



Real Estate Bulletin

Real Estate MATTERS!

Commissioner's Message

Acting Real Estate Commissioner Barbara J. Bigby Says Farewell to DRE

As I prepare to retire from state service at the end of March, I have been reflecting upon our success and achievements during my time at the DRE. I believe that success means setting goals, but not in concrete; staying focused but turning aside to help someone; following a plan but remaining flexible; moving ahead but slow enough to smell the flowers; and taking a bow while applauding those who had a part in making the magic happen. All of these things describe my lifetime at DRE.

In my career, I have been fortunate to have served eight different commissioners beginning with Robert Karpe. When I walked through the doors of DRE in July of 1971, I found a home. It was never my intention to remain for a lifetime – it just worked out that way. I began my career working at an entry level job scheduling real estate salesperson examinations and will be leaving after reaching the top job AND it only took a quick 40 years!

I jokingly say that I am Real Estate Commissioner #22.5 since I am in an acting

capacity. As we await the appointment of #23, we have also been preparing for the changes that will naturally occur with my absence at the end of March. As part of our succession planning efforts, we have been actively addressing gaps in understanding as well as introducing mentorships to share the institutional knowledge and information those of us who are exiting have gained along our way. There is a compelling reason for it – we have a high percentage of our staff in key positions that are of retirement age. Our collective goal is to be prepared for these retirements, just as we are prepared for mine, so that DRE keeps moving forward without skipping a beat.

The overriding reason why this is even possible is because of the leadership group that represents the department. These DRE executives and their managers are truly a team that supports one another as well as our collective mission. While there is always lively discussion on the issues and their outcomes, at the end of the day, we all march in the same direction. We listen to each other, respect each other, support each other,

and recognize that each of us have particular skills, talents and expertise that make each of our respective contributions both unique and critical to the success of our operations.

First and foremost, I appreciate the executive team more than words can say for their acceptance of me as #22.5 and for their unwavering support over the past year. The next Commissioner, #23, will be privileged indeed to inherit these great leaders and the over 300 other dedicated staff whom I have had the great fortune to call upon. These dedicated individuals throughout the State do what needs to be done every day to be responsive to your needs as well as to protect the interests of the public.

This realization makes it a bit easier for me to bid you all adieu as I move ahead; following a plan, staying focused, setting new goals, and hopefully taking many more bows. 🏠



Unlawful Employment and Payment of Compensation

The Department frequently receives inquiries concerning unlawful employment and payment of compensation.

Business and Professions Code (B&P) Section 10137 governs the circumstances under which a licensed real estate broker may employ or compensate a person for performing acts requiring a real estate license.

The following is a discussion of some of the issues that have arisen in this area. The Department does not have the power of a civil court to resolve contract and commission disputes and

cannot offer legal or tax advice. For guidance in those areas, licensees may wish to seek the advice of a qualified attorney or tax professional who is well versed in this field.

Broker Payment of Salesperson Commission to Third Party

Under the Real Estate Law, a salesperson can instruct the employing broker under whom he or she is licensed to pay the salesperson's commission to a third party, such

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“Broker-Controlled” Escrows: What You Need to Know About Performing In-House Escrows

By: Summer Bakotich, Special Investigator

The Department of Real Estate (DRE) receives numerous inquiries from real estate licensees and consumers alike regarding broker-controlled escrows. In particular, the DRE is often asked, “How does a real estate broker open an in-house escrow division?”

This article will briefly discuss the scope of the real estate broker exemption from the California Financial Code’s Escrow Law, as well as examine the laws and regulations to which a real estate broker must adhere to when performing broker-controlled escrows. Finally, the remainder of this article will provide helpful tips on what a real estate broker should know or do before engaging in broker-controlled escrow activity.

