



DIVISION OF REAL ESTATE NEWSLETTER

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Superintendent's Column

Licensees Buying Property For Self Must Disclose

By Margaret J. Ritenour, Superintendent

Ohio's agency disclosure law has been in effect for more than eight months. Implementation of this law has been much smoother than many in the industry originally anticipated. With few exceptions, licensees seem to understand the new law and are complying with it very well.

The Division, however, continues to receive a substantial number of calls regarding situations where real estate licensees are purchasing property for themselves. The purpose of this article is to provide licensees with some basic principles to keep in mind when deciding how to handle these situations.

The first basic "rule" a licensee needs to follow when buying property on their own account is to disclose their status as a real estate broker or salesperson to the seller. Such disclosure is necessary to put the seller on notice that he is dealing with a professional who has a higher degree of knowledge and training in the field of real estate. This disclosure should be made as soon as possible and should be documented for the licensee's protection.

Another crucial point for a licensee to understand when he is purchasing property is that he is representing himself. Like any other buyer, a licensee in this position is typically negotiating for a price and terms most favorable to his interests. Clearly, such conduct by itself does not necessarily create a violation of license law. However, problems can occur in this situation if the licensee/buyer also places himself in the position of representing the seller of the property. The obvious reason for this is the potential for breaching fiduciary duties owed to the seller and possibly acting as an undisclosed dual agent.

A common situation in which the licensee can find himself in such a dilemma is when he is purchasing property that is offered for sale directly by an owner (commonly referred to as "FSBO"). Oftentimes an agent in this situation wants to collect a commission from the seller on the transaction. To do this, he has the seller sign

an exclusive listing contract agreeing to pay the agent/buyer a commission. By doing this, the real estate licensee not only obligates the seller to a commission, but places himself in the position of being the seller's agent. As the seller's agent, the licensee owes fiduciary duties to the seller that include putting the seller's interests before

his own. Obviously, it will be almost impossible for the agent to do this and simultaneously negotiate on his own behalf as the purchaser. The real estate agent who lists a property for sale that he intends to purchase, may therefore find himself facing allegations that he has breached the fiduciary obligations he owes to the seller, as well as allegations of being an undisclosed dual agent.

To avoid these potential problems, a licensee should not enter into a listing agreement with a "FSBO" that he plans on purchasing. Instead, the agent should merely proceed to negotiate at arm's length on his own behalf as the purchaser. If the agent wants to collect a commission from the seller, it is best to do so as a buyer's agent, representing himself. The obvious problem with this, though, is convincing the seller to pay him a fee as a buyer's broker. By structuring the commission in this way, however, the licensee does not create an agency relationship with the seller and is only obligated to represent himself as the buyer.

Another situation that occurs frequently is when the listing agent or another licensee in the same firm wants to purchase property listed with their brokerage. Again in this situation, the agent/buyer will obviously be representing his own interests as a buyer. However, the brokerage (and therefore all of its agents) are obligated by the listing contract to represent and promote the seller's best interests. When an agent in the brokerage purchases property listed with the brokerage, the agent and also the brokerage are exposed to allegations by the seller of breaching fiduciary duties and acting as a dual agency.

continued on page 2

ATTENTION BROKERS!

**Are you forwarding
copies of this newsletter
to your salespersons?**

Licensees Have Full Disclosure Duties To Sellers

The duty of licensees to disclose defective conditions of a property to potential buyers was addressed in a recent newsletter article. Besides this duty to buyers, real estate licensees also have full disclosure responsibilities to sellers. This, of course, stems from the fiduciary duties the licensee owes the seller as the seller's agent.

One of the most important disclosure duties the real estate licensee has to the seller is to inform him/her of any information the agent has regarding the financial ability of a prospective purchaser to fulfill the purchase contract's terms. This would include disclosing a previous bankruptcy action the buyer may have filed, a negative credit history, limited resources for a down payment, income limitations, etc.

The agent must also disclose if a potential buyer has to sell his/her existing home in order to be able to finance the purchase of a new home. Typically, the buyer asks that this condition be placed in the purchase contract as a contingency for buying the new house. Such a contingency obviously benefits the buyer because it relieves the buyer of the obligation to purchase the property in the event the sale of his/her existing property cannot be achieved.

If a real estate agent knows that such a sale is neces-

sary for a buyer, the agent should suggest that this contingency be placed in the offer to purchase, just as the agent would suggest a financing contingency. However, in the event the potential purchaser does not want this to be a contingency in the contract, the real estate agent must still disclose to the seller the fact that the purchaser must sell their existing residence in order to purchase the seller's property. Again, this disclosure would be necessary because this would be material information regarding the buyer's ability to perform the terms of the purchase contract with the seller. The Ohio Real Estate Commission has previously found it to be misconduct for an agent to fail to make such a disclosure.

