



COMMISSION COMMENT

Summer | 2011

Two-Year License Renewal

As reported in the last issue of the *Commission Comment*, LB23, passed this year by the Legislature, will place renewals on a two year cycle to coincide with the licensee's continuing education period.

This year will be a phase in year for the two year renewal, and every licensee will be mailed a renewal packet this year.

Roughly half of the licensees will be required to renew for two years (2012-2013) and half will be required to renew for one year (2012)

Whether you will be required to renew for one year or two years will be determined by the year your continuing education is due. For the renewals we will send out this fall:

- Two year renewals covering the 2012-2013 license years will be required for licensees who have just completed (or waived) their

continuing education requirement for the 2010-2011 period.

- Two year renewals will be required for licensees who first received their license in calendar year 2011.
- One year renewals covering the 2012 license year will be sent to licensees who are required to complete (or waive) their continuing education requirements in 2011-2012. This group will then be required to renew next year, and they will renew for two years, completing the phase in of the two year renewal process.
- Errors and omissions insurance will remain unchanged, it will still be purchased on an annual basis.

Forms will be mailed in September, and will be clearly marked as one year or two year renewals based upon the above criteria.

Two year renewals will simply be double the one year broker or salesperson fee, 2012 fees have not yet been determined.

This process will set everyone's license expiration year to coincide with the year his/her continuing education is due. Renewals will be processed as they have in the past. Another article appearing in this issue will discuss the renewal process in greater detail. We strongly encourage you to read both articles. 

Pocket Cards Eliminated

Near the end of December, when renewals have been processed, the Commission will mail to all (both active and inactive) renewed licensees a receipt for the license fee rather than the familiar pocket card. This receipt will contain the licensee's I.D. number so that it may be referenced whenever that number is needed i.e. continuing education registration, E&O insurance enrollment, etc. It will be credit card sized for ease of storing in your wallet or purse.

Pocket Cards will no longer need to be turned in when transferring a license or going on inactive status.

Commission Meeting Schedule

September 15-16Lincoln
October 27-28Lincoln
December 6-7Lincoln

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The Nebraska Real Estate Commission often solicits articles from outside experts or reprints articles with permission. While we feel that these articles may offer a broader perspective and will be of interest to the reader, it should be remembered that the views expressed are those of the author and not necessarily those of the Commission.

Printed with soy ink

DIRECTOR'S DESK

Additional Hours of Education Required for 2011-2012 and Beyond



Director Greg Lemon

Originally described in the last *Commission Comment* as proposed legislation the Legislature has now passed LB24 and has mandated that licensees who wish to maintain an active license will need to complete 12 hours of continuing education and 6 hours of broker-approved training every two years.

Continuing education periods will remain as they have been i.e. two year intervals starting the January after licensure.

PLEASE NOTE: The requirement for these additional hours will not be enforced on those whose continuing education is due at the end of 2011 but will be required of those with a 2011-2012 continuing education period and thereafter. Continuing education periods will remain as they have been i.e. two year intervals starting the January after licensure.

In the next few weeks brokers will be advised as to how to have their training recognized to meet this requirement. Consult your broker with regard to broker-approved training opportunities **OR** you may substitute continuing education activities for the six hours of broker-approved training (the reverse is not true, however, broker-approved training may NOT replace the twelve hours of mandated continuing education).

Additional information on broker-approved training will be forthcoming in the next several weeks. Please watch our website and future issues of the *Commission Comment* for further details.

Returning Calls and Other Communications From Clients

The Fall, 2010 issue of the *Commission Comment* contained a well received article about the top 13 ways to avoid a disciplinary action. The second item on that list was simply titled "Communicate, Communicate, Communicate". The Real Estate Commission gets many calls from the public regarding potential complaints that begin with the statement "my agent won't call me back". Please remember that although the Real Estate Commission does not have specific standards for returning calls and other communications from clients, all such communications should be returned in a timely manner in order to fulfill your fiduciary duty to your client and act in their best interest.

