

## **Managing your Brokerage**

In this course, we will cover the following topics:

1. Managing Broker
  2. Managing Broker-Broker Relationships
  3. Listing Agreements and Offers to Purchase
  4. Professional Standards of Conduct
  5. Advertising
  6. Fee Appraisals by Brokers, BPOs
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## MANAGING BROKER

### Qualifications

### Responsibilities

### License status management

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#### Qualifications

A managing broker is defined as a person the Commission holds responsible for the actions of brokers who work under or with the managing broker. Managing brokers are licensed as brokers with a designation of managing broker.

To be a managing broker, the individual must

- ▶ have held a valid broker license for at least 2 years
- ▶ have passed at least 24 hours of broker management education courses
- ▶ have submitted proof to the Commission of passing the required courses
- ▶ be a resident of Indiana, with the exceptions being a managing broker with no Indiana residents as affiliated brokers or a managing broker within a partnership, corporation, or limited liability company where no affiliated licensees are Indiana residents
- ▶ apply to the Commission for the Managing Broker Eligible license designation
- ▶ complete 12 hours of continuing education each year, with the educational year being from July 1 of one year to June 30 of the following year
- ▶ complete 4 of the 12 hours of yearly continuing education in courses dedicated to the necessary business and management skills and legal knowledge needed by a managing broker

## Responsibilities

Once a broker meets the requirements to become a managing broker, the broker's license is designated as Managing Broker Eligible. This designation does not automatically make the broker a managing broker. The broker must be designated as the managing broker responsible for the company and associated brokers. In other words, a broker's license may have the Managing Broker Eligible designation without that broker actually being a managing broker. The broker must have the Eligible license designation *and* be identified to the Commission by the company as the managing broker.

When the broker has both the license designation and the company designation to the Commission to be a managing broker, he or she has specific responsibilities as outlined in Indiana code, as follows:

- ▶ the managing broker is responsible for all licensees working for or with him or her
- ▶ when there are two or more offices for the brokerage, the managing broker is responsible for notifying the commission of the name and address of each broker who manages the separate offices
- ▶ a broker in a partnership, corporation, or limited liability company is responsible for acting only as a managing broker
- ▶ the managing broker in a partnership, corporation, or limited liability company is responsible for designating to the commission a licensed broker who is a partner, corporate representative, or limited liability company member or representative to be responsible to the commission for the business entity's real estate-related actions
- ▶ the managing broker is responsible for notifying the commission if an affiliated broker changes the name, business address, or association under which the broker transacts business
- ▶ the managing broker is responsible for maintaining an escrow account for funds that belong to others but are held by the managing broker's firm
- ▶ the managing broker is responsible for developing and enforcing a written office policy that covers in detail the agency relationship a broker may have with a seller, landlord, buyer, or tenant

**Death or termination of a managing broker.** If a managing broker individual dies, or if a partnership's managing broker is terminated by the death of a partner, the following occurs:

- ▶ Any business contracted prior to the managing broker's death or termination may be conducted for no longer than 90 days by a broker who was formerly associated with the managing broker. This broker may not undertake any new business until he or she is associated with another managing broker.

- ▶ During the allowed 90 days, the broker who is conducting the existing business must maintain an escrow account under the same rules as when the managing broker maintained the account.
- ▶ When the broker conducting the existing business becomes associated with a new managing broker, the broker may complete the business obligations of the deceased or terminated managing broker. All other acts conducted by the broker must be in association with the new managing broker.
- ▶ Each broker associated with the deceased or terminated managing broker becomes a managing broker until the broker chooses to conduct business as a broker in association with another managing broker. For example, if Managing Broker Joe dies, Brokers Tom, Bob, and Mary all become managing brokers. If Tom then decides to work for Managing Broker Phil, Tom will become a broker and cease to be a managing broker.

## **License status management**

Each real estate company is required to be managed by one individual broker. If the office is that of a sole proprietorship, the broker in charge must be the sole proprietor. If the office is that of a partnership, corporation, or limited liability company, the broker in charge must be the managing broker who was designated to be responsible to the Commission for the business entity's actions. If a firm has more than one office, each office must be managed by a branch manager. A branch manager may manage more than one branch office within the same brokerage company.

The supervisory managing broker or branch manager has certain responsibilities regarding the license status of those brokers associated with the managing broker:

- ▶ if a newly licensed broker chooses to be assigned to a broker company, the managing broker of that company is responsible for signing the broker's licensure application attesting to the assignment to the company
- ▶ if a newly licensed broker chooses to be unassigned and then wishes to be assigned to a particular broker company, the managing broker of that company is responsible for signing the reassignment application attesting to the reassignment to that company
- ▶ if a broker is terminated from one broker company and transfers to another company, the managing broker of the new company is responsible for signing the reassignment application attesting to the new assignment
- ▶ if a broker wishes to reactivate an inactive license, reinstate an expired license, or resume active status if in referral status, the managing broker of the broker's affiliated company is responsible for signing the required application for the broker

A broker may request a license transfer from one broker company to another, a license transfer to referral status, a license transfer from unassigned to assigned

or from assigned to unassigned status. The managing broker may approve or deny any of these transfer requests

Managing Broker Review Questions:

1. Which of the following is required to become a managing broker?
    - (a) have held a valid broker license for at least 2 years
    - (b) have passed at least 24 hours of broker management education courses
    - (c) have submitted proof to the Commission of passing the required courses
    - (d) all of the above
  
  2. \_\_\_\_\_ of the 12 hours of yearly continuing education in courses dedicated to the necessary business and management skills and legal knowledge needed by a managing broker
    - (a) 5
    - (b) 4
    - (c) 3
    - (d) 12
  
  3. True or false? The Managing Broker Eligible designation automatically makes the broker a managing broker.
    - (a) True
    - (b) False
  
  4. The managing broker is responsible for notifying the commission if which of the following occurs?
    - (a) an affiliated broker changes their name,
    - (b) an affiliated broker changes their business address,
    - (c) an affiliated broker changes the association under which the broker transacts business
    - (d) all of the above
  
  5. Any business contracted prior to the managing broker's death or termination may be conducted for no longer than \_\_\_\_\_ days by a broker who was formerly associated with the managing broker.
    - (a) 90
    - (b) 75
    - (c) 60
    - (d) 30
  
  6. True or false? A branch manager may manage more than one branch office within the same brokerage company.
    - (a) True
    - (b) False
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## **BROKER / MANAGING BROKER RELATIONSHIP**

### **Control and responsibilities Employment agreements Commissions and referral compensation**

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#### **Control and responsibilities**

Managing brokers are typically not alone in conducting the real estate business. Most managing brokers conduct their business with the assistance of licensed brokers and unlicensed assistants.

In Indiana, a licensed broker may only perform real estate transactions on behalf of his or her managing broker who is responsible for the broker's actions. This means the broker may only perform transactions in the name of the managing broker. It is only the managing broker who assigns the broker's activities and only the managing broker who compensates the broker.

The broker has no authority to contract with or accept compensation from anyone other than the managing broker – not third parties, other brokers, buyers, sellers, landlords, tenants, nor referral agencies.

Brokers working for managing brokers are either employees or independent contractors, with the main difference being an issue of control as determined by income tax laws.

While the managing broker hires an independent contractor to perform certain acts, the managing broker has no control over how the contractor performs those acts. For example, if Managing Broker Henry hires Independent Contractor Lloyd for the sole purpose of selling a particular property, Henry cannot tell Lloyd how to market the property, how to obtain interested buyers, how to show the property, and so on. Henry may only compensate Lloyd once the property is sold.

On the other hand, managing brokers supervise and control those brokers hired as employees. The managing broker can create policy for how properties are to be marketed and shown, how employee brokers are to conduct themselves and the business of the company, what hours the brokers will work, and so forth.

Since there is a difference in how employees and independent contractors are controlled and handled according to tax laws, it is important to understand how that difference is established and viewed.

**Employees vs independent contractors and levels of control.** There are three categories of factors that establish the level of control the managing broker employer has over the employee or independent contractor:

- ▶ behavioral factors – determined by whether or not the company has control over what the broker does and how the broker conducts business
- ▶ financial factors – determined by how the broker is paid, if the broker is reimbursed for expenses, whether the broker uses his or her own tools or is provided tools by the company, and whether the company

withholds taxes from the broker's compensation

- ▶ relationship factors – determined by the existence of written contracts that spell out whether the relationship is that of employee or contractor, whether or not there are employee benefits such as health insurance and/or a pension plan, and whether the relationship is ongoing or for a specified duration

While these are the three categories of factors, there is no set number of factors to consider when determining if a broker is an employee or an independent contractor. All circumstances must be considered in each situation because factors which are relevant in one situation may not be relevant in another situation.

