



First Substantial Contact

At the January 17, 2013, meeting of the Nebraska Real Estate Commission the Commission adopted an interpretation further defining “First Substantial Contact” for purposes of agency disclosure requirements. The policy was developed with input from the industry and provides guidance in what has sometimes been viewed as a gray area in the agency law requirements. The interpretation is quite detailed and is reproduced in its entirety below.

Chapter 76. Real Property

Article 24, Agency Relationships

SS 76-2421 (1) contains two phrases (in ***bold italics*** below) that the Nebraska Real Estate Commission believes need some clarification to guide the conduct of real estate licensees in their practice with clients and customers, to assist designated brokers in their supervision of their affiliated licensees, and to help real estate trainers formulate and implement practical, meaningful agency disclosure training.

Section 76-2421 (1) requires that “At the ***earliest practicable opportunity*** during or following ***first substantial contact*** [emphasis added] with a seller, landlord, buyer, or tenant . . . the licensee who is offering brokerage services to that person

or who is providing brokerage services for that property shall” provide that person, whether a client or customer, with a written copy of the current brokerage disclosure pamphlet and disclose in writing to that person the types of brokerage services offered or which party the licensee is representing.

Although, as has been said in Commission Comment before (see Winter 2000 issue), “earliest practicable opportunity” is somewhat subjective and “depends on the circumstances of each situation,” the Commission interprets “***earliest practicable opportunity***” to mean that the required brokerage disclosure pamphlet should be presented and signed and the disclosure of the types of brokerage services offered or of which party the licensee is representing should be made BEFORE the licensee provides “***specific assistance***” to that client or customer. IF the written disclosure is not made before the specific assistance is provided, it must be made immediately thereafter.

Specific assistance means eliciting or accepting compromising information about a potential or actual client’s or customer’s real estate needs. Compromising information is information that would reduce, impair or erode that party’s bargaining power in an arm’s length negotiation. Compromising information may include but is not necessarily limited to:

- The person’s motivations or motivating factors.
- That a buyer or tenant is willing to pay more than the offered purchase price or lease rate.
- That a seller or landlord is willing to accept less than the asking sale price or lease rate.
- That a client or customer will agree to financing terms other than those offered.

Specific assistance shall also mean showing a specific property or properties to a specific buyer by pre-arrangement. Specific assistance MAY be provided at an open house if compromising information is elicited or accepted from the buyer at the open house, but specific assistance to a buyer WILL be deemed to be provided when there is a pre-arranged showing of a particular property or properties to that buyer.

Specific assistance may be offered anywhere and not necessarily at a formal showing or appointment, so it is important that the required disclosures be made BEFORE any compromising information is elicited or accepted, even if the setting is an open house or a public place. It is not the venue, but rather the content of the interchange that determines if specific assistance has been provided.

However it is possible to enumerate some things that are not generally considered to be specific assistance within the meaning of this policy interpretation. In the absence of the items listed above, specific assistance will not be considered to include:

- Preliminary conversations about the market, general real estate values and general financing terms;
- Conveying publically available information about the property’s or properties’ general factual features including price, location, style, amenities, etc.
- Eliciting or accepting general, non-compromising information about a buyer’s or tenant’s real estate needs or desires, such as the person’s general preferences for location, price range, features, etc.

Two useful criteria can be assessed in determining whether specific assistance has been provided:

- The direction information is flow-

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Commission Meeting Schedule

April 18-19Lincoln
May 16-17Lincoln
June 20-21Lincoln

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DIRECTOR'S DESK

Homesteads, Notaries, and Purchase Agreements

The question often arises as to when a purchase agreement needs to be acknowledged before a notary public, or to use the more common term "notarized". Nebraska law provides that: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife..." (Neb. Rev. Stat. §40-104). For our purposes the relevant definition of "homestead" is "the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated" (Neb. Rev. Stat. §40-101). To translate this into the simplest terms would result in the statement like this "under Nebraska Law the signatures of the husband and wife must be notarized on a purchase agreement for the sale of their residence."

