



Professional Practices

Lesson 20

Independent Contractor Guidelines, Co-Broker Agreements, and Antitrust

45 Hour Louisiana Post-Licensing

Independent Contractor Guidelines/Co-Broker Agreements/Antitrust

DISCLAIMER:

*The author of this course is neither an attorney nor a law firm and does not provide legal advice. The use of the content of the material provided is not a substitute for legal advice. Remember, only an attorney can provide legal advice. As always, an attorney should be consulted for all serious legal matters. Use of the material in this course **DOES NOT** create an Attorney/Client relationship.*

THERE IS NO IMPLIED OR EXPRESS WARRANTIES OF MERCHANTABILITY, SUITABILITY OR COMPLETENESS FOR ANY OF THE MATERIALS FOR YOUR PARTICULAR NEEDS. THE MATERIALS ARE USED AT YOUR OWN RISK AND THE AUTHOR OR PUBLISHERS OF ITS MATERIALS ARE NOT RESPONSIBLE OR LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOSS OF USE, DATE OR PROFITS; OR BUSINESS INTERRUPTION HOWEVER USED.

NOTE:

Several sample Independent Contractor Agreements and Co-Brokerage are available on-line. Copies have not been provided since there are none approved by the LREC at this time.

As a reminder, please check with your broker or attorney before using any legal documents.

Segment 1: Antitrust Implications for Licensees

ANTITRUST LAWS cover 4 areas (BAPT):

- B:** Group Boycotting
- A:** Allocation of Customers and Markets
- P:** Price Fixing
- T:** Tie-in Agreements

The Sherman Antitrust Act of 1890 is the federal statute that covers competition in the marketplace. Most courts define competition as “that economic condition in which prices are determined by market forces without interference upon form private concerns and there is reasonable freedom of entry into most businesses”.

In recent years some real estate brokerage activities have been scrutinized by the FTC (Federal Trade Commission). A brief explanation of the four areas covered by antitrust laws is listed below:

GROUP BOYCOTTING: All of these areas are concerns for real estate licensees. Boycotting occurs when a group of people get together and conspire to “run” someone out of the business. It is perfectly ok for one individual to choose not to do business with another. But when a one or more get together and work toward putting someone else out of business, the boycotting begins.

1. An example of this could be two competing brokers or even agents having lunch together one day. They then strike up a conversation about a new commission pricing model; maybe one “discounting fees” or “fee for services”; which has just entered the market area. The mere fact that competitors discussed this is a violation and the brokers would probably be found guilty if case went to court.
2. Another area that is somewhat unique to real estate is the boycotting of a supplier or vendor. Real Estate agents and brokers tend to complain about the high cost of advertising and sometimes feel they are “trapped” into using the very limited suppliers in the area. Many feel that the high cost of advertising is driven by the lack of competition. Therefore if a group of competitors got together and pulled all their ads from a certain vendor in an attempt to force the suppliers to lower their rates that too, would be considered an offense under boycotting.
3. Another variation on the boycott violation would be when several real estate brokers get together and agree to pay “discount” brokers a different co-op rate than they would pay a traditional broker because they won’t like the business model these “discount” guys are using.

ALLOCATION OF CUSTOMERS AND MARKETS: The easiest way to explain this is that in real estate especially there are no “protected” territories. We can get together as an office and split the town up into areas to more effectively market our brand; but we cannot prevent anyone from working in the same area. I like to use pharmaceutical reps as an example. Drug company number one may tell their rep, “you will have all of Louisiana as your territory”; but Drug company number one cannot prevent any other Drug company to sell their products in the state of Louisiana.

PRICE FIXING: ALL COMMISSIONS ARE NEGOTIABLE! A broker can set the fees he will charge and can discuss this at sales meetings in his/her office as long as there are no competitors in the area. This is an area where a great potential for violation can occur among real estate agents and companies.