Pursuant to Section 17006(a)(4) of the California Financial Code, a real estate broker licensed by the Real Estate Commissioner is exempt from the Escrow Law when performing acts in the course of or directly incidental to a real estate transaction. Additionally, the exemption states that the real estate broker must either be an agent for or party to the real estate transaction, and performing an act for which a real estate license is required. For example, if a real estate broker is acting as an agent on behalf of a buyer or seller in a real estate transaction, the broker may lawfully perform the escrow. In contrast, if the real estate broker is solely acting as a party (i.e., principal) to the transaction, and not acting as an agent on behalf of himself or any other party, the broker is not authorized to perform the escrow under the Financial Code exemption. Moreover, as a result of the Financial Code exemption, a real estate broker is not subject to the same laws and regulatory requirements to which an independent escrow agent licensed by the California Department of Corporations (DOC) is subject under the Escrow Law.

On October 9, 2011, Governor Brown signed Senate Bill 53, which will require real estate brokers performing broker-controlled escrows to notify the DRE of broker escrow activity and file a report when the broker engages in escrow activities for five or more transactions in a calendar year or whose escrow activities equal or exceed \$1,000,000 in a calendar year. The DRE will be releasing information regarding the implementation and requirements of this new law before it goes into effect on July 1, 2012.

When performing in-house escrows, a real estate broker is subject to the Real Estate Law and Commissioner’s Regulations. One area of the law that deserves special attention is trust fund handling. When conducting broker-controlled escrows, a real estate broker will receive trust funds on behalf of others. Under the Real Estate Law, all real estate brokers are required to handle, control and account for trust funds in accordance with Business and Professions Code Section 10145 and Commissioner’s Regulations 2830, 2830.1, 2831, 2831.1, 2831.2, 2832, 2832.1, 2834, 2835, and 2951.

The improper handling of trust funds is grounds for disciplinary action and can result in civil litigation and/or criminal prosecution. In many cases, an audit examination of broker-controlled escrows uncovers trust fund

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shortages in the escrow trust account which are usually due to overdrawn escrow balances, unauthorized disbursements, conversion of trust funds, and/or bank service charges. Another common violation found in broker escrow audits is the failure to maintain fidelity bond coverage. Pursuant to Commissioner's Regulation 2834, if there will be any unlicensed signatories on the escrow trust account, a real estate broker is required to maintain fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employees have access at any time.

It is worth noting that there are two specific escrow regulatory requirements placed upon real estate brokers performing in-house escrows: Commissioner's Regulations 2950 and 2951. Regulation 2950 contains a list of acts that are prohibited when a broker performs escrows under the exemption in the Escrow Law. Under this regulation, a real estate broker must comply with several requirements. For example, a real estate broker must ensure that the escrow receipts and disbursements are handled and accounted for properly, and disclosed in the escrow instructions and the final closing statement. Furthermore, all escrow disbursements should be made according to the written authorization of the party or parties to the transaction, and the final closing statement must include all escrow receipt and disbursement amounts and the names of the persons to whom the escrow disbursement are made.

Other regulatory requirements to be aware of involve fictitious business names. If a real estate broker decides to file a fictitious business name in connection with his or her broker escrow operation, the name must comply with Section 10159.5 of the

Business and Professions Code and Commissioner's Regulation 2731. Specifically, Regulation 2731(d) requires that any fictitious business name including the word "escrow" must also include the term, "a non-independent broker escrow" following the name. This also applies to any advertising, signs, or electronic promotional material. Therefore, before a broker files a fictitious business name in connection with a broker-controlled escrow operation, make certain the name is in compliance with the Department's requirements.

Moreover, a real estate broker performing broker-controlled escrows should be familiar with and may be held liable for the statutory requirements placed on all escrow agents under Section 17403.4 of the California Financial Code. This Financial Code section requires that all written escrow instructions and all escrow instructions transmitted electronically over the Internet executed by a buyer or seller, whether prepared by a person subject to this division or a person exempt from this division under Section 17006, shall contain a statement in not less than 10-point type which shall include the license name and the name of the department issuing the license or authority under which the person is operating. Additionally, Commissioner's Regulation 2950, as discussed above, requires a real estate broker to advise all parties in writing if he or she has knowledge that any licensee acting as such in the transaction has any interest as a stockholder, officer, partner or owner of the agency holding the escrow (Commissioner's Regulation 2950(h)).

