

Video: Make Our Marks Remarkable



REALTORS® ASSOCIATION OF NEW MEXICO

LEGAL UPDATE

Presented By:

Ashley Strauss-Martin, Esq.

January, 2017

TOPICS COVERED TODAY

- NM REC – NEW BROKER DUTIES AND QB REQUIREMENTS
- NEW RANM FORMS
 - MEDICAL MARIJUANA INFO SHEET - FORM 2312
 - MEDICAL MARIJUANA ADDENDUM TO RESIDENTIAL RENTAL AGREEMENT - FORM 6099
 - COMMERCIAL PA - VACANT LAND - FORM 3100
- REVISED RANM FORMS
 - PROPERTY MGMT AGREEMENT – RESIDENTIAL – FORM 6102
 - RESIDENTIAL RENTAL AGREEMENT – FORM 6101
 - COMMERCIAL LISTING AGREEMENT – FORM 3107
 - COMMERCIAL PA – FORM 3100
 - QB INFO ADDED TO MANY RANM FORMS

TOPICS COVERED TODAY

- **A QUICK RECAP OF SELLER FINANCING**
 - RECS
 - DEEDS OF TRUST
 - MORTGAGES
- **HOT LINE TOPICS**
 - MLS COMPENSATION ISSUES
 - SELLER BONUS OFFERS
 - DEATH IN PROPERTY
 - SEPTIC INSPECTIONS

TOPICS COVERED TODAY

- LEGISLATIVE - INTRODUCING
 - HOA - CAP ON DC FEE
 - HOME INSPECTOR
- LEGISLATIVE - SUPPORTING
 - SOLAR PANELS
 - PURCHASE MONEY MORTGAGE PRIORITY
- LEGISLATIVE OPPOSING
 - AUCTIONEERS DON'T NEED RE LICENSES IF QB IS INVOLVED

TOPICS COVERED TODAY

- **FEDERAL ISSUES**

- FHA PREMIUM RATE CUT
- OVERTIME RULES - INJUNCTION
- ADA COMPLIANT WEBSITES

CASE LAW

■ NEW MEXICO -

- Cobb v. Gammon - NM Court of Appeals

■ AROUND THE NATION

- Duty To Disclose SEX OFFENDER
- Salesperson Not an Employee
- Text Messages Can Form a Contract

BROKER DUTIES

ALL NEW RULES TOOK
EFFECT JAN. 1, 2017
EXCEPT FOR NEW
BROKER DUTIES -
16.61.9.8

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, 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 or seller;

BROKER DUTIES

- Brokers owe the following duties to prospective buyers and sellers:
 4. written disclosure of any potential conflict of interest that the broker has in the transaction including but not limited to: (1) any written brokerage relationship the broker has with any other parties to the transaction or (2) any material interest or relationship of a business, personal, or family nature that the broker has in 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.

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 by the to buyers and sellers to whom the broker is directly providing real estate services, including:
 - (a) timely presentation of and response to all offers or counter-offers; and
 - (b) active participation in assisting in complying with the terms and conditions of the contract and with the closing of the transaction; if the broker in the transaction is not providing the service, advice or assistance described in Paragraphs (1) and (2) of this Subsection A of 16.61.19.8 9 NMAC, the party must agree in writing that the broker is not expected to provide such service, advice or assistance;

BROKER DUTIES

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.

BROKER DUTIES

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;

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, including issuance of a receipt for cash received;
- 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 DUTIES

- **NEW SECTION - 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.

BROKER DUTIES

- 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 DUTIES

- 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;

BROKER DUTIES

- 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;

BROKER DUTIES

- 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;

BROKER DUTIES

- 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

- Passage of the broker's examination.
- At least 4 years' active experience in NM as a licensed AB during the 60-month period immediately preceding the filing of the application. This experience must be verified in writing by the AB's QB(s); or

REQUIREMENTS FOR QB LICENSE

- Documented qualifying transactional experience totaling 100 points, with at least 20 points earned during each of the 4 years prior to filing of the application
- Transactions are to be verified in writing by the applicants QB
- Transactions involving property owned by the applicant do not count toward the required total
- Points are awarded as follows and can be accumulated through any combination of the following activities:

REQUIREMENTS FOR QB LICENSE

- Each sale or lease transaction is deemed to have two sides; one side working with the buyer/tenant and the other side working with the seller/owner. Both transaction sides receive points.
- In the event of transactions handled by teams comprised of more than one associate broker the qualifying broker shall determine which associate broker is deserving of earning the points allowed, or the division of the allowable points among team members

REQUIREMENTS FOR QB LICENSE

- Real estate and property management transactions; total points available per transaction side
- Residential sales transactions - 5 points
- Residential lot sale transactions - 3 points
- Residential lease transactions - 4 points
- Comm. improved property sales transactions - 8 points
- Comm. unimproved lot sale transactions - 6 points
- Comm. lease transactions - 6 points

REQUIREMENTS FOR QB LICENSE

- Property management (PM) points are awarded for each location for which a broker has direct responsibility. Direct responsibility means acting as an agent for the owner and not just collecting rent.
- A maximum of 25 points may be used from the residential PM category with the rest of the broker's points resulting from other transactional activity.
- PM points are accumulated as follows:
 - Residential PM, each unit, one-half point/month.
 - Commercial PM, each address, one point/month.

