy contained in the documents.

DISCLOSURE OF MATERIAL FACTS

Florida law requires real estate licensees to disclose material facts affecting the value of residential property which are not readily observable to the buyer. The information is considered material to the extent that if the information had been disclosed, the sales contract would not have been signed or the terms may have been negotiated differently.

Physical material facts that affect the value of residential property can generally be measured monetarily. The court can determine the amount of damages due to a leaky roof or termite infestation, compare it with the purchase price and cost to repair the damages, and then decide whether the value was materially affected.

FYI If a bucket has been placed in the attic to collect rainwater from a leaking roof, it must be disclosed that the roof is leaking. However, if the bucket is placed in the middle of the living room and the buyer can see the rain water going into the bucket from the ceiling, neither the seller nor licensee needs to disclose what is in clear view.

Property Condition—Johnson v. Davis

The landmark case in the area of disclosures is the case of *Johnson v. Davis,* 480 So.2d 625 (Florida 1985). Prior to this case, the rule was caveat emptor, buyer beware, which is still the rule in commercial real estate contracts. In *Johnson v. Davis,* the Supreme Court of Florida held that:

> ...where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.

The Court next held in *Rayner v. Wise* that the doctrine in *Johnson* also applied to real estate professionals. This meant that the seller or licensed real estate professional must disclose material facts that affect the value of the property which are not readily observable and are not known to the buyer. This duty to disclose can also be found in Chapter 475, F.S. The case law does not mandate the manner in which disclosure must take place, whether written, oral, or any specific form.

A Seller's Disclosure is a common form used by many real estate professionals to comply with the property condition disclosure requirement. Whether written or oral, disclosure:

- is required in all residential real property transactions
- is not required in commercial transactions
- must disclose material facts not readily observable to the buyer that affect value

While disclosing a leaking roof is not a hard determination to make, other situations can be more difficult to determine if they are considered an unknown material defect. What if a halfway house is going in across the street? What if the halfway house is going in five houses down? What if it is public record that the property is zoned for this type of occupancy? At this time, these questions have not been addressed by legal decisions.

Some might argue that you cannot go wrong with disclosing, but what if the seller tells you not to and you owe the seller a fiduciary duty as a single agent? In other words, it is not always clear what the legal obligation is in these situations. Standards of Practice 1-9 of the 2016 REALTOR® Code of Ethics states, "Information concerning latent material defects is not considered confidential information." Please note that the Code of Ethics does not apply to all licensees, only members of NAR. Remember, if the seller asks you not to tell or in any situation, you always have the option to seek legal counsel.

COMPREHENSION QUESTION 9

If a seller represented by a transaction broker reveals that their home experienced flood damage several years ago but they covered it up with new carpeting, is the broker required to disclose this information to potential buyers?

_____

_____

Sinkholes

When there is a non-observable sinkhole on the property, it is clear that it should be disclosed. Less clear is whether there is a duty to disclose a *repaired* sinkhole on the property. Correlate this with the situation of a repaired roof leak. It would be uncommon to disclose that in the past the roof leaked, when there is no leak now.

Although the law is unclear about a repaired sinkhole, Florida law does provide direction when an insurance claim is processed for a sinkhole repair. Section 627.7073, F.S., requires the professionally prepared sinkhole report and certification to be filed with the County Clerk of the Court:

- when an insurer has paid a claim
- as a precondition to accepting payment for a loss
- upon completed foundation repairs or building stabilization

Disclosure of a sinkhole claim. Section 627.7073(2)(c), F.S. (2005), states: The seller of real property upon which a sinkhole claim has been made by the seller and paid by the insurer must disclose to the buyer of such property, before the closing, that a claim has been paid and whether or not the full amount of the proceeds was used to repair the sinkhole damage.

Stigmatized Property

Fortunately, some areas of the law have made it clear what one should disclose and what one should not. Section 689.25, F.S., states that if the property was a site of a homicide, suicide, or death it is not a material fact which must be disclosed. Other situations are not as clear. Further, according to Florida law, HIV and AIDS status are not material facts that must be disclosed in a real estate transaction. No cause of action arises against a real estate licensee or owner for failure to disclose that the occupant of the property is infected with HIV/AIDS.

What if a seller believes their house is haunted? Is the listing agent or seller required to disclose this belief to prospective buyers? The law is silent on haunting. Your best course of action is to consult your broker and/or legal counsel.

COMPREHENSION QUESTION 10

Broker A knows that a house has a reputation for being haunted and fails to disclose to the buyer that fact. The buyer closes on the house and then files a complaint to the DRE for failing to disclose a material fact that affects the value of the property. What is the result of the broker failing to disclose this fact?

_____

_____

RECAP

Table 1.3: Disclosure Guide

Property disclosures should be provided prior to contract execution under the following conditions:*

Type	Application
CDD:	Prior to initial sale of real property or a residential unit in a CDD
Energy-Efficiency Rating:	The buyer of a building must be given an information brochure
Radon Gas:	Any building, except for residential transient rentals less than 45 days
Lead-based Paint:	Most residential housing built before 1978, see exceptions list
Property Tax:	All residential properties
HOA:	When membership is mandatory
Condominium Association:	All condominium units in residential transactions
Sinkholes:	When a claim has been made and paid by an insurer
Property Condition:	All residential property when material facts not readily observable affect the value

*refer to the *Florida Statutes* for more specifics on each disclosure.

RESIDENTIAL SWIMMING POOL SAFETY ACT

The Residential Swimming Pool Safety Act, Chapter 515, F.S., went into effect in the year 2000. It requires certain safety features to be installed on newly constructed homes with swimming pools to prevent drowning of a young child or medically frail elderly person.

To pass the final inspection and receive a certificate of completion, a residential swimming pool must meet *one* of the following safety features pursuant to Section 515.27, F.S.:

- The pool must be isolated from access to a home by an enclosure that meets the pool barrier requirement.
- There must be an approved safety pool cover.
- All doors and windows with direct access from the home to the pool must be equipped with an approved exit alarm system with minimum sound pressure ratings.
- All doors providing direct access from the home to the pool must be equipped with a self-closing, self-latching device with the release mechanism at least 54 inches above the floor.

The failure to equip a new residential home and pool with at least one of the above safety features is a second-degree misdemeanor. No penalty will be imposed if the person, within 45 days after arrest or issuance of a summons or a notice to appear, has equipped the pool with at least one safety feature as listed above and has attended a drowning prevention education program. However, the requirement of attending a drowning prevention education program is waived if such program is not offered within 45 days after issuance of the citation.

§515.33, F.S., Information required to be furnished to buyers—A licensed pool contractor, on entering into an agreement with a buyer to build a residential swimming pool, or a licensed home builder or developer, on entering into an agreement with a buyer to build a house that includes a residential swimming pool, must give the buyer a document containing the requirements of this chapter and a copy of the publication produced by the department under section 515.31 that provides information on drowning prevention and the responsibilities of pool ownership.

CONTRACTS WITH MILITARY PERSONNEL

An active member of the United States Armed Forces, the United States Reserve Forces, or the Florida National Guard, collectively known as **servicemember,** may terminate a contract to purchase real property, prior to closing, by providing to the seller or mortgagor on the property a written notice of termination under the following circumstances:

- servicemember is required, by permanent change of station orders, to move 35 miles or more from the location of the property
- servicemember is released from active duty and the property is more than 35 miles for the member's home of record
- servicemember receives orders to move into government quarters, or the member becomes eligible to live in government quarters, or
- servicemember receives temporary duty orders to move more than 35 miles from the location of the property and the temporary duty orders exceed 90 days

The notice to the seller or mortgagor canceling the contract must be accompanied by either a copy of the official military orders or a written verification signed by the servicemember's commanding officer. Upon termination of the contract, the member is entitled to a full refund of the deposit within seven days.

The law may not be waived or modified by agreement of the parties under any circumstances. §689.27, F.S., (2003).

COMPREHENSION QUESTION 11

When military personnel are required to move more than 35 miles from the location of the property during active duty, what proof is required to terminate a real estate purchase contract?

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_____

LANDLORD-TENANT REGULATIONS

The most current laws can be seen by going to the 2016 Florida Statutes at: www.flsenate. gov/Laws/Statutes. The Landlord-Tenant Act Chapter 83, F.S., is divided into three sections:

- Part I: Nonresidential Tenancies
- Part II: Residential Tenancies
- Part III: Self-service storage space

Residential Tenancies

For the purposes of this section, the discussion concerning landlord-tenant regulations will focus solely on the regulations in residential tenancies. Part II of the Landlord-Tenant Act applies to the rental of dwelling units. It does *not* apply to the following:

- residency or detention in a facility, whether public or private, when residence or detention is incidental to the provision of medical, geriatric, educational, counseling, religious, or similar services
- transient occupancy in a hotel, condominium, motel, rooming house, or similar public lodging, or transient occupancy in a mobile home park
- occupancy by a holder of a proprietary lease in a cooperative apartment
- occupancy by an owner of a condominium unit
- occupancy under a contract of sale of a dwelling unit or the property of which it is a part in which the buyer has paid at least 12 months' rent or in which the buyer has paid at least one month's rent and a deposit of at least 5% of the purchase price of the property.

Disposition of Deposit Money or Advanced Rent

§83.49, F.S. This is one of the more important sections of the Landlord-Tenant Act. When a landlord or his/her agent receives deposit money or advance rent, they must hold the money in one of three manners:

- Hold the total amount of such money in a separate noninterest-bearing account in a Florida banking institution for the benefit of the tenant or tenants. The landlord cannot commingle such moneys with any other funds of the landlord.
- Hold the total amount of such money in a separate interest-bearing account in a Florida banking institution for the benefit of the tenant or tenants, in which case the tenant will receive and collect interest in an amount of at least 75% of the annualized average interest rate payable on such account or interest at the rate of 5% per year, simple interest, whichever the landlord elects. The landlord cannot commingle such moneys with any other funds of the landlord.
- Post a surety bond with the clerk of the circuit court in the county in which the dwelling unit is located in the amount of the security holdings or $50,000, whichever is less.

The landlord shall, in the lease agreement or within 30 days after receipt of advance rent or a security deposit, give written notice to the tenant which includes disclosure of the advance rent or security deposit. Subsequent to providing such written notice, if the landlord changes the manner or location in which he or she is holding the advance rent or security deposit, he or she must notify the tenant within 30 days after the change as provided in paragraphs (a)-(d) (see following bullet points). The landlord is not required to give new or additional notice solely because the depository has merged with another financial institution, changed its name, or transferred ownership to a different financial institution. This subsection does not apply to any landlord who rents fewer than five individual dwelling units. Failure to give this notice is not a defense to the payment of rent when due. The written notice must:

- Be given in person or by mail to the tenant
- State the name and address of the depository where the advance rent or security deposit is being held or state that the landlord has posted a surety bond as provided by law
- State whether the tenant is entitled to interest on the deposit
- Contain the following disclosure:

ADVANCE RENT AND SECURITY DEPOSIT DISCLOSURE

YOUR LEASE REQUIRES PAYMENT OF CERTAIN DEPOSITS. THE LANDLORD MAY TRANSFER ADVANCE RENTS TO THE LANDLORD'S ACCOUNT AS THEY ARE DUE AND WITHOUT NOTICE. WHEN YOU MOVE OUT, YOU MUST GIVE THE LANDLORD YOUR NEW ADDRESS SO THAT THE LANDLORD CAN SEND YOU NOTICES REGARDING YOUR

DEPOSIT. THE LANDLORD MUST MAIL YOU NOTICE, WITHIN 30 DAYS AFTER YOU MOVE OUT, OF THE LANDLORD'S INTENT TO IMPOSE A CLAIM AGAINST THE DEPOSIT. IF YOU DO NOT REPLY TO THE LANDLORD STATING YOUR OBJECTION TO THE CLAIM WITHIN 15 DAYS AFTER RECEIPT OF THE LANDLORD'S NOTICE, THE LANDLORD WILL COLLECT THE CLAIM AND MUST MAIL YOU THE REMAINING DEPOSIT, IF ANY.

IF THE LANDLORD FAILS TO TIMELY MAIL YOU NOTICE, THE LANDLORD MUST RETURN THE DEPOSIT BUT MAY LATER FILE A LAWSUIT AGAINST YOU FOR DAMAGES. IF YOU FAIL TO TIMELY OBJECT TO A CLAIM, THE LANDLORD MAY COLLECT FROM THE DEPOSIT, BUT YOU MAY LATER FILE A LAWSUIT CLAIMING A REFUND.

YOU SHOULD ATTEMPT TO INFORMALLY RESOLVE ANY DISPUTE BEFORE FILING A LAWSUIT. GENERALLY, THE PARTY IN WHOSE FAVOR A JUDGMENT IS RENDERED WILL BE AWARDED COSTS AND ATTORNEY FEES PAYABLE BY THE LOSING PARTY.

THIS DISCLOSURE IS BASIC. PLEASE REFER TO PART II OF CHAPTER 83, FLORIDA STATUTES, TO DETERMINE YOUR LEGAL RIGHTS AND OBLIGATIONS.

Upon the vacating of the premises for termination of the lease, if the landlord does not intend to impose a claim on the security deposit, the landlord will have 15 days to return the security deposit together with interest if otherwise required, or the landlord will have 30 days to give the tenant written notice by certified mail to the tenant's last known mailing address of his or her intention to impose a claim on the deposit and the reason for imposing the claim. The notice must contain a statement in substantially the following form:

NOTICE OF CLAIM

This is a notice of my intention to impose a claim for damages in the amount of $_____ upon your security deposit, due to _____. It is sent to you as required by Chapter 83.49(3), F.S. You are hereby notified that you must object in writing to this deduction from your security deposit within 15 days from the time you receive this notice or I will be authorized to deduct my claim from your security deposit. Your objection must be sent to (landlord's address).

Unless the lease states otherwise, section 83.49(5), F.S., does allow the landlord some breathing room when a tenant vacates the premises prior to the expiration of the lease term and fails to give the landlord at least seven days' advance written notice to vacate. Failure of the tenant to give such notice shall relieve the landlord of the notice requirement of section 83.49(3)(a), but shall not waive any claim the tenant may have to any part of the security deposit.

As referred to in section 475.25(1)(d), F.S., when facing conflicting demands on money in escrow, a real estate broker is required to notify the Florida Real Estate Commission. However, section 83.49 prevails over conflicting provisions in Chapter 475 and permits licensed real estate brokers to disburse security deposits and deposit money without having to comply with the notice and settlement procedures contained in section 475.25(1)(d).

In most landlord/tenant disputes the burden is on the landlord to keep careful documentation. A meticulous paper trail will help keep potential conflicts to a minimum.

COMPREHENSION QUESTION 12

Broker A has conflicting demands on a security deposit in her escrow account. The tenant says he did not damage the property by putting holes in the wall for pictures and the landlord says the holes were not there before the tenant moved in so the tenant must have made them. Broker A disburses the money as set forth by 83.49 to the landlord. The tenant files a complaint to the DRE for the broker failing to follow the procedure set out in 475.25(1) d, Florida Statutes. Why is the case dismissed?

_____

_____

Landlord's Obligation to Maintain Premises

§83.51. The law provides that the landlord must provide screens installed at the commencement of the tenancy (without qualification as to whether such item is covered in a lease agreement) and repair the screens once annually during the tenancy.

Restoration of Possession to Landlord

§83.62. In an action for possession, after entry of judgment in favor of the landlord, the clerk must issue a writ to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises. The new law clarifies that Saturdays, Sundays, and legal holidays do not stay the 24-hour notice period.

Retaliatory Conduct

§83.64. It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith.

Furthermore, the law provides for two additional instances of retaliatory conduct:

- where the tenant has paid rent to a condominium, cooperative, or homeowners' association after demand from the association in order to pay the landlord's obligation to the association, and
- where the tenant has exercised his or her rights under local, state, or federal fair housing laws

Termination of Rental Agreement by a Servicemember

Any servicemember may terminate his or her rental agreement by providing the landlord with a written notice of termination to be effective on the date stated in the notice that is at least 30 days after the landlord's receipt of the notice if any of the following criteria are met:

- the servicemember is required, pursuant to a permanent change of station orders, to move 35 miles or more from the location of the rental premises
- the servicemember is prematurely or involuntarily discharged or released from active duty or state active duty
- the servicemember is released from active duty or state active duty after having leased the rental premises while on active duty or state active duty status and the rental premises is 35 miles or more from the servicemember's home of record prior to entering active duty or state active duty
- after entering into a rental agreement, the servicemember receives military orders requiring him or her to move into government quarters or the servicemember becomes eligible to live in and opts to move into government quarters
- the servicemember receives temporary duty orders, temporary change of station orders, or active duty orders to an area 35 miles or more from the location of the rental premises, provided such orders are for a period exceeding 60 days
- the servicemember has leased the property, but prior to taking possession of the rental premises, receives a change of orders to an area that is 35 miles or more from the location of the rental premises

The above is pursuant to Chapter 83.682, F.S.

COMPREHENSION QUESTION 13

A sergeant in the Air Force is renting a house near Patrick Air Force Base. The sergeant has three years left on his military service obligation. Due to the peaceful nature of the world, the government decides his service is no longer needed. Can the sergeant get out of his lease? What if the lease specifically states that members of the military cannot get out of their leases even if they get early discharge?

_____

_____

Prohibited Provisions in Rental Agreements

A provision in a rental agreement is void and unenforceable to the extent that it purports to waive or preclude the rights, remedies, or requirements set forth in Chapter 83.47, F.S.

COMPREHENSION QUESTION 14

The tenant moved out of Landlord Kevin's unit on October 15. Shower tiles were damaged and need to be replaced. By what date must Kevin mail his Notice of Claim on the security deposit to the tenant?

_____

_____

COMPREHENSION QUESTION 15

Does the notice requirement change if the tenant vacated the premises prior to the expiration of the lease term and did not give at least seven days written notice of vacating?

_____

_____

MODULE 1 REVIEW – CORE LAW

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. In a mandatory homeowners' association the required disclosure must be provided by the:

a. developer or seller.
b. broker or sales associate.
c. mortgage company.
d. closing agent.

2. A fiduciary duty is owed by:

a. a transaction broker.
b. a single agent.
c. all real estate licensees.
d. all parties in a real estate transaction.

3. A broker who owns a brokerage firm and a referral company may be issued upon request:

a. dual licenses.
b. blanket permits.
c. multiple operations permits.
d. multiple licenses.

4. A real estate license is required when acting as a/an:

a. attorney-in-fact for the purpose of the execution of contracts.
b. individual selling their own real property.
c. salaried employee for an owner of an apartment community who works on site.
d. leasing agent who is paid on a transactional basis.

5. Under the license law, it is presumed that all licensees are operating as:

a. single agents.
b. transaction brokers.
c. broker associates.
d. seller's agents.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

MODULE 1
COMPREHENSION ANSWER KEY

1. Secretary Olivia mailed the license renewals to the DBPR for all three general partners of Bamboo Realty one week before the deadline. Unfortunately, the envelope was damaged and they were delayed in the mail. The status of all three broker licenses became involuntarily inactive for five days until they were successfully renewed online. What was the status of the partnership's registration during those five days? **The partnership was canceled automatically during that period of time. The license or registration of at least one active broker member must be in force.**

2. If your license expires on March 31 and you do not complete the renewal requirements on time, what is the status of your license on April 1? **If you miss the renewal deadline, your license status becomes involuntarily inactive the first day of the next license period.**

3. A licensee was found guilty of misrepresentation and breach of trust. His fine was $10,000. Why was the fine more than $5,000? **The commission can impose a fine up to $5,000 per offense. Two separate offenses would amount to a $10,000 fine.**

4. Which violation of real estate license law is a third degree felony? **A person who operates as a broker or sales associate without a valid or current license is committing a third degree felony.**

5. Who is prohibited from being an officer or director of a real estate corporation? **A sales associate or broker associate may not be an officer or director of a real estate corporation.**

6. Is it misleading per se for a sales team to have a team name that does not include their last name? For example the "Sunshine Realty A-team." **While it cannot be said that it is a per se violation, in all likelihood if this issue came before FREC it would be ruled a misleading advertisement. However each case would have to be determined on an individual basis.**

7. When are nicknames allowed to be used in advertising? **The FREC permits nicknames to be used in advertising as long as they are not misleading; however, the licensee's last name must appear as it is licensed with the commission.**

8. Is an HOA disclosure required prior to contract execution for *all* residential property sales within a HOA community? **If the homeowners' association mandates membership, then the HOA disclosure is required prior to contract execution for all residential sales.**

9. If a seller represented by a transaction broker reveals that their home experienced flood damage several years ago but they covered it up with new carpeting, is the broker required to disclose this information to potential buyers? **Yes, the Brokerage Relationship Disclosure requires all licensees to disclose all known unobservable facts that materially affect a property's value.**

MODULE 1 COMPREHENSION ANSWER KEY

10. Broker A knows that a house has a reputation for being haunted and fails to disclose to the buyer that fact. The buyer closes on the house and then files a complaint to the DRE for failing to disclose a material fact that affects the value of the property. What is the result of the broker failing to disclose this fact? **The "fact" that a house is haunted is not a material fact that would have to be disclosed. Therefore that matter would not be prosecuted by the DRE.**

11. When military personnel are required to move more than 35 miles from the location of the property during active duty, what proof is required to terminate a real estate purchase contract? **In order to terminate a real estate purchase contract or rental agreement, the servicemember must provide either a copy of the official military orders or a written verification signed by the servicemember's commanding officer.**

12. Broker A has conflicting demands on a security deposit held by her in the escrow account. The tenant says he did not damage the property by putting holes in wall for pictures and the landlord says the holes never existed and the tenant did it. Broker A disburses the money as set forth by 83.49 to the landlord. The tenant files a complaint to the DRE for the broker failing to follow the procedure set out in 475.25(1) d, Florida Statutes. Why is the case dismissed? **Case is dismissed because Chapter 83 controls this matter and as long as Section 83.49 was followed, the requirements of F.S. 475.25 need not be followed.**

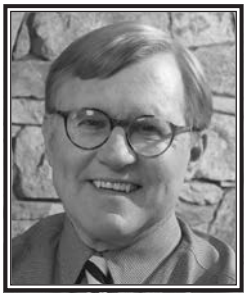
13. A sergeant in the Air Force is renting a house near Patrick Air Force Base. The sergeant has three years left on his military service obligation. Due to the peaceful nature of the world, the government decides his service is no longer needed. Can the sergeant get out of his lease? What if the lease specifically states that members of the military cannot get out of their leases even if they get early discharge? **The sergeant would be able to get out of the lease. Having a clause in the lease with a statement that servicemembers cannot get out of their lease is not enforceable because it attempts to waive or circumvent the law.**

14. The tenant moved out of Landlord Kevin's unit on October 15. Shower tiles were damaged and need to be replaced. By what date must Kevin mail his Notice of Claim on the security deposit to the tenant? **To comply with the notice requirement Landlord Kevin must mail his notice by November 14, which is within 30 days of the tenant's departure.**

15. Does the notice requirement change if the tenant vacated the premises prior to the expiration of the lease term and did not give at least seven days written notice of vacating? **If the tenant vacated the premises prior to the expiration of the lease term and did not give at least seven days written notice of vacating, the landlord does not have to follow the 30-day notice requirement. However, the tenant is still owed whatever is due from the balance of the security deposit.**

~ NOTES ~

Complying with TRID: The Federal Loan Estimate and Closing Disclosure Rules



By Ken Harney

Ken is a nationally-syndicated real estate columnist for the Washington Post Writers Group. His column, the "Nation's Housing," appears in cities across the country and has received numerous professional awards. He also writes for Inman News, an online real estate information service. Ken has served as both a member of the Federal Reserve Board's Consumer Advisory Council and the U.S. Department of Housing and Urban Development's Working Group on Computerized Loan Originations.

Note to Students: *There are possibly some changes afoot! Read this August 2016 blog post from module author Kenneth Harney. Check our website BertRodgers.com for updates.*

CFPB hints at CD Fix

By Ken Harney

August 2016

Here's some sort-of-good news: Remember a few months back when the Consumer Financial Protection Bureau announced that it would welcome comments about how to improve its TRID (TILA-RESPA Integrated Disclosure) rule? Well, the agency got a bunch from real estate licensees and NAR. Top on the list: The need to give agents direct access to the Closing Disclosure form (CD) before the closing.

Late last fall, after TRID took effect, realty agents across the country began discovering that TRID had created a situation where lenders would not send them a copy of the CD, the replacement document for the old HUD-1. Lenders and title agents said federal privacy regulations prohibited them from supplying the CD to agents of the buyer. This denial of access made it more difficult for licensees to provide the traditional sort of advice to their clients about the closing details, including possible errors on the

form. Although title agencies and some realty boards created workarounds – substitute closing statements that did not contain information that might trigger privacy concerns – the whole process seemed unnecessarily clunky.

NAR urged the CFPB to fix this disclosure problem and guess what? The CFPB agreed. In a new proposed rule amending TRID, the agency now says it plans to issue revised guidelines on the matter. Most important: The bureau said it *"understands that it is usual, accepted and appropriate for creditors and settlement agents to provide a closing disclosure to consumers, sellers and their real estate brokers or other agents."*

In the proposal, the CFPB said it hopes to issue clarifying language allowing lenders – at their discretion – to provide separate CD forms to the buyer and the sellers.

What might that mean in practical terms? The general direction sounds positive but what's with the reference to "at their discretion"? Will licensees soon be able to tell a lender, "hey, the CFPB has said it's okay for you to give me a copy of the buyer's CD, so let me have it?" And will the lender then have the "discretion" to then tell them to bug off? Or will sharing of the buyer's CD, like the sharing of the HUD-1, become standard practice?

> *"The simple answer here is: We're going to have to wait and see exactly what the CFPB adopts in its rule, which won't be for a while. The agency is accepting comments on its voluminous proposed technical changes to TRID until October, and then will take months to come out with final rules."*

Until then, I'm guessing that some lenders and title agencies will be willing to provide licensees with CDs, based on the CFPB's quote above about "usual, accepted and appropriate." But others may take a strict legal view and say – sorry guys. Our lawyers are advising us that until the CFPB publishes a final rule that eliminates our liability for privacy violations, we are sticking with our policy and not giving realty agents copies of buyers' CDs.

Which is why I call it sort-of-good news. Hassles over CDs and closing are almost certain to be cleared up once the CFPB puts out its final guidance. In the meantime, if lenders are not cooperative, read them what the CFPB said and see how it goes. It's certainly worth a try.

RESOURCES: All resources for this module are on page 119.

LEARNING OBJECTIVES

Upon completion of Module 2, the student will be able to:

1. Understand the core requirements of the TILA-RESPA Integrated Disclosures Rule that covers most mortgage and home purchase transactions.
2. Represent the interests of homebuyers through the mortgage shopping, evaluation, and application processes.
3. Through knowledge of TRID, function as a pivotal communications point in the TRID process, linking lender, title, and settlement agents with their clients' and customers' needs, as well as helping clients/customers supply the information these service providers require in a timely manner.
4. Guide clients/customers through the settlement documents, fees, and timing requirements.
5. Intervene on clients' and customers' behalf to prevent needless delays immediately before and at settlement.

INTRODUCTION

The federal TILA-RESPA Integrated Disclosure (TRID) rule, which took effect October 3, 2015, initiated a series of changes that have dramatically altered the transactions of homebuyers, mortgage borrowers, lenders, title insurance agents, and real estate professionals in profound ways. Created by the Consumer Financial Protection Bureau (CFPB) and spelled out in nearly 1,900 pages of text, the rules introduced new disclosure forms and a lengthy list of procedural mandates covering almost every step in the home mortgage process, from shopping through settlement. It also imposed potentially harsh penalties for lenders and other service providers who fail to adhere to the rules.

TRID Guide for Real Estate Professionals: **(http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/)**

TRID's coverage is broad: Its disclosure requirements extend to virtually all closed-end mortgages used to purchase homes or refinance existing mortgages. However, certain types of loan transactions are exempt:

- Home equity lines of credit (HELOCs)
- Reverse mortgages
- Loans secured by mobile homes not attached to the land
- No-interest second mortgages made for down payment assistance, energy efficiency, or foreclosure avoidance
- Loans made by a creditor who makes five or fewer mortgages in a single year

The disclosures and rules do not apply in all-cash transactions.

Though the principal legal responsibilities under TRID fall upon lenders, other participants in the home financing process, including real estate licensees, have important roles to fulfill as well. The most crucial role for licensees is to represent the interests of their clients/customers throughout the process, whether they are the buyers or the sellers. This can mean everything from walking first time home purchasers through the early stages of the mortgage shopping process now governed by TRID—immediately before the initial disclosure requirements take effect—to staying in close communication with lenders, and title and settlement service providers at every key point in the transaction to ensure that there are no problems that could harm their buyers and sellers during or before the final closing. Licensees have a special role in helping buyers and sellers understand the fees they are being charged at settlement.

TRID is complex. Many lenders, title agencies, and real estate professionals have struggled with the rules. Large numbers of transactions, especially in the first year after TRID took effect, experienced longer times from contract to closing than they typically had under the previous regulatory regime. Lenders found TRID's requirements for complete accuracy in disclosures difficult to achieve and significant numbers of mortgage loan files contained technical errors, according to studies conducted by auditors. One study by the ratings agency Moody's at the end of 2015 found that an extraordinary 90% of the mortgage files delivered into the secondary market for securitization contained compliance violations of one type or another.

BACKGROUND OF TRID: WHY THE FEDERAL GOVERNMENT CHANGED THE RESPA AND TILA DISCLOSURES AND PROCEDURES

TRID traces its origin back to three Congressional actions, two of them decades ago:

- **Passage of the Consumer Credit Protection Act of 1968,** which included as its Title I, the Truth in Lending Act (TILA). Title I sought to make financial products for consumers more understandable to the general public by mandating disclosure of Annual Percentage Rates (APRs) in mortgages and other forms of credit.
- **Passage of the Real Estate Settlement Procedures Act (RESPA) in 1974,** which mandated upfront disclosure of home mortgage terms to potential borrowers along with the itemization and estimated amounts of fees necessary to close the loan.
- **Passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,** which among many other changes, transferred rule-making authority and oversight of TILA and RESPA to the new Consumer Financial Protection Bureau from the Federal Reserve Board and the Department of Housing and Urban Development respectively.

Dodd-Frank also directed the CFPB to combine Truth in Lending disclosures and RESPA disclosures into a single, standardized form designed to help consumers understand mortgages and their costs before they signed up for them. Until the TRID disclosures took effect in 2015, most homebuyers received separate Truth in Lending and RESPA disclosures when they applied for a loan—the so-called TILA and GFE (Good Faith Estimates) forms. At settlement, buyers and sellers received the HUD-1 closing disclosure, which itemized the final fees and service charges for both parties.

