Lesson 4: Real Estate Brokerage and Law of Agency/Ethics

Lesson Topics

This lesson focuses on the following topics:

- Terms You Will Want to Remember
- The Law of Agency
- Agency Positions and Disclosure
- Brokerage and Nature of the Brokerage Business
- Fiduciary Duties
- Texas Deceptive Trade Practices - Consumer Protection Act

Lesson Learning Objectives

At the conclusion of this lesson you will be able to:

- Identify and answer questions regarding the laws that define agency.
- Describe the role of the agent, the principal, and the third party in the agency relationship.
- Understand more about the expectations of brokers and sales agents.
- Name the fiduciary duties a broker owes to a client.

Terms You Will Want to Remember

<table>
<thead>
<tr>
<th>Fiduciary</th>
<th>Principal</th>
<th>Agent</th>
<th>Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>IABS</td>
<td>DTPA</td>
<td>Fidelity</td>
<td>Indemnification</td>
</tr>
<tr>
<td>Intermediary</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Agency relationships are central to real estate transactions. A seller typically hires a broker to list and find a buyer for his or her property. Buyers often visit a broker’s office.
when shopping for real estate, and sometimes a buyer expressly hires a broker to help him or her find a property and negotiate the transaction.

An agency relationship is created when an individual authorizes another party to represent him or her and act in his or her best interest. We will discuss the rules, guidelines, and ethical issues involved in agency relationships.

**The Law of Agency**

**Texas Real Estate License Act**

*(Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003. Amended by: Acts 2005, 79th Leg., Ch. 825, Sec. 7, eff. September 1, 2005.)*

**Sec. 1101.558. REPRESENTATION DISCLOSURE.**

(a) In this section, "substantive dialogue" means a meeting or written communication that involves a substantive discussion relating to specific real property. The term **does not** include:

1. a meeting that occurs at a property that is held open for any prospective buyer or tenant; or
2. a meeting or written communication that occurs after the parties to a real estate transaction have signed a contract to sell, buy, or lease the real property concerned.

(b) A license holder who represents a party in a proposed real estate transaction **shall disclose, orally or in writing, that representation at the time of the license holder's first contact with:**

1. another party to the transaction; or
2. another license holder who represents another party to the transaction.
(c) A license holder shall provide to a party to a real estate transaction at the time of the first substantive dialogue with the party the written statement prescribed by Subsection (d) unless:

(1) the proposed transaction is for a residential lease for not more than one year and a sale is not being considered; or
(2) the license holder meets with a party who is represented by another license holder.

(d) The written statement required by Subsection (c) must be printed in a format that uses at least 10-point type and read as follows: "Before working with a real estate broker, you should know that the duties of a broker depend on whom the broker represents. If you are a prospective seller or landlord (owner) or a prospective buyer or tenant (buyer), you should know that the broker who lists the property for sale or lease is the owner’s agent. A broker who acts as a subagent represents the owner in cooperation with the listing broker. A broker who acts as a buyer’s agent represents the buyer. A broker may act as an intermediary between the parties if the parties consent in writing. A broker can assist you in locating a property, preparing a contract or lease, or obtaining financing without representing you. A broker is obligated by law to treat you honestly.

"IF THE BROKER REPRESENTS THE OWNER: The broker becomes the owner’s agent by entering into an agreement with the owner, usually through a written listing agreement, or by agreeing to act as a subagent by accepting an offer of sub-agency from the listing broker. A subagent may work in a different real estate office. A listing broker or subagent can assist the buyer but does not represent the buyer and must place the interests of the owner first. The buyer should not tell the owner's agent anything the buyer would not want the owner to know because an owner's agent must disclose to the owner any material information known to the agent."
"IF THE BROKER REPRESENTS THE BUYER": The broker becomes the buyer's agent by entering into an agreement to represent the buyer, usually through a written buyer representation agreement. A buyer's agent can assist the owner but does not represent the owner and must place the interests of the buyer first. The owner should not tell a buyer's agent anything the owner would not want the buyer to know because a buyer's agent must disclose to the buyer any material information known to the agent.

"IF THE BROKER ACTS AS AN INTERMEDIARY": A broker may act as an intermediary between the parties if the broker complies with The Texas Real Estate License Act. The broker must obtain the written consent of each party to the transaction to act as an intermediary. The written consent must state who will pay the broker and, in conspicuous bold or underlined print, set forth the broker's obligations as an intermediary. The broker is required to treat each party honestly and fairly and to comply with The Texas Real Estate License Act. A broker who acts as an intermediary in a transaction:

1. shall treat all parties honestly;
2. may not disclose that the owner will accept a price less than the asking price unless authorized in writing to do so by the owner;
3. may not disclose that the buyer will pay a price greater than the price submitted in a written offer unless authorized in writing to do so by the buyer; and
4. may not disclose any confidential information or any information that a party specifically instructs the broker in writing not to disclose unless authorized in writing to disclose the information or required to do so by The Texas Real Estate License Act or a court order or if the information materially relates to the condition of the property.

With the parties' consent, a broker acting as an intermediary between the parties may appoint a person who is licensed under The Texas Real Estate License Act and associated with the broker to communicate with and carry out instructions of one party.
and another person who is licensed under that Act and associated with the broker to communicate with and carry out instructions of the other party.

"If you choose to have a broker represent you, you should enter into a written agreement with the broker that clearly establishes the broker's obligations and your obligations. The agreement should state how and by whom the broker will be paid. You have the right to choose the type of representation, if any, you wish to receive. Your payment of a fee to a broker does not necessarily establish that the broker represents you. If you have any questions regarding the duties and responsibilities of the broker, you should resolve those questions before proceeding."

(e) The license holder may substitute "buyer" for "tenant" and "seller" for "landlord" as appropriate in the written statement prescribed by Subsection (d).

Sec. 1101.558(d)-.560(b)
(Added by Acts 2001, 77th Leg., ch. 1421, Sec.2, eff. June 1, 2003. Amended by Acts 2003, 78th Leg., ch. 15, Sec. 7, eff. Sept. 1, 2003.)

Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.
(a) A broker may act as an intermediary between parties to a real estate transaction if:
   (1) the broker obtains written consent from each party for the broker to act as an Intermediary in the transaction; and
   (2) the written consent of the parties states the source of any expected compensation to the broker.

(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d).
(c) **An intermediary shall act fairly and impartially.** Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560 to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

*(Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.)*

**Sec. 1101.560. ASSOCIATED LICENSE HOLDER ACTING AS INTERMEDIARY.**

(a) A broker who complies with the written consent requirements of Section 1101.559 may appoint:

(1) a license holder associated with the broker to communicate with and carry out instructions of one party to a real estate transaction; and

(2) another license holder associated with the broker to communicate with and carry out instructions of any other party to the transaction.

(b) A license holder may be appointed under this section only if:

(1) the written consent of the parties under Section 1101.559 authorizes the broker to make the appointment; and

(2) the broker provides written notice of the appointment to all parties involved in the real estate transaction.

(c) A license holder appointed under this section may provide opinions and advice during negotiations to the party to whom the license holder is appointed.

*(Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.)*

**Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.**

(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.
(b) A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction:
   
   (1) a buyer or tenant; and
   
   (2) a seller or landlord.

The Agent's Duties to the Principal

We mentioned earlier that the agent owes certain fiduciary duties to his or her principal (the client). Fiduciary duties are not just ethical or moral obligations; they are required under the law of agency and there can be serious penalties for failing to carry them out.

The agent owes the principal the following five duties:

1. Duty of fidelity
2. Duty of care
3. Duty of obedience
4. Duty of accounting
5. Duty to disclose facts

Duty of Fidelity

Perhaps an agent's most important duty is that of fidelity. Chapter 531 (Rule 531.1, "Fidelity") of the Rules of the Texas Real Estate Commission (TREC) describes an agent's duty of fidelity as follows:

A real estate broker or salesperson, while acting as an agent for another, is a fiduciary. Special obligations are imposed when such fiduciary relationships are created. They demand:

(1) that the primary duty of the real estate agent is to represent the interests of the agent's client, and the agent's position, in this respect, should be clear to all parties concerned in a real estate transaction; that, however, the agent, in performing duties to the client, shall treat other parties to a transaction fairly;
(2) that the real estate agent be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in performing the agent’s functions;
(3) that the real estate agent place no personal interest above that of the agent’s client. (531.1)

As laid out in TREC’s rules, the agent’s duty of fidelity stipulates that the agent must place the principal’s interests above those of all other parties, including the agent’s own interests. A key element of this duty is confidentiality, which is the agent’s obligation to keep careful watch over the information he or she receives from a client and to ensure that private information is not shared without the client’s consent.

Additionally, an agent cannot act on confidential information to obtain an unfair advantage over a principal. An agent could not, for example, inform a prospective buyer that the agent owned property that was similar to the principal’s property but was priced at less than the asking price of the principal’s property.

Texas law also prohibits an agent from buying or selling any piece of property in which he or she has a personal interest unless first disclosing this information and confirming the consent of the principal to follow through with the real estate transaction.

**Duty of Care**
A licensee must conduct real estate transactions with care and diligence, ensuring that he or she represents the principal to the best of his or her abilities while acting in the principal’s best interests. With this understanding in place, the agent can be held professionally liable for any loss the principal suffers as a result of the agent’s negligence. Agents must protect their clients from foreseeable harm.

Chapter 531 (Rule 531.2, “Integrity”) of TREC’s Rules describes this duty as follows:
A real estate broker or salesperson has a special obligation to exercise integrity in the discharge of the licensee’s responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission. (531.2)

**Duty of Obedience**

A fiduciary relationship requires that the agent act in good faith at all times, making a conscious effort to obey the principal’s instructions as set forth in the contract. This duty does not apply, however, if the principal’s instructions are illegal or unethical in any way. For example, if an owner tells his or her broker that he or she will only sell the property to a third party of a particular race, the agent has no duty to obey this instruction. He or she should instead explain that he or she cannot carry out this request because it violates fair housing law.

This example is not a matter of deciding whether breaking the law is in the client’s interest. It is not the agent’s task to determine a client’s interests for the client; that is a decision that the principal must make on his or her own. An agent might provide information that aids a client in choosing his or her goals, or an agent might try to persuade a principal that a certain course of action is an unwise choice. It is never up to the broker to determine - independently - what a client’s interests actually are. If an agent makes this kind of determination and acts on it without consulting the client, that agent runs the risk of acting against what the client believes to be in his or her best interest.

**Duty of Accounting**

If an agent holds any funds for the principal or the third party, then the status of these funds must be available to those parties at all times. The details of any financial transactions should be accurately recorded; proof of any deposits or exchanges of funds should be issued to the parties involved.
In Texas, most licensees prefer to have an independent entity, usually the title company, hold such funds in an escrow account. If a licensee elects to hold this money in trust for others, then he or she must set up a separate account for this purpose.

Texas License Law forbids commingling (i.e., mixing) these funds with other funds in the licensee’s personal or business accounts. Furthermore, Texas License Law requires these funds to be deposited into the escrow or separate account within a reasonable time.

Agents (and any salespeople acting on their behalf) cannot wait any longer than the close of the second business day after the signing of a contract to make these deposits. The money will then be held in the escrow or separate account until closing, at which time the agent must release the funds to the appropriate party. In the event that the transaction does not close, the money can only be released with the written consent of all parties involved.

**Duty to Disclose Facts**

The duty to disclose factual information is central to an agent’s role in a fiduciary relationship. Just as it is an agent’s duty to keep a principal’s personal information confidential, an agent must also disclose any information about the property or customer that may affect a principal’s decisions regarding the outcome of the real estate transaction. The agent’s duty of disclosure differs slightly depending upon whether the agent is acting on behalf of the buyer or on behalf of the seller.

Providing proper factual disclosure is one of the most important tasks of the real estate licensee. Because of its ambiguous nature, disclosure often involves conflicting opinions. One individual may consider a particular fact to be nonessential information concerning a property, while another person may believe that fact to be extremely important. For this reason, the Texas legislature periodically revisits disclosure issues, striving to clarify agency obligations.
The Principal’s Duties to the Agent
Just as the agent in a fiduciary relationship has certain obligations to the principal, the principal must also conduct himself or herself in a way that facilitates the agent’s task as a representative. The principal’s duties include the following:

- Duty to compensate the agent
- Duty to provide information
- Duty of indemnification
- Duty of availability

Duty to Compensate the Agent
The principal has a duty to compensate the agent for his or her expertise, as laid out in the terms of the contract. The principal must pay the agreed-upon commission to the agent when the agent completes his or her specified duties, unless all parties agree to another arrangement.

In the real estate industry, any party may pay the agent’s commission or fees, as long as full disclosure is made to all parties - that is, it is not the case that the principal is the only party permitted to pay the agent. If there is no other arrangement, compensation is the principal’s duty. This point will be discussed in detail later in the lesson.

An agent can agree to work for no compensation, and in these cases, the principal has no duty to compensate the agent. This kind of agency agreement creates a relationship called gratuitous agency. Even though no payment changes hands, the agent must still honor all of the duties of an agency relationship and the principal must honor his or her duties as well.

Duty to Provide Information
The principal has a duty to provide accurate responses to the agent’s requests for information; he or she must ensure that the agent and third party can rely upon his or her precision and truthfulness. The agent is usually not held responsible for any false
statements made by the principal unless the agent had reason to suspect that the statements were false.

**Duty of Indemnification**
In addition to providing compensation, the principal has a responsibility to reimburse the agent for any financial losses incurred while carrying out the real estate transaction (beyond the cost of promotional efforts, which are the agent’s responsibility). This is considered a “hold harmless” clause, releasing the agent from all damages except those resulting from the agent’s own negligence or fraud.

**Duty of Availability**
The principal must make an effort to be available for all activities related to the real estate transaction, assuming requests for his or her presence are reasonable and made in timely fashion. This includes being available to show or view a property, and being available to consider offers and notices within a realistic amount of time, and in a reasonable place and manner.

**Agency Positions and Disclosure**

**The Agent**
An *agent* is any individual acting as a representative for another individual in dealings with a third party. The agent is authorized by the person he or she represents to act on that person’s behalf. In the context of real estate transactions, the agent is a licensed representative of the seller, buyer, landlord, or tenant and facilitates the sale, purchase, exchange or lease of real property for others.

In the real estate industry, salespeople are often generically referred to as agents (as in the phrase “real estate agent”) and indeed often act as agents for their clients. We should remember, though, that there is a distinction between this generic term and the legal concept of agency: only certain individuals may legally act as agents in a real
estate transaction. Brokers are the only Texas real estate professionals who can officially enter into an agency relationship with a buyer or seller. Any salesperson involved in a transaction then represents the broker - the salesperson cannot act as an agent. This is explained further in later lessons.

**The Principal**
The agent derives his or her power and authority from another individual - the transfer of this authority is what allows him or her to take on the role of agent. The principal is the individual who authorizes another person to act on his or her behalf. This person may also be referred to as the client.

