**Unit 5 Outline**

**Real Estate Brokerage**

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I. Real Estate Brokerage

A. Sponsoring Broker-Broker Relationship

1. A real estate broker is any person licensed to perform real estate activities on behalf of a licensed sponsoring real estate broker.

2. The sponsoring broker is fully responsible for the actions performed in the course of the real estate business by all persons licensed under the sponsoring broker. In turn, all of a sponsored licensee’s activities must be performed in the name of the sponsoring broker.

3. Sponsored licensees can carry out only those responsibilities assigned by the sponsoring broker with whom they are licensed and can receive compensation only from that sponsoring broker. As an agent of the sponsoring broker, sponsored licensees have no authority to make contracts with or receive compensation from any other party.

4. The sponsoring broker is responsible for the acts of any sponsored licensees representing the firm.

5. Independent contractor versus employee

A sponsored licensee may be an employee or an independent contractor.

a. Whether a sponsored licensee is treated as an employee or an independent contractor affects the structure of the sponsored licensee’ s responsibilities and the sponsoring broker’s liability to pay and withhold taxes from the sponsored licensee’s earnings.

(1) A sponsoring broker can exercise certain controls over sponsored licensees who are employees and independent contractors.

(a) A sponsoring broker may require either an independent contractor or an employee to follow rules governing working hours, office routine, attendance at sales meetings, assignment of sales quotas, and adherence to dress codes.

(b) A sponsoring broker is required to withhold Social Security tax and income tax from wages paid to employees and to pay unemployment compensation tax on wages paid to one or more employees, as defined by state and federal laws.

(c) Employees may receive health insurance, profit-sharing plans, and worker’s compensation benefits.

(2) An independent contractor operates more independently than an employee, and a sponsoring broker may not exercise as much control over the independent contractor’s activities.

(a) While the sponsoring broker may control what the independent contractor does, the sponsoring broker cannot dictate how to do it.

(b) Independent contractors are responsible for paying their own income and Social Security taxes, and they receive nothing from sponsoring brokers that could be construed as an employee benefit.

B. Termination of Sponsorship

1. After sponsored licensees terminate employment with a sponsoring broker, their licenses become inoperative and they must obtain new licenses from their new sponsoring brokers.

2. Procedure:

a. The sponsoring broker signs and dates the license and sends a copy to the state within two days.

b. The licensee gives inoperative license to new sponsoring broker.

c. The new sponsoring broker issues the sponsor card.

C. IRS Tax Considerations: Independent Contractor/Regular Employee

The Internal Revenue Code states the following three requirements must be met in Order to apply independent contractor status to an individual:

1. The individual must have a current real estate license.

2. The individual must have a written contract with the sponsoring broker specifying that the licensee will not be treated as a regular employee for federal tax purposes and that the taxes will be paid by the licensee.

3. At least 90% of an individual’s income as a licensee must be based on sales production and not on the number of hours worked.

D. Managing Broker Responsibilities

E. Safety Concerns: Appointments and Showings

The National Association of REALTORS® and other state and local associations have safety guidelines available. Licensees can help minimize risk by implementing listed suggestions.

F. Business Planning

1. The Real Estate License Act requires that “every brokerage company other than a sole proprietorship with no other sponsored licensees, shall adopt a company or office policy dealing with certain prescribed topics”

G. Errors and Omissions Insurance

Licensees need to be aware of the most common errors and omission claims and which ones are not covered by standard real estate broker’s liability coverage forms.

1. Policy Protection and Covered Services: the sponsoring/managing broker must determine whether the errors and omission policy adequately addresses what

a. services are covered,

b. person(s) are covered,

c. damages are covered,

d. defenses are covered, and

e. territory is covered.

2. Other Policy Issues:

a. Licensee should obtain coverage that matches the licensee’s liability exposure

b. There are two basic types of deductible provisions. One type applies to each error committed, the other applies to each claim filed

c. Most E&O policies have provisions that limit payment to the amount offered in a settlement.

d. Problems may arise when one insured sues another insured.

e. Although most insurers limit coverage to the inception date of the policy, some insurers will consider providing first-time insurance buyers coverage for prior acts (for an additional premium)

H. Broker’s Compensation

1. The broker’s compensation is specified in the contract with the principal.

2. The amount of a broker’s commission is negotiable in every case. Attempting to impose uniform commission rates is a violation of antitrust laws. However, it is important for the broker and the client to agree on a negotiated rate before the agency relationship is established.

IN ILLINOIS . . . *Only a licensed broker may collect a commission. To collect a commission on a real estate transaction, a licensed broker must be hired by having a listing agreement in which the principal agrees to pay a specified commission. The percentage or dollar amount of commission must be expressed clearly in the agreement.*

3. To be considered the procuring cause of sale, the broker must cause the action that results in a real estate transaction.

