

# The Short Story: RECAD BASIC OUTLOOK

## *From the Director*

By: D. Philip Lasater, Executive Director

**W**e have already heard often from many. Make it easy, tell it simple. If it were simple somebody would have already done it. If it were simple you would have heard long before now. This does not mean it is impossible. There has to be some aspiration to get it and make it work.

### R·E·C·A·D

#### An Opportunity to:

1. Provide consumers with additional services;
2. Explain what we do in the sales process; and
3. Showcase our professionalism.

Before you wrestle and become anxious over RECAD and what it does, realize this, it is not all new. RECAD does require by state statute what has always been taught and already supposed to be done and that is not new. If no one complained or was sued everybody was relieved and went on. However, Commissioners and industry leaders did not think that was in the best interest of the public or licensees.

RECAD does require that the public be

informed of all their options and that is new. The act says that you are a contract broker until such time as an agency relationship has been established in writing. This could be a traditional agency relationship or the new nonagency relationship of contract brokerage which is essentially a customer contract for services. This choice is new and you do not have to stay a contract broker nor be one. The law is giving you and the consumer a status until you each have time to establish how best to work together.

So, if you were one of the licensees who took the required Agency Relationships and Disclosure continuing education course the last two license periods for renewal, then you understand the major portion of RECAD. Yes, basic agency is the basis for understanding and complying with RECAD.

Okay, so we agree that contract brokerage is new. But can deciding, disclosing, doing and documenting be considered new just because accountability for doing so is now state law?

Step back, learn about the possibilities and give it a chance to help you do your work. It will not surprise us to start hearing how valuable it is to have the uncertainty taken out of the variety of circumstances that exist from transaction to transaction. Though today it may not seem like it, RECAD can become a real tool in clarifying previously vague representation questions. ■

## RECAD CHRONOLOGY

- 1985** NAR/AAR Task Force on Agency Formed
- 1986** NAR produces "Who is My Client?"
- 1989** Legislature enacts disclosure requirement
- 1989** Real Estate Commission advertises rules for adoption to require early disclosure/documented in writing. *Result:* Timing not defined but documentation required in the offer to purchase. *Also Public Hearing Comments:* requested Real Estate Commission delay extensive disclosure requirements until period of education conducted
- 1990** Real Estate Commission contracts for Agency continuing education development
- 1991** Alabama Real Estate Instructors required to complete Agency training prior to instruction
- 1991-1992** Alabama course on Agency Relationships and Disclosure nationally awarded and recognized
- 1992** Agency Relationships and Disclosure mandatory continuing education for renewal of license
- 1994** Second license period Agency Relationships and disclosure mandatory continuing education for license renewal
- 1994** Real Estate Commission establishes Task Force to examine Agency issues
- 1995** Task Force produced RECAD and Legislature enacts
- 1996** RECAD period of information and education
- October 1, 1996** RECAD effective date for practice and compliance ■

## BRIEFLY LEGAL

By: Charles R. Sowell, General Counsel

# RECAD In The A.M.

All qualifying brokers must take the following two steps in order to get ready for the effective date of RECAD, which is October 1, 1996.

1. Before October 1, you must develop a written agency disclosure office policy. Refer to Rule 790-X-3-.14 we have printed in this issue. Your office policy can be as simple as a loose leaf ring notebook containing a statement of which brokerage services your company will offer, together with a sample form to be used for each. You will first have to decide what services you will offer in order to develop your office policy. This office policy must contain the mandatory disclosure form which is titled "Real Estate Brokerage Services Disclosure" set out in Rule 790-X-3-.13, which is printed in this issue. The office policy must also contain a sample sales contract with the disclosure contained in Section 34-27-8(c) of the Code, which is printed in this issue. This is the agency disclosure which has been required for years in the offer to purchase. It has been updated to include RECAD options.

2. On or before October 1, you must have an office meeting of all salespersons and associate brokers. At this meeting you must provide every licensee with a copy of the office policy, and you must explain it. Your licensees must each sign a form acknowledging receipt and satisfactory explanation of the office policy. You must keep these acknowledgments in your office records for three years. At least once a year you must repeat this process.

Then your alarm goes off on Tuesday, October 1, 1996, you are a real estate broker or agent, at least you think you still are, and RECAD is going to ambush you at any moment. Time to panic? Not really. Here is a typical first RECAD day.

