Virginia REALTORS®

Legal Hotline

25 most common Questions & Answers

2018 Update

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Advertising

1. What are my disclosure obligations for advertising?

Your disclosure obligations depend on the type of advertising. The Virginia Real Estate Board (VREB) Regulations are as follows:

For Sale or For Rent Signs Placed on Property.
The VREB Regulations provide that for sale and for lease signs placed on property must at least include the firm's name and the firm's primary or branch office telephone number. We recommend individual licensees also include their name on the signs. The Regulations do not specify where on the sign the firm's phone number must be located. Therefore, firms may include the firm phone number on a sign rider, a sticker on the sign or anywhere else on the sign. The only requirement is that the firm name and phone number be clearly and legibly displayed.

Other Print Advertising
The firm name is all that is required by the VREB for firm advertisements. Licensee advertisements must include the firm name and licensee's name.

Business Cards
They must at least include the firm name, licensee's name and "contact information." Contact information means telephone number or web address.

Electronic Media Advertising
The VREB Regulations and Code of Ethics combine to create new requirements for electronic advertising. Please read the Electronic Advertising FAQs at: www.virginiarealtors.org/for-members/legal/legal-resources/legal-faqs/advertising/

It is important to note that Brokers and franchises can have additional advertising policies and guidelines. You should always check with your Broker in addition to reviewing the VREB regulations.

2. An agent in my office is selling his own home and has heard that he doesn't have to use the Owner/Agent sign anymore - are Owner/Agent signs still required?

Agents must include in all advertising that the owner is a real estate licensee if the licensee owns or has any ownership interest in the property advertised. This is new because the agent/owner advertising disclosure applies even if the property is listed with a firm. Please note that this requirement includes for sale and for rent signs, which may require a sign rider.

Agency

3. When should the Disclosure of Brokerage Reltionship for Unrepresented Parties be given in a residential transaction?

The law states that a licensee must disclose any brokerage relationship that she has with a party to the transaction as soon as she has a substantive discussion about a specific property or properties with an actual or prospective buyer, seller, landlord, or tenant who is not her client and who is not represented by another licensee. Two common categories of substantive discussions include conversations about:

- Pricing - If a prospective purchaser at an open house asks you if the seller is willing to reduce the sale price, that is a substantive discussion.

- Repairs - If a prospective purchaser asks you if the seller is willing to agree to paint the house as part of the contract, that is substantive.

4. I am the Listing Agent and have had terrible experiences with a firm in my area. In fact, this firm has caused previous deals to fail due to incompetence and unethical behavior. Do I have to cooperate with it?

You should discuss your concerns with your client and if they consent, you do not have to cooperate. Article 3 of the Code of Ethics clearly addresses this issue:

> *REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)*

5. Can a firm practice designated agency if it has only two licensees?

No, there must be a broker to serve as the dual agent supervising the transaction and at least one licensee to represent the seller and another to represent the buyer.

6. What if my client, during the course of an exclusive listing, tells me to withdraw his property from the MLS and cease efforts on his behalf?

Sellers may unilaterally remove the firm's power of agency and right of sale and demand that the firm remove the property from the MLS. However, this action could be a breach of their agreement with Firm A, potentially entitling it to damages as set out in the listing agreement or at law.

Commission

7. May I pay a team directly or do I have to pay the individual licensees?

Brokers may only pay licensees, whether individuals or entities. So, if agents in your firm form a team, but don't create and license a business entity, you continue to pay the team members individually. However, if they form an LLC called "The Jones Team, LLC" and get it licensed at DPOR as a business entity salesperson, you can then pay the entity, and the owners can distribute the payments according to their rights.

8. The landlord wants to pay a "finder's fee" to tenants who bring in other renters. Can the landlord directly compensate his tenants in this fashion even though a real estate firm is managing the property?

Section 54.1-2103A7 of the Code of Virginia gives the answer. This section deals with exemptions from the requirements of licensure, and exempts:
"Any existing tenant of a residential dwelling unit who refers a prospective tenant to the owner of the unit or to the owner's duly authorized agent or employee and for the referral receives, or is offered, a referral fee from the owner, agent or employee."