During the past decade, however, certain limitations and drawbacks of the traditional mortgage and settlement disclosures became evident. Since they were separate forms, overseen by two different federal agencies interpreting two distinct statutes, lenders and consumers sometimes found that the information provided was overlapping and the language inconsistent and confusing. Critics also pointed out that estimates of final closing fees provided on the GFE too often were lower than what homebuyers and refinancers found on the HUD-1 at final settlement. Prior to 2010 there was little federal oversight and minimal imposition of penalties when differences in up-front estimates compared with the fees demanded at final settlement were significant and led to last minute surprises and financial shocks at settlements. Also, although federal regulations required lenders and settlement agents to provide copies of the HUD-1 closing document at least one day in advance of the settlement for review by buyers and sellers, the HUD-1 was often delivered immediately before or at the closing, allowing for little or no time for advance review and checks for errors.

All of this was accentuated during the housing and mortgage crisis that began in 2006-2007. Critics said the lack of accuracy and transparency of mortgage disclosures led to some of the abuses that triggered the crisis itself: Consumers did not understand the loans they were signing up for, and federal disclosures did not inform them about risky features of certain loans, such as negative amortization, large prepayment penalties, interest-only, and balloon payments.

The Dodd-Frank Act sought to remedy this lack of transparency by instructing the new consumer advocacy agency created by the law—the CFPB—to develop new, more effective disclosures that would better inform buyers about mortgage mechanics and their costs. Pursuant to this mandate, the CFPB published proposed rules that would create a new, combined disclosure for mortgage borrowers at application and a new closing disclosure.

After extensive testing of alternative disclosure forms with focus groups plus recommendations from industry and academic experts, the Bureau published

a revised set of rules and forms, with implementation set for 2015. This became what is now known as the TILA-RESPA Integrated Disclosure rule or TRID.

(Text of the TRID Rule: **http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/**).

See also The TILA-RESPA Integrated Disclosures Guide to the Loan Estimate and Closing Disclosure Forms **(http://files.consumerfinance.gov/f/201503_cfpb_tila-respa-integrated-disclosure-guide-to-the-loan-estimate-and-closing.pdf).**

Overview of the Disclosure Changes

The TRID rules seek to remedy most of the problems of the previous system. All the new disclosures are geared to helping the applicant/borrower to "know before you owe," in the words CFPB uses to describe its reforms.

The new disclosures are in much more understandable language than their predecessors. And they guarantee the consumer adequate time to consider the information at each stage—as much as 10 days for comparison shopping before formally committing to accept a lender's offer, and three days prior to settlement to study the final terms. Note that the primary focus of the disclosures is the homebuyer or borrower rather than the home seller.

At the end of the process, however, there is a two-page settlement disclosure exclusively for the seller, with no reference to the buyer's costs or terms.

(TRID Disclosure Timeline Example: **http://www.consumerfinance.gov/know-before-you-owe/**)

NEW DISCLOSURE FORMS

Among the most important changes, TRID introduced the Loan Estimate (LE), which took the place of both the TILA and GFE, and the Closing Disclosure (CD), which replaced the HUD-1. The Loan Estimate summarizes the key information an applicant needs to understand the nuts and bolts of a mortgage quote: monthly payments, taxes, insurance payments, disclosure of potentially risky features, itemized closing costs, recording fees, homeowner association payments, and cash needed to close.

The LE must either be delivered or sent by the lender to the applicants no later than three business days after an application is received. Applicants can apply to multiple lenders and obtain an LE from each in order to compare rates, loan fees, and settlement costs before making a final choice. Before issuing the LE, loan officers are allowed to provide mortgage shoppers a preliminary or *pro forma* set of estimates on costs, but must clearly indicate that this is not an actual *loan estimate* and thus the terms are subject to change. Borrowers have up to 10 days to consider any lender's Loan Estimate before accepting or rejecting it.

The Closing Disclosure, which details all final settlement expenses, must be delivered to the borrower no later than three business days before the scheduled consummation of the loan, which is defined as the date on which the consumer becomes contractually bound to the lender. This gives the borrower, often with the advice and counsel of the real estate licensee, the ability to ask questions about specific charges or discrepancies between the final figures and those contained in the Loan Estimate. Home sellers also receive a version of the CD describing costs such as real estate commissions and seller-paid taxes and transactional fees. This is usually provided by the title or settlement agent. Both parties in the transaction may also receive settlement statements showing disbursement of funds, usually provided by the title or settlement agent. These are permitted, but not regulated, by TRID.

To the consumer, the LE and CD represent the most visible elements in the changes brought about by TRID. But to the professionals involved in real estate and finance transactions—from mortgage lenders and brokers to real estate licensees—the intricate rules for how and when to prepare, deliver, and make necessary revisions to the information in these forms are far more important, even daunting. The more these professionals know about the specific requirements of TRID, the better equipped they will be to serve the interests of their buyers and sellers.

THE LOAN ESTIMATE: A DETAILED WALK-THROUGH

For most home purchasers, the Loan Estimate represents a significant improvement in their ability to

understand their mortgage financing options compared with the information they received via the Good Faith Estimates and Truth in Lending forms. Real estate professionals who truly understand the requirements of the Loan Estimate will be in the position to guide borrowers through the details and to help them use the LE to shop among competing lenders.

Coverage

Lenders must provide a Loan Estimate whenever a consumer applies for a closed-end home mortgage with the exceptions noted earlier in this module. As an example, a licensee might be involved in a transaction where the property seller is willing to "take back" a note as part of the terms, thereby providing mortgage money to the buyer. If the seller was offering to make this arrangement solely for this transaction and extended no other such loans during the course of a year, TRID would not apply. However, if the seller was a rental home investor who regularly offered take-back financing to purchasers, and has made more than five such loans during the previous 12 months, TRID rules would apply.

Certain types of loans that had been subject to federal Truth in Lending disclosures requirements, but not RESPA disclosure requirements, are now subject to TRID. These include loans secured by vacant land consisting of 25 or more acres of land as well as construction loans. For these categories of mortgages, which Florida licensees may encounter periodically, both the LE and he CD must be issued by the creditor under the same timelines as standard home purchase mortgages. *Note:* Under the current regulations, all-cash purchases of property are not subject to TRID.

Timing and Delivery

Lenders must provide applicants a Loan Estimate, by directly handing it to them, placing it in the U.S. mail, or via electronic delivery, within three business days of the receipt of the application. A *business day* under TRID is defined as "a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions."

Additionally, the Loan Estimate must be delivered or placed in the mail no later than the seventh business day before *consummation* of the loan, meaning the day on which the borrower becomes legally obligated to the lender. If the lender fails to deliver or place the LE in the mail within the required three days, it is a violation of TRID and cannot be "cured" by a re-issue. This violation, in turn, could mean the lender faces difficulty later in selling the loan into the secondary market, so the three day rule is crucially important. Note that the delivery rule does not mean a licensee's buyer must *receive* the Loan Estimate within three days, rather that it must have been placed in the mail within that timeline if not hand delivered or sent via electronic means. Once in receipt of the LE, buyers/borrowers have up to 10 days to shop further before indicating to the lender that it is their *intent* to accept the terms and proceed with the transaction.

Restrictions on the Lender before Issuing the Loan Estimate

Since many home purchasers traditionally shop for financing by checking websites or contacting lenders for rate quotes, TRID imposes new restrictions on lenders before shoppers formally apply for a loan. They cannot:

- Charge consumers loan-related fees before issuance, except for a "reasonable" fee to access their credit reports and scores. This means no application fees, appraisal charges, underwriting fees, and so on.
- Require shoppers to provide documents that verify information about the shopper's qualifications for the loan prior to issuance of the LE. This includes verifications of employment or income and copies of sales contracts.

Definition of *application*. Since the TRID disclosure clock begins when there is an application, its definition is important to know. An application requires six components:

1. The name of the applicant(s)
2. The applicants' annual income to qualify for the size loan they are seeking
3. The applicants' Social Security Number(s), enabling the lender to order credit reports and scores
4. The address of the property to be financed
5. An estimated value of the property
6. The amount of the mortgage requested for the purchase

If any of the six essential components are not provided, a bona fide application has not been made. That allows shoppers to provide four or five of the key pieces of information to lenders and obtain non-binding quotations.

The Loan Estimate Form (LE)

The uppermost line on the Loan Estimate form contains a sentence that licensees should emphasize to homebuyers: "Save this Loan Estimate to compare with your Closing Disclosure." One of the central purposes of TRID is to discourage lenders from inaccurately estimating their fees at the application stage only to raise them at the final closing. Since consumers are guaranteed three days to study and understand the Closing Disclosure, retaining the Loan Estimate for later comparison, line by line, with the CD, is essential.

Note that in the upper right hand corner, where the word *Product* appears, lenders are required to disclose whether the mortgage being offered contains "any payment features that may change the periodic payment" such as negative amortization, interest only, step payment (such as a five-year hybrid ARM) or a "seasonal" payment plan (such as some loans made to school teachers, which do not require payments during the summer months.)

Page One Contents

The first page of the LE offers an overview of the terms of the loan being offered—the loan amount, the rate type, (fixed or variable), the term in years, loan type (conventional or FHA/VA), the interest rate quoted by the lender, the monthly principal and interest costs, and whether the loan documents contain a prepayment penalty clause or a balloon payment requirement. It also provides the name and address of the lender, which may be different from the affiliation of the loan officer with whom the applicant has been dealing. If the loan officer is a mortgage broker originating loans for multiple lenders, the actual lender's name should be on the LE, not the broker's name. Other disclosures include the projected monthly escrows, total closing costs, and the estimated amount of cash the borrower will need to close the transaction. There is also a link for the buyer/borrower to the CFPB's special page for mortgage applicants **(www.Consumerfinance.gov/mortgage-estimate)** for additional information on using or understanding the Loan Estimate.

Page Two Contents

The second page of the LE covers the four major categories of closing charges the borrower can expect. These include:

- **Loan costs.** These are especially important for borrowers to compare among lenders since they can differ significantly. Licensees can be of real help to homebuyers by pointing them out. What is Lender A charging your homebuyer for *origination* of the mortgage versus Lender B? How many loan *points* (a **point** is equal to 1% of the loan amount)? How much for underwriting? Loan processing, application, and potentially other lender-related charges?
- **Services not subject to shopping or choice by the applicant.** These are the necessary services that the lender contracts for but that the borrower cannot shop for. These include the appraisal fee, which can vary significantly depending upon the lender's choice of the appraiser, appraiser management company fee, and the perceived complexity of the valuation. Note here that the LE does not break out the two key components of appraisal that affect costs to the borrower—the fee charged by the actual appraiser, and the additional fee added to that cost by an appraisal management company. Applicants can request a breakout for comparisons among competing lenders, but they are not permitted to actually choose an appraiser. Other services contracted for solely by the lender include credit reports and scores, flood zone determinations, tax status research, and monitoring of any changes.
- **Services the applicant *can* shop for individually.** Title-related charges can represent a significant percentage of total closing costs and applicants are free, in fact encouraged by the CFPB, to shop and compare. They are also free to accept recommendations from licensees as to which title and settlement companies offer the best services and the best performances in complying with TRID and conducting closings efficiently and with minimal delays. Note that the LE only references the estimated costs of lender title insurance, but

all buyers are free to request owner title insurance, which may result in cost savings and better coverage against title-related problems that arise after the closing.

- **Other costs.** These include local government taxes (recording and transfer fees), standard prepaid items, the initial escrow payment at closing for homeowner's hazard insurance, mortgage insurance if applicable, and property taxes. These should all be relatively consistent figures among competing lenders, if they have their data sources correct.
- **Cash to close.** This adds up all the key charges that must be paid by the applicant—the down payment, plus closing costs, adjustments for seller credits, and the upfront deposit on the mortgage. It is useful for licensees advising homebuyers to focus their attention on this bottom line number. Some buyers are shocked when they learn exactly how much cash they are going to need to have at the closing. Under the previous GFE system, there was no "cash to close" line item, an omission the LE corrects.

Page Three Contents

Additional useful information about the mortgage. This page provides useful *tracking* detail about the mortgage officer who made the loan (license number, email, and phone contact information) in the event that issues arise later. It also provides estimated payments after five years that can be used for comparison shopping.

Save this Loan Estimate to compare with your Closing Disclosure.

Loan Estimate

DATE ISSUED
APPLICANTS

PROPERTY
EST. PROP. VALUE

LOAN TERM
PURPOSE
PRODUCT
LOAN TYPE ☐ Conventional ☐ FHA ☐ VA ☐ _____
LOAN ID #
RATE LOCK ☐ NO ☐ YES, until

Before closing, your interest rate, points, and lender credits can change unless you lock the interest rate. All other estimated closing costs expire on

Loan Terms		**Can this amount increase after closing?**
Loan Amount		
Interest Rate		
Monthly Principal & Interest *See Projected Payments below for your Estimated Total Monthly Payment*		
		Does the loan have these features?
Prepayment Penalty		
Balloon Payment		

Projected Payments	
Payment Calculation	
Principal & Interest Mortgage Insurance Estimated Escrow *Amount can increase over time*	
Estimated Total Monthly Payment	

Estimated Taxes, Insurance & Assessments *Amount can increase over time*	**This estimate includes** ☐ Property Taxes ☐ Homeowner's Insurance ☐ Other: *See Section G on page 2 for escrowed property costs. You must pay for other property costs separately.*	**In escrow?**

Costs at Closing	
Estimated Closing Costs	Includes in Loan Costs + in Other Costs – in Lender Credits. *See page 2 for details.*
Estimated Cash to Close	Includes Closing Costs. *See Calculating Cash to Close on page 2 for details.*

Visit **www.consumerfinance.gov/mortgage-estimate** for general information and tools.

Closing Cost Details

Loan Costs

A. Origination Charges

% of Loan Amount (Points)

B. Services You Cannot Shop For

C. Services You Can Shop For

D. TOTAL LOAN COSTS (A + B + C)

Other Costs

E. Taxes and Other Government Fees

Recording Fees and Other Taxes
Transfer Taxes

F. Prepaids

Homeowner's Insurance Premium (months)
Mortgage Insurance Premium (months)
Prepaid Interest (per day for days @)
Property Taxes (months)

G. Initial Escrow Payment at Closing

Homeowner's Insurance	per month for	mo.
Mortgage Insurance	per month for	mo.
Property Taxes	per month for	mo.

H. Other

I. TOTAL OTHER COSTS (E + F + G + H)

J. TOTAL CLOSING COSTS

D + I
Lender Credits

Calculating Cash to Close

Total Closing Costs (J)
Closing Costs Financed (Paid from your Loan Amount)
Down Payment/Funds from Borrower
Deposit
Funds for Borrower
Seller Credits
Adjustments and Other Credits
Estimated Cash to Close

Adjustable Payment (AP) Table

Interest Only Payments?	
Optional Payments?	
Step Payments?	
Seasonal Payments?	
Monthly Principal and Interest Payments	
First Change/Amount	
Subsequent Changes	
Maximum Payment	

Adjustable Interest Rate (AIR) Table

Index + Margin
Initial Interest Rate
Minimum/Maximum Interest Rate
Change Frequency
First Change
Subsequent Changes
Limits on Interest Rate Changes
First Change
Subsequent Changes

Additional Information About This Loan

LENDER
NMLS/___ LICENSE ID
LOAN OFFICER
NMLS/___ LICENSE ID
EMAIL
PHONE

MORTGAGE BROKER
NMLS/___ LICENSE ID
LOAN OFFICER
NMLS/___ LICENSE ID
EMAIL
PHONE

Comparisons	**Use these measures to compare this loan with other loans.**
In 5 Years	Total you will have paid in principal, interest, mortgage insurance, and loan costs. Principal you will have paid off.
Annual Percentage Rate (APR)	Your costs over the loan term expressed as a rate. This is not your interest rate.
Total Interest Percentage (TIP)	The total amount of interest that you will pay over the loan term as a percentage of your loan amount.

Other Considerations

Assumption
If you sell or transfer this property to another person, we
☐ will allow, under certain conditions, this person to assume this loan on the original terms.
☐ will not allow assumption of this loan on the original terms.

Late Payment
If your payment is more than ___ days late, we will charge a late fee of _____

Refinance
Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.

Servicing
We intend
☐ to service your loan. If so, you will make your payments to us.
☐ to transfer servicing of your loan.

Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

Applicant Signature Date

Co-Applicant Signature Date

Source: Loan Estimate Form: (**http://files.consumerfinance.gov/f/201403_cfpb_loan-estimate_model-form-H24.pdf)**

Miscellaneous Rules Governing the LE

"Good Faith" on the LE. Lenders who issue Loan Estimates to applicants are expected to provide their estimates on fees *in good faith,* with the most accurate information they have at the time. If they don't have what they consider reliable information on a specific line item, they must inform the applicant that there is a possibility of change, when reliable information becomes available. As a general rule, lenders are presumed to have acted in *good faith* if the estimates they provide are *not higher* than what the borrower is asked to pay on the Closing Disclosure. But the rules recognize that at times it may not be possible for every estimate to be exactly accurate; sometimes the information itself is subject to unpredictable changes.

To accommodate this, the rules allow for certain situations where the lender *may charge more* on the CD than estimated on the LE. These include:

- Changes in estimated fees for services when the applicant shopped for services and chose a vendor that was not included on the lender's written list of service providers. That written list must accompany the LE when it is delivered or mailed.
- Changes in estimated prepaid interest charges and escrow impounds.

Tolerances. For certain fees that are not within the immediate control of the lender, the rules provide limited tolerances—wiggle room, in effect—for changes. In advising clients/customers on financing issues, licensees can alert them to the categories of estimates that are subject to tolerances and those which are not.

- **10% tolerances.** For charges related to third-party services and recording fees paid for by the borrower, there is a 10% cumulative tolerance allowance for changes between the LE and the CD. This means that the lender may charge the borrower more than the amount disclosed on the LE as long as the total sum of the changes added together do not exceed the sum of all such charges by 10%.
- **Zero tolerances.** The rules prohibit increases in disclosed charges for fees paid to the lender, mortgage broker, or any affiliate of either, or any increase for fees paid to unaffiliated third party vendors if the lender did not permit the applicant to shop. *There is no tolerance for estimates on local government transfer fees, property insurance premiums, property taxes, homeowners' association dues, condominium or cooperative fees.* For any charges that exceed tolerance thresholds, the lender must refund the excess within 60 calendar days after consummation of the loan.

Revisions and corrections to Loan Estimates. As a general rule, lenders are bound to the estimates of fees they provide in the LE. But under certain circumstances, they may issue revisions. These can be important to licensees and their buyers because issuance of the revised LE under some circumstances may affect the timing of the closing. Revisions may be issued when:

- Changed circumstances occur after the provision of the LE to the applicant that cause changes to settlement costs in excess of tolerance rules.
- Changed circumstances occur that affect the consumer's eligibility for the loan terms promised. For example, the income information provided by the applicant turns out to be lower than the actual income, rendering the applicant ineligible.
- The interest rate was not locked when the LE was provided, and locking the rate causes the loan points or lender credits to change.
- The consumer indicates intent to proceed with the transaction more than 10 days after the LE was provided.

What exactly are *changed circumstances?* The TRID rules are highly specific:

- An extraordinary event occurs beyond the control of any interested party or some other *unexpected event* affecting the consumer or the home financing transaction. *Example:* a hurricane or earthquake or other natural disaster that damages the property or requires higher closing costs.
- A situation where information that the lender relied upon about the applicant or the transaction is found to be inaccurate after the LE is issued. *Example:* the lender provides an estimate for title-related charges but the title agency goes out of business during underwriting.
- New information becomes available about the borrower or the transaction that the lender was unaware of but did not rely upon when providing the LE. *Example:* a neighbor files a claim contesting the boundary of the property the borrower plans to purchase.

Timing for revisions to the Loan Estimate. As a general rule, the lender must deliver, place in the mail, or send electronically a revised LE for the borrower within three business days after receiving the information requiring correction or revision.

Exceptions to the seven day waiting period between issuance of the LE and the CD. As noted above, lenders must deliver or send the LE at least seven business days in advance of the delivery of the CD. This gives the borrower adequate time to review the details of the LE before reviewing the CD. But there may be circumstances where a faster completion of the loan transaction is essential and a seven day waiting period may not be helpful. For example, if a foreclosure was imminent on an owner's home and could only be prevented by a faster than usual delivery of the loan proceeds to the owner, the rules would allow an exception. A circumstance that occasions the needs for a waiver of the seven day requirement must be a "bona fide personal emergency."

Summary of Timing Issues with the LE

A buyer shops for a home and may possibly obtain a pre-approval from a lender to help qualify for the property(ies) that he or she is interested in. Once the buyer formally applies to one or more lenders (i.e., provides the six key elements of an application) TRID kicks in and the lender must deliver or place in the mail or electronically send a Loan Estimate within three business days. The buyer has up to 10 days to determine whether to move ahead—to indicate "intent to proceed"—on the LE that offers what the buyer considers to be the most favorable terms. After this point, the sales contract timing governs the issuance of the Closing Disclosure (three days before consummation), but absent changed circumstances, the closing cannot take place any sooner than seven days after delivery of the LE.

THE CLOSING DISCLOSURE FORM (CD)

The Closing Disclosure replaced the traditional HUD-1 settlement document and the final Truth in Lending disclosure but has a similar function for the homebuyer and the seller: It summarizes all the important terms and costs of the transaction. Unlike the HUD-1, however, the CD is not a disbursement document showing borrower/buyer debits and credits and real estate commission fees for both sides of the transaction.

That is typically now accomplished using a settlement statement prepared by the title/settlement agent, as discussed below. As with the Loan Estimate, primary legal responsibility for the contents of the Closing Disclosure rests with the lender, although the rule allows the lender to rely on information provided by other parties to the transaction, including the settlement agent and real estate licensees.

Timing

The lender is responsible for providing the CD to the borrower/buyer no later than three business days before consummation of the transaction, the point at which the borrower becomes contractually obligated to the lender under state law. Since the purpose of the three day period is to allow the consumer adequate time to review all final terms, ask questions, and identify any problems or discrepancies between the CD and either the LE or the sales contract, licensees should encourage their buyers to make the necessary effort to do so.

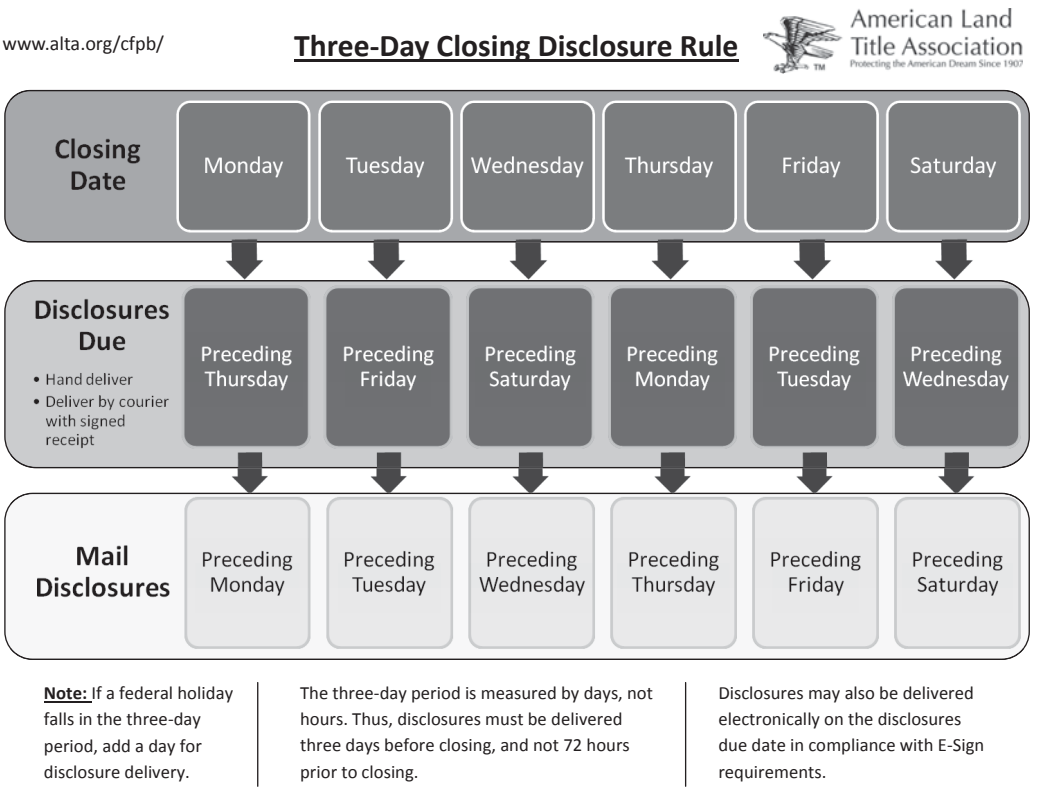
A separate version of the CD must also be provided to the seller, but can be delivered by the settlement agent rather than the lender no later than the consummation date. As with the LE, the buyer may waive the three day waiting period if there is a "bona fide personal financial emergency" that requires it.

NOTE: TRID assumes that the closing can occur seven days after the CD is provided to the borrowers by mail. This is informally known as the "mailbox rule." Settlement may occur sooner if the lender can demonstrate that the CD was received electronically, via hand delivery or courier.

For electronic deliveries, the borrower must meet E-Sign requirements. That is, there must be:

- Consent by the borrowers in advance before the documents can be sent to them
- Notice given to the borrowers of their right to receive the CD on paper
- Notice to the borrowers on how to withdraw consent to receive the CD electronically

The flow chart below shows how the closing or consummation day of the week interacts with the seven day and three day timelines.



Closing Disclosure (CD) Form

Page One Contents

This is the *general information* page, providing a review of the basic mortgage terms, loan features (e.g., prepayment penalties, balloon payment requirements when applicable), projected principal, interest, mortgage insurance and escrow payments, estimated taxes and insurance costs, plus the closing cost total, and the amount of cash needed to close. All these should track the LE; if they don't, the borrower needs to ask the lender for an explanation and possibly corrections.

Page Two Contents

On this page the closing costs are broken down in detail: Origination charges such as points and fees, third party loan–related services the lender obtained, service charges the borrower shopped for such as title, government fees and taxes, prepaid expenses for the loan, the initial escrow payment at closing, plus any other fees the borrower will be expected to pay. Note again that these should track the information disclosed earlier on the LE.

Page Three Contents

This offers a side-by-side comparison of the estimated dollars needed for the buyer/borrower to close versus earlier estimates in the LE. If there are significant divergences, the lender needs to explain.

Page Four Contents

This page has a variety of helpful information for the homebuyer about the loan, such as: Is the mortgage assumable by a subsequent purchaser of the property? What penalty are you liable for if you make a late payment? Can the lender *call* the loan, that is, require immediate repayment of the full amount owed for a specific reason? Will the lender accept partial payments? The page also provides information on the escrow account and loan details for borrowers taking out an adjustable rate mortgage.

Page Five Contents

The final page of the CD supplies the borrower with the names and contact information for all the key service providers in the transaction—the lender, mortgage broker if applicable, real estate brokers, and the settlement agent. It also alerts the buyers that the lender is supposed to provide them a copy of the appraisal used to value the house at no cost at least three days before closing.

Closing Disclosure

This form is a statement of final loan terms and closing costs. Compare this document with your Loan Estimate.

Closing Information	Transaction Information	Loan Information
Date Issued	**Borrower**	**Loan Term**
Closing Date		**Purpose**
Disbursement Date		**Product**
Settlement Agent	**Seller**	
File #		**Loan Type** ☐ Conventional ☐ FHA ☐ VA ☐ _____
Property		
	Lender	**Loan ID #**
Sale Price		**MIC #**

Loan Terms		**Can this amount increase after closing?**
Loan Amount		**NO**
Interest Rate		**NO**
Monthly Principal & Interest *See Projected Payments below for your Estimated Total Monthly Payment*		**NO**
		Does the loan have these features?
Prepayment Penalty		**YES**
Balloon Payment		**NO**

Projected Payments

Payment Calculation	**Years 1-7**	**Years 8-30**
Principal & Interest		
Mortgage Insurance	+	+
Estimated Escrow *Amount can increase over time*	+	+
Estimated Total Monthly Payment		

Estimated Taxes, Insurance & Assessments *Amount can increase over time* *See page 4 for details*	a month	**This estimate includes** ☐ Property Taxes ☐ Homeowner's Insurance ☐ Other: Homeowner's Association Dues *See Escrow Account on page 4 for details. You must pay for other property costs separately.*	**In escrow?**

Costs at Closing

Closing Costs	
Cash to Close	

Closing Cost Details

Loan Costs	Borrower-Paid At Closing	Borrower-Paid Before Closing	Seller-Paid At Closing	Seller-Paid Before Closing	Paid by Others
A. Origination Charges					
01 0.25 % of Loan Amount (Points)					
02 Application Fee					
03 Underwriting Fee					
04					
05					
06					
07					
08					
B. Services Borrower Did Not Shop For					
01 Appraisal Fee to John Smith Appraisers Inc.					
02 Credit Report Fee to Information Inc.					
03 Flood Determination Fee to Info Co.					
04 Flood Monitoring Fee to Info Co.					
05 Tax Monitoring Fee to Info Co.					
06 Tax Status Research Fee to Info Co.					
07					
08					
09					
10					
C. Services Borrower Did Shop For					
01 Pest Inspection Fee to Pests Co.					
02 Survey Fee to Surveys Co.					
03 Title – Insurance Binder to Epsilon Title Co.					
04 Title – Lender's Title Insurance to Epsilon Title Co.					
05 Title – Settlement Agent Fee to Epsilon Title Co.					
06 Title – Title Search to Epsilon Title Co.					
07					
08					
D. TOTAL LOAN COSTS (Borrower-Paid)					
Loan Costs Subtotals (A + B + C)					

Other Costs	Borrower-Paid At Closing	Borrower-Paid Before Closing	Seller-Paid At Closing	Seller-Paid Before Closing	Paid by Others
E. Taxes and Other Government Fees					
01 Recording Fees Deed: Mortgage:					
02 Transfer Tax to Any State					
F. Prepaids					
01 Homeowner's Insurance Premium					
02 Mortgage Insurance Premium					
03 Prepaid Interest					
04 Property Taxes					
05					
G. Initial Escrow Payment at Closing					
01 Homeowner's Insurance					
02 Mortgage Insurance					
03 Property Taxes					
04					
05					
06					
07					
08 Aggregate Adjustment					
H. Other					
01 HOA Capital Contribution to HOA Acre Inc.					
02 HOA Processing Fee to HOA Acre Inc.					
03 Home Inspection Fee to Engineers Inc.					
04 Home Warranty Fee to XYZ Warranty Inc.					
05 Real Estate Commission to Alpha Real Estate Broker					
06 Real Estate Commission to Omega Real Estate Broker					
07 Title – Owner's Title Insurance (optional) to Epsilon Title Co.					
08					
I. TOTAL OTHER COSTS (Borrower-Paid)					
Other Costs Subtotals (E + F + G + H)					

J. TOTAL CLOSING COSTS (Borrower-Paid)					
Closing Costs Subtotals (D + I)					
Lender Credits					

Calculating Cash to Close

Use this table to see what has changed from your Loan Estimate.