1. Price fixing is the most prominent real estate related antitrust offense. Price fixing occurs when two or more real estate companies agree to “set” their pricing or commission rates. It is a good idea (and office policy in many companies) to never discuss commission rates in any setting when two or more competitors are in the same room. The old adage: “better safe than sorry”, applies here!
2. Traditionally, the seller lists his/her property with a broker. The seller agrees to pay a certain fee to the broker. The broker then places the property listing in the MLS (Multiple Listing Services) computer system. At the time the broker does this, he offers compensation to the brokerage firm who produces the buyer.
3. Issues here would arise when competing firms attempt to control or set the fee paid by the seller or paid to the selling company.

TIE-IN AGREEMENTS: Tie-in Agreements violate antitrust laws when the sale of a “high end” property is subject to the purchaser buying a low-end property. In other words, I will sell you my million dollar house in the gated community, but only if you buy my dilapidated house in the middle of a drug invested area. There is nothing in the antitrust laws that prohibit “package deals” as long as the properties in the “package” are similar properties. Therefore an investor who wants to divest themselves of their portfolio could list their property with the requirement that all 5 or 10 properties sell as a “package” as long as they are similar properties.

Segment 2: Co-Broker Agreements

CO-BROKER AGREEMENTS

In simple words, a co-broker agreement is an agreement between competing brokers who work together to sell a property. The broker working with the seller is normally called the “listing broker”. The broker working with the buyer is normally called the “selling broker”. This terminology is difficult to grasp sometimes; therefore some agents are now describing themselves as the “agent working for the seller” or “agent working for the buyer”.

Many real estate licensees (especially those who do not belong to a Multiple Listing Service) want to protect the fee they will be earning when selling a property by including the compensation in the purchase agreement. The compensation should NOT be included in the purchase agreement because the fee paid to the broker working with the seller has nothing to do with the transaction at all. Plus the purchase agreement is signed by the buyer and the seller. The two brokers do not get to sign the purchase agreement. Therefore placing the co-op commission in the purchase agreement would be introducing parties to the contract who do not sign the agreement.

The concern over fees being due to the agent working with the buyer should not be an issue as long as both brokers involved in the transaction are members of the same multiple listing service.

The reason for this that at the time a broker joins MLS; he/she sign a document that says they will pay whatever fee they insert in the “co-op” field in MLS to the broker who provides the buyer.

At the same time the agreement they sign says that they will accept whatever amount is inserted into the “co-op” field as payment for procuring a buyer.

These two tidbits of information should help the agent have a better understanding of the process and remove the fear that they will not be paid for their efforts.

Should the sale in question be with a “non-MLS” broker or a broker belonging to a different MLS than your broker, the protection listed above is not in effect. In such cases, a separate agreement should be in writing and signed by the two brokers outlining how the marketing fee is to be shared. This type of agreement is known as a Co-Brokerage Agreement.

Reminder, this agreement is between qualifying BROKERS, not salespersons or associate brokers. In Louisiana, the broker earns the fee and shares that fee with the licensees which he or she sponsors.

Segment 3: Independent Contractor Agreements:

Definition of the word “INDEPENDENT”:

- A: not dependent
- B: not subject to control by others - self-governing
- C: not affiliated with a larger controlling unit
- D: not requiring or relying on something else
- E: not looking to others for one's opinions or for guidance in conduct
- F: not bound by or committed to a political party
- G: not requiring or relying on others

Definition of the word “CONTRACTOR”

- A: one that contracts or is party to a contract
- B: one that contracts to perform work or provide supplies
- C: one that contracts to erect buildings
- D: a person or company that undertakes a contract to provide materials or labor to perform a particular service or do a specific job.

Definition of AGREEMENT:

- A: harmony of opinion, action, or character
- B: the act or fact of agreeing
- C. an arrangement as to a course of action
- D: a contract duly executed and legally binding
- E: the language or instrument embodying such a contract

Definition of INDEPENDENT CONTRACTOR:

- A. A person hired by another not as an employee but, rather, pursuant to a contract for service where the engaging party does not supervise or control the detail of the work, and where the party engaged remains self-employed
- B. A person who contracts to do work for another person according to his or her own processes and methods; the contractor is not subject to another's control.

