

COMMISSION COMMENT

Winter | 2017

Fulfilling Your Obligations to your Customers and Clients as an Agent

The Commission often gets questions about what specific obligations an agent has under the law. In some cases these question involve a particular duty or task, and in other cases they come from a broker or real estate company seeking to set up a non-traditional type of business model. There is a long list of things you can't do as a licensee, this is a list of things you must do in a transaction or potential transaction with your clients and customers.

This list is by no means comprehensive in that it does not cover any and all obligations in any and all transactions, but it does cover the broad, general duties under the License Act and Agency Statutes applicable in all or nearly every agency relationship or transaction (we do not cover obligations created by other statutes or federal law, fair housing, lead based paint disclosure, RESPA, etc.). The article also does not cover situation specific requirements such as an agent disclosing licensee status in advertising their own property for sale, nor is it intended to be a detailed description of how each duty is complied with, but is more of a checklist to remind licensees of their various duties as agents under the law. **Please Note: Simply completing every task on this list will not ensure that a licensee has fulfilled all of his or her obligations to their client(s) under the law because there may be additional duties that are specific to the transaction or created under other laws.**

I. Obligations Under the Agency Statutes

1. Fiduciary Duty—First and foremost, **put your client's interest in front of your own with regards to the real estate transaction and the services provided.** This requirement comes from Neb. Rev. Stat. §76-2417(1)(c) (seller's or landlords agent) and §76-2418(1)(c) (buyer's or tenants agent): "To promote the interests of the client with the utmost good faith, loyalty, and fidelity."

Specific subsections of the agency statutes on fiduciary duty and agent obligations include:

- a) **Seeking a price and terms that are acceptable to the client;**
- b) **Presenting all written offers in a timely manner;**
- c) **Disclosing to the Client all adverse material facts known or readily apparent to the agent and not known to the client;**
- d) **Advising the client to obtain expert advice on matters beyond the expertise of the agent**

2. Agency Disclosure Form—Present and have any and all **unrepresented clients or customer sign the agency disclosure form at the first practicable opportunity** after first substantial contact. See Commission policy and Interpretation on First Substantial Contact for further information.

<http://www.nrec.ne.gov/legal/policyinterpretation.html#PI38>

3. Listing Agreements—Agreements for the listing of property for sale or lease for any seller or landlord must be entered into in writing before any listing activity occurs, and include the agent's duties as provided in the agency statutes, specific terms of compensation, and a fixed date of expiration. (Neb. Rev. Stat. §76-2422(1)) *(Continued on page 4)*

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Commission Meeting Schedule

January 18-19	Lincoln
February 15-16	Lincoln
March 15-16	Lincoln
April 19-20	Lincoln
May 24-25	Lincoln
June 21-22	Lincoln

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HOLIDAY MESSAGE FROM COMMISSION CHAIR JOHN GALE

On behalf of the Real Estate Commission and the Commission staff, we want to wish all of you a very Merry Christmas, Happy Hanukah, and a Happy New Year!

2017 has been a positive year for agents and home builders in Nebraska. Home sales in many communities have been on a record pace through the summer and didn't slow down much in the fall. Market valuations have improved, interest rates have remained attractive, and public confidence in home buying has been strong.

As Chair of the Commission, I remain committed to key long-term goals for the Nebraska Real Estate Commission, including: 1) Sound and sensible personal and educational standards for applicants seeking to be licensed; 2) Treating licensees subject to complaint with high standards of fairness and justice; 3) Promoting and supporting legislation that advances high professional standards; and 4) Maintaining high public trust and confidence in the professionalism of the industry.

The Commission has made good progress with its 2017-18 Objectives. The new real estate licensee database project is intended to go live in the spring of 2018; it has been a challenging project for our staff and we will all be happy when it is launched! Complaints continue to be processed within one year with few exceptions. The "teams" bill, LB 678, was adopted by the 2016 legislature and the Commission has completed and adopted Rules and Regulations pursuant to that law. The Commission and our staff are striving to provide education and materials relating to new advertising, team and agency disclosure rules. The effectiveness of pre-license education and exam passing rates is under close scrutiny by the Commission and staff.

Director Greg Lemon, Deputy for Education Alane Roubal, Deputy for Enforcement Duran Cell, and Deputy for Licensing Monica Rut have been providing excellent support for the Commission during this busy year. The quality of our staff and the level of experience and distinction of our Commissioners contribute to a positive working relationship and solid progress.

That trend of excellence this year continued when Governor Ricketts appointed Darlene Starman of Lincoln as the new first congressional district broker on the Commission, replacing Drew Stange, a broker for NAI/FMA Realty of Lincoln, whose term expired. Darlene is an associate broker for Woods Bros. Realty in Lincoln. Many thanks to Drew, and a warm welcome to Darlene!

