

2023 CORE  
COURSE



# NEW MEXICO REAL ESTATE COMMISSION

2023  
CORE COURSE

PARTICIPANT'S GUIDE

## HOW DO BROKER DUTIES COMPARE TO FIDUCIARY DUTIES

FIDUCIARY DUTIES	BROKER DUTIES
<b>Loyalty</b>	
<p>A duty of loyalty is one of the most fundamental fiduciary duties owed by an agent to his principal. This duty obligates a real estate broker to act at all times solely in the best interests of his principal to the exclusion of all other interests, including the broker's own self-interest.</p>	
<b>Confidentiality</b>	
<p>An agent is obligated to safeguard his principal's confidence and secrets. A real estate broker, therefore, must keep confidential any information that might weaken his principal's bargaining position if it were revealed. This duty of confidentiality precludes a broker representing a seller from disclosing to a buyer that the seller can, or must, sell his property below the listed price.</p>	
<b>Disclosure</b>	
<p>An agent is obligated to disclose to his principal all relevant and material information that the agent knows and that pertains to the scope of the agency. The duty of disclosure obligates a real estate broker representing a seller to reveal to the seller:</p> <ul style="list-style-type: none"><li>• All offers to purchase the seller's property.</li><li>• The identity of all potential purchasers.</li><li>• Any facts affecting the value of the property.</li><li>• Information concerning the ability or willingness of the buyer to complete the sale or to offer a higher price.</li><li>• The broker's relationship to, or interest in, a prospective buyer.</li><li>• A buyer's intention to subdivide or resell the property for a profit.</li><li>• Any other information that might affect the seller's ability to obtain the highest price and best terms in the sale of his property.</li></ul>	

## HOW DO BROKER DUTIES COMPARE TO FIDUCIARY DUTIES

FIDUCIARY DUTIES	BROKER DUTIES
<b>Obedience</b>	
An agent is obligated to obey promptly and efficiently all lawful instructions of his principal. However, this duty plainly does not include an obligation to obey any unlawful instructions; for example, an instruction not to market the property to minorities or to misrepresent the condition of the property. Compliance with instructions the agent knows to be unlawful could constitute a breach of an agent's duty of loyalty.	
<b>Reasonable Care and Diligence</b>	
An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs. The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. By reason of his license, a real estate broker is deemed to have skill and expertise in real estate matters superior to that of the average person.	
<b>Accounting</b>	
An agent is obligated to account for all money or property belonging to his principal that is entrusted to him. This duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to him that relate to his client's transactions or affairs.	

# NEW MEXICO REAL ESTATE COMMISSION

## BROKER "B"

### NMREC Investigation - Case 1A

#### INTRODUCTION

The Real Estate Commission initiated an investigation based on a written complaint received from the **Complainant/Purchaser** stating that **[Respondent A, Listing Broker (AB)]** and **[Respondent B, Respondent A's Qualifying Broker]**, misrepresented the condition of the property she purchased, and violated the terms of the agreement.

**Respondent's Broker** provided a response to the complaint as well as supporting documentation.

#### INVESTIGATIVE FINDINGS

##### **Complainant's Statement:**

The following details the major complaints. This is a serious and obvious breach of contract and **[Respondent A]** has never responded to my inquiries or my agent's inquiries regarding the breaches of contract explained below.

##### **Breach of Contract #1:**

On 3/24/2021, after several closing delays, I went to [Redacted] Title expecting to finally close. The title company's closing disclosure did not match my lender's disclosure. I was advised by [the escrow officer] that my closing could not continue because the Seller's Agent stated that the purchase price was not \$119,000.00 but \$120,000.00; this is false. In the entirety of the contract, at no time did I ever agree to a change in the selling price. In fact, my broker's email to **[Respondent A]** clearly states that I would NOT agree to a change in selling price. I would require CASH to address the repairs SELLER had failed to complete.

##### **Breach of Contract #2:**

Seller had agreed to repairs that Seller failed to complete. As evidenced by **[Respondent A]**'s email to my representative [Buyer's Broker] dated January 11, 2021. Seller agreed to repairs, in writing. **[Respondent A]** at that time gave an estimated completion date of approximately 1 week. The most common cause for a bathtub draining slowly is hair. Seller had stated in disclosure that there were NO problems with water/moisture or plumbing. On the walk through of 3/15/2021 with my agent, **[Buyer's Broker]**, I noted the following by email dated 3/15/2021 to **[Buyer's Broker]** "Here is what **[Buyer's Broker]** and I noticed:

##### **No hot water**

In both bathrooms the tubs are slowly draining, showerheads leak water (a lot) and spray the floors. The showerheads need to be replaced. The heaters don't really warm the house. They are on but just barely warm and did not increase in temperature while we were there, Kitchen light does not work. Only one of the requested repairs was completed: the repair of the weak flooring around the wood burning stove. Buyer agreed to a \$2,500.00 credit from Seller (to be paid upon closing) to address the incomplete work. To date: Seller has not paid the credit **[Respondent A]** refuses to communicate with me or my agent.

Seller has violated the terms of the contract. The Purchase Agreement and its Amendments constitute the contract in full. My mortgage loan terms state clearly that the property will be my primary residence. It was clear throughout the entire negotiation process that the home had to be habitable. The home was and remains UNINHABITABLE and I have incurred an extra cost of \$27,000.00 for just the plumbing repairs. Please see attached photos of the property. I have to literally rebuild the house.

##### **Breach of Contract #3**

On 3/24/2021, I was told by **[escrow officer]**, the only way I could close would be to return to my bank and purchase a cashier's check of \$1,000.00 made out to the Seller. This would allow her to "Match" the CDs and allow the sale to proceed. This is a direct result of stating that Seller's Agent had stated that the purchase price was now \$120,000.00. This is a deliberate misrepresentation. This is also extortion: to be told to come up with more money so I could close on my house. Despite knowing better, I provided the check, I was willing to lose \$1,000.00 to finally close on my home purchase and move in.

**Failure to Disclose:**

Seller was made aware of the terms regarding the sale. Seller agreed in writing to complete certain repairs as noted in the complete sales contract. Seller made only 2!!! repair; reinforcing the weakened flooring around the wood burning stove sometime between March 5, 2021 (date I received my home inspection report) and 3/15/2021 (date of my final walk through). I have three witnesses that can attest to this also.

Seller made a patch repair to the damaged flooring around the word burning stove - this room shares a wall with both bathrooms (see pictures from Contractor). Seller intentionally hid the damage underneath and further, Seller failed to disclose the problem that was causing the weak flooring. Seller had ample opportunity to disclose and [Respondent A] had stated, in writing, that the repairs would be completed in January (see email chain attached). A deliberate misrepresentation of such an enormous problem is not protected by law. Knowingly exposing another human being to physical and health hazards is not protected by law. Defrauding Buyer and Buyer's Lender is not protected by law. Seller had ample opportunity to disclose the cause of the weakened flooring. Seller deliberately continued the misrepresentation to ensure the sale would go through. Seller and [Respondent A] had ample opportunity to disclose.

In the Seller's disclosure, Seller attested that there were no moisture and/or water problems, no caving, heaving or settling problems, no violations of laws and regulations from the New Mexico Department of Environment. Seller's disclosure is fraudulent.

Seller and Seller's Agent are required by law to disclose such damages that can pose not only hazard for potential injury and illness but is contaminating the very ground water directly below the property. Seller made a deliberate decision to not address the other required repairs to deliberately avoid exposure of a major plumbing and structural problem which would cancel the sale. Further, Seller would have to disclose the condition and would have to reduce the selling price accordingly.

Seller and [Respondent A], as Seller's representative, had a duty to disclose the findings under the flooring. Seller had a duty to disclose prior to walk through, why repairs were not completed as stipulated by Contract. This delayed the closing further. [Respondent A] failed in his duty to properly inform [Seller] that such conditions must, by law, be disclosed. It is unconscionable to sell the property in this condition. Seller agreed in writing to address repairs. Seller then offered a cash credit from the proceeds of sale and FAILED TO PAY which further violates the terms of the Contract.

Seller's deliberate misrepresentation exposed me and my two dogs to conditions that are hazardous to our health, that are physically dangerous. I have tried to address this matter amicably but [Respondent A] has not responded. When selling a property in New Mexico, it is necessary to inform potential buyers about any serious material defects with the property that the seller is aware of.

To summarize, there are several breaches of contract by the Seller. [Respondent A], seller's broker refuses to communicate with me.

I was willing to be extorted for \$1,000.00 to finally close but my costs, in addition to the full purchase price given to Seller, are astronomical. I have been more than reasonable and attempted to contact [Respondent A] on multiple occasions. Further, I would have frankly been happy with the meager, agreed to amount to complete the repairs SELLER agreed to. HOWEVER, Seller and [Respondent A] failed to meet the terms of the contract and are in breach. Quite honestly this entire sale should be nullified. What would a reasonable person, in my current position, consider a fair resolution to this complaint?

