North Dakota Real Estate Commission
References for agency and agency disclosure 8/26

The key to each table:

The citation for a portion of North Dakota license law on agency – either the North Dakota Century Code (NDCC) 43-23 or North Dakota Administrative Code (NDAC) Chapter 70
Followed by an explanation of that particular part of the law,
Followed by the actual language of that part of the law, sometimes with key terms and phrases shaded, and sometimes in a format for easier reading,
And, in some cases, the law excerpt is followed by more detailed explanation.

43-23-06.1. Definitions.

The following defines terms for different kinds of agency, client, customer, and other real estate terms.

As used in this chapter, unless the context otherwise requires:

1. "Appointed agent" means a licensee appointed by a designated broker of the licensee's real estate brokerage firm to act solely for a client of that brokerage firm to the exclusion of other licensees of that brokerage firm.
2. "Client" means a person that has entered a written agency agreement with a real estate brokerage firm.
3. "Commission" means the North Dakota real estate commission.
4. "Customer" means a buyer, prospective buyer, seller, lessee, or lessor that is not represented by that real estate brokerage firm in a real property transaction.
5. "Designated broker" means a licensee designated by a real estate brokerage firm to act on behalf of the brokerage firm.
6. "Dual agency" means a situation in which a real estate brokerage firm or the real estate brokerage firm's licensees owe a duty to more than one party in a real estate transaction.
   Dual agency is established only as follows:
   a. When one licensee represents both the buyer and the seller in a real estate transaction; or
   b. When two or more licensees, licensed to the same broker, each represents a party to the real estate transaction.
   "Dual agency" does not exist unless both the seller and the buyer in a real estate transaction have written agency agreements with the same real estate brokerage firm.
   For purposes of "dual agency" a subagency arrangement is not a written agency agreement.
7. "Licensee" means a real estate broker, an associate real estate broker, or a real estate salesperson who is associated with a real estate brokerage firm.

Definitions continued on next page.

43-23-06.1. Definitions, *continued*

The rest of this section defines additional real estate law terms: real estate property, realty, broker, firm, and salesperson.

8. “Real estate”, “real property”, “realty”, or words of like import, means any interest or estate in land, including leaseholds, whether such interest or estate is corporeal, incorporeal, freehold, or nonfreehold, and whether situated in this state or elsewhere; provided, however, that the meaning as used in this chapter does not include oil, gas, or mineral leases, nor does it include any other mineral leasehold, mineral estate, or mineral interest of any nature whatsoever.
9. “Real estate broker”, or “broker”, means any person that, for another, for a fee, commission, salary, or other consideration, or with the intention or expectation of receiving or collecting such compensation from another, engages in or offers or attempts to engage in, either directly or indirectly by a continuing course of conduct or by a single act or transaction, any of the following acts:
    a. Lists, offers, attempts, or agrees to list real estate or any interest in that real state, or any improvements affixed on that real estate for sale, exchange, or lease.
    b. Sells, exchanges, purchases, or leases real estate or any interest in that real estate, or any improvements affixed on that real estate.
    c. Offers to sell, exchange, purchase, or lease real estate or any interest in that real estate, or any improvements affixed on that real estate.
    d. Negotiates or offers, attempts, or agrees to negotiate the sale, exchange, purchase, or leasing of real estate or any interest in that real estate, or any improvements affixed on that real estate.
    e. Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or any interest in that real estate, or any improvements on that real estate.
    f. Who is a licensee under this chapter and performs any of the acts set out in this subsection while acting in the licensee’s own behalf.
    g. Advertises or holds out as being engaged in the business of buying, selling, exchanging, or leasing of real estate or any interest in that real estate, or any improvements on that real estate.
    h. Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, or leasing of real estate or any interest in that real estate, or any improvements on that real estate.
    i. Publicly markets for sale an equitable interest in a contract for the purchase of real property between a property owner and a prospective purchaser.
10. “Real estate brokerage firm” means a person that is providing real estate brokerage services through that person’s licensees and which is licensed by the commission as a real estate brokerage firm.
11. “Real estate salesperson” means any person that for a fee, compensation, salary, or other consideration, or in the expectation or upon the promise of that compensation, is employed or engaged by a licensed real estate broker to do any act or deal in any transaction as provided in subsection 9 for or on behalf of such licensed real estate broker.

