



## Risk management and loss prevention



## **I. COMMUNICATE WITH CLIENTS ABOUT EXPECTATIONS**

- Understand what the client wants/expects from you
- Explain the process to your client
- Make sure your client understands what your role is—and is not



## II. RISK MANAGEMENT—NOT RISK AVOIDANCE

- Do not put yourself in the deal
- Do not warrant the work of others
- Assume every document you create is a trial exhibit
- Keep file organized and retain everything after closing
- A claim can be filed no matter what you did
- Anyone with \$132.00 can file a lawsuit



### **III. CAREFULLY SELECT CLIENTS**

- **Keep radar on at all time**
- **Ask questions and make sure you can fulfill their needs**
- **Ask questions to identify high-risk clients**



## **IV. DOCUMENTATION IS EVERYTHING**

- **Descriptive transmittal letters and email messages**
  - **Descriptive facsimile cover sheets**
  - **Confirmation letters or emails**
  - **Memos to the file**
  - **Use technology**
-



## V. AVOID OVER-EXTENDING YOURSELF

- No good deed goes unpunished
- Do not commit to do something beyond your expertise
- Avoid committing to do things beyond your duties
- Urge client to seek advice from appropriate professionals
  - Contractor
  - Architect
  - Engineer
  - Lawyer
  - Accountant



## Tips To Avoid Real Estate Errors and Omissions Claims

While even the most diligent licensee may be the victim of a frivolous claim, diligent business practices help decrease risk. Even if these procedures do not prevent a claim, they may greatly enhance the chance of a successful defense.

1. Resolve problems far before the closing date.
2. Don't try to be an expert at everything.
3. It is generally a good idea to require agency disclosure on every transaction.
4. Document conversation's recommendations, and activities in a log.
5. Brokers should have regular meetings with their firms' licensees and remain informed as to their activities.
6. Listing agents should have the seller complete any required property disclosure form.
7. Recommend that buyers obtain a home warranty and retain written evidence of the recommendation.
8. Recommend that buyers obtain a home inspection. If they decline, have them sign a form confirming this decision.
9. Many states and associations have standard contract forms. It is wise to address items that are outside of standard form language with the client's legal counsel, or else the real estate licensee risks the unauthorized practice of law.
10. When information is obtained from a third party, it is often a good idea to disclose the source when making representation, because sometimes information from what appears to be a valid source turns out to be inaccurate. For example, if you believe a property is on city sewer based on a prior listing or a statement by the city utility office, disclose the source of your representation.

Note these are examples of types of claims encountered by Rice Insurance Services Company, LLC in the handling of real estate errors and omissions claims in numerous states. Specific facts and circumstances may have been altered.

*This information is for illustrative purposes only and is not a contract. Nothing herein should be construed as legal advice or advice regarding any applicable standard of care. Rather, this information is intended to provide a general overview of certain products, services, and situations encountered in the course of our business. This information does not amend any E&O policy in any way. Only the policy can provide actual terms, coverages, amounts, conditions, and exclusions. The E&O program described herein is only available in certain states, and the information contained herein may not apply to your geographic area. In the event of a claim, the nature and extent of coverage is determined based on the claim's facts, circumstances, and allegations and application of the relevant policy's terms, conditions, and exclusions.*

*Prepared by Rice Insurance Services Company, LLC © 2015*

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## BACKGROUND

The Fair Housing Act prohibits discrimination in housing on the basis of race or color, national origin, religion, sex, familial status, and disability. The United States Department of Housing and Urban Development (HUD) has the power to enforce the Fair Housing Act and real estate brokers may be named in HUD's enforcement actions.

## FACTS

This matter arises out of a short sale offer on property secured by a mortgage in favor of a national lender. The path to a successful short sale or purchase of a foreclosed property is frequently more difficult when compared to more conventional transactions. As most brokers know, the owner's mortgage lender dictates most decisions in a short sale, including whether or not to accept an offer. The actual owner has little control over the terms of the purchase and sale agreement.