QB ED REQUIREMENTS

- Brokerage office administration course, a 4 day course with an in-course instructor created exam administered by the instructor at the end of course.
- 8-hour Understanding and Using RANM Forms course.
- Minimum of 8 hours of elective courses in the professional track of the applicant; defined as residential transactions, commercial transactions, property management transactions, ranch and/or vacant land transactions.
- Attendance of one NMREC, Public Hearing, or Disciplinary Hearing.

QB APP REQUIREMENTS

- A notarized affidavit of applicant's acknowledgement of the responsibilities of a QB, including the direct supervision of all brokers affiliated with the QB. Supervision defined as follows:
 - supervise all real estate related activities performed on behalf of others; including supervision of Abs, QBs, and unlicensed staff affiliated with the QB, including, but not restricted to:

QB APP REQUIREMENTS

- maintain full and complete records wherein the QB and affiliated AB(s) are engaged on behalf of others, or on their own behalf, in real estate related matters; the required records shall be available to the NMREC at the place of business of the QB or at the NMREC office; all such records whether in paper or electronic format shall be retained not less than 6 years; in the case of a PM, all records shall be retained for the full term of any agreement and for 6 years from the termination of the management agreement;

QB APP REQUIREMENTS

- Provide or promote appropriate training of all brokers and staff affiliated with the QB to ensure compliance with the real estate license law and NMREC rules;
- Supervise advertising of real estate or real estate services conducted on behalf of others by anyone associated with the QB, including website and creative agencies; and

QB APP REQUIREMENTS

- Execute and maintain current written employment or independent contractor agreements with all persons affiliated with the QB, including brokers and brokerage owners whether or not the brokerage owners are licensed real estate brokers.
- Supervise trust account management by brokerage owners whether or not the brokerage owners are licensed real estate brokers, such trust account management to conform with other trust account requirements in these regulations.

QB APP REQUIREMENTS

- A broker applying to be licensed as a QB broker supervised by another QB is not required to submit this affidavit.
- A supervisory plan which will outline the qualifying broker's schedule of training and education provided or promoted and policies for supervision of brokers. The supervisory plan will be applicable to the broker applying to be a QB and to all other brokers affiliated with them.
- A broker applying to be licensed as a QB supervised by another QB is not required to submit a supervisory plan.

QB LICENSE RENEWAL

- QB refresher course
- A minimum of 8 hours of courses from the QB professional track, including:
 - NMREC approved courses in residential transactions.
 - NMREC approved courses in commercial transactions, including courses offered by CARNM and professional designation courses offered by CCIM, SIOR, and CBI.
 - NMREC approved courses in PM ,including courses offered by IREM
 - NMREC approved courses in vacant land and/or ranch sales

QB LICENSE RENEWAL

- Attendance at one NMREC meeting, rule hearing, or disciplinary hearing.
- An application for renewal of a QB's license shall include a notarized affidavit of the applicant's acknowledgement of the responsibilities of a QB, including the direct supervision of all brokers affiliated with the QB. Supervision shall be defined in the affidavit as follows:
 - supervise all real estate related activities performed on behalf of others; including supervision of ABS, QBS, and unlicensed staff affiliated with the QB, including, but not restricted to:

QB LICENSE RENEWAL

- Maintain full and complete records
- Provide or promote appropriate training
- Supervise advertising of real estate or real estate services
- Execute and maintain current written employment or independent contractor agreements
- Supervise trust account management by brokerage owners

QB LICENSE RENEWAL

- A QB applying for license renewal who will be supervised by another QB will not be required to submit this affidavit.
- An application for renewal of a QB's license shall include a **statement affirming that the QB substantially fulfilled the supervisory plan filed with the initial application, and a plan outlining the schedule of training and education provided or promoted and the policies for supervision in the next licensing cycle.**
- A QB who is supervised by another QB is not required to submit a supervisory plan.

