



COMMISSION COMMENT

Spring | 2015

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Commission Meeting Schedule

- April 23Lincoln
- May 21-22Lincoln
- June 18-19Lincoln
- August 19-20Lincoln

Retired Trust Account Examiner Bob Arterburn



Mar. 4, 1936-
Jan. 14, 2015

Robert E. "Bob" Arterburn was the first trust account examiner hired by the Commission. He was a 33 year employee of Nebraska Real Estate Commission.

Arterburn used to say that, since he was the first examiner hired, his training consisted of receiving a briefcase, getting a list of broker names and addresses, and being told to "go audit." Arterburn established many of the practices and procedures in examinations that are still used to this day. Born in Omaha, Nebraska, lifelong resident of Blair, Nebraska, he will be missed. 

New Agency Disclosure Form Approved, Effective May 1

Effective May 1, 2015, the Commission will require a new Agency Disclosure Form to be provided to clients and customers. The new form is one page and greatly simplified from the current version, making it easier for licensees to explain and easier for the public to understand.

First and foremost it should be noted that the laws regarding agency disclosure and agency duties have not been changed. Agency disclosure should still be provided at first substantial contact. Further interpretation of first substantial contact was recently adopted by the Commission, and can be found here: <http://www.nrec.ne.gov/legal/policyinterpretation.html#pi38>.

The May 1 date is the date you should start using the new form. If a client or customer completed the old form, and nothing has changed in the relationship, the old form will still be effective after May 1. In other words licensees will generally not have to redo their current agency disclosures with the new form on May 1.

Filling Out the New Form

The new form was developed with the intention that it be straightforward and easier to fill out. Most of the features of the form are intended to be self-explanatory, but licensees should have a good working knowledge of how the forms work and how to complete them.

There are three forms, a Buyer/Seller Agency Disclosure form, a

Landlord/Tenant Form and a Common Law Agency Addendum (because common law agency is practiced less often and there simply was not room on the one page form for an explanation of it).

Buyer/Seller and Landlord/Tenant Form

The basic premise here is for the licensee to explain the capacity in which they are proposing to act for the customer or client, and have the parties initial the appropriate box and sign the form. There are some additional details noted below (for ease of discussion the customer/client will be referred to as "consumer" where it is not necessary to make a distinction between the two):

- It is a unified form, with no tear off portion to be left with the consumer like the old form had.
- Licensees should make a copy, keep the original for their records, and of course provide a copy to the consumer. If no copier is available, it is acceptable to fill the form out twice.
- Since the one page form has edited versions of agency responsibilities, the form has a link to more information about agency relationships as well as general information for consumers on the Nebraska Real Estate Commission's website. We urge licensees to point this link out and advise consumers to

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Nebraska Real Estate Commission
1200 "N" Street, Suite 402
P.O. Box 94667
Lincoln, Nebraska 68509-4667
(402) 471-2004
www.nrec.ne.gov

Facebook: Nebraskarealestatecommission
Twitter: @Nerealestatecom
EDITOR: Greg Lemon

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

Ann Dover
1000 Norfolk Ave.
Norfolk, NE 68701
(402) 371-0200

BROKER MEMBERS

Al Avery
819 Diers Ave, Suite 5
Grand Island, NE 68803
(308) 398-6600

Drew Stange
1248 "O" St.
Lincoln, NE 68508
(402) 441-5800

Herb Freeman
17809 Pacific St.
Omaha, NE 68240
(402) 397-4900

Andy Alloway
2611 S. 117th St.
Omaha, NE 68144
(402) 491-0100

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.

Printed with soy ink

DIRECTOR'S DESK

Broker Supervision

This issue of the *Comment* contains a reprinted article about broker responsibility and the issues that can arise from lack of appropriate supervision. Rather than writing something internally I thought it would be better for you to hear the story from a licensee's perspective, rather than from us as regulators. Our trust account examiners tell me that we see many brokerages that delegate the bookkeeping duties on the trust account to a non-licensed employee, while this is perfectly acceptable, the designated broker is still responsible for the trust account and should monitor the account and accounting procedures on a regular basis. Advertising has become a much harder issue to monitor and regulate as affiliated licensees use social media and services like Craigslist to advertise properties. Designated brokers are still responsible for overseeing all advertising despite the empowerment the Internet and social media have provided to affiliated licensees.



