



Virtual Office Websites

[Editor’s note: This article reprints portions of an article which originally appeared in the Summer 2004 edition of the Commission Comment. Now that certain legal matters have been settled and the National Association of Realtors® has established rules regarding virtual office websites (VOWs) it is time to update the previous article and respond to some specific questions regarding the legal operation of a VOW.]

Virtual Office Websites (VOWs) have been described as vehicles for conducting an online brokerage in a way that is similar to how a brokerage firm interacts with its clients or customers in a “bricks-and-mortar” office. Consumers, after registering with a VOW, can search the MLS listing database for properties of interest.

Under the VOW policy, the MLS participant (a designated broker) must establish a lawful broker-con-

sumer relationship and satisfy state law requirements regarding agency and other disclosure obligations. The consumer has the opportunity to search the MLS data subject to the participating designated broker’s oversight, only after the consumer registers with the VOW by providing his or her name and an e-mail address and agreeing to the VOW’s terms of use.

The National Association of Realtors® (NAR) originally adopted a policy governing VOWs operated by Multiple Listing Service (MLS) participants in May 2003. A lawsuit between the United States Department of Justice and NAR required the original VOW policy to be rewritten in 2008. As a result of the lawsuit, all MLSs were required to

adopt the 2008 VOW Policy and rescind any VOW or Internet Listing Display (ILD) Policy they may have previously adopted. Also required of MLSs was that they adopt sections 19.1 through 19.14 of the Model VOW Rules for MLSs. Additional optional prepared rule provisions could also be adopted. Finally, all Associations/MLSs were required to amend their bylaws concerning the definition of MLS “Participation”.

Significant Change

The most significant difference between the current VOW Policy and that adopted in 2003 is that MLS Participants cannot “opt out” of having their MLS data displayed on VOWs. The 2008 VOW Policy estab-

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Commission Meeting Schedule

June 24-25Lincoln
July . . .No Meeting Scheduled
August 19-20Lincoln

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DIRECTOR'S DESK

Alien Ownership of Land Revisited

The Spring 2010 issue of the Commission Comment contained an article on the Nebraska prohibition against the alien ownership of land and the general prohibition against such ownership in the state. While the article was technically correct as far as it went, it did not tell the entire story. The article should have mentioned the significant exceptions to the law.

The first exception states that the prohibition against the alien ownership of land in Nebraska does not apply to any real estate within any cities or villages in the state, or within three miles of the corporate limits of cities and villages. In addition the courts have determined that the provision applies to non-resident aliens only, and further that if the United States has a treaty with the country in which the non-resident alien is a citizen that allows land to be bequeathed or inherited in the United States by its citizens the treaty overrides state law.

The Commission has also received several questions about how this law affects licensees. As noted above the scope is extremely limited, there is certainly no duty to discover or inquire about citizenship status of a client or customer. However, if a licensee does know of a buyer or potential buyer's non-resident alien status, and is representing that buyer, advising the buyer of the potential significant impediment to the purchase of any real estate (if more than three miles outside of the corporate limits of any city or village) would be within the scope of a fiduciary responsibility to their client.

I apologize for any confusion last quarter's article may have caused. However, we did receive many positive comments on the other articles contained in last quarter's issue, and this summer we have more articles of interest on criminal background checks and reporting criminal records, technology as it relates to the industry, and a legislative roundup. We will continue to attempt to convey timely and informative articles, your continued feedback in this process helps us help you.

Greg Lemon, Director
Nebraska Real Estate Commission



Director Greg Lemon

Disciplinary Actions Taken by the Real Estate Commission

(Does Not Include Cases on Appeal)