Your first appointment is with a couple, the sellers, whose listing you want very much. You are not at their home yet, but RECAD has already kicked in, making you a contract broker. Going into the list-

ing agreement, making your company their agent. This written agency agreement terminates your status as contract broker in relation to them. You ask them to sign the agency disclosure form, making a note if they should decline, then you have them sign the listing agreement.

You do not have to worry about making the disclosure to sellers you talked with in the past because RECAD is not retroactive. RECAD will apply to those you contact in the future, beginning today.

RECAD caused several things to happen in connection with this listing presentation. As stated, you were a contract broker going into the meeting with the sellers. Under the law you would remain a contract broker unless you and the sellers enter into a written agency agreement. RECAD says no agency relationship is assumed or implied without a written agreement. RECAD also sets out responsibilities of contract brokers and agents to all parties. RECAD even allows you to have a written agreement with both the seller and the buyer, making your company a contract broker, and not an agent of either party. Under this type of plan, you would deliver the brokerage services set out in the agreements to each party.

Continuing your day you arrive at the office to file the listing agreement. While there you receive a call from a potential purchaser who says she has seen your signs, and wants to see some homes. You ask her to meet you at the office, telling her you will drive her to see these homes and more. She arrives, you offer her a soft drink, and ask her about her interests. You then explain that the law requires you to tell her about the types of real estate services available in Alabama, using the mandatory Real Estate Brokerage Services Disclosure form. You may, but are not required, to use the optional consumer information booklet. You then tell her

### Agency Relationships Under R·E·C·A·D

- Single Agency
- Sub-Agency
- Limited Consensual Dual Agency



**MUST BE IN WRITING!**

ing presentation this means you are not an agent of the seller, nor are you an agent of any potential purchasers of this home. This might change, as we will see.

The sellers invite you to their kitchen table to discuss the listing. After coffee and some small talk, you tell them that you are the best in town on this type of property. Then you tell them you have a responsibility under the law to explain the types of real estate services offered in Alabama. You do this using the mandatory Real Estate Brokerage Services Disclosure form. You may, if you wish, use the optional consumer information booklet. It is not mandatory. Then you explain the services your company offers. They choose the standard exclusive right to sell

about the services offered by your company to potential purchasers. Continue by explaining that your company already represents the sellers of the properties listed by the company. Right now you are not her agent, as your relationship with her is contract broker. Depending on your company office policy, she might remain in a contract brokerage relationship, she might select buyer agency, or she might select limited consensual dual agency, depending on whether your listed sellers will agree. If contract brokerage is continued, no written agreement is necessary. If buyer brokerage is selected, your company may be her agent only on listings of other companies. Limited consensual dual agency must be used for your company's listings unless she decides to be a customer in a contract brokerage relationship with your company. Have her sign the mandatory form, or note if she declines. If buyer agency or limited consensual dual agency is selected, there must be a written agreement. When these issues are settled, get in the car and make a sale.

I hope this helps make RECAD more real, but I understand there are no typical days in this business. I also know many of you are commercial brokers, buyer brokers, and other specialties. Just remember, the same principles apply, no matter what you are doing. The disclosures are always made. The difference is in what you are aiming, via your company office policy, to accomplish. For example, if you are a buyer broker, you will have your clients, the potential buyers, sign buyer agency brokerage agreements after the disclosure. You may then approach for sale by owners, make the disclosure, and have a contract broker relationship, whether written or unwritten, with the owners, right on through the closing. Of course you may elect to be a "pure" contract broker, representing neither the seller nor the buyer.

I have to close by reminding you there are thousands and thousands of y'all, and one of me. It is not humanly possible for me to field all of your RECAD questions, and do my job otherwise. Please take advantage of alternative sources of information. ■

# RECAD

## "TOP 10"

From the RECAD home office in Everywhere, Alabama, come the top ten reasons RECAD became law in the first place.

