

**NEW MEXICO  
ASSOCIATION OF  
REALTORS®  
LEGAL UPDATE**

**ASHLEY STRAUSS-MARTIN , ESQ.  
AUGUST 2019**

# TOPICS COVERED TODAY

- ▶ NEW AND REVISED NMAR FORMS
- ▶ LEGAL HOT LINE TOPICS
- ▶ NATIONAL TOPICS
- ▶ TIPS FOR AVOIDING LAWSUITS
- ▶ CASE LAW FROM NEW MEXICO AND AROUND THE NATION

# REVISED NMAR FORMS RELEASED JULY 2019

## RESIDENTIAL PURCHASE AGREEMENT – 2104

- **Cover Page I – Broker Duties** –Divided into Sections A and B
- **Cover Page II – Additional Broker Disclosures**
  - Page reorganized: Buyer's Broker's Disclosures at top; Seller's Broker's Disclosures at bottom
  - “Additional Disclosures” -
    - Box for “Other Written Agreements” has been added;
    - Under the Licensed TC Section, line added to ID TCs, so Form 2100 **IS NOT NEEDED\***
- **Cover Page III - Broker/Brokerage Information**
  - Page was located after the PA; moved to the front
  - Additional space added for the ID of two brokers under both



# 2104 – COVER PAGE II

4. **Additional Disclosures:** If applicable, check box below. Where noted (◆), attach NMAR Form 2100 or other disclosure.
- Buyer's Broker has an **OWNERSHIP INTEREST IN PROPERTY**
  - Buyer's Broker has **OTHER WRITTEN AGREEMENTS IN THE TRANSACTION** ◆
  - Buyer's Broker has a **CONFLICT OF INTEREST** or **MATERIAL INTEREST** (business, personal or family) ◆
  - Buyer's Broker knows of **ADVERSE MATERIAL FACTS** about the Property and/or Transaction ◆
  - Buyer's Broker has engaged a **LICENSED TRANSACTION COORDINATOR** ("TC") to provide services related to the transaction: **BROKER DUTIES:** Licensed TCs who have no interaction with the Broker's Customer or Client and/or other parties or brokers involved in the transaction, owe Broker Duties 1-5 in Section A on Cover Page I. Licensed TCs who work directly with the Broker's Customer or Client and/or other parties or brokers in the transaction, owe Broker Duties 1-5 of Section A on Cover Page I and 5, 7 and 8 of Section B on Cover Page I. Licensed TCs:
-

# RESIDENTIAL PA FORM 2104

- **Para. 4 – Earnest Money** – Added: *“If the lender prohibits the credit of any portion of the Earnest Money towards the Purchase Price, down payment and/or closing costs, the Earnest Money or applicable portion thereof shall be refunded to Buyer after closing.”*
- **Para. 6 - Financed or Cash Purchase Subparagraph A(ii) (Loans) AND Subparagraph C (Cash Purchase)** Changed: Failure of Buyer to provide Pre-Qual Letter and proof of funds in a timely matter is considered a default of the PA. Default allows the seller to CHOOSE whether he/she wishes to terminate the contract.
- **Para. 8(B) Appraisal “Order Date”** was added for LOAN (Buyer’s responsibility)

# RESIDENTIAL PA FORM 2104

- ▶ **Para. 14 – Cost-to-be-Paid Grid** (previously Para. 11).
  - ▶ Asterisks have been added after “Loan Related Costs and Fees” and after “HOA/COA” (in the Misc. Section of the Grid);
  - ▶ Asterisks are explained below the Grid. The first asterisk explanation is not new (Buyer to pay for other loan-related costs). The second asterisk explanation is new and addresses **who pays for HOA/COA costs other than the Disclosure and Resale Certificate**
  - ▶ This is a catch-all for the various documents (and names of documents) that a lender or title company may require to make the loan/insure the property.

# RESIDENTIAL PA - 2104

## PARA. 19 (LBP)

### 19. DISCLOSURES AND DOCUMENTS.

A. **LEAD BASED PAINT (“LBP”). Is any part of the Property a residence built before 1978?**  Yes  No

If the answer is “Yes”, and if available, attach fully-executed NMAR Form 5112 LBP Addendum to Purchase Agreement. If fully-executed LBP Addendum is not available at time of offer, **it must be fully executed and attached to this Agreement PRIOR TO full execution of this Agreement.** Property is also subject to the LBP Renovation, Repair and Painting Program (“RRP”). See NMAR Form 2315 – Information Sheet LBP RRP.

# RESIDENTIAL PA FORM 2104

## Para. 18 (Survey/ILR ) and Para. 21 (F)(i) (Inspections) - Delivery Deadlines |

- Clarifies that Delivery Deadlines ONLY apply if Seller is obligated to deliver the survey/ILR or inspection to the Buyer.
- If Buyer is ordering survey/ILR or inspection the Delivery Deadline does NOT apply to the date the surveyor or inspectors are expected to deliver the survey/ILR or inspection to the Buyer;

## Para. 21(I) – Resolution –

- Clarifies that if in Seller's Response, Seller does not agree to cure all of Buyer's objections as requested, Buyer may either terminate the PA or continue to negotiate with Seller.
- **Note:** PA currently (and continues) to state that if Buyer makes objections, Buyer may NOT withdraw his/her objections and terminate the PA before Seller has had an opportunity to respond.

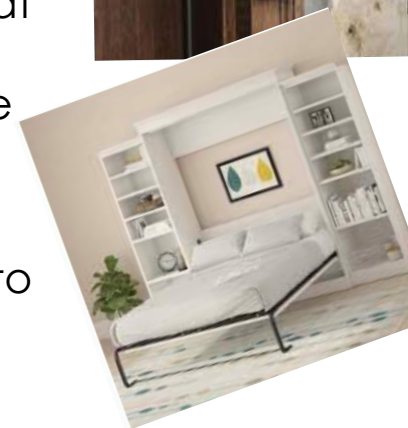


# RESIDENTIAL PA - FORM 2104

## Para, 31 – DEFINITIONS

### Subparagraph J – Fixtures

- If item/unit has multiple components, some of which are fixtures and others of which are personal property. item, as a whole is a “Fixture”. **Examples:**
- Security system has multiple components, one of which is the doorbell/camera which is affixed to the real property with screws; the other component(s) of the system is a monitoring and/or Wi-Fi device that sits on a table. The doorbell/camera is a fixture and the monitoring device is personal property, but the two components are intended to be used together, therefore, considered a “Fixture”;
- Murphy bed, where the frame is attached/secured to the real property. The mattress on the murphy bed is personal property; however, in order to use the murphy bed as it was intended to be used, one must have a mattress, so the mattress becomes a “Fixture” as well.



# RESIDENTIAL PA FORM 2104

## Para. 35 – Earnest Money Dispute

- Sentence was added regarding Interpleader actions
- Previously removed because generally, title companies are not filing Interpleader Actions; however....

## Para. 47 – Acceptance, Entire Agreement & Amendments in Writing

- Clarifies that a contract is not accepted UNTIL fully executed by the Seller and delivered to the Buyer (implicit in this is the fact that if a counteroffer is involved, a contract is not fully executed until the final counter offer is fully executed and delivered to the other side).
- Added to emphasize that acceptance can NOT be assumed; that performance under the Purchase Agreement without a signed and delivered Purchased Agreement does not create a legally binding contract

## Buyer's Sale Contingency Form 2503

- ▶ **2503 - Buyer's Contingency:**
  - ▶ Added to Para. 2(A). **MARKETING CONTINUES.** Buyer may notify Seller by (check all that apply)  Email  Text  Hand-Delivery  Other \_\_\_\_\_ that Buyer has entered into a contract for the sale of Buyer's Property.
  - ▶ Let's take a moment to walk through this **SUPER-FUN** form.

# Buyer's Sale Contingency Form 2503 –

**INTENDED PURPOSE.** *This form is intended to be used under the following circumstances: (1) the Buyer is making an offer on the Seller's property; and (2) the Buyer is attempting to sell his/her existing property; 3) the Buyer is making his offer to purchase Seller's property subject to the sale, closing and funding of his property; and 4) the Seller agrees to **discontinue MLS** marketing of his property once the Buyer's property goes under contract.*

*As used in this agreement to describe the contingency, the term "satisfies" and any variation thereof means that the Buyer's property has closed and funded and the term "waives" and any variation thereof means that it is no longer necessary for the Buyer to sell his property in order to purchase the Seller's property. In other words, if the Buyer "waives" this Contingency, the Buyer is no longer making the purchase of the Seller's property contingent on the Buyer first selling his own property.*

# Buyer's Sale Contingency Form 2503



## 2. MARKETING PERIOD AND CONTINGENCY DEADLINE.

- A. **MARKETING CONTINUES.** Seller shall have the right to offer the Subject Property for sale and to consider additional offers until Buyer delivers written notice to Seller that Buyer has entered into a contract for the sale of Buyer's Property ("Marketing Period"). **Because Seller shall have the right to continue to market the Property and accept other offers no TOM Fee shall be due.**
- B. **CONTINGENCY DEADLINE.** In the event Seller receives another acceptable offer to purchase the Subject Property during the Marketing Period, Seller shall deliver written notification (Notification to Satisfy or Waive Contingency, Page 4 of this Agreement) to the Buyer that this Contingency must be satisfied or waived within \_\_\_\_\_ hours of receipt of such notification ("Contingency Deadline"). If Buyer does not satisfy or waive this Contingency by the Contingency Deadline, this Purchase Agreement shall terminate and any Earnest Money
- will     will not be refunded to Buyer.

