

**THE REAL PROPERTY SECTION  
OF THE BAR ASSOCIATION OF SAN FRANCISCO**

**Presents**

**THE ROGUE AGENT:  
AGENCY ISSUES IN REAL ESTATE**

**Speakers**

**Harold Justman, Esq.  
Justman Associates**

**M. Henry Walker, Esq.  
Peterson, Martin & Reynolds**

**Moderator**

**Sean Ponist, Esq.  
Peterson, Martin & Reynolds  
Vice-Chair BASF Real Property Section**

**May 15, 2013**

**THE REAL PROPERTY SECTION  
OF THE BAR ASSOCIATION OF SAN FRANCISCO**

**Presents**

**THE ROGUE AGENT:  
AGENCY ISSUES IN REAL ESTATE**

**TABLE OF CONTENTS**

<b>Presenter Biographies</b>	<b>1-2</b>
<b>Presentation Outline</b>	
<b>I. <u>Existence of Agency</u></b>	<b>3</b>
<b>A. Definition</b>	<b>3</b>
<b>B. Agency Consensual</b>	<b>3</b>
<b>C. Compare “Finders”</b>	<b>3</b>
<b>D. Compare “Referring Agents”</b>	<b>4</b>
<b>E. Compare “Gratuitous Agents”</b>	<b>4</b>
<b>II. <u>Scope of Employment</u></b>	<b>4</b>
<b>A. Definition of a Real Estate Professional</b>	<b>4</b>
<b>B. Conduct within Scope of Employment</b>	<b>5</b>
<b>III. <u>Broker Liability for Tort of Agent</u></b>	<b>6</b>
<b>A. General Rule</b>	<b>6</b>
<b>B. Principal Liable for Authorized Acts of Agent</b>	<b>6</b>
<b>C. Principal Liable for Ostensible Agent</b>	<b>6</b>

<b>D.</b>	<b>Principal May Be Liable for Willful, Malicious and Criminal Activity</b>	<b>7</b>
<b>E.</b>	<b>Agent not truly an independent contractor</b>	<b>8</b>
<b>F.</b>	<b>Statutory Obligation to Indemnify</b>	<b>9</b>
<b>G.</b>	<b>Negligent Supervision</b>	<b>9</b>
<b>H.</b>	<b>Ratification</b>	<b>9</b>
<b>IV.</b>	<b><u>Termination of Agency</u></b>	<b>10</b>
<b>A.</b>	<b>In General</b>	<b>10</b>
<b>B.</b>	<b>Agent Competition with (Former) Client</b>	<b>10</b>
<b>Appendix:</b>		
<b>▪</b>	<b>Select Relevant Jury Instructions</b>	<b>11-26</b>
<b>▪</b>	<b>Select Relevant Statutes</b>	<b>27-32</b>

## **PRESENTER BIOGRAPHIES**

### **HAROLD A. JUSTMAN, ESQ.**

Harold Justman graduated from Stanford University in 1972, and he graduated from Hastings Law School in 1975. After the passing of Bob Bruss in 2007, Harold (Bob's longtime friend and personal real estate attorney of more than 25 years) took over preparation/distribution of the California Real Estate Law Newsletter.

Harold is a professor of Real Estate law at Menlo College. He also is an expert witness on the standard of care of real estate brokers and agents and is qualified as a trial expert in Santa Clara, San Mateo, San Francisco, Marin Sonoma, Alameda, Contra Costa, Fresno and San Joaquin Counties, and he is a former board attorney for the Silicon Valley Association of REALTORS®.

### **M. HENRY WALKER, ESQ.**

M. Henry Walker is Senior Counsel at the law firm of Peterson, Martin & Reynolds, a firm specializing in real estate, construction defect and business litigation. Henry has spent the majority of his 17+ years practice litigating real estate cases. He has tried or arbitrated numerous cases including non-disclosure, agent/broker liability, boundary disputes, and business disputes.

After graduating from UC Berkeley in 1992 with a BA in English, Henry worked at a title company as a title searcher. Thereafter, he attended law school at UOP McGeorge School of Law, obtaining his JD in 1996. In 2001, Henry was sworn as a Judge Pro Tem in Alameda County Superior Court, where he has heard small claims, unlawful detainer, traffic and restraining order cases. Henry volunteers as a pro bono attorney representing low income clients through Bay Area Legal.

## **SEAN E. PONIST, ESQ.**

Sean Ponist is a partner at the law firm of Peterson, Martin & Reynolds, a firm specializing in real estate, construction defect and business litigation. He has successfully tried over 25 cases to verdict. In 2011 and 2012, Mr. Ponist was selected as a Northern California Super Lawyer.

