

School Files

Hawaii Real Estate Commission

February 2005 <http://www.hawaii.gov/hirec>

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AGENCY

The following is the February 1985 "Consultant's Legislative Report on Agency Relationships" by John R. Reilly, a former Hawaii resident, attorney, real estate broker, and prelicense and continuing education instructor. Mr. Reilly currently resides in California and is still active in real estate. Although written 20 years ago, Mr. Reilly's report is still relevant in 2005.

As a result of a four year period of study and review, and Mr. Reilly's review in 1985, Hawaii Revised Statutes, Section 467-14(12) and Hawaii Administrative Rules, Section 16-99-3.1 became effective July 1, 1987 and July 11, 1987 respectively. Hawaii was one of the first states in the country to legislate agency disclosure rules. In general, the law requires a licensee to make early disclosure as to whom the broker represents and to obtain confirmation on the contract between the parties that this disclosure was made. The listing broker must inquire whether the seller authorizes the use of subagents and the sharing of commissions with the seller's subagent or the buyer's agent.

The issue of "agency" could be a prominent topic of discussion for the next couple of years. At the 2005 Hawaii State Legislature, the Hawaii Association of REALTORS® introduced a bill relating to brokerage relationships, which if passed, will amend Hawaii Revised Statutes, Chapter 467, Real Estate Brokers and Salespersons. Contained in this proposed bill are new definitions of different types of brokerage relationships, lists of duties of an agent acting in various forms of representation, the creation of "transaction brokerages", and other possible statutory changes that may have far-reaching consequences that are not clear at this time. To help facilitate meaningful discussion of this important, but neglected, topic, Mr. Reilly's report is included in this first *SCHOOL FILES* of 2005. The exhibits referred to in his report are available by contacting the Real Estate Branch at (808) 586-2643, or by e-mail at hirec@dcca.hawaii.gov.

For the real estate education community, any discussions of "agency" in your prelicense courses or continuing education courses are important in light of the proposed changes to the real estate licensing law. Whether or not any changes to the licensing laws and rules are implemented, the fact that there is a proposal to change the existing laws and rules means that the current laws and rules are not perceived as adequate. Is this true? Why or why not?

“Consultant’s Legislative Report on Agency Relationships”

by John R. Reilly

EXECUTIVE SUMMARY

1. A number of recent studies have revealed an apparent communication problem concerning consumer expectations of services offered by real estate brokers. Consumers frequently misunderstand which real estate brokers represent them and which brokers merely provide real estate services to them as agent or subagent of the other principal.

2. While most real estate transactions are successfully completed, this communication problem can lead to serious legal problems, especially when dissatisfaction arises with the basic deal and one of the parties is seeking a way out of the contract or money damages.

3. Clear disclosure of who the broker represents should be required. Not all brokers agree on agency relationships and, as a result, confusion exists among brokers as well as consumers. Required disclosure, coupled with further education on agency responsibilities, will clarify consumer expectations and enhance the professional image of the licensee.

4. The real estate industry should take its own measures to clarify agency relationships, especially its position on the subagency relationship in MLS and cooperative brokerage sales. Consumers and brokers should be free to determine their legal relationships as they see fit without undue interference from either organized real estate or government. But there should be a legal requirement that real estate brokers clearly disclose to Buyer and Seller once they determine whose agent they are.

5. This report suggests appropriate language for amending Chapter 467-14 H.R.S. (grounds for revocation or suspension) so that Buyers and Sellers confirm that agency relationship disclosure was given prior to the signing of the sales contract.

CONSULTANT’S LEGISLATIVE REPORT ON AGENCY RELATIONSHIPS

INTRODUCTION

1984 was a very productive year, both locally and nationally, in terms of studies and reports on the subject of real estate agency relationships. As a result, there is presently available a great deal of background information to help decide what needs to be done to clarify agency relationships. Much of this background material is highlighted in this report. Some agency related activities in 1984 were:

1. The Hawaii Real Estate Commission (HREC) included the agency/subagency issue as one of its programs of work for 1983-1984.
2. The HREC authorized Research Marketing Systems Inc. (RMS) to conduct several studies concerning agency.
3. The HREC retained John Reilly as consultant to research the agency/subagency issue.

4. The HREC conducted a survey of all license law officials of the National Association of License Law officials (NARELLO) to assist both the HREC and NARELLO in their individual work on the agency/subagency issue.
5. The HREC assisted in the preparation of a comprehensive report entitled “Preliminary Report From the Agency/Subagency Study Committee of the National Association of Real Estate License Law Officials.”
6. The Federal Trade Commission (FTC) released its monumental research report focusing on the residential real estate brokerage industry.
7. In addition, the California Department of Real Estate had earlier commissioned two studies on agency: Dual Agency Problems and Single Agency Practice.

