

# Management and Supervision

The management of real estate offices and supervision of real estate activities in California is an important part of a real estate broker's day-to-day responsibilities. Accordingly, the Management and Supervision course is comprised of the following:

- I. How to Establish Policies, Rules, and Procedures Including Systems to Review, Inspect and Manage Offices
- II. Supervision of All Transactions Involving Real Estate Licensees
- III. Retaining and Reviewing Documents Which May Have a Material Effect upon the Rights or Obligations of a Party in a Transaction
- IV. The Proper Filing, Storage and Maintenance of Documents Required under B&P §10148 and Commissioner's Regulation 2729 and 2729.5
- V. Proper Handling of Trust Funds According to B&P §10145 and Commissioner's Regulations 2830 through 2836
- VI. Advertising of any Service for which a License is Required Pursuant to B&P §10140.6, §10159.5, §10235, §10235.5 and §10236.4
- VII. Familiarizing Salespersons with the Requirements of Federal and State Laws Relating to the Prohibition of Discrimination
  - ❖ Court Case: Meyer v. Holley, January 22, 2003
- VIII. Regular and Consistent Reports of Licensed Activities of Salespersons
- IX. The Role and Responsibilities of Branch or Division Managers Pursuant to B&P §10164, including Salespersons Acting as Branch or Division Managers
- X. The Responsibilities of a Broker to Ensure Salespersons Working as "Teams" are in Compliance with B&P §10159.7
- XI. Supervision over Restricted Licensees
  - ❖ Court Case: Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents, Oct. 21, 2014.

Before we get into the policies, rules, and systems of a real estate brokerage company, let's take a look at the difference between a salesperson and broker, including the responsibilities and liabilities of each party.

### **Real Estate Salesperson License**

All real estate salesperson licenses issued by the California Real Estate Commissioner are for a period of four years. Applicants must qualify in the appropriate examination and satisfy all other requirements prior to issuance of the license. The four-year license may be renewed upon filing the required application and fee, and complying with the provisions of Article 2.5 (commencing with Section 10170).

The real estate salesperson's license must remain in the possession of the licensed real estate broker employer until canceled or until the salesperson leaves the employ of the broker. The real estate broker must make his license and the licenses of his salespersons available for inspection by the California Real Estate Commissioner or his designated representative.

### **Real Estate Broker License**

A real estate broker is a person who, for compensation, or in expectation of compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

- A. Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.
- B. Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.
- C. Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.
- D. Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.
- E. Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or

collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

### ***Real Estate Broker License Application***

Application for the real estate broker license examination must be made in writing to the California Real Estate Commissioner. The Commissioner may prescribe the format and content of the real estate broker examination application.

The application for the broker examination must include valid contact information at which the CalBRE may contact the applicant and shall be accompanied by the real estate broker license examination fee. Persons who have been notified by the Commissioner that they passed the real estate broker license examination may apply for a real estate broker license. A person applying for the broker examination may also apply for a real estate broker license simultaneously.

If there is any change to the information contained in a real estate broker license application after the application has been submitted and before the license has been issued, the commissioner may require the applicant to submit a supplement to the application listing the changed information.

### ***Required Experience or Equivalent***

An applicant for an original real estate broker's license shall demonstrate to the

“An applicant for a real estate broker's license having at least the equivalent of two years' general real estate experience may file a written petition with the CalBRE.”

California Real Estate Commissioner that he or she has held a real estate salesperson's license for at least two years and qualified for the renewal of his or her real estate salesperson status, within the five-year period immediately prior to the date of his or her application for the broker's license, and during such time was actively engaged

in the business as a real estate salesperson.

An applicant for a real estate broker's license having at least the equivalent of two years' general real estate experience may file a written petition with the CalBRE setting forth his or her qualifications and experience, and, if the commissioner approves, he or she may be issued a real estate broker's license immediately upon passing the examination and satisfying the other requirements.

The California Real Estate Commissioner may treat a degree from a four-year college or university, which course of study included a major or minor in real estate, as the equivalent of two years' general real estate experience.

### **Employee vs. Independent Contractor**

A real estate broker and a real estate salesperson licensed under that broker may contract between themselves as independent contractors or as employer and employee. The broker-salesperson relationship is considered an employee for legal and worker's compensation purposes and an independent contractor for tax purposes.

Characterization of a relationship as either an "employer and employee" or "independent contractor" for withholding of taxes is governed by the Unemployment Insurance Code. In other words, the real estate broker and real estate salesperson relationship can be considered an independent contractor for income tax and unemployment compensation purposes, but employer and employee for worker's compensation and legal purposes. This mean that the real estate salesperson must collect and pay their own income taxes. Thus, the real estate broker is not required to collect income tax withholdings, nor pay unemployment insurance on behalf of the real estate salesperson

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### **Worker's Compensation Insurance**

Workers' compensation insurance benefits generally allow for compensation to an employee (or heir of a deceased employee) for any injury/disease/death arising out of and in the course of employment. This may entitle an employee or heir to one or more of the following benefits, depending upon the employee's situation:

- Medical Care
- Temporary Disability
- Permanent Disability Benefits
- Vocational Rehabilitation
- Transportation
- Death Benefits

Any employee who has suffered an injury or illness resulting from employment is usually entitled to workers' compensation benefits. By law, all employers are required to maintain workers' compensation insurance for their employees for injuries occurring within the course and scope of the employment.

With only a few exceptions, all California employers must comply with state workers' compensation laws either by being insured against liability by an insurance company authorized to write this type of insurance or by securing a certificate of consent to self-insure from the California Labor and Workforce Development Agency.

The California Workers' Compensation Act is found in California Labor Code and is designed to insure that an injured employee and his/her dependents are provided adequate means of subsistence, as well as medical care, when the worker is unable to work.

In addition, it is meant to facilitate the worker's recovery as soon as possible in order that the worker may return to productive employment. Workers' compensation is meant to rehabilitate the employee, not indemnify the employer. Therefore, coverage is not considered negotiable or conditional; it is mandatory.

While independent contractors are excluded from coverage, the California Labor

and Workforce Development Agency has stated that a real estate salesperson is nearly always an employee for workers' compensation insurance purposes. Therefore, it is recommended that workers'

“A real estate broker is responsible to pay all worker's compensation insurance premiums for his salespeople.”

compensation insurance coverage be obtained for all salespersons working under a real estate broker's license.

A real estate broker is responsible to pay all worker's compensation insurance premiums for his salespeople. Lack of doing so can result in costly penalties, a misdemeanor, and the possible shut down of the business by the California Labor and Workforce Development Agency.

The State Compensation Insurance Fund can be used by the real estate broker to pay for California worker's compensation insurance requirements. If a broker does not have workers' compensation insurance and is not self-insured, an

employee may still be entitled to benefits through the Uninsured Employers' Fund of the Department of Industrial Relations.

Next is a look at the policies, rules, and procedures used to manage real estate broker offices.

## **I. How to Establish Policies, Rules, and Procedures Including Systems to Review, Inspect and Manage Offices**

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One of the best ways to assure a stable relationship between a real estate broker and the sales associates it to establish policies, rules, and procedures that everyone in the company uses to conduct real estate brokerage activities.

A **broker's policy and procedures manual** can be used to provide a clear understanding of the relationships between the real estate broker and sales associates. It outlines and defines employee management and administrative functions, sales and marketing activities, and dispute resolution procedures.

The broker's policy and procedures manual usually covers general office procedures, independent contractor relationships, sales activities, client confidentiality requirements, dispute resolution—including mediation, arbitration, and litigation, advertising guidelines, and client management practices.

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## **II. Supervision of All Transactions Involving Real Estate Licensees**

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According to Commissioner's Regulation 2725, a broker must exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

- A. Transactions requiring a real estate license
- B. Documents which may have a material effect upon the rights or obligations of a party to the transaction
- C. Filing, storage and maintenance of such documents
- D. The handling of trust funds
- E. Advertising of any service for which a license is required
- F. Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination
- G. Regular and consistent reports of licensed activities of salespersons

The form and extent of such policies, rules, procedures and systems must take into consideration the number of salespersons employed and the number and location of branch offices.

A broker may use the services of brokers and salespersons to assist in administering the provisions of the Commissioner's Regulation 2725, so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

*Reference: Real Estate Law Book, Regulation 2725.*

### ***Responsibilities and Liabilities Carried by the Broker***

California real estate brokers must:

1. Retain and make available for inspection the licenses of salespersons in the broker's employ.
2. Notify CalBRE when a salesperson is employed or terminated.
3. Maintain a definite place of business in the State of California.
4. First procure branch office license(s) if the broker intends to operate multiple branch locations.

*Reference: B&P Code Sections 10160, 10161.8, 10162, 10163, 10165, and 10178*

Real estate broker cannot fail to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required. Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license is violation of the California Real Estate Law.

### ***Professional Liability Insurance (Errors and Omissions Insurance/E&O)***

“Professional liability insurance” means insurance against liability for damages caused by any act or omission of a real estate licensee in rendering professional services in this state. An insurer may exclude coverage against liability arising out of a dishonest, fraudulent, criminal, or malicious act, error, or omission committed by, at the direction of, or with the knowledge of the insured.

*Reference: California Insurance Code Section 11589.5*

### ***Broker-Salesperson Relationship Agreements***

According to the California Real Estate Commissioner's Regulations Section 2726, every real estate broker must have a written agreement with each of his/her

salespersons, whether licensed as a salesperson or as a broker under a broker-salesperson arrangement. Again, the agreement must be dated and signed by the parties and must cover material aspects of the relationship between the parties, including supervision of licensed activities, duties and compensation.

*Reference: Real Estate Law Book, Regulation 2726.*

A real estate broker can achieve compliance with Commissioner's Regulation 2726 by including this requirement in their policies and procedures manual, including an example agreement that must be followed with every salesperson and broker-associate (broker working under a broker) hired by the broker. An agreement between the real estate broker and salesperson or broker-associate is required by the California Real Estate Commissioner to be in writing; however, the actual form of the agreement is not required to be approved by CalBRE.

### ***Notice of Change of Broker***

Whenever a real estate salesperson enters the employ of a real estate broker, the broker must notify the California Real Estate Commissioner of that fact within five days. This notification must be given on a form prepared by CalBRE and must be signed by the broker and the salesperson.

