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What Broker Duties Do I Owe Under the Law?

It appears an easy question, but the answer is . . . it depends on what kind of relationship you have with your customer/client and what agreement(s) you have entered into with your customer/client.

First, let's begin by defining a customer or client under New Mexico law. A **customer** is defined by New Mexico Real Estate Commission Regulations (Regulations) as a person who uses real estate services without entering into an express written agreement and a **client** as a person who has entered into an express written agreement with a brokerage for real estate services.

The New Mexico Real Estate Brokers Act provides that "prior to the time a licensee generates or presents any written document that has the potential to become an express written agreement, the licensee shall give to a prospective buyer, seller, landlord, or tenant a list of the licensee's duties that are in accordance with requirements established by the {Real Estate} commission and that licensees shall perform all duties that are established for licensees by the {Real Estate} commission."

The first two pages of every RANM form includes the list of Basic Broker Duties.

The Real Estate Commission (REC) has promulgated a list of basic broker duties that brokers owe to their clients and customers in the course of a real estate transaction (Basic Broker Duties). These Basic Broker Duties are the first two pages of every contract in the RANM Forms Library.

In the not-too-distant past, brokers typically worked as agents for their clients. The regulations define "agent" as a brokerage authorized solely, by means of an express written agreement, to act as a fiduciary for a person and to provide real estate services that are subject to the jurisdiction of the REC; in the case of an associate broker, "agent" means the person who has been authorized to act by that associate broker's qualifying broker.

As an agent, the broker is a fiduciary and owes his/her client fiduciary duties. Brokers are aware that fiduciary duties include the following: 1) obedience; 2) loyalty; 3) disclosure; 4) confidentiality; 5) accountability; 6) reasonable care; and 6) diligence, but what does this really mean?

Obedience means the broker will act on behalf of the client and within the scope of authority or power delegated by the client and will comply with all lawful instructions received from the client.

Loyalty means that the broker will first and foremost promote and protect the interests of the client and will avoid any conflict between his/her personal interests and the interests of the client.

Disclosure means a broker must share any knowledge the broker has that might benefit his/her client in the transaction.

Confidentiality means that the broker cannot disclose anything that the broker has learned about his/her client, the client's business, financial or personal affairs, or motivations. This duty survives the closing or termination of the listing or buyer-broker agreement and lasts forever. Only a court instruction to disclose can relieve a broker of this duty.

Accountability means a broker must be able to account for all money and documents that have been entrusted to him/her by his/her client.

Reasonable care and diligence means that the broker will discharge his/her duties with the appropriate care, competence, and diligence normally exercised by agents in similar circumstances.

In addition to the above duties, a broker owes his/her client all duties set forth in any contracts between the broker and the client.

Generally, a principal/client is liable for the acts of his/her agent/broker if the agent/broker was acting in the scope of his/her agency relationship at the time the act was

committed. Again, generally, an agent/broker is liable to a principal/client when he/she acts without actual authority and must indemnify a principal/client for loss or damage resulting from his/her unauthorized act.

It is important to note, that property managers always act in the capacity of an agent for their property owners. This relationship is set forth in the Owner-Resident Relations Act.

Today, most New Mexico brokers work with their customer or client as a transaction broker.

With all this said, these days, most New Mexico brokers work with their customer or client as a transaction broker. Under New Mexico law, a transaction broker is defined as a qualifying broker, associate broker, or brokerage that provides real estate services without entering into an agency relationship. The transaction-broker relationship is specifically defined as a non-agency relationship. Thus, fiduciary duties do not apply. This begs the question, what duties do apply?

As stated above, the REC has defined a set of Basic Broker Duties owed in such relationships. In addition, in the event of a written agreement between the broker and the client, the broker would also owe any duties set forth in the contract with the client. It is important to note that these are arguably all the duties owed, nothing more and nothing less. There is no case law in New Mexico since the creation of the transaction-broker relationship that defines the duties of a transaction broker.

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Broker Duties

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However, courts in other states, such as Colorado, with the same or similar definition of transaction broker, have held that the extent of the duties owed as a transaction broker are those defined in the statute or regulation.

For example, under Basic Broker Duties, there are only two broker duties that specifically reference "confidentiality", Basic Broker Duties 16.61.19.8(I) and (J). Clearly, a broker acting as a fiduciary would owe more confidentiality to his/her client than what is set forth in these two sections of the Basic Broker Duties. This is an example of the distinction between duties owed as a fiduciary under an agency relationship and duties owed as a transaction broker, but how many customers or clients understand this difference?

Among the Basic Broker Duties is the duty to disclose to the customer/client the following brokerage relationship options available in New Mexico: 1) transaction broker (discussed above); 2) exclusive agency (discussed above); and 3) dual agency (an express written agreement that modifies existing exclusive agency agreements to provide that the brokerage agrees to act as a facilitator in a real estate transaction rather than as an exclusive agent for either party to the transaction).

Too often, there is no conversation between the broker and his/her client/customer wherein the broker explains what these relationships mean. Consequently, clients and customers of transaction brokers often do not fully understand what duties are and or are not owed by the transaction broker. It is important for the broker to clarify with his/her customer/client what duties are owed based on the relationship and any contractual agreements between the broker and the customer/client.

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