



Dual Agency

BY GREG LEMON, DIRECTOR,
NEBRASKA REAL ESTATE
COMMISSION

Dual agency occurs when the same licensee represents parties on both sides of a transaction as their limited agent, although the provisions apply to both buyer and seller or landlord and tenant, the rest of this article will assume a two party sale situation, refer to buyer and seller only, and leave out the “limited” for brevity and simplicity’s sake.

As I am sure all licensees know, limited dual agency situations require additional consents and disclosures on the part of all parties to a transaction, it is the duty of the licensee acting as a dual agent to ensure that these matters are attended to. This article will focus on the paperwork requirements and not the duties of the licensee in these situations.

Despite the current dual agency provisions being in effect for a num-

ber of years, in talking to licensees and others it is clear that there is still some confusion as to the proper way to comply with the law when dual agency occurs. This confusion may not have been helped by a Winter, 2003 *Commission Comment* article written shortly after the dual agency law was changed by LB863 in 2002. While the article was generally correct, in some instances it oversimplified and did not clarify the obligations of licensees as to the specific parties in dual agency situations.

The dual agency provisions, found at Neb. Rev. Stat. §76-7422 (4) require that prior to acting as a dual agent “the designated broker intending to act as the dual agent shall obtain the written consent of the seller and buyer” and that “the consent of the buyer or tenant need not refer to a specific property and may refer generally to all properties (for which the agent may be acting as a dual agent)”, but that, if acting as a dual agent for a specific property, the seller and buyer “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 property (is entered into)”.

In practice the steps needed to assure compliance with the dual agency requirements for sellers and buyers will likely differ, therefore we will take them one at a time.

Licensee Responsibilities as to the Seller

The licensee responsibilities as to the seller are simpler and will nearly always follow the same track. The documentation requirement for obtaining consent to dual agency from the seller prior to acting as a dual agent is generally met by including a general consent to dual agency in the listing agreement. Because the listing agreement is always signed by the seller before a licensee acts as the seller’s agent or conducts any activity on behalf of the seller the threshold consent requirement is met. This is the first step in a two step process. The second step is completed by having the seller sign the consent to dual agency form or other document which specifies that dual agency is occurring and also specifies the party or parties responsible for paying any compensation. The second step should occur at or before the time an offer to purchase is presented and must occur no later than the time the contract to purchase the property is entered into.

If there is not a general consent to dual agency in the listing agreement the licensee must obtain one from the seller prior to showing the property to a buyer client or working with a buyer in any way acting as the dual agent in a transaction.

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Commission Meeting Schedule

April 22-23Lincoln
May 20-21Lincoln
June 24-25Lincoln
August 19-20Lincoln

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Official Publication of the
Nebraska Real Estate Commission
1200 "N" Street, Suite 402
P.O. Box 94667
Lincoln, Nebraska 68509-4667
(402) 471-2004
www.nrec.state.ne.us
EDITOR: Teresa Hoffman

COMMISSION MEMBERS

CHAIRPERSON

John Gale
Secretary of State
State Capitol
Lincoln, NE 68509
(402) 471-2554

PUBLIC MEMBER

David H. Ptak
1010 Darrus Drive
Norfolk, NE 68701
(402) 844-7046

SALESPERSON MEMBER

Kathryn Rouch
13110 W. Dodge Rd.
Omaha, NE 68154
(402) 498-8300

BROKER MEMBERS

Wesley W. Grady
810 S. Dewey St.
North Platte, NE 69103-0850
(308) 532-1810

Rita M. Griess
5901 N. 27th St.
Lincoln, NE 68521
(402) 323-8700

Vince W. Leisey
13340 California St.
Omaha, NE 68154
(402) 493-4663

Robert Dover
1000 Norfolk Avenue
Norfolk, NE 68702
(402) 371-0200

DIRECTOR

Greg Lemon
1200 "N" Street, Suite 402
Lincoln, NE 68508
(402) 471-2004
greg.lemon@nebraska.gov

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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.

