



STATE OF MAINE
DEPARTMENT OF PROFESSIONAL
AND FINANCIAL REGULATION
REAL ESTATE COMMISSION
35 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0035

Janet T. Mills
Governor

Anne L. Head
Commissioner

Public Board Meeting
July 24, 2024
AGENDA

Location: 76 Northern Ave. Gardiner, ME 04345

Room: Central Conference Room

Information regarding virtual attendance to this meeting will be posted on the Board's website at:
<https://www.maine.gov/pfr/professionallicensing/professions/real-estate-commission/home/board-meeting-information>

Time: 9:00 a.m.

Contact: Shara Chesley, (207) 624-8521
Shara.Chesley@maine.gov

- I. **CALL TO ORDER**
- II. **AGENDA MODIFICATIONS AND APPROVAL**
- III. **MINUTES REVIEW AND APPROVAL**
Review and approval of June 20, 2024 minutes.
- IV. **ADJUDICATORY HEARINGS**
2024-REC-19885 – Director v. Bernice L. Pipa
2024-REC-19739 – Director v. Lalah Kargar
- V. **PROPOSED DISMISSALS**
2021-REC-17597
2023-REC-19432
- VI. **PROPOSED CONSENT AGREEMENTS**
2021-REC-17618
2024-REC-19894
2024-REC-19957
2024-REC-20109
2024-REC-20110
2024-REC-20125
2024-REC-20139
2024-REC-20175
- VII. **DIRECTOR'S REPORT**
License Memo
Core Course

FAX: (207)624-8637

PRINTED ON RECYCLED PAPER
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PHONE: (207)624-8521

www.maine.gov/professionallicensing

OFFICES LOCATED AT:

Shara.Chesley@maine.gov

76 NORTHERN AVE GARDINER, ME 04345

VIII. PUBLIC COMMENT

Under this item, the Commission will offer an opportunity to members of the public in attendance to comment on any public matter under the jurisdiction of the Commission. While the Commission members cannot take action on any issues presented, the Commission will listen to comments and may ask staff to place the issue on a subsequent agenda. At the discretion of the Chair, a time limit on comments may be set.

IX. MEETING SCHEDULE

Next meeting scheduled for August 15, 2024.

X. ADJOURNMENT

**Minutes of the Maine Real Estate Commission Meeting
June 20, 2024**

<u>MEMBERS PRESENT</u>	<u>STAFF PRESENT</u>
Edie Fontaine, Chair	Catherine Pendergast, Director
Leanne Nichols, Vice Chair	Jeffrey Hill, Deputy Director
Charles Brawn	Lisa Wilson, AAG
	Meghan Corbett, Field Investigator
	Kaleigh Kennedy, Office Specialist I
	Shara Chesley, Office Specialist I
<u>MEMBERS ABSENT</u>	
Jane B. Towle	
Forrest C. Peterson	

Location: 76 Northern Ave Gardiner, ME

Start: 9:06 a.m.

Adjourn: 9:44 a.m.

I. CALL TO ORDER

The meeting was opened by Chair Fontaine at 9:06 a.m.

II. AGENDA MODIFICATIONS

A motion was made by Nichols and seconded by Brawn to add consent agreements 2024-REC-20117 and 2024-REC-20123 to agenda. Unanimous.

III. MINUTES REVIEW AND APPROVAL

A motion was made by Fontaine and seconded by Nichols to approve the minutes of the May 15, 2024, meeting. Unanimous.

IV. PROPOSED DISMISSALS

A motion was made by Nichols and seconded by Brawn to approve the dismissal of case numbers 2021-REC-17585; and 2021-REC-17594. Unanimous.

V. CONSENT AGREEMENTS

A motion was made by Fontaine and seconded by Brawn to approve the proposed consent agreements for case numbers: 2024-REC-19884; 2024-REC-20045; 2024-REC-20050; 2024-REC-20071; 2024-REC-20088; 2024-REC-20089; 2024-REC-20117; 204-REC-20123. Unanimous.

VI. DIRECTOR'S REPORT

The Director presented an application for consideration. A motion was made by Fontaine and seconded by Brawn to offer a consent agreement to issue the license contingent on extension of the 90-day review of documents set forth in Chapter 400 Section 4(5) to one year. Chair to sign agreement upon signature of licensee and receipt of acknowledgement from designated broker.

VII. PUBLIC COMMENT

Applicant thanked the commission for their time. No further action was taken.

VIII. MEETING SCHEDULE

The next meeting is currently scheduled for Wednesday, July 24, 2024.