He has also published numerous articles on real estate topics, including recent articles in *The Daily Journal* (“Recovering Lost Profits in Real Estate Transactions” and “Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?”) and *California Lawyer* magazine (“The Nonrefundable Deposit – Not!”). Additionally, he has lectured for the San Francisco Bar Association (“Bringing Down the House: Assessing Damages in Real Estate Cases” and “Best Use of Experts in Real Estate Cases”), the San Mateo County Bar Association (“When Real Estate Deals Go Bad” and “Expert Witnesses at Trial”) and for the National Business Institute (“Direct and Cross-Examination for Civil Litigators”).

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

**THE ROGUE AGENT:**  
**AGENCY ISSUES IN REAL ESTATE LITIGATION**

**I. Existence of Agency**

**A. Definition**

An ‘agent’ is ‘one who represents another’ (the ‘principal’) in dealings with third persons.” (Greenwald & Asimow, ¶ 2:122, citing Civ. Code §2295 and Lombardo v. Santa Monica Young Men’s Christian Assn. (1985) 169 Cal.App.3d 529, 541.)

**B. Agency Consensual**

“As between principal and agent, an agency relationship is consensual in nature. As such, it can be created only when it is clear that the principal intended to bestow upon a person the status of agent (authority to represent and bind the principal in a given transaction) and the agent, in turn, has accepted the appointment.” (Greenwald & Asimow, ¶ 2:125 (emphasis added).)

**C. Compare “Finders”**

1. Finder Defined. A “finder” is a judicially created term for a “middleman” or “intermediary.”

2. Distinction between Finder and Broker/Salesperson. The fundamental distinction from a ‘broker’ or ‘salesperson’ is that a ‘finder’ simply ‘introduces’ the parties but does not negotiate terms or engage in any other transactional activity. A finder’s employment ‘is limited to bringing the parties together so that they may negotiate their own contract, and the distinction between the finder and the broker frequently turns upon whether the intermediary has been invested with authority or duties beyond merely bringing the parties together, usually the authority to participate in negotiations. (Greenwald & Asimow, ¶ 2:37 (emphasis added), citing Tyrone v. Kelley (1973) 9 Cal.3d 1, 9.)

Importantly, “a finder, unlike a broker/salesperson, has no agency relationship with, or fiduciary duty toward, any party to the transaction.” (Greenwald & Asimow, ¶ 2:39.)

#### **D. Compare “Referring Agents”**

A “referring agent” is one who makes a referral to another agent, but otherwise has no involvement in the transaction.

#### **E. Compare “Gratuitous Agents”**

1. A person does not become the agent of another simply by offering help or making a suggestion. (Violette v. Shoup (1993) 16 Cal App 4th 611.)

2. But when a gratuitous agent enters upon the performance of an agency, she is bound to exercise the utmost good faith in dealing with her principal. (McPhetridge v. Smith (1929) 101 Cal App 138.)

## **II. Scope of Employment**

### **A. Definition of a Real Estate Professional**

A real estate broker ... is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

(Bus. & Prof. Code, § 10131.)

1. Listing Agent. A person who has obtained a listing. (Civ. Code § 2079.13(j).)

2. Selling Agent. An agent who locates property for a buyer or who finds a buyer for a property and presents an offer to purchase to the seller. (Civ. Code § 2079.13(n).)

## **B. Conduct within Scope of Employment**

Conduct is within the scope of employment if:

(a) It is reasonably related to the kinds of tasks that the agent was employed to perform; or

(b) It is reasonably foreseeable in light of the employer's business or the agent's responsibilities.

(CACI 3720; Intermountain Mortgage v. Sulimen (2000) 78 Cal App 4th 1434.)

Although the plaintiff will have the burden of proving that the agent's acts were within the course and scope of the agent's employment with broker, tread carefully when advocating the position that the agent's acts were outside the course and

scope. Almost any real estate-related acts an agent takes with regard to a client may be considered within the course and scope.

### **III. Broker Liability for Tort of Agent**

#### **A. General Rule**

Broker is responsible if agent was acting within the scope of her agency when plaintiff damaged. (CACI 3701.)

“The broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the salesperson committed within the course and scope of employment.” (California Real Estate Loans v. Wallace (1993) 18 Cal App 4th 1575; CACI 3703 (Principal is responsible if agent was acting within the scope of her agency).)

