



Qualifying Broker Refresher Course



New Mexico Real Estate Commission

Educational Sponsor

CPAR

Instructor

Michael Glass

2023 Edition / Qualifying Broker Refresher

TABLE OF CONTENTS

Module	Content	Page
	Class Introduction and Requirements	3
Module 1	The New Mexico Real Estate Commission	5
	Mission Statement	6
	Meetings	6
	Continuing Education	6
	Licensing	6
	Rules and Laws	6
	Complaint and Disciplinary Process	7
Module 2	Responsibilities and Requirements	9
	Business Plan	10
	SWOT Analysis	10
	Legal Structure of the Brokerage	11
	Defensible Position	12
	Policy and Procedures	13
	How to Acknowledge Your Defensible Position	13
	Resources for a Defensible Position	14
Module 3	Legal Risk	15
	Misrepresentation	16
	Artificial Intelligence	17
	Data Security	18
	Staying in your Scope	19
	Giving Legal Advice	19
	Personal Injury and Property Damage	20
Module 4	Broker Duties and Rules	22
	BROKER DUTIES - (Legal Obligation)	23
	Breach of Duty	24
	QB/AB Relationship	25
	Transaction Coordinators / Unlicensed Assistance	27
	Teams	28
	Earnest Money / Trust Accounts	28
	Signage and Advertising	29
Module 5	Legislative and Regulatory Influences	30
	Discrimination in Real Estate	31
	Discrimination Acts, Laws, and Codes applied to Real Estate	31
	Americans with Disabilities Act (ADA)	33
	Video and Audio Surveillance (New Mexico Specific)	33
	Digital Millennium Copyright Act (DMCA)	34
	Limiting English Proficiency (LEP)	35
Module 6	Mitigating Risk: Creating a Defensible Position	36
	Risk Management	36
	Hot Topics in Broker Risk Reduction – NAR Legal Affairs	37
Closing		39

INTRODUCTION

Welcome to the New Mexico Real Estate Commission's Qualifying Broker Refresher (QBR).

This course is designed to be interactive to maximize its benefit to you. It is structured around six modules, case study, and the NMREC Statute. Your instructor will lead you through each module, relevant portions, and encourage your participation.

It is important to note that the QBR is just that – a refresher course. The QBR is not a thorough teaching on any one topic but a review of information that Qualifying Brokers should know. While there is a breadth of information provided in this course, Brokers are recommended to take other specific courses that fully cover topics to increase their knowledge.

Qualifying Brokers are also reminded to stay up to date on emerging issues relevant to real estate brokerages and new or revised laws and regulations. No course can supply current information in this area. Make note of the websites or other sources of information you can regularly check to find out what is new.

REQUIREMENTS

NMREC Part 16 of the Rule Book states that all Qualifying Brokers must successfully complete as a condition of license renewal or as a condition of reinstatement of qualifying broker status the New Mexico Real Estate Commission approved six (6) hour Qualifying Broker Refresher.

This course can be taken by both Qualifying Brokers (6 “Elective” CE hours) and Associate Brokers (6 “Core Elective CE hours).

The NMREC Statute will be referred to throughout this course so that QB's will become reacquainted with the location of specific portions of license law and Commission rules.

Note, throughout this material the following terms maybe abbreviated in the following manner:

Associate Broker – **AB**

Attorney General - **AG**

Educational Advisory Committee - **EAC**

Manufactured Housing Division - **MHD**

New Mexico Association of Realtors - **NMAR**

New Mexico Environmental Department - **NMED**

New Mexico Human Services Division – **HSD**

New Mexico Office of the State Engineer - **OSE**

New Mexico Real Estate Commission - **NMREC**

New Mexico Regulation and Licensing Department – **RLD**

Notice of Contemplated Action – **NCA**

Qualifying Broker – **QB**

Qualifying Broker Refresher - **QBR**

Uniform Licensing Act – **ULA**

CLASSROOM POLICIES

To create an atmosphere that facilitates the learning experience, follow these classroom policies. Depending on specific facility requirements and the desires of your instructor, other classroom policies may apply.

- Breaks will be often. please use this time to check emails/voicemails if needed.
- Please turn cell phones off or put on “vibrate.”
- Out of courtesy, please do not text.
- Be present, be engaged and find your success.

If the class is presented by Zoom or other online meeting venue, please observe the following.

- Must have a working camera.
- Must have a working microphone.
- Must be seated at home or in your office (not in your car)
- Must have a full face visible on camera.

Antitrust

In Module 6, we will be going over Antitrust awareness in detail. For now, it is important to that throughout this class we must maintain a level of awareness and avoid any discussions that could appear to be Antitrust. Let us watch a video from “NAR Window to the Law.”

VIDEO BREAK

“NAR Window to the Law – Antitrust”

https://www.youtube.com/watch?v=tmQ4T_YRmMc

WORKGROUP ICEBREAKER DISCUSSION

Who are you? What do want to talk about today? Any fun facts?

Notes:

MODULE 1

New Mexico Real Estate Commission

Overview

- Mission Statement
- Meetings
- Continuing Education
- Licensing
- Rules and Laws
- Other Resources for a Defensible Position
- Complaint and Disciplinary Process

"If your actions inspire others to dream more, learn more, do more and become more, you are a leader."

-John Quincy Adams

VIDEO BREAK

Simon Sinek on "Leadership"

<https://www.youtube.com/watch?v=urrYhnaKvy4&t=32s>

Mission Statement

The mission of the New Mexico Real Estate Commission is to protect the public and enhance the professional competence of real estate brokers. It is the New Mexico Real Estate Commission's view that broker education is an integral part of public protection and a primary Commission responsibility.