43-23-12.1 (1) -- Real estate brokerage firm - Duties required
The following explains the duties a firm's licensees owe to the client, who has a written agency agreement with the firm.
1. A real estate brokerage firm and the real estate brokerage firm's licensees, which provide services through a written agency agreement for a client, are bound to that client by the duties of: ○ loyalty, ○ obedience, ○ disclosure, ○ confidentiality, ○ reasonable care, ○ diligence, and ○ accounting, subject to the provisions of this chapter and subject to any rules adopted under this chapter.
Additional explanation of instances requiring disclosure, and confidential information is identified elsewhere in administrative rules, but the other duties listed above are not further defined.

43-23-12.1 (1) -- Real estate brokerage firm - Duties required -- continued
The following lists the different agency relationships. All agency relationships must be established through a written agency agreement.
The agency relationship, which must be established through a written agency agreement, may be a ○ seller agency, ○ a buyer agency, ○ a dual agency, ○ an appointed agency, ○ a subagency ○ or another form of agency relationship.
The term "subagency" is not defined in North Dakota real estate license law, but is commonly described as a firm or licensee of that firm that legally represents the seller client but the firm also assists the buyer customer in the transaction. Buyers often have their own buyer's agency representative, and do not rely on a subagent from the firm representing the seller.

43-23-12.1 (1) -- Real estate brokerage firm - Duties required -- continued
The following explains that any relationship between the firm and a client or customer, must be disclosed in writing.
If a different relationship, including a nonagency relationship with a customer, between the real estate brokerage firm and the person for which the real estate brokerage firm performs the services is intended, the relationship must be disclosed in writing pursuant to rules adopted by the [commission].
Any kind of agency relationship agreed to with a client must be in a written agency agreement. A nonagency relationship with a customer also must be disclosed in writing. The customer must sign the disclosure before the licensee performs any services for the customer, and the broker must retain a copy. See NDAC 70-02-03-15.2.

43-23-12.1 (2) -- Real estate brokerage firm - Duties required
The following explains the legal duties a firm and its licensees owe to a customer.
2. If a buyer, prospective buyer, or seller is not represented by a real estate brokerage firm in the real property transaction, that buyer or seller remains a customer, and, as to that customer, the real estate brokerage firm and the real estate brokerage firm's licensees are nonagents that owe the following legal duties: o to perform customary acts typically performed by real estate licensees in assisting a transaction to the transaction's closing or conclusion if these acts are to assist the customer for which the services are directly provided; o to perform these acts with • honesty and • good faith; and o to disclose to the customer • any adverse material facts actually known by the licensee which pertain to the title of the real property, • the physical condition of the real property, and • defects in the real property. These limited duties are subordinate to any duties the real estate brokerage firm and the real estate brokerage firm's licensees owe to a client in the same transaction.
A licensee's primary duties are to their client, but a licensee who is a nonagent to a customer still owes legal duties to that customer. The nonagent licensee must disclose to the customer: • any known adverse material facts about, • the physical condition of, and • defects to, the property.

43-23-12.1 (3) -- Real estate brokerage firm - Duties required
The following explains the limitations on what the firm's licensees owe to a client, customer or any other person, regarding the property involved in the transaction.
3. Unless otherwise agreed in writing, a real estate brokerage firm and the real estate brokerage firm's licensees are not obligated to a client, to a customer, or to any other person • to discover defects in any real property, • to verify the ownership of any real property, • or to independently verify the accuracy or completeness of any statement or representation made by any person other than the real estate brokerage firm and the real estate brokerage firm's licensees involved in the transaction under question.
Unless agreed to in writing, the licensees are not obligated to anyone – even if a client or customer, to: • discover defects in property (not already known to the licensee), • verify ownership of the property, • independently verify accuracy or completeness of any statement/representation made by anyone except the firm or firm's licensees involved in the specific transaction.