Director Greg Lemon

New Agency Disclosure Form

The Commission is very pleased to be introducing the new Agency disclosure form (see story in this issue). Obviously it is a change, and with every change there will be some resistance and complaints, but overall the new form should be easier to explain by licensees, and easier to understand by clients and customers. The cooperation between the industry and the Commission has created a win win situation for all involved. One of the drivers behind the change was the idea that an easier form would be more likely to be offered at the appropriate time (first substantial contact) by licensees when dealing with the public, so please work with us on making that happen.

Drone Update

The Summer, 2014 issue of the *Commission Comment* contained a brief snippet about using drones for commercial purposes, I considered the article to be of somewhat limited interest, and almost didn't run it. We received more comments on the drone article than anything we have run in this newsletter for some time. Therefore I thought we should provide an update on the federal regulation of drones for commercial purposes (which is prohibited without permission from the Federal Aviation Administration "FAA"). At the time I wrote the piece the application process and rules were still very much up in the air, but there has been some recent clarification issue on the issue. The FAA has issued a much simpler process for application which would apply when certain criteria have been met (such as altitude limits, line of site flying only, and weight limits on the drone itself).

(Continued on page 3)

Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

2014-006 - Louis E. Halperin vs. Kathryn Pocras; Broker; Lincoln, NE. Stipulation and Consent Order entered January 28, 2015. License suspended for six (6) months all stayed and served on probation; plus pay a civil fine of \$1,250.00 by February 27, 2015. [Pocras violated NEB. REV. STAT. § 76-2422(6) Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01, a designated broker who intends to establish an agency relationship with any party or parties to a transaction in which the designated broker's duties and responsibilities exceed those contained in sections 76-2417 and 76-2418 shall enter into a written agency agreement with a party or parties to the transaction to perform services on their behalf. The agreement shall specify the agent's duties and responsibilities, including any duty of confidentiality, and the terms of compensation. Any agreement under this subsection shall be subject to the common-law requirements of agency applicable to real estate licensees Pocras's monthly management fee was changed in about October of 2012, without having a written agreement for this change in compensation; violating NEB. REV. STAT. § 81-885.24(16) which provides that it is an unfair trade practice to violate any provisions of the agency statutes 76-2401 to 76-2430.] 



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Director's Desk (Cont'd)

While the Commission does not enforce these federal regulations, we do have authority to discipline licensees who violate other laws. More information about the proposed application process can be found on the FAA's website: http://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295.

Office Relocation

The Nebraska Real Estate Commission Office will be moving from the current location in The Atrium in Downtown Lincoln to the State Office Building at 14th and L Streets. The move is currently scheduled for late summer of this year, we will provide further details as they become available. 

Greg Lemon, Director
Nebraska Real Estate Commission

MEET THE REAL ESTATE COMMISSION STAFF

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

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

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

COMMUNICATIONS GUIDE

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

| | |
|--|--|
| Commission Meeting Information . . . | Monica Rut monica.rut@nebraska.gov |
| Complaint Procedures | Duran Cell duran.cell@nebraska.gov |
| Continuing Education History or Inquiries | Tawny Snider tawny.snider@nebraska.gov |
| Curriculum Design (Education & Instructor Approval) | Alane Roubal alane.roubal@nebraska.gov |
| Errors and Omissions Insurance Inquiries | Monica Rut monica.rut@nebraska.gov |
| Financial Officer | Vacant |
| License Applications Packet Requests | General Staff realestate.commission@nebraska.gov |
| License Applications Process | Marilyn Masters marilyn.masters@nebraska.gov |
| Licensing Requirements | Monica Rut monica.rut@nebraska.gov |
| New Licenses in Process | Marilyn Masters marilyn.masters@nebraska.gov |
| Specialized Registrations | Monica Rut monica.rut@nebraska.gov |
| Transfer of License | Patricia Menousek patricia.menousek@nebraska.gov |
| Trust Account Matters | John Clark john.clark@nebraska.gov Ron Pierson |
| Webmaster | Monica Rut monica.rut@nebraska.gov |

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

Broker Supervision

BY: GREGORY HARTLINE, BROKER

The Nevada Real Estate Division gives permission to reprint this article with the caveat that the author is a Nevada licensee in good standing. The circumstances of Mr. Hartline's experience, as described in the article, provide a cautionary tale for real estate brokers everywhere and his message holds as true today as it did when originally published in 2004.

