

Real Estate Agent Standards of Care

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Note

While a great deal of care has been taken to provide current and accurate information, the ideas, suggestions, general principles and conclusions presented in this short course are subject to multiple additional factors. If faced with a situation relevant to the course content you are urged to consult an attorney regarding any points of law. This course should not be used as a substitute for competent legal advice.

I. Course Examination

**MN Commerce
Department
Requirement—35
Questions/26 or
more correct.**

**True/False and
Multiple Choice
Questions**

II. Risk

A. Definition of risk

1. A dangerous element or factor

B. The need to reduce or eliminate risk in real estate transactions

Recent state enforcement actions

- 1. Altered dates on a purchase agreement and failure to properly release trust funds; \$20,000 fine**
- 2. Fraudulent, dishonest and deceptive practice for failure to disclose material facts; \$10,000 fine**
- 3. Failure to disclose dual agency and brought suit for a commission for which the broker was not entitled; \$6,000 fine**
- 4. Failure to identify company name in advertising; \$5,000 fine**

Recent state enforcement actions (cont.)

5. Made material misrepresentations in the advertisement of the sale of real property; \$5,000 fine

6. Agent converted earnest money funds for his own use; \$4,000 fine

7. Failure to comply with the Truth in Housing ordinance; \$2,000 fine

III. Agency Issues

A. Disclosure (82.67)

1. Early in the transaction

a. “First substantive contact”

Disclosure Options

- a. Seller's broker**
- b. Subagent**
- c. Buyer's broker**
- d. Dual agent**
- e. Facilitator**

Fiduciary duties

- a. Obedience**
- b. Loyalty**
- c. Disclosure**
- d. Confidentiality**
- e. Accounting**
- f. Reasonable care**

Breach of contract issues

1. Intruding on the exclusive agency relationship of another broker

2. Termination

a. Listing contracts

b. Buyer representation

c. Facilitator services agreement

Disclosure Requirements (82.68)

A. Agent can only conduct business on behalf of the broker to whom licensed

B. Financial interest

1. Prior to negotiations; Disclosure must include:

a. Licensee is licensed real estate agent/broker

b. Directly or indirectly through a 3rd party

c. Buyer or seller is relative or business associate

d. Disclosure must be in writing

Material facts

- 1. Must disclose all material factors the agent is aware of**
- 2. “Material” definition**
- 3. Agent liability: Recognizing obvious issues and red flags**
- 4aa. Must disclose contrary information**

Material facts (Exceptions)

a. Suicide, natural death,
accidental death

aa. Murder is NOT an exception

b. HIV

c. Perceived paranormal activity

Material facts (Exceptions)

d. Group and/or nursing homes

e. Sex offender if written notice of information is provided

f. Information contained in an inspection report

aa. Must disclose contrary information

Statutes place same disclosure obligation on residential sellers

6. Sellers (not agents) have options

a. Provide a buyer with a 3rd party inspection report

b. Request that the buyer waive the seller disclosure obligation

7. Seller's disclosure obligation is applicable to single family residences

Real Estate Agent/Broker Disclosure

8. Real estate agent/broker's disclosure obligation is obligatory in all real estate

transactions that the licensee is involved in;

9. Consequences of inadequate disclosure

a. Cancellation of purchase agreement

b. Seller and listing broker subject to a lawsuit for claims for damages

c. Ethics and DOC complaints filed against the agent and broker

Advertising (82.69)

1. Licensee disclosure in ALL advertising

a. Property of others

b. Agent-owner

2. Individual agent

a. Brokerage name must be included in a prominent manner

Advertising

3. Team names

a. Broker must authorize the use of team name

b. Team name does not need to include the name of the team members

c. Brokerage name must be more prominently than the team name

Compensation (82.70)

- 1. All commissions and fees must go through the broker**
 - a. Requirement to disclose all compensation**
- 2. Referral fees**
 - a. Referrals cannot be paid to unlicensed individuals**
 - aa. Includes gift cards**
 - b. Referral fees can be paid to licensed brokerages outside of MN**

Compensation

3. Sharing commissions

a. Rebates can be given to parties involved in the transaction

4. Brokers may pay commissions to an agent's LLC, corporation or sole

proprietorship if the agent is the sole owner

Compensation

5. Listing brokers have no claim to trust funds

6.Actions

- **Proof of license**
- **Written agreement**
- **Agency disclosure (residential)**
- **No arbitration/hold harmless in purchase agreement**