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DIRECTOR'S DESK

Legislation

We usually try to run at least two stories on legislation of interest to licensees in the Commission Comment, one to introduce the legislation, and another when it has passed, but LB691 went through the process so quickly that we can only catch up to it on the tail end. Passed by the Legislature recently, LB691 allows the Nebraska Real Estate Commission to assess fines against those who conduct activity in the state of Nebraska requiring a real estate license without first acquiring that license. It is fundamentally unfair and inappropriate to both the licensees in the state of Nebraska who pay their fees and follow the laws, and the public at large who is protected by those laws, to allow unlicensed persons to conduct activity requiring a real estate license in the state. Under prior law our only real option was to solicit the help of the county attorney and file a criminal charge. While it is important to all of us, the unlicensed practice of real estate is not the highest of priorities on most county attorneys' to do lists.

LB691 gives the Commission the authority to assess civil penalties against unlicensed persons in the amount of \$1000 per day or the amount of commissions earned, whichever is greater. The idea behind the legislation is that these significant and very well defined penalties will give the law enough teeth to encourage swift compliance, without the need to go to hearing to collect the penalties. The bill was supported by both the Nebraska Realtor's Association and the Commission. However, there was one stumbling block, a concern about whether the Commission could exercise the necessary jurisdiction to enforce Nebraska laws against out of state, unlicensed persons. A favorable Attorney General's opinion put that question to rest and the bill passed within the first two months of the start of the Legislative session. I would also like to thank Senator Langemeier for sponsoring this legislation and successfully ushering it through the process for us.

LB818 is another bill that is worth following. The bill, as drafted, would allow brokers' price opinions to be used for lending purposes on property valued at \$250,000 or less. As of this writing, the general provisions of the bill have been proposed as amendments to LB 931, more will likely be known about the bill by the time you get this, but the issue is certainly one that we will continue to monitor.

Also of note is LB226, which went into effect March 3. The bill changes the age of consent to enter into legally binding contracts or leases from 19 to 18.

Thank You

Thanks to all who responded to our survey as well as the request for suggestions on the Property Seller Condition Disclosure Statement, your input helps us do our job better. You can see the survey results on our homepage at www.nrec.state.ne.us, click on the link under the "at a glance" section in the upper left corner.



Director Greg Lemon

Greg Lemon, Director
Nebraska Real Estate Commission

Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

2008-004 – Commission vs. Gary Thomas Thompson, Broker. Hearing held May 22, 2009. License suspended for two (2) years, with the first year served on suspension and the second year of the suspension stayed and served on probation; plus an additional six (6) hours of continuing education to include three (3) hours in trust accounts and three (3) hours in license law, Thompson must also develop written policies and procedures for governing the maintenance of transaction files and trust account records in all of his real estate offices; submit the written policies and procedures to the Commission for review and approval, and submit satisfactory documented proof that said policies and procedures have been implemented in all of his real estate offices. On May 26, 2009, Thompson appealed the Commission's decision to the District Court. Thompson filed an Application for Stay on the penalty and a Petition for Review. Stay was granted. The Commission filed a Motion to Dismiss and on October 2, 2009, the Appeal was dismissed by District Court. The suspension period commenced on December 1, 2009, and will continue through December 1, 2010, followed by the probation period which will continue through December 1, 2011; plus an additional six (6) hours of continuing education to include three (3) hours in trust accounts and three (3) hours in license law, to be completed by December 1, 2010. Thompson must also develop written policies and procedures for governing the maintenance of transaction files and trust account records in all of his real estate offices; submit the written policies and procedures to the Commission for review and approval by December 1, 2010, and submit satisfactory documented proof that said policies and procedures have been implemented in all of his real estate offices. [Thompson violated Title 299 Chapter 3 Section 002 Every broker shall maintain a bookkeeping system which will accurately and clearly disclose full compliance with the law relating to the maintaining of trust accounts; Thompson failed to identify a running cash balance after each bookkeeping entry in the General Ledger, and failed to prepare sub-ledgers on 49 of 56 real estate sales transactions. Thompson violated Title 299 Chapter 5 Section 003 (11) Failure of the licensee to identify in writing to the prospective purchaser-client, or to a purchaser-customer if offered pursuant to Neb. Rev. Stat. 76-2421 (3) (b), at the time an offer is written by the purchaser or a counter offer is accepted by the purchaser, those categories of costs the purchaser will be expected to pay at closing. At the same time, the licensee shall prepare a written estimate of the costs the purchaser will be expected to pay at closing, to the extent the necessary cost information is reasonably available. Said written information shall be signed and dated by the purchaser. A copy of the signed and dated document shall be given to the purchaser and, when a transaction results, one copy shall be maintained in the transaction file in accordance with 299 NAC 3-001. Thompson failed to maintain an estimated buyer closing cost statement on three (3) real estate transactions, and failed to have the buyer date and sign an estimated closing cost statement on one (1) transaction. Thompson violated Title 299 Chapter 5 Section 003 (14) Failure to deposit any funds received as an earnest money deposit within 72 hours or before the end of the next banking day, after an offer is accepted, in writing, unless otherwise provided in the purchase agreement. Thompson failed to deposit earnest money within 72 hours or before the end of the next banking day after an offer was accepted in three (3) transactions. Thompson violated Title 299 Chapter 5 Section 003 (19) Failure by any licensee to supervise persons hired to assist the licensee in his or her licensed real estate activities. Thompson failed to supervise the person hired to assist him with his licensed real estate activities. Thompson violated Neb. Rev. Stat. § 76-2421 (1) At the earliest practicable opportunity during or following the first substantial contact with a 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