1. Pay my mortgage loan in full \$111,030.00
2. Lump sum payment for the following:

Plumbing and Contractor fees, materials and all associated costs with the rebuild of the property and associated personal loan I was forced to take out to help pay for these repairs: \$65,000.00

**Respondent's Statement:**

This letter will serve as the response to the referenced complaint on behalf of both **[Respondent A]** and **[Respondent B]**. The Seller, [Name Redacted], entered into a written listing agreement with **[Respondent Brokerage]**. **[Respondent A]** was the transaction broker for the Seller. **[Respondent B]** was **[Respondent A]**'s qualifying broker. In their careers as real estate brokers, **[Respondent B]** and **[Respondent A]** have not had any complaints brought against them through the NMREC or any Court.

**[Complainant]**'s broker was **(Buyer's Broker AB)** or **[Buyer's Broker QB]**. **[Buyer's Broker QB]** is the person who negotiated the ORW and sales price. **[Buyer's Broker QB]** is the qualifying broker for **[Redacted Brokerage]**. The Purchase Agreement was presented to the Seller on about January 6, 2021. The offer price in the purchase agreement was \$120,000. The Purchase Agreement is attached to the Complaint. An Amendment/Addendum (NMAR 5101) was prepared by the Buyer and was presented to the Seller with the agreement to purchase. The proposed Amendment was that the Seller would contribute "up to 2.5 percent of final purchase price towards Buyer's prepaid and closing costs". The Seller accepted the NMAR 5101 Addenda and signed it on January 6, 2021, at the same time she signed and accepted the Purchase Agreement. **[Exhibits provided with response]**.

The home inspection was completed on January 14, 2021. This is an old adobe home and various/numerous/significant deficiencies were identified in the home inspection report. Based on the home inspection, Buyer submitted the ORW to Seller on January 28, 2021. The ORW asked for numerous items to be repaired.

The Seller responded to the ORW on January 28, 2021. In response to the ORW, Seller agreed to fix certain items. The Seller in the response to the ORW agreed to use a licensed electrician, but not a licensed roofer. In lieu of fixing all items on the ORW, the Seller agreed to reduce the price by \$1,000. **[Exhibits provided with response]**. The Buyer agreed to Seller's proposal and signed the ORW on January 28, 2021. Both Buyer and Seller signed the Price Reduction (from \$120,000 to \$119,000 via NMAR 2101) on January 28, 2021. A copy of the Price Reduction is attached to the Complaint.

There were two extensions to the closing date. The extensions are attached to the Complaint. The parties closed on or about March 24, 2021, as stated in the Complaint. Buyer conducted her final walk through on about March 15, 2021. The email communications in **[Exhibits provided with response]** show that after the final walk through, Buyer wanted a price reduction of \$2,500. Seller agreed to the initial \$1,000 reduction (NMAR Form 2101 attached to Complaint), then was ready to agree to reduce by another \$1,500. However, **[Buyer's Broker QB]** conveyed that Buyer changed her mind and wanted a \$2,500 credit rather than a \$2,500 price reduction. See Exhibit C. The parties signed a second NMAR 2101 Price modification/ Sellers credits on March 17, 2021. **[Exhibits provided with response]**

**[Buyer's Broker QB]** confirmed that the purchase price was supposed to be \$120,000 and that the parties agreed to a purchase price of \$120,000. See Exhibit E. In Exhibit E **[Buyer's Broker QB]** confirms that the parties initially had a price of \$120,000, that the price was reduced to \$119,000. but after the walk through the parties agreed to return the sale price to \$120,000 with a credit of \$2,500. **[Exhibits provided with response]** an email written by **[Buyer's Broker QB]** after closing and after the Buyer expressed her concerns about the closing. **[Exhibits provided with response]** is **[Buyer's Broker QB]** report of the events after closing and after he researched the events. **[Respondents A&B]** talked only with **[Buyer's Broker QB]** and cannot explain why the Buyer did not understand the purchase price changes and the Seller credit changes.

The Buyer alleges the closing was forced/coerced on her and that she did not understand the closing. Buyer admits she was upset at closing and asked numerous questions, then (after debate with the closing officer) eventually decided to sign the closing documents and purchase the home. **[Respondents A&B]** did not represent the Buyer and were not with her at the closing and certainly did not force her to close. **[Respondents A&B]** do not know if the Buyer issued a cashier's check to the Seller for \$1,000 at closing. If Buyer wrote a \$1,000 check to Seller as part of closing, a copy of the check was not attached to the Complaint. In any event, **[Respondents A&B]** did not force or encourage Buyer to write a check to Seller at closing.

Per **[Respondent A]**'s discussions and emails with **[Buyer's Broker QB]**, **[Respondent A]** understood the sale price was \$120,000. **[Respondent A]** conveyed to the closing officer that the sale price was \$120,000. **[Respondent A]** did not know there was a dispute at closing. Had he known, he would have worked with the Buyer's broker to resolve the situation.

Seller had agreed to "contribute up to 2.5% of sales price", which amounts to \$3,000. Seller then agreed to credit Buyer an additional \$2,500 after the ORW and walk through. [**Respondents A&B**] do not understand why the initial "up to 2.5% credit" was missed at closing. Apparently, the closing officer was concerned with the sales price and the \$2,500 credit and did not apply the "up to 2.5% credit". [**Buyer's Broker QB**] confirms the total credit was supposed to be \$5,500.

[**Respondent B**] understands from post-closing discussions with [**Buyer's Broker QB**] [that] in response to the Buyer's complaints, [**Buyer's Broker QB**] wrote a check to the Buyer out of his own funds in the amount of \$3,000 to try to satisfy the Buyer. Presumably, the \$3,000 was the "up to 2.5% credit" of the \$120,000 sale price.

#### **Closing officer emails:**

The various emails from [Redacted] Title Escrow attached to the Complaint show the closing officer also questioned the sale price but consulted with "the brokers" and was told the sale price was \$120,000. This comports with the [**Respondent A**]'s understanding of the transaction.

#### **Complaints about the condition of the home:**

Buyer and her broker were fully aware this was an old adobe home with various disclosed problems/ issues, and the potential for other or future problems and issues. Further, Buyer and her Broker knew the Seller's broker did not fill out the Seller's Property Disclosure statement and did not make any representations about the condition of the home. The purchase agreement clearly states Buyer needs to conduct her own due diligence. [**Respondents A&B**] did not withhold information about the home or "fail to disclose" some defect in the home. To the extent the Buyer or her broker were not satisfied with the ORW, or the repairs made to the home, or the home inspection, they were fully capable and authorized to ask for more or other repairs or inspections. Buyer has not shown any specific item the Seller's broker allegedly knew and failed to disclose.

If Buyer is unhappy with the home inspection, Buyer needs to talk to the home inspector.

#### **SUMMARY:**

Buyer and her own broker had a misunderstanding about the sale price and credits. Buyer raised some or all the concerns at closing with the closing officer or her own Broker, [**Buyer's Broker QB**]. Buyer decided to close because she did not want further delays in the closing. In any event, [**Respondents A&B**] did not breach duties owed to the Buyer. Likewise, they did not breach any real estate law in this transaction. We respectfully ask for dismissal of the Complaint as to [**Respondents A&B**].

#### **Investigator's Narrative:**

Investigator interviewed Complainant on December 8 for approximately 28 minutes. In that conversation, the investigator verified that as per respondent's statement, there was no direct communication between Respondents and Complainant. All communication was through Complainant's Buyer's Broker, who was not named in the complaint. The investigator also asked if Complainant had any evidence to indicate that Respondents had actual knowledge of the repair issues addressed in her complaint, or took any actions to conceal them. She felt strongly that they "must have known" and that Respondents had a "duty to see that the seller disclosure was accurate", but did not have evidence to support the Respondents had actual knowledge.

Interviews with other parties involved in the transaction and emails between them indicate that there may have been a miscommunication with regard to the final settlement price of the transaction as well as how repair credits from seller to buyer are applied at closing.

It appears that after Complainant Buyer did a walk through on or about March 15, 2021 prior to closing, Buyer's Broker QB emailed Respondent A on behalf of Complainant Purchaser requesting a price reduction of \$1,500 from the then agreed upon price of \$119,000. On March 16, Respondent A emailed back stating he would put together another price reduction for the seller's signature. On March 17, Buyer's Broker QB emailed back stating "*The buyer would like the reductions in the form of a credit, she said she needed the money to complete the repairs.*"

Respondent A drafted a Price Modifications/Seller Credits Amendment No.1 which did not address the price, but had the Seller credit \$2,500 to the buyer. This Amendment was signed by the seller, and forwarded to the Buyer's Broker QB, who relayed it to the Complainant Buyer, who executed it. It was then delivered to the title company. This final Amendment appears to have caused confusion between the parties as it was labeled as Amendment 1, which it appears the title company viewed as a replacement for the existing Amendment 1.