There may be situations that make the question of residence a little gray or fuzzy, such as the ownership of two homes, each of which the happily married couple spends about half of their time at, or the couple moving out of the home at some time during the course of the transaction (are they no longer residing there?). However, when in doubt as to whether the property being sold qualifies as a homestead it is best to err on the side of caution and get the husband and wife's signatures on the purchase agreement notarized rather than subject the transaction to possible future challenge to your clients' and possibly your own detriment.

And Keep it Legible

Our trust account examiners are telling me that they are seeing a lot of purchase agreements and other documents that may have been run through the fax or copier too many times or simply containing handwriting that is very hard to decipher. While I am the last person in the world who should criticize anyone's penmanship, it is always very important that contracts and other legal and transactional documents be legible to avoid uncertainty and confusion.



Director Greg Lemon

Greg Lemon, Director
Nebraska Real Estate Commission

Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

Disciplinary Actions Taken by the Real Estate Commission (Does Not Include Cases on Appeal)

2012-029 – Commission vs. Joshua Bryan Bulow; Salesperson; Lincoln, NE. Stipulation and Consent Order entered January 17, 2013. License censured; plus a civil fine of \$500.00 to be paid by February 16, 2013; plus complete an additional three (3) hours of continuing education in the area of Agency Law by May 17, 2013. [Violated Title 299 Chapter 5 Section 003.06 Failure to obtain the informed written, signed, and dated consent of all parties involved in a transaction prior to a licensee acting for more than one party in the transaction. A copy of said informed written consent shall be signed, dated, and maintained in the transaction file. If no transaction results then the informed written consent shall be maintained by the licensee's employing broker for five years after the date of the agreement; Violated Neb. Rev. Stat. § 76-2422 (4) Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01 a designated broker intending to act as a dual agent shall obtain the written consent of the seller and buyer or landlord and tenant permitting the designated broker to serve as a dual agent. The consent shall include a licensee's duties and responsibilities. The requirements of this subsection are met as to a seller or landlord if the written agreement entered into with the seller or landlord complies with this subsection. The requirements of this subsection are met as to a buyer or tenant if a consent or buyer's or tenant's agency agreement is signed by a potential buyer or tenant which complies with this subsection. The consent of the buyer or tenant does not need to refer to a specific property and may refer generally to all properties for which the buyer's or Tenant's agent may also be acting as a seller's or landlord's agent and would be a dual agent. If a licensee is acting as a dual agent with regard to a specific property, the seller and buyer or landlord and tenant shall confirm in writing the dual-agency status and the party or parties responsible for paying any compensation prior to or at the time a contract to purchase a property or a lease or letter of intent to lease is entered into for the specific property; Violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetence, or unworthiness to act as a...salesperson.]

2012-028 - Commission vs. Steven Charles Morrissey, Jr.; Salesperson; Omaha, NE. Hearing held January 17, 2013. License revoked. [Violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrated negligence, incompetence, or unworthiness to act as a salesperson; for engaging in repeated acts of criminal conduct that resulted in three (3) criminal convictions for Driving Under the Influence dated October 24, 2008, July 1, 2010, and January 17, 2012, and one criminal conviction for Assault/Battery on January 17, 2012.]

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

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Transfer of License *Patricia Menousek*
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First Substantial Contact (Cont'd)

ing should be considered. It can generally be held that the licensee eliciting or accepting personal, compromising information from the person constitutes specific assistance, but the licensee conveying general information to the person about the market, financing or a specific property or properties is not offering specific assistance.

- The nature of the information being conveyed should be considered. Generally, if the information being elicited or accepted is compromis-

ing (i.e. information a rational person would not share with the other principal in an arm's length negotiation because that information could reduce, erode or impair that person's bargaining power), then specific assistance is being provided, but if the licensee is eliciting or accepting general information that is not compromising to the person's bargaining power or position, then the licensee is not providing specific assistance.

