

NOTICE: These questions must be returned with your answer sheet.
REAL ESTATE LICENSE SERVICES, 5059 Newport Ave. #209, San Diego, California 92107

Legal Aspects of Real Estate, Final Exam #1

FINAL EXAM ANSWER FORM INSTRUCTIONS

The Final Exam Answer Form is the green answer card marked "SCANTRON FORM 882." Before beginning your final exam, fill in your name and student file number on the line marked "NAME" on both sides of the form. Write the date on the "DATE" line.

The Final Exam Answer Form has room for 50 questions on each side. They are numbered 1-50 and 51-100. As you answer the questions on the final exam, make sure that you mark your answers in the appropriate row for each question number.

USE A NO. 2 PENCIL ONLY. Using a pencil other than a No. 2 may cause the computer to incorrectly score your final exam. For each answer, choose the best answer and fill in the appropriate box (A-D) on the Answer Form. Fill in the box completely and dark. For example, if your answer on question 37 was "B" you would do the following:

37. [A] [C] [D]

If you need to change an answer, make sure that you erase the old answer completely.

THIS IS AN OPEN BOOK EXAMINATION. THE TEXTBOOK MAY BE USED DURING THE EXAM.

- In which kind of countries did the judges, in hearing and deciding cases, recognize and enforce the customs and usages of the people, rather than be guided by elaborate and detailed codes imposed by the sovereign?
 - common law countries
 - civil law countries
 - both "A" and "B"
 - neither "A" nor "B"
- In attempting to prove that a given proposition is supported by law, attorneys will refer to:
 - the Constitution
 - citations
 - the judge's conscience
 - none of the above
- The common law concept of land includes:
 - the space beneath the surface of the earth to the center
 - the space above the earth to "the top of the sky"
 - both "A" and "B"
 - neither "A" nor "B"
- What prevents legislatures from exercising capricious authority of regulation?
 - the courts
 - the various administrations
 - the Constitution
 - none of the above
- In which of the following ways may a person fail to perform a legal duty?
 - by being ignorant of the pertinent law
 - by being indifferent or negligent
 - by willfully disregarding the law
 - all of the above
- Which of the following is a basic major law governing the practice of real estate in California?
 - The Real Estate Law (Division 4 of the B&P Code)
 - The Subdivision Map Act
 - The Subdivided Lands Law
 - all of the above
- Which of the following is protected by mechanic's lien rights?
 - an unpaid contractor
 - an unpaid craftsman working for a contractor
 - someone furnishing material such as lumber who isn't paid
 - all of the above
- With reference to manner of creation, a contract may be:
 - expressed
 - implied
 - either "A" or "B"
 - neither "A" nor "B"
- The law compares a fiduciary relationship to:
 - that of a minister to his or her congregation
 - that of a trustee to a beneficiary under a trust
 - that of an officer to an enlisted man
 - none of the above
- The distinguishing feature of a leasehold interest is:
 - the fact that the tenant does not own the property
 - right to exclusive possession and use for a fixed period of time
 - the fact that rents are involved
 - none of the above
- Which part of the Real Estate Law covers licensing of persons?
 - Part 1
 - Part 2
 - both "A" and "B"
 - neither "A" nor "B"
- According to the B&P Code, which of the following license offenses is a misdemeanor?
 - displays or causes or permits to be displayed or has in his possession any canceled, revoked, suspended, fictitious, or fraudulently altered license, or any document simulating a license or purporting to be or to have been issued as a license
 - lends his license to any other person or knowingly permits the use thereof
 - displays or represents any license not issued to him as being his license
 - all of the above
- In *Anderson and Miles v. Resnick*, the California court said:
 - a salesman, insofar as his relationship with his broker is concerned, cannot be classified as an independent contractor
 - a salesman is an independent contractor
 - a salesman has a special status between employee and independent contractor
 - none of the above
- The Alquist-Priolo Special Studies Zones Act is designed for what?
 - to control development of nuclear power plants
 - to control development of heavy industry
 - to control development in the vicinity of hazardous earthquake faults
 - none of the above
- Section 125.6 of the California Business and Professions Code specifically prohibits discrimination by a state licensee against any person for which of the following reasons?
 - Race, color, and sex
 - Religion, ancestry, and physical handicap
 - Marital status or national origin
 - all of the above
- The most important incident of ownership is:
 - the right to improve something
 - the right to possess something
 - the right to sell something
 - none of the above
- In which branch of state government does police power reside?
 - the judicial branch
 - the legislative branch
 - the administrative branch
 - none of the above
- What does "fair market value" mean in the context of the Housing Financial Discrimination Act?
 - The highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller acting prudently and knowledgeably
 - the above, except that buyer and seller are not required to act prudently
 - the above, except that an open market is not required
 - none of the above
- In the language of the California Fair Employment and Housing Act, prohibitions against discrimination which are directed to the "owner" of housing accommodations are meant to include:
 - The lessee, sublessee, and assignee
 - Managing agent, real estate broker or salesman
 - Any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, including the state and any of its political subdivisions and any agency thereof
 - all of the above

20. Which is true about the U.S. Government and police power?
- it has no police power
 - it has that measure of police power necessary to properly exercise the sovereignty granted to it by the Constitution
 - it has more police power than the states
 - none of the above
21. The legal remedy to compel a defendant to honor an agreement is that of:
- injunction
 - specific performance
 - quiet title
 - foreclosure
22. What is used to compel public officials to do what they are supposed to do?
- injunction
 - mandamus
 - reformation
 - specific performance
23. If it is determined that a someone sat on his rights and caused unconscionable harm, the court may use what doctrine to disallow the action?
- laches
 - statute of limitations
 - equity
 - none of the above
24. Article 10 of the National Association of Realtors Code of Ethics pertains to:
- Discrimination
 - Accepting compensation from more than one party in a transaction
 - Denying equal professional services
 - Sharing experience with other realtors
25. Grounds for the revocation or suspension of license includes (according to the Business and Professions Code):
- Acting for more than one party in a transaction without the knowledge or consent of all parties thereto
 - Commingleing with his own money or property the money or other property of others which is received and held by the licensee
 - Taking secret or undisclosed compensation
 - all of the above
26. Under Section 10177(1) of the California Business and Professions Code, the Commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done which of the following?
- Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is causing the property to lose value
 - Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is causing a decline in the quality of the schools
 - Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is leading to an increase in crime
 - all of the above
27. When a leasehold estate is granted to someone, the owner gives up right to:
- future possession
 - immediate possession
 - all possession
 - none of the above
28. What can be defined simply as the state's power to enact laws to promote health, safety, morals and general welfare?
- constitutional power
 - legislative power
 - police power
 - none of the above
29. According to the California Fair Employment and Housing Act, "discrimination" means:
- Refusal to sell, rent, or lease housing accommodations
 - Refusal to negotiate for the sale, rental or lease of housing accommodations
 - Representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available
 - all of the above
30. The California Fair Employment and Housing Act prohibits:
- The owner of any housing Accommodation from discriminating against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such a person
 - The owner from making or causing to be made any written or oral inquiries concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation
 - Any person from making, printing, or publishing, or causing to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on color, religion, sex, marital status, national origin, or ancestry, or an intention to make such preference, limitation, or discrimination
 - all of the above
31. In Section 2780 of the California Administrative Code, it states that which of the following is prohibited?
- Refusing or failing to show, rent, sell or finance the purchase of real property to any person because of that person's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, or because of racial, religious, or ethnic composition of any occupants of the area in which the real property is located.
 - Refusing for the same reasons as above to provide or volunteer information to any person about real property
 - For the same reasons as above, channeling or steering any person away from real property
 - all of the above
32. A court order not to do something is:
- specific performance
 - quiet title
 - injunction
 - reformation
33. Actions which are brought to eliminate a "cloud" on the title of property are known as:
- quiet title actions
 - foreclosure actions
 - injunctions
 - none of the above
34. A lien to cut off an owner's interest in property upon which the lien is claimed is:
- quiet title action
 - foreclosure
 - specific performance
 - none of the above
35. A judicial foreclosure involves which of the following steps?
- foreclosing plaintiff alleges existence of a lien and nonpayment of the lien
 - foreclosing plaintiff establishes that the lien is secured by the specific property being foreclosed
 - foreclosing plaintiff asks the court to sell the property and apply the proceeds of the sale to the lien amount
 - all of the above
36. Which of the following is also prohibited under the California Administrative Code?
- Representing to any person because of his or her race, color, sex, religion, physical handicap, marital status or national origin that real property is not available for inspection, sale, or rental when such property is in fact available
 - Processing an application more slowly or otherwise acting to delay, hinder or avoid the sale, rental or financing of the purchase of real property on account of any of the above reasons
 - Refusing or failing to cooperate with or refusing or failing to assist another real estate licensee in negotiating the sale, rental, or financing of the purchase of real property because of any of the above reasons
 - all of the above
37. If the Real Estate Commissioner refuses to issue a license to an applicant, and the applicant can prove that he or she has satisfied the requirements for the license, what might the applicant seek?
- an injunction
 - specific performance
 - a writ of mandate
 - none of the above
38. What is the remedy of getting a document re-written to conform more closely to the intent of the parties involved?
- specific performance
 - reformation
 - mandamus
 - injunction
39. Which of the following is not an equitable remedy?
- specific performance
 - injunction
 - damages
 - mandamus
40. Which of the following is prohibited by the Code of Ethics and Professional Conduct contained in Section 2785 of the California Administrative Code?
- Knowingly making a substantial misrepresentation of the likely market value of real property to its owner
 - Conduct which would have warranted a denial of an application for a real estate license
 - The failure of a licensee acting in the capacity of an agent in a transaction for the sale, lease or exchange of real property to disclose to a prospective purchaser or lessee facts known to the licensee materially affecting the value or desirability of the property, when the licensee has reason to believe that such facts are not known to, nor readily observable by a prospective purchaser or lessee
 - all of the above
41. A security interest in fixtures attached to real estate can be created by:
- specific provisions included in a trust deed or mortgage secured by the real property
 - a fixture filing in the form of a Financing Statement
 - neither "A" nor "B"
 - both "A" and "B"
42. If property is a thing of which there may be ownership, then which of the following can be called property?
- animals
 - obligations
 - statutory rights
 - all of the above

Please do not write on these pages. Use your answer form.
C:\PM4\FINALS\NLEGAFIN.PM4

43. As between landlord and tenant, in the absence of an agreement to the contrary, and except for things which have been affixed by the tenant for purposes of trade, manufacture, ornament or domestic use which can be removed without injury to the premises, the basic rule about fixtures is:
- that they belong to the tenant
 - that they belong to no one
 - that they belong to the owner of the land, unless the owner chooses to require the tenant to remove it
 - none of the above
44. Normally, if an unscrupulous owner sells the same land to two or more persons in succession, which of the two buyers will prevail?
- the first in time of possession
 - the first to record
 - the first to complain
 - none of the above
45. Which of the following are considered to be incidental or appurtenant to property?
- natural rights
 - servitudes
 - easements and restrictions
 - all of the above
46. The rental of lots in a mobilehome park is under the jurisdiction of:
- the Real Estate Commissioner
 - the Department of Health and Safety
 - the State Department of Housing and Community Development
 - none of the above
47. Which is true of sole ownership?
- the owner is free to dispose of the property at will
 - normally only a sole owner's signature is required on the deed of conveyance
 - both "A" and "B"
 - neither "A" nor "B"
48. Which is a remote area subdivision of 50 or more parcels without onsite improvements, with less than 1,500 registered voters residing within certain distances from the subdivision?
- land project
 - standard
 - undivided interest
 - none of the above
49. The maximum penalty for an individual practicing without a license is:
- \$5,000 fine
 - \$50 fine
 - \$ 500 fine, six months in jail, or both
 - none of the above
50. The real estate licensing law stipulates that a person is "in the business" if there exist how many notes or sales contracts in any one calendar year?
- eight or more
 - five or more
 - ten or more
 - two or more
51. Notice which is imputed by law is:
- actual notice
 - statutory notice
 - constructive notice
 - none of the above
52. If a void or defective instrument is recorded:
- it remains invalid
 - it becomes valid
 - it becomes conditionally valid
 - none of the above
53. Which of the following must be recorded to be effective?
- judgments
 - homesteads
 - deeds
 - contracts
54. Which of the following would be included in a bundle of rights?
- right to encumber
 - right to dispose of a thing to the exclusion of others
 - right to enjoy
 - all of the above
55. Subcontractors and prime contractors have how long after filing a Claim of Lien within which to file a Lien Foreclosure action and record a Lis Pendens?
- 60 days
 - 90 days
 - 120 days
 - none of the above
56. The process by which real or personal property of a defendant in a lawsuit is seized and retained in the custody of the law as security for satisfaction of the judgment the plaintiff hopes to obtain in the pending litigation is called:
- injunction
 - attachment
 - lis pendens
 - none of the above
57. Which of the following is a classification of a subdivision?
- standard
 - common interest
 - undivided interest
 - all of the above
58. When two or more persons are owners of undivided interests in a single estate, what do you call it?
- tenancy in common
 - joint tenancy
 - tenancy in trust
 - none of the above
59. What is created when an instrument conveying an interest in real property to two or more persons does not specify that the interest is acquired by them in joint tenancy or in partnership or as community property?
- tenancy in common
 - shared tenancy
 - tenancy in unity
 - none of the above
60. Land subject to an easement is called:
- subject land
 - servient tenement
 - dominant tenement
 - none of the above
61. Which of the following is the most common way an easement is created?
- through long use
 - by implication of law
 - express grant or reservation in a grant deed
 - none of the above
62. In addition to the standard title insurance-policy, many lenders require:
- affirmative insurance on encroachments
 - priority over possible mechanic's liens
 - certain possessory and survey matters
 - all of the above
63. When a title vest (takes effect) immediately in a grantee, but upon breach of a condition the grantor has the power to terminate the estate, what kind of condition do we have?
- condition precedent
 - condition immediate
 - condition subsequent
 - condition simultaneous
64. How old must an applicant for a real estate salesperson license be?
- 17
 - 21
 - 18
 - none of the above
65. How many courses must an applicant for a broker's license complete?
- 2
 - 4
 - 8
 - 6
66. Which is true about re-examination for a real estate license?
- exam can be taken an innumerable number of times
 - the original license application is valid for 2 years
 - a new application must be filed if the applicant has not passed the examination within 2 years after original license application
 - all of the above
67. An original salesperson or broker's license is valid for:
- four years
 - two years
 - five years
 - none of the above
68. Which is true about failure to give a Preliminary Notice for contracts amounting to \$400 or more?
- nullifies mechanic's liens rights
 - nullifies stop notice rights
 - may be grounds for disciplinary action by registrar
 - all of the above
69. "CC&R's" are a declaration of:
- covenants
 - conditions
 - restrictions
 - all of the above
70. With regard to mechanic's liens, how may an owner limit his liability to the contract price?
- by doing both "B" and "C"
 - by recording his contract
 - by posting a bond in the amount of 50% of the contract
 - there is no way to limit his liability
71. Which might be considered notice of an unrecorded interest in property upon inspection of the property?
- possession in one other than the seller
 - pathways or sewer lines on the property
 - fences or walls
 - all of the above
72. Which of the following might be exempt from attachment and execution?
- a personal property business
 - an automobile
 - homesteaded property
 - none of the above
73. Which of the following would be a type of concurrent ownership?
- tenancy in common
 - joint tenancy
 - community property
 - all of the above
74. Which of the following run with the restricted land into the indefinite future?
- conditions
 - covenants
 - community property
 - neither "A" nor "B"

75. Which of the following would be considered an easement in gross?
 A. right of taking water of wood
 B. a public utility easement to erect poles and string wires over private lands
 C. right of transacting business
 D. none of the above
76. In order to enjoy some of the benefits of incorporation, yet retain the partnership form, it is possible to form a:
 A. limited corporation
 B. limited partnership
 C. semi-partnership
 D. none of the above
77. What may a tenant in common do with his or her own interest?
 A. sell it
 B. convey it
 C. mortgage it
 D. any of the above
78. Continuous and uninterrupted use for five years will create what kind of easement?
 A. by prescription
 B. by grant
 C. by implication of law
 D. none of the above
79. How may an easement be terminated?
 A. by express release
 B. by legal proceedings
 C. by nonuse of prescriptive easement for five years
 D. all of the above
80. What do we call something which requires certain action or the happening of a specified event before the estate granted can vest (i.e., take effect)?
 A. condition precedent
 B. condition subsequent
 C. covenant precedent
 D. covenant subsequent
81. Which of the following activities would be exempt from license requirements?
 A. an employee of a lending institution
 B. real estate related clerical help
 C. cemetery personnel
 D. all of the above
82. What remedy(s) is/are available in the case of a breach of a condition?
 A. an action of damages or an injunction
 B. a forfeiture of title to the grantor
 C. both "A" and "B"
 D. neither "A" nor "B"
83. How may an offer be terminated?
 A. lapse of time
 B. communication of notice of revocation
 C. both "A" and "B"
 D. neither "A" nor "B"
84. How may convicted criminals acquire property?
 A. by gift
 B. by inheritance
 C. both "A" and "B"
 D. neither "A" nor "B"
85. In a real estate transaction, an offer by one of the parties to a contract to carry out that party's part of the contract is known as a:
 A. promise
 B. tender
 C. proposal
 D. none of the above
86. Which of the following would be considered a typical statutory easement (or land burden or servitude)?
 A. rights of way
 B. rights of taking water, wood or minerals
 C. rights of transacting business or conducting sports
 D. all of the above
87. Which of the following is most likely to be an independent contractor?
 A. a real estate broker
 B. a property manager
 C. a real estate salesperson
 D. none of the above
88. Which of the following is a legal offer resulting in a binding contract when accepted?
 A. a social invitation
 B. the usual advertisement
 C. an offer to sell property at a given price under specific conditions
 D. none of the above
89. A landlord may legally enter a tenant's dwelling under the conditions that it is an emergency, or where tenant has abandoned or surrendered the premises, or pursuant to court order.
 A. true
 B. false
90. All used manufactured homes, used mobilehomes, and used commercial coaches which are sold shall have a smoke detector which is operable on the date of transfer of title.
 A. true
 B. false
91. Which of the following is a way an easement might be created?
 A. by express grant
 B. by express reservation
 C. by condemnation
 D. all of the above

92. In which of the following ways may a person acquire property?
 A. by nonoperative will
 B. by succession of community property
 C. by accession through avulsion
 D. all of the above
93. Which of the following characterizes a partnership?
 A. a lack of separate capacity to deal with property independently from its members, with certain exceptions
 B. customary equal participation of members in management
 C. co-ownership of partnership assets
 D. all of the above
94. Of which of the following must a real estate agent make copies and provide them to the persons signing them at the time the signature is obtained?
 A. listing contracts
 B. deposit receipts
 C. both "A" and "B"
 D. neither "A" nor "B"
95. Which is punishable by imprisonment in the state prison?
 A. giving away real property with tickets of admission or at drawings
 B. violating security of a real estate license exam
 C. fraudulently selling real estate property twice
 D. none of the above
96. The certificate of title when transferring a mobile home must contain provisions for application for transfer of registration by the purchaser or transferee, and a statement that the certificate may not reflect all liens.
 A. false
 B. true
97. The disclosure statement required by Regulation Z must have simple descriptive phrases next to which of the following items?
 A. the amount financed
 B. the annual percentage rate
 C. the total of payments
 D. all of the above
98. Which of the following does Regulation Z list as among those charges included in the finance charge that are of particular importance?
 A. interest
 B. loan fees, assumption fees, finders fees and buyers points
 C. investigation and credit report fees
 D. all of the above
99. Which of the following court cases have guided the fiduciary relationship?
 A. Rattray v. Scudder
 B. Thomas v. Snyder
 C. Rempel v. Kells
 D. all of the above
100. Which of the following characterizes a corporation?
 A. separate capacity to deal with property independently from its members
 B. centralized control in a board of directors
 C. liability of shareholders normally limited to the amount of their investment
 D. all of the above

NOTICE:

When you complete this exam, these questions must be returned to your monitor with your answer sheet. Both these items must be mailed by your monitor to:

Real Estate License Services
 5055 Newport Ave., #209
 San Diego, CA 92107

If you have any questions, please telephone (619) 222-2421.

Please do not write on these pages. Use your answer form.
 C:\PM4\FINALS\NLEGAFIN.PM4

改試(中)

Test only Open Book

NOTICE: These questions must be returned with your answer sheet.
REAL ESTATE LICENSE SERVICES, 5059 Newport Ave. #209, San Diego, California 92107

Legal Aspects of Real Estate, Final Exam #1

FINAL EXAM ANSWER FORM INSTRUCTIONS

The Final Exam Answer Form is the green answer card marked "SCANTRON FORM 882." Before beginning your final exam, fill in your name and student file number on the line marked "NAME" on both sides of the form. Write the date on the "DATE" line.

The Final Exam Answer Form has room for 50 questions on each side. They are numbered 1-50 and 51-100. As you answer the questions on the final exam, make sure that you mark your answers in the appropriate row for each question number.

USE A NO. 2 PENCIL ONLY. Using a pencil other than a No. 2 may cause the computer to incorrectly score your final exam. For each answer, choose the best answer and fill in the appropriate box (A-D) on the Answer Form. Fill in the box completely and dark. For example, if your answer on question 37 was "B" you would do the following:

37. [A] [C] [D]

If you need to change an answer, make sure that you erase the old answer completely.

THIS IS AN OPEN BOOK EXAMINATION. THE TEXTBOOK MAY BE USED DURING THE EXAM.

- 33 1. In which kind of countries did the judges, in hearing and deciding cases, recognize and enforce the customs and usages of the people, rather than be guided by elaborate and detailed codes imposed by the sovereign?
A. common law countries C. both "A" and "B"
B. civil law countries D. neither "A" nor "B"
- 11 2. In attempting to prove that a given proposition is supported by law, attorneys will refer to:
A. the Constitution C. the judge's conscience
B. citations D. none of the above
- 15 3. The common law concept of land includes:
A. the space beneath the surface of the earth to the center
B. the space above the earth to "the top of the sky"
C. both "A" and "B"
D. neither "A" nor "B"
- 109 4. What prevents legislatures from exercising capricious authority of regulation?
A. the courts C. the Constitution
B. the various administrations D. none of the above
5. In which of the following ways may a person fail to perform a legal duty?
A. by being ignorant of the pertinent law
B. by being indifferent or negligent
C. by willfully disregarding the law
D. all of the above
- 23 6. Which of the following is a basic major law governing the practice of real estate in California?
A. The Real Estate Law (Division 4 of the B&P Code)
B. The Subdivision Map Act
C. The Subdivided Lands Law
D. all of the above
- 53 7. Which of the following is protected by mechanic's lien rights?
A. an unpaid contractor
B. an unpaid craftsman working for a contractor
C. someone furnishing material such as lumber who isn't paid
D. all of the above
- 65 8. With reference to manner of creation, a contract may be:
A. expressed C. either "A" or "B"
B. implied D. neither "A" nor "B"
- 77 9. The law compares a fiduciary relationship to:
A. that of a minister to his or her congregation
B. that of a trustee to a beneficiary under a trust
C. that of an officer to an enlisted man
D. none of the above
- 89 10. The distinguishing feature of a leasehold interest is:
A. the fact that the tenant does not own the property
B. right to exclusive possession and use for a fixed period of time
C. the fact that rents are involved
D. none of the above
- 45 11. Which part of the Real Estate Law covers licensing of persons?
A. Part 1 C. both "A" and "B"
B. Part 2 D. neither "A" nor "B"
- 95 12. According to the B&P Code, which of the following license offenses is a misdemeanor?
A. displays or causes or permits to be displayed or has in his possession any canceled, revoked, suspended, fictitious, or fraudulently altered license, or any document simulating a license or purporting to be or to have been issued as a license
B. lends his license to any other person or knowingly permits the use thereof
C. displays or represents any license not issued to him as being his license
D. all of the above
- 121 13. In Anderson and Miles v. Reanick, the California court said:
A. a salesman, insofar as his relationship with his broker is concerned, cannot be classified as an independent contractor
B. a salesman is an independent contractor
C. a salesman has a special status between employee and independent contractor
D. none of the above
- 137 14. The Alquist-Priolo Special Studies Zones Act is designed for what?
A. to control development of nuclear power plants
B. to control development of heavy industry
C. to control development in the vicinity of hazardous earthquake faults
D. none of the above
- 95 15. Section 125.6 of the California Business and Professions Code specifically prohibits discrimination by a state licensee against any person for which of the following reasons?
A. Race, color, and sex
B. Religion, ancestry, and physical handicap
C. Marital status or national origin
D. all of the above
- 4 16. The most important incident of ownership is:
A. the right to improve something C. the right to sell something
B. the right to possess something D. none of the above
- 4 17. In which branch of state government does police power reside?
A. the judicial branch C. the administrative branch
B. the legislative branch D. none of the above
- 162 18. What does "fair market value" mean in the context of the Housing Financial Discrimination Act?
A. The highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller acting prudently and knowledgeably
B. the above, except that buyer and seller are not required to act prudently
C. the above, except that an open market is not required
D. none of the above
- 167 19. In the language of the California Fair Employment and Housing Act, prohibitions against discrimination which are directed to the "owner" of housing accommodations are meant to include:
A. The lessee, sublessee, and assignee
B. Managing agent, real estate broker or salesman
C. Any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, including the state and any of its political subdivisions and any agency thereof
D. all of the above

Please do not write on these pages. Use your answer form.

C:\PM4\FINALS\NLEGAFIN.PM4

20. Which is true about the U.S. Government and police power?
 A. it has no police power
 B. it has that measure of police power necessary to properly exercise the sovereignty granted to it by the Constitution
 C. it has more police power than the states
 D. none of the above
21. The legal remedy to compel a defendant to honor an agreement is that of:
 A. injunction
 B. specific performance
 C. quiet title
 D. foreclosure
22. What is used to compel public officials to do what they are supposed to do?
 A. injunction
 B. mandamus
 C. reformation
 D. specific performance
23. If it is determined that someone sat on his rights and caused unconscionable harm, the court may use what doctrine to disallow the action?
 A. laches
 B. statute of limitations
 C. equity
 D. none of the above
24. Article 10 of the National Association of Realtors Code of Ethics pertains to:
 A. Discrimination
 B. Accepting compensation from more than one party in a transaction
 C. Denying equal professional services
 D. Sharing experience with other realtors
25. Grounds for the revocation or suspension of license includes (according to the Business and Professions Code):
 A. Acting for more than one party in a transaction without the knowledge or consent of all parties thereto
 B. Commingling with his own money or property the money or other property of others which is received and held by the licensee
 C. Talking secret or undisclosed compensation
 D. all of the above
26. Under Section 10177(1) of the California Business and Professions Code, the Commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done which of the following?
 A. Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is causing the property to lose value
 B. Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is causing a decline in the quality of the schools
 C. Solicited the sale of property on the grounds that the entry into the neighborhood of persons of another race is leading to an increase in crime
 D. all of the above
27. When a leasehold estate is granted to someone, the owner gives up right to:
 A. future possession
 B. immediate possession
 C. all possession
 D. none of the above
28. What can be defined simply as the state's power to enact laws to promote health, safety, morals and general welfare?
 A. constitutional power
 B. legislative power
 C. police power
 D. none of the above
29. According to the California Fair Employment and Housing Act, "discrimination" means:
 A. Refusal to sell, rent, or lease housing accommodations
 B. Refusal to negotiate for the sale, rental or lease of housing accommodations
 C. Representation that a housing accommodation is not available for inspection sale, or rental when such housing accommodation is in fact so available
 D. all of the above
30. The California Fair Employment and Housing Act prohibits:
 A. The owner of any housing Accommodation from discriminating against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such a person
 B. The owner from making or causing to be made any written or oral inquiries concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation
 C. Any person from making, printing, or publishing, or causing to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on color, religion, sex, marital status, national origin, or ancestry, or an intention to make such preference, limitation, or discrimination
 D. all of the above
31. In Section 2780 of the California Administrative Code, it states that which of the following is prohibited?
 A. Refusing or failing to show, rent, sell or finance the purchase of real property to any person because of that person's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, or because of racial, religious, or ethnic composition of any occupants of the area in which the real property is located.
 B. Refusing for the same reasons as above to provide or volunteer information to any person about real property
 C. For the same reasons as above, channeling or steering any person away from real property
 D. all of the above
32. A court order not to do something is:
 A. specific performance
 B. quiet title
 C. injunction
 D. reformation
33. Actions which are brought to eliminate a "cloud" on the title of property are known as:
 A. quiet title actions
 B. foreclosure actions
 C. injunctions
 D. none of the above
34. A lien to cut off an owner's interest in property upon which the lien is claimed is:
 A. quiet title action
 B. foreclosure
 C. specific performance
 D. none of the above
35. A judicial foreclosure involves which of the following steps?
 A. foreclosing plaintiff alleges existence of a lien and nonpayment of the lien
 B. foreclosing plaintiff establishes that the lien is secured by the specific property being foreclosed
 C. foreclosing plaintiff asks the court to sell the property and apply the proceeds of the sale to the lien amount
 D. all of the above
36. Which of the following is also prohibited under the California Administrative Code?
 A. Representing to any person because of his or her race, color, sex, religion, physical handicap, marital status or national origin that real property is not available for inspection, sale, or rental when such property is in fact available
 B. Processing an application more slowly or otherwise acting to delay, hinder or avoid the sale, rental or financing of the purchase of real property on account of any of the above reasons
 C. Refusing or failing to cooperate with or refusing or failing to assist another real estate licensee in negotiating the sale, rental, or financing of the purchase of real property because of any of the above reasons
 D. all of the above
37. If the Real Estate Commissioner refuses to issue a license to an applicant, and the applicant can prove that he or she has satisfied the requirements for the license, what might the applicant seek?
 A. an injunction
 B. specific performance
 C. a writ of mandate
 D. none of the above
38. What is the remedy of getting a document re-written to conform more closely to the intent of the parties involved?
 A. specific performance
 B. reformation
 C. mandamus
 D. injunction
39. Which of the following is not an equitable remedy?
 A. specific performance
 B. injunction
 C. damages
 D. mandamus
40. Which of the following is prohibited by the Code of Ethics and Professional Conduct contained in Section 2785 of the California Administrative Code?
 A. Knowingly making a substantial misrepresentation of the likely market value of real property to its owner
 B. Conduct which would have warranted a denial of an application for a real estate license
 C. The failure of a licensee acting in the capacity of an agent in a transaction for the sale, lease or exchange of real property to disclose to a prospective purchaser or lessee facts known to the licensee materially affecting the value or desirability of the property, when the licensee has reason to believe that such facts are not known to, nor readily observable by a prospective purchaser or lessee
 D. all of the above
41. A security interest in fixtures attached to real estate can be created by:
 A. specific provisions included in a trust deed or mortgage secured by the real property
 B. a fixture filing in the form of a Financing Statement
 C. neither "A" nor "B"
 D. both "A" and "B"
42. If property is a thing of which there may be ownership, then which of the following can be called property?
 A. animals
 B. obligations
 C. statutory rights
 D. all of the above

37
43. As between landlord and tenant, in the absence of an agreement to the contrary, and except for things which have been affixed by the tenant for purposes of trade, manufacture, ornament or domestic use which can be removed without injury to the premises, the basic rule about fixtures is:

- A. that they belong to the tenant
- B. that they belong to no one
- C. that they belong to the owner of the land, unless the owner chooses to require the tenant to remove it
- D. none of the above

36
44. Normally, if an unscrupulous owner sells the same land to two or more persons in succession, which of the two buyers will prevail?

- A. the first in time of possession
- B. the first to record
- C. the first to complain
- D. none of the above

16
45. Which of the following are considered to be incidental or appurtenant to property?

- A. natural rights
- B. servitudes
- C. easements and restrictions
- D. all of the above

26
46. The rental of lots in a mobilehome park is under the jurisdiction of:

- A. the Real Estate Commissioner
- B. the Department of Health and Safety
- C. the State Department of Housing and Community Development
- D. none of the above

37
47. Which is true of sole ownership?

- A. the owner is free to dispose of the property at will
- B. normally only a sole owner's signature is required on the deed of conveyance
- C. both "A" and "B"
- D. neither "A" nor "B"

27
48. Which is a remote area subdivision of 50 or more parcels without onsite improvements, with less than 1,500 registered voters residing within certain distances from the subdivision?

- A. land project
- B. standard
- C. undivided interest
- D. none of the above

48
49. The maximum penalty for an individual practicing without a license is:

- A. \$5,000 fine
- B. \$50 fine
- C. \$ 500 fine, six months in jail, or both
- D. none of the above

48
50. The real estate licensing law stipulates that a person is "in the business" if there exist how many notes or sales contracts in any one calendar year?

- A. eight or more
- B. five or more
- C. ten or more
- D. two or more

51. Notice which is imputed by law is:

- A. actual notice
- B. statutory notice
- C. constructive notice
- D. none of the above

52. If a void or defective instrument is recorded:

- A. it remains invalid
- B. it becomes valid
- C. it becomes conditionally valid
- D. none of the above

36
53. Which of the following must be recorded to be effective?

- A. judgments
- B. homesteads
- C. deeds
- D. contracts

4
54. Which of the following would be included in a bundle of rights?

- A. right to encumber
- B. right to dispose of a thing to the exclusion of others
- C. right to enjoy
- D. all of the above

56
55. Subcontractors and prime contractors have how long after filing a Claim of Lien within which to file a Lien Foreclosure action and record a Lis Pendens?

- A. 60 days
- B. 90 days
- C. 120 days
- D. none of the above

58
56. The process by which real or personal property of a defendant in a lawsuit is seized and retained in the custody of the law as security for satisfaction of the judgment the plaintiff hopes to obtain in the pending litigation is called:

- A. injunction
- B. attachment
- C. lis pendens
- D. none of the above

26
57. Which of the following is a classification of a subdivision?

- A. standard
- B. common interest
- C. undivided interest
- D. all of the above

38
58. When two or more persons are owners of undivided interests in a single estate, what do you call it?

- A. tenancy in common
- B. joint tenancy
- C. tenancy in trust
- D. none of the above

37
59. What is created when an instrument conveying an interest in real property to two or more persons does not specify that the interest is acquired by them in joint tenancy or in partnership or as community property?

- A. tenancy in common
- B. shared tenancy
- C. tenancy in unity
- D. none of the above

59
60. Land subject to an easement is called:

- A. subject land
- B. servient tenement
- C. dominant tenement
- D. none of the above

59
61. Which of the following is the most common way an easement is created?

- A. through long use
- B. by implication of law
- C. express grant or reservation in a grant deed
- D. none of the above

43
62. In addition to the standard title insurance policy, many lenders require:

- A. affirmative insurance on encroachments
- B. priority over possible mechanic's liens
- C. certain possessory and survey matters
- D. all of the above

63. When a title vest (takes effect) immediately in a grantee, but upon breach of a condition the grantor has the power to terminate the estate, what kind of condition do we have?

- A. condition precedent
- B. condition immediate
- C. condition subsequent
- D. condition simultaneous

49
64. How old must an applicant for a real estate salesperson license be?

- A. 17
- B. 21
- C. 18
- D. none of the above

49
65. How many courses must an applicant for a broker's license complete?

- A. 2
- B. 4
- C. 8
- D. 6

49
66. Which is true about re-examination for a real estate license?

