Lesson 5: Contracts Used in Real Estate

Lesson Topics
This lesson focuses on the following topics:

- Real Estate Contracts
- Contract Law
- Discharge of Contracts
- Contracts Used in the Real Estate Business
- The Purchase Contract
- Listings Agreements
- Buyer Representation Agreements
- Agency Terminology
- Leasing Real Estate
- Leasehold Estates
- Lease Agreements
- Types of Leases
- Discharge of Leases
- Understanding the Broker's Office Policy
- Option Agreements
- Contracts for Deed
- Lease Purchase Agreements

Lesson Learning Objectives
By the end of this lesson, you should be able to:

- Explain the types of real estate contracts used in the industry.
- Discuss laws regarding contracts.
- Identify which contracts are promulgated by TREC and where to obtain forms not provided by TREC.
• Summarize the Texas laws regarding Contract for Deed and Lease Purchase Agreements.

Real Estate Contracts

A real estate contract is a contract between parties for the purchase and sale, exchange, or other conveyance of real estate. A leasehold estate is actually a rental of real property such as an apartment, and leases (rental contracts) cover such rentals since they typically do not result in recordable deeds. Freehold ("More permanent") conveyances of real estate are covered by real estate contracts, including conveying fee simple title, life estates, remainder estates, and freehold easements. Real estate contracts are typically bilateral contracts (i.e., agreed to by two parties) and should have the legal requirements specified by contract law in general and should also be in writing to be enforceable.

In writing

In many countries, real estate contracts must be in writing to be enforceable. In the United States the Statute of Frauds require real estate contracts to be in writing to be enforceable. In South Africa, the Alienation of Land Act specifies that any agreement of sale of immovable property must be in writing. In Italy each transfer of Real Estate must be registered in front of a Notary Public in writing.

Additionally, a real estate contract must:

• **Identify the parties:** The full name of the parties must be on the contract. In a sales contract, the parties are the seller(s) and buyer(s) of the real estate, who are often called the principals to distinguish them from real estate agents, who are effectively their intermediaries and representatives in negotiation of the price. If there are any real estate agents brokering the sale, they are typically listed also as the real estate brokers/agents who would earn the commission from the sale.

• **Identify the real estate (property):** The legal description must be on the contract.

• **Identify the purchase price:** The amount of the sales price
• **Include signatures:** A real estate contract must be entered into voluntarily (not by force), and must be signed by the parties, to be enforceable.

• **Have a legal purpose:** The contract is void if it calls for illegal action.

• **Involve Competent parties:** Mentally impaired, drugged persons, etc. cannot enter into a contract. Contracts in which at least one of the parties is a minor are voidable by the minor.

• **Reflect a meeting of the minds:** Each side must be clear and agree as to the essential details, rights, and obligations of the contract.

• **Include Consideration:** Consideration is something of value bargained for in exchange of the real estate. Money is the most common form of consideration, but other consideration of value, such as other property in exchange, or a promise to perform (i.e. a promise to pay) is also satisfactory.

Notarization by a notary public is normally not required for a real estate contract, but many recording offices require that a seller's or conveyor's signature on a deed be notarized to record the deed. The real estate contract is typically not recorded with the government, although statements or declarations of the price paid are commonly required to be submitted to the recorder's office. (Texas is a non-disclosure state. Sales prices are not in the recorded documents).

Sometimes real estate contracts will provide for a lawyer review period of several days after the signing by the parties to check the provisions of the contract and counter propose any that are unsuitable.

If there are any real estate brokers/agents brokering the sale, the buyer's agent will often fill in the blanks on a standard contract form for the buyer(s) and seller(s) to sign. The broker commonly gets such contract forms from the real estate commission. When both buyer and seller have agreed to the contract by signing it, the broker provides copies of the signed contract to the buyer and seller.
Offer and Acceptance

As may be the case with other contracts, real estate contracts may be formed by one party making an offer and another party accepting the offer. To be enforceable, the offers and acceptances must be in writing (Statute of Frauds, Common Law) and signed by the parties agreeing to the contract. Often, the party making the offer prepares a written real estate contract, signs it, and transmits it to the other party who would accept the offer by signing the contract. As with all other types of legal offers, the other party may accept the offer, reject it (in which case the offer is terminated), make a counteroffer (in which case the original offer is terminated), or not respond to the offer. If the offeree does not respond the offer is still active. The offeror should withdraw the offer before making an offer on another property. Before the offer (or counteroffer) is accepted, the offering (or countering) party can withdraw it. A counteroffer may be countered with yet another offer, and a counteroffering process may go on indefinitely between the parties.

To be enforceable, a real estate contract must possess original signatures by the parties and any alterations to the contract must be initialed by all the parties involved.

Specify a Deed

A real estate contract typically does not convey or transfer ownership of real estate by itself. A different document called a deed is used to convey real estate. In a real estate contract, the type of deed to be used to convey the real estate may be specified, such as a warranty deed or a quitclaim deed. If a deed type is not specifically mentioned, "marketable title" may be specified, implying a warranty deed should be provided. Lenders will insist on a warranty deed. Any liens or other encumbrances on the title to the real estate should be mentioned up front in the real estate contract, so the presence of these deficiencies would not be a reason for voiding the contract at or before the closing. If the liens are not cleared before by the time of the closing, then the title policy will specifically have an exception(s) listed for the lien(s) not cleared.
The buyer(s) signing the real estate contract are liable (legally responsible) for providing the promised consideration for the real estate, which is typically money in the amount of the purchase price. However, the details about the type of ownership may not be specified in the contract. Sometimes, signing buyer(s) may direct a lawyer preparing the deed separately what type of ownership to list on the deed and may decide to add a joint owner(s), such as a spouse, to the deed. For example, types of joint ownership (title) may include tenancy in common, joint tenancy with right of survivorship, or community property.

**Contingencies**

Contingencies are conditions which must be met if a contract is to be performed. Most contracts of sale contain contingencies of some kind or another, because few people can afford to enter into a real estate purchase without them. But it is possible for a real estate contract not to have any contingencies.

Some types of contingencies which can appear in a real estate contract include:

- **Mortgage contingency** – Performance of the contract (purchase of the real estate) is sometimes *contingent upon or subject to* the buyer getting a mortgage loan for the purchase. Usually such a contingency, calls for a buyer to apply for a loan within a certain period of time after the contract is signed. Since most people who buy a house require financing to complete their purchase, mortgage contingencies are one of the most common type of contingencies in real property contracts. If the financing is not secured, the buyer may unilaterally cancel the contract by stating that his or her condition has not or will not be satisfied. (In the Texas contracts the buyer approval for the loan is for a limited period-of-time. Once the time expires there is no longer a contingency for the approval of the buyer. The approval of the property is unlimited and ends at closing)

- **Inspection contingency** – Another buyer's condition. Purchase of the real estate is contingent upon a satisfactory inspection of the real property revealing no significant defects. Contingencies could also be made on the satisfactory repair of a certain item associated with the real estate.
• Another sale contingency – Purchase or sale of the real estate is contingent on a successful sale or purchase of another piece of real estate. The successful sale of another house may be needed to finance the purchase of a new one.
• Appraisal contingency – Purchase of the real estate is contingent upon the contract price being at or below a fair market value determined by an appraisal. Lenders will often not lend more than a certain percentage (fraction) of the appraised value, so such a contingency may be useful for a buyer. (There is no contingency for appraisal in the TREC promulgated contract forms. However, if there is a financing contingency, that is contingent on property approval.)
• Kick out contingency - Seller contingency, in which the seller accepts a contract from a buyer with a contingency (typically a home sale or rent contingency where the buyer conditions the sale on their ability to find a buyer or renter for their current property prior to settlement). The seller retains the right to sell the property to another party if he so chooses after giving the buyer 72 hours notice to remove their contingency. The buyer will then either remove their contingency and provide proof that they can consummate the sale or will release the seller from their contract and allow the seller to move forward with the new contract.

Date of Closing and Possession
A typical real estate contract specifies a date by which the closing must occur. The closing is the event in which the money (or other consideration) for the real estate is paid for and title (ownership) of the real estate is conveyed from the seller(s) to the buyer(s). The conveyance is done by the seller(s) signing a deed for buyer(s) or their attorneys or other agents to record the transfer of ownership. Often other paperwork is necessary at the closing.

The date of the closing is normally also the date when possession of the real estate is transferred from the seller(s) to the buyer(s). However, the real estate contract can specify a different date when possession changes hands. Transfer of possession of a house, condominium, or building is usually accomplished by handing over the key(s) to it. The
contract may have provisions in case the seller(s) hold over possession beyond the agreed date.

The contract can also specify which party pays for what closing cost(s). If the contract does not specify, then there are certain customary defaults depending on law, common law (judicial precedents), location, and other orders or agreements, regarding who pays for which closing costs.

**Condition of the Property**
A real estate contract may specify in what condition of the property should be when conveying the title or transferring possession. For example, the contract may say that the property is sold as is. Alternatively, there may be a representation or a warranty (guarantee) regarding the condition of the house, building, or some part of it such as affixed appliances, HVAC system, etc. Sometimes a separate disclosure form specified by a government entity is also used. The contract could also specify any personal property (non-real property) items which are to be included with the deal, such as washer and dryer which are normally detachable from the house. Utility meters, electrical wiring systems, fuse or circuit breaker boxes, plumbing, furnaces, water heaters, sinks, toilets, bathtubs, and most central air conditioning systems are normally considered to be attached to a house or building and would normally be included with the real property by default.

The Texas Real Estate Commission contracts are very specific regarding what stays with the property. The contract list both improvements (attached) and accessories (unattached) that stay with the property. The contracts are “as is” contracts, however the buyer can purchase an option to terminate for a limited period of time, giving them time for inspections and other due diligence.

**Addenda or Riders**
Riders (or addenda) are special attachments (separate sheets) that become part of the contract.
**Earnest Money Deposit**

Although money is the most common consideration, earnest money is not a required element to have a valid real estate contract. An earnest money deposit from the buyer(s) customarily accompanies an offer to buy real estate and the deposit is held by a third party, like a title company, attorney or sometimes the seller. The amount, a small fraction of the total price, is listed in the contract, with the remainder of the cost to be paid at the closing. However, the earnest money deposit represents a credit towards the final sales price, which is usually the main or only consideration. The exchange of promises is the consideration for the contract. The buyer promises to give the sales price and the seller promises to give the deed.

It is essential that licensees understand contracts, which are the legally binding agreements that prevent misunderstandings and uncertainties in real estate transactions. Lenders and title companies all look to the sales contract to understand the agreement of the parties and to prepare the paper work properly. All they know is what is in the contract. Clear, mutually-acceptable agreements are an essential component of the legal transference of ownership, and contracts are the instruments by which such agreements are legalized in real estate transactions.

Parties who are entering into an agreement regarding ownership or other kinds of interest in real estate need a contract because it establishes the terms of the agreement in clear and comprehensible language. It allows the parties to understand their role in their agreement and to know what is expected of them. If either party disputes the agreement, the parties should be able to use the contract to resolve any confusion. A well-defined and comprehensive contract establishes the facts of the agreement in mutually accepted terms, and can often prevent the parties from having to go to court to resolve their conflicts.

Both parties are liable for carrying out the terms of the contract—that is, they are obligated to perform (or refrain from performing) any actions required by a legally valid contract which they have signed or otherwise accepted. Because contracts create obligations that
can be legally enforced, it is extremely important both parties understand and accept all of the stipulations in any contractual agreement. This requires they understand the different types of contracts that exist (so they know what options they have); they should also be able to recognize the basic components of a legally valid contract, so they can tell whether a given contract will have the legal effects it should.

Because contracts serve many purposes, they take many forms. This lesson will focus on those that are most commonly involved in real estate transactions, though the lesson will also provide a more general discussion of the various types of contracts that exist. For example, legally valid contracts (not related to real estate) can be written or oral. Another perhaps surprising fact about contracts is that (depending upon the intent of the agreement) a contract can require action on the part of all the contracting parties or it can impose obligations on only one of the contracting parties.

Because of the variety of contracts and the important differences between them, it is prudent for the contracting parties to consult with knowledgeable professionals who can help guide them through the process of choosing and accepting a contract. This lesson will examine these issues and other related topics as we consider the following types of real estate related contracts.

**Contracts Have Changed**

The completion of contracts has changed considerably over the years. Into the 70s there were no standard real estate contract forms in Texas. Agents got the forms from office supply stores or from title companies that provided them with their advertising on them. That was during a time that if you wanted a copy, you had to use the old blue copy paper. Eventually, after much friction between the real estate business and the attorneys, standard forms were developed. At first, they were only required to be used by members of the Texas Association of REALTORS®. After a period of time, the Texas Real Estate Commission made the use of standard contracts required for all licensees. Today we have the Broker-Lawyer Committee that drafts and edits the standard forms, keeping them up
to date with current laws, and presenting them to TREC. TREC then reviews, approves and promulgates the forms.

In addition to those changes, we now have Zip Forms which makes it easy for licensees to prepare contracts that are very professional looking. There are several companies that have created systems to send the contracts electronically for signature. Real estate has made its way from “Mom and Pop” shops into the world of “Big Business.”

The following notice to the public, regarding contract forms, is on the TREC web-site. https://www.trec.texas.gov/agency-information/forms-and-contracts

**Notice Regarding Contract Forms**

As public records, contract forms adopted by the Texas Real Estate Commission are **available to any person**. Real estate license holders are **required** to use these forms. However, TREC contract forms are intended for use primarily by licensed real estate brokers or sales agents who are trained in their correct use. Mistakes in the use of a form may result in financial loss or a contract which is unenforceable. Persons using these forms assume all risks associated with their proper use.