- 10 National Association of Realtors studies show problems and make recommendations for a better system.
- 9 Sub-agency, once the standard vehicle for cooperating brokers, has fallen into disfavor in many areas.
- 8 Full vicarious liability incurred by consumers, both sellers and buyers, for the acts of their agents exposes these consumers to potential lawsuits.
- 7 Prior Alabama law made no provision for meaningful agency disclosure to consumers.
- 6 The growth of buyer's agents has exerted pressure on the system to accommodate buyer agency as a routine practice.
- 5 Inadvertent dual agency misleads the consumer and exposes the real estate licensee to legal liability.
- 4 The common law of agency is not very compatible with today's practice of real estate.
- 3 Contract brokerage, which allows real estate services to be delivered under contract law, instead of agency law is needed where sub-agency is not available.
- 2 Prior statutory law did not set out the responsibilities of real estate licensees in their relationships with consumers.
- 1 Buyers are often confused about the roles of real estate licensees, mistakenly believing an agent represents them when, in fact, the agent represents the seller.

## EDUCATION CORNER

By: Pat Anderson, Education Director

# Getting Ready for RECAD

**T**he Real Estate Consumer's Agency and Disclosure Act (RECAD) passed in the 1995 session of the Legislature with an effective date of October 1, 1996. This has provided time for forms and rule development, course development and licensee education prior to implementation.

After passage, the Commission's first task was to develop the mandatory disclosure form and a booklet which would serve to educate consumers about the aspects of RECAD. Those have taken shape as the "Real Estate Brokerage Services Disclosure" form and "A Consumer Information Booklet". Both of these items will be included in the new License Law book due out in October as part of Rule 790-X-3-13. The Real Estate Brokerage Services form describes all of the brokerage services available under RECAD. It is printed in this issue and there is a place for both the licensee's and consumer's signatures. Look in the Questions and Answers article for information on signing requirements.

The "Consumer Information Booklet" has been developed by the Commission to fully explain to consumers the brokerage service options provided under RECAD. The Commission will provide the booklet in "copy-ready" form to any company upon request. Brokers may then reproduce them either in their current form or by adding their own company name and logo to them for use by agents. It is not mandatory that a consumer booklet be used but is advised. There is no prohibition against companies developing their own consumer publication but do so with care making sure to include all the bro-

kerage service options. It is a good idea to seek legal advice if you choose this route.

The first major education initiative was course development. The Commission contracted with nationally recognized agency expert Julie Graton-Good to write a three hour continuing education course. The final course book will be available for distribution by early June. RECAD will be added to the menu of mandatory continuing education courses. Licensees must complete six hours from the follow-

than 475 licensees attended and heard course author Julie Garton-Good teach the new RECAD course. The workshops met their objective to raise the level of awareness regarding RECAD requirements so many companies have already begun to develop forms and office policy.

The third education initiative is the instructor training scheduled for June 4, 1996. It will be held at the Bryant Conference Center at the University of Alabama in Tuscaloosa. It will be from 9 a.m. - 4 p.m. and the cost is \$65.00. All persons who wish to be approved to teach the three hour course must attend this training session.

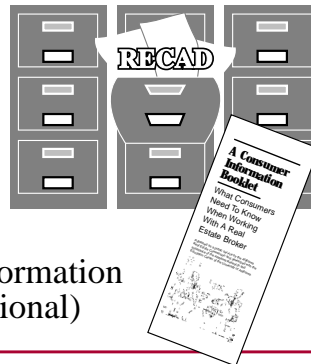
After the instructor training on June 4th, schools will be ready to offer the 3 hour RECAD continuing education course. Even though licensees can fulfill their continuing education hours without taking RECAD, it seems wise to take advantage of learning requirements of this new law by attending one of the courses offered this summer.

The fourth project in our mission of licensee education is to develop a video training tape which can be used by brokers as they conduct in-house company training. The tape is scheduled for release in early August. Cost and distribution method have not yet been determined.

The Commission is confident that all licensees will have had the opportunity to acquaint themselves with the requirements of RECAD by October 1, 1996. Many are already making plans, developing their office policy, training sales associates and preparing changes to forms. Why not join the crowd and don't get left behind. ■

### Provide to the Consumer

- Real Estate Brokerage Services Disclosure Form (Mandatory)
- Consumer Information Booklet (Optional)



ing list of three hour courses: RECAD, License Law, Agency Disclosure, Fair Housing and Handling Trust Funds. The remaining six hours of the twelve hours needed for license renewal may be elective courses.