NEW RANM FORMS

- MEDICAL MARIJUANA INFO SHEET - FORM 2312
- Landlords should be aware that as to medical marijuana **there is currently a conflict between federal and state law.** Under federal law, marijuana remains a Schedule I substance under the Controlled Substances Act (“CSA”) and **distribution of marijuana remains a federal offense.** Under New Mexico law, qualified patients may use and grow medical marijuana for their personal use and dispensaries established pursuant to New Mexico law may grow and sell/distribute medical marijuana to qualified patients. **Due to this conflict, landlords face unique issues when renting to medical marijuana users, growers and dispensaries as further discussed below.**

MEDICAL MARIJUANA INFO SHEET

- ISSUES SPECIFIC TO RENTAL PROPERTY
 - Discrimination Under State Law
 - Reasonable Accommodation under Fed Law
 - Restrictions on Use
 - Cultivating/Growing Marijuana
 - Alternatives to Smoking Marijuana
 - Manufacturing of Marijuana Products
 - Security Considerations
 - Consult an Attorney, Your Insurance Provider and Other Professionals

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- Except as otherwise provided in this Addendum, **the possession, use, manufacture or sale of any illegal substance, including marijuana, is prohibited and shall be grounds for immediate termination of the Rental Agreement.**

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- The New Mexico Erin and Lynn Compassionate Use Act (ELCUA) allows qualified patients to use and possess limited amounts of marijuana. A "qualified patient" is defined as a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card issued by the New Mexico Department of Health (NMDH) pursuant to the ELCUA. Qualifying Patients with current, active ELCUA registry identification cards, are permitted to possess and use medical marijuana on the Premises, under the following terms:

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- DOCUMENTATION OF QUALIFIED-PATIENT STATUS.
- PERMISSIBLE USE AND USE AREA(S) ON PREMISES. -
Tenant must initial applicable provision
 - _____ This is a nonsmoking residence. No smoking, including medical marijuana, inside the home or on the Premise is permitted. However, consuming medical marijuana with a vaporizer or in cannabis edibles, tonics, or concentrates in accordance with the scope of the Tenant's treatment as directed by the Tenant's physician is permitted within the confines of the unit or residence with doors and windows shut.

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- _____ Smoking of medical marijuana is permitted inside the residence provided the Qualifying Patient only uses the marijuana in accordance with the course and scope of the Tenant's treatment as directed by the Tenant's physician and provided further that such smoking is within the confines of the unit or residence with door and windows shut.

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- Under both provisions above, Tenant is prohibited from use or storage of marijuana in the common areas, if the residence has common areas, and on Tenants patios, if the residence has a patio. All use and possession must be consistent with the applicable amounts and guidelines set forth by the NMDH. Any use or possession of marijuana outside the permissible use area or in violation of the ELCUA or accompanying regulations, including the improper sale or transfer of marijuana, will be grounds for immediate termination of the Rental Agreement.

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- NON-RESIDENTS/GUESTS.
 - Non-residents, including guests, are strictly prohibited from using, possessing or cultivating marijuana on the premises regardless of whether or not they are "qualified patients" under the ELCUA. Use or possession of marijuana by non-residents, including guests, even within the Tenant's permissible use area, will be grounds for immediate termination of the Rental Agreement.

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

• CULTIVATION

- Due to health and safety concerns, regardless of the permitted cultivation as provided in the ELCUA or accompanying regulations issued by the NMDH, **no Tenant, Guest or Occupant may grow or cultivate marijuana on the premises. Any such action will be grounds for immediate termination of the Rental Agreement.**

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- ASSUMPTION OF RISK
 - Tenant acknowledges that marijuana use is unlawful under the Federal Controlled Substance Act and the validity of the ELCUA under Federal law has not been established. Tenant, in choosing to use or possess marijuana, **is doing so at his/her own risk.**

ADDENDUM TO RENTAL RESIDENTIAL AGREEMENT

- **ACKNOWLEDGMENT**

- By signing below, the Tenant acknowledges his/her understanding of the terms and conditions as stated above, and his/her agreement to comply with those terms and conditions.

RANM FORMS

- COMMERCIAL PA- VACANT LAND - NEW 3100 - COMMERCIAL COMMERCIAL PA- FORM 3100 - REVISED
 - Reformatting
 - Definitions not found in Commercial PA eliminated (such as "resolution and "appraisal")
 - Elimination of Seller's Disclosure - language added that seller must disclose material defects
 - Compensation per MLS added
 - FIRPTA revamped
 - Wire Fraud Alert Language Added

RANM FORMS

- **COMMERCIAL LISTING AGREEMENT - FORM 3107**
 - Reformatting
 - Date of Agreement: The beginning date of this Agreement is the date of full execution of this Agreement, which occurs when the last party to sign this Agreement has done so as indicated by the date stated opposite that party's signature on the last page of this Agreement.
 - Marketing Start Date

RANM FORMS

- **COMMISSION DUE FOR SALE OR OTHER EVENT**
 - Owner grants an Option or Right of First Refusal to purchase the Property provided grantee of Option or Right of First Refusal exercises said Option or Right of First Refusal; commission shall be based on actual sales price of Property and shall be due even if grantee exercises the Option or Right of First Refusal outside the term of this Listing Agreement or the Continuation Period;
 - Clarifying what commission is based on
- **LEASE COMPENSATION**

RANM FORMS

• BROKER OBLIGATIONS

- Marketing the Property for sale utilizing local industry-standard methods for marketing a Property of this nature and kind to include, but not be limited to methods further described
- Assisting Seller in identifying qualified Buyers;
- If requested, assisting potential Buyers in preparing offers and locating financing;
- Assisting Seller in negotiating the terms of a sale;
- Assisting Seller in complying with terms of contract for sale;
- Assisting Seller in monitoring pre-closing and closing procedures.

