



THE INFORMER

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by the California Community Colleges
Real Estate Endowment Fund

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DIRECTOR'S LETTER

Dear Real Estate Educator:

Our third Real Estate Educator's conference for the 2002-03 year is set for May 9, 2003, at the Park Plaza Hotel, next to the Oakland Airport. The main speaker will be Dr. Robert Kleinhenz, Senior Economist for the California Association of Realtors.® The full conference program is listed inside this issue of the INFORMER. Maps and directions to the hotel and contact information for making hotel reservations are available at the Center's Website at <http://www.ccsf.edu/reec>.

The Real Estate Education Center is moving away from maintaining its huge mailing list for INFORMER recipients, mainly because (1) it's expensive, (2) it's unreliable (I received dozens of complaints that the last INFORMER was not received – I know I didn't get mine), and (3) many (at least 30%) of the addresses are obsolete and undeliverable.

We have been building an e-mail list this year for use in distributing the INFORMER. ***In the future, the INFORMER will be sent by e-mail and will be posted to the Center's Website; physical copies will be mailed only to those who specifically request it, so please be sure to inform us how to send your copy (If you have not already received this issue by e-mail, we do NOT have your correct e-mail address).*** You will find a link for this purpose and further details inside (Page 2).

Yours truly,
Thomas B. (Tom) Gruenig
Director, Real Estate Education Center

D R E

UPDATE

	Dec-02	Nov-02	Oct-02	Sep-02
Number of Licensees:				
Broker	110,824	110,536	110,214	108,915
Salesperson	<u>225,116</u>	<u>223,298</u>	<u>221,812</u>	<u>219,900</u>
	335,940	333,834	332,026	328,815
License Exams Administered:				
Broker	691	604	995	868
Salesperson	<u>7,146</u>	<u>6,443</u>	<u>7,505</u>	<u>6,170</u>
	7,837	7,047	8,500	7,038
Pass Rates				
Broker	50%	50%	50%	54%
Salesperson	58%	57%	58%	60%
Original Licenses Issued:				
Broker	610	456	631	692
Salesperson	<u>2,776</u>	<u>2,182</u>	<u>3,328</u>	<u>2,857</u>
	3,386	2,638	3,959	3,549
Renewal Licenses Issued:				
Broker	1,839	1,827	2,349	2,028
Salesperson	<u>2,669</u>	<u>3,766</u>	<u>3,263</u>	<u>3,580</u>
	4,508	5,593	5,612	5,608
Percent of Potential Renewals:				
Broker:	92.70%	88.90%	108.00%	99%
Salesperson:	81.20%	100.50%	66.70%	90.10%
C/E Course Sponsors:	217	219	221	223
C/E Courses Approved:	896	895	896	906
Private Schools:	102	101	100	104
Pre-License Courses:	570	566	562	595

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? IF YOU RECEIVED THIS INFORMER BY U.S. MAIL, YOU WILL BE DROPPED FROM OUR MAILING LIST UNLESS YOU REQUEST OTHERWISE.

? TO REQUEST FUTURE MAILING OF THE INFORMER BY U.S. MAIL, SEND YOUR REQUEST TO THE REAL ESTATE EDUCATION CENTER, 800 MISSION ST., SAN FRANCISCO, CA 94103; TO REQUEST FUTURE MAILING OF THE INFORMER BY E-MAIL, SEND YOUR REQUEST TO THE DIRECTOR AT TGRUENIG@CCSF.EDU.

Real Estate Educators' Conference / Oakland, California

Registration

Date / Location

Friday, May 9, 2003
Park Plaza Hotel
150 Hegenberger Road, Oakland
(510) 635-5300

Registration / Luncheon Fee

Community College—\$25
(\$35 after April 25)
Other—\$30
(\$40 after April 25)

Name _____

Education Affiliation _____

Main Course Taught (for badge) _____

Address _____

City/State/Zip _____

Telephone (_____) _____

Maps and directions can be found
at the Center's Website: www.ccsf.edu/REEC

e-mail address _____

Return form with payment to: California Community Colleges Real Estate Education Center, 800 Mission St., Rm. 321
San Francisco, CA 94103. Please make checks payable to **City College of San Francisco**. No refunds will be made.