IX. ADJOURNMENT

A motion was made by Nichols and seconded by Brawn to adjourn the meeting at 9:44 a.m. Unanimous.

Reasonable Care and Diligence Core Course

The Real Estate Brokerage License Act and Commission Rules set forth the *minimum* standards of practice for licensees. Are you meeting minimum standards? Are those standards different when you are representing a client or working with a customer? This course is designed to assist you with meeting minimum standards and perhaps provide you with ideas to exceed minimum standards, when appropriate.

What does it mean to have a client relationship? How is a client relationship with a consumer different than a customer relationship? In a client relationship you are an agent representing a buyer or seller, or in some cases, both. Clients are owed fiduciary duties as set forth in 32 M.R.S. §13272:

*A real estate brokerage agency that provides services through a brokerage agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, **reasonable care, diligence** and accounting as set forth in this chapter. Such a real estate brokerage agency may be a seller agent, a buyer agent, a subagent or a disclosed dual agent.*

Licensees have fiduciary duties to clients but that does not mean they have no responsibilities to customers. When acting as a transaction broker, licensees are responsible for obtaining and providing property disclosure information including known material defects of which they have actual notice or knowledge; complying with Real Estate Commission laws and rules; complying with federal, state and local laws related to real estate brokerage; and treating all parties honestly and not knowingly giving false information.

This course will focus on the reasonable care and diligence that licensees exercise for clients and customers. It is broken into three sections:

1. Buyer, Seller & Property Identification
2. Property Disclosure
3. Explaining and Discussing Documents

Course Objectives: Licensees completing this course will be able to:

- Understand the importance of reasonable care and diligence in transactions
- Create smoother transactions
- Understand your role and manage the expectations of consumers
- Avoid complaints, civil suits and E&O issues

Section 1 – Definitions And Discussion Points

Reasonable Care: The degree of caution and concern that an ordinarily prudent and rational person would take in similar circumstances; the degree of care shown by a person who is responsible and trustworthy.

Diligence: Determined and careful effort; person does job efficiently and takes care of details; such a measure of prudence, activity as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances.

While the term “diligence” is commonly associated with the inspections that a buyer might conduct when in the process of purchasing a home to gain assurance that it meets their standards for safety, soundness and value, the term has a much broader application for real estate licensees.

In order to protect the interests of a client, as well as the licensee’s and the agency’s, reasonable care and diligence should begin at the initial meetings with a prospective client and continue until the buyer or seller client successfully closes a transaction.

Reasonable care/diligence is more than waiting for a client to ask a question. Do clients know what questions to ask? Property disclosure information, transaction documents and company data sheets are prepared by real estate professionals. **Clients are not real estate professionals; do not expect them to know what questions to ask or how to interpret information given to them.**

Discussion Points

You have a client interested in securing a property to be used as an Airbnb. What are some of the relevant issues that might be considered?

- Does the property have any rental restrictions?
- Is the property properly zoned for rentals?
- Does the booking app/business need to be registered with the City?
- Does the City/Town require a rental license?
- Does the City have a required Hotel Tax? If so, will it need to be paid?
- How many bedrooms is the septic system designed for?
- Have any deposits been made for future bookings?
- What else?

What if you are working with a customer interested in an Airbnb? Are your duties different? Yes. You would be responsible for making sure they received required property disclosure information. The customer would research whether or not the property worked for their purpose.

You are listing a property with a private septic system. What may be some of your reasonable care/diligence considerations?

- Is the septic system permit signed off by the Town?
- Was the septic system design filed with the Town, or was it installed?
- Is the septic design built for a 3BR, and your seller wants you to advertise it as a 4 BR? Chapter 410 Section 1(7) Advertising must be **free from deception and shall not misrepresent** the condition of the real estate, terms of the sale or purchase, real estate brokerage agency policies, or real estate brokerage services.
- Has a replacement system been installed?
- Do you advise your Seller to have a septic inspection in advance?
- When was the system most recently serviced?
- What else?

Does it matter that the seller is your customer or client? Yes. For example, you would not advise a seller customer to have a septic system inspection.

Section 2 – Buyer, Seller & Property Identification

Title fraud is on the rise and something every licensee should be aware of and do their due diligence to prevent. What is title fraud? It is when scammers pretend to be a property owner and forge the owner's name on a deed transferring title without the property owner knowing it. Often the properties are vacant land or homes owned by non-residents and free of mortgages/liens. **THIS IS HAPPENING IN MAINE.**

Fraudsters contact licensees to try to get them to list property they do not own. Often, they present a reason that the property must be sold quickly. Fake passports and driver licenses are being presented that include correct information with the exception of the photo.