Summary, Reminders and Suggestions:

The following is both a summary of items already discussed and a list of reminders and suggestions that a

real estate broker should know or do before performing broker-controlled escrows:

1. Become familiar with the California Financial Code's Escrow Law Exemption for real estate brokers. Pursuant to Section 17006(a)(4) of the California Financial Code, a licensed real estate broker may only perform broker-controlled escrows when the broker is an agent for, or party to, a real estate transaction and performing a service that requires a real estate license. When opening an in-house broker escrow operation, become familiar with applicable California Civil and Financial Code sections. It may also be prudent to consider consulting an attorney and certified public accountant regarding legal and tax compliance issues;
2. Comply with and adhere to all applicable Real Estate Laws and Regulations placed upon real estate brokers;
3. Obey all trust fund handling requirements in accordance with Section 10145 of the Business and Professions Code and Commissioner's Regulations 2830-2835 and 2951.
4. Make sure the fictitious business name is in compliance with Commissioner's Regulation 2731 before filing the necessary paperwork with the county recorder's office;
5. Become familiar with the Escrow Law (commencing with Section 17000 of the California Financial Code);
6. Read the following DRE Publications/Bulletins located on the Department's Web site www.dre.ca.gov:
 - a. "Surviving the Real Estate 'Escrow' Process in California"
 - b. "Broker Compliance Evaluation Manual"

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as to a corporation owned by that salesperson, or request that the broker pay the commission to a creditor of the salesperson.

The Department interprets B&P §10137 as establishing a policy that a broker must be involved with the disposition of commissions earned under his or her license. The commission earned in any real estate transaction belongs to the employing broker and not the salesperson. The broker must actually direct and control the manner and payment of a salesperson's share of an earned commission to ensure compliance with B&P §10137.

Moreover, B&P §10137 does not prevent payment of a salesperson's commission to an unlicensed entity or individual, at the request of the salesperson, as long as the unlicensed entity or individual has not engaged in any licensed activity. Here again, this position applies only with respect to the Real Estate Law and the facts stated above.

B&P §10137 is intended to prevent a broker from compensating an unlicensed person for performing licensed acts. Since the salesperson will have performed the licensed acts, the salesperson can be paid, and is entitled to request payment to another entity or person. However, the payment must come from the employing broker, and the salesperson may not purport to act independently of the employing broker. In addition, if payment is made to a corporation owned by the salesperson, the salesperson's corporation may not contract with the employing broker to provide the services of the salesperson.

Assuming the third party is not being compensated for performing acts which require a real estate license, a check may be issued from the escrow company to the third party, if authorized by the broker. Of course, full disclosure should be made to all parties.

Commission Earned by a Formerly Employed Salesperson

Compliance with B&P §10137 requires that a check for a commission earned by a formerly employed salesperson be sent to the salesperson's new employing broker.

The commission check can be made payable to either the new broker, who would in turn have to cut a new check to the salesperson, or the check could have been made payable to the salesperson, as long as the payment was sent through the new broker.

The purpose of this requirement is to ensure that the salesperson has acted and acts within the scope of his or her license. It is part of the means by which brokers supervise and control the activities of salespersons in their employ, including payments for prior licensed activity under a prior broker or brokers.

There are some circumstances in which there is no new employing broker for one reason or another, to whom or through whom payment can be made.

In this situation, the Department's policy has been to advise brokers that it is permissible to directly pay a commission that has already been *earned* to a previously employed salesperson. This interpretation is consistent with an Attorney General Opinion dealing with the payment of an *earned* commission to a suspended licensee {AG Opinion No. 54-124, 25 Ops. of the AG 43 (1955)}.

Dual Employment

B&P §10137 provides that a real estate salesperson may only be employed by and accept compensation from one real estate broker. The Department will not license a real estate salesperson for employment with more than one broker. This is designed to ensure that the one employing broker directs and controls all licensed activity of

an employed salesperson. In the case of a corporate real estate broker, the corporation is the employer. Thus, the salesperson may only work for and be compensated by that one corporation.