#### **B. Principal Liable for Authorized Acts of Agent**

“An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.” Civil Code Section 2295 and CACI 3700 provide that when a plaintiff claims that one defendant was the agent of another defendant, the plaintiff must prove that the alleged principal gave authority to the alleged agent to act on the alleged principal’s behalf. This authority may be shown by words or may be implied by the parties’ conduct. This authority cannot be shown by the words of the alleged agent alone. CACI 3705 the right to control is insufficient by itself to establish a principal agency relationship.

A real estate salesperson is not the agent of the designated officer of corporate real estate broker. Thus, a designated officer cannot be personally liable within the brokerage simply because s/he is the designated officer. (Sandler v. Sanchez (2012) 206 Cal. App. 4th 1431.)

#### **C. Principal Liable for Ostensible Agent**

Plaintiff must prove all of the following:

- (a) Alleged principal intentionally or carelessly created the impression that alleged agent was agent of alleged principal;
- (b) That plaintiff reasonably believed that the alleged agent was the agent of the alleged principal; and
- (c) That the plaintiff was harmed because the plaintiff reasonably relied on that belief.

(CACI 3709.)

#### **D. Principal May Be Liable for Willful, Malicious and Criminal Activity**

1. “Tortious conduct that violates an employee’s official duties or disregards the employer’s express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature.” (Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 221.)

2. But see Perry v. County of Fresno (2013) 215 Cal.App.4th 94: “before [vicarious] liability will be imposed on the employer there must be a connection between the employee’s intentional tort and the employee’s work.”

*Compare* – Unauthorized criminal acts may be within the “course and scope” as long as there is a “causal nexus between the tort and the employee’s work.” (Mary M. v. City of Los Angeles (1991) 54 Cal 3<sup>rd</sup> 202, 297-298; but see also Perry v. County of Fresno (2013) 215 Cal App 4<sup>th</sup> 94, finding that a correctional officer’s use of County resources to terrorize another individual was *outside the scope* of his employment – “That the employment gave [him] access to information needed to carry out his scheme is insufficient to create a causal nexus between the tort and [his] work.”)

3. Real estate application – “If the principal places the agent in a position to defraud, and the third person relies upon his apparent authority to make the representations, the principal is liable even though the agent is acting for his own purposes. The theory is that the agent's position facilitates the consummation of the

fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him. It is immaterial that the principal receives no benefits from the transaction.” (Alhino v. Starr (1980) 112 Cal.App.3d 158 (internal citations omitted).)

#### **E. Agent not truly an independent contractor**

“Despite the typical characterization of the relationship between the broker and a salesperson as an independent contractor arrangement, the statutory scheme of the Real Estate Law, particularly the broker’s duty to supervise salespersons, makes them agents and employees of the broker for purposes of the Real Estate Law.” (Cal. Real Estate Brokers: Law and Litigation, Reg. of Brokers (2012) § 8.33, p. 315-316 (internal citations omitted), citing, *inter alia*, Gipson v. Davis Realty Co. (1963) 215 Cal.App.2d 190, Resnik v. Anderson & Miles (1980) 109 Cal.App.3d 569 (court held that real estate salesperson an employee based on strictures of the Real Estate Law).) “In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine.” (Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1004.) In fact, it is so broad that “[t]ortious conduct that violates an employee’s official duties or disregards the employer’s express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature.” (Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 221.)

“A risk arises out of the employment when in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss among the costs of the employer’s business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one that may fairly be regarded as typical of or broadly incidental’ to the enterprise undertaken by the employer. Accordingly, the employer’s liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise.” (Van Groningen & Sons, Inc. (1986) 41 Cal.3d 962, 968.)

## **F. Statutory Obligation to Indemnify**

By virtue of both common law principles of agency and statutory law, brokers are liable as a matter of law for the torts committed by their salespersons within the course and scope of their agency. (Cal. Real Estate Brokers: Law and Litigation, Reg. of Brokers (2012) § 8.41, p. 321, citing Bus. & Prof. Code § 10032, Civil Code § 2079.13; The Grubb Co. v. Department of Real Estate (2011) 194 Cal.App.4th 1494, 1501 n.6; California Real Estate Loans, Inc. v. Wallace (1993) 18 Cal.App.4th 1575.) In fact, an “employer is required by statute to indemnify an employee for all that the employee necessarily expends or loses in the performance of his or her job or while obeying the directions of the employer, whether or not lawful, unless the employee believed the acts to be unlawful at the time the directions were obeyed.” (Id. (emphasis added), citing Lab. Code § 2802(a).)

## **G. Negligent Supervision**

Negligent supervision occurs when the principal had knowledge or notice of inappropriate conduct at work and failed to take curative action. (Delfino v. Agilent Technologies (2006) 145 Cal App 4th 790.)