V. Negotiations (82.71)

A. Requirement to present all written offers promptly

1. Agents cannot substitute their own judgment for that of the sellers

B. Cannot disclose terms of an offer prior to presentation

1. Seller may authorize agent to “shop” terms of an offer

2. Impact of dual agency

Negotiations

C. Obligation to provide a copy of documents to the party when signed

D. Obligation to provide closing statements detailing all disbursements

VI. Fraudulent, Deceptive and Dishonest Practices (82.81 Subd. 12)

A. Cannot represent membership in a real estate related organization in which

licensee is not a member

B. Cannot make any material misrepresentation, or false and misleading

statements, or allow another to do so

C. Cannot comingle trust funds with licensee's personal funds

Fraudulent, Deceptive and Dishonest Practices

**D. Cannot engage in
anticompetitive activity**

**E. Cannot give money or goods
to an unlicensed individual for
the referral of**

business

VII. Reasons for Discipline (82.82)

A. Incomplete, false or misleading application

B. Fraudulent, deceptive or dishonest practice

C. Court order

D. Failure to supervise causing harm to public

Reasons for Discipline

E. Violate a provision of Chapter 82

F. Shown to be incompetent, untrustworthy or financially irresponsible

G. Conflict of interest

H. MN. Tax liability (>\$500)

VIII. Discipline (82.82)

A. Denial

B. Suspension

C. Revocation

D. Censure

IX. Contracts (82.66)

A. Listing requirements

1. Written authorization

2. Contents

a. Definite expiration date

b. Address and description of the property

Contracts (82.66)

- c. List price and any terms required by the seller**
- d. Amount or basis of compensation (commission)**
- e. Clear statement of the events that will entitle a broker to a commission**
- f. Clear statement if the agreement can be cancelled and under what terms**
- g. Override clause**

Contracts

h. Dual agency disclosure

i. A notice about closing services

j. A notice about a subsequent listing

Prohibition of listing agreements

- a. Holdover clause/Automatic extension**
- b. Override longer than 6 months**
 - aa. 2 years if for the sale of a business**
 - bb. Must provide a protective list within 72 hours**
- c. Advertising**

B. Buyer representation requirements (82.66)

- **Written authorization**
- **Contents**
 - **Definite expiration date**
 - **Amount of basis of compensation (commission)**
 - **Clear statement about the events that will entitle a broker to a commission**
 - **The services included**
 - **Clear statement if the contract can be cancelled and under what terms**
 - **Override clause**
 - **Dual agency disclosure**
 - **A notice about a subsequent buyer rep agreement**

Buyer representation requirements

- **Clear statement if the contract can be cancelled and under what terms**
- **Override clause**
- **Dual agency disclosure**
- **A notice about a subsequent buyer rep agreement**

Buyer representation prohibitions

- a. Holdover clause/Automatic extension
- b. Override clause longer than 6 months
 - aa. Must provide protective list within 72 hours
 - bb. Protective list – burden on licensee

Facilitator agreements

- 1. The default relationship in MN**
 - 2. Written agreement NOT required**
 - 3. Confidentiality is the only required fiduciary duty**
- a. Services vs. fiduciary duties**

Facilitator agreements

D. Purchase agreements

- Pitfalls
- Delivery

E. Cancellation

- Cancellation of residential purchase agreement
- Breach of contract vs. cancellation of contract
- Methods of cancellation
 - Voluntary
 - Statutory – M.S. 559.217 aa. Residential property only

bb. Can be filed by either the buyer or seller

Facilitator agreements

4. Right to Cure – 15 days

- Purchase agreement terms do not automatically cancel
- E.G. – closing date

5. Declaratory cancellation – 15 days

- Purchase agreement terms do automatically cancel
- E.G. – inspection

Facilitator agreements

6. Statutory form must include

- **Property description**
- **Purchase agreement date and party names**
- **Unfulfilled condition or the reason for the default**
- **15 day notice stating aa. Right to Cure and compliance with term of the purchase agreement or obtain a court order**

bb. Declaratory where the purchase agreement has been cancelled unless a court order has been obtained

Facilitator agreements

7. Service of process

- Personal service
- Must be served on the other party
- Must serve third party

8. Affidavit must include

- Notice properly served
- Other party did not comply and/or receipt of a court order
- Serve affidavit on third party to receive earnest money