2009-024 – Richard Pearce vs. Taryn Jo Long, Broker. Stipulation and Consent Order. License suspended for a period of one (1) year, with the entire period stayed and served on probation, commencing on February 27, 2010, and continuing through February 27, 2011; plus a civil fine of \$2000.00, due March 28, 2010; plus an additional nine (9) hours of continuing education with three (3) hours in the area of agency law, three (3) hours in the area of contracts, and three (3) hours in the area of ethics, to be completed by August 26, 2010. [Long violated: Neb. Rev. Stat. § 76-2422 (6) Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01, a designated broker who intends to establish an agency relationship with any party or parties to a transaction in which the designated broker's duties and responsibilities exceed those contained in sections 76-2417 and 76-2418 shall enter into a written agency agreement with a party or parties to the transaction to perform services on their behalf. The agreement shall specify the agent's duties and responsibilities, including any duty of confidentiality, and the terms of compensation. Any agreement under this subsection shall be subject to the common-law requirements of agency applicable to real estate licensees; and Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson, whether of the same or of a different character as otherwise specified in this section. Long failed to mail pictures of the unit to the Owner in a timely manner as requested; Long failed to deposit trust funds of \$1,500.00 into her real estate trust account in a timely manner; and Long incurred expenses on the Owner's behalf when she did not have sufficient funds or rental income from the Owner to pay for such repairs.]

February 27, 2010

2009-026 – Brittney Maloley vs. Jennifer Lynn Hellman, Salesperson. Stipulation and Consent Order. License suspended for a period of twelve (12) months with the first forty five (45) days served on suspension and the remainder of the suspension period stayed and served on probation. The suspension period commenced on March 2, 2010, and will continue through April 15, 2010. The probationary period will commence on April 16, 2010, and continue through March 1, 2011; plus an additional three (3) hours of continuing education in the area of ethics to be completed by August 26, 2010. Also, Hellman must write a letter of apology to Maloley by March 13, 2010; Hellman shall undergo an alcohol dependency assessment by March 13, 2010, Hellman shall submit a copy of the findings within two (2) days of completion to the Commission; and Hellman must complete any treatments recommended by the assessment. [Hellman violated: Neb. Rev. Stat. § 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson, whether of the same or of a different character as otherwise specified in this section. Hellman made inappropriate comments or remarks towards Maloley.]

February 27, 2010

2009-023 Hobert Eugene Brake vs. Steven Randolph Wiley, Broker and Mary Kathryn Waring-Wiley, Salesperson. Mary Wiley: Dismissed. Steven Wiley: Stipulation and Consent Order. License censured; plus an additional nine (9) hours of continuing education to include three (3) hours in the area of risk management, three (3) hours in the area of ethics, and three (3) hours in the area of license law, to be completed by August 18, 2010. [Stephen Wiley vio-

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MEET THE REAL ESTATE COMMISSION STAFF

The Real Estate Commission Staff is here to serve the public and the licensee population. It is our goal to be helpful and forthright in a courteous and professional manner. We hope that when you contact our office, you always receive useful, accurate information and/or are referred to the proper authority.

Following is a communication resource to assist you when contacting our office. If the indicated person is unavailable to take your call, please share the purpose for the call and your call will be routed to someone else who can help you.

We take pride in having a skilled staff, if you have comments or suggestions as to how we may better serve you, please contact our office.

COMMUNICATIONS GUIDE

Ask for person indicated if you have questions in the following areas.

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Disciplinary Actions (Cont'd)

lated 81-885.24(2) Intentionally using advertising which is misleading or inaccurate in any material particular or in any way misrepresents any property, terms, values, policies, or services of the business conducted; by failing to remove expired listings from his website; Violated 81-885.24(12) Offering real estate for sale or lease without the knowledge and consent of the owner or his or her authorized agent or on terms other than those authorized by the owner or his or her authorized agent; by continuing to identify real property for sale on his website without the consent or knowledge of the owner due to his failure to remove the expired, withdrawn or terminated listings from his website.]

February 27, 2010

2009-032 – Timothy P. Conover and Linda K. Conover vs. James Leslie Nelms, Broker. Stipulation and Consent Order. License censured; plus an additional three (3) hours of continuing education in the area of agency to be completed by September 14, 2010. [Nelms violated Neb. Rev. Stat. § 76-2421(1) At the earliest practicable opportunity during or following the first substantial contact with a seller, landlord, buyer, or tenant who has not entered into a written agreement for brokerage services with a designated broker, the licensee who is offering brokerage services to that person or who is providing brokerage services for that property shall: (a) Provide that person with a written copy of the current brokerage disclosure pamphlet which has been prepared and approved by the commission; and (b) Disclose in writing to that person the types of brokerage relationships the designated broker and affiliated licensees are offering to that person or disclose in writing to that person which party the licensee is representing. Nelms failed to complete the Agency Disclosure on his first substantial contact with the buyers.]