- C. Self-employed person (architect, consultant, engineer, etc.) who provides certain services to a second-party called the principal (or client or owner), or to a third-party on behalf of the client.
- D. An independent contractor is not under the control, guidance, or influence of the client and, unlike an employee, does not owe a fiduciary duty.
- E. The Independent Contractor is a separate business entity and is not considered an employee.
- F. An Independent Contractor is his or her own boss. The work they perform stays within the definition of a contract which requires them to adhere to certain requirements.
- G. The client neither deducts the payroll (or the withholding) taxes from payments to the independent contractor, nor contributes the employer's share.
- H. To be legally designated as an independent contractor, an individual must
 - a. be free from the control of the client,
 - b. be able to exercise his or her judgment as to the manner and methods to accomplish the end-result, and
 - c. Be responsible for the end-result only under the terms of the contract.
 - d. The client is not responsible to the third-party for the actions or torts (civil wrongs independent of contracts) of the independent contractor unless the client (explicitly or implicitly) has authorized them, or where the actions of the independent contractor are (more or less) controlled by the client.

DEFINITION OF INDEPENDENT CONTRACTOR AGREEMENT:

- A. The real estate agent/associate broker agreement (aka: Independent Contractor) is a signed documented agreement between the real estate agent/associate broker and the real estate company or broker, who will hire the agent to act as a referral agent of the broker.
- B. The document sets forth the effective date of the agreement, obligations of both the salesperson and the broker and reasons why the agreement can be terminated.
- C. The Real Estate Independent Contractor Agreement also confirms that the real estate sales person is an independent contractor and not an employee of the real estate company.
- D. It is important that the independent contractor business arrangement be set out in writing rather than being a verbal agreement.
- E. A written Independent Contractor Agreement will prove invaluable in the event of disagreements, misunderstandings or litigation between the sales person and the broker or company.

Miscellaneous Tidbits.....:

- A. When using a pre-printed form, all the blank spaces where information is requested, should be completed.
 - a. If that blank space does not pertain to either the salesperson or the broker/company, a notation such as (N/A or a dash) should be entered into that area.
- B. All parties should read the document very carefully
- C. All parties should understand all clauses in the document
 - a. Consulting an attorney prior to signing may prove to be invaluable in the future, should issues arise
- D. There should be an area to discuss “rights and obligations” of all the parties in the document itself. If there are disagreements later, they most often focus on these provisions. Read them carefully and understand the ramifications prior to signing the document.
- E. All parties to the document should retain either the original or copies of the signed agreement.
- F. This document, as well as all legal documents, should be kept in a safe location such as a bank safety deposit box, fireproof safe or similar storage facility.

CLAUSES TO CONSIDER INCLUDING IN WRITTEN AGREEMENT:

Clauses normally contained in a written independent contractor agreement:

- A. a description of the services the Independent Contractor will perform
- B. an explanation of who will provide materials, equipment, and office space
- C. an explanation of how much and the manner in which the Independent Contractor will be paid
- D. a description of how and when the Independent Contractor will be paid
- E. an acknowledgement that Independent Contractor will be responsible for all bills incurred in doing business as a real estate licensee
- F. a statement that Broker and the real estate agent agree to an independent contractor relationship
- G. an acknowledgement that both the Broker and the Independent Contractor are duly licensed and will maintain that license in current status for the duration of this agreement
- H. a statement that the Independent Contractor will be responsible for and agrees to pay state and federal income taxes
- I. an acknowledgment by the Independent Contractor that he or she is not entitled to any employee benefits
- J. a statement by the Independent Contractor that he or she carries errors and omissions and liability insurance

- K. a description of the length of the agreement (for example, one year)
- L. a description of the circumstances under which the Independent Contractor can terminate the agreement
- M. an explanation of how the Independent Contractor will resolve any disputes.