In real estate, the principal engages the professional advice and other services of his or her agent to aid in the sale, purchase, exchange or lease of real property. The principal may be a seller, a prospective buyer, an owner wanting to lease his or her property to another person, or an individual seeking property to rent.

**The Third Party**
The third party is the final variable to consider when an agency relationship is formed. The third party is the individual with whom the agent and principal enter into real estate negotiations. The third party is also sometimes referred to as the customer. This individual may be a prospective seller, buyer, landlord, or tenant - anyone who expresses real interest in completing a contract toward the sale, purchase, or rental of real property and is both ready and able to do so. The third party is the person the agent is not representing.

**The Agency Relationship**
The agent works for the principal and works with, but not for, the third party.

Principal ➔ Agent ➔ Third Party
The third party negotiates with the principal through the agent. In these negotiations, the agent is obligated to represent the principal’s interests; it is not the agent’s task to look out for or act on behalf of the third party. The third party should have an agent of his or her own, whose job it is to act in the third party’s best interest.

For example, a seller’s primary interest might be to get the full purchase price for his or her property. A broker representing that seller should attempt to get all prospective buyers to agree to the full price, without concern for what price is best or most reasonable for those prospective buyers. The seller’s agent thus cannot do things such as helping a prospective buyer to find a way to pay less than the price the seller wants. In doing so, the agent would not be acting in his or her client’s interests.

Of course, an agent cannot completely disregard all of the third party’s concerns. He or she has certain ethical and legal obligations to the third party, such as the obligation not to misrepresent a property.

Third Parties are entitled to Fairness, Honesty and Full Disclosure of material facts about the property.

**Duty to Disclose Material Facts**

The agent must inform the third party of any *material facts* that he or she knows about the property. A material fact in a real estate transaction is any fact that is significant or essential to the transaction - that is, any piece of information that could reasonably be expected to influence a prudent individual’s decisions regarding the transaction. This duty requires the agent to disclose *latent*, or hidden, defects in the property that may not be identified in an ordinary inspection, but which could alter the customer’s decision regarding the property.
**EXAMPLE:**

If the seller is aware that the fence surrounding his listed property extends beyond the designated property boundaries and that this may lead to problems with the owners of the adjoining property, then he needs to inform potential buyers of this fact as it would probably be difficult for a buyer to discover alone. The agent must disclose this information to the prospective buyer; otherwise, the agent is intentionally concealing important information that could very likely impact the third party’s decision.

Texas Real Estate License Law identifies particular pieces of information that are not properly considered material facts. Under this law, a licensee is not required to inquire about, disclose or release information relating to whether:

*a previous or current occupant of real property had, may have had, has or may have AIDS, an HIV-related illness, or an HIV infection as defined by the Centers for Disease Control and Prevention of the United States Public Health Service; or a death occurred on a property by natural causes, suicide, or accident unrelated to the condition of the property.* (Sec. 1101.556)

**Texas Disclosure Guidelines**

Licensees have the general duty to disclose agency relationships to all parties involved in a transaction.

There are actually two requirements to disclosing agency:

1. Tell everyone (agents, customers and prospects) whom you represent at first contact, if you are representing anyone. This disclosure is required at open houses. This disclosure can be oral or in writing.
2. Give the written statement (IABS) at the first substantive discussion about a specific property.
Once *substantive dialogue* occurs between an agent and a potential client or a third party, the agent must give the person a written statement that outlines Texas agency law.

Sec. 1101.558(a) of the Texas License Law defines substantive dialogue as follows:

*A meeting or written communication that involves a substantive discussion relating to specific real property.*

Substantive dialogue does not include meetings that occur at open houses. In addition, this term does not cover meetings or communications that occur after the parties have signed a contract to sell, buy or lease the property that is the subject of the meeting or communication.

So, once an agent has engaged in this kind of discussion with a client or potential client - outside the context of an open house and before the signing of a final contract - that agent is obligated to provide that person with a statement clarifying Texas agency law. There are situations in which the agent need not supply the client with this statement. According to Sec. 1101.558(c) of the Texas License Law, the agent does not need to provide a written agency disclosure statement if:

- The proposed transaction is for a residential lease for not more than one year and a sale is not being considered; or
- The license holder meets with a party who is represented by another license holder.

We provide here a sample statement of agency disclosure created by the Texas Real Estate Commission (TREC). TREC does not require that licensees print and use this specific form; however, any alternative form must use the same wording; the wording is required by TRELA; the only alterations the licensee may make to this language are the
substitution of the term “buyer” for “tenant” and “seller” for “landlord,” as appropriate. This statement must be printed in no smaller than 10-point type; though not legally obligatory, a font larger than 10-point will make the statement easier for people to read.

The client, potential client or third party must sign or initial this document to show that he or she has read and understands it; signing the statement does not in any way bind the party to the agent.

The Information about Brokerage Services form has been provided for educational purposes only: http://www.trec.state.tx.us/pdf/contracts/op-k.pdf
Information About Brokerage Services

Texas law requires all real estate license holders to give the following information about brokerage services to prospective buyers, tenants, sellers and landlords.

TYPES OF REAL ESTATE LICENSE HOLDERS:

- **A BROKER** is responsible for all brokerage activities, including acts performed by sales agents sponsored by the broker.
- **A SALES AGENT** must be supervised by a broker to perform any services and works with clients on behalf of the broker.

A BROKER'S MINIMUM DUTIES REQUIRED BY LAW (A client is the person or party that the broker represents):

- Put the interests of the client above all others, including the broker’s own interests;
- Inform the client of any material information about the property or transaction received by the broker;
- Answer the client's questions and present any offer to or counter-offer from the client; and
- Treat all parties to a real estate transaction honestly and fairly.

A LICENSE HOLDER CAN REPRESENT A PARTY IN A REAL ESTATE TRANSACTION:

- **AS AGENT OR SUBAGENT FOR OWNER (SELLER/LANDLORD):** The broker becomes the property owner’s agent through an agreement with the owner, usually in a written listing to sell or property management agreement. A subagent represents the owner, not the buyer, through an agreement with the owner’s broker. An owner's agent must perform the broker’s minimum duties above and must inform the owner of any material information about the property or transaction known by the agent, including information disclosed to the agent or subagent by the buyer or buyer’s agent.
- **AS AGENT FOR BUYER/TENANT:** The broker becomes the buyer/tenant's agent by agreeing to represent the buyer, usually through a written representation agreement. A buyer's agent must perform the broker’s minimum duties above and must inform the buyer of any material information about the property or transaction known by the agent, including information disclosed to the agent by the seller or seller’s agent.
- **AS AGENT FOR BOTH - INTERMEDIARY:** To act as an intermediary between the parties the broker must first obtain the written agreement of each party to the transaction. The written agreement must state who will pay the broker and, in conspicuous bold or underlined print, set forth the broker's obligations as an intermediary. A broker who acts as an intermediary:
  - Must treat all parties to the transaction impartially and fairly;
May, with the parties’ written consent, appoint a different license holder associated with the broker to each party (owner and buyer) to communicate with, provide opinions and advice to, and carry out the instructions of each party to the transaction.

Must not, unless specifically authorized in writing to do so by the party, disclose:
- that the owner will accept a price less than the written asking price;
- that the buyer/tenant will pay a price greater than the price submitted in a written offer; and
- any confidential information or any other information that a party specifically instructs the broker in writing not to disclose, unless required to do so by law.

**TO AVOID DISPUTES, ALL AGREEMENTS BETWEEN YOU AND A BROKER SHOULD BE IN WRITING AND CLEARLY ESTABLISH:**

- The broker’s duties and responsibilities to you, and your obligations under the representation agreement.
- Who will pay the broker for services provided to you, when payment will be made and how the payment will be calculated.

**LICENSE HOLDER CONTACT INFORMATION:** This notice is being provided for information purposes. It does not create an obligation for you to use the broker’s services. Please acknowledge receipt of this notice below and retain a copy for your records.

<table>
<thead>
<tr>
<th>Broker’s Licensed Name or Primary Assumed Business Name</th>
<th>License No.</th>
<th>Email</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designated Broker’s Name</td>
<td>License No.</td>
<td>Email</td>
<td>Phone</td>
</tr>
<tr>
<td>Agent’s Supervisor’s Name</td>
<td>License No.</td>
<td>Email</td>
<td>Phone</td>
</tr>
<tr>
<td>Sales Agent/Associate’s Name</td>
<td>License No.</td>
<td>Email</td>
<td>Phone</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Buyer/Tenant Initials</th>
<th>Seller/landlord Initials</th>
<th>Date</th>
</tr>
</thead>
</table>

Regulated by the Texas Real Estate Commission Information available at [www.trec.texas.gov](http://www.trec.texas.gov)
Brokerage and Nature of the Brokerage Business

It is interesting to think about the word “brokerage”. There are mortgage brokers, stock brokers, wine brokers, food brokers and real estate brokers among others. Brokers simply bring people together for a specific purpose. Real estate brokerage started out the same way. People began to put buyers and sellers together for the purpose of transferring real estate. In the beginning there were no laws, no specific duties and not a particularly professional group of vendors.

Some of the brokers were wise enough to see how much more this industry could become and set out to make it better. The National Association of REALTORS® was born, the Code of Ethics was written and states began to enact legislation. MLS systems sprang up that made it easier for brokers to cooperate with each other. The industry grew and blossomed.

In the 70s and 80s real estate was still mostly a mom and pop business. Fairly small offices with a broker that usually worked closely with a small group of agents they trained and sponsored. Today it is not unusual for one broker to have several offices and be responsible for hundreds of agents.

If you look around now you will see that real estate has become big business. It has become a profession to be proud of. Real estate brokers provide needed services for buyers and sellers. The sales agents the brokers train and sponsor today sometimes work with buyers and seller in the worst of circumstances (i.e. death in the family, divorce, job transfer) and do it well. Other times the situation is such a happy one with buyers finding their first home, moving into a larger home because of growing families, etc. Needless to say it takes special people to be in the real estate business.

As of June 2016 according the Texas Real Estate Commission there were 43,250 active licensed brokers in Texas and 137,980 active licensed sales people. That group of
licensees is spread between Residential Sales and Leasing, Commercial Sales and Leasing, Apartment Location, Industrial Sales, International Sales and others.

Legislation in Texas continues to try to upgrade and improve the industry. Texas licensees are some of the best trained in the nation. Our legislature, TREC and our REALTOR® organizations work to make sure the pre-licensing and continuing education classes are meaningful and keep licensees well trained to enable them to be a great resource for the Texans.

**Becoming a Broker**

Once brokers have obtained their active licenses, they can begin their brokerage business working with and representing clients. The broker must comply with the proper handling of the license in accordance with TRELA and comply with the laws of agency (client relationships).

As a broker in the real estate brokerage business, the broker may establish the association with or sponsor other license holders to perform the practices of real estate under his or her license. Remember, in order for a salesperson license holder to legally practice he or she must be associated or sponsored by a broker. It is that broker that is ultimately responsible for salespersons’ actions and the true representative of the client when hired for the purposes of conducting real estate business.

Brokers in Texas are highly regulated by TRELA. They must provide their associated agents with a policy manual, ascertain the agents are well trained and keep their licenses current, keep them informed of any changes in the License Act or the Rules of the Commission. If an agent violates the License Act it is quite likely the broker may be found guilty, by TREC, of not supervising their sales agent properly.

As a broker operates a real estate brokerage, he or she may be hired by buyers, sellers, landlords, and tenants to represent them in the sale, purchase, or lease of real property.
Since a broker can represent any or all of the parties to a real estate transaction, it is extremely important that compliance with the law of agency and proper disclosure of client representation is adhered to. It should to be clear to all parties for who the agent is representing.

When a broker represents both sides (buyer and seller or landlord and tenant) of a real estate transaction, he or she is acting as an intermediary. There are limitations to providing advice and opinions in some intermediary representation relationships as well as disclosure and written consent requirements.

A license holder is required to treat all parties fairly and honestly, regardless of representation.

**Case Study**
Broker A was advertising his brokerage services in the newspaper while his license was inactive and being renewed. Broker A has held his license for five years. Is Broker A violating any TREC rules by continuing to advertise his brokerage services during the inactive period?

**Answer**
YES. According to Section 1101.351 (b) of the Real Estate License Act, no individual may sell, lease, advertise, or exchange real estate services without an active license. If the licensee is a salesperson, then he or she may only sell, lease, advertise, or exchange real estate while acting under his or her sponsoring broker. If that sponsoring broker’s license status is “inactive,” then all agents must stop providing real estate services until the broker renews his license.
Fiduciary Duties

The definition of agency is inherent in the basic definitions of agent, principal, and third party. Ultimately, agency is the *fiduciary relationship* between one individual (the principal) and another (the agent). In this relationship, the agent acts on behalf of the principal to negotiate with a third individual (the third party), subject to the principal’s control and consent.

This relationship is *fiduciary* because it is based on the principal’s trust and confidence that the agent will act dutifully and responsibly as his or her representative. A fiduciary relationship is based on the law of agency that dictates the duties owed to the principal and third party by the agent. A more in-depth discussion of the moral and ethical guidelines for fiduciary relationships appears in the next lesson.

Agency relationships are considered to be fiduciary relationships, which means that the principal entrusts certain powers or authority to the agent with the understanding that the agent will act competently on the principal’s behalf. Because of the trust and confidence placed in the agent in a fiduciary relationship, the law has established that an agent has certain obligations to the principal; these obligations are called “fiduciary duties.” In addition, the principal has duties to the agent that are, in effect, obligations to behave in a way that makes it easier for the agent to provide competent service.

Another way to help you remember fiduciary duties is by the acronym OLD CAR.

- **O**bedience (Legal)
- **L**oyalty (100%)
- **D**isclosure (Full)
- **C**onfidentiality (Forever)
- **A**ccounting (Forever)
- **R**easonable Care
Agency Basics - A Profile

Agency Definitions

Agency - A relationship in which one person, the agent, is authorized to represent the interests of another, the client, in business dealings with third parties.

Agent - A real estate licensee that is acting in agency relationship on behalf of a client. This is usually evidenced in the form of an employment agreement such as a listing agreement.

Client - The consumer who has an agency relationship with the licensee and/or the licensee’s firm.

Customer/Third Party - The consumer or agent who receives information, services, or benefits but has no agency relationship with the licensee or licensee’s firm.

Prospect - The consumer who is not subject to a representation relationship with the licensee or licensee’s firm.

Agency Types

A. Seller’s Agent: This agent acts as broker for the seller only and normally under a listing agreement. A listing agreement is an employment agreement and any agreement identified as a “listing” is considered as such. The agent would therefore have a fiduciary duty to the seller in addition to ministerial duties which are owed to all parties by the agent.

B. Buyer’s Agent: This agent acts as a broker for the buyer only. This is most often true even if this agent is compensated by the seller or seller’s broker. This agent does not act as an agent for the seller and owes a fiduciary duty to the buyer in addition to ministerial duties.
C. Limited Representative/Dual Agency: This party acts as a broker for both the buyer and seller through one of more salespeople within the same firm. In other words two salespeople working for the same firm would represent both the buyer and the seller in the transaction as would one individual agent orchestrating the transaction between the buyer and the seller. This is because that under the common law of agency there is one agent per employing broker and any agent employed by that broker must represent whoever the broker represents.