From NMREC website, you will find the following key components:

<https://www.rld.nm.gov/boards-and-commissions/individual-boards-and-commissions/real-estate-commission/>

Meetings

- Quarterly Meetings
- Rules Hearings
- Special Sessions
- Disciplinary Hearings
- Educational Advisory Committee Meetings

Continuing Education

- CE tracking Sheets
- Reminder Dates
- Approved Class and Schedules
- CE Broker: <https://www.cebroker.com/>

Licensing

- Public Search and Portal Login: https://nmrldlpi.my.site.com/bcd/s/public-search-license?language=en_US

Rules and Laws

- NMREC Laws & Rules
- New Mexico Uniform Owner Resident Relations Act
- Felony Convictions

Complaint and Disciplinary Process

If a Complaint is filed in writing:

- The NMREC will decide if it is in their jurisdiction.
- AB and QB will receive the complaint by email.
- The first action would be to compile the file, all emails, text messages and correspondence.
- Both AB and QB must contact their E&O carrier as soon as possible.
- E&O will supply an Attorney that can help in the response to the complaint.
- Both AB and QB will have **10 days** to respond to the complaint.

Once the response has been received by the NMREC:

- At this point, it is best to have legal counsel communicate with the NMREC.
- With or without the response, the investigation may continue.
- If it is determined no violation has occurred, the complaint will be dismissed, and the parties will be informed.
- If it is determined a violation has occurred, the NMREC may refer the complaint to the AG's office and request a Pre-NCA or NCA (Notice of Contemplated Action).

If a Pre-NCA is issued:

- This is a settlement offer to avoid a hearing. Usually includes a fine and "Letter of Reprimand" (an LOR is the minimum penalty of guilt).
- If the Licensee does not accept the settlement, an NCA will be issued.

If a NCA is issued:

- The licensee will have **20 days** to respond and request a hearing.
- The licensee and their legal counsel must be prepared for a hearing.
- There is still time to negotiate a solution.

At the hearing:

- There will be at a minimum, a NMREC Commissioner, NMREC Investigator and an Assistant AG.
- If found guilty, the licensee will receive notice and supplied a **30-day** opportunity to appeal.

Disciplinary Action upon guilty:

- The minimum penalty is a “Letter of Reprimand.”
- The maximum fine is \$1,000 per violation.
- May be required to take CE classes for no credit.
- May be referred to the AG’s office for criminal proceedings.

Other Jurisdictions

It is important to note that our legal obligations (Broker Duties) include adherence to all laws.

Example:

When a licensee goes to renew their license, it is discovered that the licensee had committed a crime in another State. The NMREC opens an investigation under the guidelines of the Uniform License Act. Upon a hearing, the NMREC may act against the licensee for violating 16.61.19.8(A)(2) of the NMREC Rules.

WORK GROUP DISCUSSION

NMREC Website

Notes:

MODULE 2

Responsibilities and Requirements

Overview

- Business Plan
- SWOT Analysis
- Legal Structure of the Brokerage
- Policy and Procedures
- Defensible Position
- How to Acknowledge Your Defensible Position

Protecting the brokerage must be a priority for a QB!

A QB's role, now more than ever, requires greater attention, focus and oversight. Our industry is changing every day and thereby creating bigger challenges. It may be time to do an assessment of the Brokerage, to see if there are any blind spots in your defensible position. Are you and your Brokerage going in the right direction? Is your WHY still your guiding focus?

Business Plan

To create a defensible position, the first item to tackle is your business plan. Is it up today? To help in answering these, let us look at the basic components of a business plan:

- What is your WHY?
- Vision, Mission, and Value Statements – Create the Differentiating Proposition.
- Brokerage Goals
- Executive Summary
- Company Overview
- Market Analysis
- Customer / Client / Competitive Analysis
- SWOT Analysis

SWOT Analysis

Strengths

Weaknesses

Opportunities

Threats

Legal Structure of the Brokerage

Items to consider:

- Research, Business Plan & Funding
- Entity Type and Business Name
 - **NMREC Rules Part 29: Trade Name Registration and use of Trade Name**
 - Business Name must be verified with NM Corporation Commission.
 - Qualifying Brokers must register the Trade Name.
 - Any changes must be reported to the NMREC within 10 days.
 - Trade names should not **mislead the public**.
- Choose a Business Structure: <https://www.sba.gov/business-guide/launch-your-business/choose-business-structure>
 - Sole Proprietorship
 - Partnership
 - Limited Liability Company
 - Corporations:
 - C Corp
 - S Corp
 - B Corp
- Register Your Business, Obtain Tax ID Numbers and Obtain Permits or Certifications
 - Municipal/County Business Licenses
 - New Mexico Gross Receipts Tax - <https://tap.state.nm.us/tap/>
 - Federal and State Tax
 - Employer Identification Number - <https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online>
 - Employer Withholding - <https://www.dws.state.nm.us/en-us/>
- Brick and Mortar vs. Virtual
 - Location
 - Market Recognition
 - Office Design and Layout
 - Lease or Own
 - ADA Compliance
 - DCMA Compliance
- Website Address and Design
- General Liability, Key Man, and Other Insurance
- Trade Association Memberships
- Maintaining Your Business
 - Single Entity LLC.: <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies>
 - **Review IRS 8832** – see example in Module 1 Resources
 - Corporation: <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership>

Defensible Position

The QB's role is critical in ensuring compliance with relevant laws, regulations, and ethical standards in the real estate industry. If we look at Part 16, "Mitigating Factors to Qualifying Broker Responsibilities", NMREC has given us, as QB's, an opportunity to reduce our overall liability. If we can show that we have policies, ongoing training, ongoing discussions on best practice, forms training, and compliance training.

While this will not completely relieve us of liability, it does reduce it. A defensible position will show that you have fulfilled your role and responsibilities.