The second education initiative was to give early training and exposure of RECAD requirements to brokers and managers. To accomplish this the Commission, in coordination with the University of Alabama, decided to conduct workshops via teleconferencing and satellite downlink. Simultaneous workshops were held at 17 different locations in 16 cities on February 29 and March 1, 1996. More



State Of Alabama  
REAL ESTATE COMMISSION

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34-27-8(c).  
RELATING TO AGENCY DISCLOSURE

(c) Each offer to purchase prepared after October 1, 1996, shall have prominently displayed the following AGENCY DISCLOSURE clause which shall be completed and initialed as indicated:

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AGENCY DISCLOSURE

Print Name of Listing Company:

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The Listing Company is an Agent of:

- (Check One)     Seller  
                   Purchaser  
                   Both parties as a limited consensual dual agent.  
                   Neither party and is acting as a contract broker.

Print Name of Selling Company if any:

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The Selling Company, if any, is an Agent of:

- (Check One)     Seller  
                   Purchaser  
                   Both parties as a limited consensual dual agent.  
                   Neither party and is acting as a contract broker.

Seller(s) initials        \_\_\_\_\_

Purchaser(s) initials    \_\_\_\_\_



State Of Alabama  
REAL ESTATE COMMISSION

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Rule 790-X-3-.13  
AGENCY/BROKERAGE SERVICES DISCLOSURE

- (1) The Real Estate Consumers Agency and Disclosure Act (RECAD) requires the Alabama Real Estate Commission to write a Real Estate Brokerage Services Disclosure form which describes the alternative types of brokerage services available to consumers in Alabama transactions. The use of this form is mandatory as required by RECAD and this rule. Additionally, the Commission has written a "Consumer Information Booklet" which is optional and may be used by any licensees who choose to use it.
- (2) Licensees, except those engaged in rental or property management services, are required to provide the Real Estate Brokerage Services Disclosure form to the consumer as soon as reasonably possible for his or her signature. Consumers are not required by law to sign the form, although the licensee should encourage that it be signed. If the consumer declines to sign, the licensee shall make a note to this effect on the form. The texts of the optional "A Consumer Information Booklet" and the mandatory form follow.

NOTE: The Real Estate Brokerage Services Disclosure Form (mandatory form) referred to in this Rule is printed in this issue. The "Consumer Information Booklet" is not reproduced in this issue.

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Rule 790-X-3-.14  
AGENCY/BROKERAGE OFFICE POLICY

- (1) The Real Estate Consumers Agency and Disclosure Act (RECAD) requires the qualifying broker to adopt and maintain an agency disclosure office policy which sets out the types of brokerage services which his or her company and licensees may offer or accept. The purpose of this rule is to specify the form and content of the office policy. Any format for the office policy is acceptable, including the use of devices such as loose leaf ring notebooks.
- (2) The qualifying broker shall provide all of his or her licensees with a copy of the office

policy. The qualifying broker shall explain the office policy to all of his or her licensees at least once a year.

- (3) The qualifying broker shall have all of his or her licensees sign a form which acknowledges that he or she has received a copy and a satisfactory explanation of the contents of the office policy.
- (4) Under RECAD, a qualifying broker may choose to offer any or all of the following services to the public: single agency, sub-agency, limited consensual dual agency, and contract brokerage. Under RECAD a qualifying broker is not limited to offering only one of these services and is not required to offer all of these services.
  - a. A single agent is engaged by and represents only one party in a real estate transaction. Buyers' agents and sellers' agents are examples of single agents. A written agency agreement with the client is required for a qualifying broker and his or her licensees to become a single agent. All qualifying brokers who offer single agency shall include a copy of their agency agreement forms(s) in their office policy.
  - b. A sub-agent acts for and helps another broker in performing brokerage services for a client. A sub-agent owes the same duties to the client (also called the principal) which the agent owes to the client. A written agency agreement with the client's qualifying broker is required for a qualifying broker and his or her licensees to become a sub-agent. All qualifying brokers who offer sub-agency shall obtain written permission from their client to do so and shall include a copy of their sub-agency agreement form(s) in their office policy.
  - c. A limited consensual dual agent is an agent for both the buyer and seller. A limited consensual dual agent represents more than one client in a transaction and owes the duties of agents set out in RECAD, except where the duties to one client will violate the duties owed to other clients. A written agreement is required for a qualifying broker and his or her licensees to become a limited consensual dual agent. All qualifying brokers who offer limited consensual dual agency shall include their limited consensual dual agency agreement form(s) in their office policy.
  - d. A contract broker assists one or more parties without being an agent or fiduciary or advocate for any party. A contract broker may provide brokerage services to consumers or customers with or without a written agreement. All qualifying brokers who offer contract broker services by written agreement shall include their contract brokerage agreement form(s) in their office policy.
- (5) All qualifying brokers shall include in their office policy a copy of the disclosure form required by Alabama Real Estate Commission Rule 790-X-3-.13. Further, all qualifying brokers shall include a copy of their sales contract forms containing the agency disclosure required to be in each offer to purchase by Section 34-27-8 Code of Alabama 1975, as amended.