# Buyer's Sale Contingency Form 2503

3. **TERMINATION OF MARKETING PERIOD.** Once Seller receives notice from Buyer that Buyer has entered into a contract for the sale of Buyer's Property, Seller must cease marketing of the Subject Property. The Purchase Agreement shall remain contingent upon the closing and funding of Buyer's Property.



- 4. TERMINATION OF CONTRACT ON BUYER'S PROPERTY.** In the event Buyer has entered into a contract for the sale of Buyer's Property and that contract subsequently terminates for any reason, Buyer must notify Seller of such termination within \_\_\_\_ days of such termination. In this event, Buyer shall have the option of waiving the contingency; however, if Buyer is unwilling or unable to waive the contingency at the time he provides notice to Seller, then Seller, in his sole discretion, may terminate the Purchase Agreement.
- A. **NOTICE.** If Seller elects to terminate, Seller shall deliver written notice to Buyer within \_\_\_\_ days of receiving Buyer's notice of the termination of the contract on Buyer's Property and Earnest Money will be refunded to Buyer. If Seller fails to timely notify Buyer of Seller's intent to terminate, Seller's right to terminate shall be deemed waived.
- B. **MARKETING RESUMES.** If Seller elects *not* to terminate the Purchase Agreement or *waives* his right to terminate the Purchase Agreement by failing to timely respond to Buyer's notice (Para. 4.A), Seller may resume marketing of the Subject Property until such time as Buyer notifies Seller that Buyer has entered into another contract for the sale of Buyer's Property ("Subsequent Marketing Period"). In the event Seller receives another acceptable offer to purchase the Subject Property during the Subsequent Marketing Period, Seller shall deliver written notification (Notification to Satisfy or Waive Contingency, Page 4 of this Agreement) to the Buyer that this Contingency must be satisfied or waived by the Contingency Deadline (Para. 2.B). If Buyer does not satisfy or waive this Contingency by the Contingency Deadline, this Purchase Agreement shall terminate and any Earnest Money shall be distributed as provided in Para. 2.B.

# Buyer's Sale Contingency Form 2503

5. **TIME FOR SATISFACTION OR WAIVER OF CONTINGENCY.** Without any notice or demand, Buyer shall notify Seller in writing on or before \_\_\_\_\_ (“Contingency Date”) that this Contingency has been satisfied or waived. If Buyer does not satisfy or waive this Contingency by the Contingency Date, this Purchase Agreement shall terminate and any Earnest Money  will  will not be refunded to Buyer. NOTE: THE FACT THE BUYER HAS ENTERED INTO A CONTRACT FOR THE SALE OF BUYER’S PROPERTY IS NEITHER A SATISFACTION, NOR A WAIVER OF THE CONTINGENCY (SEE DEFINITIONS OF “SATISFACTION” AND “WAIVER” IN THE INTRODUCTORY PARAGRAPH) AND THIS PARAGRAPH SHALL APPLY EVEN IF BUYER HAS ENTERED INTO A CONTRACT FOR THE SALE OF BUYER’S PROPERTY.



## 6. BUYER REPRESENTATIONS.

A.  Buyer's Property is for sale.

- i. Buyer's Property is listed with \_\_\_\_\_ (Broker's name) of \_\_\_\_\_ Brokerage.
- ii. Buyer's Property  is  is not currently listed with a MLS. If currently listed in the MLS, the MLS listing number is \_\_\_\_\_.
- iii. Buyer's Property has been on the market since \_\_\_\_\_.

B.  Buyer's Property is not yet for sale.

- i. Buyer  will  will not list Buyer's Property with a licensed real estate broker within \_\_\_\_\_ days from Date of Acceptance. If Buyer will be listing Buyer's Property with a licensed real estate broker, Buyer will deliver proof of this listing to Seller within \_\_\_\_\_ days from Date of Acceptance. If Buyer fails to deliver proof of said listing, the Purchase Agreement shall terminate and any Earnest Money deposit  will  will not be refunded to Buyer.
- ii. Buyer  will  will not list Property with a MLS. If Buyer will be listing Buyer's Property with a MLS, Buyer will do so within \_\_\_\_\_ days of Date of Acceptance.

## 7. NOTICES.

A. Any notices made by Buyer under this Contingency Agreement shall be made to (check applicable box)

Seller's Broker  Seller  Other \_\_\_\_\_  
Notices shall be delivered in accordance with the Purchase Agreement.

B. Any notices made by Seller under this Contingency Agreement shall be made to (check applicable box)

Buyer's Broker  Buyer  Other \_\_\_\_\_  
Notices shall be delivered in accordance with the Purchase Agreement.

# Buyer's Sale Contingency Form 2503

## 8. WAIVER OF CONTINGENCY.

A. If Buyer elects to waive this Contingency for the sale of the Buyer's Property, and is thereafter unable to close and fund on the sale of the Subject Property due to the failure to close and fund on the sale of Buyer's Property, any Earnest Money deposit will NOT be refunded to Buyer; it will be paid to the Seller. Further, Seller reserves any rights to other damages to which Seller may be entitled as a result of Buyer's financial inability to fulfill the terms and conditions of the Purchase Agreement.

B. Seller's Right to Approve (Initial Below if applicable).

Notwithstanding the foregoing, Buyer shall provide to Seller, at the time of waiver of this Contingency, evidence satisfactory to Seller that Buyer is financially qualified to purchase the Subject Property. Buyer's waiver of this Contingency is conditioned on Seller's approval of Buyer's financial qualifications. Seller will inform Buyer of Seller's approval or disapproval within \_\_\_\_ hours after receipt of the evidence referred to above. If Seller disapproves of Buyer's financial qualifications, the Purchase Agreement will terminate and any Earnest Money will be returned to Buyer. If Seller fails to provide notice of disapproval within the time specified, Seller is deemed to have approved of Buyer's financial qualifications and waives his right to terminate the Purchase Agreement based thereon. Seller may not unreasonably withhold approval.

**Initial here if the above paragraph applies:**

\_\_\_\_\_ Buyer \_\_\_\_\_ Buyer      \_\_\_\_\_ Seller \_\_\_\_\_ Seller

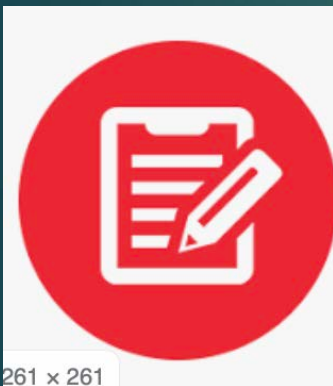
# Buyer's Sale Contingency Form 2503



## 9. TIME PERIODS FOR PERFORMANCE.

- A. Earnest Money shall be deposited  as specified in the Purchase Agreement  the date that the Buyer delivers written notice that the Buyer's Property has gone under contract for sale  the date Buyer delivers notice that this Contingency has been satisfied or waived or  other \_\_\_\_\_.
- B. Time periods in the Purchase Agreement for performance of all other obligations shall begin  as specified in the Purchase Agreement  the date that Buyer delivers written notice that Buyer's Property has gone under contract for sale  the date that the Buyer delivers written notice that this Contingency has been satisfied or waived or  other \_\_\_\_\_.

# Buyer's Sale Contingency Form 2503



## SELLER(S) NOTIFICATION TO SATISFY OR WAIVE CONTINGENCY

Buyer is hereby notified that Seller has received an acceptable offer to purchase the Subject Property from another party. UNDER THE TERMS OF THIS BUYER SALE CONTINGENCY, BUYER HAS UNTIL \_\_\_\_\_ (date) at \_\_\_\_\_ (time)  am  pm TO SATISFY OR WAIVE THE CONTINGENCY ("CONTINGENCY DEADLINE"). IF BUYER FAILS TO SATISFY OR WAIVE THIS CONTINGENCY WITHIN THE ABOVE PERIOD OF TIME, THE PURCHASE AGREEMENT SHALL TERMINATE, AND THE EARNEST MONEY SHALL BE DISTRIBUTED AS PROVIDED IN THIS CONTINGENCY AGREEMENT.

