

## What's in your file?

*By James L. Goldsmith, Esq.*

The Rules and Regulations of the State Real Estate Commission provide that a “broker shall retain records pertaining to a real estate transaction for at least three years following consummation . . .” This sparsely worded requirement raises a few questions. Do records, in the case of a transaction that is not consummated, ever need to be retained? And what exactly are “records pertaining to a transaction”? Do they include a post-it note or scrap of paper with a phone message? These questions have not been answered nor addressed.

A different requirement of the Rules and Regulations states “all contracts, commitments and agreements between a broker, or a licensee employed by the broker, and a principal or a consumer who is required to pay a fee, commission or other valuable consideration shall be in writing.” The regulations go on to identify specific items that are to be included in contracts between licensees and consumers and between buyers and sellers.

So, while we can identify written documents that are to exist in a real estate transaction, and therefore its file, we are unsure of what the legal obligations are with what else it is that we will undoubtedly come upon in a writing (virtual or electronic).

The following documents must be part of every transaction file by regulation or the Real Estate Licensing and Registration Act, the Pennsylvania statute of frauds or some other law: a consumer notice (though it may bear the licensee’s “refused” instead of a consumer signature), an employment contract (listing or buyer agency), agreement of sale, lease or other transaction contract, and estimates of closing costs. Other documents will certainly be found in just about every file, including the HUD-1 Settlement Statement and written addenda to the agreement.

Were the Real Estate Commission to pay you a visit in the course of an investigation it would ask for these documents. It would also ask for “other” including email, notes, correspondence, etc. But no law specifically states that email, notes and correspondence must be maintained. Keeping copies of these documents, however, should be the norm inasmuch as it may be your savings grace if you find yourself defending a law suit. But to the best of my knowledge, no licensee has been disciplined solely because their file does not contain extraneous notes and email.

For brokers who require well-maintained and complete files, the task is not easy. For some reason, the industry has adopted a system where the brokers and salespersons maintain separate files that, but for the essential documents, are not duplicates. Salespersons tend to keep their email and extraneous documents separate from the basic and mandatory documents noted above. Are there two files because agents are mobile and not tethered to an office? In a law office, a single file is maintained for a client. It not considered a particular lawyer’s file, but rather “**THE** file.” A lawyer wouldn’t think of maintaining a file separate from that which exists at the office. Nor would he or she not consider, for a second, retaining every email, while-you-were-out message, and the like.

Email presents a unique problem for real estate brokers. Rarely are they printed and stored in a correspondence folder as part of the file. They may never be printed and they may not all be found on a single computer. As a broker, do you require your salespersons to maintain email in a retrievable fashion? Do you require them to put it on a disk or other storage device that is turned into the office with the completed file? File management software exists, but do you enforce use of all storage features?

If you haven't grappled with these issues, you probably will. Requiring a comprehensive, well-maintained file is in your best interest. An incomplete or sloppy file can be all the proof that is needed for your opposition in a civil suit or disciplinary matter.

It's time to take control!

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