D. Sub-agent: This is an agent of a person who is already acting as an agent for a principal. In essence, this is “an agent of an agent”. They are empowered and authorized to act on behalf of an agent. The broker is normally the agent who provides this authorization. The individual licensees are sub-agents of the broker; therefore they are sub-agents of all of the clients of the firm.

Cooperating brokers used to be sub-agents of the seller. From 1913 until 1993 the National Association of REALTORS® (NAR) mandated that all brokers (both listing and selling) represent the seller as a client and work with the buyer as a customer. This was achieved by requiring that any multiple listing service (MLS) working in conjunction with any REALTOR® association mandate that any listing broker was to make an automatic unilateral offering of sub-agency to any cooperating (selling) broker in transaction. Since this offering was automatic, the only way that a sub-agency would have not been created would be when the selling broker would have rejected this offer from the listing broker. Since the selling broker was being compensated through the listing broker, this almost never happened.

For many years the prevailing sentiment was that this created a very unnatural relationship between the selling broker and the seller as many selling brokers acted as if they represented the buyer when their obligation was to advocate for the seller. It also created a situation where the seller and listing broker had vicarious liability for the actions of the selling broker whether they knew about them or not. This was because the listing broker employed the selling broker through this unilateral offering. Many felt
this created a very precarious situation for the listing brokers and sellers. This system was finally challenged successfully by some local associations in California in the 1980’s and the NAR changed its position on this issue in 1993. This is when the NAR allowed listing brokers to compensate and cooperate with selling brokers who were agents for the buyers and made the offering of sub-agency optional. Very few, if any, listing brokers offer sub-agency today and instead cooperate with and compensate buyer’s agents.

Sub-agency still exists today in practice but only within the firm where the broker for that firm employs the sub-agents under the common law of agency.

Ways to Create Agency Relationships

A. Express Agency: This is created by mutual agreement between the client and the agent. It can be either created by written or oral agreement but is most often more advantageous if it is done in writing. In most cases agency is created with sellers by agents with a listing agreement. With buyers, it is most often created orally although many agents do use buyer/broker employment agreements.

B. Implied Agency: Implied agency may be created by actions and or words and is often accidental or unintentional. Like any agency relationship, it does require the consent of the client. However this consent can happen by any number of ways that often are not obvious. An agent’s actions that may lead a consumer to believe that the agent is acting in the client’s best interests may be approved by the consumer simply by the consumer not objecting to the agent’s representations to them. An agent should take extra special care to not act beyond their intentions at the initial interaction with the prospect.

C. Formalities aren’t required to create agency relationships: In creating an agency relationship written agreements, employment agreements or compensation are not necessary elements. Although these are common ingredients in an agency representation or employment agreement, they are not essential for the
establishment of the relationship. Either knowing or being related to a party to a transaction does not necessarily, in itself, create an agency relationship. A close relation or even a friend can be integral to creating the relationship but, again, are not essential. The receipt of confidential information from a party also, on its own, does not establish such a relationship. Each of these would depend on the context in which these events or situations would occur. It is important to remember that once created, whether express or implied, the agency relationship will impose on the broker fiduciary duties to the client.

Ways to Terminate Agency Relationships

An agency relationship can be terminated by any of the following actions:

1. Completion of performance: When the contemplated act is completed whether it is to sell a property for a seller or assist a buyer in the purchase of a property, this would constitute the completion of the act. The completion would occur when the contemplated transaction closes.

2. Expiration of the term agreed upon by the parties: If the time period established in the representation agreement expires, whether or not the contemplated act has been consummated, this also would terminate the relationship. However, it would be important to understand that while the relationship has itself expired, there are residual obligations that will succeed the relationship’s termination. The agent would still owe confidentiality to the client even after the agreement expires. For example, if an agent has a listing that expires, the agent would still be bound to keep any information confided in them by the client, that is not a material fact in any further contemplated transaction, confidential. This obligation is eternal in its duration.

3. Mutual agreement of the parties or bilateral termination: If the agent and the client elect to mutually terminate their agreement, this would also serve to terminate such a relationship. This would require the mutual consent of both
parties (broker and client) and should be done in writing in the form of a “mutual cancellation”.

4. Termination of relationship by notice from either party to the other or unilateral termination: An agency relationship can be terminated unilaterally by either the client or the broker. However, this termination would not affect the contractual rights set forth in any employment agreement. For example if a seller decides they want to list with a broker while their property is still listed exclusively with a different broker can terminate the listing with the original listing broker but they would likely owe commissions to both brokers if there is a resultant sale with the new broker. The laws and REALTOR® Code of Ethics do require that this be disclosed to the sellers by the new broker. The prevailing sentiment is that any termination should be done mutually and done so in writing.

5. General points: The broker owes no further fiduciary duty to the client after the termination of the agency relationship, other than maintaining the client’s confidential information as mentioned earlier. Just as an agent would likely want to formally create an agency relationship, they should also formally terminate it. Also, a simple thank you note at the conclusion of a successful transaction could serve as a notice of completion.

Other Agency Terms
As these terms will be covered later in the program, it is worth mentioning that there are a myriad of issues in agency representation that still are being dealt with today in courts, state legislatures and in the real estate business. These terms include:

Designated Licensee Representation - This is where individual licensees in the same firm can individually represent buyers and sellers in the same transaction. In some states this is an alternative to dual or limited representation that has been codified. In Texas this practice occurs when the parties to a transaction do not wish to consent to dual agency. The broker then has the option of becoming an “Intermediary” and
appointing a licensee employed by them to represent the seller only and another licensee employed by them to represent the buyer only.

**Imputed Knowledge** - This is the concept where knowledge possessed by one agent in a company is assumed to be the same knowledge possessed by all other agents in the company and the client. The prevailing sentiment on this legal issue is that in large companies it is unrealistic and even preposterous to assume all agents possess all of the knowledge about a client and/or property represented by the broker.

**Imputed Notice** - In similar fashion to imputed knowledge, imputed notice provides that once a client’s agent has been notified of any action, it is assumed that the client has also been notified. For example if an agent who represents a buyer is informed by the listing agent of the seller’s acceptance of an offer, it is assumed that the buyers have also been notified. If the agent should delay notifying the buyer client of this acceptance and the buyer has decided to withdraw their offer after the acceptance has been communicated to their agent, they will still be bound to the agreement. They were obligated once their agent was notified.

**Sources of Agency**
Agency representation guidelines have evolved as a result of a convergence of the following:

- Texas Constitution
- State Statutes: The most prominent statute is found in the Texas Real Estate Licensing Act where an agent may be subject to disciplinary action if they acted for more than one party in a transaction without the knowledge and consent of both parties.
- Texas Real Estate Commission (TREC)
- Common law: That which is formed or influenced by opinions of the courts as opposed to statutes.
• Code of Ethics of the National Association of REALTORS® (NAR): Article 1 of the REALTOR® Code of Ethics identifies and defines the agent’s fiduciary duties to the client and also provides for the requirement for the agent to obtain informed consent when acting as an agent for both the buyer and the seller in the same transaction in states where dual agency is legal.

• Industry-wide practice: The standards of care can be modified by what measures brokers decide to implement within their own companies’ practices. A broker should take the time to adopt, define and deliver an agency representation office policy that should be in writing. This policy needs to be clearly communicated to the sub-agents employed by the broker and the sub-agents have a responsibility to be aware of this policy. Furthermore, all agents in the company have a responsibility to disclose this policy to any prospects they interact with in assisting the prospect in making a decision on who they want representing them in a transaction. Brokers are also charged with the responsibility to adopt office policies in certain situations where they may be potential conflicts of interest or misunderstandings. Examples of this may occur when agents employed by the broker may represent different buyers who may have competing and conflicting interests in the same properties. Another example is when an agent employed by the broker is buying one of the broker’s listings or is selling their property through the company.

These basics form the foundation of agency law and practice from which the broker and the agents employed by the broker are able to define what their responsibilities are and to communicate them clearly to the client. In summary, there are four basic steps that a broker must take to achieve this and deliver on their responsibilities to the consumer. These steps are:

1. Decide - The broker must decide who is going to be offered services as a customer or a client and in what situations. This must take the form of an office policy and be clearly communicated to the agents employed by the broker. It is
also important to remember that the consumers have the right to consent or not consent to these offers of services.

2. Disclose - The offering of these services must be clearly disclosed and the agent must clearly define the differences in how services are going to be delivered to a customer or a client. This disclosure must be done in a timely and meaningful manner which is usually at the initial meeting between the consumer and the agent.

3. Document - The disclosure must be properly documented to ensure clear communication and the accompanying evidence. This is achieved by using the INFORMATION ABOUT BROKERAGE SERVICES form at the inception of any relationship with a prospect.

4. Do - A broker needs to be sure that the actions of their agents reflect and are consistent with the services offered to the consumer whether they are as a customer or a client. Clear communication is the most effective way to ensure this.

**Agency Case Studies**

The disclosures, advice and counsel offered to the client will depend on the following:

1. The facts of each transaction.
2. The knowledge and experience of the client.
3. The questions asked by the client.
4. The requests and requirements of the client.
5. The nature of each property.
6. The terms of the sale.

In essence, if there is an ambiguity in a contract drafted by a real estate licensee, it is the licensee’s duty to clarify the ambiguity.
Statutes and Common Law

Common law is that which is formed or influenced by opinions of the courts as opposed to statutes. These opinions are the results of court decisions regarding agency over approximately the last 300 years. It is also important to note once again, that under the common law of agency, there is one (1) agent per employing broker.

Under the common law, the agent has the following duties to all people with whom they deal whether they are customers or clients. These are called ministerial duties:

1. Honesty
2. Disclosure of material facts: Anything deemed material in Texas is addressed by TRELA which will be reviewed later.
3. Accounting: In the ministerial context, this means making sure that all parties have legible and signed copies of all transactions documents prior to the closing of the transaction.
4. Reasonable skill and care: An agent has a duty to provide the reasonable standard of care of the real estate industry to all parties in the transaction.
5. Fairness: The NAR purged the word “fairness” from the REALTOR® Code of Ethics back in 1993 with the prevailing sentiment that the term was ambiguous.

Common law also provides that the licensee owes the following fiduciary duties to his or her client in addition to the ministerial duties identified previously:

1. Confidentiality: The agent must keep confidential whatever the client confides in them unless the item is a material fact.
2. Accounting: The agent has a duty to be able to account for all monies and other property contributed by their client and how it is allocated in the transaction.
3. Reasonable care and diligence: As with the ministerial duty of reasonable skill and care, the agent does owe a duty to provide at least the standard of care to the client but also has a greater obligation to make sure that the client has the
opportunity to perform the “due diligence” necessary to make a completely informed decision that would favor their interests in the transaction.

4. Loyalty (Undivided): An agent has a duty to protect and promote his or her client’s interests in the transaction even above their own interests.

5. Obedience: An agent must obey all lawful instructions of their client. This would also mean to follow the lawful instructions of the client and to not exceed the authority given them by the client.

6. Accountability: An agent’s representations to a client, whether they are written or verbal, can be relied upon by the client. This was upheld in a case in Arizona called Darner Motor Co. v. Universal Underwriters where Darner Motor Company had the right to rely on the verbal representations of the Universal insurance agent.

7. Disclosure (Full): An agent has the duty to fully disclose to their client anything that could benefit the client’s negotiating position with the other party in the transaction or pertinent to the property or transaction.

TRELA also encompasses that a licensee disclose anything that could materially or adversely affects the consideration to be paid by any party in the transaction to any party in the transaction in writing before completion of the transaction. Some items identified under this section include:

1. Material defects.
2. Liens and/or encumbrances.
3. Possible inability of seller or lessor to complete the transaction.
4. Possible inability of buyer or lessee to complete the transaction.

TRELA also provides that a licensee shall expeditiously perform all acts required by the holding of a license. A licensee shall not delay performance, either intentionally or through neglect. It also provides that a licensee shall not accept compensation from or represent more than one party to a transaction without the prior written consent of all
parties. This rule also provides that the services that a salesperson or broker provides to a client or third party:

- Shall conform to the standards of practice and competence recognized in the professional community for the specific real estate discipline in which the salesperson or broker engages.
- A salesperson or broker shall not undertake to provide professional services concerning a type or property or service that is outside the salesperson’s or broker’s field of competence without engaging the assistance of a person who is competent to provide those services, unless the salesperson’s or broker’s lack of expertise is first disclosed to the client in writing and the client subsequently employs the salesperson or broker.

TRELA goes on to provide that a salesperson or broker shall exercise reasonable care in:

- Ensuring that the salesperson or broker obtains information material to a client’s interests and relevant to the contemplated transaction and accurately communicates the information to the client.
- A salesperson or broker is not required to have expertise in subject areas other than those required to obtain the salesperson’s or broker’s license. For example, if the seller states that the roof is in excellent condition and only an inspector would have the expertise to determine otherwise, the broker should have no liability for merely passing along the seller’s representation.
- A salesperson or broker shall take reasonable steps to assist a client in confirming the accuracy of information relevant to the transaction. For example if the seller states that the roof is new and in excellent condition, but the agent has reason to believe that the roof is old and in a state of disrepair, evidenced by broken shingles and obvious water leaks, the agent should point out these
circumstances to the buyer/client and recommend that the buyer obtain a professional roof inspection.

A related policy states that a licensee is a real estate professional with a fiduciary duty to his or her client and to act in the client’s best interests even above his or her own interests. Reasonable care or competence may include recommending that a client seek professional or technical advice when the matter is beyond the expertise of the agent. For example, in the previous scenario, if the client is concerned about the roof’s condition, the agent should advise the client to have the roof inspected by a roofing expert.

Licensees are expected to take reasonable steps to assist their clients in confirming or verifying information under circumstances in which a reasonably prudent real estate professional has reason to question the accuracy of the information being provided in a transaction, or where the client has questioned the accuracy of the information. These considerations are intended to provide a reasonable standard for licensees to follow in complying with their duties and obligations under the statute or rule.

These are also consistent with the obligations imposed by the National Association of REALTORS® Code of Ethics in Article 2 which states:

“REALTORS® shall avoid exaggeration, misrepresentation or concealment of material facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside of the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law.”

Under Article 2, Standard of Practice (SOP) 2-1 states:
“REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real
estate licensing authority. Article 2 does not impose upon the REALTORS® the obligation of expertise in other professional or technical disciplines.”

**REALTORS® Code of Ethics provisions on representation:**
Article 1 states that the REALTOR® shall promote and protect the interests of their client. Under common law this would also mean that the REALTOR® has the obligation to do this even above his or her own interests in the transaction. SOP 1-9 states that the REALTOR® is obligated to preserve confidential information provided in the course of any agency relationship, even after the agency relationship terminates without the consent of the client. The agent’s vow of confidentiality under his or her fiduciary duty continues forever.

