

Professional Responsibility: An Overview

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A condition which is many times imposed on restricted licensees in connection with disciplinary actions brought by the Californian Bureau of Real Estate (“CalBRE” or “Bureau”) is that the licensees *must take and pass a Professional Responsibility Examination administered by the Bureau.*

What Does “Professional Responsibility” Mean in this Context?

As we at CalBRE use the term, professional responsibility means and describes the set of laws, regulations, standards, and rules of conduct codified in the California Real Estate Law and the Regulations of the Real Estate Commissioner.

A violation(s) of those professional responsibility laws, regulations, standards, and rules is a violation of the law for which administrative discipline can be and is levied by the Bureau.

While real estate licensees and others (but not CalBRE) might also use the term professional responsibility to include “ethical rules or canons”, CalBRE does not enforce the ethics rules or canons which apply to licensees by reason of membership in real estate licensee or mortgage broker trade/professional groups or associations.

On many occasions CalBRE receives calls, inquiries or complaints from individuals who want to report "unethical" behavior or ethics violations by real estate licensees in order to start the disciplinary process.

While a violation of a rule of ethics may be appalling and inexcusable, and wholly unacceptable business conduct, the Bureau can only take disciplinary action and impose penalties against licenses based on violations of the California Real Estate Law, including the Regulations of the Real Estate Commissioner.

The Law (“Professional Responsibility”) Versus Ethics Rules.

The “professional responsibility” laws enforced by CalBRE can broadly be described as the formal rules of professional conduct prescribed by the Legislature and/or by administrative regulations, which may be interpreted by the Courts of this State from time to time.

In the case of real estate licensees, the law pertaining to practice is primarily set forth in the Real Estate Law and Commissioner's Regulations, and has as its main purpose the protection of the public.

The penalties for breaches of the law include criminal and administrative sanctions. The latter are sought and imposed by the Real Estate Commissioner and the Bureau.

Ethics rules are primarily standards, principles and guidelines for conduct which are intended to elevate standards of competence and ethical behavior. In the realm of real estate licensure, those real estate practitioners who are also Realtors® are committed and agree to comply with a well developed "Code of Ethics and Standards of Practice" ("Ethics Code"). The Ethics Code was created to help govern the behavior of Realtor® members and to increase the level of competence and standards of practice among Realtors®.

Although a Realtor® association cannot discipline a member's license to practice in California, unethical members can be punished by an association in a number of ways, from a letter of warning or reprimand all the way to an expulsion and fines.

Those real estate licensees who are not Realtors® may perform their duties ethically (with or without a formal code of ethics), and may or may not follow some other mandatory or consensual ethical guidelines, but are not bound by the Realtors®' Ethics Code, although the law is applicable to their practice and conduct, just as it is to those licensees who are Realtors®.

Before moving on, the point to be reiterated here is that when the Bureau refers to “professional responsibility”, it is not referring to "ethical

codes and guidelines". As discussed above, such ethics rules are not grounds for administrative discipline by CalBRE.

Only "unlawful" acts form the basis for such discipline, and an unethical act is not necessarily unlawful (although it might be).

Some Confusion on this Law vs. Ethics Issue May Have Arisen Due to Prior Commissioner Regulation(s).

Prior to its repeal after 1996, Commissioner's Regulation 2785 did have lengthy guidelines pertaining to a "Code of Ethics and Professional Conduct", and that title might have caused readers who did not closely read all of the regulation to incorrectly conclude, believe or assume that the Ethics Code applicable to Realtors® was made a part of the Real Estate Law.

However, the version repealed, like a prior version, broke down the regulation into "unlawful conduct" versus "ethical conduct".

With regard to the latter, the 1996 Real Estate Law book set forth suggestions ... "to encourage real estate licensees to maintain a high level of ethics and professionalism in their business practices when performing acts for which a real estate license is required".

The regulation then noted that the "[s]uggestions [for ethical...conduct] are not intended as statements of duties imposed by law nor as grounds for disciplinary action by the Department of Real Estate, but as suggestions for elevating the professionalism of real estate licensees".

As stated above, in pursuing discipline against a real estate licensee, the Bureau (the successor to the Department of Real Estate) must direct its attention to acts that are unlawful (or illegal) under the Real Estate Law and Commissioner's Regulations, and not on "unethical" conduct. However, it is acknowledged and a truism that unethical behavior might also rise to the level of illegality, and unethical acts might be against the law. Yet that is not always the case.

For the purposes of licensee discipline, the punishable act must be unlawful. To identify the most frequent law violations used by CalBRE for

discipline, the following key is provided for the reader's/user's ease of reference:

California Real Estate Law and Commissioner's Regulations -

CALIFORNIA BUSINESS AND PROFESSIONS CODE (in which the Real Estate Law is set forth):