RANM FORMS

- **ELECTRONIC TRANSMISSIONS/SIGNATURES**
- **INDEMNIFICATION:**
 - 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;
 - infringement of any copyright or trademark arising out of Broker's use of Seller Listing Content;

REVISED RANM FORMS

- PROPERTY MGMT AGREEMENT – RESIDENTIAL – FORM 6102
 - Interviewing and conducting any necessary due diligence as determined by Broker to identify potential tenants. **If in conducting such due diligence, such as obtaining a criminal background check or credit report, Broker must enter into a contract with the third-party providing such report which requires the Broker to maintain the confidentiality of the information obtained or if Broker is otherwise prohibited by law from disclosing the information obtained, Owner understands and agrees that Broker will not provide such information to Owner. _____ (Owner's Initials)**

REVISED RANM FORMS

- PROPERTY MGMT AGREEMENT - RESIDENTIAL - FORM 6102
 - SMOKING. Smoking ___ is ___ is not permitted in the Property
 - MEDICAL MARIJUANA: Owner ___ will ___ will not allow a qualified patient to use medical marijuana in the Property. If Owner will allow, Owner ___ will ___ will not allow marijuana to *be smoked* in Property. (See Medical Marijuana Information Sheet - RANM 2312)

REVISED RANM FORMS

• RESIDENTIAL RENTAL AGREEMENT - 6101

- SMOKING. Smoking ___ is ___ is not allowed in the Premises. If smoking is NOT allowed, neither the Tenant(s), guests, nor any other person shall be allowed to smoke in the Premises. Any violation shall be deemed a material violation of this Agreement. Tenant understands that any damage caused by smoking any substance will be considered damage. Damage includes but is not limited to: deodorizing carpet, wax removal, additional paint preparation, replacement of drapes, repair or replacement of carpet, countertops, or any other surface damaged due to burn marks and/or smoke damage. Tenant(s) acknowledges this is a NON-SMOKING property: _____
_____ (Tenant's Initials)

RESIDENTIAL RENTAL AGREEMENT

- **CRIMINAL ACTIVITY AND MEDICAL MARIJUANA**

Neither Tenant, nor any member of Tenant's household, nor a guest nor any other person under Tenant's control shall engage in criminal activity, including drug-related criminal activity, on or near the Property or permit the Property to be used for criminal activity, including drug-related criminal activity, regardless of whether the individual engaged in such activity is a member of the household, or a guest. Drug-related criminal activity or criminal activity is a material breach of the rental agreement and is **CAUSE FOR TERMINATION OF THE TENANCY.**

CRIMINAL ACTIVITY AND MEDICAL MARIJUANA

- LANDLORD'S POLICY ON USE OF MEDICAL MJ: CHECK
 - A. ___ Because Marijuana is presently recognized as a controlled substance under federal law, Tenant is **PROHIBITED** from using, manufacturing (growing), distributing, selling, possessing, storing, or handling marijuana in, on or near the Property or any accessory buildings, such as the garage or in the common areas, if the Property has such common areas **EVEN IF SUCH ACTIVITY IS FOR A MEDICALLY-RELATED PURPOSES AND TENANT IS CONDUCTING SUCH ACTIVITY IN ACCORDANCE WITH NM LAW;**

CRIMINAL ACTIVITY AND MEDICAL MARIJUANA

- B. _____ The use of medical marijuana is permitted as provided in the attached Medical Marijuana Addendum (See Medical Marijuana Information Sheet - RANM Form 2312).



REVISED RANM FORMS

- QB INFO ADDED TO MANY RANM FORMS
 - QB'S name and contact information, including license number,
 - Clearly and conspicuously displayed on any written document
 - generated by the brokerage or presented to a prospective customer or client,
 - that has the potential to become an express written agreement.

REVISED RANM FORMS

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

SELLER FINANCING

- DIFFERENCES BETWEEN:

- RECS

- DEEDS OF TRUST

- MORTGAGES

???????

SELLER FINANCING

■ TITLE

- RECs - Equitable title transfers, not legal - until paid in full
- Mortgages/Deeds of Trust - both transfers when entered into - security interest (lien) in home

SELLER FINANCING

■ FORECLOSURE

■ RECS

- Non-judicial Foreclosure
- Default Per Contract - 30 OR 60 DAYS???
- No Rights of Redemption

■ Deeds Of Trust - Sometimes Non-Judicial Sometimes Judicial - ROR See below

■ Mortgages - Always Judicial

- Rights of Redemption Per Statute - 9 Months, But Can Be Reduced To 30 Days Per Mortgage/Deed Of Trust

SELLER FINANCING

■ LIENS

- RECs - If seller takes back, all go away but federal tax lien
- Mortgages/Deeds of Trust
 - Have to give notice of foreclosure to all lien holders, but if you do, all liens handled with sale