43-23-12.1 (4) -- Real estate brokerage firm - Duties required
The following explains that a licensee who is not involved in a transaction does not need to disclose information on a property to another licensee in the same firm who is involved in a transaction concerning the same property.
4. Unless the licensee is directly involved in a transaction regarding the affected real property, this section does not result in imputing knowledge, regarding the affected real property, of one licensee within a real estate brokerage firm to another licensee within the same real estate brokerage firm or in imposing a duty upon a licensee within a real estate brokerage firm to disclose facts that are known by that licensee regarding the affected real property to another licensee within the same real estate brokerage firm.
Example: Licensee A in a firm knows something about a property, but licensee A is not involved in a transaction about that property, while licensee B in the same firm is involved in a transaction with the same property. In this case, licensee A is not required to tell licensee B what licensee A knows about the property.

43-23-12.1 (5) -- Real estate brokerage firm - Duties required

The following explains what competing offers need to be disclosed when 2 or more licensees in the same firm represent 2 or more buyers, or when only 1 licensee represents 2 or more buyers.

5. If a real estate brokerage firm and the real estate brokerage firm's licensees represent two or more buyers or lessees as clients that desire to make an offer for the purchase or lease of the same real property, the real estate brokerage firm and the real estate brokerage firm's licensees do not breach any duty by assisting such clients with multiple offers, even though the interests of such clients are competing, and are not required to disclose the existence of competing offers, except as otherwise set forth under this subsection. The real estate brokerage firm and the real estate brokerage firm's licensees shall continue to honor agency duties to such clients, except as limited under this subsection.

   However, if an individual licensee has a written agency agreement with two or more buyers that desire to make an offer for the purchase or lease of the same real property, that licensee shall disclose to those competing buyer clients the fact that a competing written offer has been submitted by another buyer client of that licensee.

When representing buyers:

2 or more licensees in the same firm who represent 2 or more buyers/lessees as clients who make offers on the same property

-- Licensees do not need to disclose existence of competing offers.

However, if 1 licensee represents 2 or more buyers/lessees as clients who make offers on the same property

– The licensee must disclose to those competing buyer clients that a competing written offer has been submitted by another buyer client of that licensee.

43-23-12.1 (6) -- Real estate brokerage firm - Duties required

The following explains what needs to be disclosed when 2 or more licensees in the same firm represent 2 or more sellers.

6. If a real estate brokerage firm and the real estate brokerage firm's licensees represent two or more sellers or lessors as clients that desire to offer competing real property for sale or lease, the real estate brokerage firm and the real estate brokerage firm's licensees do not breach any duty to such clients by performing such services, even though the interests of such clients are competing. In such event, the real estate brokerage firm and the real estate brokerage firm's licensees shall continue to honor agency duties to such clients, except as limited under this subsection.

Representing sellers:

The same firm's licensees can represent 2 or more sellers/lessors as clients that may offer competing property for sale or lease

43-23-12.2 (1) -- Duties supersede common law.
The following explains that North Dakota real estate license law is the primary law that determines the duties a firm and its licensees owe to a client or customer.
1. The duties of a real estate brokerage firm, and the firm's licensees, as specified in this chapter or in rules adopted to implement this chapter, • supersede any fiduciary duties of that real estate brokerage firm and the firm's licensees, o to a person based on common-law principles of agency o to the extent that those common-law fiduciary duties are inconsistent with the duties specified in this chapter or in rules adopted to implement this chapter.
NDCC 43-23-12.2(1) is a limited preemption provision: the duties stated in chapter 43-23 and its implementing rules in chapter 70 supersede common-law agency fiduciary duties to the extent the common-law duties are inconsistent.

43-23-12.2 (2) -- Duties supersede common law.
The following explains that a client is not liable for certain actions by a licensee.
2. A client is not liable for • a wrongful act, • an error, • an omission, or • a misrepresentation made by a licensee in connection with the licensee providing brokerage services for the client, o including brokerage services provided under a subagency relationship, ▪ unless the client knows or should have known of the wrongful act, error, omission, or misrepresentation or ▪ unless the licensee is repeating a misrepresentation made by the client. This subsection supersedes any conflicting common-law duty of the client.
A client can be liable for a licensee's wrongful acts if the client knew or should have known of a licensee's wrongful actions or if the licensee is repeating a misrepresentation made by the client.