## Rule 790-X-3-.13(i) REAL ESTATE BROKERAGE SERVICES DISCLOSURE

Alabama law requires you, the consumer, to be informed about the types of services which real estate licensees may perform. The purpose of this disclosure is to give you a summary of these services.

- A **SINGLE AGENT** is a licensee who represents only one party in a sale. That is, a single agent represents his or her client. The client may be either the seller or the buyer. A single agent must be completely loyal and faithful to the client.
- A **SUB-AGENT** is another agent/licensee who also represents only one party in a sale. A sub-agent helps the agent represent the same client. The client may be either the seller or the buyer. A sub-agent must also be completely loyal and faithful to the client.
- A **LIMITED CONSENSUAL DUAL AGENT** is a licensee for both the buyer and the seller. This may only be done with the written, informed consent of all parties. This type of agent must also be loyal and faithful to the client, except where the duties owed to the clients conflict with one another.
- A **CONTRACT BROKER** assists one or more parties in a sale. A contract broker is not an agent and does not have the same obligations as an agent. The contract broker and licensees working with him or her perform the services set out in their contract.
- Alabama law imposes the following obligations on all real estate licensees to all parties, no matter their relationship:
  1. To provide services honestly and in good faith;
  2. To exercise reasonable care and skill;
  3. To keep confidential any information gained in confidence, unless disclosure is required by law or duty to a client, the information becomes public knowledge, or disclosure is authorized in writing;
  4. Present all written offers promptly to the seller;
  5. Answer your questions completely and accurately.
- Further, even if you are working with a licensee who is not your agent, there are many things that the licensee may do to assist you, the customer. Some examples are:
  1. Provide information about properties;
  2. Show properties;
  3. Assist in making a written offer;
  4. Provide information on financing.

You should choose which type of service you want from a licensee and sign a brokerage service agreement. If you do not sign an agreement, by law the licensee working with you is a contract broker.

The licensee's broker is required by law to have on file an office policy describing the company's brokerage services. You should feel free to ask any question you have.

The Alabama Real Estate Commission requires the real estate licensee to sign, date, and provide you a copy of this form. Your signature is not required by law or rule, but would be appreciated.

Name of Licensee \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

Consumer Name \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_



# RECAD

## QUESTIONS & ANSWERS

**S**ome of the following questions were developed simply to convey information to you on RECAD. Other questions were taken from those submitted by participants at the broker/manager workshops on February 29, and March 1, 1996. Space and time did not permit the reprinting of every question submitted. We do hope that those remaining questions either will be answered somewhere else in this issue or will be answered in the RECAD continuing education courses which will be offered after June 4, 1996.

**Q:** When RECAD becomes effective on October 1, 1996, are licensees required to go back to customers and clients with whom they are already working and comply with RECAD; i.e., get the new agency disclosure form signed, etc.?

**A:** *No, RECAD is not retroactive.*

**Q:** When can licensees implement policies under RECAD; e.g., can contract broker status or the Brokerage Services Disclosure Form be used prior to October 1, 1996?