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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	Melanie Patrick-Heather melanie.patrick-heather@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
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
Transfer of License	Tawny Snider tawny.snider@nebraska.gov
Trust Account Matters	Terry Mayrose terry.mayrose@nebraska.gov John Clark Patricia Stehly Ron Pierson
Webmaster	Monica Rut monica.rut@nebraska.gov

WEBSITE: www.nrec.state.ne.us
TELEPHONE NUMBER
(402) 471-2004
FAX NUMBER
(402) 471-4492
ADDRESS:
Nebraska Real Estate Commission
P.O. Box 94667
Lincoln, NE 68509-4667

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Disciplinary Actions (Cont'd)

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. Thompson failed to maintain a signed and dated Agency Disclosure from the respective buyers in three (3) transactions, and Thompson failed to maintain a signed and dated Agency Disclosure from the seller in two (2) transactions. Thompson violated Title 299 Chapter 5 Section 003 (22) Failure by a designated or employing broker to supervise his or her associate brokers and salespersons. Thompson failed to supervise Branch Manager Michael Slatten in his licensed real estate activities and his management of the Omaha branch office. Thompson violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson whether of the same or of a different character as otherwise specified in this section. Thompson violated each of the above sections of license law or rule of the Commission. May 22, 2009

2009-041 – Commission vs. Bruce William Scheopner, Broker. Stipulation and Consent Order. License suspended for a period of one (1) year, with the first fifteen (15) days of the suspension period served on suspension and the remainder of the suspension period stayed and served on probation. Suspension period will commence on a mutually acceptable date within 30 days from the date of receipt of a copy of the Order; plus an additional nine (9) hours of continuing education consisting of three (3) hours in license law, (3) hours in agency, and three (3) hours in ethics, to be completed by May 19, 2010. Scheopner to pay a civil fine of \$1000.00, which must be received by the Commission on or before December 19, 2009. [Scheopner violated Title 299 Chapter 5 Section 003.23 Failure by the agent of the seller to assure that a copy of the Seller Property Condition Disclosure Statement is delivered to the purchaser or to the agent of the purchaser on or before the effective date

of any contract which binds the purchaser to purchase the residential real property. Scheopner failed to assure that a copy of the Seller Property Condition Disclosure Statement was delivered to the purchasers on or before the effective date of any contract which bound the purchasers to purchase the property. Scheopner violated Title 299 Chapter 5 Section 003.25 Failure by a licensee who knows of an error, inaccuracy, or omission in a Seller Property Condition Disclosure Statement completed pursuant to Neb. Rev. Stat. Section 76-2,120 to disclose the error, inaccuracy, or omission, in writing, to a potential purchaser and the seller. Such disclosure shall be attached to the Seller Property Condition Disclosure Statement. Scheopner failed to disclose, in writing, to the purchasers and the sellers, an omission by the sellers on the Seller Property Condition Disclosure Statement and Scheopner failed to attach such written disclosure to the Disclosure Statement. Scheopner violated 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. Scheopner failed to have a seller having a joint-ownership interest in the property sign the Listing Agreement. Scheopner violated Neb. Rev. Stat. § 81-885.24 (26) Violating any rule or regulation adopted and promulgated by the commission in the interest of the public and consistent with the Nebraska Real Estate License Act. Scheopner violated Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson by failing to have a seller having a joint ownership interest in the property sign the Agency Disclosure; failed to have both sellers sign the Agency Disclosure; failing to identify on the Agency Disclosures that he was the licensee making the agency disclosure; failing to insure that the sellers completed the Seller Property Condition Disclosure in its entirety; failing to disclose, in writing, an omission on the Seller Property Condition Statement to the purchaser and the seller, and failing to have all parties having an ownership interest in the property sign the Listing Agreement.]