WHAT IS THE PROBLEM?

The essence of the problem with agency relationships in current real estate transactions is a lack of adequate communication. Buyers, Sellers, and the various real estate agents frequently have different perceptions and expectations of the role of the agent. As was stated in the FTC Report, “Both the ambiguities and the conflicts in the broker’s role can lead to false consumer expectations and to possible abuses of the broker’s fiduciary duties.”

Although the problem is lack of communication, it has the potential of developing into a legal problem, especially when the agent is arguably representing both parties in an undisclosed dual agency capacity. Once an agency relationship is created, certain legal implications arise. The principal is liable for and bound by the acts of its agent; notice to an agent is notice to the principal; ambiguities in a contract are interpreted against the party (or agent) who prepared it; an admission by an agent is legally admissible in evidence against the principal. It is, therefore, important to clarify who the agent represents.

The results of official surveys in Hawaii and nationally indicate there is confusion and misunderstanding over who the agent represents. These studies indicate that Buyers expect that the agent they work with is representing them. In many cases, however, the agent is under the impression he or she represents the Seller as agent or subagent. The studies are summarized in Exhibits A, B, and C.

The question of agency relationships is compounded by the variety of special relationships that may exist in any one real estate transaction. For example, assuming only one agent is involved, the agent could:

1. Act for the Seller only, with the Buyer being unrepresented;
2. Act for the Buyer only, with the Seller being unrepresented;
3. Act as a dual agent for both Seller and Buyer. Such dual agency is legal if both parties consent after full disclosure. (Courts generally require an “informed consent” and more complete disclosure of the implications of dual representation than most brokers give.) Frequently, however, the dual agency is unintended and undisclosed and this gives rise to legal claim for damages or rescission.

If there is more than one agent, the following could occur:

1. One agent acts for the Seller and the other, or others, act as subagents of the Seller, with the Buyer being unrepresented;
2. One acts as the Buyer's agent and other or others act as subagents of Buyer, with the Seller being unrepresented;
3. One acts as Seller's agent and other acts as Buyer's agent;
4. One acts as Seller's agent and other or others act as Seller's subagents, but also act as Buyer's agents. This dual agency is legal if consented to after full disclosure. Usually, however, the dual agency is unintended and undisclosed.

Probably the most problematic of all these special relationships are the cooperating broker sale and the in-house sale. In the typical cooperative sale, the Seller authorizes the listing broker to submit the property to the Multiple Listing Service (MLS) and to permit other participating members to show the property to buyer prospects. In the typical case, a cooperating broker spends many hours, even days, trying to locate the right property for the Buyer. The question raised is whether this cooperating broker is a subagent of the Seller based on the Seller's listing and the MLS system, or an implied agent of the Buyer based on the actions of the agent in "representing" the Buyer, or a dual agent?

There are many viewpoints on the "correct" answer. As a result, a situation is created in which the listing broker may view the cooperating broker, with whom he splits the commission, as a subagent, the Seller may feel the cooperating broker is a Buyer's agent, the Buyer may feel the cooperating broker is his agent, and the cooperating broker feels uncomfortable since he has emotionally adopted the Buyer but is often told he's legally a subagent of the Seller. There is potential misunderstanding on everyone's part, and this can create a fertile setting for litigation.

The in-house sale situation can also lead to unintended dual agency problems. Assume one sales agent within a brokerage firm, acting on behalf of the broker, acquires an exclusive listing from the Seller, and another sales agent within the same firm actively represents a prospective Buyer. A dual agency could be created, especially if the broker fails to notify the Buyer that the broker represents the Seller exclusively. As noted earlier, undisclosed dual agency can give rise to legal action.

IS CLARIFICATION NEEDED TO PROTECT THE CONSUMER?

The current system has been described by some writers as a "timebomb ready to explode." I wouldn't be so dramatic, but I would agree that further clarification of agency relationships will benefit the consumer. And, in the few cases which end up in litigation, such clarification could be a significant factor in the outcome.

The consumer, whether a Buyer or Seller, should have a clearer understanding of what to expect from the real estate agent in terms of representation or services rendered. If, for example, the cooperating broker is to be a subagent of the Seller, then the Buyer should know about the subagency. This is so even though the broker provides valuable services to the Buyer. The Seller should also be alerted to the subagency since the Seller is responsible for the acts of its subagents

as well as its agents. Buyer and Seller should know what to expect. Under the current practice of nondisclosure, Buyers often expect they are being represented when, in fact, they are only being serviced by the Seller's agent or subagent.

A second reason for clarification of agency relationships is that agents will enhance their professionalism. As agents examine more carefully how they create agency relationships and what they can and cannot do when representing a client or when providing service to a customer, then agents will appear more professional as representatives of their clients rather than as deal makers interested in a quick sale of property.