**A:** *In any case where RECAD differs from what is now required by either License Law or common law of agency, licensees must wait until October 1, 1996 for implementation of RECAD.*

**Q:** Where will RECAD appear in License Law?

**A:** *RECAD will appear in the new License Law books (due out in October) as Article 4, Sections 34-27-80 through 34-27-88. It will appear after Article 2 concludes with Section 34-27-38. Article 3 is the Timeshare Act and is published in a different book.*

**Q:** Are all active licensees required to take a 3 hour course on RECAD prior to October 1, 1996?

**A:** *No. However, licensees are encouraged to take the RECAD continuing education course since everyone must begin compliance with the law on October 1, 1996. Licensees taking the course will receive 3 hours of credit toward the 6 hours required in mandatory subjects. For licensees who only need elective credit, it will work for that as well.*

**Q:** When will the licensing examination begin to have questions about RECAD on it?

**A:** *The Commission has decided to wait until the January 1997, exam to begin including RECAD questions so that all prelicense instructors who do not attend the June 4th instructor training will have another opportunity at the October annual seminar to receive some training on RECAD.*

**Q:** What are the brokerage service arrangements provided for in RECAD?

**A:** *Single agency, sub-agency, limited consensual agency and contract brokerage.*

**Q:** Are companies required to offer all four of the brokerage service arrangements?

**A:** *No. Companies may offer one or any combination of these services. Additionally, companies are free to offer any other brokerage service arrangements not covered by RECAD.*

**Q:** Do all four brokerage service arrangements contained in RECAD constitute agency relationships?

**A:** *No. Contract broker is a nonagency status.*

**Q:** What is a contract broker?

**A:** *A licensee who assists one or more parties in a contemplated real estate transaction without being an agent or fiduciary or advocate for the interest of any party to a transaction. This is similar to what some other states have called facilitators or transaction brokers.*

**Q:** What is the licensee's position at the first meeting with a consumer?

**A:** *At initial contact and until an agency agreement is reduced to writing, licensees work with consumers in the nonagency status of contract brokers.*

**Q:** Can my company enter into listing agreements as agent for the owners and still be a contract broker in our relationships with buyers of our listings? If so, how?

**A:** *Yes. The definition of a contract broker is a licensee who is not an agent for any party. The law says this is the status of the licensee at initial contact with the consumer. The law then provides that, after disclosure, the licensee and the consumer may change this relationship by entering into an agency agreement. So it is possible for a licensee to be an agent of one party, either the buyer or seller, and at the same time be a contract broker in his or her relationship with the other party. Of course, a broker by office policy may choose to be a "pure" contract broker and represent no party in the transaction.*

**Q:** If a licensee is working with a buyer and seller as a contract broker and the buyer discloses confidential information, does that change their relationship to one of an agency status?

**A:** *No. And remember, the law requires contract brokers to keep confidential*

information received and not share it with anyone.

**Q:** When must the licensee explain to consumers the brokerage service options available under RECAD and what that licensee's company offers?

**A:** *The licensee must disclose this information to consumers as soon as reasonably possible and before any confidential information is disclosed to any other person by the licensee. The latest this could happen would be when the conversation with a consumer becomes either people specific or property specific.*

**Q:** Is there a required form for making this initial disclosure of brokerage service arrangements available under RECAD?

**A:** *Yes. It is called "Real Estate Brokerage Services Disclosure" form.*

**Q:** What is the licensee's best course of action if a consumer refuses to sign the Brokerage Services Disclosure form?

**A:** *Since a consumer cannot be required to sign the form, the licensee should sign and date the form noting that the consumer so declined.*

**Q:** If the consumer does sign the Brokerage Services Disclosure form, what is the licensee's next step?

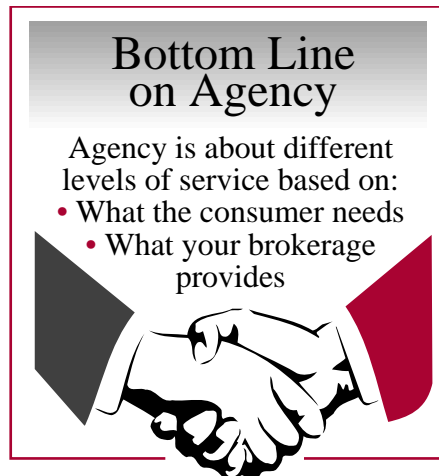
**A:** *The licensee then signs and dates the form and gives the consumer a copy. Another copy should be retained in the company's files for a minimum of (3) three years.*

**Q:** If a buyer refuses to sign the Brokerage Services Disclosure form and then asks the licensee to help him decide on an appropriate offer on a piece of property, where does the licensee stand under RECAD?