It should be pointed out that disclosure of facts regarding the buyer's financial status or conditions on their ability to perform should be made to the seller **before** the seller enters into a contract with that buyer. If the agent does not learn of this information until after a contract is entered into, the agent must disclose this information to the seller as soon as possible. Again, as with disclosure to buyers of defective conditions, it is always recommended that if an agent has any doubt as to whether a fact is material and should be disclosed, that he/she err on the side of caution and make the disclosure.

Superintendent's Column (continued from page 1)

The best way to avoid this type of dilemma is for the agent to refrain from purchasing property listed with his brokerage. If the agent does want to purchase the property, it is best for the listing brokerage to terminate the listing, and thus the agency relationship with the seller. Most brokers, however, find this to be an unacceptable option because they do not want to forfeit their commission. If this is the case, a third option would be for the brokerage to retain the listing, recognize its status as a dual agent and obtain the detailed consents to this dual agency required under Ohio Revised Code Section 4735.18(A) (4) and Ohio Administrative Code Section 1301:5-5-05.

Another avenue the brokerage could attempt would be to retain the listing, but to limit the agent's role to only that of a purchaser. The agent would then act only as principal in the transaction, and not as a licensee. He therefore should not be paid any portion of the commission. To protect itself, a brokerage attempting to handle a transaction in this fashion should have a detailed written disclosure and consent to such an arrangement prepared by their attorney and signed by the seller.

A final situation that poses a risk for agents is when they are purchasing property listed for sale with another real estate company. As with a FSBO, it is best in this situation for the agent to act only as a principal and not collect a commission as a licensee. The next best alternative would be for the licensee to represent himself as a buyer's agent and collect any commission in that capacity. What many agents do, however, is collect a commission from the listing broker under the traditional subagency arrangement. Licensees who do this need to recognize that they are creating the potential for a dual agency by establishing an agency relationship with the seller while at the same time representing themselves. Such a dual agency is only permissible under license law by obtaining the written consent of the seller.

These suggestions and guidelines are offered to help licensees who purchase real estate on their own account avoid common pitfalls that can result in a complaint being filed with the Division of Real Estate as well as possible civil liability. Licensees must remember that agency disclosure laws do not mandate one exclusive method of handling these situations. There are a variety of options the agent should discuss with his or her broker. The license law merely provides for full disclosure of the choice the licensee makes as to whom he represents and consent if he chooses to act as a dual agent.

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LOIS YEAGER

Dennis Ginty, Newsletter Editor

Disciplinary Actions

Here is a summary of recent Commission activities and decisions pursuant to Section 4735.03 (E) of the Ohio Revised Code.

The Commission has taken the following action with regard to these licensees:

REVOCATION

LEISURE TIME REALTY & MANAGEMENT COMPANY, broker, Port Clinton, Ohio, had its corporate broker's license revoked for violating Section 4735.18 (A) (6), (A) (26) and (A) (34) of the Ohio Revised Code. This revocation became effective June 7, 1989. Leisure Time Realty & Management Company permitted an individual to act in the capacity of a real estate sales associate at a time when he was not licensed with the Ohio Division of Real Estate. Also, Leisure Time Realty failed to deposit money collected as rent payments in connection with its management of a property into a special or trust bank account.

SUSPENSIONS

LINDA S. BECKNER, sales associate, Westerville, Ohio, had her sales license suspended for 30 days for violating Section 4735.18 (A) (6) of the Ohio Revised Code. However, due to mitigating circumstances, 25 days of the suspension were waived by the Commission. Ms. Beckner began serving the five day balance of this suspension on July 7, 1989. Ms. Beckner failed to convey to the real estate licensee working with a potential buyer of a property a counter-offer made by the sellers of the property. Furthermore, Ms. Beckner failed to maintain copies of the buyer's offer and the seller's counter-offer for her broker's records.

CLINTON FRANK, sales associate, Ashland, Ohio, had his sales license suspended for 10 days for violating Section 4735.18 (A) (21) of the Ohio Revised Code. Due to mitigating circumstances, however, imposition of this suspension was waived by the Commission. Mr. Frank

advertised in the Ashland County Multiple Listing Service that a property was in a particular school district, when in fact, it was located in a different school district. Mr. Frank's conduct constituted publishing advertising which is misleading or inaccurate in a material particular.