43-23-12.2 (3) – Duties supersede common law.
The following explains that a firm is not liable for certain actions by its clients.

3. A real estate brokerage firm that is providing brokerage services to a client is not liable for
• a wrongful act,
• an error,
• an omission, or
• a misrepresentation made by
  ○ the client,
  ○ listing agent of another real estate brokerage firm, or
  ○ subagent of another real estate brokerage firm,
▪ unless the real estate brokerage firm knew or should have known of the wrongful act, error, omission, or misrepresentation or
▪ unless the client, listing agent of another real estate brokerage firm, or subagent of another real estate brokerage firm is repeating a misrepresentation made by the real estate brokerage firm.

A firm can be liable for a client's or another firm's listing agent or subagent wrongful acts if the firm knew or should have known of the client's wrongful actions, or if the firm is repeating a client's misrepresentation.

43-23-12.2 (4) – Duties supersede common law.
The following explains that this section does not protect a licensee from disciplinary actions against the license if the licensee is found noncompliant with North Dakota real estate license law. The following also explains that this section does not protect a client from liability against some actions – substantial and willful misrepresentations – made in reference to a transaction.
4. This section does not limit the liability of a licensee under section 43-23-11.1 nor of a client for substantial and willful misrepresentations made in reference to a real estate transaction. As used in this section, the term "real estate brokerage firm" includes the firm and brokers and agents who work for the firm.
The licensee can still be disciplined for substantial and willful representations in a real estate transaction even though this section identifies some actions for which a licensee or firm is not liable.

43-23-12.3 (1) -- Brokerage firm may appoint agents.
The following explains that a firm may appoint specific licensee/s in its firm as the sole appointed agent/s to work exclusively with a client.
1. A real estate brokerage firm, through a designated broker, may appoint in writing to a client the licensee or licensees within the brokerage firm who will act as appointed agent of that client to the exclusion of all other licensees within the brokerage firm.

43-23-12.3 (2) -- Brokerage firm may appoint agents.
The following explains that a firm may have appointed agents that end up as parties to the same transaction, but this is not dual agency and there is no exchange of information between the clients and appointed agents.
If a real estate brokerage firm appoints an appointed agent for clients of the agency who are, or may be, parties in the same real estate transaction, • the brokerage firm and its licensees are not dual agents as to those clients, and • there is no imputation of knowledge or information among or between said clients, the real estate brokerage firm, and the appointed agents.

43-23-12.3 (3) -- Brokerage firm may appoint agents.
The following explains that a firm may establish a dual agency relationship with clients provided that required disclosures are made.
3. Nothing in this section prevents a real estate brokerage firm from entering a dual agency relationship with its clients after complying with any disclosure requirements provided by this chapter or by rules adopted under this chapter.
These disclosures must be in writing, and this requirement is stated in 43-23-12.1 (1).

70-02-03-05.1 (1-4) -- Buyer's broker agreements.
The following explains what must be in a buyer's broker agreement for residential real property, which is defined as a separate dwelling for 1 to 4 families. The following explains that a separate dual agency disclosure must be part of the agreement if the licensee represents both buyers and sellers in same transaction.
In instances where residential real property consists of separate dwelling units for one through four families, a licensee must obtain a signed buyer's broker agreement from a buyer before performing any act as a buyer's representative. All buyer's broker agreements must be in writing and must include: 1. A definite expiration date. 2. The amount of commission or other compensation. 3. A clear statement explaining the services to be provided to the buyer, and the events or condition that will entitle the licensee to a commission or other compensation. 4. If the licensee chooses to represent both buyers and sellers in the same transaction, a separate dual agency disclosure statement in accordance with the provisions of section 70-02-03-15.1.