When it comes to a defensible position, a QB holds several advantages and responsibilities:

1. **Legal Compliance:** As the ultimate authority within a brokerage, a qualifying broker handles ensuring that all agents and brokers under their supervision adhere to applicable laws and regulations. By implementing robust compliance protocols and supplying ongoing training and support, they can show a commitment to legal and ethical practices, reducing the risk of legal issues and liability for the brokerage.
2. **Risk Management:** A qualifying broker plays a vital role in mitigating risks associated with real estate transactions. They set up policies and procedures to protect both clients and the brokerage, such as thorough documentation, proper handling of funds, and proper disclosure practices. In case of a dispute or legal claim, a qualifying broker's adherence to proven risk management protocols can serve as a defensible position to show reasonable care and diligence.
3. **Professional Standards:** Upholding high professional standards is crucial in the real estate industry. A qualifying broker sets the tone for the brokerage by promoting ethical conduct, integrity, and professionalism. By enforcing ethical guidelines and fostering a culture of compliance, they can defend the brokerage's reputation and position in case of any allegations of misconduct against agents or brokers.
4. **Supervision and Training:** A qualifying broker has a duty to supervise and train agents and brokers within the brokerage. By providing comprehensive training programs, mentoring, and ongoing support, they can ensure that all members of the team are well-informed and equipped with the necessary skills and knowledge. This initiative-taking approach to supervision and training can serve as a defensible position by demonstrating that the qualifying broker took reasonable steps to prevent any misconduct or negligence.
5. **Record-Keeping:** Keeping correct and organized records is essential for a qualifying broker. By documenting all relevant transactions, communications, and compliance efforts, they can show a robust paper trail that can be used as evidence in case of any disputes or legal proceedings. Strong record-keeping practices can supply a defensible position by highlighting the broker's commitment to transparency, accountability, and accurate representation of transactions.

Overall, a qualifying broker's defensible position rests on their ability to show and keep exacting standards of legal compliance, risk management, professional conduct, supervision, training, and comprehensive record-keeping. By fulfilling these responsibilities diligently, they can protect the brokerage from potential legal and ethical challenges and support a strong position in the real estate industry.

Policy and Procedures

A top priority for QB's in creating a defensible position is to set up policy and procedures. In accordance Part 16(G) of the NMREC Rules, it is a requirement for Supervising QB's. They are to have them and make sure all Brokers in their charge receive a copy and acknowledge that they have read, understand, and adhere to those policies. The following are some components:

- Table of Contents
- Policies and Procedures Manual Goals
- New Mexico Real Estate Commission (Website) and the Qualifying Broker
- New Mexico License Law
- New Mexico Real Estate Commission Rules
- Brokerage Relations
- Recruiting Associate Broker
- Code of Ethics
- Uniform Owner Resident Relationships Act
- Fair Housing and ADA
- Antitrust
- Equal Employment
- Immigration Law Compliance
- Harassment in the Workplace
- Safety and Security

How to Acknowledge Your Defensible Position

Documented evidence that you have fulfilled your role and responsibilities of a QB is the best way to create a defensible position. From old school to the digital age, every QB is a little different in how they would document their defensible position.

Since we are in a digital age, let us look at a few tools you can use to document your actions:

- Trello – Digital project boards for creating, collaborating, and organizing your business.
- Slack – Efficient and secure team communication, organization with AI built in.

Note: These are examples, neither the class sponsor nor the instructor endorses them.

Resources for a Defensible Position

- National Association of Realtors: <https://www.nar.realtor/>
- NAR Window to the Law: <https://bit.ly/41Q8oF3>
- New Mexico Association of Realtors: <https://www.nmrealtor.com/>
- CRES Claim Prevent Blog: <https://www.cresinsurance.com/blog/>
- NM Case Look Up: <https://caselookup.nmcourts.gov/caselookup/>

WORK GROUP DISCUSSION

Module Review!

Notes:

MODULE 3

Legal Risk

Overview

- Misrepresentation
- Artificial Intelligence
- Data Security
- Staying in Your Scope
- Giving Legal Advice
- Personal Injury and Property Damage

QB Challenges, The Rules, and Defensible Position

In this module, we will look at some of the biggest issue challenges a QB faces, how they relate to the rules, and how you properly mitigate. While you may never face these challenges, it is good to have a defensible position.

Misrepresentation

Every Broker strives to make their property stand out from the crowd. It might even be tempting to exaggerate here and there about the features or the condition of the house. However, this kind of deception can end disastrously for agents.

If a Buyer feels misled about anything, a lawsuit typically follows shortly after. Always be truthful about claims you make about a property with no room for misinterpretation.

A misleading statement might help you close a sale, but it might also lead to legal action and monetary loss. It is not worth the risk.

Where Do Issues Misrepresentation Come from the most?

- Not doing a visual inspection of the property.
 - **Review “Easton v Strassburger, 1984” Module 3 Resources.**
- Photoshop pictures.
- Not showing environmental aspects.
- Incorrect zoning codes.
- Suggesting a property’s value based on a zoning code change.

VIDEO BREAK

NAR Window to the Law: “Reducing the Risk of Misrepresentation Claims”

<https://www.youtube.com/watch?v=4Z7VVPfZdtI>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes: _____

Artificial Intelligence

Artificial Intelligence (AI) is revolutionizing the real estate industry by enhancing efficiency, accuracy, and customer experiences. Through advanced data analysis, AI can predict property values, market trends, and investment opportunities with unprecedented precision. Chatbots powered by AI provide instant responses to customer inquiries, improving engagement and streamlining property search processes. Additionally, AI-driven virtual tours and image recognition technology offer immersive experiences, allowing potential buyers and renters to explore properties remotely. Overall, AI is reshaping how real estate professionals and consumers approach property transactions, making the process more informed, efficient, and personalized.

Where do we misrepresentation when Brokers use AI?

- Producing accurate information and not causing misrepresentation.
- Potential Copyright Issues.
- Search Engine Optimization.
- Modifying Forms

CRES Blogs on AI: <https://www.cresinsurance.com/AI-opportunities-and-threats>

NAR on AI: <https://www.nar.realtor/artificial-intelligence-real-estate>

VIDEO BREAK

NAR Window to the Law: "Tips on using AI"

<https://www.youtube.com/watch?v=Wxz0MGCIKiA>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Data Security

Hackers are everywhere, and they want your customer/clients' information. Moreover, if they are successful in getting it — you will be the one who pays.

Protect your customer/clients' information from criminals by having safety protocols in place and keeping your paperwork in a secure location. Once you have a secure system in place, continually change your password and make sure personal non-public data is not in your files or it is encrypted.

Per both the "Code of Ethics" and the Law, we are to preserve the confidentiality of personal information of our customer/clients. Safeguarding that personal information is not just in our own Brokerage files, there are many other concerns we have.

Where do Data Breaches Occur the Most?

- Email going in and out of Title Companies.
- Not using corporate email.
- Paperwork left on someone's desk.
- Not using a VPN or secure server.
- Where else?

