

DEPARTMENT OF BOATING AND WATERWAYS

2000 EVERGREEN STREET, SUITE 100
SACRAMENTO, CA 95815
(916) 263-8194



INFORMATION LETTER

DATE: *January 21, 2000*

TO: *Licensed Brokers and Salespersons*

FROM: *Carlton D. Moore, Interim Director
Dave Trillo, Associate Boating Administrator
Jana Clarke, Associate Boating Administrator
Department of Boating and Waterways
Yacht and Ship Broker Licensing Unit*

SUBJECTS: *Fiduciary Duty, Renewals and Reinstatements, Marine Advertisement, and Examinations*

This information letter is provided to all licensed yacht and ship brokers and salespersons as a guideline, and does not constitute legal advice. While the Department of Boating and Waterways does not provide legal advice or legal opinions to licensees, there are established legal precepts used by the Department in actions taken against licensees as part of its compliance program. Licensees wishing legal opinions concerning transactions, or the conduct of business as a Yacht and Ship Broker, or Salesperson, should seek their own legal counsel for such advice.

1. FIDUCIARY DUTY

This concept has received much discussion in the past few years, and is in need of clarification. The term "Fiduciary Duty" is not used in provisions of the Harbors and Navigation Code affecting Yacht and Ship Brokers (Division 3, Chapter 5, Article 2, beginning with Section 700), nor is it currently used in regulations issued pursuant to the statute, (Title 14, California Code of Regulations, Article 8, beginning with Section 7601). For this reason, no action

taken against a licensee for wrongdoing is ever cited as a breach of fiduciary duty. Instead, we look to the underlying action which may bring about a breach, such as fraud, misrepresentation, deceit (see H&NC Section 733) or self interest actions which are expressly prohibited (14CCR 7623). The classical fiduciary relationship between a principal and his or her agent occurs whenever there is trust or confidence reposed by one person in the integrity and fidelity of another. Breach of that trust or confidence may, in many instances, be actionable civilly or administratively.

The question has arisen as to whether a broker or salesperson has a fiduciary duty with the buyer as well as the seller (principal). Again, there is no statutory requirement that sets forth fiduciary relationships, so the answer is best made in terms of the language found in the H&NC. The broker has a duty to refrain from acts that are fraudulent, the misrepresentation of facts or acts of deceit, among others. Is it possible for one broker or salesperson to represent both the seller and the buyer? Yes. This occurs on occasion in real estate transactions, but only after full disclosure to both the buyer and the seller. There is a long-standing California case affecting real estate brokers which addresses this situation:

“A real estate agent has, among other duties, the duty to refrain from dual representation in a sale transaction without full disclosure to both principals and their knowledge and consent. Loughlin v Idora Realty Co. (1968) 259 CA2d 619, 66 Cal Rptr. 747.”

One final comment as to the “severity” of such activities. We often hear violations of the Yacht and Ship Brokers Act (and regulations) described as “technical violations.” While there is no category of “technical” violations, as opposed to others, we view activities which might constitute a breach of fiduciary duty as substantive in nature, certainly more severe than errors or omissions on listing agreements. There is a lasting theorem in American jurisprudence that states, “Implied in all contracts is the concept of good faith and fair dealing.” Misrepresentation, fraud and nondisclosure are acts working in opposition to this theorem and can easily become the basis for action against a broker’s or salesman’s license.

2. RENEWALS AND REINSTATEMENTS

The Department would like to remind all licensees that in order to properly renew your license, the renewal application and appropriate fees must be filed with the Department prior to the expiration date of your license pursuant to Section 724 (a) of the Harbors and Navigation Code, which states:

724. License renewal, expiration, reinstatement, and fees. (a) *An application on the form prescribed by the department for the renewal of a broker or salesman license shall be filed with the department prior to the last day of the period for which a previous license was issued, accompanied by the applicable renewal fee.*

If the renewal application and fees are not provided to the Department prior to the expiration date of your license, your license shall expire and must be returned to the Department pursuant to Section 724(b) of the Harbors and Navigation Code, which states:

724. License renewal, expiration, reinstatement, and fees. (b)
Every license not renewed in accordance with subdivision (a) shall expire at midnight of the last day of the period for which it was issued and shall immediately be returned to the department. The license may thereafter be reinstated only upon the filing of an application therefor, accompanied by the payment of the renewal fee required by this article, together with a penalty equal to 50 percent of the renewal fee. No examination shall be required for the reinstatement of a license which has expired solely for nonpayment of the renewal fee as required by this subdivision, subject to Section 726.

As a courtesy, the Department will continue to attach a renewal form to all licenses issued. The Department recommends that you keep the renewal form in a safe place and use it when renewing your license. In addition, the Department recommends renewing your license within thirty business days from the date of expiration. This will allow both the fees and application to be processed prior to your license expiring.

Listed below is the renewal and reinstatement fee schedule pursuant to Sections 724(b) and 736(b)(d)(f) of the Harbors and Navigation Code:

Salesperson	
Renewal	\$50.00
Reinstatement	\$75.00
Broker License	
Renewal	\$75.00
Reinstatement	\$112.50
Branch License	
Renewal	\$25.00
Reinstatement	\$37.50

If you have lost or misplaced the renewal form, please call Debbie Durant at (916) 263-8197 or Darla Yohner at (916) 263-8196.

3. MARINE ADVERTISEMENTS

Recently, several brokers requested the Department provide our legal position on whether California marinas are allowed to grant “in-house” brokers (those who lease property from a specific marina) the exclusive right to advertise their brokered vessels in the marinas.

As stated earlier, the Department does not provide legal advice to Yacht and Ship Brokers, or others having issue with local agencies which receive funding from the Department of Boating and Waterways for the construction of marinas or other boating facilities.

However, we would be responsive to issues raised by Yacht Brokers or others as they relate to violations of the contract provisions, but restrictions on the sale of vessels within a harbor, is not one of them.

There may or may not be an actionable issue here, depending on the local harbor rules, regulations or language in the berthing agreement, rental agreement or permit conditions imposed on the slip renter. However, these issues are not within the purview of the Department.

We do not become involved in matters arising between private marina operators and marina occupants.

4. **EXAMINATIONS**

The Department believes the applicant's conduct during an examination should not subvert or attempt to subvert the examination or administration of the examination. If the Department finds that the applicant has violated the security of the examination materials or is communicating with any other examinee during the administration of the examination, the applicant will immediately be disqualified from the examination.

In addition, if the Department finds that a licensee has compromised the examination process, the Director of the Department of Boating and Waterways may call a hearing pursuant to Section 720, of the Harbors and Navigation Code, which states:

720. Proof concerning applicant's reputation. *The department may require such other proof as it may deem advisable concerning the honesty, truthfulness, and good reputation of the applicant for a broker's license or of the officers of any corporation making such application before the issuance of a broker's license. For this purpose, the director may call a hearing in accordance with the provisions of this article, and at the request of the applicant shall call such a hearing.*

PLEASE DISCUSS THIS INFORMATION WITH YOUR STAFF. As always, if you have any questions regarding this information, you may contact either Dave Trillo at (916) 263-8194 or Jana Clarke at (916) 263-8195