If you are obtaining the forms for possible use in a real estate transaction, you should contact a real estate license holder or an attorney for assistance. TREC cannot provide legal advice to the public on private contractual matters.

TREC does not promulgate listing or buyer representation agreements, property management contracts, forms for commercial property, or residential leases (other than temporary residential leases used in connection with a sale). Contact your attorney or a real estate trade association for such forms.
What are Zip Forms?

Zip Forms, have replaced the need to maintain an inventory of documents or waste time searching through stacks of printed forms – up to date approved forms are just a few clicks away. You can speed up the process by sharing data between all documents related to the same transaction - simply fill out one form and the information is automatically shared with all of the forms required to complete a transaction.

Most ZIP Form programs Features:

☐ Easy navigation and improved workflow.
☐ Fill out a form – email and/or print
☐ Apply one or multiple templates at any time during the transaction
☐ Right-click to Preview, Print and/or add a form to a transaction
☐ Drag and drop forms into transactions
☐ Runs on a PC or MAC
☐ Scroll through pages of forms
☐ Automatically saves the transaction (in the background) as users work
☐ Address Book - stores contact information
☐ Outbound faxing of documents
☐ Ability to switch between English and Spanish
☐ Email selected pages or an entire transaction as single PDF or individual PDFs.
☐ Search for documents: Alphabetically, Numerically, Categorized and/or using the “Search” feature
☐ Auto flow of data from form-to-form
☐ Fast Fill provides the ability to enter data without the verbiage of the contract

☐ Strikeout, Clause Editor, Templates, Spell check, Mortgage Calculator,
☐ Sticky Notes and more
☐ Electronic signature integration available
Electronic Signatures

According to the U.S. Federal ESIGN Act passed in 2000, an electronic signature is an "electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."

In layman's terms, an electronic signature, often referred to as an e-signature, is a person's electronic expression of his or her agreement to the terms of a particular document.

What are electronic signatures used for?

Electronic signatures are used on every sort of document you can imagine. Users use electronic signatures to:

- Esign sales contracts, listing and buyer representation agreement
- Get bids approved
- Fill out and sign leases and other rental and housing agreements
- Electronically sign tax documents, bank forms, and insurance paperwork

Most electronic signature companies offer four ways to create an electronic signature

- Draw your signature using your computer mouse or touchpad
- Take a photo of your signature using your smartphone and upload it
- Type your name and select fonts to give your typed signature an authentic touch
- Sign using your finger either on our mobile app for iOS and Android, or using our in-person signing feature on the iPad

Once created, an electronic signature can be added to any document along with other annotations such as check marks or freeform text.

Are electronic signatures legal?

Yes, electronic signatures are valid and legal in the United States, Canada, the European Union, the UK, and many other areas of the world.
What are the benefits of electronic signatures?
There are many benefits to using an electronic signature. Using electronic signatures through you can get documents signed fast.

- Sign documents from anywhere
- Collect secure and legally binding signatures
- And many more

The license act requires an agent to have signed permission from an owner before offering a home for sale. For example, let’s say a Texas homeowner has moved to California, and calls you one Friday afternoon and asks if you can get his home on the market for the week-end. In today's' real estate office, it will be easy to get that signed listing agreement this afternoon. You can fill the Listing Form out with zip forms and send it by e-mail for an electronic signature. Very quickly the agent can be putting up a sign and starting to market the property.

Let’s Review
Using the following terms fill in the blanks of the following questions.

Statute of frauds funding Temporary lease agreement
consideration leasehold anyone
Community property freehold

1. Mary has a 24-month lease. Mary has a _______ estate.
2. John and Susan purchased a property as tenants in common. John and Susan have a _______ estate.
3. The _______ requires real estate contracts to be in writing.
4. In a bilateral contract the exchange of promises provides _______.
5. Married couples in Texas usually own property as _______.
6. The day the title company receives all the money from the lender and is able to write checks to the seller, the brokers and other vendors is called the day of _______.
7. If the parties agree that the seller can remain in the property for two weeks after closing they will need to attach a _______ to their contract.
8. The TREC real estate contracts are available to _______.

**Answer Key**

1. Mary has a 24-month lease. Mary has a *leasehold* estate.
2. John and Susan purchased a property as tenants in common. John and Susan have a *freehold* estate.
3. The *Statute of Frauds* requires real estate contracts to be in writing.
4. In a bilateral contract the exchange of promises provides *consideration*.
5. Married couples in Texas usually own property as *community property*.
6. The day the title company receives all the money from the lender and is able to write checks to the seller, the brokers and other vendors is called the day of *funding*.
7. If the parties agree that the seller can remain in the property for two weeks after closing they will need to attach a *temporary lease agreement* to their contract.
8. The TREC real estate contracts are available to *anyone*.

**Contract Law**


A *contract* is a voluntary arrangement between two or more parties that is enforceable by law as a binding legal agreement. Contract law concerns the rights and duties that arise from agreements.

A contract arises when the parties agree that there is an agreement. Formation of a contract generally requires an offer, acceptance, consideration, and a mutual intent to be bound. Each party to a contract must have capacity to enter the agreement. Minors, intoxicated persons, and those under a mental affliction may have insufficient capacity to enter a contract. Real estate contracts require formalities, such as the contract must be in writing and signed by the parties to be charged.
At common law, the elements of a contract are offer, acceptance, intention to create legal relations, and consideration.

Not all agreements are necessarily contractual, as the parties generally must be deemed to have an intention to be legally bound. A gentlemen's agreement is one which is not intended to be legally enforceable, and which is "binding in honour only".

**Offer and acceptance**

In order for a contract to be formed, the parties must reach mutual assent (also called a meeting of the minds). This is typically reached through offer and an acceptance which does not vary the offer's terms, which is known as the "mirror image rule". An offer is a definite statement of the offeror's willingness to be bound should certain conditions be met. If a purported acceptance does vary the terms of an offer, it is not an acceptance but a counteroffer and, therefore, simultaneously a rejection of the original offer.

Contracts may be bilateral or unilateral. A bilateral contract is an agreement in which each of the parties to the contract makes a promise or set of promises to each other. For example, in a contract for the sale of a home, the buyer promises to pay the seller $200,000 in exchange for the seller's promise to deliver title to the property.

Less common are unilateral contracts in which one party makes a promise, but the other side does not promise anything. In these cases, those accepting the offer are not required to communicate their acceptance to the offeror. In a reward contract, for example, a person who has lost a dog could promise a reward if the dog is found, through publication or orally. The payment could be additionally conditioned on the dog being returned alive. Those who learn of the reward are not required to search for the dog, but if someone finds the dog and delivers it, the promisor is required to pay.

Another type of unilateral contract is an option contract. The buyer pays the owner a sum of money to promise to sell him the property, at a certain price, if he (buyer) decides to buy within a certain period of time. The owner has promised and cannot sell the property
to anyone else during the term of the option. The seller received consideration for that promise. The buyer promises nothing. The buyer may or may not decide to exercise his option during that period.

In certain circumstances, an implied contract may be created. A contract is implied in fact if the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, a patient may implicitly enter a contract by visiting a doctor and being examined; if the patient refuses to pay after being examined, the patient has breached a contract implied in fact. A contract which is implied in law is also called a quasi-contract, because it is not in fact a contract; rather, it is a means for the courts to remedy situations in which one party would be unjustly enriched were he or she not required to compensate the other.

**Intention to be legally bound**

In commercial agreements it is presumed that parties intend to be legally bound unless the parties expressly state the opposite as in a heads of agreement document. For example, in *Rose & Frank Co v JR Crompton & Bros Ltd* an agreement between two business parties was not enforced because an 'honour clause' in the document stated "this is not a commercial or legal agreement, but is only a statement of the intention of the parties".

In contrast, domestic and social agreements such as those between children and parents are typically unenforceable on the basis of public policy. For example, in the English case *Balfour v. Balfour* a husband agreed to give his wife £30 a month while he was away from home, but the court refused to enforce the agreement when the husband stopped paying. In contrast, in *Merritt v Merritt* the court enforced an agreement between an estranged couple because the circumstances suggested their agreement was more than a domestic arrangement.
Merritt v Merritt [1970] 1 WLR 1211

Court of Appeal

A husband left his wife and went to live with another woman. There was £180 left owing on the house which was jointly owned by the couple. The husband signed an agreement whereby he would pay the wife £40 per month to enable her to meet the mortgage payments and if she paid all the charges in connection with the mortgage until it was paid off he would transfer his share of the house to her. When the mortgage was fully paid she brought an action for a declaration that the house belonged to her.

Held:
The agreement was binding. The Court of Appeal distinguished the case of Balfour v Balfour, on the grounds that these parties were separated. In the case of Balfour vs Balfour the couple were still married. Where spouses have separated, it is generally considered that they do intend to be bound by their agreements. The written agreement signed was further evidence of an intention to be bound.

Consideration

Consideration is a concept devised by English common law, and is required for simple contracts, but not for special contracts (contracts by deed). The case of Currie v Misa declared consideration to be a “Right, Interest, Profit, Benefit, or Forbearance, Detriment, Loss, Responsibility”. Thus, consideration is a promise of something of value given by a promissor in exchange for something of value given by a promisee; and typically the thing of value is goods, money, or an act. Forbearance to act, such as an adult promising to refrain from smoking, is enforceable only if one is thereby surrendering a legal right.

In Dunlop v. Selfridge Lord Dunedin adopted Pollack’s metaphor of purchase and sale to explain consideration. He called consideration ‘the price for which the promise of the other is bought.’
Dunlop v. Selfridge

Dunlop, a tire manufacturing company, made a contract with Dew, a trade purchaser, for tires at a discounted price on condition that they would not resell the tires at less than the listed price and that any reseller who wanted to buy them from Dew had to agree not to sell at the lower price either. Dew sold the tires to Selfridge at the listed price and made Selfridge agree not to sell at a lower price either and that they would pay £5 in damages if they violated this agreement. Selfridge proceeded to sell the tires below the price he promised to sell them for. Dunlop brought action and was successful at trial but this was overturned by the Court of Appeal.

There was no contract between Dunlop and Selfridge and therefore Dunlop cannot sue.

There are a few fundamental principles of law underpinning this decision:

a) the doctrine of privity, which states that only a party to a contract can sue in breach of the contract;

b) the doctrine of consideration would require the promisee (Dunlop) to give consideration to Selfridge for the contract to be completed, and this did not occur as Dunlop did not give anything to Selfridge here (Selfridge made a promise to Dunlop to only sell at a certain price but it was gratuitous because Dunlop gave no consideration in return);

c) the only way that a principal not named in a contract can be sued is if he acted as an agent on behalf of one of the parties privy to the contract. Dew was not acting as an agent for Dunlop, therefore this does not apply in this case. If Dew were Dunlop's agent, then the effect of the two deals would really be one deal. In an agency agreement, the Agent disappears and the contract is between the principal (Dunlop) and the third party (Selfridges) The principal gives tires and the third party gives money. This did not happen here. The court held that the tires belonged to Dew, not Dunlop. They had already sold them. Only parties to a contract can sue for a breach of the contract.
Another interesting court case (Hamer V. Sidway) shows that someone giving up their legal rights can be used as consideration for an agreement.

Hamer v. Sidway
Louisa Hamer, (Plaintiff), brought suit against Franklin Sidway, the executor of the estate of William E. Story I, (Defendant), for the sum of $5,000. On March 20, 1869, William E. Story had promised his nephew, William E. Story II, $5,000 if his nephew would abstain from drinking alcohol, using tobacco, swearing, and playing cards or billiards for money until the nephew reached 21 years of age. Story II accepted the promise of his uncle and did refrain from the prohibited acts until he turned the agreed-upon age of 21. After celebrating his 21st birthday on January 31, 1875, Story II wrote to his uncle and requested the promised $5,000. The uncle responded to his nephew in a letter dated February 6, 1875 in which he told his nephew that he would fulfill his promise. Story I also stated that he would prefer to wait until his nephew was older before actually handing over the (then) extremely large sum of money (according to an online inflation calculator, $5000 in 1890 would be worth approximately $125,000 in 2012). The elder Story also declared in his letter that the money owed to his nephew would accrue interest while he held it on his nephew's behalf. The younger Story consented to his uncle's wishes and agreed that the money would remain with his uncle until Story II became older. William E. Story I died on January 29, 1887 without having transferred any of the money owed to his nephew. Story II had meanwhile transferred the $5,000 financial interest to his wife; Story II's wife had later transferred this financial interest to Louisa Hamer on assignment. The elder Story's estate refused to grant Hamer the money, believing there was no binding contract due to a lack of consideration. As a result, Hamer sued the estate's executor, Franklin Sidway.

Opinion of the court
The Court of Appeals reversed and directed that the judgment of the trial court be affirmed, with costs payable out of the estate. Judge Alton Parker (later Chief Judge of the Court of Appeals), writing for a unanimous court, wrote that the forbearance of legal rights by Story II, namely the consensual abstinence from "drinking liquor, using tobacco,
swearing, and playing cards or billiards for money until he should become 21 years of age" constituted consideration in exchange for the promise given by Story I. Because the forbearance was valid consideration given by a party (Story II) in exchange for a promise to perform by another party (Story I), the promisee was contractually obligated to fulfill the promise.

Parker cited the definition of consideration: "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." The executor of Story I’s estate, Sidway, was therefore legally bound to deliver the promised $5,000 to whoever currently held the interest in the sum, which by the time of the trial was Hamer.