	Loan Estimate	Final	Did this change?
Total Closing Costs (J)			
Closing Costs Paid Before Closing			
Closing Costs Financed (Paid from your Loan Amount)			
Down Payment/Funds from Borrower			
Deposit			
Funds for Borrower			
Seller Credits			
Adjustments and Other Credits			
Cash to Close			

Summaries of Transactions

Use this table to see a summary of your transaction.

BORROWER'S TRANSACTION		
K. Due from Borrower at Closing		
01	Sale Price of Property	
02	Sale Price of Any Personal Property Included in Sale	
03	Closing Costs Paid at Closing (J)	
04		
Adjustments		
05		
06		
07		
Adjustments for Items Paid by Seller in Advance		
08	City/Town Taxes	to
09	County Taxes	to
10	Assessments	to
11	HOA Dues	to
12		
13		
14		
15		
L. Paid Already by or on Behalf of Borrower at Closing		
01	Deposit	
02	Loan Amount	
03	Existing Loan(s) Assumed or Taken Subject to	
04		
05	Seller Credit	
Other Credits		
06	Rebate from Epsilon Title Co.	
07		
Adjustments		
08		
09		
10		
11		
Adjustments for Items Unpaid by Seller		
12	City/Town Taxes	to
13	County Taxes	to
14	Assessments	to
15		
16		
17		
CALCULATION		
Total Due from Borrower at Closing (K)		
Total Paid Already by or on Behalf of Borrower at Closing (L)		
Cash to Close ☐ From ☐ To Borrower		

SELLER'S TRANSACTION		
M. Due to Seller at Closing		
01	Sale Price of Property	
02	Sale Price of Any Personal Property Included in Sale	
03		
04		
05		
06		
07		
08		
Adjustments for Items Paid by Seller in Advance		
09	City/Town Taxes	to
10	County Taxes	to
11	Assessments	to
12	HOA Dues	to
13		
14		
15		
16		
N. Due from Seller at Closing		
01	Excess Deposit	
02	Closing Costs Paid at Closing (J)	
03	Existing Loan(s) Assumed or Taken Subject to	
04	Payoff of First Mortgage Loan	
05	Payoff of Second Mortgage Loan	
06		
07		
08	Seller Credit	
09		
10		
11		
12		
13		
Adjustments for Items Unpaid by Seller		
14	City/Town Taxes	to
15	County Taxes	to
16	Assessments	to
17		
18		
19		
CALCULATION		
Total Due to Seller at Closing (M)		
Total Due from Seller at Closing (N)		
Cash ☐ From ☐ To Seller		

Additional Information About This Loan

Loan Disclosures

Assumption
If you sell or transfer this property to another person, your lender
☐ will allow, under certain conditions, this person to assume this loan on the original terms.
☐ will not allow assumption of this loan on the original terms.

Demand Feature
Your loan
☐ has a demand feature, which permits your lender to require early repayment of the loan. You should review your note for details.
☐ does not have a demand feature.

Late Payment
If your payment is more than *15* days late, your lender will charge a late fee of *5% of the monthly principal and interest payment.*

Negative Amortization (Increase in Loan Amount)
Under your loan terms, you
☐ are scheduled to make monthly payments that do not pay all of the interest due that month. As a result, your loan amount will increase (negatively amortize), and your loan amount will likely become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.
☐ may have monthly payments that do not pay all of the interest due that month. If you do, your loan amount will increase (negatively amortize), and, as a result, your loan amount may become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.
☐ do not have a negative amortization feature.

Partial Payments
Your lender
☐ may accept payments that are less than the full amount due (partial payments) and apply them to your loan.
☐ may hold them in a separate account until you pay the rest of the payment, and then apply the full payment to your loan.
☐ does not accept any partial payments.
If this loan is sold, your new lender may have a different policy.

Security Interest
You are granting a security interest in
456 Somewhere Ave., Anytown, ST 12345

You may lose this property if you do not make your payments or satisfy other obligations for this loan.

Escrow Account
For now, your loan
☐ will have an escrow account (also called an "impound" or "trust" account) to pay the property costs listed below. Without an escrow account, you would pay them directly, possibly in one or two large payments a year. Your lender may be liable for penalties and interest for failing to make a payment.

Escrow		
Escrowed Property Costs over Year 1		Estimated total amount over year 1 for your escrowed property costs: *Homeowner's Insurance* *Property Taxes*
Non-Escrowed Property Costs over Year 1		Estimated total amount over year 1 for your non-escrowed property costs: *Homeowner's Association Dues* You may have other property costs.
Initial Escrow Payment		A cushion for the escrow account you pay at closing. See Section G on page 2.
Monthly Escrow Payment		The amount included in your total monthly payment.

☐ will not have an escrow account because ☐ you declined it ☐ your lender does not offer one. You must directly pay your property costs, such as taxes and homeowner's insurance. Contact your lender to ask if your loan can have an escrow account.

No Escrow		
Estimated Property Costs over Year 1		Estimated total amount over year 1. You must pay these costs directly, possibly in one or two large payments a year.
Escrow Waiver Fee		

In the future,
Your property costs may change and, as a result, your escrow payment may change. You may be able to cancel your escrow account, but if you do, you must pay your property costs directly. If you fail to pay your property taxes, your state or local government may (1) impose fines and penalties or (2) place a tax lien on this property. If you fail to pay any of your property costs, your lender may (1) add the amounts to your loan balance, (2) add an escrow account to your loan, or (3) require you to pay for property insurance that the lender buys on your behalf, which likely would cost more and provide fewer benefits than what you could buy on your own.

Loan Calculations

Total of Payments. Total you will have paid after you make all payments of principal, interest, mortgage insurance, and loan costs, as scheduled.	
Finance Charge. The dollar amount the loan will cost you.	
Amount Financed. The loan amount available after paying your upfront finance charge.	
Annual Percentage Rate (APR). Your costs over the loan term expressed as a rate. This is not your interest rate.	
Total Interest Percentage (TIP). The total amount of interest that you will pay over the loan term as a percentage of your loan amount.	

Questions? If you have questions about the loan terms or costs on this form, use the contact information below. To get more information or make a complaint, contact the Consumer Financial Protection Bureau at **www.consumerfinance.gov/mortgage-closing**

Other Disclosures

Appraisal
If the property was appraised for your loan, your lender is required to give you a copy at no additional cost at least 3 days before closing. If you have not yet received it, please contact your lender at the information listed below.

Contract Details
See your note and security instrument for information about
- what happens if you fail to make your payments,
- what is a default on the loan,
- situations in which your lender can require early repayment of the loan, and
- the rules for making payments before they are due.

Liability after Foreclosure
If your lender forecloses on this property and the foreclosure does not cover the amount of unpaid balance on this loan,

☐ state law may protect you from liability for the unpaid balance. If you refinance or take on any additional debt on this property, you may lose this protection and have to pay any debt remaining even after foreclosure. You may want to consult a lawyer for more information.

☐ state law does not protect you from liability for the unpaid balance.

Refinance
Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.

Tax Deductions
If you borrow more than this property is worth, the interest on the loan amount above this property's fair market value is not deductible from your federal income taxes. You should consult a tax advisor for more information.

Contact Information

	Lender	Mortgage Broker	Real Estate Broker (B)	Real Estate Broker (S)	Settlement Agent
Name					
Address					
NMLS ID					
ST License ID					
Contact					
Contact NMLS ID					
Contact ST License ID					
Email					
Phone					

Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

Applicant Signature Date

Co-Applicant Signature Date

Source: Closing Disclosure Form **(http://files.consumerfinance.gov/f/201403_cfpb_closing-disclosure_cover-H25A.pdf)**

The Seller's Closing Disclosure

Though TRID is overwhelmingly oriented to disclosures affecting the homebuyer's transaction, home sellers do receive their own version of the CD, containing only their own information. It is a two-page disclosure that covers what's due the seller, adjustments to be paid by the seller, plus any credits or other cost items due from the seller at the closing.

Page one also provides contact information for the real estate sales associates and brokers involved in the transaction as well as contact information for the settlement agent. Page two covers loan costs and settlement fees including any seller contributions to them. The Seller's Closing Disclosure deletes the following from the Buyer's Closing Disclosure, all of which are considered non-public information:

- Borrower personal data
- Lender's name and loan information
- Terms of the loan
- Projected payments due
- Costs at Closing
- Borrower's table in summaries of transaction table
- Loan calculations
- Signatures

Closing Disclosure

Closing Information

Date Issued
Closing Date
Disbursement Date
Settlement Agent
File #
Property

Sale Price

Transaction Information

Borrower

Seller

Summaries of Transactions

SELLER'S TRANSACTION		
Due to Seller at Closing		
01	Sale Price of Property	
02	Sale Price of Any Personal Property Included in Sale	
03		
04		
05		
06		
07		
08		
Adjustments for Items Paid by Seller in Advance		
09	City/Town Taxes	to
10	County Taxes	to
11	Assessments	to
12		
13		
14		
15		
16		
Due from Seller at Closing		
01	Excess Deposit	
02	Closing Costs Paid at Closing (J)	
03	Existing Loan(s) Assumed or Taken Subject to	
04	Payoff of First Mortgage Loan	
05	Payoff of Second Mortgage Loan	
06		
07		
08	Seller Credit	
09		
10		
11		
12		
13		
Adjustments for Items Unpaid by Seller		
14	City/Town Taxes	to
15	County Taxes	to
16	Assessments	to
17		
18		
19		
CALCULATION		
Total Due to Seller at Closing		
Total Due from Seller at Closing		
Cash ☐ From ☐ To Seller		

Contact Information

REAL ESTATE BROKER (B)	
Name	
Address	
__ License ID	
Contact	
Contact __ License ID	
Email	
Phone	
REAL ESTATE BROKER (S)	
Name	
Address	
__ License ID	
Contact	
Contact __ License ID	
Email	
Phone	
SETTLEMENT AGENT	
Name	
Address	
__ License ID	
Contact	
Contact __ License ID	
Email	
Phone	

Questions? If you have questions about the loan terms or costs on this form, use the contact information above. To get more information or make a complaint, contact the Consumer Financial Protection Bureau at **www.consumerfinance.gov/mortgage-closing**

Closing Cost Details

Loan Costs	Seller-Paid At Closing	Seller-Paid Before Closing
A. Origination Charges		
01 % of Loan Amount (Points)		
02		
03		
04		
05		
06		
07		
08		
B. Services Borrower Did Not Shop For		
01		
02		
03		
04		
05		
06		
07		
08		
C. Services Borrower Did Shop For		
01		
02		
03		
04		
05		
06		
07		
08		

Other Costs		
E. Taxes and Other Government Fees		
01 Recording Fees Deed: Mortgage:		
02		
F. Prepaids		
01 Homeowner's Insurance Premium (mo.)		
02 Mortgage Insurance Premium (mo.)		
03 Prepaid Interest (per day from to)		
04 Property Taxes (mo.)		
05		
G. Initial Escrow Payment at Closing		
01 Homeowner's Insurance per month for mo.		
02 Mortgage Insurance per month for mo.		
03 Property Taxes per month for mo.		
04		
05		
06		
07		
08 Aggregate Adjustment		
H. Other		
01		
02		
03		
04		
05		
06		
07		
08		
09		
10		
11		
12		
13		

J. TOTAL CLOSING COSTS		

Source: **(http://files.consumerfinance.gov/f/201311_cfpb_kbyo_closing-disclosure-seller-only.pdf)**

Revisions and Corrections to the Closing Disclosure

The rules governing CD revisions and corrections are particularly important to real estate licensees because last minute changes to CDs can sometimes cause delays in closings. There are three types of changes to CDs that require the lender to issue a corrected disclosure:

- Changes that occur before consummation that require the lender to provide a new three business day waiting period for borrowers to review a corrected CD. This is required:
  - If the previously disclosed annual percentage rate (APR) becomes inaccurate for any reason by more than one-eighth of one percent (for fixed rate loans) or one-fourth of one percent for an adjustable rate loan.
  - The loan product changes, say from a fixed-rate mortgage to an adjustable rate mortgage.
  - The lender adds a prepayment penalty to the loan being offered.
- Changes that occur before consummation that do not require a new three business day waiting period. Typically these would be errors or discrepancies the lender discovers and needs to correct via a new CD. In these cases, the lender must deliver the corrected CD to the homebuyer before consummation of the transaction.

The basic rule is that the final CD must be accurate, even if a settlement-related change in costs occurs after consummation. In such a case, the lender must deliver or place in the mail a corrected CD no later than 30 days after receiving information that a change has occurred. In the case of purely clerical errors, the lender has 60 calendar days after the settlement to issue a corrected CD to the buyer/borrower. For example, if the lender cures an overcharge error in a cost item subject to tolerance, and makes a refund to the consumer, the lender must also deliver a corrected CD within 60 calendar days.

THE HOME LOAN TOOLKIT

Under the previous GFE-HUD-1 rules under RESPA, homebuyers and borrowers were required to be provided a copy of the Department of Housing and Urban Development's Settlement Cost Booklet, also known as the Special Information Booklet. As part of its reworking of the entire disclosure process, the CFPB created a more comprehensive and helpful version, which it calls the **Home Loan Toolkit.**

It is based on extensive research by the CFPB, written in plain English and is designed to be delivered electronically. It should be especially important for first time home purchasers. Under TRID, lenders must deliver or mail a copy of the Toolkit to the borrowers within three business days of receiving a loan application. However, in guidance issued along with the Toolkit, the CFPB said real estate licensees are encouraged to provide copies of the Toolkit to their buyers "at any other time, preferably as early in the home or mortgage shopping process as possible."

The 28-page Toolkit is a step-by-step, interactive guide for consumers on loan shopping. It helps them define what *affordable* means to them individually, understand their own credit situations, and counsels them on how to choose the mortgage type and down payment that is most appropriate for them. It features work sheets and what the CFPB describes as *conversation starters* designed to deepen consumers grasp of the mortgage market and their choices.

The Toolkit is available at: **(http://www.consumerfinance.gov/f/20153_cfpb_your_home-loan-toolkit-web.pdf)**

Its key contents include sections on:

- **Understanding affordability for your own situation:** income, debt levels, financial resources compared with what you'll need to obtain a mortgage. An accompanying worksheet outlines the components of monthly payments beyond just principal and interest.
- **Estimating the percentage of your income that can go for a monthly home payment.**
- **Estimating what's left over of your income after subtracting your monthly debts:** In other words, once you've paid off debts for credit cards, auto loans, student debts, etc., every month, how much are you going to really have for a mortgage?
- **Understanding your credit picture:** credit reports and scores, including your free annual credit reports from the three major credit bureaus.
- **Types of Mortgages 101:** from ARMs to fixed rate loans and hybrid adjustables, plus guidance on risky loan features to avoid.
- **Choosing the right down payment for your situation and resources.**

- **Understanding the tradeoff between paying points versus higher or lower interest rates.**
- **Loan shopping 101:** with comparison charts for quotes and terms from multiple lenders.
- **Understanding rate locks.**
- **Everything consumers need to know about Loan Estimates, Closing Disclosures, and the closing process.**

Not all buyers are likely to need to go over the ABCs of mortgage shopping and borrowing. However, all buyers will receive a copy of the Toolkit from either the lender or real estate licensee, and may well benefit from at least a quick review.

ROLES FOR REAL ESTATE LICENSEES: THE CFPB's RECOMMENDATIONS

Though TRID places primary legal responsibility for compliance on lenders, the Consumer Financial Protection Bureau (CFPB) has issued recommendations for real estate licensees on how they can help make the new regulatory regime function most efficiently.

In its "Real Estate Professional's Guide," the CFPB spells out several basic facts about TRID and what it expects from licensees.

- Learn in detail what TRID changed—and did not change—in the traditional settlement process and use that knowledge to advise homebuyers. Among the practices that TRID did not change are loan pre-approvals and pre-qualifications for borrowers. This means that homebuyers can continue to shop for homes using pre-qualification letters as well as pre-approvals. Pre-approvals have become increasingly important because many licensees prefer not to work with buyers who have not already obtained pre-approvals for specific loan amounts, thereby giving them financial credibility with home sellers. What the CFPB is emphasizing here is that even with full applications, involving the six essential elements noted above in the section on Loan Estimates, lenders can still provide shoppers with loan approvals based on information the consumer supplies.
- For TRID purposes, the real estate transaction starts with an application by the prospective borrowers, which in turn triggers the issuance of the LE within three business days. Everything up to that point is essentially the pre-disclosure stage—shopping for homes, informal shopping for financing, analyzing buyers' financial ability to proceed with a purchase and afford a home—and is not within the purview of TRID. But it is entirely within the traditional purview of real estate licensees.
- Once an LE has been issued, home purchasers have 10 days to shop for competing financial packages but within that period they must indicate their intent to proceed with the lender. Otherwise the specific terms and fees could change or the lender could revoke the offer. Licensees need to stay in close touch with homebuyers during the shopping period and make certain they inform the lender of their choice of their "intent to proceed." This can be communicated to the lender verbally or in writing or electronically, but is an essential step to move the mortgage process forward. Homebuyers may forget this deadline; licensees who are serious about guiding buyers to homes should not forget it.
- Once the homebuyer(s) indicate an intent to proceed, lenders can charge fees. Up until then, there can be no fees charged for lender services other than a reasonable fee for pulling credit. Lenders may not charge the borrower any fees in connection with the LE itself. All that changes once the borrower indicates an intent to proceed.
- Most changes to documents will not require new three day consumer review periods. The only changes that require delays of this type, according to the CFPB, are changes to the basic loan product, the addition of a prepayment clause to the loan after issuance of the LE, or an increase in the annual percentage rate by more than one-eighth of a percent in the case of a fixed rate loan or one-fourth of a percent for an ARM. For example, the following circumstances *do not* require a new three day waiting period that delays the transaction:
  - ❍ Unexpected discoveries on a walk-through such as a broken refrigerator or a missing stove, even if they require seller credits to the buyer.
  - ❍ Most changes to payments made at closing, including the amounts of the real estate commissions, administrative fees, prorations of taxes and utilities, and the amounts paid into escrow.
  - ❍ Typos discovered at the closing table.

The Guide can be accessed at: **http://www.consumerfinance.gov/know-before-you-owe/real-estate-professionals/**

BEST PRACTICES FOR REAL ESTATE PROFESSIONALS

Since the effective date of TRID, the real estate brokerage industry has sought to identify roles licensees can fulfill for their homebuyers. Among the most important are:

Facilitator in Chief

Licensees should be transactional pivot points—in regular touch with all the crucial participants in the home sale and mortgage financing/closing transactions to make certain that everyone has the information needed to move the deal to fruition. This includes working with homebuyers up front to make sure they have gathered the information that the lender and title/closing agent will need to proceed and that it has been delivered to the appropriate party in a timely manner.

Homebuyers should also understand the timelines mandated by TRID, reasons for more than one walk-through, and why realistic scheduling of closings—ideally avoiding back-to-back closings with the seller—are so important. More than ever, TRID compliance depends heavily on clear and open channels of communication between licensees, lenders, and closing service providers.

Licensees should make sure that the contract and all amendments are provided to the lender as soon as possible after the contract is executed, and provide any additional amendments to the contract no later than 10 to 14 days before the scheduled closing. They also need to provide the closing agent information as early as possible including their Florida real estate license number, email address, phone number, and the licensee's broker's Florida license number and address.

Buyer walk-throughs should be conducted as early as practical to avoid last-minute changes requiring buyer credits for repairs. Two separate walk-throughs are a good practice, if the seller will permit it. The first could be 7 to 10 days in advance of the scheduled closing, the other the day before or the day of the closing. Ideally provisions for two walk-throughs can be made in the sales contract itself.

Note on appraisals: Since appraisal fees are a no-tolerance item and must be estimated for the LE before the appraiser has had an opportunity to determine the degree of complexity of the valuation, it is helpful for licensees to provide basic information about the property to the lender if the property has any special characteristics that might require extra time and work (e.g., waterfront location, unusually large lot, large gross living area (GLA), unique architecture or design, minimal comparables in the area, presence of outbuildings, pool, etc.) so that there are no complications with the appraisal fee that get included in the Loan Estimate.

Trouble Shooter in Chief

Home sale transactions are complex and inevitably problems arise along the road to closing. Licensees who are pivot points and in close communication with all the parties in the process should be in the position to learn about, then promptly resolve, issues that affect their buyers' interests. They can also advise their buyers on how not to take actions that could delay the transaction, such as incurring new debts during the time between receiving the LE and the closing.

Closing Advisor

The lender must provide the CD to the borrower no later than three days before the scheduled closing. To help borrowers review the CD for errors or discrepancies, licensees need to get access to the borrower's CD as early as possible. Since lenders generally will not provide a copy to real estate licensees on federal privacy law grounds, licensees may turn to the closing agent or simply request a copy from the borrower directly. The key role is to compare the line items in the LE with the charges in the final CD as well as conformity with the sales contract. If there are problems, the licensee or the buyers need to contact the lender and settlement agent to determine how to correct them. If there are higher charges to the buyer than indicated on the LE, there needs to be a determination as to whether the additional fees are within tolerance limits.

Practical TRID Questions Affecting Licensees and Homebuyers

Q: The old HUD-1 had a comparison chart to show the applicable tolerance levels on specific fees and how the upfront GFE charges lined up with those on the GFE. Where is a similar tool on the Closing Disclosure that I can direct buyers' attention to?

A: There is no comparison chart in the CD that is equivalent to the HUD-1 chart. Licensees should encourage their buyers to retain copies of the Loan Estimate provided by the lender upfront, or any revised Loan Estimate issued subsequently, and compare it with the CD the buyer receives three days before closing. The lender is responsible for tracking charges to ensure that the amounts disclosed on the LE were made in good faith and that the charges at closing do not exceed the applicable tolerance. To the extent that there are any refunds due from the lender to the borrower resulting from a good faith violation, the refunds should be disclosed with lender credits on page 2 of the CD.

Q: I see that the Closing Disclosure requires a license number for the real estate broker. My office has multiple brokers who serve in different roles. Whose license number should go on the form?

A: The Contact Information box on the Closing Disclosure provides various forms of contact information for the main settlement service providers in the transaction, including the real estate professionals. The CFPB did not specify whose license number should go on the form, other than it should be information that allows the consumer to contact the brokerage if the consumer has questions or issues arise. As a result, brokerages and sales associates should use their best judgment in providing this information to lenders and closing agents. If the firm has a principal broker, that is one option. If the office has a managing broker, that is another option.

Q: The lender for my upcoming buyer's closing has refused to send me the Closing Disclosure, which I need in order to review costs for my borrower and to provide required information about the transaction to my broker, so that I may get my commission. What other sources might I have for the CD sufficiently in advance to advise my buyer?

A: One obvious source is the buyer. Another would be the closing agent or the lender, either of whom might be willing to provide you a copy upon receipt of a consent letter signed by your buyer waiving them of any possible privacy law violations. The settlement statement supplied by the closing agent will provide some of the information the licensee needs but the licensee still needs to review the Closing Disclosure with the buyer.

Q: Under Florida state contract law, is the date of consummation, for the purposes of TRID rules, the same as the date of the closing, when all notes are signed?

A: Consummation occurs when the borrower signs the loan documents for the mortgage committing the borrower to repay the lender. This typically occurs at closing.

Q: On my buyer's CD, I see some significant increases over what she expected. What fees can increase without limit from the Loan Estimate to the Closing Disclosure?

A: Prepaid interest, amounts paid into escrow, services for which the consumer shopped (including owner's title insurance), and fees changed after negotiations between the seller and buyer can, unless at the lender's determination, impact the loan and loan approval.

Q: When we discover problems during a walk-through five days in advance of the closing—say a seriously leaking water heater and the buyers are willing to escrow money for it—how should we as licensees proceed?

A: The most important thing you can do is to immediately contact the lender and settlement agent so that the Closing Disclosure can be updated with this adjustment before the closing. Adjustments such as this typically do not trigger a three day waiting period.

Q: Does TRID change who disburses funds and loan proceeds? Since the lender seems to have virtually all the legal responsibility for the transaction and prepares the Closing Disclosure used at settlement, does the lender also calculate and handle disbursements?

A: No. As under the previous HUD-1 system, the settlement agent continues to have responsibility for the closing, including disbursement of funds, recordation, and delivery of documents after the settlement. The Closing Disclosure, however, is not a disbursement document and as a result, the settlement agent likely will use a settlement document, such as the ALTA Settlement Statement or its own version.

Q: The lender and the title/settlement agent in my buyers' transaction have an affiliated business arrangement (Afba) relationship. Does that have any impact on tolerances for differences in fees disclosed on the Loan Estimate and the Closing Disclosure? Are fees subject to any tolerances governing charges for services?

A: Absolutely. Affiliate fees under TRID are treated as the lender's own fees, and therefore are subject to zero tolerance for variations between the LE and the final Closing Disclosure.

Q: What if my purchasers have business dealings abroad and are away when the Loan Estimate arrives. Does the LE expire at some point? Can it be renewed or reissued?

A: Remember that your buyers have 10 days after issuance of the Loan Estimate to communicate to the lender their intention to proceed. In the absence of such an expression of intent, the lender is not required to honor the terms offered. Since an expiration qualifies as a "changed circumstance," however, the lender has the option to issue a revised Loan Estimate, though the specific terms, rates, and fees might differ if the market has changed. Best practice is to make arrangements with buyers to receive the Loan Estimate electronically wherever they happen to be.

Q: Who is supposed to prepare the Closing Disclosure for the seller?

A: Usually the lender will ask the settlement agent to prepare the seller's version of Closing Disclosure and deliver it. The seller's Closing Disclosure covers only the fees and terms in the transaction pertinent to the seller.

Q: My buyer plans to obtain a mortgage from a bank for a property type that is exempted from coverage by TRID (a small piece of land). Do the old RESPA-TILA rules still apply to the mandatory disclosures from the lender?

A: Yes.

Q: TRID prohibits lenders from requiring mortgage shoppers to provide verifications of income, employment, and taxes prior to formal issuance of a Loan Estimate. What rules govern what my homebuyer needs to provide to obtain a pre-approval letter that we can show to home owners?

A: There is nothing in the rules to prevent your buyer from voluntarily supplying the information needed for a pre-approval letter. The information should stop short of constituting a formal application (i.e., the six elements TRID requires for an application.) For example, your buyer could provide everything except a property address. The lender will undoubtedly need but cannot require a Social Security number to pull credit reports and scores. Ask the lender what else is needed for a pre-approval.

Q: Under any circumstance can a settlement statement prepared by the settlement agent be used in place of the seller Closing Disclosure?

A: No. Settlement statements are routinely supplied to sellers and buyers but cannot be substituted for the seller's Closing Disclosure, which is mandatory under TRID.

Q: What exactly is the "mailbox rule" and how does it affect delivery of my buyers' Loan Estimate and Closing Disclosure?

A: The "mailbox rule" deals with the lender's requirement to deliver the Loan Estimate and the Closing Disclosure. In order to document that it complied with the three day rule, TRID sets up the following guidelines for judging when the LE or CD are deemed received by your buyers: 1) If the lender chooses to deliver via electronic means and complies with E-SIGN requirements, delivery is deemed to occur three business days after the documents are sent through an e-delivery system. 2) If the lender chooses to place the documents in the U.S. mail system, delivery is deemed occur three business days after the documents are placed in the U.S. mail. 3) When the lender uses hand-delivery, in person direct to your buyers, the day of delivery for the TRID timeline purposes is considered to be the day the documents are signed by the borrowers.

Q: What is the best practice for licensees when advising buyers and sellers on back-to-back closings?

A: If possible avoid back-to-back closings. Under TRID there is always the chance that the first closing will encounter a delay, creating problems for the second.

Q: What are the penalties for lenders when they are found to have not complied with the rules governing the Loan Estimate and Closing Disclosures?

A: Penalties can be severe. An unintentional error on the CD, if it goes uncorrected, could entail a $5,000 per day fine. A reckless error could incur $25,000 per day. Fines for intentional errors can extend as high as $1 million per day.

MODULE 2 REVIEW – COMPLYING WITH TRID

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. TRID (TILA-RESPA Integrated Disclosure) requirements apply to all closed-end mortgage transactions for home purchases except:

a. 15-year residential loans.
b. 30-year residential loans.
c. a refinancing loan.
d. a reverse mortgage.

2. TRID's Loan Estimate (LE) replaces what former disclosure(s)?

a. HUD-1
b. TILA and GFE
c. lead paint disclosure form
d. known defects form

3. TRID coverage does not apply for:

a. loans secured by vacant land.
b. construction loans.
c. loans for condominiums.
d. seller financing if the seller has made less than five loans during past year.

4. Charges on the Closing Disclosure can be higher than on the Loan Estimate if there:

a. are changes in hazard insurance premiums and escrows.
b. are changes in fees for services because the applicant shopped for services and selected a vendor not on the lender's list.
c. were changes in local tax rates.
d. are increases in the homeowners' association dues.

5. What changes or inaccuracies trigger a new three-day waiting period per a corrected CD?

a. typos discovered at closing
b. a change in the amount of the real estate commission
c. a missing stove discovered during the walk-through
d. a change in the APR by more than 1/8% on a fixed rate loan

6. The Loan Estimate under TRID has zero tolerance for errors in:

a. the property description.
b. the MLS listing data.
c. property taxes.
d. third party services.

7. How many days before consummation of the transaction must the lender provide the CD to the borrower/buyer?

a. 10 days
b. 7 days
c. 3 days
d. 1 day

8. The seven day waiting period between issuance of the LE and the CD can be waived if the:

a. buyer is beginning a new job and needs to move in immediately.
b. loan proceeds are necessary to preclude foreclosure in the case of a short sale.
c. seller is eager to move on and is willing to waive the waiting period.
d. lender needs to close before the end of the month.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

MODULE 2 REVIEW – COMPLYING WITH TRID

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9. How many days does a purchaser have to shop after the lender mails the Loan Estimate?

a. three business days
b. one week
c. ten days
d. seven business days

10. The Home Loan Toolkit must be sent to home buyers by the:

a. real estate broker within a week of the buyer receiving an LE.
b. lender within three business days of receiving an application.
c. closing agents within 10 days of the buyer receiving the CD.
d. seller within three days of ratifying a contract on the property.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

~ NOTES ~

Trending in Real Estate Today

By Deborah Long, PhD

Deborah Long is a Distinguished Real Estate Educator (DREI) and has been a teacher for more than 40 years. She earned her doctorate in adult education and has written more than 20 real estate textbooks.