**Employee controls.** The managing broker can require the employee to work certain hours, attend meetings, and meet a prescribed dress code. The managing broker may or may not reimburse the employee's work-related expenses but must withhold federal income, state income, social security, and Medicare taxes from the employee's compensation.

**Contractor's limited controls.** Most brokers are hired as independent contractors rather than employees. Consequently, the managing broker cannot tell the broker how to do the job, what hours to work, or require the broker to attend office meetings. Contracted brokers are paid commission rather than a salary and do not have taxes withheld from the commission. The broker must pay the taxes him or herself. The broker also may not receive any employee benefits such as health insurance from the managing broker. However, a managing broker may carry errors and omissions insurance on all affiliated brokers, whether they are employees or contractors, and may pay for the insurance or require the broker to pay for it.

IRS Code Section 3508 requires the "safe harbor test" to be conducted to determine if a broker is truly an independent contractor. To make this determination, the test has three conditions:

- ▶ the individual must be a licensed real estate broker
- ▶ all compensation or gross income must be based on production and not on the number of hours worked
- ▶ there must be a written agreement between the contracted broker and the managing broker. This agreement must outline the services the contractor will perform and state that the contractor will not be treated as an employee for income tax purposes

Even if the test has determined the broker is indeed an independent contractor, the managing broker is still responsible for the broker's professional actions.

However, it is not this responsibility for professional actions that determines the independent contractor status – it is mainly how the broker's income tax and withholding obligations are handled that makes that determination.

Since managing brokers are responsible and can be held liable for professional actions of the contractor, the managing broker may require the contractor to carry automobile liability insurance and errors and omissions insurance. The managing broker may also need a fidelity bond if the contractor has access to money belonging to others and workers' compensation coverage as protection for potential injury claims made by the contractor.

If the safe harbor test determines the broker is an employee rather than an independent contractor as the managing broker has claimed, the managing broker can incur substantial tax penalties as a result of misclassifying the employee as an independent contractor. The managing broker will also be liable for state and federal unemployment insurance premiums, workers' compensation, and disability insurance coverage. Further, the managing broker will have to withhold income taxes and social security taxes from the broker's compensation.

**Broker's responsibilities to managing broker.** Within the employment relationship, the managing broker and the broker have certain obligations to each other. To discharge the broker's responsibilities to the managing broker, he or she must

- ▶ follow all license law and rules during the performance of any real estate brokerage service
- ▶ stay up to date on license law and rules
- ▶ follow the managing broker's written policies as outlined in the company policy manual
- ▶ ask the managing broker for clarification or for assistance regarding any policy that is not clear to the broker
- ▶ promote and sell the company's listings as assigned by the managing broker
- ▶ fulfill all fiduciary duties owed the company's clients
- ▶ maintain proper licensing
- ▶ follow law and rules when handling funds or property belonging to the client
- ▶ observe deadlines for delivering transaction documents to the managing broker
- ▶ follow law and rules when creating advertising materials
- ▶ obtain and maintain required insurance coverage
- ▶ perform all services and actions in an ethical manner
- ▶ maintain tax, expense, and transaction records and provide required copies to the managing broker
- ▶ maintain affiliation with only one broker company at the same time
- ▶ upon termination of the affiliation with the company, turn over all listings that were obtained during the period of affiliation with the company



**Managing broker's responsibilities to broker.** The managing broker also has obligations to the broker who works for him or her. To fulfill these, the managing broker must

- ▶ follow license law and rules when performing and assigning brokerage services
- ▶ assure all services the broker is involved in are in accordance with the law
- ▶ establish and enforce a written policy regarding the levels of supervision of all brokers
- ▶ provide a copy of the company's policy manual to the broker
- ▶ provide the broker with appropriate access to listings and marketing data
- ▶ review all agreements which involve a new broker
- ▶ ensure all brokers affiliated with the managing broker are properly licensed
- ▶ follow the terms of the employment contract
- ▶ enforce time procedures for the broker to deliver transaction documents to the managing broker
- ▶ provide necessary and agreed-upon training for the broker

## **Employment agreements**

The managing broker must establish an agreement in writing with each affiliated broker regardless of whether the broker is an employee or an independent contractor. The agreement must be signed and dated by both the broker and the managing broker. It must cover the relationship status and terms, including the level of supervision to be imposed, duties, compensation, duration of the contract, and how the agreement is to be terminated or renewed. Using a standardized contract which has been approved by an attorney will mitigate noncompliance issues.

The managing broker must give a copy of the agreement to the employee or independent contractor.

Brokers should keep the following in mind when negotiating an employment contract:

- ▶ requirements of the broker – this may include a requirement for the broker to have an acceptable automobile with appropriate insurance, or for the broker to carry errors and omissions insurance.
- ▶ training and support – if the brokerage provides initial training, adjustment to that particular brokerage will be quicker and easier for the broker. Training issues include use of the company's forms, closing techniques, open house strategies, setting appointments, and so on.
- ▶ commission schedule – the broker should know how and when the managing broker will pay commissions and how the commissions will be split. If the company offers a bonus incentive for designated levels of commission, the broker will be encouraged to increase his or her productivity.

- ▶ telephones – whoever answers the phone will need to budget his or her time accordingly and will receive leads to potential clients.
- ▶ additional benefits – these could include allowing the broker to purchase a home without paying commission or providing incentives such as paid attendance to real estate seminars to brokers for reaching a certain level of success.
- ▶ start-up costs – independent contractors need to know if there are fees for an office phone line, desk, or other uses.
- ▶ expenses – the managing broker may pay some expenses but expect the broker to pay others. These expenses could include signs, business cards, literature, advertising, forms, business-related memberships, websites, and so on. The broker will need to know which expenses he or she will be paying and which will be paid or reimbursed by the company.

Once the terms of employment have been agreed upon, both the managing broker and the broker need to follow the terms of the agreement. They both also need to fulfill their responsibilities to each.

Even with a written independent contractor agreement in place, both parties must recognize that the broker still has a duty to supervise his or her licensees. This duty is first and foremost in their agreement.

## **Commissions and referral compensation**

One important term to be included in the employment agreement is that of the broker's compensation. If the broker is an employee, the managing broker can offer either a salary or a percentage of the commission from any transaction in which the broker is involved. If the broker is an independent contractor, the compensation must be a commission or a percentage of the commission from any transaction which the broker performs.

Many managing brokers offer a graduated payment plan in which the commission percentage paid increases over time as the broker's production increases. Thus, the broker has incentive to work harder.

Other managing brokers offer a 100% commission plan in which the broker, typically an independent contractor, is paid all of the commission from any sale transaction the broker performs. In this arrangement, the broker usually pays the managing broker a fee to cover such expenses as office space, telephones, supervision, and so on, with the broker covering the costs of marketing.

**Splitting commissions.** Indiana real estate law allows a listing broker to pay a portion of the earned commission to another broker who actually sells the property. These other brokers are called cooperating brokers.

When a broker works for a managing broker, only the managing broker can receive the commission for the sale of a property. The managing broker then pays the listing broker a percentage of the commission. The percentage amount is based on the terms of the employment agreement.

Although one broker lists a property, a cooperating broker may actually sell the property. In this case, the managing broker pays the selling broker a percentage

of the commission, according to the terms of the employment agreement. Thus, both the listing broker and the selling broker receive percentages of the commission.

If one broker lists and sells the property, the managing broker will pay that broker both the listing percentage and the selling percentage of the commission.

Who receives what percentage of the commission is laid out in the terms of the employment agreement and the listing agreement. There may be an additional agreement between the managing broker of one company with the managing brokers of other companies, referred to as a co-brokerage split. This is how it would look:

All Town Realty's managing broker Bill has a co-brokerage agreement for a 50% commission split. If Bill has a listing that a broker from another brokerage actually sells, Bill will pay the other brokerage 50% of the earned commission.

So, let's say Broker Joe works for Bill, and the terms of Joe's employment agreement state Joe will be paid 60% of the commission for any sale Joe makes.

Joe lists a property for sale with a listing agreement that provides for a commission rate of 6% of the selling price. If Joe sells the property himself, this is what the commission split would look like:

Sale price	= \$250,000
6% commission	= \$15,000
Joe's split	= \$9,000
Bill's split	= \$6,000

Now let's say that Joe lists the same property with the same listing agreement, but Cooperating Broker Sue from Uptown Realty sells the property. Here is what that commission split would look like:

Sale price	= \$250,000
6% commission	= \$15,000
50% co-brokerage split	= \$7,500 (received by managing broker Bill)
Joe's split	= \$4,500 (60% of \$7,500)
Bill's split	= \$3,000

Sue's split is determined by the employment agreement she has with Uptown Realty but would be a percentage of the \$7,500 co-brokerage split paid to Uptown's managing broker.

These examples show the incentive for brokers to list and sell their own listings rather than have a cooperating broker involved. However, many transactions involve cooperating brokers, so agreements must be in place to assure each party is paid the appropriate percentage of the earned commission.