Article 16 states that an agent cannot engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with their clients. In other words, once the client reaches an exclusive agreement with a broker to buy or sell a property, competition ceases and cooperation begins. It is important that a REALTOR® not interfere with an exclusive relationship or agreement. Most importantly a REALTOR® is prohibited from soliciting prospects who are subject to current exclusive listings or exclusive buyer/tenant relationships or agreements.

SOP 16-6 states that if an agent is contacted by the client of another REALTOR® and the client initiates the discussion, the agent may discuss the terms upon which the agent may enter into an exclusive relationship that takes effect when the current exclusive relationship expires.

SOP’s 16-7 and 16-8 state that the fact that a prospect retained a REALTOR® as an exclusive representative or exclusive broker in one or more past transactions does not preclude other REALTORS® from seeking such prospect’s future business, or from entering into a similar agreement after the expiration of the prior agreement.
SOP 16-9 states that REALTOR® needs to make reasonable efforts to determine if the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service before entering into a representation agreement with the prospect. For example, if the REALTOR® is looking to list a property exclusively, he or she should determine if the property is subject to any other listing before taking the exclusive listing.

SOP 16-13 states that all dealings with a client who is subject to an exclusive agreement shall be carried on with the client’s representative or broker, except with the consent of the client’s representative or broker or except where such dealings are initiated by the client. This standard of practice also provides that before providing substantive services such as writing an offer or preparing a competitive market analysis (CMA), a REALTOR® should ask the prospects whether they are subject to any exclusive representation agreement. A REALTOR® is prohibited from knowingly providing substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects’ exclusive representatives or at the direction of the prospects.

**Imputed Notice**

As defined earlier, imputed notice means that facts known by the licensee are imputed to the principal. If an agent withholds information of which the principal may have acted differently had they had such information, it is considered a material breach of their fiduciary obligations to the principal. In addition for an agent to withhold information from their client is to increase their liability. Imputed notice is assumed to be delivered up to the principal (client) and not down to the customer or agent.

For example, if a buyer’s agent receives an acceptance of an offer made to a seller, at that point the buyer is bound by their offer and cannot withdraw the offer without penalty. Once the buyer’s agent was informed of the acceptance, imputed notice was delivered to the buyer client.
On the other hand, if an agent represents the seller in a transaction and the seller knows of a structural problem in the house, that information is not imputed since such knowledge is not imputed down to the agent. However, the agent may have liability for the lack of due diligence by not asking for such information. This is one of the benefits of the agent advising the seller to provide a SELLER PROPERTY DISCLOSURE STATEMENT (SPDS).

Confidential information such as motivations for buying or selling shall remain confidential and the agent has no obligation to share this information with a customer or third party. If such confidential information is shared, then the information is then imputed to their principal or client.

**Additional Duties**

Some general duties for all agents include obligations to not act outside of the authority granted by the principal or client. In addition, all agents have duties to exercise reasonable care to affect a sale to the best advantage of their client. For example, an agent should secure the client the best terms at the best price obtainable. In addition, all agents have obligations to perform all duties as expeditiously as possible.

A buyer’s agent’s duties would include the following:

1. Request a Seller’s Disclosure Notice (SDN) from the seller.
2. Advise the buyers to have inspections done by licensed professionals.
3. Request a home warranty for their buyer client.
4. Explain contract provisions to their client.
5. Advise the buyer of any issues related to the contract provisions.
6. Point out to the buyer clients “red flags” in offers and subsequent counter offers.
7. Consider obtaining a property profile on the property on which the buyer intends to submit an offer or obtain as much information as possible on the property.
8. While TRELA removed liabilities associated with issues of stigmatized properties (properties characterized by undesirable situational factors such as a home where a murder occurred), a buyer can make any of these issues material in their transaction. If so, a buyer’s agent should advise the buyer about how such issues may be discovered. An effective way to do this is to make sure the buyer has any TREC or TAR consumer advisory information and to be advised to talk to the neighbors in the area of the property.

9. Provide the buyer the most updated Buyer Advisory as indicated above for information to the buyer on how they can obtain other information on the property and area.

In protecting the principal (client), a buyer’s agent needs to:

1. Promote and protect the client’s interests even above their own interests.
2. Look at each property as if they were going to buy it for themselves.
3. Disclose any facts that the agent has actual knowledge of.
4. Point out any visible “red flags” (i.e. obvious discolorations in the ceiling) and recommend any technical or professional investigation.
5. Respond to any questions on which they are not certain “I don’t know but let’s make a note of this to have it verified during the inspection period.”
6. Identify the sources when passing along information to the client. When the agent does this they make sure that the client understands that the agent has not verified the veracity of the information.

If a buyer agent and buyer decide to establish an exclusive buyer broker employment agreement it would be important for the agent to do the following:

1. Complete the agency disclosure form adopted by their office and to be used in accordance with their office policies.
2. Enter into a formal agreement with the buyer on an agency agreement form used by their office.

3. When entering into the buyer broker employment agreement, make sure to: identify the term for which the agent will act in such a capacity, spell out the duties of both the broker and buyer, specify compensation obligations and set forth how the agent will work with cooperating brokers.

**Limited Service Brokerages**

Texas statutes do not prohibit limited service listings such as brokerages who charge a flat fee for placing a client’s property in the MLS. However, since these brokerages are limited service entities, they often do not present offers to the seller. They are required to comply with all real estate statutes and rules.

These brokers must disclose risks involved in this type of arrangement. The reason for this is that sellers who employ limited service brokers are essentially representing themselves during the negotiations. Although the buyer’s broker can respond to questions and discuss the offer, care should be taken not to disclose confidential information about the buyers such as their motivation. There are concerns that the seller may become confused about who the buyer’s broker represents and the possibility of an unintentional limited representation situation or implied agency.

**Case Studies**

The following scenarios are reenactments of actual events that have occurred in real estate practice. Names were changed to protect innocent parties involved.

**Scenario 1**

Jim Perkins listed a residential property for his seller clients for $285,900. He was contacted with an offer from a buyer’s agent, Rob Jennings. Rob represented the O’Connor’s, who had received an inspection report before making the offer. Their offer
stipulated that the reverse osmosis system be replaced due to a leak under the sink noted by the inspector.

Jim’s sellers countered with a $2,000 price reduction, the estimated costs of replacing the reverse osmosis system, in lieu of making the repair themselves. The O’Connor’s accepted the counteroffer and the sale closed as scheduled.

A couple of weeks after moving in, the O’Connor’s returned home one evening to find the first floor of their new house flooded. As it turned out, the minor leak in the reverse osmosis system noted by the inspector turned out to be a significant leak from the garbage disposal that resulted in the flood.

The O’Connor’s, after getting a $10,000 estimate for the needed repairs, proceeded to sue Jim Perkins, Rob Jennings and the sellers for breach of good faith, breach of contract and damages. The case settled with the sellers paying nearly $6,000, plus $16,500 in court costs.

The sellers, angered by the outcome, filed suit against Jim and his broker for $21,500 in damages plus attorney fees for breach of fiduciary duties.

Outcome
The case was adjudicated in favor of Jim, the defendant, as the red flags that might have indicated a much more severe problem with the disposal rather than the RO system, were obfuscated by shelf paper that covered the mold. The ruling held that an agent is not responsible for discovering latent defects. An agent is also not responsible for discovering them and did not violate his fiduciary duty of reasonable care and diligence.

As a result of this case, it has become incumbent on an agent to recommend a complete professional home inspection to their client whether they are the buyer or
seller. For the listing agent, it is important to advise the seller client to provide a SELLER DISCLOSURE NOTICE (SDN) on their property and to fill it out as completely and as accurately as possible. Agents also need to advise their clients to consult any TREC or TAR Consumer Advisories.

**Scenario 2**

Ellen Griffith was a buyer’s agent representing Liz Beltran in the purchase of a 15-year old home. They made an offer of $210,000 through the listing agent, Denise Baker. The offer was contingent on the sale of Liz’s current home with a 90-day closing. Denise’s client accepted the offer and escrow was opened.

At the final walkthrough, Liz went to escrow and paid her loan fees and closing costs. In addition to the $28,000 down payment she made from the proceeds of the sale of her home, she also paid $900 for the appraisal and inspection fees.

When the seller went to execute the closing documents so that the sale could be recorded, it was discovered that they had over-encumbered the house during escrow and were unable to pay off the second loan. Due to the sale failing to close, Liz was immediately refunded her earnest money and her $28,000 down payment. She lost the $900 she paid for the inspection and appraisal fees.

Without a place to live, Liz had to rent an apartment for $1,200 a month. She began looking for another home, this time without an agent. By the time she found a similar house in the same neighborhood, a rise in the market prices had driven the price of the comparable house to $218,000, $8,000 more than she would have paid just a month ago. Also, she had to pay $1,200 to break the lease on her apartment.

**Outcome**

Liz didn’t have any recourse against the agents but legal opinions seemed consistent that she did have possible recourse against the sellers. This recourse would be
predicated on the sellers knowing they were encumbering the property and had deliberately failed to disclose that fact. Commissioner’s Rule R4-28-1101 does require the licensee to disclose any liens or encumbrances on the property but this is also predicated on the licensee being aware of the encumbrances.

Conventional wisdom also held that the title company may possibly have liability for having not discovered the encumbrances during the title search but timing may have impeded the encumbrances being revealed in a timely manner for the title company to pick them up during the title search. Regardless, both the agent and buyer should carefully review the Commitment for Title Insurance issued by the title company and pay particular attention to the exceptions. The real issue is that did the agent advise the buyer to carefully review and determine the extent of any encumbrances on the property. As the agent is likely not an expert in title searches, the responsibility would likely fall on the shoulders of the title company. Reasonable care and diligence would require the agent to advise the client to have the due diligence necessary performed to ensure an informed decision on the part of the client.

**Scenario 3**

Byron Wheeler had a buyer client looking for a home in an affluent and desirable area of the city. At the time the market was very hot and inventory was very limited in this area. The buyer also wanted a property on what was considered the most desirable street in the area. There was nothing on the market at the time except a “For Sale by Owner” property where the owner was unwilling to cooperate with and compensate real estate agents. For this reason, Byron did not offer the property to his buyer client.

Finally, a property on the street came on the market as a listed property with another broker. Byron’s buyer client made an offer substantially above asking price to make sure that he secured the property even though the buyer was expecting to have to make major renovations to the property to make it suitable for him. Shortly after the buyer moved in to his new home, he met his new “For Sale by Owner (FSBO)” neighbor right
down the street. He discovered that the “FSBO home” was the ideal home and sued his agent and the broker for breach of fiduciary duty.

Outcome
The broker settled with the buyer which entailed a substantial amount as the broker knew that in all probability, they would have lost the case and would be found guilty of violating their fiduciary duty for advancing the broker’s interests over that of the buyer’s. Under the fiduciary duty of loyalty, the agent must protect and promote their client’s interests even above their own interests. Also, the fact that compensation was not being offered was irrelevant to the duty of the agent to provide undivided loyalty to the client.

A buyer’s agent who wishes to ensure the best probability of being compensated fairly should discuss this with the buyer at the inception of the relationship. In essence, the agent should discuss this in the following fashion:

- Explain how they are compensated to the buyer. In most cases the buyer’s agent is going to be compensated through the listing agent with MLS. In other cases, the agent may compensated directly from the owner, builder or lender.
- The agent should explain how much minimum compensation that they expect to be paid. It is okay for a broker to decide how much they want to charge for their services. What is not okay is for the broker to set such fees by agreement with other brokers as that is considered price fixing.
- The agent should then ask the buyer that if they are unable to ensure obtaining this minimum compensation from the listing agent, seller, lender or builder, would the buyer be willing to make up and difference.
- If the buyer indicates they are willing to do so, the agent and broker might want to consider entering into an exclusive buyer broker agreement with the buyer. If the buyer indicates they are not willing to do this, the agent should then indicate to the buyer that they will only offer properties to the buyer where they can be
assured of receiving their minimum compensation from the listing agent, seller, lender or builder. The agent should then ask the buyer if this is acceptable.

- If the buyer says this is acceptable, then the buyer would most likely be considered an acceptable client to the broker. However, if the buyer indicates that this is unacceptable, the agent and broker might want to reconsider whether they want to represent this buyer. After all this buyer expects the agent and broker to possibly work for free which is not considered reasonable. However, the agent should make sure that no implied agency has been created with this buyer before having this conversation.

- This conversation should be documented by the agent and broker.

Scenario 4
Amanda Byrne acted as a limited representative in a transaction involving a 15-year old mobile home. Though the mobile home was not affixed to the land, the additional property structures, including a workshop and attached garage were.

The actual lot where the mobile home stood was a part of a 4-split. It was the last of the four lots, which ran in a straight line back from the main road. During escrow, the Commitment for Title Insurance clearly identified that the road used for access to the lot was privately owned; it was part of the second lot in the same 4-split.

One year after closing, the owner of the second lot blocked off the road, effectively denying the buyer access to his own property. The buyer sued Amanda, her broker, and the seller for failure to disclose material facts. At the conclusion of the case, the seller proceeded to file suit against Amanda and her broker for breach of fiduciary duty and failure to disclose a material defect.
Outcome
The cases were adjudicated in favor both the buyer and seller against Amanda and her broker for failing to disclose known material facts about the property. Apparently the seller had advised Amanda that the access to the property was only a license and not an easement and therefore the permission was revocable. Amanda breached her fiduciary duty by putting her own interests above her client's and a conviction of fraud accompanied this ruling. Amanda was incarcerated for her actions.

Scenario 5
Wendy Riker represented Robin Schwartz as her listing agent. Wendy listed Robin's relatively new home for $195,500, a fair market price.

On Thursday, Phil Bowers, representing an interested buyer, made an offer on the property for $190,000, contingent on the sale of his client's current home. The offer expired the following day, Friday at 3:00 P.M.

Wendy spent Thursday afternoon and Friday morning shopping the offer. She made numerous calls to other agents she knew had shown or previewed the property. She disclosed the price and terms of Phil's offer to each agent she spoke with, hoping she could get Robin her full asking price. One of the agents came through, offering the full asking price of $195,500 without the contingency.

Outcome
According to the NAR Code of Ethics, specifically in Standards of Practice 1-13 and 1-15 Wendy did nothing wrong. SOP 1-13.5 states the following:

When entering into buyer/tenants agreements, REALTORS® must advise clients of the possibility that sellers or seller’s representative may not treat the existence, terms or conditions of offers as confidential unless confidentiality is required by law, regulation or any confidentiality agreement between the parties.
Ostensibly, it appears that Phil may not have advised his buyer client of this and had he adequately disclosed this to the buyer, the buyer may have been compelled to make a more attractive offer to the seller.

SOP 1-15 states the following:

REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the seller’s approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm or by a cooperating broker.

Based on this, Phil should have also inquired with Wendy whether there were any other offers on the property either having been submitted or anticipated. From Wendy’s perspective, Wendy was most likely shopping offers to ensure obtaining the best price obtainable in the shortest time for her client. She was actually doing the right thing for her seller client.