Do you remember the saying about something that sounds too good to be true? It should be a red flag to remind you to use reasonable care and diligence to ensure that the person you are dealing with is who they say they are!

Fraud is not only an issue for listing licensees. Selling licensees also need to be wary of buyers. All licensees should verify who they are working with regardless of their relationship. Would you agree this would be reasonable care?

What are some potential methods of verifying the identity of buyers and sellers? You could:

- Request a copy of the buyer or seller's photo identification.
- Request a virtual online meeting if a client is unable to meet in person.
- Request mailing address information. You could mail a letter to the address on a seller's property/tax card and ask them to confirm receipt via email or text to verify ownership.
- Verify that the sellers' names match the deed.
- Have you verified the authorizing signor for an LLC, corporation, trust?
- What have you used to verify the identity of buyers and sellers?



Remember – using the same intake process for ALL buyers and sellers could reduce the chance of a Fair Housing violation accusation.

The following scenario is based on a Real Estate Commission complaint.

Fiancée Fiasco

While acting as the agent on duty, licensee met Buyer for the first time when he came into the office and expressed interest in purchasing property in the area for his fiancée. Buyer represented that he was not in need of financing as he was prepared to pay cash for properties up to \$1,000,000 in price. Buyer informed Agent that he would be providing the funds necessary to purchase a property, but that he wanted all necessary paperwork to be in Fiancée's name. Agent accepted that Buyer was owner of a successful construction/development company but took no steps to further verify his veracity or financial solvency.

Several days later, Agent drafted an offer for Fiancée to purchase Property with a 7-day closing. The offer indicated that the buyer "had delivered" an earnest money deposit of \$50,000 and was not made subject to inspections or financing.

Agent emailed Fiancée's offer to Seller Agent and communicated that she would be sending copies of the EMD and proof of funds for the transaction

Agent later wrote in an email to Seller Agent that she could not yet provide proof of funds to complete the purchase, but she was working on it.

Sellers sold the entire contents of their home via a yard sale in order to close on the requested date.

The day before closing, the closing company informed the Seller Agent that they had not received proof of funds. Agent explained she did not have any proof of funds, but she was confident the Buyer's attorney would deliver funds at the closing the next day.

On the scheduled closing date, neither Buyer, Fiancée or their attorney appeared at the title company. The transaction did not close.



Do you think any violations were found in this case? If so, what are they?
Violations are listed at the end of the course.

What could the selling licensee have done to verify the identity and legitimacy of the buyer, fiancée or attorney?

- *Internet search of the company name provided by Buyer*
- *Internet search of commercial construction company owned or operated by Buyer*
- *Internet search of Bar Association/Board of Overseers records*
- *Letter from bank verifying financial assets sufficient to close*
- *What else?*

Property Identification & Public Record Research

What steps are you taking to identify properties that you are listing or selling?

Where are you gathering information?

What sort of information might you need?

Information on liens, outstanding taxes, building permits or lack thereof, and property restrictions are a few things that come to mind. As you learned in real estate 101, every property is unique. The information you will obtain and provide is dependent upon the property. So, where might you go for property information?

- Registry of Deeds – Here you can find deeds, plans and information on covenants and restrictions. The deed outlines the terms and conditions of ownership. It is a formal, legal document that transfers ownership rights. Common transfers within a deed may include covenants, easements, rights-of-way, restrictions, and private road maintenance agreements. What issues might you uncover for your buyer or seller client by reviewing a deed?
 - Property ownership could be different. Perhaps a property may need to go through probate before listing. Are there several owners of the property that need to sign documentation?
 - Is the property being sold as part of a larger parcel? If so, that should be clear on all listing documents and a purchase agreement.
 - Discrepancy in acreage may be discovered. Information from the town can be compared to the acreage documented in the Deed.
- City/Town Office – This is another important resource for gathering property information. Do you make a point to physically go to the town office to research property files or do you rely on what is available online? Is all property information available online? No. You will most likely be able to get the general property data card, tax information, and tax maps, but you may not find other important information such as permits (e.g. occupancy, building), violations and code enforcement or tax assessor notes (e.g. tree growth or conservation easements) and septic designs.
- Other resources - property management companies, homeowner associations, condominium associations (by-laws, rules and regulations).

Are you taking adequate steps to identify sellers, buyers and properties?

The following scenario is based on a Real Estate Commission complaint.