70-02-03-15. Agency disclosure required.
The following applies only to transactions for properties that <u>are commercial, agricultural, and residential dwellings for 5 or more families</u>. It includes the required language to disclose the agency relationship.
In all real estate transactions the licensee is the agent of the seller unless all parties otherwise agree in writing. The agency relationship must be disclosed in writing to the parties before the signing of a written contractual agreement. The disclosure language must state at least the following information in substantially this form: "I ____________________, a real estate licensee, stipulate that I am representing the ____________________ (Buyer/Seller) in this transaction. Licensee" Each licensee in the transaction shall make such a disclosure.
This section applies only to transactions involving agricultural and commercial property, residential property that provides separate dwelling units for five or more families, and commercial leaseholds. Residential property that provides separate dwelling units for one through four families is subject to the agency disclosure requirement of section 70-02-03-15.1.

70-02-03-15.1. Licensee to disclose agency relationships - Duty of confidentiality.
The following defines terms “dual agency,” party to the transaction, and “real estate transaction.” The following does NOT apply to transactions involving agricultural or commercial property, residential property for 5 or more families, or commercial leaseholds.
2. As used in this section, unless the context or subject matter otherwise requires: a. "Dual agency" means a situation in which a licensee owes a duty to more than one party to the real estate transaction. Dual agency is established as follows: (1) When one licensee represents both the buyer and the seller in a real estate transaction; or (2) When two or more licensees, licensed to the same broker, each represent a party to the real estate transaction. b. “Party to the real estate transaction" includes any individual or individuals who are a seller or buyer, or potential seller or buyer. c. "Real estate transaction" means any transaction involving residential real property that consists of separate dwelling units for one through four families. "Real estate transaction" does not include transactions involving agricultural or commercial property, residential property that provides separate dwelling units for five or more families, or commercial leaseholds.
See 70-02-03-15, above, for the agency disclosure required for commercial, agricultural, or dwellings for 5 or more families.

70-02-03-15.1 (2) -- Licensee to disclose agency relationships - Duty of confidentiality.
The following explains that agency relationships must be in a separate signed written document/statement, retained in the broker's file, and made at the first substantive contact between licensee and other parties to the transaction. The following defines substantive contact for the seller, buyer, and other parties. The following explains that if any change in agency representation occurs, a new disclosure must be made immediately to any party in the transaction. The following explains that written notice of agency representation is not required for each prospective buyer who comes to an open house, provided that the agency representation is obvious through marketing materials.

2. In all real estate transactions in which the licensee represents any party to a real estate transaction,
• the licensee must make an affirmative written disclosure identifying which party that person represents in the transaction.
  ○ The disclosure must be made at the time of the first substantive contact between the licensee and any party to the real estate transaction.
  ○ The disclosure must be represented by a separate written document, and
  ○ offered to the party to the real estate transaction for signature.
  ○ True copies of the disclosure form must be retained in the broker's file.
 	
As used in this subsection, the term "substantive contact" means:
a. When representing the seller, prior to the signing of a listing agreement.
b. When representing a buyer, prior to the signing of a buyer's broker agreement.
c. As to all other parties, such as potential buyers or sellers, who are not represented by the licensee, prior to the discussion of personal financial information or the commencement of negotiations, which could affect that party's bargaining position in the transaction.
 	
• However, a licensee shall have complied with the provisions of this subsection if, in those circumstances where it is impossible as a practical matter to obtain a signed written disclosure statement from a party at the time of the first substantive contact, such as telephone contact with an absent party, the licensee orally discloses the status of the licensee's representation and, as soon as practicable thereafter, makes the written disclosure required by this subsection.
 	
d. As to any change in the licensee's representation, including dual agency, that makes the initial disclosure of representation incomplete, misleading, or inaccurate, a new disclosure must be made at once to any party to the transaction.

e. Nothing in this section requires written notice to each prospective buyer who comes to an open house display of real property; provided, however, the licensee, by sign, poster, distributed listing literature, or property description form, conspicuously discloses the licensee's agency relationship.
The above subsection states the • timing of written disclosure of representation, and • definition of "substantive contact."