Many times when a client is unhappy with or questioning something the salesperson or associate broker they are working with is doing, their next step is to call the supervising broker. Brokers must remember that the duty that the licensees' working for them have to their client extends to the supervising broker as well. The supervising broker's duty to communicate is specifically created by their fiduciary duty to the client and also an extension of their duty to supervise, if the client has a question or

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Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

2010-012 – *Lisa Kohles and Dan Brown vs. Beverly Ann Crowell, Salesperson.* Stipulation and Consent Order dated March 17, 2011. License censured; plus an additional six (6) hours of continuing education in “Agency” and “Contracts” to be completed by July 15, 2011. [Violated Neb. Rev. Stat. § 76-2417(1)(b) for failing to exercise reasonable skill and care for the Seller, and, (c) failing to promote the interest of the Seller; for failing to present the Seller’s Counter-Offer to the Buyers in a timely manner; and 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson for violating Neb. Rev. Stat. §§ 76-2417 (1) (b) (c). March 17, 2011

2010-039 – *Sheryll Mowinkel vs. Keith Lewis Brown, Broker.* Stipulation and Consent Order dated March 17, 2011. License censured; plus an additional three (3) hours of continuing education in “Ethics” to be completed by July 15, 2011. [Violated Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson; for using inappropriate profanity towards buyer’s child. March 17, 2011

2011-008 – *Commission vs. Eric Scott Lundstrom, Salesperson.* Stipulation and Consent Order dated March 17, 2011. License suspended for one (1) year, with the first thirty (30) days served on suspension and the eleven (11) month remainder stayed and served on probation; plus an additional nine (9) hours of continuing education in the area of “Agency”, “Disclosures” and “Ethics” to be completed by July 15, 2011. [Violated Neb. Rev. Stat. § 76-2418(1) A licensee representing a buyer as a limited Buyer’s Agent shall have the following duties and obligations: (b) To exercise reasonable skill and care for the client; (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity; for failing to postpone or delay closing on the property when it was discovered that the Warranty Company would not cover the furnace, air-conditioner, and humidifier, and for omitting page three of the furnace company’s inspection report to the Warranty Company; Neb. Rev. Stat. § 76-2421(1) At the earliest practicable opportunity during or following the first substantial contact with a buyer, who has not entered into a written agreement for brokerage services with a designated broker, the licensee who is offering brokerage services to that person shall (a) Provide that person with a written copy of the current brokerage disclosure pamphlet which has been prepared and approved by the commission; and (b) Disclose in writing to that person the types of brokerage relationships the designated broker and affiliated licensees are offering to that person or disclose in writing to that person which party the licensee is representing; for failing to provide an agency disclosure to the buyers at the earliest practicable opportunity during or following the first substantial contact; Neb. Rev. Stat. § 81-885.24(16) Unfair trade practice for a real estate licensee to “violate any provision of sections 76-2401 to 76-2430; specifically violating Neb. Rev. Stat. § 76-2418(1)(b)(c) and 76-2421(1)(a)(b); Neb. Rev. Stat. § 81-885.24(22) Making any substantial misrepresentations; by omitting page three of the furnace company’s inspection report to the Warranty Company; and Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as broker, associate broker, or salesperson; for violating Neb. Rev. Stat. §§ 76-2418(1)(b)(c); 76-2421(1)(a)(b); 81-885.24(16); and 81-885.24(22). March 17, 2011

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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	Monica Rut monica.rut@nebraska.gov
Complaint Procedures	Terry Mayrose terry.mayrose@nebraska.gov
Continuing Education History or Inquiries	Tawny Snider tawny.snider@nebraska.gov
Curriculum Design (Education & Instructor Approval)	Teresa Hoffman teresa.hoffman@nebraska.gov
Errors and Omissions Insurance Inquiries	Teresa Hoffman teresa.hoffman@nebraska.gov
Financial Officer	Rebecca Hallgren rebecca.hallgren@nebraska.gov
License Applications Packet Requests	General Staff realestate.commission@nebraska.gov
License Applications Process	Marilyn Masters marilyn.masters@nebraska.gov
Licensing and Education Requirements	Teresa Hoffman teresa.hoffman@nebraska.gov
New Licenses in Process	Marilyn Masters marilyn.masters@nebraska.gov
Specialized Registrations	Monica Rut monica.rut@nebraska.gov
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IMPORTANT ...

2012 License Renewal

Please review the article on the front page entitled, “TWO-YEAR LICENSE RENEWAL” which explains why some licenses will be renewing for one year while others will be renewing for two years.