March 18, 2010

2010-014 – Commission vs. Regis A. Swanson, Broker. Stipulation and Consent Order. License censured; plus an additional three (3) hours of continuing education in the area of agency to be completed by September 14, 2010. [Swanson violated Neb. Rev. Stat. § 76-2421(1) At the earliest practicable opportunity during or following the first substantial contact with a seller, landlord, buyer, or tenant who has not entered into a written agreement for brokerage services with a designated broker, the licensee who is offering brokerage services to that person or who is providing brokerage services for that property shall: (a) Provide that person with a written copy of the current brokerage disclosure pamphlet which has been prepared and approved by the commission; and (b) Disclose in writing to that person the types of brokerage relationships the designated broker and affiliated licensees are offering to that person or disclose in writing to that person which party the licensee is representing. Instead of Swanson having the buyers sign her Agency Disclosure in which she disclosed to the buyers that she was acting as their limited Buyers' Agent, Swanson had the buyers sign an Agency Disclosure that identified the name of a different real estate licensee as the licensee representing them as a Buyers' Agent.]

March 18, 2010

2009-012 Michele J. Bonge vs. Shelli Marie Novotny and Tammy L. Wherley, Stipulation and Consent Order, Novotny's and Wherley's real estate license is suspended for twelve (12) months, with the entire period stayed and served on probation. The suspension period commenced on April 22, 2010 and will continue through April 21, 2011; plus Novotny and Wherley shall complete and additional six (6) hours of continuing education. Novotny's continuing education to include three (3) hours in the area of Agency Law and three (3) hours in the area of Contracts to be completed by October 19, 2010.

Wherley's continuing education to include three (3) hours in the area of License Law and three (3) hours in the area of Contracts to be completed by October 19, 2010. [Novotny violated: 76-2417(1) a licensee representing a seller or landlord as a seller's agent or a landlord's agent shall be a limited agent with the following duties and obligations: (b) to exercise reasonable skill and care for the client, and (c) To promote the interests of the client with the utmost good faith, loyalty, and fidelity; by failing to ensure that Wherley provided an earnest deposit check for \$500 at the time of the Offer, and Novotny failed to ensure that Wherley was pre-approved for financing prior to making an Offer on the listed property. Novotny violated 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a broker; for failing to ensure Wherley provided an earnest deposit check for \$500 at the time the Offer was written, and for failing to ensure that Wherley was pre-approved for financing prior to Wherley making an Offer on the subject property.] [Wherley violated: 81-885.24 (29) Demonstrating negligence, incompetency, or unworthiness to act as a salesperson; for failing to provide an earnest deposit check for \$500 at the time the Offer was written.]

April 22, 2010

2009-019 - Commission vs. Bennie C. Taylor. Hearing held March 18, 2010. Taylor's real estate broker license is suspended for six (6) months, with the first thirty (30) days served on suspension and the remainder stayed and served on probation. The suspension period commenced on April 26, 2010, and will continue through May 25, 2010. The probation period will commence on May 26, 2010, and continue through October 25, 2010; plus pay a civil fine in the amount of \$1,000.00, within 30 days; plus pay costs associated with the hearing within 30 days. [Taylor