CRES Blogs on Data Security: <https://www.cresinsurance.com/cybersecurity-and-wire-fraud/>

VIDEO BREAK

NAR Window to the Law: "Data Security," Ransomware & Plan
Data Security: <https://www.youtube.com/watch?v=RGDcp5IR9tE&t=2s>
Ransomware: <https://www.youtube.com/watch?v=rhj2ImiEY-4>
Plan: <https://www.youtube.com/watch?v=RGDcp5IR9tE>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Staying in Your Scope

If a Broker is showing and selling types of properties, they are not familiar with, or in an area of the State they are unfamiliar with, as a QB, you need to take extra precaution.

Many times, there are requirements or other situations particular to an area of which you are unaware. If an issue arises that is due to the geographic location, you might be blamed because you did not warn your clients about any such problems.

Where Do Issues of Staying in Your Scope Happen the Most?

- A Broker practicing outside their geographical scope.
- A Broker practicing in disciplines they are unfamiliar with.

Let us review “Scope of Competence” in Module 3 Resources.

Giving Legal Advice

Clients want their Broker to have an answer for every question they ask. Similarly, Brokers want to help their clients. In New Mexico it is illegal for a Broker to give tax or legal advice. This mistake is especially difficult to avoid because taxes and legalities are an unavoidable part of real estate.

Where Do Issues of Giving Legal Advice Happen the Most?

- Interpreting legal documents.
- Explaining legal consequences.
- Drafting legal documents (including addenda to contracts).
- Adding language to standard forms.

Let us review “Staying in Your Lane” in Module 3 Resources.

VIDEO BREAK

NAR Window to the Law: “Unauthorized Practice of Law”

<https://www.youtube.com/watch?v=uj8j0wNo0MU>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Personal Injury and Property Damage

Personal Injury

If a client is injured during a showing or open house, your Brokerage may be liable. If you are found liable, you will be responsible for reimbursing any costs related to the accident.

Create policies and procedures that ensure the Brokers in your charge evaluate the property before listing, showing, or doing an open house. Evaluating the property for all possible physical risks.

What Are the Most Common Mistakes:

- Not turning on all lights – Visitor falls in a garage.
- Ice after a storm – Broker did not stop showing.
- Empty pool – Visitor jumps on diving board.
- Allowing entry to uninsurable property.

Property Damage

A Brokerage may be liable for property damage in certain circumstances. Here are a few situations where a Brokerage could be held responsible for property damage:

What Are the Most Issues Mistakes:

- A Broker causes damage to a property during a showing lead to property damage or personal injury. **Example: Opening the pool cover.**
- A Broker misrepresents the condition of a property or does not disclose material defects that result in property damage or personal injury. **Example: Property is uninhabitable.**
- A Broker does not do a property visit on a commercial property that was just listed.

It is important to note that liability can vary based on jurisdiction, specific circumstances, and applicable laws. If you have concerns about property damage and personal injury liability, it is recommended to consult with a legal professional who can supply guidance based on the specific details of your situation.

Insurances Consideration:

- RISC Coverage Lapse
- RISC Coverage Upon Death
- What you need to know about E&O: <https://www.youtube.com/watch?v=9iaQVYBVOOM>
- Brokerage Insurance Checklist: <https://www.cresinsurance.com/insurance-checklist-for-real-estate-offices/>
- Broker vehicle insurance: <https://www.cresinsurance.com/what-real-estate-brokers-should-remind-their-agents-about-this-month-vehicles/>
- Open House Liability: <https://realtybiznews.com/9-tips-to-protect-yourself-in-open-house-injury-liability/98754773/>
- Showing Liability: <https://www.cresinsurance.com/slips-bites-and-crashes-are-you-covered/>
- Requiring ABs to ensure listed property or plan on how to handle such property.

ARE YOU, THE BROKERAGE AND YOUR BROKERS PROPERLY INSURED?

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

MODULE 4

Broker Duties and Rules

Overview

- Broker Duties
- Breach of Duty
- QB/AB Relationship
- Transaction Coordinators
- Unlicensed Assistance
- Teams
- Earnest Money / Trust Accounts
- Signage and Advertising

BROKER DUTIES - (Legal Obligation)

Let us explore your options on how to train brokers in disclosing our legal obligations.

Currently, most Brokers disclose their Broker Duties by just having the person they are working with sign and initial the cover pages to the Listing Agreement or Buyer Broker Agreement. Since most Brokerage do not require the use of a Buyer Broker Agreement, most Buyer(s) do not see Broker Duties until they see the Purchase Agreement.

- Is this too Late?
- Why is it potentially too Late?
- Are there options and should they be disclosed much earlier?

A more appropriate time to disclose Broker Duties would be much earlier in the relationship that is created. A broker should consider going over the two-page stand-alone Broker Duties, after getting to know the Buyer, Seller, Landlord or Tenant and before presenting any type of proposal. **See example, “Broker Duties Non NMAR” in Module 4 Resources.**

- Could this be a bit overwhelming at a first meeting?
- What would you think if someone presented this document to you in the beginning?
- How do you feel about the term “Broker Duties”? Does it sound forced upon us?
- Remember, you are the QB, and those are your relationships that are being created.

Let us explore a more subtle approach. Rather than breaking out the above documents right at the beginning, what if we presented our Broker Duties as our **“Professional Commitment.”** A Power Point Presentation (PPP) or Video, in your own words? Consider the following:

- Your broker is collaborating with a seller(s) at a listing appointment. They are building rapport and listening to their **“Story,”** asking relevant questions along the way. Actively listening and taking notes. Then there is a pause, and the seller(s) say, “What can you do for us?”
- Your broker then says, “Thank you Mr. and Mrs. Seller, let me get my laptop out and go over that with you. But first, if you do not mind, I would like to go over my **“Professional Commitment”** with you. It will help you understand how I will be collaborating with you, guide you through the process, and how I will do everything I can do to protect you, as well as everyone else involved in the process.”
- Then your broker pulls up a PPP and in their own words, present their Broker Duties as their **“Professional Commitment.”**

Let us review an example, **“Professional Commitment”** in Module 4 resources.