**Referral compensation.** When someone recommends or provides a sales lead to a broker, it is called a referral. The same is true for rental properties when one person recommends another person as a prospective tenant. Typically, the first person is already a tenant residing on the same rental property, such as an apartment building.



The incentive to refer potential buyers or renters is compensation for the referral. In the case of a sales lead, when the property sells, both the selling broker and the person who referred the lead are paid. For the referring party, the compensation may be a percentage of the commission or a flat fee, whichever is agreed upon prior to the sale.

When an individual refers a potential tenant, the compensation is typically a flat fee or a benefit such as one month of free rent for the referring party.

Managing Broker- Broker Relationship Review Questions:

1. In Indiana, a licensed broker may only perform real estate transactions on behalf of his or her \_\_\_\_\_ who is responsible for the broker's actions.

- (a) Supervisor
- (b) Affiliate
- (c) Managing Broker
- (d) Associate

2. True or false: If the managing broker hires an independent contractor to perform certain acts, the managing broker has no control over how the contractor performs those acts.

- (a) True
- (b) False

3. IRS Code Section 3508 requires which of the following tests to be conducted to determine if a broker is truly an independent contractor?

- (a) "independence test"
- (b) "contractor test"
- (c) "safety test"
- (d) "safe harbor test"

4. Since managing brokers are responsible for the professional actions of a contractor, the managing broker may require the contractor to carry which of the following?

- (a) automobile liability insurance
- (b) errors and omissions insurance
- (c) a fidelity bond
- (d) all of the above

5. Which of the following must the managing broker provide to his or her brokers?

- (a) a copy of the company's policy manual to the broker
- (b) appropriate access to listings and marketing data
- (c) necessary and agreed-upon training for the broker
- (d) All of the above

6. True or false? Indiana real estate law allows a listing broker to pay a portion of the earned commission to another broker who actually sells the property.

- (a) True
  - (b) False
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## LISTING AGREEMENTS AND OFFERS TO PURCHASE

### Listing agreements Offers to purchase

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**Listing agreements** As was discussed in a previous chapter, there are several types of listing agreements that establish agency relationships. Regardless of the type, Indiana requires all listing agreements to be in writing either on paper or in electronic format and must include an agreement expiration date. The seller must receive a copy of the agreement within 3 business days of signing. The original agreement and all electronic files must be retained in the listing broker's office.

Brokers use pre-approved forms for listing agreements. Developing their own forms for agreements would be illegal as it would constitute an unauthorized practice of law.

Listing agreements include the following provisions:

- ▶ identification of the property
- ▶ agreement duration and expiration date
- ▶ compensation terms for any brokers involved
- ▶ names of the property owner and brokerage
- ▶ listing price for the property
- ▶ property items that may or may not be included in the sale
- ▶ broker duties and seller obligations
- ▶ signatures of seller and broker

**Property identification.** The property's legal description should be used for identifying the property even if the street address is used. The legal description can be obtained from a title insurance company or from the seller's deed.

**Duration and expiration.** Listing agreements are established for a certain length of time with an exact expiration date.

**Broker compensation.** Compensation includes the commission the listing and selling broker(s) will receive which is typically a percentage of the selling price. It may also include compensation terms for any cooperating brokers and if any compensation will be paid directly from the escrow funds from the sale proceeds. There may also be a safety or carryover clause that outlines that the broker will still be paid commission up to a specified number of days after the agreement expires if a buyer to whom the broker showed the property ends up purchasing the property after the listing agreement expires.

**Names of involved parties.** The listing agreement will indicate the property owner and the name of the real estate brokerage with whom the property is listed.

**Listing price.** The seller's asking price for the property will be included in the agreement along with any terms for financing, down payment, and so forth.

**Included and excluded items.** To avoid misunderstanding between the buyer and

seller, the listing agreement should include any personal property that may be included in the sale as well as any real or personal property that is not included.

**Duties and obligations.** By law, the broker has specific duties and responsibilities when he or she lists a property. The gist of those duties is that the broker will use due diligence to fulfill the terms of the agreement. On the other hand, the seller has obligations which may include considering all good faith offers, making the property available for showings, and providing the broker with all necessary information about the property.

**Signatures.** The seller signs and dates the agreement and adds his or her address. If there are multiple owners, they must all sign the agreement. The broker adds the brokerage name and signs the agreement.

**Additional provisions.** The listing agreement may also include the following provisions:

- ▶ a statement that the broker may provide transaction terms to the MLS unless the seller disagrees
- ▶ a warranty that the owner is the only title holder of the property
- ▶ identification of the type of agency relationship
- ▶ an agreement about placing signage on the property
- ▶ a statement that the listing is in compliance with fair housing laws

The listing agreement's compensation clause states the broker will be compensated for selling the subject property and outlines how the broker will be compensated, whether compensation will be in the form of a flat fee or a percentage of the selling price.

In addition to the compensation agreements within listing agreements, there are other types of compensation agreements outside of listing agreements:

- ▶ managing brokers have compensation agreements with employees or independent contractors that cover how they will be paid.
- ▶ brokers have compensation agreements with sellers who are not represented by other brokers, such as a seller using the For Sale by Owner process for selling the property. This agreement includes confirmation by the seller that he or she is not represented by any other broker. The agreement also includes the name of a specific buyer the broker has found for the property. If that buyer purchases the property, the seller agrees to pay the broker either a flat fee or a percentage commission when the transaction closes.

Even though the listing broker will most likely be the one filling out the listing agreement forms, the contract is actually between the seller and the managing broker of the real estate firm.

## **Offers to purchase**

Once a listing agreement has been signed, the property marketed, and a potential buyer procured, that buyer will submit an offer to purchase the property.

The offer should include the following:

- ▶ the names of the parties involved in the transaction

- ▶ the location and description of the property
- ▶ the price the buyer is offering for the property
- ▶ any deposits or balances due
- ▶ the amount of earnest money being paid
- ▶ the commission rate to be paid to the brokerage
- ▶ any conditions to the offer such as a property inspection, the buyer's financing conditions, a closing date, and so on
- ▶ a list of any items that are included with the property
- ▶ a home warranty, if applicable

The offer to purchase becomes a legally binding contract when and if the seller accepts the offer and notifies the buyer of the acceptance. If the seller does not accept the offer price or any of the included conditions, the seller may reject the offer altogether or make a counteroffer back to the buyer. The counteroffer includes the price the seller is willing to accept and any changes to the buyer's conditions submitted with the original offer.

If the buyer does not agree to the terms of the counteroffer, the buyer may reject the counteroffer and walk away or make a counteroffer of his or her own. Counteroffers can go back and forth once or several times until both buyer and seller are satisfied with the terms and price.

After the offer or counteroffer is accepted by the seller, the broker is not obligated to seek offers to purchase from other potential buyers.

When the offer is finally agreed upon, the transaction goes into escrow. The listing broker deposits the earnest money and any other funds received from the buyer into an escrow account or deposits the funds with whoever is listed in the purchase agreement to receive the deposit. The funds must be deposited within 2 banking days after the final offer is accepted by both parties.

The Indiana Real Estate Commission holds the listing broker responsible for any money the broker receives in connection to the transaction.

Earnest money is sometimes paid in something other than cash, check, or the equivalent, such as valuable personal property. If this is the case, the seller must be notified prior to accepting the offer, and whatever is being used for payment must be listed on the earnest money receipt.

**Disbursing escrow funds.** The listing broker is required to hold earnest money and other funds in the escrow account until such a time as it is legally authorized to be disbursed.

If the beneficiary of the funds being held agrees, Indiana allows the broker holding the money to transfer any interest earned on the money to a fund that has been established for the sole purpose of providing affordable housing opportunities in Indiana. The housing opportunities must meet the Internal Revenue Code 501(c)(3) requirements for not-for-profit organizations.

If the transaction does not close, the broker holding the earnest money is not required to pay the seller or the buyer unless the parties agree to a mutual release of the funds or unless a court orders payment.

There are alternative release-of-funds options for the broker, as follows:

- ▶ if the broker is notified that at least one of the parties to the transaction intends not to follow through with the offer agreement, the broker is allowed to release the earnest money deposit according to the terms of the offer to purchase
- ▶ if the offer to purchase has no provisions for the release of earnest money, the broker may notify the involved parties by certified mail that the earnest money will be disbursed to the parties the broker indicates in the notice. The broker may not disburse the earnest money in this manner if all parties agree to a mutual release or if any of the parties initiates litigation. Either action must take place within 60 days of the mailing date of the certified notice. If neither action takes place in the required timeframe, the broker may go ahead and release the funds to the party or parties listed in the notice.

