

# Tennessee Real Estate Brokers

# CONTINUING EDUCATION

## Double Trouble: Antitrust & Misrepresentation

Course approval number 7977 | 3 CE Hours

**PDH** Real Estate

### COURSE OBJECTIVES

Welcome to the PDH Academy course *Double Trouble: Antitrust & Misrepresentation*. The learning objectives of this course are as follows:

1. Define antitrust as it pertains to the law
2. Explain antitrust areas of price fixing, group boycott and tying
3. Recognize and address antitrust red flags
4. Identify types of misrepresentation
5. Compare and contrast the acts of negligence and fraud
6. Develop antitrust and misrepresentation scripts for interaction with customers, clients, vendors and associates
7. Describe the complaint process and potential damages for each
8. Create policy and risk control procedures to limit liability.
9. Set individual, personal and professional goals to insure antitrust and misrepresentation compliance.

### IMPORTANT INFORMATION

To enhance comprehension, review questions will be asked throughout the course. A final exam will be administered to check for mastery of the material. If you do not pass the final exam, you can review the course material and retake the exam at no additional cost.

If assistance is needed with this course you can contact PDH Academy at 888-564-9098 or at [support@pdhacademy.com](mailto:support@pdhacademy.com)

After completing the course and final exam, we ask that you take our course survey found at the beginning of the book to help us continue to provide high-quality continuing education.

## Double Trouble - Antitrust & Misrepresentation Final Exam

1. **The courts hold the bar higher for**
  - a) Consumers
  - b) Licensees
  - c) Tenants
  - d) All of the above
2. **The combination of cooperation and competition unique to the real estate profession easily can trigger the appearance of a(n) \_\_\_\_\_ violation.**
  - a) Antitrust
  - b) Misrepresentation
  - c) Advertising
  - d) Redlining
3. **John Sherman proposed an antitrust bill to put an end to**
  - a) The Civil War
  - b) Railroad ticket price increases for cross county travel
  - c) Anti-competitive practices created by the monopolies and trusts
  - d) Unfair labor practices for immigrants building the railroad system
4. **Violators of the Sherman Antitrust Act may be:**
  - a) Convicted of a felony
  - b) Fined
  - c) Imprisoned
  - d) All of the above
5. **The 1911 ruling known as “The Rule of Reason”**
  - a) Was overturned by the Supreme Court in 1924
  - b) Permitted the merging of the Sherman and Clayton Antitrust Acts
  - c) Clarifies that monopolies in and of themselves are not necessarily illegal
  - d) Applied to the B&O and Reading Railroad Systems
6. **Three antitrust issues include**
  - a) Breach of fiduciary, illegal boycott and steering
  - b) Price fixing, illegal boycott and steering
  - c) Price fixing, illegal boycott and tie-in
  - d) Breach of fiduciary, illegal boycott and price fixing
7. **Of all the antitrust issues, \_\_\_\_\_ is the one that most often affects the actions and behaviors of real estate agents when dealing with consumers.**
  - a) Price Fixing
  - b) Boycott
  - c) Tie-ins
  - d) Tying
8. **“Per se” means**
  - a) In exchange for
  - b) In itself
  - c) Incognito
  - d) In arrears
9. **If an act is categorized as illegal per se, it means that**
  - a) It does not require Errors and Omission insurance
  - b) It requires additional proof
  - c) It requires exculpatory evidence
  - d) It does not require additional proof
10. **According to the National Association of REALTORS®, an allegation of a \_\_\_\_\_ is the most common antitrust claim asserted against real estate brokers.**
  - a) Group Boycott
  - b) Tying
  - c) Advertising violation
  - d) Misrepresentation
11. **An antitrust compliance policy**
  - a) Shifts risk
  - b) Is unenforceable
  - c) Adds risk to the broker
  - d) Is redundant if the firm already has E&O insurance
12. **When a Barry Broker-Owner decides to change his firm’s commission rate he should**
  - a) Consult with his Board of Realtors®
  - b) Poll local brokers to see what they’re charging
  - c) Document his business reasons in writing
  - d) All of the above
13. **An effective antitrust education program should include**
  - a) Role playing
  - b) Listing dangerous words and phrases
  - c) Scripts that reduce liability
  - d.) All of the above
14. **Antitrust violation opportunities easily can occur at**
  - a) Real estate continuing education classes
  - b) Broker open houses
  - c) Board events
  - d) All of the above
15. **At a break during a real estate continuing education class, several agents from various firms engage in a discussion about the recent rise in advertising rates at their local newspaper. One agent, Jane, says she will reduce her Sunday ads from a half page to a quarter page. The other agents agree that this would be a good idea. This**
  - a) Demonstrates smart marketing business sense
  - b) Is why networking at classes is a good idea
  - c) Could hold the entire group liable for a per se violation
  - d) Is how Jane helps recruit agents to her company
16. **The #1 cause of real estate errors and omissions claims against real estate agents is**
  - a) Misrepresentation
  - b) Breach of fiduciary
  - c) Price fixing
  - d) Undisclosed dual agency
17. **“Caveat Emptor” is Latin for**
  - a) To each his own
  - b) Let the buyer beware
  - c) Live and let die
  - d) Buyers are liars
18. **“What is the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would exercise?” is known as**
  - a) Common Sense Rule
  - b) Rule of Reason
  - c) Standard of Care
  - d) Limits of Liability
19. **Failure to meet the generally accepted Standard of Care can lead to**
  - a) Liability for the agent
  - b) Liability for the broker
  - c) Loss of reputation
  - d) All of the above
20. \_\_\_\_\_ **is the #1 cause of real estate errors and omissions claims against real estate agents.**
  - a) Fraud
  - b) Misrepresentation
  - c) Antitrust violations
  - d) Advertising violations
21. **A checklist to limit misrepresentation liability might include a**
  - a) Group of various waiver forms
  - b) List of the Federally Protected classes
  - c) Copy of the company policy manual
  - d) Really good tape measure
22. **If there is no proof of damages, misrepresentation charges will**
  - a) Be heard by a lower court
  - b) Prevail without treble damages
  - c) Be dropped
  - d) Only a and b
23. **Misrepresentation can be**
  - a) Unintentional
  - b) Intentional
  - c) Passive
  - d) All of the above
24. **When listing the home of Mr. and Mrs. Seller, Salvatore Salesperson doesn’t inspect the unfinished basement since he’s rushing. If he had, he would have smelled a damp, musty odor and noticed water marks on the base of the cement block walls. Sal might face a lawsuit for**
  - a) Negligence
  - b) Collusion
  - c) Illegal tie-in
  - d) Intentional misrepresentation
25. **If an agent or broker fails to speak up to correct a consumer who mistakenly believes a fact or condition to be true when it is not, this may have occurred.**
  - a) Passive misrepresentation
  - b) Illegal boycott
  - c) Rule of Silence
  - d) Intentional Misrepresentation
26. **Most misrepresentation cases that aren’t altogether dismissed are often**
  - a) Taken to trial
  - b) Settled
  - c) Published in the local Board newsletter
  - d) Filed with the state real estate commission
27. **Civil fraud suits may have**
  - a) Punitive damages
  - b) Money damages
  - c) Prison terms
  - d) All of the above
28. **If you are guilty of an unintentional misrepresentation claim your broker most likely will**
  - a) Fire you
  - b) Try to quell the concern and quickly settle
  - c) File a cross compliant
  - d) All of the above
29. **When you say something you shouldn’t, someone relies upon it, takes action and then has damages, there are grounds for**
  - a) An antitrust lawsuit
  - b) Breach of confidence
  - c) Misrepresentation
  - d) Steering
30. **This course, Double Trouble, covered the pitfalls of**
  - a) Antitrust and Misrepresentation
  - b) Law of Agency and Fair Housing
  - c) Antitrust and Fair Housing
  - d) Code of Ethics and Misrepresentation

## Double Trouble: Antitrust & Misrepresentation - COURSE INTRODUCTION

For licensed salespersons and brokers the business of real estate holds many risks. We have laws, rules and regulations to follow. And because we are “licensed to practice,” the bar is held higher for us than for the average real estate consumer. Of all the legal pitfalls that licensees encounter, perhaps the two most litigious areas are those of Antitrust and Misrepresentation. This program will allow brokers and agents to face their sensibilities about antitrust and misrepresentation red flags, anticipate complexities, prepare scripts to effectively answer questions and better handle various situations that could otherwise lead to humiliation, severe penalties, loss of license and even prison terms.

### Learning Objectives:

- As a result of this course, participants will be able to:
- Define antitrust as it pertains to the law
- Explain antitrust areas of price fixing, group boycott and tying
- Recognize and address antitrust red flags
- Identify types of misrepresentation
- Compare and contrast the acts of negligence and fraud
- Develop antitrust and misrepresentation scripts for interaction with customers, clients, vendors and associates
- Describe the complaint process and potential damages for each
- Create policy and risk control procedures to limit liability.
- Set individual, personal and professional goals to insure antitrust and misrepresentation compliance.