Real Estate Educators' Conference
Friday, May 9, 2003

PROGRAM

- 8 a.m.** Registration desk opens
Exhibits/continental breakfast compliments of exhibitors
- 9 a.m.** Opening Session
- Thomas B. Gruenig Director, CCC Real Estate Education Center Updates
 - CCC Chancellor's Office
 - Betty Ludeman, Manager Education and Research Section, Department of Real Estate
- 10:15 a.m.** Break with Exhibitors
- 10:35 a.m.** "Real Estate Law Update"
- 11:45 a.m.** Break with Exhibitors
- 12:05 a.m.** Luncheon
- Speaker – Dr. Robert Kleinhenz, Senior Economist for the California Association of Realtors® Topic: *To be Announced*
- 1:45 p.m.** **Adjournment**
- 2:00 p.m.** Drawing

INSTRUCTOR'S CORNER (PART 1) BY TOM GRUENIG

The last issue of the INFORMER included an article by Larry Levin arguing that the practices of "shopping an offer" and "under-listing" are, effectively, misrepresentations which violate the real estate law.

In response to this article one reader has argued that shopping an offer in itself constitutes the torts of interference with contractual relationship and interference with prospecting economic advantage, which could be actionable without regard to a broker's duties under the real estate law.

This article will discuss whether "offer shopping" by a broker may be a tort under California law (I say "discuss" rather than "make clear" for reasons that will become obvious -- Read on).

"Offer shopping" refers to the practice of receiving an offer from a potential buyer and using the offer to induce other competing offers (Example: Smith submits an offer to broker, broker tells Jones the terms of Smith's offer and asks Jones to make an offer that can beat Smith's offer, Smith does so, broker takes Jones' offer back to Smith, tells Smith the terms of Jones's offer, and asks Smith to make an offer that can beat Jones' offer, etc.).

Interference with contractual relationship. The tort of interference with contractual relationship requires the following: (1) a valid and existing contract between the injured party and a third person, (2) the interfering party have known of the contract, (3) the interfering party intended to induce the breach of the contract, (4) the interfering party's wrongful conduct contract caused the interference, and (5) the injured party is damaged. It makes no difference that the contract may be voidable or in violation of the Statute of Frauds. There are many cases permitting a listing broker to recover damages from competing brokers or buyers who induce a seller to complete a sale without paying the broker a commission, even where the listing agreement would have been unenforceable against the seller.

Interference with a contractual relationship between offeror and seller can never result from "offer shopping," since there is no contract between the person who is making the offer and the seller or any other party (it *is* only an offer at this point). Since there is no contract to be interfered with, there is no interference with contractual relationship.

However, if a cooperating broker is intro-

duced into the mix, the situation becomes more complex. Depending upon the form and content of the listing broker's agreement with seller and the agreement between listing broker and cooperating broker (either MLS or an individual commission sharing agreement), the cooperating broker may have a right to receive a commission 1) under a contract with seller 2) under a contract with the listing broker 3) as a third party beneficiary of the seller broker listing agreement, or 4) as the listing broker's subrogee. Interference with any of these could give a cooperating broker claim based on interference with contractual relationship.

Example: seller signs a listing which authorizes the employment of cooperating brokers and the division of the commission. Then listing broker agrees in writing with cooperating broker to share the commission if cooperating broker is the procuring cause of a sale. Then cooperating broker's buyer makes a "full cash offer," which seller rejects. In these circumstances the seller was held liable for cooperating broker's commission. Steve Schmidt & Co. v. Berry (1986) 183 Cal.App.3d 1299. The failure of the listing broker to make reasonable

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efforts to obtain the commission for the cooperating broker, or even his/her "interference" by failing to cooperate with efforts to collect the commission, would be both a breach of the listing broker's contractual duty of good faith and fair dealing and interference with the cooperating broker's contractual relationship with the seller.*

It is conceivable that seller or the listing broker might be liable for a commission to a cooperating broker, even in cases where there is no commission sharing contract, if the circumstances show an interference with prospective economic advantage.

Interference with prospective economic advantage. "Offer shopping" in relation to the tort of interference with prospective economic advantage is even more complex. Intentional interference with prospective economic advantage is a tort theory of recovery rather than contract, and is based on interference with a 'relationship' between parties irrespective of the enforceability of the underlying agreement (Buckaloo v. Johnson 122 Cal.Rptr. 745 (1975)). It also makes no difference whether any contract was actually breached as long as the injured party suffers damage as a result. There must be (1) an economic relationship between the injured party and a third party (for example, the seller), involving probable future economic benefit to the injured party, (2) the interfering party must have known of the relationship, (3) the interfering party act intentionally in a way designed to interfere wrongfully with the relationship, (4) actual interference must have occurred, and (5) the interfering party must have caused actual damage.