70-02-03-15.1 (3-4) – Duty of confidentiality.
The following states what information is confidential and cannot be disclosed without informed, written consent of the party the licensee represents. The following also requires a licensee to keep confidential all information received from a party being represented if that party requests confidentiality.
3. Each licensee owes a duty of confidentiality to a party being represented in a real estate transaction. The following information may not be disclosed without the informed, written consent of the party being represented: a. That the party being represented is willing to pay more than the purchase price or lease price offered for the property. b. That the party being represented is willing to accept less than the purchase price or lease price being asked for the property. c. What the motivating factors are for the buying, selling, or leasing of the property by the party being represented. d. That the party being represented will agree to terms for financing of the property other than those which are offered. 4. A licensee shall also keep confidential all information received from a party being represented, which has been made confidential by request or instruction of that party.
A licensee must have the informed, written consent from the client before sharing confidential information from the client with another party. The duty of confidentiality for a licensee also applies if another represented party shares information that they request be kept confidential. See also 70-02-03-15.1 (5-6), immediately below.

70-02-03-15.1 (5-6) – Duty of confidentiality.
The following states the timelines that apply to the duty of confidentiality for parties being represented under subsections 3 and 4, immediately above. As to a nonagent brokerage firm, a customer is not owed the agency duty of confidentiality; see NDAC 70-02-03-15.2. The following states that the duty of confidentiality does not apply to material defects in the property known by the licensee, or to information, if not disclosed, would result in fraudulent misrepresentation.
5. The obligation of confidentiality set forth in subsections 3 and 4 • continues in effect during the time a party is being actively represented, and • continues on after the termination, expiration, or completion of the representation until one of the following occurs: a. The party being represented permits the disclosure by subsequent word or conduct. b. Disclosure is required by law, by court order, or order of the commission. c. The information is made public through disclosure from a source other than the licensee. 6. The provisions of subsections 3 and 4 do not serve to permit or require a licensee to keep confidential any material defects in the property of which the licensee is aware or which would constitute fraudulent misrepresentation unless disclosed.
The duty of confidentiality on some information could continue indefinitely. • A party being represented may permit much or all of otherwise confidential information to be shared, or • the party may not permit any confidential information to be shared. A licensee must have the informed, written consent from the party being represented before the licensee may disclose confidential information (NDAC 70-02-03-15.1 (3), if that information is not a known material defect or would be a fraudulent misrepresentation if kept confidential (NDAC 70-02-03-15.1 (6)).

70-02-03-15.1 (7) (d) -- Licensee to disclose agency relationships - Duty of confidentiality – D*uty of loyalty and faithfulness.*
The following states that written disclosure must explain to the party the type of representation available to the party and how the party's interest will be represented by the agent if the party chooses the licensee to act as the owner's agent, buyer's agent, or as a dual agent; and the details of the licensee's duty of loyalty and faithfulness to the party.

7. The written disclosure required by this section must advise a party to the real estate transaction of the different types of representation that are available.
   - The explanation must include information pertaining to how that party's interest shall be represented if the party chooses the licensee to act as the owner's agent, the buyer's agent, or as a dual agent.
   - The written disclosure forms, in clearly understood terms, must inform the party to the transaction as follows:

   a. If the party chooses seller representation, it must be explained that this relationship typically arises from entering into a listing agreement, or by agreeing to act as a subagent through the listing agency.
      - A subagent may work in a different real estate office.
      - A listing agent or subagent can assist the buyer but does not represent that party.
      - A listing agent or subagent is required to place the interest of the owner first, and
      - a buyer should not tell a listing agent or subagent anything that the buyer would not want the owner to know, because the listing agent or subagent must disclose any material information to the owner.
      - Also, it must be explained that if the real estate brokerage firm and its licensees represent two or more sellers as clients who both desire to offer competing real property for sale or lease,
        - the real estate brokerage firm and its licensees may do so without breaching any duty to such clients.
        - In such an event, the brokerage firm and its licensees still owe agency duties to the clients, except as limited in this subsection.

   b. If the party chooses buyer representation, it must be explained that the licensee typically becomes the buyer's agent by entering into an agreement for such representation.
      - A buyer's agent may assist the owner but does not represent the owner.
      - A buyer's agent must place the interest of the buyer first, and
        - the owner should not tell a buyer's agent anything the owner would not want the buyer to know
        - because the buyer's agent must disclose any material information to the buyer.
      - Also, it must be explained that if the real estate brokerage firm and its licensees represent two or more buyers as clients who desire to make an offer to purchase the same real property,