WHAT MAKE SENSE TO YOU? WHAT WILL YOUR POLICY? CONSISTANCE IS THE KEY?

Breach of Duty

One of the most common lawsuits brought against real estate brokers is for breach of duty. Brokers know they must always act in the best interest of the client/customer, as clients/customers place a special trust in a broker they are working with, for their expertise.

We are transaction brokers by default. Which means brokers cannot speak for, answer for, or make decisions for those they work with. Brokers can only make recommendations, and those parties they are working with, to speak, answer or decisions for themselves. Otherwise, a broker potentially acting as agents.

As Brokers, we are held to a high standard of honesty and full disclosure. Any breach of this duty, whether from negligence or intentional action, is subject to the risk of a lawsuit. Potential violating Articles 1, 2 and 3 of the “Code of Ethics”. As well as NMREC rules 16,17,19, and 20.

Where does Breach of Duty Occur the Most?

- Acting as an agent, when working in a transaction broker capacity.
 - Legal Obligations versus Fiduciary Obligations.
- Using a transaction coordinator and removing yourself from the transaction.
 - This is a direct violation of part 20 of the rules.
- Working on a Team and not disclosing such.
- Failing to verify a property that the buyer is contracted to purchase is the correct lot.
- Not doing a visual inspection of a property upon listing.

Case law on this subject goes all the way back to 1982 “Amato v. Rathbun”. Let us review the case and discuss the following.

- What has changed between then and now?
- Would the outcome be the same?
- What would you have done differently?

See “Amato v. Rathbun” in Module 4 Resources.

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Most Common Recent Litigations

Before we discuss recent litigations, it is important we understand two distinct legal terms, “Respondeat Superior” and “Vicarious Liability.” These terms are being used by real estate attorneys in deliberations and demand letters. Regardless of definition, both potentially make a QB liable acts of their brokers.

When determining what policies must be in place, liability for a broker’s action must be considered. Let us discuss so of the more common litigation that have occurred recent, and potential policies that could reduce a QB’s liability:

- Acting as an agent, when working in a transaction broker capacity.
- Not fully explaining documents to a transaction.
- Broker not explaining to a buyer the risk of waiving all inspections.
- Broker not explaining the legal risk of not disclosing known material facts.

See additional information “Recent Litigation” in Module 4 Resources.

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

QB/AB Relationship

There is concern among NMREC Commissioners and staff, the EAC, Core instructors and Ombuds coordinators that there appears to be a significant lack of understanding of the responsibilities of both the QB and AB in a real estate transaction and within the brokerage. Liability for a QB commonly begins when there is a disconnect between the two. For that reason, Part 16 and 17 of the NMREC Rules had been amended in 2021, to clarify how that relationship should exist.

It is important for a QB to review Part 16 and 17 when they are establishing relationship with AB, creating policy, and creating “Onboarding and Offboarding” procedures. A QB needs to understand their liabilities and risks as well as how they mitigate them when it comes to the ABs in their charge.

Case law that solidified the QB/AB relationship as agency: Robertson v. Carmel Builders. Let us have a class discussion on Part 16, 17 and this case. **See example in Module 4 Resources “Part 16 & 17” & “Robertson v. CBRE”.**

Onboarding and Offboarding of Brokers

Onboarding Brokers - Independent Contractor

There are many characteristics of the “ideal” AB/QB relationship that can help in determine whether an AB is affiliated with the correct QB and vice versa. Having a good questionnaire can assist the QB in determining if the AB is the right fit. Having a good onboarding policy makes sure the process goes smoothly.

See example in Module 4 Resources, “Onboarding.”

- NMAR Form 7502 Independent Contractor Agreement reflects all IRS requirements.
- Statement of Competence Agreement
- Scope of Service Agreement
- CE Requirements Page
- CE Tracking Sheet
- Digital Footprint Audit
- W-9 Taxpayer ID form
- IC Hiring Questionnaire
- Organizational Chart
- Checklist
- Policies and Procedures Manual

Offboarding Brokers

When an AB is either terminated or wishes to leave a brokerage, having a good offboarding policy is extremely important.

See example in Module 4 Resources, “Offboarding.”

- Move Broker file to Offboarding.
- Send License back to NMREC.
- Exit Interview: review ICA, CE Tracking, and security concerns.
- Digital Footprint Audit
- Audit of Brokers files and working transactions to determine disposition.
- Inventory marketing for release
- Finalize compensation.

Transaction Coordinators

A **TC** is an effective use of a licensed resource when finding success in real estate. Gary Keller (Keller Williams) felt so strongly about this, he wrote in his book “**Millionaire Real Estate Broker.**” As you build and cultivate relationships a strong **TC** can free up some of your time, by performing tasks on a transaction that are repetitive, time consuming and yet necessary. You can use that time to do what you do best, building relationships. With reward comes risk, and hiring a **TC** is not immune to this. So let us review Part 20 of the rules and produce some “Best Practices” to keep everyone on solid footing:

- When considering a **TC**, experience should be considered.
- Hiring a **TC** requires **QB** approval.
- If you are hiring a **TC** from another Brokerage, make sure they are a Qualifying Broker.
- A Transaction Coordinator Agreement detailing exactly what the **TC** will and will not be doing. **See “TC Agreement” in Module 4 Resources as an example.**

Blogs Concerning Transaction Coordinator

- “**TC**” **Fees and RESPA:** <https://www.cresinsurance.com/transaction-coordinator-fees-and-respa-violations/>
- **What Insurance does a “TC” need:** <https://www.cresinsurance.com/what-insurance-does-a-transaction-coordinator-need/>
- **How a “TC” can reduce liability with a checklist:** <https://www.cresinsurance.com/top-tips-for-real-estate-transaction-coordinators-document-checking-to-avoid-a-lawsuit/>

Unlicensed Assistance

Unlicensed Assistant (UA)

Hiring an Unlicensed Assistant **UA** can create tremendous liability for a Broker and their Qualifying Broker. It is important for a Broker understand the following “Best Practices” when considering hiring a **UA**:

- The hiring of a **UA** does require Qualifying Broker approval. Refer to your Brokerage “Policies and Procedures” to understand your Brokerage’s guidelines.
- It is important that both the Broker and the **UA** must read, understand, and adhere to Part 21 of the Rules.
- An Unlicensed Assistant Employment Agreement detailing exactly what the **UA** will and will not be doing, as well as the responsibilities of the Broker hiring the **UA** is required. **See “UA Agreement” in Module 4 Resources as an example.**

Teams

Managing teams within a brokerage especially requires careful attention to legal considerations. To minimize legal liability, it is essential to implement clear and transparent policies and procedures that align with state and federal regulations. Regular training and communication with your team members can help ensure everyone is aware of and adheres to these guidelines.

