



SUMMER 1992

George V. Voinovich  
Governor, State of Ohio

Nancy S. Chiles  
Director of Commerce

Dennis Tatum  
Superintendent

## SALESPERSON'S RELATIONSHIP TO BROKER OUTLINED

The Division of Real Estate has received an increased number of questions and concerns raised by both brokers and salespersons regarding their relationship under the real estate license laws.

In prior editions of the Division of Real Estate Newsletter, the importance of having written employment agreements between brokers and salespersons has been discussed. Having a written employment agreement can aid in reducing the risk of misunderstandings by the parties regarding their rights and obligations during their association as well as upon termination of their association.

The most common form of a real estate employment agreement which the Division has observed is usually entitled "Independent Contractor Agreement." However, this type of agreement, although titled as such, does not automatically mean that the salesperson is considered a true independent contractor.

In a traditional independent contractor relationship, the independent contractor is a person who contracts with another to perform a certain act according to his own methods and is not subject to the principal's control, other than as to the final result of his work.

However, based upon the Ohio real estate license laws, a salesperson may not work independently of his licensed

broker. Ohio courts have addressed the issue of a salesperson's relationship with a broker and have held that a licensed real estate salesperson has no independent status since the salesperson can only function through the broker with whom he is associated [*Fulton v. Aszman*, 4 Ohio App. 3d 64 (1982)]. Another Ohio court has further held that while a salesperson can be associated with a broker as an independent contractor, the salesperson would not be working independently of the broker (*Burton Minnick Realty, Inc. v. Leffel*, 1990 Ohio App. Lexis 4345).

For example, a real estate salesperson has no right to independently enter into listing agreements with owners or agreements to represent buyers. Further, a salesperson has no right to independently conclude a sale, advertise on his own, directly receive a commission or maintain an action for a commission from a buyer or seller in a transaction. Rather, these acts must be performed in the name of and through the broker with whom the salesperson is licensed. Likewise, a salesperson cannot provide his sales services to more than one broker at a time.

Accordingly, whether a salesperson's association with a broker is considered to be that of an independent contractor or of an employee, for purposes of the real estate license laws, the activities of a licensed salesperson are strictly

circumscribed. A salesperson may engage in the real estate business only on behalf of and through the licensed broker, with whom he is associated.

It is also important for a broker and salesperson to understand that an agency relationship exists between the salesperson and his associated broker, even though for tax and other purposes the salesperson may be considered as an independent contractor.

For example, a seller may list his property for sale with a broker under a written listing agreement. Even if the listing is obtained by a salesperson on behalf of the broker, the listing must be taken in the broker's name. The broker, in effect, owns the listing. The broker is then required to act in the best interests of the seller in fulfilling the terms of the listing agreement.

In this situation, the broker is an agent and the seller (client) is the principal. Because of the agency relationship which exists between the broker and salespersons associated with the broker, such salespersons are also required to act in the best interest of the seller in fulfilling the terms of the listing agreements held by the brokerage. As stated on the agency disclosure form, "The listing broker and all agents associated with the listing broker represent the owner." (Continued on page 6)



# BROKER MUST NOTIFY SALESPERSONS IF NOT RENEWING THEIR LICENSE

Brokers who do not intend to renew a salesperson's license for 1993 must notify the salesperson on or before November 1, 1992. This notification must be done in writing and sent by certified mail. The notice must state that the Superintendent may, in his discretion, reinstate the license without examination if application is made within two years from the end of the last year in which the salesperson's license was renewed. Once the notification letter is mailed to the salesperson, a copy of the letter must be sent to the Division within 10 days. Failure to provide such notice to the salesperson and to send a copy of the letter to the Division is a violation of Section 4735.18 (A)(31) of the Ohio Revised Code.

Brokers should note that if after November 1, 1992 they would like to return to the Division a

salesperson's license, they may do so upon providing the required notice. Also, if a salesperson requests that his license be returned to the Division after November 1, 1992, the broker must return the salesperson's license to the Division immediately upon termination of the association of the salesperson with the broker. If the cancellation occurs between November 1, 1992 and December 31, 1992, the broker may still be responsible for paying the salesperson's renewal fee.