November 20, 2009

2008-037 – Theresa Marie Garthright vs Matthew Barrett O'Shea, Salesperson and Kimberly Anne Topp, Broker. Topp: Dismissed. O'Shea: License suspended for a period of one (1) year, with the first ninety (90) days served on suspension and the remainder of the 1 year suspension period stayed and served on probation. The suspension period commenced on December 1, 2009, and will continue through February 28, 2010. The probation period will commence on March 1, 2010, and continue through December 1, 2010; plus an additional nine (9) hours of continuing education to include three (3) hours in agency, three (3) hours in ethics and three (3) hours in license law to be completed by May 30, 2010. [O'Shea violated: Neb. Rev. Stat. § 81-885.24 (14) Negotiating a sale, exchange, listing, or lease of real estate directly with an owner or lessor if he or she knows that such owner has a written outstanding listing contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker or negotiating directly with an owner to withdraw from or break such a listing contract for the purpose of substituting, in lieu thereof, a new listing contract. O'Shea presented an Offer direct to an owner knowing such owner had an exclusive right-to-sell listing contract with another designated broker. Violated Neb. Rev. Stat. § 81-885.24 (24) Failing by an associate broker or salesperson to place, as soon after receipt as practicable, in the custody of his or her employing broker any deposit money or other money or funds entrusted to him or her by any person dealing with him or her as the representative of his or her licensed broker. O'Shea failed to deliver the buyer's earnest money deposit to his designated broker. O'Shea violated Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson, whether of the same or of a different character as otherwise specified in this section. O'Shea presented an Offer direct to an owner knowing such owner had an exclusive right-to-sell listing contract with another designated broker, and O'Shea failed to deliver the buyer's earnest money deposit to his designated broker; November 20, 2009

The Status and Treatment of Expired Listing Agreements

Best Practice: If you plan to extend your listing agreement beyond its original expiration, do so before it expires. If a listing agreement does expire seller's limited agency expires as well, and a new agency disclosure pamphlet should be presented and a new listing agreement should be entered into to create a new listing and establish the seller's agency relationship again. Please also remember that if the listing agreement is not extended, a licensee's obligations to the seller regarding confidentiality remain in effect after the expiration of the listing agreement.

Questions are often asked of the Real Estate Commission relating to the status, obligations, and procedures regarding expired listing agreements. This article will attempt to answer those questions as they relate to most common situations.

The subject of expired listing agreements is both simpler and more complex than the subject of expired offers to purchase dealt with in an accompanying *Commission Comment* article found on page 6 of this issue. As we all know, the listing agreement must be entered into before acting on behalf of the seller and must contain the licensee's duties and responsibilities, the terms of compensation, and a fixed date of expiration. NEB. REV. STAT. §76-2422. Once the listing agreement expires, all agency obligations and duties required under the agreement are terminated, except as provided below.

Under the general principles of contract law, the expiration date of the listing agreement can be extended by mutual agreement of the parties before the listing agreement expires.

Any such extension should be done in writing and signed and dated by both parties. After a listing agreement has expired, a new listing agreement must be created. Ideally, this would be done by both parties signing a new agreement containing all the required information. However, a new listing agreement could also be entered into by the licensee and seller both clearly stating in writing their intent to enter into a new agreement based upon the terms and conditions of the old agreement, clearly referencing the old agreement, stating a new expiration date, and signing and dating the agreement.