For clarity, the initial contracted purchase price had been \$ 120,000, with seller to contribute up to 2.5% of final purchase price towards Buyer's prepaid and closing costs, executed on January 6, 2021. After initial inspections, the first Price Modifications/Seller Credits Amendment No. 1 was added to the agreement (executed) on January 28, 2021 reducing the price to \$ 119,000. Then after the Buyer's final walk through a second Amendment 1 was executed between the parties on March 17, 2021, making no mention of price, but giving the Buyer a \$ 2,500 credit from the seller. Since this document was seen as replacing the first Amendment 1 which had lowered the price from \$ 120,000 to \$ 119,000, it had the effect of raising the price back to \$120,000. This was in keeping with what Buyer's Broker QB had stated to Respondent A when he requested a \$1,500 price reduction, and then clarified by stating: "The buyer would like the reductions in the form of a credit, she said she needed the money to complete the repairs."

Apparently, the buyer did not understand the mechanics of what these forms meant and went to closing believing that the price should still be \$119,000. This frustration appears to have been further compounded by the fact that the title company did not collect all of the agreed upon credits from the seller and transfer them to the buyer, and still further compounded by the fact that the title company was not letting Brokers attend closings at this point due to Covid 19 restrictions.

This failure to collect and transfer all of the credits to the Complainant/Buyer may have been a mistake on the part of the title company, or it may have been the operation of a clause in the final Amendment No. 1. **(was there a second Amendment versus a 'final' amendment?)**

Specifically, Paragraph 1. B. (the only indicated paragraph on this form) Reads: SELLER CREDITS: Seller agrees to credit \$ 2,500 ("Credit") to Buyer at Closing. In the event Buyer is obtaining a loan for the purchase of the Property, Credit is subject to approval by Buyer's lender and shall be reflected on the Closing Disclosure. ***Seller Shall retain any amount of Credit disallowed by lender.*** (emphasis investigator)

Investigator has been unable to verify exactly what occurred in this respect, but speculates that because this appears to have been a "minimum down payment" loan, the lender may have disallowed the Complainant/Buyer receiving the credit.

What the investigator has verified through conversations with the Complainant/Buyer and the Buyer's Broker QB is that after closing, Buyer's Broker QB wrote Complainant/Buyer a check for \$ 3,000 to make up for the credit she did not receive at closing.



## CONCLUSION

The question before the Commission is if the actions of Respondent A or Respondent B represent a violation of New Mexico Real Estate License Law or Real Estate Commission Rules. The rules and law that appear to govern the allegations described in the complaint are:

### **61-29-12 Refusal, suspension or revocation of license for causes enumerated**

A. The commission may refuse to issue a license or may suspend, revoke, limit or condition a license if the applicant or licensee has by false or fraudulent representations obtained a license or, in performing or attempting to perform any of the actions specified in Chapter 61, Article 29 NMSA 1978, an applicant or licensee has:

(I) Made a substantial misrepresentation;

(2) Pursued a continued and flagrant course of misrepresentation; made false promises through agents, salespersons, advertising or otherwise; or used any trade name or insignia of membership in any real estate organization of which the licensee is not a member;

(10) Violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission;

(11) Committed an act, whether of the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act; or

### **16.61.19.8 Broker duties; disclosure**

A. Brokers owe the following duties to prospective buyers, sellers, landlords (owners) and tenants:

(1) Honesty and reasonable care and ethical and professional conduct;

(3) Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant;

(5) Written disclosure of any adverse material facts actually known by the associate broker or qualifying broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act.

B. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section 16.61.19.8(A), Brokers owe the following Broker Duties to the buyers, sellers, landlord (owners) and tenants to whom the broker is directly providing real estate services, regardless of the scope and nature of those services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

(I) Assistance to the party in completing the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services, including:

(b) Active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction.

## AG RECOMMENDATION

\_\_\_\_\_, State Investigator  
New Mexico Real Estate Commission

Date: \_\_\_\_\_

# NEW MEXICO REAL ESTATE COMMISSION

## BROKER "B"

### NMREC Investigation Broker "B" – Case 1B

#### INTRODUCTION

The Real Estate Commission initiated a complaint/investigation against Respondent Buyer's Broker's-AB & QB; based on instruction from the Commission after the Commissioners reviewed NMREC Case [1A]. Respondent Buyer's Broker is Respondent A, and Respondent Buyer's Broker QB is Respondent B.

**Respondent Brokers** provided a response to the complaint as well as supporting documentation.

#### INVESTIGATIVE FINDINGS

##### Complainant's Statement:

[Redacted Name] filed a complaint against [Listing Broker], an Associate Broker at (Redacted) Realty on August 17, 2021 alleging that during her purchase of his listing at [Redacted Address], he misrepresented the condition of the property, and failed to close the transaction as described in the purchase agreement. (NMREC Case No. 1A)

After investigation, the case was presented to the Commission on January 24, 2022. The Commission closed the case against [Respondent Listing Broker], and the Commission instructed the investigator to file a complaint against [Buyer's Brokers AB & QB] for failure to assist [Complainant/Buyer] in completing the transaction, 16.61.19.8. Broker duties (B)(1) and failure to exercise reasonable care 16.61.19.8. Broker duties (A) (1)

##### Background Information:

Respondent A, (AB) and Respondent B, (QB) are a [redacted] team that represented the Buyer in this transaction. Respondent A is not represented by an attorney, and Respondent B is. Respondent A maintains that her responsibilities in the "team" are to show the property, and Respondent B is responsible for handling the paperwork. Respondent A provided substantial supporting documentation and spoke with the investigator on several occasions. Respondent A's limited formal response is below.

##### Respondent Buyer's Broker AB's Statement:

I am a showing agent and never work with documents. My job is to show our clients homes and follow up with updates, earnest money deposits, home inspection, reminders, closing updates etc. I am here for our buyers and sellers, doing everything possible to keep them informed about the process and providing support along the way. [Respondent B] works on all contracts and is also in constant contact with our clients. Our clients get two Licensed Realtors instead of just one. Our clients are important to us, our relationship does not end at closing. We are here for them, as they become more than clients, they become friends, as a recent review confirms, and [Buyer] confirmed, this April, 2022, on our Facebook page.

##### Respondent Buyer's Broker OB's Statement through his attorney:

Prior to closing, both [Respondent AB] and [Respondent QB] was [sic] approached by their client, [Complainant in previous case], regarding the inspection report made on her new home. There were several items that needed repairing. To address these matters, [Complainant in previous case] chose to accept cash at closing versus a reduction in the price of the home. [Complainant in previous case] reasoned that she needed the cash out to use it for the necessary repairs in lieu of a reduced home price. Both the buyer and the seller were agreeable to this plan, and the parties agreed that [Complainant in previous case] would receive \$2,500 at closing to address the repairs.

[Respondent Buyer's Broker QB] asserts that he sent notice that (Complainant in previous case) was requesting \$2,500 at closing to the title company, and he thinks he probably sent the notice to the bank too, but he is not completely certain of this fact. [Complainant] asserts that it was (Listing Broker AB), the seller's agent, however, who was supposed to put in the modification on the contract to account for the \$2,500 to the buyer at closing.

However, **[Complainant in previous case]** never received her \$2,500 at closing. Rather, she was promised payment sometime in the future. **[Respondent Buyer's Broker QB]** immediately sought to protect his client's financial interests by giving **[Complainant in previous case]** \$3,000 to compensate her for any damages that she may have sustained. Therefore, despite the absence of liability, **[Buyer's Brokers AB & QB]** make themselves severally responsible for the cash at closing by choosing to pay their client and elect to pursue the \$2,500 compensation from **[Listing Broker AB]** and/or his client.

Far from holding **[Buyer's Brokers AB & QB]** responsible, **[Complainant in previous case]** filed a complaint against **[Listing Broker AB]** for his client's intransigence regarding the \$2,500 that was supposed to have been given to **[Complainant in previous case]** at closing. In effect, **[Complainant in previous case]** was vindicating both **[Buyer's Brokers AB & QB]**. **[Complainant in previous case]** did not think it was fair for her realtors to bear the brunt of what she thought to be **[Listing Broker AB]**'s mistake on behalf of his client. Despite **[Complainant in previous case]**'s defense of **[Buyer's Brokers AB & QB]**, the case was closed against **[Listing Broker AB]** and a complaint was opened against **[Buyer's Brokers AB & QB]**.

My client denies any wrongdoing in this matter. To our client's knowledge, all parties were properly noticed, and the appropriate procedure was followed. **[Buyer's Brokers AB & QB]** compensated **[Buyer]** to avoid any damages to their client, which is noteworthy. Furthermore, **[Complainant in previous case]** was compensated \$500 more than the \$2500 owed to her. Accordingly, **[Buyer's Brokers AB & QB]** personally ensured that there was no harm to the aggrieved party in this matter.

**[Buyer's Brokers AB & QB]** seek a speedy resolution to this matter. All additional supplementation the above-described transaction is attached to this letter. Please advise should you have any questions or comments.