Seller Signature \_\_\_\_\_

Date \_\_\_\_\_

Time \_\_\_\_\_

Seller Signature \_\_\_\_\_

Date \_\_\_\_\_

Time \_\_\_\_\_

The undersigned hereby states that the above Notification to Satisfy or Waive Contingency was delivered to \_\_\_\_\_ at \_\_\_\_\_ on \_\_\_\_\_, at \_\_\_\_\_  am  pm

# Buyer's Sale Contingency Form 2503

Signature

## BUYER NOTIFICATION OF SATISFACTION OR WAIVER OF CONTINGENCY

Buyer hereby notifies Seller that he (check applicable box)  WAIVES  SATISFIES this Contingency. **If Buyer is WAIVING this Contingency and subsequently is unable to complete this transaction due to the failure to sell Buyer's Property, the Earnest Money deposit will NOT be refunded to Buyer; it will be paid to the Seller. Seller reserves all rights to other damages to which Seller may be entitled as a result of Buyer's financial inability to fulfill the terms and conditions of the Purchase Agreement. Additionally, if Buyer is waiving this Contingency, Seller may have the right to review and approve Buyer's financial qualifications as provided for in Paragraph 8B. See definitions of "satisfaction" and "waiver" in the introductory paragraph.**

# Buyer's Sale Contingency Form 2503



## **APPROVAL OF BUYER'S FINANCIAL QUALIFICATIONS (IF APPLICABLE)**

Based on the documents provided by Buyer, Seller approves of Buyer's financial qualifications as required under Paragraph 8B. **If Buyer is unable to complete this transaction due to the failure to close and fund on the sale of Buyer's Property, the Earnest Money deposit will NOT be refunded to Buyer; it will be paid to the Seller. Seller reserves all rights to other damages to which Seller may be entitled as a result of Buyer's financial inability to fulfill the terms and conditions of the Purchase Agreement.**

**ORW  
Form -5109  
Section 4(C)  
Price  
Reduction or  
Seller  
Concession**

- ▶ “Other” Removed from 4(C)
- ▶ To be used when Seller is proposing price reduction/seller concession
- ▶ If Seller wishes to propose something other than price reduction/seller concession, Seller should do so in Section 4(B)
- ▶ If Seller is using Section 4(C), Seller should mark Section 4(C) (i) and/or (ii) and place proposed price reduction/seller concession on Amendment – 2101 & send back to Buyer
- ▶ If price reduction or amount of Seller concession on Seller’s Amendment is not acceptable to Buyer, then Buyer should create his/her own Amendment
- ▶ Process should continue until parties have one Amendment on which both can agree.

# HOA FORMS



Took effect July 1, 2019.



Applies to HOAs – NOT to COAs



10 Cents A Copy For Documents in Section 1  
And No more than \$300 For the DC.



HOA May Only Charge A Fee For DC At  
Closing And ONLY IF Transaction Closes.



Answers To Questions B And C Of DC are Only  
Valid For 60 Days. (\$\$ Owed by Seller)



HOA must provide updated info w/i 3 business  
days and may charge no more than \$50.00



# FORM 1725 AUCTIONEER AGREEMENT

- ▶ **Form 1725 - NEW** Auctioneer Agreement: Exception to the NM Real Estate Brokers Act that allows a Qualifying Broker to hire an unlicensed auctioneer (someone who does not hold a NM Broker's License) to auction real property. QB must enter into a transaction-specific written agreement with the auctioneer that meets the criteria set forth in this new form.



**FORM 5106  
REVOCATION  
OF OFFER/  
COUNTEROFFER**

- ▶ **NEW** Notice of Revocation of Offer/Counteroffer: Form signed by Buyer or Seller revoking the Offer of Counter Offer.
- ▶ Let's talk about issues with this.....NMAR Voice Article

# Form 6107 - NEW Vendor Certification for Brokers/Property Managers

- ▶ NMREC Rules require Brokers who hire vendors to perform maintenance or repairs on properties to ONLY hire vendors that are properly licensed, insured and bonded, as required by New Mexico law.
- ▶ Does NOT mean that all vendors must be licensed, insured and/or bonded
- ▶ Form used predominately by PMs; but, regulation specifically states that the Rule applies to ALL BROKERS (not just PMs), which means that if a Broker hires vendor in the context of a sale/purchase of a property, this Rule would apply
- ▶ Does NOT apply if a Broker (or his/her TC or assistant) simply made a call to a vendor to schedule the repair provided that vendor was selected and compensated by the buyer or seller.

# Form 6107

## Vendor Certification for Brokers/ Property Managers

2. PROPERTY ADDRESS / DESCRIPTION: \_\_\_\_\_
3. WORK PERFORMED:
  - A.  ALL WORK NEEDED/AS REQUESTED BY PROPERTY MANAGER AND/OR BROKER
  - B.  DESCRIPTION OF SPECIFIC JOB: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
4. IF APPLICABLE, VENDOR LICENSE/CERTIFICATION NUMBER (NOTE: A Business License does **NOT** qualify as a vendor license.) : \_\_\_\_\_
5. IF APPLICABLE, LICENSE/CERTIFICATION EXPIRATION DATE: \_\_\_\_\_
6. IF APPLICABLE, LICENSING/CERTIFYING ENTITY: \_\_\_\_\_
7. VENDOR HAS  INSURANCE \$ \_\_\_\_\_ / \$ \_\_\_\_\_  IS BONDED \$ \_\_\_\_\_.  
Per Claim Aggregate Bond Amount
8. DEFINITION OF CONTRACTOR AND EXCLUSIONS UNDER NEW MEXICO LAW: SEE EXHIBIT "A".
9.  HANDYMAN EXCEPTION: Check if Applicable. **NOTE: A HANDYMAN MUST PRESENT THE CARD ISSUED TO HIM/HER BY THE CONSTRUCTION INDUSTRIES DIVISION ("DIVISION") THAT CERTIFIES HIS/HER STATUS AS A HANDYMAN. HANDYMAN CERTIFICATION MUST BE RENEWED ANNUALLY. NEW MEXICO LAW DOES NOT REQUIRE A HANDYMAN TO BE INSURED OR BONDED.**
  - A. The vendor works on one undertaking or project at a time;
  - B. The project or undertaking, in the aggregate or singly, does not exceed \$7,200 compensation a year, that work being casual, minor or inconsequential, such as handyman repairs (See Exhibit A for definitions of these terms);
  - C. The project or undertaking does NOT pertain to the installation, connection or repair of electrical wiring, plumbing or gas fitting; (See Exhibit A for further explanation of these terms);
  - D. The work is not part of a larger or major operation undertaken by the vendor or different contractor;
  - E. The vendor does not advertise or maintain a sign, card or other device which would indicate to the public that he/she is qualified to engage in the business of contracting; and
  - F. The vendor files annually with the Division on a form prescribed by the Division a declaration stating that:
    - i) he/she is not a contractor within the meaning of the Construction Industries Licensing Act;
    - ii) that the work he/she performs is casual, minor or inconsequential and will not include more than one undertaking or project at one time; and
    - iii) that the total amount of such contract, in the aggregate or singly, will not exceed \$7,200 compensation a year (not including materials).

# Form 6107

## Vendor Certification for Brokers/ Property Managers

### EXHIBIT "A"



**NOTE: THE FOLLOWING ARE EXEMPT FROM NM CONTRACTOR LICENSING AND HANDYMAN REQUIREMENTS (FOR PRE-1978 HOMES, THE EPA LEAD-BASED PAINT RENOVATION, REPAIR AND PAINTING RULE CERTIFICATION MAY STILL APPLY – SEE NMAR FORM 2315):**

- FENCING
- TILE
- FIXTURES/CABINETS/MILLWORK
- FLOORING
- SANDBLASTING
- PAINTING
- WELDING
- NON-REPAIR TYPE SERVICES SUCH AS CLEANING, HAULING & YARDWORK

#### **NEW MEXICO LAW DEFINES THE TERM "CONTRACTOR" AS FOLLOWS:**

Any person who undertakes, offers to undertake by bid or other means or purports to have the capacity to undertake, by himself or through others, contracting. Contracting includes constructing, altering, repairing, installing or demolishing of any:

1. road, highway, bridge, parking area or related project;
2. building, stadium or other structure;
3. airport, subway or similar facility;
4. park, trail, bridle path, athletic field, golf course or similar facility;

# Form 6107

## Vendor Certification for Brokers/ Property Managers

### DEFINITIONS: The following terms as used above have the following meanings:

1. **Casual** - means employment for irregular periods and occurring without regularity for various property owners
2. **Inconsequential** - means of little importance or unimportant, cosmetic;
3. **Minor** - means smaller in size or degree, less important;
4. **Electrical wiring** - means all wiring, conductors, fixtures, devices, conduits, appliances or other equipment, including generating equipment such as solar electricity generating equipment of not over ten kilowatt capacity, used in connection with the general distribution or use of electrical energy;
5. **Plumbing** - means the installing, altering and repairing of all plumbing fixtures, fixture traps and soil, waste, supply and vent pipes, with their devices, appurtenances and connections, through which water, waste, sewage, oil and air are carried, when done within the property lines of the building or structure to be served by the plumbing or to the point of connection with the utility system. This definition shall not be construed as prohibiting the installation by a "fixed works" licensee of service lines from the utility system to a point five feet outside the building or structure to be served by the plumbing;
6. **Fixtures** - include closet bowls, lavatories, bathtubs, showers, kitchen sinks, laundry trays, hot water tanks, softeners, urinals, bidets, service sinks, shower pans, drink fountains, water compressors, water coolers, septic tanks or similar systems of sewage disposal and such other similar fixtures used in plumbing as designated by the

# Form 6107

## Vendor Certification for Brokers/ Property Managers

### **PERMITTED HANDYMAN TASKS:**

- Minor or inconsequential repairs to buildings or other structures (no structural repairs).
- Repair holes in interior walls;
- Repair broken windows and doors (no replacement);
- Repair portions of porches and decks (no structural work or complete replacement);
- Repair wooden or concrete stairs/steps (no complete replacement);
- Repair siding excluding any work on stucco.