- A. exam can be taken an innumerable number of times
- B. the original license application is valid for 2 years
- C. a new application must be filed if the applicant has not passed the examination within 2 years after original license application
- D. all of the above

49
67. An original salesperson or broker's license is valid for:

- A. four years
- B. two years
- C. five years
- D. none of the above

55
68. Which is true about failure to give a Preliminary Notice for contracts amounting to \$400 or more?

- A. nullifies mechanic's liens rights
- B. nullifies stop notice rights
- C. may be grounds for disciplinary action by registrar
- D. all of the above

27
69. "CC&R's" are a declaration of:

- A. covenants
- B. conditions
- C. restrictions
- D. all of the above

57
70. With regard to mechanic's liens, how may an owner limit his liability to the contract price?

- A. by doing both "B" and "C"
- B. by recording his contract
- C. by posting a bond in the amount of 50% of the contract
- D. there is no way to limit his liability

36
71. Which might be considered notice of an unrecorded interest in property upon inspection of the property?

- A. possession in one other than the seller
- B. pathways or sewer lines on the property
- C. fences or walls
- D. all of the above

58
72. Which of the following might be exempt from attachment and execution?

- A. a personal property business
- B. an automobile
- C. homesteaded property
- D. none of the above

37
73. Which of the following would be a type of concurrent ownership?

- A. tenancy in common
- B. joint tenancy
- C. community property
- D. all of the above

74. Which of the following run with the restricted land into the indefinite future?

- A. conditions
- B. covenants
- C. community property
- D. neither "A" nor "B"

- 69 75. Which of the following would be considered an easement in gross?
 A. right of taking water of wood
 B. a public utility easement to erect poles and string wires over private lands
 C. right of transacting business
 D. none of the above
- 67 76. In order to enjoy some of the benefits of incorporation, yet retain the partnership form, it is possible to form a:
 A. limited corporation
 B. limited partnership
 C. semi-partnership
 D. none of the above
- 38 77. What may a tenant in common do with his or her own interest?
 A. sell it
 B. convey it
 C. mortgage it
 D. any of the above
- 59 78. Continuous and uninterrupted use for five years will create what kind of easement?
 A. by prescription
 B. by grant
 C. by implication of law
 D. none of the above
- 60 79. How may an easement be terminated?
 A. by express release
 B. by legal proceedings
 C. by nontuse of prescriptive easement for five years
 D. all of the above
80. What do we call something which requires certain action or the happening of a specified event before the estate granted can vest (i.e., take effect)?
 A. condition precedent
 B. condition subsequent
 C. covenant precedent
 D. covenant subsequent
- 48 81. Which of the following activities would be exempt from license requirements?
 A. an employee of a lending institution
 B. real estate related clerical help
 C. cemetery personnel
 D. all of the above
82. What remedy(s) is/are available in the case of a breach of a condition?
 A. an action of damages or an injunction
 B. a forfeiture of title to the grantor
 C. both "A" and "B"
 D. neither "A" nor "B"
- 68 83. How may an offer be terminated?
 A. lapse of time
 B. communication of notice of revocation
 C. both "A" and "B"
 D. neither "A" nor "B"
84. How may convicted criminals acquire property?
 A. by gift
 B. by inheritance
 C. both "A" and "B"
 D. neither "A" nor "B"
85. In a real estate transaction, an offer by one of the parties to a contract to carry out that party's part of the contract is known as a:
 A. promise
 B. tender
 C. proposal
 D. none of the above
- 9 86. Which of the following would be considered a typical statutory easement (or land burden or servitude)?
 A. rights of way
 B. rights of taking water, wood or minerals
 C. rights of transacting business or conducting sports
 D. all of the above
- 81 87. Which of the following is most likely to be an independent contractor?
 A. a real estate broker
 B. a property manager
 C. a real estate salesperson
 D. none of the above
88. Which of the following is a legal offer resulting in a binding contract when accepted?
 A. a social invitation
 B. the usual advertisement
 C. an offer to sell property at a given price under specific conditions
 D. none of the above
- 70 89. A landlord may legally enter a tenant's dwelling under the conditions that it is an emergency, or where tenant has abandoned or surrendered the premises, or pursuant to court order.
 A. true
 B. false
- 43 90. All used manufactured homes, used mobilehomes, and used commercial coaches which are sold shall have a smoke detector which is operable on the date of transfer of title.
 A. true
 B. false
- 53 91. Which of the following is a way an easement might be created?
 A. by express grant
 B. by express reservation
 C. by condemnation
 D. all of the above

92. In which of the following ways may a person acquire property?
 A. by noncooperative will
 B. by succession of community property
 C. by accession through avulsion
 D. all of the above
93. Which of the following characterizes a partnership?
 A. a lack of separate capacity to deal with property independently from its members, with certain exceptions
 B. customary equal participation of members in management
 C. co-ownership of partnership assets
 D. all of the above
94. Of which of the following must a real estate agent make copies and provide them to the persons signing them at the time the signature is obtained?
 A. listing contracts
 B. deposit receipts
 C. both "A" and "B"
 D. neither "A" nor "B"
95. Which is punishable by imprisonment in the state prison?
 A. giving away real property with tickets of admission or at drawings
 B. violating security of a real estate license exam
 C. fraudulently selling real estate property twice
 D. none of the above
96. The certificate of title when transferring a mobile home must contain provisions for application for transfer of registration by the purchaser or transferee, and a statement that the certificate may not reflect all liens.
 A. false
 B. true
97. The disclosure statement required by Regulation Z must have simple descriptive phrases next to which of the following items?
 A. the amount financed
 B. the annual percentage rate
 C. the total of payments
 D. all of the above
98. Which of the following does Regulation Z list as among those charges included in the finance charge that are of particular importance?
 A. interest
 B. loan fees, assumption fees, finders fees and buyers points
 C. investigation and credit report fees
 D. all of the above
99. Which of the following court cases have guided the fiduciary relationship?
 A. Rattray v. Scudder
 B. Thomas v. Snyder
 C. Rempel v. Kells
 D. all of the above
100. Which of the following characterizes a corporation?
 A. separate capacity to deal with property independently from its members
 B. centralized control in a board of directors
 C. liability of shareholders normally limited to the amount of their investment
 D. all of the above

NOTICE:
 When you complete this exam, these questions must be returned to your monitor with your answer sheet. Both those items must be mailed by your monitor to:

Real Estate License Services
 5059 Newport Ave., #209
 San Diego, CA 92107

If you have any questions, please telephone (619) 222-2421.

54

laws exist, particularly real estate laws. In the strictest legal sense, "property" is really a bundle of rights which may be owned. One owns the rights to objects or things, the rights to possess, control, enjoy, and use something, as well as the right to transfer all these rights to someone else. Therefore, when we speak of ownership, we are speaking of the right by which something belongs to a person, and the "belonging" has to do with the "bundle of rights" concerning what one may do with that which is owned.

Naturally, the rights and privileges pertaining to ownership also imply certain limitations or obligations. Society imposes through law necessary duties or obligations on a property owner, and these duties and obligations are usually, if not always, clear expressions of the demands of society. Therefore, it is useful to think of a "bundle of rights" as actually a "bundle of rights and responsibilities."

TITLE

"Title" means ownership, in both the legal and popular sense of the word.

Having clear title to something implies complete ownership. The word "title" may also refer to evidence of such ownership.

THE MOST IMPORTANT INCIDENT OF OWNERSHIP

#16

Without question, the right to possess something is the most important incident of ownership. Ownership has no meaning if the right to possess that which is owned does not exist. It is also implied that the right to possess it is the right to use it, and to do so to the exclusion of others, "others" being those who do not have an ownership interest. Obviously, a thing may be owned by more than one person.

Land may be said to be valuable as it can be used. The right to possess it, implying the right to use it, signifies that land use is a very important consideration in determining value. Land which has no use has very little value because no one is willing to pay for the possession of real property which has no use.

EXCLUSIVE USE NOT ABSOLUTE

In speaking of the right to possess and use property, it should be noted that the right to do so to the exclusion of others (non-owners) is not an absolute fact of life. It is possible that while others may not be permitted to use one's property, one may have to use it in accordance with the

needs and desires of others: neighbors, planning commissions, zoning boards, building inspectors, etc.

TEMPORARY TRANSFER OF RIGHT OF POSSESSION AND USE

Obviously, one of the most significant features of ownership is, as noted, the right of possession. An owner, however, may deprive himself of the right of ownership without impairing his title. For example, he may grant a leasehold estate to someone, allowing that person to take possession and use his property for a given period of time. In that instance, the owner continues to have the right to **future possession** of the property on which he holds title. He has, in that instance, sold his **right to immediate possession.**

POLICE POWER

We've mentioned police power in passing, but it is such an important concept that it demands elaboration. The most important thing to remember about police power is that it is exercised within a changing context, that of the social, political and economic conditions of a given society at a given time. In other words, as social, political and economic conditions change, so may society's perception of what is the proper exercise of police power.

#28

It can be defined simply as the state's power to enact laws to promote health, safety, morals and general welfare. Another, perhaps more basic, way of viewing police power is as that power inherent in the state to regulate the rights of individual citizens. The next most important thing to remember about police power is that it applies to everyone equally. It may not be exercised arbitrarily and no one is exempt from the laws which issue from it.

Police power does not, as might be supposed, issue from the Constitution. States existed prior to the Constitution, and had police power. Therefore, the courts have reiterated many times that the U.S. Constitution presupposes the existence of police power.

#17

As you know, government in America is divided into three main branches: the legislative, the executive, and the judicial. It is in the legislative branch of state government that police power resides. There it is subjected to the scrutiny of elected representatives and the legislative process itself, in order that it may not be abused. The Constitution does not enumerate police power as one of those granted by the Constitution to the federal government. It isn't entirely correct, however, to say that the federal

#20
government has no police power at all. It has that measure of police power necessary to properly exercise the sovereignty granted to it by the Constitution.

It is important to mention that, as police power relates to real estate, the effect is inhibitory. That is to say, police power may restrain a property owner from using his property in such-and-such a way, but may not compel him to use it in a given way.

How, you may wonder, do courts decide whether police power is being exercised by the legislatures in a proper way? The answer is that courts use the following standard: it must be reasonable. That, on the face of it, seems rather vague. What the courts generally mean by "reasonable" is that it must not be arbitrary or capricious. To exercise police power arbitrarily or capriciously implies that it is done without discretion. The next question, then, is how much discretion do legislatures use in exercising police power. The answer is that we the people have given our state legislative bodies rather broad discretionary leeway in the ways they exercise police power. As a result, certain laws which today are deemed to be in the public interest might have been considered violations of constitutional rights in earlier times.

The ultimate test of the validity of the exercise of police power is the Fourteenth Amendment of the U.S. Constitution. Contained in the Fourteenth Amendment are the provisions for due process and equal protection before the law. The Fourteenth Amendment does not impair states' rights to exercise police power, but it does limit them to an exercise of police power which meets the provisions of the Fourteenth Amendment.

TRANSFER OF OWNERSHIP OF PROPERTY

It was mentioned earlier that one of the most important incidents of property ownership is the right to possess it and use it. It is also very important that a property owner be able to transfer ownership. To transfer ownership in real estate, is the same as to "convey" ownership or to "alienate" ownership. This is a two part process, in which the owner or transferor extinguishes his own rights at the same time that the transferee or buyer acquires those rights.

VOLUNTARY AND INVOLUNTARY TRANSFER OF PROPERTY OWNERSHIP

Transfer of ownership of real property may occur voluntarily in one of the two following ways:

- a. the owner sells his property
- b. the owner makes a gift of his property during his

lifetime or at death

Transfer of ownership of real property may be involuntary in any of the following ways:

- a. taken by eminent domain
- b. title acquired by adverse possession
- c. foreclosure of a lien

The underlying principle in property law is that the transfer of property ought to be free; that is, a property owner ought to be free to alienate his property, and the welfare of society depends upon this freedom. Any limitation imposed upon the right to convey any interest in property is called a **restraint on alienation**.

The law does not allow the right to convey interest in property to be impaired. A person who owns a parcel of land in fee simple absolute may not sell that property to someone else with the limitation that the new owner may not sell or otherwise convey that property or any portion of it. The law will consider such a limitation void, and the new owner may convey his interest in the property in any way he sees fit.

Restraints on transferability are considered to be repugnant to the concept of fee simple absolute title, and society wants to be able to easily transfer what it considers one of its most important and valuable commodities. There are exceptions to this position, however, as when a landlord leases property with the stipulation that the tenant not assign the lease to anyone else or sublet the property. The rationale for this exception is that landlords need to have some control over who uses their properties.

WHERE LAWS COME FROM

Let's move back to a consideration of law itself for a moment. As previously mentioned, there are three basic sources of law. They are: constitutions, statutes, and precedent. In addition, there are administrative rules and regulations.

Constitutions (state and federal) are a basic source of law and provide the framework within which state and local governments operate. It is important to remember that state powers are **retained** powers. That is, the states had these powers prior to the U.S. Constitution and retained them. The powers of the federal government are powers granted to it by the states through the U.S. Constitution. It is because this is the case that most real estate laws are actually state and local laws. There remain, however, a couple of very important ways in which the federal government and the U.S. Constitution affect real estate at the local level.

2

LEGAL DOCTRINES AND CONCEPTS

PUBLICATION AND CITATION

In the previous chapter we introduced the doctrine of stare decisis, that is the doctrine of precedent which is followed in the courts. Because precedent is such an important doctrine in the practice of law, it is all the more important that attorneys and other interested parties, including plaintiffs and defendants, have access to published reports of cases.

Whenever reasonable persons disagree upon matters of law, it is then the courts' responsibility to find a resolution to the disagreement. Very often the ability to find the pertinent law or judgments rendered can obviate the necessity for litigation, and if litigation cannot be forestalled, then finding the pertinent information can do much to predict the outcome.

#2
In attempting to prove that a given proposition is supported by law, attorneys will refer to citations. In other words, citations represent legal authority. If my attorney proposes that it is legal for me to use part of your land for my own purposes, he will **cite** the authority of any one of several possible established legal precedents. The authority he refers to in putting his case may be constitutional authority or statutory authority. That is, he may find something in the constitution or in statutes to support his proposition on my behalf. Failing to find a constitutional or statutory citation, he might then offer a citation from administrative rule, regulation or interpretation, or failing that, case law.

The question then arises: Where does he find these citations and how are they organized? Certain cases are approved (certified) for publication in what are called "reporter series." The two reporter series in California are:

- a. California Reports (Bancroft-Whitney)
- b. Pacific Reports (West Publishing Company)

Both of these series contain the same material, but they are listed differently as to page number and volume. When a case is cited, it is done by names and locations, always in

the same order. As an example, John Jones versus Bill Smith, appearing in Volume 99 of the Pacific Reports, Second Series, on page 40, would be cited as Jones v. Smith, (1970) 99P2d 40.

Law libraries containing these series vary in how comprehensive they are. Attorneys' offices normally have limited law libraries, as do the trust or legal departments of many banks, etc. The public may usually use the law libraries found in some courthouses. Public libraries may also have legal volumes as well as sets of the various state legal codes.

"California Jurisprudence" (Cal. Jur.) is a legal encyclopedia in which may be found articles on all sorts of legal subject matter areas, extensively annotated. "Witkin's Summary of California Law" offers legal overviews, arranged by subject matter area. "Shepard's Citations" is also an extremely useful tool used to stay abreast of the latest citations in areas of interest. In recent years, with the advent of the computer, it has become possible to do legal research much faster than previously.

THE DIFFERENCE BETWEEN LEGAL AND EQUITABLE

One of the main reasons there is a difference between legal and equitable matters is because of real estate. In England, during the period of history when kings had absolute power, anyone seeking relief, or remedies, in courts of law did so strictly at the king's pleasure. Legal courts of those times only offered remedies of money, which was called **damages**. This sufficed for some time, but an important change occurred when people began to acquire property ownership interests.

Whenever there was a dispute over title to property, or over the terms of an agreement, there was no adequate remedy, simply because the courts were not empowered to award title. They could only award money or damages, and frequently this wasn't what was needed. Because of

mounting displeasure among feudal lords and barons (from whom the king received all his armies, taxes, etc.) the king appointed his chancellor to examine claims which were being brought that couldn't be settled with money. A separate court was set up for this purpose, and was called the Chancery Court after the chancellor. The chancellor was authorized by the king to grant any remedy the king himself had the power to grant in cases which appeared to have merit. This system of court administration grew up alongside the formal legal system, and became equally as important. In this court, an appeal was being made to the king's conscience, and another word for that is "equity." Hence, courts of conscience or courts of equity.

Today there is no physical distinction between these two courts, but there remains a distinction between equitable matters and legal matters. As pertains to real estate, this distinction is still important today. The way to understand the distinction is to concentrate on the **remedy**. Legal remedies today include damages and rescission. Equitable remedies include: specific performance, injunction, quiet title, foreclosure, mandamus, and reformation. We will discuss these in some detail presently.

Damages, as previously mentioned, means monetary relief or remedy. To provide adequate relief, a remedy must "make the plaintiff whole," as the saying goes. Frequently an award of damages will do just that. If you suffer a dollar loss that can be determined, you may be perfectly satisfied to be awarded what you have lost in dollars. In a **complaint** a plaintiff will **pray for** a remedy. That remedy may be chosen from a number of possible remedies, of which one may be damages (money).

Besides damages, another **legal** remedy is that of **rescission**, which means to cancel or terminate an agreement. Suppose you enter into an agreement with someone who has misrepresented important factual information to you. You might want out of the agreement, and you might be satisfied to leave it at that if you haven't suffered a financial loss. In that case, you would seek the legal remedy of rescission. It is possible to have a formal rescission without the necessity of court action, provided both parties agree to it. If it goes to court, the case will be adjudicated according to whether or not the judge thinks you have the right to terminate the agreement.

Although there is no physical separation between courts of law and courts of equity today, and the same judge may hear both types of cases, it is still appropriate to speak of courts of equity and courts of law. For instance, if you have a complaint for which neither damages nor rescission is adequate remedy, you will want to pursue the matter in a court of equity, which means that you are seeking a different type of remedy.

REMEDIES AVAILABLE IN COURTS OF EQUITY

As previously mentioned, the remedies available in courts of equity are: specific performance, injunction, quiet title, foreclosure, mandamus and reformation. Suppose you have an agreement with someone in which that person agrees to convey real property to you, to sign and deliver to you a proper deed. Now suppose that person refuses to do so. What is your remedy?

The remedy to compel the defendant to honor the agreement is that of **specific performance**. In the case of a real property dispute as described above, the defendant would be compelled to convey the real property. The only condition would be that there existed an enforceable contract. It should be apparent that since a contract must be enforceable for the specific performance remedy to work, then it becomes very important to properly prepare all contracts, agreements, deposit receipts, etc.

Injunction is a term which signifies just the opposite of specific performance. In other words, a decree of injunction is a court order **not** to do something. Courts will grant a decree of injunction if it can be demonstrated that **irreparable harm will result from the action if it is carried out, and that decision rests upon the discretion of the court.**

As an example, suppose a lender forecloses on a property because the owner of the property has sold it without allowing the lender to approve the new borrower, despite the fact that the note and trust deed contain a due-on-sale clause giving the lender that right. Now suppose that the foreclosing lender was about to sell the property before the courts could test his right to enforce the due-on-sale clause. The owner might get an injunction to stop the sale of the property until such could be determined.

Actions which are brought to eliminate a "cloud" on the title of property are known as **quiet title actions**. Sometimes an action to impose a cloud is also referred to as a quiet title action, but this is not technically correct. The quiet title action is an action to quiet the title to adverse or hostile claims. For example, suppose someone is claiming an interest in the title to your property, such as an easement, and it is discovered that there is a document in the chain of title granting that easement, but which does not properly belong there. If the adverse claimant will not voluntarily eliminate this cloud on the title, and it can be proven that the claim is invalid, the plaintiff would seek a quiet title action.

As you probably know, a lien is an encumbrance in which property serves as security for the payment of a debt or discharge of an obligation. You probably also know that to **foreclose** a lien is to cut off an owner's interest in property

upon which a lien is claimed. This is yet another type of equitable remedy. The ownership interest which is cut off may be entire, or it may be to the extent of the lien.

A judicial foreclosure involves the following steps:

1. foreclosing plaintiff alleges:
 - a. existence of a lien
 - b. nonpayment of the lien
2. foreclosing plaintiff establishes that the lien is secured by the specific property being foreclosed
3. foreclosing plaintiff asks the court to:
 - a. sell the property
 - b. apply the proceeds of the sale to the lien amount

In California there is a nonjudicial foreclosure proceeding called a "trustee's sale proceeding." The results are the same; it just doesn't require any type of court action.

#22 The term mandamus refers to yet another remedy in courts of equity. This one is used to compel public officials, whether elected or appointed, to do that they are supposed to do. This is not a common problem, but occasionally it is necessary. Mandamus means "writ of mandate," which is an order. Problems requiring a writ of mandate might occur in the recording of documents. In real estate, for example, the county recorder might refuse to record a document which is meant to convey title to property on the grounds that it does not meet the recorder's requirements. If the plaintiff believes that it indeed does meet the requirements, he might seek a writ of mandate to compel the recorder to record the document. Another example would be in the issuance of licenses. The real estate commissioner's job, or part of it, is to issue licenses to people who complete all the requirements. If there is a dispute between the commissioner and an applicant, and the applicant feels he can prove he has satisfied the requirements, the applicant might seek a writ of mandate compelling the commissioner to issue the license.

#38 Finally, reformation is an equitable remedy. Reformation refers to the remedy of getting a document rewritten to conform more closely to the intent of the parties involved, such as parties to a contract. It is important to note that an action for reformation can in no way change the actual agreement between the parties, but is intended to correct errors, or to force the correction of errors, should one party to the contract refuse to. For example, if a critical date in a contract is inadvertently entered incorrectly, and if that error in some way benefits one of the parties to the contract, it is conceivable that that party might refuse to change the date to the actual date agreed upon. If this were to happen, the remedy of reformation would be appropriate.

THE STATUTE OF FRAUDS

One of the reasons that errors might appear in a contract is that the Statute of Frauds requires real estate contracts to be in writing. This implies that an agreement exists prior to the written contract, and that the written contract should reflect as accurately and honestly as possible the actual agreement which the written contract reflects. Sometimes errors occur in the translation from spoken agreement to contract. Contracts for real estate transactions, which we will discuss in greater detail in a later chapter, must not only be written but written properly if they are to be enforceable. If it is not enforceable, it is not enforceable either in courts of law or courts of equity. The statute of frauds is a legal doctrine which is both legal and equitable.

STATUTE OF LIMITATIONS

There is a series of laws which require that if a legal action is to be brought, it must be done within a prescribed period of time following the cause of the action. These statutes constitute another legal doctrine and are called collectively the statute of limitations. Legal actions (actions brought in courts of law) concerning contracts have a statute of limitations in California of four years. A plaintiff may wait for as long as three years and eleven months after the cause of the action to bring a lawsuit to a court of law, and will generally find the courts willing to hear the case. Courts of equity differ in this regard.

LACHES

Courts of equity have an equivalent of the statute of limitations called laches. Courts of equity will consider whether a plaintiff may have waited to bring a lawsuit in order to harm the defendant. If it is determined that the defendant "sat on his rights," and caused unconscionable harm to the defendant, the court may use the doctrine of laches to disallow the action. # 23

It is said that "equity must follow law." A good example of that is in this business of the legal doctrine of statute of limitations and the equitable doctrine of laches. Since the legal period for the statute of limitations is four years, courts of equity must follow law in that respect. In other words, they cannot extend the statute of limitations beyond four years, so that if an action is brought four years and a day after the cause of the action, courts of equity must bar the action. However, since courts of equity, as you will remember, are courts of "conscience," the court will not allow any actions which might prejudice the rights of the defendant, and that would include delaying the action unreasonably. A remedy may still be available, but it will have to be found

in a court of law instead, and there, as you know, the only remedy is one of damages, which may not be what is needed.

ESTOPPEL

Like laches, “estoppel” is a French word. The literal meaning is “stopper”. The following is the definition of estoppel given in “California Jurisprudence:

“...a bar by which a person, in consequence of his own previous action, is precluded from denying a fact which has led another to so conduct himself that if the truth is established the other will suffice.” What? Good question. To “preclude” from “denying” something means that one may not deny it. In this case, one may not deny a certain fact. What is that fact? It is a fact which has led someone else to do something. And what is the nature of that something? It is something which will cause the “person precluded from denying it” harm if the truth of it is established.

If that doesn’t help, think of it this way. If I have done something to you which, if I admitted it, would cause me to suffer (even where no actual illegality exists), and if this is something which will cause you harm if I don’t admit it, you can rely upon the doctrine of estoppel to “preclude me from denying it.”

Here’s another definition, this one from Section 623 of the California Evidence Code: “Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing is true, and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.”

If you sue me for something which is a result of you acting upon what I have led you to do, and if I have deliberately led you to do this by intentionally making you believe something is true, then the doctrine of estoppel says that I may not deny having done that. In real estate, there are applications of estoppel in conveyances and easements, as well as contract and agency law. We will be discussing all of these in more detail later.

For now, here is a concrete example of the application of estoppel in a real estate transaction. Suppose that I own an easement across your land, and this easement gives me access to a public street. I don’t use the easement for years and lead you to believe that I mean to abandon the easement. As a consequence, you build a structure that completely covers the easement. I watch the construction go up and don’t complain. When it’s nearly finished, I claim a right to use the easement. Under those conditions, my right to use the easement is terminated by estoppel. In real estate, the doctrine of estoppel is used in this way to terminate easements because society has expressed a desire to free titles of encumbrances which are in fact unused easements.

WRITTEN ASSIGNMENT 2 Chapter 2

- The doctrine of precedent which is followed in the courts is called:
 - citation
 - stare decisis
 - statute
 - none of the above
- In attempting to prove that a given proposition is supported by law, attorneys will refer to:
 - the constitution
 - citations
 - the judge’s conscience
 - none of the above
- An attorney might offer a constitutional authority, statutory authority, or administrative rule citation.
 - false
 - true
- Which is a legal encyclopedia in which may be found articles on all sorts of legal subject matter areas?
 - California Law
 - California Jurisprudence
 - California Opinion
 - none of the above
- Which is a “reporter series” in California?
 - California Reports
 - Pacific Reports
 - both “A” and “B”
 - neither “A” nor “B”
- Remedies of money are called:
 - equitable remedies
 - equitable relief
 - damages
 - none of the above
- Legal remedies today include:
 - damages
 - rescission
 - specific performance
 - both “A” and “B”
- Equitable remedies includes: specific performance, injunction, quiet title, foreclosure, mandamus, and reformation.
 - true
 - false
- Which of the following terms means to cancel or terminate an agreement?
 - foreclosure
 - mandamus
 - rescission
 - none of the above
- The remedy to compel the defendant to honor the agreement is that of:
 - mandamus
 - specific performance
 - injunction
 - none of the above

3

THE COMPONENTS OF PROPERTY

Technically, and in the historical sense, the word “property” does not refer to the thing owned, but rather to the rights or interests which the owner has in the thing owned. These rights include the right to possess, to use, to encumber, to dispose and to exclude. Thus property may be said to consist of a “bundle of rights” or a “bundle of interests” a person has in a thing, whether the thing is real or personal property.

However, today the practicing broker or salesperson and clients are not likely to think of real property in the historical legal sense as a bundle of rights or interests. Rather they regard the thing which is owned as property. This is a useful and appropriate approach and indeed it has the approval of California’s Legislature. In the Civil Code, the legislature has stated that “the thing of which there may be ownership is called property.” Ownership of a thing is the right to possess and use it to the exclusion of others. Property in this sense again is either real or personal. Real property, or real estate, as it is often called, consists of:

1. Land
2. Anything affixed to it as to be regarded as a permanent part of the land
3. That which is incidental or appurtenant to the land
4. That which is immovable by law

LAND

Land includes the soil, rock, other substances that compose the material of the earth. It also includes space — not just the space on the surface of the earth — but also the space beneath it and the space above it as well. The common law concept of land includes the space beneath the surface of the earth down to the center, and the space above it up to the “top of the sky.”

The California Civil Code expresses essentially the same

idea a little more realistically by saying that land “...includes free and occupied space for an indefinite distance upwards as well as downwards...”

Yielding to the realities of the air and space age, the courts in modern times have recognized a public right to the use of air space above private land, as a highway available to all, so long as such use does not unreasonably interfere with the landowner’s enjoyment of the property. Below the surface of the earth they have recognized the fluid and “fugitive” or moving nature of subsurface oil and gas. Such substances cannot be identified, isolated and confined strictly in a given space, and so they are incapable of ownership while they are in their natural state. They become capable of ownership when they are “captured.” The right of the landowner to drill vertically into his or her land for the purpose of capturing these substances is an intangible but valuable part of what is included in land, but this does not include any right to drill slantwise under a neighbor’s land for this purpose.

WATER

Despite the attention given to oil and gas and the wealth they represent, another fluid substance — water — is probably of greater economic importance to our society. A considerable body of law has developed concerning underground and surface water and related water rights.

THAT WHICH IS AFFIXED

In addition to land, real property consists of anything affixed to the land so as to be regarded as a permanent part of it, such as a building or a bridge or a tree, as well as anything that is similarly affixed to any already affixed object such as the doors of a building or permanently installed cabinets, or built-in appliances. For purposes of sale, however, emblements, industrial growing crops, and things

attached to or forming a part of the land which are agreed to be severed before sale or under contract of sale, are treated as goods and governed by the provisions of the Commercial Code regulating the sale of goods.

Emblements are the growing crops of the vegetable production of the soil produced annually by labor and not spontaneously. The term also denotes the right of a tenant to carry away, after the tenancy has ended, such annual products of the land as have resulted from the tenant's own care and labor.

It is interesting to trace the possible metamorphosis of personal property into real property, and vice versa, by severance and affixation. An underground deposit of iron is clearly land. When removed, transported and processed into steel girders, it is movable personal property. Used to erect a building it reverts to its status as real property. Eventually, when the building is razed, the salvage steel becomes personal property. Any part of it which is relegated to a dump and restored to its original status as part of the earth reverts to real property

THAT WHICH IS INCIDENTAL OR APPURTENANT

#45
That which is appurtenant to the land would include anything which is by right used with the land for its benefit. Examples are watercourses or easements — such as rights of way over adjoining lands, or even passages for light, air or heat, from or across the land of another. Another common type of appurtenance is stock in a mutual water company. When such stock is "appurtenant to the land," ownership of the stock may not be transferred unless the land is transferred with it. When such stock may not appurtenant to the land, of course, other landowners in the mutual water company district may buy it and thus become entitled to a larger share of the available water.

Finally, real property is anything which is immovable by law.

PERSONAL PROPERTY — THE MODERN CONCEPT

In an earlier chapter we said that personal property consists of every kind of property that is not real. It includes money, movable goods or chattels, evidences of debt and choses (things) in action. The last term is a legal phrase used loosely to describe the right to recover money or other personal property through a judicial proceeding. It includes the right to recover something under a contract, e.g. money owned

on a note, and the right to recover damages (money) for a tort or private wrong suffered.

In the light of the above definition and distinction between real and personal property, ordinarily it is not necessary to specify what is included in the conveyance of a clearly described parcel of land. However, in any doubtful case, prudence suggests clearly spelling out in writing the intentions of seller and buyer.

A likely place for such expression of intent is the deposit receipt agreement. This is especially appropriate when certain borderline types of property are involved, such as fixtures.

Fixtures are items of personal property which are attached to the land in such a manner as to be considered part of the land itself. Depending on the circumstances, personal property may or may not be so integrated with the land that it is regarded as part of the property and belongs to the owner thereof. This delicate question often arises when land is bought or sold, or when a tenant makes improvements and later the lease ends.

The California Legislature has provided at least a partial answer by statute. For example, it has declared that a thing is affixed to the land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or embedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. (Under the code, industrial growing crops, and things which by agreement are to be severed before the sale or under the contract of sale shall be treated as personal property and are governed by the law of sales of goods.)

This statutory definition is not all-inclusive, and the courts have upon occasion utilized five general tests to determine whether or not a given piece of personal property is a fixture. These are:

1. The intention of the person incorporating the personal property into the land. This test is usually considered the most important.
2. The method by which the property is so incorporated into the land. The degree of permanence of the annexation is significant. Thus, even in the absence of statutory definition, when the attachment is by cement and plaster, for example, the goods so attached are likely to be classified as fixtures.
3. The adaptability of the personal property so attached for ordinary use in connection with the land. If well adapted, it is probably a fixture.

4

SUBDIVISION LAW

The category of subdivision law is being introduced at this point because it furthers the discussion of property components and descriptions introduced in the last chapter. Furthermore, it is important to begin to see how the relationship between real estate and the law, together with the legal doctrines introduced in chapter two, come together to regulate one of the more important aspects of modern real estate practice.

The basic major laws governing the practice of real estate in California are:

1. The Real Estate Law, as amended and in effect January 1, 1985. This law consists of Division 4 of the Business and Professions Code, and is in two parts. The first part covers licensing of persons (Sections 10000 to 10602), and is the part normally referred to as "The Real Estate Law." The second part of Division 4 covers regulations of transactions (Sections 11000 to 11202), and is normally referred to as the Subdivided Lands Law.

2. The Subdivision Map Act. This law is found in Government Code Sections 66410 et seq. Although this law together with the Subdivided Lands Law are the two basic laws governing subdivisions in California, only the Subdivided Lands Act (part of the Real Estate Law mentioned in (1) above) is actually administered by the Real Estate Commissioner. The important thing to remember about these two subdivision laws is that each was adopted for a different purpose, and in order to achieve those purposes each one adopted a different definition of a subdivision. The primary objective of the Subdivision Map Act is to provide definitions of terms and to outline methods of map filing procedure applicable on a statewide basis. The primary objective of the Subdivided Lands Law, on the other hand, is to protect purchasers of property in new subdivisions from fraud, misrepresentation, or deceit in the marketing of subdivided lots, parcels, units and undivided interests in the State of California.

(3) Regulations of the Real Estate Commissioner. Another

major law governing real estate business in California, this one is found as Title 10 of the California Administrative Code. We will discuss this law separately.

(4) The Administrative Procedures Act. This law is found as Government Code Sections 11503-11528, and will also be treated separately.

Although these four are the principle laws which govern real estate in California, you will realize as you continue through the course that there are many other pertinent statutes found in other codes which reflect upon real estate and with which you must become familiar.

But to return to the subject at hand—remember for now that the Subdivided Lands Law is the second part of the so-called "Real Estate Law" found in the Business and Professions Code as Section 11000 - 11202, and has the objective of protecting purchasers of property; whereas, the Subdivision Map Act, which is Government Code Sections 66410 et seq., has the purpose of defining terms and outlining methods for filing.

WHY SUBDIVISION LAWS ARE NECESSARY

Government at all levels is involved in the real estate business. Its activities are manifested in a number of federal and state agencies or departments, as well as through the work of many special administrative agencies and local or district organizations.

With the continued growth of population and movement of people into cities and suburban areas, problems arose which only concerted public effort through governmental action could solve. These problems included the prevention of fraud and misrepresentation in the sale of subdivided real property; the regulation of lot design and physical improvements for the orderly and proper development of the community; the construction of streets and

vision can be offered for sale in California until the commissioner has issued a subdivision public report. This applies not only to tracts located in California, but to subdivided lands lying outside the state's boundaries. The public report is a disclosure document giving a factual account of the subdivided property.