9. I was offered what I considered to be a low commission split as the selling agent. When I looked at the settlement statement, I learned that the listing agent received a much higher split. This can't be right. When I demanded to see the listing agent's agreement with his seller, he refused.

The listing agent and seller can agree to offer any co-broker fee they choose. Furthermore, the listing agent has no duty to turn over his agreement with his client to you. The agreement contains confidential information, the seller may object to such action on the agent's part. Sharing the listing agreement would require the client's consent.

10. The buyer's agent submitted a purchase offer in which he increased his commission. Is that ethical?

No, this action is specifically prohibited by Article 16 of the Code of Ethics.

Standard of Practice 16-16:

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation. (Amended 1/04)

In summary. never use the terms of an offer or the threat of withholding an executed offer to increase your commission.

11. May a buyer's agent offer to rebate a portion of his commission to a client?

A licensee may rebate to a client, as long as the lender approves. (There are maximum total concessions that buyers are permitted from all sources on most loan programs.) The rebate must also be listed on the settlement statement. Keep in mind that when you advertise a potential rebate, you should use disclaimer language making clear that it is subject to lender approval.

Disclosure

12. There was a mold problem that was remediated by a qualified professional; do I, as the Listing Agent, need to disclose that?

The listing agent must disclose problems that exist, not repair or remediation history, unless that history itself suggests an ongoing problem. (For example, ten roof patches in the past year would likely suggest that a bigger problem still exists). It is not always easy to know whether a problem has been fixed; but if it has been, you need not disclose it. The key with mold is to understand that the underlying moisture problem must be addressed successfully. If it has not, no amount of remediation of the mold itself will matter. If it has, and the mold has been removed, there is nothing to disclose.

13. A seller knows about some problems with his house that could hurt his efforts to sell. His listing agent told him not to tell her about these problems, so she wouldn't be obligated to disclose them. Although her intent is to help the seller, is this the right thing to do as a listing agent?

This is an age-old problem. Yes, the listing agent has greater disclosure obligations than does the seller, and it could potentially be an advantage for the seller to use a listing agent who "knows nothing." Although listing agents are not required to discover latent defects (ex. crawling under the house to look for potential problems), they should never counsel sellers to keep property condition issues to themselves. The course that makes the most sense for both seller and listing firm is either to address the problems up front, fix them, or disclose them and adjust the buyer's expectations accordingly.

Earnest Money Deposit

14. When does an EMD have to be deposited in a purchase transaction?

The deposit must occur within five business banking days following ratification unless otherwise agreed to in writing by the parties.

15. I am the Principal Broker escrow agent; what if my agent forgets to give me the EMD within five business banking days. In other words, the funds are not deposited until the 6th day?to disclose them. Although her intent is to help the seller, is this the right thing to do as a listing agent?

You must report this violation to the Real Estate Board within three business days. In fact, any escrow violation must be reported. Brokers who fail to report escrow violations face a violation of the regulations themselves. Please note that the Real Estate Board needs the broker to report the violation in writing either by regular mail or e-mail (complaintsanalysis@dpor.virginia.gov). The Board also needs to know the name of the licensee and license number, when the deposit was due, and when it was received.

16. We are dealing with a short sale and the seller and buyer want to delay depositing the EMD until the lender approves the deal. Is that okay?

Yes, parties can agree in writing to a deposit date other than the standard five business banking days following ratification. VR's Short Sale Addendum to Residential Contract of Purchase contains language to meet this scenario.

17. Is an EMD necessary for contract formation?

No. The failure of a buyer to deliver an EMD does not mean there is no contract. It means that buyer is in default, and seller will have all rights against the defaulting buyer. The mutual promises in the contract are ample consideration to form a binding agreement. Please note that the scenario above refers to the VR contract. Other contracts in use in Virginia may require the EMD for ratification.

18. Does a real estate licensee have to hold the EMD in a real estate transaction?

No, but if the licensee holds it he is subject to the REB regulations.

Liability Protection

19. I am the Listing Agent and my client told me the house was on public sewer. I included that information in the MLS. Several months after closing, the buyer contacted my firm with the news that the house was not on public sewer and the septic system just drenched his front yard. Do I face any liability?

No, VR supported legislation to limit your liability in such cases, as long as you did not have actual knowledge the information was false or act in reckless disregard of the truth.