Red Flags Regarding Potential Problem Clients
Many real estate agents end up with issues similar to what have been presented often because they end up representing a client who ended up being the real problem. The reality is that there are people who, for a myriad of personal reasons, have tendencies to raise issues unnecessarily that ultimately result in the kinds of situations that end up creating major consequences for brokers.

An agent should be selective with who the offer representation to. Remember that an agent should never base this decision on race, color, religion, national origin, gender, familial status, disability and sexual orientation. These are the protected classes of the fair housing laws and Code of Ethics. Also, as previously indicated, an agent should take precautions with creating an unintended representation relationship until they are certain they want to offer this representation.
In asking questions of a prospective client an agent should carefully observe the following red flags about the prospect and to more thoroughly interview this prospect to determine if they want to offer them representation:

1. A prospect with unrealistic expectations: This person has an exaggerated perception of what he/she can afford or what their property would sell for in the marketplace. Take time to educate them about the market and if they refuse to realign their expectations, they agent may want to not offer them representation.

2. A prospect with a combative personality: This person is often very negative in their attitudes and can be very unreasonable and sometimes even abusive. An agent should remember that they should not tolerate abuse and if this prospect is expressing inappropriate words to the agent, the agent should calmly but firmly indicate that they are not going to engage in this conversation and either hang up or walk away.

3. A prospect who expresses vicious gossip: This person often says negative things about other people. The reality is that this person will also end up saying such things about the agent. This person has a perceived deprivation of being respected and will often raise these inflammatory issues to get attention.

4. A prospect who is a chronic malcontent: In most cases no matter how effective an agent may be at doing his/her job, they will never be able to satisfy this prospect. These are people who are, for many reasons, dissatisfied with themselves and will take this dissatisfaction out on others. This is the person who always says “No” to very idea because it’s not their idea. The irony is that they usually can offer no ideas themselves. This is a very negative person.

5. A prospect who always says “Yes”: This person often has an insecurity about their acceptance and therefore has an inability to say “No”. They often will agree to meet an agent because they don’t want to deal with rejecting someone. However, they often cause a great of frustration for the agent later because they will often postpone planned meetings or even stand the agent up.
6. A prospect who is an “eternal victim”: This person has similarities to the chronic malcontent. They tend to ruminate more and are often depressed. In many cases they will refuse to take control of a situation or make decisions because they want someone else to be responsible to be able to direct blame away from themselves. The agent will likely become one of the people they ultimately blame when something goes negative.

7. The moral zealot: This is not to say that if one has strong spiritual or religious convictions, that they are a bad person. Most people who have such convictions are very virtuous in how they conduct their lives. However, if a person has a need to express their convictions and how virtuous they are continuously, they could spell trouble for the agent. Some people who do this have an attitude that whatever indiscretions they commit, they will automatically be forgiven.

8. The prospect who asks for a “special favor”: This prospect may ask the agent to do something that would cut a legal or ethical corner. An agent should immediately severe any further communication with this person. An agent must follow instructions of a client but these instructions must be lawful.

Consulting Skills

The Skills to Deliver on Fiduciary Duties

Being able to explain the agent’s obligations to the consumer will require that the agent have certain skills in communicating with the client and empowering the client to make a fully-informed decision. The agent benefits the client in two major ways: the agent should be an effective problem-solver and a resource for their client. This does not mean that the agent should have to solve the client’s problems but should be able to effectively guide them in the problem-solving process. This often means that the agent needs to possess the same skills as that of a consultant.
In explaining his/her fiduciary duties effectively and following through on the home-buying/home selling process, the agent will need to master four key communication skills:

1. Maintain or enhance the client’s self-esteem. The best way to achieve this is to get the client talking about themselves. Asking open-ended questions is an effective way to get this done.
2. Listen and respond with empathy. Listening is often difficult but the agent needs to concentrate on what the client is saying. Writing down what they say and checking for understanding is the most effective way to achieve this.
3. Get them involved in their decision. An agent needs to make sure to provide ownership of any decision to their client. An agent provides the facts or assists the client in discovering the facts and lays the foundation for the client to make a decision.
4. Set the agenda. In order to maintain control, it is often suggested that the agent have a specific agenda for each meeting with the client and what will need to be accomplished. Doing this will eliminate confusion, ensure clearer communication and enable the agent to maintain control.

Let’s first identify the ten most important traits that a consultant must have:

1. Problem solver: People who buy or sell a home are almost always dealing with a life-change issue which creates a problem or problems for the client. A consultant needs to have the skills necessary to guide the prospect through the process of solving their problems. Remember that you don’t solve it for them; you help them solve their problems.
2. Set and complete goals: A consultant always assists their clients in setting goals that are S.M.A.R.T. (Specific, Measurable, Attainable, Realistic, and Time-Framed) and following a plan to achieve them.
3. Independent and self-starter: A consultant does NOT wait for someone to give them instructions. A consultant identifies a process that needs to be executed to achieve a goal and follows through.

4. Confident of getting the job accomplished: A consultant must always project confidence with their clients. If a consultant projects any kind of hesitancy or uncertainty, this will almost always plant a seed of doubt in the mind of their clients and the consultant may lose credibility.

5. Enjoys pursuing tasks to completion: A consultant understands that obstacles are a fact of life and is not discouraged by them. It is okay to be challenged by them but the client is very reliant on the consultant’s ability to handle challenges.

6. Adaptable to rapid change: Real estate markets change, sometimes on a dime, and the consultant needs to be prepared to suggest an adaptive strategy to not only handle the challenges confronted by the change, but to help the client take advantage of the opportunities that every different market provides. Those who are co-dependent on the corporate world for their survival often don’t handle change effectively. A consultant sees the value of change.

7. Creative: A consultant goes beyond the mainstream in contemplating solutions to complex problems. A consultant is resourceful and confident in suggesting alternative solutions that are out of the ordinary.

8. Enjoy working with people: It is important to not misunderstand this message. This does not mean that an agent must like every client they work for. As a matter of fact, true consultants often take pride in helping people they don’t necessarily like. That’s because a consultant is able to set personal differences aside and do the job that the client needs done. Of course, a consultant does carefully interview a prospective client to make sure they are clients that they’ll be able to successfully work with and for.

9. Trustworthy, honest, loyal, and brave: If an agent were to look at the definition of fiduciary duty, these words would fit the mold like a glove. The first three of these go without saying. Being brave means having the necessary courage to do what
is legally and ethically essential to serve the client. It also means having the
courage to tell your client the truth even if the client may not like what they hear.

10. Willing to do what it takes: A consultant has tenacity and determination to see a
task through to completion. A consultant knows that his/her reputation is made by
their ability to get the job done for the client.

Below is a list of a few key things that all consultants do to get the job done for their clients:

- Listen to the client: This is actually the number one job of any consultant. Asking
  quality questions and writing down the responses to get an accurate profile of the
  client and the problem is of utmost importance.
- Investigate: A consultant will take the necessary information-gathering steps to
  get a grasp of the situation with the client. In other words, a consultant does
  his/her homework.
- Analyze: A consultant looks beyond the symptoms; a consultant finds out the
  "real problem" that needs to be solved.
- Describe options/make recommendations: Unlike a traditional salesperson, a
  consultant gives an accurate profile of the client’s options and recommends a
  course of action compatible with the objectives of the client.
- Catalyze change: In making recommendations, especially those not in the
  mainstream, a consultant will effectively use a nudge in the form of friendly
  persuasion to get a client to take action.
- Implements agreed-upon course of action: Because of the objectivity that a
  consultant has with his/her perspective of the client’s decision, a consultant is in
  a position to provide reassurance to the client that they are doing the right thing.

As you may now have a grasp of what a consultant does, it is also equally important to
know what a consultant doesn’t do:
Be arrogant: While there is nothing wrong with having confidence, as business guru Peter Drucker once said “A little humility goes a long way.” An agent should not let their ego dictate their actions. Remember the most important people are the clients.

Pull punches: A consultant needs to be prepared to give the client the real truth; even if the client will take it as bad news. A consultant does not dance around the truth; they confront it and deliver it with conviction.

Create problems where none exist: A consultant knows that silence is golden. The consultant knows not to add complications to the decision that the client is making. While it is important that the client goes into the decision with their eyes completely open, a consultant does not bring in elements that are outside of the real problem.

Bite off more than they can chew: A consultant understands his/her limitations. A consultant does not try to provide service outside of their area of expertise. A real estate consultant does not try to list or sell a property outside of their primary service area. A real estate consultant does not list or sell property that they are not qualified to handle. For example, a residential real estate agent does not try to handle the sale of a business opportunity - they refer it to a qualified expert.

Over-commit and under-deliver: A consultant knows that if they make promises they can’t keep, that it will eventually catch up with them. It is much better to under-commit and over-deliver.

Neglect current clients while pursuing new ones: The consultant maintains a balance of doing what is necessary to keep their pipeline full and fulfilling their obligations to the client. After all, the best future-business building technique is to do an outstanding job for the client. They will refer business to you and consultant understands this.

As an agent reads and studies these guidelines, they should learn to see the parallels to their role as a REALTOR®. These basic skills and guidelines are the foundation to an
agent building their business as a real estate consultant. As is apparent, the role of the REALTOR® consultant is very consistent with the role of the general consultant.

**What a REALTOR® Consultant Does**

A REALTOR® consultant will refine the role of a general consultant to concentrate on listening to their client carefully. This means asking effective open-ended questions and listening carefully to the client's answers. The agent will also leave nothing to chance with memory and carefully write down the client's responses.

An agent would want to ask questions of their seller client to extract information in the following areas:

1. Motivation/urgency - What are the reasons the sellers are looking to sell and how soon do they need to make their move?
2. Next location - Where is the seller looking to move?
3. Emotional issues - How does the seller and their family feel about this move?
4. Financial expectations - Realistically, how much does the seller expect their property to sell for and how much do they expect to net from the sale?
5. Expectations of the broker - What type of service(s) does the seller expect the broker to provide them?
6. Experience in selling previous homes - What experiences have the sellers had in selling previous homes? (This question will provide clues as to the type of representation they will need from the agent.)

An agent would most likely want to ask a buyer client questions that would give them information in these areas:

- Motivation/urgency - What type of life-changing events are happening in their lives to bring about the desire or need to relocate and how soon do they need to make this move?
- Location - What type of area(s) are they interested in buying a property?
- Emotional issues - How do they and their family feel about the move?
- Financial expectations - Realistically, how much do they expect to have to pay for their new home? What down payment and monthly payment are they comfortable with?
- Expectations of broker - What types of services do they expect from their broker representative?
- Experience in buying previous homes - What types of experiences have they had in buying previous homes?

The REALTOR® consultant will also analyze the needs of their client and tie them to the market conditions to establish the best chance of obtaining the best results for their client.

The consultant will also describe the best realistic options that their client has whether they are a buyer or seller and allow them to make the best choice for them and their family. This is where the consultant will give the ownership of the decision to their client. Also, as is the case with a general consultant a REALTOR® consultant will also take the steps necessary to instigate and implement the steps necessary to help the client achieve their goals.

**Meeting with the Client**

In meeting with any client, an agent should use the following guidelines:

- Relax and build rapport. Make the client feel comfortable and get them talking about themselves.
- Make sure the agent is meeting with the decision makers. One question that might help an agent find this out is to ask the prospect a question like “Who else will be involved in this decision?”
• Make the best impression. The best way for an agent to make their best impression is to be prepared. Success occurs when careful preparation meets opportunity.

• Ask questions and listen. A rule of thumb to remember is that the client should do about 80% of the talking being prompted by effective questions from their agent.

Presentation format to sellers:

1. Establish and reestablish rapport. An agent should set a friendly and open environment by continuing to maintain or enhance the client’s self-esteem.

2. Establish control. There are generally three steps that an agent will want to take to ensure that they will have control of the meeting. The first is to politely ask the sellers where the agent would like them to be seated at the table; the second is to minimize any possible distractions such as phones; and the third is to set the agenda for the meeting and explain it to the clients.

3. Identify the benefits of using the REALTOR® consultant’s services. The agent should offer services to the seller that most directly address the seller’s most critical needs. For example, if a seller needs a fast sale, the agent may want to highlight the benefits of their marketing plan which is designed to ensure that the seller’s property will receive maximum quality exposure ensuring the maximum probability of the highest price in the least amount of time.

4. Address price and terms. The agent would review the information that the seller would need to know to make decisions on the price and terms on which they will want to offer their property. For example, the agent would review the competitive market analysis to assist the seller on pricing the property.

5. The agent should then ask the seller is they have any questions on any of the services and price & terms. If the seller seems satisfied the agent should then ask the seller for a decision to allow them to market their property.

6. If the seller has any concerns at this stage, the agent should handle them using the problem-solving track that will be covered later in the program.
7. The final step is to get a final decision from the seller.

**Presentation format to buyers:**

Before the agent makes a presentation to the buyer, they will want to have ascertained three key items about the buyer. These three aspects are the buyer’s:

1. Desire to buy.
2. Needs in their new home.
3. Ability to pay for their new home.

Asking questions that were covered earlier will enable the agent to assess the buyer’s profile with this model.

The basic presentation to the buyer should cover five critical concerns of the buyer. The agent will need to offer services that address these items. They include:

1. Informed decision - An agent will need demonstrate to the buyer how they will be able to make a fully-informed decision with the assistance of the agent.
2. Financially able - An agent should make sure that the buyer is comfortable with the financial commitment they will be making including the down payment and monthly payment.
3. Resell value - No one can promise a buyer that they will have appreciation in value; however the agent should provide market information (past, present and future) in the area(s) that they are considering buying.
4. Best buy - The buyer will be able to trust the agent to find them the property that will provide the best value both in economic terms and lifestyle (shelter) value.
5. Family agreement - The agent will want to make sure that all decision makers that are part of the family unit will be included in the decision.
The problem-solving process:
In handling concerns in the most constructive manner, the REALTOR® consultant needs to understand that they are not trying to overpower the client into buying something. They are simply leading them to make a decision with effective communication and friendly persuasion. Building trust is the key to being able to do this effectively. Also worth noting is that ninety percent of handling a concern is confronting it. In line with this, the problem-solving process should include the following steps:

- Discuss the situation. Together the agent and client should discuss the symptoms of a situation. For instance, a seller might be concerned about the commission rate the agent is requesting because they might have been offered a lower rate from a competing broker.
- Identify the core problem. The most common reason that many agents are not able to effectively handle concerns and objections is that they try to address symptoms and not the core problem. With the commission, the seller is concerned about netting the highest possible amount from the sale of their home; not what they’re paying in commissions. The agent should clarify this.
- Brainstorm solutions. The agent should ask for suggestions from the client here but also be prepared to offer their own suggested solutions as well. For example, sell the benefits of paying a higher commission will yield better results on the sale that will more than make up for any differences in commission.
- Consider the impact of each solution. This is where the client and agent weight the pro’s and con’s of each solution.
- Client picks best course of action. The agent then allows the client to choose the option that they feel will give them the best results. Keep in mind that the action chosen by the client may not be agreeable to the other party and the outcome might be to agree to not come to an agreement.