- the brokerage firm and its licensees do not breach any duty by assisting such clients with multiple offers even though the interest of such clients are competing.
  - However, if the same licensee represents two or more buyers who desire to make an offer to purchase the same property,
    - that licensee must disclose to buyer clients the fact that a competing written offer has been submitted by another buyer client of that licensee without disclosing the identity of the other buyer client or the terms of the offer.
      - In such an event, the brokerage firm and its licensees still owe agency duties to the clients, except as limited in this subsection.

c. If the party selects dual agency, it must be explained that the licensee must enter into a written agreement obtaining the consent of both parties before such representation is authorized.

- This agreement must set forth who will be responsible for paying the licensee's fee.
- Under this arrangement, the licensee is required to treat both parties honestly and impartially so as not to favor one over the other.
- Unless written permission from the appropriate party is obtained, the licensee is prohibited from disclosing
  - that the owner will accept less than the asking price,
  - that the buyer will pay a price greater than that submitted in the written offer, or
  - any other information of a confidential nature or
  - which the party has instructed the licensee not to disclose.
- Potential conflicts exist when the licensee represents more than one party, and
- the licensee's activities may be more limited.
  - The licensee is required to inform each party of any facts that would affect a party's decision to permit representation of both the owner and buyer.
  - This includes any arrangement by which the licensee will or expects to represent a party in a future transaction.

d. It must be explained

- that a duty of loyalty and faithfulness are owed to the party or parties to the transaction with whom the licensee has an agency relationship, and
- the licensee must inform that party of all important information which might affect a decision concerning the real estate transaction.
  - This includes disclosure of any material facts to the buyer that may adversely and significantly affect that person's use or enjoyment of the property.
  - It also includes disclosure of any information to either party which may indicate that one of the parties does not intend to perform in accordance with the terms of the purchase agreement or any other written agreement or obligation.

- However, it must be explained that knowledge of one licensee of a real estate brokerage firm regarding an affected real property is not imputed to another licensee in the same brokerage firm and
- no duty is imposed upon a licensee in a real estate brokerage firm to disclose facts that are known by that licensee regarding the affected real property to another licensee within the same real estate brokerage firm.
- Also, it must be explained that unless otherwise agreed in writing,
  - a real estate brokerage firm and its licensees are not obligated to a client, a customer, or any other person to discover defects in any real property,
  - to verify the ownership of any real property, or
  - to independently verify the accuracy or completeness of any statement or representation made by any person other than the real estate brokerage firm and the real estate brokerage firm's licensees involved in the transaction under question.

e. It must be explained that a licensee must deal honestly with any party to a real estate transaction, regardless of whether the party is represented by that licensee.

70-02-03-15.1 (8) Licensee to disclose agency relationships - Duty of confidentiality – *no compensation without proper disclosure*

This subsection addresses enforceability of compensation claims. A person required to be licensed may not maintain an action to recover a commission, fee, or other compensation unless the person's agency relationship was disclosed as required by this section.

8. No person required to be licensed by North Dakota Century Code chapter 43-23
   - may maintain any action to recover any commission, fee, or other compensation
     - with respect to the purchase, sale, lease, or other disposition or conveyance of real property, or
     - with respect to the offer, negotiation, or attempt to negotiate any sale, lease, purchase, or other disposition,
   - unless that person's agency relationship has been disclosed to the party or parties to the transaction in accordance with the requirements of this section.

To be paid for services, a licensee must have disclosed the licensee's agency relationship to the party/ies in the transaction, as described in this section.

70-02-03-15.1 (9) -- Licensee to disclose agency relationships - Duty of confidentiality – *Commission may approve forms.*

The following states that the Commission may approve forms to use.

9. The commission may approve a specific form or forms to implement the provisions of this section.

The Commission currently does not provide the forms as described in this section.

70-02-03-15.2 – Licensee to disclose nonagency relationship -- customer.

The following states a licensee must disclose in writing a nonagency relationship with a customer before working with them. See also NDCC 43-23-12.1 (1), near the beginning of this document.

The written disclosure must explain that licensee owes limited legal duties to a customer.