Also, by drawing the lines of legal obligations more clearly, the issues of dual agency and liability for agent misrepresentation will be easier to resolve in the event litigation arises in the transaction. The Buyer or Seller can suffer liability and damages as a result of the acts of their agent even though the agency was not understood. In addition to the consumer benefiting, the licensee also benefits in that the risks are lessened that a Seller's agent or subagent would be placed in a potential unintended dual agency position due to the erroneous perception of the Buyer that the licensee is his agent.

Experts in real estate litigation will attest to the fact that attorneys are starting to raise the issues of agency relationships and dual agency more and more in real estate legal disputes. Whether an agency exists is a question of fact for the jury to decide. As a result, trial attorneys often raise this factual issue to defeat a motion for summary judgment, even though the agency issue is only a collateral issue in the case. The Hawaii courts are starting to render opinions in this area in cases which could have been resolved had simple disclosures been given. (See Exhibit D for summary of Hawaii decisions.)

The need for clarification is evidenced by the increase in legislative efforts on the Mainland to require disclosure. In addition, the NARELLO Report emphasizes the need for clarification in order to better protect the consumer. (See Exhibit E.)

Some industry leaders point to surveys (such as the FTC and Hawaii reports) which indicate a high level of consumer satisfaction with broker services. They say "if it isn't broke, why fix it." Some critics suggest that those satisfaction levels would not have been so high if the Buyers had learned that by using their own agent, as opposed to the Seller's agent or subagent, they might have paid less for the property or negotiated better finance terms from the Seller or been exposed to better properties. Perhaps if the Seller had learned of the Seller's potential liability for the acts of the cooperating broker under subagency law, the Seller would not have authorized the use of subagents.

WHAT TYPE OF CLARIFICATION IS NEEDED?

The NARELLO Report discusses the pros and cons of at least 11 possible courses of action for licensing officials to consider. The choices range from simple disclosure of specific agency relationships to a complete restructuring of existing brokerage practice. The Report made no recommendations since the law and nature of the real estate industry varies from state to state.

These possible courses of action can be categorized as follows:

1. Disclosure of the agency relationship.
2. Creation of presumption in favor of subagency or in favor of Buyer's agency.
3. Require single agency so each principal has a broker.

Since the main finding of recent studies is that there is a communication gap between the consumers' expectations and the broker's services offered, it appears that a legislative requirement of disclosure would be a logical initial course of action. While it is true that some brokers clearly specify their agency relationship on their contracts, such is not a uniform practice in Hawaii.

In order for disclosure to apply to all transactions and to all brokers, an amendment to the licensing law is required. That way all licensees will conform, not just those who personally see the benefits of disclosure.

As for recommending courses of action beyond disclosure, such as creating presumptions of subagency, I do not think it appropriate for the legislature to intervene in how the brokerage business should be operated, at least not until something more serious than a communication problem is revealed. By creating presumptions, the legislature may appear to be endorsing one method of brokering over another. As was stated on page 13 of the NARELLO Report:

Although the real estate industry may be able to address the agency/subagency issue on its own, to date there does not appear to have been any significant nationwide effort to do so. Legislation aimed at clarifying the agency/subagency issue will involve a balancing of protection of the consumer's interest with the burden imposed on the real estate industry. Such a balancing should be left to the expertise of the state real estate licensing authority. Extensive legislation designed to totally restructure the current brokerage industry may create disadvantages that far outweigh the contemplated advantages. Finally, the agency/subagency issue is an industry wide concern.

DISCLOSURE

There are several alternatives for a disclosure requirement. These are discussed in a memorandum to the BREC dated December 21, 1984 (see Exhibit F).

The first alternative is a simple disclosure of who the agent represents and/or some acknowledgment by the consumer that disclosure was given. The second alternative is the requirement that all licensees present to Buyers and Sellers a uniform disclosure statement discussing the available choices of agent representation and/or a writing confirming which choice the consumer desires.

The third alternative is the proposed California legislative approach (with no written confirmation). There is some concern, however, whether the measure will pass in the 1985 session since it is difficult to obtain agreement on the proper wording of a uniform statement (see Exhibit G).

I think the first alternative for disclosure is the best approach. Brokers and consumers should be free to arrange any legal relationship they see fit, as long as written disclosure is made. Naturally this disclosure should be made as early in the relationship as is practical. At a minimum, however, the Buyer and Seller should confirm in the sales contract that they had received notice of the agency relationships of all brokers in the transaction. Through education programs and guidelines suggested by the HREC, brokers can best ascertain the mechanics of when and how to give appropriate disclosures.

