

School Files

Hawaii Real Estate Commission

April 2017

www.hawaii.gov/hirec

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THE CLIENT'S TRUST ACCOUNT

"The devil is in the details."

The Client's Trust Account ("CTA") is a requirement in Hawaii Administrative Rules ("HAR"), §16-99-4, Client's account; trust funds; properties other than funds. All principal brokers (PB) and brokers-in-charge ("BIC") should familiarize themselves with the "details" in this section. Why? The "devil" will get you if you don't!

The HAR rules on client's accounts remains unchanged. Here are the important facts to understand when creating a CTA and maintaining it well.

- 1) A trust fund account shall be maintained in this State. The principal broker is the designated trustee of the account. (HAR §16-99-4(a))
- 2) Records must be retained for at least three years, and kept in Hawaii. (HAR §16-99-4(b))
- 3) Trust funds must be placed into a neutral escrow depository or in a trust fund account by the next business day following receipt. The escrow depository shall be located in the same state where the property is located. (HAR §16-99-4(d))
- 4) The PB or BIC shall not commingle client's funds with other moneys. It is not considered commingling to: (a) Hold an uncashed check until offer acceptance when directed to do so by the buyer; (b) Hold an uncashed check after offer acceptance when directed to do so by the seller; (c) Maintain a minimum amount in the CTA to keep the account open. (HAR §16-99-4(h))
- 5) §16-99-4(h) also states, "Commingling of the client's funds with other moneys shall include, but not be limited to, keeping undisputed commissions, management fees, and other fees in the brokerage firm's client trust account beyond a reasonable time after those commissions, management fees, and other fees have been earned."
- 6) Only with written authorization by the PB or BIC may a salesperson, broker-salesperson, or employee handle trust properties other than funds. Without written authorization, the salesperson, broker-salesperson or employee shall not handle trust properties. The PB or BIC is responsible

for trust properties they authorize a salesperson, broker-salesperson, or employee to handle. (HAR §16-99-4(i))

- 7) No person may have custody or control of trust properties held by the PB or BIC except as provided in Chapter 467, Hawaii Revised Statutes. (HAR §16-99-4(j))
- 8) A PB may allow a BIC to have custody and control of trust properties. The PB and BIC shall be jointly responsible for any trust properties the PB authorizes the BIC to handle. (HAR §16-99-4(k))
- 9) Escrow account information, records for real estate transactions for the brokerage firm shall be retained for at least three years, and is subject to inspection by the commission or its representative at the place of business. (HAR §16-99-4(l))

Some common questions posed to the Real Estate Branch by entities seeking to obtain licensing as a real estate brokerage in Hawaii:

- 1) The owner of the entity wants control of the brokerage's monies, which includes check disbursements. The owner is not a Hawaii real estate licensee. ANSWER: NO! The PB is the bottom-line, responsible individual. Only the PB or designated BIC has control over the brokerage's monies.
- 2) The brokerage's bank account is located in another state. ANSWER: NO! The trust fund account must be maintained in Hawaii.
- 3) The bank requires two signatures for check disbursements. Can the 2nd signature be a non-licensee or licensee other than the PB? ANSWER: The PB is the trustee of the account. If the bank requires a second signature, the real estate rules do not specify who that second signatory may be.
- 4) Do all monies received by the brokerage have to flow through the client's account? ANSWER: NO. If monies are the result of a fiduciary relationship, then these funds flow through the client's account. And in light of #5 above, funds for disbursement for commissions, management fees, and other fees need to be disbursed in a reasonable amount of time, from the client's account. See HAR, §16-99-3(e), "The broker shall keep in special bank accounts, separated from the broker's own funds, moneys coming into the broker's possession in trust for other persons, such as escrow funds, trust funds, clients' moneys, rental deposits, rental receipts, and other like items."

***NOTE:** The Commission is working on a project with the Hawaii Association of REALTORS® ("HAR") pursuant to a contract with HAR, to develop a series of videos on Client Trust Accounts. The videos are expected to be completed in late April or early May, and will be posted on the Commission's website, as well as made available through other means.