Once a salesperson's license is returned to the Division, it is placed in a cancelled status, subject to being transferred or reinstated with another broker. Accordingly, even though a broker may have renewed a salesperson's license, if the broker subsequently returns it to the Division, the salesperson would not continue to be associated with the

broker upon the Division's cancellation of the license.

Salespersons can request that their license be returned to the Division in order to *transfer* it to another brokerage. License transfers can occur throughout the year, with the exception of December, when the licensee must show an undue hardship would result if the transfer did not occur. Cancelled licenses can, however, be *reinstated* during December. A license transfer occurs when a salesperson's license is returned to the Division and is transferred or placed with another broker during the same calendar year. A license reinstatement occurs when a salesperson's license is returned to the Division and is reinstated or placed with another broker in a different calendar year. Many licensees confuse these two actions and miss their reinstatement deadline under the mistaken belief that they cannot reinstate their license during December.

Questions which arise as to the procedure or ability of a licensee to transfer or reinstate a license should be directed to the licensing section of the Division.

## 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              | BROKERS  | FOREIGN SALES |
|--------------------|----------|---------------|
| COLUMBUS/CLEVELAND | COLUMBUS | COLUMBUS      |
| Sept. 2/24         | Sept. 8  | Sept. 8       |
| Oct. 1/22          | Oct. 5   | Oct. 13       |
| Nov. 4/19          | Nov. 8   | Nov. 8        |

No tests in December

(Additional exams may be added if warranted)

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.

### APPRAISER CERTIFICATION EXAMS (GENERAL AND RESIDENTIAL)

| COLUMBUS |
|----------|
| Sept. 10 |
| Oct. 8   |
| Nov. 5   |
| Dec. 10  |

## ATTENTION BROKERS!

Are you forwarding copies of this newsletter to your salespersons?



## REAL ESTATE NEWS

Ohio's cemeteries will need to register with the Division of Real Estate under the provisions of Sub. H. B. 733, which Governor George V. Voinovich signed into law on July 29, 1992.

The new law requires individuals or organizations that operate certain cemeteries to register with the Division of Real Estate between January 1, 1993 and July 1, 1993.

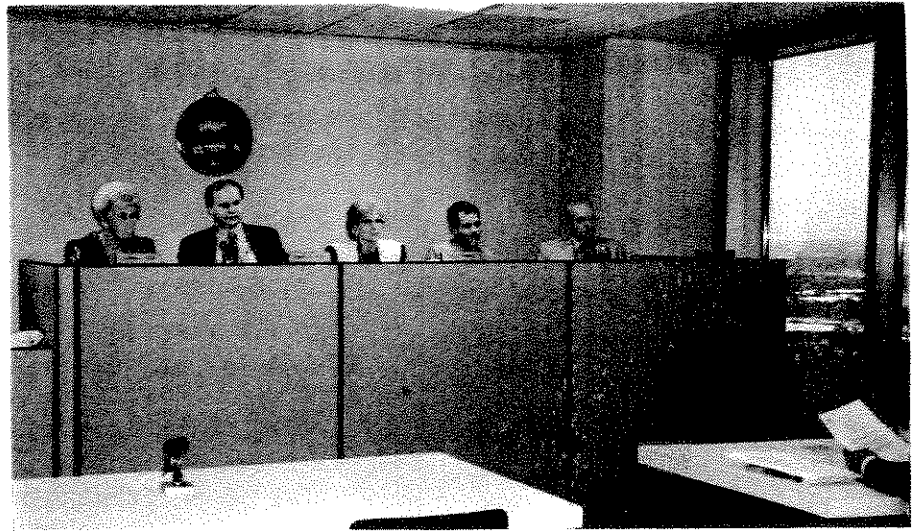
The law also creates the Ohio Cemetery Dispute Resolution Committee. The committee, which will be appointed by the Governor, will attempt to resolve disputes that individuals may have with a registered cemetery.