PROPOSED LEGISLATION

Chapter 467-14, Hawaii Revised Statutes, is amended by adding a new section to read:

“When the Broker, at the time the Buyer and Seller sign the sales contract, fails to obtain written confirmation from Buyer and Seller of the Broker’s agency relationship to Buyer and Seller.”

This act shall take effect July 1, 1987.

Comments: Since the broker (not the individual sales agent) is the person who creates and maintains the direct agency relationship with the consumer, the broker should be responsible for establishing the procedures to ensure compliance with this new section. Early disclosure of the agency relationship should be encouraged so as to lessen accidental exchange of confidential information to another’s agent. There should be some acknowledgment that, prior to signing the sales contract, the Buyer and Seller were given appropriate disclosure. The HREC can develop implementing rules and regulations concerning the timing and nature of the disclosure (see Exhibit H).

COMMITTEE REPORT

The Committee Report should cover the following points:

1. Education. The HREC should be directed to organize an intensive educational program on the issue of agency relationships during the two years prior to the effective date of this act. Such a program could include:
 - a. Educational seminars for licensees and the public on the agency relationships between licensees and Buyers and Sellers. (See Exhibit I.)
 - b. Consumer brochures explaining the nature of the agency relationships in a real estate transaction. These brochures could be made available for distribution by licensees. (See Exhibit J.)
 - c. Coverage of agency/subagency issues in the curriculum for real estate prelicense and/or continuing education courses;
 - d. Coverage of agency/subagency issues on the real estate prelicense examinations.
2. Real Estate Transaction. This act shall apply to all real estate transactions, including commercial as well as residential real estate, with the exception of leases not exceeding one year. The HREC can adopt implementing rules and regulations which would include leases within the definition of sales contract and lessor for Seller and lessee for Buyer.

3. Supplemental Provisions. Some supplemental provisions to rules and regulations:
 - a. The obligation of either Seller or Buyer to pay compensation to a broker for agency services is not necessarily determinative of the agency relationship.
 - b. Nothing in these rules shall preclude a listing broker from also being a selling broker, and the combination of these functions in one broker does not, of itself, make that broker a dual agent.
 - c. Nothing in these rules shall affect the validity of title to real property transferred involving an agency relationship because any broker failed to conform to the provisions of these rules.
 - d. The HREC is authorized to require attendance of all sales licensees in a 3-hour agency program and broker licensees in a 6-hour agency program.

CONCLUSION

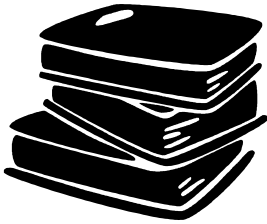
The proposed legislation is a moderate approach to helping licensees resolve the agency relationship problem. The goal is to help simplify legal relationships and eliminate the ambiguity and confusion surrounding the agent representation issue while, at the same time, leaving the parties free to arrange their legal relationships as they see fit. Licensees will have to decide who they represent, what services they will offer, and will then have to clearly disclose such relationship to both Buyer and Seller. The consumer will have a better understanding of the role of the broker in the transaction and will not expect more representation or services than is actually offered. By requiring only disclosure, the legislature avoids mandating how a broker should offer services to the consumer. Industry is encouraged to work out the problems of subagency which have been raised by many of the studies referred to herein. The HREC will closely monitor the market to see if further steps are needed to protect the consumer.

SALESPERSON'S CURRICULUM

At its monthly meeting on December 17, 2004, the Real Estate Commission approved the proposal submitted by the Hawaii Academy of Real Estate, LLC (Janice Lind, Principal, and Wayne Richardson III, president) to update its salesperson's curriculum. The current salesperson's curriculum was approved and adopted in January 1993.

The completed revision of the salesperson's curriculum is targeted for May, 2005, subject to budgetary and time requirements. Once the revised curriculum is approved, the Commission will schedule a meeting with Promissor, the Commission's test administrator, to update the salesperson's license exam questions to reflect the new curriculum.

As with the update and revision of the broker's curriculum in 2004, the Commission will designate an end date for the offering of the current salesperson's curriculum, the implementation of the new salesperson's exam, and the end date of the offering of the current salesperson's exam.



80-HOUR BROKER COURSE

Based on the number of recent telephone calls to the Real Estate Branch, the following is information on the 80-hour broker course that should be disseminated to inquirers.

The 80-hour broker curriculum was approved by the Real Estate Commission in July, 2004.

Each prelicense school certified to offer the broker's curriculum and that chooses to offer the new course, must offer the 80-hour broker curriculum as of January 1, 2005. The old 46-hour broker course is no longer acceptable.

Each prelicense school that decides to offer the 80-hour broker course is responsible to gather all the information necessary to flesh out the 80-hour curriculum, and teach the material to broker candidates. There are no written course materials provided by the Real Estate Commission.

