



# COMMISSION COMMENT

Winter

2005

## Governor Appoints Rita M. Griess to the Commission

Governor Dave Heineman appointed Rita M. Griess to a six-year term on the Real Estate Commission beginning September 2005. Rita makes her home in Lincoln. Rita is a Managing Broker for HOME Real Estate in Lincoln.

Rita has more than twenty-four years of experience in the real estate field, receiving her real estate salesperson's license in April, 1981. She received her broker's license in February, 1992. Rita has earned the CRB and CRS designations from the National Association of Realtors®, and her GRI from the Nebraska Realtors® Association.

Rita has served the real estate industry by being an active member

of the National, State and Local Realtors® Associations. Nationally, she has served as a member of the Equal Opportunity/Cultural Diversity Committee receiving her certification to teach the At Home With Diversity: One America course. At the State level, she has served on numerous committees and received the Association's Outstanding Service Award in 2004. Locally, Rita has served in various capacities receiving three President's Achievement Awards and two Meritorious Service Awards. She was also recognized as Realtor® of the Year in 1993 and President of the Lincoln Board of Realtors® in 2002.

Rita serves her community in various capacities, as well. She volunteers for Meals on Wheels, The Salvation Army, and the annual Paint-A-Thon. Rita is a regular blood donor, was a Teammates Mentor from 1998-1999, and taught Sunday School for nine years at United Methodist Church. Rita also partici-



*Chairperson Gale administers the oath of office to Rita Griess.*

pates in activities with Home Real Estate's VIP partner, Hartley Elementary School.

Additionally, Rita has served as an instructor of both real estate pre-license and continuing education subject matter. She has served on the faculty of Coldwell Banker, for the Realtors® Association, and for Larabee School of Real Estate.

Rita brings a high level of knowledge and broad experience to the Real Estate Commission. She will be an asset to the work of the Commission.

### Commission Meeting Schedule

January 18-19 .....Lincoln  
February 23 .....Lincoln  
March 23-24 .....Lincoln  
May 3-4 .....Lincoln  
June 14-15 .....Lincoln  
August 24-25 .....Lincoln  
October 5-6 .....Lincoln

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*Real Estate Commission Members:  
Seated (l to r) Chairperson John Gale, Rita Griess, and Larry Shepard;  
Standing (l to r) Harold Johnson, Mike Poskochil, and Wes Grady.*

**COMMISSION COMMENT**

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The Nebraska Real Estate Commission grants permission to reprint articles which appear in this newsletter on condition that recognition of their original publication in the **Nebraska Commission Comment** also appears with the article.

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.

*Greetings!*

As Chair of the State Real Estate Commission, I want to extend warm season's greetings to all of our Nebraska real estate brokers, sales-people and their dedicated staffs. We are proud of the work you do for the sellers, buyers, landlords and tenants of real estate in Nebraska, and the high level of professionalism you provide to them as they deal with one of their most important assets and investments.



The real estate industry in Nebraska and nationwide have demonstrated that the record housing boom for the past decade continues strong. Construction of new homes and apartments rose by 3.4 percent in September, the fastest pace since last February. Real estate company presidents have predicted strong sales through 2005, with possibly another record year. While brisk construction has brought larger home inventories in some areas, and interest rates have risen slightly, the market is considered to be very good. We wish for you another solid year of growth in 2006!

Broker Bob Moline's term expired in August, and I want to acknowledge his outstanding leadership and commitment as a member of our Commission. Governor Heineman appointed Rita Griess of Lincoln as our new broker representative. Rita has been very active in the REALTORS Association of Lincoln and the Nebraska REALTORS Association and brings a wealth of experience and knowledge to the Commission, and will serve her district well. Our public representative Jim Strand recently resigned after four years of service on the Commission; this is a challenging position, as the public representative has to look at all sides of an issue, and Jim served in this capacity with wisdom and insight. We extend our warmest thanks to him for his great service. A new public representative has not yet been appointed by the Governor.

