

*Fourth Edition, ~~2012~~*

*With the Newest SEC Laws*

# GENE TROWBRIDGE

**Commercial Real Estate's Crowdfunding Expert**

**It's a Whole  
New Business!**

*The how-to bible of syndicated investment real estate*



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**Lake Forest, California**

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## ABOUT THE AUTHOR

**Gene Trowbridge, ESQ, CCIM**

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Gene has been in the commercial and investment real estate business continuously since 1972 and in the legal profession since 1996. As the senior partner in Trowbridge Law Group LLP, he provides legal and real estate consulting services to individuals and entities, concentrating on the syndication of commercial and investment real estate. He is a member of the California Bar. He has authored several live seminars on group ownership, exchanges, and taxation that have been delivered nationally. His articles have been published in various national real estate publications. He is a frequent speaker on the subject of real estate group ownership at local, state, and national real estate conventions.

Importantly, he has hands-on experience in the syndication business, having been the sponsor of sixteen investment groups and by raising equity from investors through registered representatives in the broker-dealer community. He was responsible for the organization of these investment groups, the acquisition, management, and disposition of the real estate, and the communications with the investors.

Awarded the CCIM (Certified Commercial Investment Member of the CCIM Institute) designation in 1977, Gene continues to serve as a member of the CCIM faculty, as Senior Emeritus. He was awarded the Robert L. Ward *Instructor of the Year Award* from the CCIM Institute and the Victor L. Lyon Distinguished Service Award for his many years of outstanding contribution to the education program of the CCIM Institute.

Gene and Kay have been married for forty-eight years and have two beautiful daughters, Amy and Emily. He enjoys music, traveling (especially to Hawaii), and in the last eleven years has run thirty-seven half-marathons.

Gene invites you to inquire about his consultation and legal services provided by his law firm. He works with real estate professionals throughout the country who are considering entering the group investment business or are already in the business, assisting them with the development and implementation of a strategic plan. Gene offers legal and real estate services to his group investment clients including the formation of the legal entity chosen and the preparation of the private placement memorandum, state and federal securities notices, and all related documents. Complete information on the services provided by the law firm can be found by visiting [www.trowbridgelawgroup.com](http://www.trowbridgelawgroup.com)

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## FOREWARD TO THE FOURTH EDITION

When I wrote the first edition of *It's a Whole New Business!* I wrote it for the real estate professional who was interested in exploring the opportunities available through the formation of investment groups to acquire, operate, and dispose of investment real estate. I found that the book also appealed to those real estate professionals who have completed several group investments and wanted to expand their activity in the group investment industry.

In the second edition, I expanded certain sections that, through discussions with readers and through interactions with people who attended my workshops, I came to realize were of more interest to my readers than I had originally thought. Through my work in writing private placement memorandums during this period, I have also identified the areas that need the most attention when working with new or experienced group sponsors.

Since the publication of the first edition, the group investment industry has also had some major events, such as the IRS issuing **Rev. Proc. 2002-22** and the National Association of Securities Dealers (NASD) releasing **NASD Notice to Members 05-18** and the passage of **The JOBS ACT** and various new proclamations from the Securities and Exchange Commission.

Who would have predicted that the tenant-in-common industry would grow to an annual volume some suggest is in excess of \$7 billion and then practically disappear? Now, the SEC reports that the volume in the private placement industry annually exceeds \$1.8 trillion with 90% of that volume coming through Regulation D, Rule 506 offerings.

In this fourth edition, I have greatly expanded the chapter on securities to include information from the **JOBS ACT** and the **change in the accredited investor definition**.

In the group investment industry, people who form groups are called *syndicators* or *sponsors* and the terms are used interchangeably throughout this book.

