

SANTA FE ASSOCIATION OF REALTORS®

LEGAL UPDATE

Presented By:

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TOPICS COVERED TODAY

- NM REC – NEW BROKER DUTIES AND QB REQUIREMENTS
- WHAT HAPPENED AT LEGISLATURE
- NEW/REVISED RANM FORMS – ALREADY RELEASED
- NEW/REVISED RANM FORMS – TO BE RELEASED SOON (IF APPROVED BY EC JUNE 16TH)
- EXPLAINING LANGUAGE IN LISTING AGREEMENT - 1106
- FEDERAL – DMCA'S NEW REGISTRATION REQUIREMENTS

BROKER DUTIES

BROKER DUTIES -
16.61.9.8

RULES TO TAKE
EFFECT JAN. 1, 2018

BROKER DUTIES

- 16.61.19.8 BROKER DUTIES; DISCLOSURE:
Brokers owe specific broker duties to prospective buyers, sellers, landlords (owners) and tenants as set forth in this Part 16.61.19.8.
- Brokers shall disclose the applicable set of broker duties owed to buyers, sellers, landlords (owners) of rental property and tenants as set forth in this Part 16.61.19.8 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.

BROKER DUTIES

- In the case of prospective buyers, sellers, landlords (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.

BROKER DUTIES

- 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, etc.;
 3. performance of any and all written agreements made with the prospective buyer/seller;
 4. written disclosure of any potential conflict of interest that the broker has in the transaction....
 5. written disclosure of any adverse material facts

BROKER DUTIES

- 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 buyers, sellers, landlords (owners) and tenants to whom the broker is directly providing real estate services; Brokers working as Property Managers for a landlord (owner) are directly providing real estate services to the landlord (owner), not to the tenant:

BROKER DUTIES

1. assistance to the party in completing the transaction, unless otherwise agreed to in writing;
2. acknowledgement by the broker that there may be matters related to the transaction that are outside the broker's knowledge or expertise...;
3. advice to consult with an attorney.

BROKER DUTIES

- 4. prompt accounting for all money...;
- 5. maintenance of any confidential information learned in the course of any prior agency relationship...;
- 6. written disclosure of brokerage relationship options available in New Mexico;

BROKER DUTIES

- 7. unless otherwise authorized in writing, a broker who is directly providing real estate services to a seller/owner shall not disclose to the buyer/tenant in a transaction
 - that the seller/owner has previously indicated they will accept a sales/lease price less than the asking or listed price
 - that the seller /owner will agree to financing terms other than those offered,
 - the seller/owner's motivations for selling/leasing or
 - any other information the seller/owner has requested in writing remain confidential, unless disclosure is required by law;

BROKER DUTIES

- 8. a broker who is directly providing real estate services to a buyer/tenant shall not disclose that the buyer/tenant
 - has previously indicated they will pay a price greater than the price submitted in a written offer
 - the buyer/tenant's motivation for buying/leasing or
 - any other information the buyer/tenant has requested in writing remain confidential, unless disclosure is required by law.

BROKER DUTIES

- 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.

BROKER DUTIES

- 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 working as Property Managers for a landlord (owner) owe the following duties to tenants:

BROKER DUTIES

- prompt accounting for all money or property received by the broker from the tenant...;
- 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).

BROKER OBLIGATIONS TO OTHER BROKERS

NEW SECTION

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

BROKER OBLIGATIONS TO OTHER BROKERS

- honesty, reasonable care, and ethical and professional conduct;
- timely presentation of offers or counter-offers and responses thereto;
- 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 between broker and that party

BROKER OBLIGATIONS TO OTHER BROKERS

- compliance with local, state, federal fair housing and anti-discrimination laws, ...;
- written disclosure of any adverse material facts actually known by the broker about the property or the transaction...;
- written disclosure of any potential conflict of interest that the broker has in the transaction, including... AND

BROKER OBLIGATIONS TO OTHER BROKERS

- non-interference with a purchase agreement or any express written agreement that another broker has with a buyer, seller, landlord (owner) or tenant.

HOW WILL THIS WORK?

- Listing Broker -

- To Seller: given to the seller at the time the listing agreement is signed same as now
- To Buyer: Could be uploaded to MLS or submitted to buyer via the buyer's broker prior to submission of offer.

HOW WILL THIS WORK?

- **Buyer's Broker** -
 - To Buyer: broker gets signed by buyer when broker prints out purchase agreement - same as now
 - To Seller: is sent over to listing broker with the offer for signature by the seller

HOW WILL THIS WORK?