The public report is not issued until the commissioner is satisfied that the subdivider has met all statutory requirements with particular emphasis on the establishment of financial arrangements to assure completion and maintenance of improvements and facilities included in the offering and a showing that the lots or parcels can be used for the purpose for which they are being offered.

The definitions of "subdivision" under Section 11000 et seq. of the Subdivided Lands Law and Section 66424 of the Subdivision Map Act differ in many important respects. The common part of the definition for "subdivision" is:

"division of improved or unimproved land for the purpose of sale or lease or financing whether immediate or future"

The main differences or similarities are as follows.

1. The Subdivided Lands Law (hereafter called SLL) has no standard qualifying subdivisions within city limits; the Subdivision Map Act (hereafter called SMA) has this included.
2. The SLL refers to 5 or more parcels; the SMA refers to 2 or more parcels.
3. The SLL refers to "proposed" divisions; SMA does not.
4. There is no contiguity requirement in the SLL; in the SMA land must be contiguous units.
5. In the SLL, 160 acres and larger parcels, designated as such by government survey, are exempt; there is no such exemption in the SMA.
6. Community apartments are included in both the SLL and SMA.
7. Condominiums are included in both.
8. Stock cooperatives are included in the SLL, but no in the SMA unless they are 5 or more existing dwelling units converted.
9. In neither law is the leasing of apartments, offices, stores or similar space in apartment building, industrial building or commercial building included.

10. In the SLL, long term leasing of spaces in mobilehome parks or trailer parks is included; the leasing or financing of mobilehome parks or trailer parks is not included in the SMA.

11. Undivided interests are included in the SLL, but not the SMA.

12. Expressly zoned industrial or commercial subdivisions are exempt in the SLL, but not in the SMA.

13. Agricultural leases are included under the SLL, but not the SMA.

14. Timeshares are included in the SLL, but not the SMA.

15. Limited-equity housing cooperatives are included in SLL, but not the SMA; however, there are some exemptions available under Section 11003.4 of the Business and Professions Code.

It should be noted that a division of land for purposes of financing is included under both definitions and requires the filing of a notice of intention under the Subdivided Lands Law and may require the filing of a map under the Subdivision Map Act.

COMPLIANCE AND GOVERNMENTAL CONSULTATION

Full compliance with all of the provisions of the Subdivision Map Act and the Subdivided Lands Law is required in any subdivision development program. Subdividers and their professional consultants must be thoroughly familiar not only with the provisions of the state laws, but also with the specific provisions in the local subdivision control ordinance in effect in a particular community in which the subdivision is being developed. Numerous differences exist in the various local subdivision ordinances because of a great diversity in types of communities and conditions throughout the state.

It is recommended that land developers and subdividers consult the Department of Real Estate at an early stage in the planning of any subdivision development program to be fully aware of the current requirements of the Real Estate Commissioner with respect to the subdivision qualification under consideration.

The federal government plays an important role in the financing of home building through its mortgage insurance program. It is vital in a subdivision which proposes a building program with government-insured or guaranteed financing that the developer consult with the Federal Housing Administration, the Veteran's Administration and any

other appropriate agencies.

Subdivisions Differ — Laws Regulating Them Differ

The commissioner, under the law, regulates the conditions surrounding the sale or lease of subdivided real property while the city or county regulates the lot design and physical improvements. The commissioner is concerned with preventing fraud and misrepresentation in selling; the city or county is concerned with the orderly and proper development of the community.

It is common to think of a subdivision as a partition of a large piece of property into units designed for sale or lease for specific purposes. Ordinarily this is the case. The majority of subdivisions might be designated as lot and residential subdivisions. The parcels created are intended for sale to private individuals who plan to build homes upon them, or to speculative builders who will erect houses and sell the entire package, that is, the house and lot together.

Note: Every broker and salesperson and prospective licensee — even though they have no thought of subdividing on their own account — should be thoroughly familiar with the extent and purpose of the Commissioner's jurisdiction over the sale or lease of newly subdivided land. Sooner or later the majority of active licensees are associated with the sale of subdivided property or are called on for advice in preparing a subdivision for market.

Sometimes a broker will find that a principal is creating a subdivision without realizing it. The broker should be equipped to protect the principal from the danger of running afoul of the law.

Furthermore, when selling subdivision property the broker must make sure that two important requirements of the subdivision law are observed. First, broker must furnish the prospective buyer with a copy of the Commissioner's Subdivision Public Report and give the prospective buyer an opportunity to read it before the prospect signs up to purchase. Secondly, broker must handle the deposit or purchase money in accordance with the law. Moreover, since out-of-state subdivision offerings are treated as real property securities under the provisions of Section 10249, 10249.1 and 10249.2 of the Business and Professions Code the licensee should pay special attention to the requirements imposed before agreeing to act as an agent to handle such properties.

MOBILEHOMES

This state has been called the most mobile state in the nation. In the past this referred to the great amount of automobile and truck travel, but today it has a new dimen-

sion — mobilehomes. Since mobilehomes offer permanent housing they have become a significant factor in the housing industry. The sale or lease of five or more lots in a mobilehome park is under the jurisdiction of the commissioner and the provisions of the Subdivided Lands Law apply.

The rental of lots in a mobilehome park is under the jurisdiction of the State Department of Housing and Community Development. Section 18214 of the Health and Safety Code defines a mobilehome park as "...any area or tract of land where two or more mobilehomes used or leased or held out for rent or lease to accommodate mobilehomes used for human habitation." The enforcement of the code may be administered by local authority if they assume the responsibility of such enforcement.

RESORT PROPERTIES

Then there are the resort type subdivisions involving such properties as lots created or interests created with the intention of selling them to persons who propose to build a retirement home or a second vacation home or who desire to purchase an interest in a time-share project.

Other divisions of land occur when the subdivider has the intention of creating an industrial or commercial complex, or a community of small agriculturalists. In the past, mineral, oil and gas subdivisions have been created, the intention being the sale or lease of the parcels to persons interested in the mineral, oil and gas possibilities extant in the land. Not for some time has such a subdivision been offered in California.

COMMON INTEREST SUBDIVISIONS

As the subdivision process has become more sophisticated, very often due to scarcity of land suitable for subdividing and the resulting higher land prices, new types of subdivisions have come into being. The legislature has taken cognizance of this trend and has enacted laws to regulate such developments, including planned developments, community apartment houses, condominiums, limited-equity housing cooperatives, and undivided interest subdivisions. It is quite evident that these projects depart from the classic conception of a subdivision as being the simple division of a large piece of land into smaller parcels for the construction of individual homes.

Classification of Subdivisions

Basically, subdivisions may be classified as:

1. Standard: a land division with no common or mutual rights of either ownership or use among the owners of the parcels created by the division.

2. Common interest: individuals own or lease a separate lot or unit, or an interest therein, together with an undivided interest or membership interest in the common areas of the entire project, which common areas are usually governed by a homeowner's association. These subdivisions vary both in physical design and legal form. Condominiums, planned developments, stock cooperatives and community apartment projects are examples, as are time-sharing projects.

3. Undivided interests: the purchaser receives an undivided interest in a parcel of land as a tenant in common with all the other owners. All owners have the nonexclusive right to the use and occupancy of the property. A recreational vehicle park, with campground and other recreational amenities is an example.

4. Land project: briefly, it is a remote area subdivision of 50 or more parcels without onsite improvements, with less than 1,500 registered voters residing within certain distances from the subdivision.

In addition to the standard title policy coverages, many lenders require affirmative insurance on encroachments, priority over possible mechanics' liens, and certain possessory and survey matters. Most California land title companies make these coverages available, but arrangements should be made before work on the subdivision is started.

Covenants, Conditions and Restrictions

Subdividers, mortgage lenders, government agencies, and homebuyers need a means of assurance that the nature of a subdivision will remain unchanged. The mechanism most commonly used in California to assure this protection is deed restrictions, for which the current term is the "declaration of covenants, conditions and restrictions" or CC&Rs.

The traditional use of deed restrictions has been to control land use by requiring structures to be a certain size or price, or by restricting types of use such as prohibitions against the sale of alcoholic beverages.

The importance of restrictions has lately shifted to a broader purpose as the number of condominiums and planned developments has increased. CC&Rs are used not only to control land use, but to prescribe the very nature of the common interest subdivision, to provide for maintenance of the project, set down rules for behavior of persons, and as a vehicle for raising money for maintenance, repair and replacement of the project's components.

Restrictions may be set out in the deed to the land, which is frequently the case when the restrictions are quite simple. When the covenants, conditions and restrictions are complex, as they usually are for a common interest subdivision, they are best put out in a separate document. There are technical requirements to be met if the CC&Rs are to be effective. It is an excellent idea to employ a knowledgeable lawyer to draft and control the implementation of the restrictions.

Common interest subdivisions almost invariably have a homeowners' association to carry out the mandates of the CC&Rs. For common interest subdivisions, the Commissioner has adopted regulations that require reasonable arrangements for CC&Rs and the other governing instruments for the subdivision.

Often, a parcel of land is subject to restrictions that were recorded years before. A title report will disclose them, and they should be examined to discover whether their provisions will hinder the intended development. They are frequently setback provisions, limits on density and myriad other provisions which cannot be eliminated.

FUNCTIONS IN LAND SUBDIVISION

Before going into specifics regarding the Subdivision Map Act and the commissioner's role under the Subdivided Lands Law controlling the sale of subdivisions, let us first consider the functions of other agencies and individuals important to the subdivision process.

TITLE COMPANY

Services provided by California land title companies can greatly assist the subdivider in the development of a subdivision. After the land to be subdivided has been acquired, the title company will issue a preliminary guaranty showing the names of the persons required to sign the subdivision map as specified by the Map Act. The title company also provides the preliminary title report required by the Department of Real Estate when the Application for a public report is filed by the subdivider.

One of the main services offered by title companies is the subdivision processing service. They will handle all the "paper work" to be submitted to the Department except for the management documents and the homeowner association budget. Usually, this valuable service is offered to subdividers at little or no cost, provided the subdivider contracts for title insurance through the company.

5

ESTATES AND TITLES: REAL ESTATE OWNERSHIP LAW

HISTORY OF LAND OWNERSHIP IN CALIFORNIA

It is appropriate to begin a discussion of property ownership in California (estates, titles, etc.) and applicable laws with a brief historical overview of land titles in this state. The story of California is one of the most picturesque among the histories of our states. From the time in 1513 when Vasco Nunez de Balboa first sighted the Pacific Ocean, claiming it and the shores washed by it for the King of Spain, until 1822, the lands that are now California were part of the Spanish realm.

During this period of Spanish rule, the local government was of a patriarchal nature, with little regard for formal civil law. Military law prevailed as presidios or army garrison towns were established to maintain Spanish dominion over the vast and varied, but sparsely populated territory. As instruments for spreading the Christian faith, and for the more mundane purpose of providing supplies for the military posts, numerous missions were established, beginning in 1769 with the Franciscan mission at San Diego.

All land in California was held in the name of the King of Spain, and technically it belonged to him. Ownership and transfer of land and property rights therein were governed by the law prevailing in Spain. Significantly, Spain, like the other leading countries on the Continent of Europe, used the Roman Civil Law as distinguished from the Common Law followed in England and its colonies.

#1
In Civil Law countries the judges were guided by elaborate and detailed codes imposed by the sovereign. Under the Common Law of England, on the other hand, the judges, in hearing and deciding cases, recognized and enforced the customs and usages of the people. To be sure, when specific legislation on a question had been enacted, the judges would accept and apply it. And so it was that at the time of the American Revolution the Common Law of England then in force (including applicable acts of Parlia-

ment) became a part of our law. Since then it has continued to develop in this country with contributions by both legislative bodies and the courts.

Returning now to California under the Civil Law of Spanish rule: the use of the land could be acquired only by political or military agencies of the king. These rights to the use of the land were not, however, grants of an absolute fee title. Thus it was that several rancho grants made by the Spanish monarchs were solely for limited grazing and agricultural purposes.

Mexican Rule. In 1822 Mexico, then a territorial possession of Spain, established its independence. Inspired by the stories of fabulous wealth in California, the Mexican government encouraged colonization. Governors were given absolute discretion in the selection of the persons who could receive grants of land. An applicant for land filed a petition with the governor and, if approved received a decree which was referred to the legislative body for ratification.

Upon such approval a formal grant of the land petitioned for was made. This grant, together with the various instruments appurtenant thereto, was filed and recorded in the government archives and was known as "expediente."

Other steps in the transfer of property from the state to the individual was the marking off of monuments on the land being transferred, and establishing the grantee in possession. The latter act was usually done by some officer with judicial capacity. The governor was empowered to recognize grants and possessory rights formerly made by the Spanish government.

American Rule. In the early 1800s it became increasingly apparent, by reason of the immigration of American settlers to the Pacific coast, that Mexico could not maintain its sovereignty over California. Conditions in California became chaotic, and after years of turmoil and disorder the Bear Flag Republic emerged, to be followed by the American

53

instrument is deemed to be recorded when it is duly acknowledged or verified and deposited in the recorder's office with the proper officer of record and marked "filed for record." When a document is deposited or filed for record it is the duty of the recorder to endorse upon it its proper filing number in the order in which it is deposited and the time when it was received, noting the year, month, day, hour and minute of its reception, and to record the document without delay. The recorder indicates at whose request it was "filed for record." The contents of the document then must be transferred in writing to its appropriate book of records upon the page endorsed on the document, and when this has been done the original document is returned to the party who left it for recording. The recorder indexes all recorded documents in alphabetical order according to the names of the grantors and grantees or mortgagors or mortgagees, name or nature of the document, date of recording, and recording reference.

The effect of recording an instrument is to give constructive notice to all the world of the content of any instrument or document filed for record.

Actual notice consists of express information of a fact. Constructive notice is construed to be that which is imputed by law. Thus even if a person did not see the recorded information, such person is presumed to know it because he or she could have discovered the facts by proper inquiry. Courts have held, however, that mere recording does not validate a void or defective instrument.

Effect of Recording as Imparting Notice. The courts have ruled that the benefits of a recording statute are not available to one who takes title with actual notice of a previously executed though unrecorded instrument. Also it has been ruled that possession of land by a person other than the record owner is implied notice to the purchaser (or to the person acquiring an interest in or lien upon said property from such owner) of the right, title, interest or claim of the possessor. Thus despite the recording statutes and the assurance they give as to the status of title, the prudent purchaser should always make an actual inspection of the premises in person or through a trusted agent. This is so not only to evaluate the property, but also to determine the rights of anyone — other than the seller — who may be in possession. Failure to make such an inspection does not relieve the buyer of the notice buyer would have received by proper inquiry.

Priorities in Recording. As already noted recordation is a privilege and is not essential to validate most instruments affecting title to real property, although failure to take advantage of the recording laws penalizes those who do not use the recording system. Certain documents, such as a

declaration of homestead, must be officially recorded to be effective. But deeds, judgments, contracts, if valid in themselves, bind the parties thereto without benefit of recordation. Recordation is eminently useful nevertheless to clarify the status of land, which remains one of the most valuable assets acquired by the average individual and is not to be dealt with casually. Recordation moreover serves to reward the diligent and to protect the innocent against the dishonest.

In the absence of special conditions, such as possession by someone other than the seller, if an unscrupulous owner sells the same land to two or more persons in succession, the question of who records first is critical.

Note: One might properly assume that the first buyer gets title — i.e., that the first interest created is prior because "first in time is first in right." However, if the recordation statutes are to function as intended, this basic rule must give way. It does indeed yield under the California recording system which provides that the first in time may not prevail over parties who in good faith and for a valuable consideration acquire an interest and record it first. In other words, with respect to this limited class of "bona fide purchasers and encumbrancers for value and without notice" the general rule of priority is altered to read "first to record is first in right." Of course, a party first recording who cannot definitely establish a position as a "bona fide purchaser" will not prevail over an unrecorded interest prior in time.

Unrecorded Interests. There are many types of unrecorded interests, the existence of which may be suggested by a physical inspection of the property and which are therefore presumed to put the purchaser on sufficient notice to deny any claim to a preferred status as "bona fide purchaser." In other words, the evidence of these unrecorded interests is so apparent that a prospective purchaser is presumed to be put on notice by their very existence.

For example: some of the types of notice which may be presumed from an inspection of the property include the following: possession in one other than the seller — notice presumed of an unrecorded contract of sale or lease; pathways or sewer line on property — notice presumed of an unrecorded easement in adjoining owners; fence or wall in a particular location — notice presumed of rights of adjoining owners to encroach upon subject property; lumber on lot or recent carpentry work on premises — notice presumed of rights of persons to file mechanic's liens.

The recording laws do not protect the party "first to record" against the foregoing, nor do standard-form title insurance policies cover such situations.

Special Lien Situations. The subject of liens and encumbrances is discussed in some detail in Chapter Seven, but it will be helpful to note here the impact of the recording laws on this subject.

Lenders often agree to make what are termed “future advances” as a part of the secured loan transaction. It may happen that another lien will intervene (for example, a second deed of trust or mechanic’s lien) between the time of recordation of the original lender’s security instrument and the time of future advance made pursuant thereto. A priority question is then posed.

Sometimes under the terms of the original loan transaction, the lender is required to make further advances. An example of this is an installment payment under a construction loan. This is called an “obligatory advance.” It takes priority from the date the original deed of trust was recorded regardless of intervening liens.

In other cases, the lender may have the privilege of advancing more money to the borrower, but is not required to do so. This advance is called an “optional advance.” It dates only from the time it is made unless the lender can show lender received no actual or constructive notice of intervening liens.

As between deed of trust and mechanic’s liens, the latter relates back to the time of the commencement of the construction work as a whole. This accounts for the rule that a deed of trust must be executed and recorded prior to commencement of any work at all in order to assure its priority.

Tax and assessment liens generally prevail over private real property interests. Among themselves, these governmental liens are now often held to be on a parity.

Persons having priority may be agreement waive their rights in favor of others. An agreement to do this is called a “subordination agreement.” These agreements are often executed in connection with deeds of trust to subordinate a landowner’s “purchase-money deed of trust” to a construction loan. Without such priority of claim for payment against the real property, the building contractor might refuse to expend time and materials on the project.

OWNERSHIP OF REAL PROPERTY

The historical development of land titles has been traced, and the importance of recording titles to land has been noted. This is an appropriate time to consider how title may

be held.

All property has an owner — either the government, federal, state or local, or some private institution or party. It is the latter category that concerns us. We can recognize two basic kinds of ownership, one having certain divisions:

1. Separate ownership
2. Concurrent ownership
 - a. Tenancy in common
 - b. Joint tenancy
 - c. Community property
 - d. Tenancy in partnership

SEPARATE OWNERSHIP

Sole or several ownership simply means ownership by one person. Don't be confused by the word "several." Think of "several" in relation to "severed," as ownership severed from others. Being the sole owner, one person alone enjoys the benefits of property and is subject to the accompanying burdens, such as the payment of taxes. A sole owner is free to dispose of property at will, and normally only a sole owner's signature is required on the deed of conveyance. Indeed, even after marriage, a husband or wife may continue to own real (and personal) property in severalty (separately). # 47

CONCURRENT OWNERSHIP # 73

Concurrent ownership or co-ownership, on the other hand, means simultaneous ownership of a given piece of property by two or more persons. The several types of concurrent ownership are listed above, and we will discuss them separately.

Tenancy in Common. Tenancy in common exists when two or more persons are owners of undivided interests in a single estate. It is created whenever an instrument conveying an interest in real property (or personal property, for that matter) to two or more persons does not specify that the interest is acquired by them in joint tenancy or in partnership or as community property. # 59

Example: Interests of such co-tenants may be any fraction of the whole — thus one party may own one-tenth, another three-tenths, and a third party may own the remaining six-tenths. The deed to co-tenants should recite their respec-

tive interests, or there is a presumption their interests are equal.

There is a unity of possession in tenancy in common, meaning each owner has a right to possession and none can exclude the others nor claim any specific portion for himself or herself alone. It follows that no tenant in common while in possession can be charged rent for the use of the land unless otherwise agreed to by all tenants.

On the other hand, a tenant in common who receives rent for the premises from a third party, must divide such profits with the other tenants in common in proportion to the shares owned. By the same token, payments made by one tenant in common for the benefit of all may normally be recovered on a proportionate basis from all. These might include moneys spent for repairs, taxes, interest and principal under a trust deed. Of course, this would not apply to unnecessary improvements, unless made with the consent of the other owners.

77
Any tenant in common is free to sell, convey or mortgage the tenant's own interest as he or she sees fit, and the new owner simply takes a place as a tenant in common with the other owner or owners. Sometimes this may be impractical, and the tenant in common may force a sale of the entire property by filing an action in court known as a "partition action." Upon death there is no right of survivorship, the undivided interest of a tenant in common passes to his or her heirs or devisees who simply take the tenant's place among the owners of the property in common.

58
Joint Tenancy. Joint tenancy exists when two or more persons are joint and equal owners of the same undivided interest in specified real (or personal) property. Dating back many years to the classic "Commentaries" of Blackstone, this identity, under which each owner has exactly the same rights as every other owner, is described as a fourfold unity: "The unity of interest, the unity of title, the unity of time, and the unity of possession; in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession."

The most important characteristic of a joint tenancy from a practical standpoint, however, is the right of survivorship which flows from the unity of interest. It means that if one joint tenant dies, the surviving joint tenant (or tenants) immediately becomes the sole owner. As the California Supreme Court has stated, the survivor *...succeeds to no new title or right upon the death of his tenant, but is merely relieved thereby from the further interference of the co-tenant.* This accounts for the fact that joint tenancy property cannot be disposed of by will of a joint tenant nor does it become part of the estate of a joint tenant subject to

probate. Further, the surviving joint tenant is not even liable to creditors of the deceased who hold unforeclosed liens on the joint tenancy property.

The creditors of a joint tenant who is still alive may proceed against the interest of that tenant and force an execution sale. This would leave the title in the execution purchaser and the other joint tenant as tenants in common.

The Unities — Exception to: At common law, if any one of the four unities — time, title, interest or possession — is lacking, a tenancy in common exists. California appellate courts have accepted and enforced this rule, but by statute one exception does exist.

Prior to the creation of this statutory exception, if the sole owner of land in severalty wanted to make someone else a joint tenant with himself or herself, this could not be done by direct conveyance to the sole owner and the co-tenant. This was so because the essential unity of title was not respected: the interests of the two joint tenants did not arise from a single transfer, since one already previously owned the property.

By amendment to the Civil Code, the State Legislature authorized creation of joint tenancies:

- (1) By a title created by a simple will or transfer, when expressly declared to be a joint tenancy. (Note: This is the traditional and customary manner.)
- (2) By transfer from a sole owner to himself or herself and others. (Note: This would validate the hypothetical example cited above.)
- (3) By transfer from tenants in common or joint tenants to themselves or to themselves and others.
- (4) By transfers from a husband and wife (when holding title as community property or otherwise) to themselves, or to themselves and others.
- (5) By transfer to executors of an estate or trustees of a trust.

In each case it is important to designate the grantees in the deed "as joint tenants" or to state that they take "in joint tenancy." Although it is generally stated that these "magic words" of the statute are not essential if the words actually used clearly indicate an intent to create a joint tenancy, failure to use them may hamper insurability of the title, and invites litigation. There is, moreover, disagreement in the decisions of the courts as to just what is a sufficient expression of intent.

Contrary to the belief of many, the words "with the right of

property); nor against rights or claims not shown by public records, yet which could be ascertained by physical inspection of the land, or by appropriate inquiry of persons on the land, or by a correct survey; nor against mining claims, reservations in patents, or water rights; nor against zoning ordinances.

These limitations are not as dangerous as they might appear to be. To a considerable extent they can be eliminated by careful inspection of the land involved and routine inquiry as to the status of persons in possession. However, if desired, most of these risks can be covered by special endorsement or use of extended coverage policies at added premium cost.

A.L.T.A. Policy. In California many loans secured by realty have been made by out-of-state insurance companies which were not in a position to make personal inspection of the properties involved except at disproportionate expense. For them and other nonresident lenders, the special A.L.T.A. (American Land Title Association) policy was developed. It expands the risks normally insured against under the standard policy to include the following:

1. Unrecorded liens
2. Off-record easements
3. Rights of parties in physical possession, including tenants and buyers under unrecorded instruments.
4. rights and claims which a correct survey or physical inspection of the land would show.
5. mining claims, reservations in patents, and water rights.

Needless to say, the insurance company issues such a policy only after itself obtaining a competent survey and physical inspection of the property.

Extended Coverage. The American Land Title Association has adopted an owner's extended coverage policy (designated as A.L.T.A. Owner's Policy Form, Standard Form, as amended 1970) that provides to buyers or owners the same protection that the A.L.T.A. policy gives lenders. But note that even in these policies no protection is afforded against defects on other matters concerning the title which are known to the insured to exist at the date of the policy yet have not previously been communicated in writing to the insurer, nor against governmental regulations concerning occupancy and use. The former limitation is self-explanatory; the latter is due to the fluid and frequently changing nature of governmental zoning regulations.

Title Insurance Companies in California. Under the provisions of the Insurance Code of California, each title insur-

ance company organized under the laws of this State must have at least \$500,000 paid-in capital, and must deposit with the Insurance Commissioner a "guaranteed fund" of \$100,000 in cash or approved securities.

It must also set apart annually, as a title insurance surplus fund, a sum equal to 10 percent of its premiums collected during the year, until this fund equals the lesser of 25 percent of the paid-in capital of the company or \$1,000,000. This fund — very substantial in the case of the larger and older companies — is constantly maintained as a further security to the holders and beneficiaries of policies of title insurance.

Policies of title insurance are now almost universally used in California, largely in the standardized forms prepared by the California Land Title Association, which is the trade organization of the title companies of the state. Every title insurer must adopt and make available to the public a schedule of fees and charges for title policies. Today it is the general practice in California for buyers, sellers and lenders — as well as the attorneys and real estate brokers who serve them — to rely on title insurance companies for title information, title reports and policies of title insurance.

Rebate Law. Title companies are required to charge for title reports under the terms of legislation adopted at the 1967 general session of the California Legislature. The rebate law requires the title companies to not only charge for reports, but to also make sincere efforts to collect them except in certain defined circumstances.

Title insurance companies can still furnish "the name of the owner of record and the record description of any parcel of real property" without charge.

The statute extends the anti-commission provisions of Section 12404 of the Insurance Code to prohibit direct or indirect payments by a title company to principals in a transaction as a consideration for title business.

Thus, the law prohibits a title company from paying, either directly or indirectly, any commission, rebate, or other consideration as an inducement for or as compensation on any title insurance business, escrow or other title business in connection with which a title policy is issued.

Torrens System of Land Registration. Of purely historical interest in California — although still found elsewhere — is the Torrens system of land title registration, patterned after the system of registering titles to ships. It was adopted here in 1914 as the Land Title Act, and provided for registration after a court decree in an action similar to a quiet title suit.

Always optional, the system never became popular, and its limited use was confined almost exclusively to the southern counties of the State. In 1955 the Torrens Act was repealed.

6

REAL ESTATE LICENSE LAW

#11

As previously explained, the so-called "Real Estate Law" is codified as Division 4 of the Business and Professions Code, and consists of two parts. Part 1 covers Licensing of Persons (Sections 10000 to 10602), and it is this part which is normally referred to as "The Real Estate Law." The second part of Division 4 of the B&P Code covers Regulation of Transactions, and is called The Subdivided Lands Law (Sections 11000-11202). The Subdivided Lands Law will be treated in a separate chapter. In this chapter, "Real Estate License Law," we are concerned primarily with Part 1 of Division 4. The full text of the law and Regulations of the Real Estate Commissioner which clarify, implement, interpret or make specific its various sections appears in the "Real Estate Law," a book published by the Department of Real Estate.

As America outgrew its pioneering and homesteading stages of development and moved steadily toward greater and greater urbanization, city dwellers across the land found they personally could no longer satisfactorily "strike a deal" with strangers in bargaining for land and homes.

The need for an intermediary to provide basic real estate knowledge and services, to negotiate and bring about desired results, was very real. This need was met in the person of the real estate agent, who continues to fill this important role in the complexities of today's society.

However, along with increasing opportunities to provide real estate agency services to the maturing nation came certain abuses of the public trust in the form of unethical, illegal or sharp practices by dishonest or incompetent agents operating in a climate of unorganized and often unscrupulous competition. Real estate practitioners themselves began to see the need for some type of controlling organization.

The general public's legitimate interest in the buying, selling, exchanging and financing of real property predictably led to the regulation of the real estate business through the adoption, state by state and over time, of reasonable

legislative and administrative controls. The enactment of such controls is within the general power of a state to regulate any occupation whose membership should meet specified qualifications.

Today, all fifty states and the District of Columbia have enacted statutes governing to some degree the licensing, regulation and conduct of real estate agents. The nation's first real estate licensing law was passed in California in 1917. It was challenged in the courts and declared to be unconstitutional. The Real Estate Act of 1919 was then adopted and upheld by the State Supreme Court as being a reasonable exercise of the power of the state to regulate the conduct of its citizens in the interest of the common good. With subsequent amendments and additions the law has been in effect ever since.

Real estate agents operating in the 1980s provide both basic services and specializations to the modern community. General brokerage, property management, development, financing, counseling, franchising and appraising are examples of the services offered by today's real estate professionals in the fields of residential, commercial and industrial, investment, special purpose, raw land, and agricultural real estate. Consumer concern that high business standards be maintained by today's broker professional is no less that it was when the real estate profession first came under regulation.

During the past 65 years, as weaknesses in existing laws to control abuses in real estate activities were revealed, corrective legislation was passed by socially responsive legislators until today a complete set of reasonable licensing, regulatory and subdivision marketing controls are in place and enforced by the California Real Estate Commissioner. As you already know, this power of government regulation and supervision is called "police power," and since we have explained police power in some detail, we will move on to a consideration of the Real Estate Law itself.

Real Estate Act—A Brief History. The California Department of Real Estate, whose chief officer is the Real Estate

Commissioner, was created by legislative act in 1917. It was the first law of its kind providing for the licensing and regulation of real estate agents. It has served as a pattern for similar legislation in many other states.

As first enacted, the law was declared unconstitutional by the state Supreme Court **In re Raleigh, 177 C.746** on March 19, 1918. Opponents had claimed the act was unreasonable interference with the right of every citizen to engage in legitimate and useful occupation and that the power given to the commissioner was arbitrary. In its ruling the court found the act invalid because it exempted from its provisions those corporations and persons who had "received from the Insurance Commissioner or the Bureau of Building and Loan Supervision a certain authority or license to do business within the state."

The court noted the requirements for obtaining licenses from the Insurance Commissioner were much more simple and far less burdensome than those imposed upon real estate brokers and salespersons by the real estate act, e.g., insurance licensees did not require recommendations vouching for their truthfulness and honesty; did not need a bond; and did not need to maintain an office. The court could not discern any reason for these special conditions or concessions but raised no other objections to the act.

Constitutionality of Act Declared. The constitutionality of the act was still in question when a new Real Estate Commissioner, Ray L. Riley, was appointed on July 28, 1919. Through his urging, the Legislature passed the Gates Bill which amended the original real estate law. As amended, the law was upheld by the Supreme Court in November, 1919.

Among the strongest supporters of the real estate licensing law was the organized real estate industry itself. The industry believed the reasonable regulation of those engaged in the real estate business would benefit the public and assist in creating and maintaining higher professional standards and ethical practices in the conduct of real estate brokerage activities.

Thus the law is designed primarily for the protection of the public in real estate transactions in which the services of an agent are employed. By requiring qualifications for licensing (the original act did not require a licensing examination) the Commissioner is able to ascertain that persons acting in the capacity of a broker or salesperson have certain knowledge qualifications.

This power given to the Commissioner is not arbitrary and is not without control or guidance. If the Commissioner finds that an applicant for license is not honest and truthful, that finding must be based upon facts which reasonably justify this conclusion. When an applicant in fact has the

qualifications required by law, the Commissioner must issue the license.

By requiring qualifications for license and by the establishment and enforcement of definite standards and practices, the law has also played an important part in the continuing industry drive for professional designations and recognition for those engaged in real estate practice.

Commissioner's Jurisdiction Extended. Since the passage of the original act creating the Department of Real Estate, the jurisdiction of the Real Estate Commissioner, at first only over the licensing of real estate brokers and salespersons, has been gradually extended.

Beginning in 1933 the administration and enforcement of those provisions of the Business and Professions Code regulating the sale or lease of subdivided lands (Subdivided Lands Law) have been a responsibility of the Commissioner and the department with gradual yet consistent increases over time in the degree of authority given to the Commissioner by law.

As with the licensing law, the subdivided lands provisions were attacked as being unconstitutional in that they placed unreasonable burdens on the exercise of property rights, they were vague and uncertain, and they benefited only a special class and not a whole public. Again, our Supreme Court held these contentions were not sound. The court held that the object of the law was the prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to abuses. The court said the method of furnishing information to real property purchasers which involved investigation and written disclosure of certain essential facts was protection for innocent purchasers.

Extensions of Authority. Licensing and regulatory controls for mineral, oil and gas brokers were enacted by law in 1943, as were the activities of business opportunity brokers. Later legislation permitted and still allows any licensed real estate broker or salesperson to engage in the business opportunity field under a general real estate license.

In 1955, because of complaints about practices of some brokers which were clearly adverse to the public good, the Legislature passed and has since amended and strengthened statutes regulating the handling of real property loans by licensees. Substantial new laws and regulations were adopted in 1982 regulating disclosures in mortgage loan broker activities. These are covered later in this course.

On January 2, 1970, the Commissioner became responsible for administering the Real Estate Syndicate Act relating to some types of real estate syndicates that were formerly under the jurisdiction of the Corporations Commissioner.

However, under a law change on January 1, 1978, this jurisdiction was returned to the Corporations Commissioner.

On July 1, 1975, brokers and salespersons under the authority of their real estate licenses, became authorized to engage in the sale, purchase, negotiation, etc., of mobilehomes registered for at least one year with the Department of Motor Vehicles. Effective July 1, 1980, licensees may also negotiate the sale of other mobilehomes provided the requirements of the Health and Safety Code Section 18551 for transforming a mobilehome to real property have been satisfied.

On September 25, 1980, prepaid rental listing services became regulated and require the licensing of any person rendering such services, other than a real estate licensee, by the Department of Real Estate.

Public Trust. In the brief history given, it can readily be understood that brokers and salespersons are engaged in many activities, as representatives of others in a confidential and fiduciary capacity. The public has more than a passing interest in seeing that the trust of the community is well placed in the real estate professional. To that end, the state seeks to help justify this trust and confidence by prescribing certain educational, experience and ethical requirements for real estate practitioners and subjecting to discipline those licensees who violate this trust.

Decisions and Rulings Affecting Real Estate Law. What is commonly referred to as the "Real Estate Law" must clearly be distinguished from what is known as real property law, law of agency, contract law, or other legal aspects of real estate ownership and conveyancing. Although these sets of laws interrelate and overlap, they are nevertheless different legal rules and should be separately understood. The Real Estate Law affects the licensing and conduct of persons acting as real estate agents. The law is enforced at special administrative hearings by the Commissioner rather than by a court of law. You understand by now that this course, titled "Real Estate Law," includes a study not only of the so-called Real Estate Law, as just described, but also the other sets of laws which comprise the legal aspects of California real estate activity.