Governor Voinovich has appointed Owen Hall as the newest member of the Ohio Real Estate Commission. Mr. Hall is a broker with the Owen Hall Realty Group in Celina, Ohio. He replaces Marcellus H. Smith whose term expired on June 30, 1992.

Robert Porter of Toledo has been appointed to the Real Estate Appraiser Board. Mr. Porter is a general certified appraiser. He succeeds James T. Caldwell whose term expired on June 30, 1992. In addition, Donald B. Leach, Jr. was reappointed to another three-year term on the Board.

In recent months, the Ohio Real Estate Commission has heard from many licensees who say they have received incorrect information from their brokers on their due dates for meeting their educational and reinstatement requirements. **The Commission reaffirms that each real estate licensee is responsible for knowing their own educational and reinstatement deadlines.**

If you have any questions about these deadlines, please contact the Division of Real Estate.



*Members of the Ohio Real Estate Commission listen to testimony during its August 12, 1992 meeting. From left are: Norma L. Good, Edward J. Kizer, Lois Yeager, John Kealy and Owen Hall.*

## CERTIFICATES OF CONTINUATION TO ARRIVE THIS AUTUMN

The deadline to file your 1993 Certificate of Continuation is December 31, 1992. The renewal forms will be mailed to each licensed broker, corporation, partnership, or association in Ohio in late October. These certificates must be filed annually by all brokers in order to legally continue to practice real estate in Ohio.

If you have not received your certificate by November 15, 1992, call the Division's Licensing Section at (614) 466-4100.

Ohio law provides a 15-day grace period to file the renewal by January 15, 1993. However, an additional 50% of the renewal fee is charged as a late filing penalty for continuations postmarked during the grace period. If the Certificate of Continuation is not postmarked by January 15, 1993, the broker's license will be revoked. As a result, the licenses of all salespersons affiliated with the broker will be cancelled.

When filing the Certificate of Continuation, please remember the following important points:

- Answer all questions on your

Certificate of Continuation including the name and account number of your **trust** or **special** account. (This account should not be designated as an escrow account.)

- Enclose your check, certified check, or money order made payable to the "Ohio Division of Real Estate"
- Include any late filing fee with your payment if filing after December 31, 1992, but before January 15, 1993
- Enclose all licenses for persons who are not being renewed, *if* they have been properly notified

Additionally, note that no sales license can be *transferred* during December, unless an undue hardship can be shown. Cancelled licenses can, however be *reinstated* during December. Many licensees confuse these two and miss their reinstatement deadline under the mistaken belief that they cannot reinstate their license during December. Again, it is only the *transfer* of licenses that is prohibited in December.

Brokers who have any questions about the renewal process should call the Division at (614) 466-4100.

# DISCIPLINARY ACTIONS

## REVOCATIONS

EARSIE MACK, broker, Bedford Heights, Ohio, had her broker's license revoked for violating Sections 4735.18 (A)(6) and (A)(28) of the Ohio Revised Code. This revocation became effective April 6, 1992. Ms. Mack, in her capacity as a real estate broker, had a judgment entered against her in the Cleveland Municipal Court in the amount of \$935.00 plus interest and costs. This was an unsatisfied, final judgment.

DARRELL R. MUNCY, broker, Kettering, Ohio, had his broker's license revoked for violating five counts of Ohio Revised Code Section 4735.18 (A)(6) and one count of Section 4735.18 (A)(6) as it incorporates Ohio Administrative Code Section 1301:5-1-13. This revocation became effective May 21, 1991.

On two separate occasions, Mr. Muncy issued checks which were drawn on his real estate brokerage's trust account, however, there were insufficient funds to cover the checks.

Also, in three different transactions, Mr. Muncy acknowledged that he received monies in connection with the purchase of real estate. These monies were to be placed in Mr. Muncy's real estate brokerage's trust account; however, Mr. Muncy failed to deposit the funds as required.