In this situation, a broker representing a couple with several children submitted a short sale offer to the lender, contingent upon a home inspection. Based upon the results of the home inspection, the couple requested several minor repairs to the home. The lender refused and accepted another party's offer, which was \$15,000 lower than the couple's offer.

The couple filed a complaint with HUD alleging the seller, lender, and listing broker discriminated against them due to the fact that they have children. They alleged the listing broker was uncooperative and stalled on the repair issue due to the fact that they have children.

The listing broker, seller, and lender contended that they unaware of the fact that the couple had children; therefore, it was impossible for them to discriminate against the couple. Additionally, the lender did not refuse to sell the couple the home, but refused to accept their counteroffer that required repairs. It is not uncommon for a lender to refuse to make repairs. Furthermore, it is not uncommon for a short sale to fall through.

HUD assigned an investigator to this matter and the listing broker had an attorney prepare a written response to the matter.

## RESULT

Please note that many professional liability policies exclude coverage for discrimination. However, the applicable policy in this case provided limited coverage for discrimination claims. The complaint was ultimately dismissed, but not before considerable time, energy, and cost had been incurred. The listing broker's insurance carrier paid approximately ten thousand dollars for an attorney to assist with his defense. Additionally, the broker spent a substantial amount of time and energy gathering records, providing testimony, and meeting with his attorney. The broker and the broker's attorney also had to meet with the HUD investigator and provide him with additional information necessary for his investigation. HUD also insisted the parties engage in a conciliation process before it completed the investigation.

## SUGGESTED APPROACH

The couple's broker could have explained to them in writing that lenders may reject any counteroffers and that lenders often refuse to make repairs. The couple's broker could have also explained to the couple in writing that lenders often consider other factors besides the sales price, including time and effort that would have to be expended to comply with the contract, the net proceeds to the lender, and whether the offer is contingent on financing.

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Check, check, and one more check



## **REALTOR RISK MANAGEMENT AND LEGAL LIABILITY: Best Practices for Mitigating The Risk In Advance**

*Presented by Kate Southard*

1. The best thing you can do to protect yourself from risk is OUTRAGEOUSLY GOOD file management.
  - a. It forces you to do things well.
  - b. Dropbox – why we love Dropbox – see it from anywhere
    - i. What we track for Current year
      1. 2017 Open Files
        - a. Paper Files – 3 partition classification folder (8 tabs available) (\$5 each)
        - b. Electronic files: Set up just like our paper files
          - i. Cover Sheet/tax info./MLS print out
          - ii. Purchase Agreement
          - iii. Auditable items
          - iv. Inspections/Objections
          - v. Correspondence
          - vi. Title work
          - vii. Marketing
          - viii. Contractual Agreements (Listing Agreement)
      2. Closed files (kept by year)
        - a. Pretend the next time you see this file you are going to be sitting on the witness stand with your right hand up in the air. That will change your perspective.
        - b. Have assistants and agents use their INITIALS. It establishes accountability and pride in our work.
      3. Fully Document EVERY file
        - a. Any changes to price, dates or terms, important correspondence should be printed and put in file.
      4. The beauty of good forms & checklists
        - a. You need checklists at every stage of your career.
        - b. New Listing checklist
        - c. Net out
        - d. Process checklist
        - e. Inspection checklist
        - f. Closed File checklist
        - g. Cheatsheets: Listing & Under Contract
2. Scanners – make life easier
3. Systems
  - a. Dropbox
    - i. See it on phone, ipad, at office, at home, in the restaurant. Any one of us can update it and it shows up – synching.
  - b. Zipforms/Docusign
    - i. Docusign is only signature platform that is ISO certified
    - ii. Zipforms - we pay extra for the mobile version