- **Property Manager**

- To Owner: gets broker duties owed to owner signed when broker enters into property management agreement with owner - same as now
- To Tenant: gets broker duties owed to tenant signed when broker enters into rental agreement with tenant - same as now, but different set of duties

REQUIREMENTS FOR QB LICENSE

- To supervise ABs, at least 4 years active experience in NM as a licensed AB or QB; 2 years if not supervising
- Passage of the broker's examination
- Documented qualifying transactional experience totaling 100 points

QB ED REQUIREMENTS

- Brokerage office administration course
- 8-hour Understanding and Using RANM Forms course.
- Minimum of 8 hours of elective courses
- Attendance of one NMREC, Public Hearing, or Disciplinary Hearing
- A notarized affidavit of applicant's acknowledgement of the responsibilities of a QB,

QB LICENSE RENEWAL

- QB refresher course
- A minimum of 8 hours of courses from the QB professional track
- Attendance at one NMREC meeting, rule or disciplinary hearing;
- Affidavit of the applicant's acknowledgement of the responsibilities of a QB;
- A statement affirming that the QB substantially fulfilled the supervisory plan filed with the initial application,

AT THE ROUND HOUSE

- LEGISLATIVE INTRODUCED
 - HOA – CAP ON DC FEE - NO
 - HOME INSPECTOR - NO
- LEGISLATIVE – SUPPORTED
 - 4-YRS – FOR QB LICENSE UNLESS NO SUPERVISION OF ABs - YES
 - SOLAR PANELS - YES
- LEGISLATIVE OPPOSED
 - AUCTIONEERS DON'T NEED RE LICENSES IF QB IS INVOLVED - NO

NEW/REVISED RANM FORMS ALREADY RELEASED

- MEDICAL MARIJUANA INFO SHEET - FORM 2312
- MEDICAL MARIJUANA ADDENDUM TO RESIDENTIAL RENTAL AGREEMENT - FORM 609
- COMMERCIAL PA- VACANT LAND - FORM 3100
- PROPERTY MGMT AGREEMENT - RESIDENTIAL - FORM 6102
- RESIDENTIAL RENTAL AGREEMENT - 6101
- COMMERCIAL LISTING AGREEMENT - FORM 3107
- COMMERCIAL PA- FORM 3100

NEW/REVISED RANM FORMS TO BE RELEASED

- CONDO INFO SHEETS
 - RE-SALE
 - NEW DEVELOPMENTS
- PA - 2104
- SELLER'S DISCLOSURE

PA - RANM FORM 2104

- Cover Page II - If Buyer's Broker, **Qualifying Broker or the Brokerage** has a material interest or relationship of a business, personal or family nature in the transaction, including compensation from more than one party must be disclosed.
- **No longer must be disclosed "In a separate document"**

PA - RANM FORM 2104

- **FIXTURES.** The Property shall include all Fixtures, free of all liens, **unless otherwise noted**, including, but not limited to, the following Fixtures if such Fixture exists on the Property, unless otherwise excluded as stated in Paragraph 4E:
 - **Solar Power System(s)/Panels (If leased by Seller, lien may exist)**
- **PERSONAL PROPERTY.** The following existing personal property, if checked, shall remain with the Property:
 - **Freestanding Range(s)**

PA - RANM FORM 2104

In the event the lender determines Buyer does not qualify for the loan, Buyer shall provide to Seller and Seller must receive a written rejection letter from the Buyer's lender **prior to 11:59 p.m on the day before; or _____ days** before Settlement/Signing Date. In the event Seller does not receive such rejection letter within the timeframe set forth in this Subparagraph 5(A)(v), Buyer shall forfeit his Earnest Money to Seller.

PA - RANM FORM 2104

POSSESSION DATE.

Seller shall deliver possession of the Property to Buyer on the Possession Date as set forth below:

- Funding Date at 5:00 p.m. OR
 - **At time Funding Date Requirements are satisfied**
 - Other
- Unless otherwise agreed to in writing, upon Possession Date, or **the date the Property is surrendered to Buyer per a Seller Occupancy Agreement**, if applicable, Seller shall have all his personal belongings and all debris and garbage removed from the Property.

PA - RANM FORM 2104

- **PRORATIONS.** Any equipment rental or contract service agreement (e.g. alarm system, satellite system, propane tank (*to include any remaining propane gas therein*), private refuse collection, road maintenance, etc) shall be handled directly between the Buyer and Seller; the title or escrow company shall not be responsible for proration thereof.

PA - RANM FORM 2104

- Added to Document Grid in Para. 17H
 - Solar Power Systems/Panels
- **RESOLUTION.** If Buyer requests a cure of his objections, Seller may agree to Buyer's requested cure, provide an alternative cure, or refuse to correct/address Buyer's objections (collectively "Buyer's Response"). *Buyer may not withdraw his objections prior to Seller's Response;* however, if Buyer and Seller are unable to reach a Resolution to Buyer's objections by the Resolution Deadline, then **THIS AGREEMENT SHALL TERMINATE** and Earnest Money shall be refunded to Buyer.