Listing Agreements & Offers to Purchase Review Questions:

1. If a buyer in a transaction notifies the broker holding the earnest money that he is not going to fulfil the offer agreement,
    - a. the broker must hold the funds until ordered by a court to release them.
    - b. the broker may release the funds in accordance with the terms of the offer to purchase.
    - c. the broker must immediately release the funds to the buyer.
    - d. the broker must immediately release the funds to the seller.
  
  2. Who must sign the listing agreement if a property has multiple owners?
    - (a) All of the owners
    - (b) The broker
    - (c) The broker and the designated owner
    - (d) Both a and b
  
  3. True or false? Indiana requires all listing agreements to be in writing either on paper or in electronic format.
    - (a) True
    - (b) False
  
  4. The seller must receive a copy of the listing agreement within \_\_\_\_\_ business days of signing.
    - (a) 2
    - (b) 3
    - (c) 4
    - (d) 5
  
  5. True or false? Earnest money can only be paid in the form of a check or money order.
    - (a) True
    - (b) False
  
  6. Offers to purchase should include which of the following?
    - (a) the location and description of the property
    - (b) the price the buyer is offering for the property
    - (c) the amount of earnest money being paid
    - (d) all of the above
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## PROFESSIONAL STANDARDS OF CONDUCT

### Unfair inducements

### Incompetency

### Disclosures

### Handling referrals

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Indiana has established laws and rules to regulate the practice of real estate and the conduct of real estate professionals. The purpose of these laws and rules is to protect the public. The real estate codes outline what a practitioner is required to do, what a practitioner is allowed to do, and what he or she must not do. The codes also include the penalties for violating any of the laws or rules. These codes make up the professional standards for real estate practitioners in Indiana.

### Unfair inducements

An inducement is something that helps bring about an action or a desired result. An inducement can be positive in nature, such as the offer of payment or a favor. It can also be negative in nature, such as a threat.

In real estate, there are times when an inducement has legitimacy. For example, a listing broker may offer a portion of the broker's commission as an inducement to selling brokers if they sell a subject property. This is a fair and acceptable inducement, or incentive, for the selling broker's help.

However, there are times when inducements are unfair and even illegal. If the inducement is related to *fraud or material deception*, it violates Indiana laws and standards of professional practice. The following are examples of unfair inducements:

- ▶ a broker who offers an inducement or attempts to improperly influence a real estate appraiser to make a determination of either a higher or lower value, depending on the broker's position
- ▶ a broker who attempts to use bribery, coercion, extortion, intimidation, collusion, or any other manner of inducement to corrupt a real estate appraiser who is developing, reporting, or reviewing an appraisal prepared in connection with a particular real estate transaction
- ▶ a broker who is recruiting students within the classroom or any other area on school grounds for employment and offering any sort of inducement to the students for employment
- ▶ a broker who accepts or offers an incentive or rebate for obtaining a listing or inducing a sale without fully disclosing the inducement in writing to all parties to the transaction
- ▶ a broker who allows his or her name or license to be used in connection with an individual or business who provides services beyond the individual or business's competency in return for lower prices

There are many other potential situations where a broker could offer or accept inducements. Whether or not those inducements violate law or the professional standards of practice depends on the intent, disclosure, and fairness of the inducement.

## Incompetency

Professional standards of practice include the broker's duty to competently practice real estate. Incompetent practice includes the following acts:

- ▶ failing to account for or remit any funds or documents that belong to others
- ▶ accepting or offering an undisclosed inducement or rebate for obtaining a listing or for inducing a sale
- ▶ receiving or giving an undisclosed direct profit on real estate transaction expenditures
- ▶ acting as both broker and undisclosed client in any transaction
- ▶ guaranteeing or authorizing future profits that may result from the resale of real property, or allowing another person to make such guarantees
- ▶ listing or offering property for sale, lease, etc. without authorization of the property owner
- ▶ inducing a party to breach a written agreement so that a new agreement can be made with another person
- ▶ accepting compensation for issuing an appraisal report at a predetermined value
- ▶ issuing an appraisal report on the broker's own property without disclosing the ownership
- ▶ soliciting or negotiating an agreement with a party who already has an exclusive agency agreement with another broker
- ▶ representing more than one Indiana broker company
- ▶ compensating an unlicensed individual for acts that require a license
- ▶ committing fraud or material deception while performing acts that require a license
- ▶ violating the Indiana civil rights act or other Indiana real estate laws
- ▶ undertaking professional activities that the broker is not qualified to undertake
- ▶ practicing real estate when unfit to do so as a result of addiction to, abuse of, or severe dependency on alcohol or drugs that endanger the public
- ▶ practicing real estate when unfit to do so as a result of physical or mental incapacity to practice safely and competently
- ▶ practicing real estate when unfit to do so as a result of failing to keep abreast of current professional theory or practice
- ▶ practicing real estate when unfit to do so as a result of engaging in any prohibited activities, violating Indiana law, or not complying with disciplinary sanctions

## Disclosures

**Required.** Indiana law requires the following disclosures regarding real estate transactions:

- ▶ agency relationship disclosure
- ▶ limited agency disclosures and nondisclosures
- ▶ managing broker policy disclosure

- ▶ non-agency disclosure
- ▶ in-house agency designated agent name disclosure
- ▶ managing broker's compensation disclosure
- ▶ disclosure of a property's adverse material facts
- ▶ licensed broker's interest in property
- ▶ inducement or rebate for listing or sale disclosure
- ▶ property condition disclosures

**Prohibited.** Indiana law disallows making disclosures regarding

- ▶ whether a party will accept less or pay more for the sale or lease of a property
- ▶ what motivates the client to sell, buy, or lease a property
- ▶ material or confidential facts about the client
- ▶ non-adverse material facts about the property
- ▶ confidential information received from client during an agency relationship

## Handling referrals

**Referral status and continuing education.** Brokers can often receive a waiver from continuing education requirements for one reason or another. When the waiver is received, the broker's license remains active, but the broker is not allowed to perform real estate services that require a license. However, providing referrals does not require a license, so the broker can remain affiliated with a managing broker and only refer business or leads to a licensed broker. When this occurs, the broker's license is in referral status. The broker can have that status removed by completing continuing education requirements, submitting an application, and paying a fee for the change of license status. Meanwhile, prior to having the license status changed, the broker can remain in the real estate industry and receive compensation by making referrals.

**Referral service companies.** Often referral service companies are established to refer client leads to licensed brokers. The referral service can be a separate company or part of another company or franchise system.

Indiana law allows a broker company to participate in a referral service or franchise that offers a referral service if

- ▶ the broker company signs a written agreement with the client
- ▶ the broker company signs a written agreement with the cooperating broker that includes the amount of fee to be paid for referrals

Additionally, brokers or referral companies licensed under real estate laws in states other than Indiana may refer real estate business to brokers licensed in Indiana.

Professional Standards of Conduct Review Questions:

1. Which of the following would be considered an unfair inducement on the part of a broker?
    - a. Offering a rebate to a seller without disclosing it in writing to all parties
    - b. Stating to a buyer that the value of a property is likely to increase in the future
    - c. Offering to split a commission with a cooperating broker from a competing company
    - d. Offering to provide a potential buyer with market information in return for using the broker's services
  
  2. The required disclosures in Indiana include
    - a. previous offers received and rejected for the listed property.
    - b. chain of title for the listed property.
    - c. managing broker's compensation.
    - d. favorable and unfavorable material facts about the listed property.
  
  3. True or false? Inducements can be positive or negative in nature.
    - (a) True
    - (b) False
  
  4. True or false? There is no such thing as a legitimate inducement.
    - (a) True
    - (b) False
  
  5. Which of the following acts would be considered as incompetent practice?
    - (a) listing or offering property for sale, lease, etc. without authorization of the property owner
    - (b) inducing a party to breach a written agreement so that a new agreement can be made with another person
    - (c) accepting compensation for issuing an appraisal report at a predetermined value
    - (d) all of the above
  
  6. Which of the following is a required disclosure in an Indiana real estate transaction?
    - (a) managing broker's compensation disclosure
    - (b) disclosure of a property's adverse material facts
    - (c) licensed broker's interest in property
    - (d) all of the above
-

## ADVERTISING

Requirements and prohibitions  
Discriminatory advertising  
Internet advertising  
Privacy protections

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### Requirements and prohibitions

Indiana real estate law includes the following advertising requirements:

- ▶ any display, classified advertising, signs, internet advertising, or business cards that carry a broker's name must also contain the name of the broker company with whom the broker is associated. The broker company's name must be clearly visible and larger than the broker's name on all advertising. Advertisements that do not show or that conceal the identity of the broker and the broker company are considered blind ads and are prohibited
- ▶ all advertising must be under the direct supervision and in the name of the broker company. The managing broker is responsible for the content of all advertising by associated agents
- ▶ all advertising, including internet, television, and radio, must indicate the name of the broker company as it appears on the company's license or as the company is publicly known
- ▶ if showing the company's name is not practical in electronic displays where information is limited, such as text messages, the company's name is not required to be shown as long as the electronic display is linked to another display that includes the company's name
- ▶ a broker who is selling his or her own property through the broker company must disclose the company's identity

Indiana real estate laws include the following advertising prohibitions:

- ▶ a broker must not advertise that a property is being offered by a private party that is not engaged in the real estate business
- ▶ a broker must not advertise using only a post office box number, a telephone number, or a street address
- ▶ a broker must not put a sign on any property, advertise a particular property, or offer a property for sale, lease, or rent unless the broker has obtained written consent to do so from the property's owner or the owner's authorized agent
- ▶ a broker must not advertise services or goods in a false or misleading manner

### Discriminatory

## advertising

The Civil Rights Act of 1866 prohibited discrimination in housing based on race. The Fair Housing Act of 1968 extended that prohibition to include color, religion, or national origin. In 1974, the Housing and Community Development Act added sex to the list. The Fair Housing Amendments Act added handicap and familial status in 1988. The 1992 Americans with Disabilities Act provided extensive rights and protections to individuals with disabilities in regard to public places.