As in the past, a renewal will be mailed to every licensee. It is our intention to mail these in September. Your renewal form will be clearly marked indicating the term and the cost of the license. As always your renewal will be mailed to your broker’s main office address, unless you have informed us of your preferred contact address. In that case, the renewal will be mailed to the requested contact address. In order for mail to be deliverable, the Post Office must have the names of all persons receiving mail at that address. **Failure to receive your renewal packet because it was lost in the mail or not personally delivered to you does not relieve you of your obligation to renew your license on time.**

DEADLINES WILL NOT CHANGE!

November 30, 2011, is the deadline for submitting renewal application materials for all active and inactive salespersons and brokers, along with the proper fees and, if needed, proof of continuing education and errors and omissions insurance. The Office is open until 5:00 P.M. (CST). If the renewal is complete and all necessary materials have been submitted, postmarks of November 30, 2011, will be honored. **Postal meter marks will not substitute for postmarks!**

Licenses held on inactive status

must be renewed too.

Renewal forms specific to inactive licenses and renewal instructions will be mailed along with all others and are subject to the same deadlines and fees as described in this article.

INDIVIDUALIZED FORMS

Mailed renewal forms are produced from our database and are individualized to the named licensee. Please take the time to read the supplied information carefully and make any corrections necessary. **Do not attempt to use someone else’s form, the barcode will not accommodate this.** Please take care not to lose your individualized form. If you do lose the mailed renewal, you can download a generic renewal from our website at: www.nrec.ne.gov. **Please be aware that a downloaded form is NOT individualized, therefore, it is very important that you select the correct form for the correct renewal term, supply continuing education if it is due and fill-in the contact information at the top of the form in order to be properly identified.** You can also renew directly on-line by going to www.nrec.ne.gov. Please see the paragraph on this topic later in this article.

INCOMPLETE APPLICATIONS

NO LICENSES WILL BE RENEWED UNTIL THE CORRECT FORM IS RECEIVED, ALL INFORMATION REQUESTED IN THE APPLICATION IS SUPPLIED, THE RENEWAL FEE IN THE CORRECT AMOUNT IS INCLUDED AND THE FORM IS SIGNED BY THE LICENSEE.

There should be no questions left unanswered. If active, make certain you properly address your errors & omissions insurance and continuing education requirements. Make sure your check or credit card information is enclosed, filled out properly, legible, and in the correct amount. **If you are unsure as to how to complete your renewal, we will be happy to answer any questions you may have. INACCURATE OR INCOMPLETE RENEWALS MAY JEOPARDIZE THE TIMELY RENEWAL OF YOUR LICENSE AND COULD RESULT IN THE ASSESSMENT OF LATE FEES.**

LATE RENEWALS

Any salesperson or broker who fails to file an application for renewal of a license and pay the renewal fee by the November 30 date, as provided in the Nebraska Real Estate License Act and Neb. Rev. Stat. § 49-1203, may file a late renewal application with all required information included. Renewals which are late must pay, in addition to the renewal fee, the sum of twenty-five dollars for each month, or portion of month, beginning on December 1, 2011; provided that such late application is filed by 5:00 P.M. (CDT) June 30, 2012.

‘BUNDLING’ OF RENEWAL SUBMISSIONS

Every individual licensee is responsible for the renewal of his or her own license. However, some firms have a practice of holding renewals until they have collected all the renewals of the licensees with the

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License Renewals (Cont'd)

firm and then submitting them to the Commission all together. There are two general approaches to this 'bundling' practice. One, all renewals for the firm are collected, with individual checks attached to each renewal, and then all renewals for the firm are sent, under one cover, to our Office. Two, all renewals for the firm are collected with the firm writing one check to cover the total amount needed to renew all licensees in the 'bundle' and then they are sent, under one cover, to our Office. Both practices can cause situations to occur where late penalty fees can accrue, if the 'bundled' renewals are not sent considerably early, to allow for the review and processing to take place prior to the renewal deadline.

In the first scenario, the licensee may have turned his/her renewal and check into the firm a month or more in advance. The 'bundle' arrives at the Commission Office a day or two before the deadline. In processing, it is found that questions have not been answered; the form is unsigned; proof of continuing education or errors and omissions insurance is needed; and/or an individual licensee's check is not correct. The individual licensee will owe a late penalty fee if the correction cannot be made prior to the renewal deadline.