In the past, most prelicense schools have relied on "Principles and Practices of Hawaiian Real Estate" written by Paige Vitousek, John Reilly, and Robert Rediske, as the main text for their prelicense courses. Because there was only one hour more required for the broker's course, prelicense schools were able to get a lot of mileage from the written textbook and did not have to necessarily come up with additional material in order to teach the approved curricula for both the salesperson's and broker's courses. This is no longer the case. Each prelicense school must put together their own course materials, or at the very least, is responsible for gathering the information to conform to the approved broker's curriculum. Additionally, each prelicense school is responsible to update and teach accurate and current information.

As of this writing, the Hawaii Academy of Real Estate (HARE) (Janice Lind, Principal) will be offering the new broker course. HARE is based on Kauai and O'ahu.

The Commission looks forward to other prelicense schools offering the new curriculum in the very near future.



2005-2006 CORE COURSE

ProSchools, Inc. was approved by the Real Estate Commission at its monthly meeting on January 28, 2005, to develop the Commission's mandatory core course for the 2005-2006 biennium. ProSchools also developed the Commission's 2003-2004 core course and, for the first time, provided the core course in an on-line format.

The 2005-2006 core course will once again be developed in both a live classroom and an on-line format, and materials and an instructor's manual will be provided for live presentations. "Scope of services for agents, Seller's Disclosures, and Agency" will be three of the prominent topics included in the new core course. There will also be a "pre-test" and "post-test" included for teaching purposes, but these "tests" will not determine credit for the course. ProSchools will be partnering with Margaret McCarthy Fernandez and Kenneth Chong. Fernandez is a veteran broker in Oregon and Washington. Chong is our own Ken Chong, prelicense instructor, continuing education instructor, broker, and consultant to the Real Estate Commission regarding condominium projects and law.

Target date for the completion of the 2005-2006 Commission core course will be about May 2005. Please note that the **2003-2004 Commission core course will NOT be available after May 31, 2005.**



2005 – 2006 Continuing Education Certificates, “99” Code for Continuing Education Certificates Issued, and Other Reminders



The 2005-2006 Continuing Education certificates for the elective courses are now available for purchase. The cost remains at \$1.00 a certificate. Certificates may be ordered by calling Toa, Education Clerk, at 586-2643.

The elective courses certificate color for 2005-2006 is aqua with “ELECTIVE” on the side of the certificate, and the mandatory course certificate color will also be aqua with “CORE” on the side of the certificate. Please note that the mandatory course certificates will be made available for purchase when the “Core course” is determined.

When issuing CE certificates to licensees who are reactivating or restoring their license, be sure to use the “99” code when reporting information to the Real Estate Commission. The information reported should be as follows: If the certificate number is 12345, the first two numbers should be replaced with “99” – **99**345. This “99” code affects all orange colored certificates for courses starting from January 1, 2005.

The “99” code ensures the licensee will receive credit for the appropriate biennium. If licensees are reactivating or restoring their licenses and the “99” code is not used, they will be credited for the current biennium (2005-2006) requirements and not the previous biennium (2003-2004) requirements.

If any information submitted to the Commission needs to be changed, please complete and submit the Continuing Education Certificate Changes/Additions form. A copy is enclosed for your use. Please make as many copies as needed.

Also, be aware that certificates can only be issued to licensees with a current pocket card (expiration of 12/31/2006) or individuals who are restoring or reactivating a license and provide a copy of their restoration or renewal application.

Please note that when a licensee is reactivating their license, the licensee must submit a completed Change Form – Real Estate, the original continuing education certificates (2 orange and 1 orange with watermark “C”) and the required fee to the Licensing Branch.

To ensure submission of correct information, all providers are reminded to verify license numbers by viewing the licensee’s State of Hawaii Real Estate Commission issued pocket card, or a printout of the “license screen” from the Professional and Vocational Licensing Division’s database which may be used in lieu of the original real estate pocket card, for all licensees attending the courses.

If you have any questions, please contact Toalua Lavatai, Education Clerk, at 586-2643.