Compliance with all of these antidiscrimination laws is critical when advertising real estate housing and services. Any advertising that indicates a preference, limitation, or discrimination based on race, color, national origin, religion, handicap, sex, or familial status is discriminatory and violates fair housing laws.

For example, an advertisement that describes the property as "close to schools, shopping, and public parks" is not discriminatory. However, one that describes the property as "close to night clubs and adult recreation facilities, making this property perfect for singles" is clearly showing a preference for single adults and, thus, indicating discrimination based on familial status.

Another example of discriminatory advertising might be: "A beautiful, newly remodeled home in a great neighborhood. No dogs allowed regardless of the reason." Handicap is a protected class, so fair housing laws allow individuals with disabilities to have service dogs even when there is a "no pets allowed" rule. Therefore, this advertisement violates fair housing laws by stating "regardless of the reason," which appears to be another way of saying "even if it is a service dog."

## Internet advertising

The National Association of REALTORS® (NAR) provides its own policy and rules regarding advertising on the Internet:

- ▶ an Internet advertisement for marketing real property must include the city in which the property is located
- ▶ an Internet advertisement for marketing real property must include the brokerage name or doing-business-as name as registered with the Commission. Commonly recognized abbreviations are allowed.
- ▶ an Internet advertisement for marketing real property must include the regulatory jurisdiction in which the brokerage holds a real estate brokerage license if that jurisdiction is different than where the advertised property is located
- ▶ an Internet site that markets real estate brokerage services must include the brokerage's home page or a clearly identified link to another site that includes the brokerage registered name or doing-business-as name, the city and state where the brokerage office is located, and the regulatory jurisdictions in which the brokerage holds a real estate brokerage license
- ▶ an individual broker who is marketing real property on an Internet site must include the broker's name, the name of the broker's affiliated brokerage, the city where the property is located, and the jurisdiction in which the brokerage holds a real estate brokerage license if that jurisdiction is different than where the advertised property is located
- ▶ an individual broker who is marketing real estate services on an

Internet site must include the broker's name, the name of the broker's affiliated brokerage, the city and state where the broker's office is located, and the regulatory jurisdiction where the broker holds a real estate license

- ▶ a brokerage company or an individual broker who uses Internet electronic communications such as email for advertising must include the broker's name, the brokerage registered or doing-business-as name, the city and state where the brokerage office is located, and the regulatory jurisdictions where the brokerage holds a license. This information must be on the first or last page of all communications.

Licensed entities that use Internet marketing for real property must monitor the advertising information at least once a month to assure the information is current and not misleading. Licensed entities may include properties listed by other entities with authorization of the listing broker and must disclose that the property is available from another identified entity.

**Privacy protections** The federal government has established laws to protect the public against having personal information disclosed and/or shared without permission from the individual and against receiving unwanted information and solicitations via emails and telephone calls.

**Privacy Act of 1974.** The Privacy Act of 1974 established controls over what personal information is collected by the federal government and how the information can be used. Federal agencies, such as HUD, that handle personal information are bound by the Privacy Act not to disclose any of the personal information obtained on an individual without written consent of the individual. They are also required to take prescribed precautions to keep personal information confidential. The agency is required to keep only information that is necessary to accomplish the purpose of the agency. The agency must also disclose to requesting individuals the purpose for gathering and using the personal information.

The Privacy Act also requires that federal agencies allow individuals to have incorrect information changed or removed. If an individual was seeking assistance through HUD to acquire affordable housing and HUD's records showed an incorrect income amount for the individual, HUD is required to make the correction

**CAN SPAM Act.** The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN SPAM) was established in 2003. The Act sets the national standards for sending commercial email and requires the Federal Trade Commission to enforce the provisions of the Act.

The Act prohibits businesses from sending unwanted commercial emails and texts to wireless devices such as cell phones. The Act requires the Federal Communications Commission (FCC) to develop rules to protect consumers from "unwanted mobile service commercial messages."

Although the Act is enforced by the FTC, other federal, state, and private parties are authorized by the Act to bring claims for violations. If the FTC brings claim for a violation, a civil penalty up to \$16,000 can be imposed. Civil penalties imposed by other agencies are determined by the particular agency itself.

Individual states can impose damages for actual loss and statutory damages. The FCC can seek penalties up to \$150,000 for each violation with a prescribed maximum of \$1,500,000 per incident. Penalties for criminal violations on CAN SPAM can include fines, forfeiture of assets, or imprisonment up to 5 years.

CAN SPAM requires the following:

- ▶ commercial emails must identify the sender and the advertiser, including a valid physical postal address where the receiver can write
- ▶ commercial emails must give the receiver an "opt out" choice to stop receiving the sender's messages. The sender must comply with the opt out within 10 days.
- ▶ commercial email subject lines must not be deceptive or misleading. Emails containing sexually explicit content must include warnings within the subject line that the message contains sexually explicit material.

The CAN SPAM Act was later modified to define the terms "person" and "sender." The modifications clarified that the sender would be in compliance with the Act if a post office box or private mailbox was included in the email. The modifications also clarified the opt-out process by stating that a recipient cannot

- ▶ be charged a fee to opt out
- ▶ be required to provide any information other than his or her email address and opt-out preferences
- ▶ be required to take any other steps other than replying to the commercial message or visiting a single page on an Internet site to opt out

Additionally, opt outs never expire, and senders of commercial emails may not sell or transfer any email addresses to another list.

CAN SPAM regulates commercial messages sent to wireless devices. The FTC and the FCC regulate messages sent to non-wireless devices, such as desktop computers. The FTC's rules regarding non-wireless devices are as follows:

- ▶ unwanted commercial emails must clearly identify themselves as solicitations for products or services
- ▶ commercial emails must include a convenient, legitimate way for the receiver to "opt out" of receiving future messages
- ▶ commercial emails must include legitimate return email addresses and the sender's postal address
- ▶ commercial emails must include accurate subject lines. The subject lines must not be misleading in any way.

The Act states that "the problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches and the pursuit of cooperative efforts with other countries will be necessary as well."

**Do Not Call Registry.** In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to restrict the making of telemarketing calls and the use

of automatic telephone dialing systems and voice messages. The TCPA was implemented with the requirement that entities making telemarketing calls maintain company-specific do-not-call lists. The TCPA also regulates the use of SMS text messages and fax machines.

In 2003, the FCC and the FTC revised the rules to establish a national Do-Not-Call registry that covers all telemarketers and applies to interstate and intrastate calls. The revisions include restrictions on the use of autodialers and requirements for transmitting caller ID information.

The rules under the TCPA are as follows:

- ▶ telemarketers are prohibited from calling residences before 8 a.m. or after 9 p.m. local time
- ▶ telemarketers are required to maintain a company-specific do-not-call list that must be honored for 5 years
- ▶ telemarketers are required to honor the national do-not-call registry. Consumers only need to register their phone numbers on the national list one time as the list does not expire
- ▶ telemarketers are required to provide the name of the person or entity for whom the call is being made. They must also provide a telephone number or address at which that person or entity can be contacted.
- ▶ telemarketers must not use an artificial voice or recording when calling residences
- ▶ telemarketers must not call an emergency line, a hospital emergency number, a physician's office, a hospital or healthcare facility, a cell phone, or any service that charges the recipient for the call
- ▶ telemarketers must not use autodialing that engages two or more lines of a multi-line business
- ▶ telemarketers must not send unsolicited advertising faxes

Tax-exempt nonprofit organizations are exempt from the do-not-call rules of the TCPA. A telemarketer who is responding to a consumer's request or inquiry is also exempt from the do-not-call rules.