§ 54.1-2142.1. Liability for false information. § 54.1-2142.1. Liability for false information.

... [A] licensee shall not be liable for providing false information if the information was (i) provided to the licensee by the licensee's client; (ii) obtained from a governmental entity; (iii) obtained from a nongovernmental person or entity that obtained the information from a governmental entity; or (iv) obtained from a person licensed, certified, or registered to provide professional services in the Commonwealth, upon which the licensee relies, and the licensee did not (a) have actual knowledge that the information was false or (b) act in reckless disregard of the truth.

License Law

20. Can we sell mobile homes if we are selling the land beneath them?

If the mobile home is no longer mobile, that is, it's no longer a motor vehicle but is affixed to the real estate and being taxed as real estate (not personal property), you can sell it with your license. However, if it's still a vehicle (not affixed and not taxed as real estate), you must have a license from the Manufactured Housing Board to sell it, whether you're selling the land it sits on or not. So the land doesn't matter, although most of the time if it's affixed and taxed as real estate, you are also selling the land. But selling the land is not enough to make legal the sale of a vehicle sitting on it.

Property Management

21. Do I have to be licensed to practice property management?

Whether a license is required to do property management depends on what type of property management activities we are talking about. Property management per se is not a licensed activity and no license is required. However, that statement only applies if property management is limited to duties like handling calls from tenants and repairs. Showing property and leasing are licensed activities and all licensed activities must be done by a licensee and through a licensed firm.

22. An experienced property manager wants to join my firm and head a new property management division. I am the broker and do not have any experience with property management - is it safe to allow this new practice?

Be very cautious moving forward. The supervising broker is responsible for ensuring that brokerage services are carried out competently and in accordance with the law. If the broker is unfamiliar with the area of practice it will be very difficult for her to ensure compliance with the law. I recommend that the broker educate herself about property management through training and closely monitor all activities of the property manager. Also, please remember Code of Ethics Article 11 requires competence in your area of real estate practice.

Property Owners Association Act

23. The buyer is terminating the contract based on the POA packet but she really just wants out because she got cold feet. Can she do that?

Her reasoning does not matter; she will have an absolute right to terminate at any time during the termination period.

24. My buyer client received the POA packet and wants out. Therefore, we sent the seller a signed release of contract requesting a release within three days of receiving the packet. Now the seller says he won't sign the release and is proceeding to settlement. What gives?

Your buyer may still be obligated under the contract. The POA Act provides a termination right within a specified number of

days, but you didn't terminate, you asked for a release. A termination and a release are very different things. Termination is generally the unilateral act of one party declaring the contract at an end. For example, the buyer terminates upon being refused a loan or because the seller refuses to make agreed-upon repairs. Assuming appropriate contingencies are in place, a termination of this sort does not rely upon the agreement of the other party. It's a unilateral act. A release is a mutual act of the parties by which one or more of the parties are released from obligations under the contract pursuant to whatever agreements the parties have reached. For example, Firm A can release sellers from a listing and sellers agree to pay Firm & advertising expenses, or sellers can release buyers if buyers forfeit the deposit. Remember, just because you terminate pursuant to the contract, that doesn't automatically entitle you to freedom from liability or to return of the EMD. Sending a release as well provides the parties with the opportunity to agree on distribution of the EMD funds and ultimately liability protection.

Document Retention

25. How long do the Real Estate Board Regulations require my firm to keep documents?

You should always consult with your accountant and/or firm attorney to determine whether you should keep these documents longer. The regulations state that brokers should retain the following:

- Documents to be retained for three years from the date of execution:
  - Brokerage agreements; and
  - Dual and designated agency disclosures and consents.
- The disclosure of brokerage relationship to an unrepresented party form must be retained for three years from the date provided to the party.
- Documents to be retained for three years from the date of closing or from ratification, if the transaction fails to close:
  - Executed purchase contracts;
  - Any executed release from a contract;
  - Executed lease agreements;
  - Executed property management agreements; and
  - Each settlement statement.
- It is a violation to fail to maintain a complete and accurate record of such receipts and their disbursements for moneys received on behalf of others for a period of three years, from the date of the closing, or termination of the sales transaction, or termination of a lease, or conclusion of the licensee's involvement in the lease.

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