When a listing agreement has expired, even for a short time, a new agency disclosure pamphlet should also be presented to the seller and signed prior to entering into a new listing agreement. Although this may seem redundant, please remember that the listing and agency relationship have expired and you are starting "from scratch" with the new arrangement in the eyes of the law (and the Commission).

A further question which arises relates to what duties and obligations survive an expired listing agreement. As previously stated, a licensee's duties as a limited agent expire, but the licensee still has certain obligations which extend beyond the expiration of the agreement. NEB. REV. STAT. §76-2423 states that, upon expiration or termination of a listing agreement, a licensee is still required to properly account for all money and property related to and received during the relationship and is required to keep confidential all information received during the course of the

relationship, except for the disclosure of information which is required by law.

For example, Joe Broker has a recently expired listing agreement with Mr. and Mrs. Seller. While the listing was current, the Sellers informed Broker that they were moving out of town and confided that they really want to sell the house and were considering lowering the asking price considerably, given both the current market and their situation. Mr. Broker is also aware that a roofing inspector has recommended that a new roof is needed on the property.

The licensee's obligations with regard to this information remain the same as they were when the listing and agency were in effect. He must treat the information relating to the seller's motivation for selling the house as confidential, and he must reveal the information relating to the roof to prospective buyers as an adverse material fact.

In addition, if the listing agreement so provides, and if the seller closes with any prospective buyer solicited during the term of the active listing agreement, the broker will still be entitled to compensation as provided in the agreement, even if it has expired.

Because of the paperwork and lapse of agency when a listing agreement expires, the best time to renew a listing agreement is before it expires. 



The Status and Treatment of Expired Offers to Purchase

Best Practice: While there are many ways to form a contract to purchase real estate that may be legally enforceable, the best practice after an offer has expired on its own terms is to write a new offer with all required terms, in writing, signed and dated, in order to ensure that you create a purchase contract that will be enforceable.

Questions are often asked of the Real Estate Commission relating to the status, obligations, and procedures regarding expired offers to purchase. This article will attempt to answer those questions as they relate to most common situations.

In reviewing this subject, it should first be noted that the Nebraska Real Estate License Act does not speak specifically to expired offers and counter offers. However, NEB. REV. STAT. §81-885.01 does define a broker and salesperson as “any person who, for any form of compensation or consideration with the intent or expectation of receiving same from another, negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease or option for any real estate or improvements thereon.” The law clearly provides that the negotiation of the sale or purchase of real estate is at the core of licensed activity. Nebraska law also provides that a licensee must present all written offers to their client in a timely manner. NEB. REV. STAT. §76-2417(1)(c)(ii) and NEB. REV. STAT. §76-2418(1)(c)(ii). Therefore, licensees must have a certain base level of knowledge regarding the presentation, negotiation and acceptance of offers to purchase, in order for licensees to represent their client and

perform their duties under the Act. Failure to demonstrate an appropriate level of competence regarding offers to purchase could be deemed to be “demonstrating negligence, incompetency, or unworthiness” to act as a licensee as provided in the license law. NEB. REV. STAT. §81-885.24(29).

The actual offer to purchase and acceptance of such offer would be covered by general contract and real estate law as discussed below.

Status and Treatment of Expired Offers to Purchase

A long established principle of contract law, recently affirmed by a Nebraska appellate court ruling, states that the power to create a contract by acceptance of an offer terminates at the time specified in the offer. *Keller v. Bones*, 8 Neb. App. 946, 604 N. W. 2d 847. The Nebraska Supreme Court reversed the Appellate ruling in *Bones*, based upon the facts of the case and the language in the offer, holding that an offer to purchase signed and accepted before its expiration was still valid and binding, despite not having been communicated to the purchaser until after its expiration. *Keller v. Bones*, 260 Neb. 202, 615 N.W. 2d 883.

Clearly, an offer that has lapsed is no longer open to unilateral acceptance on the part of the offeree -- the offer is “dead” by its own terms. The question is, can it be revived? The short answer is yes, but intent to revive must be clearly shown on the part of the offeror.

The lapse of an offer does not prohibit the parties from entering into a future agreement under the terms similar or terms from the initial offer.