The FCC again revised the rules in 2012 to require the following:

- ▶ telemarketers must obtain prior express written consent from consumers before robocalling them
- ▶ telemarketers are no longer allowed to use an established business relationship to avoid getting consent from consumers when calling their home phones
- ▶ telemarketers must provide an automated, interactive opt-out mechanism during each robocall

The TCPA does not preempt any state laws that are more restrictive regarding telemarketing calls or faxes.

Individuals may bring action in an appropriate state court against a telemarketer who has violated the TCPA and may recover actual monetary losses caused by the violation and/or monetary damages for each violation.

The attorney general of a state may also bring action against a violator on behalf of the state's residents for recovery of actual monetary loss or to receive monetary damages for each violation. The state is to file a complaint with the FCC who may then choose to intervene in the action.

Advertising Review Questions:

1. Under Indiana law,
    - a. managing brokers must originate all company advertising.
    - b. internet advertising does not have to show the broker's name as long as the company name is visible.
    - c. the managing broker is responsible for all advertising by associated brokers in the company..
    - d. text messages are not considered to be a form of advertising.
  
  2. What kind of advertising contact is regulated by the CAN SPAM Act?
    - a. Robocalls to landlines
    - b. Commercial emails to wireless devices
    - c. Advertising faxes
    - d. Junk postal mail
  
  3. A broker must not put a sign on any property for sale, lease, or rent unless the broker has obtained \_\_\_\_\_ to do so from the property's owner or the owner's authorized agent.
    - (a) Written consent
    - (b) Verbal consent
    - (c) Either a or b
    - (d) None of the above
  
  4. The Civil Rights Act of 1866 prohibited discrimination in housing based on \_\_\_\_\_.
    - (a) religion
    - (b) sex
    - (c) national origin
    - (d) race
  
  5. What does TCPA stand for?
    - (a) TeleCommunications Protection Act
    - (b) Telephone Consumer Protection Act
    - (c) Telephone Cancellation Policy Act
    - (d) Teleportation Career Promotion Act
  
  6. Telemarketers are prohibited from doing which of the following?
    - (a) Using an artificial voice or recording when calling residences
    - (b) Using autodialing that engages two or more lines of a multi-line business
    - (c) Calling residences before 8 a.m. or after 9 p.m. local time
    - (d) All of the above
-

## FEE APPRAISALS AND BROKER'S PRICE OPINIONS (BPOs)

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Indiana law (§ 24-5-23.5-1) defines appraisal as "an estimation that: (1) represents the final opinion of the value of real property that is the subject of a real estate transaction; and (2) serves as the basis for the extension of credit, in the case of a real estate transaction involving the making, refinancing, or consolidation of a mortgage loan."

The term appraisal may include an automated valuation model, a broker's price opinion, or a desktop evaluation.

In all states, anyone performing valuation work, such as appraisals, for federally regulated institutions must be licensed as an appraiser.

Indiana licensed real estate brokers are permitted to perform price and/or valuation analyses, including appraisals, in non-federally related transactions. Brokers may perform broker's price opinions (BPOs) and competitive market analyses (CMAs) as part of the listing process and for other purposes. Brokers in Indiana may be paid a fee for appraising real estate.

According to Indiana law, any broker who appraises real estate in Indiana must comply with the *Uniform Standards of Professional Appraisal Practice* (USPAP). The USPAP includes standards and requirements for the development and reporting of a real property appraisal, an appraisal review involving a real property appraisal, and mass appraisals. The USPAP also includes statements that clarify, interpret, explain, or elaborate on a standard rule and opinions that illustrate the applicability of appraisal standards in specific situations.

The USPAP does not require or prescribe specific appraisal methods to be used. Instead, it provides quality control standards for appraisals and requires that appraisers correctly use methods that would be acceptable to other appraisers for the same assignment and to any entity intended to use the appraisal.

The USPAP is updated every 2 years.

A broker price opinion estimates and details the probable selling or leasing price for a particular property. The BPO includes details about the property's condition, market, neighborhood, and comparable properties. It does not, however, include an automated valuation model. BPOs are often used by mortgage lenders to determine a value range for a property without the time and expense of having a full appraisal performed. It is typically used for pending foreclosures and refinancing.

Oftentimes, a "drive-by" BPO is performed when someone is still residing in the home. This type of BPO is intended to be a discovery mission to determine if the home has been vacated. The drive-by BPO is typically used when mortgage borrowers fall behind on their payments, and the lender wants to know the condition of the house and any potential issues they may encounter when filing foreclosure proceedings. It is a very tentative valuation because the interior of the home has not been evaluated. The outside of the house might look fine, but the living area may be severely deteriorated.

A more thorough valuation can be performed by an internal BPO where the broker

actually enters the house. An internal BPO is similar to the valuation a broker does for a seller to determine market value. This BPO involves verifying square footage and room count as well as reporting the condition of the inside and outside of the house. Repair and cleaning estimates may be necessary. Photographs and detailed forms are required. Brokers are typically paid a higher fee for internal BPOs. A mortgage lender relies upon internal BPOs as one of the first steps to filing foreclosure to give the lender an idea of what price they can expect for the property in the current real estate market.

Fee Appraisals and BPOs Review Questions:

1. A drive-by BPO is typically used when
  - a. a federally-insured lender wants to know whether a borrower's collateral supports a requested loan amount.
  - b. a property is in a neighborhood where it is too dangerous for a broker to leave her car.
  - c. a seller wants to determine market value of his property before signing a listing.
  - d. a lender wants to know the condition of a property before filing foreclosure proceedings.
  
2. Which of the following would be included in the definition of the term "appraisal"?
  - (a) an automated valuation model
  - (b) a broker's price opinion
  - (c) a desktop evaluation
  - (d) All of the above
  
3. True or false? Indiana licensed real estate brokers are permitted to perform price and/or valuation analyses, including appraisals, only for federally related transactions.
  - (a) True
  - (b) False
  
4. How often is the USPAP updated?
  - (a) Every 2 years
  - (b) Every 3 years
  - (c) Every year
  - (d) Every 5 years

# Managing your Brokerage

## Snapshot Review

### MANAGING BROKER

#### Qualifications

- 2 years valid broker license; 24 hours broker management education; Indiana resident, with exceptions; 12 hours continuing education per year, 4 of which in management

#### Responsibilities

- supervise all affiliated licensees; notify Commission of names of managing brokers for each office; as managing broker in partnership, corporation, or LLC, designate a licensed broker to handle business entity's actions; notify Commission of affiliated broker change of name, address, or association; maintain escrow accounts; provide and enforce written office policy for agency relationships
- on death or termination of managing broker: formerly associated broker has 90 days to finish deceased broker's contracts and maintain escrow accounts; no new business until associated with new managing broker; all brokers associated with deceased or terminated managing broker become managing brokers until associated with another managing broker

#### License Status Management

- supervisory manager for each branch office signs licensee's application for assignment, reassignment, reactivation, reinstatement, or resumption of active status; manager also approves or denies all transfer requests

### MANAGING BROKER – BROKER RELATIONSHIPS

#### Control and responsibilities

- licensees only perform transactions on behalf of managing broker; only contract with or accept compensation from managing broker; are either employees or independent contractors for managing broker
- managing broker has no control over how independent contractors perform work but do supervise and control employees
- categories of level of control over employee or contractor include behavioral factors which include control over work, financial factors which include payment and benefits, and relationship factors which include written contract
- contractors pay own taxes and receive no employee benefits
- IRS safe harbor test determines if broker is contractor or employee based on how compensation is determined and if written contract exists between contractor and managing broker; penalties can be imposed if broker designated as contractor is really employee
- **broker's responsibilities to managing broker include:** comply with license laws; follow written policies; ask for assistance; promote company's listings; fulfill duties to clients; maintain licensing; handle funds properly; follow laws for documents and advertising; maintain records; affiliate with only one company at a time; perform ethically; turn over all listings at termination
- **managing broker's responsibilities to broker include:** follow license laws; enforce written policies; provide listings; review broker-related agreements; ensure proper licensure; follow employment contract; provide training; enforce document delivery procedures

#### Employment Agreements

- required for employees and independent contractors; must be signed by broker and managing broker; must cover relationship status and terms, including supervision, compensation, duties, duration, and how to terminate or renew
- should be developed by attorney; copy must be given to employee or contractor
- broker should consider requirements, training and support, commission schedule, start-up costs and telephones, expenses, and additional benefits

#### Commissions and Referral Compensation

- employees can be paid salary or percentage of commissions; independent contractors must be paid a commission or percentage of a commission
- Indiana allows commission splitting with another broker who actually sells the property; commissions are usually divided among managing broker, listing broker, and selling broker, as covered in the employment contract; incentives exist for brokers who list and sell the same property

- referrals are recommendations or sales leads provided to a broker; can come from existing tenants referring new tenants or from one broker to another for properties for sale; the referring party is compensated for the referral