The form of notification must provide for the furnishing of at least the following information:

1. Name and business address of the broker.
2. Mailing address of the salesperson, if different from the business address.
3. Date when the salesperson entered the employ of the broker.
4. Certification by the salesperson that he has complied with the provisions of Section 10161.8(d) of the Business and Professions Code.
5. Name and business address of the real estate broker to whom the salesperson was last licensed and the date of termination of that relationship.
6. Certification by the salesperson that the predecessor broker has notice of the termination of the relationship.

As an acceptable alternative to (5) and (6) above, the form may be utilized by the predecessor broker to give notice of the termination of the broker/salesperson relationship if this notice is mailed to the commissioner not more than ten days following such termination.

***Retention of Salesperson's License Certificate***

The license certificate of a real estate salesperson licensee shall be retained at the main business office of the real estate broker to whom the salesperson is licensed. Upon the termination of employment of the salesperson, the broker shall return the license certificate to the salesperson within three business days following the termination.

**III. Retaining and Reviewing Documents Which May Have a Material Effect upon the Rights or Obligations of a Party in a Transaction**

A licensed broker must retain for 3 years copies of all listings, deposit receipts, canceled checks, trust account records, and other documents executed by him or her or obtained by him or her in connection with any transaction for which a broker's license is required.

The retention period must run from the date of the closing of the transaction or from the date of the listing if the transaction is not consummated. After reasonable notice, the books, accounts and records must be made available for audit, examination, inspection and copying by a CalBRE representative during regular business hours.

*Reference: Real Estate Law Book, Section 10148 6.*

***A. Retain Copies for Three (3) Years***

According to Business and Professions Code Section 10148, a real estate broker must retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required.

***B. Retention Period Defined***

The retention period runs from *the date of the closing of the transaction or from the date of the listing if the transaction is not consummated*.

***C. Audit: Books and Records Made Available to CalBRE***

After notice, the real estate broker's books, accounts, and records must be made available for examination, inspection, and copying by the California Real Estate Commissioner or his or her designated representative during regular business hours. The audit cannot be harassing in nature.

The California Real Estate Commissioner can charge a real estate broker for the costs of an audit. If the California Real Estate commissioner finds a real estate

“The Commissioner can issue a **desist and refrain order** requiring that the broker and all sales associates immediately stop real estate brokerage and other activities that require a real estate license.”

broker has violated Section 10145 of Business and Professions Code, the Commissioner can issue a **desist and refrain order** requiring that the broker and all sales associates immediately stop real estate brokerage and other activities that require a real estate license.

If the real estate broker does not pay for the costs of the audit, then within sixty (60) days of mailing a notice of billing the California Real Estate Commissioner can suspend or revoke the real estate broker’s license. The California Real Estate Commissioner can also institute court action to collect the costs of the audit from the real estate broker.

#### **D. Electronic Records**

According to Commissioner’s Regulation 2729.5 (Record Retention – Uniform Electronic Transactions Act), a real estate broker who obtains documents in connection with any transaction for which a real estate broker’s license is required to retain a copy of the documents, including any electronic signatures, when such documents contain either:

1. An electronic signature pursuant to the *Uniform Electronic Transactions Act* (Section 1633.1 et seq. of the Civil Code), or
2. The Electronic Signatures in Global and National Commerce Act.

The broker must retain a copy of the documents by:

1. Causing a paper copy of the document to be made or
2. By using electronic image storage media pursuant to Section 2729.

The broker may retain copies of the documents at a location other than the broker’s place of business. However, the real estate broker must maintain at the broker’s office a means of viewing copies of documents or records stored to Section 2729 of the Commissioner’s Regulations.

***E. Destruction or Altering of Documents***

The California Bureau of Real Estate (CalBRE) may suspend or revoke the license of any real estate broker, real estate salesperson, or corporation licensed as a real estate broker, if the real estate broker, real estate salesperson, or any director, officer, employee, or agent of the corporation licensed as a real estate broker knowingly destroys, alters, conceals, mutilates, or falsifies any of the books, papers, writings, documents, or tangible objects that are required to be maintained by this section or that have been sought in connection with an investigation, audit, or examination of a real estate licensee by the California Real Estate Commissioner.

***F. Electronic Storage of Documents***

According to Section of 2729 of the Commissioner's Regulations, a real estate broker may use electronic image storage media to retain and store copies of all listings, deposit receipts, canceled checks, trust records and other documents executed by him or her or obtained by him or her in connection with any transaction for which a real estate broker license is required, provided the following requirements are satisfied:

1. The electronic image storage must be nonerasable "write once, read many" ("WORM") that does not allow changes to the stored document or record.
2. The stored document or record is made or preserved as part of and in the regular course of business.
3. The original record from which the stored document or record was copied was made or prepared by the broker or the broker's employees at or near the time of the act, condition or event reflected in the record.
4. The custodian of the record is able to identify the stored document or record, the mode of its preparation, and the mode of storing it on the electronic image storage.
5. The electronic image storage system contains a reliable indexing system that provides ready access to a desired document or record, appropriate quality control of the storage process to ensure the quality of imaged documents or records, and date ordered arrangement of stored documents or records to assure a consistent and logical flow of paperwork to preclude unnecessary search time.
6. Records copied and stored under this section must be retained for three years pursuant to Section 10148 of the Code.

A real estate broker must produce, at the broker's own expense, a paper copy of any document or record requested by CalBRE.

However, a real estate broker is NOT required to retain electronic messages of an ephemeral nature (lasting for a very short period of time), as described in Section 1624 of the Civil Code.

#### **IV. Proper Filing, Storage and Maintenance of Documents Required under B&P §10148 and Commissioner's Regulation 2729 and 2729.5**

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Proper records management is important to a well-run and long-term real estate brokerage business. The real estate broker must make sure that files, records, and other important information are dependably maintained and secured, thus reducing the real estate broker's overall risk.

***A. Some documents commonly retained by real estate brokers include:***

1. Real estate contracts and addenda
2. Broker-Salesperson agreements
3. Bank records, including all trust account information
4. Errors and omissions (E&O) insurance records
5. Advertising records

Disasters usually occur with no warning, so the real estate broker needs to have an action plan set up well in advance off the occurrence of the actual event. Minor water leaks and other maintenance items do not fall under a disaster, they are more of a nuisance.

A real estate broker should back up all data nightly and store it at a remote location. The other alternative is for the real estate broker to take the backed up data home (off site). All transaction files should be maintained in hard copy format and stored in one place in the real estate office. Many real estate brokers scan the documents into their computer hard drive after the property closes escrow.

#### **V. Proper Handling of Trust Funds According to B&P §10145 and Commissioner's Regulations 2830 through 2836**

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According to Section 10145 of the Business and Professions Code, a real estate broker who accepts funds belonging to others in connection with a transaction must deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state.

All funds deposited by the broker in a trust fund account must be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

“All funds deposited by the broker in a trust fund account must be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.”

Unless otherwise specified in writing by the beneficiary of the funds, a broker is required to do one of the following three things with trust funds no later than three business days following receipt of the funds by the broker or the broker's salesperson:

1. Deposit the funds into a neutral escrow depository;
2. Place funds accepted on behalf of the owner into the hands of the owner of the funds;
3. Deposit the funds into a trust fund bank account maintained by the broker.

#### ***A. Collecting Payments and Performing Services for Investors***

Notwithstanding the provisions of paragraph (1), a real estate broker collecting payments or performing services for investors or note owners in connection with loans secured by a first lien on real property may deposit funds received in trust in an out-of-state depository institution insured by the Federal Deposit Insurance Corporation, if the investor or note owner is any one of the following:

1. The Federal National Mortgage Association (Fannie Mae), the Government National Mortgage Association (Ginnie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal Housing Administration (FHA), or the United States Department of Veterans Affairs (VA).
2. A bank or subsidiary thereof, bank holding company or subsidiary thereof, trust company, savings bank or savings and loan association or subsidiary thereof, savings bank or savings association holding company or subsidiary thereof, credit union, industrial bank or industrial loan company, or insurance company, doing business under the authority of, and in accordance with, the laws of this state, another state, or the United States relating to banks, trust companies, savings banks or savings associations, credit unions, industrial banks or industrial loan companies, or insurance companies, as evidenced by a license, certificate, or charter issued by the United States or a state, district, territory, or commonwealth of the United States.
3. Trustees of a pension, profit-sharing, or welfare fund, if the pension, profit-sharing, or welfare fund has a net worth of not less than fifteen million dollars (\$15,000,000).

4. A corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or a wholly owned subsidiary of that corporation.
5. A syndication or other combination of any of the entities specified in the preceding paragraphs that purchase promissory notes.
6. The California Housing Finance Agency or a local housing finance agency organized under the Health and Safety Code.
7. A licensed residential mortgage lender or servicer acting under the authority of that license.
8. A licensed real estate broker selling all or part of the loan, note, or contract to a lender or purchaser specified above.

***B. Out-Of-State Depository***

A real estate broker who deposits funds held in trust in an out-of-state depository institution must make the books, records, and files available to the California Real Estate Commissioner. The real estate broker must pay the Real Estate Commissioner's representative reasonable expenses for travel and lodging incurred while conducting an examination at the out-of-state location.

***C. Real Estate Broker Acting as Principal***

A real estate broker acting as a principal (pursuant to Section 10131.1) must place all funds received from others for the purchase of real property sales contracts or promissory notes secured directly or collaterally by liens on real property in a neutral escrow depository unless delivery of the contract or note is made simultaneously with the receipt of the purchase funds.

***D. Salesperson Handling Trust Funds***

1. A real estate salesperson who accepts trust funds from others on behalf of the broker under whom he or she is licensed must immediately deliver the funds to the broker or, if so directed by the broker, must deliver the funds into the custody of the broker's principal or a neutral escrow depository or must deposit the funds into the broker's trust fund account. If not otherwise expressly prohibited by this part, a real estate broker may, at the request of the owner of trust funds or of the principals to a transaction or series of transactions from whom the broker has received trust funds, deposit the funds into an **interest-bearing account** in a bank, savings and loan association, credit union, or industrial loan company, the accounts of which are insured by the Federal Deposit Insurance Corporation, if all of the following requirements are met:

- A. The account is in the name of the broker as trustee for the designated beneficiary or principal of a transaction or series of transactions.
  - If broker holds an individual broker's license, the account should be set up in his or her name or in the name of a fictitious business name if the broker is the holder of a license bearing such fictitious name and designated a "Trust Account." For example: John Doe Trust Account, or; Jane Doe Trust Account, or; assuming broker has registered dba of 25th Century Realty, 25th Century Realty Trust Account
- B. If broker is a corporate broker licensee, the account should be set up in the corporation's name or in the name of a fictitious business name if the corporate broker is the holder of a license bearing such fictitious name and designated a "Trust Account." For example: ABC, Inc. Trust Account, or; assuming corporate broker has registered dba of ABC Realty, ABC Realty Trust Account.