1. Zipforms emails you a completed pdf to drop into Dropbox very easily and for easy forwarding to the buyers/sellers/title co.
  - c. We all use cell phones. No land lines.
  - d. Wunderlist
  - e. Hiring an assistant.
    - i. Background checks.
    - ii. Triple deep reference checks.
    - iii. Don't hire a "mini-me" Hire outside your species!! Someone who is good at what you're not.
  - f. Using an assistant.
    - i. Same set of standards and values as you have.
    - ii. Don't give them keys and all your passwords the first day.
  - g. Cameras in houses for sale - The new etiquette
  - h. Social Media
    - i. When you are on trial, the judge and/or opposing counsel might actually look at your page!
    - ii. Don't put anything on there that you don't want to see in Court or an ethics hearing.
    - iii. Never talk about clients on Social Media.
  - i. Contact Management
    - i. I-cloud
    - ii. Call every single buyer and every single seller every single week.
4. Last but NOT least
- a. Attorneys and Judges
    - i. Do you know a good attorney? No, not the one that did your divorce.
    - ii. Where does the Judge live?
    - iii. RANM's Legal Services Ashley Strauss martin
  - b. E& O Insurance Tail Issues
    - i. Lead Based Paint Issues
      1. EPA audits
      2. Insurance coverage – not likely you have any.
      3. Your own properties
  - c. Your car
    - i. What goes in your car.
      1. Keys
      2. Parachute box
      3. Hammer, pliers, screwdriver, WD 40, office supplies, jumper cables, First Aid kit, work out clothes, extra "vacant Land" shoes, extra coat, water, garbage bags.
    - ii. Are you insured for THAT?
      1. Calculating risk of passengers
  - d. Website
  - e. If you have agents, have an agent agreement!
  - f. Taxes
    - i. Pay them first
    - ii. NMGRT – it's easy. Do it or hire someone to do it.

# NEW LISTING CHECKLIST

## PROPERTY \_\_\_\_\_

### Listing Agreement

- \_\_\_\_\_ Kate's Signature (pg 2 & 6)
- \_\_\_\_\_ Copy to seller
- \_\_\_\_\_ Saved to e-file

### Lead Paint

- \_\_\_\_\_ Saved to e-file
- \_\_\_\_\_ Uploaded MLS

### Property Disclosure

- \_\_\_\_\_ Saved to e-file
- \_\_\_\_\_ Uploaded to MLS

### Floor Plan

- \_\_\_\_\_ Ordered
- \_\_\_\_\_ Scheduled for \_\_\_\_\_
- \_\_\_\_\_ Saved to e-file
- \_\_\_\_\_ Uploaded to MLS

### Pictures & Virtual Tour (Styletours)

- \_\_\_\_\_ Ordered or taken
- \_\_\_\_\_ Scheduled for \_\_\_\_\_
- \_\_\_\_\_ Saved to e-file
- \_\_\_\_\_ Uploaded to MLS

### Property Tax Calculator

- \_\_\_\_\_ Saved to e-file
- \_\_\_\_\_ Uploaded to MLS

### Homebook

- \_\_\_\_\_ Completed
- \_\_\_\_\_ Save to e-file in Publisher
- \_\_\_\_\_ Save to e-file as a PDF
- \_\_\_\_\_ Print 10 for home
- \_\_\_\_\_ Print five extra for file cabinet
- \_\_\_\_\_ Sent to client

### Flyer

- \_\_\_\_\_ Completed
- \_\_\_\_\_ Save to e-file in Publisher
- \_\_\_\_\_ Save to e-file as a PDF
- \_\_\_\_\_ Print 20 for home
- \_\_\_\_\_ Print five extra for file cabinet
- \_\_\_\_\_ Sent to client

### GAAR-MLS

- \_\_\_\_\_ Enter
- \_\_\_\_\_ Activated
- \_\_\_\_\_ Print listing for file
- \_\_\_\_\_ Check attachments
- \_\_\_\_\_ Check photos/tour

### Lockbox up

- \_\_\_\_\_ Register box # on Supraekey.com

### Sign Up

- \_\_\_\_\_ Flyer box (if needed)