Finally, the Ohio Division of Real Estate issued a subpoena pertaining to an investigation conducted by the Superintendent. The subpoena required that Mr. Muncy produce listing contracts, purchase agreements, land contracts, leases, receipts, deposit slips, cancelled checks, closing statements, deeds and agency disclosure statements relevant to all real estate related dealings with the complainant. Mr. Muncy failed to obey the subpoena as issued.

CARLTON W. REHKLAU, sales associate, Pioneer, Ohio, had his sales license revoked for violating Section

4735.18 (A) of the Ohio Revised Code. This revocation became effective April 6, 1992. Mr. Rehklaue was convicted of forgery in violation of Ohio Revised Code Section 2913.31 (A)(2) in case number 91-CR-080 in the Williams County Court of Common Pleas.

JOSEPH H. RENGERS, broker, Dayton, Ohio, had his broker's license revoked for violating Sections 4735.18 (A)(5) and (A)(6) of the Ohio Revised Code. This revocation became effective May 21, 1992. The complainant entered into an agreement to purchase a property from Mr. Rengers. In connection with this agreement, the complainant paid Mr. Rengers a downpayment on the property. The complainant did not proceed with purchasing the subject property and obtained a judgment in Montgomery County Common Pleas Court against Mr. Rengers for the downpayment. Mr. Rengers failed to remit this money to the complainant.

TERRY L. WILLIAMS, broker, New Albany, Ohio, had his broker's license revoked for violating Sections 4735.18 (A)(6) and (A)(17) of the Ohio Revised Code. This revocation became effective April 6, 1992. Mr. Williams placed a "For Sale" sign on a property without the consent of the owners or their authorized agents.

## SUSPENSIONS

SHIRLEY ARNOLD, sales associate, Cleveland, Ohio, had her sales license suspended for 30 days for violating Section 4735.18 (A)(21) of the Ohio Revised Code. However, due to mitigating circumstances, 15 days of this suspension were waived by the Ohio Real Estate Commission. Ms. Arnold began serving the 15 day balance of the suspension on June 22, 1992. Ms. Arnold advertised in the Multiple Listing Service the size of a lot as being larger than it actually was. Ms. Arnold published misleading and/or inaccurate

advertising which misrepresented a material particular regarding the subject property.

JAMES T. CARR, broker, Worthington, Ohio, had his broker's license suspended for 60 days for violating Sections 4735.18 (A)(6) and (A)(12) of the Ohio Revised Code. This suspension began on May 4, 1992. Mr. Carr entered into an agreement to purchase a property contingent upon him arranging a conventional first mortgage commitment. Mr. Carr did not proceed with purchasing the subject property. Furthermore, he did not apply for financing or make a good faith attempt to obtain a loan commitment, yet he discussed with the sellers a scheduled closing date. Also, on the purchase agreement Mr. Carr indicated he was a member of an association of Realtors. However, at the time, he was not a member of such an association.

LINDA K. FRANK, broker, Lancaster, Ohio, had her broker's license suspended for 10 days for violating Section 4735.18 (A)(6) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of the suspension was waived by the Commission. In connection with a real estate purchase contract, Ms. Frank received an earnest money deposit from prospective purchasers of the subject property. When the transaction did not close, Ms. Frank returned the earnest money to the prospective purchasers without the knowledge or consent of the seller, or pursuant to a court order to do so.

JOHN GABELMAN, sales associate, Dublin, Ohio, had his sales license suspended for 60 days for violating Section 4735.18 (A)(6) and (A)(9) as it incorporates Sections 4735.01 and 4735.02 of the Ohio Revised Code. This suspension began on May 4, 1992. Mr. Gabelman prepared an offer to pur-

*(Continued on page 5)*



## DISCIPLINARY ACTIONS *(Continued from page 4)*

chase real estate on behalf of a prospective buyer. However, at the time Mr. Gabelman prepared this offer, his license was under suspension for failing to complete the 10-hour post licensure education. Mr. Gabelman engaged in conduct requiring a real estate license while his license was suspended.

