



Insurance Department

State of Utah

GARY R. HERBERT
Governor
SPENCER J. COX
Lieutenant Governor
TODD E. KISER
Commissioner

State of Utah Title & Escrow Commission Meeting Meeting Information

Date: **May 8, 2017**

Time: **9AM**

Place: East Building, Copper Room

MEMBERS

COMMISSION MEMBERS

xChair, David Moore (*Agency, Salt Lake County*) xMatthew Jagerson (*Agency, Utah County*)
xVice Chair, Bob Rice (*Insurer, Ada County, ID*) Jeff Wiener (*Insurer, Salt Lake County*)
Sylvia Andersen (*Public Member, Salt Lake County*)

DEPARTMENT STAFF

Todd Kiser, *Ins. Commissioner* xBrett Barratt, *Deputy Comm.* Perri Babalis, *AG Counsel - TEC*
xSuzette Green-Wright, *MC Dir.* xRandy Overstreet, *Licensing Dir.* xReed Stringham, *AG Counsel - UID*
Angie Watson, *Examiner* Adam Martin, *Examiner* xSteve Gooch, *PIO Recorder*

PUBLIC

Carol Yamamoto Tim A. Krueger Matt Ryden
Tim Grubb Scott Cope James Swan
Chase Phillips Blake Heiner Adam Back
Mark Webber [PHONE] Wes Jensen [PHONE] Cort Ashton

MINUTES — *Not Approved*

General Session: (Open to the Public)

- **Welcome** / David Moore, Chair (9:02 AM)
 - Jeff is excused.
 - Sylvia is excused.
- **Telephone Roll Call**
- **Adopt Minutes of Previous Meeting**
 - Bob requests changes:
 - Page 3, 9th bullet: The word "~~escrow~~" should be changed to "earnest money" and "~~subject~~" should become "someone not party to the contract."
 - Page 4, 7th bullet, 4th line: The line should end "...acting as an escrow agent outside the scope of their authority."
 - **Motion by Bob to approve. Seconded by Matthew. Motion passes 3-0.**
- **Reports**
 - Concur with Licensee Report / Suzette
 - For agencies, there were no lapses and no new licenses.
 - For agents, Suzette forgot to take out the expiration date and the number of days they were expired. She lists them:
 - Curtis McCoy – 102 days
 - Lori Mathewson – 439 days
 - William Rowley – 148 days
 - David asks about Lori Mathewson being over 400 days. Suzette says she likely has another license besides title and sometimes it affects that count.

- Bob asks when Mountain View Title lapsed. Suzette says March 31. Bob asks what the 19 designation means. Suzette says it's the new expiration date. It lapsed March 31, 2017, was reinstated on April 6, 2017, and the new expiration is in 2019.
 - Concur with Complaint & Enforcement Report / Suzette
 - There were 8 enforcement cases closed since the first of the month.
 - An advertising with a client complaint has hit a number of companies. They have already been contacted by Angie.
 - There's 1 new E-Case that had to do with audit findings. There are 3 outstanding E-Cases, 2 of which will be handled today; the other will be done in June.
 - **Motion by Bob to concur with the complaint and enforcement reports. Seconded by Matthew. Motion passes 3-0.**
 - Request for Dual Licensee Expedited Request: None
 - Request for Attorney Exemption:
 - Brandon L. Kidman
 - Brandon has been licensed with the Utah State Bar since 2009. He became licensed for both title and escrow in April 2017 — there is no requirement on how long you must be licensed for title to be eligible for an exemption. Looking at the letter Brandon supplied, Randy believes Brandon has enough experience for the department to grant him the exemption for not having an insurance license for 3 years.
 - David notes that Brandon has been preliminarily approved by the department, and has had a license for 8 years.
 - **Motion by Bob to concur. Seconded by Matthew. Motion passes 3-0.**
 - Trevor C. Mooney
 - Trevor initially requested an exemption in 2016. The department preliminarily disapproved the exemption and the Title & Escrow Commission agreed. He didn't have enough experience and had a title license for less than 3 years.
 - He has submitted a new request. Randy has attached the resume Trevor sent previously, so we could understand his additional experience. He has had some enhanced attorney experience and real estate experience, and the department feels it was enough to preliminarily approve the exemption.
 - **Motion by Matthew to concur. Seconded by Bob. Motion passes 3-0.**
- **Administrative Proceedings Action / Brett Barratt, ALJ**
 - Stipulation and Order:
 - Linear Title Agency of Utah (ENF# 3872)
 - Linear Title Agency employed a producer who was licensed but not designated to Linear Title. During the period of investigation, the producer had closed 12 transactions. The respondent has agreed to a \$1,000 forfeiture.
 - David notes that appointments usually go along with title licenses, and asks if the producer's license was just in title, or in title and escrow. Wes Jensen says it was just in escrow. David says this means it was a designation issue, not an appointment issue.
 - **Motion by Bob to concur. Seconded by Matthew. Motion passes 3-0.**
 - BNT of Utah LLC (ENF# 3878)
 - BNT of Utah had failed to file its scheduled escrow charges. The department determined that the respondent had closed 99 transactions from April 30, 2015 and March 15, 2017. The respondent has agreed to a \$1,500 forfeiture.
 - Bob asks if the fees were consistent amounts during the time in question. Chase Phillips clarifies that they were consistent and were the same fees that were filed after the oversight was discovered.
 - **Motion by Bob to concur. Seconded by Matthew. Motion passes 3-0.**
 - Order to Show Cause: None