## KSRE Cover Sheet

MLS #	Shackle	CONTRACT DATE
Lockbox #	CBS	SCHED CLOSING
Alarm	Gate	ACTUAL CLOSING

SUBJECT PROPERTY		
Address		List Price
Purchase Price	EM	Date to Title

SELLERS	
(1)	(2)
Address	Address
Phone	Phone
Alt Ph/Fax	Alt Ph/Fax
eMail	eMail

BUYERS	
(1)	(2)
Address	Address
Phone	Phone
Alt Ph/Fax	Alt Ph/Fax
eMail	eMail

COOPERATING COMPANY		
Agent/Company		
Phone	Email	
Address	Fax	
Asst	Ph	eMail

LENDER	
Loan Officer/Company	
Phone	eMail

TITLE		
Closer/Company		
Phone	Email	
Address	Fax	
Binder Ordered	Closing Sched	Keys to Title Co

Notes:

# KSRE NET OUT ESTIMATE

CLIENT: \_\_\_\_\_

DATE PREPARED: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

PURCHASE PRICE: \_\_\_\_\_

Closing Costs	Buyer	Seller
Credit Report		
Origination Fee		
Prepaid Taxes		
Prepaid Hazard Insurance		
Prepaid Flood Insurance		
VA Funding Fee		
Mortgagee Title Policy		
Tax Service Fee		
Property Taxes (Daily tax rate x days from 1/1 to closing date)		
Appraisal (\$475)		
Appraisal Reinspection		
Home Inspection (\$350)		
Home Warranty (\$425)		
Termite/Dry Rot Inspection (\$80)		
Sewer line / Duct Scope (\$180)		
Radiant Heat Inspection (\$80)		
Septic Tank Pumping (\$80)		
Repairs Estimate (will vary based on insp & negotiations)		
Fed Ex Fees		
Survey (ILR \$225 or Stake \$600)		
Seller's Recording Fee		
Title Binder		
Owner's Title Insurance Policy + NMGRT		
Title Co. Closing Fee \$395 +\$1/1000 + NMGRT		
Prorata Document Search Fee \$50		
Special Assessmt Search Fee \$50		
Flood Certification		
Final Water Bill		
HOA Transfer fee (\$400 if applicable)		
Real Estate Commission		
NMGRT <span style="float: right;">Current Rate: 0.073125</span>		
Mobile notary (\$150 if needed)		
<b>Total Approximate Closing Costs</b>		
<b>Seller's Projected Net Proceeds</b>		
Contract Sales Price		
Minus Closing Costs		
Minus Mortgage Balance (if known, otherwise enter 0)		
<b>Net to Seller ESTIMATE</b>		