From a review of our 2004-2005 Real Estate Commission Objectives, it appears that the Commission and hard-working Commission staff have made solid progress toward achieving those goals, such as: conducting an instructor development workshop, which was held May 12-13; renewing the examination provider contract with Applied Measurement Professionals, which was signed for an effective period through June 30, 2007; continuing to update and enhance the Commission website, which has had a number of new features added; and passing the agency agreement amendment through the Legislature, which was done, and became effective on September 4, 2005.

In addition, the Real Estate Commission, following a staff study, lowered the licensing and renewal fees \$10 each and made competitive Errors & Omissions insurance policies available to licensees in the commission-offered plan for \$15 less than last year's premium.

New 2005-2006 Commission Objectives have now been approved, and we are focusing on accomplishing these new goals. The Nebraska REAL-

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**MEET THE REAL ESTATE  
COMMISSION STAFF**

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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**

**(Please note changes since September 1, 2005)**

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

Commission Meeting Information . . .	Monica Wade
Complaint Procedures . . . . .	Terry Mayrose DDEnf@nrec.ne.gov
Continuing Education History or Inquiries . . . . .	Melanie Patrick-Heather EdEnf@nrec.ne.gov
Curriculum Design (Education & Instructor Approval) . . . . .	Teresa Hoffman DeputyD@nrec.ne.gov
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Specialized Registrations . . . . .	Monica Wade Finance@nrec.ne.gov
Transfer of License . . . . .	Tawny Snider LicTsf@nrec.ne.gov
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# Disciplinary Actions Taken by the Real Estate Commission

*(Does Not Include Cases on Appeal)*

**2005-015** – Carmon D Yusten vs. Charlotte Irene James, Broker. Stipulation and Consent Order. License censured; plus an additional six (6) hours of continuing education, including three (3) hours in the area of license law and three (3) hours in the area of ethics, to be completed by February 9, 2006. [Violated Neb. Rev. Stat. § 81-885.24 (29) by demonstrating unworthiness to act as a broker by attempting to collect a commission from the clients prior to a proposed closing.] October 13, 2005

**2004-014** – Donald Christopher Miller vs Timothy Kuchta Jr., Broker. Stipulation and Consent Order. License censured; plus an additional three (3) hours of continuing education in the area of agency, to be completed by December 12, 2005. [Violated Neb. Rev. Stat. § 81-885.24 (16) by violating any provision of sections 76-2401 through 76-2430, specifically, Neb. Rev. Stat. § 76-2421 (1) At the earliest practicable opportunity during or following the first substantial contact with the seller, landlord, buyer, or tenant 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 or who is providing brokerage services for that property 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.] October 13, 2005

**2005-022** - Kathi Ward vs Bruce Daniel Abraham, Broker. Stipulation and Consent Order. License suspended for a period of twenty four (24) months commencing on November 16, 2005, through November 16, 2007, with the entire period served on probation; plus

an additional nine (9) hours of additional continuing education with three (3) hours being in the area of agency, three (3) hours in the area of license law, and three (3) hours in the area of ethics, all to be completed by March 16, 2006. [Violated Neb. Rev. Stat. § 76-2417 (1) A licensee representing a seller or landlord as a seller's or landlord's agent shall be a limited agent with the following duties and obligations: (a) To preform the terms of the written agreement made with the client; (b) To exercise reasonable skill and care for the client, and (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity; Neb. Rev. Stat. § 81-885.24 (2) Intentionally using advertising which is misleading or inaccurate in any material particular or in any way misrepresents any property, terms, values, policies, or services of the business conducted; Neb. Rev. Stat. § 81-885.24 (22) Making any substantial misrepresentations; and Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence and unworthiness to act as a broker. November 16, 2005

**2005-047** – Commission vs Nada Resnik-McNenny, Broker. Stipulation and Consent Order. License censured; plus an additional six (6) hours of continuing education with three (3) hours in the area of agency, and three (3) hours in the area of license law to be completed by February 14, 2006. [Violated Neb. Rev. Stat. § 76-2422 (2) Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01, a designated broker intending to establish a single agency relationship with a seller or landlord shall enter into a written agency agreement with the party to be represented. The agreement shall include a licensee's duties and responsibilities specified in section 76-2417, the terms of compensation, a fixed date of expiration of the agreement, and whether an offer of subagency may be made to any other designated broker; and Neb. Rev.