## **H. Ratification**

Approval of conduct after it occurred can be shown through words, or it can be inferred from a person’s conduct. Approval can be inferred if a person voluntarily keeps the benefits of the agent’s unauthorized conduct after she learns of it. (CACI 3710.)

Principal broker found to have ratified conduct of its agent found when:

- Agent informed supervisor of the details of the transaction/wrongdoing and principal fails to take immediate corrective action;
- Principal does not terminate and/or rehires agent after learning of misconduct;
- Principal and agent defended at the trial by their attorney.

(Alhino v. Starr (1980) 112 Cal.App.3d 158.)

Ratification of an agent's "bad acts" may also subject the broker to punitive damages exposure. (Id.; see also, Kelly-Zurian v. Wohl Shoe Co (1994) 22 Cal App 4<sup>th</sup> 397.)

#### **IV. Termination of Agency**

##### **A. In General**

"The parties may agree to terminate an agency or employment, the agent may renounce it, or the principal may revoke it." (6 Witkin, Summary of Law (10th ed. 2005) Agency and Employment, §204, p. 257.)

##### **B. Agent Competition with (Former) Client**

"After termination of the agency relationship, the agent may compete with the principal, but the agent remains under a duty not to take advantage of a still subsisting confidential relationship created during the prior agency relationship." (6 Witkin, Summary of Law (10th ed. 2005) Agency and Employment, §100, p. 147.)

## APPENDIX OF ADDITIONAL AUTHORITY

### SELECT RELEVANT JURY INSTRUCTIONS

#### **3701. Tort Liability Asserted Against Principal - Essential Factual Elements**

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of agent*]'s [*insert tort theory, e.g., "negligence"*].

[*Name of plaintiff*] also claims that [*name of defendant*] is responsible for the harm because [*name of agent*] was acting as [his/her/its] [agent/employee/[*insert other relationship, e.g., "partner"*]] when the incident occurred.

If you find that [*name of agent*]'s [*insert tort theory*] harmed [*name of plaintiff*], then you must decide whether [*name of defendant*] is responsible for the harm.

[*Name of defendant*] is responsible if [*name of plaintiff*] proves both of the following:

1. That [*name of agent*] was [*name of defendant*]'s [agent/ employee/[*insert other relationship*]]; and
2. That [*name of agent*] was acting within the scope of [his/ her] [agency/employment/[*insert other relationship*]] when [he/she] harmed [*name of plaintiff*].

#### **Directions for Use**

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 113, p. 107.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see CACI No. 3703, *Legal Relationship Not Disputed*.

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

### **Sources and Authority**

Civil Code section 2295 provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

"The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations and footnote omitted.)

"The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)

"Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

The Supreme Court has articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209.)

The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209.)

## Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 113-117

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:1-3:4  
(New September 2003)

### 3703. Legal Relationship Not Disputed

In this case [*name of agent*] was the [employee/agent/[*insert other relationship, e.g., "partner"*]] of [*name of defendant*].

If you find that [*name of agent*] was acting within the scope of [his/her] [employment/agency/[*insert other relationship*]] when the incident occurred, then [*name of defendant*] is responsible for any harm caused by [*name of agent*]'s [*insert applicable tort theory, e.g., "negligence"*].

#### Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 113, p. 107.)

This instruction may not apply where employer liability is statutory, such as under the Fair Employment and Housing Act.

### **Sources and Authority**

Ordinarily, the question of agency is one of fact; however, where the evidence is undisputed the issue becomes one of law. (*Mantonya v. Bratlie* (1948) 33 Cal.2d 120, 128-129 [199 P.2d 677].)

This instruction may be appropriate in cases where vicarious liability is asserted in the context of employment, since agency and employment are often viewed as synonymous. Witkin observes: "There is seldom any reason to distinguish between the service of an agent and that of an employee. . . . However, the two relationships are not considered identical. It is said that a servant or employee works for his employer, while an agent also acts for and in the place of the principal for the purpose of bringing him into legal relations with third persons." (2 Witkin, Summary of Cal. Law (9th ed. 1987), Agency and Employment, § 5, p. 24.)

"It is settled that for purposes of liability to third parties for torts, a real estate salesperson is the agent of the broker who employs him or her. The broker is liable as a matter of law for all damages caused to third persons by the tortious acts of the salesperson committed within the course and scope of employment." (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1581 [23 Cal.Rptr.2d 462], internal citations omitted.)