**A:** *The licensee remains as a contract broker unless an agency agreement is reduced to writing and cannot perform any fiduciary duties for the buyer; i.e., cannot suggest an amount to be offered, cannot negotiate on his behalf, etc. The licensee can draw up the offer and present it but cannot advocate the buyer's interest.*

**Q:** Can a consumer then sign a brokerage agreement with the licensee even though he/she refused to sign the Brokerage Services Disclosure form?

**A:** *Yes. These are two separate matters. The Brokerage Services Disclosure form is to document that the licensee explained to the consumer all the brokerage service arrangements available under RECAD. The brokerage agreement is to document which of those relationships was chosen by the consumer. This could be an agency or nonagency (contract broker) relationship.*



**Q:** Is the requirement to put the agency disclosure statement in the offer to purchase agreement still required under RECAD?

**A:** *Yes. Section 34-27-8(c) has been expanded to include limited consensual dual agency and contract brokerage. This agreement is to reaffirm the agency or nonagency relationship agreed upon earlier in the transaction. Beginning October 1, 1996, all offers to purchase must contain this new version. (See Section 34-27-8(c) which is printed in this issue.)*

**Q:** Are licensees required to use the "Consumer Information Booklet" developed by the Commission?

**A:** *No. However, licensees are encouraged to provide this information to consumers either by using the Commission developed booklet or by using one developed by their own company.*

**Q:** Does RECAD require every company to develop a written office policy?

**A:** *Yes. By October 1, 1996, every company must develop a written office policy that states the types of brokerage service arrangements a licensee may offer or accept.*

**Q:** Are qualifying brokers required to discuss office policy with all company licensees?

**A:** *Yes. RECAD requires the qualifying broker to provide all licensees with a copy of the office policy and explain it to them at least once a year. The licensee must then sign a form which acknowledges that the qualifying broker satisfactorily complied with these requirements. These signed forms shall be maintained in company records for a period of three years.*

**Q:** Are licensees who are property managers exempt from the requirements of RECAD?

**A:** *Property managers are exempt only from the disclosure requirement. That is because disclosure every time a potential tenant comes in to look at a piece of property seems cumbersome and unnecessary. To have to make the disclosure to every person who comes in to inquire about renting property places an unfair burden on the licensee with no apparent consumer benefit. Tenants already understand that property managers represent owners. However, all other aspects and requirements of RECAD apply to property managers.*

**Q:** If a licensee repeats a misrepresentation made by a seller client, is the licensee responsible under RECAD?

**A:** *No, provided the licensee did not know or should not have known that the client's statement was false.*

**Q:** Under RECAD can a seller or listing agent be held responsible for a misrepresentation made to a buyer by a sub-agent?

**A:** *No, provided the seller and listing agent did not know or should not have known of the misrepresentation or the*

*sub-agent is not repeating a misrepresentation made by the seller or listing agent.*

**Q:** While working with a consumer as a contract broker, can a licensee’s actions create an implied agency relationship?

**A:** While RECAD says that agency relationships cannot be implied or assumed, that does not give licensees permission to say they are a contract broker and then act as an agent. Delivery of client level services to someone with whom a licensee has a contract broker relationship is a violation of RECAD punishable by the Commission through disciplinary action.

**Q:** If a buyer who wants representation is searching for a property to purchase, can he employ more than one company to act as his agent?

**A:** Yes. Buyers’ agents may co-broke just the same as sellers’ agents do. The buyer would have to be careful not to sign more than one “exclusive” agreement, and would need agreement of the cooperating brokers to make this work.

**Q:** Does RECAD in any way alter the MLS sub-agency relationship?

**A:** No. The MLS system has already been modified by Realtor action. The modification means cooperating brokers are no longer automatically considered sub-agents, but may be buyer’s agents, and when RECAD becomes effective may be contract brokers.

**Q:** In cases where a licensee makes a referral of a client to another licensee (such as companies who also have “referral” companies), who is responsible for making the disclosures in order to comply with RECAD?

**A:** In the typical case the licensee responsible for making the disclosure would be the licensee who receives the referral because this is the licensee who has the face to face meeting and discussions with the consumer.

**Q:** If the type of agency relationship with a consumer changes during the

process of working with that consumer, what does RECAD require?

**A:** The new agency agreement must be reduced to writing in order to replace the first agency agreement. It is extremely unlikely that the type of agency relationship will be changed. Except for an agency relationship being changed to a limited consensual dual agency, we have never heard of a change in a type of agency relationship, although it is theoretically possible.