*Reference: Real Estate Law Book, Regulation 2832 11 2.*

2. All of the funds in the account are covered by insurance provided by an agency of the United States.
3. The funds in the account are kept separate, distinct, and apart from funds belonging to the broker or to any other person for whom the broker holds funds in trust.
4. The broker discloses to the person from whom the trust funds are received, and to a beneficiary whose identity is known to the broker at the time of establishing the account, the nature of the account, how interest will be calculated and paid under various circumstances, whether service charges will be paid to the depository and by whom, and possible notice requirements or penalties for withdrawal of funds from the account.
5. Interest earned on funds in the account may not inure directly or indirectly to the benefit of the broker or a person licensed to the broker.
6. In an executory sale, lease, or loan transaction in which the broker accepts funds in trust to be applied to the purchase, lease, or loan, the parties to the contract must have specified in the contract or by collateral written agreement the person to whom interest earned on the funds is to be paid or credited.

The broker must have no obligation to place trust funds into an interest-bearing account unless requested to do so and unless all of the above conditions are met.  
In addition, if the real estate broker advises the party making the request that the funds will not be placed in an interest-bearing account, then the broker is not required to do so. The broker must maintain a separate record of the receipt and disposition of all trust funds, including any interest earned on the funds.

**E. Furnish Authorization for Examination of Financial Records**

Upon request of the California Real Estate Commissioner, a broker must furnish to the commissioner an authorization for examination of financial records of those trust fund accounts maintained in a financial institution, in accordance with the procedures set forth in Section 7473 of the Government Code.

**F. Broker Placement of Trust Funds with Financial Institutions.**

According to the California Real Estate Commissioner's Regulations 2830 through 2836, the relationship between a real estate broker and a client for whom the broker holds funds in trust is an **agency relationship**.

*Compensating Balances*

A "compensating balance" is a balance maintained in a checking account or other account in a bank or other recognized depository in the name of a real estate broker for the purpose of paying bank fees on a separate trust fund account.

**G. Fiduciary Duty to Client**

As an agent, the broker owes a fiduciary duty to the client regarding the handling of trust funds. Any benefit received by the broker relating to the broker's handling of client funds in trust belongs to the client by law, and the broker must pass that benefit along to the client.

**H. Inducement to Place Trust Account**

Unless in possession of written permission from the client, it is unlawful for any real estate broker, including any corporate broker, to receive, directly or indirectly, any commission, compensation, or other consideration, whether personal or professional, from any person or institution other than the client as an inducement for the placement of a trust fund account in accordance with Section 10145 of the Business and Professions Code.

Unless in possession of written permission from the client, the following activities, whether performed directly or indirectly, are deemed per se receipt of inducements for the placement of trust account business by any person and are unlawful:

1. Receiving or requesting payment for, accepting or requesting provision of, or accepting or requesting assistance with business expenses, including, but not

limited to, rent, employee salaries, furniture, copiers, facsimile machines, automobiles, telephone services or equipment, or computers.

2. Receiving or requesting receipt of any form of consideration intended for the benefit of the broker, rather than the trust account itself, including cash, below market rate loans, automobile charges, or merchandise or merchandise credits.
3. Receiving or requesting to receive on behalf of the broker or corporation, compensating balances or benefits in the pricing or fees for the maintenance of a compensating balance account.
4. Receiving or requesting provision of all, or any part, of the time or productive effort of any employee of the bank or other recognized depository for any service unrelated to the trust account.
5. Receiving or requesting expenditures for food, beverages, and entertainment.

#### ***I. Activities NOT Considered Unlawful***

Receipt or request of receipt of the following are not deemed to be unlawful or in violation of this section:

1. Promotional items with a permanently affixed company logo of the bank or other recognized depository with a value of not more than ten dollars (\$10) each. "Promotional item" does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.
2. Receipt or requested receipt of education or educational materials exclusively related to the business of trust fund management if continuing education credits are not provided.

The receipt or requested receipt of any form of consideration as an inducement for the placement of a trust account not specifically set forth in this section is not be presumed lawful merely because it is not specifically prohibited.

#### ***J. Real Estate Broker Acting as Agent for Financial Institution***

A real estate broker, when acting as agent for a financial institution as beneficiary of a loan, may deposit and maintain funds from or for the account of an obligor for the future payment of property taxes, assessments or insurance relating to real property containing only a one-to-four family residence, in an interest-bearing trust account in a bank or savings and loan association in order to pay interest to the obligor in accordance with Section 2954.8 of the Civil Code if the following requirements are met:

1. The account is in the name of the broker as trustee.

2. All of the funds in the account are covered by insurance provided by an agency of the federal government.
3. All of the funds in the account are funds held in trust by the broker for others.
4. The broker discloses to the obligor how interest will be calculated and paid.
5. No interest earned on the funds must inure directly or indirectly to the benefit of the broker nor to any person licensed to the broker.

#### ***K. Uncashed Checks***

Every broker must keep a record of all trust funds received, including uncashed checks held pursuant to instructions of his or her principal. This record, including records maintained under an automated data processing system, must set forth in chronological sequence the following information in columnar form:

1. Date trust funds received
2. From whom trust funds received
3. Amount received
4. With respect to funds deposited in an account, date of said deposit
5. With respect to trust funds previously deposited to an account, check number and date of related disbursement
6. With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded
7. Daily balance of said account.

#### ***L. Maintenance of Journals***

Maintenance of journals of account cash receipts and disbursements, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles, must constitute compliance with subdivision (a) provided that such journals, records, or systems contain the elements required by subdivision (a) and that such elements are maintained in a format that will readily enable tracing and reconciliation in accordance with Section 2831.2.

A broker is not required to keep records pursuant to this section of checks which are written by a principal, given to the broker and made payable to third parties for the provision of services, including but not limited to escrow, credit and appraisal services, when the total amount of such checks for any transaction from that principal does not exceed \$1,000.

Upon request of the CalBRE or the maker of such checks, a broker must account for the receipt and distribution of such checks. A broker must retain for three

years copies of receipts issued or obtained in connection with the receipt and distribution of such checks.

*Reference: California Real Estate Commissioner's Regulations Section 2831.1.*

#### ***M. Separate Record for Each Beneficiary or Transaction.***

“A broker must keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker’s trust bank account and interest, if any, earned on the funds on deposit.”

identify the transaction and the parties to the transaction.

A broker must keep a separate record for each beneficiary or transaction, accounting for all funds which have been deposited to the broker’s trust bank account and interest, if any, earned on the funds on deposit. This record must include information sufficient to

Each record will set forth (in chronological sequence) the following information in columnar form:

1. Date of deposit
2. Amount of deposit
3. Date of each related disbursement
4. Check number of each related disbursement
5. Amount of each related disbursement
6. If applicable, dates and amounts of interest earned and credited to the account
7. Balance after posting transactions on any date.

*Reference: Real Estate Law Book, Regulation 2831.1 5.*

#### ***N. Maintenance of Ledgers***

Maintenance of trust ledgers of separate beneficiaries or transactions, or similar records, or automated data processing systems, including computer systems and electronic storage and manipulation of information and documents, in accordance with generally accepted accounting principles will constitute compliance provided that such ledgers, records, or systems contain the elements required and that such elements are maintained in a format that will readily enable tracing and reconciliation.

#### ***O. Trust Account Reconciliation***

The balance of all separate beneficiary or transaction records maintained pursuant to the provisions of Section 2831.1 must be reconciled with the record of all trust funds received and disbursed required by Section 2831, at least once a month, except in those months when the bank account did not have any activities.

A record of the reconciliation must be maintained, and it must identify the bank account name and number, the date of the reconciliation, the account number or name of the principals or beneficiaries or transactions, and the trust fund liabilities of the broker to each of the principals, beneficiaries, or transactions.

The balance of all separate beneficiary or transaction records (for example, CalBRE Form RE 4523) must be reconciled with the record of all trust funds received and disbursed (for example, CalBRE Form RE 4522) at least once a month.

A record of reconciliation must be maintained and it must identify the following:

1. Bank account name;
2. Account number;
3. Date of reconciliation;
4. Name of beneficiary;
5. Trust fund liabilities of the broker to each beneficiary.

For example: ABC Realty, Inc. Trust Account 0339-000011 5/31/99 Balances per Separate Beneficiary Records: Jones \$500.00 Smith \$250.00 Thompson \$100.00 Total of Separate Records \$850.00 Balance per Record of All Trust Funds Received: \$850.00 Difference (if any, should be fully explained) \$0.00  
*Reference: Real Estate Law Book, Regulation 2831.2 6.*

#### **P. Neutral Escrow Depository**

Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than three business days following receipt of the funds by the broker or by the broker's salesperson.

#### **Q. Uncashed Checks**

A check received from the offeror may be held uncashed by the broker until acceptance of the offer if:

1. the check by its terms is not negotiable by the broker or if the offeror has given written instructions that the check must not be deposited nor cashed until acceptance of the offer and

2. the offeree is informed that the check is being so held before or at the time the offer is presented for acceptance.

In these circumstances if the offeror's check was held by the broker until acceptance of the offer, the check must be placed into a neutral escrow depository or the trust fund account, or into the hands of the offeree if offeror and offeree expressly so provide in writing, not later than three business days following acceptance of the offer unless the broker receives written authorization from the offeree to continue to hold the check.

#### ***R. Real Estate Broker Performing Escrows***

A real estate broker who is not licensed under the Escrow Law (Section 17000, et seq., of the Financial Code) when acting in the capacity of an escrow holder in a real estate purchase and sale, exchange or loan transaction in which the broker is performing acts for which a real estate license is required must place all funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account in the name of the broker, or in a fictitious name if the broker is the holder of a license bearing such fictitious name, as trustee at a bank or other financial institution not later than the next business day following receipt of the funds by the broker or by the broker's salesperson. 2832.1.

Section 17006(a) (4) of the Financial Code exempts a licensed broker from the Escrow Law when the broker is performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required.