RESOURCES: All resources for this module are on pages 120-125.

PART I:
LAWS AFFECTING DISCRIMINATION BASED ON SEX, FAMILIAL STATUS, AND DISABILITIES AND THE USE OF REAL ESTATE

LEARNING OBJECTIVES

Upon completion of Part I, the student will be able to:

1. Define terms such as *protected classes, disability* or *handicap, reasonable accommodations* and *modifications, assistance* and *service animals*.
2. Summarize the consequences that may result from discrimination based on sex, familial status, or disability.
3. Describe policies that landlords, property owners, property managers, and brokers should adopt in working with individuals with disabilities.
4. Distinguish between a *pet,* a *service animal,* and an *assistance animal.*

INTRODUCTION

Floridians are entitled by law to rent a place to live or buy a home without consideration of their national origin, race or color, sex, disability, religion, or familial status. Real estate licensees, brokers, landlords, or anyone in the housing business have violated these laws if they encourage property owners to sell or rent with discriminatory intent.[1]

Real estate brokers who engage in residential leasing must be thoroughly familiar with fair housing laws. Not only must brokers be aware of limits and obligations imposed under Florida law, they must also be familiar and comply with federal fair housing laws. Brokers must ensure that any unlicensed, salaried employees the broker employs to assist him or her in managing property for others are trained in fair housing requirements. The liability that brokerage firms are exposed to when their associates and employees violate these laws is significant.

This module will briefly review the protected classes and prohibited actions, but will then focus specifically on handicapping condition or disability, requests for accommodations or modifications, and permissible inquiries and restrictions under both the Americans with Disabilities Act and fair housing laws. For a more extensive review of fair housing laws, students should review Module 7: Federal and State Laws Pertaining to Real Estate in the Bert Rodgers Schools 63-Hour Sales Associate Pre-License Course.

PROTECTED CLASSES AND PROHIBITED CONDUCT

The protected classes are the same under both federal and Florida fair housing laws. The Florida Fair Housing Act is found at Chapter 760 of the Florida General Statutes. The law describes discrimination in a real estate transaction and broadly defines a real estate transaction as any of the following:

1. The making or purchasing of loans or providing other financial assistance:
   a. For purchasing, constructing, improving, repairing, or maintaining a dwelling; or
   b. Secured by residential real estate.
2. The selling, brokering, or appraising of residential real property.

The Fair Housing Act (FHAct)[2] prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions, and homeowners' insurance companies. Both the protected classes under federal and Florida state law prohibit discrimination based upon:

- Race
- Color
- National origin
- Religion
- Sex/Gender
- Handicap (Disability)
- Familial status

Note that marital status, sexual orientation, citizenship, and age are *not* protected classes under federal and Florida fair housing laws. The purpose of this module is not to focus on all of the protected classes but rather to focus on three protected classes: sex, familial status, and handicap—the three protected classes that generate the greatest amount of confusion and potential liability.

Sex

The term *sex* in the fair housing acts actually refers to *gender,* not to sexual orientation. For example, under the fair housing acts, it would be unlawful to charge male tenants a higher security deposit than females. This law does not specifically protect *sexual orientation* or *gender identity*. Thus a landlord who refuses to rent to an individual who is lesbian or gay or transgender may not necessarily violate fair housing laws.

However, depending on the actions of the landlord, the Housing and Urban Development agency (HUD) which enforces federal fair housing law, writes that "…a lesbian, gay, bisexual, or transgender (LGBT) person's experience with sexual orientation or gender identity housing discrimination may still be covered by the *Fair Housing Act*."[3] HUD provides these two examples:

– A gay man is evicted because his landlord believes he will infect other tenants with HIV/AIDS. That situation may constitute illegal disability discrimination under the Fair Housing Act because the man is perceived to have a disability, HIV/AIDS.

– A property manager refuses to rent an apartment to a prospective tenant who is transgender. If the housing denial is because of the prospective tenant's non-conformity with gender stereotypes, it may constitute illegal discrimination on the basis of sex under the Fair Housing Act.[4]

In addition, housing providers that receive HUD funding, have loans insured by the Federal Housing Administration (FHA), as well as lenders insured by FHA, may be subject to HUD program regulations intended to ensure equal access of LGBT persons. HUD provides this illustration:

> An underwriter for an FHA insured loan is reviewing an application where two male incomes are being used as the basis for the applicants' credit worthiness. The underwriter assumes the applicants are a gay couple and, as a result, denies the application despite the applicants' credentials. This scenario may

> violate HUD regulations which prohibit FHA-insured lenders from taking actual or perceived sexual orientation into consideration in determining adequacy of an applicant's income.[5]

Many state, city, and county laws specifically include sexual orientation and gender identity as prohibited classes. While the state of Florida does not include sexual orientation or gender identity in its state fair housing law, as of this writing, some communities *do* include such protected classes. Brokers may wish to contact their state or local human rights agency to determine coverage under those laws.

On a related note the U.S. Department of Justice (DOJ) has investigated sexual harassment in housing. The DOJ reports that "Women, particularly those who are poor and with limited housing options, often have little recourse but to tolerate sexual harassment or risk having their families and themselves removed from their homes. The Department's enforcement program is aimed at landlords who create an untenable living environment by demanding sexual favors from tenants or by creating a sexually hostile environment for them."[6]

Finally, brokers who are members of the National Association of REALTORS® (NAR) should note that this trade association (which represents more than one million real estate licensees in the U.S.) has in recent years amended Article 10 of its Code of Ethics to include sexual orientation and gender identity as protected classes. That means that REALTORS® are in violation of NAR standards of conduct should they participate in transactions where individuals have been discriminated against because of sexual orientation or gender identity and that those members could lose their standing in the NAR as a result.

Familial Status

Family status is another protected class under fair housing laws. The term **familial status** refers to children under the age of 18 living with parents or legal custodians. The term can also refer to pregnant women and people having custody of children under 18.

Brokers should understand that *marital status* is not a protected class. *Familial status* specifically refers to the presence of children, not the marital status of the parents or custodians. As a result, an owner may legally refuse to rent to a heterosexual couple if they aren't married, so long as the owner consistently applies this policy to all unmarried heterosexual couples without regard to any protected class. Also, while it may be illegal to discriminate based on age in hiring and lending situations, *age is not a protected class under fair housing laws*, other than for minors under familial status.

There are some exemptions for housing complexes that may appear to be unfriendly to families. In the FHAct, communities may be able to *chill the market* by marketing their residential units as *housing for older adults*. However, these communities or complexes must meet certain requirements in order for them to characterize their properties in this way.

When familial status was first recognized as a protected class, communities had to have certain facilities in place for older people in order to qualify for the exemption. The Housing for Older Persons Act of 1995 (HOPA) made several changes to the 55 and older exemption.

First, it eliminated the requirement that 55 and older housing have "significant facilities and services" designed for the elderly. Significant facilities might have included social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive healthcare programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them.

Second, HOPA established a *good faith reliance* immunity from damages for persons who in good faith believe that the 55 and older exemption applies to a particular property, if they do not actually know that the property is not eligible for the exemption, and if the property has formally stated in writing that it qualifies for the exemption.

HOPA retains the requirement that housing must have one person who is 55 years of age or older living in at least 80% of its occupied units. It also still requires that housing publish and follow policies and procedures that demonstrate an intent to be housing for persons 55 and older (rather than housing for adults or for singles, for example).

An exempt property will not violate the Fair Housing Act if it excludes families with children, but it does

not have to do so. Of course, the property must meet the Act's requirements that at least 80% of its occupied units have at least one occupant who is 55 or older, and that it publish and follow policies and procedures which demonstrate an intent to be 55 and older housing.

Note that cities and counties may establish limits on occupancy based on the number of prospective tenants and/or the number of bedrooms or sewage disposal systems available. Thus, a landlord could refuse to rent a one-bedroom dwelling to a family of five people, but not because some of the family members are children. Rather, the reason would be that there are too many occupants for a small unit.

Generally HUD has ruled that two people can occupy one bedroom, but HUD has also indicated that landlords and property managers can adopt reasonable occupancy standards as well based on the size of the bedrooms.[7]

Case in 2014

Florida Justice Institute (FJI) filed a lawsuit against a real estate licensee and two real estate firms in Broward County after the licensee repeatedly told testers that children were not allowed to live in an apartment building, which is a violation of the Fair Housing Act. This was after the licensee had already forced a woman to move out after she became pregnant.

In early 2014, FJI reported that it successfully negotiated a settlement agreement requiring the payment of damages and attorneys' fees, as well as requiring the defendants to adopt policy changes to prevent familial status discrimination in the future, and undergo training on fair housing laws.[8]

Unacceptable Practices

Unless an owner falls within one of the limited exemptions of fair housing laws (selling one's own property or leasing space in owner-occupied rental property), no one may take any of the following actions based on race, color, national origin, religion, sex, familial status, or handicap:

- refuse to engage in a real estate transaction
- refuse to rent or sell property
- set different terms, conditions, or privileges for a sale or rental
- provide different housing services or facilities
- refuse to receive or fail to transmit a bona fide offer
- indicate that a property is not available when it actually is
- refuse to negotiate

Case in 2012

In a case involving familial status in early 2012, a jury in the Southern District of Florida awarded more than $1 million to thirteen individuals and the Fair Housing Center of the Greater Palm Beaches, Inc. Seven families who resided in Pelican Lake Village, an apartment complex in Pahokee, Florida, brought the lawsuit.

In 2008, the owner of the property sold Pelican Lake for the purpose of providing housing for ex-offenders, including sex offenders. The sex offenders could not live near the school bus stop for Pelican Lake and the owner began working together to force all families with school age children to move out. The owner sent out a notice stating that the property had been sold, stating that "IF YOU HAVE CHILDREN LIVING OR STAYING IN THE APARTMENT UNDER THE AGE OF 18 YEARS OLD, YOU WILL HAVE TO VACATE THE PROPERTY BEFORE JANUARY 1st, 2009."

The notice also characterized the new status of the property as an "ADULTS ONLY COMMUNITY" and concluded with the statement that "IF YOU REFUSE TO MOVE OR COMPLY WITH THE NEW OWNERS WE WILL EVICT YOU IMMEDIATELY." The current tenants received visits from the new owners demanding that they leave Pelican Lake immediately. The seven families as well as other families with children, sought out new housing and moved out of Pelican Lake at the end of 2008 within a month of being informed that they must vacate the complex.

The owners were told to pay both compensatory and punitive damages. Individual family members received total awards as high as $141,000.00.[9]

- steer a person towards or away from particular property
- threaten, intimidate, retaliate against, or otherwise interfere with the use and enjoyment of property
- for profit, persuade owners to sell or rent because persons from a protected class are moving into the area (blockbusting)

It is important to note that *no owner may claim any exemption* if the owner employs a broker or pays any other person to assist him/her in the sale or lease of his or her property. Thus real estate licensees should refuse to work with sellers who insist on discriminatory practices.

HANDICAP OR DISABILITY

While there is considerable confusion about the meaning of the terms *sex* and *familial status* as they apply to fair housing laws, perhaps the greatest number of questions arise in working with individuals who have disabilities. According to HUD, the majority of housing discrimination complaints nationally arise from either familial status or handicap.[10]

First, what is a handicap, or to use the more sensitive term, *disability?* (Terms such as *cripple* and *invalid* are considered insensitive and should be avoided). When most people think of a disability, they often picture someone in a wheelchair. But there are many different types of disability. Under both state and federal fair housing laws, an individual has a **handicapping condition** if the individual:

1. has a physical or mental disability (including hearing, mobility, or visual impairments, chronic alcoholism, chronic mental illness, AIDS, AIDS related complex, autism, and mental retardation) *that substantially limits one or more major life activities, or*
2. has a record of such a disability, *or*
3. is regarded as having such a disability

The Code of Federal Regulations defines **physical** *or* **mental impairment** as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; *or*

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[11]

The term *physical* or *mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

Major life activities include the ability to care for yourself, perform manual tasks, walk, talk, see, hear, breathe, learn, and work.

In addition to protections afforded under fair housing laws, federal laws under the Americans with Disabilities Act (ADA) afford protection to certain individuals who have a handicapping condition regarding access to places of public accommodation and commercial, educational, or governmental facilities. Depending on the facility and its use, property owners may be subject to both ADA and fair housing laws.

Accommodations and Modifications

Discrimination claims based on disability often arise due to the owner's refusal to make accommodations or modifications. It is important to understand what constitutes a "*reasonable request* for an accommodation or modification."

First, what is the difference between an *accommodation* and a *modification*? An **accommodation** is a change or variance in rules, services, practices, or policies that allow a person with a handicapping condition to enjoy the housing, but does not alter application of the rule, policy, service, or practice as to other tenants.

Landlords may not refuse to make reasonable accommodations in rules, policies, practices, or services if necessary for the disabled person to use the housing. Examples of **reasonable accommodations** include:

- assigning a reserved parking space to a mobility-impaired tenant near his or her apartment when the complex offers tenants ample, unassigned parking

- providing written material either orally or in large print or Braille to a visually impaired tenant
- reminding a developmentally challenged tenant that rent is due in three days
- permitting a live-in aide to reside with a disabled tenant even if it violates normal policy
- altering chemicals used for pest control or maintenance or, if alternate chemicals are ineffective, at least providing an allergic tenant with several days' notice prior to using the chemicals in his/her building

A **modification** alters the physical characteristics of the dwelling or common areas of a building. These requests generally arise only in lease transactions, because in a purchase, the buyers acquire and control the property and may make whatever changes they wish. In lease transactions, prospective tenants with a handicapping condition may request a landlord to allow reasonable modifications to the dwelling or common use areas to enable the tenant to use the housing.

Generally, landlords may not refuse such reasonable requests, but the landlord may require the tenant to pay for the modifications. Further, if *internal modifications* would interfere with a future occupant's use, then the landlord may require the tenant, if reasonable and necessary, to restore the dwelling to its original condition at the end of the tenancy.

The same is not true of *external modifications*, such as a wheelchair ramp. Typically tenants may not be required to remove the external modification at the end of the tenancy.

Modifications fall within one of the following three classifications, namely:

1. **Modifications that do not need to be restored to the original condition.** These include modifications that do not interfere with future occupants' use of the unit and modifications to the public and common use areas (often external), such as widening interior doorways, grab bars in bathrooms, and ramps to afford ingress and egress.
2. **Modifications that must be restored to original condition but do not require an escrow account.** Typically these modifications are relatively minor, easy to restore, and inexpensive, such as replacing a cabinet underneath a bathroom sink that was removed to allow wheelchair access.
3. **Modifications that must be restored but are moderately expensive and require an escrow account.** An owner who permits more extensive modifications that will cost more to remediate, such as lowering kitchen and bathroom counters or replacing all the kitchen cabinets, may lawfully request the tenant to deposit a reasonable agreed sum into an escrow account that will be held until the end of the tenancy and used to pay for the restoration of the premises. Any unused funds from such deposits that are not needed to pay for the restoration should be returned to the tenant.

Requests for Accommodations and Modifications

According to *Joint Statements* issued by HUD and the DOJ in May 2004 and March 2008 regarding reasonable accommodations and modifications respectively, owner/landlords may *not* require that an accommodation or modification request be in writing.

> When a tenant "... makes clear to the housing provider that [the tenant] is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of [a] disability" or is requesting a structural change, the tenant should explain the type of accommodation/ modification sought and, if the need is not apparent, the relationship between the requested accommodation or modification and the disability."[12]

HUD and the DOJ offers these examples:

Example 1: A tenant, whose arthritis impairs the use of her hands and causes her substantial difficulty in using the doorknobs in her apartment, wishes to replace the doorknobs with levers. Since there is a relationship between the tenant's disability and the requested modification and the modification is reasonable, the housing provider must allow her to make the modification at the tenant's expense.

Example 2: A homeowner with a mobility disability asks the condo association to permit him to change his roofing from shaker shingles to clay tiles and fiberglass shingles because he alleges that the shingles are less fireproof and put him at greater risk during a fire. There is no evidence that the shingles permitted by the homeowner's association provide inadequate fire protection and the person with the disability has not identified a nexus

between his disability and the need for clay tiles and fiberglass shingles. The homeowner's association is not required to permit the homeowner's modification because the homeowner's request is not reasonable and there is no nexus between the request and the disability.

The *Joint Statements* note that a request under the Fair Housing Act:

- need not be made in any particular manner or time period,
- may be requested by another person acting on behalf of the disabled individual,
- need not reference the Fair Housing Act or use the term "reasonable accommodation/ modification,"
- may be oral or in writing, (although written helps prevent misunderstandings), and
- can't be refused merely because the tenant didn't follow the landlord's request procedure.[13]

In the *Joint Statements*, HUD indicates that in response to a request for a reasonable modification, a housing provider may request reliable disability-related information that:

1. is necessary to verify that the person meets the Act's definition of disability (that is, has a physical or mental impairment that substantially limits one or more major life activities);
2. describes the needed modification; and
3. shows the relationship between the person's disability and the need for the requested modification. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual herself (for example, proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits or a credible statement by the individual).

Who can provide the statement? A doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability may also provide verification of a disability. In most cases, an individual's medical records or detailed information about the nature of a person's disability is not necessary for this inquiry.

Once a housing provider has established that a person meets the Act's definition of disability, the provider's request for documentation should seek only the information that is necessary to evaluate if the reasonable modification is needed because of a disability. Such information must be kept confidential and must not be shared with other persons unless they need the information to make or assess a decision to grant or deny a reasonable modification request or unless disclosure is required by law (e.g., a court-issued subpoena requiring disclosure).

A housing provider is entitled to obtain information that is necessary to evaluate whether a requested reasonable modification may be necessary because of a disability. If a person's disability is *obvious*, or otherwise *known* to the housing provider, and if the need for the requested modification is also readily apparent or known, then the provider *may not* request any additional information about the requester's disability or the disability-related need for the modification.

If the requester's disability *is known* or *readily apparent* to the provider, but the need for the modification is not readily apparent or known, the provider may request only information that is necessary to evaluate the disability-related need for the modification.

The *Joint Statements* again provide good illustrations of appropriate or inappropriate requests:

Example 1: An applicant with an obvious mobility impairment who uses a motorized scooter to move around asks the housing provider to permit her to install a ramp at the entrance of the apartment building. Since the physical disability (for example, difficulty walking) and the disability-related need for the requested modification are both readily apparent, the provider may not require the applicant to provide any additional information about her disability or the need for the requested modification.

Example 2: A deaf tenant asks his housing provider to allow him to install extra electrical lines and a cable line so the tenant can use computer equipment that helps him communicate with others. If the tenant's disability is known, the housing provider may not require him to document his disability; however, since the need for the electrical and cable lines may not be apparent, the housing provider may request information that is neces-

sary to support the disability-related need for the requested modification.[14]

Individuals in Florida who believe that they have been victims of an illegal housing practice may:

- file a complaint with the HUD
- file their own lawsuit in federal or state court
- file a complaint with the Florida Human Relations Commission

Assistance or Service Animals

Perhaps the request most frequently encountered by brokers or owners is from tenants who have an assistance or service animal. An assistance animal may also be referred to as a *support animal, therapy animal,* or *service animal*. Owners who have a *no pet* policy are prohibited by both state and federal law from refusing to rent to a person who has a service or assistance animal, whether in a vacation rental or short- or long-term lease. Supervising brokers should seek to ensure that their associated licensees and employees clearly understand that assistance or service animals are *not* pets.

While the Americans with Disabilities Act (ADA) now defines a **service animal** as a *canine*, the Fair Housing Act has no such limit on assistance animals. Such animals may be cats, birds, ponies, monkeys or guinea pigs, to name a few. HUD explains:

> An **assistance animal** is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability. Assistance animals perform many disability-related functions, including but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to sounds, providing protection or rescue assistance, pulling a wheelchair, fetching items, alerting persons to impending seizures, or providing emotional support to persons with disabilities who have a disability-related need for such support.[15]

For purposes of reasonable accommodation requests, neither the FHAct nor Section 504 of the Rehabilitation Act of 1973 requires an assistance animal to be individually trained or certified. While dogs are the most common type of assistance animal, other animals can also be assistance animals.

If a housing community has a policy allowing pets that do not exceed a certain size and weight, the policy may need to be waived to accommodate the assistance animal.

Supervising brokers may want to develop two policies: one that addresses animals or pets in general, and separate rules that apply to assistance animals. Most likely there would be an overlap to some extent between the policies, such as requirements for vaccinations, neutering, cleaning up after the animal, using a leash, keeping the animal quiet and under control, and prohibiting aggressive or dangerous animals.

These policies would have to differentiate between those owners who may not charge a pet deposit for assistance or service animals (although they may deduct from the tenant security deposit any damage caused by the assistance animal) and those who may charge a pet deposit. If a tenant with an assistance animal adds another animal to the household without proof of its assistance nature, the owner may charge a pet deposit for the unverified animal, but not for the assistance animal.

In 2013, HUD issued a notice, "Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs"[16] to explain owners' obligations under both the Fair Housing Act and the ADA regarding assistance or service animals. The Notice distinguishes between *assistance animals* under the Fair Housing Act (and Section 504 of the Rehabilitation Act of 1973), and *service animals* as defined under the ADA and "applies to all housing providers covered by the FHAct, Section 504 and/or the ADA."

The Notice explains owners' obligations and the appropriate test to apply under each Act. The Notice states:

> In situations where the ADA and the FHAct/Section 504 apply simultaneously (e.g., public housing agency, sales or leasing offices, or housing associated with a university or other place of education), housing providers must meet their obligations under both the reasonable accommodation standard of the FHAct/Section 504 and the service animal provisions of the ADA.... [P]ublic accommodations that

operate housing facilities may not use the ADA definition of service animal as a justification for reducing their FHAct obligations.[17]

Review Table 3:1 below for a comparison of the ADA and the Fair Housing Act.

Table 3:1 ADA and Fair Housing Act Details[18]

Applicable Law	Property Subject to Law	Type of Animal	Permissible Inquiries
ADA: Americans with Disabilities Act	Public entities, e.g., commercial, governmental, & educational facilities & places of public accommodation (all places open to the public, e.g., restaurants, hotels, taxis, shuttles, grocery, department and other retail stores, hospitals, medical offices, theaters, health clubs, parks, zoos, etc.	*Service animal* defined as a *canine* only, with limited exception for miniature horse.	Does this person need this dog due to a disability? *and* What work or tasks has the dog been trained to perform?
Fair Housing Act	Residential dwelling units	*Assistance* animals may include multiple species, e.g., dogs, cats, monkeys, birds and other animals.	Does this person have a disability? *and* Does the animal provide assistance, perform tasks or services or provide emotional support that alleviates the symptom or effect of the person's disability?

Inquiries Under the Fair Housing Act (FHAct)

An *assistance animal* under the FHAct is not required to be individually trained or certified as are service animals. Similar to the ADA, if the disability and the disability-related need is either readily apparent or already known to the housing provider, then no further documentation may be requested.

If either the disability or the need for the animal is not readily apparent, for example, a person prone to seizures who has a seizure-alert service animal, then an owner or broker-property manager may ask the following two questions when faced with a request for an accommodation to allow an assistance animal:

1. Does the person seeking to use the animal have a disability, (i.e., a physical or mental impairment that substantially limits one or more major life activities)?

and

2. Does the animal work, provide assistance, perform tasks or services for the benefit of the person with the disability or provide emotional support that alleviates one or more of the identified symptoms or effects of the person's disability?

If the answer to either question is *no*, then the request for accommodation may be denied, but if the answer to both questions is *yes*, then the owner generally must grant an accommodation to existing policy and allow the animal access to all areas of the premises where persons are permitted entry.

If the disability is obvious, but the need for and tasks performed by the animal are not apparent, then the housing provider may only ask the tenant for documentation of the disability related need for the animal.

What if a tenant states that the animal is needed for

emotional support? HUD advises that the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability. Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support.[19]

Housing providers may not ask an applicant or tenant to provide access to his or her medical records or medical providers or to provide extensive information or documentation of the person's physical or mental impairments.

A substantiated request may be denied only if making the accommodation:

1. would impose an undue financial or administrative burden or would fundamentally alter the housing provider's services, or
2. the specific animal poses a direct threat to the safety and health of others that can't be reduced by other reasonable accommodations, or
3. the specific animal would cause substantial physical damage to the property of others that can't be reduced or eliminated by other reasonable accommodations.

The determination of either #2 or #3 "...must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct—not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused."[20]

Americans with Disabilities Act (ADA) and Service Animals

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation.[21] The law applies to *public entities*, (i.e., federal, state, and local governmental programs, services, activities, and facilities as well as to commercial facilities, educational facilities, and public accommodations, including leasing offices, shelters, assisted living facilities, guest lodging, most retail establishments, and many others).

Ten years after the passage of the ADA, the US Department of Justice (DOJ) revised ADA regulations to narrowly define a **service animal** as:

> ..any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability....[22]

Note the specific reference to *dogs*. However, other ADA regulations provide a limited exception for miniature horses:

> (1) *Reasonable modifications*. A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.
>
> (2) *Assessment factors*. In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—
>
> (i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
>
> (ii) Whether the handler has sufficient control of the miniature horse;
>
> (iii) Whether the miniature horse is housebroken; and
>
> (iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.[23]

The regulations provide that the work or tasks per-

formed by the service animal must be *directly related* to the person's disability and mention the following examples:

- assisting persons who are blind or have low vision to navigate and other tasks
- alerting persons who are deaf or hard of hearing to the presence of people or sounds
- providing nonviolent protection or rescue work
- assisting an individual having a seizure
- pulling a wheelchair
- alerting a person to the presence of allergens
- retrieving items such as medicine, or the telephone
- providing physical support and assistance with balance or stability to a mobility-impaired person
- preventing or interrupting impulsive or destructive behaviors in persons with psychiatric or neurological disabilities[24]

An individual's need for an animal to deter crime or to provide companionship does not meet the criteria for a service animal, according to the ADA.[25] In other words, if an individual wants a large breed of dog to scare off unwanted intruders, that reason is not sufficient to cause a landlord to permit the animal.

If an animal meets the ADA definition of service animal, then public entities and public accommodations must allow the service animal into the covered facility.

If the individual's disability and the work or tasks performed by the animal are apparent, then broker-property managers and owners may not request any further documentation or verification. If either the disability or the work/tasks performed are not apparent, then the only two questions the covered facility may ask are:

1. Does this person need this animal to accompany him/her due to a disability?

   and

2. What work or tasks has the animal been trained to perform that relate to the disability?[26]

Brokers, property managers, and owners *may not ask* about the nature or extent of the disability nor require medical records or proof that the animal has been certified, trained, or licensed as a service animal, nor may it charge any fee for the service animal's admittance. If it either is apparent or the individual verifies the existence of a disability and the related work or tasks performed by the animal, then the service animal must be admitted to all areas of the facility to which the public has access *unless*:

1. the animal is out of control and the handler does not take effective action to control the animal, or
2. the animal is not housebroken, or
3. the animal poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by a reasonable modification to other policies, practices, and procedures[27]

Summary of Laws Regarding Assistance Animals

While the ADA maintains a narrow definition of a service animal, federal and state fair housing laws define the concept more broadly.

In contrast to the ADA's narrow definition of *service animal*, what constitutes an *assistance animal* under both federal and Florida fair housing laws is much broader and may include cats, birds, dogs, monkeys, and other species.

Florida's Vocational Rehabilitation Act states:

Service animal means an animal that is trained to perform tasks for an individual with a disability. The tasks may include, but are not limited to, guiding a person who is visually impaired or blind, alerting a person who is deaf or hard of hearing, pulling a wheelchair, assisting with mobility or balance, alerting and protecting a person who is having a seizure, retrieving objects, or performing other special tasks. A service animal is not a pet.

F.S. 413.08(d)

(2) An individual with a disability is entitled to full and equal accommodations, advantages, facilities, and privileges in all public accommodations. This section does not require any person, firm, business, or corporation, or any agent thereof, to modify or provide any vehicle, premises, facility, or service to a higher degree of accommodation than is required for a person not so disabled.

(3) An individual with a disability has the right to be accompanied by a service animal in all areas of a

public accommodation that the public or customers are normally permitted to occupy.

(a) Documentation that the service animal is trained is not a precondition for providing service to an individual accompanied by a service animal. A public accommodation may ask if an animal is a service animal or what tasks the animal has been trained to perform in order to determine the difference between a service animal and a pet.

(b) A public accommodation may not impose a deposit or surcharge on an individual with a disability as a precondition to permitting a service animal to accompany the individual with a disability, even if a deposit is routinely required for pets.

(c) An individual with a disability is liable for damage caused by a service animal if it is the regular policy and practice of the public accommodation to charge nondisabled persons for damages caused by their pets.

(d) The care or supervision of a service animal is the responsibility of the individual owner. A public accommodation is not required to provide care or food or a special location for the service animal or assistance with removing animal excrement.

(e) A public accommodation may exclude or remove any animal from the premises, including a service animal, if the animal's behavior poses a direct threat to the health and safety of others. Allergies and fear of animals are not valid reasons for denying access or refusing service to an individual with a service animal. If a service animal is excluded or removed for being a direct threat to others, the public accommodation must provide the individual with a disability the option of continuing access to the public accommodation without having the service animal on the premises.

(4) Any person, firm, or corporation, or the agent of any person, firm, or corporation, who denies or interferes with admittance to, or enjoyment of, a public accommodation or otherwise interferes with the rights of an individual with a disability or the trainer of a service animal while engaged in the training of such an animal pursuant to subsection (8), commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.[28]

Summary Regarding Accommodations and Modifications

The vast majority of residential property owners who seek to rent their property and any licensees they employ will be subject to and must comply with both federal and Florida laws that require owners to make *reasonable accommodations* for persons with disabilities, including those who wish to have an assistance animal.

Owners or their licensees must respond to requests for accommodations or modifications. The failure to respond to an accommodation/modification request is in itself a violation of the Fair Housing Act.[29]

Licensees managing commercial properties, whether shopping centers, office buildings, or other commercial properties that do not provide any lodging, generally must only comply with the ADA laws and regulations regarding service animals and do not have to be concerned with the FHAct's assistance animal issues.

The sale, purchase, or lease of most residential property clearly will be subject to fair housing laws, but leasing certain residential property may also be subject to the service animal requirements under the ADA if the property is a "place of public accommodation." According to some interpretations, leasing rooms in a bed and breakfast, vacation rental properties, or units in an apartment or condominium complex would qualify as a "place of public accommodation" (as would a broker's business office), thus requiring compliance with both laws.

When dealing with multiple laws, HUD's April 2013 *Notice* recommends that a provider first apply the ADA *service animal* test, because if the animal qualifies as a service animal then the animal must be permitted to accompany the individual in all areas of the facility that persons normally may go unless the animal is uncontrollable or not housebroken or presents a direct threat to others' health and safety.