CHRISTOPHER G. NEARY, sales associate, Columbus, Ohio, had his sales license suspended for 15 days for violating Ohio Revised Code Section 4735.18 (A)(6) as it incorporates Ohio Administrative Code Section 1301:5-5-05. Due to mitigating circumstances, however, 10 days of this suspension were waived by the Commission. Mr. Neary began serving the five day balance of the suspension on June 29, 1992. Mr. Neary prepared and submitted a real estate purchase offer to the property owner. However, Mr. Neary failed to provide a copy of the Ohio agency disclosure form to the owner, signed and dated by the purchaser, prior to the presentation of the offer.

WILMA G. SCOTT, sales associate, Hillsboro, Ohio, had her sales license suspended for 30 days for violating Section 4735.18 (A)(6) of the Ohio Revised Code. This suspension began on June 22, 1992. Ms. Scott prepared a purchase agreement on behalf of the buyers of a property. The agreement provided for the buyer to pay for a termite test. On behalf of the buyers, Ms. Scott arranged for a wood destroying inspection. Ms. Scott received a copy of the report which noted the presence of damage due to carpenter ants. However, Ms. Scott failed to provide a copy of this report to the purchasers.

MICHAEL P. SENTER, sales associate, Huber Heights, Ohio, had his sales license suspended for 30 days for violating Section 4735.18 (A)(5) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of the suspension was waived by the Commission. Mr. Senter received

money from the buyer of a property in connection with the buyer's offer to purchase furniture and other contents in the subject property. At the time of the closing, it was apparent the buyer would not be purchasing the furniture or other personal effects. However, Mr. Senter failed to remit the purchaser's money for the furniture until nearly five months after the closing.

ROBERT J. SIEDLECKI, sales associate, Port Clinton, Ohio, had his sales license suspended for 45 days for violating Section 4735.18 (A)(6) and (A)(9) as it incorporates Sections 4735.01 and 4735.02 of the Ohio Revised Code. This suspension began on June 22, 1992. Mr. Siedlecki's license was suspended for failure to submit proof of completion of 30 hours of real estate appraisal and 30 hours of real estate finance within 12 months of the date his license was issued. Before Mr. Siedlecki's license was reinstated, he continued to engage in conduct for which a real estate license is required. Mr. Siedlecki offered and listed real estate for sale, and otherwise representing himself as having engaged in the business of selling, purchasing, renting, or leasing real estate.

DONALD L. THOMPSON, broker, Zanesville, Ohio, had his broker's license suspended for 20 days for violating Section 4735.18 (A) (6) of the Ohio Revised Code. Due to mitigating circumstances, however, 10 days of this suspension were waived by the Commission. Mr. Thompson began serving the 10 day balance of the suspension on June 29, 1992. Mr. Thompson managed a property on behalf of the property owners. In connection with his management of the subject property, Mr. Thompson received rents which were placed in his real estate brokerage trust account. Mr. Thompson erroneously relied upon another in applying these funds against his

commission claimed for managing the property.

ROBERT N. ZENDER, sales associate, Akron, Ohio, had his sales license suspended for 90 days for violating Section 4735.18 (A) (6) of the Ohio Revised Code. This suspension shall commence upon reinstatement of Mr. Zender's real estate license. Mr. Zender had a final judgment entered against him in the Summit County Court of Common Pleas, case number CV 83113328. The court found that Mr. Zender engaged in constructive fraud with respect to the sale of real estate.

CHARLES J. ZIDIAN, broker, Youngstown, Ohio, had his broker's license suspended for 45 days for violating Section 4735.18 (A) (28) of the Ohio Revised Code. However, due to mitigating circumstances, 30 days of this suspension were waived by the Commission. Mr. Zidian began serving the 15 day balance of the suspension on June 22, 1992. Mr. Zidian had a judgment entered against him in The Mahoning County Court in case number 29-316. This was a final, unsatisfied judgment which arose out of Mr. Zidian's conduct as a licensed real estate broker.