### The following topics will be covered in this course:

#### Antitrust

1. Intro
2. Historical Perspective (The Sherman Act, Supreme Court Rule of Reason)
3. Antitrust Issues
  - Price Fixing
  - Group Boycott
  - Tying / Tie-In
4. Interaction with customers, clients, vendors and associates
5. The Complaint Process
6. Limiting Liability
7. Self Evaluation / Action Steps

#### Misrepresentation

8. Intro
9. Standard of Care
10. Legal theories
  - Unintentional / Negligent Misrepresentation
  - Passive Misrepresentation
  - Negligence
  - Intentional Misrepresentation / Fraud
11. The Complaint Process
12. Limiting Liability
13. Self Evaluation / Action Steps

## ANTITRUST INTRODUCTION

Almost everyone likes to talk about real estate. And the internet’s free flow of information (whether correct or not) has created would-be real estate ‘experts’ who challenge real estate licensees at every opportunity. But the public is not alone in scrutinizing our words and actions. So does government, especially since housing and real estate play a major role in the economic stability of our country? We are licensed to practice and have federal, state and local laws to follow. In our daily business we both cooperate and compete with other licensees. The combination of cooperation and competition unique to the real estate profession is what easily can trigger the appearance or the actual act of the antitrust violations of price-fixing, illegal boycott and tying. Let’s go back 150 years to learn how this came about.

## 1) HISTORICAL PERSPECTIVE

### Sherman Antitrust Act

In the mid to late 1800’s the US saw anti-competitive and monopolistic practices of the oil and railroad barons of the day. Enter John Sherman, an Ohio attorney turned politician and brother of the famous Civil War Union Army General William Sherman. John Sherman, a Whig who helped form the Republican Party, served under 7 US Presidents (Taft through McKinley) in various positions including Senator, Secretary of the Treasury and Secretary of State. As a Senator and Secretary of the Treasury, Sherman was intent on helping the US reach economic and financial solvency after the drain and division caused by the Civil War. As the country made a rebound so did big companies who formed combinations (known as trusts) to gain control over markets. Sherman proposed a bill which later would be called the Sherman Antitrust Act to put an end to anti-competitive practices created by the monopolies and trusts. The bill passed the Senate by an overwhelming 52–1 vote, and it passed the House without dissent. President Benjamin Harrison signed the bill into law on July 2, 1890. Anyone forming such trusts or combinations that thwarted competition was convicted of a felony and subject to fines of \$5,000 (a lot of money in 1890!) and a year in jail. Individuals and companies suffering losses because of trusts were permitted to sue in Federal court for triple damages. The Sherman Act was designed to restore competition and did just that. It prohibits agreement or conspiracy among competitors to fix prices, rig bids, engage in anti-competitive activities (boycott), establish monopolies or restrain trade.

### Rule of Reason

The courts were very strict in their interpretation of the Sherman Antitrust Act, and in 1911 the US brought action against both Standard Oil Company and the American Tobacco Company for monopoly and restraint of trade. While the Supreme Court found both parties guilty of unfair practices and restraint of trade, they declared that a monopoly in and of itself is not necessarily illegal. In other words, just because you may be the only company who makes and sells a certain widget does not necessarily mean you are an illegal monopoly. This ruling has become known as the Rule of Reason.

### The Clayton Act

Then, in 1914, President Woodrow Wilson signed the Clayton Act which had been introduced by Alabama Democrat Henry De Lamar Clayton, Jr whose father, Henry De Lamar Clayton Sr, was a prominent judge and Major General in the Confederate Army during the Civil War. The Clayton Act served as a clarification of the Sherman Act and in fact gave it more muscle. It specifically included price discrimination, exclusive “dealing,” tying and any practices considered harmful to consumers. By this time penalties for these criminal charges had increased to \$350,000 and up to 3 years in prison for an individual and fines up to 10 million dollars for corporations. Enforcement was handled by both the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Other areas of The Clayton Act included measures to proactively prevent antitrust issues. For example, companies that wish to merge must notify the FTC and obtain approvals prior to the merger.

Over the years there have been many allegations, threats of lawsuits and lawsuits themselves in regard to restraint of trade, monopoly and price fixing. The real estate industry was no exception. In 1983 an FTC staff report found that real estate brokers’ commission rates were relatively stable over a long period of time. That created a potential claim that the stability was due to collusion. Quickly the National Association of Realtors® and other real estate groups instituted educational programs to alert their members to the importance of **never** referring to pricing policies of competitors, local boards or MLS groups. Instead, agents should describe their own company fees as independently and individually set by the broker based on the services they provide.

In the 1990’s, 75 years after The Clayton Act was passed, the Federal government (DOJ) brought an antitrust suit against Microsoft. The case was settled in 2002, but there are still criticisms and dissenting opinions about the case.

Then, in 2013 Toys R Us reached a \$35.5 million settlement of a four billion dollar antitrust class action alleging it restrained prices on toys by forcing manufacturers to brand their products directly to Toys R Us.

Perhaps we will always have reason to fear abuses by corporate powers, but hopefully the Sherman and Clayton Antitrust Acts will be there to prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services.

## 2) ANTITRUST ISSUES

### Price Fixing

Of all the antitrust issues price fixing is the one that most often affects the actions and behaviors of real estate agents when dealing with consumers. Conspiracy, actual or presumed, to fix prices is a “per se violation.” “Per se” means “in itself or “by itself.” “Illegal per se” means that the act is inherently illegal. So, if an act is categorized as illegal per se, it means that it does not require any additional proof or surrounding circumstances. Merely committing the act would make a person liable for the violation. As defined, since a per se antitrust violation is inherently illegal, there is no need of extrinsic proof of any surrounding circumstances or of its reasonableness. That means the agents will have little or no opportunity to “explain” what they meant in their own defense. If it happened, it happened.

Price fixing relates to not only commission rates but also to types of listings, length (term) of listing, coop splits and in-house fees and ladders. Here are five very typical examples of illegal price fixing in the real estate business.

1. Alex Agent is at a local party and is approached by a neighbor who asks, “So how’s the real estate business these days?” Alex responds, “Great! Are you in the market to buy or sell?” The neighbor replies, “Well, we might be putting our home on the market in a few months. We’re thinking about a move down south. But, hey, what’s the standard commission rate right now?” Alex replies, “5% is pretty much the going rate.”
2. After their committee meeting at the Board of Realtors®, Bruce Broker from ABC Real Estate and Brian Broker from XYZ Real Estate decide to have lunch together. In their discussion about the real estate market, Brian mentions how his company profitability is shrinking. Brian agrees and says, “Yes, we all should raise our fees. That would really help cover the rising company expenses.”
3. Sally Salesperson is at the home of Mr. and Mrs. Seller and is filling out the listing contract. When

## review questions...

The following 3 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

1. **In the early 21st century antitrust suits were settled against**
  - a) Martha Stewart
  - b) Microsoft
  - c) Toys R Us
  - d) All of the above
2. **Enforcement of an antitrust suit is handled by:**
  - a) The Supreme Court
  - b) HUD
  - c) Congress
  - d) The FTC and/or the DOJ
3. **Two politicians who helped create Antitrust laws are:**
  - a) Sherman and Clayton
  - b) Garfield and Harrison
  - c) Laurel and Hardy
  - d) Grant and Hayes

Review Question Answers:  
1. d 2. d 3. a

she gets to the section about length of the listing term, she says, “So I’m writing 6 months since that’s what most agents in the MLS do.” The Sellers, not knowing any better, just nod in agreement.

4. Sam Salesperson is at a listing presentation and is describing how his company cooperates and splits the listing commission with the other agents in the MLS. He says, “Our commission is 6%, and the rate we give out to the coop agents is half, or 3%. That’s pretty much the standard and fair practice.”
5. Bob Smith, the broker owner at Bob Smith Realty, is interviewing for new agents and is in discussion with Peter Prospect. Peter asks how the company would compensate him for listing and selling, and Bob says, “You start out at 50/50 which is what the all the traditional brokerage models offer. Then you increase by 5% as your volume increases. It’s all pretty standard.”

If you have found yourself in similar situations and responded in these ways, then you are headed for trouble! Be aware that there is no such thing as a “standard fee” in the real estate business. While your

own broker may set a standard as company policy, it is never appropriate to tell a consumer that the industry has “standard fees.” Even if you really believe or even know for sure that your local competitors charge the same fee as you do, it is NEVER appropriate to say it. If you do, it may give the impression that we all got together to set our fees..... Price Fixing!

So let’s revisit the 5 scenarios from above, and this time let’s note examples of legally correct verbiage in **bold**.