The point at which the licensee first provides specific assistance will be

deemed to be **"first substantial contact"** under this section.

On a related matter, the Commission will deem an electronic copy of the current brokerage disclosure language that has been appropriately checked and completed by the licensee and which has been emailed to the person to whom disclosure is being made to be in compliance with Section 76-2421 (1) (a), provided that the recipient client or customer sends the licensee an email response acknowledging receipt of the disclosure language.

Adopted January 17, 2013. 

No BPOs and CMAs for Property Tax Appeal Purposes

Few items we have posted to our website have raised more questions and discussion than when we posted "No BPOs and CMAs for property tax appeals" last summer under "What's New" on the Commission homepage.

That interpretation is based upon the Real Property Appraiser's Act as well as the Real Estate License Act.

The basic rule is that no one can engage in "Appraisal Activity" without proper appraiser credentials (an appraiser's license).

The Real Property Appraiser's Act defines "appraisal" as follows:

"Appraisal means an analysis, opinion, or conclusion prepared by a real property appraiser relating to the value of specified interests in or aspects of identified real estate or identified real property. An appraisal may be classified by the nature of the assignment into either a valuation assignment or an evaluation assignment."

Although structured somewhat differently than the Real Estate License act, the Appraiser's Act also has provisions that use compensation as one of the basis or triggers for defining activity requiring a license, and provides a limited exemption for property owner's valuing their own property.

The Real Estate License Act then creates an exception to the Appraiser Act requirements for Broker Price Opinions (BPOs) and Comparative Market Analysis (CMAs).

"(1) The Real Property Appraiser Act shall not apply to a person licensed under the Nebraska Real Estate License Act who, in the ordinary course of his or her business, gives a broker's price opinion or comparative market analysis, except that such opinion or analysis shall not be referred to as an appraisal."

The License Act Defines BPOs and CMAs as: "an analysis, opinion, or conclusion prepared by a person licensed under the Nebraska Real Estate License Act in the ordinary course of his or her business *relating to the price of specified interests in or aspects of identified real estate or identified real property for the purpose of (a) listing, purchase, or sale or (b) originating, extending, renewing, or modifying a loan in a transaction other than a federally related transaction;*"

So reading the two statutes together you come up with the rule that a real estate licensee cannot engage in providing an analysis or opinion relating to the value of real estate (unless you are also a licensed appraiser) with a limited exception for BPOs and CMAs, which may only be done for real estate marketing purposes or limited lending purposes.

One of the main instances where a violation of this rule may occur is when real estate licensees assist their clients in the valuation of property for property tax appeal purposes. While this would not be a direct violation of the Real Estate License Act, it would be a violation of

the Real Property Appraisers Act, as described above. If a real estate licensee were found to be in violation of the Appraiser's Act, they might also be subject to disciplinary action by the Real Estate Commission for demonstrating negligence, incompetence and unworthiness to act as a licensee. 



Broker-Approved Training First Year Report

The 2013-2014 license renewal period has, for the most part, concluded. This was the first time licensees had to meet the broker-approved training requirement in order to renew. The current education requirement is:

The total education requirement for all active licensees is a total of **18 hours every two years**. Of that 18 hours, at least 12 hours must be in approved continuing education with 6 hours in designated subject matter, "R" courses. The remaining 6 hours may be in training approved by the licensee's broker that has been recognized by the Commission or may be in additional approved continuing education activities. "R" courses may be duplicated in subsequent CE periods but non-"R" continuing education may not be duplicated within 4 years. There is no prohibition on duplicating training activities approved by the licensee's broker.

Approximately 2,200 licensees successfully met the 18 hour education requirement, many utilizing a combination of both continuing education and broker-approved training activities.

In just one year 39 providers of broker-approved training have stepped forward and taken on the responsibility of administering a training program in such

a manner that the training can be recognized for license credit.

There have been 113 individual training programs submitted to and recognized by the Commission.