*(Continued on page 4)*

(Continued from page 3)

### Disciplinary Action (Cont'd)

Stat. § 81-885.24 (29) by demonstrating negligence to act as a broker.

November 16, 2005

**2005-017** – Commission vs Roberta L. Springer, Broker. Stipulation and Consent Order. License permanently surrendered. [Violated Neb. Rev. Stat. § 81-885.24 (26) by violation of a rule or regulation adopted and promulgated by the Commission in the interest of the public and consistent with the Nebraska Real Estate License Act, specifically the stipulated facts demonstrate a violation of Title 299 Chapter 5-003.17, by failing to produce documents, books and records in the licensee's possession, or under her control, concerning any real estate transaction under investigation by the Commission as requested by the Commission on December 17, 2004; Neb. Rev. Stat. § 81-885.24 (29) by demonstrating negligence, incompetency or unworthiness to act as a broker, by utilizing, or allowing the utilization, of services of individuals without an "active" Nebraska real estate license for time-share sales in Nebraska on behalf of a Florida time-share development for which she was the designated broker; and by failing to provide transaction files when requested on December 17, 2004. November 16, 2005

**2005-030** - Michael Inzauro vs Russell Allen Craig, Salesperson. Stipulation and Consent Order. License censured; plus an additional six (6) hours of continuing education with three (3) hours in the area of license law, and three (3) hours in the area of agency to be completed by February 14, 2006. [Violated Neb. Rev. Stat. § 76-2418 (1) A licensee representing a buyer as a buyer's agent shall be a limited agent with 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, including; (iv) Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee; and Neb. Rev. Stat. § 81-885.24 (29) by demonstrating negligence to act as a salesperson.

November 16, 2005

## When Are You Leaving The Listing Agreement?

As the result of a complaint, the Commission has readdressed the issue of when to leave a copy of the listing agreement with the principal to a transaction. The Nebraska Real Estate License Act at Neb. Rev. Stat. § 81-885.24(19) provides that it is an unfair trade practice if a licensee fails to include a fixed date of expiration in any written listing agreement and fails to leave a copy of the agreement with the principal. The principal is the seller(s) of the property.

The Commission takes the position that the licensee must leave a copy of the listing agreement with the principal when the principal meets with the licensee to sign the document. Argument has been made by licensees that the licensee has a reasonable time after the principal signs the listing agreement to deliver a copy to the principal. The statutory language does not provide for a reasonable time for delivery. The statute does allow a reasonable time for delivery following signing of the purchase agreement. Since the statutory language is different between the two sections, the interpretation is different.

A copy of the listing agreement must be left with the principal at the time the agreement is entered into since this is the document that starts the relationship between the parties. The principal is entitled to immediately have a copy of the document which sets forth the obligation of the parties to the agreement. This requirement can be met by printing two copies of the completed agreement from a computer; by completing two copies of a "fill-in-the-blanks" form; by having the listing agreements printed on "NCR" paper; by having the ability to photocopy the completed agreement at the site of the signing; or by using carbon paper.

If you happen to be a licensee who is not currently complying with this provision, you should immediately bring your practice into compliance.



# The Pitfalls of Being A Dual Agent and a Principal to A Transaction

*(Editor's note: The following article was written by Special Assistant Attorney General Abbie Widger at the request of the Commission. It is intended to give guidance to licensees who find themselves in such circumstances.)*

Over the past few months, the Commission has addressed the issue of whether a real estate licensee may act as a limited dual agent in a transaction where the licensee is also a principal.

Before discussing the ramifications or pitfalls of a licensee/principal being a limited dual agent in a transaction, let us review the duties and obligations of a limited dual agent as outlined in the Agency Relationships statutes. The duties are as follows:

1. Perform pursuant to the terms of the written agreement;
2. Exercise reasonable skill and care for the client;
3. Promote the best interests of the client with the utmost good faith, loyalty and fidelity including:
  - a. Seeking a price and terms which are acceptable to the client;
  - b. Presenting all written offers to the client;
  - c. Disclosing to the client all adverse material facts actually known by the licensee; and
  - d. Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee.
4. Account in a timely manner for all money and property received;
5. Comply with all laws; and

6. Disclose all adverse material facts actually known by the licensee. The adverse material facts may include:
  - a. Environmental hazards affecting the property;
  - b. The physical condition of the property;
  - c. Any material defects in the property;
  - d. Any material defects in the title of the property; or
  - e. Any material limitation on the client's ability to perform.