#### **Investigator's Narrative:**

Investigator interviewed **[Buyer]** on December 8 for approximately 28 minutes. In that conversation, the investigator verified that as per **[Listing Broker's]** statement, there was no direct communication between **[Listing Broker AB]** and **[Buyer]**. All communication was through Complainant's Buyer's Broker **[Respondents in this case]**, who were not named in the prior complaint. The investigator also asked if **[Buyer]** had any evidence to indicate that **[Listing Broker AB]** had actual knowledge of the repair issues addressed in her complaint, or took any actions to conceal them. She felt strongly that they "must have known" and that **[Listing Broker]** had a "duty to see that the seller disclosure was accurate" but did not have evidence to support the **[Listing Broker]** had actual knowledge.

Interviews with other parties involved in the transaction and emails between them indicate that there may have been a miscommunication with regard to the final settlement price of the transaction as well as how repair credits from seller to buyer are applied at closing.

It appears that after **[Complainant in previous case]** Buyer did a walk through on or about March 15, 2021 prior to closing Buyer's Broker QB **[Respondent B]** emailed **[Listing Broker]** on behalf of **[Complainant in previous case]** Purchaser requesting a price reduction of \$1,500 from the then agreed upon price of \$119,000. On March 16, **[Listing Broker AB]** emailed back stating he would put together another price reduction for the seller's signature. On March 17, Buyer's Broker QB **[Respondent B]** emailed back stating "The buyer would like the reductions in the form of a credit, he said she needed the money to complete the repairs."

**[Listing Broker]** drafted a Price Modifications/Seller Credits Amendment No.1 which did not address the price, but had the Seller credit \$2,500 to the buyer. This Amendment was signed by the seller, and forwarded to the Buyer's Broker QB **[Respondent B]**, who relayed it to the **[Buyer]**, who executed it. It was then delivered to the title company. This final Amendment appears to have caused confusion between the parties as it was labeled as Amendment 1, which it appears the title company viewed as a replacement for the existing Amendment 1.

For clarity, the initial contracted purchase price had been \$120,000, with seller to contribute up to 2.5% of final purchase price towards Buyer's prepaid and closing costs, executed on January 6, 2021. After initial inspections, the first Price Modifications/Seller Credits Amendment No. 1 was added to the agreement executed on January 28, 2021 reducing the price to \$ 119,000. Then after the Buyer's final walk through a second Amendment 1 was executed

between the parties on March 17, 2021, making no mention of price, but giving the Buyer a \$2,500 credit from the seller. Since this document appears to have been seen as replacing the first Amendment 1 which had lowered the price from \$120,000 to \$119,000, it had the effect of raising the price back to \$120,000. This was in keeping with what Buyer's Broker QB [**Respondent B**] had stated to [Listing Broker] when he requested a \$1,500 price reduction (on top of the previously negotiated \$1,000 price reduction), and then clarified by stating, *"The buyer would like the reductions in the form of a credit, she said she needed the money to complete the repairs."*

Apparently, the buyer did not understand the mechanics of what these forms meant and went to closing believing that the price should still be \$119,000. This frustration appears to have been further compounded by the fact that the title company did not collect all of the agreed upon credits from the seller and transfer them to the buyer, and still further compounded by the fact that the title company was not letting Brokers attend closings at this point due to COVID 19 restrictions.

This failure to collect and transfer all of the credits to the [**Complainant in previous case**]/Buyer may have been a mistake on the part of the title company, or it may have been the operation of a clause in the final Amendment No. 1.

Specifically, Paragraph 1. B. (the only indicated paragraph on this form) Reads: **SELLER CREDITS:** Seller agrees to credit \$ 2,500 ("Credit") to Buyer at Closing. In the event Buyer is obtaining a loan for the purchase of the Property, Credit is subject to approval by Buyer's lender and shall be reflected on the Closing Disclosure. **Seller Shall retain any amount of Credit disallowed by lender.**

When the Investigator interviewed the Buyer's Broker QB [**Respondent B**] he felt that if the "Final Addendum 1" was misleading and that this was the responsibility of the Listing Broker AB, since he drafted the document. It is worth noting however, that this addendum was executed by the seller, and then sent to Buyer's Broker QB [**Respondent B**] who then forwarded it to the Buyer.

The buyer apparently did not understand what effect the "Final Addendum 1" had on the transaction, or the possibility that her lender would disallow these funds to be issued in credit form.

Investigator has been unable to verify exactly what occurred in this respect; but speculates that because this appears to have been a "minimum down payment" loan, the lender may have disallowed the Buyer receiving the credit.

What the investigator has verified through conversations with the Buyer and the **Buyer's Broker QB** is that after closing, Buyer's Broker QB wrote Buyer a check for \$ 3,000 to make up for the credit she did not receive at closing.

## CONCLUSION

The question before the Commission is if the above described behavior violates New Mexico Real Estate License Law or Real Estate Commission rules.

Rules applicable to this situation may be:

### **61-29-10.2 Licensee's duties; disclosure**

B. Licensees shall perform all duties that are established for licensees by the commission.

### **61-29-12 Refusal, suspension or revocation of license for causes enumerated**

(10) Violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission;

(11) Committed an act, whether of the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act;

### **16.61.19.8. Broker duties; disclosure**

Brokers owe specific broker duties to prospective buyers, sellers, landlords (owners), tenants as set forth herein, 16.61.19.8 NMAC. Brokers shall disclose the applicable set of broker duties owed to buyers, sellers, landlords (owners) of rental property and tenants as set forth herein, 16.61.19.8 NMAC, prior to the time the broker generates or presents any written document to that party that has the potential to become an express written agreement and obtain from that applicable party written acknowledgement that the broker has made such disclosures. Brokers shall perform all duties established for brokers by the commission. In the case of prospective buyers, sellers, landlord (owners) and tenants to whom the broker is not directly providing real estate services, such disclosure and acknowledgment of receipt shall be made through the broker who is directly providing real estate services to that buyer, seller, landlord (owner) or tenant.

A. Brokers owe the following duties to prospective buyers, sellers, landlords (owners) and tenants:

(1) Honesty and reasonable care and ethical and professional conduct;

(3) Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant;

(5) Written disclosure of any adverse material facts actually known by the associate broker or qualifying broker about the property or the transaction, or about the financial ability of the party to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act.

B. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section 16.61.19.8(A), Brokers owe the following Broker Duties to the buyers, sellers, landlord (owners) and tenants to whom the broker is directly providing real estate services, regardless of the scope and nature of those services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

(I) Assistance to the party in completing the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services, including:

(b) Active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction.

## AG RECOMMENDATION

\_\_\_\_\_, Chief Investigator

Date: \_\_\_\_\_

New Mexico Real Estate Commission

# NEW MEXICO REAL ESTATE COMMISSION

## BROKER "B"

### NMREC Investigation – Broker "B": Case 2 ("Teams")

#### INTRODUCTION

The Real Estate Commission initiated an investigation based on a written complaint received from the Complainant (Seller) alleging **Respondent A and Respondent B** failed to disclose the existence of offers, a material breach of contract.

**Respondent A-AB - (Sellers Broker/Listing Broker)**

**Respondent B-AB - (Transaction Coordinator for Listing Broker)**

**Respondent C-QB for ALL Respondents A, Band D**

**Respondent D-AB assisting TC/Listing Broker during Respondent A's absence**

**Respondent C and Respondent D were added to the complaint by the NMREC**

#### INVESTIGATIVE FINDINGS

##### **Complainant's Statement (in its entirety):**

**Respondent A** has committed multiple serious errors including multiple material breaches in contract, during the time he worked as my agent/realtor. He continued making errors and showing his lack of ethical behavior even after I fired him. His behavior resulted in a significantly smaller profit off my house, a large sum of additional money spent by me to restage and relist the house, more money wasted by about 70 days of extra expenses. I also incurred and am still incurring many hours of extra work readying the house for sale again and dealing with legal issues, mediation, and paperwork. I initiated mediation with him in good faith on 8/31/2021 and he has been stalling ever since. His lawyer agreed to get back to the mediator on Monday (9/27) and nothing has happened by Tuesday (9/28) end of business. I wanted to allow **Respondent A** the opportunity to mediate before I filed a complaint, but now, I believe he is acting in bad faith.

##### **Statement of Facts/Timeline**

\*March 11, 2021: Subject property is listed

\*March 15, 2021: Seller receives 7 offers and discusses them with **Respondent A** via Meet which she set up

\*March 16, 2021: Completed DocuSign accepting offer #2: Price 375K will pay \$25K above appraisal

\*March 16, 2021: **Respondent A** Texts: "*Got it! Just went pending*"

\*Seller takes apart the staging, remove art, sell most of the furniture and hire movers

\*No communication from **Respondent A** to Seller for 7 days

\*March 23, 2021: Seller texts **Respondent A**; "can you ask the buyer if they want the washer and dryer?"