The economic relationship between offeror and seller presumptively involves at least the expectation of future economic benefit to the offeror (whether this is *probable* may be debatable, unless the offeror can show that he/she is in a position to profitably make a better offer than others are likely to make, and is therefore

*This example shows one danger of "under-listing" (See Larry Levin's article in the last INFORMER). A listing broker who exposes the seller to liability to pay a commission under these circumstances is in breach of fiduciary duty to the seller unless a full disclosure has been made to and understood by the seller at the time the listing is entered into.

likely to make a profitable contract as a result). If a listing broker "shops" an offer brought by a cooperating broker, this would clearly undercut the cooperating broker's prospects of getting a commission, and seems to be a clear violation of the listing broker's duty of good faith and fair dealing in relation to any contract for commission sharing between the listing broker and the cooperating broker. For the same reason it seems to be in interference by the listing broker with the cooperating broker's prospective economic advantage, even in cases where there is an unenforceable commission sharing agreement. A broker who receives an offer from the offeror, or the offeror's (cooperating) broker, obviously cannot deny knowing of the relationships that result between the brokers, offeror, and seller, and a broker who "shops" that offer to a third party obviously intends to interfere with those relationships by inducing other, competing, offers. Assuming the offeror or cooperating broker can demonstrate lost profits or other damages, will he/she be able successfully to sue?*

The answer is: Only if plaintiff can prove

**An interesting complication to this question is whether the *seller* would be liable for any tort committed by the broker in these examples. While normally we would expect of the seller would be vicariously liable for misconduct of his/her agent, the broker, California cases hold that a party to a contract cannot ordinarily be liable *in tort* for interfering with performance of his *own* contract (although it may still be a breach of contract). Also, in Deeter v. Angus 224 Cal.Rptr. 801 Cal.App. 1 Dist., 1986, the court suggested that it is only interference by an "outside party" to the relationship that can amount to interference with prospective economic advantage. Is a broker, acting as agent for the seller (or buyer), an "outside party" to the seller-buyer relationship? Or, is the broker the alter ego of the client in such circumstances? It doesn't make much sense, after all, to claim that a seller should be liable to an offeror *for interfering with the seller's own economic or business relationship with the offeror*. If it is not wrong for the seller to "shop" offers, can it be wrong for a broker to do it in the seller's behalf? Similar questions could be asked about who is an "outside party" to the relationships among the parties in connection with the cooperating broker's commission. There are no California cases directly dealing with these questions.

"that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376. The court left unanswered exactly what "wrongful by some legal measure" means, but posed two possibilities: (1) the conduct might have to be an independent tort, such as fraud, intimidation, coercion, or duress, or (2) might include "bad" behavior which does not amount to a tort, such as "anticompetitive behavior." So, not just *any* reprehensible interference will do. Lower courts have since held that violation of an industry standard or "unethical" conduct is not sufficiently "wrongful," but in Gemini Aluminum Corp. v. California Custom Shapes, Inc., 116 Cal.Rptr.2d 358, held that *misappropriation of trade secrets* was sufficiently "wrongful" to be the basis of an interference with prospective economic advantage claim.***

So, *can* a broker who "shops" offers be sued successfully by the offeror or the cooperating broker for the tort of interference with prospective economic advantage? This depends on whether offer shopping is considered to be "wrongful by some legal measure". Under ordinary circumstances, if the offeror has no particular expectation of confidentiality for his/her offer, offer shopping would presumably not be regarded as legally "wrongful" even if it were regarded as unethical or reprehensible. Would "cheating" a cooperating broker out of an expected share of a commission be "wrongful" if there is no enforceable con-

***Suppose an offeror has paid for economic studies or made other expensive preparations for making the offer, under circumstances where it should be clearly understood that the offeror regards as valuable the secrecy and confidentiality of the terms and conditions of the offer. The outcome is not entirely clear (at least to me). Of course, an offeror in this circumstance could insist on an agreement with the seller that the offer is confidential, and that in consideration of offeror making the offer, the seller agrees to keep it confidential, etc. If this is done, and the offer is "shopped" the offeror could presumably sue the seller for breach of contract and the broker for interference with contractual relationship.

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tract? What does a person making or procuring an offer in a real estate transaction expect will be done with his/her offer? Should an offeror or cooperating broker reasonably anticipate that the offer may be “shopped around” to obtain competing offers that will tend to defeat their own offer? If so, there is no tort.