If the animal does not qualify as a service animal, whether because it's not a canine or because it provides emotional support, then the housing provider must evaluate the request under the

assistance animal standards under fair housing laws.

Licensees must remember, for example, that emotional support animals that do not qualify as service animals under the ADA, may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the FHAct.

Design and Construction: Access to Buildings

The design of buildings has been influenced by the ADA[30] as well as federal fair housing laws, particularly in the area of covered multifamily buildings certified as ready for occupancy on and after March 13, 1991.

Covered multifamily buildings are:

1. buildings having one or more elevators and four or more units, *and*
2. ground floor units in buildings with four or more units.[31]

These buildings must satisfy the following requirements, namely:

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

Understand that if a building with four or more units has no elevator (and had its first occupancy after March 13, 1991), the above standards apply only to ground floor units. If building standards are more stringent under state or local law than the foregoing requirements, then the state or local standards prevail.

Enforcement and Penalties

Individuals who believe that they have been victims of an illegal housing practice may file a complaint with the HUD or file their own lawsuit in federal or state court. The Department of Justice brings suits on behalf of individuals based on referrals from HUD.[33] The federal government is also involved in enforcement matters. In fiscal years 2012 and 2013, HUD and Fair Housing Assistance Program (FHAP) agencies obtained over $425 million in compensation for victims of housing discrimination. In addition, HUD and FHAP agencies obtained a broad range of housing and public interest relief. This relief included making housing opportunities available, obtaining reasonable accommodations for persons with disabilities, and modifying applicant and tenant policies so that they comply with fair housing laws. Further, the U.S. Department of Justice recovered more than $2 million in damages and civil penalties in Fair Housing Act cases that were investigated and charged by HUD.[34]

Floridians who think they have experienced housing discrimination can also turn to the Florida Commission on Human Relations. The Florida Legislature created the Florida Commission on Human Relations in

Case: *HUD vs. H&H Development Group, et.al., FHEO 07-11-0533-8*

In late 2012, HUD charged the owner, an architect, the builder, and designers of a condominium complex in Pevely, Missouri with building a multifamily complex that was inaccessible to persons with disabilities (3 story building with 36 units total and no elevator).

Steps and inaccessible curb ramps prevented people in wheelchairs from accessing the units, the clubhouse, and common areas. Additionally, the complex lacked any designated parking and the units had inaccessible kitchens, thermostats, and mailboxes. Knob-style hardware on the front doors (instead of levers) made it difficult for people with arthritis to open their doors.

In 2014, the architect agreed to pay a total of $35,000 of which $32,200 provided funding to retrofit the property. One of the contractors agreed to perform work to correct inaccessible features in the common areas.[32]

1969 to enforce the Florida Civil Rights Act and to address discrimination issues through education, outreach, and partnerships. The Commission has investigated and closed more than 74,000 cases and has negotiated close to $13 million in settlement amounts for more than 1,500 people through its mediation services.

According to the Commission, "For fiscal year 2008–2009, 39% of the cases investigated by [its] housing investigations unit were based on disability, with race a close second at 27%."[35]

The Florida Commission on Human Relations basic statutory responsibilities are set forth in Florida's Fair Housing Act which addresses discrimination in housing based on race, color, national origin, sex, disability, religion, and familial status. The Commission also deals with employment discrimination.

Since 1969, when the Commission was established, state and federal laws have significantly expanded the jurisdiction of the Commission. The Commission may institute civil actions in any appropriate court if it is unable to obtain voluntary compliance with Florida's Fair Housing Act (FFHA).

The court may impose the following fines for each violation:

1. Up to $10,000, if the respondent has not previously been found guilty of a violation of the FFHA
2. Up to $25,000, if the respondent has been found guilty of one prior violation of the FFHA within the preceding five years
3. Up to $50,000, if the respondent has been found guilty of two or more violations of the FFHA within the preceding seven years

In imposing a fine, the court must consider "the nature and circumstances of the violation, the degree of culpability, the history of prior violations of Florida's fair housing act, the financial circumstances of the respondent, and the goal of deterring future violations."[36]

In addition to fines, the court will award reasonable attorney's fees and costs to the Commission when the Commission prevails.

Private parties can bring a complaint to the Florida Commission on Human Relations, but so can any local agency certified as substantially equivalent, such as fair housing councils.[37]

Here is a partial list of such groups in Florida:

City of Bradenton Planning & Community Development Dept.
101 Old Main St
Bradenton, FL
(941) 932-9408
http://www.cityofbradenton.com/index.asp?Type=B_BASIC&SEC=%7B35F774FE-96EA-4566-8D9B-5E6E93BE3F71%7D

Fair Housing Center of Greater Palm Beaches
1300 W. Lantana Road, Suite 200
Lantana, FL 33462
(877) 910-3247
http://fairhousingflorida.com/

Fair Housing Continuum, Inc.
4760 North U.S. Hwy 1, Ste. 203
Melbourne, FL 32935-7200
(321) 757-3532
http://www.fairhousingcontinuum.com/about-us/

Florida Commission on Human Relations
4075 Esplanade Way, Rm. 110
Tallahassee, FL 32399
(850) 488-59002
http://fchr.state.fl.us/

Hillsborough County Board of County Commissioners
601 East Kennedy Blvd.
Tampa, FL 33602
(813) 272-5735
http://www.hillsboroughcounty.org/bocc/

Jacksonville Human Rights Commission
117 West Duval Street, Suite 350
Jacksonville, FL
(904) 630-4911
http://www.coj.net/departments/human-rights-commission.aspx

Legal Aid Society of Palm Beach County, Inc.
423 Fern Street, Suite 200
West Palm Beach, FL 33401
(561) 655-8944
http://www.legalaidpbc.org/

Orlando Human Relations Department
400 South Orange Avenue, #9

Orlando, FL 32801
(407) 246-2122
http://www.cityoforlando.net/oca/human-relations/

Palm Beach County Human Rights Council
P.O. Box 267
Palm Beach, FL 33402
(561) 358-0105
http://www.pbchrc.org/

Pinellas County Housing Authority
11479 Ulmerton Road
Largo, FL 33778
(727) 443-7684
http://www.pinellashousing.com/

Pinellas County Office of Human Rights
400 S. Ft. Harrison Ave., 5th Floor
Clearwater, FL 33756
(727) 464-4880
http://www.pinellascounty.org/humanrights/

St Petersburg Community Affairs Division
One 4th Street, North, MSC Bldg, 3rd Floor
St. Petersburg, FL 33701
(727) 893-7345
http://www.stpete.org/city_departments/human_resources/community_affairs.php

Tampa Office of Human Rights
102 E. 7th Avenue
Tampa, FL 33602
(813) 274-5835
http://fchr.state.fl.us/fchr/outreach/community_resource_map/district_3/hillsborough_county__5/discrimination/human_rights/office_of_human_rights

Florida real estate licensees who participate in discriminatory acts may find themselves facing administrative hearings in front of the Florida Real Estate Commission (FREC). Should licensees be found in violation of fair housing laws, they could be subject to the loss of their license.

SUMMARY

Veteran real estate licensees can probably recall a time when housing discrimination was prevalent and accepted. While some might say that more change is necessary, many would agree that most real estate licensees and consumers are very well educated on the subject of fair housing.

If there are areas of confusion it is in the implementation, not the philosophy of fair housing. Licensees and property owners still find it challenging to comply with the laws and rules regarding the protected classes of sex, familial status, and handicap. Education is the key to making sure that Americans have equal housing and economic opportunities.

MODULE 3, PART I REVIEW – TRENDING IN REAL ESTATE TODAY

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. All of the following are protected classes under federal and fair housing laws *except*:

a. national origin.
b. citizenship.
c. handicap.
d. familial status.

2. In addition to following fair housing laws with respect to protected classes, brokers who are members of the National Association of REALTORS® (NAR) must also be mindful of discrimination based on:

a. marital status.
b. gender identity.
c. financial qualifications.
d. education.

3. The term *familial status* does *not* refer to:

a. a pregnant woman.
b. children under 18.
c. individuals who are the guardians for minors.
d. an elderly person in a wheelchair.

4. The act of persuading owners to sell or rent because persons from a protected class are moving into the area is known as:

a. steering.
b. channeling.
c. redlining.
d. blockbusting.

5. The term *handicap* does *not* refer to people:

a. with mental illnesses.
b. with alcoholism.
c. who are perceived to have a disability.
d. who are a minority in their neighborhood.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

PART II:
REAL ESTATE LITIGATION CLASSICS

LEARNING OBJECTIVES

Upon completion of Part II, the student will be able to:

1. Discuss the significance and the impact of the Edina case on agency relationships and practices in Florida.
2. Summarize the best practices in dealing with problems related to mold, based on the Ballard case.
3. Cite the rules on Internet advertising, particularly as they related to the Internet, and discuss issues related to the *NAR v. DOJ* lawsuit.
4. Discuss the impact of the Abneys rebate case as it affects the practice of receiving rebates and other compensation in a real estate transaction.
5. Apply disclosure rules as they apply to airports and similar structures in terms of the Whidbey Island case.
6. Describe best practices for handling questions regarding a competitor's and one's own real estate compensation.

INTRODUCTION

The real estate profession, by and large, is not one that dwells on the past. Nor is it an introspective one.

There may be several reasons for this lack of reflection. Perhaps the most significant reason is that the real estate brokerage profession is not that old. The first efforts to organize real estate into a profession did not take place until the late 1800s and culminated in the founding of the National Association of REALTORS® (NAR). NAR started as the National Association of Real Estate Exchanges (NAREE) on May 12, 1908 in Chicago. With 120 founding members, 19 Boards, and one state association, the NAREE's objective was "to unite the real estate men of America for the purpose of effectively exerting a combined influence upon matters affecting real estate interests."

Another benchmark suggests that the real estate profession is fairly young. Its professional code of conduct, the NAR Code of Ethics, is barely 100 years old, having celebrated its centennial in 2013. The first state to enact license law, California, is yet to celebrate its century of licensure (that will happen in 2017).

Another reason that the real estate profession may not be interested in its origins is that it is largely comprised of forward-thinking people, trained to focus on the next transaction rather than on past successes or failures.

Nevertheless, it can be helpful to consider and to question where certain business practices originated, if for no other reason than to avoid repeating old mistakes.

The real estate industry has more than one million participants in the U.S. alone. What drives such a large and influential industry to regulate itself or to consider reform? Often, it is lawsuits—big ones. The following discussion reviews court cases that have caused the real estate profession to shift or change its practices.

THE EDINA REALTY AGENCY DEBACLE

Until the early 1990s, the custom among real estate brokers was to act as agents for the seller. The term *buyer brokerage* was not yet in use nor was the concept even on the horizon, even though concerned

practitioners were aware of some of the troubling aspects of unintended dual agency and seller subagency.

Working closely with buyers made the practice of seller agency challenging to practice. Often, real estate professionals working with buyers bonded with them—intellectually and emotionally. However, professionals working *with* buyers did not work *for* them. The professionals were, in fact, working for the seller. They were described as selling agents and as subagents of the seller.

The problem was that this relationship was rarely disclosed to buyers. If any questions were raised about the broker's loyalty, it was often dismissed with, 'Isn't it great that you don't have to pay me the commission even though I do a lot of work for you? I get paid by the seller." The real issue of the broker's loyalty and legal responsibility to the seller was never addressed or disclosed.

Everyone was confused by this practice. Sellers thought only their individual real estate broker worked for them and assumed that licensees from other firms worked for the buyer. Licensees working with buyers recognized that their legal obligations were to the seller but they behaved as though they had the buyers' best interests at heart. Buyers assumed that the licensees with whom they were dealing worked for them as well.

However, as subagents of the seller, licensees working with buyers were duty-bound to pass on to sellers' salespersons any secrets buyers shared with them about how high they would bid or the terms they would accept.

It is not surprising, then, that most real estate professionals unwittingly became dual agents, a role where they represented both the buyer and the seller at the same time. Even with disclosure to consumers, dual agency is challenging to practice properly since ethical conflicts abound: if brokers work for a seller and buyer in the same transaction, how do they obtain the highest price and best terms for the seller and also get the lowest price and best terms for the buyer?

Into this confusing mess walked Jamie Bokusky, a consumer who was looking for a home in a suburb of Minneapolis, Minnesota called Minnetonka. In 1991, Jamie worked with an Edina Realty licensee to purchase a home listed for sale with another Edina Realty licensee. When she asked the broker with whom she was working if the home she was interested in purchasing had a sprinkler system, she was told "yes." She purchased the home without having an independent inspection performed.

As it turns out, Jamie discovered after closing that her home merely had a hose spigot and no sprinkler system. Upset, Jamie turned to her broker who indicated that a mistake had been made, but apparently the broker failed to make any amends. Jamie then turned to an attorney who initially advised her to avoid litigation since the costs of a lawsuit would far exceed those of installing a sprinkler system at her expense.

But Jamie continued to press her point: she was sure that the broker she had worked with had her best interests at heart and should have negotiated on her behalf and advised her to obtain inspections. Jamie's attorney advised her that in fact all licensees work for the seller, not for buyers, and, at some point, may have realized that Jamie was the victim of undisclosed dual agency.

A class action lawsuit ensued. Jamie's attorney reasoned that Jamie's victimization was undoubtedly shared by 20,000 other Edina Realty consumers and filed at $250 million suit against the brokerage firm. Those suing asked the court to refund the estimated sales commissions Edina Realty earned on an average 6,000 in-house transaction a year over the six years covered by the litigation. According to the plaintiffs' attorney Rodney Wilson, Edina Realty should have explained it owed conflicting duties to both parties.

Attorneys for Edina Realty claimed that Bokusky was first informed in writing about her agent's legal role when it was presented as a clause in the purchase contract she signed and that Jamie had received representation from the selling agent who assisted her. Jamie's attorney counter-argued that the firm should have further elaborated that consenting to the purchase agreement language would be tantamount to waiving any right to the undivided loyalty of the agent.[1]

Edina Realty was one of the largest real estate brokerage firms in the country at the time of this litigation, so the lawsuit gained a significant amount of traction in the media over the ensuing months. The case became more sensational when the plaintiff's attorney added racketeering charges to the list of

complaints. If proven, then triple damages would be awarded.

The firm's general counsel stated that his company complied with all Minnesota legal requirements for disclosure to consumers on relationships.[2]

The initial lawsuit snowballed into three, including a suit brought by the United States Department of Justice charging Edina Realty under the Racketeer Influenced and Corrupt Organizations Act, commonly referred to as the RICO Act (and usually used to prosecute mobsters.). RICO is a United States federal law that provides for extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization.

The central issue for the courts to consider became, "How much explanation do real estate agents owe customers about their legal relationship?"

In February, 1995, judges approved settlements worth a combined $19.9 million, ending three lawsuits.[3] Plaintiff attorney Wilson claimed that the settlements were worth "several hundreds of dollars" for more than 20,000 people who filed claims in the class-action cases:

In St. Paul, a U.S. district judge signed off on a $14 million cash settlement involving two federal lawsuits against Edina. About $12.3 million of the total federal settlement covered claims stemming from a lawsuit against Edina for real estate deals made from April 1, 1986, to Sept. 30, 1993, where homebuyers and sellers were both represented by the company's sales professionals. The remaining $1.67 million covered consumers who were represented by Edina agents or bought Edina listings and were unrepresented and paid money to a title company and/or a bank both associated with Edina Realty.

Edina never admitted any wrongdoing and maintained that it acted at all times lawfully.

Relevance to Florida Real Estate Professionals

The repercussions from the Edina Realty lawsuits were significant. During the legal proceedings, the National Association of REALTORS® formed a committee to determine the best way of explaining and disclosing broker relationships to consumers. States began requiring their licensees to provide agency disclosure in writing. Some states, notably Georgia, Florida, and Colorado, completely outlawed the practice of dual agency.

This case provided a wake-up call to most licensees across the country, who realized that they were all vulnerable to the accusation that they were practicing undisclosed dual agency. In Florida, the Brokerage Relationship Disclosure Act was passed, permitting real estate licensees to engage in four types of brokerage relationships with consumers: transaction broker, single agent, designated sales associate, and no brokerage relationship:

> F.S. 475.278 Authorized brokerage relationships; presumption of transaction brokerage; required disclosures.—
>
> (1) BROKERAGE RELATIONSHIPS.—
>
> (a) Authorized brokerage relationships.—A real estate licensee in this state may enter into a brokerage relationship as either a transaction broker or as a single agent with potential buyers and sellers. A real estate licensee may not operate as a disclosed or nondisclosed dual agent. As used in this section, the term "dual agent" means a broker who represents as a fiduciary both the prospective buyer and the prospective seller in a real estate transaction. This part does not prevent a licensee from changing from one brokerage relationship to the other as long as the buyer or the seller, or both, gives consent as required by subparagraph (3)(c)2. before the change and the appropriate disclosure of duties as provided in this part is made to the buyer or seller. This part does not require a customer to enter into a brokerage relationship with any real estate licensee.

Transaction brokerage allows licensees to represent one or both parties in a limited capacity. **Single agency** permits licensees to represent either a buyer or a seller, but never both, in a fiduciary capacity. The fiduciary duties of a single agent include representation. In some situations licensees may also act as **designated sales associates** in which two associates from the same brokerage firm represent different parties in the same transaction as single agents. This form of representation is limited to commercial transactions.

Since 2003, it is presumed that all licensees are operating in the capacity of a transaction broker unless a single agency or no brokerage relationship is established. However, a written disclosure must be given when consumers and licensees enter into a single agency or no brokerage relationship.[4] The **no-brokerage relationship** does not include representation of any kind.

Some real estate licensees think that agency legislation and disclosure forms have cluttered the real estate transaction and have unnecessarily made consumers more leery of working with real estate professionals. Studies indicate that many brokers do not properly advise consumers about their choices in agency relationships or at least do not advise consumers in a timely way. But there is no doubt that the Edina case provided a substantive national conversation about the way real estate brokers interact with consumers and opened up the possibilities of representations for buyers.

MOLD IS GOLD: THE BALLARD CASE

Dealing with environmental issues has always been difficult for real estate professionals. In some cases, such as lead-based paint, the federal government provides a simple benchmark for disclosure: was the dwelling built before 1978? If so, disclosure to consumers is required. In the case of radon, while there is no federally required or state required disclosure form, the Environmental Protection Agency (EPA) has provided guidelines for dangerous levels of the radioactive gas: four picocuries or more.

But in the case of mold, there were and are no federal guidelines for identifying or disclosing dangerous levels of mold. There is no scientific agreement about which molds are toxic or at what levels or to what individuals. Until the *Ballard v. Farmers Insurance* case, mold was not even an issue that consumers asked their licensees about. Mold was considered to be a minor and treatable problem and one not taken very seriously.

The Ballard case first began as a single claim for water damage to a hardwood floor, but was expanded to include mold contamination of the entire house and surrounding structures. In June 2001, the Ballards, Melinda and her husband Ron, claimed that Farmers Insurance did not properly deal with their mold claim and handle their damage quickly enough, causing the mold to spread in their sumptuous home in Dripping Springs (ironically!), an area outside Austin, Texas.

The Ballards requested $100 million in restitution. According to the Ballards, Farmers delayed in covering repairs for a water leak in the couple's 22-room mansion and ignored contractors' warnings that dangerous molds could grow under the house's sub-flooring if the sub-flooring were not pulled up. The couple said Farmers' failure to properly handle the claim allowed the toxic mold *Stachybotrys atra* to take over their house, which damaged the family's health. In early 1999, the family, including their three year old son Reece, experienced the first of a number of unexplained illnesses, including coughing up blood.[5]

While the jury denied the Ballards' medical claims, the jury found that the carrier mishandled the insureds claim and awarded them a stunning $32 million dollars. The verdict and Ms. Ballard's allegation of health problems caused by mold drew media attention around the country. However, in December 2002, a state appellate court lowered the award to $4 million in actual damages, throwing out millions the jury had provided for mental anguish and punitive damages.

In early 2004, appeals were pending before the Texas Supreme Court when both sides reached an undisclosed settlement agreement.[6]

Relevance to Florida Real Estate Professionals

While the Ballard case was not the only mold case in the courts at the time, its significant award to the family sparked national interest as well as significant consumer concerns. Real estate licensees became much more sensitized to mold issues as a direct result of this case. A contributing factor to the increase in interest in mold was that attorneys discovered that litigation in this area was fertile and lucrative. Courses in lawsuits involving mold remediation called "Mold is Gold" were well attended at legal continuing education programs for attorneys!

Another contributory factor was that insurance companies began limiting their exposure to mold claims by either excluding mold claims from coverage or limiting payout on a claim to $10,000 total—the latter approach adopted by Florida insurers.[7]

While California adopted a mandatory mold disclosure form, there is no such form required in Florida or other states. Some states, such as North Carolina, have advised their licensees to disclose one square foot or more of mold to prospective purchasers, but has not advised brokers how to make that disclosure.

It may be helpful, then, for real estate professionals to review the advice of National Association of REALTORS®:

- During your visual inspections, pay specific attention to stains or discoloration on ceilings and walls, including the baseboard area, to pick up red flags associated with plumbing leaks and drainage problems.
- Pay attention to mold or mildew odors.
- If you notice any of these signs of potential mold problems, carefully word a written disclosure. Be sure not to offer expert analysis, avoiding terms such as "black mold" or "toxic mold." Generic descriptions such as "mold type" or "mildew-like" might be used. Here's an example: "Some staining observed on north wall of downstairs bedroom. Mildew-like odors also noted in master bedroom closet. Contact a qualified specialist for review."
- Insist that potential buyers have their own independent home inspections conducted.
- Become aware of the licensed experts in your area who are prepared to inspect for mold, and know when to advise (in writing) that potential buyers hire one of those experts. Some home inspectors are beginning to provide specific mold detection and diagnostic services. If necessary, recommend that your buyer principals and customers retain a Certified Industrial Hygienist (CIH) or other environmental specialist to provide mold detection and lab analysis services.[8]

VOWS, NAR, AND DOJ: LIONS AND TIGERS AND BEARS, OH MY!

In the late 1800s and early 1900s, when real estate brokers met at real estate congresses and local associations, they frequently shared information about properties they were trying to sell. They agreed to compensate other brokers who helped sell those properties. These meetings became the foundation of the first multiple listing services or MLSes.

The offer to share information in exchange for compensation became more formalized with a system of distributing information first on index cards, then later in books that resembled catalogs of homes for sale. In the late 1900s, as computer technology revolutionized the distribution of data, MLSes went online and it became possible for brokers to upload their listing data directly.

The MLS systems were and still are local and/or regional. For example, *My Florida Regional MLS* is Florida's largest multiple listing service with more than 33,000 subscribers. It is owned by 15 Shareholder REALTOR® Boards and Associations in Central and Southwest Florida.[9] The Columbus and Central Ohio Regional Multiple Listing Service, Inc. is a computerized network of more than 700 cooperating real estate offices.[10]

Most MLS systems restrict membership and access to real estate broker firms (and their sales professionals) who are appropriately licensed by the state, are members of a local board or association of REALTORS®, and are members of the applicable national trade association such as NAR.

Once data became accessible on the Internet, it also became possible for individuals, licensed and unlicensed, to copy and paste the data into various formats. Understandably, real estate licensees who work hard to obtain listings, were upset by these parties who were considered rogue, unethical, and even illegal. The entities who took the information claimed that the real marketplace should be open and accessible to anyone, licensed or unlicensed. As the practice of taking listing data from licensee websites became more frequent, real estate regulatory agencies (notably, in Texas and South Dakota) attempted to regulate these entities out of business. Some firms, including large national franchises, threatened to remove their listings from MLSes that did not adequately "protect" the data.

Some of those entities who were accused of taking data without permission were characterized as Virtual Office Websites, or VOWs. The main criticism of VOWs is that they often did not have a brick-and-mortar presence, a requirement of most regulatory real estate agencies. Moreover, the staff of the VOWs were unlicensed, or if licensed, were employed

mainly to collect referral fees by selling leads to listing firms.

In May 2003, NAR, the largest trade association in the U.S. with more than one million members, issued a VOW policy that attempted to protect listing brokers and their principals and customers from misuse of their data. The policy covered, among other things, how much MLS information can be posted online and the relationship VOWs need to establish with customers before granting access to the information. In addition, the policy gives MLS members the ability to opt out of having their listings displayed by any or all VOWs of other participants of their MLS.

In response to NAR's 2003 policy, in September, 2005, the Department of Justice's (DOJ) Antitrust Division filed a civil complaint in U.S. District Court against NAR, alleging violation of federal antitrust laws in connection with its obstruction of real estate brokers who use Internet tools to offer services to consumers.

Specifically, the DOJ alleged that NAR's policy violated of Section 1 of the Sherman Act (15 U.S.C. § 1) and stated in this suit that the DOJ had to stop NAR from "… maintaining or enforcing a policy that restrains competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anticompetitive rules."[11]

Further, DOJ added that:

> The brokers against whom the policy discriminates operate secure, password-protected Internet sites that enable the brokers' customers to search for and receive real estate listings over the Internet. These websites thus replace or augment the traditional practice by which the broker conducts a search of properties for sale and then provides information to the customer by hand, mail, fax, or email. Since these websites were first developed in the late 1990s, brokers' use of the Internet in connection with their delivery of brokerage services has become an important competitive alternative to traditional *brick-and-mortar* business models.
>
> Defendant's members include traditional brokers who are concerned about competition from Internet-savvy brokers," the complaint continues. In response to such concerns, defendant, through its members, adopted a policy (the 'VOW Policy') limiting this new competition. The VOW Policy significantly alters the rules governing multiple listing services ('MLS'). MLSes collect detailed information about nearly all properties for sale through brokers and are indispensable tools for brokers serving buyers and sellers in each MLS's market area. Defendant's local Realtor associations ('member boards') control a majority of the MLSes in the United States.
>
> The complaint adds that this "VOW Policy permits brokers to selectively or generally withhold their principals' and customers' listings from VOW operators by means of an 'opt-out' right. In essence, the VOW Policy allows traditional brokers to block the customers of targeted competitors from using the Internet to review the same set of MLS listings that the traditional brokers provide to their customers.

And this, states the DOJ;

> …restricts the manner in which brokers with efficient, Internet-based business models may provide listings to their customers, and imposes additional restrictions on brokers operating VOWs that do not apply to their traditional competitors. Defendant thus denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, and it suppresses technological innovation, discourages competition on price and quality, and raises barriers to entry. Defendant — an association of competitors — has agreed to a policy that suppresses new competition and harms consumers.[12]

In response to negotiations with the DOJ, NAR withdrew its VOW policy and replaced it with new guidelines, called Internet Listing Display (ILD). The DOJ found the second policy insufficient and continued its suit.

In May, 2008, NAR and the U.S. Department of Justice reached a settlement, concluding a two-year DOJ investigation and two and a half years of litigation. The settlement required that MLSes repeal rules adopted, if any, implementing the VOW or ILD policies.[13] MLS participants can no longer choose to opt out of having their listings shown on the VOW sites of other participants. Both sides claimed success in the outcome of the litigation.

Since this settlement, advertising sites such as Zillow and Trulia have become major resources for consumers for real estate listing information. Such advertisers offer features such as automated valuations and third-party comments. These advertising sites are not VOWs nor are they brokerage firms, so their content is not regulated in the same manner as that of real estate brokerage firms.

Some of these advertising sites also feed their content to other sites, such as eBay and Craig's List. Real estate brokers have expressed dismay at the number and types of errors that can be seen on these websites and are concerned that there is little control over these sites.[14]

Relevance to Florida Real Estate Professionals

The settlement limited the ability and power of listing brokers affiliated with a REALTOR® association to choose with whom to share listing data. However, sellers have choices about where their listings appear. While the settlement only affected realtor-brokers and multiple listing services (MLS), many state regulatory agencies have taken the position that Internet display of listing information is advertising, and that principals and customers must give written consent to advertise listed property. In Florida, listing brokers may accomplish this directive by having the appropriate language on their listing agreements (all listing agreements must be in writing).

Since the settlement, the term *VOW* has expanded to include Internet sites operated by MLS participants. A consumer accessing VOWs can search and view listing data after registering and providing his/her name and a valid email address, and accepting certain *Terms of Use*. MLS participants are eligible to operate VOWs. Sales licensees may also operate VOWs with the consent of the participant broker.

There are two ways of placing MLS data onto a website: by downloading bulk MLS data directly from the MLS or by hiring a third party for this purpose. In either case, the VOW operator must inform the local MLS entity whenever a VOW is going to be used, so that the MLS can insure that proper guidelines are being followed.

To download data, the participant broker must have a data license from the MLS permitting the use of MLS database content for a VOW. Third party data providers must also be licensed for MLS bulk data use. There are companies already licensed and approved by the MLS for this purpose. VOW operators may display listings obtained from sources other than the MLS, however, MLSes require VOW operators to identify the source of such listings.

In some respects, then, today's VOWs are analogous to traditional *brick and mortar* offices. VOW participants have equivalent rights, responsibilities, and obligations with respect to both their *physical* and their *virtual* offices.

FREC RULES REGARDING ADVERTISING

Whatever individual real estate firms decide regarding Internet advertising and VOWs, they must comply with Florida Real Estate Commission requirements regarding advertising, including advertising on the Internet:

61J2-10.025. Advertising

(1) All advertising must be in a manner in which reasonable persons would know they are dealing with a real estate licensee. All real estate advertisements must include the licensed name of the brokerage firm. No real estate advertisement placed or caused to be placed by a licensee shall be fraudulent, false, deceptive or misleading.

(2) When the licensee's personal name appears in the advertisement, at the very least the licensee's last name must be used in the manner in which it is registered with the Commission.

(3) (a) When advertising on a site on the Internet, the brokerage firm name as required in subsection (1) above shall be placed adjacent to or immediately above or below the point of contact information. "Point of contact information" refers to any means by which to contact the brokerage firm or individual licensee including mailing address(s), physical street address(es), email address(es), telephone number(s) or facsimile telephone number(s).

(b) The remaining requirements of subsections (1) and (2) apply to advertising on a site on the Internet.

REALTORS® and Internet Advertising

It should also be noted that many Florida real estate

licensees are also REALTORS®, and if so, they must comply with the NAR Code of Ethics. Article 12 of the Code deals specifically with advertising:

> REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations.
>
> Standard of Practice 12-10
>
> REALTORS®' obligation to present a true picture in their advertising and representations to the public includes Internet content posted, and the URLs and domain names they use, and prohibits REALTORS® from:
>
> 1. engaging in deceptive or unauthorized framing of real estate brokerage websites;
> 2. manipulating (e.g., presenting content developed by others) listing and other content in any way that produces a deceptive or misleading result;
> 3. deceptively using metatags, keywords or other devices/methods to direct, drive, or divert Internet traffic; or
> 4. presenting content developed by others without either attribution or without permission, or
> 5. to otherwise mislead consumers.