### **PROHIBITED HANDYMAN TASKS:**

- Advertise as a contractor or impart to the general public he is any manner qualified to engage in the business of contracting;
- Work on any projects as a sub-contractor to a licensed contractor;
- Add on a room to an existing building or remodel any portion of an existing room or building;
- Build or erect an entire building or any other structure such as a porch, deck, shed, gazebo or other garden structure;
- Perform any kind of roof construction or roof repair;
- Perform any kind of stucco application or stucco repair;
- Use the services of others or hire employees or sub-contractors;
- Combine with others, including other handyman certificate holders, to accomplish work;
- Perform any plumbing, mechanical, or electrical work;
- Work on more than one undertaking at a time;
- Build a driveway.

# Back-Up Contract FORM 1530



## NEW MEXICO ASSOCIATION OF REALTORS® ADDENDUM FOR BACK-UP PURCHASE AGREEMENT - 2019



ADDENDUM NO. \_\_\_\_\_



**This “Back-Up” Purchase Agreement obligates Seller to sell and Buyer to buy *IF* Seller notifies Buyer that ALL Purchase Agreement(s) previously accepted by Seller have terminated by the date set forth in Paragraph 2.**

**The** **This** Addendum is part of the  Residential  Commercial  Vacant Land  Farm and Ranch Purchase Agreement dated \_\_\_\_\_, 20\_\_\_\_ between \_\_\_\_\_

\_\_\_\_\_ (“Buyer”) and \_\_\_\_\_ (“Seller”) and relating to the following Property:

Address \_\_\_\_\_ City \_\_\_\_\_ Zip Code \_\_\_\_\_

Legal Description  
or see metes and bounds description attached as Exhibit \_\_\_\_\_, \_\_\_\_\_ County, New Mexico  
and is hereinafter referred to as “Back-Up Purchase Agreement”.

- 1. CONTINGENCY. This Back-Up Purchase Agreement is contingent on termination of the Primary Purchase Agreement and ALL Prior Back-Up Purchase Agreements.** Seller, in his sole discretion, shall determine if the Primary Purchase Agreement and ALL Prior Back-Up Purchase Agreements have terminated. Buyer acknowledges and affirms that Seller has entered into the following: (Check “B” if applicable)
  - A. A purchase agreement with another buyer to sell the Property (“Primary Purchase Agreement”);
  - B.  In addition to the Primary Purchase Agreement, Seller has entered into one or more Back-Up Purchase Agreements with other buyer(s).



# Back-Up Contract FORM 1530

2. **NOTICE.** Seller shall notify Buyer immediately of the termination of the Primary Purchase Agreement and any Prior Back-Up Purchase Agreements (See Notification on Page 2). This Back-Up Purchase Agreement does not become the Primary Purchase Agreement until and unless Seller has notified Buyer that the Primary Purchase Agreement and ALL Prior Back-Up Purchase Agreement(s) have terminated. Notwithstanding any other provision of this Back-Up Purchase Agreement, including this Addendum, if Seller does not provide written notification to Buyer on or before \_\_\_\_\_, 20\_\_\_\_ that the Primary Purchase Agreement and ALL Prior Back-Up Purchase Agreements have terminated, then this Back-Up Purchase Agreement shall automatically terminate. **SELLER SHALL MOVE BACK-UP PURCHASE AGREEMENTS INTO PRIMARY POSITION IN THE ORDER IN WHICH THEY WERE ACCEPTED BY SELLER.**

3. **DATE OF ACCEPTANCE/DATE OF “UNDER CONTRACT”.** Date of Acceptance is the date on which this Back-Up Purchase Agreement is fully executed and delivered, which means the parties are “Under Contract” as of the Date of Acceptance; HOWEVER, the parties are NOT obligated to perform on this Back-Up Purchase Agreement until the time frame set-forth in Paragraph 4.

# Back-Up Contract FORM 1530

**4. TIME FOR PERFORMANCE.** Neither party is obligated to perform on this Back-Up Purchase Agreement until and unless Buyer receives written notice from Seller that the Primary Purchase Agreement and ALL Prior Back-Up Purchase Agreements have terminated. This means that where a date for performances in this Back-Up Purchase Agreement states “X No. of Days from Date of Acceptance”, the date for performance shall now be “X No. of Days from the Date that Seller Notifies Buyer that Buyer’s Back-Up Purchase Agreement is now the Primary Purchase Agreement.” NOTE: Because of this, there CANNOT be any specific calendar date deadlines (e.g. March 1<sup>st</sup>) in this Back-Up Purchase Agreement; all dates in this Back-Up Purchase Agreement **MUST BE** expressed in number of days (e.g. 4 days).

**5. NOTIFICATION TO BUYER.**

- A. Prior Purchase Agreements.** Buyer shall notify Seller that Prior Back-Up Purchase Agreements have terminated by (check all that apply)  Email  Text  Hand-Delivery  Other \_\_\_\_\_.
- B. Primary Purchase Agreement.** Seller shall notify Buyer that Buyer’s Purchase Agreement is the Primary Purchase Agreement by sending Buyer the Notification below.

# Back-Up Contract FORM 1530



**BY SIGNATURE HERETO, SELLER AFFIRMS THIS BACK-UP PURCHASE AGREEMENT IS  
BACK-UP PURCHASE AGREEMENT NO. \_\_\_\_\_**

- **This section to be completed by BUYER, but Seller MUST review for accuracy before signing this Addendum. If number is incorrect, Seller should NOT sign this Addendum. Seller may submit a counteroffer with the correct number and/or notify Buyer of the correct number, so that Buyer may submit a corrected Back-Up Purchase Agreement Addendum.**
- **For purposes of determining this number, only count the number of Prior Back-Up Purchase Agreements the Seller has accepted; do NOT count the Primary Purchase Agreement. For example, if Buyer is the first Back-Up Purchase Agreement behind the Primary Purchase Agreement, then this is Back-Up Purchased Agreement No. 1; if Seller has already entered into one Back-Up Purchase Agreement before this one, then this is Back-Up Purchase Agreement No. 2.**

# Back-Up Contract FORM 1530

## SELLER'S NOTIFICATION OF TERMINATION OF THE PRIMARY PURCHASE AGREEMENT

**Buyer is hereby notified that the Primary Purchase Agreement has terminated and Buyer is now the Primary Purchase Agreement.**

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Seller Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

---

Seller Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

---

Buyer Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

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Buyer Signature \_\_\_\_\_ Date \_\_\_\_\_ Time \_\_\_\_\_

# SELLER'S NOTIFICATION OF MULTIPLE OFFERS – REPLACES INVITATION TO OFFER

- ▶ FORM HAS CHANGED SINCE LEGAL UPDATE – WATCH FOR NEW VIDEO - TO BE RELEASED BY SEPTEMBER 11, 2019

# AMENDMENT AND ADDENDUM HAVE BEEN COMBINED - FORM 5108



## NEW MEXICO ASSOCIATION OF REALTORS® AMENDMENT/ADDENDUM NO. \_\_ - 2019

This Amendment/Addendum is a  part of the  Residential  Commercial  Vacant Land  Farm and Ranch Purchase Agreement (the "Agreement") dated \_\_\_\_\_, \_\_\_\_\_ between \_\_\_\_\_ ("Buyer") and \_\_\_\_\_ ("Seller") relating to the purchase of the following Property:

Address \_\_\_\_\_ City \_\_\_\_\_ Zip Code \_\_\_\_\_

Legal Description  
or see metes and bounds description attached as Exhibit \_\_\_\_\_, \_\_\_\_\_ County, New Mexico.

The Agreement is amended as follows:

# LISTING AGREEMENT FORM 1106



## 8. OFFERS.

- A. **Oral Offers.** Broker shall NOT be required to submit to Seller **ORAL** offers to purchase or lease the Property.
- B. **Additional Offers.** If Seller enters into a written agreement for the sale or lease of the Property, unless that agreement is terminated, or the interest of the Buyer is forfeited, Broker  shall  shall not be required to submit additional offers to Seller.
- C. **Offer Letters.** An Offer Letter is a letter written by a buyer interested in purchasing a home that often provides personal information about the buyer and includes reasons why the buyer wishes to purchase the home and/or why the seller should sell the home to that particular buyer. In a competitive market, when multiple buyers are interested in a home, Offer Letters may assist a seller in determining to whom the seller wishes to sell. **However, sellers should be cautious in accepting Offer Letters from buyers, as Offer Letters have the potential to expose a seller to a claim of discrimination under the Federal Fair Housing Act, as well as the New Mexico Human Rights Act.** Both of these Acts prohibit discriminating against buyers based on their inclusion in certain protected classes (See. Para. 15). Offer Letters may include personal information about a buyer that would indicate to a seller that the buyer falls into one of these protected classes. If/When a seller decides not to sell their home to the buyer who wrote the Offer Letter, that buyer may believe and therefore, claim, that the reason the seller rejected the buyer's offer was because the buyer was a member of one of those protected classes. Seller  WILL  WILL NOT accept Offer Letters from buyers.