On behalf of the Commissioners and the Commission staff, I send our best wishes to you and your families for a happy holiday season and a very successful 2018. We have appreciated the cooperation and input of the Nebraska REALTORS on various goals and policy issues this year, and we know that cooperation will continue in 2018 as new policy issues evolve.



Commission Chair John Gale

Sincerely,
John A. Gale
Chair, Nebraska Real Estate Commission

DIRECTOR'S DESK

License Law Minutes

The Commission is constantly looking at ways to better protect the public and promote compliance with the License Act by improving communications with licensees. In November of this year we sent out the first Commission created video, a "License Law Minute" regarding going behind the listing, or approaching a seller who already has an exclusive listing agreement on their property.



Director Greg Lemon

I realize our production values and to an even greater extent my personal presentation skills may not be at Hollywood, or even local broadcasting service, levels, but we will still be emailing these out on a regular basis, and I hope you take the time to take a look at these minutes. I am going to try to keep them in the two minute range, so they should be a quick and easily digestible view. We will email all licensees and education providers each time a new video becomes available.

If you have any ideas for new videos please do not hesitate to contact me, I already have a pretty good list, but I am sure there are more good ideas out there.

The videos can be viewed by clicking on the appropriate tab on the lower left corner of the Commission's homepage.

Happy Holidays

We have had an eventful year at the Commission, with the new team and advertising rules going into place, development of a new database which should be up next year, as well as smaller changes like the new license law minutes discussed above. Through all these changes overall complaints are down, and on that positive note, Happy Holidays to all reading this newsletter from everyone here at the Commission.

Greg Lemon, Director
Nebraska Real Estate Commission



MEET THE REAL ESTATE COMMISSION STAFF

The Real Estate Commission Staff is here to serve the public and the licensee population. It is our goal to be helpful and forthright in a courteous and professional manner. We hope that when you contact our office, you always receive useful, accurate information and/or are referred to the proper authority.

Following is a communication resource to assist you when contacting our office. If the indicated person is unavailable to take your call, please share the purpose for the call and your call will be routed to someone else who can help you.

We take pride in having a skilled staff, if you have comments or suggestions as to how we may better serve you, please contact our office.

COMMUNICATIONS GUIDE

Ask for person indicated if you have questions in the following areas.

Commission Meeting Information . . . *Alane Roubal*
alane.roubal@nebraska.gov

Complaint Procedures *Duran Cell*
duran.cell@nebraska.gov

Continuing Education History or
Inquiries *Tawny Snider*
tawny.snider@nebraska.gov

Curriculum Design (Education &
Instructor Approval) *Alane Roubal*
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Errors and Omissions Insurance
Inquiries *Monica Rut*
monica.rut@nebraska.gov

Financial Officer *Jenny Schabert*
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License Applications Packet
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realestate.commission@nebraska.gov

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Licensing Requirements *Monica Rut*
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New Licenses in Process *Patricia Menousek*
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Transfer of License. *Patricia Menousek*
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II. Obligations Regarding Client Funds:

1. **Place all client or customer funds in the broker trust account, transferred or distribute the funds in the time and manner called for under law and the terms of the conditions of any associated contracts or agreements** (Neb. Rev. Stat. §81-885.21(1)). The trust account may be bypassed if and only if there is a specific agreement to bypass the account in writing signed by all interested parties. If the broker trust account is bypassed funds, coming into a licensee's possession must still be accounted for (see below).
2. **Account for and keep an accurate record of all money coming into the agent's possession belonging to others** (Neb. Rev. Stat. §81885.24(3)).

III. Obligations Related to Transactional Paperwork:

1. **Provide a fixed date of expiration in all listing agreements and provide a copy of such agreement to the principal** (Neb. Rev. Stat. §81-885.24(19)).
2. **Deliver a copy of any completed purchase agreement to both buyer and seller in a reasonable time** (Neb. Rev. Stat. §81-885.24(20)).
3. **Provide to the client at the time an offer is presented and accepted a good faith estimate of closing costs. This estimate must also be provided to the customer if such service is listed as provided by your brokerage on the agency disclosure statement.** (Nebraska Administrative Code T. 299, Chapter 5, Sec. 03.10 (seller-client) and 03.11 (buyer-client)).
4. **Reducing all offers to writing upon when requested by the prospective purchaser.** (Nebraska Administrative Code T. 299, Chapter 5, Sec. 03.18)
5. **Disclose Adverse Material Facts in writing to a buyer at or before the time the purchaser signs an offer to purchase and maintain a copy, signed by the buyer in the transaction file.** (Nebraska Administrative Code T. 299, Chapter 5, Sec. 03.20, applicable to any agent involved in the transaction)
6. **Ensure that a completed seller property disclosure statement is provided to the purchaser before any binding contract is entered into.** (Nebraska Administrative Code T. 299, Chapter 5, Sec. 03.23 (seller's agent) and 03.24 (buyer's agent)).