**\*March 25, 2021: Respondent A calls Seller to tell her his office failed to file the signed offer with the buyer's agent and that the buyer has bought another house**

\*March 25, 2021: A second offer is submitted by [potential Buyer Broker]; **Respondent A** does not transmit to her- she finds out about this on April 1st because it is left at the end of a long email thread sent to me by **Respondent A**. This offer is acknowledged by **Respondent B** on March 26, 2021; she does not inform Seller of this offer either. Offer expires on March 27, 2021 and Seller doesn't know this at the time

\*March 30, 2021: Seller asks **Respondent A** to send a (Listing) Termination contract

\*March 30, 2021: **Respondent A** sends DocuSign Termination agreement

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\*March 30, 2021: **Respondent B** 'lies' to [**potential Buyer Broker**]; "the home will likely be relisted higher based on the initial interest. **Respondent B** asks [**potential Buyer Broker**] "*if his buyers would be willing to go to 375 or 380K*". (Seller did not tell Respondent B or Respondent A she wanted to relist for higher)

\*March 31, 2021: Seller signs termination agreement on DocuSign

\*April 1, 2021 **Respondent A** emails a 3rd offer from [**same potential Buyer Broker**]. This is after the termination agreement is already executed.

Offer #3: Good Morning [**Complainant**], I received this offer from Realtor who was one of the 7 offers initially. I will contribute up to \$10,000 of my commission if there is a deficiency between the sales price and the appraised value. Offer is for \$380K or \$5K above appraisal value-whichever is lower.

\*April 25, 2021: Seller hires a new broker, has the empty house staged, has new photos taken, and relist for \$385K

\*April 25, 2021: Seller accepts an offer for \$385K with \$7000 over appraisal clause

\*May 10, 2021: subject property appraises for \$363K

\*May 19, 2021: Seller accepts a price modification to \$370K due to appraisal

\*May 24, 2021: **Respondent A** still advertising her house online on Next Door with old (original listing photos) at \$350K

\*May 26, 2021: subject property sells; Seller nets \$335,953.32

### **Respondent A, Respondent B and Respondent C's Response (thru their attorney):**

**Respondent A** has been a broker for 37 years and has been involved in over 2,200 transactions....His attempts to correct the issue with Complainant have even left him without coverage from his errors and omissions carrier.

[**Respondent B**] had a scheduled vacation for March 16, 2021 and was scheduled to leave at around 12:00 pm, During her absence, [**Respondent D** (a licensed broker with the same brokerage and at the time who had worked with **Respondent A** for about 4.5 years) was to step in and take over [**Respondent B's**] responsibilities. [**Respondent D**] has stepped in for [**Respondent B**] on numerous times in the past.

[**Respondent B**] returned from her vacation in the afternoon on March 24, 2021. [**Respondent A**] asked [**Respondent B**] if the buyers of the Property would like the washer and dryer to convey with the Property. [**Respondent B**] then called the broker to ask. The broker informed [**Respondent B**] that she had never received an acceptance of the offer they submitted and that she assumed [**Complainant**] had accepted another offer. [**Respondent B**] then contacted [**Respondent D**] to see what was going on and asked whether the acceptance was delivered to the buyers. [**Respondent D**] told [**Respondent B**] that she could not find evidence of her submitting the acceptance. (**Respondent B**) also asked whether [**Respondent D**] had checked to see if the buyers had submitted earnest money, whether [**Respondent D**] had submitted the file to the title company to open escrow, whether she had followed up regarding inspections, and whether she had ordered a pending rider. None of those things had occurred. [**Respondent D**] left [**brokerage**] on April 29, 2021 and did not provide any notice period. [**Respondent B**] then called [**Respondent C**] who suggested getting in touch with the brokers for the other buyers that had submitted offers to see if they would be interested in re-submitting their previous offers.

On March 25, 2021, Respondent A learned from Respondent B that [**Complainant's**] acceptance of an offer for the purchase of the Property was not delivered to the buyers. [**Respondent A**] immediately contacted [**Complainant**], informed her of what happened and discussed getting the property back on the market. [**Respondent A**] emailed [**Complainant**] later that day to discuss having stagers come back to the Property to get it back on the market and told [**Complainant**] he would make it up to her. At approximately 5:00 pm on March 25, [**Complainant**] responded to [**Respondent A**] and asked [**Respondent A**] to "slow down and let [**her**] inform [**herself**] about what to do next."

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[Complainant] told [Respondent A] that she was "not ready to have a stager show up at [her] house tomorrow." [Respondent A] then cancelled the stagers and explained that his offer to "make it up to [her]" meant that he would reduce his commission on a sale of her Property if she did not receive a comparable offer, pay for re-staging of the Property, pay for her moving expenses, and anything else she deemed appropriate. [Complainant] said she would get back to [Respondent A] once she had time to think about how to proceed. [Respondent A] understood that to mean that she was not sure whether she wanted to continue to sell the Property and, even if she did, whether she wanted to continue with [Respondent A] as the broker. [Respondent A] did not believe he had the authority to communicate offers to her at that time and wanted to honor her desires to give her time. Also, at this time, the Property was "pending" in the Multiple Listing Service ("MLS") because [Complainant] had previously accepted an offer and thus it was not on the market.

A renewed offer from [Buyers Broker], a broker that had earlier submitted an offer that [Complainant] rejected, came in at around 10:00 pm on March 25. The offer was for \$351,000 with an escalation clause up to \$370,000 if there were competing offers. As there were no competing offers, the escalation clause would not have come into play. [Respondent A] saw that offer on March 26 and explained to [Buyers Broker] that [Complainant] needed some time and would be getting back to [Respondent A] about how she wanted to proceed. [Buyers Broker] indicated that was fine but was hopeful of getting an answer to the offer before the Property went back into MLS.

(Respondent A) followed up with [Complainant] on March 30 after not hearing from her. At 5:30 pm that day, [Complainant] asked [Respondent A] to terminate the listing agreement ... [Complainant] signed the termination on March 31 at approximately 11:45 am.

[Respondent A] and [Respondent B] were not soliciting offers after the listing agreement had been terminated and did not "inadvertently" send [Buyers Broker's] email communication of March 31 to [Complainant] as they were not trying to hide anything from [Complainant]. Rather, they were trying to help her in the sale of her Property and help make the situation right.

[Respondent A] also understands from [Complainant's] complaint that she believes [Respondent A] and [Respondent B] continued to market the Property after the listing agreement was terminated. This is not true. [Respondent A and B] do not have control of the websites that pull information from listings that are put out to the public. It appears that the website [Complainant] refers to just pulled information from [Respondent's] original listing and never took it down. [Respondent A] had other experiences where similar websites continued to show advertisements for properties that had sold up to 6 months before.

### **Attorney for Respondent A, B, and C, also provided the following information below explaining that the parties had participated in mediation through their local Association.**

In September 2021, [Respondent A and B] received a notification from the [local Association] that [Complainant] had requested to mediate her concerns with the listing of the Property. In that request, [Complainant] demanded payment of \$20,000. After reaching out to counsel, [Respondents A, B, and C], through their counsel, were attempting to figure out whether they would be insured and defended by their Errors and Omissions Policy relating to [Complainant's] concerns, whether they would be appointed counsel by their insurer, and whether the same attorney would be able to represent them all. The insurer for [Respondent A, B, and C] informed their counsel that [Respondent A] would not be covered for the issue with [Complainant] because [Respondent A] had offered to compensate [Complainant] for the issue with the accepted offer. This added complications to the mediation as [Respondent A] was suddenly left without counsel provided by his insurer and left to have to personally pay [Complainant] in the event an agreement was reached.

On September 27, 2021, [Respondent A, Band C's] counsel spoke with representatives from [local Association] about the mediation and indicated that [Respondent A and B] were still trying to sort out the issues of coverage and representation, that they were likely to agree to mediation, but may not be able to give [local Association] a final answer by close of business on September 27 due to the issues with coverage for [Respondent A]. [Respondent A and B], through counsel, confirmed to [local Association] that they would participate in mediation on September 30, 2021. Unbeknownst to [Respondent A], [Complainant] filed the complaint on September 30, 2021. [Respondent A] was not being dismissive of [Complainant's] request to mediate this matter and was not being negligent.



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### **Respondent D's Response (thru her separate attorney in part):**

[**Respondent D**] has been licensed since February 2017, and has not received any NMREC complaints in the past.

[**Respondent D**] was at the time of the transaction a member of the [**Respondent A**] Team. [**Respondent D**] now works with a different brokerage. As shown in the purchase agreement, [**Respondent D**] was not a broker or a transaction coordinator for any party in this transaction. Further, as shown in the Complaint, the [**Complainant**] did not know of [**Respondent D**], had no interaction with [**Respondent D**] and has no complaint against [**Respondent D**].

As a team member, [**Respondent D**] knew of the [subject listing], Further, [**Respondent D**] had communications with [**Respondent B**] and [**Respondent A**] about the transaction after [**Complainant**] made complaints. However, [**Respondent D**] does not remember the [**March 16, 2021 accepted offer**] offer to purchase at the time it was made, nor does she remember being asked to transmit the [**March 16, 2021 accepted offer**] offer to [**Complainant**]. Since [**Respondent D**] was not the Seller's broker or transaction coordinator, she was not authorized to communicate with the Seller without specific authority from [**Respondent A or Respondent B**]. [**Respondent D**] did meet the Seller at the home (**with Respondent B and a photographer**) prior to the time the listing went active in MLS for the purpose of preparing the listing. However, [**Respondent D**] did not discuss the substance of any offers with the Seller. [**Respondent D**] would not have communicated with the Seller without specific instruction from [**Respondent A**] or from the transaction coordinator. [**Respondent D**] would not have communicated anything of substance to a seller or a buyer without specific instruction from [**Respondent A**] or the assigned transaction coordinator. [**Respondent D**], after having searched her email and texts, does not recall receiving any instruction, written or otherwise, to forward the [**March 16, 2021 accepted offer**] offer to the Seller.