Diligence Disaster

The asset manager representing the bank conducting a foreclosure sale entered into a listing agreement for a property with an agency. The asset manager provided little information to seller agent regarding the property. Seller agent went to the town office where he obtained the current tax record information which indicated that the property was a 3-bedroom, 1 bathroom residence

on a 5.65-acre lot. Seller agent also obtained from the town office a copy of a deed which described the parcel to have dimensions of 320' x 770', or 5.65 acres.

Seller agent did not check the County Registry of Deeds for information relevant to the foreclosure and did not confirm the size of the lot with the asset manager. Seller agent advertised the property as a three-bedroom, one bathroom residence on 5.65 acres.

Seller agent met with buyers who had contacted him regarding the property and provided them with the Real Estate Brokerage Relationships Form, written property information and 2002 deed he had obtained at the town office. Buyers did not sign a written agreement for representation.

Buyers submitted an offer to purchase to the asset manager via an internet website. The seller agent was notified that there were multiple offers and buyers should submit their best offer.

Seller agent and the buyers reviewed a purchase and sale agreement form provided by the asset manager. Attached to the agreement as "Exhibit A" was a legal description of the property which indicated that only a portion of the 5.65-acre parcel had been foreclosed upon, and the property to be sold was only 220' x 300' (1.5 acres).

The agreement provided in the paragraph entitled "DESCRIPTION OF PROPERTY" that "[b]uyer acknowledges that he has reviewed the legal description prior to signing this Agreement and acknowledges that a copy has been provided and attached by initialing below."

Seller agent did not review Exhibit A or inform the buyers that the lot dimensions differed from those he had advertised.

Seller agent signed the agreement as the agent representing the buyers and submitted their second offer.

The buyers' offer to purchase was accepted by the asset manager and the transaction eventually closed successfully. A signed agreement for representation and written consent to disclosed dual agency were dated the day of closing.

The deed conveying the property to the buyers contained the same property description as Exhibit A to the purchase and sale agreement, indicating dimensions of 220' x 300'. Seller agent did not review the deed, or notice the discrepancy, prior to the closing on the property.

At some point after purchasing the property, the buyers had a new well and septic system installed.

Several years later, the buyers learned that the parcel they purchased was only 1.5 acres and that their new well and septic system had been installed on an abutting parcel that they did not own.



Do you think any violations were found in this case? If so, what are they?
Violations are listed at the end of the course.

What could the licensee have done to verify the size of the property?

- *Review documents on file at the Registry of Deeds*
- *Review documents from the asset management company*
- *Request asset manager to provide additional clarifying documentation*
- *Read the deed*
- *Do the math!*

Personal Safety:

You received an email from someone who wants to meet you at your new listing tonight at 6:30 PM after they get out of work. They are interested and said that this property seems to be exactly what they have been looking for! What do you do? Hopefully you stop for a moment to take some steps to ensure your personal safety. What steps might you take?

- Properly vet buyers and sellers before meeting them in the field
- Encourage buyers and sellers to come into the office to meet
- Download a safety app to your mobile device
- Let someone know who you are meeting and where
- Consider bringing someone with you
- Require proof of funds or a prequalification letter before working with Buyers
- Other examples?

Does it matter whether you are an agent or transaction broker when it comes to identifying buyers and sellers; property identification and personal safety? No.



DB DISCUSSION POINT



What are Designated Brokers doing to help affiliated licensees with buyer/seller identification and personal safety?

- ✓ **Does your Policy & Procedure Manual address these issues? When was the last time you reviewed your manual?**
 - ✓ **Do you have an open-door policy for affiliated licensees to report safety concerns?**
 - ✓ **Do you suggest, or make available, mobile apps that allow them to share their location during Open Houses, Showings or when meeting clients alone?**
 - ✓ **Do you offer buyer/seller identification and personal safety training?**
-

Section 3 – Property Disclosure

All licensees have a duty to obtain and provide WRITTEN property disclosure information including disclosure of material defects pertaining to the physical condition of the property, regardless of whether they are working with a client or customer. Accurate property disclosures

are important for a variety of reasons. They are important to sellers as they allow sellers the ability to be transparent about the condition of a property which may avoid negotiations down the road for issues discovered in an inspection. They assist buyers in making informed decisions about a property as they call out aspects of the property that may need further research or inspection.

Licenses must provide property disclosure information as set forth in Chapter 410 Section 15 – 18 of Commission Rules in the categories of Private Water Supply; Private Wastewater Disposal System, Public or Quasi Public System, Heating System, and Hazardous Materials. In addition to specific information required, “any other information pertinent” for each category is required.