The exemption is personal to the broker and the broker must not delegate any duties other than duties performed under the direct supervision of the broker. The broker's exemption provided for above is not available for any arrangement entered into for the purpose of performing escrows for more than one business.

Section 17403.4 of the Financial Code requires all written escrow instructions executed by a buyer or seller to contain a statement in not less than 10-point type which must include the license name and the name of the department issuing the license or authority under which the person is operating. This section does not apply to supplemental escrow instructions or modifications to escrow instructions.

Real Estate Commissioner's Regulation 2950 sets forth acts which are prohibited and may be grounds for disciplinary action:

- A. Soliciting or accepting an escrow instruction (or amended or supplemental escrow instruction) containing any blank to be filled in after signing or initialing of such escrow instruction (or amended or supplemental escrow instruction);
- B. Permitting any person to make any addition to, deletion from, or alteration of an escrow instruction (or amended or supplemental escrow instruction) received by such licensee, unless such addition, deletion or alteration is signed or initialed by all persons who had signed or initialed such escrow instruction (or amended or supplemental escrow instruction) prior to such addition, deletion or alteration;
- C. Failing to deliver at the time of execution of any escrow instruction or amended or supplemental escrow instruction a copy thereof to all persons executing the same;
- D. Failing to maintain books, records and accounts in accordance with accepted principles of accounting and good business practice;
- E. Failing to maintain the office, place of books, records, accounts, safes, files and papers relating to such escrows freely accessible and available for audit, inspection and examination by the Commissioner;
- F. Failing to deposit all money received as an escrow agent and as part of an escrow transaction in a bank trust account, or escrow account on or before the close of the next full working day after receipt thereof;
- G. Withdrawing or paying out any money deposited in such trustee account or escrow account without the written instruction of the party or parties paying the money into escrow;
- H. Failing to advise all parties in writing if he/she has knowledge that any licensee acting as such in the transaction has any interest as a stockholder, officer, partner or owner of the agency holding the escrow;
- I. Failing upon closing of an escrow transaction to render to each principal in the transaction a written statement of all receipts and disbursements together with the name of the person to whom any such disbursement is made;
- J. Delivering or recording any instrument which purportedly transfers a party's title or interest in or to real property without first obtaining the written consent of that party to the delivery or recording.

*Reference: Financial Code Sections 17006(a) (4) and 17403.4 Real Estate Law Book, Regulation 2950*

When broker is handling escrow funds: A real estate broker who is not licensed under the Escrow Law (Section 17000 et seq. of the Financial Code), when acting in the capacity of an escrow holder in a real estate transaction in which the broker is performing acts for which a real estate license is required, must place all funds accepted on behalf of another into one of the three places listed above not later than the next business day following receipt of the funds by the broker or the broker's salesperson.

*Reference: Real Estate Law Book, Regulation 2832 7.*

Withdrawals may be made from the trust account only upon the signature of the broker or one or more of the following persons with written authorization from the broker:

1. A salesperson licensed to the broker;
2. A person licensed as a broker who has entered into a written agreement with the employing broker;
3. An unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of trust funds to which the employee would have access.

Withdrawals may be made from the trust account of a corporate broker only upon the signature of an officer through whom the corporation is licensed or one of the persons detailed above.

The corporate broker should always be a signatory on the trust account.

Concerning an unlicensed employee with fidelity bond coverage, it is recommended that the fidelity bond specifically identify the trust account which is being covered. The fidelity bond must not include a deductible clause.

*Reference: Real Estate Law Book, Regulation 2834 15 16 8.*

“Concerning an unlicensed employee with fidelity bond coverage, it is recommended that the fidelity bond specifically identify the trust account which is being covered.”

#### **S. Trust Fund Handling for Multiple Beneficiaries**

The written consent of every principal who is an owner of the funds in the account must be obtained by a real estate broker prior to each disbursement if such a disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds.

**T. Trust Fund Withdrawals***Individual Broker*

Withdrawals may be made from a trust fund account of an individual broker only upon the signature of the broker or one or more of the following persons if specifically authorized in writing by the broker:

1. A salesperson licensed to the broker.
2. A person licensed as a broker who has entered into a written agreement pursuant to Section 2726 with the broker.
3. An unlicensed employee of the broker with fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any given time.

*Corporate Broker*

Withdrawals may be made from the trust fund account of a corporate broker only upon the signature of:

1. An officer through whom the corporation is licensed pursuant to Section 10158 or 10211 of the Code; or
2. One of the persons mentioned above, provided that specific authorization in writing is given by the officer through whom the corporation is licensed and that the officer is an authorized signatory of the trust fund account.

An arrangement under which a person above is authorized to make withdrawals from a trust fund account of a broker must not relieve an individual broker, nor the broker-officer of a corporate broker's licensee, from responsibility or liability as provided by law in handling trust funds in the broker's custody.

**U. Commingling**

"Commingling" as used in Section 10176(e) of the Code is *prohibited except as specified in this section.*

For purposes of Section 10176(e), the following does not constitute "commingling":

1. The deposit into a trust account of reasonably sufficient funds, not to exceed \$200, to pay service charges or fees levied or assessed against the account by the bank or financial institution where the account is maintained.
2. The deposit of funds into a trust account belonging in part to the broker's principal and in part to the broker--when it is not reasonably practicable to separate such funds, provided the part of the funds belonging to the broker is disbursed not later than twenty-five days after their deposit and there is no dispute between the broker and the broker's principal as to the broker's

portion of the funds. When the right of a broker to receive a portion of trust funds is disputed by the broker's principal, the disputed portion must not be withdrawn until the dispute is finally settled.

3. The deposit into a trust account of broker-owned funds in connection with activities pursuant to either subdivision (d) or (e) of Section 10131 of the Code or when making, collecting payments or servicing a loan which is subject to the provisions of Section 10240 of the Code provided:
  - A. The broker meets the criteria of Section 10232 of the Code.
  - B. All funds in the account which are owned by the broker are identified at all times in a separate record which is distinct from any separate record maintained for a beneficiary.
  - C. All broker owned funds deposited into the account are disbursed from the account not later than 25 days after their deposit.

Every broker must keep a record of all trust funds received, including uncashed checks. If a broker does not maintain a trust account or maintains a trust account but forwards all trust funds received to either the escrow or to the owner of the funds, then he/she must maintain a *Record of Trust Funds Received but not Deposited to the Trust*, including:

- A. Date funds received;
- B. Form of payment;
- C. Amount received and from whom received;
- D. Description of property or other identification;
- E. Identity as to whom funds were forwarded;
- F. Date of disposition.

However, a broker is not required to keep the above records of passing through checks made payable to service providers (e.g., escrow, credit and appraisal services) when the total of such checks from any one principal for any transaction does not exceed \$1,000. Upon request of the Department or the maker of such checks, a broker must account for the receipt and distribution of such checks. A broker must retain for *three years* copies of receipts issued or obtained in connection with the receipt and distribution of such checks.

If a broker does maintain a trust account, he/she must maintain a *Columnar Record of all Trust Funds Received and Paid Out of the Trust Fund Bank Account* (for example, CalBRE Form RE 4522). This record should show the following in chronological sequence:

- A. Date funds received;

- B. From whom funds received;
- C. Amount received;
- D. Date of deposit;
- E. Check number and date of related disbursement;
- F. Daily balance of trust bank account.

*Reference: Real Estate Law Book, Regulation 2831 4.*

Funds belonging to a broker should not be commingled with trust funds. Common examples of commingling are:

- A. Personal or company funds deposited into the trust fund bank account
- B. Trust funds deposited into the general or personal bank account
- C. Funds collected on real property wholly owned by the broker handled through the trust account.

A broker, however, is allowed to maintain up to \$200 of personal funds in a trust account to cover checking account service fees and other bank charges.

## **VI. Advertising of any Service for which a License is Required Pursuant to B&P §10140.6, §10159.5, §10235, §10235.5 and §10236.4**

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According to Business and Professions Code Section 10140.6, *a real estate licensee must not publish, circulate, distribute, or cause to be published, circulated, or distributed in any newspaper or periodical, or by mail, any matter pertaining to any activity for which a real estate license is required that does not contain a designation disclosing that he or she is performing acts for which a real estate license is required.*

A real estate licensee must disclose his or her license identification number and, if that licensee is a mortgage loan originator, the unique identifier assigned to that licensee by the Nationwide Mortgage Licensing System and Registry, on all solicitation materials intended to be the first point of contact with consumers and on real property purchase agreements when acting as an agent in those transactions.

### **A. *Solicitation Defined***

*"Solicitation materials intended to be the first point of contact with consumers"* include: business cards, stationery, advertising fliers, and other materials designed to solicit the creation of a professional relationship between the licensee and a consumer, and excludes an advertisement in print or electronic media and "for sale" signs.

The provisions of this section do not apply to classified rental advertisements reciting the telephone number at the premises of the property offered for rent or the address of the property offered for rent.

### ***B. Fictitious Business Name***

According to Business and Professions Code Section 10159.5, every person

“A broker must not use a fictitious name in the conduct of any activity requiring a real estate license unless the broker first obtains a license bearing the fictitious name.”

applying for a license under this chapter who desires to have the license issued under a **fictitious business name** must file with his or her application a certified copy of his or her fictitious business name statement filed with the county

clerk in the county or counties where the fictitious business name will be used.

A responsible broker may, by contract, permit a salesperson to do all of the following:

1. File an application on behalf of a responsible broker with a county clerk to obtain a fictitious business name.
2. Deliver to CalBRE an application, signed by the responsible broker, requesting CalBRE's approval to use a county approved fictitious business name that must be identified with the responsible broker's license number.
3. Pay for any fees associated with filing an application with a county or CalBRE to obtain or use a fictitious business name.
4. Maintain ownership of a fictitious business name that may be used subject to the control of the responsible broker.
5. A salesperson using a fictitious business name must use that name only as permitted by his or her responsible broker.
6. Advertising and solicitation materials, including print or electronic media and "for sale" signage, containing a fictitious business name must include the name and license number of the salesperson who is using the fictitious business name.

A broker must **not** use a fictitious name in the conduct of any activity requiring a real estate license unless the broker first obtains a license bearing the fictitious name.

A fictitious business name is frequently referred to as a "dba" - doing business as. To obtain a license bearing a fictitious name, the broker must apply to

CalBRE and attach a certified copy of the fictitious business name statement filed with the county clerk.