## PROCESS CHECKLIST: ACCEPTANCE TO CLOSED FILE (\*Auditable Items)

- o Lead Based Paint Disclosure signed by Seller & Agent (Signed & dated BEFORE Buyers sign Purchase Agreement)
- o Property Tax Disclosure signed by Buyer and Seller \*\*
- o Lead Based Paint Disclosure signed by Buyer\*\*
- o Fully executed Purchase Agreement (PA) emailed (includes Addendums, Counteroffers, Exhibits)
  - o Title Company
  - o Our client, whether buyer or seller
  - o Cooperating Broker
  - o Buyer's Lender
- o Property Disclosure Statement from Seller provided to Buyer. Both sign.
- o Earnest Money delivered to Title Company \*\* (Title emails receipt - add to Dropbox)
- o SOLD sign goes up
- o Selling Agent enters Property as Pending in MLS
- o Lender begins processing loan & obtaining necessary info
- o Title Company sends title work to Lender, title binder goes to Buyer and agents – file in Dropbox
- o Title Company emails Restrictive Covenants - file in Dropbox and forward to Buyer for review
- o Inspections & Objections
  - o DATES in PA for Receipt of Inspections, Objections and Resolutions calendared to ensure they are met
  - o Order inspections
    - Termite, dry rot, home inspection ALWAYS
    - Any other inspections Buyer desires: Radon, sewer scope, duct scope, mold, structural etc.
  - o Inspections conducted & delivered via email (Due date in Purchase Agreement)
  - o Objections are filed by Buyer (Due Date in Purchase Agreement)
  - o Buyer's Agent prepares Objections
  - o Buyer reviews and signs
  - o Objections sent to Seller's Agent
  - o Objections are negotiated between Buyer and Seller requiring signatures at every stage.
  - o Final acceptance saved to Dropbox, emailed to Cooperating Agent & Title Co (Objections are NEVER sent to Lender)
- o Home Owner Association Documents ordered from HOA (either by Seller's Broker or Title Co)
- o Home Owner Association Documents provided to Buyer
- o HOA Disclosure Certificate is issued allocating dues & making certain disclosures\* \*
  - o Signed by Seller's Broker
  - o Signed by HOA representative
  - o Signed by Buyers
- o Survey is ordered
- o Appraisal ordered by Lender and paid by Seller (usually paid to Lender on Seller's credit card)
- o Appraisal is conducted (Flood Zone determination made during Appraisal)
- o Pre-closing walk-through to assure home in same condition as at time of offer
- o Lender sends Loan documents to title company
- o Title Company circulates Closing Statement (HUD) for review by agents and lender
  - o HUD sent to Buyer and Seller for review ONLY AFTER Agent reviews!
- o FIRPTA Affidavit of Non Foreign Seller must be completed if over \$300K\*\* (usually completed by title company as a Qualified Substitute)
- o Closing at Title Company on Settlement/Signing Date (Can be done by e-mail and Fed Ex)
  - o Take property keys to closing
  - o Mark keys out of key system
- o Funding Date
  - o Seller gets \$\$\$\$
  - o Buyer gets keys, garage door openers, gate code from Title Company
- o Commission Check
  - o Review check for correct gross receipts tax
  - o Deposit check in bank
  - o Enter in check book
  - o Put deposit slip and copy of check in Income File and scan to Dropbox
- o Complete Closing Check List and close File
  - o Enter in NM Gross Receipts tax file in Dropbox
  - o Enter in Production Files in Dropbox
  - o Pay any applicable referral
  - o Enter as Sold in MLS
- o If Selling Agent, remove sign & lockbox from property

*(This list may not be comprehensive as specific details will depend on the individual Purchase Agreement.)*

## INSPECTION CHECKLIST

<b>INSP DUE:</b>		<b>ORW DUE:</b>		<b>RES DUE:</b>	
<b>FULL HOME:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					
WARRANTY?: <b>YES</b> <b>NO</b>		WHICH COMPANY?		WHO PAYS? <b>BUYER</b> <b>SELLER</b>	

<b>TERMITE/DRY ROT:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					

<b>SEWER:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					

<b>ROOF:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					

<b>APPRAISAL:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					

<b>OTHER:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					

<b>OTHER:</b>				<b>PHONE:</b>	
Ordered by:		Scheduled for:		Inspector:	
Copy to client:		Who pays? <b>BUYER</b> <b>SELLER</b>			
Comments:					



# CLOSED FILE CHECKLIST

(unless otherwise indicated, items in tab are organized top to bottom in order listed)

## Left inside behind front cover

\_\_\_ Closed File Checklist  
\_\_\_ KSRE Cover Sheet

\_\_\_ Sold MLS printout  
(highlight sold price & selling date)

## Purchase Agreement/HUD Tab

\_\_\_ Copy of commission deposit receipt  
\_\_\_ Final TRID (signed by buyers & sellers)  
\_\_\_ Purchase Agreement (signed by buyers & sellers) (signed by Kate on pg 2)  
\_\_\_ Counter Offers (signed by buyers & sellers) (always on top until closes)  
\_\_\_ Addendums/Amendments (signed by buyers & sellers)

## Auditable Items Tab

\_\_\_ Purple blank paper  
\_\_\_ Earnest money record  
\_\_\_ Orange blank paper  
\_\_\_ Lead Paint Disclosure (if home built before 1978)  
\_\_\_ Property Tax Calculator (signed by buyers & sellers)