Additionally, maintaining thorough records of transactions and interactions can provide legal protection in case of disputes. By fostering a culture of compliance and professionalism, you can effectively manage your brokerage and reduce the risk of legal issues.

The NMREC will soon vote on adopting team regulations. Let us review the current draft of that proposal, located in Module 4 Resources.

Earnest Money / Trust Accounts

Types of Banking Accounts A Brokerage May Need

- **Brokerage Operating Account**, which will be used for the day-to-day operations.
- **Brokerage Trust Account**, this account will **ONLY** contain money belonging to others as it relates to a sales transaction (earnest money).
- **Property Management Trust Account**, this account will contain money belonging to others as it relates to managing property.
- **Special Trust Account**, this account will be used when principals agree in writing that an interest-bearing special trust accounts be established.
- **Custodial Account**, this account is established for the sole interest of the owner of the account.

Earnest Money Procedures

Once received, earnest money must immediately be deposited in a designated trust account, with a cooperating QB or with a title company authorized to do business in New Mexico.

Policies to consider:

- How will brokers manage the earnest money from buyer(s) to a trust account.
- Training brokers on how to explain the earnest money dispute process.
- Training brokers on how to explain alternatives, such as **“Time Off Market.”**

Think about how your brokerage manages other people’s money and what considerations you should make when developing policies and procedures.

Signage and Advertising

Signage

A Real Estate Brokerage office conducting business under a registered Trade Name, must identify the **Qualifying Broker(s)** in the following manner:

- **Legible signage, located in a conspicuous place near the office entrance.**
- **Identifying all Qualifying Brokers** conducting business in the office.
- If the office is in a building, then the Brokerage name must be identified in the building directory.

Real Estate Advertising and Self-Branding

- Must be true and factual.
- Rule applies to advertising property or real estate services. (Including self-branding)
- Must include the Trade Name and phone number of the Brokerage.
- Font size must be 33% the size of the Broker or Team name.
- Any ownership interest of a Broker; buying, selling, leasing, or renting, must disclose they are a Broker.
- Must comply with local, state, and federal law.
- Applies to all forms of advertisement.
- In messages that can only be two hundred characters or less the information must be a click away.
- All Advertising required prior written approval by Qualifying Broker.

Advancements in technology have created an ability to advertise in so many different mediums. With this ability to have greater exposure, comes greater risk. It is important for a Qualifying Broker to mitigate this risk through policies, procedures, and training to keep the Brokerage and Brokers protected.

These policies will need to be continuously updated. As marketing strategies continuously change, so must your ability to adapt to that change. Do your research, understand the risk, and train everyone associated with the Brokerage.

Social Media

The most challenging aspect of oversight for a QB when it comes to advertising and self-branding, will be social media. Most QB's call it an impossible task. However, with a solid policy that can create a defensible position and reduce risk for everyone, makes it a little more manageable.

See sample "Social Media Marketing Policy" Module 4 Resources.

MODULE 5

Legislative and Regulatory Influences

Overview

- Discrimination in Real Estate
- Discrimination Acts, Laws, and Codes applied to Real Estate
- Americans with Disabilities Act (ADA)
- Video and Audio Surveillance (New Mexico Specific)
- Digital Millennium Copyright Act (DMCA)
- Limiting English Proficiency (LEP)

Discrimination in Real Estate

Discrimination in real estate refers to the unjust or prejudiced treatment of individuals or groups based on specific protected characteristics during various aspects of the real estate transaction process, such as buying, selling, renting, or financing properties. This discriminatory behavior can encompass a range of factors, including but not limited to race, color, religion, national origin, gender, familial status, disability, and, in some cases, sexual orientation and gender identity.

Discrimination in real estate can manifest in different forms, such as:

- **Refusal of Services:** When a real estate professional, such as a broker, agent, or landlord, denies housing-related services, opportunities, or information to individuals or groups based on their protected characteristics.
- **Unequal Terms and Conditions:** Imposing different terms, conditions, or standards on individuals or groups, or providing them with unequal access to housing options, based on protected characteristics.
- **Steering:** The practice of guiding individuals or families towards or away from certain neighborhoods or properties based on their protected characteristics, rather than their housing preferences or needs.
- **Redlining:** The systematic denial or avoidance of financial services, including mortgage loans, to specific neighborhoods or communities, often based on the racial or ethnic composition of those areas.
- **Harassment:** Engaging in intimidating, threatening, or discriminatory behavior towards individuals or groups in a way that interferes with their ability to access housing or housing-related services.

Discrimination Acts, Laws, and Codes applied to Real Estate

New Mexico Human Rights Act

The New Mexico Human Rights Act is a state law enacted by the state legislature and enforced by an eleven member “**Human Rights Commission.**” The Act differs from the Federal Fair Housing Act, as it applies to all real estate and has the additional protected class of spousal affiliation.

Federal Fair Housing Laws

Federal Fair Housing laws include the 1866 Civil Rights Act and the 1968 Federal Fair Housing Act. On April 11, 2021, FFHA was amended to include sexual orientation and gender identification.

- **Federal Fair Housing Act:** <https://www.hud.gov/program/FFHA>
- **A list of the Federal Acts:** [Anti-discrimination laws in the United States](#)

Diversity, Equity & Inclusion (DEI)

Diversity, Equity, and Inclusion (DEI) are pivotal in the real estate industry as they foster fairness, representation, and equal opportunities for all individuals, regardless of their background. In an inclusive environment, diverse perspectives contribute to more innovative and well-rounded decision-making processes. Addressing historical disparities and promoting equitable access to housing helps create a more just society. DEI initiatives in real estate ensure that underrepresented communities are not marginalized, enabling them to participate fully in property ownership, investment, and development. Ultimately, embracing DEI principles enriches the industry, strengthens communities, and paves the way for a more balanced and prosperous future.