IRS RULES CONCERNING INDEPENDENT CONTRACTORS:

Know the IRS (Internal Revenue Service) Rules:

- A. Real estate agents and brokers enjoy a special IRS classification as Statutory Independent Contractors.
- B. Be sure that you know the rules to keep that status.
- C. In the changing world of real estate services, new business models and compensation methods may result in classification as an employee.
- D. The three requirements to qualify as a Statutory Independent Contractor under the law passed by Congress in 1992 are: (These apply to federal tax purposes only.)
 - 1. **The sales associate must be a licensed real estate salesperson.**
 - a. This seems self-explanatory, but the law wanted to be sure that real estate brokers did not place assistants or agents-in-training in the status of independent contractor.
 - 2. **Income must be related to sales and not hours worked.**
 - a. If a broker has a licensed assistant, but pays them by the hour or bases their compensation on hours worked in some way, they cannot be an independent contractor.
 - b. If you are a part time agent and are doing other jobs for the brokerage on an hourly or salaried basis, it's likely that independent contractor status would not apply, as the majority of your compensation would not be from sales related activities.
 - 3. **There must be a written independent contractor agreement.**
 - a. A written independent contractor agreement between the real estate agent and the broker would state the fact that the agent is to be treated as an independent contractor for federal tax purposes.

To confirm IRS Rules let's review a typical scenario:

We all know times are a bit tough for many real estate agents. Because of this, many agents are working at additional jobs to make ends meet. Many are working outside the real estate industry as employees, often full time, and then working their real estate business on the side.

One might ask: If an agent works as an employee in someone else's business, does the IRS make it more difficult for real estate salesperson to qualify as a bona fide real estate agent for IRS purposes? The answer to that question is normally, "no". Most real estate agents meet the three requirements listed above which affords them with a very special tax status for IRS purposes known as statutory independent contractors also known as statutory non-employees.

The good news is that real estate salespersons who meet the 3 requirements restated below are automatically considered independent contractors by the IRS, no matter how many other jobs they may have:

1. Hold a current real estate license
2. Agent's compensation must be based on sales commissions, not number of hours worked, and
3. Must have a written Independent Contractors Agreement with the hiring firm stating that the agent will not be treated as an employee for federal income tax purposes.

What about payroll taxes and the like?:

- A. If an agent qualifies as a Statutory Independent Contractor, the broker or brokerage firm is not required to withhold federal taxes from his or her pay.
- B. The agent pays taxes based on his or her income
- C. NOTE: This special Statutory Independent Contractor status only applies to federal taxes:
 - a. Income tax
 - b. Social Security tax
 - c. Medicare Tax
 - d. Federal unemployment taxes
- D. It does not apply to state income taxes.

Another Scenario:

- A. It is very common for a salesperson to work a full-time job outside real estate as an employee and have a separate real estate business on the side.
- B. In this situation, as long as the salesperson meets the three (3) requirements
- C. An activity does not have to be full-time to qualify as a business.
- D. Nor does IRS require a person to engage in only one type of income-producing activity at the same time.
- E. A salesperson will probably run into a problem with the IRS if they perform the exact same services as both an employee and an independent contractor for the same firm.

- F. This scenario is not uncommon in among real estate licensees.
- G. In this case, it's a good idea to carefully document the time and effort the salesperson puts into their own real estate business, as well as keeping track of all their expenses.

IRS Related Documentation/Forms:

W-9

As part of your “in processing” at the real estate company, your broker/manager/administrator should have requested that you complete IRS Form W-9, AKA: Request for Taxpayer Identification number and Certification.

This is the form used to request the correct name and TIN (Taxpayer Identification number) of the worker (Independent Contractors). The TIN can either be your social security number or an Employer Identification Number (EIN). The W-9 should be kept in the broker/employer files for a minimum of four (4) years for future reference should IRS requests information from broker/employer.

Form 1099-Misc

As an Independent Contractor you will not receive a W-2 at the end of the year, you will receive a Form 1099 – Misc. This is the form that your broker must use to report payments made to you during the year.

Anyone who pays someone an amount greater than \$600 in one calendar year, is required to complete the Form 1099 – Misc indicating the amount paid the service provider (Independent Contractor) and a copy provided to the independent contractor by January 31, of the year following the payment. A copy of the 1099 –Misc must be sent to the IRS by February 28 if filing manually or March 31st if file the 1099s electronically.

Self- Employment Taxes

Now that it has been determined that you are indeed an Independent Contractor, you are “officially” self-employed and with that distinction, tax requirements. Your broker will provide you with that Form 1099-Misc we described above.