REPEATING OF CE COURSES FOR CREDIT

At long last, real estate licensees may REPEAT the SAME continuing education course and receive credit!!! Yay!!! No more upset and disgruntled licensees who perhaps spent time and money on a course listed in their CE history, and signed up for it again. No more frustrated CE providers dealing with these upset and disgruntled licensees, explaining that their CE history is easily available for review prior to registering for a CE course.

No more frustrated Real Estate Branch staff dealing with both of the above. At least, let's hope so! Now, according to the rule amendment recently signed into effect, real estate licensees may repeat the same CE course for credit. The new rule reads, ". . . a licensee shall not take a continuing education course for

which the licensee has already received a certificate within two consecutive biennia." (See Hawaii Administrative Rules §16-99-95)

The real estate education online system was upgraded to accommodate this change and is effective as of Monday, March 13, 2017.



SCHEDULING OF A COURSE 3-DAYS OUT

ATTENTION: Whereas in the past with the old, 14-day out requirement to schedule a CE class, now, there is only a 3-day requirement to offer the course in the Real Estate Education Online System. This also means that changes to offer dates after entered into the system will not be tolerated. Think before scheduling the CE course.

Mahalo for your consideration and cooperation in this matter of mutual importance!



HOW DOES RESPA AFFECT REAL ESTATE LICENSEES?

By Iris Ikeda, Commissioner and Alison Kiyotoki, Mortgage Supervisor
The Division of Financial Institutions, DCCA

RESPA may affect the real estate industry in a nuanced way depending on the particular activity between the real estate licensee and the mortgage broker. Since 2010, mortgage brokers in Hawaii must be licensed by the Division of Financial Institutions, DCCA ("DFI"), as mortgage loan originators ("MLO").¹ As a regulated industry, the DFI requires MLOs to comply with state and federal laws. This new regulatory scheme might have an effect on the interaction between real estate licensees and MLOs.

The Real Estate Settlement Procedures Act of 1974 ("RESPA") was enacted by Congress in 1974 (and became effective in 1975) as a response to abuses in the real estate settlement process. RESPA prohibits kickbacks and unearned fees stating that "No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding,... A company may not pay any other company or the employees of any other company for the referral of settlement service business." A "thing of value" is broadly defined in section 3(2) of RESPA ([12 U.S.C. 2602\(2\)](#)) and does not require transfer of money. An agreement or understanding need not be written or verbalized but may be established by a practice, pattern or course of conduct.² RESPA does allow normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto.³

In the past, mortgage companies may have sponsored a luncheon or sponsored other events for real estate agents. Under RESPA, before you accept the luncheon or event paid by the mortgage company or MLO, you should ask yourself the following questions: (1) is the mortgage company or MLO sponsoring the educational event as a way to promote its services; (2) are the costs associated with the event what the

¹ Chapter 454F, Hawaii Revised Statutes

² 12 C.F.R. 1024.14

³ 12 C.F.R. 1024.14(g)

real estate agent would normally pay; and (3) is the event sponsored on the implicit condition of referring business to the MLO? Is the MLO holding him/herself out in such a way that you want to refer your clients to because of the expertise? If you answered "yes" to these questions, you may find yourself in a possible RESPA violation.

Scenario 1: To attract business, title and escrow companies, mortgage companies, and other similar companies who rely on real estate licensees to refer business to them, may offer continuing education ("CE") credit courses. Before you accept one of these events, you may want to ask yourself (1) is the cost of the CE something you would normally pay for; (2) if there is a minimal charge for the CE, is this fee charged the normal cost of CE or is the cost of the CE defrayed by the sponsor; (3) is the sponsor's name a marketing activity or advertisement? Generally if the cost is underwritten by the sponsor so the real estate licensees do not have to pay fees or pay minimal fees they would otherwise have to pay, such sponsorship could be interpreted as a "thing of value" received by the licensee for RESPA purposes. And, the real estate licensee may be in violation of federal law.