Gregory Hartline, a Nevada broker, was disciplined by the Nevada Real Estate Division for failing to have complete transaction files in his office for three properties, failing to review agent files, and failing to supervise his agents. Hartline was required to pay a \$5,000 fine and complete 6 hours of classroom education as well as writing an article for publication in the Nevada Real Estate Division newsletter.

Recently, my brokerage was threatened by the actions of an agent who was not acting ethically. Unbeknownst to me, his business decisions were solely the product of personal greed and without any regard to the public that he was charged with serving. Although sworn to uphold the highest ethical standards, he had ignored these obvious fiduciary responsibilities.

As his broker, I should have identified his transgressions early on. I did not. Though I certainly never intentionally meant to harm anyone, because of my lack of discovery, an innocent party was unfortunately damaged. As the supervision broker, I must ultimately share in the blame by implication. Had I been aware of my agent's improprieties at an early stage, I would have been able to intercede and correct the situation before it grew into the significant infraction that it became. I have been asked to write these words so that others may share in my experience.

Perhaps, in light of this submission, some other broker will be more vigilant and the public will ultimately be better served.

This altogether unfortunate state of affairs has brought me to reflect upon the nature of supervision, delegation and, ultimately, broker responsibility. I have learned that even the most seasoned and sophisticated agent can act in ways that are unethical and wholly unprofessional. While those actions are frequently outside of the knowledge of their broker, ultimately the broker will be held accountable.

Vigilance is the keyword, and none of us are omniscient. We can never be completely aware of all of the actions of those who are operating within our companies. Our commitment to vigilance, while imperfect, must be incessant. We are charged with being as knowledgeable as possible with regard to those who hang their licenses under ours. For those of us who are involved in large companies, we are faced with a particularly daunting challenge. As company rosters grow in size, the degree to which a broker can be "hands on" is necessarily diminished.

Most brokers in larger companies will, of necessity, delegate some degree of their supervision and compliance operations to others. With proper training, a compliance officer in a large organization can be an essential extension of the broker's business practice. Still, that broker's supervisory effectiveness will only be as efficient as that compliance officer is on any given day. Given the complexity of many contemporary real estate operations, it is obvious that there is the potential for more and more essentially unsupervised activities by agents.

Responsible delegation begins with broker training and supervision

and ends with more broker training and more and more ongoing supervision. The contemporary real estate culture is partially to blame. Profitability modes which are built on ever larger rosters are, in my opinion, not in the best interest of the public. They are a business reality that will not change in the foreseeable future.

Even the most responsible delegation within these business models cannot produce the kind of supervision that could ever be construed as ideal. This ultimately puts more and more responsibility on the individual agent to act as professionally and ethically as possible—and often without someone overseeing them with any degree of regularity. The agent certainly is charged with a large degree of responsibility in the ramifications of his or her actions. They are the first line of defense. However, all of us are human and we all make mistakes. It is the intentional transgression, not the innocent oversight or error, which is the subject of this consideration.

It would be easy to suggest that by "raising the bar" in the terms of pre-licensing standards we could elevate the quality of agents so that all would perform more satisfactorily. This is only a partial solution. An ethically bereft agent will always be a cancer in our industry—regardless of his or her professional sophistication. Certainly, more stringent licensing requirements could only help. Increasingly more extensive pre-licensing education coupled with better mentoring and training upon licensure would, of course, be a positive improvement. In my case, however, it was the actions of a very sophisticated agent who was acting intentionally unethically. The solution: short of the impossibility of

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Real Estate Commission Prevails in Federal Lawsuit on Unlicensed Practice

The Nebraska Real Estate Commission recently prevailed in its motion to dismiss the federal lawsuit originally filed in 2010, which challenged the Commission's authority to regulate unlicensed brokerage practices.

