

## A DOC Complaint — Why Fight It?

### Practice Pointers

Who do you talk to if you receive an enforcement letter from the DOC?

1. Your broker.
2. An experienced attorney who practices in this field of law.
3. An ethics advisor knowledgeable about the Code of Conduct.
4. Your E&O insurance representative.

by Steven J. Lodge

With all the frenzy of recent Department of Commerce enforcement activity spectators may find themselves wondering, if the offense is so technical in nature and the fine is only a few thousand dollars, why not just pay it and forget it? Why fight it, when the cost of fighting is so high – and isn't the deck stacked against the licensee?

It may be that paying the fine is right for you. But you'd better give it some thought first. Here are some considerations that may influence the decision.

### History of Offenses Costs More

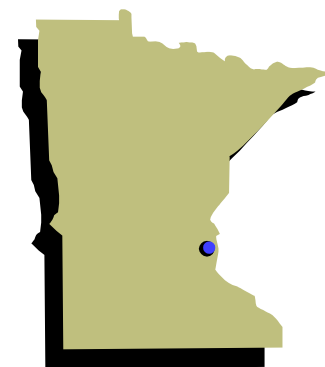
Even if this violation and the penalty is your first, admitting guilt and accepting the Consent Order penalty becomes your "history" of offenses and will be considered in the event another charge, whether related or not, is brought against you. That means the next time you are accused, the penalty the DOC wants from you may be more, and eventually if enough investigations are brought, you may lose your license. The "convenience" admission may seem cost effective now, but its ripple effect may be drastic, and it is not reversible.

### Other Relevant Governing Authorities

- a. If the alleged conduct constitutes not only a violation of the relevant licensing laws but also, for example, the **Real Estate Settlement Procedures Act (RESPA)**, then the DOC is not the only governing authority that could impose its authority upon you. The Department of Housing and Urban Development (HUD) has concurrent and independent power to investigate and impose separate civil and criminal fines, and unless the proposed resolution also constitutes a settlement with HUD, admitting the alleged conduct could also lay the foundation for an easy HUD action and more fines.
- b. A person who violates any provision of Minn.Stat. 82.01 et seq., (the real estate licensee statute) or any rule or order of the commerce commissioner, is guilty of a *gross misdemeanor*. Minn.Stat. 82.40. That means the potential for hundreds of dollars in fines and up to a year in jail. RESPA violations carry separate federal criminal penalties. Statutes governing other licenses and/or regulated activity may apply as well, and they commonly carry similar criminal responsibility for violation. The DOC action is *civil* in nature, so it doesn't prevent criminal prosecution. If in the proposed consent order you are accused of a violation and you admit guilt, then although rare, if you are charged criminally then you have essentially sealed your fate.

### Ethics Complaints

Irrespective of the specific violation alleged by the DOC, violations of the law and of your fiduciary duties and failure to act in your clients' best interests are solid violations of Articles 1, 2, 12, of the National Association of Realtors Code of Ethics. Your admission of guilt in a Consent Order may also effectively constitute an admission of an ethics violation, which can also be accompanied by fines and other penalties.



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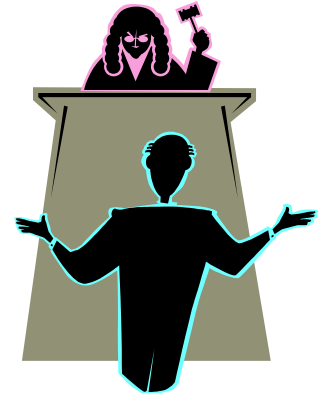
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## **Civil Actions by Clients**

The DOC and HUD are not the only potential complainants, and the fines you pay are not likely to be used to compensate your aggrieved clients. Private parties may also bring civil actions based upon your actions, and where violations of RESPA have resulted in damages and in some cases they may bring private actions for license violations. RESPA violations may result not only in an award of actual damages to private parties, but also treble damages *and* attorney fees. And if a client successfully argues that your conduct violated a fiduciary duty owed to the client, one of the possible remedies is to force you to pay back your commission. There is presently a class action lawsuit against Coldwell Banker Burnett that is alleging violations of fiduciary duties to their clients when Coldwell Banker Burnett agents referred their clients to Coldwell Banker Burnetts' title company.

Don't forget, your admission of guilt may reach further than just one incident. If the conduct in question was a pattern, then each and every client who you represented while engaging in the conduct may have the same claims, complaints and recourse.



## **E&O Insurance Impact**

Even if your Errors and Omissions insurance covers private claims against you, it probably won't cover penalties and fines due to license violations, and even more surely won't cover criminal penalties. Even if it does cover private liability for damages, the claims will damage your insurability and drive your rates up.

## **Broker Supervisory Liability/Vicarious Liability / Agent Employability**

Your broker is statutorily responsible for supervising your conduct as a real estate licensee, and your representation agreements with clients are on behalf of your broker. Your broker's liability may be your liability too. And his/her defense expenses may be yours too. And of course, if your practice is detrimental to your broker's business, you may lose your affiliation.

## **Reputation/Consumer Reporting Forums**

Your professional reputation is key to your continued success. It doesn't take too many disgruntled and outspoken clients to damage your reputation even if you did nothing wrong. Add a public admission of guilt (it will be on the DOC website) and an adverse action against your license and those customer complaints only get louder and less defensible. And with today's easy internet-based forums, e-mail and easy access to databases like the Better Business Bureau and the DOC an admission of guilt can resonate.

Obviously it's possible that you could indeed simply pay the DOC fine and go about your career without any further ramifications. And certainly careers aren't usually ended by an isolated disgruntled client – even if that client has a legitimate complaint. But if the allegations are substantial, and if they may resonate, then it is worth serious consideration before signing an admission of guilt.

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### **NOTICE**

The foregoing is not intended to constitute legal advice for any specific circumstance, but is intended to reflect broadly applicable principles relevant to a typical situation. Each set of facts and each contract is, or can be unique; the unique facts and specific language of the contract may require a different legal analysis and may result in a different outcome. Before proceeding in reliance upon this or any other general description of law, consult with an attorney competent in the field of practice relevant to your situation.

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