Source: https://en.wikipedia.org/wiki/Hamer_v._Sidway

Courts will typically not weigh the "adequacy" of consideration provided the consideration is determined to be "sufficient", with sufficiency defined as meeting the test of law, whereas "adequacy" is the subjective fairness or equivalence. For instance, agreeing to sell a car for a penny may constitute a binding contract (although if the transaction is an attempt to avoid tax, it will be treated by the tax authority as though a market price had been paid). Parties may do this for tax purposes, attempting to disguise gift transactions as contracts.

Capacity
Sometimes the capacity of either natural or artificial persons to either enforce contracts, or have contracts enforced against them is restricted. For instance, very small children may not be held to bargains they have made, on the assumption that they lack the maturity to understand what they are doing; errant employees or directors may be prevented from contracting for their company, because they have acted ultra vires (beyond their power). Another example might be people who are mentally incapacitated, either by disability or drunkenness.
Each contractual party must be a "competent person" having legal capacity. The parties may be natural persons ("individuals") or juristic persons ("corporations"). An agreement is formed when an "offer" is accepted. The parties must have an intention to be legally bound; and to be valid, the agreement must have both proper "form" and a lawful object.

In the United States, persons under 18 are typically minor and their contracts are considered voidable; however, if the minor voids the contract, benefits received by the minor must be returned. The minor can enforce breaches of contract by an adult while the adult's enforcement may be more limited under the bargain principle. Promissory estoppel or unjust enrichment may be available, but generally are not.

(Source: https://en.wikipedia.org/wiki/Contract#Offer_and_acceptance)

### Promissory Estoppel. Investopedia.

http://www.investopedia.com/terms/p/promissory_estoppel.asp#ixzz4Vy44rY1v

**What is Promissory Estoppel**

A court may use promissory estoppel to enable an injured party to recover on a promise. There are common legally required elements for a person to make a claim for promissory estoppel — the parties are a promisor and a promise. The promisee has suffered some financial loss. An additional requirement is that the person making the claim, the promisee, must have reasonably relied on the promise — in other words, that the promise was one that a reasonable person would ordinarily rely on. Finally, promissory estoppel is usually only granted if a court determines that enforcing the promise is essentially the only means by which an injustice to the promisee can be avoided.

(Source: http://www.investopedia.com/terms/p/promissory_estoppel.asp#ixzz4Vy44rY1v)

### Unjust Enrichment aka “Not Entitled To”

For example, if two parties have savings accounts with very similar account numbers and a large deposit goes into the wrong account by mistake, the bank will be responsible for correcting it by depositing it into the correct account. But what if the person who received
the money by accident immediately withdrew it? The bank would be able to recover the money. For the receiver to take the money would be “unjust enrichment.”

Typically, contracts are oral or written, but written contracts have typically been preferred in common law legal systems; in 1677 England passed the Statute of Frauds which influenced similar statute of frauds laws in the United States and other countries such as Australia. In general, the Uniform Commercial Code as adopted in the United States requires a written contract for tangible product sales in excess of $500, and real estate contracts are required to be written. If the contract is not required by law to be written, an oral contract is valid and therefore legally binding.

If a contract is in a written form, and somebody signs it, then the signer is typically bound by its terms regardless of whether they have actually read it provided the document is contractual in nature. However, affirmative defenses such as duress or unconscionability may enable the signer to avoid the obligation. Further, reasonable notice of a contract's terms must be given to the other party prior to their entry into the contract.

An implied contract, may also be legally binding. Implied contracts are real contracts under which the parties receive the "benefit of the bargain". However, contracts implied in law are also known as quasi-contracts, and the remedy is quantum meruit, the fair market value of goods or services rendered.

**quantum meruit**
(kwahn-tuhtm mare-ooh-it) n. Latin for "as much as he deserved," the actual value of services performed. Quantum meruit determines the amount to be paid for services when no contract exists or when there is doubt as to the amount due for the work performed but done under circumstances when payment could be expected. This may include a physician's emergency aid, legal work when there was no contract, or evaluating the amount due when outside forces cause a job to be terminated unexpectedly. If a person sues for payment for services in such circumstances the judge or jury will calculate the
amount due based on time and usual rate of pay or the customary charge, based on quantum meruit by implying a contract existed.

http://www.investopedia.com/terms/p/promissory_estoppel.asp#ixzz4Vy44rY1v

**Contract.**

Wikipedia:


**Contract terms: construction and interpretation**

If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price or safety, may cause the entire contract to fail. However, a court will attempt to give effect to commercial contracts where possible, by construing a reasonable construction of the contract.

Courts may also look to external standards, which are either mentioned explicitly in the contract or implied by common practice in a certain field. In addition, the court may also imply a term; if price is excluded, the court may imply a reasonable price, with the exception of land, and second-hand goods, which are unique.

If there are uncertain or incomplete clauses in the contract, and all options in resolving its true meaning have failed, it may be possible to sever and void just those affected clauses if the contract includes a severability clause.

(Source: https://en.wikipedia.org/wiki/Contract#Contract_terms:_construction_and_interpretation)

In many cases an uncertainty in a contract may void the entire contract. Real estate agents must take care to only use the TREC promulgated forms and addenda to avoid writing things into a contract that could make it uncertain.
Puffery
Contracts. Wikipedia.
Statements in a contract may not be upheld if the court finds that the statements are subjective or promotional puffery. English courts may weigh the emphasis or relative knowledge in determining whether a statement is enforceable as part of the contract. In the English case of Bannerman v. White the court upheld a rejection by a buyer of hops which had been treated with sulphur since the buyer explicitly expressed the importance of this requirement. The relative knowledge of the parties may also be a factor, as in English case of Bissett v. Wilkinson where the court did not find misrepresentation when a seller said that farmland being sold would carry 2000 sheep if worked by one team; the buyer was considered sufficiently knowledgeable to accept or reject the seller's opinion.

Bannerman v White
The claimant agreed by contract to purchase some hops to be used for making beer. He asked the seller if the hops had been treated with sulphur and told him if they had he wouldn't buy them as he would not be able to use them for making beer if they had. The seller assured him that the hops had not been treated with sulphur. In fact they had been treated with sulphur.

The statement that the hops had not been treated with sulphur was a term of the contract rather than a representation as the claimant had communicated the importance of the term and relied on the statement. His action for breach of contract was successful.

http://www.e-lawresources.co.uk/Bannerman-v-White.php

Terms implied in law
Statutes or judicial rulings may create implied contractual terms, particularly in standardized relationships such as employment or shipping contracts. The Uniform Commercial Code of the United States also imposes an implied covenant of good faith and fair dealing in performance and enforcement of contracts covered by the Code.
Most countries have statutes which deal directly with sale of goods, lease transactions, and trade practices. In the United States, prominent examples include, in the case of products, an implied warranty of merchantability and fitness for a particular purpose, and in the case of homes an implied warranty of habitability.


**Implied Warranty of Habitability**

An unstated guarantee that a rental property meets basic living and safety standards. When a tenant rents an apartment, for example, an implied warranty of habitability means that the unit will have hot water, a working electrical system, heat in the winter, lockable doors and windows, a working toilet and smoke detectors, and be free of pests like roaches and rats, among other conditions.


If the courts have to decide if a contract existed, they will consider several factors one of which will be if there was offer and acceptance. Did both of the parties understand the offer? If there is a mutual mistake either party can void the contract. If only one person is mistaken the contract cannot be voided unless there was fraud or misrepresentation involved.

The court will determine if the contract contains all of the essential elements of a valid contract including:

- Competent parties
- Mutual agreement
- Lawful objective
- Consideration
- If it is any type of real estate contract (sales contracts, listing agreements, buyer representation agreements, commission agreements, etc.) the Statute of Frauds require the contract be in writing and be signed by the person to be charged.
• If it is a contract that is not covered by the State of Frauds an oral contract can be found valid. Leases of less than six months do not have to be in writing. The hard part with an oral contract is proof of what was said and by whom.

The following summary of cases prove that it is anyone’s guess what will happen in court.


**Parker v Clarke (1960)**
Mrs Parker was the niece of Mrs Clarke. An agreement was made that the Parkers would sell their house and live with the Clarkes. They would share the bills and the Clarkes would then leave the house to the Parkers. Mrs Clarke wrote to the Parkers giving them the details of expenses and confirming the agreement. The Parkers sold their house and moved in. Mr Clarke changed his will leaving the house to the Parkers. Later the couples fell out and the Parkers were asked to leave. They claimed damages for breach of contract.

It was held that the exchange of letters showed the two couples were serious and the agreement was intended to be legally binding because (1) the Parkers had sold their own home, and (2) Mr Clarke changed his will. Therefore the Parkers were entitled to damages.

**Tanner v Tanner (1975)**
A man promised a woman that the house in which they had lived together (without being married) should be available for her and the couple’s children. It was held that the promise had contractual force because, in reliance on it, the woman had moved out of her rent-controlled flat.

**Jones v Padavatton (1969)**
In 1962, Mrs Jones offered a monthly allowance to her daughter if she would give up her job in America and come to England and study to become a barrister. Because of
accommodation problems Mrs Jones bought a house in London where the daughter lived and received rents from other tenants. In 1967 they fell out and Mrs Jones claimed the house even though the daughter had not even passed half of her exams.

It was held that the first agreement to study was a family arrangement and not intended to be binding. Even if it was, it could only be deemed to be for a reasonable time, in this case five years. The second agreement was only a family agreement and there was no intention to create legal relations. Therefore, the mother was not liable on the maintenance agreement and could also claim the house.

**Simpkins v Pays (1955)**
The defendant, her granddaughter, and the plaintiff, a paying lodger shared a house. They all contributed one-third of the stake in entering a competition in the defendant’s name. One week a prize was won but on the defendant's refusal to share the prize, the plaintiff sued for a third.

It was held that the **presence of the outsider** rebutted the presumption that it was a family agreement and not intended to be binding. The mutual arrangement was a joint enterprise to which cash was contributed in the expectation of sharing any prize.

**Rose v Crompton Bros (1925)**
The defendants were paper manufacturers and entered into an agreement with the plaintiffs whereby the plaintiffs were to act as sole agents for the sale of the defendant's paper in the US. The written agreement contained a clause that it was not entered into as a formal or legal agreement and would not be subject to legal jurisdiction in the courts but was a record of the purpose and intention of the parties to which they honourably pledged themselves, that it would be carried through with mutual loyalty and friendly co-operation. The plaintiffs placed orders for paper which were accepted by the defendants. Before the orders were sent, the defendants terminated the agency agreement and refused to send the paper.
It was held that the sole agency agreement was not binding owing to the inclusion of the "honourable pledge clause". Regarding the orders which had been placed and accepted, however, contracts had been created and the defendants, in failing to execute them, were in breach of contract.

**Jones v Vernon Pools (1938)**
The plaintiff claimed to have won the football pools. The coupon stated that the transaction was "binding in honour only". It was held that the plaintiff was not entitled to recover because the agreement was based on the honour of the parties (and thus not legally binding).

**Edwards v Skyways (1964)**
The plaintiff pilot was made redundant by the defendant. He had been informed by his pilots association that he would be given an ex gratia payment (ie, a gift). The defendant failed to pay and the pilot sued. The defendant argued that the use of the words "ex gratia" showed that there was no intention to create legal relations.

It was held that this agreement related to business matters and was presumed to be binding. The defendants had failed to rebut this presumption. The court also stated that the words "ex gratia" or "without admission of liability" are used simply to indicate that the party agreeing to pay does not admit any pre-existing liability on his part; but he is certainly not seeking to preclude the legal enforceability of the settlement itself by describing the payment as "ex gratia".

**JH Milner v Percy Bilton (1966)**
A property developer reached an "understanding" with a firm of solicitors to employ them in connection with a proposed development, but neither side entered into a definite commitment. The use of deliberately vague language was held to negative contractual intention.
Weeks v Tybald (1605)
The defendant "affirmed and published that he would give a sum of money to anyone that should marry his daughter with his consent." The court held that "It is not reasonable that the defendant should be bound by such general words spoken to excite suitors."

Kleinwort Benson v Malaysia Mining Corp (1989)
The plaintiff bank agreed with the defendants to lend money to a subsidiary of the defendants. As part of the arrangement, the defendants gave the plaintiffs a letter of comfort which stated that it was the company's policy to ensure that the business of its subsidiary is at all times in a position to meet its liabilities. The subsidiary went into liquidation and the plaintiffs claimed payment from the defendants.

It was held that the letters of comfort were statements of the company's present policy, and not contractual promises as to future conduct. They were not intended to create legal relations, and gave rise to no more than a moral responsibility on the part of the defendants to meet the subsidiary's debt.

(Source: http://www.lawteacher.net/cases/contract-law/intention-cases.php)

The following Questions and Answers are from the TREC Legal Faqs page:

Q: Does a lease for a term of longer than one year and a contract for the sale of real estate need to be in writing to be enforceable?
A: Yes. The Statute of Frauds, as defined by Chapter 26 of the Business and Commerce Code, requires that certain agreements be reduced to writing to be enforceable. However, you should consult with a private attorney for advice on this matter.

Q: Does a license holder have to use TREC's contract forms? Does TREC ever discipline a license holder who fails to use an adopted form?
A: Yes and yes. A license holder is required to use contract forms adopted by TREC. [TRELA §1101.155, Rule 537.11, etc.] Some exceptions for when a license holder does not have to use a form are in Rule 537.11(a). A license holder should also be familiar with
Rules 537.11(f)-(g). Those rules prohibit a license holder from adding anything except factual matters or business details to a form adopted by TREC for mandatory use. Contract forms adopted for mandatory use are on our website.

