



Do I have to comply with a subpoena?

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QUESTION: A sheriff's deputy came to my office and delivered a subpoena. The subpoena is demanding that I turn over to the buyer's lawyer all the emails and text messages between me and my seller that relate to a recently closed transaction. Am I required to comply with the subpoena? Does my duty of confidentiality under the License Law require me to fight the subpoena or not comply with it? What will happen if I don't comply?

ANSWER: The duty of confidentiality arises from a broker's fiduciary duty during the transaction. Acting as a fiduciary, a broker is required to uphold the duties of: (1) loyalty and obedience; (2) skill, care, and diligence; (3) disclosure of information; and (4) accounting. The duty of loyalty and obedience requires the broker to protect a client's personal information unless the client gives the broker permission to disclose. So, if a broker represents a seller, the broker should not disclose the seller's health condition, job transfer, bottom line price to sell, or any other fact that may give the buyer an advantage in negotiations during the transaction.

Under the License Law, a broker generally has no continuing duty to a client after the agency contract terminates. If you used the Exclusive Right to Sell Listing Agreement (Form 101), agency terminated at closing. That means your duty of loyalty and obedience under the License Law ended at that time unless you and the seller have an agreement stating otherwise or other special circumstances not mentioned in your facts extended the duty beyond Closing. In this case, it does not look like your duty of loyalty and obedience is applicable, and you should comply with the subpoena unless you wish to object. A subpoena is a serious request that is enforceable by the contempt powers of the court. If you do not comply with the subpoena, you may be sanctioned. The Rules of Civil Procedure do allow a short deadline for you to object to the subpoena if you wish. Possible objections include, but are not limited to, not enough time for compliance, undue burden and expense, and unreasonableness.

It should be noted that unlike the License Law, your duty of confidentiality continues even after agency is terminated under the Code of Ethics. See SOP 1-9. However, the Code of Ethics does not affect your obligation here, because the Code of Ethics states that "where the Code of Ethics and the law conflict, the obligations of the law must take precedence." It should also be noted that if you receive a subpoena while still under an active agency agreement, you should immediately seek legal counsel if your client does not consent in writing to your disclosing their confidential information.

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