The Real Estate Commissioner may refuse to issue a license bearing a fictitious name to a broker if the fictitious name:

1. is misleading or would constitute false advertising;
2. implies a partnership or corporation when a partnership or corporation does not exist;
3. includes the name of a real estate salesperson;
4. constitutes a violation of the provisions of Sections 17910, 17910.5, 17915 or 17917 of the Code (these Sections provide the procedures for issuance of a fictitious business name);
5. is the name formerly used by a licensee whose license has since been revoked.

*Reference: Real Estate Law Book, Section 10159.5 and Regulation 2731*

Note: The general statute governing fictitious business names is contained in Section 17900 of the Business and Professions Code. As the provisions of this section apply to real estate licensing in the case of an individual licensee, a name is fictitious when it does not contain the surname of the individual conducting the business, or when it implies that there is more than one owner. A name that suggests the existence of additional owners is one that includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," "Team," and the like.

A name is not fictitious if it sets forth an individual's surname and the words merely describe the business being conducted, such as "Realty," "Loans," "Property Management," and other words relating to the type of business an individual is engaged in.

Where a licensee is a natural person, the use of a nickname in place of his or her legal given name (first name) must not constitute a fictitious name for purposes of this section, provided that where the nickname is used, the licensee also uses his or her surname (last name) as it appears on their real estate license, and includes their real estate license identification number as required by Section 10140.6 of the Code.

In the case of a domestic or foreign corporation, a fictitious business name would be anything other than the actual name of the corporation as contained in the articles of incorporation filed with the California Secretary of State. It should be noted that real estate salespersons are not eligible to apply for fictitious business

names under their license. Pursuant to the Real Estate Law, **fictitious business names may only be licensed to real estate brokers.**

**C. False, Misleading, or Deceptive Advertising**

According to Business and Professions Section 10235, no real estate licensee must knowingly advertise, print, display, publish, distribute, telecast or broadcast, or cause or permit to be advertised, printed, displayed, published, distributed, televised or broadcast, in any manner any statement or representation with regard to the rates, terms, or conditions for making, purchasing or negotiating loans or real property sales contracts which is *false, misleading, or deceptive*.

Indicating or otherwise implying any specific yield or return on any note other than the interest rate specified in said note shall be *prima facie* evidence that such advertisement is misleading or deceptive unless the advertisement sets forth the actual interest rate specified in the note and the discount from the outstanding principal balance at which it is being offered for sale.

According to Business and Professions Code Section 10235.5, no real estate licensee or mortgage loan originator must place an advertisement disseminated primarily in this state for a loan unless there is disclosed within the printed text of that advertisement, or the oral text in the case of a radio or television advertisement, the Bureau of Real Estate number and the unique identifier assigned to that licensee by the Nationwide Mortgage Licensing System and Registry under which the loan would be made or arranged.

In addition, according to Business and Professions Code Section 10236.4, in compliance with Section 10235.5, every licensed real estate broker must also display his or her license number on all advertisements where there is a solicitation for borrowers or potential investors. Every mortgage loan originator, as defined in Section 10166.01, must also display the unique identifier assigned to that individual by the Nationwide Mortgage Licensing System and Registry on all advertisements where there is a solicitation for borrowers.

The disclosures required by Sections 10232.4 and 10240 must include the licensee's license number, the mortgage loan originator's unique identifier, if applicable, and the department's license information telephone number.

## VII. Familiarizing Salespersons with the Requirements of Federal and State Laws Relating to the Prohibition of Discrimination

### *Real Estate Commissioner's Regulations Section 2725(f) Duty to Supervise*

A broker licensee must take reasonable steps to become aware of and to be familiar with and to familiarize his or her salespersons with the requirements of federal and state laws and regulations relating to the prohibition of discrimination in the sale, rental, or financing of the purchase of real property. Such laws and regulations include but are not limited to the current provisions and any amendments thereto of:

1. Unruh Civil Rights Act.
2. Title VII and IX of the United States Civil Rights Act of 1968.
3. The Housing Financial Discrimination Act (Holden Act).
4. Blind and other physically disabled persons.

### *Real Estate Commissioner's Regulations*

The Real Estate Commissioner has enacted regulations prohibiting real estate brokers and their salespeople from any practice that discriminates against anyone based on:

1. Race
2. Color
3. Religion
4. Ancestry
5. Sex
6. Disability
7. Marital Status
8. National Origin

The Commissioner also prohibits **blockbusting** and **panic selling**. Panic selling occurs when a broker or salesperson goes into a neighborhood and induces homeowners and tenants to move out of the neighborhood because of an impending change in the ethnic makeup of the neighborhood. A broker also may not use advertising that discriminates in the sale or rental of real property. This relates to all advertising used in the course of business. A broker may not attempt to induce or actually induce a person to sell or rent their real property because of the entry of a certain class of people into the neighborhood. This is called blockbusting and is illegal.

The Commissioner also holds real estate brokers accountable to their agents to inform them of all fair housing laws and Commissioner's regulations regarding the matter.

***Regulations of the Real Estate Commissioner, Regulation 2780******Discriminatory Conduct as the Basis for Disciplinary Action***

Under Regulation 2780 discriminatory conduct is a basis for disciplinary action.

Prohibited discriminatory conduct by a real estate licensee based upon race, color, sex, religion, ancestry, physical handicap, marital status, or national origin includes:

Refusing to negotiate for the sale, rental, or financing of the purchase of real property or otherwise making unavailable or denying real property to any person because of such person's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin.

Refusing or failing to show, rent, or finance the purchase of real property to any person or refusing or failing to provide or volunteer information to any person about real property, or channeling or steering any person away from real property, because of that person's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin or because of the racial, religious, or ethnic composition of any occupants of the area in which the real property is located.

It will not constitute discrimination under this subdivision of the law for a real estate licensee to refuse or fail to show, rent, sell, or finance the purchase of real property to any person having a physical handicap because of the presence of hazardous conditions or architectural barriers to the physically handicapped which conform to applicable state and local building codes and regulations.

Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status, or national origin against any person in the:

- Sale,
- Purchase,
- Negotiation,
- Solicitation of the sale or purchase,
- The collection of payments,
- The performance of services in connection with contracts of sale of real property,
- The performance of services in connection with loans secured directly or collaterally by liens on real property, or
- Business opportunities will fall under Regulation 2780.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of California as to acquiring, financing, holding, or transferring real property.

Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status, or national origin against any person in the terms, conditions, or privileges of sale, rental, or financing of the purchase of real property. This does not prohibit the sale price, rent, or terms of a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status, or national origin against any person in providing services or facilities in connection with the sale, rental, or financing of the purchase of real property, including but not limited to:

1. Processing applications differently,
2. Referring prospects to other licensees because of the prospects' race, color, sex, religion, ancestry, physical handicap, marital status, or national origin,
3. Using with discriminatory intent or effect, codes or other means of identifying minority prospects,
4. Assigning real estate licensees on the basis of a prospective client's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin.



## **UNLAWFUL ACTIVITY OF THE CORPORATION'S EMPLOYEE OR AGENT**

Meyer v. Holley (2003)

DAVID MEYER, individually and in his capacity as  
PRESIDENT AND DESIGNATED OFFICER/BROKER  
OF TRIAD, INC., etc., PETITIONER v. EMMA

MARY ELLEN HOLLEY, et vir, et al. on writ of certiorari (re-examination  
of the actions of a trial court) to the United States Court of Appeals for the  
Ninth Circuit Court.

537 U.S. 280  
January 22, 2003



## UNLAWFUL ACTIVITY OF THE CORPORATION'S EMPLOYEE OR AGENT (*continued*)

Meyer v. Holley (2003)

Justice Breyer delivered the opinion of the Ninth Circuit Court of Appeals.

The Fair Housing Act forbids racial discrimination in respect to the sale or rental of a dwelling. The question before us is whether the Act imposes personal liability without fault upon an officer or owner of a residential real estate corporation for the unlawful activity of the corporation's employee or agent.

For purposes of this decision we simplify the background facts as follows: Respondents Emma Mary Ellen Holley and David Holley, an interracial couple, tried to buy a house in Twenty-Nine Palms, California.

A real estate corporation, Triad, Inc., had listed the house for sale. Grove Crank, a Triad salesperson, is alleged to have prevented the Holleys from obtaining the house—and for racially discriminatory reasons.

The Holleys brought a lawsuit in Federal District Court against Crank and Triad. They claimed, among other things, that both were responsible for a fair housing law violation.

The Holleys later filed a separate suit against David Meyer, the petitioner here. Meyer, they said, was Triad's president, Triad's sole shareholder, and Triad's licensed "officer/broker." They claimed that Meyer was vicariously liable in one or more of these capacities for Crank's unlawful actions.

The Federal District Court consolidated the two lawsuits. It dismissed all claims other than the Fair Housing Act claim on statute of limitations grounds (the plaintiff took too long to bring action and was, therefore, not able to do so).

It dismissed the claims against Meyer in his capacity as officer of Triad because:

1. it considered those claims as assertions of *vicarious liability*, and
2. it believed that the Fair Housing Act did not impose personal vicarious liability upon a corporate *officer*.



## UNLAWFUL ACTIVITY OF THE CORPORATION'S EMPLOYEE OR AGENT (*continued*)

Meyer v. Holley (2003)

The Federal District Court stated that "any liability against Meyer as an officer of Triad would only attach to Triad," the corporation.

The court added that the Holleys had "not urged theories that could justify reaching Meyer individually." It later went on to dismiss for similar reasons claims of vicarious liability against Meyer in his capacity as the "designated officer/broker" in respect to Triad's real estate license.

The Federal District Court certified its judgment as final to permit the Holleys to appeal its vicarious liability determinations. The Ninth Circuit Court of Appeals reversed those determinations.

The Ninth Circuit Court of Appeals recognized that "under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action," but, in its view, "the criteria for the Fair Housing Act" are "different."

That Act, it said, "specified" liability "for those who direct or control or have the right to direct or control the conduct of another"--even if they were not at all involved in the discrimination itself and even in the absence of any traditional agent/principal or employee/employer relationship.

Meyer, in his capacity as Triad's sole owner, had "the authority to control the acts" of a Triad salesperson. Meyer, in his capacity as Triad's officer, "did direct or control, or had the right to direct or control, the conduct" of a Triad salesperson.