In the Spring of 2010 the Nebraska Real Estate Commission sent a cease and desist order to Leslie Rae Young, a California Licensed Broker, for listing Nebraska real property on Realtor.com as well as forsalebyowner.com without a Nebraska Broker's license. The listings stated such things as "Presented by Leslie Young", and contained links to "e-mail agent" and "view agent's other listings," among other information.

In June of 2010 a second cease and desist order was sent, citing new statutory provisions giving the Commission civil authority to

impose fines of up to \$1000 per day for unlicensed practice. Young immediately challenged the constitutionality of the unlicensed practice enforcement statutes in federal district court, filing a lawsuit challenging the Commission's jurisdiction in the matter.

The federal court initially granted the plaintiff's (Young's) motion for a temporary restraining order, prohibiting the Commission from enforcing the unlicensed practice statutes and cease and desist order. The temporary restraining order was effective against the Commission as it applied to Young only, and did not stop the Commission from applying the unlicensed practice provisions against others.

In March of 2012 the court lifted the temporary restraining order against the Commission, stating that the plaintiff was unlikely to prevail on the constitutional challenge to the Commission's jurisdiction over the plaintiff and the statutes governing the matter, including the language stating that a "single act" falling under the definition of the activities of a real estate broker could confer jurisdiction on the part of the Commission over an unlicensed person.

Young then filed an amended complaint in which she claimed that requiring her to obtain a Nebraska real estate license infringed upon her constitutional right to free speech and other rights, arguing that her listings constituted "mere advertising."

In the briefs prepared for the case the Commission argued that Young had violated the act by holding her-

self out as a broker in the internet advertising that stated "brokered by," "contact agent" etc. and then providing Young's contact information as the presumed intermediary or "broker" in the transaction, arguing that whether or not Young had acted as a broker, she had "held herself out" to be acting as a broker for Nebraska sellers of Nebraska properties, in violation of the statute.

Young argued that the "brokered by" and "contact agent" language was not provided by her, but was mandated by the format used on the websites where the properties were advertised. The Commission countered that argument by pointing out that the agent and brokerage language was there because some of the sites used were only intended for the use of brokers listing property only, and that Young apparently wanted to act as a broker when it suited the purpose of getting on those websites, but didn't want to be one when it would require getting a Nebraska license.

On January 28, 2015, the court issued an opinion upholding the statutes and granting the Commission's motion to dismiss the lawsuit, stating:

"The Court agrees with the defendant that "A person may list his or her own property for sale on the Internet without a license. A licensed broker may list a client's property for sale on the Internet. However, an unlicensed broker who describes herself as a "broker" may not list a client's property for sale on the internet or hold herself out as a "broker" without a license..."

Young has filed a motion with the court to reconsider the ruling, which is still pending as of the time this article was written. The full opinion can be found here: <http://tinyurl.com/LeslieYoungRuling>. 



PHOTO COURTESY NEBRASKA'S TOURISM.

(Continued from page 1)

New Disclosure Form (Cont'd)

review the information provided. The consumer page can be found here: <http://www.nrec.ne.gov/consumer-info/index.html>.

- There is room for two parties to sign and initial the form, if you are acting on behalf of more than two people please use additional forms.
- If dealing with a customer, the form is more straightforward than before. Simply have the customer or customers initial at the top of the customer box, and check within that box what capacity you are working in (buyer's agent, seller's agent, etc.)

Additional Information on the Form

The designated broker should put what services (if any) they will provide to an unrepresented customer on the back of the form. They may also put what types of brokerage services they offer as well as concise, factual wording regarding additional services they perform for clients in the various agency relationships.