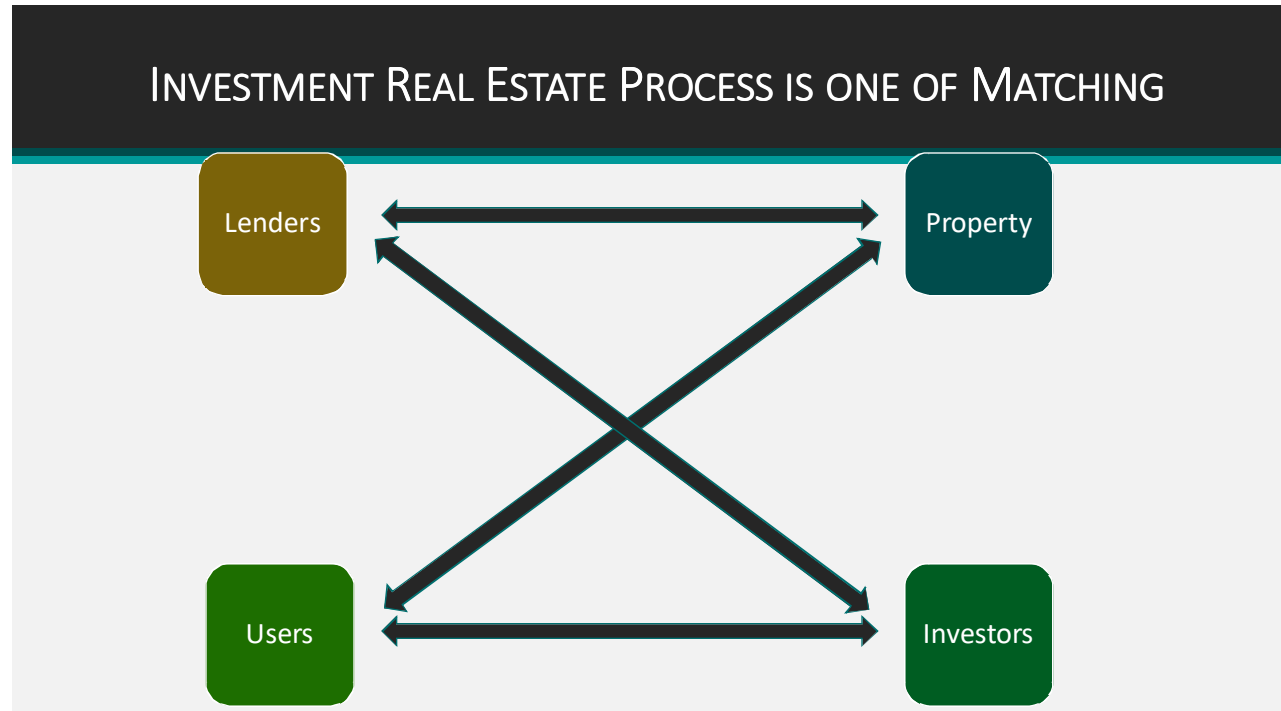
In this book, certain sections of Federal Securities Law and the Internal Revenue Code are included. You will recognize them because the type font will look like this: **IRC Section 1221**.

***TIP: Throughout this book, a TROWBRIDGE IMPORTANT TIP (TIP) will appear in this format. These TIPS add my practical insights to the technical material presented.***



# Chapter One: It's a Whole New Business!

## The Investment Real Estate Process



The investment real estate world is a process where, at any one time, several transactions are waiting to happen.

### **Investors are looking for a property or a property is looking for investors**

At any time, there are investors in the marketplace looking for income-producing properties to purchase. At the same time, there are properties listed for sale in the market that are looking for investors to purchase them.

### **Properties are looking for users or users are looking for a property**

At any time, there are partially or totally vacant investment properties looking for one or more tenants. At the same time, there may be tenants who are looking for space to occupy in partially or totally vacant investment properties.

### **Lenders are looking for properties and properties are looking for lenders**

At any time, there are investors looking for lenders to provide debt so they can take advantage of leverage to purchase or improve investment properties. At the same time there are lenders looking to provide the debt by making loans on income-producing investment properties.