SELLER FINANCING

- RECs - Good Practices
 - Title Insurance - Always
 - Escrow - WHY????
 - Escrow Taxes and Insurance (Liability/Property) - WHY??
- Doing RECs? Take a Class

RANM LEGAL HOT LINE

- **MLS COMPENSATION ISSUES**
 - Must be member of MLS in which co-op compensation is offered in order to collect co-op compensation
 - **NM MLS works a little differently than most**

RANM LEGAL HOT LINE

- **SELLER BONUS OFFERS**

- MLS IS NO PLACE FOR A SELLER-OFFERED BONUS
- ONLY FOR COMP BETWEEN BROKERS/MLS PARTICIPANTS
- **MOST YOU CAN DO IS SAY "SELLER IS OFFERING A BONUS, CONTACT LISTING BROKER FOR INFORMATION**
- BUYER'S BROKER - GET SOMETHING IN WRITING FROM SELLER

RANM LEGAL HOT LINE

- 47-13-2. Disclosure of information not required in real estate transactions. - **Disclosure NOT Required**
 - Site of a **natural death**;
 - the site of a **homicide, suicide, assault, sexual assault or any other crime punishable as a felony**;
 - or
 - owned or occupied by a person who was exposed to, infected with or suspected to be **infected with HIV** or **diagnosed to be suffering from AIDS** or any other disease that has been determined by medical evidence as highly unlikely to be transmittable to others through the occupancy of improvements to real property or that is not known to be transmitted through the occupancy of improvements located on that real property.

RANM LEGAL HOT LINE

• SEPTIC INSPECTIONS

- RECS - always upon equitable transfer
- Required even if not selling as improved property
- Seller must conduct, no exceptions
- Don't have to do repairs before sale
- Person who owns 15 days after evaluation must request variance or permit
- NMED will look to new owner to fix any issues

FEDERAL ISSUES

- HUD suspended indefinitely the FHA premium rate cut that had been expected to take effect on Jan. 27.
 - HUD had announced the reduction Jan. 9.
 - NAR estimated the reduced premium
 - would have saved the average FHA borrower \$500 a year in insurance costs,
 - that roughly 750,000 to 850,000 homebuyers will face higher costs, and
 - that 30,000 to 40,000 new homebuyers will be left out in 2017 without the cut

FEDERAL ISSUES

■ OVERTIME RULES - INJUNCTION

- 21 state attorney generals and a business coalition that argued that the salary threshold was too high and that DOL exceeded its statutory authority by automatically indexing the threshold to inflation
- November 22, 2016, the U.S. District Court for the Eastern District of Texas agreed DOL exceeded its delegated authority and issued a nationwide injunction prohibiting the DOL rule from going into effect as scheduled on December 1, 2016

OVERTIME RULES – INJUNCTION

- Rule would have doubled the salary threshold (to \$47,476) under which non-exempted workers are guaranteed time-and-a-half pay if they work more than 40 hours in a given week. The rule would have also indexed the threshold to inflation, every three years starting in 2020.

OVERTIME RULES – INJUNCTION

- If DOL prevails on appeal and the rule goes into effect, employers may face legal challenges by employees seeking past due overtime pay.
- Speak with your legal counsel to determine whether to implement existing plans to comply with DOL's overtime rule despite this injunctive ruling or whether to wait for a final outcome by the courts.

FEDERAL ISSUES

- ADA COMPLIANT WEBSITES
 - ADA is silent on whether it applies to websites - Left to Courts to Decide
 - Courts are split, but most assert that a business's accessibility obligations extend to its website
 - It is expected that DOJ will issue a mandate of web accessibility under the ADA sometime in 2018

ADA COMPLIANT WEBSITES

- Accessible websites allows adaptive software and specialized browsers used by persons with disabilities to augment content and make it easier for the person to interact with a website in order to improve and help maximize the person's experience on the site, obtaining the site's information in a format that takes their disability into account. For example,
 - Programs that add text descriptions to complex graphics,
 - voice-overs that read text aloud, or
 - transcripts of videos.

ADA COMPLIANT WEBSITES

- Contact your website provider to ask about the current accessibility of your site,
- A technical expert can help identify where your site might fail to comply with the “Web Content Accessibility Guidelines 2.0,” a technical standard created by the World Wide Web Consortium to help developers and site managers make the web more accessible

ADA COMPLIANT WEBSITES

- Changes can be implemented incrementally.
- DOJ has generally allowed businesses up to 18 months to implement necessary accessibility changes
- Ensure ongoing compliance with the Web Content Accessibility Guidelines 2.0 when you add new content or website features
- Educate and train relevant personnel

6 STEPS TO HELP EVERYONE ACCESS

- 1. CLEAN FONT TYPES
 - software programs that use a voice synthesizer or braille display to help blind or visually impaired users read text on the web
 - <http://webaim.org/techniques/fonts/>