**Q: Would it be permissible to use a promulgated contract form as a contract for deed or contract of sale by making appropriate changes in Paragraph 11?**

**A:** No. None of the forms promulgated by TREC are intended for use as a contract for deed. An attorney will need to prepare an appropriate form.

**Q: Can a non-license holder use the promulgated contract forms?**

**A:** Yes. The contract forms are available for public use.

**Q: What should I do if TREC doesn’t promulgate a form that I need?**

**A:** The Texas Association of Realtors (TAR) provides certain forms to its members. However, if you are not a member of TAR, you should have an attorney draft the necessary documents. It is a violation of the law for a license holder to draft an instrument that transfers or otherwise affects an interest in real property. [TRELA §1101.654]

**Q: My broker did not fill out our contract properly and the effective date is blank. Does this mean that the contract is invalid or void?**

**A:** The Commission can not make a determination about the validity of your contract. You should consult a private attorney regarding this issue. A license holder’s failure to properly complete a TREC promulgated form completely and accurately could be considered negligence and subject the license holder to disciplinary action. [TRELA §1101.652(b)(1)]

**Q: My client does not want to accept the property “as is” and wants to wait until after the inspection to list specific repairs that he wants the seller to fix. Can I just leave both boxes in Paragraph 7D of the One to Four Family Residential Contract (Resale) blank or can I check 7D 2 and write in “repairs to be listed following inspection”?**
A: Neither option is permissible. Leaving both boxes in blank in Paragraph 7D or altering the contract terms by adding language that does not enumerate specific repairs in Paragraph 7D2 could be considered to be acting negligently or incompetently if a complaint were to be filed in connection with the transaction [TRELA §1101.652(b)(1)]. The buyer should only choose Paragraph 7D2 if there are specific repairs known at the time of the contract that the buyer wants the seller to pay for. Otherwise, the buyer should check Paragraph 7D1. Most buyers in your client’s situation will then also elect to pay an option fee pursuant to Paragraph 23 in exchange for the right to terminate for any reason within a negotiated number of days. During this option period, an inspection can be performed and if specific repairs are identified, the parties can negotiate to amend the contract to address these items, or the buyer can terminate the contract.

Q: Is the Disclosure of Relationship with Residential Service Company form required for every transaction?
A: No. This form is required only when a residential service company agrees to pay a license holder for a service provided to or on behalf of the company. The form should indicate which license holders have received or will receive the payment. If a license holder is not receiving a payment from the company, this should be noted as well. Each license holder must sign the form.

Q: How are days counted in a TREC contract?
A: Starting with the effective (final execution) date of the contract, the first day of the period starts the next day. Each day is counted as calendar day.

Let’s Review
Using the following terms fill in the blanks of the questions below.

Rejection [Upheld] [Unilateral]
Mutual mistake [Mutual asset] [Duress]
Promissory estoppel [Unjust enrichment] [Contract]
1. A _______ is a voluntary arrangement between two or more parties that is enforceable by law.
2. A meeting of the minds is known as _______.
3. A counteroffer is a _______ of the original offer.
4. An option to purchase contract is a _______ contract.
5. Courts sometimes use _______ to avoid injustice to the promissee.
6. If someone receives something of value they are not entitled to the courts might say it was _______.
7. Unconscionability or _______ may enable the signer to avoid a contract obligation.
8. If there is a _______ in a contract, either party may terminate the contract.
9. Family agreements are not usually _______ by the courts.

**Answer Key**

1. A **contract** is a voluntary arrangement between two or more parties that is enforceable by law.
2. A meeting of the minds is known as **mutual assent**.
3. A counteroffer is a **rejection** of the original offer.
4. An option to purchase contract is a **unilateral** contract.
5. Courts sometimes use **promissory estoppel** to avoid injustice to the promissee.
6. If someone receives something of value they are not entitled to the courts might say it was **unjust enrichment**.
7. Unconscionability or **duress** may enable the signer to avoid a contract obligation.
8. If there is a **mutual mistake** in a contract, either party may terminate the contract.
9. Family agreements are not usually **upheld** by the courts.
Discharge of Contracts


**Discharge of a contract** implies termination of contractual obligations. This is because when the parties originally entered into the contract, the rights and duties in terms of **contractual obligations** were set up. Consequently, when those rights and duties are put out then the contract is said to have been discharged. Once a contract stands discharged, parties to it are no more liable even though the obligations under the contract remain incomplete.

A contract is deemed to be discharged, that is, concluded and no longer binding, in the following circumstances:

- Discharge by performance.
- Discharge of Contract by Substituted Agreement.
- Discharge by lapse of time.
- Discharge by operation of law.
- Discharge by Impossibility of Performance.
- Discharge by Accord and Satisfaction.
- Discharge by breach.

We shall examine each of them as follows.

**Discharge by performance**

Where both the parties have either carried out or tendered (attempted) to carry out their obligations under the contract, is referred to as discharge of the contract by performance. Because performance by one party constitutes the occurrence of a constructive condition, the other party’s duty to perform is also triggered, and the person who has performed has the right to receive the other party’s performance. The overwhelming majority of **contracts** are discharged in this way.
When a buyer and a seller each perform their obligations under the contract including the closing of the transaction, the contract is discharged.

Paragraph 19 of the TREC One to Four Family contract say that a few things survive closing.

**REPRESENTATIONS:** All covenants, representations and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. Unless expressly prohibited by written agreement, Seller may continue to show the Property and receive, negotiate and accept back up offers.

## Discharge of Contract by Substituted Agreement

A contract emanates from an agreement between the parties. It thus follows that the contract must also be discharged by agreement. Therefore, what is required, inevitably, is mutuality. **Discharge by substituted agreement** arises when a contract is abandoned, or the terms within it are altered, and both the parties are in conformity over it.

For example, A and B enter into some agreement, and A wants to change his mind and not to carry out his terms of the contract. If he does this unilaterally then he will be in breach of contract to B. However, if he approaches B and states that he would like to be released from his liabilities under the contract then the latter might agree. In that case the contract is said to be discharged by (bilateral) agreement. In effect B has promised not to sue A if he does not perform his part of the contract and the consideration for his promise is A’s promise not to sue B. Discharge by agreement may arise in the following ways.

### Novation

The term **novation** implies the substitution of a new contract for the original one. This arrangement may be either with the same parties or with different parties. For a novation to be valid and effective, the consent of all the parties, including the new one(s), if any, is essential. Moreover, the subsequent or second agreement must be one capable of
enforcement in law, the consideration for which is the exchange of promises not to enforce the original contract.

When a mortgage loan is being assumed by a new party and the lender requires the new party to financially qualify and then releases the original party it is a novation.

**Rescission**
This refers to cancellation of all or some of the material terms of the contract. If the contracting parties mutually decide to do so, the respective contractual obligations of the parties stand terminated. If both parties agree to terminate a contract it is called “mutual rescission”.

**Alteration**
This refers to a change in one or more of the terms of a contract with the consent of all the contracting parties. Alteration results in a new contract but parties to it remain the same. Here the assumption is that both the parties are to gain a fresh but different benefit from the new agreement. The TREC Amendment form assist the parties in making an alteration to the original contract.

**Waiver**
The term waiver implies abandonment or relinquishment of a right. Where a party deliberately abandons its rights under the contract, the other party is released of its obligations, otherwise binding upon it.

**Discharge by lapse of time**
A contract stands discharged if not enforced within a specified period called the ‘period of limitation’. The Limitation Act, 1963 prescribes the period of limitation for various contracts. For instance, period of limitation for exercising right to recover an immovable property is twelve years, and right to recover a debt is three years. Contractual rights become time barred after the expiry of this limitation period. Accordingly, if a debt is not recovered within
three years of its payment becoming due, the debt ceases to be payable and is discharged by lapse of time.

**Discharge by Impossibility of Performance**

Sometimes after a contract has been established, something might occur, though not at the fault of either party, which can render the contract impossible to perform, or illegal, or radically different from that originally undertaken.

However, if whatever happens to prevent the contract from being performed

- has not been caused by either party
- could not have been foreseen, and
- its effect is to destroy the basis of the contract

Then the courts will, generality, state that the contract has become impossible to perform. If that happens then the contract is discharged and neither party will have any liability under it.

The performance of a contractual obligation may become subsequently impossible on a number of grounds. They include the following.

- Objective impossibility of performance
- Commercial impracticability
- Frustration of purpose
- Temporary impossibility

**Discharge of operation of law**

A contract stands discharged by operation of law in the following circumstances.

- Unauthorized material alteration of a written document. A party can treat a contract discharged (i.e., from his side) if the other party alters a term (such as quantity or price) of the contract without seeking the consent of the former.
- Statutes of Limitations. A contract stands discharged if not enforced within a specified period called the 'period of limitation'. The Limitation Act, 1963 prescribes
the period of limitation for various contracts. For instance, limitation period for exercising right to recover an immovable property is twelve years and right to recover a debt is three years. Contractual rights become time barred after the expiry of this limitation period.

- **Insolvency.** A discharge in bankruptcy will ordinarily bar enforcement of most of a debtor’s contracts.
- **Merger.** A contract also stands discharged through a merger that occurs when an inferior right accruing to party in a contract amalgamates into the superior right ensuing to the same party. For instance, A leases a factory premises from B for some manufacturing activity for a year, but 3 months ahead of the expiry of lease purchases that very premises. Now since A has become the owner of the building, his rights associated with the lease (inferior rights) subsequently merge into the rights of ownership (superior rights). The previous rental contract ceases to exist.

**Discharge by Accord and Satisfaction**

To discharge a contract by accord and satisfaction; the parties must agree to accept performance that is different from the performance originally promised. It may be studied under the following sub-heads.

- An accord is an executory contract to perform an act that will satisfy an existing duty. An accord suspends, but does not discharge, the original contract. If the obligor refuses to perform, the obligee can sue on the original obligation or seek a decree for specific performance on the accord.
- Satisfaction is the performance of the accord, which discharges the original contractual obligation.

**Discharge of contract by breach**

Breach occurs where one party to a contract fails to perform its contractual obligations, or the performance is defective. A breach of contract does not per se bring a contract to an end. The breach may give to the aggrieved party the right to terminate the contract but it is for the non-breaching side to decide whether or not to exercise that option. The aggrieved party has a right of election; that is to say, it can choose either to affirm the
contract or to terminate it. However, once that decision has been taken, it is, in principle, irrevocable.

**Anticipatory Breach**
Also known as 'breach by repudiation', anticipatory breach occurs when one party states, before the arrival of the date fixed for performance, without justification that it cannot or will not carry out the material part of the contractual obligations on the agreed date or that it intends to perform in a way that is inconsistent with the terms of the contract. This may also occur where one party by some action makes performance impossible. For instance, A, after agreeing to sell his car to B on a fixed date, sells it to C. This is anticipatory breach.

**Effect of anticipatory breach**
Where there is an anticipatory breach, the non-breaching party may either
- rescind the contract, or
- treat the contract in force and wait for the time of performance. In first case, it can immediately sue for damages, i.e., it is not required to wait for the time for performance to expire.

For example, [D agreed to employ P] as a courier for three months commencing on June 1. Before the said date D told P that his services would not be required. This was to be an anticipatory breach of contract and it entitled P to sue D for damages immediately. If the non-breaching party elects to treat the contract operative, it waits until the time of performance and then holds the other party liable for the non-performance. Thus, by doing so the non-breaching party is giving an opportunity to the breaching party to still perform, if it can, in order to get a valid discharge.

**Actual Breach**
Actual breach refers to the failure to perform contractual obligations when performance is due. Failure to perform obligations is the most common form of breach, wherein a seller
fails to deliver the goods by the appointed time, or where, although delivered, the goods
are not up to the mark in respect of quality or quantity specified in the contract.

**Effect of actual breach**

Breach is described as a method of discharge although it may not automatically discharge
the contract. Breach of contract leads to two main remedies, namely breach of condition,
and breach of warranty.

(Source: [http://accountlearning.com/discharge-of-a-contract-definition-methods-of-
discharge/](http://accountlearning.com/discharge-of-a-contract-definition-methods-of-
discharge/))

**Let’s Look Further at Discharge Caused by Performance**

When a breach occurs, the injured party has several remedies to consider. The injured
party’s remedy depends upon the type of breach or performance that has occurred.
Whether partial performance, substantial performance or no performance has occurred,
the injured party has the right to take action against the breaching party.

If the parties in a contract do not completely fulfill or default on their obligations, then they
have breached the contract. In situations where a breach of contract occurs, the injured
party can seek compensation for any damages or discharge the contract. When a party
discharges a contract, it means that the terms and conditions of the contract have been
satisfied or cancelled. Usually, a contract will contain a section that discusses when a
discharge is allowable and the consequences of breaching the contract.

There are several instances when a party can discharge a contract.

1. **Partial performance**: Partial performance occurs when either party only performs
part of the duties indicated in the contract. When partial performance occurs, the
damaged party can seek restitution or cancel the contract entirely. For example,
when the purchaser has paid part of the price, taken possession of the property,
and made permanent improvements to it, the parties clearly cannot be returned to
the positions they occupied before the contract was formed. The party seeking
performance must have reasonably relied on the contract (and on the other party's
continuing agreement) and so changed her or his position that injustice can be avoided only by “specific enforcement.”

2. **Substantial performance:** Occurs when a party has performed the majority of the contract’s terms but does not perform them according to the contract’s stipulations. However, often the party has performed enough of the contractual obligations to force payment or compliance with the contract. For example, some builders contracts call for the buyer to be willing to close when the property is “substantially complete”. (Minor things to do still exist but the Certificate of Occupancy is in place and the contract has been substantially performed)

3. **Non-performance because of legal issues:** When a contract calls for a party to act illegally, that party is not required to meet the terms of the contract.