Building Relationships
An agent should follow the nine general rules for building relationships with their clients:
1. Give the client 100% of their complete and undivided attention. This is showing respect to the client and their time. If an agent allows themselves to be interrupted by phone calls, this may be taken as disrespectful by the client.

2. Observe body and language and expressions of the client. In addition to listening carefully an agent should observe the client’s expressions and body language during discussion.

3. Ask for clarification if things are not clear. An agent should ask for clarification if they are not clear on what the client is saying. By the same token the agent should invite the client to ask questions if they are not clear on any issues.

4. Allow the clients to finish what they are saying. An agent should never interrupt their client when they are speaking. Interruptions may be interpreted by the client as a signal that the agent is not listening and/or does not respect what the client is saying.

5. Ask clients for additional information. As the client is allowed to speak and share information about themselves, they will become more comfortable sharing information and the agent should seize the opportunity to find out more about their client. Remember that knowledge is power.

6. Check for understanding. If the client says something that is not clear to the agent, the agent should confidently ask the client to clarify what they are saying.

7. Use “You” rather “I” or “We”. The agent should remember that it is the client making the decision. Using the phrase “You” will reinforce that any decision belongs to the client.

8. Be non-judgmental. Agents should never judge a client on superficial factors such as appearance as they can be deceiving. Also, when a client has had some unfortunate circumstances to deal with in the past such as a foreclosure, an agent should not draw conclusions about their character.

9. Show empathy. An agent should respect that a decision to buy or sell a property is a major decision and be tolerant of any delays and concerns as they arise.
Using these skills will ensure the best possible results for both the client and the REALTOR® consultant.

Explaining Your Fiduciary Duty
Below is a newsletter that offers advice on counseling with the consumer on your duties to the customer and client:

Explaining Your Fiduciary Duty Effectively

There are many markets where many buyers and sellers have their guard up with real estate agents and lenders. Taking time to effectively and clearly explain your fiduciary duty to a prospective buyer or seller will not only assist you in fulfilling your legal obligations, it may help you sell yourself to them. After all, many principles about providing high quality service tie in very closely to your fiduciary duty.

Weere are many markets where many buyers and sellers have their guard up with real estate agents and lenders. Taking time to effectively and clearly explain yn build your business. It is important to understand that with regard to the definitions and descriptions that you see here in this edition, to make sure to verify these with your broker and make sure that everything that you do has the approval of your broker and is consistent with your individual state laws regarding representation.

First, there are always going to be two kinds of people with whom you deal: customers and clients. Whether the person you are doing business with is a buyer, seller, landlord, tenant, or other agent, they are either going to be a “customer” or a “client”. If you’re not sure whether someone is one or the other, make sure to consult with your broker immediately to get clarification on your broker’s agency office policy. You need to be very clear on understanding this
policy as you will have to explain it to your prospective buyer or seller in a very understandable and comprehensible fashion.

The simplest distinction between a customer and a client is that you work: customer customer and “for” the client. The client employs you; the customer is someone that you provide goods and/or services to. In the simplest of terms, you simply have a duty to describe the type of relationship that you intend to have with the buyer or seller. Do you intend to treat them as a customer or a client? It is also important to understand that they have the right to consent or not consent to this relationship. Nearly all state laws, broker office policies, and the N.A.R. Code Of Ethics require that this conversation be documented. Make sure that you fulfill these mandated requirements in your discussion.

To both the customer and the client, you have ministerial duties. Ministerial duties are defined as follows:

1. Honesty.
2. Disclosure of material facts.
3. Accounting - signed, legible copies of all transactions documents to all parties.
4. Reasonable skill and care.
5. Fairness

In some states, you may also have a codified duty to provide “n some states, you may also have a codified duty to provide ken from the N.A.R. Code primarily because of the ambiguity of the term.

Remember that these are obligations that you have with all parties with whom you deal. For instance, in many states, brokers have an office policy that might be described as follows: (NOTE: This is only an example of a typical broker’s office policy and does not represent the office policy of all brokers. Make sure to check with your broker.)
• You are the listing agent: You and your broker represent the seller; the other broker and the selling agent represent the buyer. The seller is your client and the selling agent, the selling broker, and the buyer are your customers.

• You are the selling agent: You and your broker represent the buyer; the other broker and the listing agent represent the seller. The buyer is your client and the listing agent, listing broker, and the seller are your customers.

• You or an agent in your company is handling both the listing and the buyer: You, the other agent, and your broker probably represent both the buyer and the seller as dual agents although in states where dual agency is practiced, “informed consent” is almost always required by statute. It is important to note that not all brokers allow their agents to practice dual agency as it is a legal conflict of interest and some brokers are just not comfortable with allowing it. Again, please be sure to check with your broker on this. Some states have also outlawed the practice of dual agency but not Texas.

Texas does allow the practice of a broker having the option of being an er: You, the other agent, and your broker probably represent both the buyer and the seller as duerent agents employed by him or her to represent the buyer and seller individually and respectively. This does require the consent of the buyer and seller in the transaction.

In identifying your obligations to your client, you still owe the ministerial duties we identified previously but in addition, you also have fiduciary duties. Your fiduciary duties are as follows:

Confidentiality: You must keep confidential, whatever you client confides in you unless the item is a material fact that must be disclosed under your ministerial duties. Typical items that are kept confidential are buyers who require anonymity or a party’s deteriorating health status. Assure them that you are bound by your
duty of confidentiality even beyond the termination of your representation agreement with them.

Accounting (Copies plus estimates of buyeral, whatever you client confides in you unless the item is a material fact that must be disclosed under your ministerial duties. Typical items that are kept confidential are buyeral be incurring. To a seller it is the net proceeds in most cases. You have an obligation to be sure that they at least are provided an estimate of these items ahead of time.

Reasonable Care & Diligence: In addition to reasonable skill and care, you have a duty to make sure that your client is advised to perform all of the “due diligence” (Reviewing inspection reports, transaction documents, and financial documents) that they will need to make a fully-informed decision.

Loyalty: An agent has a duty to protect and promote his/her client’s best interests even above the agent’s own personal interests. Assure them that you are obligated by the standards of care and by law to act in their best interests.

Obedience: An agent has a duty to obey his/her client’s instructions provided that they are lawful instructions. Let them know that you are bound to their wishes when you represent them.

Accountability: An agent is accountable for all representations they make to their client whether they are written or verbal. Let them know that the information that you will be providing to them will be as accurate as possible with the understanding that should be advised to verify it.

Disclosure (Full Disclosure of anything that could help your client make to their position.): You are obligated to share with them any information that you are made privy to that may assist them in getting an edge in negotiating with the other party. This will actually assure them that they will have the peace of mind in knowing that you are their advocate and truly acting in their best interests.
Notice that if you were to create an acronym of these duties, they would spell out CARLOAD. In other words you have a CARLOAD of responsibility. This is an easy way to remember and explain your fiduciary duties to your prospective clients.

If you happen to end up in a dual agency, the duty of full disclosure is in conflict with the duty of confidentiality. In this case, the duty of confidentiality will trump the duty of full disclosure unless the item is a material fact which, of course, must be disclosed to all parties. That is why that when you are a dual agent, you are regarded as a limited agent. You are limited in what you can tell the seller about the buyer and the buyer about the seller. Essentially you will have to share the same information with both of them without favoring either party’s interests. While this type of agency does impose some limitations on the services you provide, some agents and consumers are more sophisticated and have remarked that there are some benefits associated with dual agency in that the agent has more control of the quality of the transaction. However, for someone who needs a lot of advice, counsel, and guidance, dual agency may not be the best way to represent them. Again, this should be discussed with your broker.

Another point is to please remember to not offer to represent them unless you are certain you want to represent them. You may want to say something on the order of re regarded as a limit yet whether I’ll be representing you or not, please don’t say anything that you would not want the other party to know.” Also, remember that as you ask them qualifying questions, always ask them “What experiences have you had in previous real estate transactions?” This will give the insight necessary to make your decision to represent them or not.
Texas Deceptive Trade Practices - Consumer Protection Act

The Texas Deceptive Trade Practices Act was enacted in 1973. The purpose of the act is to protect consumers against false, misleading, and deceptive business practices, unconscionable actions and breaches of warranty.

In 1995, the Legislature amended the DTPA by adding an exemption for providing a professional service. Courts have not applied the exemption to real estate licensees.

Since losing a DTPA case can be so punitive many honest Texas REALTORS,® have settled out of court because it was less risky.

In 2011, the 82nd Texas Legislature added real estate brokerage as a specific exemption to the DTPA.

Now unless a licensee has committed an unconscionable act, misrepresentation of a material fact, or a failure to disclose with the intention of inducing a consumer into a transaction, the licensee can no longer be held liable under DTPA.

DTPA defines an "unconscionable action" as one that "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree".

Since the Texas Real Estate License Act has always required full disclosure of all material facts about the property, nothing much has changed in the day to day practice of licensees.

Case Study

Broker J had been representing Buyer K for two months when he finally found a suitable property for her. Buyer K agreed to purchase this property, and presented an offer of $80,000, which was $10,000 less than the listing price. The seller (Seller L) agreed, and they proceeded towards closing.
At closing, however, the transaction fell through. It was discovered that there were several liens on the property, and the property could not be sold. Seller L was aware of the liens but had thought he would be able to clear them before the date of closing. He had kept this information hidden from his broker, Broker M.

Buyer K is very upset about this issue and wants to file a lawsuit. Which party is liable?

**Answer:** The seller is liable for concealing this information. Although agents are held responsible for their own wrongful actions and negligence, there are only certain circumstances under which they are held liable for a client’s actions, and since the seller concealed this information from the broker in this case, the broker is not responsible to the prospective buyer for undisclosed liens on the property.

In general, the agent is understood to operate under a warranty of authority. This is a kind of guarantee that an agent gives (explicitly or implicitly) to a third party, establishing that the agent has the authority to bind a principal - i.e., that the agent has the authority to makes contracts, agreements, and enter into similar arrangements on the principal’s behalf. The agent cannot be held responsible if the principal does not or cannot follow through on the agreements the agent makes on the principal’s behalf. The warrant of authority concerns only the agent’s authority to act on the principal’s behalf, not his or her authority to ensure that the principal *himself* acts in a certain way.

For the purposes of this case, the seller’s broker is merely the seller’s representative and has no liability if the seller is unable to actually turn over title to the property.

It is important that real estate agents remember that sellers are still responsible under DTPA. Most lawsuits brought against real estate licensees cite violations of the DTPA.

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) allows an aggrieved consumer to hold a seller of goods and services liable for damages resulting
from deceptive or unfair trade practices. In the context of real estate, the consumer is the buyer, and the seller of goods is the seller of real property.

Overall, the DTPA lists 25 specific violations, commonly referred to as the “laundry list.” Of these 25 violations, the following are applicable to the real estate industry:

- Representing goods as new or original if they are in fact reconditioned or used
- Representing goods as meeting a certain standard, quality, or grade or as if they are of a particular style when, in fact, they do not fit these descriptions
- Misrepresenting facts concerning the goods, services, or business of another in order to discredit that entity
- Misrepresenting facts concerning the reasons for a reduction in price of goods or services
- Representing an agreement as containing rights, remedies, or obligations that it does not contain
- Concealing or misrepresenting the need for replacement or repair services
- Misrepresenting the authority of the representative to negotiate the transaction
- Claiming that replacement or repair services have been performed when, in fact, they have not
- Failure to disclose any information at the time of the transaction that may have affected the outcome of the transaction

If the consumer can prove that the seller or the broker knowingly and intentionally committed any of these violations, the offending party can be held liable for damages. There are a number of ways for a real estate licensee to ensure that they satisfy the standards of fair and honest trade practices, and thus to protect themselves from this kind of litigation:

- Be responsible and thorough in disclosing property defects
- Encourage all parties to carry out appropriate property inspections
- Avoid offering opinions or making unwarranted exaggerations about the property
- Keep careful notes regarding the transaction process
Disclosure
First and foremost, real estate licensees must be vigilant about the disclosures they make to the prospective buyer concerning any property. Again, the duty of disclosure is central to the agent’s role in a fiduciary relationship, even when dealing with a third party. The licensee must disclose any and all defects in a property (of which he or she is aware), including any additional information about the property that may affect the prospective buyer’s final decision.

The State of Texas requires all sellers of residential property to submit a seller’s disclosure form. TREC offers a Seller’s Disclosure of Property Condition form, but sellers are not obligated to use this specific form. As long as the disclosure includes all of the information that TREC requires, any form may be used.

**LEARN MORE**

Basically, the disclosure notice is an opportunity for the seller to be upfront and comprehensive about all facts and defects concerning the property. It is the real estate licensee’s responsibility to advise the seller about the necessity of the disclosure notice, although the form itself should be filled out by the seller. This form is required even when an owner sells his or her own property. The completed form should be given to the prospective buyer before he or she makes an offer to buy the property.

**Recommande Inspections**
It is in the best interest of all parties to have the property inspected by a professional property inspector who is not associated with the real estate licensee. The licensee can provide a list of qualified inspectors to the prospective buyer, but he or she should not be present to mediate the conversation between the inspector and the prospective buyer.
If the initial inspection reveals defects in the property and the appropriate repairs are made, the prospective buyer should be encouraged to review the property a second time to ensure that the defects have been addressed to his or her satisfaction. In the event that a prospective buyer chooses not to have a property inspected, the licensee should secure a signed written statement from the prospective buyer stating that he or she made this choice despite the licensee’s recommendation that the property be inspected.

Case Study
Broker Q and her client had a contract accepted for purchase of a single family home. In order to expedite the inspection process, Broker Q strongly recommends an inspector she has worked with in the past and assures her client that the inspector will provide a thorough and comprehensive home inspection. Broker Q also states that the inspection would include a wood-boring pest inspection. Is this risky behavior for Broker Q?

Answer
YES. A broker should think hard before steering her client in the direction of any particular service provider since she cannot truly guarantee the quality or effectiveness of the service. TREC’s Canons of Professional Ethics require licensees to conduct themselves with integrity and competence, as well as to make their clients’ interests their foremost concern. Because this is so, it would be more prudent for Broker Q to offer a list of potential inspectors to her client and allow her client to choose for himself. Broker Q might offer general advice about choosing an inspector, but she should not make or imply any judgments about the quality of the report a specific inspector would provide.

Avoid Opinions and Puffing
It is important for the agent to steer clear of personal opinions when commenting on a property. If the customer believes that the agent made unwarranted exaggerations over the course of the transaction, that agent may be accused of puffing. It is the agent’s
responsibility to provide known facts about the property, not his or her opinions. If a client or customer asks for an agent’s opinion, the agent should refer the individual to a specialist (for example, a property inspector, an attorney, or a plumber) who can provide unbiased and informed assistance to the consumer. The agent should, however, avoid recommending a particular specialist; if the consumer is dissatisfied with the work of that individual, the licensee could be held liable. Instead, the agent can provide the consumer with a list of qualified professionals.