In addition, the limited dual agent may disclose any information to one client that the licensee gains from the other client if the information is relevant to the transaction or the client, unless prohibited by the statute. If the licensee learns that the property contains an underground storage tank, the licensee has a duty to report the matter to the potential buyer since it is probably relevant to the use of the property.

The limited dual agent shall not disclose, however, without the informed written consent of the client to whom the information pertains the following confidential information:

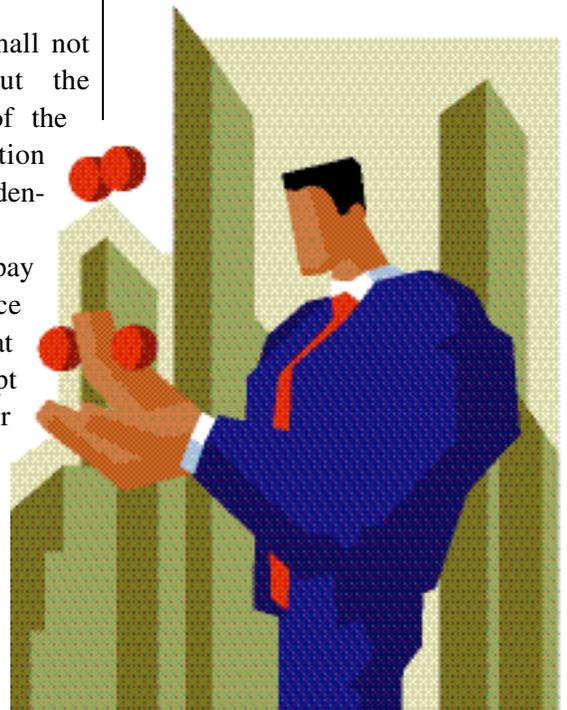
That a buyer is willing to pay more than the purchase price offered for the property; That the seller is willing to accept less than the asking price for the property; What the motivating factors are for any client buying or selling the property; and

That the client will agree to financing terms other than those offered.

## Licensee/Seller

You are a licensed real estate broker or salesperson and you own real estate. You could decide to offer the property for sale by owner; not act as a licensee and not have to worry about being a limited dual agent. Your requirements would be disclose, in writing, to any buyer prior to the buyer becoming obligated to purchase the property: a) your interest in the property; and b) the fact you are a real estate licensee. You, however, decide to sell the real estate and list it with the firm with which you are associated with you as the limited seller's agent for yourself. As you hoped, several people are interested in the property. Every time you show the property you complete the Agency Acknowledgment disclosure identifying yourself as a limited seller's agent and working with the potential buyer as a customer. Even-

*(Continued on page 6)*



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### Pitfalls of ... (Cont'd)

tually, you sell the property to one of these buyers who you did not represent as a limited buyer's agent. This situation was dual agency free! What would happen if a person(s) you are representing as a limited buyer's agent became interested in your property and wants to see it? What do you do? Do you enter into limited dual agency with this buyer or do you request assistance?

### Licensee/Buyer

You are a licensed real estate salesperson or broker and you wish to purchase some real estate.

You look at for sale by owner properties and at those properties for which you are not a limited seller's agent. You make an offer on one of these properties which includes the disclosure to the seller that you, as the buyer, are a real estate licensee. The seller accepts the offer and no dual agency has occurred. What would happen if you decided to make an offer on a property on which you are the limited seller's agent? What do you do? Do you enter into limited dual agency with this seller, or do you request assistance? (Note: This last situation does not intend to cover what has been known as a "guaranteed sale" program.)