1. Alex Agent is at a local party and is approached by a neighbor who asks, “So how’s the real estate business these days?” Alex responds, “Great! Are you in the market to buy or sell?” The neighbor replies, “Well, we might be putting our home on the market in a few months. We’re thinking about a move down south. But, hey, what’s the standard commission rate right now?” Alex replies, “5% is pretty much the going rate.”

Instead of suggesting there is a “going rate” which infers price fixing, Alex might better reply, **“There is no such thing as a “standard” commission. Brokers charge various fees based on the services they provide. At our company we charge 5%. Let’s get together this week to talk about the process of getting your home ready for sale and what we can do to help.”**

2. After their committee meeting at the Board of Realtors®, Bruce Broker from ABC Real Estate and Brian Broker from XYZ Real Estate decide to have lunch together. In their discussion about the real estate market, Brian mentions how his company profitability is shrinking. Brian agrees and says, “Yes, we all should raise our fees. That would really help cover the rising company expenses.”

It’s okay that Brian agreed with Bruce. But it’s not okay that he suggested that they both raise their fees. That is a conspiracy to fix prices. Brian would be shifting risk by instead saying, **“Yes, I feel your pain. We’re always looking for ways to cut expenses these days. It’s not an easy task! So tell me, how’s your golf game these days? Last time we spoke, you said you were joining a league.”**

3. Sally Salesperson is at the home of Mr. and Mrs. Seller and is filling out the listing contract. When she gets to the section about length of the listing term, she says, “So I’m writing 6 months since that’s what most agents in the MLS do.” The Sellers, not knowing any better, just nod in agreement.

Sally is inferring that most of the local agents agreed upon a “fixed” term” which is a per se violation. Here’s a safer reply: **“So I’m writing 6 months since that’s about how long it’s taking for homes in your neighborhood to sell right now. Our company and our MLS keeps track of Days-On-Market (DOM) so that we can best advise Sellers how long it may take to sell.”**

4. Sam Salesperson is at a listing presentation and is describing how his company cooperates and splits the listing commission with the other agents in the MLS. He says, “Our commission is 6%, and the rate we give out to the coop agents is half, or 3%. That’s pretty much the standard and fair practice.”

Sam is implying that coop splits are “standard” or “fixed.” Instead he could say, **“At our company the commission is 6%, and the rate we give out to the coop agents is half, or 3%. We believe it’s a nice incentive, and since about 43% of our listings were sold by the cooperating real estate community last year, I guess it’s working!”**

5. Bob Smith, the broker owner at Bob Smith Realty is interviewing for new agents and is in discussion with Peter Prospect. Peter asks how the company would compensate him for listing and selling, and Bob says, “You start out at 50/50 which is what the all the traditional brokerage models offer. Then you increase by 5% as your volume increases. It’s all pretty standard.”

Suggesting that all the companies pay their agents the same way is a per se violation. Bob would be wiser to say, **“The commission schedule we offer at Bob Smith Realty is right here in our policy manual.” Looking at the page together, Bob continues, “You start out at 50/50 and then you increase by 5% as your volume increases. The ladder we offer is right here. Let’s do a few examples so I can help you understand how many listings and sales you’ll need to meet your financial goals.”**

Can you see the difference? It’s all about the words and phrases we choose. In the first 5 scenarios the real estate agents and brokers give the impression (even if unintentionally) that we all get together to standardize and set our fees. If that’s how the consumer interprets the discussion, then this becomes a per se violation, even if the meaning was unintentional.

### Group Boycott

Another per se violation that agents often commit, even if unintentionally, is illegal group boycott. This occurs when two or more companies agree to “freeze someone out” or, even worse, drive someone out of business. According to the National Association of REALTORS®, an allegation of a group boycott is the most common antitrust claim asserted against real estate brokers. Here are some examples of how this might occur:

1. Andrea Agent is at a broker open house and chatting with her agent friends from other companies. Andrea says to them, “Boy, can you believe how expensive the sign riders are at SSS Sign Company these days? We should all stop ordering from them and see how they like it.”

- Stephan Salesperson is at a listing presentation and is describing how his company cooperates and splits the listing commission with the other agents in the MLS. He says to the Sellers, "So we give the other brokers 2.5% otherwise they won't show it."
- Sandy Salesperson is at a listing presentation trying to justify her company's commission to Sellers who tell her that they heard there is a new broker in town who charges far less. Sandy says, "Oh, yes.... the new discount broker. Well you should know that nobody likes to show their listings. We do work for money, you know."
- Several brokers are talking in the back of the room after a Board of Realtors® meeting, and they all agree that Discounts R Us, the new discount broker who just joined their MLS, is going to hurt their businesses by offering discount commissions to consumers. They agree to not show any of the listings that Discounts R Us puts in the MLS.

These examples demonstrate how easily an agent or brokers can slip into the dangerous waters of group boycott. Even if the discussion is not acted upon, an illegal per se violation has occurred! There are many cases throughout the country where agents, brokers and even boards of Realtors® have been liable for this offense.

### Tying / Tie-In

Tie-ins occur when an agent or a company requires a party to participate or purchase a product or service as a condition of another purchase. For example, ABC Realty requires all Buyers of homes they sell to also procure their mortgages through the ABC Mortgage Company. While ABC Realty, with informed consent of their Sellers, can require that all Buyers be subject to the mortgage qualification process of the ABC Mortgage Company, it would be an illegal tie-in arrangement to actually require the Buyers to use only their mortgage company.

Another example of illegal tying is demonstrated in the following scenario:

Steve Salesperson of ABC Realty has a Buyer client, Dan Developer, who wishes to purchase a 30 acre parcel of land that Steve showed him. Dan does his due diligence and learns he can subdivide the land into 20 building lots. Since Dan owns a construction company he plans to build and sell spec homes on the 20 lots. Steve sees the opportunity for not only a large land sale but also a future of listing of 20 homes when the lots are subdivided and the homes are built. He says to Dan, "When you build the homes, can I have the listings and help you get them sold?" Dan says, "Sure, I guess so. We seem to get along pretty well." So Steve salesperson writes up the contract on the 30 acre parcel and adds this rider: "This sale includes the agreement that Dan Developer will list the future subdivision with Steve Salesperson of ABC Realty."

While there is nothing inherently wrong with the fact that Steve hopes to secure the future subdivision, it is illegal for him to "tie" that future listing to the current sale of the 30 acre parcel. And even if Dan Developer is happy with Steve and actually hopes to list the future subdivision with Steve, it is illegal to "tie" the plan to the first purchase. Again, as stated above, tie-ins occur when an agent or a company requires a party to participate or purchase a product or service as a condition of another purchase.

## 3) INTERACTION WITH CUSTOMERS, CLIENTS, VENDORS AND ASSOCIATES

When it comes to antitrust, real estate agents need to use caution when interacting with customers, clients, vendors, associates..... frankly anyone and everyone with whom they interact. When an agent tells a consumer that commission rates are "pretty standard" or that the "going rate" is x, these comments are per se violations. And even if the comments are true, that is..... even if the agent is absolutely certain that the local brokers all charge the same rate, it's still not appropriate to say these words or phrases because it might give the consumer the impression that the local brokers all got together and established their fees. This is price fixing!

The same prudence should be used when dealing with vendors and suppliers. Certainly one company can make its own decision to stop using the services of a supplier if the price is too high or the product isn't satisfactory, but sharing that idea with another firm in town can lead to big trouble. Even mere threats of not using the supplier could be construed as conspiracy to boycott.

When talking with fellow salespeople from other firms, real estate agents need to use extreme caution. If a conversation is heard and reported, even if no action is taken, all the people in the group can be liable. The opportunity for antitrust violations is rampant since real estate agents interact all the time. While agents may be competing for business, they more often are interacting and cooperating with one another. That is, they spend a great deal of time together when they co-broke a transaction or when they attend real estate classes, broker open houses, board events, and state or national conventions.

In regard to the broker owners of various firms (not the individual salespeople), caution also needs to be used when deciding how to offer coop splits to other firms. Each firm should make those decisions independently and without advice from other firms. Additionally, Board of Realtors® and Multiple Listing organizations may not set fees for the coop splits among the members.