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Disciplinary Actions (Cont'd)

violated Neb. Rev. Stat. 76-2417(1) A licensee representing a seller or landlord as a seller's agent or a landlord's agent shall be a limited agent with the following duties and obligations: (a) To exercise reasonable skill and care for the client; and (b) Promote the interests of the client with the utmost good faith, loyalty, and fidelity; Taylor allowed the subject transaction to close without having obtained a Deed of Reconveyance from U.S. Bank, as required by the Title Insurance Commitment of April 10, 2008, and the Purchase Agreement. Neb. Rev Stat. § 76-2422(2) Before engaging in any of the activities enumerated in subdivision (2) of section 81-885.01, a designated broker intending to establish a single agency relationship with a seller or landlord shall enter into a written agency agreement with the party to be represented. The agreement shall include a licensee's duties and responsibilities specified in section 76-2417, the terms of compensation, a fixed date of expiration of the agreement, and whether an offer of sub-agency may be made to any designated broker; Taylor failed to have a written Listing Agreement with the seller. Neb. Rev. Stat. § 76-2425 violating any provision of section 76-2401 to 76-2430; Taylor violated Neb. Rev. Stat. §§ 76-2417 (1) (a) (b) and 76-2422(2). Taylor violated Neb. Rev. Stat. § 81-885.24(29) Demonstrating negligence, incompetency, or unworthiness to act as a broker, associate broker, or salesperson; Taylor allowed the subject transaction to close without having obtained a Deed of Reconveyance from U.S. Bank as required by the Title Insurance Commitment of April 10, 2008, and the Purchase Agreement; Taylor violated a provision of 76-2401 to 76-2430; and Taylor failed to have a written Listing Agreement with the seller.]

March 27, 2010

Legislative Roundup

The legislature passed a number of significant bills this year that may be of interest to licensees.

LB931 Allows Broker Price Opinions and Comparative Market Analyses to be used for lending purposes in "non federally related" transactions, by federal law this means transactions involving property valued at \$250,000 or less. **Effective April 14, 2010**

The bill also changes the disclaimer language to be used on such opinions which now must read:

"This opinion or analysis is not an appraisal. It is intended only for the benefit of the addressee for the purpose of assisting buyers or sellers or prospective buyers or sellers in deciding the listing, offering, or sale price of the real property or for lending purposes in a transaction other than a federally related transaction. This opinion or analysis is not governed by the Real Property Appraiser Act."

LB691 Allows the Commission to impose **administrative fines on non licensed persons** conducting licensed activity, the fines may be assessed at a rate of up to \$1000 a day in violation or the amount of all unlicensed commissions earned, whichever is greater. The bill also clarifies that the authority of the commission relating to activity while a broker is licensed extends to that person even if they are no longer licensed. **Effective July 15, 2010**

LB226 Changes the age of majority for entering into legally binding contracts and leases from 19 to 18. **Effective March 3, 2010**

LB945 Prohibits texting and related activities while driving. "no person shall use a handheld wireless communication device to read a written communication, manually type a written communication, or send a written communication while operating a motor vehicle which is in motion." The new law makes texting while driving a secondary offense traffic infraction so a violator cannot be charged unless they are also charged with some other traffic violation. Fines start at \$200 and go up to \$500 for repeated violations. **Effective July 15, 2010**



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Virtual Office Website (Cont'd)

lishes that “If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data . . . except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.”

Please note: that sellers of property may “opt out” of having their listed property displayed on the Internet, altogether, or may elect to have their listed property displayed on the Internet but without the address appearing.

NAR’s VOW policy is impacted by real estate license law and the agency relationships statutes. The VOW policy provides that the VOW may be operated by affiliated licensees, i.e. associate brokers and salespersons affiliated with an MLS participant (the designated broker), if permitted by state law and the participant’s MLS. In Nebraska this is permitted.

According to the VOW policy, consumers who merely register at a VOW are not entering into an agency relationship with the operator (the designated broker or an authorized affiliated licensee) and are not financially obligated to the operator. Such a relationship and obligation must be created according to each state’s regulatory statutes, separate from the VOW registration process, must be prominently labeled, and may not be entered into or accepted solely by a mouse click. VOW policy § II d. The VOW policy clearly states that agency agreements and relationships should be entered into separately, in a form and manner that assures the consumer understands and agrees to whatever he or she is signing, and that it is in conformance with governing statutes.

VOWs and Nebraska Statutes

Agency

The first agency issue is whether or not an agency relationship has been formed by the consumer accessing the VOW. In other words, is this consumer a client or a customer, and who is the licensee representing?