## RECOVERY FUND ACTIONS

The following persons had their real estate licenses automatically suspended pursuant to Section 4735.12 (E) of the Ohio Revised Code. These suspensions were a result of payments made from the Real Estate Recovery Fund:

|                           | Amount Paid | Date Paid |
|---------------------------|-------------|-----------|
| Wilma Jones               | \$1,543.00  | 2-4-92    |
| R. Casto &<br>Casto Prop. | \$15,671.69 | 3-6-92    |
| Terry L.<br>Williams      | \$2,500.00  | 5-12-92   |
| Gwendolyn<br>Boggan       | \$2,000.00  | 6-29-92   |
| William Callery           | \$14,856.21 | 7-13-92   |

# TEST RESULTS

Below are the examination statistics for the first half of 1992:

## BROKERS

| Test Date | Total Tested | Total Passed | Pass Rate |
|-----------|--------------|--------------|-----------|
| January   | 17           | 17           | 100%      |
| February  | 20           | 16           | 80%       |
| March     | 26           | 19           | 73%       |
| April     | 22           | 14           | 64%       |
| May       | 25           | 17           | 68%       |
| June      | 21           | 15           | 71%       |

## SALES

| Test Date | Total Tested | Total Passed | Pass Rate |
|-----------|--------------|--------------|-----------|
| January   | 502          | 322          | 64%       |
| February  | 508          | 308          | 61%       |
| March     | 463          | 254          | 55%       |
| April     | 530          | 346          | 65%       |
| May       | 600          | 325          | 54%       |
| June      | 563          | 312          | 55%       |

## FOREIGN REAL ESTATE SALES

| Test Date | Total Tested | Total Passed | Pass Rate |
|-----------|--------------|--------------|-----------|
| January   | 4            | 3            | 75%       |
| February  | 2            | 1            | 50%       |
| March     | 3            | 3            | 100%      |
| April     | 2            | 0            | 0%        |
| May       | 1            | 0            | 0%        |
| June      | 1            | 0            | 0%        |

## APPRAISER (GENERAL)

| Test Date | Total Tested | Total Passed | Pass Rate |
|-----------|--------------|--------------|-----------|
| January   | 16           | 14           | 88%       |
| February  | 7            | 6            | 86%       |
| March     | 11           | 10           | 91%       |
| April     | 5            | 3            | 60%       |
| May       | 4            | 4            | 100%      |
| June      | 4            | 4            | 100%      |

## APPRAISER (RESIDENTIAL)

| Test Date | Total Tested | Total Passed | Pass Rate |
|-----------|--------------|--------------|-----------|
| January   | 43           | 34           | 79%       |
| February  | 13           | 7            | 54%       |
| March     | 39           | 26           | 67%       |
| April     | 12           | 9            | 75%       |
| May       | 21           | 13           | 62%       |
| June      | 14           | 11           | 79%       |

# SALESPERSON'S RELATIONSHIP

(Continued from page 1)

Likewise, agreements by a brokerage to represent a buyer must be obtained in the name of and through the brokerage. Accordingly, when a brokerage enters into an agreement to represent a buyer, all agents associated with the brokerage, directly or indirectly, represent the buyer. For this reason, in transactions where the brokerage has a listing on a particular property, an agent (salesperson) of the listing brokerage cannot agree to solely represent the buyer in the purchase of such property. In this situation, in order for the buyer to also be represented by the brokerage, a dual agency relationship is created which would necessitate the knowledge and consent of all parties to the transaction and the entering of a written dual agency agreement. Because the process of dual agency is complicated and difficult to practice without breaching a duty to one or both of the parties, it is recommended that dual agency agreements be obtained by special agreement rather than by a boiler-plate form and that the broker be consulted when dual agency consent is being sought.



State of Ohio  
 Department of Commerce  
 Division of Real Estate  
 77 South High Street, 20th Floor  
 Columbus, OH 43266-0547

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