Such agreement would, of course, still have to meet the requirements of a contract for the purchase of real estate, i.e., it must be in writing, it must specify a purchase price, closing date, indicate the clear intent of both parties to enter into the agreement, describe the property in question with specificity, etc. The cleanest way to do this is to write a new offer. However, as noted in *Bones*, there is a general principle of law that the offeror is the master of the offer and, if they wish to revive it they can, but of course such revival should be evidenced by clear written intent on the part of the offeror. If there is a lapse date in the purchase agreement and the acceptance comes after the lapse date, the offeror (buyer) should cross out the lapse date, extend that date, and initial and date this change or otherwise clearly indicate intent to agree to the seller’s acceptance so as to avoid any ambiguity on the face of the purchase agreement.

Although it certainly is possible to create a binding purchase contract by using an expired offer, the best practice is to write an entirely new offer, avoiding ambiguity or interpretation, and worst case, litigation, when closing a transaction or enforcing a contract. 



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Dual Agency (Cont'd)

Licensee Responsibilities as to the Buyer, or “Step into my car, let’s look at some listings”

The dual agency consent requirements as to the buyer may be met in a couple of ways, as long as the buyer consent is obtained prior to undertaking any actions as a dual agent of the buyer. One is the use of a general consent and the other is the use of a property specific consent. Please note that the threshold or initial consent described in both methods described below should be executed at the “step into my car, let’s look at some of my listings” stage and not the “did you like that one?” stage of the transaction.

The General Consent

The buyer may sign a general consent to dual agency which will allow the licensee to act on behalf of the buyer and show the buyer multiple properties they have listed. However, if a general consent is used initially and a deal is contemplated, an additional document specifying the property involved, that dual agency has occurred, and the party or parties responsible for paying compensation should be executed prior to making an offer and must be executed no later than the time of entering into a contract to purchase (this will generally be the same document the seller will also sign as the second step of dual agency documentation compliance process described above).

The Specific Consent

If a general consent to dual agency form is not used, the buyer must sign a specific consent to dual agency allowing the licensee to act on behalf of the buyer and show the buyer that specific consent prior to acting as a dual

agent. As long as the specific consent identifies the property in question, confirms the dual agency status, and specifies the party or parties responsible for paying any compensation this document can meet the dual agency consent requirements for the buyer in one step. This specific consent will also be signed by the seller and used for the second step of the process for sellers described above.

The Paperwork

One question that is often asked involves using the same document for general consent form and the specific consent form described above. This can be done, but the general consent, of course, has to be signed and dated when originally presented, it can then become a specific consent

by identifying the property and having the buyer initial and date the addition. If the terms of compensation were not contained in the general consent they must be added and initialed and dated by the buyer as well.

Clear as Mud?

If you are like me and prefer to slice rules down to their bare essence for ease of remembering and compliance try this: Always obtain written, signed and dated consent to dual agency from all parties prior to acting as a dual agent, and be sure you have a written, signed and dated agreement specifying that dual agency is occurring, the specific property involved in the transaction, and the terms of compensation at or prior to entering into a contract for purchase. 🏠

Did You Know? Alien Ownership of Land Prohibited

A question recently was posed to this office about whether persons who were not citizens of the United States could own land in Nebraska. The answer may surprise you. Nebraska law does prohibit alien (non U.S. Citizen) ownership of land or interests in land. The Nebraska Constitution provides that “The right of aliens in respect to the acquisition, ownership, possession, enjoyment and descent of property may be regulated by law” (Nebraska Constitution, Article I, sec. 25). Nebraska statutes provide that “Aliens and corporations not incorporated under the laws of the state of Nebraska are prohibited from acquiring title or taking or holding any land, or any leasehold interest extending more than five years” (Neb. Rev. Stat. §76-402).

While the prohibition against the alien ownership of land is an important law to be aware of, licensees also must remember that discrimination, including the refusal to sell, rent or negotiate for the sale or rental of a dwelling based upon the race, color, religion, sex, familial status or national origin, is strictly prohibited the Federal and Nebraska Fair Housing Acts and Nebraska real estate license law. You should never make an assumption regarding a client’s or potential purchaser’s alien status based upon their appearance or ethnicity, doing so may be seen as discriminatory under the state and federal fair housing acts.

Nebraska Real Estate Commission
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