A **material defect** is a physical condition of a property that is significantly adverse. (This term is not defined in the Maine Real Estate Brokerage Act.).

Material defect disclosure is required of ALL licensees, but the responsibility is different depending on whether a licensee is working with a client or customer. Licensee representing a buyer or seller must disclose material defects that they have knowledge of, or acting in a reasonable manner should have known, to their client. Transaction brokers working with customers are required to disclose material defects of which they have *actual* notice or knowledge.

Does your buyer client understand what the form discloses and what it may not disclose? Does your client understand that there could be latent defects, which are hidden or concealed defects, that could not be discovered through customary observation or inspection?

Does your buyer client understand the potential risks of proceeding without benefit of inspections?

The Maine Real Estate Commission does not mandate that a specific form be used to provide property disclosure information. The Commission does require that **WHATEVER** form you use contain the property disclosure information required by law or rule, and that the information be complete and accurate *throughout the transaction*.

Required disclosures beyond the physical condition of everything within the four corners of the property are material facts and provided only to clients. What is a material fact?

Material fact. “Material fact” means a fact that relates to the transaction and is so substantial and important as to influence the client to whom it is imparted. [32 M.R.S. § 13271(8)]:

- What are some examples of material facts? Death in house or on property (murder, suicide, natural causes – does the cause of death make a difference? Maybe), proposed changes in use of nearby properties (commercial building, highway), zoning changes, flood insurance changes, registered sex offender.
- Material facts extend past the property line. Material facts are not owed to customers but they are owed to your client(s). Be aware that some states do this differently. How does this affect Disclosed Dual Agency? Material facts must be disclosed to all parties if you are a **disclosed dual agent**. If the Seller does not want the licensee to disclose a material fact you cannot be a disclosed dual agent as you are required to disclose.

- Written Property Disclosures Information is not limited to residential property. Commercial property (with no residential component) requires disclosure of material defects and known hazardous materials [Chapter 410 Section 18(2)]

Misrepresentation - 32 M.R.S. § 13067-A(4):

***Substantial misrepresentation.** Making any substantial misrepresentation by omission or commission, but not including innocent misrepresentation;*

Misrepresentation by **omission**:

- Providing fuel consumption information for one heat source when two sources are used
- Foreclosure property disclosure with “N/A” on each page

Misrepresentation by **commission**:

- Promoting a home as having 4 bedrooms when the septic system is designed for 3 bedrooms without disclosing the septic system is designed for 3 bedrooms.

What are some of the risks of not exercising reasonable care/diligence when it comes to property disclosure information?

- ❖ **Real Estate Commission Authority 32 MRSA § 13068 - Fines, license suspension/revocation**
- ❖ **Civil liability** (at least 6 years) for both licensee and seller.
- ❖ **Damage to business reputation**

When are licensees required to provide buyers with property disclosure information? Prior to or during preparation of an offer.

Are a licensee’s responsibilities different for a foreclosure property? No.

Is there a difference in the responsibility of the listing and selling licensee to provide written property disclosure information? The listing licensee is responsible for obtaining information necessary to make disclosures and conveying the information to the selling licensee. The selling licensee is responsible for obtaining the information from listing licensee *and making sure disclosures are provided to buyers.*

What if the listing licensee provides a partially completed disclosure or one with inaccurate information? Does the selling licensee have further obligations?

Yes. The selling licensee must obtain and provide the property disclosure information if unable to obtain from listing licensee.

What if the buyer is purchasing a FSBO?

The selling licensee (whether transaction broker or buyer agent) is responsible for obtaining and providing property disclosure information to buyer. For example, licensee may have to go to a town office or contact septic servicing companies to obtain information on a septic system.

Does the addition of “sold as-is” relieve the licensee of responsibility/liability from information on the disclosure? No.

How/where is information gathered?

Is the licensee’s disclosure responsibility complete by asking the seller for information?

No. The seller is one source of information. Commission rules require that the listing licensee ask the seller for specific information and further require all licensees to convey that information “and any other information pertinent” to the disclosure to all buyers (clients and customers). Providing thorough and accurate information may involve several other sources of information.

Real estate licensees are hired as professionals and expected to be aware of the disclosure process, recognize red flags and take the appropriate steps to obtain and make necessary disclosures. Property Disclosure Information is a representation of the seller’s property; licensee often may need to contact other sources for information (e.g. town office, well driller, fuel company, septic tank service company, insurance company). Verification of information by more than one source is good practice, when possible. Ask licensees to identify other sources.