**Keep Careful Notes**
Finally, the agent should always keep detailed and accurate notes throughout the real estate transaction. This is to ensure that the licensee can provide evidence regarding certain actions or events over the course of a transaction if he or she is later called upon to do so.

**DTPA Lawsuits**
When a lawsuit is filed under the DTPA, there are a number of ways the problem might be resolved. A reasonable settlement can always be made between the licensee and the consumer if the case is addressed within a set time limit. An agent may be released from liability if that agent can show that any inaccurate information he or she provided to the consumer was obtained from another source (for example, from governmental records or a seller’s disclosure form), and that the agent had no reasonable way of knowing that information was false. For example, if an agent quotes the wrong square footage for a property based on inaccurate county records, the agent would be protected from liability. Also, if an agent can show that the training they received was inaccurate or mistaken (for example, an incorrect statement appearing on the state’s real estate exam), and that he or she carried out the business of real estate relying on this information as fact, then the agent is not liable.

Recovery under the DTPA is limited to economic damages. In order for the Texas Real Estate Commission to revoke or suspend an agent’s license, that licensee’s violations of
the DTPA must be coupled with violations of provisions set forth in the Texas Real Estate Licensing Act. Some of the infractions for which TREC may revoke or suspend an agent’s license - that is, violations of license law which are also violations of the DTPA - are the following:

- Material misrepresentation or failure to disclose any known or latent property defects
- Deceptive practices in the marketing, selling, or offering of real property
- False promises made to the consumer through advertising or directly through the agent
- Failure to disclose which party is compensating the agent, or that more than one party is liable for compensation without the written consent of all parties involved
- Request or acceptance of an undisclosed compensation
- Acting as agent and undisclosed principal in a transaction

**Case Study**

Four months ago, Seller A listed a home with Broker B’s office, Budget Brokerage. The seller and Broker B signed a listing agreement, and they agreed to enter into an agency relationship. Broker B is a very busy person, and she assigned the task of finding a buyer for this home to Salesperson C, a new employee. Salesperson C looked over the facts about the property and she noted that the local school district is under-funded and is considered to be one of the worst school districts in the city. She mentioned this to the broker and raised a concern that this information might make it difficult to sell the home. Her broker told her not to worry because Texas law does not require a seller’s agent to disclose that sort of information to buyers.

Two weeks later, Buyer D walked into the brokerage. Salesperson C happened to be the only person in the office and after a brief talk with Buyer D, she realized that Seller A’s property would be perfect for the buyer’s needs. They immediately went to look at the property. Salesperson C mentioned several latent defects in the property but did not
mention the problems with the school district. Salesperson C also showed the buyer several other properties, but the buyer decided to purchase Seller A’s home.

The closing went smoothly, with no major concerns. After closing, however, Broker B received a letter of an impending lawsuit from Buyer D. Apparently Buyer D moved in and immediately discovered negative information about the school district. She is convinced that Salesperson C and Budget Brokerage misled her by concealing facts.

Consider this situation. Is Budget Brokerage liable?

**Answer:** It is possible that Budget Brokerage could be held liable. Texas law does not consider information such as the quality of the school district to be a material fact or a latent defect, so the agent is not required to disclose this information. This case study does not mention whether the agent gave the buyer a disclosure of agency form and the statement of agency law. The buyer in this case may not have been aware that the salesperson was not acting as her agent - and a buyer’s agent would be responsible for providing her client with accurate information about the community in which a property is located. If the salesperson’s actions created a situation of implied agency, then the buyer may have a case.

**REALTOR® Code of Ethics**

The broker is mandated by TRELA to abide by the REALTOR Code of Ethics. These are provided here along with discussions of each of the articles and Standards of Practice:

**Code of Ethics and Standards of Practice of the National Association of Realtors®**

**Effective January 1, 2016**

Where the word Realtors® is used in this Code and Preamble, it shall be deemed to include Realtor-Associate®s.
While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Preamble
Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. Realtors® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which Realtors® should dedicate themselves, and for which they should be diligent in preparing themselves. Realtors®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow Realtors® a common responsibility for its integrity and honor.

In recognition and appreciation of their obligations to clients, customers, the public, and each other, Realtors® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. Realtors® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of Realtors®. (Amended 1/00)
Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, Realtors® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where Realtors® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain.

The term Realtor® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of this obligation, Realtors® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, “Whatsoever ye would that others should do to you, do ye even so to them.”

Accepting this standard as their own, Realtors® pledge to observe its spirit in all of their activities whether conducted personally, through associates or others, or via technological means, and to conduct their business in accordance with the tenets set forth below. (Amended 1/07)

Duties to Clients and Customers

Article 1
When representing a buyer, seller, landlord, tenant, or other client as an agent, Realtors® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve Realtors® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in
a non-agency capacity, Realtors® remain obligated to treat all parties honestly. (Amended 1/01)

**Standard of Practice 1-1**
Realtors®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics. (Amended 1/93)

**Standard of Practice 1-2**
The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.

The duties the Code of Ethics imposes are applicable whether Realtors® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on Realtors® acting in non-agency capacities.

As used in this Code of Ethics, “client” means the person(s) or entity(ies) with whom a Realtor® or a Realtor®’s firm has an agency or legally recognized non-agency relationship; “customer” means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the Realtor® or the Realtor®’s firm; “prospect” means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the Realtor® or Realtor®’s firm; “agent” means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and “broker” means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. (Adopted 1/95, Amended 1/07)
Standard of Practice 1-3
Realtors®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

Standard of Practice 1-4
Realtors®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the Realtor®’s services. (Amended 1/93)

Standard of Practice 1-5
Realtors® may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties. (Adopted 1/93)

Standard of Practice 1-6
Realtors® shall submit offers and counter-offers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)

Standard of Practice 1-7
When acting as listing brokers, Realtors® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. Realtors® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. Realtors® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/93)

Standard of Practice 1-8
Realtors®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in
writing. Realtors®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated. (Adopted 1/93, Amended 1/99)

**Standard of Practice 1-9**

The obligation of Realtors® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. Realtors® shall not knowingly, during or following the termination of professional relationships with their clients:

1) reveal confidential information of clients; or
2) use confidential information of clients to the disadvantage of clients; or
3) use confidential information of clients for the Realtor®’s advantage or the advantage of third parties unless:
   a) clients consent after full disclosure; or
   b) Realtors® are required by court order; or
   c) it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or
   d) it is necessary to defend a Realtor® or the Realtor®’s employees or associates against an accusation of wrongful conduct.

Information concerning latent material defects is not considered confidential information under this Code of Ethics. (Adopted 1/93, Amended 1/01)

**Standard of Practice 1-10**

Realtors® shall, consistent with the terms and conditions of their real estate licensure and their property management agreement, competently manage the property of clients with due regard for the rights, safety and health of tenants and others lawfully on the premises. (Adopted 1/95, Amended 1/00)
**Standard of Practice 1-11**

Realtors® who are employed to maintain or manage a client's property shall exercise due diligence and make reasonable efforts to protect it against reasonably foreseeable contingencies and losses. (Adopted 1/95)

**Standard of Practice 1-12**

When entering into listing contracts, Realtors® must advise sellers/landlords of:

1) the Realtor®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
3) any potential for listing brokers to act as disclosed dual agents, e.g., buyer/tenant agents. (Adopted 1/93, Renumbered 1/98, Amended 1/03)

**Standard of Practice 1-13**

When entering into buyer/tenant agreements, Realtors® must advise potential clients of:

1) the Realtor®'s company policies regarding cooperation;
2) the amount of compensation to be paid by the client;
3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc., and
5) the possibility that sellers or sellers’ representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)
**Standard of Practice 1-14**
Fees for preparing appraisals or other valuations shall not be contingent upon the amount of the appraisal or valuation. (Adopted 1/02)

**Standard of Practice 1-15**
Realtors®, in response to inquiries from buyers or cooperating brokers shall, with the sellers’ approval, disclose the existence of offers on the property. Where disclosure is authorized, Realtors® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. ( Adopted 1/03, Amended 1/09)

**Standard of Practice 1-16**
Realtors® shall not access or use, or permit or enable others to access or use, listed or managed property on terms or conditions other than those authorized by the owner or seller. (Adopted 1/12)

**Article 2**
Realtors® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. Realtors® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law. (Amended 1/00)

**Standard of Practice 2-1**
Realtors® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the Realtor® the obligation of expertise in other professional or technical disciplines. (Amended 1/96)
Standard of Practice 2-2
(Renumbered as Standard of Practice 1-12 1/98)

Standard of Practice 2-3
(Renumbered as Standard of Practice 1-13 1/98)

Standard of Practice 2-4
Realtors® shall not be parties to the naming of a false consideration in any document, unless it be the naming of an obviously nominal consideration.

Standard of Practice 2-5
Factors defined as "non-material" by law or regulation or which are expressly referenced in law or regulation as not being subject to disclosure are considered not "pertinent" for purposes of Article 2. (Adopted 1/93)

Article 3
Realtors® shall cooperate with other brokers except when cooperation is not in the client’s best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)

Standard of Practice 3-1
Realtors®, acting as exclusive agents or brokers of sellers/landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation. (Amended 1/99)
Standard of Practice 3-2
Any change in compensation offered for cooperative services must be communicated to the other Realtor® prior to the time that Realtor® submits an offer to purchase/lease the property. After a Realtor® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction. (Amended 1/14)

Standard of Practice 3-3
Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation. (Adopted 1/94)

Standard of Practice 3-4
Realtors®, acting as listing brokers, have an affirmative obligation to disclose the existence of dual or variable rate commission arrangements (i.e., listings where one amount of commission is payable if the listing broker’s firm is the procuring cause of sale/lease and a different amount of commission is payable if the sale/lease results through the efforts of the seller/landlord or a cooperating broker). The listing broker shall, as soon as practical, disclose the existence of such arrangements to potential cooperating brokers and shall, in response to inquiries from cooperating brokers, disclose the differential that would result in a cooperative transaction or in a sale/lease that results through the efforts of the seller/landlord. If the cooperating broker is a buyer/tenant representative, the buyer/tenant representative must disclose such information to their client before the client makes an offer to purchase or lease. (Amended 1/02)

Standard of Practice 3-5
It is the obligation of subagents to promptly disclose all pertinent facts to the principal’s agent prior to as well as after a purchase or lease agreement is executed. (Amended 1/93)
Standard of Practice 3-6
Realtors® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. (Adopted 5/86, Amended 1/04)

Standard of Practice 3-7
When seeking information from another Realtor® concerning property under a management or listing agreement, Realtors® shall disclose their Realtor® status and whether their interest is personal or on behalf of a client and, if on behalf of a client, their relationship with the client. (Amended 1/11)

Standard of Practice 3-8
Realtors® shall not misrepresent the availability of access to show or inspect a listed property. (Amended 11/87)

Standard of Practice 3-9
Realtors® shall not provide access to listed property on terms other than those established by the owner or the listing broker. (Adopted 1/10)

Standard of Practice 3-10
The duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords. (Adopted 1/11)

Article 4
Realtors® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner’s agent or broker. In selling property they
own, or in which they have any interest, Realtors® shall reveal their ownership or interest in writing to the purchaser or the purchaser’s representative. (Amended 1/00)

**Standard of Practice 4-1**

For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by Realtors® prior to the signing of any contract. (Adopted 2/86)

**Article 5**

Realtors® shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

**Article 6**

Realtors® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent.

When recommending real estate products or services (e.g., homeowner’s insurance, warranty programs, mortgage financing, title insurance, etc.), Realtors® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the Realtor® or Realtor®’s firm may receive as a direct result of such recommendation. (Amended 1/99)

**Standard of Practice 6-1**

Realtors® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. (Amended 5/88)
Article 7
In a transaction, Realtors® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the Realtor®’s client or clients. (Amended 1/93)

Article 8
Realtors® shall keep in a special account in an appropriate financial institution, separated from their own funds, monies coming into their possession in trust for other persons, such as escrows, trust funds, clients’ monies, and other like items.

Article 9
Realtors®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. (Amended 1/04)

Standard of Practice 9-1
For the protection of all parties, Realtors® shall use reasonable care to ensure that documents pertaining to the purchase, sale, or lease of real estate are kept current through the use of written extensions or amendments. (Amended 1/93)

Standard of Practice 9-2
When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, Realtors® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party. (Adopted 1/07)
Duties to the Public

Article 10
Realtors® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. Realtors® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. (Amended 1/14)

Realtors®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. (Amended 1/14)

Standard of Practice 10-1
When involved in the sale or lease of a residence, Realtors® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood nor shall they engage in any activity which may result in panic selling, however, Realtors® may provide other demographic information. (Adopted 1/94, Amended 1/06)

Standard of Practice 10-2
When not involved in the sale or lease of a residence, Realtors® may provide demographic information related to a property, transaction or professional assignment to a party if such demographic information is (a) deemed by the Realtor® to be needed to assist with or complete, in a manner consistent with Article 10, a real estate transaction or professional assignment and (b) is obtained or derived from a recognized, reliable, independent, and impartial source. The source of such information and any additions, deletions, modifications, interpretations, or other changes shall be disclosed in reasonable detail. (Adopted 1/05, RENUMBERED 1/06)
Standard of Practice 10-3
Realtors® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. (Adopted 1/94, Renumbered 1/05 and 1/06, Amended 1/14)

Standard of Practice 10-4
As used in Article 10 “real estate employment practices” relates to employees and independent contractors providing real estate-related services and the administrative and clerical staff directly supporting those individuals. (Adopted 1/00, Renumbered 1/05 and 1/06)

Article 11
The services which Realtors® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage; specifically, residential real estate brokerage, real property management, commercial and industrial real estate brokerage, land brokerage, real estate appraisal, real estate counseling, real estate syndication, real estate auction, and international real estate.

Realtors® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth. (Amended 1/10)

Standard of Practice 11-1
When Realtors® prepare opinions of real property value or price they must:
1) be knowledgeable about the type of property being valued,
2) have access to the information and resources necessary to formulate an accurate opinion, and
3) be familiar with the area where the subject property is located unless lack of any of these is disclosed to the party requesting the opinion in advance.