Let us review this new initiative of the NAR: <https://www.nar.realtor/ae/aexperience/your-roadmap-to-diversity>

VIDEO BREAK

Fair Housing: <https://www.youtube.com/watch?v=BLdrcXsW3Ps&t=4s>

DEI: https://www.youtube.com/watch?v=zA6LOCal_gE

Advertising: https://www.youtube.com/watch?v=Cqf_WDd-F3Q

NAR “Code of Ethics”

In the NAR “Code of Ethics,” Article 10 and Standards of Practice 10-1 through 10-5, you will find restrictive guidelines as it pertains to discrimination. A brokerage must review the language and create policies for the QB and all brokers for the way that interact with their colleagues, employees, and the public. Not just while they are practicing real estate, but in their private lives as well.

Equal Employment Opportunity Commission

Equal Employment Opportunity (EEO) laws prohibit specific types of job discrimination in certain workplaces.

- EEOC website: <https://www.eeoc.gov/>
- Workforce Solutions website: <https://www.dws.state.nm.us/Human-Rights-Information>

Discrimination Training

While not all encompassing, the following videos and simulator, can be most effective for your training on discrimination. Make policies, make training schedules and be consistent.

- Bias Training: https://www.youtube.com/watch?v=_XleTjTv7BI&t=7s
- Fairhaven Simulator: <https://fairhaven.realtor/>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Americans with Disabilities Act (ADA)

The purpose is to ensure equal access to public accommodations for disabled people. Public accommodations include commercial properties, and places accessible to the public, including broker offices and retail stores. The purpose is also to provide guidelines for accessibility requirements in buildings.

ADA Compliant Websites

<https://www.nar.realtor/window-to-the-law/ada-and-website-accessibility-update>

Video and Audio Surveillance (New Mexico Specific)

Video Surveillance

A person may not intentionally use the unaided eye to view or intentionally use an instrumentality to view, photograph, videotape, film, webcast or record the intimate areas of another person without the knowledge and consent of that person: (1) while the person is in the interior of a bedroom, bathroom, changing room, fitting room, dressing room or training booth or the interior of any other area in which the person has a reasonable expectation of privacy; or (2) under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place. **N.M Stat. Ann.30-9-20(A)**

Audio Surveillance

Illegal interference with communications consists of knowingly and without lawful authority: reading, interrupting, taking, or copying of any communication is unlawful without the consent of the parties to said communication. **N.M. Stat. Ann. 30-12-1(c)**

Digital Millennium Copyright Act (DMCA)

The Digital Millennium Copyright Act (DMCA) is a federal copyright law that enhances the penalties for copyright infringement occurring on the Internet. The law provides exemptions or “safe harbors” from copyright infringement liability for online service providers (OSP) that satisfy certain criteria. Courts construe the definition of “online service provider” broadly, which would include MLSs as well as participants and subscribers hosting an IDX display.

One safe harbor limits the liability of an OSP that hosts a system, network or website on which Internet users may post user-generated content. If an OSP complies with the provisions of this DMCA safe harbor, it cannot be liable for copyright infringement if a user posts infringing material on its website. This protects an OSP from incurring significant sums in copyright infringement damages, as statutory damages are as high as \$150,000 per work. For this reason, it is highly recommended that MLSs, participants, and subscribers comply with the DMCA safe harbor provisions discussed herein.

To qualify for this safe harbor, the OSP must:

1. Designate, on its website, and register with the Copyright Office an agent to receive takedown requests. The agent could be the MLS, participant, subscriber, or other individual or entity.
2. Develop and post a DMCA-compliant website policy that addresses repeat offenders.
3. Comply with the DMCA takedown procedure, if a copyright owner submits a takedown notice to the OSP, which alleges infringement of its copyright at a certain location, then the OSP must promptly remove allegedly infringing material. The alleged infringer may submit a counter-notice that the OSP must share with the copyright owner. If the copyright owner fails to initiate a copyright lawsuit within ten (10) days, then the OSP may restore the removed material.
4. Have no actual knowledge of any complaints of infringing activity.
5. Not be aware of facts or circumstances from which complained-of infringing activity is apparent.
6. Not receive a financial benefit attributable to complained-of infringing activity when the OSP can control such activity.

Full compliance with these DMCA safe harbor criteria will mitigate an OSP’s copyright infringement liability. For more information see 17 U.S.C. §512. (Adopted 11

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

Limiting English Proficiency (LEP)

Limiting English proficiency refers to the situation where someone has a restricted or inadequate ability to communicate effectively in the English language. This limitation can manifest in various ways, such as difficulty understanding or speaking English, which can impact one's professional and personal interactions, especially in a predominantly English-speaking environment like the United States. In a professional context, limited English proficiency can hinder career advancement, limit job opportunities, and create challenges in fields where effective communication is crucial, such as real estate brokerage. It can also affect access to educational and social resources, making it important for individuals to seek language support and improvement opportunities to overcome these limitations.

Review NAR on this topic: [Working with Non-English-Speaking Clients](#)

New Mexico Requirements: <https://www.nmrid.org/certification-licensure/>

VIDEO BREAK

NAR Window to the Law: "Working with Non-English-Speaking Clients"

<https://www.youtube.com/watch?v=rquk62ZQI1Q>

WORK GROUP DISCUSSION

What Resolution Should We Create for Our Defensible Position

Notes:

MODULE 6

Mitigating Risk: Creating a Defensible Position

Overview

- Risk Management
- Hot Topics in Broker Risk Reduction – NAR Legal Affairs

Risk Management

As we discussed in the Module Break Risk Management starts with understanding what a Brokerage and the Qualifying Broker can do to mitigate it. Four diverse ways to consider Risk Management:

- **Avoidance:** Removing it, as an example, not allowing Brokers to work on Seller Financing Transactions, without the use of a Title Company and Escrow Company.
- **Controlling:** Be pre-emptive, for example, using the CE Tracking Sheets.
- **Transferring:** Shifting the liability, as an example, requires the proper insurance.
- **Retaining:** Some liability cannot be removed. As such, we create policies and procedures to keep those in check.