A licensee in either of these two situations should request assistance from his or her designated or supervising broker. The situation should be discussed with the broker and a request made to have a different licensee with no possible dual agency issues be assigned to represent the

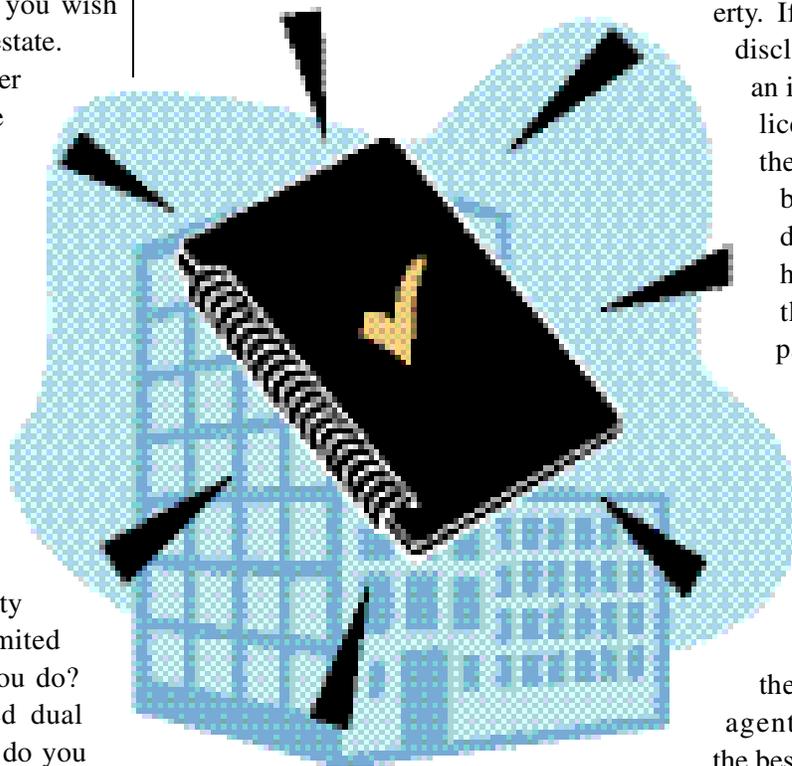
other principal. Although, there is no prohibition in licensing laws or the Agency Relationships statutes against a licensee acting as a limited dual agent and a principal in the same transaction, it is not recommended that such a position be taken by a licensee. If you still decide to go forward as a dual agent and principal, remember, prior to the other principal becoming obligated to perform under a contract, to disclose, in writing, under Title 299, Chapter 5, Sections 003.04 and 003.08, respectively, that you as a licensee have an interest in

ios is representing the best interests of the other client/principal if the limited dual agent cannot disclose information about himself or herself. For example, the a limited dual agent/seller could not reveal to the buyer that the limited dual agent/seller would take less than the listing price for the property. Yet, the limited dual agent/seller would be required to disclose that he or she may not be able to perform on the purchase agreement. It may be difficult for the limited dual agent/seller to disclose that he or she is unable or unwilling to close on the prop-

erty. If he or she does not disclose this fact, there is an issue as to whether the licensee is representing the best interests of the buyer. If the limited dual agent is the buyer, he or she cannot reveal that he or she would pay more than the asking price. Yet, if the limited dual agent/buyer believes the property is worth substantially more than the seller is asking, is the limited dual agent/buyer representing the best interests of the seller

by not informing the seller?

The statutes also provide that the limited dual agent may not disclose to one client any confidential information about the other client unless failure to disclose the information would be fraudulent misrepresentation. For example, if the limited dual agent/buyer made an offer, knowing he or she could not obtain a loan for the offer price, his or her silence may



the property you are buying or selling and that you are acting in the dual capacity of agent and principal. You, of course also need to make all other proper disclosures, including the dual agency consent.

### Pitfalls

One may question whether the licensee operating as a limited dual agent/principal in the above scenar-

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(Continued from page 6)

### Pitfalls of ... (Cont'd)

not be in the best interests of the seller. Also, if a limited dual agent/buyer knew the seller was asking substantially less than the value of the property, the limited dual agent/buyer's silence may not be in the best interests of the seller. Both, may be fraudulent misrepresentation.