## review questions...

The following 7 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

- Price fixing relates to**
  - Length of listing
  - Coop splits
  - Commission rates
  - All of the above
- Conspiracy, actual or presumed, to fix prices is a per se violation.**
  - True
  - False
- A per se antitrust violation is inherently illegal, so there is no need of extrinsic proof of any surrounding circumstances or of its reasonableness.**
  - True
  - False
- Illegal group boycott occurs when**
  - Two or more companies agree to "freeze someone out"
  - A broker owner announces at a his monthly sales meeting that the company will no longer advertise in the local newspaper because the font is too small
  - Two broker owners have lunch to discuss a group purchase of copy paper
  - A Board of Realtors® owns and operates its own MLS
- Sally Salesperson is at a listing presentation where the Sellers are comparing her company's commission rate to that of a local discount broker they interviewed yesterday. Sally reminds them that this discount broker is a new company, has only part timers and hardly anyone even shows their listings. Sally**
  - Can justify her statement since it's true
  - Should prove that her company has better market share
  - Is protecting the Seller's best interest
  - Is inferring illegal group boycott
- Demanding the Buyers to use your firm's mortgage company when they buy your listing**
  - Protects and promotes the Sellers' best interest
  - Protects and promotes the Buyers' best interest
  - Is an example of illegal tie-in
  - Is a form of illegal price fixing
- Tie-ins occur when an agent or a company requires a party to participate or purchase a product or service as a condition of another purchase**
  - True
  - False

Review Question Answers:  
1. d 2. a 3. a 4. a 5. d 6. c 7. a

But what if one firm wishes to offer a higher split to another firm? Is that legal? Yes.....as long as the two firms don't collude with a third firm! For example, it is perfectly legal for Broker A from ABC Realty and Broker X from XYZ Realty to agree that they will cooperate at a 3% coop fee even though they may be offering a lower percentage rate in their local MLS. Perhaps these two firms have a close relationship, do lots of business together and have no ethical problems or issues. This is a business arrangement. But it would be illegal for Broker A and Broker X to include Broker L from LMN Realty in their discussion and mutually agree on their higher coop fees to the exclusion of the other members of the MLS. That being said, note that a broker may have more than one (and even differing) coop splits with various firms as long as they are independently

set. Conspiracy to set group fees and/or to boycott firms is a slippery slope. And broker owners legally may offer their clients variable rate commissions as long as this action is not created through discussion or consultation with other firms. Broker owners should consult with their legal counsel before embarking on these pricing structures.

## 4) THE COMPLAINT PROCESS

The antitrust laws are enforced by both the FTC's Bureau of Competition and the Antitrust Division of the DOJ. Criminal antitrust enforcement is handled by the Department of Justice (DOJ). Civil suits are handled by the FTC.

Due to the seriousness of this type of violation, salespeople should immediately report any possible antitrust incidences to their manager or broker. For example, if salespeople from one firm are in any discussion or even present at any scenario where it could be interpreted that salespeople from other firms are suggesting price fixing or boycott, the incident should be reported and documented up the chain of command. The firm's corporate counsel should be notified for antitrust legal advice.

And, if a real estate broker or firm is contacted by an antitrust representative or if an actual subpoena is received, the broker owner would be wise to immediately refer actions to the company's attorney for all further communication and correspondence. Notifying the counsel of the local board, the state association as well as the NAR is also recommended since they may be willing to provide assistance. Fines can range from \$250,000 to millions of dollars. Loss of real estate license occurs in states where a convicted felon cannot hold a real estate license. Note there is no Errors and Omissions insurance policy that will cover antitrust.

According to the DOJ website, The Antitrust Division's Citizen Complaint Center (CCC) keeps all complaints confidential and handles them in the following way:

1. They create a record of the information provided.
2. They conduct a preliminary review of the complaint for possible antitrust violations.
3. If the complaint raises sufficient concern under the Federal antitrust laws, the CCC refers it to the appropriate Division legal staff where additional research may lead to a formal investigation into the reported conduct.
4. If the Division needs more information, they make contact within one month of receiving the complaint. Due to the confidential nature of Division investigations, they do not notify the complainant if they open an investigation.

In 1993 the DOJ issued an Antitrust Leniency Program for Corporations, and in 1994 they issued one for Individuals. Individuals or companies who believe they may have been involved in criminal antitrust violations and cooperate with the Antitrust Division can avoid criminal conviction, fines, and prison sentences if they meet the various conditions of the Division's Leniency Program.

For those who are interested in perusing the multitude of actions filed with the DOJ, the DOJ website lists their case filings in searchable fields on their website, and the Office of Public Affairs posts recent cases of interest. Here follow two interesting cases, one about a \$14.9 million criminal fine for price fixing, and the other about an ongoing investigation of real estate investors who pleaded guilty of bid-rigging.

### [Case #1](#)

Department of Justice Office of Public Affairs  
December 9, 2015

#### **Three German Executives Indicted for Participation in Parking Heater Price-Fixing Scheme**

A federal grand jury in Detroit returned an indictment against Frank Haeusler, Volker Hohensee and Harald Sailer for their alleged participation in a conspiracy to fix the prices of parking heaters.

The indictment charges the three German executives – one current and two former – with conspiring to fix the prices of parking heaters used in commercial vehicles and sold in the aftermarket in the United States and elsewhere. Parking heaters are devices that heat the interior compartment of a motor vehicle independent of the operation of the vehicle's engine.

"These senior company officials conspired to fix the aftermarket prices of parking heaters sold to hundreds of businesses throughout the United States and North America," said Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division. "Today's indictment reinforces the Department of Justice's commitment to prosecute those who scheme to thwart competition."

"Today's charges outline a deceptive scheme to subvert competition in the marketplace," said Assistant Director in Charge Diego G. Rodriguez. "Those who engage in this type of criminal activity not only stand to defraud consumers, but erode the public's trust in the competitive bidding process. The FBI will continue to work with the Antitrust Division to ensure the integrity of competition across all industries."

The indictment, filed today in the U.S. District Court for the Eastern District of Michigan, alleges that Hohensee, Haeusler and Sailer worked together with other conspirators to artificially set aftermarket prices for parking heaters used in commercial vehicles in the United States and beyond. The charged executives and their co-conspirators met to discuss parking heater prices, agreed to set a price floor for parking heater kits and also agreed to coordinate the timing and amount of price increases for parking heaters.

According to the charge, the conspiracy existed from as early as October 2007 and lasted until at least Nov. 19, 2012. Hohensee is the former president of Espar Inc. and a resident of Canada; Haeusler is a former vice president of Espar Inc.'s German affiliate, Eberspaecher Climate Control Systems; and Sailer held the same position at Eberspaecher and remains an executive with the company.

On March 12, 2015, Espar Inc. admitted its role in the price-fixing conspiracy and pleaded guilty in the U.S. District Court for the Eastern District of New York. The company was sentenced on June 25, 2015 and has paid a \$14.9 million criminal fine.

Today's charge is the result of an ongoing federal antitrust investigation handled by the Antitrust Division's New York Office with assistance from the FBI's New York Field Office. Anyone with information concerning price fixing or other anticompetitive conduct in the parking heater industry should contact the Antitrust Division's Citizen Complaint Center at 1-888-647-3258

### [Case #2](#)

Department of Justice Office of Public Affairs  
January 4, 2016

#### **Two Georgia Real Estate Investors Plead Guilty to Rigging Bids at Public Home Foreclosure Auctions**

##### ***The 11th and 12th Defendants Charged in Ongoing Investigation***

Two Georgia real estate investors pleaded guilty today for their roles in bid-rigging and mail fraud conspiracies at public real estate foreclosure auctions in Georgia. Paul Chen and Ira Eisenberg each admitted that they agreed not to bid against others at certain public real estate foreclosure auctions and that they conspired to defraud mortgage holders and homeowners using the mail system.

"These individuals unlawfully rigged home foreclosure auctions, and then used payoffs and private side auctions to divide among themselves money that should have gone to mortgage holders and homeowners," said Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division. "Together with our FBI colleagues, the division will bring to justice unscrupulous investors who scheme to rob unsuspecting mortgage holders and homeowners."

"Incidents of bid rigging at public real estate auctions continue to be an issue in Georgia and elsewhere in the United States, and the FBI would like to remind the public that such matters are violations of federal law," said Special Agent in Charge J. Britt Johnson of the FBI's Atlanta Field Office. "The FBI will continue to work with the U.S. Department of Justice's Antitrust Division in identifying, investigating and prosecuting those individuals engaged in such activities."

Chen admitted to participating in the conspiracy in Fulton County, Georgia, from as early as February 2009 until at least March 2010, and Eisenberg admitted to participating from as early as August 2009 until at least February 2011. Additionally, Chen admitted to participating in the DeKalb County, Georgia, conspiracy from as early as November 2009 until at least September 2011. According to documents filed with the court, the purpose of the conspiracies was to suppress and restrain competition and divert money to the conspirators that otherwise would have gone to pay off the mortgage and other holders of debt secured by the properties and, in some cases, the defaulting homeowner.