## **LISTING AGREEMENTS AND OFFERS TO PURCHASE**

### **Listing agreements**

- must be in writing, on paper or electronically and must include expiration date
- must use pre-approved forms
- include identification of property, duration and expiration date, compensation terms, property owner and brokerage names, listing price, property items to be included, broker duties, seller obligations, signatures of seller and broker, and any other provisions such as MLS listing and warranties

### **Offers to purchase**

- include names of involved parties, property location and description, offering price and deposits or earnest monies, commission rate for brokerage, conditions to the offer, items to be included with the property, home warranty if applicable
- offer becomes legally binding when seller accepts and notifies buyer; lack of acceptance may result in counteroffer or rejection of offer
- after acceptance of offer, transaction goes into escrow with funds deposited within 2 banking days and with broker held responsible for any money received
- if transaction does not close, broker pays the seller or buyer only if both agree or if there is a court order; otherwise, broker releases funds as determined by offer to purchase terms or broker notifies parties how funds will be released; funds must be released within 60 days of mailing date of notice

## **PROFESSIONAL STANDARDS OF CONDUCT**

### **Unfair Inducements**

- inducement defined as something that helps bring about an action or desired result; can be positive or negative
- unfair inducements include anything related to fraud or material deception, such as influencing or coercing an appraiser, offering or accepting an incentive for obtaining a listing or a sale without disclosure, or allowing the broker's license or name to be used inappropriately

### **Incompetency**

- competent practice –
  - account for funds belonging to others
  - no accepting of undisclosed inducements
  - no undisclosed direct profits on expenditures;
  - no acting as broker and undisclosed client in same transaction
  - no guaranteeing future profits from resale of property
  - no listing of property without owner authority
  - no inducing party to breach written agreement
  - no accepting compensation for issuing appraisal report at predetermined value
  - no appraisal report on broker's property without disclosure
  - no negotiating agreement with party who is client of another broker
  - no representing multiple Indiana broker companies
  - no compensating unlicensed individuals for acts that require license
  - no committing fraud
  - no violating Indiana laws

### **Disclosures**

- required: agency relationship, limited agency, managing broker policy, non-agency, designated agent for in-house agency; managing broker's compensation; property adverse material facts; broker's interest in property; inducement for listing or selling; property condition
- prohibited: if party will accept less or pay more; client's motivation; material or confidential facts about client; non-adverse material facts about property; confidential information received from client

### **Handling Referrals**

- broker can waive continuing education, remain active, and provide referrals for a fee; license is changed to referral status; broker cannot perform real estate services
- referral service companies can be separate company or part of another company but must sign written agreement with client and sign written agreement with cooperating broker that includes amount of referral fee

**ADVERTISING  
Requirements**

- brokers or companies licensed outside Indiana can refer business to Indiana brokers
- advertising that includes broker's name must include name of brokerage, and be clearly visible; failure to show broker name or brokerage name results in illegal blind ads
- advertising must be supervised by and under name of broker company with managing broker responsible for content: broker company name must appear as it does on the company's license or as publicly known
- electronic advertising can show link to another display that includes company's name
- broker selling his or her own property must disclose the name of the broker company under which the property is being sold

**Prohibitions**

- no advertising for private party selling property when not engaged in real estate business
- no advertising using only post office box, phone number, or street address
- no putting sign on any property or advertising a property without written consent of property owner
- no advertising in false or misleading manner
- school must not advertise that course is endorsed, recommended, or accredited by Commission
- person must not advertise that sponsor's course is required or recommended by Commission but may advertise that sponsor or sponsor's course is approved by Commission
- school must not engage in false or misleading advertising
- school must retain data and calculations to support advertised number or percentage of students who pass the broker exam; advertisement must include period for passing percentages; percentages must be based on first-time examination candidates

**Discriminatory advertising**

- advertising must comply with all antidiscrimination laws; must not show preference, limitation, or discrimination based on race, color, national origin, religion, handicap, sex, or familial status

**Internet advertising**

- National Association of REALTORS® rules cover Internet advertising; must include: city where property is located; brokerage name; regulatory jurisdiction of brokerage if different from where property is located; brokerage home page or link to another site that has brokerage name; location, and regulatory jurisdiction where brokerage holds a license; broker's name, affiliated brokerage, property's city, and jurisdiction where brokerage holds a license if the jurisdiction is different than where the property is located; broker's name, affiliated brokerage, office location, and jurisdiction where the broker holds a license; identifying information must be on first or last page of all communications
- licensed entities must monitor Internet advertising content at least once a month for accuracy

**Privacy protections**

- **Privacy Act of 1974:** established controls over what personal information is collected by federal government and how that information can be used; protects public against disclosure of personal information without permission and against receiving unwanted information and solicitations via emails or calls
- agency must: written consent to disclose personal information; protect confidentiality of personal information collected; keep only information necessary for purpose of the agency; disclose purpose for obtaining and using personal information; change or remove incorrect information
- **CAN SPAM Act:** sets standards for sending commercial email; requires FTC to enforce the Act; prohibits businesses from sending unwanted emails and texts to wireless devices
- government agencies and private parties may sue for violations; per violation penalties up to \$16,000 on claim brought by FTC or up to \$150,000 if brought by FCC; criminal penalties include fines, forfeiture of assets, or prison up to 5 years
- commercial emails must: identify sender, advertiser, and physical postal address where receiver can write; give free non-expiring opt-out choice with sender required to comply within 10 days; no deceptive or misleading subject lines; subject line warning of sexually explicit content
- **Do Not Call Registry or Telephone Consumer Protection Act** restricts telemarketing calls and use of automatic telephone dialing systems and voice messages; regulates SMS text messages and fax machines; covers interstate and intrastate telemarketing calls



- TCPA restrictions: no calling residents before 8 a.m. or after 9 p.m.; company-specific do-not-call lists must be honored for 5 years; national registry must be honored forever; must identify name of person or entity for whom call is being made along with phone number or address where person or entity can be contacted; must not use artificial voice or recording when calling residences; must not call emergency or healthcare lines or services that charge the recipient for the call; must not use autodialing that engages 2 or more lines of multi-line business; no unsolicited advertising faxes; must have written consent from consumers prior to robocalling; must not use established business relationship to avoid getting consent for calling home phones; must provide opt-out mechanism during each robocall; tax exempt nonprofit organizations and telemarketers who are responding to a consumer's request are exempt from do-not-call rules; claims for violations can be brought in state court for monetary losses or damages

## **FEE APPRAISALS BY BROKERS, BPOs**

- appraisals may include automated valuation model, a broker's price opinion, or a desktop evaluation; appraisers for federally regulated institutions must be licensed as appraiser
- licensed brokers can appraise for non-federally related transactions in Indiana; brokers can perform BPOs and CMAs
- Indiana brokers who appraise must comply with USPAP; USPAP includes standards for appraisals but does not include specific appraisal methods to be used
- BPOs estimate and detail probable selling price, including property condition, market, neighborhood, and comparables
- drive-by BPO: tentative valuation because no interior evaluation is performed
- internal BPO: involves verifying square footage and room count, reporting condition of property, establishing repair estimates, taking photos

## **FINAL EXAM**

1. To be a managing broker, the individual must
  - a. have been licensed for at least 5 years.
  - b. complete 24 hours of continuing education each year.
  - c. have passed at least 24 hours of broker management education courses.
  - d. be a resident of Indiana with no Indiana residents as affiliated brokers.
2. Which of the following statements is true?
  - a. The broker's license is designated as Managing Broker after completion of the managing broker education courses.
  - b. The broker automatically becomes a managing broker once the broker's license has been designated as Managing Broker Eligible.
  - c. To become a managing broker, a broker must be designated to the Commission as the managing broker responsible for the company and its brokers.
  - d. To be a managing broker, a broker must have both the Managing Broker Eligible license designation and be designated to the Commission as the company's managing broker.
3. Which of the following is a responsibility of a managing broker?
  - a. To manage all of the company's branch offices
  - b. To have affiliated brokers notify the Commission if they change the name under which they transact business.
  - c. To develop and enforce a written office policy that details allowable agency relationships
  - d. To be responsible only for broker employees who work for the corporation

4. If a managing broker dies,
  - a. all business contracted prior to the death must be terminated immediately.
  - b. a designated affiliated broker must become a managing broker.
  - c. any business contracted prior to the death may be conducted by an affiliated broker for no longer than 60 days.
  - d. each broker associated with the deceased managing broker becomes a managing broker until associated with another managing broker.
  
5. Which of the following is true?
  - a. A newly licensed broker is randomly assigned to a broker company by the Indiana Real Estate Commission.
  - b. If a newly licensed broker chooses to be unassigned to a broker company, the broker must become a sole proprietorship.
  - c. If a newly licensed broker transfers from one brokerage to another, the managing broker at the first brokerage is responsible for signing the reassignment application.
  - d. The affiliated managing broker may deny any broker's transfer request.
  