- 480(a)(3) Performance of act which would have been grounds for disciplinary action
- 490 Substantially related criminal conviction
- 10130 Acting without license
- 10137 Unlawful employment or payment of compensation
- 10145 Trust fund handling
- 10145(a) Trust fund handling
- 10145(d) Violation of interest bearing trust account requirements
- 10145(c) Failure by salesperson to deliver trust funds to broker
- 10148 Failure to retain records and make available for inspection
- 10159.2 Failure by designated officer to supervise licensed acts of corporation
- 10159.5 Failure to obtain license with fictitious business name
- 10160 Failure to maintain salesperson licenses in possession of broker
- 10161.8 Failure of broker to notify Commissioner of salesperson employment
- 10162 Failure to maintain a place of business
- 10165 Failure to comply with specified B&P code sections
- 10176(a) Making any substantial misrepresentation
- 10176(b) Making false promise
- 10176(c) Continued & flagrant course of misrepresentations through salespersons
- 10176(d) Failure to disclose dual agency
- 10176(e) Commingling trust funds with brokers funds
- 10176(f) Exclusive listing agreements without definite termination date
- 10176(g) Secret profit or undisclosed compensation
- 10176(h) Secret profit under option agreement
- 10176(i) Fraud or dishonest dealing in licensed capacity
- 10177(a) Procuring a real estate license by misrepresentation or material false statement
- 10177(b) Conviction of crime
- 10177(c) False advertisement
- 10177(d) Violation of real estate law or regulations
- 10177(e) Willfully using term "Realtor" or any trade name or insignia of membership in any real estate organization of which licensee is not a member
- 10177(f) Conduct that would have warranted denial of a license

- 10177(g) Negligence or incompetence in performing licensed acts
- 10177(h) Failure to supervise salespersons or licensed acts of corporation
- 10177(i) Improper use of governmental employment giving access to confidential records
- 10177(j) Fraud or dishonest dealing as principal
- 10177(k) Violation of restricted license condition
- 10177.5 Civil fraud judgment based on licensed acts
- 10231.2 Failure to give self-dealing notice
- 10234 Failure by broker negotiating mortgage loan to record or cause trust deed to be recorded
- 10235.5 Lender purchaser disclosure violation
- 10238(1) Failure of RPS dealer to file annual report
- 10238(a) Failure of broker to notify Commissioner within 30 days of 1st mortgage transaction or of any material change in required notice
- 10238(d) Illegal sale of promotional notes
- 10238(f) Violation of restriction to sell notes in excess of 10 to qualified persons
- 10238(g) Sale of notes with illegal terms
- 10240 Failure to provide mortgage loan disclosure statement
- 10241 Improper mortgage loan disclosure statement
- 11022 False advertising in subdivision sales

COMMISSIONER'S REGULATIONS:

- 2715 Licensee's failure to maintain current business or mailing address with DRE
- 2725 Failure of broker to exercise reasonable supervision over the activities of his or her salespersons
- 2726 Failure to have broker-salesperson agreements
- 2731 Unauthorized use of fictitious business name
- 2740 Performing licensed acts by corporation without a designated officer
- 2753 Broker's failure to retain salesperson's license at main office or return license at termination of employment
- 2831 Failure to keep proper trust fund records
- 2831.1 Inadequate separate trust fund beneficiary records
- 2831.2 Failure to reconcile trust account
- 2832 Failure to comply with trust fund handling provisions
- 2832(a) Failure of broker to place trust funds into hands of owner, into neutral escrow depository or trust fund account within three business days of receipt
- 2832(d) Failure of broker holding trust funds contingent on offer of acceptance to properly place funds within three days of acceptance

- 2832(e) Failure of broker acting as escrow holder to deposit trust funds in trust account by next business day following receipt.
- 2832.1 Failure to obtain permission to reduce trust fund balance in a multiple beneficiary account
- 2834 Trust account withdrawals by unauthorized or unbonded person
- 2835 Retention of broker funds in trust accounts
- 2840 Failure to give approved borrower disclosure
- 2950 Violation of broker-controlled escrow requirements
- 2950(d) Failure of broker handling escrows to maintain records and accounts
- 2950(h) Failure to disclose interest in the agency holding the escrow
- 2951 Improper record keeping for broker handled escrows

CalBRE Tools and Resources to Help Licensees and Others Understand Professional Responsibility Laws.

The Bureau has developed tools and resources for its licensees and others who have the need to reference and understand the professional responsibility laws.

They are available as free downloads from the Bureaus' website at www.bre.ca.gov (under the heading "Resources") and they include:

1. The California Real Estate Law Book. This includes the Real Estate Law, which starts at section 10000 of the California Business and Professions Code, and Regulations of the Commissioner, together with the Subdivided Lands Act (which is also regulated and enforced by CalBRE), and pertinent excerpts from other California codes.
2. The Reference Book. This is a practical guide with information relating to real estate practice, licensing, and examinations.
3. Real Estate Bulletin articles, alerts, and other CalBRE publications, including a Bulletin article on the fiduciary duty(ies) of real estate brokers, and a real estate broker self-evaluation compliance checklist
4. A Professional Responsibility Examination Course Booklet. This booklet was prepared as a workbook – and as a basis of study – for the Professional Responsibility Examination.

The Professional Responsibility Examination Course Booklet was also developed to provide the reader with an understanding of the professional responsibilities of a California real estate licensee and an enhanced awareness of conduct that is proper and required. The Booklet contains

excerpts from the Real Estate Law, the Reference Book, other Bureau publications, and some Real Estate Bulletin articles.

Compliance with the professional responsibility laws depends on a sound understanding of those laws. Such an understanding is not just about memorizing the laws, regulations and the legal mandates that apply to licensure, but requires the knowledge about how and when the laws are to be applied and why they are important.

The aim of this writing and the identified materials is to help licensees and others better understand the professional responsibility laws, including their importance and applicability, and we hope that our resources provide the reader with valuable guidance in connection with this objective.

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Author's Note: This publication was completed on February 11, 2014, and an article previously written by the author ("Violations of Real Estate 'Ethics' Rules Alone Do Not Form the Basis for Discipline Against Licensees: There Must Be Identifiable 'Unlawful' Conduct," Real Estate Bulletin 3 [Pub. of the Department of Real Estate, Winter 2012] was used in large part in the development of this writing.

