

## Broker Responsibility in a Nutshell

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### Introductory Comments:

The NAR Legal Scan is the “watch dog” for issues that are existing in lawsuits, ethics charges and real estate commission cases. It shows us where to beef up policies and projects what is on the horizon. Go to

[www.realtor.org](http://www.realtor.org) search for 2014 Legal Scan...note to self! Don't hit print as it is 100s of pages.

### I. What's is the Real Estate Office today look like?

- A. Brick and Mortar vs. Virtual or a combination of both?
- B. Support staff or not?

### II. Selection of Agents and what do you require of them?

- A. Independent Contractor vs. Employee Debate
  - i. In Los Angeles County Superior Court there is a case pending (*Bararsani v. Coldwell Banker Real Estate Brokerage Company*) that, depending on its outcome, could have wide-spread consequences for the conduct of real estate brokerage business in California and, possibly, the rest of the country. It has to do with the classification of real estate agents as independent contractors rather than as employees.
  - ii. **Fate of Long-Standing Massachusetts Brokerage Model Hangs In Balance**As first reported by [David Frank](#) in [Massachusetts Lawyers Weekly](#), the critical question of whether real estate agents are governed by the state's strict independent contractor law, which would entitle agents to minimum wage, overtime and benefits, is headed to the Appeals Court.
  - iii. June 3, 2015: he Supreme Judicial Court has just released its long awaited opinion in *Monell, et al. v. Boston Pads, LLC*, ([link here](#)), ruling that Massachusetts real estate and rental agents can remain classified as independent contractors under the state's real estate licensing and independent contractor law. The ruling keeps the traditional commission-only independent contractor brokerage office model in place, with brokers allowed to classify agents as 1099 independent contractors, without facing liability for not paying them salary, overtime or providing employee benefits. A collective deep breath should be heard throughout the entire Mass. real estate industry this morning.

- B. Texas/ HI Law: this section is not meant to create or require an employer/employee relationship between a broker and a sponsored salesperson
- C. Requiring agents to have a certain skill set/designation/education in order to save guard the company from incompetent agents.
- D. Paperwork maintenance and other requirements

### **III. Agency Relationships and Obligations**

A. Since Breach of Fiduciary Duties is always right at the top of the list for reasons for law suits it is imperative that the Brokerage makes sure that their licensees are truly in touch with the responsibility that comes with each one of the duties owed.

B. Where are the breaches?

- i. Advocacy/Loyalty: Not truly protecting your clients' interest
- ii. Obedience: Following the clients' LAWFUL instructions
- iii. Confidentiality: The MOST breached of all duties
- iv. Reasonable Skill and Care WITH Diligence: the Diligence is often the missing link to this one. Agents letting deadlines pass, not returning phone calls, not responding to offers by deadlines and the BIG ONE....never getting it in writing. Verbal negotiations will not get you a deal!
- v. Full Disclosure...the scariest of all the duties. It depends upon what the consumer wants to know, right? But everything that your licensees KNOWS that affects the transaction must be disclosed
- vi. Accounting: for all the paperwork, funds, and the property which was included in the contract

### **IV. Contracts and Forms**

- A. Uniformity
- B. Who signs upon whose behalf?

### **V. Risk Management and Maintenance of Records**

#### **Transaction Management Requirements**

- A Should be uniform throughout the company for risk management
- B. Web-based vs. paper files pros and cons (group discussion)
- C. ALL Paperwork belongs at the Broker's Office either digital or paper. The listings
  - both of properties and buyers are the 'brokerages' and the brokerage is responsible for those documents. What if an agent leaves?
- D. Digital Signatures
- E. Property Management and Commercial as well as Residential
- F. ESI...Electronically Stored Information REQUIRED in a law suit

**VI. Property Management as a viable option for income and service to clients**

- A. The problem is that the BROKER must be involved if someone in the company is doing property management
- B. Training and adherence to license law is critical or this becomes a costly business

**VII. Advertising Guidelines for online and off line is critical for the Brokerage**

**VII. Advertising Compliance**

- A. License Law/Requirements for disclosure of Company and Agent's relationship
- B. Article 12 of the NAR Code of Ethics
  - 1. True Picture Discussion: Camera Lens Deception
  - 2. Using Designations that you are allowed to use
  - 3. Domain names
  - 4. In ALL Communication identifying the company and agents are licensed providing real estate services
  - 5. Video and YouTube
  - 6. Drones and other 'legal vs illegal' uses that could get the company fined.
  - 7. Coming Soon and Exclusive Listings and authorization to show Article 3 of NAR COE

**VIII. Policies for the Brokerage to consider**

- A. Managing and Leveraging Teams
  - 1. Teams have become a part of the real estate brokerage today with one problem. No one really 'manages' the team and the team often thinks of themselves as the brokerage...which is the furthest thing from the truth.
  - 2. CRB: Understanding and Leveraging Teams course and the new CRETS certification for teams will help broker owner/managers create policies and checklist for team management.
  - 3. Legal liability of teams v. the benefit of teams.
  - 4. Organizational structure decisions for Team Management
- B. Personal Assistants (employees, licensed, unlicensed issues)
- C. Commission Disputes
  - a. Anti-trust issues when negotiating commissions
  - b. Bonus Commission or Rebates when offered by a developer...who gets it and to whom does that need to be disclosed ?
  - c. MLS Compensation/Co-operation dialogue Article 3 of the NAR Code of Ethics
  - d. Procuring Cause and Arbitration vs Mediation of commission disputes.

- D. The Internet: Friend or Foe?
  - a. Where are your listings? IDX/Zillow/3<sup>rd</sup> part sites/agent's own postings
  - b. Internet policies for your office regarding knowing where your agents are on the Internet. Do you have a list? Google search for their names and posts...
  - c. Website confirms with the HI real estate commission regarding disclosure of the brokerage
  - d. Safeguarding your information

### **VIII. Federal Rules and Regulations to Implement in your Brokerage**

- A. Do Not Call Compliance
- B. Privacy Rules as it pertains to personal information of client
- C. Fair Housing Statues
- D. RESPA/TRID

### **IX. Public Relationships and Client Feedback and Testimonials**

- A. The public now becomes the distributor of information. Posts on "Zillow/Trulia"
- B. Testimonials for Clients from surveys
- C. Exceeding the Clients Expectations through policies and training..
- D. Monitoring the issues as they arise and training provided to create a template so that the issue doesn't occur again.
- E. Disclosure Issues-where to begin!
  - 1.The more forms the better especially now with digital signatures and e-transactions
  - 2.Common forgotten ones"
    - a. Relationships with the parties
    - b. Affiliated Business Relationships/kickbacks
    - c. Recommendations vs Endorsements
    - d. What the brokerage knows...should the agent also be responsible for knowing? Important for new agents.
    - e.What are the biggest environmental and local disclosure issues for you

**Having a THOROUGH Policy and Procedures Manual in place to handle the issues plus for the organizational management of the company is imperative as the best risk management technique.**