However, this "one broker" restriction does not apply to real estate brokers who act as a salesperson or broker-associate for a broker. For example, a real estate broker may work for another broker in a real estate sales company while simultaneously continuing to work at a property management company.

Commissioner's Regulation 2728.5 (Title 10, Chapter 6, California Code of Regulations) provides that "a real estate broker acting in the capacity of a salesman to another broker under written agreement may perform acts for which a license is required on behalf of the employing broker at any place of business at which the employing broker is currently licensed to perform acts for which a real estate license is required".

Commission Sharing/Splitting

The California Real Estate Law (Business and Professions Code §10000, et seq.) does not prohibit the sharing of commissions. Before going further, it must be understood that this section and its analysis only covers the California Real Estate Law. Other laws, such as the Federal Real Estate Settlement Procedures Act (known as RESPA) must also be considered by licensees.

From a technical point-of-view, the agent/client relationship, and the right to commissions therefrom, belong to the broker. Nevertheless, it is recognized that real estate agents may work together and decide to share or split a commission.

A licensee may share or split his or her commission with another person or entity *provided* that person or entity has not performed any acts for which a real estate license is required. The Real Estate Law prohibits the payment of compensation to unlicensed persons

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who are performing acts requiring a license on behalf of another or others.

For example, a licensee may give a share of the licensee's commission to a buyer, as an incentive to a prospective buyer, assuming the incentive payment is not a violation of some other provision of law. Where an unlicensed person is acting as a principal in a transaction (*i.e.*, seller or buyer), that person is not "acting on behalf of another or others" (licensed activity) and the prohibition described above would not apply.

If licensed acts were performed, a commission can be shared only if the person was a licensed real estate broker or salesperson acting within the scope of his or her license.

Even though a licensed salesperson may share his or her commission, as discussed above, the salesperson's employing broker must actually direct and control the manner and payment of a salesperson's share of the earned commission to ensure compliance with B&P §10137.

Pre-supposing that the broker has authorized escrow to directly pay a commission to the salesperson, the commission can be paid to the salesperson out of escrow.

Depending on the circumstances, there may be a disclosure requirement if such payment is a material fact to a party to the transaction.

Lastly, B&P §10137 allows "a licensed real estate broker to pay a commission to a broker of another State". This refers to another State in the United States of America. It does not refer to a foreign country. However, there is no prohibition in the Real Estate Law against a real estate broker, licensed in the State of California, paying money to a foreign individual or company (which may or may not be a licensed real estate broker in their respective countries), as long as the payment of money is not for acts which require a real estate license in the State of California. 🏠

Common Interest Development Documents

As common interest developments become more prevalent, it is increasingly important that real estate brokers and salespersons become more knowledgeable about the management documents affecting the use, control and operation of units and the common area within a common interest development (CID), as well as applicable laws and regulations. Here are some suggestions to assist you in completing a smooth transaction involving a CID:

- ❖ Always be prepared for purchaser's questions. Purchasers are more knowledgeable than ever. Be familiar with the documents that are used with a common interest development. The buyer must receive a copy of the Covenants, Conditions and Restrictions (CC&R's), Bylaws, Articles of Incorporation (if applicable for that project), the Subdivision Public Report and the homeowners' association budget.
- ❖ Be prepared to explain what an assessment or maintenance fee is and know what the homeowners' association must maintain. If the project has a subsidy arrangement, be able to explain the agreement.

When will the subsidy expire? What will the assessment be after the subsidy ends? If the project has an existing homeowners' association, be prepared to discuss the financial status of the project. Both purchasers and lenders request this type of information.

- ❖ Review the CC&R's applicable to the project. Developers are including more information in the CC&R's, such as disclosures of soil conditions, building restrictions, and earthquake fault lines. Be familiar with the use restrictions in the CC&R's and the homeowners' association's rules implemented by the board of directors, such as the pool and clubhouse usage and hours, pet restrictions, parking requirements, etc.
- ❖ Read the Subdivision Public Report. Be able to answer questions about the major sections of the report. Be prepared to explain what type of legal interest is being conveyed and be familiar with any material disclosures.