The California Real Estate Law, or license law, as it is sometimes referred to, has two principal purposes: (1) the protection of the general public from harm at the hands of dishonest and incompetent agents and (2) the protection of the reputation of honest agents against the adverse publicity and public resentment often caused by the unprincipled and unscrupulous who would infiltrate the agent's ranks.

Since the entire text of the Real Estate Law and a detailed analysis, as published by the state, is 124 pages in length, and since this course is meant to acquaint you with many more legal aspects of California real estate, the Real Estate Law has been compressed into an outline of essential information, which follows. The student is advised to study the outline, which presents the essential information in clear, easy-to-follow steps, and be prepared to answer questions based on the information contained therein.

THE REAL ESTATE LAW

I. Police Power

A. Definition: Police power is the authority of the state to enact legislation within constitutional limitations in order to ensure the safety, health, morals, and general welfare of the people of the state.

B. Constitutional Justification.

1. Contained in the Bill of Rights to the U.S. Constitution
2. It states, "The powers not delegated to the United States by the Constitution nor prohibited to it by the states are reserved to the states respectively or to the people."

H. Need for license law: To protect the public from unqualified and unethical real estate agents.

III. Real Estate Bureaucratic Structure

A. The Department of Real Estate

1. Was created in 1917
2. Has the following responsibilities:
 - a. license and regulate real estate agents
 - b. regulate the sale or lease of subdivided land
 - c. govern the handling of real property loans by real estate licensees
 - d. regulate certain types of mobile home transactions
 - e. manage prepaid rental listing services run by someone other than a licensee.

B. Real Estate Commissioner

1. Job background
 - a. The Commissioner is the chief executive officer of the Department of Real Estate and the chairperson of the Real Estate Advisory Commission

- b. The Commissioner is appointed by the Governor
- c. The Commissioner must have five years of active experience as a California real estate broker or five years of related experience in California in the last ten years.

2. Overall objectives of the Commissioner

- a. Decide departmental policy
- b. Enforce the provisions of the Real Estate Law

3. Specific duties of the Commissioner

- a. Screen license applicants
- b. Investigate nonlicensees conducting business transactions requiring a real estate license
- c. Review complaints against licensees
- d. The pertinent regulations within limits of non-exempt franchises, real property securities and the sale of subdivisions
- e. Hold formal hearings within the limits of the Administrative Procedures Act
- f. NOT settle commission disputes

C. Real Estate Advisory Commission

1. Organizational background

- a. Established January 1, 1977
- b. Comprised of ten members
 - i. 6 licensed real estate brokers
 - ii. four public members
- c. Only the Commissioner receives compensation
- d. Must meet a minimum of four times a year

2. Function: Assist in shaping administrative policy and procedure.

D. Real Estate Funds

- 1. Real Estate Fund: Provides funds to support the Department of Real Estate
- 2. Real Estate Education, Research & Recovery Allocation Fund
 - a. Education and Research Subfund: Supports applicable education and research
 - b. Recovery Subfund
 - i. Purpose: To provide recovery money to wronged parties where no other remedy is available
 - ii. When applicable:

- (A) In certain cases of fraud, misrepresentation, and deceit in a real estate transaction
- (B) The agent does not pay the court judgment
- iii. Award maximums:
 - (A) \$20,000 per transaction
 - (B) \$100,000 for all combined transactions

IV. Activities requiring a license:

A. Applicable activities

1. sell or buy real property
2. offer to sell or buy real property
3. solicit real estate buyers
4. list or solicit listings of real property
5. exchange, offer to exchange, lease, or offer to lease real property*
6. buy, sell, or exchange an existing lease *
7. collect rent*
8. sell or issue a real estate syndicate security
9. assist with filing on state or federal lands
10. negotiate mortgages and trust deeds
11. buy or offer to buy existing real property loans
12. sell or offer to sell existing real property loans
13. exchange or offer to exchange real property loans

B. (*): Does not pertain to managers of a motel, hotel, trailer park, apartment building, or apartment complex.

C. Concept of "in the business" #50

1. Definition: The presence of eight or more notes or sales contracts in any one calendar year
2. Pertains to the last three activities listed even if performed for the benefit of one's self, if it constitutes being "in the business."

V. Maximum Penalty for practicing without a license. #49

- A. Individual: \$1,000 fine, six months in jail, or both
- B. Corporation: \$10,000 fine
- C. Consumer who utilizes an unlicensed agent: \$100 fine

VI. Activities exempt from license requirements. #81

- A. Anyone dealing with their own property as long as it does not constitute being "in the business."

- B. An employee of a lending institution
- C. An appraiser
- D. Real Estate related clerical help
- E. An attorney if performing duties for a client as an attorney
- F. An attorney-in-fact conducting a real estate transaction for the principal
- G. A resident manager or employee of an apartment building or apartment complex
- H. Cemetery personnel

VII. California Real Estate License

A. Qualifications

1. Salesperson

- a. at least 18 years old
- b. complete the prescribed application (RE Form 400)
- c. pass the Department of Real Estate examination
- d. be an honest and truthful person
- e. on or after January 1, 1986:
 - i. pass an approved real estate principles course prior to examination
 - ii. pass additional courses within 18 months of licensure

2. Broker

- a. At least 18 years of age
- b. Complete the prescribed application (RE Form 400)
- c. Pass the Department of Real Estate exam
- d. Be an honest and truthful person
- e. Meet the statutory education and experience requirements:
 - i. Complete the eight required college level courses described earlier in this chapter.
 - ii. Experience requirement
 - (A) Applicant actively engaged as a real estate salesperson for at least two years out of the five years immediately preceding application filing, or...
 - (B) Applicant proves equivalent general real estate experience and the Real Estate Commissioner agrees.
 - (C) Applicant has completed a four year college degree in any field.

VIII. Re-examination.

- A. Exam can be taken an innumerable number of times
- B. The original license application is valid for two years.
- C. A new application must be filed if the applicant has not passed the examination in that time period.

IX. Fingerprints.

- A. All original applicants for a real estate license who have not held some type of real estate license in current status in the previous two years must be fingerprinted.
- B. Mandated by Section 10152 of the California B&P Code.

X. License term.

- A. Original salesperson or broker license valid for a term of four years.
- B. Renewed licenses are valid for a term of four years.

XI. Continuing Education.

- A. Must complete 45 clock-hours of approved subjects within the preceding four years before license renewal
 - 1. 3-hour minimum in ethics, professional conduct, and the legal aspects of real estate
 - 2. 21-hour minimum in consumer protection
 - 3. remaining hours in "consumer service" courses
- B. Verification of competency must be furnished by the institution providing the instruction
- C. The institution must be approved by the Department of Real Estate.

XII. License Renewal.

- A. A license must be renewed by midnight of the date of expiration on the license.
- B. Renewal occurs when:
 - 1. The appropriate fee has been paid
 - 2. The continuing education requirements have been met
- C. An applicant has two years after the expiration of a license to file for late renewal.

XIII. Fees

A. No fee is refundable

B. 1987 Department of Real Estate Fee Schedule:

1. Real estate salesperson license examination, including re-examination, if necessary— \$25.00
2. Reschedule of a real estate salesperson license exam—\$10.00
3. Real estate salesperson license— \$145.00
4. Restricted real estate salesperson license— \$120.00
5. Late renewal of a salesperson license. — \$160.00
6. Real estate or mineral, oil and gas (M.O.G.) broker license examination, including re-exam, if necessary— \$50.00
7. Reschedule of a real estate broker license examination—\$15.00
8. Real estate broker license— \$165.00
9. Restricted real estate broker license— \$165.00
10. Late renewal of a broker license— \$220.00
11. Reschedule of a M.O.G. broker license— \$15.00
12. M.O.G. broker license— \$165.00
13. Late renewal of a M.O.G. broker license— \$220.00
14. M.O.G. permit— \$50.00
15. Fingerprint processing, when applicable— \$19.00
16. Real property securities deal endorsement* — \$100.00

(*): The endorsement is valid for the term of the license. The fee must be paid each license renewal.

XIV. Inactive License.

A. The inactive license status has been eliminated as of January 1, 1981.

B. Current inactive licenses which have not been suspended or revoked may be reinstated or renewed if all license requirements have been met. Reinstatement or renewal is now only granted on an active basis.

C. An additional fee is required if the license was taken out on an inactive basis to compensate for the initial lower fee payment.

XV. Types of licenses.

A. Salesperson

1. Must be under the control and supervision of a licensed real estate broker
2. Cannot act independently
3. License must be available in the broker's principal office.

B. Broker.

1. Individual broker

a. Most common type of broker license

b. Characteristics:

- i. Licensee can conduct business under own name or fictitious name
- ii. Must maintain a definite place of business
- iii. The licenses of the broker and all employed salespersons, if any, must be available for inspection.

2. Partnership brokerage.

a. Partnership license discontinued in 1968

b. Partnerships are allowed between licensees

c. Partnerships may be formed between brokers alone or with salespersons.

3. Corporate brokerage.

a. License is issued to the corporation

b. The license must be qualified by a responsible licensed broker who is a corporate officer.

c. The qualifying officer must control the real estate operations of the corporation.

d. Replacement of the qualifying officer does not affect the license.

4. Fictitious business name.

a. Concept of "DBA"

i. "DBA" stands for "doing business as"

ii. Any DBA must be approved by the Commissioner.

b. Reasons for denying a fictitious business name

i. Implies a nonexistent partnership or corporation

ii. Violates the law

iii. Construed to be false advertising

iv. Incorporates a salesperson's name

v. Utilizes a name used previously by a person who has their license suspended or revoked.

7

MECHANIC'S LIENS & OTHER ENCUMBRANCES

#7

11

2

3

California law expressly provides that persons furnishing labor or material for the improvement of real estate may file liens upon the property affected if they are not compensated. Thus an unpaid contractor, or a craftsman employed by the contractor to work upon a building project, but who has not been paid by the owner or contractor may protect any interests by filing a lien against the property in a manner prescribed by law. The same right is held by any person who has furnished material such as lumber, plumbing, or roofing if the claim is not paid. It is because of the possibility of these liens being filed that an owner employing a contractor sometimes requires that a bond be furnished to guarantee payment of such possible claims.

the construction, alteration, addition or repair of any building or other structure or work of improvement.

It includes grading and filling and landscaping of lots or tracts of land, as well as demolition and removal of buildings. In each case the contributor has a lien upon the property upon which the contributor has bestowed labor or furnished material, for the value given, including a charge for any appliances or power provided. The work may have been done at the instance of the owner, or by any person acting by owner's authority or under the owner, as a contractor. Indeed the statute states that every contractor, subcontractor, architect, builder or other person in charge of the job is deemed to be an agent of the owner for purposes of the lien law.

THE THEORY

The mechanic's lien law is based on the theory that improvements contribute additional value to land; therefore, it is only equitable to impose a charge on the land equal to such increase in value. This charge may exist in the absence of any direct contract relationship between the lien claimant and the landowner. The lien must, however, be founded upon a valid contract with the contractor, subcontractor, lessee or vendee. Also, ordinarily the lien is valid only to the extent of labor and materials furnished for and actually used in the job.

WHOMAY OBTAIN

The California Civil Code specifies who may secure a mechanic's lien. "Laborer" means any person who, acting as an employee, performs labor upon or bestows skill or other necessary services on any work of improvement. "Materialman" means any person who furnishes materials or supplies to be used or consumed in any work of improvement. Thus the statute extends the right to all persons and laborers of every class who perform labor or bestow services or furnish materials or equipment, which contribute to

Normally, bills for materials and services are paid when due. But if there is a default by the owner or contractor, the claimant must act promptly to exercise lien rights. The lien law is quite technical in its requirements, particularly with respect to notice by subcontractors and materialmen required as a prerequisite to filing a valid mechanic's lien, but we will presently offer you a condensed version of the law.

It will sometimes happen that a real estate broker is also a licensed contractor, and for that reason will be concerned with the Mechanics Lien Law. For that matter, the real estate licensee may himself be the property owner who is involved in a development project, and thus must know how the Mechanic's Lien Law is applied. In any case, the principle reason for learning about the Mechanic's Lien Law and the Stop Notice is that they are encumbrances, and an understanding of encumbrances is vital to the real estate professional.

Because of its comparatively high value, coupled with its permanence, it is not extraordinary to find that mankind's ingenuity has devised a multitude of ways to deal with land. We have, for example, already observed the various ways in which title may be held.

An encumbrance may be defined broadly as any right or interest in land possessed by a stranger to the title, which affects the value of the owner's estate, but does not prevent the owner from enjoying and transferring the fee.

There are two categories of encumbrances -- (1) those affecting title and (2) those affecting condition or use of property.

1. Those that affect the title, notably liens. A lien is defined as a charge imposed upon specific property by which it is made security for the performance of an act, typically the payment of a debt. Liens may affect both real and personal property. They may be voluntary or involuntary. They may be specific, affecting only a particular property, or general, affecting all property of the owner not exempt by law. The principle kinds of liens are:

1. Mortgages and trust deeds
2. Mechanic's liens
3. Tax liens and special assessments
4. Attachments and judgments

2. The other type of encumbrance, as mentioned, affects condition or use of property, notably:

1. Easements
2. Building restrictions and zoning requirements
3. Encroachments.

TERMS AND PROCEDURES

To return to our discussion of mechanic's liens, before we explain the proper procedures for perfecting a mechanic's lien, you should first read through the following list of terms which are related to the procedure:

1. *Awarding Authority* -- This is the owner or the agent of the owner who awards an original building or construction contract, also called the prime contract.
2. *Bonded Stop Notice* -- A bond which accompanies a Stop Notice to a construction lender and must be in a sum equal to one-and-one-fourth times the amount of the claim. The bond, along with the Stop Notice, must be delivered by certified or registered mail or in person, to the persons responsible for administering or holding construction funds. Should the claimant lose his or her action (lawsuit on the bond), then the claimant must pay all costs that may be awarded against the owner or contractor or construction lenders. This is the reason for the bond on

the stop notice.

3. *Stop Notice* -- A written notice, signed and verified by the claimant or the claimant's agent, which puts a lender or anyone else holding construction funds on notice that there is money due and owing to the claimant. (**Note:** Whereas a mechanic's lien is a lien against property, a stop notice is a lien against funds).

The Stop Notice must state the following:

- a. The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant.
- b. The name of the person to or for whom the labor, services, etc. were furnished.
- c. The amount based on value as near as possible, of the work or equipment already completed or furnished and the amount of the whole work agreed to be done or furnished.

IF INVOLVING A PRIVATE WORK OF IMPROVEMENT, THE STOP NOTICE MUST BE DELIVERED TO THE OWNER PERSONALLY OR LEFT AT HIS/HER RESIDENCE OR PLACE OF BUSINESS WITH SOME PERSON IN CHARGE, OR DELIVERED TO HIS/HER ARCHITECT, IF ANY, AND, IF THE NOTICE IS SERVED UPON A CONSTRUCTION LENDER, HOLDING CONSTRUCTION FUNDS AND MAINTAINING BRANCH OFFICES, IT MUST BE DELIVERED TO THE MANAGER OR OTHER RESPONSIBLE PERSON AT THE OFFICE OR BRANCH WHICH ADMINISTERS OR HOLDS THE CONSTRUCTION FUNDS.

IF INVOLVING ANY PUBLIC WORK FOR THE STATE, THE NOTICE MUST BE FILED WITH THE DIRECTOR OF THE DEPARTMENT WHICH LET THE CONTRACT.

IF INVOLVING ANY OTHER PUBLIC WORK, THE NOTICE MUST BE FILED IN THE OFFICE OF THE CONTROLLER, AUDITOR, OR OTHER PUBLIC DISBURSING OFFICER WHOSE DUTY IT IS TO MAKE PAYMENTS UNDER THE PROVISIONS OF THE CONTRACT, OR WITH THE COMMISSIONERS, MANAGERS, TRUSTEES, OFFICERS, BOARD OF SUPERVISORS, BOARD OF TRUSTEES, COMMON COUNCIL, OR OTHER BODY BY WHOM THE CONTRACT WAS AWARDED.

ANY STOP NOTICE MAY BE SERVED BY REGISTERED OR CERTIFIED MAIL WITH THE SAME EFFECT AS PERSONAL SERVICE (CIVIL CODE, SECTION 3103)

THE STOP NOTICE OBLIGATES THE PERSON HOLDING CONSTRUCTION FUNDS TO WITHHOLD SUFFICIENT FUNDS TO SATISFY THE AMOUNT IN THE

STOPNOTICE. IF THE PERSON HOLDING THE FUNDS DOES NOT WITHHOLD SUFFICIENT FUNDS TO SATISFY THE STOP NOTICE, THEN THE LENDER OR WHO-EVER ELSE IS HOLDING THE FUNDS MAY BE RESPONSIBLE TO THE CLAIMANT DIRECTLY.

In order to bind a construction lender, the stop notice must be bonded. The bond which accompanies the stop notice to any construction lender must be in the sum equal to one-and-one-quarter times the amount of the claim. The bond must be delivered along with the stop notice in person or by certified or registered mail to the persons responsible for administering or holding the construction funds.

Should the claimant lose in his/her action (lawsuit on the bond), then the claimant must pay all costs that may be awarded against the owner or contractor or construction lender. That is the reason for the bond on the stop notice.

4. *Preliminary 20-day Notice* -- This is a notice in writing from a claim- and that is a necessary prerequisite to filing a mechanic's lien or stop notice. This notice is to be distinguished from the "Notice to Owner" form that home improvement contractors are required to give to owners. This notice has to be given by anyone who furnishes labor, equipment, services or materials, with the following exceptions:

- a. Anyone who is working for wages is not required to give this notice
- b. Anyone who has a direct contract with the owner of the property is not required to give the preliminary 20-day notice.
- c. An express trust fund which is established to pay fringe benefits to workers is not obligated to give this notice.

The preliminary 20-day notice is given to the owner, the original contractor, and the lender. Materialmen, suppliers, and architects (non-licensed people) also have to give the Preliminary Notice to lenders, even if they are dealing directly with the property owner. The deadline for giving the Preliminary Notice is 20 days after first supplying the labor, services, equipment or materials.

The Preliminary 20-day Notice must describe what has been furnished or supplied (labor, services, etc.), or what is to be furnished. It is also necessary to provide any lender with a total price estimate. In addition, all of the following must be on the Preliminary Notice:

- a. Name and address of the person supplying the labor, material, etc.

- b. Name of the person who contracted for these things.
- c. Description of the job site sufficient for identification.
- d. Statement equivalent to a threat of a mechanic's lien if bills for labor, materials, etc. are not paid.
- e. Name and address of express trust fund, if any.

NOTE: IF AN OWNER AGREES TO WAIVE SERVICE OF THE PRELIMINARY NOTICE, SUCH AGREEMENT HAS NO EFFECT WHATSOEVER; NOTICE MUST STILL BE SERVED

The Preliminary Notice may be delivered in person, and it is necessary to get a receipt. If it is not delivered in person, then it may be left with a person in charge at the principle place of business of the person being notified. Again, the person making the delivery should get a receipt. It may also be delivered by certified or registered mail addressed to the appropriate residential address, the address on the building permit, or the address which appears on the construction trust deed. It is only necessary to give one notice for each work of improvement, unless that being furnished is furnished by more than one contractor or subcontractor, in which case separate notices are required.

FAILURE TO GIVE A PRELIMINARY NOTICE FOR CONTRACTS AMOUNTING TO \$400 OR MORE NOT ONLY NULLIFIES LIEN AND STOP NOTICE RIGHTS, BUT MAY BE GROUNDS FOR DISCIPLINARY ACTION BY THE REGISTRAR. #68

5. *Notice of Cessation of Labor* -- A form which, if signed, verified, and recorded by a property owner after work has stopped on a construction project, will limit the time within which mechanic's liens must be filed to 60 days by the original contractor and 30 days for any subcontractors.

PROCEDURES

Now that you've been introduced to some of the terms (and by inference, some of the procedures), let's examine what would be proper procedure for any contractor with regard to Preliminary Notices, the Mechanic's Lien Law and Stop Notices.

PRIOR TO START OF PROJECT

All contractors should obtain the legal description of the work site (Map book and page number), get the name of the owner and the extent of the owner's interest in the property, and find out if the owner is the one who is requesting the improvement. If not, then find out what the interest is of the

person making the request. Then find out who, if anybody else, also claims an interest in the property, such as lenders. Make a determination about yourself as to whether you are a prime contractor, subcontractor, laborer, or material supplier. If there is a construction lender, then get the lender's name.

NOTE: ALL OF THE FOREGOING INFORMATION WILL BE NECESSARY TO INCLUDE ON ANY FORMS OR NOTICES WHICH MAY LATER HAVE TO BE FILLED OUT.

AT THE START OF THE PROJECT

ALL SUBCONTRACTORS are required to send out a Preliminary 20-day Notice to the owner, the original contractor, and the construction lender. The most common way in which this notice is served is by first class certified or registered mail, return receipt requested, postage prepaid.

WHEN WORK IS COMPLETED

SUBCONTRACTORS

If the owner files a Notice of Cessation of Labor or a Notice of Completion, you have 30 days from the date either of these forms is filed by the owner within which to record a Claim of Lien or Stop Notice.

If the owner does not file either a Notice of Cessation of Labor nor a Notice of Completion, and if labor ceases and the owner or agent uses the work of improvement or accepts the improvement, then you have 90 days within which to record a Claim of Lien or Stop Notice.

PRIME CONTRACTORS

You are not required to send a preliminary notice; that is just for subcontractors. The requirements for recording a claim of lien are the same as described above for subcontractors, except that if the owner does file his Notice of Cessation or Completion, you have thirty more days than the subcontractor within which to file a Claim of Lien or Stop Notice. In other words, in that case you would have 60 days instead of 30 to file.

BOTH SUBCONTRACTORS AND PRIME CONTRACTOR

Both have 90 days after filing a Claim of Lien within which to file a Lien Foreclosure action and record a Lis Pendens at the same time. A Lis Pendens is a notice that a lawsuit is pending and that the lawsuit affects the real property in question. It warns everyone who might acquire the property that he or she may be bound by an adverse judgment (Civil

Code Section 3146)

And that's how simple (and complicated) it is.

QUESTIONS YOU MAY HAVE ABOUT LIENS AND STOP NOTICES, ETC.

Question: What is the biggest difference between a lien and a stop notice?

Answer: Mechanic's liens are claims against property, primarily the improvement made on the property; stop notices are claims against construction funds. Both are ways of recovering money due and owed to someone.

Question: What exactly is an express trust?

Answer: In the construction business this is usually a trust which is established through collective bargaining agreements for the management of fringe benefits. It is considered to have lien rights against the owner, just like individual workers.

Question: Who has lien rights and stop notice rights?

Answer: Both skilled and unskilled mechanics and laborers, contractors (both specialty and general, prime and sub), material suppliers, equipment lessors, and any express trust fund accounts.

NOTE: IF NOTICE IS GIVEN WITHIN 20 DAYS OF THE START OF A PROJECT, THOSE PEOPLE WHO PREVIOUSLY CONTRIBUTED TO THE IMPROVEMENT PROJECT MAY ALSO MAKE A CLAIM OF LIEN. THIS WOULD BE SUCH PEOPLE AS ARCHITECTS, ENGINEERS AND SURVEYORS.

Question: Who is not entitled to a claim of lien?

Answer: We said earlier that employees working for wages were not entitled to a claim of lien, but that isn't strictly accurate and requires some clarification. If they are not paid their wages, they may assign their lien rights to the Labor Commission, which will collect their wages for them. Therefore, they have an indirect right to a claim of lien. Employees of material suppliers are not entitled to lien rights. People who furnish materials, supplies, labor, etc. which is not specifically ordered by the owner or the owner's agent are also not entitled to a lien.

Question: What or who is an owner's agent?

Answer: For general purposes, an agent of an owner is any

person who is in charge of any work of improvement or any portion of any work of improvement, which would include the prime contractor and all subcontractors.

Question: If the Preliminary 20-Day Notice isn't filed, is it still possible to make a claim of lien?

Answer: Absolutely not.

Question: Why not?

*Answer: Because it is the Preliminary Notice which legally informs the owner about the Mechanic's Lien Law and your right to his property if you aren't paid, **REGARDLESS OF WHETHER THE OWNER PAYS THE PRIME CONTRACTOR IN FULL OR NOT.***

Question: How soon should a Foreclosure of Lien be brought to trial?

Answer: As soon as possible, and not later than two years.

Question: How much might one recover?

Answer: The reasonable value of what you provided, whether labor, services, materials, etc., or the price you agreed upon with whomever you had a contract, whichever is less. The owner also has the right to limit your recovery to the contract price by filing the contract with the county recorder and posting a payment bond in an amount equal to 50 percent of the contract.

NOTE: YOU AUTOMATICALLY FORFEIT YOUR CLAIM OF LIEN IF YOU CLAIM MORE THAN WAS ACTUALLY OWED TO YOU.

Question: If a foreclosure sale does not produce sufficient money to pay everyone who has a legitimate claim, who gets paid first?

*Answer: Mechanic's liens will probably be only one of several different types of liens which are competing for a share of the proceeds from a foreclosure sale, and generally speaking those who record first get paid first. However, as you might suspect, property taxes have first priority, regardless of when you might have filed a mechanic's lien. As for who among all the various mechanic's liens gets first money, there is no priority. In other words, all mechanic's lien claimants share pro rate if the amount of the foreclosure sale is insufficient to pay all claims. Another type of lien, in addition to property tax lien, which takes priority over mechanic's liens is the lien made by any mortgage holder, trust deed, etc., **IF SUCH A LIEN IS RECORDED PRIOR TO START OF WORK OR DELIVERY OF MATERIAL.***

Otherwise, mortgage liens, etc., are subordinate to mechanic's liens.

Question: If an owner pays a prime contractor in full, is he protected from liens from subcontractors who are not paid by the prime contractor?

Answer: NO.

Question: Then how can an owner protect himself against liens which might be brought against his property?

Answer: He can record his contract and post a bond in the amount of 50 percent of the contract. This limits the owner's liability to the contract price, but does not actually eliminate the possibility of having a mechanic's lien brought against his property.

Question: What is a performance bond?

Answer: This is a bond that an owner may post which guarantees that the project will be completed. The bonding company, should the project be abandoned or if the work is not acceptable, may hire another contractor to complete the original contractor's work or sue for damages.

Question: What is a contract bond?

Answer: This is a bond which an owner may purchase which guarantees not only that the job will be completed, but that all labor and materials will be paid for.

Question: What are progress payments, and how are they managed?

Answer: This is an installment payment situation where the owner agrees to pay the prime contractor in periodic sums of money, and the contractor agrees to furnish, in return, proof of having paid his subcontractors and materialmen or else a waiver of lien from those who have not paid. In most cases, the owner will keep the final payment for a period of time after the project is completed, until the lien period is over.

Question: How is a mechanic's lien terminated?

Answer: Voluntary release of the lien, normally after payment of the underlying debt, would terminate the lien. But even in the absence of release, the lien does not endure indefinitely. The code provides that a mechanic's lien will not bind any property for more than 90 days after filing of the lien or 90 days after the expiration of a credit, unless property foreclosure proceedings are commenced within that time. When credit is extended for purposes of this limitation, it may not extend for more than one year from the

time of the completion of the work. Moreover, a notice of the fact and terms of the credit must be filed for record within the 90 day lien period. If the lien is foreclosed by court action, there may ultimately be a judicial sale of the property and payment to the lien holders out of the proceeds.

Question: Why is it important to determine the exact starting time of a work of improvement?

Answer: Fixing the time, to the instant, is crucial when questions of priority of claim arise as between mechanic's liens and deeds of trust. A California appellate court has provided this useful definition of commencement of work: "...some work and labor on the ground, the effects of which are apparent -- easily seen by everybody; such as beginning to dig the foundation or work of like description, which everyone can readily see and recognize as the commencement of a building."

Question: Why is it important to determine the exact completion time of the work of improvement?

Answer: Fixing this time, to the exact day, is critical when establishing whether or not a given claim of lien has been filed within the proper time limit fixed by law.

Question: What is a Notice of Nonresponsibility?

Answer: The owner, or any person having or claiming any interest in the land, may, within 10 days after obtaining knowledge of construction, alteration or repair, give notice that he or she will not be responsible for the work by posting a notice in some conspicuous place on the property and recording a verified copy thereof. The notice must contain a description of the property with the name and nature of title or interest of the person giving it, name of the purchaser under the contract, if any, or lessee, if known, and a statement that the person giving the notice will not be responsible for any claims arising from the work of improvement. If such notice is posted, the owner of the interest in the land may not have owner's interest liened, providing the notice is recorded within the ten day period.

The validity of a notice of nonresponsibility cannot be determined from the official county records since they will not disclose whether compliance has been made with the code requirements as to posting on the premises. If such posting has not been made, a recorded notice affords no protection from a mechanic's lien.

ATTACHMENTS AND JUDGMENTS

In addition to mechanic's liens and stop notices, attachments and judgments are two more types of liens which

create encumbrances affecting the title to property. By no means as common as mechanic's liens or tax liens, but fully as effective and important when they do apply, are the liens created by attachments and judgments.

Attachment. This is the process by which real or personal property of a defendant in a lawsuit is seized and retained in the custody of the law as security for satisfaction of the judgment the plaintiff hopes to obtain in the pending litigation. The plaintiff gets the lien before entry of judgment, and thus is assured of availability of property of the defendant for eventual execution in satisfaction of the claim -- assuming the judgment is awarded to the plaintiff.

Prejudgment attachments of the property of a natural person have been limited by case law and statute to claims arising out of the conduct of a business, trade or profession. There are numerous other limitations on obtaining a prejudgment attachment.

Property Exempt From Attachment and Execution. As a matter of public policy -- no doubt to prevent extreme hardship -- certain property is exempt from attachment or execution when proper claim is made for exemption (Code of Civil Procedure Section 706.010 et seq.) The most important exemption is the homestead, and the formalities of declaration of homestead by the owner to obtain exemption will be presented later in this chapter.

Judgment. A judgment is the final determination of the rights of the parties in an action or proceeding by a court of competent jurisdiction. There is, of course, always a possibility that either party will appeal, and the judgment might subsequently be reversed or amended. Comparatively few judgments are appealed, but even for those which are not, the judgment is not truly finalized until the time to appeal or seek other procedural legal relief has elapsed.

A judgment does not automatically create a lien. However, as soon as a properly certified abstract of the judgment or decree of any court of this state, or any federal court of record, is recorded with the recorder of any county, it becomes a lien upon all nonexempt real property of the judgment debtor, located in that county. It extends, moreover, to all realty the debtor may thereafter acquire before the lien expires. Since the lien normally continues for ten years from the date of entry of the judgment or decree, it is rigorous in its effect.

As with the lien on attachment, various ways are provided by law for discharging it, e.g., when the enforcement of the judgment is stayed on appeal and the defendant executes a sufficient undertaking (i.e., promise or security) or deposits in court the requisite amount of money.

EASEMENTS

#86
Having considered various types of liens which are encumbrances affecting the title to property, we now direct our attention to encumbrances which affect the physical condition or use of the property. Easements, probably the most common of this category, are rights to enter and use another person's land or a portion thereof within definable limits. Therefore, an easement is a right, privilege or interest limited to a specific purpose which one party has in the land of another.

#60
Easement rights are usually created for the benefit of the owner of adjoining land, hence such benefited land is called the "dominant tenement," and the land subject to the easement is described as the "servient tenement." Unless the right is specifically described to be "exclusive," its creation does not prevent the owner of the land from using the land and the portion covered by the easement in any non-interfering manner.

#56
Appurtenant Easements. Typical statutory easements (or land burdens or servitudes as they are also known) include: rights-of-way; rights of taking water, wood, minerals and other things; right of transacting business or conducting sports upon the land; the right of flooding land; the right of receiving air, light, or heat from over, or discharging the same upon or over land; the right of using a wall as a party wall; the right of receiving more than natural support from adjacent land or things affixed thereto. These easements, when attached to a "dominant tenement," are considered appurtenant thereto, and pass automatically upon transfer of the dominant tenement, or, "run with the land." Appurtenant means "belonging to." Purchasers of the servient tenement usually take subject to the easement either because the easement is recorded or because it is apparent on the ground.

#75
Easements in Gross. It is possible to have an easement which is not appurtenant to particular land. Thus A, who owns no land, may have a right-of-way over B's land. Public utilities frequently enjoy easements to erect poles and string wires over private lands, yet own no related dominant tenement. Such easements are technically known as easements in gross, and are personal rights -- attached to the person of the easement holder and not attached to any specific land, yet in reality they encumber someone's land and in effect constitute an interest therein.

In determining whether an easement is appurtenant or in gross, if the instrument creating it is unclear, (1) if the easement can fairly be construed as being attached to the

land it will be so construed (2) the intention of the parties and the right created are important considerations and (3) outside evidence may be considered.

#91
How Easements are Created. Easements may be created in various ways, such as by express grant, express reservation, implied grant or implied reservation, agreement, prescription, necessity, dedication, condemnation, sale of land with reference to a plat, or estoppel.

Normally, easements arise in one of three ways. Either they are expressly set forth in some writing (such as a deed or a contract) or they arise by implication of law or by virtue of long use. Those created by deed must comply with the usual requirements of any deed and may arise either by express grant to another or by express reservation to oneself.

#61
While the most common method of creating an easement is by express grant or reservation in a grant deed, written agreements between adjoining landowners often are used. The only person who can grant a permanent easement is the fee owner of the servient tenement or a person with the power to dispose of the fee.

Easement by Implication of Law. Civil Code Section 1104 contains the rule for implied grants. Certain conditions must exist at the time a property is conveyed before an easement by implied grant will have effect. Easements created by implication of law may be somewhat difficult to understand. An easement by necessity is one example of an easement by implication.

The "way of necessity" is generally recognized whenever a transfer occurs which truly landlocks a parcel of real estate and there is no method of access whatsoever, except over the servient tenement retained by the seller, or over the land of a stranger.

Another implied easement is recognized when land in one ownership is divided, and at the time of division one portion is being used for the benefit of the other portion, e.g., a sewer lateral. Another type of easement by implication is where land is sold with reference to a plat delineating streets. The purchaser of the land gains an easement over such delineated ways.

#78
Easement by Prescription. Continuous and uninterrupted use for five years will create an easement by prescription where such use is hostile and adverse (i.e., without license or permission by the owner), open and notorious (i.e., the owner knows of the use or may be presumed to have notice of the use), exclusive (i.e., although use is not necessarily by one person only, yet it is such as to indicate to the landowner that a private right is being asserted), and under

some claim of right.

#79 **Termination of Easements.** Easements may be extinguished or terminated in several ways, including express release; legal proceedings; non-use of prescriptive easement for five years; abandonment; merger of the servient tenement and the easement in the same person; destruction of the servient tenement; and adverse possession by the owner of the servient tenement.

RESTRICTIONS

A very common type of encumbrance is the restriction, which, as the name suggests, in some way restricts the free use of the land by the owner. Commonly, restrictions are referred to as "covenants, conditions, and restrictions," or simply CC&Rs. You will remember that this term has been introduced earlier.