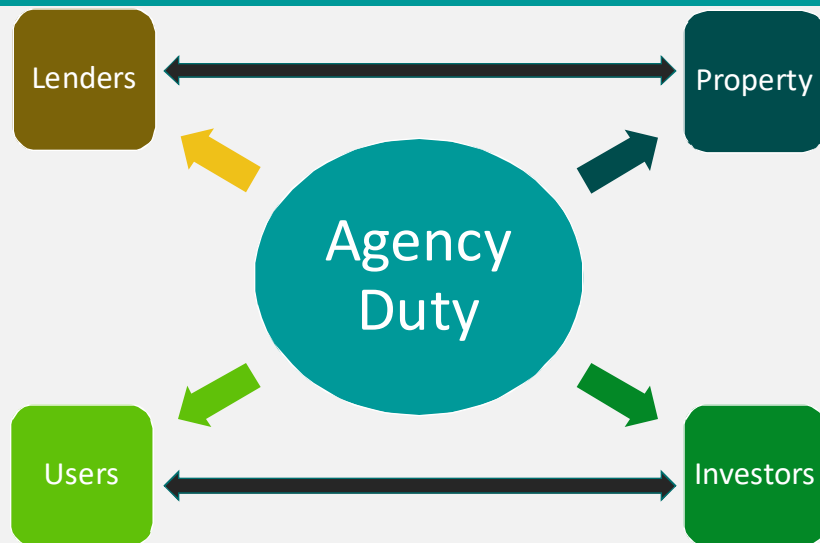
## Description of Different Roles



### ***Deal maker and agent***

The role of a broker, property manager, or lender, in the real estate marketplace, is that of someone who places themselves in the middle of a transaction occurring in the marketplace. By placing themselves in the middle of these transactions, the broker, property manager, or lender can generate commissions or fees. While taking into consideration the needs of the various clients in the transaction, the actions of the broker, property manager, or lender are essentially that of an agent and are governed by the law of agency. In addition, there may be aspects of fiduciary duty arising from the agency relationship.

## YOU HAVE AN AGENCY DUTY



### Agency law as applied to brokers and agents

An *agent* is one who represents another, the *principal*, in dealings with third parties. Representation of a principal by an agent is called an *agency*.

Agency is the relationship that results from the act of one person, the principal, who authorizes another, the agent, to conduct one or more transactions with one or more third persons. The agent has a duty to exercise discretion in effecting the principal's goals and purposes.

In a typical real estate brokerage contract, an agency relationship is developed between the seller or landlord, who are the principals, and the broker, who is the agent. These agency relationships come in what we call *seller representation* and *landlord representation* assignments.

There can also be an agency relationship created between a buyer or tenant, who are the principals, and the broker, who is acting as their agent. These agency relationships come in what are called *buyer representation* and *tenant representation* assignments.

In addition, dual agency issues arise in commercial and investment real estate when a relationship develops between a broker and two parties in the same transaction with different goals such as the landlord and tenant or the seller and buyer.

The broker-principal relationship may be governed by contract law, agency law, and statutory law.

By entering into a brokerage contract, such as a listing agreement, the principal employs the broker as his or her agent to perform services specified in the contract. The broker is bound to act in the relationship in a manner so as to abide by the provisions of contract law.

In addition to the specific provisions of contract law governing the actions of the broker, agency law provisions would apply. When we enter into a contract to buy or sell a product, we are bound by contract law, but it is unlikely that we have entered into any agency relationship with the other party.

When a real estate broker enters into a contract to provide services to a principal, they must perform their contractual duties within the additional umbrella of the full scope of agency law.

Most states have enacted statutes which require an agent in an agency relationship to act in a certain manner toward the principal. Even in a relationship that does not meet the definition of a contract, it is possible the agent will have established an agency relationship which is governed by statutory law.

For example, generally, an agent's right to be paid a commission and to sue for that commission if it is not paid is based on the existence of a written agreement. There can be, however, an agency relationship created between an agent and a principal without a written contract. An agent, therefore, should be aware that one might owe a duty to a principal whether or not the principal owes a commission to the agent.

### **Reciprocal**

The creation of an agency relationship must be reciprocal. The agency relationship can only be created when it is clear the principal intended to bestow upon someone the status of an agent by giving the agent the authority to represent them, *and* the agent, in return, has accepted that authority.

### **Formalities**

Agency relationships require no special formalities. In an agency relationship, there need not be any written agreement and there need not be any obligation to pay the agent any compensation.

**Timing**

Conferring the authority in an agency relationship by the principal can take place prior to the actions taken by the agent, or confirmation of the authority can be ratified after the agent has taken the action.