In the second scenario, the licensee had turned his/her check and form into the firm a month or more in advance and the 'bundle' with one check arrives at our Office on or close to the deadline. Again, the review process finds that an individual application, or more than one, is incomplete or proof of continuing education or errors and omissions insurance is needed. This time, however, if the correction cannot be made

by the deadline, all renewal applications covered by the single check are late and the late penalty fee accrues to each and every renewal application in the bundle. If the 'bundling' option is used, please be sure to mail early!

RENEW EARLY!

The processing of renewal applications, as the volume of renewals received increases near the deadline, can be as long as a week to ten days. This being the case, the return of the individual application or 'bundled' applications, by mail, in and of itself, will cause late penalties to occur. Therefore, we encourage all licensees to mail renewals early and not wait until the last minute.

Opportunities TO RENEW
On-line At
www.nrec.ne.gov

We hope that you have seen the continuing redesign of our website and have acquainted yourself with the tremendous amount of material available on it. We are seeking to make it more user-friendly and to bring you greater opportunities in this medium. While everyone will be mailed a renewal in the traditional fashion, the opportunity to submit a renewal on-line is also available to you. **Should you elect to renew on-line please remember that the same deadlines apply to on-line renewals. Please also remember that you CANNOT fill out on-line renewals for anyone but yourself. If multiple licensees use the same computer to renew their license on-line, they must exit the on-line renewal page completely and re-enter using their own individual user name and password. Once you enter this page, your identification**

is automatically supplied on the form(s) any electronic signature besides your own will invalidate the renewal form. It is recommended that you keep a copy of the submission page for your records.

CREDIT CARD PAYMENTS

We can accept Discover, Visa and MasterCard to pay fees associated with the renewal of licenses. Debit cards will NOT be accepted. Please review forms and supply the indicated information when opting for the credit card method of payment.

REMEMBER: DO NOT COMBINE FEES

LICENSE RENEWAL FEES CANNOT BE COMBINED WITH TRANSFER FEES OR EXAMINATION FEES. THESE ARE SEPARATE PROCESSES. PLEASE SEND SUCH REQUESTS AND THE APPROPRIATE FEE UNDER SEPARATE COVER.

INSUFFICIENT FUNDS

ANY PAYMENT RETURNED BY A FINANCIAL INSTITUTION WILL BE SUBJECT TO A \$30 PROCESSING FEE. IT SHOULD ALSO BE POINTED OUT THAT THE LICENSE ACT PROVIDES THAT THE ISSUANCE OF AN INSUFFICIENT FUNDS CHECK MAY BE GROUNDS FOR DENIAL OR REVOCATION OF A LICENSE. YOUR RENEWAL WILL NOT BE PROCESSED UNTIL YOUR CHECK OR PAYMENT HAS CLEARED. 

Use of Digital Signatures and Electronic Documents in Real Estate Practice

The Commission is asked on a regular basis about the usage and enforceability of electronic signatures and documents in real estate transactions. While the Commission embraces change and recognizes the steady onward march of technology in our daily lives and business dealings, the mission of the Commission is to protect the public and provide guidance to licensees in their practice. This mission is best served by promoting policies and practices that lend themselves to certainty and are not subject to interpretation.

Filings with the Commission

The Commission considers your Commission supplied user-id and password to be your electronic signature for purposes of online filing of applications and renewals and other documents with the Commission. Documents signed via the DocuSign system are also acceptable to the Commission. While the Commission desires a high level of security, the risk of someone wanting to pay a licensee's renewal or file their continuing education for them are not extremely high, so we feel the level of certainty and security matches the activity. The Commission also accepts facsimile submission of most documents and filings, as well as e-mail attachments.

Agency Disclosures

The Commission has allowed the agency disclosure pamphlet to be presented and accepted electronically, in conjunction with the use of the virtual office website ("VOW"), for some time. A web based or other automatic system should record the date and time the disclosure pam-

phlet was presented, the name of the person to whom it was presented, and an indication that the person to whom it was presented acknowledged receipt or viewing of it. The information must be available to be printed out and placed in your transaction file until your trust account examination is conducted and then converted to non-writable electronic media as provided in the Commission's guidelines for storage of trust account records as outlined in the Summer, 1998 issue of the *Commission Comment* (available online at the Commission's website).