- Informal Adjudicative Proceeding and Order: None
- Notice of Formal Adjudicative Proceeding: None
- **Board Duties & Responsibilities / Perri**
- **New Business**
 - Discuss 31A-23a-406(1)(g) / Jeff
 - **Moved to June.**
 - Discuss DRE purchase contract addendum and draft version of R592-18 / Jeff
 - David asks if there are any new developments since last month. Suzette says nothing that she is aware of.
 - David says he has some problems with the rule, specifically that title agents aren't a party to the earnest money, and he doesn't know if title agents want to be a party to the contract. Under case law in Utah, if a title company is holding money, it's an escrow and they need to be paid for it.
 - Chase says the DRE sent over an addendum last month that they want to use for earnest money, and they were seeking comment. He asks if they have moved forward in approving the addendum. Angie was involved in that discussion, but she's out sick today.
 - Bob asks about the new rules and who approves them. Perri says it's the Title & Escrow Commission, with the concurrence of the commissioner. Bob asks what power the DRE has regarding title rules. Perri says they have none. The Title & Escrow Commission must notify the DRE of new title rules and they can submit public comment, but that's it.
 - **Motion by Bob to disapprove the draft of R592-18. Seconded by Matthew. Motion passes 3-0.**
 - David asks if the commission wants to make its own rule. Carol agrees with David, as far as title agents not wanting to be a party to the contract. In her experience, whenever there's been an escrow dispute, it causes so much work and frustration on the title side, but it's the other party's issue, not title's.
 - David says once we accept earnest money, it's an escrow and is subject to escrow fees. There should be an agreement in place aside from the REPC that would address a dispute.
 - Chase says if a transaction fails after you've taken earnest money, then you're in violation because you haven't issued a policy.
 - Mark Webber says this is a longtime issue. A lot of real estate companies are trying to push off the responsibility for earnest money, and it's falling on title agents. He doesn't think we can just say we won't take earnest money anymore, because there are times we'll have to take the money or we won't get the deal. There are a lot of real estate companies that don't have a trust account.
 - Blake Heiner says there is a legal basis for the commission to say that title agents cannot accept earnest money. But does the commission want to outlaw it completely?
 - Mark says because real estate companies are trying to push it off, the ULTA sent out a proposed guideline that included agent protections, and encouraged agents to use it. However, a lot of companies aren't using it, and everyone gets pressured to not use it if parties object. It's a difficult issue. It would be really easy if the commissioner were to make a rule to say title companies can't accept earnest money. There might be a backlash, but he thinks it should be considered. We need to know what the impact would be.
 - David notes that holding earnest money has been the practice for a number of years, and that might cause some issues. Blake says either the commission needs to ban that practice, or there must be significant changes. It would need to be a statute change regarding doing escrow without issuing title insurance, as well as structural changes. He notes that anyone holding earnest money is in violation, so it must be addressed by the commission one way or another.
 - Brett says one thing he found interesting was the proposed R592-18-5(2), which says if parties can't agree, the agency can interplead it to the court. Is there anything that we can propose to move the issue forward? He would suggest taking court fees being taken out of the earnest money being held. Mark agrees, and says the ULTA document included that provision.