When considering your options, it is important to know what areas are most important. You will always be modifying your policies and procedures when it comes to Risk Management. As you will discover new areas to be concerned with as your Brokerage grows and matures.

While there are many areas to be concerned with, by far, a Brokerage biggest risk factor is the Licensees in the Qualifying Brokers charge. Followed closely by Unlicensed Personal. The actions of the individuals in your charge can make or break your Brokerage.

When making decisions about your Defensible Position and the Policies and Procedures to protect your Brokerage, those in your charge and the Public, consider the following items. This is not an all-encompassing list and will evolve as you do.

Hot Topics in Broker Risk Reduction – NAR Legal Affairs

Competition in Real Estate

REALTORS® help foster competition through their participation in local MLS broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants. REALTORS® work together for the benefit of consumers and help ensure buyers and sellers have the greatest access, transparency, and choice in their homeownership journeys. As a result, brokerages of all sizes can compete and provide their services to consumers, who in turn have the freedom to choose between different service models and pricing that best meet their needs.

Call to Action - See example in Module 6 Resources

- Local Broker Marketplace
- REALTORS® Essentials
- Using Buyer Broker Agreements
- Value of Using a Buyer Broker
- How we are Paid
- [Competition.realtor](#)

Antitrust

Understanding the principles of antitrust law is critical for both brokers and agents, not only to protect the brokerage from costly antitrust claims, but to best serve consumers in their homeownership journey. Keep in mind that brokers may be held liable for the anticompetitive behavior of their salespeople and staff, so having an antitrust compliance program in place to educate and train staff is important. Business decisions should always be made unilaterally and independently, and never because of an agreement, understanding or conspiracy among competitors.

Cybercrime and Wire Fraud

Cybercrime continues to be a top concern in the real estate industry. In 2022, the FBI Internet Crime Complaint Center (IC3) reported a significant increase in total victim losses of \$10.3 million, a 49% increase from 2021. The top scams facing consumers and business in the real estate industry are:

1. **Phishing/vishing/smishing/pharming** whereby fraudsters use unsolicited emails, text messages and phone calls from a legitimate company to obtain personal, financial and login credentials.
2. **Wire fraud** is conducted by fraudsters compromising email accounts to effectuate fraudulent fund transfers.
3. **Ransomware** whereby cybercriminals install malicious software that locks users out of their systems or encrypts data making it inaccessible unless a ransom payment is paid.

Copyright Infringement

It is easier than ever for unauthorized uses of third-party works to be discovered. To avoid costly copyright infringement demands, real estate professionals should be sure to obtain permission to use any third-party work and comply with the terms of the license to avoid copyright infringement and keep records to easily confirm rights as needed. Be sure to confirm that any rights received align with the current and planned use of photographs or other third-party work before using it, including on a website, in the MLS, and marketing materials.

Real estate professionals should also ensure proper rights to any music used at live events, such as an open house and before incorporating into recordings. Keep in mind that specific types of licenses must be obtained before incorporating music into a video recording. In addition, real estate professionals should comply with the Digital Millennium Copyright Act safe harbor to reduce the risk of when third parties post on their websites, including photos and music that appear through an IDX display.

Disclosures and Misrepresentation

Misrepresentation of a property's condition is consistently among the top claims against real estate professionals. To reduce the risk of a costly misrepresentation claim, it's critical that real estate professionals are familiar with applicable disclosure laws. Real estate professionals generally owe a duty to disclose any known material fact under state law and, pursuant to Article 2 of the REALTOR® Code of Ethics, REALTORS® must disclose material facts, which are facts that a reasonable buyer would consider important in deciding whether and on what terms to purchase a property. Failure to properly disclose can lead to misrepresentation claims, ranging from fraud to negligence and in some states, innocent misrepresentation.

Independent Contractor Status

The ability to work as an independent contractor is recognized and protected under many states and some federal laws. The risk of misclassification poses a challenge for brokerages, particularly with the proliferation of teams, where team leads may want to dictate how team members manage their tasks and time. While there is often an inherent conflict between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors, some state statutes expressly address the unique status of real estate agents, permitting classification as independent contractors despite the required control and supervision the broker has over the licensees. For example, in 2022, New Jersey amended its real estate brokerage law to retroactively exclude real estate salespersons from the state wage law, which uses the "ABC test" to classify workers. In addition, a recent California appellate decision affirmed a salesperson's ability to choose to be an independent contractor, citing a 3-part test found in the state business licensing code.

TCPA & DNC: Texting and Calling

Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate professionals have violated the Telephone Consumer Protection Act (TCPA) and Do Not Call (DNC) laws by sending text messages and placing phone calls without the recipient's consent. Specifically, the TCPA requires prior express written consent before using an automatic telephone dialing system (ATDS) to place telemarketing calls or texts to wireless numbers.

For risk reduction tips and resources on the previous topics, let us review **"Hot Topics in Broker Risk Reduction" in Module 6 Resources.**

CLOSING

"In conclusion, this Qualifying Broker Refresher course has been designed with the utmost dedication to empower real estate professionals like yourself in New Mexico. As a fellow real estate broker in the Land of Enchantment, I understand the unique challenges and opportunities that our state offers in the real estate industry.

Throughout this manual, we've delved deep into the latest legal updates, market trends, and best practices, ensuring that you're equipped with the knowledge and skills necessary to excel in your role. Whether you're a seasoned broker looking to stay at the forefront of the industry or a newcomer aiming to make your mark, this course has been tailored to meet your needs.

Remember, real estate is not about transactions; it is about making dreams a reality for your clients. By staying informed and continually improving your expertise, you can truly assist as many real estate licensees as possible in achieving their dreams.

As you embark on your journey as a qualified broker, never forget the importance of ethics, professionalism, and integrity in this field. Uphold the standards that make our profession honorable and trusted.

Thank you for entrusting us with your ongoing education, and I wish you continued success in your real estate career. With the knowledge gained here, you are well on your way to "Making Their Dreams Reality" for many more clients in New Mexico's vibrant real estate market."