And even if Meyer neither participated in nor authorized the discrimination in question, that "control" or "authority to control" is "enough ... to hold Meyer personally liable."

The Ninth Circuit added that, for similar reasons, Meyer, in his capacity as Triad's license-related officer/broker, was vicariously liable for Crank's discriminatory activity. It is so ordered.

**VIII. Regular and Consistent Reports of Licensed Activities of Salespersons**

The form and extent of such policies, rules, procedures and systems must take into consideration the number of salespersons employed and the number and location of branch offices.

A broker must establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

*Reference: Real Estate Law Book, Regulation 2725 5.*

**IX. Role and Responsibilities of Branch or Division Managers Pursuant to B&P §10164, including Salespersons Acting as Branch or Division Managers**

According to Business and Professions Code Section 10164, an employing broker or corporate designated broker officer may appoint a licensee as a manager of a branch office or division of the employing broker's or employing corporate designated broker officer's real estate business and delegate to the appointed manager the responsibility to oversee day-to-day operations, supervise the licensed activities of licensees, and supervise clerical staff employed in the branch office or division.

**A. Real Estate Broker Appoints Salesperson Licensee as Sales Manager**

A licensee accepting appointment as a manager will be subject to disciplinary action for failure to properly supervise licensed activity.

Appointment of a manager must only be made by means of a written contract in which the manager accepts the delegated responsibility. The appointing employing broker or corporate designated broker officer must retain a copy of the contract and send a notice to the department, in a form approved by the Commissioner, identifying the appointed manager and the branch office or division the manager is appointed to supervise.

“A licensee accepting appointment as a manager will be subject to disciplinary action for failure to properly supervise licensed activity.”

A licensee shall not be appointed as a manager if any of the following apply:

1. The licensee holds a restricted license.
2. The licensee is or has been subject to an order of debarment.

3. The licensee is a salesperson with less than two years of full-time real estate experience within five years preceding the appointment.

*Branch or Division Managers*

An employing broker or corporate designated broker-officer may appoint a licensee as a manager of a branch office or division of the employing broker's or employing corporate designated broker officer's real estate business and delegate to the appointed manager the responsibility to oversee day-to-day operations, supervise the licensed activities of licensees, and supervise clerical staff employed in the branch office or division.

A licensee accepting appointment as a manager is subject to disciplinary action for failure to properly supervise licensed activity. Appointment of a manager must be through a written contract in which the manager accepts the delegated responsibility. The appointing employing broker or corporate designated broker officer must retain a copy of the contract and send a notice to CalBRE, in a form approved by the California Real Estate Commissioner, identifying the appointed manager and the branch office or division the manager is appointed to supervise.

*Broker/Salesperson Operating from Branch Office*

A real estate broker acting in the capacity of a salesperson to another broker under a written agreement may perform acts for which a license is required on behalf of the employing broker at any place of business at which the employing broker is currently licensed to perform acts for which a real estate license is required. An employing broker must make sure all branch offices are properly licensed through CalBRE.

*Reference: Commissioner's Regulation 2728.5.*

***B. Notify Real Estate Commissioner***

Whenever an appointment of a branch manager is terminated or changed, the employing broker or corporate designated broker officer must immediately notify the Commissioner in writing.

*Reference: B&P Code Section 10164.*

***C. Business and Professions Code 10177***

According to Business and Professions Code Section 10177, a real estate broker or salesperson who acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if

done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act.

According to the California Real Estate Commissioner's Regulations section 2724, a real estate broker may delegate the responsibility and authority to supervise and control the activities of nonlicensed persons acting under Section 10131.01:

- A. To a real estate broker acting in the capacity of a salesperson to the employing broker and who has entered into a written agreement relating thereto with the employing broker.
- B. To a real estate salesperson licensed to the broker if the salesperson has accumulated at least two years full-time experience as a salesperson licensee during the immediately preceding five-year period and has entered into a written agreement with the broker with respect to the delegation of responsibility.

#### ***D. Assignment of Supervisory Responsibility***

According to the California Real Estate Commissioner's Regulations Section 2743, a resolution assigning supervisory responsibility over salespersons licensed to a corporate broker is in compliance with Section 10159.2 of the Business and Professions Code if the assignment is made by reference to a specified business address or addresses of the corporate broker rather than by the listing of the names of salespersons subject to the supervision of the broker officer.

In filing the resolution with CalBRE, the following information must be furnished on a form prescribed by the Bureau:

1. Name, business address and license number of the corporate broker.
2. Name of the individual broker licensee who was responsible for supervision of the salespersons in question immediately preceding the effective date of the resolution.

#### **X. The Responsibilities of a Broker to Ensure Salespersons Working as "Teams" are in Compliance with B&P §10159.7**

According to Business and Professions Code Section 10159.7, the following definitions apply:

**A. Responsible Broker's Identity**

"Responsible broker's identity" means a name and the associated license identification number under which the responsible broker is currently licensed by the Bureau and conducts business in general or is a substantial division of the real estate firm.

**B. Fictitious Business Name**

"Fictitious business name" means a professional identity or brand name under which activity requiring a real estate license is conducted and the use of which is subject to approval by CalBRE.

**C. Ownership of Fictitious Business Name**

"Ownership of a fictitious business name" means the right to use, renew, and control the use of a fictitious business name obtained in accordance with Section 10159.5.

**D. Responsible Broker**

"Responsible broker" means the broker is responsible for the exercise of control and supervision of salespersons (under Section 10159.2), or a licensee subject to discipline (under subdivision (h) of Section 10177) for failure to supervise activity requiring a real estate license. The supervision of a salesperson required under this part or any other law is limited to regulatory compliance and consumer protection.

**E. Team Name**

"Team name" means a professional identity or brand name used by a salesperson, and one or more other real estate licensees, for the provision of real estate licensed services. Notwithstanding any other law, the use of a team name does not require that a separate license be issued for that name pursuant to Section 10159.5.

A team name does not constitute a fictitious business name for purposes of this part or any other law or for purposes of filing a fictitious business name statement with an application as required (by subdivision (a) of Section 10159.5) if all of the following apply:

1. The name is used by two or more real estate licensees who work together to provide licensed real estate services, or who represent themselves to the public as being a part of a team, group, or association to provide those services.
2. The name includes the surname of at least one of the licensee members of the team, group, or association in conjunction with the term "associates," "group," or "team."

3. The name does not include any term or terms, such as "real estate broker," "real estate brokerage," "broker," or "brokerage" or any other term that would lead a member of the public to believe that the team is offering real estate brokerage services, which imply or suggest the existence of a real estate entity independent of a responsible broker.

Nothing in this section changes a real estate broker's duties under this division to supervise a salesperson.

#### ***F. Teams and Groups***

The broker must ensure that there is an adequate level of supervision for related licensees, including groups of licensees who work together (possibly referred to as a "team or group").

As for any other licensees or employees and others who perform duties on behalf of the brokerage, the broker is responsible for ensuring that such groups are supervised accordingly and that they are conducted in such a way as to avoid misleading the public (e.g. that they do not give the impression of being an incorporated company or a separate real estate brokerage).

#### ***G. Written Office Policies***

Written office policies may assist in this regard and should include direction on the following:

- A. Broker authorization
- B. Broker and team identification in advertising
- C. Advertising of team must meet local statutes and regulations
- D. Meet all local statutes and regulations, i.e., team leader name must be in the advertising; team leader must supervise team members, etc.
- E. Unlicensed persons
- F. Compensation
- G. Other

### **XI. Supervision over Restricted Licensees**

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The California Real Estate Commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate

licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

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

- having obtained the written authorization of the owner of the property concerned to offer the property for sale, lease, exchange, or rent.
- K. Failing to disburse funds in accordance with a commitment to make a mortgage loan that is accepted by the applicant when the real estate broker represents to the applicant that the broker is either of the following:
1. The lender.
  2. Authorized to issue the commitment on behalf of the lender or lenders in the mortgage loan transaction.
- L. Intentionally delaying the closing of a mortgage loan for the sole purpose of increasing interest, costs, fees, or charges payable by the borrower.
- M. Violating any section, division, or article of law which provides that a violation of that section, division, or article of law by a licensed person is a violation of that person's licensing law, if it occurs within the scope of that person's duties as a licensee.

*Reference: Business and Professions Code Section 10176.*

There are certain types of restricted licenses sometimes issued by the Commissioner when a license has been suspended, revoked or denied after a hearing. In effect, they are *probationary licenses* and contain specific restrictions. The Commissioner can restrict licenses by: term (one month, three months, etc.); employment by a particular broker (for a salesperson); limitation to a certain area or type of activity; requiring detailed reports of each transaction; requiring the filing of a surety bond; and other conditions or combinations of conditions.

### ***Real Estate Broker's Responsibilities over Restricted Licensees***

When a real estate broker becomes the new sponsoring broker for a licensee who has a restricted license, the broker is required to complete CalBRE form RE 214A. Under Part 17 Employing Broker Certification, the real estate broker must certify the following: "I hereby certify that I have read the Decision of the Real Estate Commissioner referenced above, which provides for the issuance of a restricted real estate salesperson license and/or Mortgage Loan Originator (MLO) license endorsement. I will carefully review all transaction documents which the restricted salesperson licensee prepares and will otherwise exercise close supervision over the licensed activity of the above named salesperson. Should he/she violate any of the conditions of the restricted license and/or MLO license endorsement, I will immediately notify the Real Estate Commissioner in writing. I hereby certify that: a) The above information is true and correct to the best of my knowledge, and b) there is a written agreement with this salesperson on file in my office as required by Section 2726 of the Commissioner's Regulations."

***Corporations***

According to the Business and Professions Code Section 10159.2, the officer designated by a corporate broker licensee (pursuant to Section 10211) is responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

A corporate broker licensee that has procured additional licenses (in accordance with Section 10158) through officers other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

A certified copy of any resolution of the board of directors assigning supervisory responsibility over real estate salespersons licensed to the corporation must be filed with the Real Estate Commissioner within five days after the adoption or modification.

***A. Broker Responsibility Regarding Debarred Persons***

According to the California Real Estate Commissioner's Regulations Section 2725.5, the Business and Professions Code Section 10087 authorizes the California Real Estate Commissioner to debar licensed or unlicensed persons from any position of employment with, or management or control of, a real estate business.

Such debarred persons are further prohibited by Section 10087 from participating in any business activity of a real estate salesperson or a real estate broker and from engaging in any real estate-related business activity on the premises where a real estate salesperson or real estate broker is conducting business.