4. **Mutual agreement:** A contract can be discharged when both parties mutually agree to cancel the contract.

5. **Operation of law:** When a contract is not for a legal object or becomes unenforceable because of the statute of frauds, statute of limitations or legal competency rule, the contract can be discharged. Enforcement of these contracts would be a violation of the law.

**Breach of Contract**

A breach of contract occurs when the terms or conditions of a contract have been violated. When one party breaches the contract’s terms, he or she assumes the consequences of defaulting; in these cases, the non-defaulting party has the right to pursue any damages that he or she suffered as a result of the breach.

**Remedies of a Breached Contract**

When a buyer defaults on a real estate contract, the seller has four options:

1. The seller can forfeit the contract. **Under the Texas contract forms the seller may accept the earnest money as liquidated damages, releasing everyone from the contract.**
2. The seller can rescind the contract. This means that the seller can cancel the contract entirely; however, this means that the seller must return all payments he or she has received from the buyer.

3. The seller can sue for specific performance. Specific performance is a court order that requires one party to carry out the promises stipulated in the contract.

4. The seller can sue for compensatory damages. This means that the seller can take the buyer to court to recover any damages he or she may have suffered because of the breach of contract.

When a seller defaults on a real estate contract, the buyer has three options:

1. The buyer can rescind the contract and try to recoup liquidated damages, which is the monetary amount required to satisfy a loss resulting from a breach of contract.

2. The buyer can file a lawsuit for specific performance. In this case, the buyer can try to force the seller to perform the contract.

3. The buyer can sue for compensatory damages, which means that he or she can try to recover any damages he or she may have suffered by taking the claim to court.

4. Under the Texas contract forms the buyer may accept the earnest money as liquidated damages, releasing everyone from the contract.

Paragraph 15 of the One to Four Family Residential Contract reads as follows:

**DEFAULT:** If Buyer fails to comply with this contract, Buyer will be in default, and Seller may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If Seller fails to comply with this contract, Seller will be in default and Buyer may (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.
Rescission

Rescission is the act of terminating the contract without suffering any consequences. However, unilateral rescission can only occur in cases of fraud, misrepresentation or mistake. There are two types of rescission: unilateral rescission and mutual rescission.

When unilateral rescission occurs, this means that one party wants to rescind the contract because he or she discovers that the terms of the contract are based upon fraudulent, inaccurate or misleading information. In this case, the rescinding party wants to terminate the contract because of the other party's failure to perform or uphold the contract. When a party rescinds the contract because of fraud, mistake or misrepresentation, the other party cannot sue for specific performance or for damages.

Mutual rescission occurs when both parties agree to terminate the contract. When both parties agree to terminate the contract, the contract becomes void, and the situation returns to status quo.

Remedies for Injuries as a Result of the Breach

When a breach of contract occurs, the injured party has the right to sue for damages. He or she has the option to force performance of the contract or to sue for monetary damages. There are three types of monetary damages:

1. Actual damages
2. Liquidated damages
3. Exemplary damages

Actual Damages: Monetary compensation given to an injured party for losses that were a result of the actions or omissions of another party which can be shown by the evidence. These damages are not for “inconvenience” and cannot be speculative. Example: A grocer contracts with a local farmer to provide eggs for one year. The farmer provides eggs for three months and then decides the price has been set too low to support the feed requirements and stops all deliveries. The customers come in and complain to the grocer and the grocer gets repetitive migraines from all the stress. He has to purchase
eggs from another producer at a dollar more on the case. He further believes the original farmer’s eggs would have sold much better and he would have made about $5000 dollars more for the year. The only compensation the grocer can receive is the additional cost to purchase the same quantity of eggs.

**Liquidated Damages**: These are the damages established by the contract in the event of default. They must be reasonably related to costs of breach. The court will scrutinize excessive liquidated damages. Generally, construction contracts have a completion date. Then they will have a clause that will state how much per day the contractor will be charged for late delivery of the building.

**Example**: The Smiths have contracted with Wishful Dreams Construction Co. to build them a home to be complete in 8 months. The Smiths know they will have to move out of their home and into their new home in exactly 8 months. So, they place a liquidated damages clause in the contract of $1,000/day. Hotels and motels around the area have a going rate of $150 to $195 a day. Also, furnished apartments can be rented for $1,100 per month. Is the $1,000/day liquidated damages clause reasonably related to the Smith’s cost or is it punitive in nature? If the court decides the clause is punitive, the court will adjust the clause to reflect the true costs to the Smiths.

**The earnest money in the TREC contracts can be used as liquidated damages.**

**Exemplary Damages**: Fines that are used to punish the breaching party. Typically, courts will use exemplary damages to make an example of the breaching party for being grossly negligent or intentionally fraudulent. Courts will opt to use exemplary damages when actual or liquidated damages do not seem sufficient enough to compensate the injured party.
Let’s Review

Using these terms below fill in the blanks below.

<table>
<thead>
<tr>
<th>Both parties</th>
<th>Rescind</th>
<th>Impossibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Novation</td>
<td>Merger</td>
<td>Sue for damages</td>
</tr>
<tr>
<td>Liquidated</td>
<td>Actual damages</td>
<td>Exemplary</td>
</tr>
</tbody>
</table>

1. Courts can apply different types of damages in event of a breach of contract. If they believe there was intentional fraud or gross negligence they can apply _______ damages as punishment.
2. Earnest money can be used a _______ damages, releasing everyone from the contract.
3. If a buyer finds there has been misrepresentation in regard to his or her contract they can _______ the contract without penalty.
4. If a buyer wants to force a seller to continue with a contract and transfer the property to him or her they will sue the seller for _______.
5. If John has a lease that will not expire for six more months. John decided to purchase the property and closed yesterday. John’s lease was discharged by _______.
6. If a lot is under contract for a home builder to build a home on it and suddenly the zoning is upzoned to commercial property the contract will be discharged by the _______ of performance.
7. If a contract has not been enforced by the period allowed by the Statute of Limitations it can be discharged by a _______.
8. If a contract is discharged by mutual termination it means that _______ agreed to terminate the contract.
9. When the parties agree to discharge a contract with replacing it with a new contract it is a _______.
10. During a contract merger the _______ contract is merged into the _______ contract.
11. If a seller states he will not do the repairs that he agreed to in the contract, the buyer can decide to discharge the contract or _______.

12. The money that was actually lost because of a default under the contract can be recovered by a suit for _______.

**Answer Key**

1. Courts can apply different types of damages in event of a breach of contract. If they believe there was intentional fraud or gross negligence they can apply *exemplary damages* as punishment.

2. Earnest money can be used a *liquidated damages*, releasing everyone from the contract.

3. If a buyer finds there has been misrepresentation in regard to his or her contract they can *rescind* the contract without penalty.

4. If a buyer wants to force a seller to continue with a contract and transfer the property to him or her they will sue the seller for *specific performance*.

5. If John has a lease that will not expire for six more months. John decided to purchase the property and closed yesterday. John’s lease was discharged by *merger*.

6. If a lot is under contract for a home builder to build a home on it and suddenly the zoning is upzoned to commercial property the contract will be discharged by the *impossibility* of performance.

7. If a contract has not been enforced by the period allowed by the Statute of Limitations it can be discharged by a *lapse of time*.

8. If a contract is discharged by mutual termination it means that *both parties* agreed to terminate the contract.

9. When the parties agree to discharge a contract with replacing it with a new contract it is a *novation*.

10. During a contract merger the *inferior* contract is merged into the *superior* contract.

11. If a seller states he will not do the repairs that he agreed to in the contract, the buyer can decide to discharge the contract or *sue for damages*. 
12. The money that was actually lost because of a default under the contract can be recovered by a suit for *actual damages*.

**Contracts Used in the Real Estate Business**

There are many contracts used in the real estate business. They include:

- Listing Agreements
- Buyer Representation Agreements
- Sales Contract
- Property Management Agreements
- Lease Agreements
- Agreements between Brokers
- Independent Contractor Agreements

As we go through the various types of contracts keep in mind the parties that can be liable under that contract. For example, if a buyer has signed a Buyer Representation Agreement with John at ABC Realty but buys a property from Max at XYZ Realty the only person liable to John for commission is the buyer. (The parties to the agreement are John and the Buyer). The Buyer Representation Agreement is between John and the buyer. Max has no part of that. If Max interfered with John’s relationship with his buyer, Max could be guilty of a violation of the NAR Code of Ethics but Max is not responsible for John’s commission. The buyer is responsible for the agreement in the Buyer’s Representation Agreement. If the buyer has also signed a Buyer’s Representation Agreement with Max, the buyer may owe both agents a commission.

Even if the property was listed with Midtown Realty and they advertised in MLS that they would share their commission with an agent that sold the property it does not solve John’s problem. If both John and Max showed the property it may end up going to arbitration to determine who was the procuring cause of the sale. If Max wins in arbitration he will share in the commission with the listing broker and John will still need to look to the buyer to get paid a commission.
Remember that if there was NO Buyer Representation Agreement John would have no possible way of getting paid under these same conditions. It is always best for agents to have written agreements with their clients that specify the obligations on both sides.

**The Purchase Contract** *(The parties are the buyer and the seller)*

The sales contract, also known as the purchase contract, is the most important document in a real estate transaction because it establishes the details of the agreement between the buyer and seller and identifies their legal rights and obligations.

The sale contract includes the price that the buyer is willing to pay, the amount of earnest money he or she will give and any other conditions that the buyer wants to stipulate; it is essentially the buyer’s written offer to purchase real estate.

Once a sales contract is agreed upon by both parties it starts the process of the title company checking the public records to determine if the seller can transfer good title and checking for any encumbrances that will affect the property. It also starts the process of the buyer being able to communicate the type of financing they will need to purchase the property, to their lender. A sale contract protects both the buyer and seller by ensuring that both parties uphold their promises.

The buyer and the seller will both have a series of obligations to meet according to the contract. Most of the obligations have a time limit. Usually the contract says something like “to be delivered by the _____ day after the effective date of the contract”. The effective date of the contract is the date both parties have signed the written contract, initialed any changes and communicated the fact that the contract has been accepted to the other party or their agent. Agents fill in the effective date on the contract, on behalf of their broker.

Contract days are calendar days. Week-ends and holidays count. You always start counting on the day after the effective date. So if the contract became effective on April 3rd, the first day will be the 4th. If the contract says one of the parties has 3 days to do
something it must be done before midnight on the 6\textsuperscript{th} unless a different time is stipulated in the contract.

Paragraph 23 of the TREC One to Four family contract is a good example. If the buyer is purchasing an option to terminate and the effective date is the 3\textsuperscript{rd}, the contract says the option money will need to be to the seller by midnight on the 6\textsuperscript{th}. If the buyer decides to use his option to terminate within the 10 days the parties agrees to the Notice of Termination will need to be to the seller by 5PM on the 13\textsuperscript{th}.

\textbf{(Note:} When you deliver something to someone’s agent it is the same as delivering it to the party. Delivering the option money to the listing agent is acceptable. Only to the Seller or his agent. \textit{Never to the title company.})

\begin{verbatim}
23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer’s agreement to pay Seller $____ (Option Fee) within 3 days after the effective date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within ___10___ days after the effective date of this contract (Option Period). Notices under this paragraph must be given by 5:00 p.m. (local time where the Property is located) by the date specified. If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee to Seller within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded; however, any earnest money will be refunded to Buyer. The Option Fee \_
\_
will \_will not be credited to the Sales Price at closing. \textbf{Time is of the essence for this paragraph and strict compliance with the time for performance is required.}
\end{verbatim}

The “time is of the essence” statement in this paragraph means the time frames in this paragraph are very specific and cannot be late. It is the only paragraph in the contract that uses that very legal language. The rest of the contract uses a “reasonable time” theory. Time is of the essence is also included on several specific addenda. Agents must
never write time is of the essence on a contract. It changes legal rights of the parties and is the unauthorized practice of law.

Information Needed to Complete the Contract Form

The following information will be needed to fill out the contract form:

- Name, address, telephone, e-mail, and fax number of the parties.
- Legal description and street address of the property.
- Type of financing, cash down payment, term, etc.
- Amount of earnest money.
- Name and address of title company, telephone, e-mail, fax, closer’s name.
- Who will pay for the title policy?
- Does the buyer want the survey amendment to the title policy and who will pay for it?
- Is the seller going to furnish the existing survey and affidavit or will there be a new survey? If a new survey, who will pay for it?
- Is there any specific thing the buyer wants to be able to do at the property after closing that they need time to research? If so it needs to be listed as an objection possibility under Paragraph 6D, i.e. add a swimming pool, park an RV in their driveway, keep their five dogs, etc.
- How many days after the buyer receives the Exception Documents, the Commitment, and the Survey does the buyer need to make objections?
- Is the property in a Mandatory Home Owner’s Association?
- Has the buyer received and reviewed the Seller’s Disclosure Notice? If not when?
- Was the property built before 1978?
- Are there any specific treatments or repairs the buyer wants to ask to be included in the offer price?
- When do the parties plan to close?
- Will possession be at closing and funding or is a temporary lease needed?
- Are there any **factual statements or business details** that need added to Special Provisions?
• Is the seller willing to pay any of the buyer’s closing cost?
• Where and how do the parties want any notices regarding the contract to be sent?
• What addenda will need to be added to the contract?
• Does the buyer want an option to terminate? The parties will need to agree on the amount of option money and the number of days for the right to terminate.
• Do the parties want their attorneys listed?
• Name and license number of both brokers
• Name, office address, telephone, fax and e-mail for both agents.
• Name and telephone for the licensed supervisors of both agents.
• The representation each broker has with their client.