# ESTIMATED PROPERTY TAX LEVY



- WHY? Because of 3% cap.
- Produced before an offer is made
- Based on Original List Price
- Production of current tax bill, in addition to the Estimate??? NO – Why??
  - ✓ Estimated Tax Disclosure produced by Assessor must include current or prior year tax
  - ✓ Law does require additional bill reflecting current taxes
  - ✓ Statute specifically states that "The legislature finds that property tax levied on a residential property for the current year can be a misleading guide to property tax levies in the years following the sale
  - ✓ Two separate tax documents may be confusing to buyer



# ESTIMATED PROPERTY TAX LEVY



- Residential property" means property consisting of 1 or more dwellings together with appurtenant structures AND Land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitate the use of the dwellings and appurtenant structures
- "Dwellings" includes both manufactured homes and other structures when used primarily for permanent human habitation, but the term does NOT include structures when used primarily for temporary or transient human habitation such as hotels, motels and similar structures

# USE OF OCCUPANCY AGREEMENTS

- ▶ Not intended for long-term occupancy/tenancy
- ▶ Longer-term occupancy, could create a traditional landlord-tenant relationship
- ▶ NMORRA excludes "*occupancy under a contract of sale of a dwelling unit or the property of which it is part, if the occupant is the purchaser or a person who succeeds to his interest*".
- ▶ Does not explicitly exclude seller occupancies, so, EASY for a seller-occupancy to fall under the NMORRA if the seller stayed "too long". What's "too long"? Anything over a week????

# USE OF OCCUPANCY AGREEMENTS

- ▶ Harder to inadvertently create a traditional tenancy in a buyer-occupancy situation (b/c of the explicit exclusion in Act), but if that buyer stayed long enough, it certainly could happen.
- ▶ Because Occupancy Agreements do not address many landlord-tenant issues, the use of the form is ill advised in longer-term situations.
- ▶ Problems likely to develop in longer-term situations and if NMORRA does not apply and the form doesn't address situation, parties are almost guaranteed to end up in litigation over the issue(s).
- ▶ Broker who recommended the use of one of those Occupancy Agreements in a long-term tenancy/occupancy type situation may be found to have acted negligently.

# LET'S PLAY – HOT-LINE Q & A ELEMENTS OF A BEDROOMS?

- A. Floor area of not less than 70 square feet
- B. Not less than 7 ft in any horizontal direction
- C. Ceiling height no less than 7 ft.
- D. Adequate egress to exterior of home
- E. Direct access to hallway, living room or other common area
- F. No Security bars
- G. Must have a Closet
- H. Must be used for sleeping
- I. Must be shown as bedroom on building plans



# MOBILE HOMES W/O LAND



## \* TRUE OF FALSE

1. You can only sell them if you have a have a real estate license.
2. You can place it in MLS.
3. With a real estate license, you can sell as many you want.
4. You can use NMAR forms or write a contract for buyers/sellers.
5. You can run it through brokerage.
6. If things go wrong, can call your E and O carrier.
7. You can sell it and close it like any other home.

# BROKER LIENS

**On a sale, you can file a lien IF:**

- A. Only Commercial Property: if you have a listing agreement, property sells and seller doesn't pay you
- B. Commercial or Residential Property: if you have a listing agreement, property sells and seller doesn't pay you
- C. Commercial or Residential Property: if you have a Buyer-Broker-Agreement, buyer buys and buyer doesn't pay
- D. Commercial or Residential Property: even with NO listing agreement, if seller verbally agrees to pay you, property sells and seller doesn't pay you
- E. None of the above
- F. All of the above

# NON-DISCLOSURE STATUTE

Seller, lessor/landlord of property, shall not be liable for failure to disclose:

- A. the site of a natural death;
- B. the site of a homicide, suicide, assault, sexual assault or any other crime punishable as a felony;
- C. that a registered sex offender lives in the area;
- D. The site is owned or occupied by a person who was exposed to, infected with or suspected to be infected with the human immunodeficiency virus or diagnosed to be suffering from acquired immune deficiency syndrome or any other disease;
- E. A, B and C
- F. A, B and D
- G. All of the above

# NON-DISCLOSURE STATUTE

- No cause of action shall arise against a seller, lessor or landlord of real property, or any agents involved in such a transaction for failure to disclose to any person property was or is suspected to have been the site of the incidents described in
- Failure to make a disclosure of any of the facts or suspicions shall NOT be deemed to be grounds for termination or rescission of any sale, lease, exchange or any transaction in which an interest in the real property has been or will be conveyed to another.





# Seller's Requirement To Disclose Material Defects

- ▶ No statute that dictates what a seller must disclose (other than the estimated property tax levy)
- ▶ Requirement to disclose comes from case law
- ▶ Actionable fraud is found if a party to a transaction knows of material facts, has a duty to disclose, and remains silent.
- ▶ Duty to disclose may arise if there is knowledge that the other party to a contemplated transaction is acting under a mistaken belief.
- ▶ Duty to disclose may also arise if one has superior knowledge that is not within the reach of the other party or could not have been discovered by *the exercise of reasonable diligence*.
- ▶ NM Courts have long recognized the claim of fraudulent non-disclosure in the context of real estate transactions.

# VARIABLE RATE COMMISSIONS

## THE FOLLOWING ARE TRUE:

- A.** MEANS THE CO-OP BROKER COMMISSION THE LISTING BROKER IS OFFERING TO A CO-OP BROKER IN THE MLS MAY VARY DEPENDING ON VARIOUS FACTORS
- B.** MUST ALWAYS BE SPONTANEOUSLY DISCLOSED TO THE CO-OP BROKER
- C.** MUST ONLY BE DISCLOSED IF ASKED
- D.** AMOUNT OF THE DIFFERENTIAL MUST BE DISCLOSED IN THE MLS
- E.** AMOUNT OF THE DIFFERENTIAL MUST ONLY BE DISCLOSED IF ASKED
- F.** MEANS THE LISTING BROKER MAY ADJUST THE COMMISSION HE/SHE CHARGES THE SELLER UNDER CERTAIN CIRCUMSTANCES
- G.** CO-OP BROKER MUST DISCLOSE TO THEIR BUYER IF THERE IS A VRC

# VARIABLE RATE COMMISSIONS

## ▶ Standard of Practice 3-4

- ▶ REALTORS®, acting as listing brokers, have an affirmative obligation to disclose the existence of dual or variable rate commission arrangements (i.e., listings where one amount of commission is payable if the listing broker's firm is the procuring cause of sale/lease and a different amount of commission is payable if the sale/lease results through the efforts of the seller/landlord or a cooperating broker). The listing broker shall, as soon as practical, disclose the existence of such arrangements to potential cooperating brokers and shall, in response to inquiries from cooperating brokers, disclose the differential that would result in a cooperative transaction or in a sale/lease that results through the efforts of the seller/landlord. If the cooperating broker is a buyer/tenant representative, the buyer/tenant representative must disclose such information to their client before the client makes an offer to purchase or lease. *(Amended 1/02)*

# Independent contractor status

## QB'S and TEAMS

### Agreement

Independent contractor agreement, but it's not determinative – courts will look at reality of relationship.

### Own Materials

- Car
- Computer
- Phone
- Pay their own business expenses

### No Mandatory Anything

- Desk Time
- Meetings
- Phone Time
- Dress Code

# EPA LBP ENFORCEMENT

- ▶ Seller signed an Exclusive Listing Agreement with broker. House was built around 1900.
- ▶ Seller knew about presence of LBP hazards because he had home tested for lead in 2009 after his son developed lead poisoning. Seller showed Broker copy of LBP report.
- ▶ Prospective buyers offered to buy house.
- ▶ Buyer made offer. As part of sales contract, broker indicated that seller had NO knowledge of LBP and that there were no records indicating such potential hazards.
- ▶ This contradicted Broker's signed statement to an earlier prospective buyer, who had backed out of the deal after being notified about and reviewing the LBP records.
- ▶ Second prospective buyers – lacking the legally required disclosure of the lead testing report and unaware of the known lead hazards – purchased the residence.
- ▶ Buyer's child was diagnosed with lead poisoning.
- ▶ Broker plead guilty to knowingly failing to provide a required lead paint hazard warning notice, a criminal misdemeanor and was fined \$1,000 and ordered to pay \$53,000 to the victim.

# FHA Condo Rule

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- ▶ **August 14, 2019**, HUD released final rule on project approval for single-family condos insured by FHA.
- ▶ **Single Unit Approval (SUA) is Back!** Following the Great Recession, HUD suspended the ability of FHA borrowers to obtain financing for a condominium purchase in a non-FHA approved property, what was often referred to as “spot loans.” Under new rule, FHA borrowers can obtain on non- FHA approved condo properties that meet the following requirements:
  - ▶ at least five units;
  - ▶ a limited concentration of FHA-insured units;
  - ▶ at least 50 percent owner-occupancy; and
  - ▶ a maximum of 35 percent commercial space.

# FHA Condo Rule

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## ▶ Re-Certification Requirements

- ▶ Increased the certification period for FHA condo properties from 2 to 3 years, with an additional 6-month grace period after the certification end date to submit re-certification materials, thus, reducing costly and time-consuming efforts condominium associations face to maintain FHA approval.
- ▶ Condo associations will continue to be able to submit an updated re-certification package rather than the full certification package each time

# FHA Condo Rule



## ▶ Commercial Space

- ▶ Increased the commercial space allowed in an FHA approved condo property from 25 to 35 percent
- ▶ Will allow exceptions up to 49 percent.
- ▶ HUD has the discretion to issue mortgagee letters to change the allowable commercial space to be within 25 and 55 percent, if necessary

## ▶ Owner-Occupancy Requirement

- ▶ Current owner-occupancy requirement: 50 percent
- ▶ For properties that are over 12 months old with less than 10 percent of their units in arrears, HUD may approve an owner-occupancy level as low as 35 percent.
- ▶ This removes the previous onerous requirement that properties demonstrate reserves at 20 percent or higher to allow for reduced owner-occupancy
- ▶ Under the final rule, HUD has the ability to establish a different owner-occupancy level by mortgagee letter between 30 and 75 percent, which allows for much more flexibility in responding to changing market needs.