PA - RANM FORM 2104

- Broker has not investigated and is not responsible for the forgoing aspects of the Property, among which lot size, acreage, and square footage may have been approximated, but are not warranted as accurate. Buyer shall have had full and fair opportunity to inspect and judge all aspects of the Property with professional assistance of Buyer's choosing prior to settlement ~~and is purchasing Property based solely upon Buyer's inspection and judgment and not by reason of any representation made to Buyer by Seller or Broker unless expressly set forth in this Agreement or Disclosure Statements~~

PA - RANM FORM 2104

- BUYER AND SELLER AUTHORIZATIONS. Unless otherwise instructed in writing, with respect to the real estate transaction that is the subject of this Agreement, Seller and Buyer hereby authorize the following: the Title Company, Lender, Escrow Agent and their representatives to provide a copy of any and all loan estimates, closing disclosures, other settlement statements and title documents to the Seller's and Buyer's respective Brokers; *the Title Company to deliver any Title Company generated settlement statement(s), in its entirety (Seller and Buyer's information) to both the Seller and Buyer and their respective Brokers;* and his respective Broker to be present for the Closing

PA - RANM FORM 2104

- **WIRE FRAUD ALERT**. Criminals are hacking email accounts of real estate agents, title companies, settlement attorneys and others, resulting in fraudulent wire instructions being used to divert funds to the account of the criminal. The emails look legitimate but they are not. Buyer and Seller are advised not to wire any funds without personally speaking with the intended recipient of the wire to confirm the routing number and the account number. Buyer and Seller should not send personal information such as social security numbers, bank account numbers and credit card numbers except through secured email or personal delivery to the intended recipient.

PROPERTY DISCLOSURE FORM 2301

Prior Inspection Report: NEW SECTION

Is Seller in possession of any pre-listing or current home inspection reports regarding the Property: YES NO. If yes, report(s) IS IS NOT attach as exhibit to this Seller's Disclosure Statement. If attached or provided, Seller is not attesting to the accuracy or thoroughness of the report and the report is not intended to replace Buyer's own inspection of and due diligence on the Property. Additionally, Buyer should be aware that he/she would not be entitled to pursue a claim against the inspector(s) who performed the inspection(s) and provided the attached/provided report(s) because the buyer did not contract with that inspector(s). Issues identified in report that have since been resolved by Seller: _____

PROPERTY DISCLOSURE FORM 2301

- SOLAR POWER SYSTEM/PANELS: _____
OWNED _____LEASED.
- INSURANCE CLAIMS: If yes, did Seller receive proceeds from that claim? Yes No. If Seller did receive proceeds, did Seller use proceeds to repair or correct the issue that was the subject matter of the claim? Yes No

PROPERTY DISCLOSURE FORM 2301

- **LAWSUITS RE: COMPONENTS OF PROPERTY:** Is Seller currently or has Seller ever been a party to a lawsuit, individually or as part of a class action, involving any component or feature of the Property? If yes, and Seller received proceeds from such lawsuit, were proceeds used to repair or correct the component or feature at issue? Yes No

REVISED RANM FORMS

- Forms Committee Work Plan 2017
 - Commercial Forms
 - Trespass Info to PA
 - Listing Agreement
 - Info Sheets
 - Broker Relationships (including pros and cons)
 - Seller Financing

UNDERSTANDING TERMS IN LISTING AGREEMENT

- **SAYS: INDEMNIFICATION.** Seller will indemnify and hold Brokerage Firm and Broker harmless from any liability for damages, including attorneys' fees, arising out of the following:
- **MEANS:** that the seller will not pursue a claim against you or the broker if the following should occur. It also means that if you are sued as a result of any of the following, the seller will cover expenses you incur in defending such a lawsuit and any damages for which you are found by a court to be liable/responsible.

UNDERSTANDING TERMS IN LISTING AGREEMENT

SAYS:

incorrect or undisclosed
information about the Property,
which Seller knew
or should have known

UNDERSTANDING TERMS IN LISTING AGREEMENT

- **MEANS:** For example, seller provides you incorrect information about the property which you then pass along to the buyer or the seller fails to provide you material information, and therefore you can't pass such information along to the buyer.
- When the buyer discovers the information was incorrect or was undisclosed, the buyer brings suit against you.
- The seller is agreeing to not hold you responsible for disclosing the information that he/she provided to you or for failing to disclose information that the seller did not provide AND to pay for expenses you incur as a result of disclosure of incorrect information or failure to disclose information that should have been disclosed.