Facilitator agreements

9. Attorney's fees

a. Prevailing party not to exceed \$3,000

10. What happens if both parties initiate a cancellation

- One party initiates a cancellation
- The other party responds with a cancellation before the deadline of the first cancellation
- Purchase agreement is cancelled as of the date of the second cancellation
- Earnest money is determined separately
- aa. Who filed first is not a factor

X. Trust

Accounts (82.75)

Deposit

- 3 business days from acceptance of the purchase agreement
- Directly to the party
- Agreement to hold

B. If offer is rejected

1. Earnest money is refunded the next business day

C. No commingling

1. Exception: Minimum balance is required

X. Trust Accounts

D. Interest

- Housing Trust Fund
- Separate account

E. Closing of a trust account requires a 10 day notice to the DOC

XI. Data Security

A. Importance of data security and privacy

1. Personal information collected during a real estate transaction

B. What happens if this data is breached

- Fraud
- Identity theft

C. Laws that govern

- MN statutes §§ 325E.61 and 325E.64
- Gramm Leach Bliley (federal)
- Privacy rule
- Safeguards Rule (a.k.a. The “Red Flag” Rule)

XI. Data Security

D. Brokers need to develop a company policy

- **Compliance required at the office and at home and/or off sites (agents)**
- **Policy needs to include discipline for agents who do not comply**
- **E. Devices and documents**
 - **Cell phones**
 - **Computers, laptops, iPads**
 - **Photo copiers**
 - **Electronic and hard copy of files**
 - **Brief cases, purses, totes, etc.**

Data Security

Proper destruction required

How data breaches can occur

- **Break-ins (Smash and grabs)**
- **Unsecured cell phones, laptops, iPads**

principals to a sound data security program (FTC)

1. Take stock

a. Information inventory checklist

aa. Who has access?

bb. Who maintains?

cc. Consumer opt-out policy

principals to a sound data security program (FTC)

2. Scale down

- **Assess the information you collect**
- **Document retention policy**
- **Tips for maintaining security**

principals to a sound data security program (FTC)

3. Lock it

a. Protect the information you collect

aa. Checklist for protecting personal information

- i Physical security
- ii Electronic security
- iii Employee training
- iv Security practices of contractors and service providers

Five key principals to a sound data security program (FTC)

4. Pitch it

a. Proper disposal of personal information

aa. Checklist for creating a Document Retention Policy

- i Accounting records
- ii Corporate records
- lii Employment records
- lv Legal documents

Five key principals to a sound data security program (FTC)

v MLS documents

vi Property records

vii Pension and profit sharing

bb. Legal review of the company policy

cc. Periodic reviews and updates to maintain relevancy

principals to a sound data security program (FTC)

5. Plan ahead

a. The need for a written Data Security Program

aa. Checklist for implementing a Data Security Program

bb. Checklist for drafting a Breach Notification Policy

Collecting consumer information on line

1. Website Privacy Policy

Miscellaneous Issues

- **Computation of time**
 - **Days: Exclude 1st day but include the “event”**
- **Business days**
 - **Exclude Saturdays, Sundays and legal holidays**
- **Unclaimed property**
 - **M.S. 345**
 - **3 years**
 - **Report must be filed with the DOC**

Miscellaneous Issues

- **Records (82.72)**
 - **Audits**
 - **Retention**
 - **6 years**
 - **Maintained at brokerage**

Miscellaneous Issues

- **Retention exemptions**
- **Agency disclosure if a contract is not entered into**
- **Buyer representation or Facilitator agreement if purchase agreement is not written**

Exposure to Risk through Preventive Maintenance

Brokerage policy and procedure manual

- Use of independent contract agreements
- Write complete purchase agreements
 - Avoid leaving blanks
 - Write good contingencies
 - What
 - When
 - What happens if contingency is not met
 - Who receives earnest money

Reducing Your Exposure to Risk through Preventive Maintenance

- Review pre-approval letters
 - Are there contingencies?
 - Do verifications expire prior to closing?
 - Read title commitments
 - Review the HUD-1 Statement prior to closing
 - Attend all closings
 - Stay current of industry updates and changes
- a. Read real estate newsletters and weekly email updates
- Remote agents

Review/Exam