At the beginning of your real estate career, it is suggested that you consult with a CPA (Certified Public Accountant) or professional bookkeeper/tax preparer that will assist you in getting a “set of books” started to assist you in meeting all the requirements imposed by the IRS (Internal Revenue Service).

Self-employed (Independent Contractors) individuals are generally required to file an annual Income Tax Return and pay estimated tax on a quarterly basis.

In addition to the income tax requirements, self-employed individuals must also pay self-employment tax (SE tax) which normally consists of contributions to Social Security and Medicare tax liabilities. A CPA or Bookkeeper will figure net profit or net loss from your business venture.

Louisiana Laws Regarding Non-Compete Agreements

Quoting Louisiana Revised Statutes 37:1448.1 – Non-compete Agreements:

“A non-compete agreement between a real estate broker and licensee which requires the licensee to refrain from carrying on or engaging in a business similar to that of the real estate broker or from soliciting customers of the real estate broker within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the real estate broker carries on a like business therein, for any period of time up to two years, shall be unenforceable and an absolute nullity unless the licensee shall have the right to rescind the non-compete agreement until midnight of the third business day following the execution of the non-compete agreement or the delivery of the agreement to the licensee, whichever is later. In any agreement between the broker and licensee, which includes a non-compete agreement, the non-compete agreement shall be prominently displayed in bold-faced block lettering of not less than ten-point type.”

B. Any action to enforce the provisions of this Section shall be brought in a court of competent jurisdiction in this state.

C. The provisions of this Section shall be effective as to agreements entered into after January 1, 2006.

Acts 2005, No. 229, §1.”

For the entire text included in the Louisiana Revised Statutes 23:921 – Restraint of business prohibited...search for Louisiana RS: 23:921 on the internet. Print out and read for further explanation of this area.

Non-Compete Agreements:

DEFINITION of Non-Compete Agreement in Louisiana:

Some employers, including real estate brokers, require clauses in their employment contracts that limit the ability of the employee to compete with the employer by “stealing” customers or trade secrets. These clauses are known as “non-compete” clauses. The agreements of which they are a part are called non-compete agreements.

These agreements must strike a fair balance between protecting the employer’s legitimate business interests from that of an unfair competitive advantage with the employee’s given right to work in the field in which he or she was trained.

Generally, the fair or unfair advantage would ultimately be decided in a court of law. The Court would examine the size and type of business involved as well as the geographical location of the limitations imposed on the employee; and investigate whether the employee was given adequate notice about the restriction at the time the agreement was signed.

Just as in any contract in Louisiana, there must be consideration. Remember consideration does not have to be in the form of money, but both parties to the contract or agreement must be giving and receiving something of value. Some Louisiana courts have determined that both the offer of initial and the offer of continued employment is sufficient to be deemed “consideration” or a “benefit” to the employee in exchange for the employee to agree to refrain from competing with the employer should the employment relationship terminate in the future.

The law in Louisiana that governs these non-compete issues is quoted below. Generally speaking, any agreement or law that restrains anyone from exercising a lawful profession, trade or business of any kind is prohibited. There are specific exceptions but those are limited to specific geographic areas where the restriction last no longer than two (2) years from the termination of employment.

When it comes to non-compete in real estate, under LA 37:1448.1, the real estate licensee must have received a three day right to rescind the agreement. In addition the section of the agreement pertaining to the non-compete must have been "prominently displayed in bold-faced block lettering of not less than ten-point type". This means that the real estate broker is required to make sure that the non-complete language is not "buried" in the body of the agreement. The real estate licensee being hired by the broker must know about the non-compete clause and have a three (3) day right to rescind the agreement.

In addition, it is important for the employer/broker to know if the "new hire" has a non-compete agreement with their former employer. The new employer/broker does not want to be liable to any former employer/broker if hiring the employee would put him or her in violation of the earlier agreement. Different rules may apply depending on the specific situation.

Questions and Answers:

QUESTION:

What is a Real Estate Independent Contractor Agreement?

ANSWER:

An Agreement between the licensee and the broker putting any agreements they may have made in writing.

QUESTION:

Why should I have one and how does it protect me?