Obtaining the consumer’s name and e-mail address in the VOW registration process would not be considered a “substantial contact” under Nebraska’s Agency Relationships Statute. This would be similar to asking viewers at an open house to fill out a name and address in a guest book. Also, consumers simply viewing MLS data do not constitute a substantial contact. This is similar to paging through listings in the newspaper or viewing listings at an unmanned kiosk. However, once a licensee, or script on the website, invites the consumer to provide, or the consumer appears likely to provide personal information, financial circumstances, family matters, etc. or the consumer indicates interest in particular properties and starts making specific inquiries relative to properties i.e. requesting a showing, asking for additional information or clarification, whether those inquiries be through a website, telephone, e-mail or in person, this would be a substantial contact and would require the agency disclosure and use of the brochure prior to this information being shared. This disclosure may be presented in electronic form as long as the brochure is in the proper format and compliant with the law. The consumer needs to know if he or she is a client or a customer and who the licensee is representing in an electronic communication, just as the consumer needs to know in a face-to-face communication.

Agency disclosure is between a consumer and a specific licensee. If the substantial contact is made per-

sonally between a licensee and a consumer, as in a telephone, e-mail or in-person exchange, the identity of the licensee is obvious. If the substantial contact is more of an automated process, in other words the substantial contact is between the consumer and the website, some assignment of those contacts needs to be clear i.e. a specific licensee is responsible for all website contacts or there are rotating shifts in which various licensees are responsible for specific shifts, etc. These licensees, then, would be held responsible for seeing that the agency disclosure brochure utilized for the consumer clearly identifies the licensee who will be serving in the manner disclosed.

Advertising

A component of the service provided by the VOW is the dissemination and promotion of its own listings and those of other MLS participants in the hope of achieving a sale or lease. According to the NAR VOW Policy § II 3 d.: “A Participant’s VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information about properties displayed on the VOW.”

The use of a VOW involves advertising and, as such, is regulated by the License Act and the rules and regulations regarding advertising. Title 299, Chapter 2, Section 003 indicates: “Advertising shall include all forms of identification, representation, promotion, and solicitation disseminated in any manner and by any means of communication to the public for any purpose related to licensed real estate activity. All advertising shall be under the direct supervision of the broker, and in the name the broker is conducting business as recorded with the Commission.”

An affiliated licensee who is

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Virtual Office Website (Cont'd)

authorized to operate a VOW by his or her designated broker must operate such VOW under the direct supervision of the designated broker, and in the name under which the designated broker conducts business as recorded with the Commission. Just as the designated broker may in other advertising situations, he or she may allow other identifying information about the affiliated licensee to appear in the authorized VOW as long as it is not misleading, inaccurate, or not in compliance with the statute, rules MLS policy, and broker policy.

Under Nebraska law, to advertise property for sale or lease, the seller/owner must consent to such offer for sale or lease and, therefore, to the property's advertising on **any** VOW. This would include authorizing the property's inclusion on other MLS participants' VOWs. Licensees should take care to assure that their VOWs do not imply that the listings of others are those of the designated broker or authorized affiliated licensee operating the VOW.

In Closing

The VOW issue has been debated nationally for some time, and remains a somewhat complicated issue. The Commission recommends that any broker desiring to implement a VOW contact his or her legal counsel, to assure that the VOW is developed and implemented in compliance with applicable Nebraska statutes. 🏠

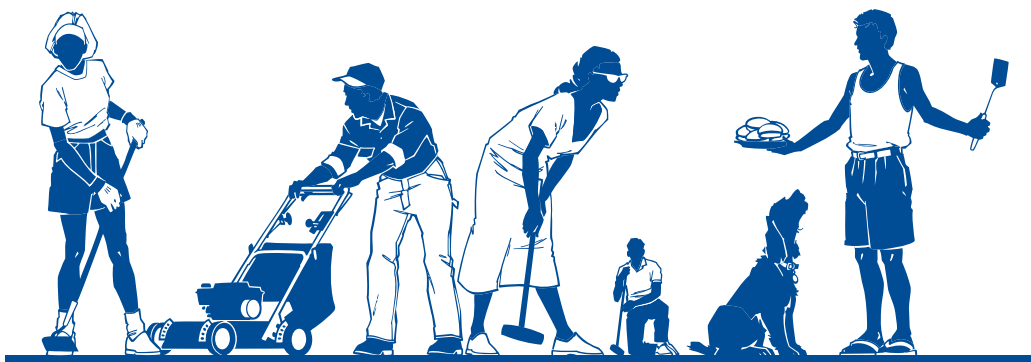
Exemption for Dealing with Asset Managers Selling HUD Properties