If the offeror does *not* reasonably antici-

pate that the offer will be “shopped,” using the offer in this way may be an implicit misrepresentation or false promise (in violation of Business and Professions Code 10176 (a) and (b), and 10177 (I)). Is violation of the Business and Professions Code “wrongful by some legal measure”? --My own opinion is: almost certainly. Is “offer shopping” a violation of the Business and Professions code? --Reread Larry Levin’s article in the last INFORMER, then *you* decide.

Conclusion. Legal questions about “offer shopping” will be resolved by litigation. It would be better if some *other* real estate broker, and not you, clarifies the law in this area by getting sued.



A Note From The California Real Estate Education Association

It is always valuable to remember the purpose of CREEA. It is to promote and enhance educational and professional standards of competence. This includes improving the performance among all educators.

Our goals include promoting higher standards of real estate knowledge and competence among licensees, administrators, instructors, and students.

The CREEA officers reaffirm their desire to make the organization stronger and better in the education circle. CREEA is the only statewide organization dedicated solely to real estate education. Through their publications, meetings, and on-line services, CREEA provides opportunities for members to network, exchange ideas and teaching tips, and contact government offices and trade associations.

We invite everyone to visit the CREEA website at www.creea.org and learn of its events, newsletter, membership directory, with links to the REEA, CDRE, and others.

CREEA membership is open to all those who are interested in real estate education. We invite all to join in the common purpose of improving California real estate education.

-----Joe Newton--

INSTRUCTOR’S CORNER (PART 2) BY DR. D. GROGAN, EL CAMINO COLLEGE

As of July 1, 2003, AB 2167 becomes effective. This new bill requires a real estate salesperson to complete a college level Real Estate Practice course within 18 months of becoming licensed. Many have asked what was the basis for requiring Practice?

As a part of the background for enactment of this new law, the Real Estate Commissioner asked for ideas and feedback from the statewide industry associations, and from individuals. In addition, the Education Study Group meets annually at the Sacramento offices of the Department of Real Estate to discuss basic education for the original salesperson and broker licenses, conditional licensing educational requirements, and continuing education for license renewal. Other interested parties, such as educational institutions and publishers, industry trade associations and the

DRE staff, contribute comments.

This information led to further investigation and to the recognition that the public often complains to DRE and trade associations that their licensed agent was not knowledgeable in many areas of their real estate transaction, especially on explaining and completing real estate contracts, for example agreements that are intended to be legally binding yet a major portion of the documents left blank, or not filled in correctly, or filled in with incorrect information. The DRE wants to reduce legal actions resulting from licensees’ lack of basic competencies. The desire is to reduce litigation through quality education without restricting access to the industry.

A real estate agent who completes only the standard California purchase agreement for an offer to purchase will have dealt with many legal issues. The

licensee makes many disclosures, including agency relationships; the down payment and loans; Mello Roos; the TDS; common interest subdivisions; title and vesting; pest control; and more. Other items include personal property and fixture issues, the liquidated damages clause and the provisions for arbitration and mediation. Actual practice shows that the most flagrant offenders are those who cannot accurately complete items such as these in the basic contract.

A Real Estate Practice course should address this problem by preparing students to properly complete real estate contracts and other typical forms, such as a counter offer, TDS, Agency Confirmation and similar essential standard real estate paperwork.



Chancellor's Office Update

Real Estate Educator's Conference February 2003

Real Estate: Total Enrollment and Student statistics

82 of 108 Community Colleges Offering Real Estate Courses - Spring 2002

Total Enrollment trend (last 3 semesters)

Spring 2001 - 12,197

Fall 2001 - 15,308

Spring 2002 - 18,605

Distance Education Enrollment (Spring 2002)

23 Sections/Sessions offered

902 Students Enrolled

Top Colleges based on total enrollment (Spring 2002)

San Francisco - 793

Santiago Canyon - 622

Cerritos - 566

Cuyamaca - 551

Saddleback- 495

192 Real Estate Certificates & Degrees Awarded (2001-2002)

Associate of Arts Degree (A.A.) - 30

Associate of Science Degree (A.S.) - 49

Certificates requiring less than 60 units - 19

Certificates requiring less than 30 units - 82

Certificates requiring less than 18 units - 9

Age (Spring 2002)

24 or younger - 24%

25 to 34 - 31%

35 to 49 - 32%

50+ - 13%

Ethnicity (Spring 2002)

African American - 10%

Asian - 16%

Filipino - 3%

Hispanic - 21%

Native American - 1%

Pacific Islander - 1%

White* - 39%

Lisa Fassett, Vocational Education Services Team (VEST) lfassett@cccco.edu (916) 324-0934



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Real Estate Education Center

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