Scenario 2: To attract business, title and escrow companies, mortgage companies, and other similar companies who rely on real estate licensees to refer business to them offer to put on education sessions about the services the companies offer to real estate licensees. *Use the same analysis in Scenario 1. In this case, if a title/escrow company and/or a mortgage company were to sponsor a free educational seminar for real estate agents (with no CE credit provided), this would be consistent with the marketing of settlement service provider business allowed under RESPA.*

Recently a mortgage loan originator (not licensed in Hawaii) and a Hawaii mortgage loan originator company offered a continuing education session for continuing education credits to real estate licensees. The CE credits were offered for "free" at a hotel. The CE course was previously certified by the Real Estate Commission. A question was raised by the Division of Financial Institutions, DCCA ("DFI"), about whether the session was prohibited by RESPA. DFI used the same analysis above and determined that the CE session could violate RESPA as the course was offered for free and ordinarily there would be a cost incurred for CE courses and for the venue. The MLO and MLOC were not providing the allowable educational information about the services that could be provided by the MLO and MLOC. The CE session was cancelled by the CE provider offering the course after discussion with DFI and the Real Estate Commission.

The Dodd-Frank Act granted authority to the Consumer Financial Protection Bureau ("CFPB") to supervise for and enforce compliance with RESPA. The CFPB has taken violations seriously and has been cracking down on violations for kickbacks, fees and things of value. Violations of Section 8 provisions of RESPA are subject to criminal and civil penalties. Fines can be up to \$11,000 per incident and one year and one month in prison. The Dodd-Frank Act also provided enforcement authority to states that regulate settlement services.

As you can see, RESPA violations are serious and can be expensive! In addition to the two scenarios identified in this article, and the real-life occurrence described above, there are many other types of scenarios that could be RESPA violations. Please be aware...knowledge is power!

***Note:** This article first appeared in the July 2016 issue of School Files. It was prompted by an incident where one of the Commission's approved CE providers was offering a CE course for "free". The CE Provider was an active mortgage lender on the mainland. The potential RESPA violations came to light in discussions with the Division of Financial Institutions ("DFI"), Department of Commerce and Consumer Affairs. Recently, there have been inquiries regarding CE courses offered and taught by mortgage lenders. The Commission has also received proposed CE courses from mortgage lending groups, and questions were raised as to the appropriateness of offering these courses, again, with no fee attached. The information in the above article will assist in future instances where CE courses attended by Hawaii real estate licensees may be inappropriate because of potential RESPA violations.



ONLINE COURSES GAINING ON TRADITIONAL CLASSROOM COURSES

Online real estate education began about 1997 or so. The first two computer-based continuing education courses available to Hawaii real estate licensees were John Reilly's courses, "Tax Free Exchange of Residential Property" and "Consensual Dual Agency". The Association of Real Estate License Law Officials ("ARELLO") established its Distance Standards and Certification Program about 1999. Hawaii is a member of ARELLO. Hawaii accepts continuing education courses that have been ARELLO-certified. This means the course meets those standards established by the program which includes course objectives, course design, interactivity, course delivery, equipment, evaluation, and support. The number of ARELLO-certified courses has increased steadily. For example, one of Hawaii's approved continuing education providers is ProSchools, Inc. All of ProSchools' Hawaii-certified continuing education courses are ARELLO-certified.

Hard to believe that online education was available that many years ago. Slowly, over the biennia, Hawaii real estate licensees appear to be opting for more and more online courses than before. During the 2012 biennium, only 4,137 licensees opted for the online version of the Commission's core course, as compared to 10,937 licensees taking the traditional classroom version. During the 2014 biennium, 10,139 licensees took the core online. The classroom version of the core course saw 12,726 licensees completing the course. For the 2016 biennium, for the first time, 12,935 licensees took the core online, as compared to 11,009 licensees taking the core via classroom.

This trend will probably continue over the course of the next couple of biennia, or more. As more "millennials" enter the industry, their choices of modes of learning will no doubt influence how continuing education courses are offered. Does this mean that traditional classroom learning is going out the window? Perhaps. Will there be a backlash? Perhaps. In the meantime, it's a plus that online education has improved dramatically. Courses are more and more interactive, with quizzes, photos, videos, etc. embedded in the online content.