Restrictions are generally created by private owners, typically by appropriate clauses in deeds, or in agreements, or in general plans of entire subdivisions (as previously explained). Usually restrictions assume the form of a covenant -- a promise to do or not to do a certain thing -- or a condition. Zoning is an example of a public use restriction.

A covenant is essentially a promise to do or not to do a certain thing, and it is generally used in connection with instruments pertaining to real property, and is created by agreement. Typically, it is embodied in deeds, but it may be found in any other writing. For example, a tenant might covenant in a lease to make certain repairs, or a buyer might covenant to use certain land only for a retail grocery store.

A condition, on the other hand, is a qualification of an estate granted. Conditions, which can be imposed only in conveyances, are classified as conditions precedent and conditions subsequent. A condition precedent requires certain action or the happening of a specified event before the estate granted can vest (i.e., take effect).

A familiar example is a requirement found in most of the installment contracts of sale of real estate. All payments shall be made at the time specified before the buyer may demand transfer of title. When there is a condition subsequent in a deed, the title vests (takes effect) immediately in the grantee, but upon breach of the condition, the grantor has the power to terminate the estate. This is termed a forfeiture, since the title may revert or be forfeited to the creator of the condition without payment of any consideration.

Covenants and conditions are distinguishable in two further respects: first, in regard to the relief awarded, and

second, as to the persons by or against whom they may be enforced.

Relief Awarded. As to the first: While a condition affects the estate created, and the failure to comply with it may result in a forfeiture of title, the only remedy to a breach of covenant is an action of damages or an injunction. Breach of a condition may prevent any right arising in favor of the guilty party, or destroy a right previously acquired, but does not subject the guilty party to liability and damages. Breach of covenant, while it gives rise to a right of actual damages, does not necessarily excuse the other party from performance.

Enforcement. As to the second difference: A covenant normally doesn't bind successors of the promisor who may become owners of the affected and restricted land. However, some covenants "run with the land" (i.e., they bind the assigns of the covenantor or promisee), or they may be binding and effective by statute or in equity. Conditions, on the other hand, always run with the restricted land into the indefinite future.

How Construed. Whether a particular provision is a condition or covenant is a question of construction. Since the law abhors forfeitures, the courts ordinarily will construe restrictive provisions as covenants only, unless the intent to create a condition is plain. The use of the term "conditions" or "covenants" is not always controlling. The real test is whether the intention is clearly expressed and the enjoyment of the estate conveyed was intended to depend upon the performance of a condition; otherwise, it will be construed as a covenant only.

For instance, the deed reciting that it is given upon the agreement of the grantee to do or not to do a certain thing implies a covenant and not a condition. So also with a recital that the land conveyed is or is not to be used for certain purposes, as to be used for church purposes, or school-house grounds. Moreover, the plaintiff must allege and prove performance of all conditions precedent in order to recover.

Sufficiency of Performance. Where the contracting parties agree that the sufficiency of a performance shall be determined by some third person, as an architect in a building contract, the architect's determination is conclusive in the absence of proof of fraud or mistake. Where the contract involves matters of fancy, taste or judgment, the party to whom the promise is made is the sole judge of satisfaction. Unless the contract provides otherwise, if this party asserts dissatisfaction in good faith, there can be no inquiry into the reasonableness of such attitude though there may be a question concerning whether any contract in fact was created where performance is said to depend entirely upon

8

CONTRACT LAW

The transfer of interests in real property requires the use of contracts, and as in all other aspects of real estate there are applicable laws. Probably no other phase of the law is as important to parties to transactions in real estate, real estate brokers and salespersons as the law of contracts. It is important therefore to understand their nature and to be well acquainted with some of the broad rules governing their creation, operation and enforcement.

Contract Defined. Any term which is so broad in its application as "contract" is bound to be difficult to define with precision. California's Civil Code says "A contract is an agreement to do or not to do a certain thing." The American Law Institute offers this definition: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Still another authority on the subject — Corbin — submits a definition which combines the foregoing two versions: "A contract is an agreement between two or more persons consisting of a promise or mutual promises which the law will enforce, or the performance of which the law in some way will recognize as a duty." This latter can serve as your working definition, and its meaning will be clarified later when we analyze the essential elements of a contract.

8
Classification. It will be helpful to review certain terms which are commonly used to classify contracts. Thus, with reference to manner of creation, a contract may be expressed or implied.

In an express contract the parties declare the terms and manifest their intentions in words, either oral or written. In an implied contract, their agreement is shown by acts and conduct rather than words (e.g., in a hurry, you enter the corner drugstore, where you have an account, pick up a pack of cigarettes, wave it at the clerk, the clerk nods, and you leave).

With reference to **content of the agreement**, a contract may be **bilateral** or **unilateral**. A bilateral contract is one in which the promise of one party is given in exchange for the

promise of the other party. (e.g., A tells B "I'll give you \$300 if you will promise to paint my house" and B so promises). In a unilateral contract, on the other hand, a promise is given by one party to induce some actual performance by the other party. The second party is not bound to act, but if the second party acts, the former is obligated to keep the promise (e.g., A offers a reward of \$100 to anyone who will find and return A's lost dog. B finds and returns the dog).

With reference to extent of performance, a contract may be **executory** or **executed**. In an executory contract, something remains to be done by one or both parties. In an executed contract, both parties have completely performed.

Finally, with reference to legal effect, contracts may be classified as **void, voidable, unenforceable, or valid**.

A void agreement is not a contract at all; it lacks legal effect (e.g., an agreement to commit a crime, or in California, an attempt by a minor under 18 to make a contract relating to real property).

A voidable contract is one which is valid and enforceable on its face, but one which one or more of the parties may reject (e.g., certain contracts of infants are voidable at the option of the infant; or the contract induced by fraud may be voided by the victim).

An unenforceable contract is valid, but for some reason cannot be proved or sued upon by one or both of the parties (e.g., a contract that cannot be enforced because of the passage of time under the statute of limitations).

A valid contract is one that is binding and enforceable. It has all the essential elements required by law.

ESSENTIAL ELEMENTS OF CONTRACT

Under the Civil Code of California it is essential to the existence of a contract that there be:

1. Parties capable of contracting;

2. Their consent;
3. Lawful object; and
4. A sufficient consideration.

It may be helpful to add a fifth requirement which is present only in certain contracts, namely:

5. A proper writing.

Parties Capable of Contracting. For a valid contract, there must be two or more parties who have at least limited legal capacity. Generally everyone is fully capable of contracting, except persons who are subject to certain limitations.

Example: un-emancipated minors, persons of unsound mind, aliens and persons deprived of civil rights (e.g., convicts).

Minors. A minor is a person under the age of 18 years. A minor is either un-emancipated or emancipated (set free from parental control/supervision) under the Emancipation of Minors Act.

An un-emancipated minor (hereafter "minor") cannot give a delegation of power, make a contract relating to real property, or any interest therein, or relating to any person property not in the minor's immediate possession or control. With certain statutory exceptions he or she may disaffirm any contracts entered into during the minority or for a reasonable time after reaching majority; or, in case of a minor's death within that period, by the minor's heirs or person representatives.

A minor is deemed incapable of appointing an agent, hence such delegation of authority, i.e., power of attorney, is absolutely void. Thus a broker could not serve as agent of a minor to buy or sell. A broker could represent an informed adult in dealing with a minor, but the client must be willing to hazard the possibility of having the contract voided. Difficulty can be forestalled by negotiating in real property with or for a minor only through a court appointed guardian. For the minor's protection, such negotiations cannot be concluded by the guardian without court approval.

Emancipation of Minor's Act. Under this Act (Civil Code Sections 60 et seq.) emancipated minors have certain powers to deal with real property and are considered as being over the age of majority for certain purposes, including the following: to enter into a binding contract; to buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property; and to convey or release interests in property. (Civil Code Section 63).

An emancipated minor is a person under 18 years of age who has entered into a valid marriage (even though terminated by dissolution) or is on active duty with any of the armed forces of the United States of America or has received a declaration of emancipation by petitioning the superior court of the county where he or she resides. (Civil Code Section 62). Brokers dealing with minors must proceed cautiously and should seek the advice of their attorney.

Incompetents. California law provides that after the incapacity of a person of unsound mind has been judicially determined, no contract can be made with such person until restoration to capacity. Similarly, a person who is entirely without understanding but has not been judicially declared incompetent has no power to contract.

In dealing with incompetents concerning real property, proper procedure calls for appointment of a guardian and court approval of the latter's acts.

Note: Both minors or incompetents, however, may acquire title to real property by gift or by inheritance. They may convey, mortgage, lease or acquire real property pursuant to a superior court order obtained through appropriate guardianship or conservatorship proceedings.

Aliens. In California resident or nonresident aliens have essentially the same property rights as citizens. Section 671 of the Civil Code provides that "any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." In the federal law, however, there are certain restrictions upon the property rights of aliens.

Convicts. Persons sentenced to imprisonment in state prisons are deprived of such of their civil rights as may be necessary for the security of the institution in which they are confined and for the reasonable protection of the public.

Convicts do not forfeit their property. They may acquire property by gift, inheritance or by will, under certain conditions, and they may convey their property or acquire property through conveyance.

We now arrive at an appropriate time to consider briefly the capacity of certain other persons or associations to enter into contracts, particularly those involving real property. The bulk of the nation's business is conducted by individual proprietors, by ordinary partnerships, and by corporations. The first category presents no special problems. The owner who is a sole proprietor takes title in his or her name, or if married the spouse may join as a grantee.

#93

Partnerships. In a partnership two or more persons carry on a business as co-owners for profit. The partnership may exist if such intention can be proved whether or not the partners reduced their agreement to a formal writing. The more important characteristics of a partnership are: its lack of separate capacity to deal with property independently from its members (with certain exceptions hereafter noted); customary equal participation of members in management; co-ownership of partnership assets; individual interest of each partner in profits and surplus; and the mutual agency relationship between partners making each the agent of the other, insofar as partnership business is concerned.

Partnership property constitutes the originally vested and subsequent partnership acquisitions. The best practice usually is to take title in the name of the partnership itself, but title may be taken in the individual names of one or more of the partners, or in the name of a third party holding as trustee for the partnership. Although any authorized partner may then dispose of the property, it is customary for all partners to execute the instrument of transfer.

Where property is acquired in the partnership name, it should not be transferred until a "statement of partnership" is filed in the recorder's office showing the names of the partnership and its members, and until a special partnership acknowledgment is attached to the instrument.

Of course if title to real property stands in an individual's name, both the individual and such person's spouse should sign the instrument of transfer.

#76

In order to enjoy some of the benefits of incorporation, yet retain the partnership form, it is possible to form a "limited partnership." This can be achieved only by filing a formal certificate. Limited partners may not allow their names to be used in the business and may not participate in management. If these requirements are met, the limited partners are not responsible for firm debts beyond their investment, but at least one partner in such a firm must be a general partner with unlimited liability.

#100

Corporation. The more important characteristics of a corporation are: separate capacity to deal with property independently from its members; centralized control in a board of directors; liability of shareholders normally limited to the amount of their investment; freely transferable shares, and continued existence regardless of death or retirement of its shareholders.

Although a corporation may take title to property in its own name, it is an artificial person created by law, and must function through human agents. Accordingly, corporate control is vested in the board of directors and so it becomes important to have some evidence of the board's decision in

connection with the proposed property transaction. The decisions of the board are usually in the form of resolutions authorizing certain officers to deal with the corporate property. Certified copies of these resolutions, obtained from the secretary, will disclose the corporate officers with whom one can safely negotiate. It should be noted that since a corporation has perpetual existence, it is not permitted to take title to property in joint tenancy with right of survivorship.

Note: Some corporations are organized on a non-profit basis. Members of such a nonprofit corporation are not personally liable for the debts or obligations of the corporation, and in many respects such an organization is similar in operation to a regular corporation. Thus its property is controlled and its affairs are conducted by a board of directors, and it may make contracts and acquire and dispose of real or personal property in its own name.

Nonprofit Associations. Sometimes transactions in real property will involve nonprofit associations, which are loosely knit, un-incorporated associations of natural persons for religious, scientific, social, educational, recreational, benevolent or other purposes.

When an un-incorporated association proposes to dispose of property, the conveyance should, in the case of benevolent or fraternal societies or associations, be executed by its presiding officer and recording secretary under seal after resolution duly adopted by its governing body.

Personal Representative. A final category of parties to contracts, and one of considerable importance, is that of **personal representatives of decedents.** A person who leaves a will may name an executor or executrix to carry out its provisions. If this person fails to name an executor, or doesn't leave a will, the probate court will appoint an administrator to administer the estate. The acts of these officials are generally subject to court supervision. Real estate agents usually come into contact with executors and administrators when the latter are interested in selling a parcel of real estate belonging to the estate. The procedures incident to these so-called "probate sales" are somewhat involved, and will be explored further in the chapter on "Agency."

Mutual Consent. The second major requirement of a valid contract (remember, the first requirement was "parties capable of contracting") is that the parties who have the capacity to contract shall properly and mutually consent or assent to be bound. This mutual consent is normally evidenced by an offer of one party and acceptance by the other party. There need not be a true "meeting of the minds" of the parties, for they are bound only by their apparent

intentions outwardly manifested in words or acts.

Courts cannot read minds, and secret or unexpressed intentions, hopes and motivations are immaterial. However, the assent must be genuine and free, and if it is clouded or negated by such influences as fraud or mistake, the contract may be voidable at the option of one or both parties, depending on the circumstances.

An offer expresses the offeror's willingness to enter into the contract. It must of course be communicated to the offeree. It must, therefore, manifest a contractual intention. Thus, a social invitation is not a legal offer which results in a binding contract when accepted. Nor is the usual advertisement an offer; it is merely an invitation to deal.

The offer must be definite and certain in its terms. The precise acts to be done must be clearly ascertainable. Courts cannot make contracts for the parties, nor fix terms and conditions. The offer must be "nonillusory" in character; that is, it must actually bind the offeror if it is accepted. An illusory offer would exist if it were stated in it that the offeror could cancel or withdraw at pleasure without reasonable notice.

Many examples might be cited where the California courts have refused to enforce contracts because of uncertainty. In one case, the broker provided in a deposit receipt that there was to be a first deed of trust in a fixed amount to a bank, and a second to the seller for the balance. Interest in each case was fixed. Then the contract stated "total monthly payments, including interest, to be \$95." Specific performance was denied because the deposit receipt was silent as to what portion of the \$95 was to be paid to the bank and what to the seller.

Land Identification. The problem of certainty may be acute in connection with land identification. A broker may not have the deed by which the owner acquired the property, or the title report or policy connected with it. The contract must, however, contain such a description, or at least furnish a key to the property agreed to be sold so that it can be exactly ascertained. The problem of property description has been discussed in some detail in an earlier chapter. Suffice it to say that the description should be as detailed and accurate as possible.

83 **Termination of Offer.** The hope of the offeror is that the other party will accept and a contract will be formed. But the offeror does not want to wait indefinitely, and need not. The offer may be terminated in any one of a number of ways:

(a) **Lapse of Time.** The offer is revoked if the offeree fails to accept it within a prescribed period of time.

(b) **Communication of Notice of Revocation.** Can be done anytime before the other party has communicated acceptance, and is true even if the offeror has said the offer would be kept open for a stated period of time which has not elapsed. If the offeree pays to keep the offer open for a prescribed period of time, we have an **option**, and the offeror must abide by its terms. Usually an option involves the right to buy the particular property under the stated terms with a firm price.

An option is itself a form of contract — a contract to keep an offer open.

It should be noted that some consideration, even though it be only 25 cents on a \$100,000 parcel of real estate, must in fact pass from the optionee to the optioner.

The option may be given either alone or in connection with a lease of the property. It may be in either the customary form of an exclusive right to purchase or lease, or in the form of a privilege of first right of refusal to purchase or lease.

Although option rights are usually assignable unless there is a restriction to the contrary, they do not give the optionee any "interest in the land." The option will terminate automatically upon expiration of the time specified without "exercise" by the optionee. In addition, the termination of a lease containing an option also usually terminates the option. However, the option provisions and lease provisions may be divisible. It is possible that a renewal of the lease will renew the option. Leases are discussed in greater detail in Chapter Ten.

If the offeree makes a qualified acceptance (as by changing the price), in effect a counter-offer is made and the original offer is dead. It cannot later be accepted, unless revived by the offeror repeating it. Thus the roles of the parties are exchanged, and the counter-offer itself may then be terminated like an original offer. It should be noted here that this discussion of offer and acceptance, and the rest of the discussion as to formation of contracts, may not apply to contracts between merchants for the sale of goods. These are governed by the California Uniform Commercial Code.

Rejection by the Offeree. An unequivocal rejection ends the offer, but simple discussion and preliminary bargaining do not do so when they involve no more than inquiries or suggestions for different terms.

Death of insanity of the offeror or offeree works a revocation of the offer regardless of the notice thereof.

Having considered the offer let us now look at the other side of the coin. An acceptance is the proper assent by the

9

LAW OF AGENCY

According to Civil Code Section 2295, "An agent is one who represents another, called the principal, in dealing with third persons. Such representation is called agency."

In an agency relationship, the principal delegates to the agent the right to act on his or her behalf in business transactions or other dealings and to exercise some degree of discretion while so acting. The agent acts for and in the place of the principal for the purpose of bringing the principal into legal relationships with third persons.

The agent owes loyalty to the principal and a duty created by a fiduciary relationship which the law compares to the duty owed to a beneficiary by a trustee under a trust (Civil Code Section 2228 et seq.).

In most real estate transactions the real estate broker acts as an agent for someone else — the principal — who seeks to sell to or buy from or exchange real property or a business opportunity with a third party. As agent, the real estate licensee is authorized to represent licensee's principal in real property transactions with third persons. From the agency relationship a vast body of rules has emerged governing the rights and duties of principal, agent, and third party. We shall examine the basic rules in some detail and apply these rules of law to specific situations in which real estate licensees are frequently involved.

AGENCY DISTINGUISHED FROM OTHER RELATIONSHIPS

It is important to distinguish agency from other types of relationships, notably where:

- (1) The real estate broker acts on his or her own account;
- (2) There is an ordinary employer-employee relationship;
- (3) Services are rendered by an independent contractor.

Broker Acting for Own Account. Not infrequently a real

estate broker or salesperson will deal in real property for his or her own account. Because of professional background and contacts, a licensee is more aware of investment and profit opportunities in real property than are a majority of the people who do not have real estate licenses. An effort to exploit these opportunities to personal advantage may involve legal or ethical matters to be carefully considered by the licensee before becoming involved in a transaction for licensee's own account.

Numerous complaints are made to the Department of Real Estate resulting from the efforts of licensees to secure profits in real estate transactions by purporting to act as principals. In this connection they have resorted to the use of options, net listings, and other types of contracts which combine features of listing with those of an option.

The use of options and net listings is neither illegal nor unethical in those cases where a full disclosure of the licensee's involvement in the transaction and the legal effect of the contract is made known to the persons with whom the licensee is dealing. The other party to the prospective transaction must be given to understand that the licensee is acting as a principal rather than an agent so that the party may at all times deal at arm's length with the licensee.

A licensed real estate broker should be particularly careful in this respect, inasmuch as a broker's contacts with owners and prospective purchasers of real estate are made largely because of the fact that the broker advertises and holds himself or herself out to be a licensed agent. Office signs, signs on properties and stationery advertise the fact that the licensee is a licensed real estate broker. Care must be taken to dispel this agency image if the licensee chooses to act as a principal in a real property transaction. It is particularly dangerous for a broker to start out as an agent in a transaction and to switch status to that of a principal before the deal is consummated. Prior to switching status, the broker has a duty to exercise due diligence in attempting to find a buyer for the principal's property at the highest price and upon the

best terms for the principal that the broker can negotiate.

Various court decisions indicate that the burden of proof under these circumstances is upon the agent to show that persons with whom he or she has dealt were fully informed of this change of status. To merely advise the other party to the transaction that the agent "controls a property" or a similar vague reference to the fact that the broker is not acting as an agent will probably not be held by a court to constitute sufficient notice of a change of status from broker to principal.

Option to Purchase. A somewhat similar situation arises when a broker who is employed to find a purchaser of real property is given an option to purchase the property by the owner which runs concurrently with the agency. In such a case the broker, when pursuing self-interests, cannot ignore those of the broker's principal, and broker will not be permitted to enjoy the fruits of an advantage taken of a fiduciary relationship. The law does not allow a listing agent who has a concurrent option to purchase the real property to make a profit at the expense of the owner by delaying exercise of the option until a price has been received in excess of the option/listing price, unless there is a full disclosure of the circumstances to the owner.

The law is well summarized in "American Jurisprudence": "If a broker employed to sell property is also given...an option to purchase the property himself, he occupies the dual status of agent and purchaser and he is not entitled to exercise his option except by divesting himself of his obligation as agent by making a full disclosure of any information in his possession as to the prospect of making a sale to another."

Disclosure. In the language of "The Restatement of Agency": "Before dealing with the principal on his own account...an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material...if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account..., but also all other facts which he should realize have, or are likely to have, a bearing on the desirability of the transaction from the viewpoint of the principal."

The very nature of combined listing and option contracts places the broker using them in a position where the broker must exercise utmost caution not to violate obligations to a client. The broker must remember that it is a violation of the Real Estate Law to fail to give written notification of the

amount of broker's profit to the employer and to obtain the written consent of the employer if agent elects to exercise the option (Business and Professions Code, Section 10176(h)).

As mentioned in the previous chapter on contracts, a listing is a type of contract, and is ruled by the law of agency. It is therefore appropriate at this time to discuss listings in more detail.

Net Listing

In a net listing the compensation is not definitely determined, but a clause in the contract usually permits the agent to retain as compensation all the monies received in excess of the selling price by the seller. The agent is required by the Real Estate Law to reveal to both buyer and seller, in writing within one month of the closing of the transaction, the selling price involved. The law permits this information to be disclosed by the closing statement of the escrow holder, and this is the usual practice.

Note: A net listing is perfectly legitimate, but it may give rise to a charge of fraud, misrepresentation and other abuses which the Real Estate Law is designed to protect the public against. Accordingly, if a net listing is used, the meaning should be thoroughly explained to the principal who should be fully informed that all moneys received over and above the net price will be kept by the broker as commission on the transaction.

Under the Real Estate Law failure of an agent to disclose the amount of agent's compensation in connection with a net listing is cause for revocation or suspension of license. This must be done prior to or at the time the principal binds himself or herself to the transaction.

Open Listing.

An open listing is a written memorandum signed by the party to be charged (usually the seller of the property) which authorizes the broker to act as agent for the sale of certain described property. Usually no time limit is specified for the employment. However, open listings have been used which provide a definite term. The property is identified by a suitable description, and generally the terms and conditions of sale are set forth.

Open listings are the simplest form of written authorization. They may be given concurrently to more than one agent, and usually the seller is not required to notify the other agents in case of a sale by one of them, in order to prevent liability of paying more than one commission. The sale of the property under such an agreement is considered to

cancel all outstanding listings.

Thus where several open listings are given, the commission is considered to be earned by the broker who first finds a buyer who meets the terms of the listing, or whose offer is accepted by the seller. If the owner personally sells the property, the owner is not obligated to pay a commission to any of the brokers holding "open listings."

Exclusive Agency Listing. An exclusive agency listing is a contract containing the words "exclusive agency." The commission is payable to the broker named in the contract and if the broker or any other broker finds the buyer and effects the sale, the broker holding the exclusive listing is entitled to a commission.

Note: If a broker other than the broker holding the exclusive agency listing is the procuring cause of the sale, the owner may be liable for the payment of two full commissions. It is to be noted that the listing refers to an agency and as the owner is not an agent, the owner may personally effect the sale without incurring liability for commission to the broker holding the agency listing.

Exclusive Right to Sell Listing. Another form of listing is the "exclusive right to sell." Under such listing, a commission is due the broker named in the contract if the property is sold within the time limit by the said broker, by any other broker, or by the owner. Frequently such contracts also provide that the owner shall be liable to pay a commission, if a sale is made within a specified time after the listing expires, to a buyer introduced to the owner by the listing broker during the term of the listing. The real estate broker is usually obligated under the terms of the listing contract to furnish a list of the names of persons with whom the broker has negotiated during the listing period within a specified number of days after the expiration of the listing.

The "exclusive right" and the "exclusive agency" type of listing should be for a definite term, with a specified time of termination. If a licensed broker does not provide for this, the broker is subject to disciplinary action against broker's license, under the California Real Estate Law.

Multiple Listing Service. A multiple listing service is a cooperative listing service conducted by a group of brokers, usually members of a real estate board. The group provides a standard "multiple listing" form which is used by the members. It is usually an "Exclusive Authorization Right to Sell" listing form, and provides, among other things, that the member of the group who takes the particular listing is to turn it in to a central bureau. From there it is distributed to all participants in the service and all have the right to work on it. Commissions earned on such listings are shared

between the cooperating brokers, with the listing broker providing for the division of commission in each listing sent to other participants.

There are numerous such multiple listing services conducted by real estate boards and other groups throughout California. The number has grown during the past few years, and they have been generally successful.

Deposit Receipt. Generally, California brokers use a deposit receipt when accepting "earnest money" to bind an offer for property by a prospective buyer. This is a very important instrument in the usual real estate transaction. It is a receipt for the money deposited, but more importantly it is customarily the basic contract for the purchase and sale of the real property involved. It should set forth all the basic factors which are included in a contract of sale, including arrangements for financing. It should contain a complete understanding among the buyer, seller, and broker as to the return of the deposit in the event the offer is not accepted, and provisions for disposition of deposit money should the buyer fail to complete the purchase.

Some of these provisions are incorporated by "standard" clauses in the printed deposit receipt forms, but it is apparent that the terms and conditions of the offer must be filled out with extreme care by the broker or salesperson.

Agent Must Give Copies of Contracts. The real estate license law provides that brokers and salespersons must give copies of documents and agreements to the persons signing them at the time the signature is obtained. The law not only applies to copies of listing contracts and deposit receipts, but to any document pertaining to any of the acts for which one is required to hold a license.

When Broker is Entitled to Commission. Ordinarily the broker is entitled to a commission when the broker produces a buyer, ready, willing and able to purchase the property for the price and on the terms specified by the principal, regardless of whether the sale is ever consummated. Contracts may expressly provide that no commissions are payable except upon a completed sale or on an installment of the purchase price when paid by the buyer, and such a provision controls in the absence of fraud or prevention of performance by the principal. The broker must be the procuring cause of the sale; it is not sufficient that the broker merely introduces the seller and buyer, if they are unable to agree upon the terms of the sale within the time period of the agency.

The broker may, however, have a cause of action for the payment of commission under the listing contract if the property is sold to the buyer introduced by the broker after the listing has expired.

Tender Defined. A tender in a real estate transaction is an offer by one of the parties to the contract to carry out that party's part of the contract. A tender is usually made at the time of the closing of title (i.e., concluding the transaction). If, at closing of title, one of the parties defaults or is unable to carry out his or her contractual obligation, and the other party is ready to close, the latter makes the tender. If the latter is the seller, then the seller offers the deed to the purchaser, and demands the payment of the balance of the purchase price.

If the latter is the purchaser, the purchaser offers the amount of money required in accordance with the provisions of the contract, and demands the deed from the seller. In the event of litigation arising out of some dispute between the buyer and the seller, the party who made the tender can rightfully claim that he or she was ready, willing, and able to go through with the deal, and that the other party defaulted. If both parties were in default, neither may recover any damages against the other. Whether the parties made a tender is a question of fact which must be established by competent evidence.

The person to whom the tender is made must specify any objections at the time or they are waived. The tender of performance, when properly made, has the effect of placing the other party in default if the other party refused to accept it and the party making the tender may rescind or sue for breach of contract, or for specific performance where this remedy is available.

It will be helpful at this point, since we are discussing agency within the context of the acquisition and transfer of real property, to reiterate the ways in which these activities may occur. Few topics are of greater interest to the real estate salesperson and broker than those concerned with acquisition and transfer of title to property. Usually acquisition of property by one owner entails a transfer from another owner, and so we consider the techniques together.

The basic distinction between real and personal property is not taken into account in the broad statutory statement of how property is acquired. The Civil Code declares that five ways or means are available for the acquisition of property: will, succession, accession, occupancy, and by transfer. These may be further broken down as follows:

(1) By will:

- a. Formal or witnessed will
- b. Holographic will
- c. Nuncupative will

(2) By succession:

- a. Of separate property

- b. Of community property

(3) By accession:

- a. Through accretion
 - 1. By alluvion
 - 2. By dereliction
- b. Through avulsion
- c. Through addition of fixtures
- d. Through improvements made in error

(4) By occupancy:

- a. Abandonment
- b. Prescription
- c. Adverse possession

(5) By transfer:

- a. Private grant
- b. Public grant
- c. Gift:
 - 1. To private person
 - 2. To public — by dedication
- d. Alienation by operation of law or court action:
 - 1. Judgment of court
 - (a) Partition action
 - (b) Quiet title action
 - (c) Foreclosure action
 - (d) Declaratory relief action
 - 2. Execution sale
 - 3. Forfeiture:
 - (a) Estate on condition subsequent
 - (b) Estate on special limitation
 - 4. Bankruptcy:
 - (a) Voluntary
 - (b) Involuntary
 - 5. Marriage
 - 6. Escheat
 - 7. Eminent Domain
 - 8. Equitable estoppel

Employer-Employee vs. Independent Contractor

With reference to the law of agency, it is important to make distinctions between independent contractor status and the employer-employee relationship. An ordinary employee, or servant, is defined in the Labor Code as one

employed to render personal services to the person's employer, otherwise than in pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the master. A servant works for his or her master, while an agent not only does this, but acts for and in the place of the principal for the purpose of making contracts and thus bringing the principal into legal relationships with third persons. For purposes of the Real Estate Law, a real estate salesperson is an agent of the real estate broker under whom he or she is licensed. If the broker is a corporation, the salesperson is an agent of the corporation, not of the supervising qualifying broker.

Independent Contractor. An independent contractor is one who, in rendering services, exercises an independent employment or occupation and is responsible to the employer only as to the results of his or her work. An important factor in establishing one as an independent contractor is that the individual determines the method of accomplishing the work for which the individual has contracted.

Real estate brokers are almost always independent contractors. Under the law of agency a real estate broker is ordinarily deemed a special agent who deals in the name of the broker's principal, but does not have custody and control of the subject matter of the agency.

Real Estate License Law. This subject is discussed in detail in a separate chapter, but it is appropriate here to mention that for purposes of the Real Estate License Law—and this is of primary importance to the licensee—salespersons are employees of the broker as a matter of law and cannot be independent contractors. A contract between a salesperson and his/her broker in which the salesperson is characterized as an independent contractor does not make it so under the Real Estate Law.

Interrelating Factors. An independent contractor is a person who sells final results rather than time and whose methods of achieving those results are not subject to the control of another. The independent contractor agrees to do the work contracted for in his or her way. An independent contractor may, however, be an agent. The real estate broker is usually in this category. On the other hand, office personnel are not independent contractors. Further complicating a clear understanding of the above classifications is the fact that there are many independent contractors such as building subcontractors who are not agents at all.

CREATION OF AGENCY RELATIONSHIP

The relationship of principal and agent can be created by agreement (with or without a written contract), by ratification or by estoppel. Normally, however, the status of real estate agent is created by express contract. When created

in this manner, the basic principles of contract law are applicable.

Consideration. Consideration is not essential to the creation of an agency. One may gratuitously undertake to act as an agent and will still be held to certain standards demanded of an agent for compensation. Generally, however, there is a contract with consideration from the real estate broker and principal. Under the Real Estate Law, acts must be performed for or in expectation of a compensation in order for a **licensed** agency to exist. When the principal signs a listing contract promising compensation for service by an agent and the agent renders the service requested, the contract is described as unilateral.

When the broker makes a counter-promise in the listing agreement to "use due diligence" in finding a purchaser it is a bilateral contract in that the consideration is a promise for a promise.

An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation is unenforceable unless the agreement, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by the party's agent.

This is a logical application of the "equal dignities" rule which states that to be enforceable the authority to enter into a contract required by law to be in writing must also be written. There are certain exceptions, however, as where the agent acts in the immediate presence of the principal and executes the instrument under the principal's direction.

Another exception is sometimes made in circumstances where an agent is an executive officer of a corporation, but this is only in limited cases where the making of the contract is within the scope of the officer's authority. These requirements are in general based upon the English Statute of Frauds which, in modified form, is applied in most, if not all, American jurisdictions.

Employment Contract. Thus the first act that takes place between broker and client is the written contract of employment. Although this transaction between the parties would seem to be the most simple phase of the entire relation, it has nevertheless been one of the greatest sources of litigation.

The duty to know the proper employment procedure is placed upon the broker. A broker draws clients from all walks of life and it is incumbent upon the broker in view of the broker's knowledge and expertise to see that the employment relationship is created in correct form and in a fair manner according to the circumstances.

AGENT'S AUTHORITY

The following is a brief and general summary of the "law of agency." Some of the material has limited application to everyday real estate transactions, but the general principles should nevertheless be understood.

The Civil Code provides that every agent has authority:

- (1) To do everything necessary, or proper or usual in the ordinary course of business, for effecting the purpose of the agency;
- (2) To make representations as to facts involved in the transaction in which the agent is engaged.

The authority of an agent may be actual or ostensible. Actual authority is that authority a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe that he or she possesses. Ostensible authority is that authority a principal intentionally, or by want of ordinary care, causes third persons to believe that the agent possesses.

The principal is liable to persons who have sustained injury through a reasonable and prudent reliance upon the ostensible authority of an agent. The act or declaration of the agent can never alone establish ostensible authority, but silence upon the part of the principal who knows that an agent is holding himself or herself out as vested with certain authority may give rise to liability of the principal.

When the principal executes and entrusts to the agent a negotiable or non-negotiable instrument containing blanks and the agent fills them in, the principal will be bound to third persons who rely upon the instrument, even though the agent was not so authorized.

Emergency Broadens Authority

An agent has expanded authority in an emergency, including the power to disobey instructions where it is clearly in the interests of the principal, and where there is no time to obtain instructions from the principal.

Restrictions on Authority.

An agent who is given the power to sell and convey real property for a principal also possesses the power to give the usual covenants of warranty unless there are express restrictions in this regard in the agent's agreement with the principal.

The Civil Code expressly states that an agent can never have authority, either actual or ostensible, to do an act which is known or suspected by the person with whom the agent deals to be a fraud upon the principal. Unless specifically authorized an agent has no authority to act in the agent's own name unless it is in the usual course of business for the agent to do so.

An agency to sell does not carry with it the authority to modify or cancel the contract of sale after it has been made. A mere agency to sell property ordinarily empowers the agent to find a purchaser but does not authorize the agent to enter into a contract to convey on behalf of the principal. Unless otherwise specified the authority to sell only permits a sale for cash and the agent is not entitled to accept goods in payment.

An agent who has authority to collect money may endorse a negotiable instrument received in payment only where the exercise of this power is necessary for the performance of the agent's duty. Where an agent is expressly authorized to collect money, the agent may accept a valid check and the agent's receipt of the check will be considered payment to the principal.

An agent who negotiates a loan on behalf of a lender-principal ordinarily has no authority to collect from the borrower except in those instances where the agent has possession of the security and the borrower has knowledge of this fact.