The Nebraska Real Estate Commission has been in contact with asset managers who work with the Department of Housing and Urban Development (HUD) on the sale of HUD owned properties. The processes utilized by these asset managers on a multistate basis for the sale of property often do not meet with certain Nebraska agency law requirements, including requirements that all offers be presented in writing, and that buyer's agents and seller's agents communicate with each other and not directly with buyers and sellers in real estate transactions. The listing agreements are often not in compliance with Nebraska agency law either.

Licensees placing offers on HUD properties are required to get a NAID (Name Address IDentification) number from HUD before placing offers on properties through HUD's online bidding system. The Nebraska Real Estate Commission has determined that all licensees working with asset managers and acting as a buyer's or a seller's agent on HUD properties should be NAID registered or working under a broker who is NAID registered before so acting, or they will be in violation of the Nebraska agency laws to the extent that any procedures or actions taken in the course of the transaction do not follow those laws.

Licensees who are NAID registered, or working under the supervision of a broker who is NAID registered, will be considered officers of the federal government for the limited purpose of the HUD related transaction and, therefore, exempt from the Nebraska license and agency laws under §81-885.04(5). Licensees should place a copy of their NAID certification in all HUD related transaction files.

Licensees can then follow HUD transaction procedures without violating Nebraska law. Licensees will not be considered officers of the federal government or exempt from license and agency law provisions for non-HUD property transactions. This includes Fannie Mae, Freddie Mac and bank foreclosure sales through asset managers which all must follow all state license law and agency rules. The Commission is aware that many asset managers may not be entirely cooperative in this regard and is reviewing this issue. 🏠



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CRIMINAL BACKGROUND CHECKS — TIPS FOR AN EXPEDITED PROCESS

The Nebraska Real Estate License Act requires all applicants for original licensure as a real estate salesperson or broker to undergo a criminal background check utilizing fingerprints. This includes both resident and nonresident applicants. As recent applicants or brokers who work on a regular basis with applicants may have noticed, these checks may take several weeks to complete. Increasing use of criminal background checks in other areas of licensure and certification have led to an increased backlog and longer time periods for real estate license background checks. These checks are conducted by the Nebraska State Patrol and not the Real Estate Commission, so the time the process takes is not under our direct control.

The Commission realizes that many applicants are anxious to get through the process and want to get licensed and get to work as quickly as possible. We have had recent communications with the State Patrol, about what can be done to make the process more efficient.

The most important thing they identified is having the fingerprint cards done at Nebraska State Patrol offices, where they have the technology and equipment to scan the prints and get a better image. While it can be done at various other locations including local law enforcement offices, use of the State Patrol's equipment will help speed the process for you and other applicants as increased use of the Patrol's equipment will help reduce the backlog. It is also important to make sure that the card is signed by both the person taking the prints and the person getting the prints taken, if there is a missing signature the applicant will have to start over after the Patrol discovers the problem, which may add days or even weeks to the process. Please also remember that you must first obtain the fingerprint cards from the Real Estate Commission before going to the Patrol, and some of the smaller troop centers also require an appointment in advance.

Full instructions on the fingerprint process may be accessed by looking on our website at <http://www.nrec.state.ne.us/bkgd.html>. The instructions also list the six State Patrol troop headquarters.

REMEMBER FOR GREATEST SUCCESS: **Livescan machines at State Patrol offices capture the best images**
Bring proper I.D.
Confirm information on each card is complete and readable
Make certain each card is signed by person taking the fingerprint and
the applicant