ILLEGAL REBATES: *ABNEY ET AL V. AMERICAN HOME SHIELD CORPORATION*

Offering home warranties to buyers is a common and useful practice in residential real estate transactions. The home warranty programs give buyers reassurance, particularly when buying an older home, that should something go wrong with the mechanical systems of a home, obtaining repairs or replacements could be a less aggravating process. Sellers often pay for these warranty programs as a way of enhancing an older home's appeal. Brokers love them because when something breaks down during the listing, warranty companies take care of the repair or replacement, usually at a nominal cost, even if the listing never sells. To make the policies even more attractive, brokers can rest assured that if a system or appliance breaks down in the home immediately after closing (as they seem prone to do), the buyer simply calls the warranty company which sends a local repair firm to take care of the problem.

The warranty programs are not perfect. They can be expensive, they do not cover everything, (not even all of the appliances) and there may be a deductible per service call. But brokers still enjoy these programs. To sweeten the likelihood that brokers will offer these programs to consumers, warranty companies offered rebates to brokerage firms for each policy sold.

In the past, licensees did not have to do much more than call the warranty companies up and arrange for the policy to be in place at closing. Some firms required that licensees fill out paperwork on the condition of the home's components to be covered. Brokers also placed yard signs, stating *Property under Warranty* and provided brochures on the policy.

The issue was whether the rebate offered to brokerage firms was legal. The Real Estate Settlement Procedures Act (RESPA) speaks to many issues affecting the closing experience, including the matter of referral/rebate fees for settlement services and limits the opportunities for such fees to be earned. RESPA governs appraisers, title insurance companies, surveyors, and yes, real estate licensees, too.

RESPA states that the:

- fees must be earned—that the recipient has to do more than make a phone call
- fees have to be disclosed on the Closing Disclosure (CD), and
- price that consumers pay for the product cannot be *jacked up* to cover the cost of the referral

For the years since these policies have been available, real estate brokers considered themselves exempt from these provisions of RESPA, largely because selling a home warranty to a buyer was not, in their view, a settlement service. While these policies were paid for at closing, they were not considered a typical closing service, such as title work, surveying or appraising.

A class action lawsuit forced HUD, the federal agency who oversees RESPA, to provide a clear ruling on the issue of rebate fees on home warranty policies and whether real estate firms had to comply with HUD

regulations. About 500,000 homebuyers and sellers who purchased warranties between May 27, 2008, and March 4, 2011 from American Home Shield (AHS) sued AHS and real estate brokers, alleging that that payments they received from American Home Shield violated RESPA's anti-kickback provisions.

The complainants won. They became eligible to receive an average of $52 each under the terms of the settlement, which also released real estate brokers and licensees from claims. AHS agreed to pay up to $26 million to settle allegations that the company paid illegal kickbacks to real estate brokers and licensees to market the company's home warranties.[15]

The company denied that the payments it made to real estate brokers who marketed its products violated the RESPA, and put a positive spin on the settlement, saying it "confirmed the compliancy of the company's new broker compensation practices."[16]

Relevance to Florida Real Estate Professionals

Once the settlement was reached, HUD said that under Section 8 of RESPA, brokers offering a home warranty are making a referral to a settlement service provider. Once HUD concluded that the sales pitch offered by licensees to consumers about the benefits of a home warranty is a referral, it logically invoked RESPA's restriction of compensating real estate professionals for such referrals.

Is there ever an occasion when a real estate licensee may be compensated for "selling" a home warranty? Yes. HUD has offered some guidelines:

First, HUD requires actual service to be performed in order for the rebate fee to be considered earned. The services must be actual, necessary, and distinct from the primary services performed by a broker or licensee. HUD has suggested that recording serial numbers of equipment, inspecting equipment to be covered for pre-existing conditions, or photographing equipment to be covered might attain the level of investment needed to be considered an "actual, necessary, and distinct" service that would be compensable under RESPA. Perhaps even marketing the warranty policy by hanging a sign rider and/or distributing brochures which substantiate the *earning* of the fee. HUD's guidance in identifying what constitutes "actual, necessary, and distinct" services is helpful but not necessarily determinative.

HUD considers contractual relationships between licensees and home warranty companies (HWC) in which the HWC assumes responsibility for statements made by licensees to be indicative of a relationship through which a licensee may perform compensable services.

The last factor to consider is whether the fee is reasonable. Assuming that a brokerage firm is paid $60 for selling the warranty, is $60 a reasonable fee to be paid for, say, hanging a sign rider? Any fee lawfully paid under RESPA must be reasonably related to the actual service performed.

Additionally, consumers who are involved in a transaction where a rebate has been paid must know about the fee and consent to it. This step is usually dealt with by placing the fee on the settlement statement for all the parties to see.

Note that in addition to RESPA's rules about rebates, Florida real estate licensees must also abide by Rule 61J2-10.028(2) which addresses various issues associated with the disclosure of and sharing of compensation received by a real estate licensee.

This rule states that prior to the referral, the broker must fully and completely advise "his principal and all affected parties in the transaction ... of all facts pertaining to the arrangement of a kickback or rebate." So, when a broker receives a kickback, whether it is for selling a homeowner's warranty to a customer or referring a principal to a moving company, the broker must first inform all the parties to the transaction of all the facts concerning the kickback.

It should be noted that a literal reading of the rule could require the broker to disclose even the dollar amount of the kickback.

However, Florida real estate license law permits a licensee to share his or her commission with a party to a real estate transaction as long as it is disclosed to all parties to the transaction.

RESPA regulations, FREC, and NAR standards have made it challenging for licensees to receive home warranty rebates, so much so that firms report that rather than take the rebates to which they may be lawfully entitled, that they decline them or turn the funds over to consumer instead.

Insurance Commissioner Dave Jones Announces $1.25 Million Settlement with Fidelity Companies for Alleged Illegal Rebating Activities

SACRAMENTO – Insurance Commissioner Dave Jones announced today that the California Department of Insurance (CDI) has reached an agreement with Fidelity National Title Insurance Company, to resolve allegations of illegal rebating activities between 2003 and 2011. Under the settlement terms, the companies, all affiliates of Fidelity National Financial, Inc., agreed to pay $1.25 million in penalties and $175,000 to CDI for reimbursement of its costs.

"Illegal rebates by and to those involved in the home purchasing process compromise the best interests of the consumer," said Commissioner Jones. "Illegal rebate activities drive up the cost of title insurance, escrow, and home warranty policies, which add to the cost of buying a home. I will continue to take aggressive enforcement actions to ensure fair pricing for consumers."

CDI alleged that, between 2003 and 2011, the Fidelity companies entered into agreements with various [real estate brokers] and other settlement service providers to pay a purported "sublicensing fee" to access orders placed with the Fidelity companies using a technology platform known as "TransactionPoint." The "sublicensing agreements" were alleged to be a conduit for unlawful payments to REALTORS® and others to induce the referral of title, escrow and home warranty business. TransactionPoint was developed by Fidelity National Financial, Inc.

Fidelity companies were very cooperative in the investigation and negotiations leading to this settlement and a related settlement involving TransactionPoint presently being finalized between Fidelity and the District Attorneys of Ventura and San Diego Counties.

"During the settlement negotiations, the Fidelity companies were highly cooperative," added Jones. "I commend the companies' immediate action to halt the TransactionPoint fee arrangements." (January 8, 2013) [17]

A Lawsuit on The Horizon: *Whidbey Island Residents V. The Navy* (Yes, the Navy!)

Whidbey Island is about 30 miles north of Seattle and lies in Puget Sound off western Washington State. It is home to Naval Air Station Whidbey Island and to approximately 58,000 residents, half of whom live in rural locations.

Whidbey Island is approximately 55 miles long and about 1.5 miles at its narrowest to 12 miles at its widest with a total of 168.67 square miles. During World War II, in September, 1942, Naval Air Station Whidbey Island (NASWI) was commissioned as an active U.S. Navy installation. Since the end of World War II, the station has been in and out of service during periods of war. Similar to other naval air stations across the United States, Whidbey was likely to be closed because it couldn't meet the requirements of the post-war Naval Aviation; 6,000-foot runways were now the minimum standard and approach paths had to be suitable for radar-controlled approaches in any weather. Whidbey was nevertheless saved from extinction and today there are 17 active duty squadrons and two Ready Reserve squadrons currently based there. The air station also maintains a Search and Rescue Unit, flying three Sikorsky MH-60S Nighthawks. Search and Rescue provides 24-hour day and night maritime, inland and mountainous rescue support for Department of Defense personnel and the greater Pacific Northwest community. The base also continues its long-standing role as a center of activity for Naval Air Reserve operations and training in the region.

The landing strip built in World War II handled flights when planes were fewer, slower, and quieter. But in 2008, the Navy Air station began training pilots to fly Growlers, a jet built by Boeing. In 2015 there were 83 Growlers at the base, and now there could be as many as 114.[18] As the jet's name suggests, the aircraft is noisy. Neighbors of the base complain that windows shatter during the Growlers takeoffs. One group of Whidbey Island citizens say that Little Leaguers have to cover their ears and livestock are

being injured by the sound of roaring jets. Residents claim that they must use headphones in bed to block out the noise.[19]

Residents assert that they were forced to sue the Navy because the Navy refused to listen to their complaints. The lawsuit alleges the Navy failed to conduct a required environmental review before it began using Outlying Field near Coupeville for practice by aircraft from Whidbey Island Naval Air Station.

The Navy claims that it performed an environmental assessment in 2005 when it first planned to retire aging Prowler planes for the newer Growlers, a fighter plane equipped to jam enemy radar and radio communications.

At the time, the environmental assessment concluded the impact on residents would be less, because fewer planes would be taking off and landing.

Instead, the complaint says, the number of takeoffs and landings have increased. Based on Navy data, the complaint says that 9,669 flight operations were conducted at the field in 2013. In 2005, there were 7,682 for the year, according to the complaint.[20]

The citizens hired a consultant to do decibel-level testing and determined that inside the Whidbey Island homes, the noise level was at 95 decibels and outside it was 139 when jets flew over. According to the National Institutes of Health, permanent hearing loss can occur at 115 to 120 decibels.[21]

While the Navy agreed to temporarily suspend landing practice through 2013, the Navy commented that using another field will "interfere with other necessary operations, entailing delays and operational conflicts." The residents want a permanent fix that would force the Navy to take the jets elsewhere.

Whidbey Island real estate professionals became involved in the debate about the naval station after some residents alleged they weren't properly notified of the jet noise prior to purchasing their homes. A 1992 county regulation requires noise disclosure specifying that touch-and-go operations are performed at "tactical military jet aircraft facilities" and are "scheduled during day and night periods."[22]

"Additionally," the disclosure states, "the noise generated by a single flyover of a military jet may exceed the average noise level depicted by the airport noise zones and may exceed 100 decibels." A second disclosure added a year later is intended for new building projects only. At present, the local MLS provides a form that real estate licensees give prospective home buyers, a version of the shorter building code disclosure.[23]

According to the Island planning director, both regulations are currently in effect and are intended for different purposes. Purchasers are supposed to receive and sign both disclosure statements.[24]

In June 2014, homeowners advised the media that they are exploring suing real estate brokers for failure to disclose the noise problem from the naval station.[25] Earlier in 2014, the Whidbey Island Association of REALTORS® met to review and discuss a newly-drafted noise ordinance that addresses the concerns of both the county government and its residents.[26]

Note: according to Redfin, the median list price of homes on the Island is $375,000 and the median cost per square foot is $189.[27]

Relevance to Florida Real Estate Professionals

Florida real estate brokers should note that what is occurring on Whidbey could easily happen in the Sunshine State. In addition to numerous Coast Guard, Marine, and Navy bases, Florida has five Air Force bases:

Eglin Air Force Base in Valparaiso
Hurlburt Field Air Force Base in Mary Esther
MacDill Air Force Base in Tampa
Patrick Air Force Base in Brevard County
Tyndall Air Force Base in Panama City

These military airport sites, as well as commercial sites, such as Miami International or the Orlando International Airport, are often quite visible from surrounding areas. Smaller regional or private airports may not be. Do licensees have to disclose the presence of such facilities?

In a Florida case on the question regarding disclosure of material facts, *Johnson vs. Davis*, the Supreme Court held that facts that are (1) not known to the seller, (2) known to the buyer or (3) readily observable to the buyer do not need to be disclosed.[28] One could conclude that real estate professionals do not have

to disclose the presence of large airports but would perhaps have to disclose the presence of small ones.

What, however, would a licensee have to disclose about known nuisances (such as significant noise from jets, as in the Whidbey case)? If they are considered material facts which would affect a consumer's decision to buy a home in the area, real estate licensees would have to make appropriate disclosures.[29]

Should licensees have to reveal the location of industrial and military development if it does not cause a nuisance? How far away should an airport or say, a nuclear facility be, for it to be a disclosure issue? These are questions that have yet to be resolved by the Real Estate Commission. However, it may be ethically appropriate and prudent to disclose such information or to provide curious consumers with the appropriate resources to answer their questions.

MONEY, MONEY, MONEY: ANTI-TRUST LITIGATION

Let's end where we began, with the Department of Justice (DOJ) suing real estate brokers. The United States Supreme Court first applied antitrust law to the real estate brokerage in the 1950s in *United States v. National Association of Real Estate Boards*.[30] According to the DOJ, "The members of the Washington [District of Columbia] Real Estate Board combined and conspired to fix the commission rates for their service … in the District of Columbia [D.C.]." At the time, the D.C. board had set standard rates of commission; moreover, its code of ethics did not permit its members to deviate from the set commission.

The Court had no trouble determining that this conduct was illegal and that the Sherman Anti-Trust Act was relevant to the brokerage business just like any other commercial activity.

In 1974, the Supreme Court upheld the conviction of four brokers in Montgomery County, Maryland who conspired to fix commissions.[31] At the time, the real estate market was depressed, and at an informal occasion, one of the brokers stated that his firm was going to raise its commission rate from the prevailing 6% to 7%. Within a short time, the other three brokers increased their commission rates to the same percentage: "The court found that the dinner announcement and the ensuing discussions between the brokers provided enough evidence to uphold the jury's conviction of each of the defendants under Sherman Act."[32]

In *Park v. El Paso Bd. of REALTORS®*, a broker offered to list sellers' homes on the MLS for a flat fee. At trial, the broker demonstrated that competing brokers had tried to impose "punitive splits" on the plaintiff, had made derogatory comments about the broker to consumers, and boycotted showing his listings. The jury found for the broker.[33]

Enforcing Antitrust Laws in the Real Estate Industry

The Department of Justice has a long-standing history of investigation and suing over matters regarding the practice of real estate. Here is how the DOJ sees its role:[34]

U.S. v. National Association of REALTORS®

Issue: The Division challenged NAR's MLS rules that inhibited competition from Internet-based brokers. On November 18, 2008 the Court entered a Final Judgment approving a settlement against NAR.

Under the Final Judgment, NAR repealed the policies challenged by the United States and replaced those policies with rules that do not discriminate against innovative brokers who use the Internet to provide high-quality, low-priced brokerage services to consumers.

U.S. v. Consolidated Multiple Listing Service, Inc.

Issue: The Division challenged several rules mandated by the Columbia, SC multiple listing service that may reduce choice and raise prices for Columbia consumers. These include rules that:

- Required brokers to perform a prescribed set of services—such as negotiating a home's sale price and attending the closing—even if the broker's customer would prefer to perform some of these tasks on his or her own in order to save money on the real estate broker's fee.
- Gave Columbia real estate brokers the ability to exclude brokers from outside Columbia who could offer local consumers innovative brokerage options that better match their needs.

On August 27, 2009, the Court entered a Final Judgment that:

- Required the Consolidated Multiple Listing Service,

Inc. to cease enforcement of these rules.

- Prevented the MLS from passing new rules that would discriminate against innovative brokers. May 2, 2008

U.S. v. Multiple Listing Service of Hilton Head Island, Inc.

Issue: In October 2007, the Division filed a lawsuit alleging that the Multiple Listing Service of Hilton Head Island, Inc., violated antitrust laws by enforcing certain rules that unreasonably restrain competition. These include rules that:

- Required member-brokers to maintain a physical office, reside within the MLS service area, and operate their offices during hours deemed reasonable by the MLS.
- Required prospective members to disclose their business history and prior employment and obtain letters of recommendation from three current broker-members.
- Authorized the MLS Board of Trustees to adopt mandatory commission guidelines and to impose discriminatory requirements on Internet-based brokers.

On May 28, 2008, the Court entered a Final Judgment that:

- Required the Hilton Head MLS to cease enforcement of these rules.
- Prevented the MLS from passing new rules that would discriminate against innovative brokers. October 16, 2007

U.S. v. Kentucky Real Estate Commission

Issue: The Division challenged regulations that prohibited Kentucky real estate brokers from offering rebates and other inducements to consumers. The United States settled its lawsuit after the Kentucky Real Estate Commission agreed to rescind its rebate ban. July 13, 2005

Relevance to Florida Real Estate Professionals

Real estate is a more competitive business than ever. Consumers have choices regarding representation, fee structures, and marketing plans. A consumer can choose to be represented or not; to pay a flat fee or percentage commission or sliding scale; and whether to be on the MLS and/or Internet or to be given limited service or full service.

But it is still possible for real estate professionals to be accused of anti-competitive practices. To avoid any such allegation of impropriety, a broker should avoid any hint of price/term fixing, territorial assignments, or boycotts.

In many businesses, including real estate, many competitors may charge similar prices for the same services. This practice is not illegal as long as each competitor sets prices independently. An antitrust violation occurs when brokers discuss and agree to

Investigations:

Montana Rebate Ban

Issue: The Division investigated a regulation that prohibited Montana brokers from offering rebates and other inducements to consumers. In response to an investigation by the Division, the Montana Board of Realty Regulation repealed the regulation. April 1, 2008

West Virginia Rebate Ban

Issue: The Division investigated regulations that prohibited West Virginia brokers from offering rebates and other inducements to consumers. The West Virginia Real Estate Commission repealed the regulation. May 4, 2006

South Dakota Rebate Ban

Issue: The Division investigated rulings by the South Dakota Real Estate Commission that prohibited brokers in that state from offering rebates and other inducements to consumers. The South Dakota Real Estate Commission repealed the regulation. August 17, 2005

charge the same prices or offer exactly the same terms as their competitors. Brokers can avoid charges of price fixing by only discussing one's own company's fees, commission splits, and listing terms. Brokers should not discuss their competitors' compensation structures.

Agreements between competitors to divide the market geographically, by price range, type of property, or some other segmentation are considered anti-competitive because they conspire to establish dominance in a particular market. This is not the same as an individual company's practice of specializing in certain properties such as historic buildings or custom-built housing.

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

While it is appropriate to discuss compensation at sales meetings held within a firm, it is inappropriate to discuss compensation among competitors who come together to promote their common business interests. To avoid an accusation of conspiracy, brokers should avoid conversations at association meetings about commission rates, pricing structures, listing policies, or marketing practices of other brokers.

And just as a reminder, while brokerage firms can charge any compensation that they wish—flat fees, hourly, retainers, and commission—licensees must set their compensation with their principals and customers in the written agreements.

A SUMMARY AND PERSONAL NOTE

Real estate professionals have enormous responsibilities to their principals, customers, and the public at large. They are the gatekeepers of the American dream of home ownership; they are guardians for appropriate land use and a clean environment; they provide invaluable service to businesses, citizens, and government; and the results of their work fuel the economy.

These responsibilities expose the real estate professional to real liability. To avoid litigation is sometimes impossible. But if real estate brokers understand their principals' and customers' concerns and are responsive to them, they can avoid becoming parties to lawsuits. Short of that, brokers should obtain errors and omission insurance.

Tips on Explaining Your Professional Fee to Consumers:

- When you are questioned by consumers about your professional fee, you should justify your value by providing a list of the activities and tasks that you do in order to help the consumer achieve his goal—purchasing or selling a property. You can find a number of such lists on the Internet, and they frequently have more than 100 tasks performed by brokers when they represent buyers or sellers.
- Explain how your compensation works and how much of the commission you earn. Consumers are frequently surprised by the relatively small amount that an individual broker can earn on a sale. Don't forget to mention that this is a gross commission amount, subject to state and federal income tax, self-employment tax. Mention that you pay for your own business expenses, too, such as transportation and health care.
- Sell the quality of the experience of working with you. Cheap isn't necessarily better.
- Wait to quote a professional fee until you understand the needs of your principal or customer. Some of their goals require more time and effort.
- Never, ever make derogatory comments about your competition. It is unprofessional and unethical.

Sometimes the only way to change an industry is through litigation. Litigation has sometimes changed the real estate industry for the better. The real estate business has not always been as honest in its disclosure and practices as possible.

But litigation is time-consuming and expensive, and the only winners in the courtroom tend to be attorneys. The best advice is to be a resource to real estate principals and customers. Don't give them advice; rather lead them to the best experts who can advise them appropriately.

Understanding past litigation and real estate brokerage history is the best way to avoid repeating history. The ultimate challenge for all of—as real estate professionals and human beings—will be to do the right thing.

MODULE 3, PART II REVIEW – TRENDING IN REAL ESTATE TODAY

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. The Edina lawsuit occurred because of a/an:

a. insult by the broker to the principal.
b. misrepresentation regarding a sprinkler system.
c. nearby airport.
d. broker's failure to prequalify the buyer.

2. Florida's Brokerage Relationship Disclosure Act does *not* allow real estate licensees to engage in which brokerage relationships with consumers?

a. transaction broker
b. single agent and designated sales associate
c. no brokerage relationship
d. dual agency

3. The Florida Real Estate Commission rules regarding advertising on the Internet state that the brokerage firm name:

a. has to appear on every page of a real estate brokerage website.
b. must be placed adjacent to or immediately above or below the point of contact information.
c. cannot appear on Virtual Office websites.
d. and license number must appear on every web page.

4. Regarding kickbacks or rebates, Florida real estate licensees:

a. must advise principals and all affected parties in the transaction of all facts pertaining to the arrangement of kickbacks or rebates.
b. do not have to disclose kickbacks associated with home warranty programs.
c. must advise affected parties only if the amount is more than $100.
d. do not have to disclose them if they are cash or check.

5. The lesson that a Florida real estate professional could learn from the Whidbey Island lawsuit is:

a. don't sell property near any airport.
b. have a professional do decibel readings of sound levels of properties near airports before taking listings.
c. disclose information about the presence of airports and any related concerns.
d. that similar lawsuits are unlikely to happen in Florida.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

PART III:
AN EXPLORATION OF MINERAL RIGHTS AND FRACKING

LEARNING OBJECTIVES

Upon completion of Part III, the student will be able to:

1. Define terms such as *split estate, subsurface rights, hydraulic fracturing (fracking),* and *community pooling.*
2. Summarize the general concerns about the environmental impact of fracking.
3. Evaluate the impact of fracking on Florida's environment, particularly as it may relate to water issues.
4. Discuss how severing mineral rights impacts title insurance, lending, valuation, and disclosure practices.

INTRODUCTION

This module explores the concept of severing property rights, often described as split estate. Also discussed are recent concerns regarding subsurface rights and fracking in Florida.

CUIUS EST SOLUM, EIUS EST USQUE AD COELUM ET AD INFEROS

Cuius est solum, eius est usque ad coelum et ad inferos is a Latin expression. Translation: *for whoever owns the soil, it is theirs all the way to Heaven and down to Hell*. This concept of property ownership suggests that when consumers purchase real estate, they have rights not only to the surface of the land itself, but also to the air above and everything in the ground below.

A 13th century judge may have used the Latin phrase first when discussing the rights to have burial plots or tombs free from the interference of an overhanging building. The term also appears in common law during the time of King Edward I of England (1239–1307).[1] A later discussion is found in William Blackstone's work *Commentaries on the Law of England* (1766):

> Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.[2]

Famous American jurist Louis Brandeis (1856–1941) also referred to *ab orco usque ad coelum—from Hades all the way to Heaven*.[3]

The principle of *cuius est solum* suggests that a person who owns land possesses everything above and below it. Thus, an owner could prosecute those who violated the property's boundaries for trespassing, though they may never have actually touched the soil. Under this principle, if two neighbors wanted to join their properties by building a bridge over a plot of land that did not belong to either of them, the owner of that plot of land could stop the construction of the bridge or demand payment.

The principle of *cuius est solum* could also apply to a firm that wishes to drill or mine under somebody's land. The owner would have to give permission even if the entrance to the mine was on neighboring land.

After the first hot-air balloon flight in 1783, people began to realize that *ad coelum* could lead to some

extreme situations. The *ad coelum* principle would lead landowners to believe that the balloonists were trespassing. Imagine today thinking that one could shoot down the Goodyear Blimp as it passes overhead!

Once it was judicially determined that air rights could be thought of in terms of private and/or public airspace, it was not a big leap to see the value of those rights. An entire body of law has developed in the last century regarding air rights with its own particular vocabulary. For example, the right to fly over property, particularly for takeoff and landing, is called an **avigation easement.**

Surface rights can be as complicated as air rights. **Surface rights** can also be separated from the general bundle of rights. **Timber rights** as well as hunting and fishing rights are routinely leased or licensed to others. In the old days, farmers sold their timber rights when they wanted to clear their land for crops or livestock. During the Great Depression, people also sold their standing timber to earn extra money.

Another complicated surface right is the right to the water that the physical property may contain or adjoin. Many landowners are privileged to enjoy waterfront properties. Yet, the rights to the use of the water are very complex, depending on where the water is and what kind of water is available. Most states west of the Mississippi River are known as *prior allocation* states as opposed to the eastern states' *riparian system* (riparian means *river bank*). While the legal details vary from state to state in the West, the general principle is that water rights are unconnected to land ownership and can be sold or mortgaged like other property.

The **Riparian Doctrine** prevails in Florida and in most of the states east of the Mississippi River. The main idea behind **riparian rights** is that a person who owns land on, alongside, or crossed by a natural watercourse has a legal right to access and use of the water running through the property. But once the land that borders the water is transferred to another owner, the previous owner no longer has any claim to water rights. The rights to water are inextricably tied to the rights of the land and cannot be severed. However, because of the prior allocation theory in western states, it is not uncommon to see water rights severed from property rights and sold or leased to others.

When property rights are severed, this situation is often described as a **split estate.** (Technically, this term could be used to characterize a property where the air and/or surface rights have been severed in addition to subsurface rights.)

Subsurface Rights

As with air and surface rights, *subsurface rights* can be severed from the general bundle of property rights. **Subsurface rights** are ownership rights in a parcel of real estate, to the water, minerals, gas, oil, and so forth that lie beneath the surface of the property. These rights can be assigned, leased, mortgaged, or sold.

When most people consider buying real estate, they take into account only the surface and the buildings attached to the property when estimating its value. However, in some areas around the country, the minerals beneath the surface (mainly oil, natural gas, and coal) may be worth far more than anything on the surface.

The owner of a fee simple estate is generally free to transfer subsurface mineral rights to someone else by selling or leasing them. While restrictive covenants, state laws, and zoning ordinances may affect or restrict a property owner's rights to transfer subsurface rights, many owners in the United States have already done so.

The complications of transferring subsurface rights to others are numerous. When subsurface rights are transferred to others, the holders of those rights may enter the property and potentially be careless or imprudent in the way they extract minerals or enter the property. The actions of the subsurface rights owners could also cause damage to surrounding properties. The transfer of subsurface rights usually involves a long-term lease or sale, which means that the subsequent property owners may also be limited in their use of the affected property. This limitation could impede a future sale. *(See later discussion on mineral leases).*

FLORIDA'S NATURAL GAS DEPOSITS

About 300 million years ago, the earth was composed of water and a large land mass called Pangea. Pangea was a supercontinent that took up one-third of the planet's surface. About 225 million years ago, the continental plates began drifting apart. This drift

created enormous basins that swallowed up an enormous quantity of organic material, which became compressed by sedimentary deposits and superheated by magma. The compression and heating caused the creation of shale, a type of rock. When shale breaks down, it forms natural gas and other byproducts.[4]

While it has not been financially prudent to explore for shale gas in the past, a new process called hydraulic fracturing or *fracking* has made such exploration not only feasible but affordable for drilling companies.

Florida's compressed limestone formations may also harbor oil and gas 10,000 feet below the surface, and in recent years, drilling companies have been exploring the possibility of fracking in the Sunshine State. As early as 2012, companies applied for early drilling and wastewater permits and have discussed fracking with state environmental officials.[5]

Where in Florida would drilling efforts be focused? One is the **Sunniland Trend,** a 150 mile long and 20 mile wide underground formation that runs from Fort Myers in southwest Florida to Miami and is directly below public lands such as Florida Panther National Wildlife Refuge. The second area of fracking focus is northwest Florida.[6]

Hydraulic Fracturing (Fracking)

Natural gas is extracted by horizontal drilling—a process known as *hydraulic fracturing* (or *fracking*). The drills go sideways for hundreds of feet using a high pressure injection of water, sand, and chemicals to crack solid rock, releasing fossil fuels trapped underground.

Fracking is causing a significant energy boom in the U.S. as well as creating revenues for the states and municipalities where drilling has been successful. Frequently mentioned by oil and gas company advocacy groups are the numbers of jobs that are created by this relatively new industry as well as the prospect of lessening U.S. dependence on foreign oil.

What, then, are the advantages to exploring for natural gas? Coal-burning power plants have long been described as environmentally dirty. Those who defend the use of natural gas say that replacing coal-burning plants with cleaner natural gas plants would be better for the environment. (The Sunshine State gets about 60% of its overall electricity from natural gas.) Nuclear power is also considered to have significant environmental impacts. No wonder that interest in hydraulic fracturing has already been expressed by one of Florida's largest utility companies, Florida Power and Light.[7]

Nevertheless, hydraulic fracturing is also described as a controversial industrial process that is *invasive, threatening,* and *disturbing*—a process that goes on 24 hours-a-day. Drilling requires clearing access roads and building natural gas links and pipelines. Big trucks delivering chemicals and taking out the natural gas and waste water travel on roads to the wells frequently. The wells and surrounding areas are often unsightly. Once drilled, a wellhead can deliver gas for 20 or more years becoming a permanent fixture on the landscape. Several states have imposed a moratorium on fracking as those jurisdictions review the experiences of other states where fracking is underway.

Fracking also has its opponents in Florida. Alachua County[8] commissioners unanimously approved a resolution supporting a statewide ban on the practice. Two bills in the state legislature would ban fracking.[9] (See later discussion.)

A review of some of the controversial aspects of fracking follows.

Fracking and Water

Fracking is an industrial process that requires the use of millions of gallons of water to lubricate the drills. The water is mixed with chemicals and then pumped underground.