These charges have been filed as a result of the ongoing investigation being conducted by the Antitrust Division's Washington Criminal II Section, the FBI's Atlanta Division, and the U.S. Attorney's Office of the Northern District of Georgia, in connection with the President's Financial Fraud Enforcement Task Force. The task force was established to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. With more than 20 federal agencies, 94 U.S. Attorneys' Offices, and state and local partners, it is the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud. Since its formation, the task force has made great strides in facilitating increased investigation and prosecution of financial crimes; enhancing coordination and cooperation among federal, state and local authorities; addressing discrimination in the lending and financial markets; and conducting outreach to the public, victims, financial institutions and other organizations. Since fiscal year 2009, the Justice Department has filed over 18,000 financial fraud cases against more than 25,000 defendants. For more information about the task force, please visit [www.StopFraud.gov](http://www.StopFraud.gov). Anyone with information concerning bid rigging or fraud related to public real estate foreclosure auctions should contact the Washington Criminal II Section of the Antitrust Division at 202-598-4000, call the Antitrust Division's Citizen Complaint Center at 888-647-3258.

### **Penalties**

In addition to humiliation and loss of license, penalties for criminal antitrust cases may include

- Liability for three times the plaintiff's actual damages (treble damages)
- Payment of the plaintiff's reasonable attorney's fees and costs
- Court supervision of the defendant's business for up to 10 years
- Prison terms

## **5) LIMITING LIABILITY**

An antitrust compliance program is critical for every company to have in place. A well-constructed compliance program focusses on avoiding conduct that creates the appearance of a conspiracy in price fixing or restraint of trade as well as with conduct that actually constitutes such a conspiracy. Education and training regarding what to say and what not to say in every possible scenario helps agents build confidence as well as limit legal liability for themselves and their firm. And, the sad truth is that it doesn't really matter what the agent might have meant or what actually happened. The outcome of an antitrust trial will depend upon what the judge or jury *believed* took place.

Including the firm's antitrust policy in the company policy manual is strongly recommended by NAR and other real estate advisors. The policy should clearly state that the firm sets its fees independently, and it should include the procedure for reporting up the chain of command when and if a situation arises. Including an "FAQ" or a "Tips & Techniques" section in the company policy manual also is a helpful reminder for agents who need a quick answer.

For example: Seller asks, "XYX Realty said they can do it for less. Can you?"

Possible answers:

- "No. Our fee is X%."
- "Our fees are based on the services we provide."
- "There is no such thing as a standard fee. Brokerage firms set their fees independently."
- "Perhaps they do charge less than we do. I just don't know. But what I do know is that our company's listings sell in far less time than the median days on market in the MLS. And you've indicated that you're in a hurry."
- "No. Our fee is x%, and you don't pay us a penny until and unless you're satisfied with the buyer's price and terms."

Or many other combinations and answers that you and your company can develop.

Annual sales meeting programs that focus on antitrust issues and include role play and other exercises are another way to keep everyone on their toes. This is a great opportunity to build scripts and create that "DOs and DONTs" list.

Documentation and a paper trail also help limit liability. Broker owners are advised to document in writing why and when they change their firm's fees. This documentation could be a simple memo to management and staff or even to the licensees within the firm, and it could mention the new pricing or fee structure as it relates to the firm's business goals and/or the local economic forecast.

## 6) SELF EVALUATION / ACTION STEPS

Before we leave this section, please take a moment to decide what action steps you will take to improve your antitrust skills. If you're a Realtor® member, there are many self-help tips, articles, brochures and a videos available at the realtor.org website.

Do you need to develop better scripts? Record yourself as you answer mock questions, and then listen to the words and phrases you selected. Did you make any "inferences" that might be misinterpreted? Practice, practice, practice until you feel comfortable with the

sound of your own voice and the professionalism of your responses. As you become more knowledgeable and confident you will become more convincing. Someone once said that the art of persuasion is nothing more than a combination of knowledge and passion. If you agree, then practice will help you become more skillful, more productive and more profitable!

## review questions...

The following 15 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

- 1. Bob Broker, while attending a Board of Realtor® committee meeting, hears several members at the table complaining about the new discount broker in town and asking one another what they should do about it. Bob knocks over his glass of water, announces he will not participate in any possible illegal boycott discussions, asks the committee chair to note his concerns and leaves the meeting. Bob Broker is**
  - a) Probably going to be cited for a code of ethics violation
  - b) Protecting himself from illegal boycott liability
  - c) A team player
  - d) Overreacting since he could have just sat quietly and not join the discussion
- 2. ABC Realty Company offers a 3% coop broker fee in their MLS but a 2.5% coop fee to any brokerage firms who are not members of their MLS. This action is**
  - a) Legal as long as ABC made that decision independently
  - b) Legal as long as it is approved by the MLS Board of Directors
  - c) An example of illegal boycott
  - d) Restraint of trade
- 3. It is illegal for a Broker to have a policy that charges a Seller a higher commission rate if the property is sold through a cooperating broker than if it is sold in-house.**
  - a) True
  - b) False

Questions continued on the next page

- 4. Bob Broker-Owner from ABC Realty meets with his competitor Ben Broker-Owner from XYZ Realty. Bob tells Ben that although ABC offers 2.5% to the cooperating brokers in their MLS, he would like to offer Ben's company 3% since they work so well together. Ben agrees to offer the same coop arrangement. This action demonstrates**
  - a) A per se illegal boycott
  - b) Price fixing
  - c) An MLS violation
  - d) A legal, cooperative business arrangement
- 5. Antitrust Laws are enforced by**
  - a) Local Boards of Realtors®
  - b) The EPA and the DEC
  - c) The FTC and the DOJ
  - d) The FTC and the FBI
- 6. Criminal antitrust enforcement is handled by the**
  - a) DOJ
  - b) FTC
  - c) FBI
  - d) CSI
- 7. Errors and Omissions insurance offers a rider, although costly, that covers antitrust claims.**
  - a) True
  - b) False
- 8. Penalties from criminal antitrust cases may include**
  - a) Treble damages
  - b) Court supervision
  - c) Prison terms
  - d) All of the above
- 9. Salespeople should immediately report any possible antitrust incidences to the**
  - a) Antitrust Division's Citizen Complaint Center
  - b) Firm's attorney
  - c) Manager or broker-owner
  - d) Local Board of Realtors®
- 10. The Antitrust Division's Citizen Complaint Center (CCC)**
  - a) Publicizes all complaints on their website
  - b) Notifies the complainant of regular progress in the case
  - c) Has a panel that votes on the case
  - d) May refer the complaint to the appropriate Division legal staff
- 11. Due to the confidential nature of Division investigations, the CCC does not notify the complainant if they open an investigation.**
  - a) True
  - b) False
- 12. If a real estate broker or firm is contacted by an antitrust representative or if an actual subpoena is received, the broker owner would be wise to**
  - a) Immediately contact the company's attorney for all further communication and correspondence.
  - b) Plead not guilty to stall further action
  - c) Contact the firm's Errors and Omissions carrier
  - d) Refer the matter to the local Board counsel
- 13. A brokerage firm that has a written antitrust policy is held harmless in an antitrust lawsuit.**
  - a) True
  - b) False
- 14. Risk avoidance for antitrust claims includes**
  - a) A written, company antitrust policy
  - b) Antitrust orientation for all new agents
  - c) An annual sales meeting program that covers antitrust compliance
  - d) All of the above
- 15. A brokerage firm should**
  - a) Establish fees unilaterally
  - b) Establish fees independently
  - c) Establish fees without consulting other real estate firms
  - d) All of the above

Review Question Answers:  
 1. b 2. a 3. b 4. d 5. c 6. a 7. b 8. d 9. c 10. d  
 11. a 12. a 13. a 14. b 15. d

## MISREPRESENTATION

### Introduction

Consumer complaints of misrepresentation are the #1 cause of real estate errors and omissions claims. Some years as many as 75% of all claims reported to E&O

carriers are cases about alleged misrepresentation. Too often agents guess at answering consumers' questions because they feel uncomfortable saying "I don't know" or "That's not our area of expertise" or "Let me get back to you on that." Saying the wrong thing, not saying the right thing or not saying anything when you should have gets real estate agents in big trouble. Whether written or oral or just an "off-handed"

remark, misstatements are common problems in the whirling world of real estate sales.

Historically “caveat emptor” (Let the Buyer Beware!) was the rule of thumb in many business transactions. But over the years courts have ruled that in consumer transactions, including real estate, the doctrine of “caveat emptor” is inappropriate. Protecting consumers from the unscrupulous acts of questionable salespeople and hustlers is more in vogue today. Real estate agents and brokerage firms have moved from “Buyer Beware” to “Broker Beware” and “Broker Take Care!”

But still, too often there are misstatements of material fact or failure to reveal material facts..... sometimes innocently, sometimes fraudulently, and sometimes out of negligence.

This section of Double Trouble will cover the various types of misrepresentation and focus on how you can limit liability, reduce exposure to litigation and maintain positive relationships with your customers and clients.