The complaint shows a text from [**Respondent A**] that the listing has gone "pending". [**Respondent D**] does not remember being copied on the text or any other communication directing her to do anything with the offer. [**Respondent D**] did not change the MLS status of the listing and did not have authority to change the MLS status of the listing.

In short, this is an unfortunate event where it seems an offer to purchase was not timely transmitted to a Seller. However, since [**Respondent D**] was not the broker or associate broker, it was not [**Respondent D's**] duty to transmit the offer.

### **Investigative Narrative:**

On November 29, 2021, investigator interviewed potential buyer's broker who presented the offer that was acknowledged by **Respondent B** on March 14, 2021 at 3:40pm and accepted by **Complainant** on March 16, 2021. Investigator asked buyer's broker whether she had received written confirmation of the Seller's acceptance and her response was:

*"NO, did not hear for several days ...our offer had expired as far as my knowledge with no communication, so we went shopping and found another house and purchased another home ... after about a week or maybe two weeks that I had not heard back. from them, she [**Respondent B**] did call me and asked me when we were doing inspections ... I did not know we were under contract ...I never received a signed contract that was sent to me..."*

On December 1, 2021, investigator interviewed a second potential Buyer's Broker who on March 25, 2021 submitted an updated offer, acknowledged by **Respondent B** on March 26, 2021 at 9:16am. He told investigator he never heard back from **Respondent A or Respondent B**.

On December 21, 2021, investigator asked **Respondent D's** attorney to clarify what tasks and responsibilities on a transaction are handled by a team member when assisting a broker, associate broker or Transaction Coordinator when "filling in".

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**Response:** To the best of **[Respondent D's]** recollection, there was no specific policy within the **[Respondent A Team]** regarding task assignment when a team member was "filling in". Each event was handled on a transaction-by-transaction basis. Each transaction, and each "filling in" event, was unique. Generally, when a Transaction Coordinator ("TC") or Broker was away, the TC or Broker would assign specific tasks to be completed to other team members while the TC or Broker was away. In this transaction, **[Respondent D]** was not told to forward any offers or accepted offers. Since **(Respondent D)** was not the TC or Broker, she did not automatically receive notice of offers or electronically signed/accepted offers.

**[Respondent B]** was still working on the afternoon of March 16, 2021, when **[Complainant]** says she electronically signed/accepted the offer. Since **[Respondent B]** was working (answering emails), presumably **[Respondent B]** would have forwarded the signed/accepted offer. Likewise, if **[Respondent B]** had assigned a task, there would be an email or text documenting the assignment. **[Respondent B]** states she did not receive an email, text or phone call regarding forwarding an accepted/signed offer. **[Respondent B]** was working on the afternoon of March 16, 2021 and should have received electronic notice of the signed offer from **[Complainant]**. **[Respondent D]** would not have received that notice because she was not the TC or the Broker on the transaction.

**\*\*On December 22, 2021, investigator asked for clarification of Respondent A Team member's duties:**

**Q:** Is there a specific policy within the **[Respondent A Team]** regarding task assignment when a team member is "filling in"?

**Q:** Is Each transaction, and Each "filling in" event, unique?

**Q:** When a Transaction Coordinator or Broker goes away, does TC or Broker assign specific tasks to be completed to other team members while the TC or Broker is away? In this transaction, was **[Respondent D]** told to forward any offers or accepted offers?

**ANSWER:** When someone like **[Respondent B]** is out of the office or out of town, there is no specific written policy and tasks are not necessarily specifically assigned, unless it is necessary for a specific situation. In that sense, the "filling in" event is not normally "unique" as you have asked, as the members of the team understand the process of a real estate transaction and because it is understood by all members of the team and individuals that work in the office that, when one member of the team is out of the office, the other members step in and fill in. When someone like **[Respondent B]** is out of town, it has never previously been needed to be specifically addressed, what **[Respondent D]** or others would need to do in her absence. Nor has it been necessary for a task such as delivering a signed acceptance to be specifically assigned to someone; as members of the team understood the procedure and expectation and process of a real estate transaction. Also, when **[Respondent B]** has been out of the office, it was understood and the normal practice that someone like **[Respondent D]**, who knows the process of a real estate transaction and the necessary tasks, would step in in her absence.

**Q:** Who was it? **[Respondent D, Respondent B or Respondent A]** who would have forwarded the signed/accepted offer? Is there an email or text documenting the assignment?

**ANSWER:** ... once she **[Complainant]** signed to accept the offer, it would have been the person in **[Respondent B or Respondent D]**'s position, not **[Respondent A]**, who would have delivered that signed acceptance to the buyer's broker. This was not an "assignment" to be assigned or documented, as it was normal and understood practice and it was not expected that **[Respondent A]** would actually deliver the signed acceptance to the buyer's broker. Thus, **[Respondent A]** would not normally make a formal assignment to accomplish this task.

**[Respondent B]** has not been technically "hired" by **[Respondent A]** or **(Respondent C)** as a "transaction coordinator" but works as a transaction coordinator on certain transactions. **[Respondent B and Respondent A]** have an independent contractor arrangement, a copy of which is attached.

On December 17, 2021, investigator received a letter from Complainant requesting to formally withdraw the complaint against Respondent A, Respondent B and Respondent C because they had all successfully mediated the matter through [local Association].

# NEW MEXICO REAL ESTATE COMMISSION

## CONCLUSION

The question before the Commission is if **Respondent A, B, C and D's** actions demonstrate a violation of the NM Real Estate Licensing Law or the NM Rules:

### Possible Violations of the NMREC Laws:

61-29-10.2 Licensee's duties; disclosure

B. Licensees shall perform all duties that are established for licensees by the commission.

61-29-12 Refusal, suspension or revocation of license for causes enumerated

A. The commission may refuse to issue a license or may suspend, revoke, limit or condition a license if the applicant or licensee has by false or fraudulent representations obtained a license or, in performing or attempting to perform any of the actions specified in Chapter 61, Article 29 NMSA 1978, an applicant or licensee has:

(10) Violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission;

(11) Committed an act, whether of the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act;

### Potential Violations of the NMREC Rules:

## **PART19: BROKER DUTIES AND BROKERAGE RELATIONSHIPS**

### **16.61.19.8. Broker duties; disclosure**

A. Brokers owe the following duties to prospective buyers, sellers, landlords (owners) and tenants:

(1) Honesty and reasonable care and ethical and professional conduct;

(3) Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant

B. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section I 6.61. I 9.8(A), Brokers owe the following Broker Duties to the buyers, sellers, landlord (owners) and tenants to whom the broker is directly providing real estate services, regardless of the scope and nature of those services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

(1) Assistance to the party in completing the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services, including:

(a) Timely presentation of and response to all written offers or counter-offers;

(b) Active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction;

D. Broker Obligations to Other Brokers. Brokers owe the following professional obligations to other brokers; however, brokers are not required to provide to one another a list of these broker obligations.

(1) Honesty, reasonable care, and ethical and professional conduct;

(2) Timely presentation of all written offers or counter-offers and responses thereto, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services;

(3) Active participation in assisting the party to whom the broker is directly providing real estate services in complying with the terms and conditions of the contract and with the closing of the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services.

## AG RECOMMENDATION

\_\_\_\_\_, Investigator

Date: \_\_\_\_\_

New Mexico Real Estate Commission

### **61-29-12 Refusal, suspension or revocation of license for causes enumerated**

A. The commission may refuse to issue a license or may suspend, revoke, limit or condition a license if the applicant or licensee has by false or fraudulent representations obtained a license or, in performing or attempting to perform any of the actions specified in Chapter 61, Article 29 NMSA 1978, an applicant or licensee has:

- (1) Made a substantial misrepresentation;
- (2) Pursued a continued and flagrant course of misrepresentation; made false promises through agents, salespersons, advertising or otherwise; or used any trade name or insignia of membership in any real estate organization of which the licensee is not a member;
- (3) Paid or received a rebate, profit, compensation or commission to or from any unlicensed person, except the licensee's principal or other party to the transaction, and then only with that principal's written consent;
- (4) Represented or attempted to represent a qualifying broker other than a qualifying broker with whom the licensee is associated without the express knowledge and consent of that qualifying broker;
- (5) Failed, within a reasonable time, to account for or to remit any money coming into the licensee's possession that belongs to others, commingled funds of others with the licensee's own or failed to keep funds of others in an escrow or trustee account or failed to furnish legible copies of all listing and sales contracts to all parties executing them;
- (6) Been convicted in any court of competent jurisdiction of a felony or any offense involving moral turpitude;
- (7) Employed or compensated, directly or indirectly, a person for performing any of the acts regulated by Chapter 61, Article 29 NMSA 1978 who is not a licensed qualifying broker or an associate broker; provided, however, that a qualifying broker may pay a commission to a qualifying broker of another state as provided in Section 61-29-16.1 NMSA 1978;
- (8) Failed, if a qualifying broker, to place as soon after receipt as is practicably possible, after securing signatures of all parties to the transaction, any deposit money or other money received by the qualifying broker in a real estate transaction in a custodial, trust or escrow account, maintained by the qualifying broker in a bank or savings and loan institution or title company authorized to do business in this state, in which the funds shall be kept until the transaction is consummated or otherwise terminated, at which time a full accounting of the funds shall be made by the qualifying broker. Records relative to the deposit, maintenance and withdrawal of the funds shall contain information as may be prescribed by the rules of the commission.

