

Modern Real Estate Practice in Illinois, 6th Edition
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Chapter 5: Real Estate Brokerage

Learning Objectives

After reading this chapter, students should be able to:

- Identify the role of technologies, personnel, and license laws in the operation of a real estate business.
- Describe the various types of antitrust violations common in the real estate industry and the penalties involved with each.
- Explain how a broker's compensation is usually determined.
- Distinguish employees from independent contractors and explain why the distinction is important.
- Define the following key terms: allocation of customers or markets; antitrust laws; brokerage; Can-Spam Act of 2003; commission; cooperative commission; electronic contracting; employees; group boycotting; independent contractor; Junk Fax Prevention Act of 2005; National Do-Not-Call Registry; personal assistant; electronic contracting; price-fixing; procuring cause; ready, willing and able buyer; salesperson; tie-in agreement; transactional broker.

Why Learn About Real Estate Brokerage?

Real estate is an industry driven by small businesses. Most brokerages are not giant national companies, and even those that are members of large franchises are still small businesses at heart, run locally to serve what is essentially a local market. Like any small business, there are challenges and advantages. To be successful, a licensee has to know not only his or her product (real estate) but also how to run a business. There are financial challenges to running any operation as well as personnel issues, such as how many people to hire, and in what capacity. What jobs need to be done, and what kinds of people are needed to do them best? Who are you competing with, and how can you successfully thrive in a marketplace with five, ten, twenty or more different brokerages all competing for the same piece of the pie? The answers to these questions are not easy ones, but a successful licensee needs to think of him or herself as a businessperson, not just an agent.

Suggested Items to Bring To Class

1. Newspaper and periodical articles on antitrust laws indicating the legal consequences of such illegal activities.
2. Sample independent contractor and employee agreements from local real estate companies.

Lecture Outline

I. Real Estate Brokerage

A. Broker-Salesperson Relationship

- A real estate salesperson is any person licensed to perform real estate activities on behalf of a licensed real estate broker.
- The broker is fully responsible for the actions performed in the course of the real estate business by all persons licensed under the broker. In turn, all of a salesperson's activities must be performed in the name of the sponsoring broker.
- The salesperson can carry out only those responsibilities assigned by the broker with whom he or she is licensed and can receive compensation only from that broker. As an agent of the broker, the salesperson has no authority to make contracts with or receive compensation from any other party.
- The broker is responsible for the acts of any sponsored licensees representing the firm.

1. Independent contractor versus employee

A salesperson may be an employee or an independent contractor.

- a.** Whether a salesperson is treated as an employee or an independent contractor affects the structure of the salesperson's responsibilities and the broker's liability to pay and withhold taxes from the salesperson's earnings.

- A broker can exercise certain controls over salespersons who are employees.
 - A broker may require an employee to follow rules governing working hours, office routine, attendance at sales meetings, assignment of sales quotas and adherence to dress codes.
 - A 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.

- Employees may receive health insurance, profit-sharing plans and worker's compensation benefits.
- An independent contractor operates more independently than an employee, and a broker may not exercise the same control over the salesperson's activities.
 - While the broker may control what the independent contractor does, the broker cannot dictate how to do it.
 - Independent contractors are responsible for paying their own income and Social Security taxes and receive nothing from brokers that could be construed as an employee benefit.
- b. Under the qualified real estate agent category in the Internal Revenue Code, meeting three requirements can establish an independent contractor status:
 - The individual must have a current real estate license.
 - He or she must have a written contract that specifies that the salesperson will not be treated as an employee for federal tax purposes.
 - At least 90 percent of the individual's income as a licensee must be based on sales production and not on the number of hours worked.

B. 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 his or her 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 in a court of law 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:
 - has a change of mind and refuses to sell
 - has a spouse who refuses to sign the deed
 - holds a title with uncorrected defects
 - commits fraud with respect to the transaction
 - is unable to deliver possession within a reasonable time
 - insists on terms not in the listing
 - has a mutual agreement with the buyer to cancel the transaction

C. Sales Force

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

IN ILLINOIS . . . *it is illegal for a sponsoring broker to pay a commission to anyone other than the salesperson licensed under that same sponsoring broker or another firm's sponsoring broker who then pays his or her own salesperson 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.*

2. Some firms have adopted a 100 percent commission plan, under which salespersons pay a monthly service charge to their brokers to cover the costs of office space, telephones and supervision in return for keeping 100 percent of the commissions from the sales they negotiate.
3. Under a graduated commission split plan, compensation is based on a salesperson's achieving specified production goals.

D. Commission Structures

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

2. Commission “splits” earned by salespersons and broker associates vary. Some firms have adopted a 100 percent commission plan. Other companies offer graduated commission splits, based on a salesperson achieving specified production goals.

E. Transactional Brokerage

A transactional broker’s job is simply to help both the buyer and the seller with the necessary paperwork and formalities involved in transferring ownership of real property. The buyer and the seller negotiate the sale without representation. The transactional broker is expected to treat all parties honestly and competently, to locate qualified buyers or suitable properties, to help the parties arrive at mutually acceptable terms, and to assist in the closing of the transaction.

IN ILLINOIS . . . *Transactional brokerage is not legal in Illinois.*

F. 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.

G. 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 1450.165 of the administrative rules specifies the permitted activities in which an unlicensed real estate assistant may engage.*

H. Technology and Brokerage of the Future

In addition to assistants, a wide range of technologies is available to help a real estate licensee do his or her job more efficiently and effectively.

1. Electronic Contracting

Two federal Acts govern electronic contracting: the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act (E-Sign).

2. Fee for Services

It may be important for licensees to be more flexible and open to seeing their occupation as a bundle of services that can be unbundled. *Fee for services* is the arrangement where the consumer decides which services he or she needs and then works with and pays the licensees solely for those services. It is *not* the same as *discounted real estate services*, the arrangement where a consumer receives all of the real estate services, but at a discounted price.

II. Antitrust Laws

Federal and state antitrust laws prohibit monopolies as well as any contracts, combinations and conspiracies, such as the following, that unreasonably restrain trade. The major federal laws are the Sherman Act, the Clayton Act, and the Federal Trade Commission law.

A. Price Fixing

- The practice of setting prices for products or services, rather than letting competition in the open market establish those prices
- 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

- 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

- Involves an agreement among the brokers to divide their markets and refrain from competing for each other's business.

D. Tie-in Agreements

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

E. Federal Sherman Antitrust Act Penalties

- Penalties for violating antitrust laws are severe.

III. 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. 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, go to 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 e-mailing 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 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.

IV. State License Laws

All 50 states, the District of Columbia and all Canadian provinces license and regulate the activities of real estate brokers and salespersons.

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 to evaluate the competency of real estate professionals. "Illinois license law consists of the act itself and rules which interpret and implement it."*

Discussion Questions

1. When would you use the services of a broker? (Answers should include when purchasing insurance, stocks and bonds, and real estate. Students may also mention commodities, lumber, cattle, grain, precious metals and mortgage securities.)

Classroom Exercises

1. Have students consider the challenges that might arise in setting up and operating a real estate brokerage. Some students may come from small business or entrepreneurial backgrounds: they might share their experiences in other fields, and discuss how those experiences might be similar to or different from those faced by a broker. In general, students should think about where to locate their office; what support staff to hire; what technologies to purchase; and how to market their business.