NEW COMMISSIONER FROM HILO



Sean Ginoza, Broker, Hilo, HI, was recommended by the Senate committee on Commerce, Consumer Protection and Health to be advised and consented to as the newest member of the Hawaii Real Estate Commission by the Twenty-Ninth State Legislature on March 24, 2017. He was an interim appointee effective November 9, 2016. Mr. Ginoza's appointment will expire June 30, 2018.

Mr. Ginoza is associated with Ginoza Realty, Inc., which focusses on property management. He is the Vice President and a Director for the brokerage. He started full-time with Ginoza Realty in 2007. Mr. Ginoza attended Waiakea High School, and the University of Northern Colorado. He is a member of the Hawaii Island REALTORS®.

CONTINUING EDUCATION PROVIDERS

Abe Lee Seminars
All Islands Real Estate School
American Dream Real Estate School, LLC
At Your Pace Online, LLC
The Berman Education Company, LLC
Bly School of Real Estate
Building Industries Association of Hawaii
Carol Ball School of Real Estate
Carol M. Egan, Attorney at Law
The CE Shop, Inc.
Coldwell Banker Pacific Properties Real Estate School
Continuing Ed Express, LLC
Hawaii Association of Realtors
Hawaii Business Training
Hawaii CCIM Chapter
Hawaii Island Realtors
Honolulu Board of Realtors
International Association of Certified Home Inspectors (InterNACHI)
Kauai Board of Realtors
McKissock, LP
OnCourse Learning Corporation
dba Career WebSchool
Preferred Systems, Inc.
ProSchools, Inc.
Ralph Foulger's School of Real Estate
Realtors' Association of Maui, Inc.
REMI School of Real Estate
Russ Goode Seminars
USA Homeownership Foundation, Inc.,
dba Veterans Association of Real Estate Professionals (VAREP)
Vitousek Real Estate Schools, Inc.
West Hawaii Association of Realtors

PRELICENSE SCHOOLS

Abe Lee Seminars
Akahi Real Estate Network, LLC
All Islands Real Estate School
American Dream Real Estate School, LLC
Bly School of Real Estate
Carol Ball School of Real Estate
Coldwell Banker Pacific Properties Real Estate School
Continuing Ed Express, LLC
Digital Learning Centers, LLC dba REMI School of Real Estate
Inet Realty
ProSchools, Inc.
Ralph Foulger's School of Real Estate
Seiler School of Real Estate
Vitousek Real Estate Schools, Inc.