Dual Agency

Licensees no longer have to mark potential dual agent on the disclosure

form as has been advised in the past. Dual agent will likely only be marked in a few situations on first substantial contact, such as when the licensee has a listing and is talking to a potential buyer for that listing who the licensee would represent as a buyer's agent. Please note that the required written disclosures and consent to dual agency would still be required when dual agency occurs.

Common Law Agency

Because common law agency occurs less frequently, and in order to keep the main form simple, common law agency is dealt with through the use of an addendum.

Two thirds of the way down on the Buyer/Seller, and Landlord/Tenant main form is a place to check that the licensee will be acting as a common law agent, and in what capacity they are acting as a common law agent. Those spaces need to be checked on the main form, and the addendum, should be presented and explained to the consumer, filled out, signed, and attached to the main form. The licensee retains the original, copy to the consumer, or execute in duplicate.

Please note, that pursuant to Commission policy it is not required that a common law agent provide the agency disclosure form to an unrep-



resented customer, but that they may, and if they do, the form has information for the customer regarding who the common law agent is representing.

The new forms can be found on the Commission's website at: <http://tinyurl.com/AgencyDisc>. 

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Broker Supervisor (Cont'd)

developing a somehow more innately moral agent, is always better supervision.

We live in a less than perfect world. There will always be those agents who act irresponsibly. This unfortunate reality places the onus of responsibility for ethical service squarely on the shoulders of the supervising broker. It is also an unfortunate truth that a single errant agent can erode an otherwise wholly

conscientious business operation.

While the broker is busy supervising the newest and most neophyte agent on the roster, an unethical veteran professional can be undermining the entire integrity of the operation. Only one bad agent can blemish an otherwise stellar company.

Furthermore, the larger the brokerage, the more exposure to liability the broker is required to sustain. In these companies, it is all the more important for the broker to "grow eyes" in the back of his or her head. If those

additional "eyes" are a part of a delegated team, then that team is still charged with protecting the interest of the public and, by extension, the license of the broker. Harry Truman was known to place a sign on his desk that read "The Buck Stops Here." The president's aphorism is a paradigm of responsibility that every broker should embrace. To do so is to serve the best interests of the public.



Broker Approved Training Survey

In January, the Commission issued an On-line survey to designated brokers across the state on the subject of Broker-Approved Training (BAT). The eleven-question survey inquired into a variety of topics such as if BAT was easy to initiate, or if brokers preferred other methods of meeting continuing education requirements. Survey questions also addressed availability of presenters and preferred topics among others.

- Responses to the survey, while anonymous, were divided into the three congressional districts of the state. Differences in the responses by district were fairly small.
- A statewide average of only 18% of brokers thought they were receiving too much information about BAT activities.

- When brokers were asked if they knew how to approve licensees to receive credit for BAT, the overwhelming response from each district was “No opinion or Uncertain.”
- Slightly more brokers to the West were having difficulties using BAT than their colleagues to the East. 38% in the Central and West and 32% in the eastern area of the state compared to only 22% of the metro Omaha area found the BAT process to be “cumbersome”
- When asked, as a broker, if they “appreciate the opportunity to select and approve the subject matter for affiliated licensees,” the responses ranged from 48% in the West to a high of 66% in the Omaha area.

In response to the survey, the Commission will continue to post the newly approved BAT activities on the Commission meeting agendas. The Commission also encourages all licensees, brokers, as well as providers to visit the **Frequently Asked Questions on Broker-Approved Training Activities** page of the Web site found at www.nrec.ne.gov/licensing-forms/licenseeinfooftraining.html.

BAT and/or Continuing Education providers that would like to be contacted as potential sources for Broker-Approved Training activities can be added to a list that will be posted on the Commission Web site. Please contact the Commission office at 402-471-2004 for more information regarding the provider list. 🏠



An example of his earlier prairie style design, Frank Lloyd Wright's Sutton House in McCook is one of few homes west of the Mississippi designed by the famous architect. Photo Courtesy of Nebraska Tourism.

Nebraska Real Estate Commission
PO Box 94667
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Explore the rainforests of three continents in the world's largest indoor jungle, the Lied Jungle at Henry Doorly Zoo in Omaha.