The seller may or may not be able to provide the information (*inheritance, foreclosure, etc.*) and other sources may need to be contacted for the information. A seller may provide information they believe to be true, but may not be correct.

Examples:

- *Seller states the location of the well is unknown but states “it must be an artesian well” are you confident the information is accurate? Does the seller understand what an artesian well is?*
- *Seller believes furnace was installed in 2007. While viewing the basement you notice a service tag hanging on the furnace. Should you review the tag for more info? If information conflicts with information provided by seller should you call servicing company to verify info?*

When is “unknown” or “N/A” an appropriate response on a property disclosure form? Is there a difference?

Some information may not be known either by the seller, visual observation of licensee or other sources. For example, a seller may not know when the furnace was installed; licensee checks with area businesses in the industry but has no luck finding the information. Is the correct response “unknown” or “N/A”? Unknown. “N/A” is a term used for “not applicable” (if a furnace exists N/A is not an appropriate response). In this scenario is it reasonable to assume the furnace was not installed during the seller’s ownership of the property or that the seller may not know or remember this information?

What are some examples of “other information” that may be pertinent to the areas of disclosure?

- Private Water Supply: seasonal water; well shared with neighbor; more than one well
- Heating System: two fuel sources attached to one chimney, unsleeved or buried fuel line,

- unlined chimney; supplemental heat sources such as space heaters;
- Wastewater Disposal System: shoreland zoning, overboard discharge;
- Known Hazardous Materials: pesticides, recognized hazardous waste disposal sites

In gathering information to complete the written disclosures it is important that the licensee listens carefully to the seller. Deferred maintenance issues that the seller dismisses as insignificant may become an undisclosed material defect for the buyer after closing. Pay attention to red flags that may require additional discussion or investigation and ask the seller if they are aware of anything licensee has *not* asked about the property that may be important.

Other disclosures that may be required:

- **Arsenic** 33 M.R.S. § 173-A
Seller of residential property must provide buyer with information developed by DHHS regarding what homeowners should know about arsenic in water supplies and treated wood.
- **Radon Testing (rental properties)** 14 M.R.S. § 6030-D – Beginning March 1, 2014 residential rental properties are required to be tested for radon air quality (unless a radon mitigation system has been installed). There are exceptions, restrictions on who can do the testing, etc. Tip sheets and information are available at the State of Maine Division of Environmental Health.
- **Transfer of Shoreland Property** 30-A M.R.S. § 4216 – As of 2019 the transfer of any property with a subsurface wastewater disposal system located within a shoreland area requires the seller to provide a written statement as to whether or not the system has malfunctioned within the 180 days previous to transfer and testing and potential replacement of the system. See statute for details on the testing and exceptions.
- **Methamphetamine** – (33 M.R.S. § 173, sub-§7) This law requires disclosure at the sale or transfer whether the real estate has been used in the manufacture of Methamphetamine.
- **Public Way** – (33 M.R.S. § 173 (6))(Access to property by a public way) “Public way”, means a way, owned and maintained by the State, a county or municipality, over which the general has a right to pass. (29 M.R.S §101, sub-§59)
- **Disclosure of Flood Risk** (33 M.R.S. §193, sub-§4) This is a new law that went into effect on August 9, 2024. It requires that sellers provide information to buyers regarding potential flood risks, including whether the property is located wholly or partially in an area of special flood hazard mapped on the effective flood insurance rate map, with a copy of the relevant panel of the flood rate map prior to or at the time of an offer. Disclosure must also include whether during the seller’s ownership:
 1. Any flood events affected the property or a structure on the property;
 2. Any flood-related damage to a structure occurred on the property;
 3. Any flood insurance claims filed for a structure on the property with dates of claims; and

4. Any past disaster-related aid provided related to the property or a structure on the property from federal, state or local sources for the purpose of flood recovery and the dates of any payments.

The law includes a definition of “flood” as:

- (1) A general and temporary condition of partial or complete inundation of normally dry areas from:
 - (a) The overflow of inland or tidal waters; or
 - (b) The unusual and rapid accumulation or runoff of surface waters from any source; or
- (2) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm or by an unanticipated force of nature, such as a flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event that results in flooding as described in subparagraph (1), division (a).

Are buyers and sellers required to sign written property disclosure information? Not according to licensee law and rule but agency policy may require or recommend signature. Can an agency require another agency to comply with their policy to require the seller and buyer to sign the disclosure? No.