### **Secondary Sources**

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 3-5

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.01-8.03 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:1  
(New September 2003)

### **3710. Ratification**

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for the harm caused by [*name of agent*]'s conduct because [he/ she/it] approved that conduct after it occurred. If you find that [*name of agent*] harmed [*name of plaintiff*], you must decide whether [*name of defendant*] approved that conduct. To establish [his/her] claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of agent*] intended to act on behalf of [*name of defendant*];
2. That [*name of defendant*] learned of [*name of agent*]'s conduct after it occurred;  
and
3. That [*name of defendant*] approved [*name of agent*]'s conduct.

Approval can be shown through words, or it can be inferred from a person's conduct. [Approval can be inferred if a person voluntarily keeps the benefits of [his/her/its] [representative/ employee]'s unauthorized conduct after [he/she/it] learns of the unauthorized conduct.]

### **Directions for Use**

The last bracketed sentence should be read only if it is appropriate to the facts of the case.

### **Sources and Authority**

"An agency may be created, and an authority may be conferred, by a . . . subsequent ratification." (Civ. Code, § 2307.) "A ratification can be made . . . by accepting or retaining the benefit of the act, with notice thereof." (Civ. Code, § 2310.) "Ratification of part of an indivisible transaction is a ratification of the whole." (Civ. Code, § 2311.) "A principal is responsible for . . . wrongs committed by his agent [if] . . . he has . . . ratified them . . ." (Civ. Code, § 2339.)

The concept of ratification is more commonly associated with contract law than tort law. Nevertheless, "[r]atification has, in fact, been a basis for imputed tort liability under the common law for centuries." (Kraus, *Ratification of Torts: An*

*Overview and Critique of the Traditional Doctrine and Its Recent Extension to Claims of Workplace Harassment* (1997) 32 Tort & Ins. L.J. 807.)

"Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.'" (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

"A principal is liable when it ratifies an originally unauthorized tort. The failure to discharge an agent or employee may be evidence of ratification. As noted in *McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256 [171 P.2d 85], 'If the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.'" (*Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 [77 Cal.Rptr.2d 12].)

### **Secondary Sources**

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 87-92

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[7] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, §§ 30.02, 30.07 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:4

(New September 2003)

### **3720. Scope of Employment**

[*Name of plaintiff*] must prove that [*name of agent*] was acting within the scope of [his/her] [employment/authorization] when [*name of plaintiff*] was harmed.

Conduct is within the scope of [employment/authorization] if:

- (a) It is reasonably related to the kinds of tasks that the [employee/agent] was employed to perform; or
- (b) It is reasonably foreseeable in light of the employer's business or the [agent's/employee's job] responsibilities.

#### **Directions for Use**

For an instruction on the scope of employment in cases involving on-duty peace officers, see CACI No. 3721, *Scope of Employment—Peace Officer's Misuse of Authority*.

This instruction is closely related to CACI No. 3723, *Substantial Deviation*, which focuses on when an act is not within the scope of employment.

#### **Sources and Authority**

"The question of scope of employment is ordinarily one of fact for the jury to determine." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].) However, it becomes a question of law when the facts are undisputed and no conflicting inferences are possible. (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188, 471 P.2d 988].)

Plaintiff bears the burden of proof to show that the employee's tortious act was committed within the scope of his employment. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835, 602 P.2d 755].)

"That the employment brought the tortfeasor and victim together in time and place is not enough. . . . [T]he incident leading to injury must be an 'outgrowth' of the employment [or] the risk of tortious injury must be 'inherent in the working

environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.'" (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)

"In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine." (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

"Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M.*, *supra*, 54 Cal.3d at p. 209, internal citations omitted.)

In *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676], the Supreme Court adopted the following analysis on scope of employment: "A risk arises out of the employment when 'in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.' Accordingly, the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise."

California does not follow the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests. (*Lisa M.*, *supra*, 12 Cal.4th at p. 297.) However, the employee's motivation is a relevant factor in the scope of employment analysis. (*Id* at p. 298.)

In *Farmers*, *supra*, and later in *Lisa M.*, *supra*, the Supreme Court adopted and employed the following "foreseeability test" from *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 618-619 [124 Cal.Rptr. 143]: "One way to determine whether a risk is inherent in, or created by, an enterprise is to ask

whether the actual occurrence was a generally foreseeable consequence of the activity. However, 'foreseeability' in this context must be distinguished from 'foreseeability' as a test for negligence. In the latter sense 'foreseeable' means a level of probability which would lead a prudent person to take effective precautions whereas 'foreseeability' as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

In *Lisa M., supra*, the court first analyzed whether the wrongful conduct was "engendered by" or was an "outgrowth" of the perpetrator's employment. (*Lisa M., supra* at p. 300.) The court then applied the *Rodgers* foreseeability test: "The employment . . . must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought." (*Id.* at p. 299.) The court reached the same result under both analyses [ultrasound technician who sexually assaulted a patient was not acting within the scope of employment].

