



# DIVISION OF REAL ESTATE NEWSLETTER

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SUPERINTENDENT OF REAL ESTATE

## Superintendent's Column

# Need For Agency Disclosure Law Explained

By Margaret J. Ritenour, Superintendent

Last summer, the Ohio Real Estate Commission adopted a new agency disclosure law that will take effect January 1, 1989. Under this law, every licensee will be required to disclose to a prospective purchaser or tenant who he/she represents in a transaction. This disclosure must be made in writing and on a form approved by the Ohio Real Estate Commission.

Although new to Ohio, this law is not the first of its kind. Similar laws exist in 26 states. Seven other states are in the process of adopting such a law and the rest are considering such legislation. In this article, I will discuss why an agency disclosure law was deemed necessary — namely the problem of dual agency.

Dual agency exists where an agent represents both the buyer and the seller to a transaction. Under Ohio law dual agency has always been prohibited unless both parties knew of and consented to the dual representation. Prohibitions of this kind have historically existed in all states.

Dual agency is prohibited because it places an agent in the position of owing his duties of loyalty, faithfulness and obedience to two parties whose interests are inherently opposite. On one hand, the seller's goal is to sell his property for the highest price on advantageous terms; on the other hand, the buyer's goal is to purchase that property at the lowest price possible and on the most beneficial terms. As an agent, it is almost impossible to promote both of these interests at the same time without violating the fiduciary duties owed to either the buyer or the seller.

Knowing this, why would anyone place him or herself in the position of being a dual agent? The answer is that few people do. They become a dual agent unintentionally and through implication. This generally occurs because these agents fail to understand who they represent in the transaction and to act accordingly.

Most licensees recognize that when they list a property for sale, they become the exclusive agent of the seller. As such, it is their duty to promote the seller's interests. Confusion sometimes arises, however, when an agent is the "cooperating" or "selling" agent. In this situa-

tion, who does the agent represent? The prevailing view is that they are the subagent of the seller. This position is based upon the practice of cooperation between brokers and the Multiple Listing Service. Through this system, a listing broker offers to split the commission he/she receives from the seller with another broker who assists in finding a buyer. Legally, this is considered to be a "unilateral offer of subagency." If another broker accepts this offer, he or she becomes the subagent of the listing broker, and thus the seller. As a subagent, the selling agent is likewise obligated to promote the best interest of the seller.

Some selling agents may engage in everyday behavior that may lead buyers to believe that they are the buyer's agent. Agents can do this through their words as well as through their conduct. For example, an agent may mislead a buyer by referring to himself/herself as "the buyer's agent", or by referring to the buyer as "my client" or "my buyer". Conduct designed to help the buyer get the property for a lower price or on terms more favorable to the buyer may also lead the buyer to believe an agent represents him/her. Clearly, such conduct confuses and misleads buyers. More importantly, this type of conduct can imply an agency relationship between an agent and a buyer.

It is important for licensees to understand that an agency relationship is not created only through a *written* contract. It can be *implied* from a licensee's conduct. Courts in increasing numbers are looking beyond the source of a commission to determine what the agency relationships were in a transaction. Instead, they are

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## Attention!!!

PLEASE SHARE THIS NEWSLETTER WITH ALL  
OF YOUR SALES ASSOCIATES. FEEL FREE TO  
MAKE COPIES.

(THIS IS MAILED TO BROKERS AND BRANCH OFFICES ONLY)

## Disclosure Law (continued from page 1)

looking at an agent's conduct to determine whether an agency relationship was created with a buyer. If a court finds that an agent's conduct implies that they were acting on behalf of the buyer, it may find that agent to be the buyer's agent.

When this occurs the agent has become a dual agent: agreeing to be the subagent of the seller, and implying he is the buyer's agent as well. There can be grave consequences if this dual agency was not disclosed and agreed to by both the buyer and seller. These consequences can include suspension or revocation of the agent's license for violating Ohio license law. It can also include civil liability to either the buyer or seller. In this situation, the transaction may be rescinded, and com-

pensatory damages can be awarded.

The problem of dual agency has been increasing dramatically in recent years. Law suits alleging dual agency are being litigated and won by buyers and sellers across the country in increasing numbers. In Ohio, more and more lawsuits filed against brokers include a count alleging that dual agency took place and that the agent violated his fiduciary duties to the buyer or seller.

In the next issue of the *Division of Real Estate Newsletter*, I will discuss the new law that was passed to address the dual agency situation. I will also explain usage of the Agency Disclosure Form and additional ways to avoid future problems.