6 STEPS TO HELP EVERYONE ACCESS

• 2. HIGH-CONTRAST THEMES

- Removing the grayscale on your site also assists those who are visually impaired, such as this website that adjusts the contrast according to the viewers needs.
- <https://trailridge.co/boulder-county-city-reviews/>

6 STEPS TO HELP EVERYONE ACCESS

- 3. “SKIP TO MAIN CONTENT” LINK
 - For users who cannot use a mouse, add a function called “skip navigation” or “skip to main content” to your site
 - Lets a person navigating a website with a keyboard skip over all the links in a site’s navigation menu - link at the top of your navigation
 - <https://www.youtube.com/watch?v=SOHqddqZjJdg>

6 STEPS TO HELP EVERYONE ACCESS

- 4. ALT TEXT AND HTML HEADINGS
 - Alt text (alternative text) is an image description that can be read by screen readers to describe an image to the visually impaired
 - HTML headings use text instead of images or CSS so that screen readers can pick them up

6 STEPS TO HELP EVERYONE ACCESS

- 5. VIDEO CLOSED CAPTIONING
 - If video content is an important component of your marketing, assist deaf and hard-of-hearing web users by including closed captioning with your video content
 - <https://www.youtube.com/watch?v=HQWIYYFXM2M>

6 STEPS TO HELP EVERYONE ACCESS

- 6. AUDIO DESCRIPTIONS
 - Videos with audio descriptions help blind and visually impaired users visualize videos and images to get a more complete picture
 - https://www.youtube.com/watch?v=07j4_aP8dWA

ALSO TO HELP EVERYONE ACCESS

- Add a simple feedback form that can help users of your site who may be disabled to get in touch, so they can inform you about what accessibility features may need to be improved or added
- Add contact information for someone at your business who can respond to a particular user's inability to access the site, or a portion of it

RESOURCES

- U.S. Department of Health & Human Services: Building and Managing Websites
- The A11Y Project
- Mobile Accessibility Checklist
- Adobe: Making Your Website Design Accessible
- Job Accommodation Network
- University of Washington: Creating Accessible Videos

CASE LAW



**WHAT
ARE THE
COURTS
SAYING?**

BEST COURT SCENES



BEST COURT SCENES

[https://www.youtube.com/
watch?v=3nGQLQF1b6I](https://www.youtube.com/watch?v=3nGQLQF1b6I)

NM COURT OF APPEALS

- *COBB V. GAMMON*
 - All Brokers Involved Worked For Same Brokerage
 - Buyer Gammons were builders/developers who wanted a tract of land they could subdivide, build on and sell the land/homes
 - Buyers G were represented By Broker "X" who showed Buyers G a 5-acre parcel and assured Buyers G they Could Subdivide
 - Restrictive Covenant on property said "No Lot Smaller than 5 Acres"
 - Restrictive Covenant Language was in title work, but Neither Broker X, Nor Buyers G caught it
 - Buyers G Bought And Subdivided Into 2.5 Acres, Built On One of the subdivided parcels and sold it

NM COURT OF APPEALS

- While Building Second House On Second 2.5 Acre Lot, title co. called and informed Buyers G of the restriction
- Broker X and his Brokerage Said They Would Fix It and encouraged Buyers G to Finish Building 2nd Home
- Brokerage Marketed Home 2nd home Without Disclosing Violation
- Brokerage tried to get Neighboring owners to Waive Objection to Violation And Consent To Amending Covenant
- Began Circulating Letter To Other Owners

NM COURT OF APPEALS

- Letter Said That
 - Covenant Was Expiring. It Didn't Expire For 15 Years.
 - **Covenant Conflicted With The Character Of the Area. It did not.**
 - Owners Of 7 Lots Had Signed Waiver. The Owner Who Had Signed Had Since Sold The Lots And Current Owners Had Not Signed Waivers.
- **Broker "X" Hand Delivered Letters And Attempted To Obtain Signatures**
- Broker "X" Said He Was Representing A Friend And That He Didn't Have A Stake In The Outcome

NM COURT OF APPEALS

- Broker X Got Neighbor #1 To Sign
- Neighbor #2 (COBB) Didn't Agree And Brought Suit To Enforce Covenant
- Other brokers from same brokerage who knew of violation represented Buyer #2 (Simmons) Who Bought Neighbor #1's House
- Broker Didn't Disclose to Simmons that Buyers G Were In Violation Of Covenant
- Didn't Disclose To Simmons That Seller Had Signed An Agreement To Waive Enforcement of The Covenant

NM COURT OF APPEALS

- After Simmons Purchased, Brokerage Tried To Get Simmons To Sell Buyers G Some Land Or To Waive Covenant
- Simmons Refused
- When Sued by Cobb, Buyers G Brought in All Property Owners, Incl. Simmons, Seeking To Bind Them To Decision In Case
- Simmons Counterclaimed For Breach Of Covenant Against Gammon and Negligent Misrepresentation