The contract will be used throughout the transaction and guides the parties, the lender and the title company. It is important the contract be complete and be correct.

As with any other type of contract, a real estate sale contract must meet the minimum requirements for a legally enforceable contract; this means that all parties bound by the contract must be legally competent and mutually agree to all terms in the contract. The contract must also contain lawful objective, include consideration, adhere to the statute of frauds and have a legal description of the property being conveyed.

The TREC One to Four Family Residential Contract describes the land, the improvements and the accessories in paragraph 2.

2. PROPERTY: The land, improvements and accessories are collectively referred to as the “Property”.
   A. LAND: Lot Block__, ________________Addition, City of _____________, County of ______, Texas, known as _____________________________(address/zip code), or as described on attached exhibit.
   B. IMPROVEMENTS: The house, garage and all other fixtures and improvements attached to the above-described real property, including without limitation, the following permanently installed and built-in items, if any: all equipment and
appliances, valances, screens, shutters, awnings, wall-to-wall carpeting, mirrors, ceiling fans, attic fans, mail boxes, television antennas, mounts and brackets for televisions and speakers, heating and air-conditioning units, security and fire detection equipment, wiring, plumbing and lighting fixtures, chandeliers, water softener system, kitchen equipment, garage door openers, cleaning equipment, shrubbery, landscaping, outdoor cooking equipment, and all other property owned by Seller and attached to the above described real property.

C. ACCESSORIES: The following described related accessories, if any: window air conditioning units, stove, fireplace screens, curtains and rods, blinds, window shades, draperies and rods, door keys, mailbox keys, above ground pool, swimming pool equipment and maintenance accessories, artificial fireplace logs, and controls for: (i) garage doors, (ii) entry gates, and (iii) other improvements and accessories.

D. EXCLUSIONS: The following improvements and accessories will be retained by Seller and must be removed prior to delivery of possession:

Read paragraph 2 carefully. Notice that “property” includes the land, the improvements and the accessories. Paragraph 2B describes the Improvements and paragraph 2C describes the Accessories. Improvements are “permanently installed and built-in items” while accessories are not attached or built-in, but still stay with the property.

Notice that mounts and brackets for TV or speakers are considered improvements and stay with the property while the TV and the speakers do not stay. Shrubbery and landscaping stay, the seller cannot take the rose bush. Swimming pool equipment and maintenance accessories stay as accessories.

The same Land, Improvements and Accessories are listed on the TAR Listing Agreement. The listing agent should review this list with the seller to be sure the seller understands they cannot take the draperies that match their bedspread unless they are going to list that as an exclusion in 2D. If the seller does exclude an item on the listing
agreement as an exclusion, the agent will want to be sure it is listed as an exclusion on the sales contract.

If the parties want to add additional items of personal property to stay with the property (that are not already listed in 2B or 2C), you can attach the Non-Realty Items Addendum.

Legal Property Description

Real estate sale contracts must have a legal property description because courts will use this information to determine whether the subject property can be identified with reasonable certainty. Although the subject property’s address provides an estimation of where the property is located, a legal description allows a surveyor to identify the exact boundaries of a property.

There are three methods used to describe real estate.

1. **Metes and bounds**: Metes and bounds is a legal land description method that identifies the exact dimensions and location of a lot in reference to a fixed and permanent monument. Metes refers to the distance measurements used in the description, and bounds refers to the directions of the boundaries that enclose the parcel of real estate.

2. **The rectangular survey system**: The rectangular survey method, also known as a government survey or U.S. public lands survey, uses the longitude and latitude system of mapping. This method uses a surveyed grid of meridians, baselines, townships and ranges to describe land.

3. **Recorded plats**: The recorded plat system of land description is also known as the lot-block-tract system, reordered survey or recorded map method. It uses the metes and bounds method of land description to locate the borders of each parcel. Once the surveyor establishes the property’s perimeter, he or she records the dimensions on a plat (map) for easy reference.
**Earnest Money**

The earnest money shows that the buyer is highly interested in the property and is willing of closing the sale. Once a buyer signs a purchase contract, he or she is required to pay the earnest money specified in the contract to exemplify this interest.

The earnest money is essentially a deposit that a buyer makes to show that he or she is making the offer in good faith and is serious about his or her offer; it also exhibits the buyer’s intent to carry out the terms in the agreement. Sometimes, sellers will stipulate that the earnest money is nonrefundable because this assures the seller that the buyer has good intentions. Generally, the deposit should be enough to discourage the buyer from defaulting and cover any expenses that the seller or broker incurs if the buyer defaults. The amount of earnest money required can depend upon the buyer’s level of interest in the property; however, most of the time, both parties must come to a mutual agreement as what a reasonable deposit is.

Earnest money is not required to create a legally enforceable contract, and it does not serve as consideration in a contract; instead, a buyer can use the earnest money as a credit toward the down payment or get a refund of the earnest money at the closing of the sale. Another purpose of earnest money is to act as liquidated damages in case of default.

Until the seller accepts the offer and the buyer is notified of that acceptance, the earnest money cannot be deposited. Once the offer has been accepted, the broker then has the power to deposit the earnest money; however, he or she must do this by the close of the second business day after the contract has been executed. (Signed by all parties and acceptance communicated is another way the word “executed” is used.)

Most states will require that sales contracts:

- Be in writing
- Be signed by the parties bound by the contract
- Contain evidence of intent to convey ownership interest
Identify the vendor and vendee
Identify the subject property

Usually, a title insurance company will hold the earnest money until the offer has been accepted; however, in the cases where the broker holds the earnest money, he or she must deposit the funds into an escrow account.

**Escrow**

When a buyer places money in escrow, he or she is placing something—usually money—into the custody of a third party until the terms and conditions of a contract are met. Escrow accounts ensure that there are always funds available to pay for any damages, taxes or insurance. Earnest money is placed into an escrow account to ensure that the seller and broker are compensated if the buyer defaults. It is very common in Texas for the title company to act as the escrow agent. The title company collects all the money for the sale, collects all the necessary paperwork, prepares the deed, pays all expenses for the sale, etc.

**Writing the Offer**

When an offer is being prepared it is the buyer's agent's job to understand every line in the contract. Prepare a cost analysis for the buyer. Review the contract with the buyer being sure they understand every item before they sign it.

Remember that the parties (either one) can withdraw their offer until you have final signed acceptance and communication of that written acceptance.

Buyers’ agents should continue to show other properties to the buyer until an offer has been accepted.

Never suggest the buyer make more than one offer at a time. If the buyer wants to make an offer on another property be sure to ascertain the buyer has the option to terminate
the first contract or instructs you to withdraw the first offer. Be the buyers advocate at all time.

Remember that agents give advice and counsel. The buyer makes the decision and as their advocate, agents back them up and try to make it happen for them.

**Follow Up Until Closing with the Buyer**

Prior to closing the Title Company will send a commitment for title insurance to the buyer. The buyer’s agent should also receive a copy of the Commitment. Now is the time to double check the names of the parties, the legal description of the property, and any issue that will not be cleared up at closing. The buyer will want to determine if anything is being reserved by the seller. i.e.: mineral rights. Be sure the buyer is aware if all of their obligations and time requirement.

**Presenting the Offer**

When an offer is received it is the listing agent’s job to review every line in the contract. Remember a few words can change the closing statement drastically. Avoid surprises. Prepare a net sheet for the seller. Review the contract with the seller being sure they understand every item before they sign it. If they have any unusual concerns advise them to speak with an attorney before signing the offer.

Remember that the parties (either one) can withdraw their offer until you have a final signed acceptance and communication of that written acceptance.

Listing agents should continue to present all offers to the seller. Even when the property is “pending” the seller may be able to negotiate a Back Up Offer.

Never suggest the seller counter more than one offer at a time. No offer has priority over another offer. Seller gets to see all offers and decide what to do. The seller has the right to accept one offer, reject one or both offers, counter one offer or ignore both offers. The
seller is not obligated to even accept a full price offer. The listing agent's commission may have been earned if the seller refuses a full price offer.

If the seller wants to stay in contact with both buyers he could write them each a letter saying he was NOT accepting their offer but would consider it more favorably if they made certain changes. That way seller is obligated to nothing and the decision is back in the buyer's court. The agent must be the sellers advocate at all times. Help your seller negotiate the very best offer possible.

Remember that agents give advice and counsel. The seller makes the decision and, as their advocate, agents back them up.

**Follow Up with the Seller During the "Pending" Stage**

Stay in close contact with the seller throughout the process. Remember if you learn anything of importance regarding the transaction you owe the seller the duty of full disclosure.

Be sure the seller is aware of their responsibilities under the contract. For example, delivery of the survey and the affidavit, seller's disclosure, lead based paint information, home owner association information, having utilities on, etc.

**Forms**

Many forms are used in the real estate business. The Texas Real Estate Commission has many forms that can be obtained from their website or are available through the zip forms program offered by Texas Association of REALTORS® for their members. TREC has 6 promulgated (required) contract forms, 13 promulgated addenda that can be added to the contracts, 2 approved addenda, 2 promulgated temporary lease agreements, 1 amendment to change the contract that has already been accepted and several forms that are not contract forms but are notices or disclosures. TREC’s forms are available to the public but TREC issues a warning that the contacts should be completed by someone knowledgeable about the forms.
Each of the six contract forms can be specialized by the use of the Addenda TREC has furnished. Just by attaching an addendum the contract becomes contingent upon the sale of another property or becomes a back-up contract in case a primary contract falls through. The Third Party Financing Addendum is a commonly used addendum to make the contract contingent, for a limited period of time, upon the buyer’s ability to get financing.

Listing agreements, buyer representation agreements, lease agreements, property management agreements are not available from TREC. Many brokers have these forms prepared by their Texas licensed attorney. Members of the Texas Association of REALTORS® (TAR) have access to these forms through TAR. TAR forms are prepared by TAR attorneys and are copy written forms. They are not available to the public.

Let’s Review

Using the following words, fill in the blanks of the questions below.

Reasonable Time Cannot be late Encumbrances
Record plat system Contract Rectangular survey system
Metes and bounds 2nd Never
Calendar Title Company Effective date

1. The _______ establishes the details of the agreement between the buyer and seller and identifies their legal rights and obligations.

2. The title company will be checking the public records to determine if the seller can transfer good title and checking for any _______ that will affect the property.

3. Contract days are _______ days.

4. The _______ of the contract is the date both parties have signed the written contract, initialed any changes and communicated the fact that the contract has been accepted to the other party or their agent.

5. Option money must be delivered to the seller or his or her agent, never to the _______.

Please fill in the blanks with the appropriate words from the list provided.
6. Except for paragraph 23 the TREC contracts uses a _______ theory.
7. Time is of the essence in a contract means that performance _______.
8. Agents must _______ add legal language like “time is of the essence to a contract.
9. _______ is a legal land description method that identifies the exact dimensions and location of a lot in reference to a fixed and permanent monument.
10. The _______ uses a surveyed grid of meridians, baselines, townships and ranges to describe land.
11. Lots and blocks are part of the _______ used to describe land.
12. Earnest money must be deposited into escrow by the end of the _______ working day after the contract is fully accepted.

Answer Key
1. The contract establishes the details of the agreement between the buyer and seller and identifies their legal rights and obligations.
2. The title company will be checking the public records to determine if the seller can transfer good title and checking for any encumbrances that will affect the property.
3. Contract days are calendar days.
4. The effective date of the contract is the date both parties have signed the written contract, initialed any changes and communicated the fact that the contract has been accepted to the other party or their agent.
5. Option money must be delivered to the seller or his or her agent, never to the title company.
6. Except for paragraph 23 the TREC contracts uses a reasonable time theory.
7. Time is of the essence in a contract means that performance cannot be late.
8. Agents must never add legal language like “time is of the essence to a contract.
9. Metes and bounds is a legal land description method that identifies the exact dimensions and location of a lot in reference to a fixed and permanent monument.
10. The rectangular survey system uses a surveyed grid of meridians, baselines, townships and ranges to describe land.
11. Lots and blocks are part of the recorded plat system used to describe land.
12. Earnest money must be deposited into escrow by the end of the 2nd working day after the contract is fully accepted.

**Listing Agreements (Parties are the seller and the listing broker)**

The *listing agreement* is the written contract between the owner of real property and the agent representing the owner in the marketing and sale of that property. This document outlines the terms and conditions of each party, namely, the agent’s responsibility to represent the principal to the best of his or her ability in accordance with the law and the principal's responsibility to pay the stated commission to the agent for his or her expertise and service. A listing agreement should be detailed and comprehensive so as to avoid any misunderstandings regarding the obligations and intentions of each party. At a minimum, the listing file should include the following information:

- The Information About Brokerage services form
- An explanation of agency duties your company provides to the principal and the third party
- Names of involved parties
- Legal description and physical address of listed property, along with any other fixtures to be included in the sale (accessories not already listed in the contract)
- The beginning and termination dates
- Terms of commission for agent’s participation and seller’s agreement to pay upon agent’s completion of contractual duties
- Terms of the sale, including listed price and financing options
- Remaining balance of the seller’s mortgage, if any, as of the start date of the contract
- Type of listing
- Written permission to market the property in a reasonable manner
- Written permission to keep a lockbox on the premises
- Written consent for the broker to become an intermediary, if applicable
- Fair housing language and logo
- Dated signatures of involved parties
The Texas Association of REALTORS® (TAR) provides a listing agreement for use by its members. TREC does not provide listing agreements. They are not promulgated forms. The TAR forms are drawn by Texas attorneys and are legal for licensees to use. Brokers can also have their own Texas licensed attorneys draw the forms.