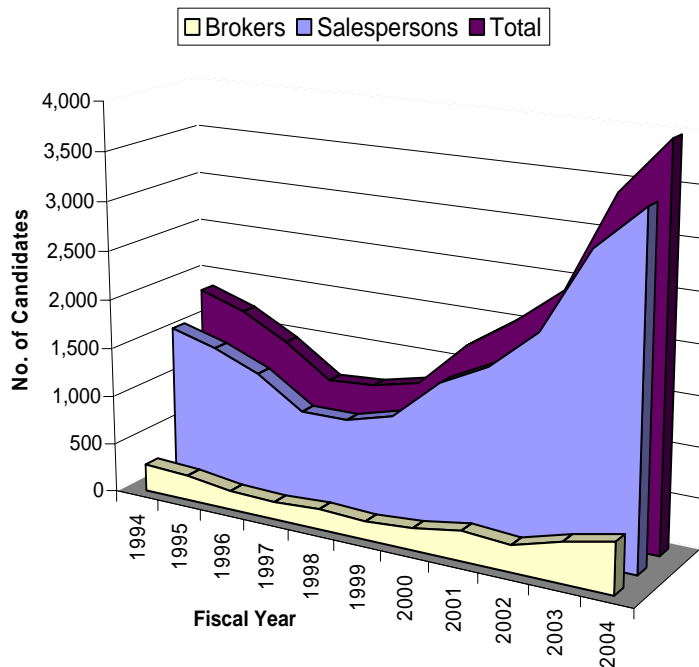
2004 ANNUAL REPORT

REAL ESTATE LICENSING EXAMINATION

	FY 2003	FY 2004	% Change
Brokers Tested	409	516	26.2%
Salespersons Tested	3012	3458	14.8%
Total Tested	3421	3974	16.2%
Brokers Pass	171	201	17.5%
Salespersons Pass	1939	2152	11.0%
Total Passed	2110	2353	11.5%
% Brokers Pass	41.8%	39.0%	
% Salespersons Pass	64.4%	62.2%	

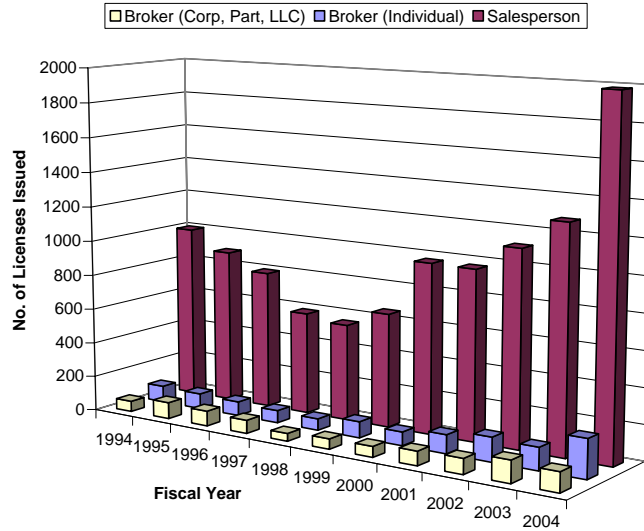
The Real Estate Commission's 2004 Annual Report was presented to Governor Linda Lingle in December, 2004. Following are some excerpts from the annual report that may be of interest to real estate educators. For a complete copy of the 2004 Commission Annual Report, go to www.hawaii.gov/hirec, click on "Publications" in the right hand, yellow column.

**Licensing Examination Candidates
FY 1994 - 2004**



	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Brokers	278	255	193	178	207	187	224	304	269	409	516
Salespersons	1,575	1,444	1,258	952	955	1,082	1,504	1,744	2,158	3,012	3,458
Total	1,853	1,699	1,451	1,130	1,162	1,269	1,728	2,048	2,427	3,421	3,974

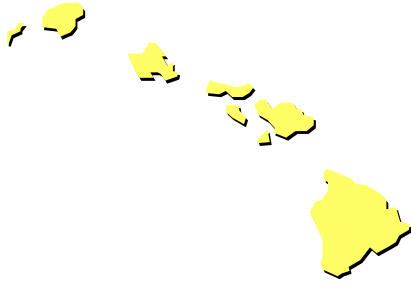
**New Real Estate Licenses Issued
1994 - 2004**



	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Broker (Corp, Part, LLC)	61	94	86	76	44	58	61	81	88	126	112
Broker (Individual)	94	88	81	71	66	92	78	107	138	128	220
Salesperson	997	886	793	586	553	651	971	968	1111	1278	1984

Current Real Estate Licensees (July 2004) by License Type and Island

	Oahu	Hawaii	Maui	Kauai	Molokai	Lanai	Other	Total
Active								
Broker	1,621	362	346	169	10	4	26	2,538
Salesperson	4,116	1,043	1,501	645	21	6	70	7,402
Sole Proprietor Corporation, Partnership, LLC	826	131	114	49	3	1	5	1,129
Corporation, Partnership, LLC	791	183	206	77	5	3		1,265
Total Active	7,354	1,719	2,167	940	39	14	101	12,334
Inactive								
Broker	316	54	27	17	2		135	551
Salesperson	2,435	473	672	343	2	6	407	4,338
Corporation, Partnership, LLC	26	10	9	6			11	62
Total Inactive	2,777	537	708	366	4	6	553	4,951
Active and Inactive								
Broker	1,937	416	373	186	12	4	161	3,089
Salesperson	6,551	1,516	2,173	988	23	12	477	11,740
Sole Proprietor Corporation, Partnership, LLC	826	131	114	49	3	1	5	1,129
Corporation, Partnership, LLC	817	193	215	83	5	3	11	1,327
Total	10,131	2,256	2,875	1,306	43	20	654	17,285



Mineral Rights and Statutory Reservations in Hawaii

By Vern Yamanaka, Commissioner, Broker, Hilo

In reviewing the new broker curriculum as it was being revised, developing test questions for the broker's test, and speaking to providers and instructors over the past year, I had the opportunity to revisit an old educational issue that was brought up in the mid 70's.