UNDERSTANDING TERMS IN LISTING AGREEMENT

- This is (generally) the type of claim that your E and O carrier would cover (assuming no fraud was involved), so if you waive this provision, you will likely have insurance coverage to defend you and pay any damages awarded to the party who brought suit (if that party is successful in proving his/her claim). Contact your carrier or refer to your policy for more information on your coverage.
- The "should known" language sometimes causes seller's pause/concern, but there is case law in NM that says sellers must disclose material facts that they "should have known", which is why the language is included in this subparagraph.

UNDERSTANDING TERMS IN LISTING AGREEMENT

SAYS: claims for any personal injury to third-parties or damage to the personal property of third-parties occurring on the Property, such damages or claims to include costs and attorney's fees, provided such injury and/or damage is not due to Broker's own negligent, reckless or intentional actions;

UNDERSTANDING TERMS IN LISTING AGREEMENT

MEANS: This addresses the scenario where a buyer or contractor or even another broker is injured on the property or there is damage to their personal property while on the seller's property and the injury or damage was NOT caused by your negligence, recklessness or intentional act. For example, a buyer trips down the stairs or slips on a wet or icy sidewalk and is injured and/or damages his/her personal property. Again, the seller agrees not to sue you even if the seller is sued and agrees to cover your expenses if you are sued. Again, this subparagraph ONLY applies if you did NOTHING to cause the injury or damage.

UNDERSTANDING TERMS IN LISTING AGREEMENT

The seller is required to maintain insurance on the property which would likely cover any such injury or damage (assuming seller does as he/she is required to do); however, it is important to note that the RISC policy does NOT cover you for such claims by third parties. **So if this scenario did occur and you were sued, you would have to cover the cost of defense and any damages awarded to the party who brought suit.** This subparagraph provides that the seller will reimburse you for all those costs, but if removed, the seller would not be required to do so. **Something to consider if you waive this provision is whether you wish the seller to provide proof that he/she has insurance on the property and to periodically re-confirm the policy is being maintained through the listing.**

UNDERSTANDING TERMS IN LISTING AGREEMENT

- **SAYS:** infringement of any copyright arising out of Broker's use of Seller Listing Content.
- **MEANS:** This addresses the scenario where the seller provides you floor plans, photographs or other marketing materials that you use to market and sell the home and those materials infringe on the creator's copyright and you get sued because you disseminated the materials. If you are not using any materials provided by seller, then this subparagraph is moot.
- You can visit the [realtor.org](https://www.realtor.org) website for license agreements which you can have the creator of the content sign which will give you the right to use the content as provided in the license agreement.
- Check with your carrier about coverage

UNDERSTANDING TERMS IN LISTING AGREEMENT

- **SAYS:** SELLER RELEASE. Provided the following damages, claims or liability do not arise from the intentional, reckless or negligent acts of Brokerage Firm, Broker or cooperating Broker, Seller agrees that neither Brokerage Firm, Broker, nor any cooperating Broker shall be liable for any damages or claims for any personal injury or damage to real or personal property caused by acts of third parties, including, but not limited to, vandalism and theft or to acts outside of the parties' control, including, but not limited to, acts of God and freezing water pipes. Broker shall not be responsible for maintenance of the Property unless otherwise agreed to in writing.

UNDERSTANDING TERMS IN LISTING AGREEMENT

- **MEANS:** Similar to subparagraph ii above, but more inclusive. The seller agrees not to sue you if some third party is injured on the property OR if there is any damage to the property UNLESS you did something wrong to cause the damage.
- It provides some examples: if property is broken into through no fault of yours; seller won't sue you. If water pipes burst through no fault of yours, seller won't sue you; if tree branch falls on house and breaks the window through no fault of yours, seller won't sue you.
- Clarifies that you are not responsible for maintaining the property.
- Key here is that you did nothing wrong to cause these things to happen. For example, if you showed the house and neglected to lock the front door when you left and someone came in and stole the seller's belongings or vandalized the interior of the house, you may be liable for that; this subparagraph would NOT apply because you did something to cause the damage.

FEDERAL ISSUES

NEW DMCA REGISTRATION REQUIREMENTS

- December 1, 2016, for safe harbor protection, must register Designated Agents through new online system
- Entities that registered Designated Agents through the previous paper registration regime have until December 31, 2017 to re-register otherwise **they lose DMCA safe harbor protection.**
- New directory system replaces paper-based (\$6 vs. \$105)
- **Must re-register every 3 years or lose safe harbor protection**
- <https://dmca.copyright.gov/osp/login.html>

FEDERAL ISSUES

THANK YOU!