When an opinion of value or price is prepared other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, the opinion shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

1) identification of the subject property
2) date prepared
3) defined value or price
4) limiting conditions, including statements of purpose(s) and intended user(s)
5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
6) basis for the opinion, including applicable market data
7) if the opinion is not an appraisal, a statement to that effect
8) disclosure of whether and when a physical inspection of the property’s exterior was conducted
9) disclosure of whether and when a physical inspection of the property’s interior was conducted
10) disclosure of whether the Realtor® has any conflicts of interest

(Amended 1/14)

**Standard of Practice 11-2**

The obligations of the Code of Ethics in respect of real estate disciplines other than appraisal shall be interpreted and applied in accordance with the standards of competence and practice which clients and the public reasonably require to protect their rights and interests considering the complexity of the transaction, the availability of
expert assistance, and, where the Realtor® is an agent or subagent, the obligations of a fiduciary. (Adopted 1/95)

**Standard of Practice 11-3**
When Realtors® provide consultive services to clients which involve advice or counsel for a fee (not a commission), such advice shall be rendered in an objective manner and the fee shall not be contingent on the substance of the advice or counsel given. If brokerage or transaction services are to be provided in addition to consultive services, a separate compensation may be paid with prior agreement between the client and Realtor®. (Adopted 1/96)

**Standard of Practice 11-4**
The competency required by Article 11 relates to services contracted for between Realtors® and their clients or customers; the duties express imposed by the Code of Ethics; and the duties imposed by law or regulation. (Adopted 1/02)

**Article 12**
Realtors® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. Realtors® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)

**Standard of Practice 12-1**
Realtors® may use the term “free” and similar terms in their advertising and in other representations provided that all terms governing availability of the offered product or service are clearly disclosed at the same time. (Amended 1/97)
Standard of Practice 12-2
Realtors® may represent their services as “free” or without cost even if they expect to receive compensation from a source other than their client provided that the potential for the Realtor® to obtain a benefit from a third party is clearly disclosed at the same time. (Amended 1/97)

Standard of Practice 12-3
The offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the Realtor® making the offer. However, Realtors® must exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or representations so that any party interested in receiving or otherwise benefiting from the Realtor®’s offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. The offering of any inducements to do business is subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. (Amended 1/95)

Standard of Practice 12-4
Realtors® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, Realtors® shall not quote a price different from that agreed upon with the seller/landlord. (Amended 1/93)

Standard of Practice 12-5
Realtors® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that Realtor®’s firm in a reasonable and readily apparent manner either in the advertisement or in electronic advertising via a link to a display with all required disclosures. (Adopted 11/86, Amended 1/16)
Standard of Practice 12-6
Realtors®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as Realtors® or real estate licensees. (Amended 1/93)

Standard of Practice 12-7
Only Realtors® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have “sold” the property. Prior to closing, a cooperating broker may post a “sold” sign only with the consent of the listing broker. (Amended 1/96)

Standard of Practice 12-8
The obligation to present a true picture in representations to the public includes information presented, provided, or displayed on Realtors®' websites. Realtors® shall use reasonable efforts to ensure that information on their websites is current. When it becomes apparent that information on a Realtor®’s website is no longer current or accurate, Realtors® shall promptly take corrective action. (Adopted 1/07)

Standard of Practice 12-9
Realtor® firm websites shall disclose the firm’s name and state(s) of licensure in a reasonable and readily apparent manner.

Websites of Realtors® and non-member licensees affiliated with a Realtor® firm shall disclose the firm’s name and that Realtor®’s or non-member licensee’s state(s) of licensure in a reasonable and readily apparent manner. (Adopted 1/07)

Standard of Practice 12-10
Realtors®' obligation to present a true picture in their advertising and representations to the public includes Internet content posted, and the URLs and domain names they use, and prohibits Realtors® from:
1) engaging in deceptive or unauthorized framing of real estate brokerage websites;
2) manipulating (e.g., presenting content developed by others) listing and other content in any way that produces a deceptive or misleading result;
3) deceptively using metatags, keywords or other devices/methods to direct, drive, or divert Internet traffic; or
4) presenting content developed by others without either attribution or without permission, or
5) to otherwise mislead consumers. (Adopted 1/07, Amended 1/13)

**Standard of Practice 12-11**
Realtors® intending to share or sell consumer information gathered via the Internet shall disclose that possibility in a reasonable and readily apparent manner. (Adopted 1/07)

**Standard of Practice 12-12**
Realtors® shall not:
   1) use URLs or domain names that present less than a true picture, or
   2) register URLs or domain names which, if used, would present less than a true picture. (Adopted 1/08)

**Standard of Practice 12-13**
The obligation to present a true picture in advertising, marketing, and representations allows Realtors® to use and display only professional designations, certifications, and other credentials to which they are legitimately entitled. (Adopted 1/08)

**Article 13**
Realtors® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.
Article 14
If charged with unethical practice or asked to present evidence or to cooperate in any other way, in any professional standards proceeding or investigation, Realtors® shall place all pertinent facts before the proper tribunals of the Member Board or affiliated institute, society, or council in which membership is held and shall take no action to disrupt or obstruct such processes. (Amended 1/99)

Standard of Practice 14-1
Realtors® shall not be subject to disciplinary proceedings in more than one Board of Realtors® or affiliated institute, society, or council in which they hold membership with respect to alleged violations of the Code of Ethics relating to the same transaction or event. (Amended 1/95)

Standard of Practice 14-2
Realtors® shall not make any unauthorized disclosure or dissemination of the allegations, findings, or decision developed in connection with an ethics hearing or appeal or in connection with an arbitration hearing or procedural review. (Amended 1/92)

Standard of Practice 14-3
Realtors® shall not obstruct the Board’s investigative or professional standards proceedings by instituting or threatening to institute actions for libel, slander, or defamation against any party to a professional standards proceeding or their witnesses based on the filing of an arbitration request, an ethics complaint, or testimony given before any tribunal. (Adopted 11/87, Amended 1/99)

Standard of Practice 14-4
Realtors® shall not intentionally impede the Board’s investigative or disciplinary proceedings by filing multiple ethics complaints based on the same event or transaction. (Adopted 11/88)
Duties to Realtors®

Article 15
Realtors® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices. (Amended 1/12)

Standard of Practice 15-1
Realtors® shall not knowingly or recklessly file false or unfounded ethics complaints. (Adopted 1/00)

Standard of Practice 15-2
The obligation to refrain from making false or misleading statements about other real estate professionals, their businesses, and their business practices includes the duty to not knowingly or recklessly publish, repeat, retransmit, or republish false or misleading statements made by others. This duty applies whether false or misleading statements are repeated in person, in writing, by technological means (e.g., the Internet), or by any other means. (Adopted 1/07, Amended 1/12)

Standard of Practice 15-3
The obligation to refrain from making false or misleading statements about other real estate professionals, their businesses, and their business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the Realtor® controls once the Realtor® knows the statement is false or misleading. (Adopted 1/10, Amended 1/12)

Article 16
Realtors® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other Realtors® have with clients. (Amended 1/04)
Standard of Practice 16-1

Article 16 is not intended to prohibit aggressive or innovative business practices which are otherwise ethical and does not prohibit disagreements with other Realtors® involving commission, fees, compensation or other forms of payment or expenses. (Adopted 1/93, Amended 1/95)

Standard of Practice 16-2

Article 16 does not preclude Realtors® from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another Realtor®. A general telephone canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed “general” for purposes of this standard. (Amended 1/04)

Article 16 is intended to recognize as unethical two basic types of solicitations:
First, telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another Realtor® and

Second, mail or other forms of written solicitations of prospects whose properties are exclusively listed with another Realtor® when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, “for sale” or “for rent” signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other Realtors® under offers of sub-agency or cooperation. (Amended 1/04)

Standard of Practice 16-3

Article 16 does not preclude Realtors® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type
of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers’ exclusive agreements. However, information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other Realtors® to whom such offers to provide services may be made. (Amended 1/04)

**Standard of Practice 16-4**
Realtors® shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the Realtor®, refuses to disclose the expiration date and nature of such listing, i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the Realtor® may contact the owner to secure such information and may discuss the terms upon which the Realtor® might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing. (Amended 1/94)

**Standard of Practice 16-5**
Realtors® shall not solicit buyer/tenant agreements from buyers/tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a Realtor®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the Realtor® may contact the buyer/tenant to secure such information and may discuss the terms upon which the Realtor® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement. (Adopted 1/94, Amended 1/98)

**Standard of Practice 16-6**
When Realtors® are contacted by the client of another Realtor® regarding the creation of an exclusive relationship to provide the same type of service, and Realtors® have not
directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement. (Amended 1/98)

**Standard of Practice 16-7**
The fact that a prospect has retained a Realtor® as an exclusive representative or exclusive broker in one or more past transactions does not preclude other Realtors® from seeking such prospect’s future business. (Amended 1/04)

**Standard of Practice 16-8**
The fact that an exclusive agreement has been entered into with a Realtor® shall not preclude or inhibit any other Realtor® from entering into a similar agreement after the expiration of the prior agreement. (Amended 1/98)

**Standard of Practice 16-9**
Realtors®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. (Amended 1/04)

**Standard of Practice 16-10**
Realtors®, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord’s representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord’s representative or broker not later than execution of a purchase agreement or lease. (Amended 1/04)

**Standard of Practice 16-11**
On unlisted property, Realtors® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and
shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. (Amended 1/04)

Realtors® shall make any request for anticipated compensation from the seller/landlord at first contact. (Amended 1/98)

**Standard of Practice 16-12**
Realtors®, acting as representatives or brokers of sellers/landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement. (Amended 1/04)

**Standard of Practice 16-13**
All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client’s representative or broker, and not with the client, except with the consent of the client’s representative or broker or except where such dealings are initiated by the client.

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, Realtors® shall ask prospects whether they are a party to any exclusive representation agreement. Realtors® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects’ exclusive representatives or at the direction of prospects. (Adopted 1/93, Amended 1/04)

**Standard of Practice 16-14**
Realtors® are free to enter into contractual relationships or to negotiate with sellers/landlords, buyers/tenants or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent. (Amended 1/98)
Standard of Practice 16-15
In cooperative transactions Realtors® shall compensate cooperating Realtors® (principal brokers) and shall not compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with other Realtors® without the prior express knowledge and consent of the cooperating broker.

Standard of Practice 16-16
Realtors®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker’s offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker’s agreement to modify the offer of compensation. (Amended 1/04)

Standard of Practice 16-17
Realtors®, acting as subagents or as buyer/tenant representatives or brokers, shall not attempt to extend a listing broker’s offer of cooperation and/or compensation to other brokers without the consent of the listing broker. (Amended 1/04)

Standard of Practice 16-18
Realtors® shall not use information obtained from listing brokers through offers to cooperate made through multiple listing services or through other offers of cooperation to refer listing brokers’ clients to other brokers or to create buyer/tenant relationships with listing brokers’ clients, unless such use is authorized by listing brokers. (Amended 1/02)

Standard of Practice 16-19
Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on property without consent of the seller/landlord. (Amended 1/93)
Standard of Practice 16-20
Realtors®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude Realtors® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. (Adopted 1/98, Amended 1/10)

Article 17
In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between Realtors® (principals) associated with different firms, arising out of their relationship as Realtors®, the Realtors® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, Realtors® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

In the event clients of Realtors® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, Realtors® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.

The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of Realtors® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award. (Amended 1/12)

Standard of Practice 17-1
The filing of litigation and refusal to withdraw from it by Realtors® in an arbitrable matter constitutes a refusal to arbitrate. (Adopted 2/86)
**Standard of Practice 17-2**

Article 17 does not require Realtors® to mediate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to mediate through the Board’s facilities. The fact that all parties decline to participate in mediation does not relieve Realtors® of the duty to arbitrate.

Article 17 does not require Realtors® to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board. (Amended 1/12)

**Standard of Practice 17-3**

Realtors®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other Realtors® absent a specific written agreement to the contrary. (Adopted 1/96)

**Standard of Practice 17-4**

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all
current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97, Amended 1/07)

2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the seller or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97, Amended 1/07)

3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)
4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. (Adopted 1/97)

5) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, claims to be the procuring cause of sale or lease. In such cases arbitration shall be between the listing broker and the buyer or tenant representative and the amount in dispute is limited to the amount of the reduction of commission to which the listing broker agreed. (Adopted 1/05)

**Standard of Practice 17-5**

The obligation to arbitrate established in Article 17 includes disputes between Realtors® (principals) in different states in instances where, absent an established inter-association arbitration agreement, the Realtor® (principal) requesting arbitration agrees to submit to the jurisdiction of, travel to, participate in, and be bound by any resulting award rendered in arbitration conducted by the respondent(s) Realtor®’s association, in instances where the respondent(s) Realtor®’s association determines that an arbitrable issue exists. (Adopted 1/07)

**Explanatory Notes**

The reader should be aware of the following policies which have been approved by the Board of Directors of the National Association:

In filing a charge of an alleged violation of the Code of Ethics by a Realtor®, the charge must read as an alleged violation of one or more Articles of the Code. Standards of Practice may be cited in support of the charge.
The Standards of Practice serve to clarify the ethical obligations imposed by the various Articles and supplement, and do not substitute for, the Case Interpretations in Interpretations of the Code of Ethics.

Modifications to existing Standards of Practice and additional new Standards of Practice are approved from time to time. Readers are cautioned to ensure that the most recent publications are utilized.

**Lesson 4 Summary**

Licensees’ first duty in agency relationships is the duty of disclosure. Licensees acting as agents are required to provide all parties to a transaction with a written statement that outlines Texas agency law. Agents are also required to disclose relevant agency relationships to third parties upon first contact. Oral disclosure is acceptable at initial contact, but written disclosure is required once substantive dialogue occurs.

Because of the fiduciary nature of agency relationships, the broker who serves as an agent owes five duties to his or her clients. Most importantly, the agent must comply with the duty of fidelity, which means that the agent must always place the principal’s interests above those of anyone else involved in the transaction, including the agent. The other four duties require the agent to:

1. Act with care and competence regarding the principal’s affairs.
2. Obey the principal’s instructions (as long as these are within the law).
3. Account for monies and property given to and received from the principal.
4. Disclose all known material facts about the property and transaction.

It is important that members of the public understand the role of real estate agents and brokers in a real estate transaction. Proper disclosure is the only way to ensure that all of those involved in a transaction understand each other’s roles and are clear about
who represents whom. That is to say, proper disclosure helps customers and clients to understand where an agent or broker’s fiduciary duties lie.

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) allows an aggrieved consumer to hold a seller of goods and services liable for damages resulting from deceptive or unfair trade practices. When a licensee is the seller’s agent, the licensee can be considered the seller of services, and a consumer can bring action against the licensee for knowingly and intentionally deceiving the consumer in the selling or leasing of any real property.

To prevent lawsuits under the DTPA, real estate agents must be diligent about disclosing the known facts about a property. Agents should also recommend that buyers arrange an independent inspection of the property, avoid offering opinions or making exaggerated statements about the property (puffing), and keep careful notes and records regarding the transaction. Recovery under the DTPA is limited to economic damages, but if a licensee’s violation of the DPTA is also a violation of Texas License Law, TREC can suspend or revoke the individual’s license.

Brokers in Texas are highly regulated by TRELA. They must provide their associated agents with a policy manual, ascertain the agents are well trained and keep their licenses current, keep them informed of any changes in the License Act or the Rules of the Commission. If an agent violates the License Act it is quite likely the broker may be found guilty, by TREC, of not supervising their sales agent properly.

*Please return to the course player to take the lesson quiz.*