Some courts have developed a two-prong test for determining whether an act is within the scope of employment. An act is within the scope of employment if it either (1) is required or incident to his duties, or (2) could be reasonably foreseen by the employer in any event. If the employee's act satisfies either part of this two-prong test, then the employer is liable. (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333].) It has been noted that "the foreseeability-based test and the two-prong test are not so much different tests, but different ways of articulating the same test for scope of employment." (*Id.* at p. 1561.)

### **Secondary Sources**

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 126-143

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*  
(Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew  
Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8  
(New September 2003)

### **3722. Scope of Employment - Unauthorized Acts**

An employee's unauthorized conduct may be within the scope of  
[employment/authorization] if [the conduct was committed in the course of a series  
of acts authorized by the employer] [or] [the conduct arose from a risk inherent in  
or created by the enterprise].

[An employee's wrongful or criminal conduct may be within the scope of  
employment even if it breaks a company rule or does not benefit the employer.]

#### **Sources and Authority**

An "employer's liability extends beyond his actual or possible control of the  
employee to include risks inherent in or created by the enterprise." (*Perez v. Van  
Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d  
676].)

"The fact that an employee is not engaged in the ultimate object of his employment  
at the time of his wrongful act does not preclude attribution of liability to an  
employer. . . . [T]he proper inquiry is not whether the wrongful act itself was  
authorized but whether it was committed in the course of a series of acts of the  
agent which were authorized by the principal." (*Mary M. v. City of Los Angeles*  
(1991) 54 Cal.3d 202, 219 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citations  
omitted.)

"Tortious conduct that violates an employee's official duties or disregards the  
employer's express orders may nonetheless be within the scope of employment. So  
may acts that do not benefit the employer, or are willful or malicious in nature."  
(*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)

It is "well established, if somewhat surprising on first encounter, . . . that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)

### **Secondary Sources**

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 135-138

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03[3][d], 8.03[3][f] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, §§ 3:11-3:12 (*New September 2003*)

### **3723. Substantial Deviation**

If [an employee/a representative] combines his or her personal business with the employer's business, then the employee's conduct is within the scope of [employment/authorization]. However, if it clearly appears at the time of the conduct that the [employee/representative] was not performing work for his or her employer, either directly or indirectly, but was acting only for his or her own personal reasons, then the conduct was not within the scope of [employment/authorization].

[An employee's conduct that slightly deviates from an employee's work is to be expected. For example, acts that are necessary for an employee's comfort, health, and convenience while at work are within the scope of employment.]

## **Directions for Use**

This instruction is closely related to CACI No. 3720, *Scope of Employment*. It focuses on when an act is not within the scope of employment.

## **Sources and Authority**

"[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability 'with a few exceptions' in instances where the employee has 'substantially deviated from his duties for personal purposes.'" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

"In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment." (*Mary M., supra*, 54 Cal.3d at p. 213, internal citations omitted.)

"[A]n employer cannot deny responsibility for a tort that occurs when an employee engages in an act necessary to his or her comfort and convenience while at work." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1563 [56 Cal.Rptr.2d 333].)

"The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)

"[D]eviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected . . . . In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure." (*DeMirjian v. Ideal Heating Corp.* (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114], internal citation omitted.)

Where the employee combines personal business with that of the employer or attends "to both at substantially the same time, no nice inquiry will be made" into

which business the employee was engaged in at the time of injury unless it is readily apparent that the employee could not have been serving the employer, either directly or indirectly. (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

The fact that the employee is on the same route of return that would be used for both his employer's errand and his own tends to show a combination of missions. (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496 [48 Cal.Rptr. 765].)

But if the employee deviates substantially from employment duties for personal purposes, or "if the misconduct is not an 'outgrowth' of the employment," the scope-of-employment test is not met. (*Farmers Insurance Group, supra*, 11 Cal.4th at p. 1005.) Thus, " 'if the tort is personal in nature, the employee's mere presence at the worksite and attendance to job duties prior to or subsequent to the tort, will not call into play the principles of respondeat superior.' " (*Ibid.*, internal citations omitted.)

"[A]cts necessary to the comfort, convenience, health and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his employment." (*Bailey, supra*, 48 Cal.App.4th at p. 1560, internal citations omitted.)

"While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 933 [237 Cal.Rptr. 718], internal citations omitted.)