There are four possible listing agreements that can be made between the agent and principal:

1. Open listings
2. Exclusive right-to-sell listings
3. Exclusive agency listings
4. Net listings

**Open Listings (MLS does NOT accept)**

Open listings allow for a seller to list his or her property concurrently with a number of competing brokers or to sell the property on his or her own without liability for a commission payment. Some sellers believe that this type of listing works in their favor because more prospects come from being listed with various brokerages, and the seller will not be locked into paying a commission in the event the property is sold as a result of the seller’s own initiative. In addition, the open listing policy releases the seller from any obligation to inform the other listing brokers when the property goes under contract or becomes closed. The sale of the property under such an agreement essentially cancels all outstanding listings.

Real estate licensees, on the other hand, generally avoid open listing agreements, primarily because it is difficult to determine who is subject to the commission payment when multiple brokers are involved. Furthermore, brokers do not feel protected in this type of agreement because it may occur that a licensee who diligently markets and advertises a property will not be rewarded for his or her efforts if another licensee secures the sale of the property.
Exclusive Right-To-Sell Listings (MLS accepts)

Real estate professionals generally prefer exclusive right-to-sell listings over other listing agreements. This type of agreement states that as long as the property is sold within the stipulated time frame of the contract, the listing broker named in the contract will receive a commission for his or her role as agent in the real estate transaction. It does not matter how the sale is secured, whether by the named listing agent, another agent or if the owner finds a buyer without the listing agent’s assistance. Regardless, a commission must be paid to the listing agent, who holds exclusive rights to the commission. The listing is the marketing agent. They market the property to all of the other agents in town as well as their own clients.

Clearly, when comparing these terms with those of an open listing agreement, it remains obvious why real estate licensees favor this approach. From the licensee’s perspective, holding an exclusive right to a commission protects him or her from the possibility of dedicating precious time and effort to a fruitless real estate transaction. For this same reason, real estate professionals encourage sellers to consider exclusive right-to-sell listings over the alternative listing agreements. They argue that when an agent has a vested interest in a property, he or she is more willing to exert the time, effort and finances to the diligent marketing of that property.

Because the listing agent has a secure hold on the commission, he or she can spend more time and energy finding a qualified buyer. View this in contrast to an open listing agreement, where brokers may expend less promotional effort and may settle for an offer below the property’s market value, for fear that another broker may secure the sale of the property before they do and consequently receive the commission.

Exclusive Agency Listings (MLS accepts)

Exclusive agency listings combine elements of open listing agreements and exclusive right-to-sell agreements. As with open listings, exclusive agency listings release the owner from any obligation to pay a commission in the event that the owner secures the sale of the property. As with an exclusive right-to-sell listing, the seller agrees to list the
property with only one broker during a specified listing term. The distinguishing characteristic of exclusive agency listings is that the named listing broker is owed commission only if the property is sold by anyone other than the owner. It is this feature that can lead to problems on occasion. In an exclusive agency listing agreement, an owner may conspire with the broker’s prospective buyer to execute the sale of the property after the contract expires so as to avoid the payment of a commission to the named listing broker. In this case, the listing broker can only collect commission by proving that he or she was the procuring cause of the sale, meaning the individual who found a ready, willing and able buyer and whose actions put into motion the fulfillment of the agency obligations.

**Net Listings (MLS does Not Accept)**

Net listings are listing agreements in which the seller pays as commission any amount over the listing price set in the contract. A seller may choose to enter into a net listing agreement if that seller has a set price that he or she will accept for the property and does not wish to negotiate other offers with prospective buyers. Net listings can be issued in conjunction with open listings, exclusive right-to-sell listings and exclusive agency listings.

**Consider the following scenario**

Seller X has a parcel of land that he has been trying to sell on his own for quite some time. Tired of dedicating effort to the marketing of the property but unwilling to accept the low offers he has received in the past, he calls upon Licensee Y to secure the sale of the lot for no less than $100,000. Seller X agrees that in exchange for not being bothered with the details of the real estate transaction, Licensee Y will receive as commission the difference between the actual selling price and the seller’s desired net amount. Shortly thereafter, Licensee Y secures the sale of the property for $110,000, and she walks away with a 10% commission.

In many states, net listings are illegal because of the potential risk to both the seller and the licensee. Although they are permitted in Texas, many real estate licensees advise against them, and they are not commonly used. In Texas, the agent may only take a net
listing when the owner insist upon it and only if the agent is certain the owner is aware of the current market value.

Think back to the previous example of the parcel of land that was sold for $110,000 with a 10% commission. At first glance it may seem that the licensee would be willing to dedicate a great amount of time and effort to the marketing of this property because of the opportunity to secure such a high commission rate. Though this may indeed work in some cases, this is not guaranteed.

**Here is the same situation but with a different outcome**

Again, Seller X requires a net amount of $100,000 for the parcel of land, allowing for Licensee Y to accept the price differential between this amount and the actual selling price. Licensee Y, hoping to receive a higher than usual commission for her involvement, puts a great amount of time, energy and money into promoting the property, which she lists for $110,000. After Licensee Y has spent a few hundred dollars and a number of hours on the marketing of the property, a prospective buyer makes an offer on it. However, the offer is for only $100,000. Because Licensee Y must honor the interests of her client, she must communicate this offer to Seller X, who is pleased that he'll receive the desired amount and, therefore, accepts the offer. In this scenario, Licensee Y walks away with nothing except lost time, energy and money.

**Finally, here is yet another version of events**

Seller X again requires $100,000 for the sale of his property. Choosing not to disclose to Seller X that the actual market value of the property is substantially higher than his desired net amount, Licensee Y lists the property for $130,000. Shortly after putting the property on the market, a buyer agrees to buy the piece of property for the listed price of $130,000, thereby securing a 30% commission for the agent. In this situation, Licensee Y seems to have walked away with the better end of the bargain.
However, the Texas Real Estate Commission requires that net listing agreements can only be made if the principal is absolutely unwilling to consider any other offers and is fully aware of the market value of the property. In this scenario, Licensee Y did not disclose the fair market value of the property to Seller X and can be held liable for withholding information and knowingly misleading her client.

The names of all parties to the contract: All persons with an ownership interest in the property must be named in the listing agreement, and the agreement must have their signatures. If one or more owners are married, then their spouses should also be named and their signatures included in the listing agreement. If the property is leased to a tenant or tenants, whether entirely or in part, that information is a material fact that should be disclosed and the terms of the lease(s) provided. There are also separate addenda to the agreement where sellers or tenants consent to the showing of the property and the placing of a lockbox on it for entry when the occupant is not present.

The real estate broker or firm: The listing salesperson’s name as well as his or her broker’s name and the company name, if applicable, are required. Remember that a written contract evidencing an agreement with the seller is required to entitle a licensee to a commission or fee.

The description of the property: This would cover the legal description as well as the street address. These items will be necessary in the final sale contract. If the property is an acreage tract and the seller does not have a good legal description, you may have to go to the county deed records and obtain a copy of the original deed. This may be especially helpful if the property does not front on a public street, so that you can confirm legal accessibility to the property, something most title companies require.

Real property versus personal property: Any items of real property or personal property that is listed in the listing agreement as Improvements or Accessories that will be removed by the seller before closing must be specifically excluded. These items may
become points of negotiation in the final sale contract and must be addressed again there because a buyer is not bound by a listing agreement.

**Leased equipment:** A matter that should also be covered when identifying what property conveys is “leased equipment.” Water softeners, cable television boxes and security systems are some examples of items that may be leased by the owner. The listing agreement should address the length and cost of the lease agreement as well as whether the items have transferability.

**The listing price:** This is the expected gross sale price. The seller’s net proceeds will be determined by the gross sale price minus any unpaid real estate taxes, closing costs, remaining mortgage balance and any other liens or outstanding debts secured by the property. The listing price is merely the initial asking price, not the price for which the property will end up selling. Other provisions of the listing agreement spell out that the broker will earn the fee or commission if and when the broker presents an offer from a ready willing and able buyer at the listing price or another price acceptable to seller.

Paragraph 5B and 5C, in the TAR listing agreement reads as follows:

B. **Earned:** Broker’s compensation is earned when any one of the following occurs during this Listing:
   (1) Seller sells, exchanges, options, agrees to sell, agrees to exchange, or agrees to option the Property to anyone at any price on any terms;
   (2) Broker individually or in cooperation with another broker procures a buyer ready, willing, and able to buy the Property at the Listing Price or at any other price acceptable to Seller; or
   (3) Seller breaches this Listing.

C. **Payable:** Once earned, Broker’s compensation is payable either during this Listing or after it ends at the earlier of:
   (1) the closing and funding of any sale or exchange of all or part of the Property;
   (2) Seller’s refusal to sell the Property after Broker’s compensation has been earned;
(3) Seller’s breach of this Listing; or
(4) at such time as otherwise set forth in this Listing.

**Term of listing agreement:** This is probably one of the most vital portions of a listing agreement because it specifies in writing the dates of commencement and termination. An acceptable offer that results in a contract must be obtained during the listing term for an agent to be entitled to the negotiated fee or commission.

**Broker’s authority and responsibilities:** Includes the broker’s authority to advertise the property and stipulates where it can be advertised, in addition to the seller’s permission for the broker to place a “For Sale” sign on the property and the broker’s authority to work with other brokers through an MLS. Other marketing issues such as when and how showings are to take place are also covered under this paragraph in the listing agreement.

**Commission agreement:** The conditions under which a commission will be paid are specified in this section. If the listing is an exclusive right to sell listing the listing broker is entitled to the commission regardless of who the procuring cause is. The listing broker typically splits the listing commission with the procuring cause of the sale called the “other broker.” The broker and the seller agree to how the commission will be split with the other broker in the listing agreement. What follows is an example of how cooperation between brokers may be handled in a listing agreement.

**Cooperation with Other Brokers:** Broker will allow other brokers to show the Property to prospective buyers. Broker will offer to pay the other broker a fee as described below if the other broker procures a buyer that purchases the Property.

A. **MLS Participants:** If the other broker is a participant in the MLS in which this Listing is filed, Broker will offer to pay the other broker:
   (1) if the other broker represents the buyer: ___ % of the sales price or $____;
   and
   (2) if the other broker is a subagent: ___ % of the sales price or $______.
B. **Non-MLS Brokers:** If the other broker is not a participant in the MLS in which this Listing is filed, Broker will offer to pay the other broker:

   (1) if the other broker represents the buyer: ___ % of the sales price or $____;

   and

   (2) if the other broker is a subagent: ___ % of the sales price or $______.

**Parts of a Listing Agreement**

Once a listing price is agreed upon and the broker and seller agree to the employment relationship, the broker will need to gather detailed information about the property. This information will allow the broker to provide correct information to potential buyers as well as other brokers through the MLS (if applicable). Obtaining this information up front will also help prepare the salesperson to answer most typical questions asked by buyers without having to contact the seller with questions every time. By familiarizing herself with the property she is selling, the real estate professional will be able to gain the confidence of both the seller and buyer. The following information is typically needed for the listing agreement:

- The names and legal relationships, if any, of the owners as well as those of any tenants on the property.
- Proof of both ownership interest and authority to sell.
- The complete legal description and street address of the property, and, if a mobile home or other trailer is involved that is conveyed with a certificate of title, the complete information for that.
- Any property that will not convey that is listed on the listing agreement. The listing agreement, any offers and the final contract all must specify these items as well because the listing agreement does not bind a potential buyer of the property.
- **Seller’s Disclosure of the Property Condition**
  - Construction improvements, including the age, size and type of construction, along with any remodeling done.
  - Construction or structural defects, such as a cracked foundation or leaking roof, as well as any items that may affect the safety and functionality of the property in a permanent manner.
The dimensions of the lot (length and width) or boundary markers on acreage tracks along with the square footage. Obtaining a plat or survey is helpful in determining dimensions.

The number, type and size of each room.

Existing mortgage loan information, including the names and addresses of all lenders, along with all current mortgage liens, loan balances, monthly payments, loan numbers, interest rates, the assumability conditions (if applicable) for the loan and whether the loan may be prepaid without penalty.

Whether the seller is willing to offer special financing and on what terms.

Any outstanding special assessments or tax rollbacks along with their documentation and whether the seller or the buyer will pay for them.

The current property tax amount and assessed value per taxing authority. Request a copy of the most recent tax receipt for this so you have the tax identification numbers necessary to close later.

The current zoning classification and any pending zoning changes. Zoning should be documented. Be prepared to explain what the classifications mean to your clients.

Possibility of future annexation by a municipality and available documentation of this.

Any unusual covenants or deed restrictions.

Neighborhood, association or area amenities and any required dues. The respective organizations should have written copies of this information available for you.

Proximity to schools, churches, parks and public transportation. If the seller does not know this, the information should be obtained elsewhere.

Identification of school district property and the applicable state ranking of schools in close proximity.

Any special features or additional information that would make the property more desirable.