## 7) STANDARD OF CARE

In every state of the USA, real estate professionals are required to maintain a license to practice. License laws define what is expected of licensees in their daily practice. Every licensee is expected to exercise a standard of care that is honest, prudent and reasonable. Licensees are held to a higher bar than the general public since, in order to attain a license, licensees were required to study and learn the business and legal requirements imposed on the real estate profession. This professional behavior is known as standard of care. Failure to meet the generally accepted standard of care can lead to serious liability for the licensee and the brokerage firm.

Webster defines “standard” as “*that which is established as a rule or model by authority, custom, or general consent; criterion; test.*”

“Standard of Care” is defined as “*the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would exercise. If a person’s actions do not meet this standard of care, then his/her acts fail to meet the duty of care which all people (supposedly) have toward others*”

In real estate we often tie standard of care to “due diligence” as expressed in License Law, the Law of Agency, Federal, State and Local Regulations, and to the NAR Code of Ethics. So when a consumer sues a broker, the inevitable question that comes up is, “What is the standard of care that a reasonable broker would have taken?” Although all licensees are not uniform in their degrees of intelligence or morals, everyone is expected to not only know and follow the laws but also demonstrate ethical behavior and honest business practices.

## review questions...

The following 6 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

- In their business practice real estate agents are expected to use**
  - GPS systems in their cars
  - Price fixing addendums
  - Standard of care
  - Personal Assistants
- Real estate brokers keen on risk shifting now tend to re-interpret the doctrine of “Buyer Beware” as**
  - Buyer be Damned
  - Broker be Sued
  - Broker Beware
  - Buyer Be Gone
- In determining reasonable standard of care, a trier of fact might consider**
  - License laws
  - The NAR Code of Ethics
  - Law of Agency
  - All of the above
- When listing a home, Samantha Salesperson demonstrates reasonable care by**
  - Quoting what the Seller tells her
  - Verifying the taxes at the assessor’s office
  - Copying the tax info from the previous listing
  - All of the above
- Misrepresentation is the #1 cause of real estate errors and omissions claims against real estate agents.**
  - True
  - False
- Alleged claims of misrepresentation rank as high as what percent of all claims received by E&O insurance companies?**
  - 15%
  - 30%
  - 50%
  - 75%

1. c 2. c 3. d 4. b 5. a 6. d  
Review Question Answers:

## 8) LEGAL THEORIES

Black’s Law Dictionary defines misrepresentation as “*any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.*”

In real estate, we define misrepresentation as a misstatement or concealment of a material fact made with the intent of causing another party to act. Whether the agent was ignorant, careless or malicious, it’s still misrepresentation! While Federal Law doesn’t cover misrepresentation, each state does have their own laws. And the National Association of Realtors® also address this issue.

According to the Realtor® Code of Ethics, Standard of Practice 2-1:

“*Realtors® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the Realtor® the obligation of expertise in other professional or technical disciplines. (Amended 1/96)*”

So..... Sean Salesperson has shown a home to Buyer Clients who later call him and ask how long a certain living room wall is because they want to be sure they can fit their six foot media cabinet. Sean goes back to the home, measures the wall incorrectly and emails them a number of 72” which will work just right for their 72” cabinet. After the closing, when the cabinet doesn’t fit because the wall is 66” and is blocked on both sides by doorways, the Buyers sue Sean and his broker for misrepresentation. Is Sean liable? Did he demonstrate an unacceptable standard of care? What could he have done differently to better protect himself? Will the company E&O cover this? Before we answer these questions, let’s take a look at the various legal theories that describe and define misrepresentation. (Note that students should check with their individual state laws to be certain they are in sync.)

For misrepresentation to occur, **all** these factors must be met:

- You say something you shouldn’t or don’t say something you should
- Your intent is to cause someone to act or not act
- Someone relies upon your statement
- They take action or don’t take action based on their reliance
- They have damages

Within the areas of misrepresentation are varying degrees..... from bad to worse! Let’s take a look:

## Unintentional / Negligent Misrepresentation

Unintentional or negligent misrepresentation (often innocent) occurs when the agent *has no intention to deceive* but makes a mistake, an oversight, is careless, sloppy or shows an inattention to details or lack of care. In many instances the parties work things out, and the case is settled quickly by the broker. Or, if the E&O carrier is involved, there generally is a money settlement. This type of case doesn’t usually go to trial. However, there have been cases where the courts held the agent liable and said the agent had a *duty* to know and/or to find out. Each story is different, each case is different, and each outcome can vary.

EXAMPLE: Now let’s revisit the above story about Sean who measured the living room wall and reported in writing (in an email to the Buyers) the incorrect number of feet. When he was later sued, he went back to the subject property to check his error because he just couldn’t believe how this might have happened. That’s when he realized he was holding the tape 6 inches off. He was embarrassed by his error and felt really bad for the Buyers because he certainly never meant to intentionally give them the wrong number. Nonetheless the Buyers were harmed by this error and had to sell the cabinet and buy a smaller one that would fit.

Now let’s answer the questions:

*Is Sean liable?* Yes! Even though the error was innocent, it still harmed the Buyers.

Did he demonstrate an unacceptable standard of care? Maybe; maybe not. That would be decided by the parties or by a court and not by us since each case could be different. Some might think Sean should have measured more than once just to check his work. Some might feel it was just an innocent mistake. Some might think he was negligent.

*What could he have done differently to better protect himself?* Perhaps he might have measured more than once or even asked someone else to check his work. Or perhaps, to shift risk, he could have not measured at all and asked the buyers to return and measure the wall themselves. Or would this have annoyed the Buyers? (See how easily agents can get tangled in a misrepresentation web?)

*Will the company E&O cover this?* Yes; most likely the E&O company would settle. Or perhaps Sean would just pick up the cost on his own. That would be determined by Sean and his broker.

## Passive Misrepresentation

If an agent or broker fails to speak up to correct a consumer who mistakenly believes a fact or condition to be true when it is not, passive misrepresentation has occurred.



#### EXAMPLE:

Sandra Salesperson is excited that her Buyer clients, Bob and Betty, want to purchase the ranch home she just showed them. It's the last home on a dead end street and has acres of woods on two sides to afford them peace and quiet and the privacy they're looking for. Coming from a bustling city location about 90 miles away, Bob and Betty have just retired and are looking for a nice, county setting that will suit their new lifestyle. "Wow," Betty says. "All these woods will be such a wonderful noise barrier and a lovely and peaceful natural setting. That's just what we're looking for!"

Sandra happens to know that the woods directly behind the subject property will soon house the 1.7 million square foot Galleria Mall that the Pyramid Company has just been approved to build. With 84 shops and several large anchor stores already in contract, the ground breaking will commence in 3 months, and then construction noise will continue for at least another 18 months. Sandra doesn't mention the forthcoming mall, and Bob and Betty close on the home. Four month later Sandra's broker receives notice that a misrepresentation claim has been filed against Sandra and the broker.

Should Sandra have mentioned the forthcoming mall project? Yes! Especially because she knew about it AND she knew that Bob and Betty were specifically looking for peace and quiet.

But what if she didn't know about it? Would the court's opinion be that she *should have known* about it? Probably, yes! Real estate agents are expected to be aware of the local happenings. News as big as a giant mall coming in would be known by most people, not just the real estate agents. This could become a very large case and maybe even fraud and/or a rescission. No matter how it ends, it will be very costly for Sandra and her broker. Not a pretty picture.

#### Negligence

This occurs when a broker or sales agent fails to discover or fails to disclose defects that could have been discovered or disclosed by a reasonably competent broker or agent.

EXAMPLE: In the case *McGonigle v. Astle Realty, et. al.* in July 2013 a federal district court in Kansas found a real estate salesperson liable for failing to disclose to his Buyer clients the existence of a dam on the purchased property and a related agreement recorded with the local municipality that required owners of this property to maintain the tree growth under the dam. Their claim against their own agent and the brokerage firm was for breach of contract under the Exclusive Buyer's Agreement. They also sued the Seller and the Seller's agent.

The court dismissed all claims against the Seller and the Seller's agent as well as the claim that the Buyer didn't know about the dam which was shown to be visible. But because the Seller's agent had informed the Buyer's agent of the existence of the dam agreement and the duties it imposed, and because the Buyer's agent had failed to pass along this information to his clients because he thought it was no big deal, the court did find the Buyer's agent and the brokerage firm liable for breaching the Exclusive Buyer Agency agreement entered into with the Buyers and for breaching their obligation to disclose all adverse material facts known to them about the property. The court imposed damages of \$202,500 finding that this award would suffice to cover the costs of tree removal needed under the dam.

Clearly this is a case where a licensee harmed a client by being negligent in disclosing the recorded maintenance agreement regarding the dam. In addition we have a breach of fiduciary regarding the exclusive buyer agency agreement and the due diligence it imposed. Some may think the licensee and the firm got off easy, but each case is different, and each court rules how they see fit.