Contracts

It is the Commission's opinion that Nebraska statutory law gives electronic signatures and contracts the same legal force as manual signatures and paper contracts, if certain conditions are satisfied. It is important to note, however, that while the Commission may make recommendations for the proper use of electronic documents and signatures by licensees, the courts have the ultimate say on whether electronic documents and signatures used in listing agreements and real estate contracts are legally valid and enforceable.

Two state laws are of major significance regarding whether real estate contracts need to be in writing: (1) the Statute of Frauds and (2) the Uniform Electronic Transactions Act.

(1) Statute of Frauds. Under the Statute of Frauds, a real estate contract is "void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the . . . sale is to be made." Neb. Rev. Stat. § 36-105.

The Statute of Frauds has been in effect in various forms for centuries. The full and more appropriately descriptive name is "An Act to Prevent Frauds and Perjuries," as it was titled when first passed by English parliament in 1677. The legal principles behind the Statute of Frauds were adopted, in one form or another, by most jurisdictions in the United States including Nebraska.

(2) Uniform Electronic Transactions Act. In the year 2000, Nebraska adopted the Uniform Electronic Transactions Act ("UETA"), which provides:

(1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(3) If a law requires a record to be in writing, an electronic record satisfies the law.

(4) If a law requires a signature, an electronic signature satisfies the law. Neb. Rev. Stat. § 86-634.

It should be noted that UETA is written very broadly, so as not to tie the act to any particular technology. For example, "electronic signature" is defined as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." While there are advantages and logical reasons to have this broad definition, the act does not require any particular degree of security (encryption, identity verification, etc.) in the electronic signature or document, nor

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Use of Digital Signatures ... (Cont'd)

does it define what technologies may or may not be acceptable or what exactly does or does not constitute a valid electronic signature

UETA also has provisions about consent to use electronic signatures and documents in a transaction. UETA only applies to transactions where the parties have agreed to conduct the transaction by electronic means, but an agreement to conduct the transaction via electronic means is determined by surrounding circumstances. Courts in other states have construed this fairly liberally and the simple act of receiving and replying to e-mails has been considered to be an agreement to conduct a transaction by electronic means.

At this point it could arguably be said UETA provides that electronic signatures and electronic documents are as good as manual signatures and paper documents in a real estate transaction. However, the Commission is charged with the mission of regulating real estate licensees and protecting the public by promoting sound real estate practices aimed at providing certainty and avoiding potential litigation in real estate transactions.

While there have been court cases that have upheld e-mail modifications or even e-mail offer or acceptance of real estate contracts, there have also been cases that say the contrary. In an unpublished opinion, the Nebraska Court of Appeals held the parties were bound to the terms of an oral purchase agreement for an interest in real estate, because according to the court, the e-mail correspondence between the parties memorialized the terms of the agreement and satisfied the Statute of Frauds. See

Berlin v. Murray, 2008 Neb. App. LEXIS 95 (Neb. App. 2008). Nevertheless, the discovery and litigation process if an e-mail or electronic transaction comes into dispute can be very expensive and time consuming, and may involve lengthy discovery requests involving data stored on hard drives and servers, as well as requests that electronic media not be altered or overwritten during the course of the litigation.

Ink and Paper Documents and Signature, Tried and True

The Commission recommends that paper documents and manual signatures be used for real estate contracts. It is sound practice to follow up on any verbal agreements or e-mail, text, etc. with a written, signed and dated document as soon as possible to avoid any uncertainty or ambiguity. Paper documents and ink signatures are the tried and true procedure, and their use lends a high degree of certainty to properly drafted and executed transactions.

Electronic Signatures and Documents, the Brave New World

The Nebraska Real Estate Commission cannot state with certainty what does or does not constitute a legally binding contract executed by electronic means. But it is certainly no stretch of the imagination to assign a certain level or hierarchy to the various types of electronic signatures and documents that may be used.

In general, the greater degree to which the technology used uniquely attributes or ties the document to the person purporting to sign it the better. A digitally recorded manual signature or endorsement accomplished by a protected password or pin num-

ber known only to the signer is better than a simple typed name on the document, or attributing the document to the purported signer solely because of the email address or ownership of the device (cell phone, computer etc.) it came from.