Ratification of Unauthorized Acts

Occasionally a person may act as agent without any authority to do so, or the true agent may act beyond the scope of the agent's authority. The alleged principal is not bound by such acts. However, a principal may under certain circumstances ratify the acts of the agent and thus become bound. Not only must the principal intend to ratify, but:

- (a) The agent must have professed to act as a representative of the principal;
- (b) The principal must have been capable of authorizing the act both at the time of the act and at the time of ratification (e.g., sometimes the promoters of a proposed corporation make contracts on its behalf, but the corporation cannot ratify them — though it may achieve the same result by other means);
- (c) The principal must have knowledge of all the material facts (unless ratification is given with the intention to ratify whatever the facts may be);
- (d) The principal must ratify the entire act of the agent,

10

LANDLORD AND TENANT LAW

We have seen spent most of this course, so far, considering real estate law as it applies to the acquisition, ownership and transfer of real property. In the old historical sense a basic distinction was made between freehold estates and less-than-freehold estates. The latter category consists of what are today more commonly called leases or leaseholds, and that is the subject of this chapter. When you consider leaseholds, you are obviously considering the landlord/tenant relationship and the various laws which pertain to it.

The distinguishing feature of a leasehold interest is the right to exclusive possession and use for a fixed period of time of real property held by the lessee (tenant). The lessor (landlord), having parted with this right to exclusive possession, merely holds the basic title (reversion) during the existence of the lease. Hotel guests, licensees and employees may all be privileged to use a given space under certain contractual conditions; yet since none of these has an exclusive right to possession, they are not governed by the laws regulating the relation of landlord and tenant.

Leasehold estates are **chattels real**. Although they give the owner (i.e., the tenant or lessee) an estate (i.e., an interest) in real property, they are in fact a form of personal property and are governed by laws applicable to personal property.

TYPES OF LEASEHOLD ESTATES (TENANCIES)

Most authorities recognize four fundamental types of leases based on the length of their duration, namely:

- (1) Estate for years
- (2) Estate from period to period (periodic tenancy)
- (3) Estate at will
- (4) Estate at sufferance

Estate for Years. An estate for years is one which is to continue for a definite period fixed in advance by agreement

between lessor and lessee. The label is somewhat misleading because the period may be for less than a year, measured in specific days or weeks or months.

Estate From Period to Period. An estate from period to period (or periodic tenancy) is one which continues from period to period (either year to year, month to month, or week to week) as designated by lessor and lessee in their agreement. Perhaps the most common periodic tenancy is the month-to-month tenancy.

Estate at Will. An estate at will is one which is terminable at the will or unilateral decision of either party, with no designated period or duration. Tenancies at will are uncommon because through the landlord's acceptance of periodic rents, the tenancy is treated like a periodic tenancy (Civil Code Section 1946). By statute California and certain other states have modified the potentially summary and abrupt conclusion of such estates and require advance 30-day notice of termination by each party.

Estate at Sufferance. An estate at sufferance is one in which the lessee who has rightfully come into possession of the land retains possession after the expiration of the term. For example, a tenant holds over after the expiration of a lease.

REQUISITES FOR CREATION OF A LEASEHOLD ESTATE

No particular language is required in order to create a leasehold so long as the intention to rent the property appears. The language, however, must include the names of the parties, description of the property, amount of rental payments and length of time the lease will continue. It is not necessary that the words "let" or "demise" be written into the lease to make it legal.

In Writing. Leases for one year or less need not be in writing. However, it makes for certainty and intelligibility to reduce all leases, even those from month to month, to written

form. Leases for longer than one year are required to be in writing by the provisions of the Statute of Frauds.

It should be noted that a lease for merely one year, normally not within the Statute of Frauds, nevertheless falls therein when the one-year period is to start subsequent to the date of entering into the agreement.

The California courts have held that in the event the lease is a written one, it must be signed by the lessor. It is not necessary that the lessee sign the lease as delivery to and acceptance by the lessee is sufficient. Acceptance by the lessee of the provisions of the lease may be evidenced by the lessee paying rent and entering into possession of the real property, even though the lessee may not have signed the lease agreement.

Thus the lessee entering into possession of the property and paying rent binds both the lessor and the lessee to the provisions of the lease agreement. Upon acceptance both lessee and lessor become bound under the lease as a conveyance. A lessor, in order to have the lease operative, must deliver it signed, and the instrument must pass into the control of the lessee or assignee of the lease to constitute an effective delivery. As indicated, acceptance of the leased premises by the lessee may also be regarded as delivery.

Language of the Lease. The landlord is one who has an estate in real estate which he or she agrees to rent to another called the tenant for a fixed period of time. The relationship between landlord and tenant is created by a lease. A lease is a conveyance of an estate in land coupled with a contract between the one granting the lease, called the lessor, and the one to whom the estate is granted, called the lessee, for the possession and use of the property in consideration of rent. Obligations of a dual nature are thereby established:

- (1) Those growing out of the relationship of landlord and tenant, and
- (2) Those growing out of the expressed stipulation of the lease.

A lease is construed according to the intent of the parties, as gathered from the language of the lease and in accordance with the rules of interpretation of contracts generally. Like other contracts a written lease cannot be altered in its executory provisions by an oral agreement. Any alterations of the lease agreement mutually agreed upon by all parties thereto must be in writing. The lease cannot be changed by mutual oral agreements unless these agreements have been fully performed and thereby become an executed modification of the lease.

The rental of real property is presumed to be from month to

month unless otherwise designated in writing. There are exceptions to this general statement; namely, lodgings and dwelling houses, in places where there is not custom or usage on the subject, and also real property used for agricultural or grazing purposes may be leased for one year or less verbally.

Note: This has the effect of making oral leases for a year or less on such property as vacant lots and business structures unenforceable unless the lease is in writing. Lacking a written lease, the presumption is that the hiring is on a month-to-month basis.

RIGHTS AND OBLIGATIONS OF PARTIES TO LEASE

A number of matters as between landlord and tenant should be considered before entering into the lease agreement. Many of these matters are relatively unimportant in the oral month-to-month tenancy, but become increasingly important in the case of written leaseholds for a longer period of time.

Since these subjects are each covered in considerable detail by contract provisions of the instrument, each written lease must be separately studied to determine the rights and obligations of the parties involved. Some of the more important subjects which should be covered even in the simpler types of leases are the following:

1. Duration of lease
2. Rent
3. Possession, maintenance and improvements
4. Liability of parties for injuries resulting from condition of the premises
5. Transfer by lessee
6. Special covenants, conditions and provisions
7. Termination

Tenant's Privacy vs. Landlord's Right of Entry. Under what conditions may a landlord legally enter the tenant's dwelling? Civil Code Section 1954 states such entry may be made:

- (a) in an emergency
- (b) to make necessary or agreed repairs, alterations, improvements, decorations, supply necessary or agreed services, or show dwelling to prospective or actual purchasers, mortgagors, tenants, workmen or contractors
- (c) where tenant has abandoned or surrendered the pre-

mises

(d) pursuant to court order

Other than in the case of emergency or tenant abandonment, landlord must enter during "normal business hours," unless tenant consents at time of entry. Except in an emergency situation or where otherwise impracticable to give notice, landlord must give tenant reasonable notice of intent to enter (24 hours presumed reasonable). Landlord shall not abuse this right of entry nor harass tenant.

Civil Code Section 1953 provides that any lease or rental agreement provision attempting to waive or modify tenant's rights under Civil Code Section 1954 is void.

Thus the tenant's basic right to privacy, use and possession is protected while providing for landlord's reasonable access to the premises in emergency or necessary situations.

Possession, Maintenance and Improvements. In every lease the law implies a covenant on the part of the lessor to the quiet enjoyment and possession of the property by the lessee during the term of the lease. It is a warranty by the lessor against lessor's own acts, not those of strangers. Eviction of the lessee constitutes a breach of this covenant. Eviction occurs when the landlord ousts the tenant or allows the tenant to be ousted by another who has paramount title.

An eviction, however, can exist without a physical ouster of the tenant. Generally, any disturbance of the tenant's possession, whereby the property is rendered wholly or substantially unsuitable for the use for which it was leased, or any interference with the tenant's beneficial enjoyment of the property (such as threats of expulsion) will constitute eviction.

Constructive Eviction. Constructive eviction may also occur through the landlord's attempts to lease the property to others or through the making of extensive and unwarranted alterations to the property.

A tenant who is evicted, or constructively evicted, may abandon the premises and refuse to pay further rent without incurring liability for breach of the lease. For many years the courts held that a tenant relying on the doctrine of constructive eviction must have surrendered possession of the property in order to escape the obligation to pay rent. Where the building is a dwelling house, however, the California Supreme Court has held that there is an implied warranty of habitability from the landlord to the tenant that the premises will be maintained in a condition to meet **bare living requirements**. A breach of this implied warranty by

the landlord is directly related to the tenant's obligation to pay all or part of the rent and is considered a form of constructive eviction, and the tenant's obligation to pay rent will depend upon the extent of the eviction.

Landlord's Minimum Obligations. Civil Code Section 1941.1 sets forth the landlord's minimum obligations to the tenant. These obligations require the landlord to assure:

- The plumbing, including hot and cold water, gas facilities, sewer and septic tank connections are in working order
- The heater, lights, and wiring work and are safe
- Floors, stairways, and railings are in good condition
- When rented, the premises are clean, with no piles of trash, rats, mice, roaches, or other pests; and maintain areas which are under his/her control during the tenancy. An adequate number of appropriate garbage containers
- There are no leaks when it rains, and no broken doors or windows.

Tenant's Legal Obligations for Care of Premises. A tenant's affirmative duties to a landlord for reasonable care of the premises are found in Section 1941.2 of the Code. The tenant must:

- Keep his/her part of the premises as clean and sanitary as possible (unless the landlord has expressly agreed in writing to do it)
- Dispose of garbage or trash (unless the landlord has expressly agreed in writing to do it)
- Properly use the plumbing, electrical and gas fixtures and keep them clean
- Not permit any person, with tenant's permission, to damage or deface any part of the rental building not do so him/herself
- Use the dwelling for a residence and use the rooms for the purpose for which they were designed or intended.

Housing Standards. The State Housing Law and various housing codes require the landlord to keep a dwelling in good condition in accordance with specified structural, plumbing, electrical, sanitation, fire and safety standards. These laws are generally enforced by local city and county Building Inspection Department, Health Department, or Fire Department, depending on the type of problem. If there is a violation, a tenant can file a complaint with the appropriate department. They can investigate the complaint and require the landlord to make needed repairs.

Repairs by Tenants. There are other remedies available to a tenant if the landlord fails to maintain the property in a condition fit for human occupancy. The tenant may give the landlord a notice to repair and do either of the following if the landlord fails to make the repairs necessary to render the property habitable:

- (1) Spend up to one month's rent in repairs *, or
- (2) Abandon the premises in which case the tenant is relieved from the requirement of paying additional rent and the performance of other conditions of the lease.

(*This remedy not available more than twice in twelve months) If the landlord attempts to evict the tenant or increases rent or decreases services in retaliation against the tenant's having utilized one month's rent to repair the property, the landlord may be restrained by court order from undertaking any such retaliatory action for a period of sixty days.

Condemnation of Premises. If the entire leased property is condemned under a proceeding in eminent domain, the lessee is ordinarily released from all of his obligations under the lease agreement including the obligation to pay rent. If the premises are only partially taken and the portion of the property which has not been condemned may still be used by the lessee for the purpose for which it was leased, the lessee must continue to pay rent according to the terms of the lease agreement.

In such a case, the lessee rather than the lessor is entitled to damages resulting from the condemnation.

#43
Tenant Improvements. Before a tenant makes improvements such as the installation of fixtures, the tenant should enter into a supplemental agreement with the landlord concerning these fixtures. If he or she does not, the fixtures will ordinarily become a part of the real property and will belong to the owner of the land when the lease has terminated. This rule of law has been modified by statute in California in those cases where a tenant has installed fixtures for the purposes of trade, manufacture, ornamental or domestic use. Such fixtures may be removed by the tenant during the term of the lease unless they have become an integral part of the premises through the manner in which affixed and if removal can be effected without injury to the real property.

The law as written leaves much room for honest differences of opinion between landlord and tenant. It is therefore preferable to provide in advance by agreement for the disposition of fixtures.

Liability of Parties for Injuries Resulting From Condition

of Premises. Generally, where the entire premises are leased, the landlord is not liable for injuries to the tenant or the tenant's invitees resulting from the defective condition of the premises, even though the exercise of reasonable diligence would have disclosed the defects. If the premises are a dwelling house, the landlord's failure to repair dilapidation does not make the landlord liable where the tenant, after knowledge of the dilapidation, stays on instead of abandoning the premises.

A special covenant by the landlord to repair may make the landlord liable for injuries if after notice to repair he or she fails to do so. Where the landlord has actual knowledge of defects and conceals them from the tenant, the landlord may be liable for injuries sustained by reason thereof. A landlord may be liable also where an injury results from the defective condition of some part of the premises over which the landlord retains control, such as hallways, stairs, elevators or roof, where there are several tenants.

Transfer by Lessee. The tenant may, in the absence of a covenant or condition to the contrary, make an assignment of the lease or create a sublease of the premises. An assignment is a transfer of the entire leasehold. A sublease is a transfer of less than the leasehold with the reversion in the sublessor.

For example, suppose two years of a three year lease remain. The tenant might assign a third party all rights to occupancy for the entire two years, or might sublet the tenant's rights for one year and reoccupy the premises in the third year.

Termination. A tenancy for a specified term (i.e., estate for years) ends at the expiration of the term and without notice. Periodic tenancies may be terminated by either party by a written notice of at least as long before the expiration thereof as the term of the lease but not exceeding one month. The general rule, therefore, is that if a tenant pays rent weekly one week's notice suffices; if tenancy is on a two-week basis and rent is paid for that period, then two weeks notice is required.

The failure of a tenant to give proper notice may result in the tenant's having to pay additional rent. The notice of departure of the tenant does not have to correspond to the due date for the rent; e.g., if the rent is due on July 1, the tenant can give notice on July 10 and move out on August 10 when a 30 day notice is appropriate. Of course, the tenant must still pay the rent for the first 10 days of August.

Parties may specifically agree that a seven day notice shall be sufficient. When this agreement exists, there is no necessity for the notice to be in writing as an oral or verbal notice is sufficient. Tenancies at will require no less than 30

11

THE CALIFORNIA CODES AND REAL ESTATE

As previously explained, Sections 10000-10602 of the Business and Professions Code comprise the so-called Real Estate Law, and Sections 11000-11200 define the Real Estate Commissioner's jurisdiction over subdivisions and his responsibilities in connection therewith. This does not imply that a licensee's conduct is amenable only to these sections. Scattered throughout the California Codes are statutes with which the licensee should be acquainted in order to avoid pitfalls in practice. Some of these, or their content description, are presented in this chapter.

BUSINESS AND PROFESSIONS CODE

In addition to the sections referred to as the Real Estate Law, licensees should be familiar with the following pertinent sections of the Business and Professions Code.

License Offenses

Section 119. Any person who does any of the following is guilty of a misdemeanor:

- (a) Displays or causes or permits to be displayed or has in his possession any canceled, revoked, suspended, fictitious, or fraudulently altered license, or any document simulating a license or purporting to be or to have been issued as a license.
- (b) Lends his license to any other person or knowingly permits the use thereof by another.
- (c) Displays or represents any license not issued to him as being his license.
- (d) Fails or refuses to surrender to the issuing authority upon its lawful demand any license which has been suspended, revoked, or canceled.
- (e) Permits any unlawful use of a license issued to him.
- (f) Photographs, photostats, duplicates, or in any

way reproduces any license or facsimile thereof in such a manner that it could be mistaken for a valid license, or displays or has in his possession any such photograph, photostat, duplicate, reproduction, or facsimile unless authorized by the provisions of this code.

As used in this section, "license" includes "certificate," "permit," "authority," and "registration" or any other indicia giving authorization to engage in a business or profession regulated by this code or referred to in Sections 1000 or 3600.

Disciplinary Provisions for Discriminatory Acts

Section 125.6 Every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to such person if, because of the applicant's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, he or she refuses to perform the licensed activity by another licensee, or if, because of the applicant's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, he or she makes any discrimination, or restriction in the performance of the licensed activity. Nothing in this section shall be interpreted to apply to discrimination by employers with regard to employees or prospective employees, nor shall this section authorize action against any club license issued pursuant to Article 4 (commencing with Section 23425) of Chapter 3 of Division 9 because of discriminatory membership policy. The presence of architectural barriers to the physically handicapped person which conform to applicable state or local building codes and regulations shall not constitute discrimination under this section.

It shall not constitute discrimination under this section for a person licensed pursuant to Division 2 (commencing with Section 500) to refuse to perform a

licensed activity if the licensee determines that because of the relation between the licensed activity sought and the physical handicap, the licensed activity sought is beyond the licensee's skill, or could better be performed by another licensee.

"License" as used in this section includes (same definition as given earlier).

"Applicant" as used in this section means a person applying for licensed services provided by a person licensed under this code.

"Physical handicap" as used in this section includes impairment of sight, hearing or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which required special education or related services.

(For a further detailed discussion of discrimination and related disciplinary action, refer to **chapter 15, "Fair Housing."**)

Grounds for Denial of License

Section 475. (a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

- (1) Knowingly making a false statement of fact required to be revealed in an application for license;
- (2) Conviction of a crime;
- (3) Commission of any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; and
- (4) Commission of any act which, if done by a licensee of the business or professions in question, would be grounds for suspension or revocation of license.

(b) Notwithstanding any other provisions of this code, the provisions of this division shall govern the suspension and revocation of licenses on grounds specified in subdivision (a)(1) and (2) above.

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

Inapplicability of Division to Attorneys and Persons Subject to Alcoholic Beverage Control Act

Section 476. Nothing in this division shall apply to the licensure or registration of persons pursuant to Chapter 4 (commencing with Section 6000) of Division 3, or pursuant to Division 9 (commencing with Section 23000) or pursuant to Chapter 5 (commencing with Section 19800) of Division 8.

"Board" and "License" Defined

Section 477. As used in this division: (a) "board" includes "bureau," "commission," "committee," "department," "division," "examining committee," and "agency."

Denial of License by Board

Section 480. (a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

- (1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed or the judgment of the conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.
- (2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; or
- (3) Done any act which if done by a licensee of the business or profession in question, would be grounds for suspension or revocation of license.

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made.

(b) Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis that he has been convicted of a felony if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code or that he has been convicted of a misdemeanor if he has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate

the rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482.

(c) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for such license.

Criteria Development

Section 481. Each board under the provisions of this code shall develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.

Rehabilitation Criteria

Section 482. Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

- (a) Considering the denial of a license by the board under Section 480; or
- (b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

Attestation by Other Persons to Good Moral Character Not Required for Application for License

Section 484. No person applying for licensure under this code shall be required to submit to any licensing board any attestation by other persons to his good moral character.

Procedure by Board Upon Denial of Application for License

Section 485. Upon denial of an application for a license, under this chapter the board shall: (a) File and serve a statement of issues in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code; or, in the alternative,

- (b) Notify the applicant that the application is denied, stating (1) the reason for the denial, and (2) that the applicant has the right to a hearing under

~~Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code if written request for hearing is made within the 60 day period, the applicant's right to a hearing is deemed waived.~~

Service of the notice of denial may be made in the manner authorized for service of summons in civil actions, or by registered mail addressed to the applicant at the latest address filed by the applicant in writing with the board in his application or otherwise. Service by mail is complete on the date of mailing.

Re-application; Informing Applicant of Requirements

Section 486. Where the board has denied an application for a license under this chapter it shall, in its decision, or in its notice under subdivision (b) of Section 485, inform the applicant of the following:

- (a) The earliest date on which the applicant may reapply for a license.
- (b) That all competent evidence of rehabilitation presented will be considered upon a re-application.

Along with the decision, or the notice under subdivision (b) of Section 485, the board shall serve a copy of the criteria relating to rehabilitation formulated under Section 482.

Hearing

Section 487. If a hearing is requested by the applicant, the board shall conduct such hearing within 90 days from the date the hearing is requested unless the applicant shall request or agree in writing to a postponement or continuance of the hearing. Notwithstanding the above, the Office of Administrative Hearings may order, or on a showing of good cause, grant a request for, up to 45 additional days within which to conduct a hearing but in no case shall more than two such orders be made or requests be granted.

Conviction of Crime; Relationship of Crime to Licensed Activity

Section 490. A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued, or the ground of knowingly making a false statement of fact required to be revealed in an application for such

license. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

Information to Ex-Licensee

Section 491. Upon suspension or revocation of a license by a board on one or more of the grounds specified in Section 490, the board shall:

(a) Send a copy of the provisions of Section 11522 of the Government Code to the ex-licensuree.

(b) Send a copy of the criteria relating to rehabilitation formulated under Section 482 to the ex-licensuree.

Public Reprovals

Section 495. Notwithstanding any other provision of law, any entity authorized to issue a license or certificate pursuant to this code may publicly reprove a licentiate or certificate holder thereof, for any act which would constitute grounds to suspend or revoke a license or certificate. Any proceedings for public reproof, public reproof or suspension, or public reproof and revocation shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Examination Security; Penalty for Violating

Section 496. A board may deny, suspend, revoke or otherwise restrict a license on the ground that an applicant or licensee has subverted or attempted to subvert any licensing examination or the administration of an examination, including but not limited to:

(a) Conduct which violates the security of the examination materials; removing from the examination room any examination materials; the unauthorized xerographic, photographic or other mechanical reproduction of any portion of the actual licensing examination; aiding by any means the unauthorized xerographic, photographic or other mechanical reproduction of any portion of the actual licensing examination; paying or using professional or paid

examination-takers for the purpose of reconstructing any portion of the licensing examination; obtaining examination questions or other examination material, except by specific authorization either before, during or after an examination or use or purport to use any examination questions or materials which were improperly removed or taken from any examination for the purpose of instructing or preparing applicants for examinations; or selling, distributing, buying, receiving or having unauthorized possession of any portion of a future, current or previously administered licensing examination.

(b) Conduct which violates the standard of examination administration; communicating with any other examinee during the administration of a licensing examination; copying answers from another examinee or permitting one's answers to be copied by another examinee; having in one's possession during the administration of the licensing examination any books, equipment, notes, written or printed materials or data of any kind, other than the examination materials distributed, or otherwise authorized to be in one's possession during the examination; or impersonating any examinee or having an impersonator take the licensing examination on one's behalf.

Conduct Constituting Violation of Examination Security

Section 497. Whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, a violation of any provision of this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of a board, the Attorney General or the district attorney of the county.

The proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure.

The remedy provided for by this section shall be in addition to, and not a limitation on, the authority provided for in any other provision of this code.

Illegal Practice of Law Punishable

Section 6125. No person shall practice law in this state unless he is an active member of the State Bar. **(Note:** The term "to practice law" and equivalent expres-

onment in the county jail not exceeding one year, or by both, or by both such fine and imprisonment.

(5) This section shall not be construed to preclude the applicability of any other provision of the criminal law of this state which applies or may apply to any transaction.

To Give Real Property With Tickets of Admission or at Drawings May Be a Misdemeanor

Section 532c. Any person, firm, corporation or co-partnership who knowingly and designedly offers or gives with winning numbers at any drawing or numbers or with tickets of admission to places of public assemblage, any lot or parcel of real property and charges or collects fees in connection with the transfer thereof, is guilty of a misdemeanor.

To Fraudulently Sell Real Property Twice Bears Heavy Penalty

Section 533. Every person who, after once selling, bartering, or disposing of any tract of land or town lot, or after executing any bond or agreement for the sale of any land or town lot, again willfully and with intent to defraud previous or subsequent purchasers, sells, barter, or disposes of the same tract of land or town lot, or any part thereof, or willfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter, or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the state prison.

False Statements by Licensees May Lead to Fine and Imprisonment

Section 536. Every commission merchant, broker, agent, factor, or consignee, who shall willfully and corruptly make, or cause to be made, to the principal or consignor of such commission merchant, agent, broker, factor or consignee, a false statement as to the price obtained for any property consigned or entrusted for sale, or as to the quality or quantity of any property so consigned or entrusted, or as to any expenditures made in connection therewith, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punishable by fine not exceeding one thousand dollars (\$1,000) and not less than two hundred dollars, or by imprisonment in the county jail not exceeding six months and not less than 10 days, or by both such fine and imprisonment.

Clearly, just about any fraudulent or dishonest action (direct or indirect) that can be imagined within the activities

of the real estate market is covered in the Penal Code. Obviously, the best advice, if one is in doubt of the legality or illegality of a possible course of action, is that "when in doubt, don't." Or at the very least, to seek professional legal counsel. Fortunately, relatively few real estate professionals fall afoul of the Penal Code, but it is important to understand that improper behavior can result in more than suspension or revocation of one's license. The state stands ready to prosecute criminal behavior, in real estate activities as in all others.

THE CORPORATIONS CODE

Now we move on to some of the pertinent sections of the California Corporations Code. The subject under discussion here is real estate syndicates.

Broker Exemption

Section 25206. A broker licensed by the Real Estate Commissioner is exempt from the provisions of Section 25210 (of the Corporations Code) when engaged in transactions in any interest in any general or limited partnership, joint venture, unincorporated association, or similar organization (but not a corporation) owned beneficially by no more than 100 persons and formed for the sole purpose of, and engaged solely in, investment in or gain from an interest in real property, including, but not limited to, a sale, exchange, trade, or development. An interest held by a husband and wife shall be considered held by one person for the purposes of this section.

Jurisdiction Transfer of Real Estate Syndicates

Section 25706. (a) All effective permits, orders, and consents under the Real Estate Syndicate Act, all administrative orders relating to the Real Estate Syndicate Act, and all conditions imposed upon the Real Estate Syndicate Act remain in effect so long as they would have remained in effect if such act had not been repealed, but shall be considered to have been filed, entered, or imposed under this law. An application to amend, extend, modify, revoke, or set aside any such permits, orders, or consents shall be filed under and be subject to the provisions of this division.

(b) Any application pending under the Real Estate Syndicate Act, upon the effective date of this section, shall be processed by the Real Estate Commissioner pursuant to the provisions of the Real Estate Syndicate Act in effect on December 31, 1977, until such application is granted or denied by such commis-

sioner.

(c) Except as expressly provided by this section, the Real Estate Syndicate Act continues to govern all suits, actions, prosecutions, or proceedings which are pending prior to, or which may be initiated thereunder on the basis of facts or circumstances occurring prior to, the effective date of this section.

(d) No civil suit or action may be maintained to enforce any liability under the Real Estate Syndicate Act, unless brought within any period of limitation which applied the time the cause of action accrued.

(e) Judicial review of all administrative orders under the Real Estate Syndicate Act as to which review proceedings have not been commenced prior to the effective date of this section shall be governed by Section 25609, except that no review proceeding may be commenced unless the petition is filed within the applicable period of limitation which applied to a review proceeding when the order was issued and except that judicial review of administrative orders of the Real Estate Commissioner made pursuant to subdivision (b) shall be governed by the provisions of law applicable to such proceedings on December 31, 1977.

Franchise Defined

Section 31005. (a) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchiser; and

(2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchiser's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchiser or its affiliate; and

(3) The franchisee is required to pay, directly or indirectly, a franchise fee.

Unlawful to Sell Unless Registered or Exempted

Section 31110. On and after April 15, 1971, it shall be unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered under this part or exempted under Chapter 1 (commencing with Section 31100) of this part.

Unlawful to Sell Non-Exempt Franchise Unless Licensed

Section 31210. It is unlawful for any person to effect or attempt to effect a sale of a franchise in this state, except in transactions exempted under Chapter 1 (commencing with Section 31100) of Part 2 of this division, unless such person is: (1) identified in an application or amended application filed with the commissioner pursuant to Part 2 (commencing with Section 31100) of this division, (2) licensed by the California Department of Real Estate as a real estate broker or real estate salesman, or (3) licensed by the commissioner as a broker-dealer or agent pursuant to the Corporate Securities Law of 1968.

Penalty for Violating Franchise Investment Law

Section 31410. Any person who willfully violates any provision of this law, or who willfully violates any rule or order under this law, shall upon conviction be fined not more than ten thousand dollars (\$10,000) or imprisoned in the state prison, or in a county jail for not more than one year, or be punished by both such fine and imprisonment; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

Obviously the foregoing sections of the Corporations Code are important in relation to the conduct of real estate business within a franchise, a business arrangement which has grown in importance over recent years and promises to continue doing so. The following brief excerpt from the Labor Code touches upon a requirement for anyone in the real estate business who is an employer.

LABOR CODE

Employer Required to Secure Payment of Liability Compensation

Section 3700. Every employer except the state shall secure the payment of compensation in one or more of the following ways:

(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this state.

(b) By securing from the Director of Industrial Relations a certificate of consent to self-insure, which may be given upon furnishing proof satisfactory to

12

NATIONAL LAW: IMPORTANT FEDERAL LAWS AFFECTING REAL ESTATE

THE CONSTITUTION

#4
The federal Constitution is the means by which legislatures are prevented from exercising capricious authority of regulation. Because of the Constitution, legislative bodies may not arbitrarily pass laws taking the life, liberty or property of citizens. Each statute must be justified as necessary and proper for the protection or advancement of a genuine public interest. You will remember that legislative bodies have "police power," the power which is described by the Supreme Court in the following way:

"By means of it, the legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the state may prescribe regulations promoting the health, peace, morals, education and good order of the people, and legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity."

In short, police power is the power in the state to enact laws **within constitutional limits** to promote the order, safety, health, morals and general welfare of the commonwealth. The various real estate laws which we have examined are all upheld by this police power, and it is important to remember that they have been enacted within constitutional restraints.

Under our system of government the United States Government has only those powers granted to it by the federal Constitution. This includes all powers necessary and proper to carry into effect the powers expressly granted. This latter doctrine of implied powers is necessary for the federal government to function. Implied powers have been vastly increased in recent years by all three branches of the federal government.

The states have all powers of sovereignty except those exclusively granted to the United States, those prohibited

to them by the federal Constitution and those powers limited by their own respective constitutions. Hence the state legislative branch is possessed of the entire police power of the state except as so limited.

By the California Constitution this power of legislation is also vested in counties, cities and towns to make and enforce within their respective limits all such local police and other regulations as are not in conflict with general laws.

THE BILL OF RIGHTS

The first 10 amendments to the United States Constitution, all adopted in 1791, expressly provide that "the powers not delegated to the United States by the Constitution nor prohibited to it by the states are reserved to the states respectively or to the people." It is these first 10 amendments that are commonly known as the Bill of Rights. They are limitations solely upon the power of the United States and not upon the power of the states.

Our State Constitution, however, has its own Bill of Rights protecting the people in the same manner.

The legislature may not impose onerous, unreasonable or unnecessary burdens upon persons, property or business. Where a law operates upon all persons and property similarly situated, it is not obnoxious to the constitutional provisions guaranteeing equal protection of the law to all persons and classes of persons, or guaranteeing persons' freedom of contract, or guaranteeing that no person shall be deprived of life, liberty or property without due process of law.

In no country do the citizens have more liberty than in America. Yet liberty does not mean license to do as one pleases. Each person must so use his own rights, privileges and property so as not to injure another. Where our liberty is restricted, it is in the public interest and this power of legislation, as mentioned, is called police power. Just as

individual states enact laws authorized by police power, so the federal government will do likewise when it is necessary to protect the health, well being, morals, etc. of the nation at large.

THE CIVIL RIGHTS ACT OF 1968

Perhaps it is appropriate to begin a discussion of federal laws affecting real estate with a brief mention of the Civil Rights Act of 1968. This very important law is discussed in the context of fair housing, along with other important anti-discrimination statutes, in chapter fifteen. You will also find a discussion of the Civil Rights Act in Chapter 13 in the context of the *Jones v. Mayer* Supreme Court decision. Therefore, we will forego any further mention of the Civil Rights Act at this point, except to underscore that this law has a very significant bearing on the conduct of real estate business. As you read chapters 13 and 15, the reasons for this will become increasingly clear.

TRUTH IN LENDING ACT

The Truth in Lending Act became effective July 1, 1969. The principal purpose of the Act is to promote the informed use of consumer credit by requiring creditors to disclose credit terms in order to enable consumers to make comparisons between various credit sources. To implement the Act the Board of Governors of the Federal Reserve System issued a regulation known as Regulation Z.

After a decade of experience with the Act and Regulation Z it became clear that the requirements placed too great a burden on creditors, provided too many disclosures for consumers, and fostered too much litigation. This prompted the Congress in 1980 to amend the Act by passing the Truth in Lending Simplification and Reform Act. To reflect the amendments to the Act the Federal Reserve Board substantially revised Regulation Z. Compliance with the simplified Act and revised regulation Z became mandatory on October 1, 1982.

At the time revised Regulation Z was promulgated, the Federal Reserve Board adopted model disclosures for closed-end transactions such as purchases of real property, and model language for certain other disclosures. The Board also announced that its staff would no longer provide written responses to individual requests for interpretations of the Regulation, but would issue a staff commentary from time to time to address questions of interpretation.

The creditor is responsible for furnishing Truth in Lending disclosures to the consumer. Regulation Z now defines a

creditor as a person who extends consumer credit more than 25 times a year or more than 5 times a year for transactions secured by a dwelling. The credit extended must be subject to a finance charge or be payable by written agreement in more than four installments. Another requirement that must be met to render a person a creditor is that the obligation be initially payable on its face or by agreement to that person.

In its definition of "creditor" revised Regulation Z included "arranger of credit," which it defined as a person who arrange or the extension of credit by persons who did not meet the "creditor" definition. The Federal Reserve Board, in considering the necessity for a more specific description of the type of activity which would constitute "arranger of credit," inquired whether real estate brokers who arrange seller financing of homes should be considered "arrangers of credit." In 1982, Congress resolved the question by passing the Garn-St. Germain Depository Institutions Act, which amended the Truth in Lending Simplification and Reform Act of 1980 by deleting "arranger of credit" from the definition of "creditor." To implement the amendment the Federal Reserve Board amended revised Regulation Z by removing "arranger of credit" from the "creditor" definition, effective October 1, 1982. The effect of the Board's action is to release real estate brokers or other arrangers of credit from the responsibility for providing Truth in Lending disclosures, unless such persons otherwise come within the definition of "creditor."

EXEMPTIONS

There are two basic types of transactions that are exempt from coverage under Regulation Z. The first exemption is for credit extended primarily for a business, commercial, or agricultural purpose. If property is not, or is not intended to be, owner-occupied, and the creditor extends credit to acquire, improve, or maintain a rental property, regardless of the number of family units, the transaction will be considered to be for a business purpose.

Special rules apply for credit to acquire, improve, or maintain rental property that is, or will be, owner-occupied within a year. If the property contains more than two family units and the purpose of the credit is to acquire the property, the credit is deemed to be for a business purpose. However, if the credit is extended to improve or maintain the property, it is deemed to be for a business purpose if it contains more than four housing units. These rules should not be construed to prevent an extension of credit for property containing fewer than the aforesaid prescribed number of units from being considered business credit. Credit involving fewer numbers of units may be considered business credit depending on the circumstances of the transaction.