NM COURT OF APPEALS

- Trail Court Found For Cobb Against Buyers G And Broker - \$311,931, plus punitive damages, plus attorney fees
- Also Found For Simmons Against Brokerage \$452,287, plus attorney fees, post judgment interest and costs
- Buyers G And Broker Appealed

NM COURT OF APPEALS

- After Appeal Was Filed, Parties Settled Cobb's Claim Against Broker
- Appeal Was Dismissed Against Buyers G for reasons further explained in the Court of Appeals opinion
- Simmons Claim Against Broker Remained
 - Negligent Misrepresentation
 - Negligence Per Se

NM COURT OF APPEALS

- *Negligent Misrepresentation*
 - *Material misrepresentation*
 - *Buyer relied on representation*
 - *Broker knew representation was false*
 - *Broker intended to induce buyer to buy*

NM COURT OF APPEALS

- Requires a failure to exercise ordinary care in obtaining or communicating a statement
- An intent that the plaintiff receive and be influenced by the statement where it is reasonably foreseeable that the plaintiff would be harmed if the information conveyed was incorrect or misleading
- Can be established by commission or **OMISSION**

NM COURT OF APPEALS

- Broker should have disclosed to Simmons the violation and the fact that seller had signed a waiver of covenant
- Cited Broker Duties - Duty of honesty, reasonable care, and to Disclose Adverse Material Facts

NM COURT OF APPEALS

- RANM PA - language that “broker doesn’t warrant or guaranty condition of property.....has not relied on statements made by broker”, etc.
- Court said this does not alleviate duty to disclose material issues, and PA says that!

NM COURT OF APPEALS

- Negligence Per Se
 - Statute or reg which prescribes certain actions or defines standard of conduct
 - Defendant violated
 - Plaintiff was in the class of persons intended to be protected
 - And harm was that which the legislature intended to prevent

NM COURT OF APPEALS

- Reg - requires broker to disclose
 - Broker didn't disclose violation or the fact seller had signed waiver
- Simmons was the in the class of people intended to be protected
- And type of harm they suffered was harm the regulation was intended to prevent

NM COURT OF APPEALS

- Damages Affirmed
 - \$123,000 for overpayment of lots
 - \$202,725 in commissions
 - \$126,562.95 in Carry Cost Damage
 - \$152,552.36 in attorney fees for defending and suit
- Damages affirmed accept
 - adjustment - commission due, but not on \$123,000
 - Attorney fees on defense, but not counterclaim

CASE LAW

- **Massachusetts** - Two Courts determined parties can enter into a valid real estate purchase contract **VIA TEXT**
 - **First - Parties met a couple of times and then owner told buyer "work through the listing broker for the remainder of discussions"**
 - **Series of offers made and third offer contained all changes requested by seller. Listing broker responded as follows:**

CASE LAW

Steve. Seller wants you [Buyer] to sign first, with a check, and then he will sign.

Normally, the seller signs last or second. Not trying to be stupid or contrary, but that is the way it normally works. Can Rick [McDonald] sign today and get it to me today? Tim.

CASE LAW

- Buyer delivered a signed offer along with the deposit check.
- Seller never deposited check nor signed agreement, but instead entered into an agreement to sell property to another party.
- Buyer brought a lawsuit claiming that the listing broker's text created an offer that they accepted by delivering a signed offer and the deposit check to the listing broker

CASE LAW

- Court ruled that the text failed to establish a contractual relationship between the parties
- That while the parties could form a contract via text message, parties would need to have a written agreement that contains **all of the material terms and is signed in order to satisfy the Statute of Frauds**
- Court ruled that earlier negotiations between the parties had created a contractual framework that satisfied the Statute of Frauds but listing broker did not have the authority to bind the seller.
- While the seller had told buyer to work through listing broker, court concluded that it was clear to all the **parties that listing broker was merely an intermediary and did not have authority to sell property**
- Therefore, seller was not bound by listing broker's text and there was no contract between the parties.

CASE LAW

- Second - After buyers visited property, brokers began negotiating terms of purchase through email and texts. Texts:
- *May 12 - [Buyer's Rep]: Good afternoon. I emailed an offer over to you for 93 Commercial.*
- *[Listing broker]: Hi Mike. Won't hear back til morning. Talk to you then.*
- *May 13 - [Buyer's Rep]: Hi, he said he would split the difference at \$962,500.*
- *[Listing Broker]: OK. I'll convey.*
- *May 14 - [LB]: Hi Mike. The sellers accept the price.*

CASE LAW

- Following receipt of the last message, Buyer's Rep emailed listing broker a signed purchase agreement plus a copy of an EM check.
- Check was never sent to listing broker and seller never signed the agreement, and seller then sold the property to another buyer.
- Buyer brought a lawsuit seeking to enforce the contract.

CASE LAW

- Court - parties could create a real estate contract through text messages, but the negotiations here did not create a contract.
- Unlike the first case, buyer and seller had never discussed the contractual terms, such as a financing clause and inspection clause.
- Also, text message failed to satisfy Statute of Frauds, as messages did not contain any of the material terms of the transaction except for price.
- And the messages were not signed by the parties.
- Thus, no contract formed via text message.