- Mark asks if the department has a position on this matter. Brett says the department doesn't have a strong feeling one way or another, but would like to facilitate some resolution that would be beneficial to title agencies. Is there a way it can be resolved in a mutually beneficial matter?
- Bob says he questions whether the commission needs to take a position. Wouldn't it just be reiterating the 406 statute? He agrees, but if we say we can't take earnest money, it might result in a change to the statute to expand when title agencies can do escrow.
- Blake thinks a rule isn't necessary, and that it could be done with a bulletin from the department. It would just call the current rule to the attention of the licensees, which would give the licensees a basis to tell customers they can't do it. Mark asks what the bulletin would say, because he's not sure it would be a violation to hold earnest money.
- Bob says if you have an escrow instruction that anticipates the failure of the escrow, then you're anticipating a policy not being issued. Wouldn't that intention be a circumvention of the statute? Blake agrees and says if all goes well and the transaction closes, that's great; but if the transaction fails, you've performed escrow services without a fee and without issuing title insurance. Mark says you could make that same argument for every transaction, because every transaction has the potential to fail.
- David notes that there was a bulletin or rule that talks about lot reservations and that those aren't a violation if the buyer decides not to take the lot. The problem happens when the deal fails. Do we need to change the statute to say that failure to issue a policy may not be a violation under certain circumstances? Blake says you could put a requirement on the title producer to only do it for escrow instructions.
- Blake requests clarification of some kind from the Title & Escrow Commission. That can then be used as a backstop by those out in the field. David asks if it can be as simple as requiring escrow instructions that lay out what happens in the event of a failure. Mark says the argument would be that the REPC provides escrow instructions, but he can see holes in that because the REPC doesn't include the protections that title companies would need when accepting earnest money.
- Brett asks if anyone has experience in other states that address the issue. Bob says most other states that he's familiar with have a blanket exception for title agencies to do escrow. By having a title agent license, you don't need a separate license to do escrow. The thing that makes Utah unique is requiring that a policy be issued along with an escrow. Brett asks what happens in Idaho if there's a dispute. Bob says it's a contract that's dictated by the terms of the escrow instructions or earnest money agreement. Generally speaking, most people won't return earnest money to either party if there's a dispute — they'll interplead it. Usually the threat of interpleading forces an agreement.
- Bob says if the department took the same view of earnest money as they did for lot reservations, then the industry should have an agreement or form for holding earnest money. However, if the department started fining people for accepting earnest money, there wouldn't be a need for a form or agreement.
- Mark says the ULTA sent out its form and asked that everyone use it, but they can't make it a mandatory requirement. He knows there are companies that aren't using it or who will change it or revise it under pressure from real estate agents. Blake says there are plenty of forms out there — it's a question of whether it's a violation. If it's not, will the commission require agents and producers to have a written escrow instruction to address what happens in a failure.
- Mark suggests that he and Blake facilitate a subcommittee to come up with a recommendation for the commission. David and Bob like the idea, and David would be happy to participate.
- Wes Jensen asks if it would make sense to have an addendum to the REPC that can be signed at the same time as everything else. David says making it party to the REPC is problematic, but it might have to happen that way.
- Matt Ryden says his concern is that the proposed agreement won't provide for a fee in case the transaction doesn't close. Can the commission even make that determination under the code? Bob says Matt has a good point, and asks if it would be wise to have a determination about whether

holding earnest money is legal under 406. If the department says holding earnest money is prohibited, there's no need for a subcommittee. Brett thinks that's a valid request, and he defers to the AG's office.

- **Motion by Matthew to request an AG opinion on whether it's allowable for a title agency to hold earnest money. Seconded by Bob. Motion passes 3-0.**
- **Old Business**
 - Update on commissioner terms / Steve
 - The department sent a notice to all agents after the Title & Escrow Commission meeting last month, and got a number of responses. They have been reviewed and recommendations will be run by Commissioner Kiser.
 - We are still looking for a General Public member.
 - If names are submitted by May 12, they can be ready for the Senate's June Interim Session.
 - Bob asks if we've reached out to the real estate community to act as the public member. Steve says we have not. Brett says we can, but notes that it may delay having the General Public spot filled.
 - Update on department website regarding "active" vs. "authorized" status / Randy
 - Randy says development on the project began May 1 and is scheduled to launch June 14.
- **Other Business**
- **Hot Topics**

Executive Session (None)

- **Adjourn** (10:04 AM)
 - **Motion by Bob to adjourn. Seconded by Matthew. Motion passes 3-0.**
- **Next Meeting: June 12, 2017** — Copper Room

2017 Meeting Schedule in Copper Room

Jan 9	Feb 13 (SOB B110)	Mar 13	Apr 3	May 8	Jun 12
Jul 10	Aug 14	Sept 11	Oct 2	Nov 13	Dec 11