Does the seller’s signature relieve the licensee of responsibility/liability from information on the disclosure? No.

Can property disclosure information change? Yes! Property disclosure information should be reviewed, updated (dates/source) and kept current (wherever available) throughout the listing period (including while under contract) and prior to re-listing.

How might a buyer perceive the fact that a disclosure is dated six months ago? Might they wonder if any maintenance has been done to the property (e.g. furnace serviced, septic tank pumped)? What else has not been maintained?

Sellers may not think to inform licensee of things that changed and should be updated on the property disclosure (install heat pump, replace well pump, etc.).

Remind the seller to keep you informed of changes. Do you have a system in place to periodically check in with seller regarding property disclosure information?

Ask students to share their system.

Scenarios:

1. **Selling licensee notifies listing licensee that the results of the building inspection are unacceptable and buyer has decided not to purchase the property because all of the sills must be replaced. Should the property disclosure information be**

amended to reflect this defect? *Maybe. Steps need to be taken to verify information. Is the source of information reliable? If the defect is determined to be true, the disclosure must be amended.*

2. **You are listing a property and the seller tells you that she has lived at the property for 10+ years but has never had the septic system serviced. Is that important? Would you ask more questions?**

Would you suggest having the septic system serviced (pumped, clean filter, check baffles; check distribution box, etc.)? Check town records to determine if system was approved by the Code Enforcement Officer and that there is a plan on file? (lack of maintenance may suggest that the system is not properly functioning or at the very least that the seller may not know if there is a septic tank or leach field).

3. **Seller, on an annual basis, sprays around the foundation of the house to control an infestation of carpenter ants. The seller mentions this to the licensee. The licensee tells seller there is no need to disclose believing such maintenance of the property is not a required disclosure. The buyer purchases and shortly thereafter is confronted with a significant infestation problem. When asked by the buyer why the annual spraying was not disclosed, the seller responds that the licensee told him that this was maintenance and not a defect. Was the licensee's advice correct?**

No. It would be prudent for the listing agent (and buyer's agent to listing agent) to ask if there is any seasonal or routine maintenance required for the property. In this instance spraying should be disclosed.

4. **You are listing a property, and your Seller client has told you that they have a long history of conflict with the neighbors over their "loud" recreational vehicles that run at all hours. Does this information need to be disclosed?** *Material facts must be disclosed to clients but are not owed to customers.*



Remember – as a transaction broker your disclosure responsibilities are similar to a licensee with a client except that you only disclose material defects you have *actual* notice or knowledge of and you do not disclose material facts.

DB DISCUSSION POINT



Are you reviewing, or delegating review, of property disclosure information for accuracy and completeness?



Are you keeping affiliated licensees informed of law changes?

Section 4 – Explaining And Discussing Documents

Technology has drastically changed the way real estate transactions are conducted. Digital, paperless transactions are becoming commonplace. While technology may have changed the way you are doing business, it has not changed your responsibilities to clients and customers.

A common denominator discovered in investigations against real estate licensees is that the consumer did not understand their relationship with the licensee or documents they signed. It is imperative that licensees take time to **EXPLAIN** and **DISCUSS** the various documents used throughout a transaction.

Do you remember when you first started out as a real estate licensee? You took a course to learn about real estate transactions including forms and disclosures required. You are usually working with buyers and sellers that do not have the knowledge you possessed when you were first licensed!

Clearly you cannot look into the mind of another to know if they understood a document they signed but you can dig in a bit to look for confirmation of understanding. If they did not agree to sign an agreement for representation after you provided and discussed the Real Estate Brokerage Relationships Form ask them a question such as – “I just want to confirm that you understand that as a customer I am not required to keep any information you give to me confidential or work in your best interest, correct?” If they were not paying attention before that may capture their attention!



Remember - you are the professional with real estate brokerage experience. Are you taking time to explain documents and set expectations with clients and customers?

Competency in Explaining Forms and Obtaining Informed Written Consent

Are you using a software program (e.g. DocuSign) that skips to the placeholders where the client must initial or affix their signature?

Do your customers and clients understand what they are signing? What steps are you taking to ensure that they do?

- Have you paraphrased all the documents?
- Send a copy of documents for review before sending the electronic signature version.
- Are all parties to the contract present for review and explanation?

How confident are you in your understanding of the documents and ability to explain them?

- When is the last time you thoroughly read all of the documents you use in transactions?
- Are you using the most updated versions required by your company?

What documents might buyers and sellers have trouble understanding without your assistance?