The written disclosure must explain that the licensee must place the interest of the represented client before that of the customer, if the licensee's brokerage firm and licensees represent another party in the same transaction.

The following states the duties which are not owed to a customer.

In all real estate transactions in which the licensee performs services for a customer, as that term is defined by North Dakota Century Code section 43-23-06.1, the licensee must disclose the nonagency relationship in writing to the customer.

- This document must be signed by the customer prior to the licensee performing any services for the customer.
- A copy of the signed written disclosure must be retained in the broker's file.
- The written disclosure must explain that as to a customer the real estate brokerage firm and its licensees are nonagents that owe to the customer only limited legal duties.
- These limited legal duties are to perform the customary acts typically performed by real estate licensees in assisting a transaction to the transaction's closing or conclusion with
  - honesty and good faith and
  - to disclose to the customer any adverse material facts actually known by the licensee which pertain to
    - the title of the real property,
    - the physical condition of the real property, and
    - defects in the real property.
- The real estate brokerage firm and its licensees do not owe the agency duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting to the customer.
- The disclosure must also explain that if the brokerage firm and its licensees represent another party in the same real estate transaction, the licensee is required to place the interest of the represented client first.

A licensee must disclose in writing a nonagency relationship with a customer before working with them.

A customer may be a "party to the real estate transaction" without being represented by this brokerage firm; the terms serve different purposes. Under 70-02-03-15.2, this brokerage firm and its licensees do not owe the customer the agency duty of confidentiality. The confidentiality duties in 70-02-03-12.1 (3-5) apply to a party being represented by the brokerage firm.

70-02-03-17. Designated broker - Appointed agent. -- *Confidential information – respecting, disclosing in specific agency arrangements.*

The following states that an appointed agent may disclose to the appointed agent's broker a client's confidential information for client's benefit. If the broker wants to disclose this confidential information, the client must approve that disclosure.

The appointed agency must disclose in writing this appointed agency to the client before entering into a broker agreement.

This written disclosure must include certain information:

- name of agent,
- duties owed to client,
- that the firm may be representing both seller and buyer,
- that another agent in the firm may be appointed during the agreement, and
- a section for client to consent/not consent in writing to the appointment.

A change in appointment does not relieve the initial appointed agent of their duties to the client.

The appointed agent's duty to the agent's designated broker is to keep the broker fully informed of all the agent's actions – and any other related information -- throughout the transaction that may affect broker responsibility.

1. Appointed agent procedures and disclosure.
   a. A designated broker appointing a licensee to act as an agent of a client shall take ordinary and necessary care to protect confidential information disclosed by the client to the appointed agent.
   b. An appointed agent may reveal to the agency's designated broker confidential information of a client for seeking advice or assistance for the benefit of the client about a possible transaction.
      - The designated broker shall treat confidential information as such and may not disclose such information unless otherwise requested or permitted by the client who originally disclosed the confidential information.
2. Appointed agent - Written disclosure.
   a. An appointed agent shall disclose in writing such appointment to the client before entering into a brokerage agreement and shall include, at a minimum, the following provisions:
      (1) The name of the appointed agent;
      (2) A statement that the appointed agent will be the client's agent and will owe the client fiduciary duties, which among other things, include the obligation not to reveal confidential information obtained from the client to other licensees, except to the designated broker for seeking advice or assistance for the benefit of the client;
      (3) A statement that the agency may be representing both the seller and the buyer in connection with the sale or purchase of real estate;

(4) A statement that other licensees may be appointed during the term of the brokerage agreement should the appointed agent not be able to fulfill the terms of the brokerage agreement or as by agreement between the designated broker and client. An appointment of another agent as a new or additional agent does not relieve the first appointed agent of any of the fiduciary duties owed to the client. At the time of the appointment of the new or additional agents, the designated broker must comply with the provisions of this section; and

(5) A section for the client to consent or not consent, in writing, to the appointment.

3. Appointed agent's duty to the designated broker. In any appointed agent transaction, the appointed agent shall keep the designated broker fully informed of all activities conducted by the appointed agent during the transaction and shall notify the designated broker of any other activities that might affect the responsibility of the designated broker.