6. The only person who can compensate a broker is
  - a. the broker's managing broker.
  - b. a designated broker.
  - c. a client.
  - d. a cooperating broker.
  
7. One feature that distinguishes an independent contractor from an employee is
  - a. how often the managing broker pays the individual.
  - b. whether the individual is covered by errors and omissions insurance.
  - c. whether the managing broker controls how the individual performs assigned tasks.
  - d. what kind of real estate license the individual holds.
  
8. One requirement of the "safe harbor" test that indicates that a broker is an independent contractor rather than an employee is
  - a. the individual is not assigned to a particular managing broker.
  - b. the individual is not bound by an employment contract.
  - c. the individual's compensation is based on hours worked, not commissions earned.
  - d. the individual's compensation is based on production, not hours worked.
  
9. If it is determined that an affiliated broker is an employee of the managing broker rather than an independent contractor, the managing broker
  - a. is subject to severe tax penalties.
  - b. must withhold income and social security taxes from the employee's compensation.
  - c. must carry a fidelity bond on the employee.
  - d. must pay for errors and omissions insurance on the employee.

10. A broker's responsibilities to a managing broker include
- providing the managing broker with a copy of all listings obtained by the broker.
  - notifying the managing broker of all of the broker's affiliations with other broker companies.
  - providing the managing broker with copies of all listings the broker is taking with him when leaving the company.
  - obtaining and maintaining required insurance coverage.
11. Which of the following is FALSE regarding an employment agreement?
- Only independent contractors need written employment agreements.
  - The agreement must include how it is to be terminated.
  - The agreement must cover the relationship status and level of supervision.
  - The contract needs to be approved by an attorney.
12. Why should a brokerage provide initial training to a new broker?
- It will be quicker and easier for the broker to adjust to the company.
  - It is required by the Indiana Real Estate Commission.
  - It will help determine if the broker should be an employee or an independent contractor.
  - It will determine the broker's compensation schedule based on how the broker performs in the training.
13. When a listing broker pays a portion of the earned commission to the broker who actually sells the property, this is called
- paying a bonus.
  - sharing the compensation.
  - splitting the commission.
  - profit sharing.
14. Sarah lists a property for sale with a commission rate of 7% of the selling price, which ends up being \$280,000. Sarah's employment agreement with Justin states that Sarah will be paid 50% of the commission for any sale that Sarah makes. What is Justin's split on this transaction?
- \$14,000
  - \$19,600
  - \$7,400
  - \$9,800
15. Sarah lists a property for \$280,000 with a 7% commission rate and an employment agreement with Justin for 50% commission on properties Sarah lists and sells. However, a cooperating broker named Tim with a co-brokerage commission split agreement of 50% sells this property. What is Sarah's split on this transaction?
- \$9,800
  - \$7,000
  - \$4,900
  - \$3,500

16. Indiana law requires that all listing agreements include

- a. the broker's duties to the seller.
- b. the listing price for the property.
- c. items to be excluded from the sale.
- d. expiration date for the agreement.

17. The offer to purchase becomes a legally binding contract

- a. when the buyer signs the offer and provides it to the seller.
- b. when the seller accepts the offer and notifies the buyer.
- c. when the seller counteroffers the offer.
- d. when the transaction closes and title transfers to the buyer.

18. When a real estate transaction goes into escrow, the listing broker has \_\_\_\_\_ to deposit any funds received from the buyer.

- a. 2 banking days after the final offer is accepted by both parties
- b. 5 days after the offer is agreed upon
- c. 24 hours after the transaction goes into escrow
- d. 3 business days after the final offer is accepted by the seller

19. If the transaction does not close,

- a. the escrow funds must be released immediately.
- b. the broker may disburse escrow funds in conjunction with notification to the involved parties.
- c. either party can dispute funds disbursement by initiating litigation within 90 days.
- d. only one involved party must notify broker of disbursement requirements.

20. Something negative or positive that helps bring about an action or a desired result is called

- a. a bribe.
- b. a threat.
- c. an inducement.
- d. a coercion.

21. Which of the following would be a fair and legal inducement?

- a. A broker offering another broker a portion of the commission to sell a property
- b. A broker influencing an appraiser for a higher appraisal value
- c. A broker who is recruiting students on school grounds for employment with the broker
- d. A broker letting a friend use the broker's name to provide plumbing services for a discounted price

22. Which of the following constitutes incompetent practice?
- a. Accepting and disclosing a rebate for obtaining a listing
  - b. Disclosing that the broker is acting as both broker and client in a transaction
  - c. Guaranteeing future profits from the resale of a property
  - d. Accepting and disclosing a direct profit on transaction expenditures
23. Which of the following is required to be disclosed in Indiana?
- a. A client's motivation to sell a property
  - b. All material facts about a property
  - c. Property condition
  - d. All material facts about the client
24. A referral service company refers
- a. brokers to broker companies.
  - b. brokers to sellers.
  - c. properties to buyers.
  - d. sellers to brokers.
25. Indiana law includes the following advertising regulation.
- a. Only managing brokers can create advertising materials.
  - b. Blind advertisements are allowed in certain mediums.
  - c. Use of only a telephone number in an advertisement is prohibited.
  - d. The company's name must be shown in all advertising text messages.
26. Which of the following is legal advertising?
- a. Small apartment available to singles only
  - b. Newly remodeled home near public park and shopping
  - c. Cute house near Catholic church and school
  - d. Condo for rent in Jewish neighborhood
27. According to NAR, Internet advertising for real property or real estate services must include
- a. the street location of the property.
  - b. the physical address of the brokerage office.
  - c. the managing broker's name and license number.
  - d. the broker's name and affiliated brokerage.
28. Which of the following laws requires that an individual's incorrect information be changed or removed?
- a. CAN SPAM Act
  - b. Fair Housing Act
  - c. TCP Act
  - d. Privacy Act
29. What does the CAN SPAM Act specifically prohibit?
- a. Unwanted commercial marketing calls to residences
  - b. Unwanted commercial emails to wireless devices
  - c. Unwanted advertising faxes
  - d. Unwanted commercial advertising sent via postal mail

30. In addition to regulating telemarketing calls, the TCPA also regulates the use of
- emails to wired devices.
  - postal mail advertising.
  - fax machines.
  - Internet advertising
31. BPOs for federally regulated institutions require what type of license?
- Real estate broker
  - Real estate managing broker
  - Real estate appraiser
  - No license required
32. An individual who wants to become a managing broker in Indiana must have
- been licensed for at least 2 years.
  - completed 30 hours of continuing education.
  - completed 10 hours of broker management education.
  - earned a diploma from an accredited college or university.
33. Even after meeting all other requirements for managing broker, an individual can only become a managing broker if the broker is
- apprenticed to another managing broker for one year.
  - nominated by a member of the Commission.
  - identified to the Commission as managing broker by the broker's company.
  - at least twenty-one years old.
34. If a managing broker dies,
- any associate broker who takes over the deceased broker's contracts may not take on any new business until associated with a new managing broker.
  - the senior associate broker automatically becomes the new managing broker.
  - any business contracted prior to the death may be conducted by an affiliated broker until completed.
  - the broker's existing contracts immediately terminate.
35. Which of the following statements about managing brokers is TRUE?
- They are the only members of a real estate brokerage who can contract with a client.
  - They have no authority to tell employees how to do their jobs.
  - They are necessarily employees of their firms.
  - They are the only members of a real estate brokerage who can solicit business.
36. The "safe harbor" test to identify whether an individual is an independent contractor requires
- a written disclaimer that the managing broker is not responsible for the actions of the individual.
  - evidence that the brokerage does not pay for the individual's errors and omissions insurance.
  - evidence that the individual is paid a fair hourly wage.
  - a written agreement stating that the individual is not an employee.

37. A managing broker's responsibilities to a broker include

- a. attending the broker's listing presentations.
- b. providing access to marketing data.
- c. providing tax counseling.
- d. providing health insurance.

38. Ed lists a property for \$310,000 with a 6% commission rate and an employment agreement with Johann for 50% commission on properties Ed lists and sells. When the house sells for \$300,000, a cooperating broker named Jenn claims a co-brokerage commission split of 50%. What is Ed's split on this transaction?

- a. \$9,300
- b. \$9,000
- c. \$4,650
- d. \$4,500

39. Indiana law requires all listing agreements to

- a. provide for MLS cooperation.
- b. state compliance with the Americans with Disabilities Act.
- c. name the lender and title company to be used.
- d. be in writing.

40. An offer to purchase is agreed upon on Monday of a normal business week. The listing broker must deposit the buyer's earnest money into the designated escrow account by

- a. Wednesday of that week.
- b. Thursday of that week.
- c. Friday of that week.
- d. Monday of the next week.