### **Secondary Sources**

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, §§ 127-128

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 3:8  
(New September 2003)

#### **426. Negligent Hiring, Supervision, or Retention of Employee**

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of employee*] and that [*name of employer defendant*] is responsible for that harm because [*name of employer defendant*] negligently [hired/ supervised/ [or] retained] [*name of employee*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of employee*] was [unfit/ [or] incompetent] to perform the work for which [he/she] was hired;
2. That [*name of employer defendant*] knew or should have known that [*name of employee*] was [unfit/ [or] incompetent] and that this [unfitness/ [or] incompetence] created a particular risk to others;
3. That [*name of employee*]'s [unfitness/ [or] incompetence] harmed [*name of plaintiff*]; and
4. That [*name of employer defendant*]'s negligence in [hiring/ supervising/ [or] retaining] [*name of employee*] was a substantial factor in causing [*name of plaintiff*]'s harm.

New December 2009

#### **Directions for Use**

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice of the employee's unfitness. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662—663 [109 Cal.Rptr. 269].)

### **Sources and Authority**

“California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee.” (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)

“Negligence liability will be imposed on an employer if it ‘knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.’” (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)

“Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability.” (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)

“Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff’s injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship.” (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339—1340 [78 Cal.Rptr.2d 525].)

“We are cited to no authority, nor have we found any authority basing liability on lack of, or on inadequate, supervision, in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.” (*Noble, supra*, 33 Cal.App.3d at p. 664.)

“Apparently, [defendant] had no actual knowledge of [the employee]’s past. But the evidence recounted above presents triable issues of material fact regarding

whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee].” (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384—386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

“A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) [CACI No. 426](#).) That same awareness underlies a claim for negligent entrustment. (See [CACI No. 724](#).) In a typical case, like this, the two claims are functionally identical.” (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

“[I]f an employer admits vicarious liability for its employee’s negligent driving in the scope of employment, ‘the damages attributable to both employer and employee will be coextensive.’ Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee’s negligent driving, the universe of defendants who can be held responsible for plaintiff’s damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee.” (*Diaz, supra*, 41 Cal.4th at p. 1159, internal citations omitted.)

Restatement Third of Agency, section 7.05(1), states: “A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”

## **Secondary Sources**

6 Witkin, *Summary of California Law* (10th ed. 2005) Torts, § 1190

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 5-H, *Negligence*, ¶¶ 5:615 et seq. (The Rutter Group)

3 *California Torts*, Ch. 40B, *Employment Discrimination and Harassment*, § 40B.21 (Matthew Bender)

21 *California Forms of Pleading and Practice*, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 *California Points and Authorities*, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

## **SELECT RELEVANT STATUTES**

### **Business & Professions Code**

B&P Code §10177. The commissioner may suspend or revoke the license of a real estate licensee, delay the renewal of a license of a real estate licensee, or deny the issuance of a license to an applicant, who has done any of the following, or may suspend or revoke the license of a corporation, delay the renewal of a license of a corporation, or deny the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following:

(a) Procured, or attempted to procure, a real estate license or license renewal, for himself or herself or a salesperson, by fraud, misrepresentation, or deceit, or by making a material misstatement of fact in an application for a real estate license, license renewal, or reinstatement.

(b) Entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, irrespective of an order granting probation following that conviction, suspending the imposition of sentence, or of a subsequent order under Section 1203.4 of the Penal Code allowing that licensee to withdraw his or her plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information.

(c) Knowingly authorized, directed, connived at, or aided in the publication, advertisement, distribution, or circulation of a material false statement or representation concerning his or her designation or certification of special education, credential, trade organization membership, or business, or concerning a business opportunity or a land or subdivision, as defined in Chapter 1 (commencing with Section 11000) of Part 2, offered for sale.

(d) Willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2.

(e) Willfully used the term "realtor" or a trade name or insignia of membership in a real estate organization of which the licensee is not a member.

(f) Acted or conducted himself or herself in a manner that would have warranted the denial of his or her application for a real estate license, or either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and only upon an express finding of a violation of law by the agency or entity.

(g) Demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

(i) Used his or her employment by a governmental agency in a capacity giving access to records, other than public records, in a manner that violates the confidential nature of the records.

(j) Engaged in any other conduct, whether of the same or a different character than specified in this section, that constitutes fraud or dishonest dealing.

(k) Violated any of the terms, conditions, restrictions, and limitations contained in an order granting a restricted license.

(l) (1) Solicited or induced the sale, lease, or listing for sale or lease of residential property on the ground, 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 having a characteristic listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those characteristics are defined in Sections 12926 and 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code.