**Q:** If you are working with a repeat client who you know is going to list their property with you, does the licensee have to go through the brokerage service options disclosure and company service options disclosure with them again?

**A:** Yes. RECAD requires the disclosures be made in every transaction.

**Q:** On the sale of in-house listings, can the qualifying broker appoint one agent to represent the seller and another to represent the buyer in order to avoid a dual agency situation?

**A:** No. RECAD does not allow a broker to do that. In this case, both buyer and seller must agree in writing to limited consensual dual agency. If one or the other side does not agree, the buyer would have to obtain a buyer broker from another company if he/she wants representation.

**Q:** When people come to open houses, must the licensee on site go through

the Brokerage Service Disclosure form with each one?

**A:** No. It is not necessary to make the required disclosures unless the consumer shows interest in more than just looking at the property.

**Q:** If a licensee is working as a buyer’s agent and calls a “For Sale By Owner” to secure information or set up a showing, must the licensee make disclosures required under RECAD to the FSBO?

**A:** Yes, a licensee engaged as an agent of the buyer must make the required disclosures to the owner at the appropriate time.

**Q:** Is a licensee initially working with a FSBO as a contract broker?

**A:** Yes, a licensee engaged as an agent of the buyer is initially a contract broker in his or her relationship to the owner.

**Q:** Can a contract broker relationship change to an agency relationship sometime later in the transaction?

**A:** Yes, however, it must be reduced to writing.

**Q:** Since a written agreement is necessary to establish an agency relationship, how is sub-agency handled?

**A:** RECAD does not require a listing broker and the cooperating brokers acting as sub-agents to have a written agreement among themselves. Rule 790-X-3-.14 requires a listing broker to obtain written permission from the seller in order to offer sub-agency to cooperating brokers. A written agency agreement between the listing agency and the seller is necessary to establish an agency relationship, and an agency relationship is required in order for sub-agency to be offered by the listing broker.

**Q:** If the selling agent is a sub-agent of the seller, is the selling agent also in a contract broker relationship with the buyer?

**A:** Yes, as a sub-agent, the seller is your client. Therefore, the buyer is your customer which means you are working with him/her as a contract broker. ■



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# CONCLUDING REMARKS

*By: D. Philip Lasater, Executive Director*

**T**his SPECIAL EDITION on RECAD is designed to go beyond a mere recitation of the law and rules. That will be covered specifically enough in continuing education courses and by brokers in sales meetings. We are interested in being a conveyor of meaningful information. So for that reason our approach in this issue is slightly different.

Things have been written and said about agency and RECAD almost monthly for years. We do not want to keep saying the same things the same way with the same result. It has to be acknowledged that the reception to the requirements of the coming RECAD are mixed at best. There is apprehension, confusion and resistance for all the reasons any change is ever required and for the same reasons agency has been a perennial problem for the last ten years.

It is not our obligation to now justify agency as a legitimate issue. Nor is it ours to defend or substantiate the effort

RECAD represents to bring order and understanding to real estate transactions for the public and licensees.

It will be our attempt, however, to make the implementation as smooth as possible. Consequently, a training course on RECAD has been developed, a broker/manager seminar was conducted in February, an instructor training will be held in June and a transactional scenario video will be produced for use by brokers in sales training.

The Real Estate Commission has endeavored to be a resource for information and education. Brokers must now establish their office and brokerage policies as well as train their sales associates about practice issues and compliance.

## **For the Record . . .**

It should be said that agency, brokerage relationships disclosure issues emanate from the common law of agency. Real Estate Commissions did not create them

nor are they empowered to eliminate them.

## **What Can the Commission Do Now?**

In order to be the resource we can effectively be, it will be necessary to employ the following policy. All brokers and sales associates should direct their RECAD related questions to their qualifying brokers. Commission staff will field telephone calls and correspondence from qualifying brokers but all other inquiries will be referred to the licensees' respective qualifying brokers. The Commission in its last meeting approved establishing a BROKER RESOURCE PANEL to address the inevitable practice issues which will need clarification. Before any refinement or modification can take place, the act has to become effective and be time-tested. The Commission is committed to helping make the execution of RECAD as workable as possible, consequently, benefiting the public and licensees alike. ■