Industry proponents of shale basin gas drilling say it can be done safely and unobtrusively.[10] However, concerns arise regarding the use of chemicals mixed in with water to lubricate the drills used in fracking. Drilling involves millions of gallons of water pumped deep underground. A significant amount of the chemical-laced water is then recaptured and stored. In the process, some of the water is lost and the fear is that the chemicals used in the water will leach into nearby drinking wells. The *Raleigh News and Observer* cited a memo from the U.S. House Committee on Energy and Commerce which stated that the chemicals have included diesel, benzene, and xylem, which smell like paint thinners.[11]

Furthermore, fracking companies are not required to disclose what additives they inject into the earth to shake the gas loose. Fracking companies are exempt

from the regulation that exists under the federal Energy Policy Act of 2005 because of the *Halliburton Loophole*. In other words, fracking companies are exempt from having to comply with federal laws such as the Safe Drinking Water Act or the Clean Water Act.[12]

Concerned with the lack of required disclosure, Florida legislators proposed two bills at the end of 2014. House Bill 71 would require companies to inform the Florida Department of Environmental Protection (DEP) of the chemicals they use in the process and for the state agency to forward the information to a national registry called FracFocus.org. Another house bill, HB 157, would allow the Florida DEP to determine if an exemption from public disclosure should be given to any chemical that a company argues needs to be shielded as a proprietary secret. Audubon Florida has expressed its concern with both bills, citing that neither bill requires companies to disclose the amount of chemicals used,[13] information that might be vital should there be a spill. In January, 2015, three legislators proposed bills that would ban fracking altogether in Florida.[14]

An environmental group also expressed concerns that **acid fracking,** the process of using water pressure and acid to blast the limestone, could be used in Southwest Florida.[15]

Opponents to fracking point out that the source of the water for drilling is usually a river or waterway and tapping these water resources could prove contentious. In Florida, the issue of using ground water for fracking will be particularly heated since Floridians obtain the vast majority of its water supply, including their drinking water, from ground water through the Floridan Aquifer. Some critics of fracking in Florida describe water as the state's greatest resource and commodity and that the benefits of fracking are far outweighed by its potential damage to a sensitive environment.

Audubon Florida says water used in the fracking process in Lee or Collier counties could have a big impact on the water supply. According to a conservationist and former Sarasota County commissioner, even fracking to the south in Lee, Collier, and Hendry counties[16] could have implications in nearby counties such as Sarasota. Maintaining a "delicate balance" and potential stresses on the aquifer and rivers and lakes and potential for contamination were some of the concerns expressed.[17]

Fracking and Water and Wastewater Wells

As discussed earlier, fracking removes natural gas trapped in prehistoric shale rock formations by pumping in water and chemicals to smash the rock—a process that creates tons of waste. The question arises: where will the waste go?

The fracking industry prefers deep injection wells to store waste, a method approved by the EPA. However, injection wells can spill and, as described earlier, there have been studies that indicated areas surrounding these wells experience seismic tremors. Other options include trucking the chemically-treated water to municipal water treatment facilities or storing the wastewater in open-air impoundments. These options have been characterized as being expensive and complicated.[18]

Environmentalists also express concerns that fracking water will be stored less than 1,000 feet from the Big Cypress drainage basin and in the middle of the Florida panthers' remaining Everglades habitat. The Florida panther is an endangered species with an estimated 100 to 160 remaining in the wild. The Collier Resources Company owns the mineral rights to 800,000 acres in Collier, Lee, and Hendry counties which lie underneath the wilderness that is the panther's remaining habitat.[19]

According to Florida's DEP, Dan A. Hughes Company has applied for a wastewater injection well permit. The company has leased the underground mineral rights from Collier Resources Company, which owns or manages more than 800,000 acres of mineral rights in three counties in Southwest Florida. A public protest forced the Environmental Protection Agency to agree to hold a hearing on the permit.[20]

Communities in other states complain about the damage to local roads and extreme noise from trucks affecting their quality of life. Trucking waste from drilling sites also has costs and environmental consequences.

There is also concern that the condensates that are offgassed by the natural gas storage facilities are toxic.[21]

Fracking and Earthquakes

In addition to the aesthetic concerns about the impact of fracking on the landscape, there are serious environmental worries about hydraulic drilling, including whether or not fracking causes earthquakes.

According to *Mother Jones*, an independent investigative news organization, the U.S. Geological Survey (USGS) sought out reasons for the series of tremors in the Midwest. Because the Midwest is not highly prone to earthquakes from plates shifting beneath the earth, scientists considered the possibility that some of the earthquakes may have been man-made.

A reporter for *Mother Jones* writes,

> Seismic activity in the Midwest started increasing around 12 years ago, but picked up significantly in the past few years according to a new USGS study. Since 1970, the baseline for earthquakes in the Midwest measuring above a 3.0 was at around 21 per year, but beginning in 2001, that number began to rise. The number of 3.0-plus earthquakes rose from 29 in 2008 to 50 in 2009, then to 87 in 2010, and in 2011 to 134.[22]

The scientists concluded that even though fracking causes tiny tremors, there appeared to be no relationship between fracking and the larger earthquakes that have recently occurred. But they did note that earthquakes have taken place where pumping waste water into deep underground wells is a common practice, notably in Oklahoma, Arkansas, and neighboring states.[23] According to the *Huffington Post*, there are now more than 150,000 wells in 33 states into which oil and gas drillers have injected at least 10 trillion gallons of fluid.[24] New technology has made it possible to reach deeply into the earth to extract natural gas, thus increasing the numbers of wells.

Some states have moved to regulate, suspend, or even shut down fracking operations after seismic activity was noted. For example, Ohio state regulators suspended the development of several deep-injection wells after a 4.0 earthquake in Youngstown.[25] Arkansas and Texas regulators also shut down wells.[26]

Note that hazardous waste regulations that prevent induced earthquakes do not apply to the oil and gas companies. As of 2012, the Environmental Protection Agency (EPA) was working on recommendations under its authority to enforce environmental laws such as the Clean Water Act.[27]

It should be noted that Florida is not a state known for significant seismic activity.[28]

Community Pooling

Forced pooling is a controversial legal tool used to gain access to minerals beneath private property—in many cases, without the landowners' permission.

Also known as **compulsory pooling,** this practice allows drillers to tap local natural gas even if property owners do not want drillers exploring under their land. Forced pooling has grown more contentious as concerns rise about drilling safety and the environmental impact.

People who support property rights compare forced pooling to eminent domain—a government right to seize private property for the public good. However, unlike eminent domain, forced pooling benefits private companies and forces landowners to join gas-leasing agreements with their neighbors.

In general, drillers are able to extract minerals from a large area, in most states a minimum of 640 acres. If leases can be obtained for a certain percentage of land, the company has the ability to extract from the entire area. Since gas exploration companies would not have the right to set foot on the holdout landowner's property, they use wells built on a neighboring property to collect the underground gas.[29]

Approximately 40 states have some form of forced or compulsory pooling law.[30] Florida has a forced pooling law, FS 377.28. It states, in part, "…[that] the need for the operation as a unit of an entire field, or of any pool or pools, portion or portions, or combinations thereof within a field, for the production of oil or gas, or both, and other minerals which may be associated and produced therewith, in order to avoid the drilling of unnecessary wells, otherwise to prevent waste, or to increase the ultimate recovery of the unitized minerals by additional recovery method…" may be considered.[31]

According to gas companies, forced pooling has numerous advantages. Pooling allows for fewer wells and obtains gas more efficiently. Pooling also creates neater drilling parcels instead of a quilt pattern of leased and unleased land. Because drilling companies could be tempted to siphon natural gas from holdout property owners since the holdout land would be in the way of clear access to leased property, pooling could make drilling companies more accountable for payment. Since landowners would be forced to cooperate with drilling firms, drillers could be compelled to compensate these individuals as well.[32]

IMPACT ON HOMEOWNERS/ CASUALTY INSURANCE

As discussed earlier, there is evidence that fracking creates some seismic activity, either directly or indirectly.

What if fracking activity on nearby land or on land leased to a mineral rights holder causes damage to buildings? In many states, damage done to dwellings and harm to people caused by earthquakes *is not covered* in a typical homeowner's insurance policy; neither is the shifting, rising, nor sinking of land, whether it is natural or man-made.[33]

This lack of coverage should be of some concern to property owners. If homeowners have leased their oil or gas rights and the immediate surrounding neighbors have not and are harmed by fracking activity near their homes, they could bring a cause of action against the neighbor and/or against the company involved in the fracking activity, especially in cases of negligence. However, suing the neighbor might be an exercise in futility, if the neighbor doesn't carry sufficient insurance. Presumably, the fracking company would carry sufficient insurance, but proving negligence can be difficult, particularly if the damaged property owner is suing a mega-corporation.

It is advisable for property owners to review their coverage against problems caused by fracking and if insufficiently protected, they may want to consider purchasing an earthquake endorsement.

IMPACT ON TITLE INSURANCE, LENDING, AND APPRAISING

Title Insurance

Real estate professionals know that title insurers do not cover every title defect. Municipal water liens and building code violations are examples of standard exemptions from title insurance coverage. What may be less well known is that title insurers have a standard exception for any lease, grant, exception, or reservation of minerals or mineral rights.

This means that if a property owner severed any of their mineral rights in the past, any problems that arise would not be covered if those interests negatively affect the property in the future, even if it was not specifically disclosed in the policy.[34]

However, it is possible to obtain an endorsement (ALTA Endorsement #9) in a residential transaction to cover title issues regarding mineral rights. Asking for such an endorsement would require the insurer to do title work to see if mineral rights have been previously reserved, and if they have, the title insurer will not add the endorsement. Should a title insurance company refuse to add the endorsement, it may be a red flag to a purchaser who is concerned about title problems.

It would be difficult to find a title company that is willing and qualified to render a title opinion on the status of a property's mineral interests. Though title insurance companies rarely provide mineral estate coverage, mineral rights title searches are still possible, but not easy. Here's why:

Deeds do not commonly refer to the status of mineral rights. The assumption is that mineral rights as well as other subsurface rights and air rights are included in the transfer of the property unless there is a specific mention to the contrary. According to one attorney, "The only way to be sure that a deed actually conveys mineral rights is to research the chain of title to confirm the mineral rights were not previously severed and are still a part of the fee simple estate."[35]

One title insurer advised that should a mineral deed or other unusual property right severance be discovered, it would be disclosed to the purchaser and then accepted on the policy. However, it is questionable as to whether severed mineral rights are even likely to be discovered. Many mineral interests were granted decades ago.

If title researchers discover that mineral rights have been severed, they would be challenged by the difficulty of tracing the document forward to the current owners. Mineral title searches involve more than the usual time for property title searches and may involve title issues that are difficult to resolve. As mentioned earlier, mineral rights were often established decades ago and were written by hand. The rights may have been passed on to the original owner's descendants or to other entities.[36]

Assuming that the title company would disclose the discovery of a mineral rights reservation to the buyers around the time of closing, would the buyers be able to terminate the transaction and be entitled to a refund of their deposit? Most likely, yes. If the seller did not advise the buyers that the seller was transferring less than clear, marketable title to all of the prop-

erty, then the seller would be in breach of a contract that assures the buyer of clear and marketable title.

Lending

What does a severed estate mean to lenders? Potentially, severed mineral interests or oil and gas leases can significantly decrease the value of the mortgaged property.[37]

The owner of the oil and gas is termed the holder of the **dominant estate.** The owner of the land under which the minerals lie is called the **servient** property. Consider the term *servient* as in the word *subservient*. The landowner serves the needs of the dominant owner. These needs may include the right to use as much of the surface area as is reasonably necessary to obtain the gas beneath. Subsurface lessees (most often oil and gas leases) often have similar rights to dominant estate owners.

For example, the owner or tenant with subsurface rights could possibly build roads, install pipelines, or construct drilling pads. While a lender may take into account the potential for royalties that might offset devaluation or risk, there is always the possibility that such intrusions onto the land significantly decrease the value of the mortgaged property.[38]

Consider also that the holders of mineral rights have contracts with the landowners that prohibit the landowners from building on, digging in, and even landscaping their land. Those types of prohibitions could also limit property uses as well as the number of future buyers and, thus, the collateral's value.[39]

According to one mineral deed described in a North Carolina newspaper, the document gave the drilling company the "perpetual right to drill or build tunnels, shafts or wells—a right, the mineral deed says, the company has 'without limitation.' Although the deed specified that the drilling or mining would originate from land other than the homeowner's property, the activities and equipment, which could include tunnels and shafts, would occur beneath it."[40] Some lenders may perceive these activities as adversely affecting the collateralized property.

Many lenders will not work with borrowers when mineral rights are not included in the purchase: "Lenders …do not approve these transactions without the mineral rights. Fannie Mae and Freddie Mac won't purchase mortgages on properties with title defects, a term which some would interpret to include the reservation of mineral rights. They may make an exception for mineral rights—but only those that "do not materially alter the contour of the property or impair its value or usefulness for its intended purposes."[41]

Catskill Mountainkeeper, a New York environmental group, reported that banks are also refusing to refinance for homeowners, even to neighbors who don't have a gas lease, if their property is close to a property that does have a lease. Lenders who provide Federal Housing Administration (FHA) and Department of Housing and Urban Development (HUD) loans will not provide financing if surface or gas rights have been leased within 300 feet of a residential structure or within 300 feet of property boundary lines.[42]

Appraising

While it is too early to determine the impact of severed mineral rights on the value of properties in Florida, other states have already reported the impact of fracking in some communities.

> How should real estate licensees respond to consumer concerns about the possible impact of fracking on the value of property they wish to purchase in North Carolina?
>
> Perhaps the experience of New York real estate brokers can offer some guidance.
>
> In the second quarter of 2012 residential sales were up 6.7 % across New York State. In Sullivan County, where people tend to buy second homes, sales were down 4%. Sullivan County lies on top of the Marcellus Shale, an area that has been associated with fracking exploration.
>
> Real estate brokers there report that prospective buyers ask numerous questions about the possibility of fracking, its impact, and what to know if leases for mineral rights have been given.
>
> A president of a property owners association, which represents 70,000 acres in the area, states that his group represents owners willing to sign leases once New York approves fracking. But real estate professionals in the area worry that their businesses would be "doomed."[46]

A 2012 *New York Times* article reported that potential buyers are spooked by the possibility that New York State will permit hydraulic fracturing.[43]

In Texas, "real estate appraisers have severely discounted valuations, (driving prices down by as much as 75%) if a property has a gas well."[44]

Just how fracking and severed mineral rights will affect assessment rolls, the value of property in communities, and ultimately the tax base is yet to be determined.[45]

MINERAL LEASES

One alternative to selling subsurface mineral rights is to lease them for a specified period. Mineral rights extraction companies often prefer to lease mineral rights for a period of time in order to determine the exact value of the available minerals under the surface. If insufficient minerals are found, the lease will not be renewed. Surface rights owners normally negotiate royalty payments based on a percentage of the value of the extracted minerals. Many states require minimum royalty payments.[47]

Texas, Louisiana, and Oklahoma property owners are very familiar with the transfer of subsurface rights since these states are rich in oil. But the transfer of subsurface rights is less common in Florida, and land owners who are considering transferring their subsurface property rights should be aware of several important issues.

As described earlier, the holders of the subsurface rights will have the right to access the surface and occupy as much of the land as is necessary to extract the minerals. Even if it is not expressly stated in the agreement that transfers those rights, the dominant owner has this prerogative. As a result, the servient estate owners should be concerned as to what extent a subsurface property owner may use and occupy the surface to obtain the minerals and what resulting damage or alteration could occur.

Granted, there are limits to what extent the subsurface owners' rights are; the use has to be reasonable and justifiable. For example, surface owners have a duty to ensure that the surface is not damaged or weakened. Should damage occur, subsurface owners must take remedial steps to restore the support as it was prior to the removal of the minerals. Second, subsurface owners must operate with deference to the surface's owner.[48]

In order to protect property rights, land owners who consider the sale, assignment, or lease of their subsurface mineral rights should obtain competent legal advice and insist on complete written documents that clearly define the rights and obligations of the parties that deal with the exploration and removal of subsurface minerals.

LICENSEE'S DUTY TO DISCOVER AND DISCLOSE MATERIAL FACTS

The doctrine of caveat emptor or *let the buyer beware* still prevails in many states. This doctrine applies to the purchase of real estate. However, the public has a right to trust real estate professionals, even when those professionals do not represent them. Licensees, particularly those acting as single agents of the property owner (i.e., listing single agents or leasing agents/property managers), have an independent duty to discover and disclose material facts.

Listing agents, as single agents of the property owners and the persons making the initial representations in advertising the property, including information submitted to cooperative listing services, bear the primary responsibility for assuring that their statements concerning the property are accurate.

Given the possibility that some owners may have purchased, inherited, or otherwise obtained property where the air, surface, or subsurface rights may be limited or nonexistent, it would be advisable that when there is a red flag, listing real estate professionals ask sellers to order a search of the title. Similarly, a licensee who encounters red flags should counsel the buyer to obtain legal advice, should any of the rights that are typically obtained appear to be reserved or severed.

Examples of Red Flags

What would a red flag be regarding the possibility of a severed estate? Licensees selling property in those Florida counties where mineral rights issues have already been severed would be expected by the Florida Real Estate Commission to advise sellers and buyers about the possible impact of drilling in terms of title, lending, appraising, and environmental impacts and to refer those consumers to appropriate

advisers. Again, licensees are expected to refer their principals and customers to experts when they suspect that a property may be, in fact, a split estate.

Listing brokers cannot rely on what their principals and customers tell them about these matters either. Licensees who make statements to the public about a property are expected to have personally visited and inspected the property and may be held accountable for their representations/statements.

There is no question that if any property rights are reserved or severed, that information must be disclosed.

SUMMARY

Real estate professionals have enormous responsibilities to their principals, customers, and the public at large. They are the gatekeepers of the American dream of home ownership, and they are the guardians for appropriate land use and a clean environment.

While Florida professionals have not, in the past, had to be overly concerned about the possibilities of split estates or their consequences, the potential for hydraulic fracturing may make estate transactions more complex. It is both a blessing and a curse of this business that each real estate transaction is different and each one represents a learning opportunity.

Split estates represent yet another such challenge for real estate professionals.

RESOURCES: All resources for this module are at the end of this course.

MODULE 3, PART III REVIEW – TRENDING IN REAL ESTATE TODAY

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. ***Cuius est solum, eius est usque ad coelum et ad inferos* means:**
   a. property owners can expect to receive subsurface rights at closing.
   b. property owners may sever their air, surface, and subsurface rights.
   c. property owners generally own "from heaven to hell."
   d. hydraulic fracturing is illegal.

2. **The right to fly over property, particularly for takeoff and landing, is called:**
   a. an avigation easement.
   b. riparian rights.
   c. prior allocation.
   d. trespassing.

3. **The Riparian Doctrine prevails:**
   a. in Colorado.
   b. in states with significant drought.
   c. in Florida and in most of the states east of the Mississippi River.
   d. wherever land borders water.

4. **Another term for hydraulic fracturing is:**
   a. severance.
   b. water pressure.
   c. fracking.
   d. riparian drilling.

5. **The leasing or assigning of a landowner's mineral rights:**
   a. is always a short-term lease or sale.
   b. has no effect on a future sale of the property.
   c. does not limit the use of the property by any subsequent owners.
   d. gives a right of access to the holder of the mineral rights.

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An Overview of Home Construction and Inspections for Real Estate Professionals

By Denise Oyler

Denise Oyler is a Broker Associate with Berkshire Hathaway HomeServices in Sarasota, FL. A native Floridian, Denise attended college at the University of Central Florida receiving a BA in Psychology with a minor in Business Administration. She also has a master degree. Her coaching career began twenty five years ago in the boating industry and continues with a unique online coaching program titled Emergence: Real Estate Coaching for New Agents.

Denise began her real estate career as a developer in Alabama and in 2005 received her Florida Real Estate License. Her credentials include: Training Broker for a mid-size independent brokerage company, State Permitted Real Estate Instructor, and a member of the Florida REALTORS® Faculty.

For the past four years Denise has traveled throughout the state of Florida speaking at real estate associations and conventions as the expert on training newly licensed agents. Denise Oyler's dedication to this profession remains steadfast as she serves as a Director for Florida REALTORS,® sits on several state committees and locally is the Chair for Professional Development and on the Board of Directors for the REALTOR® Association of Sarasota and Manatee.

Contingency—dependent upon the fulfillment of a condition.

Egress—a means of exiting a property.

Flashing—impervious material placed in a strategic position to prevent water passage.

Heat Pump—a device that transfers heat from a colder area to a hotter area by using mechanical energy, as in a refrigerator.

Heat Strips—a more expensive way to heat air; one heat strip will use more power than an entire heat pump.

HVAC—the acronym Heating, Ventilation, and Air Conditioning.

Ingress—a means of entering a property; access

OSB (Oriented Strand Board)—a building material comprised of wood particleboard formed by adding adhesives and compressing layers of wood strands or flakes in specific patterns.

P-trap—a plumbing fixture that holds a small amount of water to create a seal that prevents sewer gas passing from the drainpipes into the home.

R-value—a quantifiable rating on how well a solid material is resistant to conductive heat transfer. This measurement is used to describe insulation. Increasing the thickness of an insulating layer increases thermal resistance and keeps a home cooler.

Sheetrock—brand name for drywall.

WDO—acronym for Wood Destroying Organism (not just termites).

LEARNING OBJECTIVES

Upon completion of Module 4, the student will be able to:

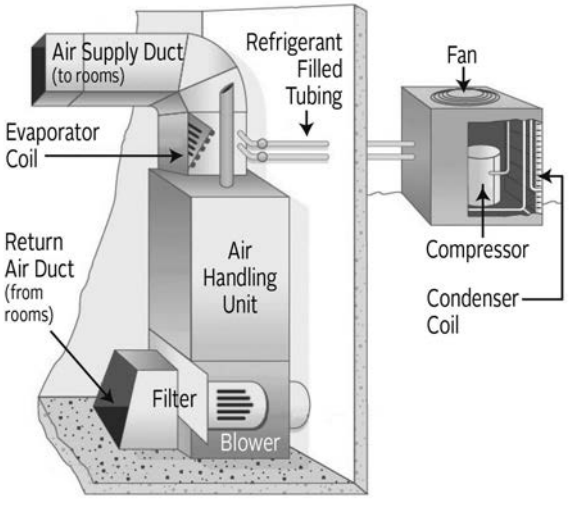
1. Identify the basic processes involved in building a home.
2. Explain the importance of building inspections during the contract contingency period.
3. Apply construction knowledge when previewing homes.
4. Discuss various inspections that may be performed during the home inspection contingency period.
5. List the steps for vetting other business professionals within the real estate industry.

INTRODUCTION

If you are a real estate licensee specializing in the resale of residential property, then you might be wondering, "Why is it so important that I understand the basic principles of residential construction?" Every home you list or sell will more than likely have a home inspection conducted during the inspection period timeframe allowed by the Florida Residential Contracts for Sale and Purchase. Understanding how a home is constructed will give you insights into any defects which may be discovered by the licensed home inspector. Just for clarification, you are a real estate professional, not a home inspector. It is not your responsibility to explain the home inspection report to your customer. The home inspector is normally hired by the buyer and the buyer is also their customer. Together, you share the customer. It is the home inspector's responsibility to explain the inspection report to their customer.

It is to your advantage to have a preliminary understanding of the most common subjects the inspector will discuss with buyers. Demonstrating your knowledge in this area by answering basic questions about the home you are showing your buyer, even before you present an offer on that home, will instill confidence in your skill level.

For example, a few years back my role at a mid-size independent firm was to train all newly licensed sales associates. At one point I had 15 new licensees on my team. I allowed them to call me at any time with questions they might have. One afternoon a call came in from a sales associate who was showing a home and he asked me, "If there are two air conditioners, should there be two thermostats?" Of course the answer is "yes." However, I knew the price range of homes this licensee was showing and I could not understand why this property would have a second central a/c unit. I asked him where the two air conditioning units were located. He replied, "One is outside and one is in a closet in the home." Clearly this licensee did not understand the different components of a HVAC system. A single HVAC system has one compressor and one air handler; the air handler was in the closet and the compressor was outdoors. His ignorance could have led to a material misrepresentation about the property. I am pleased to share that this licensee has since learned much more about the makeup of a home and today is a successful full-time REALTOR®. This is an excellent example of the necessity to broaden your knowledge base into every area that affects the purchase and sale of a home.



HVAC System

THE HOME CONSTRUCTION PROCESS

If you watch the construction of a house, you will learn there are several stages in the building process. In layman's terms: first you might see the ground being moved around, then there might be concrete blocks all around the perimeter of what looks like the location of the home. Soon you will notice pipes sticking out of the ground. A little farther along in the process some really big wooden triangles will be delivered to the property.

Before any of these physical changes occur, there is an unseen first step: the purchase of the land. The State of Florida has a contract to use for this type of purchase, the Vacant Land Contract. During the due diligence time period, if the property purchased is not part of a new home builder approved sub-divided parcel of land project, then several specialists should be consulted. Some of these specialists include local zoning officials, environmental engineers, architects, and local permitting officials. In this course we will not go any further into this area of raw land development. For the sake of simplicity, the home construction we are discussing has already been approved and is being completed by a reputable home builder in your local area.

The vast majority of American homes are built using completely standardized building practices. One reason for this consistency is a set of uniform building codes that apply across the country. Another reason is cost—the techniques used to build homes produce reliable housing, quickly, and at a low cost (relatively speaking). Many of these steps are performed by independent crews known as **subcontractors**. For example, framing is generally done by one subcontractor while the roofing is done by a completely different subcontractor. Each subcontractor has specialized knowledge and skills and is an independent business. All of the subcontractors are coordinated by a **contractor** who oversees the job and is responsible for completing the house on time and on budget. Electricians are another example of a type of subcontractor.

PREPARING FOR CONSTRUCTION OF THE HOME

The two main processes that take place before any building can begin are:

1. **Grading and site preparation.** This may involve "two crews in one" unless there are a lot of trees or vegetation on the site, necessitating a separate crew to clear the land. Bulldozers and backhoes are brought onto the site and clearing begins. The property has already been surveyed and trees that are to remain are marked. The main objective for this crew is to level the ground. On occasion fill dirt may be used to raise the building level before the foundation is poured.
2. **Foundation construction.** Once the site has been cleared and leveled, wooden forms are built to serve as the template for the foundation. Every home has a foundation—either slab, crawl space, basement, or in coastal areas, posts. Footings (structures where the house interfaces with the earth that supports it) are installed. If the home is going to have a well, it will be dug at this point. If the home has a full basement, the hole is dug, and the footings are formed and poured, plus the foundation walls are formed and poured. If it's slab-on-grade, the footings are dug, formed, and poured; the area between them is leveled and fitted with utility runs (plumbing drains and electrical chases); and then the slab is poured. Once concrete is poured into the holes and trenches, it will need time to cure. During this period, there will be no activity on the construction site.

Inspection before Moving Forward

When the curing process is complete, a county or city inspector visits the site to make sure foundation components are up to code and installed properly. If you have seen homes with a lot of cracks on the outside walls, one of the reason may be that the concrete poured met the curing code time frame, but could have cured longer to help ensure against multiple cracks in the future.

CONSTRUCTION OF THE HOME

Framing

The skeleton of the house is now constructed. Lumber—particularly 2x4s, plywood, and OSB (oriented strand board) are the main materials used

throughout the framing process of home construction. There is also a protective barrier material known as a house wrap that is used to decrease mold-causing moisture. If the home is a concrete block home, the outside walls will be formed using concrete blocks and a masonry crew will be on site. Inside the walls of the home, 2x4s are placed on 16" centers. The middle of one 2x4 is exactly 16" away from the center of the next 2x4.

SIDE NOTE: The term *elevation* in the housing industry has a dual meaning. Typically, when one hears the word elevation they automatically think about sea level and flood zones. When discussing the architectural design of homes, elevation has a different meaning—the outward appearance of the home. Several homes within a planned community may have the same under-air interior layout; however there may be a difference in their outward appearance, or elevation. To create the difference between the homes, roof designs, window placement, and outside wall materials used may vary.

Installation of Windows and Doors

2x10 Header Beam

Special reinforcement and construction regulations are followed when framing doors and windows. This process gives the walls above the doors and windows enough strength to withstand the weight of the roof. A 2x10 "header" or beam is constructed to provide the necessary support.

Roofing

Trusses are used for roof framing. They are a framework of pre-fabricated, triangular wooden structures used to support the roof. Strong and designed to span large distances, trusses distribute the weight of the roof to the outside walls. To install trusses the contractor will require a crane. The trusses will be attached to the walls with metal plates. Aluminum flashing is used to keep water away from the walls at the point where shingles touch the walls. Leaks are commonly caused by improper flashing. Once the trusses are up, the roof is covered in plywood or Oriented Strand Board (OSB). The selected covering of the roof is then applied. The most common selection is asphalt shingles. There are different grades and styles of asphalt shingles. Tile is also another selective covering along with metal, all of which have a variety of styles to choose from. With all roofs, a form of venting must occur; ridge vents are common.

Trusses

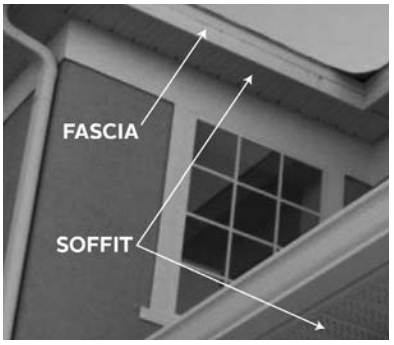
Flashing

SIDE NOTE: The type of roof construction chosen can significantly affect the cost of homeowners' insurance. A hip roof and a gable roof are two of the most popular chosen roof construction styles. Typically, a **hip roof** withstands higher winds better than a **gable roof**; therefore insurance premiums on homes with similar square footage built in the same year may be higher for the gable roof than the hip roof construction. This concept is especially important to remember when showing older resale homes.

Siding

If a home is using vinyl siding for the exterior walls, then it is installed during this phase of construction. **Vinyl siding** is made from thin, flexible sheets of plastic about 2 millimeters thick, pre-colored, and bent into shape during manufacturing. The sheets are 12 feet long and about a foot high. Starting at the bottom the sheets **interlock** into each other as you go up. Because vinyl expands and contracts due to temperature and sunlight, it fits into deep **channels** at the corners and around windows and doors. The channels are deep enough that as the siding contracts it

remains within the channel. Each channel and sheet is nailed into place. The area extending out from the house under the roof is known as the **soffit** (parallel to the roof). The **fascia boards** are perpendicular to the roof. The soffit is perforated so that air can flow into the attic and up through the ridge vents to ventilate the attic. At this point the house is *dried in*, meaning that it is completely protected from water.