# HUD SAYS- PAYMENTS FROM HOME WARRANTY COMPANIES

- ▶ Must be for services that are “actual, necessary and distinct from the primary services provided” by REALTOR®.
- ▶ Cannot pay compensation to a REALTOR® for the “mere taking of an application.”
- ▶ Even where the REALTOR®’s services are “actual, necessary and distinct”, HUD must be satisfied that the amount of the payment is “reasonably related” to the value of the services being
- ▶ **CANNOT** pay a REALTOR® on a per-transaction basis if the only services provided by that REALTOR® are marketing services directed to that REALTOR®’s own clients and customers. Regardless of the work involved, such activities constitute “referrals” rather than marketing services.

# HUD SAYS- HOME WARRANTY COMPANY PAYMENTS

- ▶ Examples of services that a REALTOR® can provide for (and receive payment from) a Home Warranty company:
  - ▶ conducting actual inspections of items to be covered by the warranty to identify pre-existing conditions;
  - ▶ recording serial numbers of the items to be covered;
  - ▶ documenting the condition of the covered items by taking pictures;
  - ▶ reporting to the home warranty company regarding inspections.

# HUD SAYS- HOME WARRANTY COMPANY PAYMENTS

- ▶ HUD has indicated that it would look more favorably at a contractual relationship between a REALTOR® and a home warranty company if:
  - ▶ the contract makes the REALTOR® the legal agent of the home warranty company such that the home warranty company assumes responsibility for REALTOR®'s representations;
  - ▶ the REALTOR® discloses his/her compensation arrangement to his/her clients and makes clear to them that they can purchase home warranties from other companies (or not at all).



# SOCIAL MEDIA ADVERTISING AND THE FAIR HOUSING

- ▶ HUD and the JD's interest in how the FHA applies to social media marketing suggests that private persons and groups, as well as state and federal regulators likely will start scrutinizing how housing advertisers use big data and targeted advertising to market, sell and rent housing.
- ▶ To limit the likelihood your advertising on social media (for properties or services) will be considered discriminatory, consider these "Best Practices":
  - ▶ Create an advertising plan prior to marketing and confirm that your plan markets to a broad demographic;
  - ▶ Avoid using any available advertising filter based on a classes protected under the FFAH **and the New Mexico Human Rights Act**, which includes race, color, religion, national origin, sex, disability, familial status, sexual orientation, gender identity and spousal affiliation;
  - ▶ Consider engaging an experienced digital marketing firm that is familiar with advertising on social media platforms.

# TOP 10 TIPS TO AVOID LAWSUITS

## ▶ **Maintain good communications**

- ▶ Keep your client informed of all significant developments in an offer, contract, or purchase, and responding promptly—within 24 hours—to clients' messages. In this e-mail age, there's no excuse not to!

## ▶ **Maintain good records**

- ▶ After each telephone call, immediately send an email confirming what was discussed on the call, the agreement reached and the plan going forward.
- ▶ Keep well organized records of all substantive communications with client - copies of letters and emails, dated notes of telephone calls; it's PARAMOUNT in a lawsuit

## ▶ **Avoid giving false expectations**

- ▶ Do not try to protect your clients from bad news. If obstacles arise at any time in the course of a transaction, your client will rely on you to inform them promptly, to provide a complete explanation, and to give your honest assessment of the risks and benefits of the clients' options going forward.
- ▶ Do not "oversell" and raise the expectations of your client. It is better to give a client reasonable and sage advice and to manage their expectations.

# TOP 10 TIPS TO AVOID LAWSUITS

## ▶ Have the client make the hard decisions

- ▶ Clients rely on their brokers to provide a complete and accurate assessment of all risks and benefits of any transaction, but the CLIENT must decide how to proceed in light of your assessment. Do not allow a client to say, "It is up to you," because if your decision does not yield the desired results, the client may hold you responsible.
- ▶ Decisions such as whether to get a home inspection or list at a certain price are best made by the CLIENT. You can provide them an assessment of the risks and possible choices, but ultimately, the decision is up to the CLIENT. A client who is empowered to direct the deal (w/ your advice) is less likely to blame YOU if things do not well.

## ▶ Document your advice and the client's decisions

- ▶ Whatever decision a client makes, be certain there is a written record of the advice you provided the client to inform their decision. Should a client take a course you advise against, follow his or her instructions (whenever possible), but state in writing that you would recommend against that approach.
- ▶ If you simply cannot follow the course of action requested from the client (for example, because it would be illegal, unethical or dishonest), advise the client immediately and explain why. If the client insists in that instance, you may need to withdraw as the client's agent.

# TOP 10 TIPS TO AVOID LAWSUITS

## ▶ **Avoid filing fee disputes against the client**

- ▶ Pursuing mediation or litigation over a commission against a client can often lead to a client filing a lawsuit or ethical grievance against you. Even if your client has wronged you, and even if you are, indisputably, entitled to relief, take a moment to evaluate whether that relief would outweigh the cost of defending against the lawsuit or grievance that is likely to ensue.
- ▶ Do not consider only the financial cost, e.g., your deductible and insurance premium, but also the time you would have to invest in your defense and the risk to your reputation, whatever the result. In all but the most egregious circumstances, writing off a loss or walking away from a dispute is often the more cost-effective path.

## ▶ **Avoid the extremely difficult client**

Consider carefully whether to retain or stay with clients: who make unreasonable demands; who constantly question your analysis or advice; who refuse to communicate effectively; and/ or who have fired or speak badly of your peers. Remember, a client prone to angry or irrational behavior may, eventually, direct his or her ire at you, regardless how careful you have been to provide the utmost service.

# TOP 10 TIPS TO AVOID LAWSUITS

## ▶ **Avoid the unethical, discriminatory and/or fraudulent client**

- ▶ Worse than a difficult client is a client who asks that you engage in unethical, discriminatory or fraudulent conduct.
- ▶ This can expose you to civil actions & grievance proceedings, AND fraud by your client with your knowledge can expose you to criminal actions as well.
- ▶ If a client insists you take some unethical, discriminatory or dishonest action, even after you counsel against it, terminate that relationship immediately.

## ▶ **Do NOT favor your interests over your client's Interests, or one client's interests over another**

- ▶ Always be mindful of, and avoid actual or potential conflicts of interest. There is no quicker way to embroil yourself in a lawsuit or grievance
- ▶ The appearance of a conflict of interest is enough to instigate an adverse action. Immediately notify your client in the event of a conflict arises



# TOP 10 TIPS TO AVOID LAWSUITS

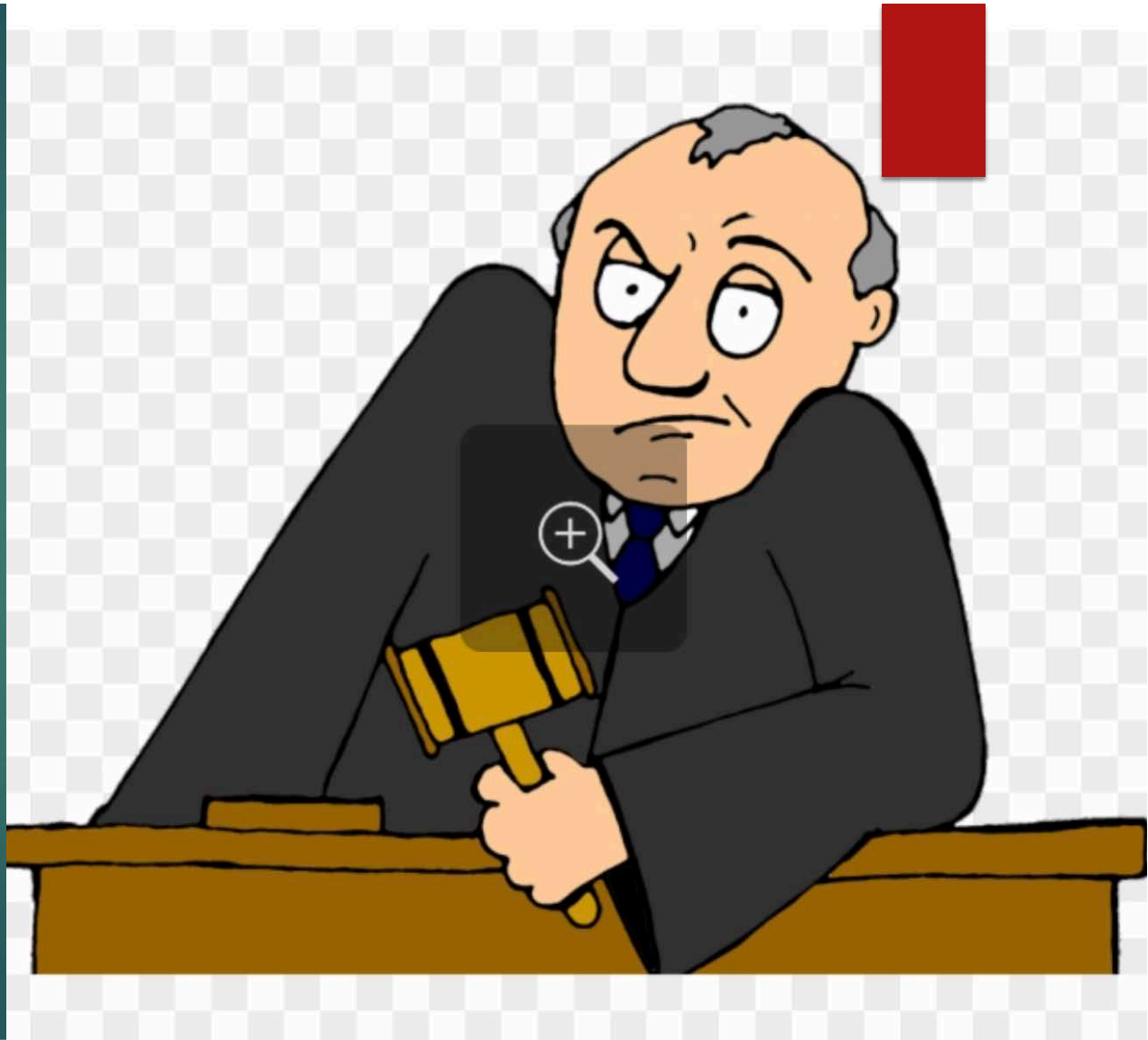
## ▶ **Be proactive in addressing client complaints**