In 1975, with the advent of geothermal exploration on the Big Island, a new type of value was attributed to real estate. Prior to this time there was little, if any, value attributed to mineral rights, which most landowners assumed were owned by the State of Hawaii. Once geothermal rights were classified as a "mineral" by the Hawaii State Legislature (1974), those lands that were located in a resource area or any potential area (sites were located on all major islands) suddenly held the potential for added value.

The State of Hawaii is a statutory State where any reservation on land needed a statutory reservation in the deeding document. In over 90 percent of lands in Hawaii, there is a statutory reservation to the State of Hawaii for the mineral rights; however, there are many parcels where there is no reservation to the State, prior government, or individual. In those cases, the mineral rights belong to the property owner.

In the late 70's and 80's, geothermal developers paid property owners royalties and lease payments that amounted to millions of dollars for the right to explore and develop these mineral resources. Today, developers are paying royalties and lease payments to the holders of mineral rights. Payments are also being made to fee owners who do not own the mineral rights under developed land, for access rights. Legal precedent has been established in other States where property owners adjacent to developed resource areas may be able to seek a share of royalty payments if their mineral rights are being mined below the surface.

There are two basic classifications of mineral rights ownership:

-On lands where the State of Hawaii has a documented reservation the fee owner would have the first rights to petition the State for development of resources. Private developers would apply for development rights through or in partnership with the fee owner. The compensation to the fee owner could be in the form of a front end bonus prior to permitting and drilling, lease rent for land utilized in the development, and a royalty payment on production based upon gross sales.

-On lands where there are no statutory reservations, or where other entities/individuals have recorded statutory reservations, the developer may negotiate a lease or purchase the mineral rights associated with that property. The same bonus or premium, lease rent and royalty payment would apply but at a much greater valuation.

In proven resource areas, millions of dollars have been paid to fee owners for exploratory rights, and with the present production of electrical power from geothermal development in Hawaii, royalties are being paid to the owner of mineral and occupier rights. In the 1970's and 80's, over 400,000 acres of land in Hawaii were leased for mineral exploration and there may still be new areas with potential.

In protecting the consumer, all licensees need to be knowledgeable about issues like mineral rights and statutory reservations related to property. In the past, real estate text books and tests have mistakenly perpetuated the idea of absolute State ownership of mineral rights. The new curriculum and tests have been changed to address that issue.

Title reports have acknowledged State ownership of mineral rights with no record of any prior statutory reservation. The individual licensee is obligated to question and check title reports for statutory reservations on all lands, but especially on lands where known resources are present. Licensee liability could be great considering that in the past there has been a case where the mineral right premium and rent has exceeded the full fee value of the property, and other cases where at least 25% of the fee value has been paid in front end premiums for exploratory leases.

We need to recognize the process of statutory reservations on lands, not only for mineral rights, but also public access, resource management, water, trail access, and other issues where past owners may reserve future use and rights to lands conveyed to another.

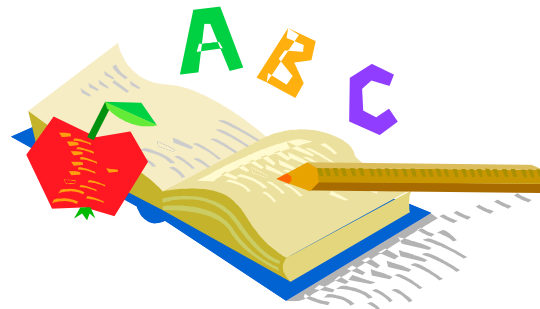
Vern Yamanaka is a broker, and the Commissioner from the Big Island He is the Chair of the Education Review Committee.