This may seem like a pretty long list, but if you have some experience you should be able to go through and say to yourself after each item, "yes, we do this every time", if you can't say that, then take this opportunity to fix it. 

Reminder: Keep Your E & O Current

Although the Commission has gone to a two-year license renewal cycle, licensees are still required to renew their errors and omissions insurance annually, you can check the status of your errors and omissions insurance on the licensee portal:

<https://www.nebraska.gov/apps-LicenseePortal/login/auth>

Please note that errors and omissions insurance must be kept current at all times in order to maintain your license on active status, and must be renewed annually.

Licenses Duties Related to the Seller Property Disclosure Statement

The Seller Property Disclosure Statutes (Neb. Rev. Stat. §76-2,120) clearly provide that a licensee must assure that a copy of Seller Property Condition Disclosure Statement (“SPCD”) is provided to the buyer on or before the buyer enters into a contract to purchase the subject property. Title 299 of the Nebraska Real Estate Commission rules and regulations place a positive duty on both the buyer’s and seller’s agents to assure the delivery and receipt of the SPCD.

There has been much discussion and some confusion on what exactly must be done to properly fulfill this requirement. While the disclosure statutes go on to say that a licensee is not required to verify the accuracy or completeness of the statement, this statement must be viewed in conjunction with other requirements in order for an agent to fulfill his or her obligations under the property disclosure and agency statutes.

The Commission has always interpreted requiring the delivery of the SPCD to mean delivery of a properly completed document. While the licensee has no obligation to verify the accuracy of the statements or whether there have been omissions of relevant facts or only partial statements made in comments regarding conditions (“completeness” as referred to in the statute and the paragraph above), the obligation to deliver is essentially meaningless if it does not require the licensee to ensure that a “completed” form is provided, as opposed to a blank or partially blank form with questions left unanswered. The Commission has always interpreted the provision requiring that the purchaser be provided a properly and fully filled out form.


Example 1: Part II, Section D, Question 15, “Have you (seller) made any insurance or manufacturer claims with regard to the real property?” is answered yes, on the comments section of the form the seller states that there was an insurance claim for storm damage to the property. The seller’s agent is not responsible for requesting that the seller provide further information on the claim. However, we would recommend a buyer’s agent, when reviewing the form, note to the buyer that it would be in the buyer’s best interest to inquire further into the storm damage and resolution of the claim.

Example 2: Part II, Section D, Question 15, “Have you (seller) made any insurance or manufacturer claims with regard to the real property?” is left blank.

Seller should be requested to complete the form and answer the question (which of course includes the “Do Not Know” option if they in fact do not know) in order that a completed property seller disclosure form can be delivered to the buyer.

Example 3: Seller refuses to fill out a form, or fill out certain sections of the form. Seller’s agent should inform seller of their obligation to complete the form, if seller still refuses seller should make a note in the transaction file regarding their request and seller’s refusal. Buyer’s agent should note to buyer that there is no form or an incomplete form being presented, request a complete form, and, if a complete form is not provided, note in the transaction file that the request was made. They should also discuss with buyer any specific interest they may have or questions they may want to ask about information not provided.

Example 4: During a showing Seller’s agent notes evidence of past water intrusion in the basement of the subject property. If no water intrusion is noted on the seller disclosure form seller’s agent should inform seller of the matter, and suggest they disclose the intrusion on the SPCD, if seller refuses, seller’s agent is obligated to disclose the evidence of water intrusion as an adverse material fact, by definition a defect that seriously affects the desirability or value of the property and is not reasonably ascertainable or known to a party. Adverse material facts must be disclosed to the buyer in writing, and such disclosure should be signed by the buyer and maintained in the transaction file.

Example 5: Example 4: During a showing Buyer’s agent notes evidence of past water intrusion in the basement of the subject property. Buyer’s agent should attempt to discover further information about the problem through seller’s agent and inform buyer of the problem, discussing possible strategies and options for further negotiation related to or mitigation of the problem. If no water intrusion is noted on the seller disclosure form. Buyer’s agent is obligated to disclose the evidence of water intrusion as an adverse material fact, by definition a defect that seriously affects the desirability or value of the property and is not reasonably ascertainable or known to a party. Adverse material facts must be disclosed to the buyer in writing, and such disclosure should be signed by the buyer and maintained in the transaction file. 

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