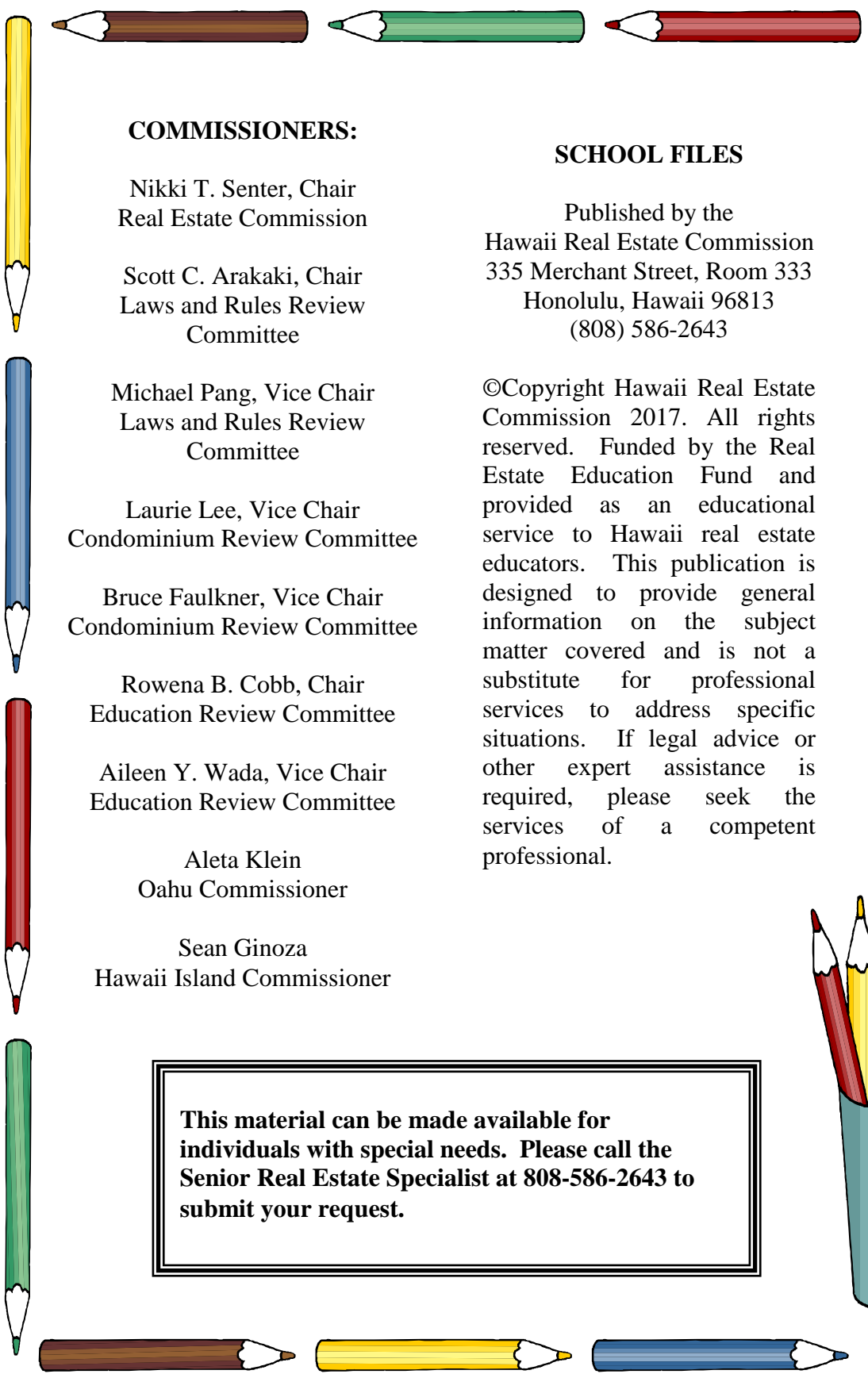
**2017 REAL ESTATE COMMISSION
MEETING SCHEDULE**

<p>Laws & Rules Review Committee - 9:00 a.m.</p> <p>Condominium Review Committee - Upon adjournment of the Laws & Rules Review Committee Meeting</p> <p>Education Review Committee - Upon adjournment of the Condominium Review Committee Meeting</p>	<p align="center">Real Estate Commission 9:00 a.m.</p>
<p align="center">Wednesday, April 12, 2017</p>	<p align="center">Friday, April 21, 2017</p>
<p align="center">Wednesday, May 10, 2017</p>	<p align="center">Friday, May 26, 2017</p>
<p align="center">Wednesday, June 14, 2017</p>	<p align="center">Friday, June 30, 2017</p>
<p align="center">Wednesday, July 12, 2017</p>	<p align="center">Friday, July 28, 2017</p>
<p align="center">Wednesday, August 09, 2017</p>	<p align="center">Friday, August 25, 2017</p>
<p align="center">Wednesday, September 13, 2017</p>	<p align="center">Friday, September 29, 2017</p>
<p align="center">Wednesday, October 11, 2017</p>	<p align="center">Friday, October 27, 2017</p>
<p align="center">Wednesday, November 08, 2017</p>	<p align="center">Wednesday, November 22, 2017</p>
<p align="center">Wednesday, December 06, 2017</p>	<p align="center">Friday, December 15, 2017</p>

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at www.hawaii.gov/hirec or call the Real Estate Commission Office at 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at 586-2643 to submit your request.





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SCHOOL FILES

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