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## Plan Ahead To Complete Continuing Education

For the majority of real estate licensees, the next 30 hours of continuing education will be due on January 31, 1989. Real estate licensees, licensed before January 1, 1980, will have their licenses automatically suspended if they fail to complete this education by the due date.

Please note that licensees are now required to complete three hours of civil rights instruction as part of the 30 hours of continuing education. Unless this separate three-hour course is included, none of the other continuing education hours will be accepted.

To meet the continuing education requirements, a licensee must complete the courses and submit a certificate of completion and a compliance form before January 31, 1989. It is important to note that the licensee — not the school — is required to forward these documents to the Division.

To receive a copy of approved continuing education courses or to receive additional information on the requirements, please contact the Education Section of the Division of Real Estate at 1-800-344-4100.

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## Business Names Can Be Reserved During Approval Process

The Ohio Real Estate Commission has recently ruled that real estate brokers wishing to establish a business name for a sole proprietorship, corporation, or partnership can now reserve that name with the Division of Real Estate. Under this rule, the name can be held for 60 days for a fee of \$5.00.

This procedure was established because of the time consuming process of incorporating, ordering business and yard signs, and having other legal and practical arrangements made.

Approval and reservation of a business name from the Secretary of State's Office does **not** guarantee that it will be approved by the Division of Real Estate. The Superintendent of Real Estate has independent authority to deny a proposed name when it is substantially similar to another licensed real estate broker or is potentially misleading to the public.

Thus, brokers planning on incorporating are advised to check for name availability with both the Division of Real Estate and the Secretary of State's Office before filing for incorporation. This should certainly be done **before** ordering signs, stationery, etc.

Likewise, brokers forming partnerships, or an individual broker wishing to do business in a name other than his/her own, are advised to receive approval and reserve that name prior to taking these steps.

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The Ohio Real Estate Commission

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## License Law Books Available

The new real estate license law book is now available from the Division of Real Estate. This law book contains the current statutes of the Ohio Revised Code and the Ohio Administrative Code as recently amended.

To receive a copy of the law book, please forward a check or money order for \$7 payable to the "Ohio Division of Real Estate." The address is Ohio Department of Commerce, Division of Real Estate, Two Nationwide Plaza, 5th Floor, Columbus, OH 43266-0547.

# 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

GERALD ZARISKE, sales associate, Howard, Ohio, had his sales license and his broker's license that was on deposit revoked for violating Section 4735.18(I) as it incorporates Sections 4735.01 and 4735.02 of the Ohio Revised Code. This revocation became effective December 15, 1987. While his license was under suspension, Zariske offered real estate for sale on behalf of another and held himself out as engaged in the business of selling real estate. He also assisted in the procuring of prospects or the negotiation of transactions which resulted in the sale of real estate properties during this suspension.

## SUSPENSIONS

INGE J. BERG, sales associate, Westlake, Ohio, had her sales license suspended for 30 days for violating Section 4735.18(F) and (I) as it incorporates Section 4735.21 of the Ohio Revised Code. However, due to mitigating circumstances, 20 days of the suspension were waived. The 10 day balance of the suspension began on December 4, 1987. Berg collected and deposited funds into her personal checking account that she received in a fiduciary capacity. This was done without the knowledge or consent of her broker. Berg also paid the complainant money with checks which were drawn on her personal checking account.

ROBERT A. BROWN, broker, Vermilion, Ohio, had his broker's license suspended for 30 days for violating Section 4735.18(F) of the Ohio Revised Code. This suspension began on November 30, 1987. Brown issued a check made payable to the Ohio Division of Real Estate for a change of his business name. Payment of this check was refused by the bank upon which it was drawn. Brown failed to make this check good within a reasonable time despite repeated requests from the Division.

RONALD L. BYRD, broker, Dayton, Ohio, had his broker's license suspended for 120 days for violating Sections 4735.18(E), (F) and (X) of the Ohio Revised Code. This suspension shall commence upon reinstatement of his license. Byrd received an earnest money deposit from the buyers of a property in connection with their agreement to purchase the property. Byrd failed to timely return the earnest money to the buyers when they did not purchase the subject property and their agreement to purchase had been terminated. Also, Byrd failed to maintain the earnest money deposit in his trust account. Finally, Byrd failed to keep a copy of the earnest

money receipt and records of receipts and/or disbursements of all funds incident to this real estate transaction.