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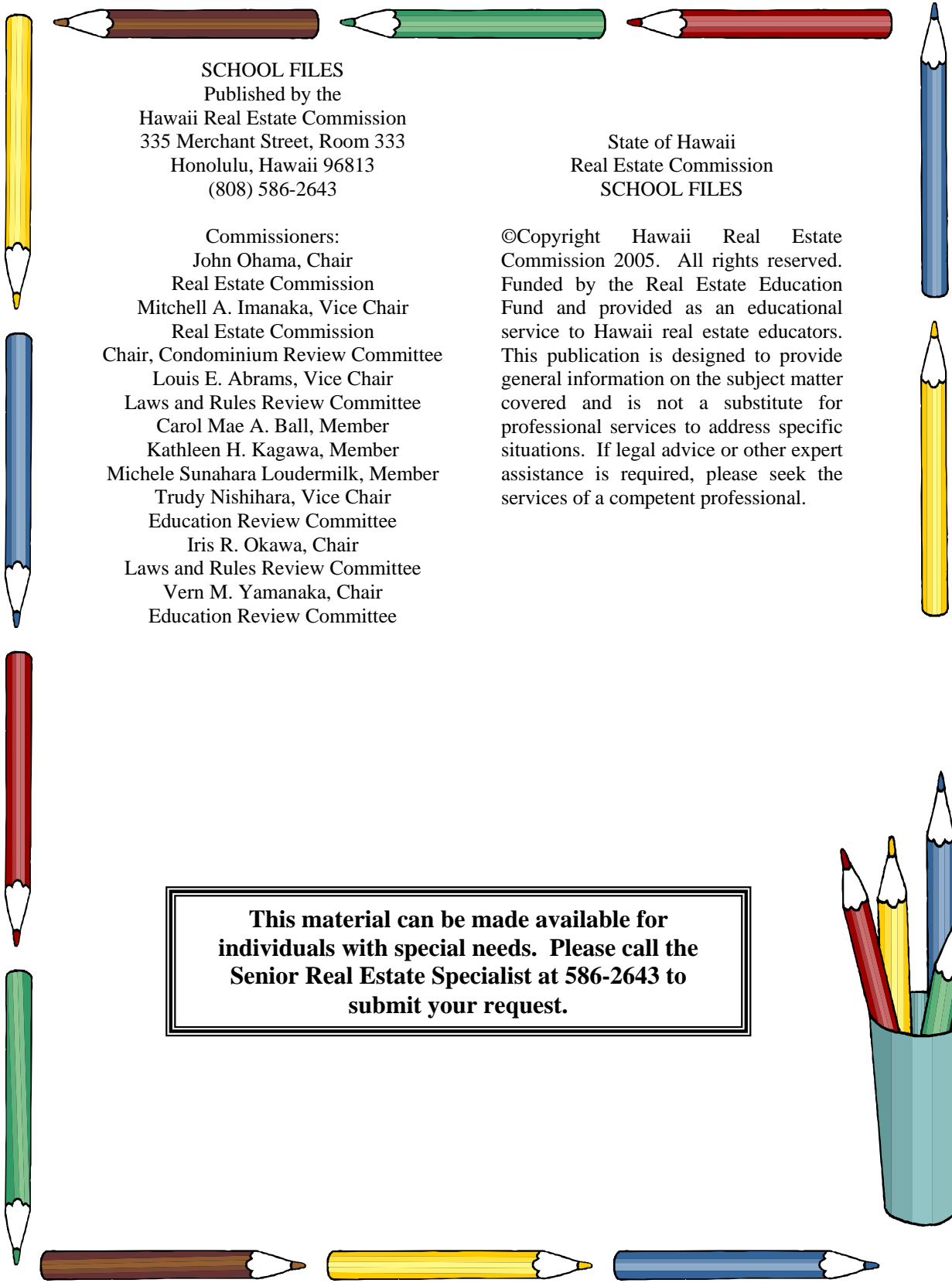


**2005
REAL ESTATE COMMISSION
MEETING SCHEDULE**

Laws & Rules Review Committee – 9:00 a.m. Education Review Committee – Upon adjournment of the Laws & Rules Review Committee Meeting Condominium Review Committee – Upon adjournment of the Education Review Committee Meeting, which is upon the adjournment of the Laws & Rules Review Committee Meeting, which convenes at 9:00 a.m.	Real Estate Commission 9:00 a.m.
Wednesday, February 9, 2005	Friday, February 25, 2005
Wednesday, March 9, 2005	Thursday, March 24, 2005
Wednesday, April 13, 2005	Friday, April 29, 2005
Wednesday, May 11, 2005	Friday, May 27, 2005
Wednesday, June 8, 2005	Friday, June 24, 2005
Wednesday, July 13, 2005	Friday, July 29, 2005
Wednesday, August 10, 2005	Friday, August 26, 2005
Wednesday, September 14, 2005	Friday, September 30, 2005
Wednesday, October 12, 2005	Friday, October 28, 2005
Wednesday, November 9, 2005	Wednesday, November 23, 2005
Wednesday, December 7, 2005	Friday, December 16, 2005

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.



SCHOOL FILES

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Real Estate Commission
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