CASE LAW

- OHIO - Court ruled broker had no duty to disclose sex offender next door - nonmaterial defect that did not involve the property
- When Buyers discovered that a convicted criminal lived next to the home they had under contract, they terminated the agreement.
- Sellers filed a lawsuit seeking specific performance
- Buyers said Brokerage breached its FD by failing to alert them to the presence of the convicted criminal next door.
- Brokerage served as a dual agent in the transaction.
- Buyers claimed they had asked about criminal activity in the neighborhood and Broker had not told them about the neighbor.
- The trial court found for Brokerage and Buyers appealed.

CASE LAW

- Court examined whether Brokerage owed Buyers FD to disclose
- Broker has a duty to disclose all material defects known to the licensee, **with the state statute defining material defects as physical defects found on the property.**
- Court looked at two other cases involving breach of FD allegations when non-physical defects were allegedly not disclosed to the buyer. Both cases involved deaths on the property, one of which involved a murder.
- In both cases, the courts determined that these “psychological stigmas” were not material defects and so did not need to be disclosed by brokers
- Court of Appeals affirmed the trial court.

CASE LAW

- Presence of a convicted criminal next door was not a material defect and therefore Brokerage was not required to disclose this fact, **even if known**.
- Court further stated that there was no evidence that the Brokerage even knew about the presence of the convicted criminal
- And that the Buyers could have learned about the presence of the felon in the neighborhood by conducting their own investigation.
- Court affirmed the trial court's ruling in favor of the Brokerage

CASE LAW

- **COLORADO** - Buyer was interested in purchasing property owned by FANNIE MAE. Because of Buyer's financial situation, her parents agreed to purchase home for her and she would rent it from them.
- Broker placed a "For Sale" sign on Property and a notice on the front door that warned trespassers that they would be prosecuted.
- After making the offer to purchase the property, Buyer brought her mother to the property. They did not inform Broker or Owner that they would be visiting the property. **While they were walking around the property, Buyer's mother fell and suffered injuries.**

CASE LAW

- Buyer's mother brought a lawsuit against Owner and Broker for her injuries claiming the "For Sale" sign constituted an "express or implied representation" to the public to visit the property.
- Trial court concluded Buyer and her mother were trespassers and "For Sale" sign did not make her an invitee because she never had permission of Seller to enter the property. Buyer's mother appealed.
- Colorado Court of Appeals affirmed the trial court ruling.
- Unlike most states where a landowner's duties to visitors are established by common law, Colorado had codified the common law into its statutes.
- Statutes describe an "invitee" as person who is invited by owner onto property or comes to property to do business with owner, while a "trespasser" is an individual who enters property without permission of landowner.

CASE LAW

- Court determined that a “For Sale” sign, standing alone, **does not create an implied invitation to strangers to enter a property and that saying that by placing a “For Sale” on a property would allow anyone to enter the property without permission would be unreasonable**
- Instead, the court stated that a “For Sale” sign coupled with other facts, such as the owner allowing others to enter the property unaccompanied, could create an implied invitation but this would require a factual examination.
- Since there were no such facts present that would create an implied invitation by Owner, Court affirmed trial court’s ruling **that Buyer’s mother was a trespasser on property.**

CASE LAW

- **ARIZONA** -Victim's wife filed a wrongful death lawsuit against brokerage claiming Broker was **vicariously liable for the death of her husband caused by Salesperson in a car accident because Salesperson was an employee of the Broker.**
- Trial court found for Broker, "Salesperson was an independent contractor."
- Victim's wife appealed
- Court of Appeals affirmed the trial court and ruled that Salesperson was an independent contractor based on state's license law which required a broker to supervise its salespeople in the performance and documentation of a real estate transaction by specifying the types of transaction records that must be maintained. **The license law imposes no other supervisory duties upon broker.**

CASE LAW

- Victim's wife argued license statute stated that Broker was responsible for all salesperson's actions, therefore Broker was liable for automobile accident.
- Court rejected this argument because the license law described the specific actions where brokers are required to supervise and did not require broker to supervise most actions undertaken by salespeople such as driving.
- License law did not create an employer-employee relationship between the broker and the salesperson and so the salesperson could qualify as an independent contractor.

CASE LAW

- Victim's wife argued that even if Salesperson was an independent contractor, Broker was still liable because driving was requirement for being a salesperson.
- Court again looked to the state's license law and found that the **Broker was not required to supervise the Salesperson's driving, nor was driving a non-delegable duty imposed by statute on the Broker.**
- Thus, the court also rejected this argument.

RANM LEGAL HOT LINE

1-877-699-7266

LEGALHOTLINE@NMREALTOR.COM



MONDAY – FRIDAY
9:00 TO 1:00 PM



Video: Maintaining the REALTOR® Brand