MICHAEL GLENN, broker, Cleveland, Ohio, had his broker's license suspended for 30 days for violating Section 4735.18(F) of the Ohio Revised Code. This suspension commenced on November 30, 1987. On his 1987 Certificate of Continuation, Glenn verified trust account information that was incorrect.

EDMOND INA, broker, Westlake, Ohio, had his broker's license suspended for 30 days for violating Section 4735.18(F) of the Ohio Revised Code. However, due to mitigating circumstances, 20 days of the suspension were waived. The 10 day balance of the suspension began on December 4, 1987. Ina represented to a mortgage company that he was holding an earnest money deposit received from a buyer for the purchase of a property. However, Ina knew or should have known that he did not have the earnest money in his possession.

DANIEL N. JOURILES, sales associate, Parma, Ohio, had his sales license suspended for 30 days for violating Section 4735.18(F) of the Ohio Revised Code. Due to mitigating circumstances, however, 20 days of the suspension were waived. The 10 day balance of the suspension began on January 8, 1988. Jouriles issued a check made payable to the Ohio Division of Real Estate for the transfer of his real estate sales license. Payment of the check was refused by the bank upon which it was drawn. Mr. Jouriles failed to make this check good within a reasonable time despite repeated requests to do so.

ROBERTA MADDOX, sales associate, Worthington, Ohio, had her sales license suspended for 10 days for violating Section 4735.18(F) of the Ohio Revised Code. Due to mitigating circumstances, however, imposition of the suspension was waived by the Commission. Maddox was unwilling to write a back-up offer on a property for the complainants. She also discouraged the complainants from submitting a contingent written offer.

SALLY A. ROSEMAN, broker, Cleveland, Ohio, had her broker's license suspended for 10 days for violating Section 4735.18(F) of the Ohio Revised Code. Due to mitigating circumstances, however, imposition of the suspension was waived. Roseman agreed to receive a commission/fee for the sale of a property from a broker other than the broker with whom she was licensed.

ETHEL RYBOLT, sales associate, Cincinnati, Ohio, had her sales license suspended for 30 days for violating Section 4735.18(F) of the Ohio Revised Code. This suspension shall begin upon reinstatement of her license. Rybolt submitted a check made payable to the Ohio Division of Real Estate for the transfer of her real estate sales license. Payment of the check was refused

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## Disciplinary Actions (continued from page 3)

by the bank upon which it was drawn. Rybolt failed to make this check good despite repeated requests to do so.

### RECOVERY FUND ACTION

JOHN R. WARNER, broker, Columbus, Ohio, had his broker's license automatically suspended pursuant to Section 4735.12(E) of the Ohio Revised Code. This

suspension was a result of a payment made from the Real Estate Recovery Fund on December 1, 1987, of an unsatisfied judgment in the amount of \$6,000. This payment was made as a result of Warner's failure to complete the transfer of real estate and the assumption of an existing FHA loan to the plaintiff. His failure to perform these duties in his capacity as a licensed real estate broker was a violation of Section 4735.18 of the Ohio Revised Code.

## Unclaimed Funds Reporting Period Shortened

As a result of an amendment included in House Bill 470 last year, real estate brokers must now report funds which have been unclaimed for a period of **two** years. The reporting period was reduced from five years to two years to lessen the burden to brokers in maintaining such records.

The duty to report unclaimed funds applies to real estate brokers when the funds belong to another person whom the broker is unable to locate. Escrow funds, security deposits and other money received in a fiduciary capacity are common examples of funds that become unclaimed.

After a broker possesses unclaimed funds for two years, the broker must report the funds to the Director of Commerce in care of the Chief of Unclaimed Funds. The report must be filed by November 1 of each year. The Division of Unclaimed Funds is then responsible for maintaining these funds while attempting to locate the rightful owner.

In accordance with Section 169.11 of the Ohio Revised Code, brokers may report funds before two years elapse if they have reason to believe that the owner will not be located during this period.

It is important to note that the Division of Unclaimed Funds will **not** accept funds where the ownership of the money is in dispute. Rather, the broker must maintain these funds in his/her trust account until the dispute is resolved.

To receive more information on the procedure for reporting unclaimed funds, write to the Ohio Department

of Commerce, Division of Unclaimed Funds, Two Nationwide Plaza, Fourth Floor, Columbus, OH 43266-0545.

### 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
April	6	14, 21	(FULL)
May	4	19	9, 16
June	1	16	6

Note: Additional exams may be added if warranted.

### FOREIGN REAL ESTATE SALES

April	12, 26
May	10, 24
June	7, 21

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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