SAMUEL L. JOHNSON, broker, Cleveland, Ohio, had his broker's license suspended for violating Section 4735.18 (A) (28) of the Ohio Revised Code. Mr. Johnson, in his capacity as a licensed real estate broker, had a judgment entered against him in the Cuyahoga County Court of Common Pleas. This is a final judgment in the amount of \$7,395.87 which Mr. Johnson did not satisfy. The suspension shall commence upon reinstatement of Mr. Johnson's real estate license, and continue for the period of time he remains liable for the judgment against him.

JAMES PARKER, broker, and J. PARKER & ASSOCIATES, INC., corporate broker, had their brokers' licenses suspended for 30 days for violating Section 4735.18 (A) (6) and (A) (26) of the Ohio Revised Code. However, due to mitigating circumstances, 20 days of each suspension were waived by the Commission. Mr. Parker and J. Parker & Associates, Inc. began serving the 10 day balances of their suspensions on July 7, 1989. Mr. Parker and J. Parker & Associates, Inc. received a security deposit in connection with a rental application submitted on a property which was not deposited into the company's real estate trust account.

CHRIS D. WEATHERMAN, sales associate, Columbus, Ohio, had his sales license suspended for 30 days for violating Section 4735.18 (A) (6) of the Ohio Revised Code. This suspension began on July 7, 1989. Mr. Weatherman prepared a purchase offer on behalf of the potential buyers of a property. The offer required the buyers to give Mr. Weatherman an earnest money deposit upon acceptance of the offer. However, after a sales contract was entered into, Mr. Weatherman failed to convey to the sellers and listing agent that the buyers had failed to pay the earnest money.

Process Of Transferring Licenses Clarified

Last year, approximately 7,800 persons transferred their real estate licenses between brokers. When agents transfer their license, an issue that frequently arises is the date when they may legally start doing business for their new broker.

An individual may only act on behalf of the new brokerage when the transfer application has been **processed** by the Ohio Division of Real Estate and a new license has been issued by our office in the name of the new brokerage. This generally occurs within one to three working days of receipt of the completed transfer application and license. Until the new license is issued by the Division, the real estate agent or broker may not advertise, take list-

ings, show properties, or write contracts in the name of the new brokerage.

Delays in processing transfer applications most often occur when the former broker does not promptly return the agent's license to the Division. Brokers are reminded that Ohio Revised Code Section 4735.13 (B) requires brokers to **immediately** return the license of a salesperson who is terminating his or her affiliation. (There is no 10-day grace period to return this license as many brokers mistakenly believe.) Brokers who fail to promptly return the salesperson's license can be subject to disciplinary action for failing to comply with this section of the license law.

Paul Everson Elected President of Real Estate Commission

Paul J. Everson was unanimously elected president of the Ohio Real Estate Commission on July 18, 1989. Mr. Everson has been a member of the Commission for 18 years and previously served as President for 11 of those years.

Arthur C. Church completed five years of service as President of the Ohio Real Estate Commission on June 30, 1989. Mr. Church was appointed to the Commission as the public's representative in 1984 and elected President of the Commission in 1985. He is a graduate of the University of Cincinnati College of Law and has been

practicing law since 1967 in Cincinnati.

"Arthur Church has served the Real Estate Commission well for several years. His dedication and experience will be missed," said Superintendent Margaret J. Ritenour.

Governor Richard F. Celeste appointed John C. Kealy of Shaker Heights as the public representative to the Commission. Mr. Kealy is an attorney in private practice in Cleveland and is President of the Kealy Trucking Company. He is a graduate of Georgetown University and Case Western Reserve University Law School.

Please Note Division's Address Has Changed

The Division of Real Estate is still receiving mail addressed to its former address. Since December, the Division has been operating in the Riffe Center for Government and the Arts in downtown Columbus.

The Division's current address is:

Ohio Department of Commerce
Division of Real Estate
77 S. High St.
20th Floor
Columbus, OH 43266-0547

Please update your records to reflect our current address so we can serve you better.

By sending your mail to the Division's current address, your mail will reach the Division more quickly. The Division will then be able to act on your correspondence as soon as possible.

Upcoming Test Dates

The following are the tentatively scheduled dates for the real estate sales, brokers and foreign real estate sales examinations for the upcoming months:

	SALES COLUMBUS/CLEVELAND		BROKERS COLUMBUS
October	4	19	23
November	1	16	20
December	13	7	11

(Additional exams will be added if warranted)

FOREIGN REAL ESTATE SALES

October	3, 17, 31
November	14, 28
December	(None in December)

The foreign real estate sales examination is given *only* in Columbus. Because of the small number of applicants for the foreign real estate dealer examination, these exams are scheduled on an individual basis as the applications are received.

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