- ▶ Even the best of relationships can quickly turn sour if the client perceives that you are not responsive to concerns they voice to you.
- ▶ It may not be enough to simply acknowledge a complaint. You most likely need to respond with information pertaining to the client's concerns and a plan to address them.
- ▶ Whether or not you believe you are at fault, take responsibility for remedying the situation, including presenting the client with options and your proposals for how to avoid the issue going forward.

## ▶ **Don't forget liability insurance**

- ▶ Although having an insurance policy will not keep you out of a lawsuit, it can certainly give you comfort and some protection from personal liability. NOTIFY EARLY!!!
- ▶ And don't forget about tail coverage!

# CASE LAW



## **Vihstadt vs.**

## **NM Real Estate Commission- 1988**

- ▶ Key Realty, Inc, bought property from First National Bank of Lea County; Key Realty obtained a note and mortgage from another lender
- ▶ Key Realty sold property to Vihstadt (a broker) on a wrap-around REC
- ▶ Vihstadt engaged Smith which was in the business of brokering RECs, to find a buyer for the REC. Vihstadt identified himself as a real estate broker,
- ▶ Smith found buyer for REC, Ronald Rodeman and was paid a commission of \$600 for the sale.
- ▶ After making several payments to Rodeman, Vihstadt defaulted on the REC and on the underlying mortgage. Underlying mortgage holder foreclosed and Rodeman lost his investment.
- ▶ Rodeman filed a complaint with the REC against Vihstadt alleging that the Vihstadts owed him money under the REC, had repeatedly submitted late payments, had defaulted on the underlying mortgage, etc.
- ▶ The REC held a hearing and revoked Vihstadt's license for "bad faith, untrustworthiness, impropriety and dishonesty."

# Vihstadt vs. NM Real Estate Commission - 1988

- ▶ Vihstadt appealed Commission's Decision. District Ct. affirmed Commission's Decision. Vihstadt appealed again.
- ▶ The sole issue on appeal: whether the Commission lacked jurisdiction to revoke Vihstadt's license.
- ▶ Vihstadt said Commission lacked jurisdiction because he was not acting in the capacity of a broker during the event giving rise to the complaint -- the sale of the REC to Rodeman
- ▶ Commission is authorized to revoke a broker's license if he is found guilty of any of the acts set forth in Section [61-29-12](#).
- ▶ BUT, for Commission to have jurisdiction, broker must engage in enumerated activities while acting as a broker!

# Vihstadt vs.

## NM Real Estate Commission - 1988

- ▶ Real Estate Broker is a person, business association or corporation, who for a salary, fee, commission or valuable consideration lists, sells or offers for sale, buys or offers to buy, or negotiates **the purchase or sale or exchange of real estate** \* \* \* as a whole or partial vocation. (Emphasis added.)
- ▶ A "broker" is generally defined as "an agent who, for a commission \* \* \* bargains \* \* \* in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to \* \* \* the sale or purchase of any form of property, real or personal \* \* \*."

## Vihstadt vs.

## NM Real Estate Commission

- ▶ Undisputed facts show that Smith acted as an intermediary between Key Realty and Rodeman
- ▶ Smith agreed to sell Key Realty's interest in the REC for which she received a commission of \$600.
- ▶ Smith was the only person with whom Rodeman dealt with when he purchased the REC . Rodeman never met or spoke to Vihstadt until the Vihstadts defaulted
- ▶ Vihstadt did not engage in any activities of selling, or offering to sell, or negotiating the purchase or sale or exchange of real estate or a real estate contract; he was not employed as a "broker"; Smith was the "broker" as is generally defined above.
- ▶ **SIDE NOTE:** Smith was not engaged in the business of a real estate broker, who sells or negotiates the purchase or sale of real estate. Smith was acting as a note broker, a seller of commercial paper.

***Vihstadt vs.***

***NM Real Estate Commission - 1988***

- ▶ Because Vihstadt was not acting as a real estate broker during the sale of the real estate contract, we conclude that the Commission lacked jurisdiction.

## Vihstadt vs.

## NM Real Estate Commission - 1988

- ▶ **REC:** Has jurisdiction over Vihstadt because he was acting as a "broker" during the sale of the property from Key Realty to Vihstadts.
- ▶ **CT:** NO!!! Vihstadt was not acting in the capacity of a real estate broker during the Key Realty/Vihstadts transaction. **There was no real estate broker was involved in this sale. There was absolutely no real estate broker intermediary between Key Realty, as the seller, and the Vihstadts, as the buyers.**
- ▶ **REC:** relies on **Poorbaugh v. New Mexico Real Estate Comm'n**, for the proposition that it has jurisdiction over a real estate broker who is buying or selling property for himself.
- ▶ **CT:** **Poorbaugh** is not helpful. In **Poorbaugh**, we held that the Commission had jurisdiction over a real estate broker who was buying and selling real estate for himself because he held himself out as a broker to a buyer and seller.



# **Fred W. Poorbaugh vs. New Mexico Real Estate COMMISSION**

- ▶ Poorbaugh argued that since he bought and sold the land for himself, he was not acting as a "broker."
- ▶ REC claimed that because he represented to the buyer and seller that he was a broker, he was in fact a "broker" within the meaning of § 67-24-20 and therefore it had jurisdiction
- ▶ Section 67-24-29 provides that the Commission can revoke a broker's license if, while engaged in any activity as a broker, he is guilty of any of the acts enumerated

# **Fred W. Poorbaugh vs. New Mexico Real Estate Commission**

- ▶ Section 67-24-29 provides that the Commission can revoke a broker's license if, while engaged in any activity **as a broker**, he is guilty of any of the acts enumerated in the section.
- ▶ We hold that under the NM statute if Poorbaugh **represented to either the buyer or seller that he was acting as a broker**, the Commission has jurisdiction.
- ▶ Whether Poorbaugh made such a representation is a factual determination to be made by the trier of fact.
- ▶ **A licensed broker has the burden of showing that there is no possibility of misunderstanding or confusion as to his status when he purports to act for himself.**

# 16.61.32.8. Advertisements

- ▶ A broker advertising to, sell, or exchange real property which the broker owns or partially owns shall indicate within such advertising, including signs, that the broker owns the real property.
- ▶ Disclosure of such ownership must also be made in the listing contract, purchase agreement, or exchange agreement.
- ▶ If an owner-broker engages a third party broker to list the owner-broker's property, the third party broker is not required to make an owner-broker disclosure in advertising and signs, but such disclosure is required in the listing contract, purchase agreement or exchange agreement.
- ▶ A broker advertising to rent or lease real property which the broker owns or partially owns is not required to disclose such ownership in advertising and signs, but is required to make such disclosure in rental or lease agreements.

# COLORADO CASE

- ▶ CO broker entered into contracts with 3 clients that unbundled services he would provide in exchange for a flat fee. In one instance, the Broker agreed to only input the listing into a MLS. In the other two listings, he agreed to provide a yard sign, a lock box, centralized showing services, and listing the properties in the MLS. The Broker was acting as a transaction broker.
- ▶ An anonymous complaint was filed with the CO REC alleging that the Broker failed to provide statutorily mandated services.
- ▶ REC found that duties listed in state's transaction brokerage statute are mandatory and cannot be limited via contract. Broker challenged the Commission's discipline.
- ▶ CO COURT OF APPEALS affirmed Commission's discipline. Broker argued that statute allowed him contract out of the duties contained in the transaction brokerage statute and that the Commission's discipline against him violated federal antitrust laws.
- ▶ Court found statutory duties contained in law were mandatory.
- ▶ Colorado's statutes provide that a licensee providing real estate services must either act as a single agent or a transaction broker. A single agent represents only one party in the transaction and owes certain duties to his/her client. Transaction brokers do not represent either party in the transaction and also owe certain duties to their clients, but these duties are more limited than a single agent.