Soffit and Fascia

Rough Electrical

The purpose of this crew is to establish safe electrical service to every room in the home. All boxes for electrical switches, outlets, and lights are placed throughout the home according to a predetermined set of plans. The electrical panel is installed and then all wires are distributed throughout the home. Normally the wires travel throughout the attic and between the walls. All wires are clipped and capped.

Rough Plumbing

Rough plumbing involves installation of all water lines, sewer lines, (you will have sewer lines even if you have a septic system), bathtubs, and ventilation systems. All the separate sewer lines will join one main line and be connected to either a septic or sewer system for the home. All separate water lines will join one main water line and be connected to either a well or public water service.

Rough HVAC

Before the drywall process begins, it is good practice to install all the ducting and ventilation systems for the heating and cooling system of the home. There are two parts to the system. The air handler normally is located inside the home in a closet, attic, or garage (as our friend we mentioned earlier in the course discovered!), and the compressor is found outside the home mounted to a concrete pad. The purpose of an air handler is to move the air. All air handlers require a return duct where the HVAC filter is located. This filter should be cleaned or replaced on a regular basis otherwise the system becomes less efficient. Inside the air handler there are evaporator coils, which remove the heat and humidity from the air passing through the system. The compressor/condenser is the motor part or heart of the system. It changes chemicals (refrigerant) from a gas to a liquid and then into a low-pressure mist.

Inspections before Moving Forward

Rough framing, plumbing, and electrical and mechanical systems are inspected for compliance with building codes. More than likely, these will be three different inspections.

Insulation. The purpose of insulation is to lower the heating and cooling costs for the house by limiting heat transfer through the walls and the ceiling. The insulation process starts by installing **foam channels** in the eaves. These channels guarantee that air will be able to flow from the soffit vents to the ridge vents. Without these channels, insulation tends to expand into the eaves and block the soffit vents. The house we are *building* in this course uses standard fiberglass insulation throughout. All insulation has a thin plastic barrier called a vapor barrier. This vapor barrier is designed to protect the insulation from natural moisture due to weather.

Drywall. This is the process where a home starts looking like a home. The interior walls are formed and rooms actually become rooms. **Drywall** is plasterboard, commonly called **sheetrock.** It is a half-inch layer of plaster or gypsum sandwiched between two thick sheets of paper. It is remarkably solid, and also remarkably heavy. Each sheet measures four feet wide by twelve feet high and weighs around fifty pounds. In one day the dry wall crew will install all the drywall and then return the next day to tape. **Taping** (or mudding) the drywall means to cover all of the cracks and nails with **drywall mud** (spackling compound) so that the walls are completely smooth. A primer coat of paint will then be applied.

FINISHING DETAILS

From this point forward detailed finishes are applied to all the stages done previously.

1. **Trim.** Detailed trim work is crafted at this stage: baseboards, moldings.
2. **Painting.** During this detailed stage all walls and moldings are painted. If wallpaper is to be installed it is completed also.
3. **Finish electrical.** The electrician will return and install all light fixtures, switches, wall outlets, and cover plates.
4. **Bathroom and kitchen counters and cabinets.** All the cabinetry and countertops are installed.
5. **Finish plumbing.** Once the cabinets are in, the plumber will return and install sinks, toilets, and faucets. If the water heater was not installed during the rough plumbing stage, then it will be installed now.
6. **Carpet and flooring.** All chosen flooring is installed.
7. **Finish HVAC.**
8. **Hookup to water main or well.**
9. **Hookup to sewer or septic system.**
10. **Punch list.** At this point, the general contractor inspects the house, noting any problems. All problems are noted on what is called a **punch list.** The different sub-contractors return to fix any issue discovered during the inspection.

FINAL INSPECTION

A building-code official completes a final inspection and issues a Certificate of Occupancy (CO). If any defects are found during this inspection, a follow-up inspection may be scheduled to ensure that they have been corrected. Throughout the process of building a home, various county inspections are conducted to maintain building codes and quality. These codes and regulations are for safety.

APPLYING YOUR KNOWLEDGE

Now that you are armed with a better understanding of how a home is constructed, when showing a home to a prospective buyer or previewing a home as a potential listing, your new skill set will come in handy. You will look at homes in a new light, observing details and features you may have been oblivious to in the past. Sharing these insights with your customers will once again reinforce their belief in your professionalism.

The best way to apply any newly acquired knowledge is through practice. As you preview properties in an effort to obtain listings and show listed properties to prospective buyers, be observant. When you drive to the property and enter the subdivision or road where the home is located, notice the construction material of the road and its condition. If the quality of the road is poor, make a mental note to check whether the road is private or publicly owned.

Upon arrival at the subject property, note ingress and egress—every property must have the availability of legal access. Is there a shared driveway or a fence with a lock? Does a neighbor's basketball hoop block a common sidewalk?

Park on the street and not in the driveway so that you may observe the driveway's construction, slope, and any defects. From the street it is also easy to observe the roof. Check for tree branches on the roof or close to the roof. Look for any *dips* in the structure of the roof surface. Note the roof's ventilation system. In older properties ridge vents may be damaged.

As you walk closer to the entrance of the property, take a close look at the drainage along the sides of the home. Water is a great source of *story-telling,* so look for extra damp areas on the ground. If it has not rained for a while and a section of the property is damp, this could be an indication that the irrigation system is not functioning property. If there has been a lot of rain, even better. Water will flow to the area of least resistance. Follow the flow and look for abnormalities.

Before knocking on the front door note the condition of the soffit and fascia. Also look for roof shingle slippage. Slippage occurs normally as a roof ages. If more than three quarters of an inch of shingle is visible extending over the edge of the roof line, it indicates the roof is nearing the end of its life expectancy.

A common area where water damage may occur is the point at which the front door roofing area joins the main roof area. Look up for water damage and look down by the wood framing of the front door to check for signs of water damage.

The minute you step into the property, take a deep

breath and mentally record your first-impression of the presence or lack of offensive odors. Our olfactory system has been designed to adjust to unpleasant smells within a few minutes. **Olfactory adaptation** occurs when odor receptors stop sending messages to the brain about a lingering odor. First impressions signal potential defects within the property. A moldy smell is a common first impression experienced in properties that are vacant, without power, and have no means of circulating air. The aroma of mold may also be an indicator the property could have plumbing defects or roof leaks.

Another common smell encountered frequently is pet urine. Pet urine is not considered a material defect of a property, but it can influence a buyer's perceptions of the property. Any strong unpleasant odors may derail a home sale. Extremely strong perfumed smells, suggest to buyers subconsciously, "what are the sellers hiding"? Be aware of where your nose may lead you and your customers!

While previewing the interior of the home, examine the ceiling—look for any possible active or repaired water leaks. Pay special attention to skylights because they have a tendency to leak. If a mold smell is strong and there appears to be no indication of roof leaks that have reached the ceiling, then check under kitchen and bathroom cabinets for leaks.

Also check the flooring to see if it shows any sign of dampness. Hot or warm spots in the floor, soaked carpeting, and abnormally high water bills can be signs of failing copper pipes. Pinhole leaks are common occurrences in some areas. A **pinhole leak** is where the copper plumbing has experienced pitting corrosion and begins to leak. Copper water piping does not last forever. In its original design criteria, copper piping was projected to last for 20–25 years, but failure can often occur in as little as two years due to water or soil chemistry. A copper water plumbing system can have significant damage by pitting corrosion, but not have pinhole leaks. The challenge is how to discover pitting corrosion before pinhole leaks develop. Many homeowners in the areas of higher than normal reported pinhole leaks have re-plumbed their homes to avoid the costly repairs caused by pinhole leaks.

Next, begin a mental checklist of all the major components of a home and begin to inspect the following items at the subject property: A/C unit (both compressor and air handler), hot water tank, electrical panel, windows/sliders, appliances, and how the dryer is vented. When looking at these items, note their age and condition. Pay special attention to the electric panel. Is it fuse or circuit breaker operation? Most insurance companies will not insure homes that still operate using a fuse system. Note the manufacturer—Federal Pacific electric panels are not insurable by several insurance companies. Open the panel door and look for the latest service or inspection date.

If the property has a pool, observe the water level in the pool and the finish of the pool's surface and decking surface. Look for cracks that may have occurred in the pool decking area and observe if there is water pooling. Water pooling is an indicator that the drainage system for the decking may not be working. If there are a series of obvious rings around the pool, this could be an indication it that the pool has a leak. The best way I can describe what a ring around a pool looks like is to equate it to drinking a cup of coffee with cream in it. Let's say you are having your morning cup of coffee and have already taken several sips, but the phone rings. It's one of your customers and they have lots of questions. When you finally get back to your cup of coffee for 30 minutes later you take a few more sips and the phone rings again. Another 30 minutes goes by before you can take another big sip of your coffee and when you do…you notice two coffee/cream rings around your cup. This is what happens to a slow leaking pool—water/scum lines will appear around the pool.

If the pool is screened, walk around the inside perimeter of the pool cage and check for rusted out fasteners and any screen rips or tears. Wood rot is another common defect found around pool areas especially where the pool cage is joined to the roof overhangs.

Next you should walk around the outside of the property. Observe the placement of trees, both branches and roots and how they affect the foundation or roof of the property. Look for possible wood rot damage, either on the siding or casements.

It is not your responsibility to point all the property defects of the home to your buyers. You do need to know what questions to ask the listing agent and the home inspector.

If you are previewing the property to gather information for a listing presentation, knowledge of home construction will alert you to possible material defects

and allow you to intelligently request from the seller further information about past repairs or defects. *If you are not a licensed home inspector, be careful what you say.*

BRING ON THE INSPECTORS

Now that an offer has been accepted and it is an executed contract, always recommend your customers or clients order a home inspection, which is different from a building inspection.

A **home inspection** is usually tied to what is called a contingency in our Florida Residential Contract for Sale and Purchase. The time period in which to complete the home inspection is normally specified in the contract. If you are working with the buyer, check the contract and note the inspection deadline date. Confirm in writing with the listing licensee, if applicable, that they agree that the date is correct. This is one deadline you definitely do not want to miss.

When recommending a home inspector to a customer it is advisable to always recommend at least three different companies or individuals. Make sure you have vetted these inspectors, because they are an extension of your service. They are your business partners in the transaction. To properly vet a home inspector, review the home inspector's website and the first impression they portray. Review the home inspector's written reports to determine the reports are easy to understand. How many years of experience do they have? Are there testimonials and reviews from past customers? Does the inspector appear to be detailed? Does the inspector have good communication skills? Does the home inspector dress professionally? What type of equipment do they use? Request references from the home inspector or check with your brokerage's management team.

The purpose of the home inspector is to identify if the property has any defects. This typically means that the inspector should be fully aware of governing building codes, such as frame construction, the electrical and plumbing systems, heating and cooling systems, and the condition of any other structures that are found on the property. Additional services offered by the home inspector, at an additional cost, may be irrigation system inspection and pool inspection.

One of the first aspects that a home inspector will address is the condition of the core structure. This means checking the foundation of the home for any weakened areas of support. If the basic structure appears to be sound, then the inspector can move on to the major systems that provide utilities to the home.

Heating and cooling systems for the property are tested as well as the electrical wiring and plumbing systems checked. Gas lines are checked for leaks and proper installation. If fireplaces are present, they are inspected to ensure the devices are in proper working order and are vented properly.

Next, the interior structures in the property are inspected. This means checking the condition of interior walls and doorframes to make sure there are no signs of a weakened infrastructure. Ceilings are also inspected to ensure they are in good condition. Throughout the interior of the property, the inspector will look for the presence of safety devices, such as smoke detectors. Attic spaces, closets, and the condition of the doors and windows are also reviewed. Appliances may also be checked to make sure they are operational.

Outside, the inspector will pay attention to the condition of the roof and look for proper flashing and drainage via gutters and downspouts. Irrigation systems may be tested upon request. If the home inspector does not test irrigation systems, a separate specialist may need to be scheduled. The same applies to pool inspections. Inquire with the home inspector whether or not they conduct pool inspections.

Almost every property has a few problems and there is almost always a solution for those problems. A home inspection is not an appraisal; it does not determine the value of a property. Nor does it guarantee items that are working at the time of the inspection will continue to work. It is recommended that real estate professionals be present during the home inspection (check with your brokerage company on their policy of attending home inspections) and, depending on the size of the property, plan to budget at least three hours for the process to be completed.

If a home inspector recommends further detailed inspections this is the time to call in one or more specialists. For example, a home inspector is not a

roofing expert. An issue with the roof may require the experience and expertise of a roofing contractor. Electrical issues are safety issues and it is a good practice to leave those to licensed electricians.

Since we live in Florida, mold is frequently an issue that is recommended by home inspectors to be further investigated. (Note, some inspectors have mold inspection certification.)

The key to mold control is moisture control. Mold is caused by excess moisture due to plumbing leaks or a warm climate that causes condensation. Molds have the potential to cause health problems. Molds produce allergens (substances that can cause allergic reactions), irritants, and in some cases, potentially toxic substances (mycotoxins). Inhaling or touching mold or mold spores may cause allergic reactions in sensitive individuals. For a mold sample to be analyzed for mycotoxins, a sample must be taken and shipped off to a laboratory for analysis. This is done by a certified mold inspector. It takes around three to five days for the report and there is a separate cost involved for laboratory testing. As a licensee, be especially careful not to state whether the mold is good mold or bad mold. This could subject you and your brokerage to potential liability. You may wish to refer your customers to the EPA website for further information. www.epa.gov/mold

Defective drywall (Yes, this is the politically correct name to use!) is another airborne substance that can be detrimental to the human respiratory system. "Chinese drywall," now called **defective drywall,** refers to an environmental health issue involving defective drywall manufactured in China and imported to the United States starting in 2001.

Laboratory tests for volatile chemicals in samples of drywall have identified emissions of the sulfurous gases carbon disulfide, carbonyl sulfide, and hydrogen sulfide. These emissions, which have the odor of rotten eggs, worsen as temperature and humidity rise and cause copper surfaces to turn black and powdery, a chemical process indicative of reaction with hydrogen sulfide. Homeowners have reported a variety of symptoms, including respiratory problems such as asthma attacks, chronic coughing, and difficulty breathing, as well as chronic headaches and sinus issues.

The largest supply of defective drywall was shipped to Florida in 2005, 2006, and 2007. It is estimated that 56% of the defective drywall made it to Florida and 60,000–100,000 homes may have been affected. If a home inspector suspects that the property is contaminated, a specialist will be recommended. To test for defective drywall, a square sample of the drywall is removed and sent to a laboratory. If the sample tests positive, remediation of the property is a possible solution. There are companies that specialize exclusively in defective drywall remediation. There is still some controversy whether a remediated property is safe or not. If there is an offer being made on a property that was constructed during the above referenced timeframe, then it is advisable to include a *defective drywall addendum.*

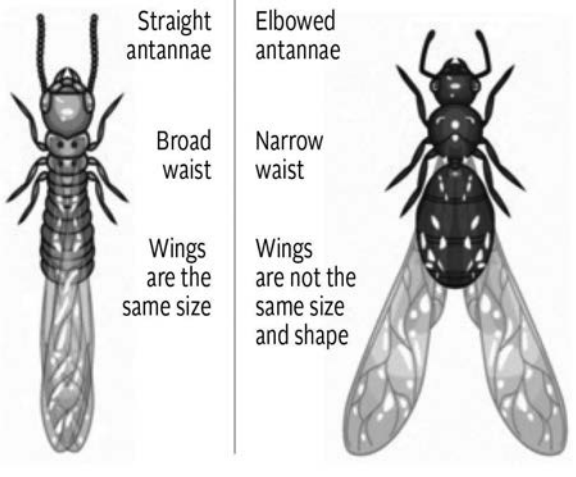
Radon is a radioactive gas that is emitted from the soil. The Surgeon General has warned that radon is the second highest cause of lung cancer in the United States. It is usually found in igneous rock and soil, but in some cases well water may also be a source of radon. It is created by the breakdown of uranium and is odorless, colorless, and tasteless—virtually undetectable unless tested for inside a property. Radon enters a property through cracks in the foundation of the property. To test a property for radon it is best to hire an air quality professional, who will use *active* testing for radon rather than passive. The test will require all doors and windows to be closed for a minimum of 48 hours while devices are placed throughout the property that continually monitor air quality. The desired level is less than .04/pCi/L. If the levels of radon are higher, there are mitigation steps that can be taken. Sealing all cracks and openings is one of the first steps to take for mitigation. There is also a process called soil suction, which draws the radon out from under the property and vents it away from the property. Another form of mitigation, the house pressurization method, uses a fan to create pressure differentiations to keep the radon out of the interior of the property.

Another unseen and on the rise danger is *electromagnetic fields (EMFs).* There are an increasing number of individuals that are sensitive to EMF's emitted by power lines. There are two types of electromagnetic fields produced by power lines. The first is an **electric field** which is always present when the power line is turned on. Electric fields are

stopped most effectively and controlled by building materials. The second, a **magnetic field,** is caused by the electric current flowing in the line when people use electricity. This can vary considerable and is considered the most dangerous. The only way to know for certain what EMF's are being emitted by a power line is to measure with an EMF or **gauss meter.** There are actually buyers who own their own gauss meters and measure each perspective home that they are interested in purchasing.

The correct way to use the gauss meter would be to measure the EMF's indoors and outdoors during different times of the day. Take specific measurements where you would spend the most amount of time in the home. Test with your electricity switched off at the mains, then again with it turned on. This is done to determine how much of the EMF's are coming from the power line and how much from your own house wiring. The BioInitiative Report recommends 1 milliGauss (0.1 mircoTesla) limit for habitable space adjacent to all new or upgraded power lines. If you are electrically sensitive, the BioInitiative Report states the above mentioned measurement may still be too high.

An inspection that is sometimes required by lenders is a WDO (wood destroying organism). Also included with the WDO inspection is a pest inspection. Any organism that can destroy the strength of wood is looked for. Not only termites and wood boring beetles destroy wood, but so does fungi. There are also several pests that can inhabit the attic space of homes and cause unsafe living conditions, such as squirrels, rats, and raccoons.



Difference between Termite and Ant

There are two other reports that are helpful to order during the inspection period and these are ordered through the home inspector. The reports are generated from the home inspection report and transferred onto a uniform form so that they may be shared with insurance companies. For homes over 30-years old, homeowner insurance companies will request a *Four Point (4pt) Inspection.* The **Four Point Inspection**

Vetting Process Steps

1. List any service providers you have personally used.
2. Cross reference your personal list with your local real estate association's business partners or affiliates membership list.
3. Once you find a minimum of three names per professional category, ask other associates in your brokerage company for their opinions about the names you have selected. This is also a good time to ask these associates whom they might recommend.
4. Consult with your brokerage's management team and solicit their recommendations.
5. Contact the prospective service providers and ask for three references.
6. Once you feel comfortable with your selected recommendations for your customers, create a professional service list for your customers when they ask for service provider recommendations.
7. Each professional category should have a minimum of three choices.
8. Also include a disclaimer at the bottom of the sheet. Sample of the disclaimer: *The following list of companies is provided as a guideline. There are many more companies to choose from. (insert your name) and (insert your brokerage's name) does not endorse any one company in particular.*

covers the main four points of a home: plumbing, electrical, HVAC systems, and the roof condition. The insurance company may also request a *Wind Mitigation Report,* also generated by your home inspector. These two reports are normally an additional fee to have prepared by the home inspector.

The **Wind Mitigation Report** focuses on the exact specifics of how the roof was constructed. Windstorm inspections look for construction features that have been shown to reduce losses in hurricanes, such as a hip roof; concrete block construction; the presence of gable end bracing; shutters and opening protections; the presence of roof-to-wall attachments such as nails, clips, or hurricane straps; and the presence of a secondary water resistance barrier. They even measure the length of the nails. The Wind Mitigation Report may serve as a tool for a reduction in the homeowner's insurance premiums.

THE VETTING PROCESS

In the real estate profession there are many other business professionals that you must cooperate with. A home inspector's or any other specialist inspector's customer is also your customer. You each contribute specialized knowledge that helps the buyer make informed decisions.

Many times your customer will ask you for recommendations on which home inspector they should hire. This is when implementing an established vetting process is valuable. To **vet** is to make a careful and critical examination of something. In our profession, to vet would be translated as investigating a service provider's reputation. Every person we recommend in this business is a direct extension of our reputation.

CONCLUSION

The key to becoming a successful real estate professional is through ongoing education. Participating in courses such as this provide you with new information, broadening your knowledge base. Applying that knowledge enhances your skills. Repeated application of newly acquired knowledge elevates your experience level. This module contains valuable information about the home construction processes. When you apply that knowledge along with a keen eye for observation and details, you have positioned yourself for success.

MODULE 4 REVIEW – HOME CONSTRUCTION & INSPECTIONS

You are *not* required to answer the module review questions to complete the 14-hour course. They are intended to help prepare you for the Final Exam. Choose the best response to each question. The answers are found in the back of the book.

1. The processes required prior to constructing a new home are:

a. framing and roofing.
b. grading and site preparation and foundation construction.
c. grading and sewer connection.
d. electrical and plumbing and framing.

2. The time period for completion of the home inspection is usually included in the:

a. broker's checklist.
b. mortgage loan.
c. building code.
d. sales contract.

3. Insurance companies may not insure a home with a:

a. fuse electrical system.
b. circuit breaker electrical system.
c. compressor and an air handler.
d. pool.

4. Home inspections may offer additional services at added cost including:

a. roof repair.
b. building code compliance.
c. pool inspection.
d. an appraisal.

5. Which step is *not* a part of the vetting process?

a. List professionals you are familiar with.
b. Provide the names of three professionals.
c. Include a disclaimer.
d. Choose providers who are not on your brokerage team's list.

How did you do? Remember, we have instructors available to assist you throughout your learning experience. Email: REinstructor@BertRodgers.com or call 941-378-2900 ext. 502

MODULE TWO RESOURCES

Complying with TRID: The Federal Loan Estimate and Closing Disclosure Rules

TRID Guide for Real Estate Professionals:
http://www.consumerfinance.gov/policy-compliance/know-you-owe-mortgages/real-estate-professionals/

Text of the TRID Rule:
http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/

TILA-RESPA Integrated Disclosures Guide to the Loan Estimate and Closing Disclosure Forms:
http://files.consumerfinance.gov/f/201503_cfpb_tila-respa-integrated-disclosure-guide-to-the-loan-estimate-and-closing.pdf

TRID disclosure Timeline Example:
http://www.consumerfinance.gov/know-before-you-owe/

CFPB's special page for mortgage applicants:
www.Consumerfinance.gov/mortgage-estimate

Loan Estimate Form:
http://files.consumerfinance.gov/f/201403_cfpb_loan-estimate_model-form-H24.pdf

Closing Disclosure Form:
http://files.consumerfinance.gov/f/201403_cfpb_closing-disclosure_cover-H25A.pdf

Seller's Closing Disclosure Form:
http://files.consumerfinance.gov/f/201311_cfpb_kbyo_closing-disclosure-seller-only.pdf

Home Loan Tool Kit:
http://www.consumerfinance.gov/f/20153_cfpb_your_home-loan-toolkit-web.pdf

Real Estate Professional's Guide:
http://www.consumerfinance.gov/know-before-you-owe/real-estate-professionals/

MODULE THREE RESOURCES

Trending in Real Estate Today
Part I: Laws Affecting Discrimination Based on Sex, Familial Status, and Disabilities and the Use of Real Estate

1. F.S.760, *Florida's Fair Housing Act* can be read here: http://fchr.state.fl.us/fchr/resources/the_laws/chapter_760_florida_statutes__1
2. 42 U.S.C. 3601 et seq.
3. HUD, Ending Housing Discrimination against lesbian, gay, Bisexual and Transgender Individuals and their Families. http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (accessed February 20, 2015).
4. Ibid.
5. Ibid.
6. Department of Justice, Fair Housing. http://www.justice.gov/crt/about/hce/housing_coverage.php (accessed February 20, 2015)
7. *Federal Register* /Vol. 63, No. 245 /Tuesday, December 22, 1998 /Notices
8. *FJI, On Behalf of HOPE Fair Housing Center, Settles Lawsuit Against Real Estate Companies for Housing Discrimination.* http://www.floridajusticeinstitute.org/our-impact/fji-behalf-hope-fair-housing-center-files-law-suit-real-estate-companies-housing-discrimination/ (accessed February 19, 2015)
9. Whyte, et al. v. Alston Management, et al. http://www.relmanlaw.com/civil-rights-litigation/cases/whytealston.php. (accessed February 20, 2015)
10. *HUD Annual Report on Fair Housing, 2012-13.* http://portal.hud.gov/hudportal/HUD?src=/annualreport
11. 24 CFR §100.201
12. *Reasonable Accommodations under the Fair Housing Act,* May 17, 2004. Found at: www.hud.gov/offices/fheo/library/huddojstatement.pdf and *Reasonable Modifications under the Fair Housing Act,* March 5, 2008. Found at www.hud.gov/offices/fheo/disabilities/ reasonable_modifications_mar08.pdf. (accessed February 22, 2015)
13. Ibid.
14. Ibid.
15. *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs.* To view this document, go to www.hud.gov and enter FHEO-2013-01 in the search field or go to https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=https%3A%2F%2Fportal.hud.gov%2Fhudportal%2Fdocuments%2Fhuddoc%3Fid%3Dservanimals_ntcfheo2013-01.pdf&ei=ELzkVIDSNomeyQS1voHACg&usg=AFQjCNHNgJl0ryyZFIuStxVdhjzBvaBdIw&sig2=xPhlYYQET2qtQqti74SM6w
16. Ibid.
17. Ibid.
18. Adapted from the North Carolina Real Estate Commission (NCREC) *General Update Manual*, 2014-2015. The author also acknowledges the NCREC's presentation of these issues at an Instructor Development Workshop in August, 2014 as well as the NCREC's legal education staff's research on these topics.
19. A Comparative Study: Service Animals and Emotional Support Animals under the Fair Housing Act and the Americans with Disabilities Act & An Overview of Assistance Animal Laws of Select States, The University of Iowa Clinical Law Program, 2010.

MODULE THREE RESOURCES

20. FHEO Notice: FHEO-2013-01 which can be accessed here: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCAQFjAA&url=https%3A%2F%2Fportal.hud.gov%2Fhudportal%2Fdocuments%2Fhuddoc%3Fid%3Dservanimals_ntcfheo2013-01.pdf&ei=9uLkVP_5OI-ryQTLvoLQBQ&usg=AFQjCNHNgJl0ryyZFluStxVdhjzBvaBdIw&sig2=SFkLA8yfj8kN7EHzTGkstg
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MODULE REVIEW ANSWER KEY

Module 1 — Real Estate Core Law

1. In a mandatory homeowners' association the required disclosure must be provided by the:
   a. developer or seller.
2. A fiduciary duty is owed by:
   b. a single agent.
3. A broker who owns a brokerage firm and a referral company may be issued upon request:
   d. multiple licenses.
4. A real estate license is required when acting as a/an:
   d. leasing agent who is paid on a transactional basis.
5. Under the license law, it is presumed that all licensees are operating as:
   b. transaction brokers.

Module 2 — Complying with TRID: The Federal Loan Estimate and Closing Disclosure Rules

1. TRID (TILA-RESPA Integrated Disclosure) requirements apply to all closed-end mortgage transactions for home purchases *except*:
   d. reverse mortgage.
2. TRID's Loan Estimate (LE) replaces what former disclosure(s)?
   b. TILA and GFE
3. TRID coverage does not apply for:
   d. seller financing if the seller has made less than five loans during past year.
4. The Closing Disclosure can have higher charges than on the Loan Estimate if there:
   b. are changes in fees for services because the applicant shopped for services and selected a vendor not on the lender's list.
5. What changes or inaccuracies trigger a new three-day waiting period per a corrected CD?
   d. a change in the APR by more than 1/8% on a fixed rate loan.
6. The Loan Estimate under TRID has zero tolerance for errors in:
   c. property taxes.
7. How many days before consummation of the transaction must the lender provide the CD to the borrower/buyer?
   c. three days
8. The seven day waiting period between issuance of the LE and the CD can be waived if the:
   b. loan proceeds are necessary to preclude foreclosure in the case of a short sale.
9. How many days does a purchaser have to shop after the lender mails the Loan Estimate?
   c. ten days
10. The Home Loan Toolkit must be sent to home buyers by the:
    b. lender within three business days of receiving an application.

MODULE REVIEW ANSWER KEY

Module 3 — Current Trends in Real Estate

Part I

1. All of the following are protected classes under federal and fair housing laws *except*:
   b. citizenship.
2. In addition to avoiding discrimination based on fair housing laws' protected classes, brokers who are members of the National Association of REALTORS® (NAR) must also avoid discrimination based on:
   b. gender identity.
3. The term *familial status* does *not* refer to:
   d. an elderly person in a wheelchair.
4. The act of persuading owners to sell or rent because persons from a protected class are moving into the area is known as:
   d. blockbusting.
5. The term *handicap* does *not* refer to people:
   d. who are a minority in their neighborhood.

Part II

1. The Edina lawsuit occurred because of a/an:
   b. misrepresentation regarding a sprinkler system.
2. Florida's Brokerage Relationship Disclosure Act does *not* allow real estate licensees to engage in which brokerage relationships with consumers?
   d. dual agency
3. The Florida Real Estate Commission rules regarding advertising on the Internet state that the brokerage firm name:
   b. must be placed adjacent to or immediately above or below the point of contact information.
4. Regarding kickbacks or rebates, Florida real estate licensees:
   a. must advise principals and all affected parties in the transaction of all facts pertaining to the arrangement of kickbacks or rebates.
5. The lesson that a Florida real estate professional could learn from the Whidbey Island lawsuits is:
   c. disclose information about the presence of airports and any related concerns.

Part III

1. *Cuius est solum, eius est usque ad coelum et ad inferos* means:
   c. property owners generally own "from heaven to hell."
2. The right to fly over property, particularly for takeoff and landing, is called:
   a. an *avigation easement.*
3. The Riparian Doctrine prevails:
   c. in Florida and in most of the states east of the Mississippi River.
4. Another term for hydraulic fracturing is:
   c. fracking.
5. The leasing or assigning of a landowner's mineral rights:
   d. gives a right of access to the holder of the mineral rights.

MODULE REVIEW ANSWER KEY

Module 4 — An Overview of Home Construction and Inspections for Real Estate Professionals

1. The processes required prior to constructing a new home are:
   b. grading and site preparation and foundation construction.
2. The time period for completion of the home inspection is usually included in the:
   d. sales contract.
3. Insurance companies may not insure a home with a:
   a. fuse electrical system.
4. Home inspectors may offer additional services at added cost including:
   c. pool inspection.
5. Which step is *not* a part of the vetting process?
   d. Choose providers who are not on your brokerage team's list.

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