“A broker who becomes aware of violations of Section 10087 is responsible for reporting such violations to the CalBRE.”

A broker is responsible for screening his or her employees, both licensed and unlicensed, and regular business associates engaging in any real estate-related business activity on the broker's premises, for compliance with Section 10087.

Such broker responsibility includes, but is not limited to, quarterly review of the Bureau's online listing of debarred persons and of the listing of disciplinary actions published in the Bureau's quarterly bulletin.

A broker who becomes aware of violations of Section 10087 is responsible for reporting such violations to the CalBRE.

### ***B. Surety Bonds***

As one of the conditions to the issuance of a restricted license (authorized by Section 10156.5) the California Real Estate Commissioner may require the filing of surety bonds in such form and condition as he may require in respect to the restricted licensee for the protection of persons or classes of persons with whom said licensee may deal.

*Reference: B&P Code Sections 10156.5 and 10156.8*

### ***C. Real Estate License Reinstatement***

The following criteria have been developed by CalBRE for the purpose of evaluating the rehabilitation of an applicant for issuance or for reinstatement of a license in considering whether or not to deny the issuance or reinstatement on account of a crime or act committed by the applicant:

- A. The passage of not less than two years since the most recent criminal conviction or act of the applicant that is a basis to deny the Bureau action sought. A longer period will be required if there is a history of acts or conduct substantially related to the qualifications, functions or duties of a licensee of the Bureau.
- B. Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant.
- C. Expungement of criminal convictions resulting from immoral or antisocial acts.
- D. Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.
- E. Successful completion or early discharge from probation or parole.
- F. Abstinence from the use of controlled substances or alcohol for not less than two years if the conduct which is the basis to deny the Bureau action sought is attributable in part to the use of controlled substances or alcohol.
- G. Payment of the fine or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

- H. Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the Bureau action sought.
- I. Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.
- J. Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.
- K. Correction of business practices resulting in injury to others or with the potential to cause such injury.
- L. Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.
- M. New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the departmental action sought.
- N. Change in attitude from that which existed at the time of the conduct in question as evidenced by any or all of the following:
  1. Testimony of applicant.
  2. Evidence from family members, friends or other persons familiar with applicant's previous conduct and with his subsequent attitudes and behavioral patterns.
  3. Evidence from probation or parole officers or law enforcement officials competent to testify as to applicant's social adjustments.
  4. Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.
  5. Absence of subsequent felony or misdemeanor convictions that are reflective of an inability to conform to societal rules when considered in light of the conduct in question.
- O. Each of the above criteria notwithstanding, no mortgage loan originator license endorsement shall be issued to an applicant for such license endorsement where the applicant has been convicted of any felony within seven (7) years from the date of his or her application for a license endorsement. This ban is not subject to mitigation or rehabilitation.
- P. Each of the above criteria notwithstanding, no mortgage loan originator license endorsement shall be issued to an applicant for such license endorsement where the applicant has ever been convicted of a felony where such felony involved an act of fraud, dishonesty, a breach of trust, or money laundering. This ban is not subject to mitigation or rehabilitation.

*Reference: Civil Code Section 2911.*

Next is a look at a recent appellate court case regarding broker supervision.



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## BROKER SUPERVISION

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

**Appellate Court Case: Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents**

Case Number B249868

Court of Appeals of California, Second District, Division Two.

Filed October 21, 2014.

Law Offices of Frank M. Buda and Frank M. Buda for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Paul D. Gifford, Assistant Attorney General, Diane S. Shaw and Elisa B. Wolfe-Donato, Deputy Attorneys General, for Defendants and Respondents.

**ASHMANN-GERST, J.**

Hector N. Diaz (Diaz) and The Diaz Group, Inc. (DGI) appeal from the judgment denying their petition compelling the Real Estate Commissioner of the State of California (Commissioner) to set aside its decision revoking their broker licenses. The appellate court found no error and affirmed (agreed with) the trials court's decision.

**Facts of the Case:**

Diaz obtained his real estate broker license from the California Department of Real Estate or "Department" (now called the California Bureau of Real Estate or CalBRE) on June 7, 2005. At the same time, he obtained permission to do business as Supremacy Realtors and Object Mortgage. Thereafter, DGI obtained a license in early 2006, and Diaz was listed as its designated officer (broker-officer for the corporation).

The Department issued Munoz a conditional real estate salesperson license in 2005. Beginning in June 2008, he became a licensed agent under Diaz's broker's license under an independent contractor agreement.



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## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

The agreement provided that Munoz would pay DGI "\$500 per transaction on Real Estate and Mortgage Loans." Initially, he worked at an office located at 1020 South Anaheim Boulevard, Suite 310, in Anaheim. Diaz and DGI obtained branch licenses for the office where Munoz worked.

American National Group (ANG) was located at 1701 East Lincoln Avenue in Anaheim. It advertised itself as a company that helped borrowers avoid foreclosure. Among other things, it negotiated loan modifications. The Department (CalBRE) never issued a license to ANG. Cavaldi Management, Inc. was the registered owner, and Cesar Valdivia (Valdivia), Munoz's first cousin, was listed as ANG's "Officer/Director." Though Valdivia had a real estate salesperson license, he did not have a broker license. Eddy Faijo (Faijo), Jaime Amayo (Amayo) and Maria Delgado Nieto (Nieto) all worked at ANG. They were not licensed by the Department.

Valdivia decided Munoz should work at ANG's office. He did so, beginning in August 2008. DGI obtained a branch license for the new office on November 5, 2008. Four months later, on March 10, 2009, Diaz obtained a corresponding branch license. Munoz's e-mail address was mmunoz@anghelp.com. In February to April 2009, Munoz processed loan modifications and helped people buy and sell homes for ANG.

Valdivia asked Munoz to help a person named Jose R. Flores (Flores) do a short sale on a house for \$350,000. Flores owed \$388,000 on a first mortgage and \$97,000 on a second mortgage. In October 2008, Munoz and Flores entered into a residential listing agreement in which Supremacy Realtors was listed as Flores's broker. Flores lost interest and the house never sold.

Munoz arranged a loan for a borrower named Pineda in connection with the purchase of a single family residence. DGI received a commission, and then Diaz paid Munoz his commission from those proceeds. The file was either lost or "ruined" when Munoz moved his office.

### **Diaz's Supervision of Munoz**

Diaz reviewed two listing agreements that Munoz entered into on behalf of



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

DGI. Munoz was responsible for keeping his files, and Diaz was supposed to pick them up. They met five or six times, and Munoz reported that "he had no activity going on." Whenever Diaz went to ANG's office, it was for about 10 to 20 minutes. A couple of times, Diaz spoke to Valdivia. They did not speak about the specifics of their businesses, except that Valvidia said that he was doing loan modifications through a law firm.

Consumers complained to the Department about ANG's collection of advance fees. The Department assigned Samuel Delgado (Delgado) to investigate Diaz, DGI, Valdivia and Munoz.

In April 2009, the Department authorized DGI to perform loan modifications. Soon after, Munoz expressed interest in loan modification work. On June 23, 2009, Munoz changed his employing broker to Castleview Direct. When later asked about that, he said the change was done by a bank representative so Munoz could get a commission on an FHA loan.

DGI and Munoz entered into a July 2009 addendum to the independent contractor agreement. The addendum provided: "Agent . . . Munoz agrees to pay [DGI] the amount of \$300 for each loan modification he performs. This amount is payable from the advance fee collected from his customers." At the time, Diaz was not aware that Munoz had changed brokers.

The Department sent Diaz a letter indicating that it was inquiring into ANG's loan modification services. According to the Department, Diaz had previously confirmed that he had a business arrangement with ANG and Munoz to conduct loan modifications.

It requested a "written chronological version of the subject matter in order that we may consider all pertinent facts in our inquiry" as well as "copies of all of the documents relating to this transaction [*sic*], including but not limited to:

1. The Department's "No objection letter"
2. Employee records for Munoz
3. The business contract between ANG/Munoz and DGI.



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

On behalf of DGI, Diaz wrote a letter to the Department denying affiliation with ANG and stating, in part: "In June of 2008, Munoz asked me if he could work with our company as a Real Estate Agent and since then he has not closed any transactions with our company."

Delgado went to ANG's office on July 30, 2009. It had advertising for ANG facing traffic. He asked two men near the entrance if they would help him with a loan modification, and they said yes. Delgado said he was with the Department and asked to speak to the real estate broker.

Eventually, Munoz appeared. When Delgado asked about ANG's unlicensed loan modification activity, Munoz said "they" were authorized to perform loan modifications under DGI, who was the real estate broker.

According to Munoz, Diaz had filed ANG's office as a branch office and had contracted ANG to do loan modifications under DGI's no objection letter from the Department.

Delgado asked for copies of recent loan modification files performed under DGI's no objection letter, and Munoz said all the files had been forwarded to "their" attorney.

The Department filed an Accusation against Diaz and DGI that contained two causes.

In the First Cause, which was labeled "Unlicensed DBA/Unlicensed Activity," the Department alleged that the term "Respondents" referred to Diaz, DGI, ANG, Munoz, Valdivia, Faijo, Amayo and Nieto. It was then alleged that the Respondents used the fictitious business name ANG to collect advance fees from borrowers and provide loan modification and negotiation services "requiring the issuance of a real estate broker license" despite not "filing an application for the use of such name with the Department" as required by statute and regulation.

Also through the ANG business name, the Respondents "utilized employees



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## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

and/or representatives in soliciting and negotiating loans even though they were not licensed by the Department as real estate brokers or salespersons."

In part, it was alleged that the Respondents solicited and entered into contracts for loan modification and negotiation services with Patricia Cisneros, Rogelio Gomez, Jorge Montes, Pedro Perez, Gloria Cruz, Fidel Moreno, Maria Candelaria Muratalla, and Luis Alarcon, and that the Respondents charged an advance fee.

Other borrowers who paid an advance fee were identified as Cecilio Lara, Magaly Granados, Hector Rocha, Juan Carlos Luevano, Leticia Medina and Pedro Carillo.

With respect to Munoz, the Accusation alleged that DGI was listed as his employing broker from June 20, 2008, through June 29, 2009, and that Munoz "engaged in activities requiring a real estate transaction for Diaz' dba Supremacy Realtors in 2008 and 2009."