Nothing in this paragraph prohibits a qualifying broker from depositing non-trust funds in an amount not to exceed the required minimum balance in each trust account so as to meet the minimum balance requirements of the bank necessary to maintain the account and avoid charges. The minimum balance deposit shall not be considered commingling and shall not be subject to levy, attachment or garnishment. This paragraph does not prohibit a qualifying broker from depositing any deposit money or other money received by the qualifying broker in a real estate transaction with another cooperating broker who shall in turn comply with this paragraph;

- (9) Failed, if an associate broker, to place as soon after receipt as is practicably possible in the custody of the associate broker's qualifying broker, after securing signatures of all parties to the transaction, any deposit money or other money entrusted to the associate broker by any person dealing with the associate broker as the representative of the qualifying broker;

(10) Violated a provision of Chapter 61, Article 29 NMSA 1978 or a rule promulgated by the commission;

(11) Committed an act, whether of the same or different character from that specified in this subsection, that is related to dealings as a qualifying broker or an associate broker and that constitutes or demonstrates bad faith, incompetency, untrustworthiness, impropriety, fraud, dishonesty, negligence or any unlawful act; or

(12) Been the subject of disciplinary action as a licensee while licensed to practice real estate in another jurisdiction, territory or possession of the United States or another country.

B. An unlawful act or violation of Chapter 61, Article 29 NMSA 1978 by an associate broker, employee, partner or associate of a qualifying broker shall not be cause for the revocation of a license of the qualifying broker unless it appears to the satisfaction of the commission that the qualifying broker had guilty knowledge of the unlawful act or violation.

**History:** 1953 Comp., § 67-24-29, enacted by Laws 1959, ch. 226, § 11; 1965, ch. 304, § 7; 1981, ch. 22, § 3; 1983, ch. 261, § 5; 1984, ch. 56, § 1; 1987, ch. 90, § 5; 1991, ch.

## **PART 19: BROKER DUTIES AND BROKERAGE RELATIONSHIPS**

### **16.61.19.7. Definitions**

Refer to 16.61.1.7 NMAC.

[16.61.19.7 NMAC - Rp, 16.61.19.7 NMAC, 1-1-2004]

### **16.61.19.8. Broker duties; disclosure**

Brokers owe specific broker duties to prospective buyers, sellers, landlords (owners), tenants as set forth herein, 16.61.19.8 NMAC. Brokers shall disclose the applicable set of broker duties owed to buyers, sellers, landlords (owners) of rental property and tenants as set forth herein, 16.61.19.8 NMAC, prior to the time the broker generates or presents any written document to that party that has the potential to become an express written agreement and obtain from that applicable party written acknowledgement that the broker has made such disclosures. Brokers shall perform all duties established for brokers by the commission. In the case of prospective buyers, sellers, landlord (owners) and tenants to whom the broker is not directly providing real estate services, such disclosure and acknowledgment of receipt shall be made through the broker who is directly providing real estate services to that buyer, seller, landlord (owner) or tenant.

A. Brokers owe the following duties to prospective buyers, sellers, landlords (owners) and tenants:

- (1) Honesty and reasonable care and ethical and professional conduct;
- (2) Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the Real Estate Commission rules, the New Mexico Uniform Owner Resident Relations Act, and other applicable local, state, and federal laws and regulations;
- (3) Performance of any and all written agreements made with the prospective buyer, seller, landlord (owner) or tenant;
- (4) Written disclosure of any potential conflict of interest that the broker has in the transaction including but not limited to:
  - (a) Any written brokerage relationship the broker has with any other parties to the transaction or;
  - (b) Any material interest or relationship of a business, personal, or family nature that the broker has in the transaction;
  - (c) Any written agreement the broker has with a licensed transaction coordinator who will be providing brokerage services related to the transaction.
- (5) Written disclosure of any adverse material facts actually known by the associate broker or qualifying broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act.

B. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Section 16.61.19.8(A), Brokers owe the following Broker Duties to the buyers, sellers, landlord (owners) and tenants to whom the broker is directly providing real estate services, regardless of the scope and nature of those services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

- (1) Assistance to the party in completing the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services, including:
  - (a) Timely presentation of and response to all written offers or counter-offers; and
  - (b) Active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction;

If the broker in the transaction is not providing the service, advice or assistance described in Paragraphs (a) and (b) of this Subsection B of 16.61.19.8 NMAC, the party must agree in writing that the broker is not expected to provide such service, advice or assistance. The broker shall disclose the existence of such agreement in writing to the other brokers involved in the transaction;

(2) Acknowledgement by the broker that there may be matters related to the transaction that are outside the broker's knowledge or expertise and that the broker will suggest that the party seek expert advice on these matters;

(3) Advice to consult with an attorney regarding the effectiveness, validity or consequences of any written document generated by the brokerage or presented to the party and that has the potential to become an express written agreement.

(4) Prompt accounting for all money or property received by the broker;

(5) Maintenance of any confidential information learned in the course of any prior agency relationship unless the disclosure is with the former principal's written consent or is required by law;

(6) Written disclosure of brokerage relationship options available in New Mexico;

(7) Unless otherwise authorized in writing, a broker who is directly providing real estate services to a seller/owner shall not disclose the following to the buyer/tenant in a transaction:

- (a) That the seller/owner has previously indicated they will accept a sales/lease price less than the asking or listed price of a property;
- (b) That the seller/owner will agree to financing terms other than those offered;
- (c) The seller/owner's motivations for selling/leasing; or
- (d) Any other information the seller/owner has requested in writing remain confidential, unless disclosure is required by law;

(8) Unless otherwise authorized in writing, a broker who is directly providing real estate services to a buyer/tenant shall not disclose the following to the seller/owner in the transaction:

- (a) That the buyer/tenant has previously indicated they will pay a price greater than the price submitted in a written offer;
- (b) The buyer/tenant's motivation for buying/leasing; or
- (c) Any other information the buyer has requested in writing remain confidential, unless disclosure is required by law.

(9) In the event the broker is working for the landlord (owner) as a residential property manager, the broker additionally owes to the landlord (owner) all duties owed under the law of agency.

C. In addition to the broker duties owed to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Subsection A of 16.61.19.8 NMAC, brokers working as Property Managers for a landlord (owner) owe the following duties to tenants:

- (1) Prompt accounting for all money or property received by the broker from the tenant, including issuance of a receipt for cash received;
- (2) If a residential property manager, written disclosure that the broker is the agent of the owner of the property and not of the tenant; in the commercial property management context, written disclosure of the broker's relationship with the landlord (owner).

D. Broker Obligations to Other Brokers. Brokers owe the following professional obligations to other brokers; however, brokers are not required to provide to one another a list of these broker obligations.

- (1) Honesty, reasonable care, and ethical and professional conduct;
- (2) Timely presentation of all written offers or counter-offers and responses thereto, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services;
- (3) Active participation in assisting the party to whom the broker is directly providing real estate services in complying with the terms and conditions of the contract and with the closing of the transaction, unless otherwise agreed to in writing by the party to whom the broker is directly providing real estate services;
- (4) Compliance with local, state, and federal fair housing and anti-discrimination laws, the New Mexico real estate license law and the Real Estate Commission rules; the New Mexico Uniform Owner-Resident Relations Act, and other applicable local, state, and federal laws and regulations;
- (5) Written disclosure of any adverse material facts actually known by the broker about the property or the transaction, or about the financial ability of the parties to the transaction to complete the transaction; adverse material facts requiring disclosure do not include any information covered by federal fair housing laws or the New Mexico Human Rights Act;
- (6) Written disclosure of any potential conflict of interest that the broker has in the transaction, including but not limited to, any material interest the broker has in the transaction or any relationship of a business, personal, or family nature that the broker has with a party to the transaction;
- (7) Non-interference with a purchase agreement or any express written agreement that another broker has with a buyer, seller, landlord (owner) or tenant.