#### Intentional Misrepresentation / Fraud

This occurs when a broker or agent knowingly says something that is untrue in order to deceive another party.

#### EXAMPLE:

In the case *Gebhard v. Laxmi-Vishnu Enterprises, Inc* in Texas in 2012, the court awarded a Seller damages for an agent's failure to accurately disclose the terms of an amended sales contract to the Seller's Power of Attorney (POA) while the Seller was out of the country. The agent knew that the Seller was firm about not accepting anything lower than a \$1.25 million down payment for the sale of his hotel. The agent found a buyer, and the contract was signed by the parties for a \$4.75 million purchase price and a \$1.25 million down payment with the Seller holding the mortgage. Later, the Seller left the country on business and gave a POA to a friend who could represent him at the closing. In the meantime the agent amended the contract to include a far lower down payment and told the POA that it was approved by the Seller. The POA signed the amended contract, and the transaction closed. When the Seller returned and learned he been duped, he sued the agent and agent's firm.

The jury determined that the agent had committed fraud by falsely telling the Seller's representative that amended contract was approved by the Seller. A jury can award punitive damages when the evidence of fraud is "clear and convincing," a higher standard of proof. The Salesperson argued that the evidence of

fraud did not meet this higher standard, but the court disagreed. The evidence could support the conclusion that the Salesperson had not properly advised the Seller about the amended contract and had misled the Seller's representative, and the parties' subsequent actions supported this conclusion. The court affirmed the fraud and awarded punitive damages.

There are a multitude of intentional misrepresentation and fraud cases against unscrupulous real estate agents who lie about or conceal pertinent facts for their own profit and/or aggrandizement. One just needs to Google the words "real estate intentional misrepresentation" and you will find about "1,820,000 results!" But, in defense of the good guys among us, many of these cases were dismissed because the agents, in fact, had done nothing wrong. Often an agent or broker is sued because all the parties in the transaction typically are sued when only one or no party is actually liable. More about this in the next section.

### review questions...

The following 19 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

#### 1. Misrepresentation can be

- a) Unintentional
- b) Intentional
- c) Passive
- d) All of the above

#### 2. Buyer Broker Betty assures her Buyers that the attic in the home they like will be great to store all their heavy boxes. She should have

- a) Measured the attic to be certain
- b) Offered to help them carry the boxes on moving day
- c) Asked them to check with their home inspector as to the weight bearing integrity of the attic
- d) Checked with the local building code for attic storage guidelines

#### 3. Stating that a defective condition does not exist when you know it does is an example of

- a) Standard of Care
- b) Innocent misrepresentation
- c) Illegal boycott
- d) Intentional misrepresentation

#### 4. The Seller and the Buyer Broker are accompanying Boris and Belinda Buyer as they stop to look closely at the sill in the basement of the home they are previewing. Boris expresses concern that the sill looks like it might have termites. The Seller responds, "That's impossible. We have a dog, so there's no way we could have termites." This seems to satisfy the Buyers. The Buyer Broker

- a) Could be held liable for passive misrepresentation
- b) Is not responsible for the Seller's misinformation
- c) Can defend himself by saying he never heard the comment
- d) Should take a photo of the dog

#### 5. The lawsuit most often faced by real estate professionals is

- a) Steering
- b) Price fixing
- c) Misrepresentation
- d) Racial discrimination

#### 6. Errors and Omissions Insurance will most often cover

- a) A careless error in writing the taxes onto the MLS input form
- b) A fender bender in the Seller's driveway
- c) Stating incorrect info about the racial composition of the neighborhood
- d) Fraud

#### 7. When listing the home of Mr. and Mrs. Seller, Salvatore Salesperson doesn't inspect the unfinished basement since he's rushing. If he had, he would have smelled a damp, musty odor and noticed water marks on the base of the cement block walls. Sal might face a lawsuit for

- a) Negligence
- b) Collusion
- c) Illegal tie-in
- d) Intentional misrepresentation

#### 8. Fraud is a representation of a material fact

- a) Which is false
- b) With intent to deceive a third party
- c) That leads to injury of the third party
- d) All of the above

#### 9. Fraud is a false representation of an opinion.

- a) True
- b) False

Questions continued on the next page

10. Bartholomew Buyer is considering a home purchase and asks his agent if the home will appreciate. The best answer might be
- “Sure! All homes appreciate eventually.”
  - “It’s illegal for me to give you my opinion on that.”
  - “The local news channel just did a piece on area home values and said we’re in an appreciating market, so yes!”
  - “I sure hope so, but I don’t have a crystal ball.”
11. A home you’re showing is serviced by well and septic. Your Buyer client expresses an interest in having an in-ground pool installed in the back yard. You’re thinking that’s where the leach fields are but say nothing. You could be liable for
- Intentional misrepresentation
  - Negligence
  - Passive misrepresentation
  - Steering
12. Susan Salesperson looks at the survey map of her new listing and sees the property size as 150 x 120. By mistake she writes 140 x 130 on the MLS input sheet. Susan
- Will need to submit to an arbitration hearing at her local Board
  - Has set herself up for an intentional misrepresentation lawsuit
  - Will most likely be held harmless since the discrepancy is of no serious consequence in terms of damages to the parties.
  - Should ask the surveyor to alter his numbers on the survey.
13. This occurs when a broker or sales agent fails to discover or fails to disclose defects that could have been discovered or disclosed by a reasonably competent broker or agent.
- Negligence
  - Standard of Care
  - Unintentional Misrepresentation
  - Innocent Misrepresentation
14. It’s okay to offer an opinion as long as
- You’re certain that you’re right
  - You aren’t in an Exclusive Right to Represent Agreement
  - You clarify and confirm in an email that your comment was simply an opinion and not necessarily a fact.
  - The Buyer trusts you

15. Saul Salesperson farms the Meadow Lark subdivision and has had many listings and sales there. Meadow Lark is serviced by town water and sewer. This improvement project was voted on and installed ten years ago much to the delight of the residents who previously were serviced by their own well and septic systems. What he doesn’t know is that his newest listing there never did connect to the town sewer, and the current owner doesn’t disclose this to Saul. Saul lists the home in the MLS as having town sewer. This is an example of
- Breach of fiduciary
  - Unintentional Misrepresentation
  - Fraud
  - Standard of Care
16. This occurs when a broker or agent knowingly says something that is untrue in order to deceive another party.
- Negligence
  - Intentional Misrepresentation
  - Illegal Boycott
  - Passive Misrepresentation
17. A jury can award punitive damages when the evidence of fraud is clear and convincing.
- True
  - False
18. If one were to Google “real estate intentional misrepresentation” the search engine would show approximately these many results:
- 100,000
  - 500,000
  - 1,000,000
  - More than 1,000,000
19. If a Buyer relies upon the misstatement of the agent and therefore doesn’t buy a particular home because of the misstatement
- There are no damages since the Buyer didn’t buy
  - There may be a claim for misrepresentation
  - The act is one of collusion between the agent and the Buyer
  - The broker is not held liable in any action

Review Question Answers:  
 1. d 2. c 3. d 4. a 5. c  
 6. a 7. a 8. d 9. b 10. d  
 11. c 12. c 13. a 14. c 15. b  
 16. b 17. a 18. d 19. b

## 9) THE COMPLAINT PROCESS

Misrepresentation complaints generally begin when real estate consumers contact their agent to complain about an alleged misrepresentation offense. They’re usually angry and are quick to place blame on the agent. Agents would be wise to patiently listen to the complaint, take very good notes, empathize without accepting blame, and tell the caller they would like to have their broker involved in the discussion. Then immediately take the issue to the manager or broker for further review and a game plan. Very often the broker can quell the concern and reach a satisfactory agreement. Good will and reputation are at stake, so perhaps there will be a good deed of some kind or monetary compensation to the complainant, probably equal to or more than the commission. But, if agreement cannot be reached or the demands are too high, the firm contacts the E&O insurance company who takes over. Cases are rarely taken to trial because E&O companies prefer to settle in order to save time and money. There is a monetary “nuisance or harassment” value in quickly moving to a settlement. If the case were to go to trial there would be attorneys’ fees added to the eventual damages. And since the broker has a large deductible for E&O cases (which vary as to the specific policy), the broker usually submits to a monetary settlement. Every case is different, so there isn’t a “set” amount that constitutes a “fair” settlement.

So that’s the quick overview of how the majority of normal complaints are handled. But what about the BIG cases, the ones where the damages (or perceived damages) are large and where the consumer is harmed? Now we move to fraud which can be both a civil and a criminal offense. Civil = monetary penalties, and criminal = monetary and punitive penalties and even prison terms.