The second exemption is for credit over \$25,000. The dollar limitation does not apply if the loan is secured by real property, or by personal property which is used or expected to be used as the consumer's principal dwelling.

FORM OF DISCLOSURES

Regulation Z requires all Truth in Lending disclosures concerning the credit sale or loan to be grouped together and segregated from other information. The Regulation prohibits the inclusion of any information not directly related to the disclosures required by Regulation Z. It also provides that any itemization of the amount financed be made separately from the other required disclosures. In addition, Regulation Z requires that the terms "finance charge" and "annual percentage rate" shall be more conspicuous than other required disclosures.

The disclosures may be segregated by putting them on a separate sheet of paper, or if the disclosures are on a contract or other document they may be set off from other information by outlining them in a box or by printing them in a different type style, with bold print dividing lines, or with a different color background. The portion of the sale or loan document that contains these disclosures is commonly called "the federal box."

Before its revision, Regulation Z required that all Truth in Lending disclosures be made on one side of a page. Under revised Regulation Z, the Truth in Lending disclosures must be separate from everything else, but may be continued from one page to another.

Regulation Z contains several model forms, including forms which contain disclosures required for transactions involving loan assumptions, variable rate mortgages, and graduated payment mortgages. Lenders may duplicate these forms or modify them by including disclosures required for particular transactions.

REQUIRED DISCLOSURES

497
There are as many as eighteen disclosures required by Regulation Z for closed-end credit transactions such as mortgage loans. A creditor is only required to make those disclosures that are relevant to a particular transaction. The disclosure statement must have simple descriptive phrases next to five of the most important items disclosed. These items are: the amount financed, the finance charge, the annual percentage rate, the total of payments, and, in credit sales, the total sale price. Regulation Z provides suggested

phrases for the five required terms. These phrases are not required to be used verbatim.

The following is a summary of the required disclosures.

Identity of Creditor

The creditor making the disclosures must be identified.

Amount Financed

Regulation Z requires the use of the term "amount financed" together with a brief description of the term. The suggested phrase is "the amount of credit provided to you or on your behalf."

Itemization of Amount Financed

The disclosure of the itemization of the amount financed may be eliminated in those cases where good faith estimates of settlement costs have been supplied for transactions subject to the Real Estate Settlement Procedures Act (RESPA). If the transaction is not subject to RESPA, the creditor must either provide a written itemization of the amount financed, or provide a statement that the consumer has the right to receive a written itemization of the amount financed together with a space for the consumer to indicate whether an itemization is desired. However, many state laws require that the creditor provide the itemization even if the consumer does not specifically request it. The itemization must be separate from the "federal box."

Finance Charge

Regulation Z requires the use of the term "finance charge" together with a brief description such as "the dollar amount the credit will cost you."

The requirement that the components of the finance charge be itemized has been eliminated from revised Regulation Z. In fact, the new rules prohibit creditors from itemizing the finance charge with the other disclosures. Only the total amount may be given. In addition, Regulation Z requires the disclosure of the finance charge in all real estate transactions. Prior to its revision Regulation Z did not require either the total dollar amount of the finance charge or the total of payments to be disclosed on a first loan to finance the purchase of the borrower's dwelling.

The finance charge must include any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. Regulation Z provides examples of charges that must be included in the finance charge and

examples of charges that are excluded from the finance charge.

#98
Charges of particular importance in real estate and residential mortgage transactions which Regulation Z lists among those charges included in the finance charge, are:

1. interest
2. loan fees, assumption fees, finders fees and buyers points
3. investigation and credit report fees
4. premiums for mortgage-guaranty or similar insurance

Charges which are not finance charges include seller's points, and the following fees, when occurring in a transaction secured by real property or in a residential mortgage transaction (which may include the purchase of a mobile home), if they are bona fide and reasonable in amount:

1. fees for title examination, abstract of title, title insurance, property survey, and similar purposes
2. fees for preparing deeds, mortgages, and reconveyance, settlement, and similar documents
3. notary, appraisal and credit report fees
4. amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge

ANNUAL PERCENTAGE RATE

The disclosure of the annual percentage rate requires the use of that particular term together with a brief description such as "the cost of your credit as a yearly rate." In a regular transaction, the disclosed annual percentage rate is considered accurate if it is not more than 1/8 of 1 percentage point above or below the actual annual percentage rate determined. However, in irregular transactions, the annual percentage rate is considered accurate if it is not more than 1/4 of 1 percentage point above or below the actual percentage rate determined. Irregular transactions include multiple advances, irregular payment periods (other than an odd first month), or irregular payment amounts (other than an odd first or final payment).

VARIABLE RATE

In the case of variable rate loans such as adjustable rate mortgages, where the annual percentage rate originally disclosed to the consumer may later increase, there must be

a disclosure of:

1. the circumstances under which the rate may increase
2. any limitations on the increase
3. the effect of an increase
4. an example of the payment terms that would result from an increase. The variable rate disclosures required by other federal agency regulations, such as those of the Federal Home Loan Bank Board or Comptroller of the Currency, may be substituted for the Regulation Z requirements.

PAYMENT SCHEDULE

The creditor must disclose the number, amounts, and timing of payments scheduled to repay the obligation. Regulation Z provides for an abbreviated disclosure of payment schedule for transactions in which a series of payments vary solely because of the application of a finance charge to the unpaid principal balance. This situation arises most frequently in graduated payment mortgages or in mortgages where mortgage insurance premiums are based on the unpaid principal balance. In these transactions creditors need to disclose only the amount of the largest and smallest payments in the series and that the other payments may vary.

TOTAL OF PAYMENTS

Regulation Z requires the creditor to use the term "total of payments" as well as a brief description such as "the amount you will have paid when you have made all scheduled payments." The total of payments (which is the sum of the payments disclosed in the payment schedule) must be disclosed for all real estate transactions under revised Regulation Z.

DEMAND FEATURE

Regulation Z requires that if the obligation has a demand feature, that fact be disclosed. This disclosure is required only for a demand feature contemplated by the parties as part of the legal obligation. Transactions that convert to a demand status as a result of the consumer's default are not within the purview of this requirement. Neither is a due-on-sale clause.

13

CASE LAW: IMPORTANT COURT DECISIONS IN REAL ESTATE

Numerous court decisions have established a substantial body of "case law" relating to real estate matters. Some are more important than others. In this chapter we will examine a number of the more important decisions and legal opinions, and discuss how they apply to the everyday business of real estate.

ANDERSON AND MILES V. RESNICK PUBLIC LIABILITY

Even though an employer or principal may not be personally at fault, they can be held liable in damages for the negligent conduct of employees while they are acting within the general scope of their employment. This liability finds its most notable illustrations in cases involving automobile accidents of employees while driving on the employer's business. If the wrongdoer is an independent contractor, however, the person who hired him or her would not ordinarily be liable for injuries caused by negligence of the independent contractor.

In view of the difficult question of law as to the true legal status of any particular salesperson and the great risks involved, serious consideration must be given by brokers to carrying public liability insurance covering all their salespersons and office personnel regardless of employment contract clauses attempting to create an "independent contractor" status. The courts will look to the relationship rather than to labels placed upon it by the parties.

In August 1980 in Anderson and Miles v. Resnik, the California Second District Court of Appeals said, A salesman, insofar as his relationship with his broker is concerned, cannot be classified as an independent contractor. Any contract which purports to change that relationship is invalid as being contrary to the law. The California Supreme Court in late October declined to hear the Resnik case, an action which allows to stand the Appeal Court decision in the matter.

ANDRADE DEVELOPMENT CO. V. MARTIN MANAGEMENT AND CONTROL

Prior to January 1, 1975, the husband of a marriage generally had the power to manage and control the real and personal community property with the exception of the wife's earnings. Community property was subject to the debts of whoever had management and control. Community property was liable for: both pre- and post-marital debts of husband; only pre-marital debts of the wife, in which case the husband's earnings could not be held liable.

On and after January 1, 1975, each spouse was given co-equal management and control of the community property. An exception to co-equal management and control exists where one of the spouses manages a community personal property business. This spouse has sole management and control of the business. Community property is liable for the debts of either spouse contracted after marriage. For debts contracted prior to marriage, community property is liable for those debts except that portion of the community property comprised of the earnings of either spouse.

Neither spouse may make a gift without the consent of the other. Neither spouse may encumber the furniture, furnishings or fittings of the home, or the clothing of the other spouse or minor children without the written consent of the other spouse. As in prior law, both must joint in the conveyance, encumbrance or leasing (one year or more) of community real property. Civil Code Section 5127 provides that both spouses either personally or by duly authorized agent must joint in executing any instrument by which community real property or any interest therein is sold, leased or encumbered.

In Andrade Development Co. v. Martin the court found a contract null and void which was signed only by a husband and purported to sell community property. Where real property is owned by more than one person, licensees

should obtain all necessary signatures to the contract when the owners sign the listing and acceptance.

Each spouse has the right to dispose of his or her one-half of the community property by will. Failing to do so, the surviving spouse gets the decedent's half by **intestate succession**.

BARKIS V. SCOTT

REAL PROPERTY SALES CONTRACT

A real property sales contract is an instrument by which the seller agrees to convey title to real property to the buyer after the buyer has met certain conditions specified in the contract and which does not require conveyance of title within one year.

Primarily, a sales contract is used where a buyer can make only a small down payment plus monthly installment payments over a period of time. When the buyer has paid over time an agreed-upon sum, the buyer is entitled to a deed from the seller. The buyer is called the **vendee**; the seller is called the **vendor**.

This device, variously designated "Installment Sales Contract," "Agreement to Convey," "Agreement for Purchase and Sale," "Land Sale Contract," or "Land Contract of Sale," meets the definition of a contract set forth in Section 1549 of the California Civil Code. Such agreement is invalid unless the same or some note or memorandum thereof is in writing and subscribed to by the party being charged or by that party's agent.

The presumed advantage of such an instrument to a seller is the ease with which seller may eliminate a purchaser's interest in the event of a default. This presumption, however, was considerably weakened by the court's decision in **Barkis v. Scott (34 Cal.2d 116, 208 P.2d)** that California Civil Code Section 3275 was a sufficient barrier to harsh and unreasonable foreclosure proceedings. Since seller is still the "vestee" seller remains in a position to deed the property to another or to further encumber it.

When selling a parcel of land under a sales contract which is not recorded, the seller is prohibited from otherwise encumbering the parcel to an aggregate amount exceeding the amount due under the contract without the written consent of the purchasing parties.

Real property sales contracts must recite the number of years required to complete payment in accordance with the term of the contract and, if tax estimate is made, the basis for it.

When selling improved or unimproved real property under a real property sales contract, the seller or assignee must apply installment payments from the buyer first to payments which might be due on obligations secured by an encumbrance or encumbrances on the property.

The law requires that each sales contract relating to purchase of real property in a subdivision shall clearly set forth the legal description of the property, all the existing encumbrances at the date of the contract, and the terms of the contract.

The seller faces the problems of difficulty in "clearing title" and regaining possession of the property if the buyer defaults. In the light of this fact, except in the special area of large land developments, the advantage which a land contract may have held as a security device seems to have dissipated in favor of the use of a deed of trust with power of sale.

The disadvantages of a sales contract to the buyer are several, the chief of which are:

1. Covenants in restriction of assignment or transfer of the land contract which hamper or prevent the transfer of buyer's interest therein.
2. A prevailing opinion among financial institutions that a land contract is poor collateral.
3. After full performance the buyer may receive defective title or no title at all, although normally the contract will require delivery of a policy of title insurance. The buyer may have to pay the premium for this.
4. Lack of assurance that the seller has good title at the time the contract is made, coupled with the fact that prior to full performance by the buyer the buyer may not rescind the contract on these grounds.
5. If during the interim from the execution of the contract to full performance by the buyer, the seller should be adjudicated a bankrupt, die and title pass to heirs, be adjudicated an incompetent or have a conservator appointed, the buyer can with reasonable certainty anticipate time consuming, frustrating, and expensive litigation before obtaining a deed and policy of title insurance.

Many of these disadvantages are largely eliminated by using a contract secured by a deed of trust or a three-party instrument, where a trustee is appointed in the same way as in a deed of trust, coupled with the title insurance insuring the equitable title of the vendee and the legal title of vendor.

A buyer shall be engaged to prepay all or any part of the

taken place on the property in question ten years earlier.

In a fiduciary relationship it is the duty of the agent in whom such trust and confidence are reposed by the agent's principal, to make full disclosure of all material facts relating to the subject matter of the agency. (Note: Although agents are obliged to fully disclose to a principal all material facts that might influence the principal's decision concerning any real property transaction, they should be aware of a California Attorney General's opinion (Op. 69/263) explaining that race, creed, or color is not a material fact and should not be disclosed, even though the furnishing of such information is at the request of the owner.)

The courts have held that negotiating a sale to the agent's wife without making a full disclosure to the principal is a violation of the duty which the agent owes to disclose all material facts. A later case was concerned with the failure of the real estate broker to disclose to the seller that the buyer was the broker's mother-in-law. The court stated that where a seller's real estate agent is obligated to disclose to agent's principal the identity of the buyer, and where the buyer is not the agent but has with the agent such blood, marital or other relationship which would suggest a reasonable possibility that the agent could be indirectly acquiring an interest in the property, such relationship is a material fact which the agent must disclose to the agent's principal.

An agent's duty includes full disclosure and explanation of facts necessary for the principal to make an intelligent decision. In some circumstances that duty may include a duty to investigate. In George Ball Pacific, Inc. v. Coldwell Banker & Company (1980) 117 Cal.App.3d 248, 172 Cal.Rptr. 597, the court found that the broker had made an inaccurate representation when he arranged a lease without knowing whether the lessor owned the property being leased.

An agent, moreover, is under a duty to use reasonable care and skill, to obey directions of the employer and to render an account on demand. A gratuitous agent (i.e., one who is not paid for the agent's services) cannot be compelled to perform the undertaking, but such an agent who actually enters upon performance must also obey instructions and is bound to exercise the utmost good faith in dealing with the principal.

MORE CASES GUIDING THE FIDUCIARY RELATIONSHIP

#99
RATTRAY V. SCUDDER

THOMAS V. SNYDER

REMPEL V. KELLS

JORGENSEN V. BEACH 'N' BAY REALTY, INC.

An agent cannot act for two principals in negotiations with each other unless both have knowledge of and consent to the dual agency. Such conduct is opposed to public policy in that it places the agent in a position where the agent may represent conflicting interests. Therefore, regardless of the agent's honesty or the fairness of the contract in the particular case, the agent cannot recover commissions from either. Carrying the principle further, it has been held by the Supreme Court that the undisclosed dual agency is a ground for rescission by either principal without any necessity of showing injury. Even when the dual agency position is known and consented to by all parties, the agent owes to each party the same duty of utmost good faith, honesty, and loyalty in the transaction, and the same duty to disclose any material fact that would affect the judgment of either party.

This rule of agency is specifically mentioned in the California Real Estate Law, and its violation is cause for revocation or suspension of a real estate license. (See Section 10176(d) of Business and Professions Code).

Furthermore, the courts have unequivocally held that an agent cannot acquire any secret interests adverse to the principal; that the agent cannot lawfully make a secret personal profit out of the subject of the agency; that if an agent conceals the agent's interest in the property sold the agent is liable to the principal for all secret profits made by the agent; that where an agent falsely represents the figure at which property can be purchased and then purchases it for self at a lower figure, charging the principal the larger price and pocketing the difference, the agent will be compelled to disgorge the secret profits; that the fact that the principal was willing to pay the larger amount or that the property may have been worth the amount charged the principal, is immaterial.

The decision in the case of Rattray v. Scudder is a clear exposition of the attitude of the Supreme Court of our state toward the fiduciary relationship between the broker and the principal. In that case a real estate broker was retained by an owner of realty to find a purchaser for the property. The broker violated fiduciary duties where, without disclosing to the principal that broker had found a purchaser, broker made misrepresentations that broker was unable to sell the property at the agreed price, and by untruthful and misleading statements induced the principal to reduce the price of the property and to sell it to the brokerage firm of which broker was a member. In commenting on duties and good faith of a broker the court said:

The law of California imposes on...the real estate agent the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitive consequences that are provided for a disloyal or recreant trustee...

A real estate agent when acting as such is duty bound to inform a principal of every fact material to the principal. In this fiduciary capacity the agent owes an affirmative duty of disclosure. Not only does failure to abide by these fundamentals place the agent in a position of jeopardizing the agent's license, but the courts have held that the agent is not entitled to any profit from transactions in which such agent is guilty of violating these principles.

In the case of Thomas v. Snyder, California's Court of Appeal stated:

What is required of an agent toward his principal is clearly set forth in the text found in 1 California Jurisprudence, page 789, as follows: 'The proposition is conclusively settled that an agent is charged in full measure with the duty of good faith in his dealings with his principal, touching the subject of his authority. The animating principle in this proposition is that no one should, nor will he be permitted to enjoy the fruits of an advantage taken of a fiduciary relation whose dominant characteristic is the confidence reposed in one person by another. The law requires perfect good faith on the part of agents not only in form but in substance, and not only from agents receiving compensation, but also from gratuitous agents. Indeed, the rule is so familiar as to be trite that the obligation of an agent to his principal demands of him the strictest integrity and most faithful service.'

The requirements of law governing the relation of agent and principal is to the effect that the agent cannot be allowed to profit at the expense of the agent's principal, no matter whether the result is reached by misrepresentation or concealment or other fraudulent device.

In the case of Rempel v. Kells a California appellate court held that an agent obtaining profits by fraudulent conduct and concealment from the principal is not even entitled to recover expenses incurred by the agent in connection with the transaction.

The duty of a real estate broker to disclose material facts known by him to the seller employing him was again confirmed in the recent appellate court case Jorgensen v. Beach 'n' Bay Realty, Inc., (125 C.A. 3d 155). In that case, the listing broker presented an offer to his seller that was only about 7 percent less than the listing price. The broker presented the offer on behalf of a speculator for whom the

broker hoped to act in future transactions. When the broker presented the offer, he informed the seller that he was also acting on behalf of the offeror and was therefore a dual agent in the transaction. The seller wished to counter offer on the price, but the broker recommended that she not do so. The seller followed this recommendation. The sale was consummated. Shortly thereafter the purchaser resold the property through the broker at a 13.5 percent profit.

In reversing the nonsuit for the broker, the appellate court held that the broker did not fully discharge his fiduciary obligations to the seller by simply disclosing that he was acting as a dual agent in the transaction. It was the broker's duty to disclose all material facts known to him which might have affected the seller's decision to accept the offer. The court suggested that the facts known to the broker which might have affected the seller's decision included (1) the fact that the buyer was acquiring the property for investment purposes and (2) the fact that the broker had a substantial personal stake in negotiating a bargain purchase for the buyer.

WALTERS V. MARLER OBLIGATIONS OF REAL ESTATE SALESPERSONS

A real estate salesperson to the same extent as the salesperson's broker is subject to the obligations arising out of the fiduciary relationship between the broker and the broker's principal. The salesperson is the agent of the broker and is employed to carry on licensed activities on behalf of the broker. In performing these acts for which a license is required, the salesperson must disclose to the broker's principal all of the information salesperson has which may affect the principal's decision in a transaction involving the principal. A failure on the part of the salesperson to fulfill his obligation could result in disciplinary action against the salesperson's license. Moreover, the broker could be held liable in damages to the principal for acts and omissions of the salesperson under the doctrine of **respondent superior**. Since the broker may be subject to administrative disciplinary action or civil liability for the acts of broker's salespersons, the broker should take particular care in instructing salespersons on their duties and obligations to the broker's principals. The salespersons should also exercise the greatest care in carrying out these instructions of the broker in dealing with the broker's clients.

A real estate salesperson is also subject to the proscriptions of the Real Estate Law against dual agency, secret profits and other acts and omissions which violate an agent's duties to the agent's principal. Since a broker has a statutory

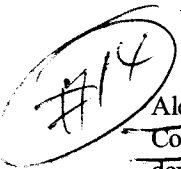
14

OTHER CALIFORNIA LAWS AFFECTING REAL ESTATE ACTIVITIES

As previously mentioned, the primary laws affecting real estate activity in California are: The California Real Estate Law (B&P Code Sections 10000-10602); the Subdivided Lands Law (B&P Code Sections 11000-11200); the Subdivision Map Act (Govt. Code, Title 2, Division 3, Pt 1); and the Regulations of the Real Estate Commissioner (Title 10, California Administrative Code). In addition, as we have seen, there are numerous court decisions which pertain to the conduct of real estate, as well as certain national (federal) laws.

In this chapter we will discuss numerous laws which appear in many of the other California codes, such as the Vehicle Code, the Financial Code, the Commercial Code and the Labor Code. While these laws are not comprehensive "real estate laws," they nevertheless have something to do with the conduct of real estate business, either directly or indirectly, and they are applicable to specific situations.

ALQUIST-PRIOLO SPECIAL STUDIES ZONES ACT

 ~~Alquist-Priolo Special Studies Zones Act (Public Resources Code Sections 2621-2630) is a zoning act designed to control development in the vicinity of hazardous earthquake faults for the benefit of public safety. The act is directed solely at the problem of surface fault rupture. Although seismic shaking effects are more damaging than fault rupture, the act is not directed at the other earthquake hazards.~~

A "special studies zone" is a special kind of geologic hazard zone, delineated by the State Geologist around traces of potentially active faults, where specific site investigations are needed to avoid inadvertent construction over traces of active (i.e. hazardous) faults. A zone normally extends one quarter of a mile or more in width, centering on the trace of a fault which may be hazardous for development or construction of a structure for human occupancy due to surface faulting or fault creep.

The Alquist-Priolo Special Studies Zones Act is now appli-

cable to any project defined in Section 2621.6 upon issuance of the official special zones map to affected local jurisdictions but does not apply to any development or structure in existence prior to the effective date of the amendment. Geologic reports are required to be obtained by cities-counties for all projects approved by them after May 4, 1975, unless they find no undue hazards, and they may then waive the geologic report with the approval of the State Geologist.

If a subdivision was approved by the city/county authorities after May 4, 1975, then the geologic report will have either been obtained or waived for all lots in the subdivision.

Maps of special studies zones may be consulted at any district office of the California Division of Mines and Geology. Individual copies may be obtained from many local jurisdictions.

Real Estate licensees who are involved in property transactions located near special studies zones should obtain information about that zone.

Section 2621.9 of Public Resources Code provides that any person who is acting as an agent for a seller of real property which is located within a delineated special studies zone, or the seller if acting without an agent, shall disclose to any prospective purchaser the fact that the property is located within a delineated special studies zone.

Any subdivision lying within the special studies zone which is subject to the Subdivision Map Act shall be required to obtain special approval by a city or county in accordance with policies and criteria established by the State Mining and Geology Board. Prior to giving approval to a subdivision project with the special hazards zone, a city or county shall require a geologic report defining any hazard of surface fault rupture. With the approval of the State Geologist, however, the city or county may waive the geologic report if it finds that no undue hazards of surface fault rupture exists. A local government may establish policies and criteria for approval of projects within the

special studies zone which are stricter than those prescribed by the Special Studies Zone Act.

CRIMINAL LAW

Comparatively few prosecutions are brought against persons engaged in the real estate business for violations of criminal laws of the state. The problem of violations of the Penal Code is nevertheless of interest to all practitioners, particularly since many offenses may be committed by clients or by others with whom brokers come into contact.

And so we scan a representative selection of statutes in this area. Most are drawn from the Penal Code and the wording is rather technical. In some cases the penalty for violations is specified; in others the offense is simply identified as a felony or misdemeanor. A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor.

Many crimes may, in the discretion of the court, be punishable by imprisonment in the state prison on the one hand or in the county jail or fine on the other. Such a crime is a misdemeanor for all purposes if the court's judgment imposes punishment other than imprisonment in the state prison or where the court grants probation without imposition of sentence and declares the offense to be a misdemeanor.

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons...for 16 months or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine or by both. Misdemeanors, on the other hand, are punishable by imprisonment in the county jail for not more than six months, or by a fine, or by both, unless a different punishment is prescribed by the law violated (Penal Code Sections 18, 18a, 18b, 19, 19a).

There are several provisions in the Penal Code of the statutes of California which are pertinent to, and in regulation of, various real estate and other transactions and the real estate business. It might be well to review some of these provisions for the purpose of acquainting real estate brokers and salespersons with their context.

The definitions which follow are paraphrased from the actual code sections in the interest of brevity and clarity.

Reference to the actual code language is necessary to learn the precise meaning and effect. No attempt has been made to include every crime that may be related to the real estate business, as that would be impossible in a course of this length.

GRAND THEFT AND PETTY THEFT

References to "larceny," "embezzlement," or "stealing" in all California laws or statutes have been changed to "theft." Grand theft is committed when the money, labor, or real or personal property taken exceeds four hundred dollars (\$400) in value. There are provisions however which define theft of property of lesser value as grand theft, such as some farm crops, farm animals and real property severed from the land. (Penal Code Sections 484, 487, 487a, 487b, 487d, 487g).

REAL ESTATE RELATED CRIMES

- a. Receiving funds for the purpose of construction, and wrongfully directing that money from the intended purpose is theft, as is receiving such funds by submitting a false voucher for construction loan funds. (P.C. Sections 484b, 484c)
- b. Copying without permission, and with intent to use, documents owned by a title company is theft. (P.C. Section 496c)
- c. Removing a structure from mortgaged real property, or after foreclosure sale, with intent to defraud or to injure the mortgagee or purchaser is theft. (P.C. Section 502.5)
- d. A debtor who sells property covered by a security agreement and fails to pay to the secured party the amounts due under the security agreement, or the proceeds (whichever is the lesser), commits embezzlement. (P.C. Section 504b)
- e. A broker or other fiduciary fraudulently appropriating or secreting trust funds commits embezzlement. (P.C. section 506)
- f. Obtaining property from another by a threat to accuse that other person or members of his or her family of a crime is extortion. (P.C. Sections 518, 519)
- g. Making or recording a deed, knowing the maker has no title is a misdemeanor. (P.C. Section 531a)
- h. Making or procuring a false financial statement to benefit oneself or another person in obtaining credit is a misdemeanor. (P.C. Section 532a)

any other loan financing the remainder of the purchase price of the mobilehome. Licensees should also familiarize themselves with the requirements of conditional sales contracts when used in connection with the sale of a mobilehome.

8. It is unlawful for a licensee to fail or neglect to cause the endorsement, dating and delivery of the certificate of ownership or certificate of title of the mobilehome, and when in the possession of the licensee to fail to deliver the registration card to the purchaser who is lawfully entitled to a transfer of registration. Generally, the deliver requirement is satisfied by submitting through the HCD the appropriate transfer and registration documents in accordance with Sections 18100.5, et seq. of the Health and Safety Code.

In addition to the restrictions outlined above, as presented in Section 10131.7 of the Business and Professions Code, there are further restrictions on licensees who perform within the scope of Section 10131.6. They are found in Section 10177.2, and are the following grounds for discipline by the Commissioner:

1. Using a false or fictitious name, knowingly making a false statement, knowingly concealing a false fact in any application for registration or otherwise committing a fraud in such an application.

2. Failure to provide for delivery of a properly endorsed certificate of title or ownership from the seller to the buyer.

3. Knowingly participating in the purchase or sale of a stolen mobilehome.

4. Violation of one or more of the terms and provisions of Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code or Part 5 (commencing with Section 10701) of Division 2 of the Revenue and Taxation Code, or Chapter 2b (commencing with Section 2981) of Title 14 of Part 4 of Division 3 of the Civil Code, or a rule or regulation adopted pursuant thereto.

5. Submission of a check, draft, or money order to HCD for any fee or obligation due the State for which payment is refused or presentation.

MOBILEHOME TRANSFORMED TO REAL PROPERTY

The sections of the Business and Professions Code we have just discussed are not applicable to a situation in which a

licensee is offering to sell a mobilehome which has been attached to a foundation system in accordance with the requirements of Section 18551 of the Health and Safety Code. This section became effective on July 1, 1980, and permits licensees to offer for sale and sell mobilehomes regardless of age, provided the conditions described in Section 18551 are satisfied.

There are four principal prerequisites for transforming a mobilehome into real property: (1) obtaining a building permit, (2) placing a mobilehome on a foundation (3) obtaining a certificate of occupancy and (4) recording a document reflecting that the mobilehome has been affixed to a foundation system. There are also six preconditions which must be met before a local agency can issue a building permit. These are set forth in Health and Safety Code Sections 18551(a)(1) through 18551(a)(6).

After a mobilehome has been installed on a foundation system pursuant to Section 18551, it is deemed a fixture or improvement to the real property and is taxed as such. Once a mobilehome has been transformed into real property it is no longer considered a vehicle for purposes of registration or any other purposes. Attachment to a foundation system in accordance with the provisions of Section 18551 also results in other consequences for the mobilehome, its owner and the licensee.

First, the mobilehome is taxable as real property. Secondly, DMV or HCD must cancel its registration, and title to the mobilehome is thereafter registered with the county recorder and ownership is transferred accordingly (until its removal from the foundation). Finally, once a mobilehome has been transformed into real property, it appears that Section 10131.6(b) of the Business and Professions Code is no longer applicable. Real Estate brokers should be able to maintain an office to engage in the sale of mobilehomes at any location where all except one of the mobilehomes have been attached to a foundation system.

TAXATION OF MOBILEHOMES

After a mobilehome has been attached to a foundation system pursuant to Section 18551, it is taxable in the same manner as other real property. Mobilehomes which are sold new after July 1, 1980, but which are not attached to a foundation system pursuant to Section 18551, and mobilehomes sold new on or before June 30, 1980, for which vehicle license fees are 120 days or more delinquent on, or at any time after July 1, 1980, will be taxed as personal property. Taxation as personal property will be virtually indistinguishable from taxation as real property.

Those mobilehomes sold new on or before June 30, 1980, will continue to be taxed as vehicles, i.e., license fees will continue to be paid until either permanently attached to a foundation pursuant to Section 18551 or until the registration fee is delinquent for 120 days or more. (These fees will be payable to HCD commencing on July 1, 1981.)

A broker engaged in the sale of mobilehomes should, with some degree of assurance, be able to advise clients and prospective clients of the following:

1. A mobilehome affixed to a foundation, certified, recorded, etc. after July 1, 1980, will be entered on the real property tax rolls of the county and will be taxed as real property.
2. Mobilehomes with license fees delinquent for 120 days or more as of or after July 1, 1980, will be reported by DMV or HCD to the assessor of the county in which the mobilehome is located and will then be placed on the unsecured property tax rolls.
3. Mobilehomes on foundations before or after July 1, 1980, but not legally so in accordance with Section 18551, if license fees are 120 days or more delinquent, will appear on the unsecured property tax rolls and will be taxed as personal property.

REMOVAL OF A MOBILEHOME FROM ITS FOUNDATION

The new law prohibits removal of a mobilehome that has been attached to a foundation in accordance with the provisions of Section 18551 unless the following conditions are met: (1) all persons who have title to any estate or interest in the real property consent to its removal, and (2) 30 days prior to removal, the owner of the mobilehome notifies HCD and the local assessor of its intended removal.

HCD must be given written evidence of the consent to removal of all persons having title or interest in the real property. HCD will then require the owner to obtain a transportation permit or mobilehome registration, whichever it deems appropriate. Once removed from the permanent foundation, the mobilehome will be treated as personal property or as a vehicle, depending upon when it was first sold new and if at time of attachment its license fees were 120 days or more delinquent.

TRANSFER OF TITLE

Beginning on July 1, 1981, and thereafter, all mobilehomes must be annually registered and licensed with HCD. Registrations previously issued by the Department of Motor Vehicles will be transferred to HCD. Those registrations

issued by DMV will remain valid until renewed, replaced, transferred, suspended or revoked. The primary exceptions to the annual registration and licensing requirements are the following: (1) mobilehomes sold new on or before June 30, 1980; (2) mobilehomes sold new on or before June 30, 1980 which are 120 days or more delinquent in payment of license fees; and (3) those mobilehomes affixed to a foundation pursuant to Health and Safety Code Section 18551.

Those mobilehomes sold new on or after July 1, 1980, will be registered only at the time of sale, resale or transfer of title. Once a mobilehome is placed on the local tax rolls because of delinquencies in the payment of license fees, it too will only be subject to new registration upon sale, resale or transfer of title. The reason these mobilehomes are excepted from registration fee requirements is that they pay annual local property taxes (personal or real property) rather than vehicle license fees. There are other exceptions to the registration requirements set forth in Section 18075.5 of the Health and Safety Code, which essentially exempt foreign mobilehomes owned by nonresidents of California.

Requirements for transferring title and registering a mobilehome with HCD are set forth in Section 18100.5, et seq., of the Health and Safety Code. Upon registration with HCD, HCD must issue a certificate of title to the registered owner.

A real estate broker engaging in used mobilehome sales must, not later than the end of the tenth calendar day after the sale of a mobilehome that is subject to registration, give written notice of the transfer to the headquarters office of the Department of Housing and Community Development on a form prescribed by that department. (Regulation 2861 of the Real Estate Commissioner and Section 18100.5, Health and Safety Code.)

The certificate of title must contain all of the following:

1. Information required on the registration card (the true name and mailing address of the registered owner, the legal owner if any, and junior lien holder if any; the name of the county in which the registered owner resides; the situs of the mobilehome, including county; a description of the mobilehome);
2. Provisions for transferring title;
3. Provisions for application for transfer of registration by the purchaser or transferee;
4. A statement that the certificate may not reflect all liens.

All persons who acquire or release an interest in a mobilehome must notify HCD within 20 days of the date of release of acquisition (Health and Safety Code Section

18100.5). HCD must then amend the registration and certificate card and provide a copy of amended registration to all lien holders. Both the transferor and transferee must then sign the certificate of title. Before registration will be transferred, if the mobilehome is taxable as property, the county tax collector must issue a tax clearance. In addition, if the mobilehome is to be located in a mobilehome park, the purchase agreement must contain a provision signed by the buyer stating that he has agreed to the terms of the existing rental agreement.

Licenses should refer to Health and Safety Code Sections 18080-18110 and appropriate HCD regulations for a detailed understanding of the requirements which must be followed in order to transfer title to a mobilehome and establish a lien interest. Knowledge of these criteria is particularly important in order to perfect a security interest in a mobilehome. Refer also to the section earlier in this chapter on security interests.

MOBILEHOME SALES OFFICE

Under Section 10131.6(b) of the Real Estate Law, a real estate broker may not maintain an office to engage in the sale of mobilehomes at any place where two or more mobilehomes are displayed or offered for sale unless he also has a mobilehome dealer's license. However, when a mobilehome is transformed into real property through compliance with the requirements of Section 18551, the limitations of Section 10131.6(b) are no longer applicable. A broker can set up an office where all of the mobilehomes except one have been placed on foundations with proper certification and recordation.

Special Problems

1. *Section 10147.5 Notice:* The Notice required by this section of the Business and Professions Code regarding the negotiability of the amount or rate of commissions is applicable to the sale of mobilehomes, whether the mobilehome is considered real or personal property or a vehicle.

2. *Out of State Mobilehomes:* Mobilehomes which are purchased out-of-state and brought into California are treated, for tax purposes, in the same manner as if they were originally registered in California. For example, if the mobilehome was sold new on or after June 30, 1980, it will be taxed as personal property. There are potential registration problems relating mainly to documenting ownership and out-of-state registration. Licenses should refer to Health and Safety Code Section 18075.5, et. seq., for detailing of the documentation necessary to register an out-of-state mobilehome in California.