For example, if a real estate agent representing a landlord simply shows a retail tenant a potential location in a strip center, there is no agency relationship created. The agent owes no duty to the potential tenant. But when the tenant asks the agent for specific information such as traffic count, demographics, and competition and the agents provide the information, an agency relationship is likely created. From that point on, the agent has a duty to perform the required agency duties toward the tenant.

***Ostensible agency***

An ostensible agency may be found to exist to protect third parties who are unaware of the contractual or agency relationships of others. An agency relationship can be found to be created whenever the principal intentionally or unintentionally causes a third party to *believe* a real estate agent is being used as an agent for the principal.

**Scope**

The precise scope of an agent's authority in the agency relationship turns on the specific terms of the contract with the principal.

In addition, agents have incidental authority to do everything necessary, proper, and needed in the ordinary course of business to complete the purpose of the agency.

However, there are two limits placed on the powers granted to an agent:

- The agent has no power to execute contracts for the principal.  
Without the principal's express authorization, an agent has no authority to execute a contract on behalf of the principal. An agent's authority to sign contracts for the principal must itself be in writing.
- There are limits on an agent's ability to handle funds.  
The real estate law and regulations of most states severely restrict the manner in which agents may handle funds belonging to their principals. Generally, these funds must be placed in a neutral escrow or trust account.

### **A list of agency duties in a deal-making capacity**

Without going into a complete discussion of agency duties, which is more appropriate in a real estate licensing course, it is important to be reminded of some of the basic duties that occur in an agency relationship. As you read the list, think if you could foresee any conflicts that might arise if you were acting as an agent for a buyer or seller while at the same time operating as the group sponsor of a group that owns a property listed for sale or is in the market to purchase a property.

- Duty of loyalty and good faith
- Duty to be honest and truthful
- Duty to investigate and disclose material facts which might affect the principal's decision
- Duty to disclose the relationship with other party
- Duty to disclose intent to purchase
- Duty to disclose all offers
- Duty of care and diligence
- Duty to disclose profits

### **Listing agent acts as an intended purchaser**

The agency relationship between the broker and principal requires the broker to disclose any material facts that would affect the principal's decision to list the property or sell the property. The broker must not use the agency relationship to obtain any advantage over the principal in any transaction arising out of the agency relationship. The broker must disclose if the broker intends to purchase the property from the principal.

### **Buyer's broker has an interest in a property**

Similarly, a broker representing the buyer must disclose the nature and extent of that broker's direct or indirect ownership of the property, including the broker's membership in a group that has an ownership interest in the property being offered to the buyer. The broker must not use the agency relationship to obtain any advantage over the principal in any transaction arising out of the agency relationship.

### **An agency relationship may also include a fiduciary relationship**

When one person simply employs another person and directs, supervises, or approves the actions of the other person in an agency relationship, it is unlikely that a fiduciary relationship is established. However, when the person employed offers to perform their activity under a relationship of special trust and special confidence involving the exercise of professional expertise and discretion, and the client accepts the offer of these services, a fiduciary duty is established.



## Commercial real estate's crowdfunding expert

**Gene Trowbridge, Esq., CCIM**, is the author of the Fourth Edition of *It's a Whole New Business!* It remains the definitive and essential text on creating and sponsoring real estate investment groups. In this significant 2021 update, Gene includes the latest Securities & Exchange Commission laws and statics. And he leads you through the legalities and techniques of funding commercial real estate projects through crowdsourcing.

Since the earliest drafts of what became the JOBS Act of 2012, through the SEC's long rules process, to today, Gene has been at the forefront of educating and advising group sponsors and investors. The U.S. crowdfunding phenomenon in commercial real estate is estimated by some to reach \$869 *billion* by 2027. This book will help you benefit from the anticipated dramatic growth.

Gene Trowbridge works as an attorney for and consultant to individuals and investment collectives engaged in group sponsorships. He also conducts educational workshops on the subject and contributes to industry publications. In addition to his syndication law practice, he was a distinguished and highly honored member of the CCIM Institute faculty for years.

**For further information and a current list of special events,  
go to [TrowbridgeLawGroup.com](http://TrowbridgeLawGroup.com)**



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