From April 2008 to May 18, 2009, Munoz "advertised short sale and loan modification services under one or more business names including, but not limited to, 'ANG' in various print and electronic media, including a website located at <http://www.anghelp.com>.

Those advertisements solicited borrowers [by] offering short sales and loan modification services and listed" an address for ANG that was the same for DGI's Anaheim branch location.

Along with other respondents, Munoz did the following: "negotiate the purchase, sale or exchange of real property; negotiate one or more loans for, or perform services for, borrowers and/or lenders in connection with loans secured directly or collaterally by one or more liens on real property; and charge, demand or collect an advance fee."

The Second Cause of the Accusation alleged the following: "Respondent Diaz's failure to supervise the activities of Respondent DGI to ensure



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

compliance with the Real Estate Law is in violation.

The Department held a hearing.

Administrative Law Judge Mark Harman (ALJ Harman) issued a proposed decision stating that the Department failed to prove that Diaz or DGI caused ANG or its employees to perform loan modification services or advance fees transactions.

Nor did the Department prove that Diaz or DGI profited from those transactions, and that they were aware that Munoz was violating the law.

However, ALJ Harman found cause for discipline under Business and Professions Code section 10177 for the failure of Diaz and DGI to exercise reasonable supervision over Munoz while he worked at DGI's branch office, which was ANG's office.

According to ALJ Harman, Munoz and Valdivia "were offering loan modification services as ANG." Munoz kept business cards showing him as a "Loan Officer/Realtor" for ANG.

ALJ Harman determined that "Munoz was engaged in real estate activities, e.g., loan modification services, that required a license, but he was acting in the name of ANG instead of the name of his broker, Respondent DGI, which was the only broker that was authorized to employ and compensate him."

ALJ Harman noted that a person applying for a license to file a copy of his fictitious business name statement, and it is unlawful for a licensee to conduct business under a fictitious business name unless that fictitious business name is on the license.

ALJ Harman determined that Diaz and DGI "failed to maintain records of transactions that Munoz had performed. Diaz was unaware of the Flores short sale transaction. Respondent Diaz failed to implement policies and procedures that would enable him to supervise Munoz in the performance of real estate



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

activities within ANG's office."

ALJ Harman noted: "Respondent Diaz had knowledge that Valdivia and ANG were performing loan modification services, but somehow, he did not know the legal requirements to engage in this activity."

Respondent Diaz, nevertheless, designated ANG's office as a licensed branch office and employed Valdivia's cousin, Munoz, as his agent while working inside ANG's office. These acts enhanced ANG's interests by giving the appearances to customers that ANG was operating a legitimate real estate business at the Lincoln Avenue location."

While the evidence did not explain the parties' expectations, ALJ Harman inferred that "Respondent Diaz chose, as a business decision, not to find out what was going on at ANG so that he would be able to claim that he was not aware of nor connected with ANG's violations of the Real Estate Law."

*Respondent Diaz may argue that he simply relied on Munoz to initiate a discussion about Munoz's real estate activities, but that in no way satisfies Respondent Diaz's duty to supervise his employee." According to ALJ Harman, Diaz's "denial of any wrongdoing suggests that he is not amenable to correction at the present time."*

ALJ Harman proposed an order that would provide that all of Diaz's and DGI's licenses under the Real Estate Law are revoked.

Within 90 days, Diaz could apply for a restricted real estate salesperson license. After four years, he can apply for an unrestricted real estate salesperson license. The Commissioner adopted the proposed decision.

Diaz and DGI filed a petition compelling the Commissioner to set aside his decision. According to the trial court:

1. The weight of the evidence supports the Commissioner's finding that Diaz and DGI failed to exercise reasonable supervision of Munoz;
2. The July 22, 2009, letter from Diaz to the Department demonstrated that



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

he was unaware of the Pineda transaction and therefore failed to keep track of Munoz's transactions;

3. Though Diaz met with Munoz five or six times at ANG's office, Diaz merely accepted Munoz's word when he said he had "no activity going on" and failed to inquire how Munoz was spending his time, or about what specific activities he was engaged in;
4. Diaz and DGI's failure to inquire further into Munoz's work and progress amounted to a willful blindness and was not reasonable;
5. Diaz and DGI failed to reasonably supervise Munoz because he operated, to some degree, at the discretion of Valdivia, the owner of ANG and a person not affiliated with Diaz and DGI;
6. It was incumbent upon Diaz and DGI to ensure that Munoz's actions were not being directed to any degree by ANG or Valdivia;
7. Diaz and DGI failed to establish sufficient policies, rules, procedures and systems to review, oversee, inspect and manage Munoz at ANG's office;
8. Munoz engaged in multiple transactions without the knowledge of Diaz and DGI, including the Flores listing and, as stated by ANG employee Gudilia Granados (Granados), Munoz processed loan modifications and acted as a realtor by helping people buy and sell homes;
9. Even though Munoz did not reveal his activities to Diaz, that does not absolve him of the responsibility to further inquire into Munoz's activities;
10. The evidence showed that Munoz was Diaz and DGI's licensee and was supposed to act on their behalf only; and
11. Diaz and DGI failed to provide files to the Department regarding Munoz's transactions.

The petition was denied and this timely appeal followed.

"The officer designated by a corporate broker licensee shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required."



## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

This language brooks no compromise. For any real estate salesperson employed by a broker, the statute covers all activities of that real estate salesperson for which a license is required.

Even if the statute was ambiguous, we would construe it broadly. We note that a real estate broker is a person who negotiates or solicits transactions involving and related to the sale, purchase, lease or exchange of real property, or related to loans secured by liens on real property.

And "a real estate salesperson within the meaning of this part is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth above. The statutory scheme contemplates that real estate salespersons will engage in real estate transactions only under a broker.

As one case explained, "It is evident that brokers and salespersons belong in distinctly different categories and that the broker, because of his superior

knowledge, experience and proven stability is authorized to deal with the public, contract with its members and collect money from them; the salesperson, on the other hand, is strictly the agent of the broker.

He cannot contract in his own name, nor accept compensation from any person other than the broker under whom he is licensed; it is a misdemeanor for anyone, whether obligor, escrow holder, or otherwise, to pay or deliver to anyone other than the broker compensation for services within the scope of the act."

The only way for that real estate salesperson to be properly supervised, and the best way to ensure that the public is protected, is to construe the section as covering all real estate salespersons' activities.

If the statute were construed narrowly, real estate salespersons employed by a broker could engage in unsupervised activity for which a license was required by the simple artifice of saying the activity was not on the broker's



## BROKER SUPERVISION (*continued*)

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behalf. This consequence would be untenable because, "with no such fixed responsibility, the statutory purpose would be frustrated."

Based on incorporated allegations, the Second Cause alleged that Munoz advertised short sale and loan modification services under one or more business names, including ANG; he negotiated the purchase, sale or exchange of real property; he negotiated loans; and he "engaged in activities requiring a real estate transaction for Diaz' dba Supremacy Realtors in 2008 and 2009."

It was also alleged that DGI was Munoz's employing broker. Then, the Second Cause alleged that Diaz failed to supervise DGI's activities. Taken together, the allegations accused Diaz of failing to supervise Munoz's advertising, negotiation of real estate sales and loans, and activities requiring a real estate transaction.

In part, it provides: "A broker must exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

- A. Transactions requiring a real estate license.
- B. Documents which may have a material effect upon the rights or obligations of a party to the transaction.
- C. Filing, storage and maintenance of such documents.
- D. The handling of trust funds.
- E. Advertising of any service for which a license is required.
- F. Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.
- G. Regular and consistent reports of licensed activities of salespersons."

The Commissioner found:

1. Munoz acted in ANG's name and engaged in loan modification services that required a license;
2. Diaz and DGI failed to maintain records of Munoz's transactions; and
3. Diaz and DGI failed to implement policies and procedures to enable Diaz to supervise Munoz.



## BROKER SUPERVISION (*continued*)

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Though not worded exactly the same, the trial court made the same findings. In addition, the trial court found that Munoz acted as a realtor for ANG.

Because it was alleged that DGI was Munoz's broker, it was sufficiently alleged that all of Munoz's activities requiring a license fell under DGI's broker license and were therefore pursued on behalf of DGI.

And the Second Cause identified the statute and regulations that Diaz violated. Given the allegations in the Accusation, we conclude that Diaz and DGI were given sufficient notice that they would have to defend against the contention that they did not properly supervise Munoz in connection with loan modifications as well as the negotiation of real estate sales, purchases and exchanges, all of which required a license, and that the alleged failure to supervise could be of any particular variety proscribed by law such as the failure to maintain records or develop policies and procedures to supervise salespersons.

Though the Accusation did not specifically refer to Diaz and DGI's failure to supervise with respect to the Pineda transaction and the Flores listing, that is of no moment. Those specific violations are simply examples of the generally alleged failure to supervise Munoz in connection with real estate transactions. Diaz and DGI point out that the trial court stated that "Diaz and DGI employed Munoz from June 2008 to July 2009," and then opined that their acceptance of Munoz's claim that there was no activity begged "the question of what Munoz was doing for over a year with almost zero results," and supported the inference that Diaz and DGI were being willfully blind.

Though unclear, it appears that Diaz and DGI contend that the trial court assumed without evidence that real estate salespersons perform licensed activities at all times, Diaz should have known this, and he was therefore required to do more than simply meet with Munoz and blindly take his words at face value regarding his lack of licensed activities.

According to Diaz and DGI, "The trial court's [written ruling]...finds that Munoz engaged in multiple transactions without the knowledge of Diaz and



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## BROKER SUPERVISION (*continued*)

Diaz et al., Plaintiffs and Appellants v. Real Estate Commissioner of the State of California et al., Defendants and Respondents (2014)

DGI. In the case of Munoz, the record does not indicate other real estate transactions done on behalf of DGI with the exception of the cancelled Flores listing transaction. . . . Munoz did not disclose this cancelled listing transaction to Diaz. Further, there is no evidence as to what a further inquiry would have disclosed about the Flores transaction, if Munoz stated there were no transactions."

The premise of this argument fails. As we have explained, Diaz was responsible for supervising all of Munoz's licensed activities, and all of those activities fell under the umbrella of Diaz's and DGI's broker licenses. It does not matter whether those activities were purportedly performed on behalf of ANG.

The judgment is affirmed. BOREN, P. J. and CHAVEZ, J., concurs.

This concludes our three hour continuing education course *Management and Supervision*

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