Further information regarding CIDs and the public report process is available on the DRE Web site www.dre.ca.gov. 🏠



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- c. "Trust Funds"
 - d. "When Broker Handles Escrow", Spring 2010 Real Estate Bulletin
 - e. DRE Reference Book Chapter 8-"Escrows" and Chapter 21- "Trust Funds"
7. Use discretion when hiring an Escrow Officer. You will need a qualified professional with applicable escrow experience to handle your broker escrows. Also, it would be prudent to conduct a thorough background investigation of all escrow staff as it is likely that they will be handling trust funds on behalf of others. This background investigation should include a review of the individual's criminal record. Please note that it is not uncommon for a de-barred escrow officer, previously employed by an independent escrow company, to try and seek employment with a real estate broker escrow operation. Therefore, you should check out the individual's license history and record of disciplinary action with the DOC and/or the California Department of Insurance before hiring any escrow staff. If the individual is licensed by the DRE, you can look up an individual's license record on our Web site or call our Enforcement Section. Please see a list of the Department's phone numbers listed under "Contact Us" on our Web site.
8. If you hire an escrow officer or any escrow employee who is not licensed by the DRE, and that individual will be a signatory on the escrow trust account, fidelity bond coverage at least equal to the maximum amount of the trust funds to which the employee has access at any time is required.
9. Although there is no specific statutory requirement, you might consider taking a continuing education course or other instructional course on escrows. Furthermore, not all escrows should be handled the same way. For example, escrows involving mobile homes, commercial property, and business opportunities involve different components and processing than conventional real estate transactions. Therefore, if an escrow operation will be performing such escrows, it is advised that education be sought in these specialized areas. It is also recommended that your escrow officer and/or staff have taken escrow courses. The California Escrow Association (www.caescrow.org) is a statewide association of professional escrow practitioners who offer escrow classes and certifications. The Escrow Institute (www.escrowinstitute.org) is another professional organization in California that offers a variety of escrow courses;
10. Review Commissioner's Regulation 2950. The Regulations of the Real Estate Commissioner can be viewed online at: http://www.dre.ca.gov/pdf_docs/relaw/regs2012.pdf.
- The foregoing information has been provided to give you the fundamentals of what you as a real estate broker need to know about performing in-house escrows. 

Education Course Monitoring and Licensee Auditing

DRE's Education Section monitors education course providers who offer real estate courses to students and licensees for education credit. The Education Section assigns exclusive course numbers to education providers through an application approval process, and those numbers are to be issued only to students who successfully complete the course and associated final examinations. Course providers who are found to be in violation of education regulations are subject to corrective action and may have course offerings withdrawn upon a 30-day notice.

Any course representative or affiliate, whether DRE-approved or not, shall offer courses in compliance with regulation. Violating Commissioner's Regulation 3007.3(n) shall constitute grounds for denial or withdrawal of the courses assigned to the originating course provider applicant. Course providers should not affiliate with other providers unless they can fully ensure that their courses are being offered with full regulation compliance and in the fashion in which the course was originally approved. Any variation by representatives will be subject to potential corrective action or withdrawal of a course provider's offerings. If you are a course provider you might ask yourself, "Is an unfastened affiliation worth having course approvals withdrawn?"

The Education Section is also charged with auditing the continuing education records of licensees per Commissioner's Regulation 3013. When requested by DRE, a licensee who fails to provide the Department with certificates of attendance or certified copies of the provider's course completion certificates may be subject to potential disciplinary action. It is suggested that licensees retain copies of all course completion certificates for up to five years so they can respond quickly if asked to provide substantiation. Course providers, via Commissioner's Regulation 3012.2, shall maintain records for a period of five years in the event a duplicate certificate is requested by a licensee.

The Education Section recommends that students and licensees, when searching for education providers, do so through DRE's Web site to verify course provider status. 



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Real Estate Bulletin

SPRING 2012

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