A major reason the lawyers for injured parties like to sue for actual fraud is because they generally can recover substantially more damages. If the fraud is egregious and morally reprehensible, the judge or jury can award punitive damages. (Compensatory damages are designed to compensate the wronged party. Punitive damages, by contrast, are designed to punish the guilty party and to discourage similar behavior in the future.) If punitive damages are awarded in a given case, and this is always a subjective decision for the judge or the jury, they can be many times the amount of compensatory damages.

Let’s list other damages a real estate salesperson can incur besides the obvious loss of commission or other monies:

- Stress
- Humiliation
- Loss of time
- Loss of reputation
- Loss of other business with that client
- Reduction in overall productivity
- Reduction in profitability
- License revocation

Kind of makes us think twice about what to say, how to say it, and how to prove you did!

And that brings us to the many steps we can take to reduce liability.

## 10) LIMITING LIABILITY

So now we all know (*or do we?*) that there are things we SHOULD say and things we SHOULDN’T when speaking with customers and clients. So here’s a little story that may *interest* you. Pun intended.

A few years ago in Westchester County, a Manhattan bedroom community, an agent was about to present an offer on behalf of her Buyer clients. (In this area of NY State agents write ‘offers’ or ‘binders’ that are superseded by a formal contract prepared by the Seller’s attorney.) The offer, very close to listing price, was well over \$1 million, and while she knew that the Buyers were wealthy enough to buy the home with cash, their offer did include a mortgage contingency. When she contacted the listing broker about her offer, the agent learned there were multiple offers on the property. She then called her Buyers and recommended they remove the mortgage contingency and become cash Buyers to have a more competitive advantage in the bidding war that might ensue. She told her Buyers that “they could always get the mortgage later.” Subsequently she admitted these were her exact words.

So the Buyers relied on her advice and agreed to remove the mortgage contingency. And guess what? They got the house!! Woo Hoo! All seemed golden until about five months later when the Buyers finally got around to applying for their purchase mortgage. The mortgage originator told them the app looked fine; no problem. He also made them aware of the IRS provision regarding a 90-day time limit on home acquisition debt when purchasing property and securing a mortgage against the principal for a first or second home. In order for the mortgage interest to be treated as deductible interest on home acquisition debt, the mortgage must be obtained within 90 days of the home purchase. Since they were applying well past the 90-day limit, their mortgage would be considered

a home equity loan for IRS tax purposes. The key difference then, is that the interest on home equity is deductible on loans only up to \$100,000 while the interest on a purchase mortgage (home acquisition debt) is deductible on loans up to \$1 million. So now the happy homeowners were angry and upset and said they would have applied sooner if only they had known! When they called to ask their agent why she didn't warn them of the 90-day time limit, she admitted "she just didn't know about this rule."

No surprise what happened next..... the Buyers called an attorney and sued the agent and her firm for misrepresentation. Slam dunk case which quickly settled out of court, and the firm paid the buyers an undisclosed amount of MONEY. My guess is that it exceeded the commission they actually had received. Note I didn't say 'earned'.

Many of you are probably thinking that the agent 'woulda, coulda, shoulda' done so many things to have shielded herself from this lawsuit. Yes..... the agent could have protected herself by shifting risk. She "shoulda" but didn't ask the buyers (and follow up in an email) to consult with their own financial advisor or attorney before removing the mortgage contingency. She "coulda" but didn't even know enough to tell the buyers (and follow up in an email) that they had a window of 90 days for tax purposes. By her own admission she said she just didn't know about the IRS rule, but if she had known, she certainly "woulda" told them.

So what are the lessons here? You and your broker more than likely will be in a jam if:

1. You say something you shouldn't or don't say something you should
2. Your intent is to cause someone to act or not act
3. Someone relies upon your statement
4. They take action or don't take action based on their reliance
5. They have damages

All this equals MISREPRESENTATION!

Since agents need to use language and communication skills in order to list and sell real estate it would be impossible to revert to complete silence as a means of protection. So creating a checklist for limiting liability would surely help reduce and shift risk. Let's get started:

1. Use waiver forms.
2. Use Property Disclosure.
3. Use Agency Disclosure.
4. Have an Agency Due Diligence list (and also state what you won't do).

5. Clarify in writing personal property included and not included in the sale.
- 6 Shift to survey or other legal docs re property boundary clarification.
7. Know and report local fees / preservation tax / add-on fees.
8. Know second home market issues (seasonal congestion / rental rules).
9. Clarify homeowner fees (HOA) and rules.
10. Shift environmental issues to an expert.
11. Know your state laws re Meagan's Law and stigmatizations.
12. Keep opinions to a minimum, and confirm that your opinion is just that.
13. Keep good records. Record your text messages and emails. Back up often.
14. After discussions follow up with a written confirmation of what transpired.
15. Don't be the "source." Be the "resource." Shift, shift, shift.
16. Shift risk to attorneys, inspectors, appraisers, accountants, et al.
17. Never say, "I'm sure" or "I am certain that....." Better to say, "According to the Assessor's Office (or the Seller, or whomever) the answer is X. And it could change at any time."
18. Memorize scripts that help shift risk.

When working with Buyers and/or Sellers:

- a) "I wouldn't want to give you the wrong information because I'm not a home inspector." (or an attorney, or a roofer, or a school counselor, etc.)
- b) "I can't be your source on that, but I can be a resource. Here's some links to \_\_\_\_ that may provide the answers."
- c) "It would be illegal for me to answer that question." (If this is true.)
- d) "I understand your concern. Let me ask the listing agent to ask the Seller."
- e) "I just don't know."
- f) "Do you have any other questions?"

Brainstorm this exercise at a sales meeting so you can create more scripts that feel comfortable.

## 11) SELF EVALUATION / ACTION STEPS

Most of us come into real estate expecting to help people buy and sell homes. It's a service industry. We think of ourselves as conduits in promulgating the American dream of home ownership. We expect and deserve to earn money since it's a real job. And we expect to make a fairly good amount of money for being in a job where we don't necessarily get a paycheck every week. We put in the time, energy and money and only get paid when the consumer wins. When they win, we win and get paid. Everyone is happy, and we get testimonials and referrals that keep us going. *But we certainly don't think we'll ever be sued.*

And yet we *are* sued. Are we easy targets? Perhaps the perception of the public is that real estate agents and brokers have deep pockets and unlimited E&O insurance. Or maybe they assume we know everything about everything which is why they ask us so many questions. And they probably think (and they might be right!) that we're great at sales but sloppy at record keeping.

So what will **you** do differently as a result of this course? Will you more carefully select the words or phrases you use? Will you take better notes and keep better records? Take a few moments to list some action steps that will help you avoid the pitfalls of misrepresentation. And good luck!

### review questions...

The following 10 questions will be a review of the content from this section.

These questions will NOT be graded.

Answers to the review questions can be found below.

#### 1. Criminal fraud suits may have

- a) Punitive damages
- b) Money damages
- c) Prison terms
- d) All of the above

#### 2. A major reason lawyers like to sue for actual fraud is because they

- a) Are advised to do so by the E&O insurance company
- b) Generally can recover more substantial damages on behalf of their client
- c) Are only interested in making more money for themselves
- d) All of the above

#### 3. Involvement in a misrepresentation lawsuit causes

- a) Humiliation
- b) Stress
- c) Loss of reputation
- d) All of the above

#### 4. A checklist to limit misrepresentation liability might include a

- a) Group of various waiver forms
- b) List of the Federally Protected classes
- c) Copy of the company policy manual
- d) Really good tape measure

#### 5. It's better to be the resource than to be the

- a) Exclusive agent
- b) Source
- c) Lawyer
- d) Guide on the side

#### 6. Tips to limit liability include

- a) Refer environmental issues to an expert
- b) Memorize scripts that help shift risk
- c) Record text messages
- d) All of the above

#### 7. The safest response to a consumer who asks a question out of your area of expertise is

- a) "I'm not sure, but let me take a guess and say...."
- b) "I'm pretty certain the answer is ....."
- c) "I don't know."
- d) "I know I shouldn't be saying this, but....."

#### 8. It's a good idea to brainstorm at sales meetings to

- a) Develop scripts
- b) Build lists of Do's and Don'ts
- c) Share info about new development projects
- d) All of the above

#### 9. Real estate agents may very well be easy targets for lawsuits because they

- a) Are generally unscrupulous
- b) Known to keep poor records
- c) Are very wealthy
- d) Don't have any deductibles for their E&O insurance

#### 10. Punitive damages are designed to punish the guilty party and to

- a) Demonstrate disgust on behalf of the judicial system
- b) Discourage similar behavior in the future
- c) Encourage similar behavior in the future
- d) None of the above

Review Question Answers:  
1. d 2. b 3. d 4. a 5. b  
6. d 7. c 8. d 9. b 10. b