- ✓ Real Estate Brokerage Relationships Form – do they understand how choosing between being a customer or client affects them?
- ✓ Buyer Representation Agreements – do they understand the terms they are agreeing to? Do you?
- ✓ Listing Agreements – do they understand the terms of the compensation?
- ✓ Appointed Agency Authorization – have you explained how appointed agency works? Do they know that the agreement is between them and the agency – not you?
- ✓ Disclosed Dual Agency Authorization – do they understand that they have agreed to limited representation, and in that situation, you would be the agent for two clients with adverse interests?
- ✓ Purchase and Sale Agreements & Amendments – do they understand every section of the agreement – not just the sections with blanks that need to be filled in?
- ✓ Earnest Money Deposits – do they understand the risk of losing the deposit or disputed earnest money?

Recordkeeping

As a licensee, you will quickly discover that reasonable care and diligence run parallel, regardless of which side of the transaction you are on. How are you documenting the transaction to protect your client, your designated broker and yourself?

- Notetaking: use extensive details
- Phone calls: keep a detailed log/notes or recap conversation(s) in an email to that individual.
- Text messages
- Emails: keep all records pertinent to the transaction

Documentation could help you in the case of a complaint or lawsuit.

Wrap Up

Your responsibility around reasonable care and diligence covers a wide variety of topics that may be different depending on whether you are working with a client or a customer. All licensees have responsibilities around buyer/seller identification; property identification; personal safety; property disclosure information; and document review and explanation.

Taking the time to perform reasonable care and diligence will help set expectations with buyers and sellers and may avoid complaints, civil suits and E&O issues.

DRAFT

Fiancée Fiasco Violations

- ✓ *Agent acknowledges that she failed to act in a reasonably prudent manner to avoid error when she told Buyer and Fiancée that she was acting as their buyer agent; and when she provided them with advice and conducted an investigation relevant to the Property, prior to entering into a written buyer representation agreement, which constitutes a violation of 10 M.R.S.A. § 8003(5-A)(A)(4); and 32 M.R.S.A. §§ 13177-A(2), 13282, and 13283(3).*
- ✓ *Agent acknowledges that she failed to act in a reasonably prudent manner in order to*

avoid error when she represented that Buyer would be prepared to close on the purchase of Property in less than 10 days without benefit of mortgage financing but had not taken steps to qualify his ability to do so, which constitutes a violation of 10 M.R.S.A. § 8003(5-A)(A)(4) and 32 M.R.S.A. § 13067-A(6).

- ✓ *Agent acknowledges that she made substantial misrepresentations of her buyer client and that buyer client's ability to purchase Property without benefit of financing, when she had no reasonable basis for doing so, which constitutes a violation of 10 M.R.S.A. § 8003(5-A)(A)(4) and 32 M.R.S.A. § 13067-A(4).*

Diligence Disaster Violations

- ✓ *failure to act in a reasonably prudent manner in order to avoid error when listing "the property" for sale when he failed to verify the description of the property which had been foreclosed upon, which constitutes a violation of 32 M.R.S. § 13067-A(6) and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4).*
- ✓ *failure to act in a reasonably prudent manner in order to avoid error when he advertised a description of "the property" which misrepresented the size of the lot to be conveyed, which constitutes a violation of 32 M.R.S. § 13067-A(6) and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4).*
- ✓ *failure to act in a reasonably prudent manner in order to avoid error when he did not enter into a written buyer representation agreement with "the buyers" but continued to provide client level services to them, which constitutes a violation of 32 M.R.S. § 13067-A(6) and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4).*
- ✓ *failure to act in a reasonably prudent manner in order to avoid error when he did not obtain written consent from "the buyers" to act as a disclosed dual agent, which constitutes a violation of 32 M.R.S. §§ 13067-A(6) and 13275(1) and Chapter 410 Section 7 of the Maine Real Estate Commission Rules and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4) and (5).*
- ✓ *failure to act in a reasonably prudent manner in order to avoid error when he did not review the property description included as Exhibit A to the purchase and sale agreement and did not advise "the buyers" that the property description was significantly different from that which had previously been provided to them, which constitutes a violation of 32 M.R.S. § 13067-A(6) and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4).*
- ✓ *failure to act in a reasonably prudent manner in order to avoid error when he did not review the property description contained in the deed of conveyance and did not advise "the buyers" that the property description was significantly different from that which had previously been provided to them, which constitutes a violation of 32 M.R.S. § 13067-A(6) and is grounds for imposing discipline pursuant to 10 M.R.S. § 8003(5-A)(A)(4).*