[16.61.19.8 NMAC - Rp, 16.61.19.8 NMAC, 1/1/2004; A, 1/30/2004; A, 3-27-2004; A, 1/1/2006; A, 1/1/2006, A, 1/1/2007; A, 12/31/2008; A, 1/1/2012; A, 1/1/2014. A, 1/15/2018; A, 1/1/2019; A, 1/3/2021]

#### **16.61.19.9. Brokerage relationships**

Brokerages working with consumers either as customers or clients may do so through a variety of brokerage relationships. These relationships include but are not limited to a transaction broker relationship, an exclusive agency relationship or a dual agency relationship. For all regulated real estate transactions, a customer or client may enter into an express written agreement to become a client of a brokerage without creating an agency relationship, and no agency duties will be imposed.

A. Transaction broker: a qualifying broker, associate broker or brokerage that provides real estate services without entering into an agency relationship. The transaction broker relationship is a non-fiduciary relationship.

B. Exclusive agency: an express written agreement between a person and a brokerage wherein the brokerage agrees to exclusively represent as an agent the interests of the person in a real estate transaction. Such agreements include buyer agency, seller agency, designated agency, and sub-agency agreements.

C. Dual agency: an express written agreement that modifies existing exclusive agency agreements to provide that the brokerage agrees to act as a facilitator in a real estate transaction rather than as an exclusive agent for either party to the transaction.

[16.61.19.9 NMAC - Rp, 16.61.19.9 NMAC, 1-1-2004; A, 12-31-2008; A, 1-1-2012]



**16.61.19.10. Dual agency relationship**

A. Dual agency occurs when:

- (1) An associate broker or qualifying broker is agent for both a seller client and a buyer client in the same transaction;
- (2) An associate broker is agent for either a seller client or a buyer client, and the agent's qualifying broker is agent for the other client in the transaction; and,
- (3) In a transaction where a buyer client and a seller client are each served by different associate brokers in an agency relationship supervised by the same qualifying broker, and the qualifying broker does not choose the designated agency option, both the associate brokers and the qualifying broker are dual agents in the transaction.

B. In all situations, a dual agent shall act in the capacity of a facilitator rather than as an exclusive agent of either party to the transaction.

C. Prior to writing or presenting offers, a dual agent shall obtain written authority from the buyer client and the seller client in the form of a separate dual agency agreement.

D. Information obtained by an associate broker or qualifying broker prior to the time that written authority for dual agency was granted shall not be disclosed to the other party unless required by law or rules or permitted by the client who originally disclosed the confidential information.

[16.61.19.10 NMAC - Rp, 16.61.19.11 NMAC, 1-1-2004; A, 1-1-2006]

# E&O Claims – suggestions to minimize claims

- Resolve problems before they become problems
- Don't be the expert, know how to find the experts
- Disclosure of agency
- Keep written logs of calls, conversations, emails
- Stay informed of changes in law
- Encourage sellers disclosure form
- Encourage buyers to hire inspectors
- Use standard contracts
- When using 3<sup>rd</sup> party info, disclose source

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### TIPS TO AVOID REAL ESTATE ERRORS AND OMISSIONS CLAIMS

While even the most diligent licensee may be the victim of a frivolous claim, diligent business practices help decrease risk. Even if these procedures do not prevent a claim, they may greatly enhance the chance of a successful defense.

1. Resolve problems far before the closing date. Don't wait until the last minute to address problem issues. When people are rushed to resolve matters, they are more likely to make mistakes or overlook items.
2. Don't try to be an expert at everything. Involve key professionals, such as attorneys, home inspectors, termite inspectors, appraisers, lenders, and surveyors when needed. Provide a list of several names or a copy of the yellow page listings but do not recommend a specific individual or firm! Keep a copy of the list you provide.
3. It is generally a good idea to require agency disclosure on every transaction. Be familiar with your state's laws regarding when a written agency disclosure is required, at what stage it must be completed, and who must be provided with signed copies. Typically, agency relationships should be disclosed as soon as possible, but in any event, prior to providing specific assistance to the client. For example, buyers should be advised if the agent showing them the house is the seller's agent.
4. Document conversations, recommendations, and activities in a log. It is also often helpful to document conversations by sending a brief follow up email. Keep organized, detailed records of all real estate transactions. This is often required by state law, will assist you in recalling details, and will be helpful to an attorney if a defense is needed in the future.
5. Brokers should have regular meetings with their firms' licensees and remain informed as to their activities. Establish consistent guidelines and make sure everyone in the firm understands and complies with them.
6. Listing agents should have the seller complete any required property disclosure form. This form should never be filled out by the real estate licensee. Additionally, if any issues arise while the property is listed, advise the seller to update the disclosure form accordingly.
7. Recommend that buyers obtain a home warranty and retain written evidence of the recommendation.
8. Recommend that buyers obtain a home inspection. If they decline, have them sign a form confirming this decision.
9. Many states and associations have standard contract forms. It is wise to address items that are outside of standard form language with the client's legal counsel, or else the real estate licensee risks the unauthorized practice of law.
10. When information is obtained from a third party, it is often a good idea to disclose the source when making representations, because sometimes information from what appears to be a valid source turns out to be inaccurate. For example, if you believe a property is on city sewer based on a prior listing or a statement by the city utility office, disclose the source of your representation.

# 10 Things To Do and Not Do in a Real Estate Transaction

**1 As the listing agent, DO have the seller sign and verify the information submitted to the MLS.** Protect yourself and have the seller sign the MLS report before you submit the information to your MLS.

**2 Telephone Call Signatures – DO NOT DO IT.** The buyer and/or seller should always sign legally binding documents such as the purchase agreement or counter-offers. The agent's signature for the buyer and/or seller followed by the words "per telephone call" is not sufficient as a legally binding document and will not stand up in court. Get a signature! All aspects of a real estate transaction are critical. The buyer and/or seller need to sign all necessary documents.

**3 DO get a release agreement.** If you agree to a settlement or condition of the property, contact risk management to obtain an appropriately drafted Settlement and Release Form. Have both parties sign the form. Sellers often credit buyers for a condition of the property. For the seller's protection, have the buyer sign the Settlement and Release Form stating that a settlement for X amount of dollars was agreed on for X conditions. When the form is used, the buyer is on notice that a dollar amount has been agreed on; therefore the seller can not be held liable for damages (for the specified condition or conditions) at a later date.

**4 Agents – DO your inspection.** Go to the property. Even if the house is flawless, find something to write in the agent's portion of the TDS confirming your visual inspection of the property. Do not write "Buyer should get physical inspection" as the statement fails to prove that you actually inspected the property.

**5 DO NOT go outside of your profession.** If you see a crack in the concrete slab, simply write, "Crack in concrete slab." DO NOT try to guess what caused the crack. Do not perform inspections of inaccessible areas such as roofs, attics, and crawl spaces. Your job is to view accessible areas. If you represent the buyer and are advised that an issue may exist within an inaccessible area such as the roof, attic or crawl space, recommend to the buyer, in writing, to have the appropriate professional inspect the condition(s).

**6 Sellers – DO have the buyer get a professional inspection.** When selling a property, a condition of sale should include that the buyer have a professional home inspection completed by an ASHI or CREIA certified home inspector. DO NOT suggest a specific inspector. The only requirement should be that an ASHI or CREIA certified inspector be used. Inspectors from these agencies are held to a higher standard. DO NOT let the buyer skip the home inspection. Defects or conditions of the property that arise later, may come back to haunt the seller because it was not addressed before the transfer of property.

**7 DO use a 3-step disclosure process.** If you are making a material representation as to the condition of a property and are not sure that the statement is factual. Use the following process in written form. For example, if your seller represents that a new roof was installed by a licensed contractor 5 years ago, do the following:

**1st:** Identify the source of the statement.

**2nd:** Disclaim verification and/or accuracy and validity of the third-party statement.

**3rd:** Urge the buyer to independently confirm the statement. Under this example, the disclosure would state:

"Per seller, new roof was installed by a licensed contractor 5 years ago."

"Agent has not, nor shall he/she verify seller's statements as to the roof."

"Buyer is urged to perform an independent investigation to confirm seller's statements as to the roof."

**8 DO consider the appropriate time frame for Notice(s) to Perform.** The Notice to Perform aspect of the purchase agreement is a very potent clause. If the buyer agrees to the standard 24-hour notice period in the purchase agreement, it could come back to haunt the buyer and his agent. For example, if the standard 24-hour notice is stated in the Notice to Perform, the buyer and his agent may consider removal of the contingency and default under this time period. When representing the buyer, consider using a longer period such as 72 hours.

**9 DO use the appropriate form for increased deposits subject to Liquidated Damages Clause.** The Liquidated Damages Clause in a residential purchase agreement only applies to the initial deposit. If the seller wants the buyer to increase the deposit, subject to the Liquidated Damages Clause, the purchase agreement mandates that the parties use the CAR-RID form. The higher the amount of the deposit that is subject to liquidated damages, the greater the protection to the seller. Similarly, the lower the amount of the deposit subject to liquidated damages, the less money the buyer stands to lose if they fail to close the transaction.

**10 DO call Risk Management.** As we all know, several things can happen in the course of a transaction. If you face any situation that you are unsure of, do not hesitate to place a call to risk management. The call may take as little as 5 minutes and can save you several months of litigation, as well as the payment of your deductible.

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