(2) Notwithstanding paragraph (1), with respect to familial status, paragraph (1) shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in paragraph (1) shall be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall apply to paragraph (1).

(m) Violated the Franchise Investment Law (Division 5 (commencing with Section 31000) of Title 4 of the Corporations Code) or regulations of the Commissioner of Corporations pertaining thereto.

(n) Violated the Corporate Securities Law of 1968 (Division 1 (commencing with Section 25000) of Title 4 of the Corporations Code) or the regulations of the Commissioner of Corporations pertaining thereto.

(o) Failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of a licensee's direct or indirect ownership interest in that real property. The direct or indirect ownership interest in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee has a special relationship shall be disclosed to the buyer.

(p) Violated Article 6 (commencing with Section 10237).

(q) Violated or failed to comply with Chapter 2 (commencing with Section 2920) of Title 14 of Part 4 of Division 3 of the Civil Code, related to mortgages.

If a real estate broker that is a corporation has not done any of the foregoing acts, either directly or through its employees, agents, officers, directors, or persons

owning or controlling 10 percent or more of the corporation's stock, the commissioner may not deny the issuance or delay the renewal of a real estate license to, or suspend or revoke the real estate license of, the corporation, provided that any offending officer, director, or stockholder, who has done any of the foregoing acts individually and not on behalf of the corporation, has been completely disassociated from any affiliation or ownership in the corporation. A decision by the commissioner to delay the renewal of a real estate license shall toll the expiration of that license until the results of any pending disciplinary actions against that licensee are final, or until the licensee voluntarily surrenders his, her, or its license, whichever is earlier.

This section shall become operative on July 1, 2012.

B&P Code §10176. The commissioner may, upon his or her own motion, and shall, upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this state, and he or she may temporarily suspend or permanently revoke a real estate license at any time where the licensee, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

- (a) Making any substantial misrepresentation.
- (b) Making any false promises of a character likely to influence, persuade, or induce.
- (c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salespersons.
- (d) Acting for more than one party in a transaction without the knowledge or consent of all parties thereto.
- (e) Commingling with his or her own money or property the money or other property of others which is received and held by him or her.
- (f) Claiming, demanding, or receiving a fee, compensation, or commission under any exclusive agreement authorizing or employing a licensee to perform any acts set forth in Section 10131 for compensation or commission where the agreement does not contain a definite, specified date of final and complete termination.
- (g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission, or profit or the failure of a licensee to reveal to the employer of the licensee the full amount of the licensee's compensation,

commission, or profit under any agreement authorizing or employing the licensee to do any acts for which a license is required under this chapter for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of the agreement, whether evidenced by documents in an escrow or by any other or different procedure.

(h) The use by a licensee of any provision allowing the licensee an option to purchase in an agreement authorizing or employing the licensee to sell, buy, or exchange real estate or a business opportunity for compensation or commission, except when the licensee prior to or coincident with election to exercise the option to purchase reveals in writing to the employer the full amount of the licensee's profit and obtains the written consent of the employer approving the amount of the profit.

(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(j) Obtaining the signature of a prospective purchaser to an agreement which provides that the prospective purchaser shall either transact the purchasing, leasing, renting, or exchanging of a business opportunity property through the broker obtaining the signature, or pay a compensation to the broker if the property is purchased, leased, rented, or exchanged without the broker first having obtained the written authorization of the owner of the property concerned to offer the property for sale, lease, exchange, or rent.

(k) Failing to disburse funds in accordance with a commitment to make a mortgage loan that is accepted by the applicant when the real estate broker represents to the applicant that the broker is either of the following:

(1) The lender.

(2) Authorized to issue the commitment on behalf of the lender or lenders in the mortgage loan transaction.

(l) Intentionally delaying the closing of a mortgage loan for the sole purpose of increasing interest, costs, fees, or charges payable by the borrower.

(m) Violating any section, division, or article of law which provides that a violation of that section, division, or article of law by a licensed person is a violation of that person's licensing law, if it occurs within the scope of that person's duties as a licensee.

Last modified: February 22, 2013

## **Regulations of the Real Estate Commissioner**

### 2725. Broker Supervision.

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

- (a) Transactions requiring a real estate license.
- (b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.
- (c) Filing, storage and maintenance of such documents.
- (d) The handling of trust funds.
- (e) Advertising of any service for which a license is required.
- (f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.
- (g) Regular and consistent reports of licensed activities of salespersons.

The form and extent of such policies, rules, procedures and systems shall take into consideration the number of salespersons employed and the number and location of branch offices.

A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.