Pursuant to the Agency Relationships statutes, there is no imputation of knowledge or information between any client and the licensee. This means that just because the seller knows a fact about the property, the law does not automatically assume the licensee has knowledge of the fact due to his or her representation of the seller. However, when the licensee is a limited dual agent and the principal, the licensee may lose this protection and the knowledge of the client may become the knowledge of the licensee. You will note that the previous sentence uses the word "may". This is because the specific issue has not been litigated in the courts or before the Commission. However, it would be hard for the licensee to argue no knowledge.

When complaints are filed with the Commission concerning the limited dual agency/principal issue, the Commission will generally examine several factors to determine if there is a violation of the agency statutes. The transaction will be reviewed to make sure all the necessary disclosures have been made. The Seller Property Condition Disclosure Statement (SPCDS) will be examined to determine the extent of the disclosure. Since the limited dual agent/seller has an obligation to represent the buyer with the utmost good faith and fidelity and disclose all adverse material facts, the disclosure on the SPCDS is critical. If there is no inspection of the property, the

Commission will question whether the limited dual agent/seller encouraged or discouraged the buyer to obtain inspections. If the buyer questions the stability of a retaining wall, for example, and the licensee discouraged an inspection of the retaining wall, a close examination of the representation of the buyer will occur should the retaining wall fall down after closing. Although not a technical violation if the License Act or Agency Relationships statutes, acting as a principal and a limited dual agent may lead to other regulatory violations for the unwary licensee.

If the purchase agreement contains language that "the offer is based on the buyer's inspection of the property and not based on any representations and warranties of the condition by the agent," the buyer may be able to make a claim that this clause is voidable since the agent was the seller. Acting as the principal and the limited dual agent may require an examination of certain clauses in the purchase agreement.

Some states have completely banned the practice. In Utah, the statute specifically provides that a licensee may not act or attempt to act as a limited agent in any transaction in which: a) the licensee is a principal in the transaction; or b) any entity in which the licensee is an officer, director, partner, member, employee, or stockholder is a principal to the transaction.

Courts have stated that the relationship of agent and principal is fiduciary in nature, founded on trust or confidence reposed by one person in the integrity and fidelity of another. Included in the fundamental duties of such fiduciary are good faith and fidelity, and full and fair disclosure. Such duties are imposed on real estate licensees by license law, rules and regulations, contract

law, the principals of the law of agency and tort law. The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. Therefore, a licensee must prove, prior to undertaking to act as a limited dual agent, the licensee made a full and complete disclosure to all parties as a predicate for obtaining the consent of the principals to proceed in the undertaking. This is especially true where the limited dual agent is a principal, as questions will be asked to assure that they have carefully considered the possible consequences of a dual agency relationship. The fiduciary duty of loyalty that the licensee owes to the client prohibits the licensee from advancing any interests averse to the client or conducting business to benefit the agent or others. Although technically legal in itself, the wisest course of action may be to involve another agent so as to avoid the pitfalls.



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**Return Service Requested**



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*(Continued from page 2)*

**Greetings (Cont'd)**

TORS Association has suggested some new policy revisions, which are now under study by Commission staff. Such helpful input from the industry always receive close attention and review, as we consider ways to improve effective and progressive regulatory oversight for our licensees.

We are pleased that the processing time for the State Patrol for criminal history checks has been dramatically reduced, and this will help expedite the taking of examinations by new applicants. The Commission continues to give close attention to applicants with any criminal background; our guidelines continue to be enforced with consistency, so some are allowed to sit for license examinations, and others are not. We consider this to be a very important duty to preserve public confidence and trust in the industry and in the Commission's oversight.

On behalf of all of the Commissioners, I send our best wishes to you for a season of family celebrations, and the richness of friendships! We all have much to be grateful for as citizens of our great nation with its freedoms and liberties. May your New Year be one of new successes, positive life adventures, and fulfillment of your own personal goals and resolutions for 2006!

A handwritten signature in black ink that reads "John A. Gale". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sincerely,  
John A. Gale  
Chair and Secretary of State