IN ILLINOIS . . . *The closing of the sale is the usual proof that the broker has produced a buyer and earned a commission*.

4. Even if the transaction is not consummated, the broker may still be entitled to a partial commission if the seller:

a. has a change of mind and refuses to sell;

b. has a spouse who refuses to sign the deed;

c. holds a title with uncorrected defects;

d. commits fraud with respect to the transaction;

e. is unable to deliver possession within a reasonable time;

f. insists on terms not in the listing; *or*

g. has a mutual agreement with the buyer to cancel the transaction.

I. Commission Structures

1. The amount of compensation a sponsored licensee receives is set by mutual agreement between the sponsoring broker and the licensee.

2. Sponsoring brokers may pay commission directly to a licensee’s own corporation

IN ILLINOIS . . . *It is illegal for a sponsoring broker to pay a commission to anyone other than the broker licensed under that same sponsoring broker or another firm’s sponsoring broker who then pays his or her own broker involved. Fees, commission, or other compensation cannot be paid to unlicensed persons for services requiring a real estate license. “Other compensation” includes gifts of certain items of personal property or other premiums. This is not to be confused with referral fees paid between brokers for leads, which are legal as long as the individuals are licensed*.

3. Some firms have adopted a 100% commission plan, under which licensees pay a monthly service charge to their brokers to cover the costs of office space, telephones, and supervision in return for keeping 100% of the commissions from the sales they negotiate.

4. Under a graduated commission split plan, compensation is based on licensees achieving specified production goals.

5. The sponsoring broker’s compensation and policy with cooperating brokers who represent other parties in a transaction must always be disclosed.

I. Legal Rights and Obligations

The broker should advise the parties of the desirability of securing legal counsel to protect their interests. Only a lawyer can offer legal advice.

J. Real Estate Assistants and Technologies

A real estate assistant (also known as a personal assistant or professional assistant) is a combination office manager, marketer, organizer, and facilitator with a fundamental understanding of the real estate industry. An assistant may or may not have a real estate license.

IN ILLINOIS . . . *Section 1450.740 of the administrative rules specifies the permitted activities in which an unlicensed real estate assistant may engage.*

K. Technology and Brokerage of the Future

In addition to assistants, technology is available to help real estate licensees do their jobs more efficiently and effectively.

II. Antitrust Laws

Federal and state antitrust laws prohibit monopolies as well as any contracts, combinations, and conspiracies that unreasonably restrain trade. The Sherman Antitrust Act is the major antitrust law.

A. Price Fixing

1. Price fixing is the practice of setting prices for products or services, rather than letting competition in the open market establish those prices.

2. Multiple-listing organizations, Boards of REALTORS® and other professional organizations may not set fees or commission splits or deny membership to brokers based on the fees the brokers charge.

B. Group Boycotting

1. This occurs when two or more businesses conspire against another business or agree to withhold their patronage to reduce competition.

C. Allocation of Customers and Markets

1. This involves an agreement among brokers to divide their markets and refrain from competing for each other’s business.

D. Tie-in Agreements

1. This involves an agreement to sell one product only if the buyer purchases another product as well.

E. Federal Sherman Antitrust Act Penalties

1. Penalties for violating antitrust laws are severe.

1. Other Consumer Protection Measures

A. National Do Not Call Registry

1. List of phone numbers of consumers who do not want to be contacted by commercial telemarketers. The list covers the sale of goods or services by telephone. Political organizations, charities, telephone surveyors and companies with which a consumer has an existing business relationship are exempt.

2. Do-not-call rules apply to real estate agents. For information regarding compliance with the law, visit www.donotcall.gov

B. The CAN-SPAM Act of 2003

1. The CAN-SPAM Act establishes requirements for sending commercial e-mail, spells out penalties for those who don’t comply, and gives consumers the right to have e-mailers stop sending messages to them.

2. Violations are subject to fines of up to $1,000.

C. The Junk Fax Prevention Act of 2005

1. The act does not legalize unsolicited fax ads or solicitation, but it does allow for an established business relationship exception.

2. In general, a licensee could not legally send an unsolicited commercial fax message without express written consent or without an established business relationship with the client.

3. In 2008, the FCC issued clarifications to the Junk Fax rules.

IN ILLINOIS . . . *Sending an unsolicited advertising or fundraising fax without permission can be a crime punishable by a $500 fine.*

IN ILLINOIS . . . *There has been a Real Estate License Act since January 1, 1921. The current law, the Real Estate License Act of 2000, is administered by the Bureau of Real Estate Professions. The act governs the licensing and activities of brokers and salespeople “for the protection of the public” and evaluates the competency of real estate professionals. “Illinois license law consists of the act itself and rules which interpret and implement it.”*