Similarly the digital contract itself has a higher degree of security and enforceability if it is digitally encrypted or otherwise locked from editing at the time of signing, or stored and safeguarded at a third party site with proper safeguards against tampering and chain of custody records and procedures versus simply created and stored in an editable text format.

In general, this analysis would put informal communications like e-mails and text messages at the bottom of the enforceability (or perhaps more appropriately "disputeability") hierarchy, documents which are created using an electronically recorded manual signature or a protected password digitally encrypted or otherwise created and stored in a non-editable format safeguarded against editing or alteration in some way would be at the top end of the enforceability hierarchy.

Electronic signatures and documents can be valid and enforceable under current law, and we acknowledge that systems procedures can be crafted to make such electronic documents more secure and verifiable than a paper contract, but at this time we recommend that licensees proceed with caution in this area and consult an attorney before relying on electronic media for real estate contracts.

We also recognize that large institutional clients who have reviewed and clearly indicated approval of the use of electronic signatures and doc-

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Use of Digital Signatures ... (Cont'd)

uments, such as HUD’s approval and use of the DocuSign system for real estate transactions, would likely be an appropriate use of electronic signatures and documents in real estate transactions for those particular clients.

Listing Agreements

Listing agreements also fall under the statute of frauds (Neb. Rev. Stat. § 36-107). For the reasons stated above regarding contracts for the sale of land, the Commission also recommends that listing agreements be executed and signed on paper, or that you consult an attorney about the appropriate technology to be used if entering into listing agreements by electronic means. 

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Director’s Desk (Cont’d)

issue concerning one of the broker’s affiliated licensees that they want to discuss, how can they broker properly supervise the affiliated licensee if they ignore the issue, or do not to hear both sides of it?

Greg Lemon, Director
Nebraska Real Estate Commission

New Law Allows Interest Bearing Trust Accounts

LB347, passed by the legislature this year and effective August 27, 2011, allows designated brokers to use interest bearing trust accounts as long as the interest accrues to a non-profit organization. Brokers desiring to open an interest bearing trust account must designate the account as such on their “Consent to Examine Trust Account Form”. If Broker’s wish to change an existing account to an interest bearing account they will need to fill out the revised form and designate that the account will be interest bearing. The form is available on our website at www.nrec.ne.gov

A revised Trust Account Manual will be sent to all designated brokers about the same time as publication of this issue of the Commission Comment providing further detail on the requirements for interest bearing trust accounts.

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Disciplinary Actions (Cont’d)

2010-019 – *Mary A. Redman vs. Sheila Rae Hulme, Salesperson.* Stipulation and Consent Order dated April 21, 2011. License censured; plus an additional six (6) hours of continuing education in “Agency” and “License Law” to be completed by August 19, 2011; and pay a civil fine of \$500.00 on or before May 21, 2011. [Violated Neb. Rev. Stat. § 81-885.24(11) Placing a sign on any property offering it for sale or rent without the written consent of the owner or his or her authorized agent; Neb. Rev. Stat. § 81-885.24(12) Offering real estate for sale or lease without the knowledge and consent of the owner or his or her authorized agent or on terms other than those authorized by the owner or his or her authorized agent; and Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to

act as a broker, associate broker, or salesperson; for violating Neb. Rev. Stat. § 81-885.24(11) and (12). April 21, 2011

2011-007 – *Commission vs. David Joseph Egan, Broker.* Stipulation and Consent Order dated April 21, 2011. License censured; plus an additional six (6) hours of continuing education in “Contracts” and “Ethics” to be completed by August 19, 2011. [Violated Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson; for having the sellers sign, on April 15, 2009, the Offer to Purchase dated March 27, 2009, despite the fact that the offer had already expired on its own terms on March 29, 2009; and, for making inappropriate and demeaning comments to one of the sellers on April 14, 2009, and on May 29, 2009.

April 21, 2011

Seller Property Disclosure Statement – Duties and Responsibilities of Licensees

The Commission has recently received many questions regarding a licensee’s responsibilities regarding the Seller Property Disclosure Statement (“SPCD”). The following article is an excerpt with minor editorial revisions from the an article written for the Summer 2000 Commission Comment, shortly after an Attorney General’s Opinion requested by the Commission had been requested on the subject.