\_\_\_ Certification of Delivery of Tax Levy (RANM 3250)  
(optional, not to replace Tax Calculator)  
\_\_\_ FIRPTA or Qualified Substitute Statement  
(if over \$300K)  
\_\_\_ HOA/PID Documentation

## Inspections/Objections Tab

\_\_\_ Inspection Checklist  
\_\_\_ Objections (signed by buyers & sellers)  
\_\_\_ Property Disclosure (signed by buyers & sellers)

\_\_\_ Inspections/Reports  
\_\_\_ Appraisal

## Correspondence Tab

\_\_\_ Orange blank paper (at bottom of Correspondence)  
\_\_\_ copy of email sending signed Listing Agrmt to client

\_\_\_ copy of email sending signed Purchase Agrmt to client

## Title Work Tab

\_\_\_ Survey (on top)

\_\_\_ Title Binder

## Contractual Agreement Tab

\_\_\_ Listing Agreement (signed by sellers) (signed by Kate on pg 11 & 7)  
\_\_\_ If Buyer is client, "Transaction Broker without Written Agreement" paper

## Office Policies

\_\_\_ SOLD entered in MLS  
\_\_\_ Sign taken down  
\_\_\_ Lock box taken down

\_\_\_ Mark out listing in key book & remove key from box  
\_\_\_ Send thank you: Client \_\_\_ Coop Agent \_\_\_  
\_\_\_ Zillow review sent to client

## Money

\_\_\_ Deposit commission check  
\_\_\_ Post deposit in Quickbooks  
\_\_\_ Put deposit slip & copy of check in Income File  
\_\_\_ Calculations reflect correct NMGRT%  
\_\_\_ Pay any applicable referral

## Final Details

\_\_\_ Add to Contacts: Mail \_\_\_ Email \_\_\_ Both \_\_\_  
\_\_\_ Add to Production files  
\_\_\_ Make changes to KS website  
\_\_\_ Relabel file  
\_\_\_ Final approval



PROPERTY:	123 Cherry Ln	456 MI Amigo NW	789 Calle Nada		
Contract Price:	\$200,000	\$350,000	\$515,000		
Contract Date:	01/15/17	01/22/17	01/29/17		
Effective Date:	01/17/17	01/24/17	01/29/17		
Seller(s)	Jones	Smith	Seller 1		
Buyer(s)	Buyer 1	Buyer 2	Ima Buyer		
Coop Agent	Ima Realtor	Joe Realtor	John Newble		
Title Officer	Tony Ponce, Fidelity	Maura Dahrting, Old Republic	Monica Borrego, Stewart		
Lender	Sandla	Bank of Albq	First Mortgage		
Appraiser	(B) Seller reimb \$500	(B) Seller reimb \$500	(B) Seller reimb		
Appraisal Ordered?					
Appraisal Date?					
DEADLINES					
Inspections Due	02/04/17	02/15/17	03/01/17		
ORW Due	02/07/17	02/18/17	03/04/17		
Res Due	02/10/17	02/21/17	03/07/17		
Closing Date	02/20/17	03/03/17	03/17/17		
INSPECTIONS - Who pays?	(B) / (S) reimb to \$500	Seller	(B) / (S) reimb to \$400		
Home Inspection	General 2/3 9am	Conc 1 2/11 1pm	Conc 1 2/27 1pm		
Re-Inspection					
Pest / Dry Rot			Brents 2/27 10am		
Sewer			TLC 2/27 11am		
HVAC					
Roof					
Other					
Other					
Home Warranty?	PA Blank	Buyer Pays	Seller pays		
DOCUMENTS					
Net Out Completed?	YES	YES	n/a		
EMD Received?					
Referral?	YES	YES	NO		
ADDITIONAL NOTES					
	NEED FIRPTA; 25% referral	NEED FIRPTA; 25% referral	NEED HOA		