# COLORADO CASE

- ▶ Transaction broker's duties include assisting clients with negotiations, communication, advertising, and closing. Looking at legislative history, court found that there was no evidence that legislature intended for licensees to unbundle services and instead concluded that the statutorily defined duties are mandatory.
- ▶ Court determined that nothing in state's transaction brokerage statute allowed broker to avoid requirements of statute. Affirmed decision of Commission.
- ▶ While the state statute did state that the licensee could take on duties "in addition to or different from" the statutorily described duties so long as they are disclosed to the clients, the court found that this language did not allow the licensees to provide fewer services when acting as a transaction broker. More services, not less.
- ▶ Next, the court rejected the Broker's argument that the Commission's actions violated federal antitrust law. Unlike *North Carolina Dental* case, here Commission was enforcing state statutory provisions and **not its own regulations**. Court ruled that the Commission was appropriately acting within its regulatory duties prescribed by statute and thus rejected argument that Commission was suppressing competition.



**HOW WOULD THIS PLAY OUT IN  
NEW MEXICO???**

**LET'S ANALYZE/HYPOTHESIZE,  
SHALL WE.....**

# NEW MEXICO LAW

- Duties owed by brokers in NM are dictated by regulation, not statute
- ▶ Broker Duties allow brokers to “contract away” certain obligations: “Unless otherwise agreed to in writing by the party, assistance to the party in completing the transaction including:
  - ▶ timely presentation of and response to all written offers or counteroffers; and
  - ▶ active participation in assisting in complying with the terms and conditions of the contract and with the finalization of the transaction”

# KW SUED FOR AUTO COLD CALLING

A NC resident and a home seller alleges KW marketing plan for its agents resulted in at least 3 unsolicited, autodialed and prerecorded calls from KW agents to his personal cell phone after his property listing expired on the MLS. The Complaint alleges:

- Hayhurst had previously listed his property with RE/MAX and KW agents called his cell number to relist with KW. His number was on the DNC list since 2003 and he did not give any prior express consent to receive these calls
- KW's marketing plan directs realtors to use certain prescribed practices to market KW's' realty services, including unsolicited, prerecorded and autodialed calls to cellular numbers and other numbers registered on the DNC



# KW SUED FOR AUTO COLD CALLING

- “A key component” of KW’s agent marketing plan has been for its agents to buy lists of potential leads for listings from lead provider companies such as Landvoice Data or RedX, which generate personal phone numbers associated with expired MLS listings, including phone numbers registered on the DNC Registry, and which provide a web-hosted auto dialer for agents to make marketing calls en masse to those numbers without the recipients’ consent.
- One of the KW agents who called Hayhurst said she obtained his phone number through RedX
- In fact, KW’s’ marketing plan for franchisees — involving purchasing lists of leads and autodialing them — is reinforced at the highest levels of KW’s organization.
- ▶ Seeks a minimum of \$500 in damages and up to \$1,500 in damages, for each violation of the TCPA for each member of the proposed class, which the complaint says could include thousands of people. Also, actual and/or statutory damages and costs and an injunction requiring KW STOP!

# KW SUED FOR ANTI-TRUST VIOLATIONS

## ▶ Complaint Allegations:

- ▶ The suit points to statements made by KW CEO and KW training scripts as evidence that the Austin-based brokerage and franchisor **steers buyers away from listings offering low commissions and discourages sellers from offering lower buyer broker commissions because of steering, thereby keeping buyer broker commissions at a standard level of around 3 percent**
- ▶ KW “instructs seller-brokers to tell home sellers that ‘[t]he standard real estate commission has stabilized, over the years, at right around 6 percent’ and that ‘you’re putting yourself at a disadvantage competitively when you reduce your commission.’ This is a message that KW has also broadcast to the entire industry, including its purported competitor brokerages”
- ▶ KW, through its professional education arm KW University, **trains its listing brokers to “dissuade” sellers from reducing the buyer-broker commission**

*CHRISTOPHER  
MOEHL  
VS.  
NAR,  
REALOLGY,  
HOMESERVICES  
OF AMERICA,  
RE/MAX AND  
KW REALTY*

## WHO FILED IT?

- HOMES SELLERS WHO LISTED THEIR HOMES ON ONE OF 20 MLSs

## WHY?

- Allege Defendants conspired to require home sellers to pay the broker representing the buyer of their homes, and to do so at an inflated amount in violation of federal anti trust laws

# MOEHRL VS. NAR, Et. Al. BASIS ANTI-TRUST LAWSUIT

- Centers around NAR's Adoption of Rule that requires all brokers to make a blanket, non-negotiable offer of compensation when listing property in MLS
- Brokers essentially required to market property through MLS; MLSs are controlled by local NAR Associations
- Sellers required to pay cost that would be borne by buyers in a competitive market

# MOEHRL VS. NAR, Et. Al.

## CLAIMS:

WITHOUT RULE, BUYERS WOULD PAY THEIR OWN BROKERS AND BUYERS' BROKERS WOULD COMPETE TO BE RETAINED BY OFFERING A LOWER COMMISSION

WITH RULE PRICE COMPETITION AMONG BUYERS' BROKERS IS RESTRAINED BECAUSE BUYER DOES NOT PAY OR NEGOTIATE HIS BROKER'S COMMISSION

AND MOST BUYERS' BROKERS WON'T SHOW HOMES TO THEIR CLIENTS IF SELLER/LISTING BROKER IS OFFERING A LOWER COMMISSION OR WILL SHOW THOSE HOMES LAST

# **MOEHRL vs. NAR, Et. Al.**

## **FACTS ALLEGED**

- ▶ In more competitive foreign markets, home buyers pay their brokers if they choose to use one, and they pay less than 1/2 the rate paid to buyer's brokers in the US
- ▶ Buyer's often find their own homes, but buyers' brokers continue to be paid 2.5-3% despite their diminishing role
- ▶ Inflated buyer's broker commissions have inflated total commissions paid by home sellers, such as Plaintiff

# *MOEHRL vs. NAR, Et. Al.*

## ANTI-TRUST FACTS ALLEGED

- ❖ NAR requires members AND MLSs to comply with NAR's MLS Handbook
- ❖ Sanctions for failing to do so
- ❖ No Professional Liability Insurance if don't comply with NAR Handbook
- ❖ NAR Reviews for Compliance
- ❖ Franchisees collaborated with local Realtor associations to implement, comply and enforce NAR's rules

# ***MOEHRL vs. NAR, Et. Al.***

## **ANTI-TRUST ARGUMENT**

- Price competition among buyers' brokers has been restrained.
- Competition among home buyers has been restrained by their inability to compete for the purchase of a home by lowering the buyer broker commission
- NAR uses its control of MLSs and Defendant Franchisors use their agreement with their local franchisees to require brokers in local residential real estate markets to adhere to NAR's rules, including Co-Op Broker Compensation Rule.



# MOEHRL vs. NAR, Et. Al.

## RELIEF REQUESTED

- Court Certify as a Class Action
- Award
  - Plaintiff and the other members of the Class damages and/or restitution;
  - Pre- and post-judgment interest;
  - Costs of suit, including reasonable attorneys' fees and expenses;
  - **Permanent injunction**, enjoining Defendants from continuing to require sellers to pay the buyer broker and from continuing to restrict competition among buyer brokers

## NAR'S FORMAL RESPONSE

# MOTION TO DISMISS – FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED – MOTION NOT LIKELY GRANTED

- Several state and federal courts have considered challenges to MLSs, and they have concluded that MLSs benefit consumers b/c they encourage brokers to share listing information and cooperate when serving the interests of their clients.
- NAR believes strongly that the lawsuit is baseless
- Be cautious about discussing the case online
- Direct all media inquiries to NAR's VP of Media Communications, Mantill Williams ([mwilliams@realtors.org](mailto:mwilliams@realtors.org)).
- If you have any questions about the legal allegations, please direct those to Lesley Muchow ([lmuchow@realtors.org](mailto:lmuchow@realtors.org)).

# NMAR VOICE - LEGAL CORNER

- Sent via email within the first week or after end of quarter
- Interesting News regarding NMAR, Legislation, Housing Stats, REC, NAR, Events and the Legal Corner
- Legal Corner Topics in the past:
  - Social Media Advertising
  - Posting and Reposting Listings – Is It Allowed?
  - What's It Means to be a Non-Disclosure State
  - Audio Video Surveillance in Homes
  - Title Company Rule Changes Impacting Your Clients
  - Selling Properties with Solar Panels
  - Highlights from Legal Updates
  - Revoking Offers/Counteroffers
  - Revocation of Offers/Counteroffers

Not Receiving It?

Contact Diane at NMAR - [diane@nmrealtor.com](mailto:diane@nmrealtor.com)



# NMAR LEGAL HOT LINE

(505) 821-1583 (ABQ AREA)

OR

1-877-699-7266 (STATE-WIDE)

[LEGALHOTLINE@NMREALTOR.COM](mailto:LEGALHOTLINE@NMREALTOR.COM)



MONDAY – FRIDAY  
9:00 TO 1:00 PM





*THANK  
you!*