Many employing brokers have signed off on training so that their affiliated licensees can receive credit. Some of these training programs are in-house only, but many have been provided to multiple firms with multiple brokers signing off on a single program.

Early feedback to the Commission is that employing brokers, managers, trainers and many licensees appreciate the opportunity to receive credit for training that may not meet the subject-matter criteria to qualify as continuing education programs but, nevertheless, prove valuable to successfully practice real estate in Nebraska.

Reminders:

For Attendees or Recipients of Broker-Approved Training:

To get credit for attending broker-approved training it has to have been approved, in advance of the program, by your designated broker. Simply signing up for a "Broker Approved Training Seminar" and attending is not enough to

get credit, **your designated broker MUST have signed onto the program and that approval has to have been reported to the Commission**. Providers sometimes advertise and disseminate material identified as "Broker-Approved Training" to all licensees, but please remember, it is your responsibility to verify that your designated broker has approved that training. You can verify by asking your broker, asking the provider of the training, or contacting the Commission office. Also remember that if you have both a designated and a managing broker, it must be the designated broker who signs the approval.

For Providers:

Broker-approved training applications must be sent to the Commission for approval at least 30 days prior to the training being offered for credit, there are no exceptions or exemptions from this requirement. After approval, Notices of Training Scheduling have to be in this office prior to the noticed program beginning. There are also no exceptions or exemptions to this requirement.

For All Involved:

Please don't hesitate to contact the Commission if you have any questions about any of the education programs. 

Let's Talk Trust Accounts

The Nebraska Real Estate Commission has periodically run the Trust Accounts column in the Commission Comment newsletter to provide updates and information on trust account management.

Changes to the FDIC Rules on Noninterest Bearing Transaction Accounts

The Dodd Frank Wall Street Reform Act (Dodd-Frank Act) provided for temporary unlimited deposit insurance coverage for noninterest bearing transaction accounts from December 31, 2010 through December 31, 2012. With the expiration of the Dodd-Frank Act the general rule is that coverage goes back down to \$250,000 per depositor. However, there

is an exception for accounts held by one party in a fiduciary capacity for another party.

From the Federal Deposit Insurance Corporation Website:

"FDIC regulations provide that deposit accounts owned by one party but held in a fiduciary capacity by another party are eligible for pass-through deposit insurance coverage if (1) the deposit account records generally indicate the account's custodial or fiduciary nature and (2) the details of the relationship and the interests of other parties in the account are ascertainable from the deposit

account records or from records maintained in good faith and in the regular course of business by the depositor or by some person or entity that maintains such records for the depositor."

In other words, a broker's trust account should qualify for \$250,000 in pass through coverage per client under the FDIC rules.

Requirements to Maintain a Broker Trust Account

The Commission's trust account examiners often get asked why all designated brokers need to maintain a trust

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Return Service Requested

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Trust Accounts (Cont'd)

account if they have no activity in that account. The short answer is that the law clearly requires it:

“Each broker other than an inactive broker shall maintain in a bank, savings bank, building and loan association, or savings and loan association a separate, insured checking account in this state in his or her name or the name under which he or she does business which shall be designated a trust account in which all downpayments, earnest money deposits, or other trust funds received by him or her, his or her associate brokers, or his or her salespersons on behalf of his or her principal or any other person shall be deposited...” (Neb. Rev. Stat. §81-885.21(1))

We are also often asked why the law requires a trust account if there is no activity in the account, or why the law has the stringent requirement with no exceptions. With a real estate broker’s license a licensee has the authority to

obtain and hold client funds, even if such an activity is not currently contemplated by the broker, such activity is a regular part of real estate practice. If a broker were to come into the possession of client funds, for example, a down payment was received on a property, the broker would have 72 hours to deposit that

money in his/her trust account (NAC Title 299, Ch. 5, Sec. 003.14). Seventy two hours is not a lot of time to make the deposit if he/she doesn’t have a trust account set up already. If you don’t like that answer we will fall back on the paragraph above, you have to do it because the law clearly says so. 