ANSWER:

Oral agreements invite costly misunderstandings because there's no clear written statement of what the Independent Contractor has agreed to do, how much you have agreed to pay, or what the two of you will do if a dispute arises.

These misunderstandings might be innocent – the Broker and the Independent Contractor may genuinely remember the agreement differently -- or they may be intentional.

Either way, it will be the word of the Broker against the word of the Independent Contractor, and there is no telling whom a judge or jury will believe. It's much safer to rely on a written document that clearly sets out the details of your relationship.

Even more important, a written independent contractor agreement helps establish a worker's independent contractor status by showing the IRS and other agencies that both the Broker and the Agent intended to create a hiring firm/independent contractor relationship, not an employer/employee relationship. Caution here, the written agreement is not a magic bullet! A written agreement is useless if the Independent Contractor is treated like an employee.

QUESTION:

What are the IRS's three requirements to qualify as an Independent Real Estate Contractor?

ANSWER:

1. A signed, written independent contractor's agreement signed by both the broker and the agent stating that the agent will be treated an independent contractor and not an employee.
2. The independent contractor must have a current real estate license.
3. Compensation received by the agent must be based on production and not hours worked.

QUESTION:

My broker has just approached me to see if I would become his licensed real estate assistant. He indicated I would work Monday through Friday from 9 to 5 and get paid by check every Friday at the rate of \$15 per hour times the total number of hours I work per week. He said he would not be taking out payroll or taxes from my paycheck as I am a licensed real estate agent and an independent contractor. Is this okay?

ANSWER:

No...Since you are being paid based on the number of hours you work, you cannot be an independent contractor according to IRS rules. Even though you work as a "part time agent" and a "part time assistant" at the firm, you probably would not be considered an independent contractor.

QUESTION:

I was at a real estate luncheon the other day and when the subject about commissions came up one of the "older" real estate agents got up and abruptly left the room. The rest of us "newbies" in the group cannot understand why she was so rude.

ANSWER:

The "senior" agent probably saved you guys. As mentioned in the section about antitrust laws earlier in this presentation, any time licensees start talking about commission and there is at least one person from a competing office in the area, the group could be construed as violating antitrust laws. It is best to refrain from speaking about commissions or any other antitrust issues when in public.

QUESTION:

I work in an area of the state that does not have a Multiple Listing Service. None of the agents in our area belong to the National Association of REALTORS®. The brokers in the area allow us to show their listings. We always were paid a normal commission, but lately that has changed and we never know what we're going to be paid when we sell a property. Wouldn't it be a good idea to include our commission in the purchase agreement?

ANSWER:

As mentioned earlier, the real estate fee should not be included in the purchase agreement. It is a good idea to get an agreement signed by both the listing and selling brokers agreeing to payment of commission. Remember ALL COMMISSIONS ARE NEGOTIABLE! Language such as "normal" or "customary" could cause violations of antitrust.

REVIEW:

The licensee has been introduced to the Federal Sherman Antitrust Laws and an example of each and is now better equipped to answer questions in a manner in which will not be a violation thereof.

Concerns of licensees about being paid by a co-operating broker were discussed in the chapter two. No need to worry about getting a co-operating broker agreement signed if both brokers are members of the same MLS system. An agreement should be made and put into writing, then signed for any co-broker who is not a member of same MLS or of any MLS whatsoever.

An Independent Contractor's Agreement between Broker and Agent sets forth the agreement between the parties. It is essential to state the fact that the Agent will not be considered an employee, that the Agent's compensation is based on production and not hours worked. The agreement should also include a clause stating that the employee is free to set their own work schedule and will not be required to have set work hours or be required to attend meetings or other "command performances".

In addition, the agent also learned the various IRS related forms they are expected to complete and the importance of the agreement. The agent was made aware of the Louisiana Laws regarding non-complete clauses in the Independent Contractor's Agreement.

The BROKER and AGENT should discuss items such as compensation, expectations, commission structure, office space availability and support staff at the time the agreement is signed.

As always, when signing a legal binding document, if there are any questions whatsoever, or just to be assured the document does not have a "hidden" agenda; it is always a good idea to consult an attorney.