3. *Escrows:* When selling a mobilehome, licensees are not required to use third party escrow holders, unless they are performing acts which require a vehicle dealer's license. When acting as a vehicle dealer, escrows must be conducted in accordance with Health and Safety Code section 18035. If a broker chooses not to use a third party escrow in connection with a mobilehome sale transaction, then he must comply with the terms of Section 2950, Title 10 of the California Administrative Code.

Title to mobilehomes may be held in joint tenancy, as tenants in common or as community property. The manner in which title is taken will affect the ability of an owner to transfer title to and/or encumber his mobilehome. If title is held as joint tenants, the signatures of all joint tenants are necessary to transfer or encumber the mobilehome. When title is held as tenants in common, either tenant can transfer his interest, but he may not encumber his interest without the signature of the other tenant. When title is held as community property the signature of each spouse is also required to transfer title or encumber the mobilehome.

In the preparation of escrow instructions, knowledge of the capacity of persons to transfer title is essential. These instructions should identify the mobilehome as specifically as possible. It is suggested that the information contained in the registration card be used to identify the mobilehome being transferred or encumbered. Reference to the registration statement will assist the licensee in determining whether or not the mobilehome has been registered with DMV or HCD for one year and if it is located on a site coming within the provisions of Business and Professions Code Section 10131.7(a).

When preparing escrow instructions, the proration of usual items such as ground rent, or taxes is permissible. The proration of license fees is permitted if buyer and seller agree to it.

If an escrow is used, the sale is complete upon the close of escrow. When no escrow is used the sale is completed when the buyer has signed a purchase contract or security agreement and has taken possession of the mobilehome. Regardless of whether or not an escrow is used, the provisions of Health and Safety Code Sections 18100.5 and 18101 must be followed to effect a transfer of title and the provisions of Sections 18103.5 through 18106 must be followed to perfect a security interest.

4. *Moving the Mobilehome:* The requirements for moving a mobilehome from one site to another were discussed earlier. Nevertheless, there are special problems associated with transfer of mobilehomes from one site to another. Every licensee when negotiating the sale of a

#46
mobilehome which is going to be removed should be familiar with the various rules. For this purpose, a licensee should contact DMV or JCD for a complete set of rules and regulations pertaining to the transportation of mobilehomes.

5. *Mobilehome Trailer Parks*: There is extensive statutory regulation on the rights and duties of landlords and tenants of mobilehome parks which is too extensive to discuss here. Licensees should review the Mobilehome Residency Law, Sections 798, et seq., of the Civil Code and the Mobilehome Parks Act, Sections 18200, et seq., of the Health and Safety Code.

Clearly, the real estate agent choosing to specialize in mobilehome sales must be proficient in the intricacies of this complicated field and a master of the business in order to avoid the many pitfalls awaiting the unqualified. The California Association of Realtors has published a book entitled "Mobilehomes" which offers opinions, suggestions, guidelines of experts in this field, and insights into the complexities of this growing area of service and opportunity for real estate licensees.

STATE HOUSING LAW HOUSING STANDARDS

The State Housing Law and various housing codes require a landlord to keep a dwelling in good condition in accordance with specified structural, plumbing, electrical, sanitation, fire, and safety standards. These laws are generally enforced by local city and county agencies, such as the Building Inspection Department, Health Department, or Fire Department, depending on the type of problem. If there is a violation, a tenant can file a complaint with the appropriate department. They can investigate the complaint and require the landlord to make needed repairs.

There are other remedies available to a tenant if the landlord fails to maintain the property in a condition fit for human occupancy. The tenant may give the landlord a notice to repair and do either of the following if the landlord fails to make the repairs necessary to render the property habitable:

1. Spend up to one month's rent in repairs

(Note: This re-remedy is available no more than twice in twelve months)

or:

2. Abandon the premises, in which case the tenant is relieved from the requirement of paying additional rent and the performance of other conditions of the lease.

If the landlord attempts to evict the tenant or increase the rent or decrease services in retaliation against the tenant's having utilized one month's rent to repair the property, the landlord may be restrained by court order from undertaking any such retaliatory action for a period of sixty days.

THE LABOR CODE

The California Labor Code is important to real estate licensees in terms of employer-employee relationships. An ordinary employee, or servant, is defined in the Labor Code as one employed to render personal services to the person's employer, otherwise than in pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the master.

A servant works for his or her master, while an agent not only does this, but acts for and in place of the principal for the purpose of making contracts and thus bringing the principal into legal relationships with third persons. Thus a filing clerk in an office, or a machinist in a factory, would be ordinary employees. A broker normally would not be classified as an employee. For purposes of the Real Estate Law, a real estate salesperson is an agent of the real estate broker under whom he or she is licensed. If the broker is a corporation, the salesperson is an agent of the corporation, not of the supervising qualifying broker. (*Walters v. Marler*, 1978, 83 Cal.App.3d 1, 147 Cal.Rptr. 655.)

An independent contractor is one who, in rendering services, exercises an independent employment or occupation and is responsible to the employer only as to the results of his or her work. An important factor in establishing one as an independent contractor is that the individual determines the method of accomplishing the work for which the individual has contracted.

Real estate brokers are almost always independent contractors. Under the law of agency a real estate broker is ordinarily deemed a special agent who deals in the name of the broker's principal, but does not have custody and control of the subject matter of the agency.

For purposes of the Real Estate License Law — and this is of primary significance to a licensee — salespersons are employees of the broker as a matter of law and cannot be independent contractors. A contract between a salesperson and his/her broker in which the salesperson is characterized as an independent contractor does not make it so under the Real Estate Law. Questions relating to how other governmental agencies view the broker-salesperson relationship should be referred to those agencies.

the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

As defined in § 3602(h), 'Handicap' means, with respect to a person-

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (2) a record of having such an impairment, or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance as defined in § 802 of Title 21.

The act is very specific in clarifying what is meant by the term *physical or mental impairment* in an effort to minimize unrelated complaints. §6(b)(3) even goes so far as to state, *Neither the term 'individual with handicaps' nor the term 'handicap' shall apply to any individual solely because that individual is a transvestite.*

Finally, certain exemptions are provided for in the act. § 3607 provides for a religious organization or private club exemption. Of major interest to some real estate agents, § 3605(c) allows for the following exemption in the appraisal of property. *Nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.*

Between the various laws and the court cases, discrimination in housing of all origins have been outlawed. All real estate licensee must strictly comply with these federal rules.

STATE LEVEL

To further insure that everyone in California receives the opportunity for fair housing, the California Legislature and the Real Estate Commissioner have enacted several measures. In this section, we will discuss the applicable state statutes and any pertinent court cases.

CALIFORNIA BUSINESS AND PROFESSIONS CODE

The California Business and Professions Code contain two sections of particular importance to our discussion. It should be noted that other sections of this code will be

discussed in the section on ethics. § 125.6 states,

Every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to such person if, because of the applicant's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, he or she refuses to perform the licensed activity or aids or incites the refusal to perform such licensed activity by another licensee, or if, because of the applicant's race, color, sex, religion, ancestry, physical handicap, marital status, or national origin, he or she makes any discrimination, or restriction in the performance of the licensed activity. Nothing in this section shall be interpreted to apply to discrimination by employers with regard to employees or prospective employees, nor shall this section authorize action against any club license issued pursuant to Article 4 (commencing with Section 23425) of Chapter 3 of Division 9 because of discriminatory membership policy. The presence of architectural barriers to the physically handicapped person which conform to applicable state or local building codes and regulations shall not constitute discrimination under this section.

It shall not constitute discrimination under this section for a person licensed pursuant to Division 2 (commencing with Section 500) to refuse to perform a licensed activity if the licensee determines that because of the relation between the licensed activity sought and the physical handicap, the licensed activity sought is beyond the licensee's skill, or could better be performed by another licensee. ...

'Physical handicap,' as used in this section, includes impairment of sight, hearing or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.

The second section we need to consider from this state code is § 10177(l). According to it,

~~*The Commissioner may suspend or revoke the license of any real estate licensee, or may deny the issuance of a license to an applicant, who has done, or may suspend or revoke the license of, or deny the issuance of a license to, a corporate applicant if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done, any of the following: ...*~~

- (1) Solicited or induced the sale, lease or the listing for

26

sale or lease, of residential property on the grounds, wholly or in part, of loss of value, increase in crime, or decline of the quality of the schools, due to the present or prospective entry into the neighborhood of a person or persons of another race, color, religion, ancestry or national origin.

This practice is known as *panic selling*. It is also called *blockbusting*. The law specifically prohibits this activity. In your dealings as an agent, be particularly careful not to make a remark in passing that could be construed as an inducement to panic selling. You are subject to discipline for it.

CALIFORNIA CIVIL CODE

The California Civil Code also deals with many important areas of fair housing. In particular, § 51 to § 55.1 provides vital legal protection for various groups. We will examine those sections that are most pertinent to our examination. The law states the following.

§51. UNRUH CIVIL RIGHTS ACT; EQUAL RIGHTS; BUSINESS ESTABLISHMENTS

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or blindness or other physical disability.

Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, or to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modification that the State Architect otherwise possesses pursuant to other provisions of the law.

Nothing in this section shall require any person renting, leasing, or otherwise providing real property for

compensation to modify his or her property in any way, or to provide a higher degree of care for a blind or other physically disabled person than for a person who is not physically disabled.

Your real estate business falls into this category of *business establishment*. Therefore, you are legally compelled to not discriminate in any shape or form in providing services with your business establishment.

§51.2. AGEDISCRIMINATION IN HOUSING PROHIBITED; EXCEPTED; INTENT

(a) Section 51 shall be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age. Where accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may establish and preserve such housing for senior citizens, pursuant to Section 51.3 of the Civil Code.

(b) This section is intended to clarify the holdings in Marina Point, Ltd. v. Wolfson (1982), 30 Cal.3d 72, and O'Connor v. Village Green Owners' Association (1983), 33 Cal.3d 790.

§ 51.3. HOUSING; AGE LIMITATIONS; NECESSITY FOR SENIOR CITIZEN HOUSING

(a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.

(b) The Legislature finds and declares that different age limitations for senior citizen housing are appropriate in recognition of the size of a development in relationship to the community in which it is located.

(c) For the purposes of this section, the following definitions apply:

(1) 'Qualifying resident' or 'senior citizen' means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development.

(2) 'Qualified permanent resident' means a person who meets all of the following requirements:

(A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization,

physically disabled.

The courts have provided many decisions which interpret the above-mentioned sections of the California Civil Code. In **Newby v. Alto Riviera Apartments**, 131 Cal.Rptr. 547, 60 C.A.3d 288, the court ruled that arbitrary discrimination by landlords is illegal. In the case of **Hubert v. Williams**, 184 Cal.Rptr. 161, 133 C.A.3d Supp. 1, the issue of a person's sexual preference was addressed. The court ruled that a landlord may not discriminate in refusing to rent to a prospective tenant because of the person's sexual orientation. The courts have also placed certain limitations on applying the Unruh Act. In **Crowell v. Isaacs**, 45 Cal.Rptr. 566, 235 C.A.2d 755, the court ruled that an agent need not specifically seek out a buyer of a certain ethnic group nor advertise that all races are invited to purchase the property. In **Flowers v. John Burnham and Co.**, 98 Cal.Rptr. 644, 21 C.A.3d 700, the court ruled that a landlord may apply certain age restrictions with respect to children. The issue of a tenant's ability to pay was addressed by the State Attorney General. In SO 75-81, 59 Op. Atty. Gen. 223, it was decided that establishing such requirements is not discriminatory.

§ 54 through § 55.1 of the Civil Code, titled Part 2.5, deal with blind and other physically disabled persons. We will examine the most appropriate portions.

According to § 54.1(b)(1), *Blind persons, visually handicapped persons, deaf persons, and other physically disabled persons shall be entitled to full and equal access, as other members of the general public, to all housing accommodations offered for rent, lease, or compensation in this state, subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons . . .*

(5) It shall be deemed a denial of equal access to housing accommodations within the meaning of this subdivision for any person, firm, or corporation to refuse to lease or rent housing accommodations to a blind person or visually handicapped person on the basis that such person uses the services of a guide dog, to a deaf person on the basis that such person uses the services of a signal dog, or to a physically handicapped person on the basis that such person uses the services of a service dog, or to refuse to permit such a blind person or visually handicapped person to keep a guide dog, a deaf person to keep a signal dog, or a physically handicapped person to keep a service dog on the premises.

A party who violates those protected by § 54.1 is liable for each such offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than

two hundred fifty dollars (\$250), and such attorney's fees as may be determined by the court in addition thereto . . .

CALIFORNIA HEALTH AND SAFETY CODE

The portions of this state code which are most significant to us are contained in § 35800 to § 35833. They comprise the Housing Financial Discrimination Act of 1977. This state law deals specifically with discrimination in financial situations. It is an effort to guarantee fair lending practices for all California residents.

CHAPTER 1. FINDINGS AND DECLARATIONS OF PURPOSE AND POLICY

§ 35800. *This part shall be known and may be cited as the Holden Act.*

§ 35801. *The Legislature finds and declares:*

(a) The subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of the state.

(b) A healthy housing market, where residents of this state have a choice of housing opportunities and where the housing consumer may effectually choose within a free market place, is necessary to achieve a healthy state economy.

(c) The equities that California residents accumulate in family homes must be protected and conserved.

(d) The Legislature has the responsibility to direct the discontinuance of injurious practices.

(e) With respect to certain geographic areas, financial institutions have sometimes denied financial assistance or approved assistance on terms less favorable than are usually offered in other geographic areas, regardless of the creditworthiness of the applicant or the condition of the real property security offered, and this practice has the following effects:

(1) Contributes to the decline of available family housing in such areas and is likely to continue to do so.

(2) Limits the choice of housing opportunities and inhibits the operation of a healthy housing market in such areas.

(3) Leads to the abandonment of such areas.

(4) Adversely affects the health, welfare, and safety of the residents of this state.

(5) Undermines the value of the equity of current owners of property in such areas.

(6) Inhibits the granting of amortized loans.

(7) Perpetuates racially and economically segregated neighborhoods and geographic areas.

(f) The practice of denying mortgage loans or adversely varying the terms of such loans because of conditions, characteristics, or trends in a neighborhood or geographic area that are unrelated to the creditworthiness of the applicant or the value of the real property security offered is against public policy.

§ 35802. The purposes of this part include the following:

(a) To prevent discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the security property.

(b) To encourage increased lending in neighborhoods or geographic areas in which conventional residential mortgage financing has been available.

(c) To increase the availability of housing accommodations to credit-worthy persons.

(d) To ensure the supply of decent, safe housing.

(e) To prevent the abandonment and decay of neighborhoods and geographic areas.

§ 35803. This part shall be deemed an exercise of the police power of the state for the protection of the health, welfare, and peace of the people of this state...

CHAPTER 2. DEFINITIONS

§ 35805. As used in this part: ...

(b) 'Fair market value' means the highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller acting prudently and knowledgeably ...

CHAPTER 3. PROHIBITIONS AND ENFORCEMENT

§ 35810. No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations due, in whole or in part, to the consideration of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the housing accommodation, unless the financial institution can demonstrate that such consideration in the particular case is required to avoid an unsafe and unsound business practice.

§ 35811. No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving or refinancing housing accommodations due, in whole or in part, to the consideration of race, color, religion, sex, marital status, national origin, or ancestry.

§ 35812. No financial institution shall consider the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area surrounding a housing accommodation or whether or not such composition is undergoing change, or is expected to undergo change, in appraising a housing accommodation or in determining whether or not, and under what terms and conditions, to provide financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing a housing accommodation. No financial institution shall utilize appraisal practices that are inconsistent with the provisions of this part.

§ 35813. Nothing in this part shall (1) require a financial institution to provide financial assistance if it is clearly evident that occupancy of the housing accommodation would create an imminent threat to the health or safety of the occupant, or (2) be construed to preclude a financial institution from considering the fair market value of the property which will secure the proposed loan.

§ 35814. The Secretary shall issue such rules, regulations, guidelines, and orders as are necessary to interpret and enforce the provisions of this part and to affirmatively further the provisions of this part. The Secretary may delegate the responsibilities imposed by this section to one or more departments within the agency that license persons or organizations engaged in a business related to, or affecting compliance with, this part.

§ 35815. The Secretary or the Secretary's designee shall monitor and investigate the lending patterns and

practices of financial institutions for compliance with this part, including the lending patterns and practices for housing accommodations which are not occupied by the owner. If a finding is made that such patterns or practices violate the provisions of this part, the Secretary or the Secretary's designee shall take such action as will effectuate the purposes of this part. In addition to other remedies provided by this part or other provisions of law, the Secretary may recommend to the State Treasurer that state funds not be deposited in a financial institution where the Secretary has made a finding that such financial institution has engaged in a lending pattern and practice which violates the provisions of this part.

CHAPTER 4. COMPLAINT RESOLUTION

... § If ... the Secretary finds that a financial institution has engaged in any unlawful practice as defined in this part, the Secretary shall ... take one on the following steps ... :

(a) The making of the financial assistance or the making of the financial assistance on nondiscriminatory terms; or

(b) The payment of damages to the complainant in an amount not to exceed one thousand dollars (\$1,000), if the Secretary finds that effective relief under subdivision (a) is no longer available.

One of your clients may feel that he has been discriminated against by a lender. Your help may be requested. Knowledge of the above provisions will assist you in informing your client of his rights. However, do not give any legal advice. To play it safe, the client should consult with a competent legal professional.

CALIFORNIA GOVERNMENT CODE

For our purposes, § 12900 to § 12995 of this code pertain the most to fair housing. Together, they comprise the California Fair Employment and Housing Act. They expand the application of the Rumford Act.

GENERAL PROVISIONS

§ 12900. This part may be known and referred to as the 'California Fair Employment and Housing Act...'

FAIR HOUSING LAW

DEFINITIONS

12927. As used in this part in connection with housing accommodations, unless a different meaning clearly appears from the context:

(a) 'Affirmative actions' means any activity for the purpose of eliminating discrimination in housing accommodations because of race, color, religion, sex, marital status, national origin, or ancestry...

(c) 'Discrimination' includes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental, or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provisions of inferior terms, conditions, privileges, facilities, or services in connection with such housing accommodations; includes the cancellation or termination of a sale or rental agreement; and includes the provision of segregated or separated housing accommodations. The term 'discrimination' does not include refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within a household....

(e) 'Owner' includes the lessee, sublessee, assignee, managing agent, real estate broker or salesman, or any person having any legal or equitable right or ownership or possession or the right to rent or lease housing accommodations, and includes the state and any of its political subdivisions and any agency thereof.

PROHIBITIONS

§ 12955. It shall be unlawful:

(a) For the owner of any housing accommodation to discriminate against any person because of race, color, religion, sex, marital status, national origin, or ancestry of such person.

(b) For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation.

~~(c) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, marital status, national origin, or ancestry or an intention to make any such preference, limitation, or discrimination.~~

~~(d) For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, sex, marital status, national origin, or ancestry with reference thereto.~~

~~(e) For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or group of persons because of the race, color, religion, sex, marital status, national origin, or ancestry of such person or persons, or of prospective occupants or tenants, in the terms, conditions, or privileges relating to the obtaining or use of any such financial assistance.~~

~~(f) For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section, informed law enforcement agencies of practices believed unlawful under this section, or has testified or assisted in any proceeding under this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.~~

~~(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.~~

COMMISSION'S ACTIONS-PENALTIES

§ 12987. *If the Commission, after hearing, finds that a respondent has engaged in any unlawful practice as defined in this part, the Commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such practice and to take*

such actions, as, in the judgment of the Commission, will effectuate the purpose of this part, including, but not limited to, any of the following:

(1) The sale or rental of the housing accommodation if it is still available, or the sale or rental of a like housing accommodation, if one is available, or the provision of financial assistance, terms, conditions, or privileges previously denied in violation of subdivision (f) of Section 12955 in the purchase, organization, or construction of the housing accommodation, if available.

(2) The payment of punitive damages in an amount not to exceed one thousand dollars (\$1,000), adjusted annually in accordance with the Consumer Price Index, and the payment of actual damages.

(3) Affirmative or prospective relief.

However, no remedy shall be available to the aggrieved person unless the aggrieved person waives any and all rights or claims under Section 52 of the Civil Code prior to receiving a remedy, and signs a written waiver to that effect.

The Commission may require a report of the manner of compliance.

If the Commission finds that a respondent has not engaged in any practice which constitutes a violation of this part, the Commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent.

Any order issued by the Commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

The Attorney General provided an interpretation which is of special interest to all real estate agents. In SO73-19, 56 Op. Atty. Gen. 546, it was concluded that an agent cannot furnish the ethnic or race background of a prospective renter or purchaser even if requested. Breach of this duty can result in severe legal actions. Be very careful when informing your principals of any third parties. Further clarification of this act was provided by the case of **Hess v. Fair Employment and Housing Commission, 187 Cal. Rptr. 712, 138 C.A. 232**. In it, the court ruled that the application of the prohibition against discrimination based on marital status extends to unmarried couples.

REGULATIONS OF THE CALIFORNIA REAL ESTATE COMMISSIONER

In an effort to further apply discrimination prohibitions to the real estate agent, the Real Estate Commissioner enacted § 2780 through § 2782. They are contained in the California Administrative Code.

§ 2780. DISCRIMINATORY CONDUCT AS THE BASIS FOR DISCIPLINARY ACTION.

Prohibited discriminatory conduct by a real estate licensee based upon race, color, sex, religion, ancestry, physical handicap, marital status or national origin includes, but is not limited to, the following:

(a) Refusing to negotiate for the sale, rental or financing of the purchase of real property or otherwise making unavailable or denying real property to any person because of such person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

#37
(b) Refusing or failing to show, rent, sell or finance the purchase of real property to any person or refusing or failing to provide or volunteer information to any person about real property, or channeling or steering any person away from real property, because of that person's race, color, sex, religion, ancestry, physical handicap, marital status or national origin or because of the racial, religious, or ethnic composition of any occupants of the area in which the real property is located.

It shall not constitute discrimination under this subdivision for a real estate licensee to refuse or fail to show, rent, sell or finance the purchase of real property to any person having a physical handicap because of the presence of hazardous conditions or architectural barriers to the physically handicapped which conform to applicable state or local building codes and regulations.

(c) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in the sale or purchase or negotiation or solicitation of the sale or purchase or the collection of payment or the performance of services in connection with contracts for the sale of real property or in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts

based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

(d) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in the terms, conditions or privileges of sale, rental or financing of the purchase of real property.

This subdivision does not prohibit the sale price, rent or terms of a housing accommodation containing facilities for the physically handicapped to differ reasonably from a housing accommodation not containing such facilities.

(e) Discriminating because of race, color, sex, religion, ancestry, physical handicap, marital status or national origin against any person in providing services or facilities in connection with the sale, rental or financing of the purchase of real property, including but not limited to: processing applications differently, referring prospects to other licensees because of the prospects' race, color, sex, religion, ancestry, physical handicap, marital status or national origin, using with discriminatory intent or effect, codes or other means of identifying minority prospects, or assigning real estate licensees on the basis of a prospective client's race, color, sex, religion, ancestry, physical handicap, marital status or national origin.

Prohibited discriminatory conduct by a real estate licensee under this subdivision does not include acts based on a person's marital status which are reasonably taken in recognition of the community property laws of this state as to the acquiring, financing, holding or transferring of real property.

#36
(f) Representing to any person because of his or her race, color, sex, religion, ancestry, physical handicap, marital status or national origin that real property is not available for inspection, sale or rental when such real property is in fact available.

(g) Processing an application more slowly or otherwise acting to delay, hinder or avoid the sale, rental or financing of the purchase of real property on account of the race, color, sex, religion, ancestry, physical handicap, marital status or national origin of a potential owner or occupant.

(h) Making any effort to encourage discrimination against persons because of their race, color, sex,

ARTICLE 6

To prevent dissension and misunderstanding and to assure better service to the owner, the REALTOR® should urge the exclusive listing of property unless contrary to the best interest of the owner.

ARTICLE 7

In accepting employment as an agent, the REALTOR® pledges himself to protect and promote the interests of the client. The obligation of absolute fidelity to the client's interest is primary, but it does not relieve the REALTOR® of the obligation to treat fairly all parties to the transaction.

ARTICLE 8

The REALTOR® shall not accept compensation from more than one party, even if permitted by law, without the full knowledge of all parties to the transaction.

ARTICLE 9

The REALTOR® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts. He has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose.

ARTICLE 10

The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed or country of national origin.

ARTICLE 11

A REALTOR® is expected to provide a level of competent service in keeping with the Standards of Practice in those fields in which the REALTOR® customarily engages.

The REALTOR® shall not undertake to provide specialized professional services concerning a type of property or service that is outside of his field of competence unless he engages the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any

person engaged to provide such assistance shall be so identified to the client and his contribution to the assignment should be set forth.

The REALTOR® shall refer to the Standards of Practice of the National Association as to the degree of competence that a client has a right to expect the REALTOR® to possess, taking into consideration the complexity of the problem, the availability of expert assistance, and the opportunities for experience available to the REALTOR®.

ARTICLE 12

The REALTOR® shall not undertake to provide professional services concerning a property or its value where he has a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

ARTICLE 13

The REALTOR® shall not acquire an interest in or buy for himself, any member of his immediate family, his firm or any member thereof, or any entity in which he has a substantial ownership interest, property listed with him, without making the true position known to the listing owner. In selling property owned by himself, or in which he has any interest, the REALTOR® shall reveal the facts of his ownership or interest to the purchaser.

ARTICLE 14

In the event of a controversy between REALTORS® associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their board or boards rather than litigate the matter.

ARTICLE 15

If a REALTOR® is charged with unethical practice or is asked to present evidence in any disciplinary proceeding or investigation, he shall place all pertinent facts before the proper tribunal of the member board of affiliated institute, society, or council of which he is a member.

ARTICLE 16

When acting as agent, the REALTOR® shall not accept any commission, rebate, or profit on expenditure

#24

licensee is a member.

Nothing in this regulation is intended to limit, add or supersede any provision of law relating to the duties and obligations of real estate licensees or the consequences of violations of law. Subdivision (a) lists specific acts and omissions which do violate existing law and are grounds for disciplinary action against a real estate licensee. The conduct guidelines set forth in subdivisions (b) and (c) are not intended as statements of duties imposed by law nor as grounds for disciplinary action by the Department of Real Estate but as guidelines for elevating the professionalism of real estate licensees.

You need to be aware of the fact that various professional real estate associations have their own codes of ethics. While everyone can normally benefit from them, they are really only binding on the members of the associations. If you do in fact belong to one or more such organizations, check with them for their guidelines.

NATIONAL ASSOCIATION OF REALTORS® CODE OF ETHICS

Many real estate licensees are REALTORS®. They are required to abide by the following code of ethics. Other agents can also benefit by observing it.

PREAMBLE

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. The REALTOR® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interest impose obligations beyond those of ordinary commerce. They impose grave social responsibility and patriotic duty to which the REALTOR® should dedicate himself, and for which he should be diligent in preparing himself. The REALTOR®, therefore, is zealous to maintain and improve the standards of his calling and shares with his fellow REALTORS® a common responsibility for its integrity and honor. The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients

ever can justify departure from this ideal.

In the interpretation of his obligation, a REALTOR® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, 'Whatsoever ye would that men should do you, do ye even so to them.'

Accepting this standard as his own, every REALTOR® pledges himself to observe its spirit in all of his activities and to conduct his business in accordance with the tenets set forth below.

ARTICLE 1

The REALTOR® should keep himself informed on matters affecting real estate in his community, the state, and nation so that he may be able to contribute responsibly to public thinking on such matters.

ARTICLE 2

In justice to those who place their interests in his care, the REALTOR® should endeavor always to be informed regarding laws, proposed legislation, governmental regulations, public policies, and current market conditions in order to be in a position to advise his clients properly.

ARTICLE 3

It is the duty of the REALTOR® to protect the public against fraud, misrepresentation, and unethical practices in real estate transactions. He should endeavor to eliminate in his community any practices which could be damaging to the public or bring discredit to the real estate profession. The REALTOR® should assist the governmental agency charged with regulating the practices of brokers and salesmen in his state.

ARTICLE 4

The REALTOR® should seek no unfair advantage over other REALTORS® and should conduct his business so as to avoid controversies with other REALTORS®.

ARTICLE 5

In the best interests of society, of his associates, and his own business, the REALTOR® should willingly share with other REALTORS® the lessons of his experience and study for the benefit of the public, and should be loyal to the Board of REALTORS® of his community and active in its work.

racy of the estimate of fair market value.

(13) Making an addition to or modification of the terms of an instrument previously signed or initialed by a party to a transaction without the knowledge and consent of the party.

~~(b) UNETHICAL CONDUCT. In order to maintain a high level of ethics in business practice, real estate licensees should avoid engaging in any of the following activities:~~

(1) Representing, without a reasonable basis, the nature and/or condition of the interior or exterior features of a property when soliciting an offer.

(2) Failing to respond to reasonable inquiries of a principal as to the status or extent of efforts to market property listed exclusively with the licensee.

(3) Representing as an agent that any specific service is free when, in fact, it is covered by a fee to be charged as part of the transaction.

(4) Failing to disclose to a person when first discussing the purchase of real property, the existence of any direct or indirect ownership interest of the licensee in the property.

(5) Recommending by a salesperson to a party to a real estate transaction that a particular lender or escrow service be used when the salesperson believes his or her broker has a significant beneficial interest in such entity without disclosing this information at the time the recommendation is made.

(6) Claiming to be an expert in an area of specialization in real estate brokerage, e.g., appraisal, property management, industrial siting, etc., if, in fact, the licensee has had no special training, preparation or experience in such area.

(7) Using the term 'appraisal' in any advertising or offering for promoting real estate brokerage business to describe a real property evaluation service to be provided by the licensee unless the evaluation process will involve a written estimate of value based upon the assembling, analyzing and reconciling of facts and value indicators for the real property in question.

(8) Failing to disclose to the appropriate regulatory agency any conduct on the part of a financial institution which reasonably could be construed as a violation of the Housing Financial Discrimination Act of 1977 (anti-redlining) Part 6 (com-

mencing with Section 35800) of Division 24 of the Health and Safety Code.

(9) Representing to a customer or prospective customer that because the licensee or his or her broker is a member of, or affiliated with, a franchised real estate brokerage entity, that such entity shares substantial responsibility, with the licensee, or his or her broker, for the proper handling of transactions if such is not the case.

(10) Demanding a commission or discount by a licensee purchasing real property for one's own account after an agreement in principle has been reached with the owner as to the terms and conditions of purchase without any reference to price reduction because of the agent's licensed status.

(c) **BENEFICIAL CONDUCT.** In the best interests of all licensees and the public they serve, brokers and salespersons are encouraged to pursue the following beneficial business practices:

(1) Measuring success by the quality and benefits rendered to the buyers and sellers in real estate transactions rather than by the amount of compensation realized as a broker or salesperson.

(2) Treating all parties to a transaction honestly.

(3) Promptly reporting to the California Department of Real Estate any apparent violations of the Real Estate Law.

(4) Using care in the preparation of any advertisement to present an accurate picture or message to the reader, viewer, or listener.

(5) Submitting all written offers as a matter of top priority.

(6) Maintain adequate and complete records of all one's real estate dealings.

(7) Keeping oneself current on factors affecting the real estate market in which the licensee operates as an agent.

(8) Making a full, open, and sincere effort to cooperate with other licensees, unless the principal has instructed the licensee to the contrary.

(9) Attempting to settle disputes with other licensees through mediation or arbitration.

(10) Complying with these standards of professional conduct, and the Code of Ethics of an organized real estate industry group of which

sioner is the highest authority of the state board in charge of ruling on ethical questions regarding real estate licensees, the Commissioner's Regulations carry a great amount of weight. Also, they are the most pervasive since they apply to all real estate licensees. Read them carefully!

#40
§ 2785. CODE OF ETHICS AND PROFESSIONAL CONDUCT.

In order to enhance the professionalism of the California real estate industry, and maximize protection for members of the public dealing with real estate licensees, the following standards of professional conduct and business practices are adopted:

(a) **UNLAWFUL CONDUCT.** Licensees shall not engage in 'fraud' or 'dishonest dealing' or 'conduct which would have warranted the denial of an application for a real estate license' within the meaning of Business and Professions Code Section 10176 and 10177 including, but not limited to, the following acts and omissions:

(1) Knowingly making a substantial misrepresentation of the likely market value of real property to its owner either for the purpose of securing a listing or for the purpose of acquiring an interest in the property for the licensee's own account.

(2) The statement or implication by a licensee to an owner of real property during listing negotiations that the licensee is precluded by law, regulation or by the rules of any organization, other than the broker firm seeking the listing, from charging less than the commission or fee quoted to the owner by the licensee.

(3) The failure by a licensee acting in the capacity of an agent in a transaction for the sale, lease or exchange of real property to disclose to a prospective purchaser or lessee facts known to the licensee materially affecting the value or desirability of the property, when the licensee has reason to believe that such facts are not known to, nor readily observable by a prospective purchaser or lessee.

(4) When seeking a listing, representation to an owner of the real property that the soliciting licensee has obtained a bona fide written offer to purchase the property, unless at the time of the representation the licensee has possession of a bona fide written offer to purchase.

(5) The willful failure by a listing broker to present or cause to be presented to the owner of the property any offer to purchase received prior to the

closing of a sale, unless expressly instructed by the owner not to present such an offer, or unless the offer is patently frivolous.

(6) Presenting competing offers to purchase real property to the owner by the listing broker in such a manner as to induce the owner to accept the offer which will provide the greatest compensation to the listing broker, without regard to the benefits, advantages, and/or disadvantages to the owner.

(7) Knowingly underestimating the probable closing costs in a transaction in a communication to the prospective buyer or seller of real property in order to induce that person to make or to accept an offer to purchase the property.

(8) Failing to explain to the parties or prospective parties to a real estate transaction the meaning and probable significance of a contingency in an offer or contract that the licensee knows or reasonably believes may affect the closing date of the transaction, or the timing of the vacating of the property by the seller or its occupancy by the buyer.

(9) Knowingly making a false or misleading representation to the seller of real property as to the form, amount and/or treatment of a deposit toward purchase of the property made by an offeror.

(10) The refunding by a licensee, when acting as an agent or subagent for seller, of all or part of an offeror's purchase money deposit in a real estate sales transaction after the seller has accepted the offer to purchase, unless the licensee has the express permission of the seller to make the refund.

(11) Failing to disclose to the seller of real property in a transaction in which the licensee is acting in the capacity of an agent, the nature and extent of any direct or indirect interest that the licensee expects to acquire as a result of the sale. The prospective purchase of the property by a person related to the licensee by blood or marriage, purchase by an entity in which the licensee has an ownership interest, or purchase by any other person with whom the licensee occupies a special relationship where there is a reasonable probability that the licensee could be indirectly acquiring an interest in the property, shall be disclosed.

(12) A representation made as principal or agent to a prospective purchaser of a promissory note secured by real property with respect to the fair market value of the securing property without a reasonable basis for believing the truth and accu-