The Attorney General has issued an opinion on the requirements of the real estate licensee with regard to the SPCD Statement. A copy of the full opinion can be obtained at the Attorney General’s website: <http://www.ago.ne.gov/agopinions/> by searching on the opinion number “024”. The Attorney General cautions that the opinion only addresses the obligations of the licensee in the context of the Commission’s role in disciplining real estate licensees and does not address the civil liability of the licensee.

Specifically, with regard to these issues the Attorney General’s opinion provides:

1. “Construing together the statutes (sic) and regulations pertaining to real estate licensees, it is not unreasonable to expect an agent to read those documents as he or she assists the client with necessary paperwork.”

2. “...we found no affirmative duty on the part of an agent either to inspect the property in question or independently verify the accuracy of the written information prepared by the client..”

3. “in our opinion, the licensee can be expected to read the statement, but need not investigate its accuracy.”

4. “Therefore, with regard to the ground for discipline found at 299 NAC 5, 5-003.25, a licensee should only be disciplined based on her actual knowledge of an error, inaccuracy, or omission.”

Based on the Attorney General’s opinion the Commission reiterates its determination that the licensee should review the SPCD Statement. The licensee is not required to inspect the property or independently verify the condition of the property to insure the seller accurately disclosed the matters and condition on the SPCD. However, to disclose known errors, inaccuracies or omissions. If, (upon review of the form) the licensee sees that the seller has not completed the entire form and does not complete the entire form even after having the omission called to the seller’s attention, the licensee should inform the seller and any prospective purchaser, in writing, that the form is not complete.

Likewise, if the licensee observes that the seller states that the roof does not leak, yet the licensee knows by statements made by the seller (or other evidence) that the roof leaked when it rained, and the seller has not repaired the leak, the license should inform the seller and any prospective

purchaser, in writing, of the error or inaccuracy in the SPCD Statement.

The civil liability of the licensee was addressed in the case, *Bohm v. DMA Partnership and Home Real Estate, inc., Grand Island*, 8 Neb. App. 1069, 607 N.W. 2d 212 (2000). The court in *Bohm* stated that to bring a civil cause of action against a licensee, the purchaser that the SPCD Statement was actually provided by the seller, the seller knowingly provided a statement containing an error, inaccuracy or omission, and that licensee know the seller had knowledge of the error, inaccuracy or omission at the time the seller provided the statement (one could assume that if the licensee disclosed the property issue fully and fairly in writing to the prospective purchaser it would relieve them of liability, but this was not addressed in the opinion). In this particular case the seller’s failure to make these allegations resulted in the case being dismissed. The *Bohm* case is a prime example of the differences between a licensee’s civil liability and their responsibilities under the license laws. The Commission urges that the licensee consult legal counsel if questions arise regarding civil liability. 





Limited Exemption for Dealing with Asset Managers Passed

LB25, which goes into effect on August 27, 2011, provides certain limited exemptions for licensee when dealing with asset management companies. Asset management companies, as defined by the bill, handle the sale of properties for large institutional property and mortgage holders including banks and savings and loans, mortgage holding entities chartered by Congress, or governmental entities, including but not limited to FANNIE MAE, HUD, etc. These companies will generally list such properties with a licensee (to get the property on the MLS), but they do not use a listing and transaction model (particularly when it comes to presenting offers) that conforms with our laws. The new law creates a narrow exception for licensees when

dealing these companies so that licensees can continue to work with them without violating the license law. The exceptions relate to the requirements of the listing agreement (statutory duties do not have to be stated) and to writing and presenting offers. These exceptions would only apply to a licensee's duties as they relate to the asset management companies as defined in the bill, a licensee's duties to other customers and clients remain unchanged, even if an asset management company is involved in the transaction.

HUD Interpretation Repealed

The interpretation that licensees selling properties for asset managers working with the Department of

Housing and Urban Development (HUD) are exempt from the license law is no longer necessary with the passage of the new law. The interpretation is discussed in further detail in the Summer, 2010 *Commission Comment*, but generally stated placed transactions involving sales of HUD properties by asset managers for HUD entirely out of the license act. The new law allows licensees to deal with asset managers for HUD and other property owners to work with the asset managers without breaking license law requirements while still remaining under the other requirements and protections of the Act, so the interpretation creating the exemption is no longer necessary and is rescinded effective August 27, 2011. 