Any required disclosures concerning agency relationships or property conditions.
Terminating a Listing Agreement

A listing agreement may be terminated for a number of reasons other than the expiration of the pre-determined time period. These reasons are listed below:

- Unilateral revocation by the owner or by the broker for just cause. For example, the seller may not cooperate with showings or may want to terminate the agreement because of lack of activity or apparent abandonment by the broker. When there is any type of falling out between the seller and broker, it is usually prudent to terminate the listing agreement rather than exacerbate hard feelings or, worse, risk ending up in litigation.
- Bankruptcy of the seller. When this occurs, the bankruptcy court has the right to block a sale, and usually a trustee over the bankruptcy estate must assist with court approval to proceed, automatically staying any further action by law.
- Destruction of the property that is not repairable.
- Fulfillment of the listing agreement (i.e., the property sells).
- Death or incapacity of seller or broker.
- Mutual agreement of seller and broker. Usually documented by a written agreement to terminate. Sometimes this occurs just because the seller changes his or her mind about selling.
- A change in the use of the property by outside forces, such as a zoning change. For example, a residential property that becomes office space. Since the broker was retained to sell the property as residential, the change makes the contract impossible to execute.

Note that even if the listing is terminated, one party or both parties might owe damages to the other.

The Texas Real Estate License Act says that agency relationships can be terminated at any time by either party. If a listing contract is for six months and the seller notifies the broker after two months, in writing, that the seller no longer wants the broker to work for him/her, the broker must stop working. The broker should pick up signs, stop advertising, remove the property from MLS, etc. Refusing to allow the owner to move on would be a
violation of TREL A. The owner may still have liability. The TAR Listing Agreement says that if the owner defaults under the listing agreement, the broker’s commission is earned and payable now.

Questions and Answers from the TREC FAQ

Q: Does TREC have a promulgated listing agreement form?
A: No. A listing agreement is a private contract between a real estate broker and a property owner and is not promulgated by TREC. The Texas Association of Realtors (TAR) provides certain forms to its members. If you are a member, you may find a listing agreement form that meets your needs through TAR. Otherwise, you should consult with a private attorney.

Q: Can listing agreements be extended?
A: Listing agreements are private contracts between a real estate broker and a seller. The terms of the contract and/or desires of the parties would determine whether the listing agreement can be extended. You should contact a private attorney if you have any questions about extending a listing agreement.

Q: I listed my property for sale with a broker and the broker has done nothing about selling the house. Can I break my contract and list with someone else?
A: Your listing contract with the broker is a private legal contract. TREC is unable to advise you on private contractual matters. If you feel that the broker has not fulfilled the broker's part of the agreement, i.e. advertising, holding open houses, etc., then you may have grounds to terminate the contract but you would need to contact a private attorney for help in making that determination. You could also ask the broker to agree to cancel or release the listing. If the broker agrees, then the contract can be mutually rescinded.

Q: If a broker has an exclusive listing with a seller, may another broker solicit a listing from the same seller that would begin after the other listing expired?
A: Yes. Rule 535.153 states that §1101.652(b)(22) of TREL A does not prohibit a license holder from soliciting a listing from the owner while the owner's property is subject to an
exclusive listing with another broker, provided the listing does not commence until after the current listing expires.

Q: I am changing sponsoring brokers. Do I get to take my listings with me?
A: No. Listing agreements are private contracts between the property owner and the real estate broker, not the sales agent.

Q: My agent moved to another broker’s office and I want them to continue to handle my listing. Can I switch my listing to the new broker’s office?
A: No. Listing agreements are private contracts between the property owner and the real estate broker, not the sales agent. You can ask the original broker to release you from the agreement or contact a private attorney to advise you if you can terminate the listing agreement in some other fashion. TREC does not have the authority to require a broker to release you from a listing agreement.

Q: I signed a listing agreement with a broker and don’t understand some of the terms in the agreement. Can you explain the terms to me?
A: No. TREC is unable to advise you in private contractual matters. You should discuss the terms of the listing agreement with a private attorney.

Q: I am a sales agent and am not sure how to fill out the listing agreement form. Can you help me?
A: No. TREC is unable to advise you on how to fill out a private contract form. You should direct your questions to your sponsoring broker. If your sponsoring broker is unable to help you with your questions about a Texas Association of Realtors (TAR) listing agreement form, you can direct your questions to TAR.
Buyer Representation Agreements (The parties are the buyer and broker)

Buyer representation agreements, or buyer-broker agreements, are similar to listing agreements between the seller and broker. As with a listing agreement, buyer’s representation agreements should be in writing and should define the obligations of each party to the other. The buyer commits to working exclusively with the broker, and the broker commits to working diligently to locate property for the buyer and to negotiate an offer in the best interests of the buyer. The buyer-broker agreement should be limited to a specified time period and should contain the following information:

- Names of involved parties
- Beginning date and termination date
- General characteristics of the property search
- Broker’s and client’s obligations
- Agency relationship/permission for the broker to become an intermediary
- Compensation agreement
- Consent for broker to represent competing prospective buyers
- Fair Housing language and logo
- Terms of a protection period after the termination of the contract calling for the client to honor commission agreement if client enters into a contract to purchase a property that was introduced to the client by the broker during the term of the buyer-broker agreement (as long as broker provides list of all properties shown to client within 10 days of contract termination)
- Dated signatures of involved parties

In an exclusive Buyer Representation Agreement, you will find language similar to the following:

____________________________________
Appointment: Client grants to Broker the exclusive right to act as Client’s real estate agent for the purpose of acquiring property in the market area.

____________________________________
It is a little more challenging to describe the property in the Buyer’s Representation since the exact location is yet to be discovered. Be sure when you complete the Market Area you describe an area with borders such as “City of Austin” or “Dallas County”. If you have multiple city or county possibilities list them all. Example: “Cities of Farmers Branch, Dallas and Carrollton”. The Buyer’s Representation Agreement is only good if the buyer purchases in the market area listed.

A buyer’s agent is expected to find a buyer a home to meet their expectation including looking at new homes, MLS listings, for sale by owners, etc.

The TAR Listing Agreement spells out specifically how commission will be handled between the Buyers Broker and the Buyer Client.

11. BROKER’S FEES:
A. Commission: The parties agree that Broker will receive a commission calculated as follows: (1) ________ % of the gross sales price if Client agrees to purchase property in the market area; and (2) if Client agrees to lease property in the market area a fee equal to (check only one box): _____ % of one month’s rent or _____ % of all rents to be paid over the term of the lease.
B. Source of Commission Payment: Broker will seek to obtain payment of the commission specified in Paragraph 11A first from the seller, landlord, or their agents. If such persons refuse or fail to pay Broker the amount specified, Client will pay Broker the amount specified less any amounts Broker receives from such persons.

D. Additional Compensation: If a seller, landlord, or their agents offer compensation in excess of the amount stated in Paragraph 11A (including but not limited to marketing incentives or bonuses to cooperating brokers) Broker may retain the additional compensation in addition to the specified commission. Client is not obligated to pay any such additional compensation to Broker.
Let’s look at a few examples:

- A buyer agrees that their agent will get paid 4% on the Buyer’s Representation Agreement. They buy a home that was listed in MLS and the listing broker is going to pay the selling broker 4%. Buyer owes -0-.

- They decide to buy a for Sale by Owner and the owner will not pay any commission. The buyer owes 4%. (NOTE: The buyer can instruct their agent to only show them properties that the 4% will be paid by the seller or the seller's agent. It can be made part of the Buyer’s Rep Agreement.)

- They choose to buy a new home and the builder is paying agents 4% plus a bonus. The buyer owes -0-. The agent’s broker gets the 4% plus the bonus.

- They buy a home listed in MLS that the listing agent is only offering to pay the selling agent 2%. They negotiate for the seller to pay 2% of their closing cost which frees up the money to pay the addition 2% they owe the broker.

**Representing Buyers and Seller**

If an agent is going to represent buyers and sellers it is important that they understand agency relationships. Agency is the relationship created when one party authorizes another party to represent him or her and act in his or her interest. For example, the relationship between an attorney and his or her client is a relationship of agency.

*Agency relationships are fiduciary* in nature because one person places trust and confidence in another to responsibly handle the obligations of the position as his or her representative.

These relationships carry special obligations, and most professions, including the real estate profession, provide guidelines for the duties and procedures involved in agency relationships.
Agency Terminology

The first hurdle to understanding agency relationships is the vocabulary used when discussing these relationships. Who are the parties engaged in the relationship and how are they referred to?

- **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.

- **The Principal:** The agent must be empowered by another individual to take on the role of agent. The *principal* is the individual that authorizes another person to act on his or her behalf. This person may also be referred to as the client.

- **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; he or she is also sometimes referred to as the customer.

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

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Principal ➔ Agent ➔ Third Party
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The third party negotiates with the principal through the agent. The agent is obligated to treat the third party fairly and may sometimes even provide helpful services to the third party, but the agent is the fiduciary of the principal and, therefore, must represent the principal’s interests first.

The agent is bound by certain duties and ethics owed to the principal. Written agreements are typically used and serve to provide detailed information about the rules and duties owed by both the principal, or client, and the agent.

- **Authority:** The amount of authority that an agent has differs depending upon the arrangement.
• **Universal:** The *universal agent* has a great deal of authority in his or her principal's affairs. This agent can do anything on behalf of the principal that is allowed by law, such as enter into contracts for the principal and give gifts in the name of the principal. A legal guardian, for example, has all of the power of a universal agent.

• **General:** A *general agent* has more limited authority than a universal agent but is usually authorized to manage all of the principal’s affairs in certain specified areas, like the business manager who is allowed to enter into contracts and make business decisions for a company. A property manager usually also has a general agency relationship with the owner of the property, and he or she is authorized to collect rents, budget expenses for the property, procure tenants, hire employees and generally run the property on behalf of the owner. Associated licensees usually also have a relationship of general agency with their supervising brokers; associated licensees and salespersons have the authority to act in the supervising broker’s name in real estate transactions.

• **Special:** The *special agent* has the most limited authority of any type of agent. Usually, the special agent only has authority in one specific transaction. Also, the special agent may not enter into or sign contracts on behalf of his or her principal. In the real estate industry, the licensee generally has a relationship of special agency with the principal. All listings and buyer representation agreements are in the name of the broker. The broker is the “special agent” for all buyers and sellers. Agents also have different types of *authority.*

• **Authority:** Having the power to perform certain actions for the principal.

• **Actual:** Express agreements and some implied agreements grant actual authority to the agent.

• **Apparent:** Sometimes, the actions or words of a principal can convince a third party that the agent has authority when in fact the agent has no authority. In such a situation, the person who acts as an agent has apparent authority.

• **Express Actual Authority:** Some actions within the scope of the agent’s authority are express actual authority, which means they are those duties that the principal specifically tells the agent to do.
• **Implied Actual Authority:** Other actions within the scope of the agent’s authority fall under implied actual authority, which means actions that are necessary to complete the duties that were expressly authorized. These are generally actions that are customary for the business.

• **Forming an Agency Relationship:** The only requirement for establishing an agency relationship is the consent of both parties.

• **Express Agreement:** Most agency relationships are formed by *express agreement*, where a principal appoints an agent, and the agent accepts. This agreement does not have to be written to be valid; oral agreements are held to the same rules of agency relationships as written ones. However, written agreements are generally considered the safest way to outline the expectations and obligations of the parties involved. In the event that problems arise over the course of the agency relationship, this written agreement acts as a record of the defined contractual terms and expressed intentions of the agent and principal. A listing agreement and a buyer’s representation agreement are examples of express agency agreements. Written agreements protect you, the agent, by clearly spelling out the client’s expectations of you and defining the client’s role in the transaction, such as compensation. Also, written agreements typically contain language allowing the agent to act as an intermediary between the parties. **Intermediary must be consented to in writing.**

• **Implied Agreement:** An *implied agency* relationship arises when a party assumes consent to the relationship based solely upon inferences formed from communication with the other party—it is created by the actions, conduct and words of the parties. With implied agency, the principal and agent may never explicitly state the nature or terms of the relationship, but both parties will be held to the duties of an agency relationship. Because of this possibility, it is important that all people in professions where agency is a common relationship practice vigilant disclosures. If you do not wish to act as the party’s agent, it is vital to inform him or her of this fact to prevent
creating an implied agency relationship. Again, it is highly recommended to state the terms of the relationship in writing.

History of Real Estate Agency

The concept of land ownership meant nothing to our early ancestors. People who survived by hunting and gathering traveled frequently, depending upon the migration of animals and the seasonal climate changes. Once farming techniques were developed, groups of people began settling.

However, no individual person owned land; rather, the entire group or tribe had the use of the land. In some areas of the world, land ownership is still seen this way.

However, in other areas, including England, feudal systems developed, in which kings and other members of royalty owned the land that the peasants worked. Finally, in 1650, it was decreed that people who were not members of the royal class could own land, as well. With this new right, all people were now able to buy, sell, trade or will to heirs the rights to land. Hence, the passage of this right started the real estate industry as we know it today.

When settlers began arriving in America, they claimed land and worked it. Towns were established, which grew into cities. As the young country grew, some people saw an opportunity to make a profit off of the transfer of land rights. These individuals found property owners who wished to sell, kept a list of properties for sale and then found buyers for the properties.

These early real estate “salespersons” were not acting in an agent capacity, that is, they served their own interests, not the interests of the buyer or the seller. The vendor often convinced the owner to sell for a very low price and the buyer to purchase for a high price; the vendor would pocket the difference.
In the 1880s, some vendors realized that it would be necessary to self-regulate their business, or the government would step in. Vendors began organizing locally, and in 1908, the National Association of Real Estate Exchanges, now known as the National Association of REALTORS®, was formed. In 1913, this group created a Code of Ethics for the industry.

The National Association of REALTORS® was unable to prevent state legislation of the real estate industry. Throughout the 1900s, states began passing license laws and acts regulating the industry.

However, the Code of Ethics influenced these acts and laws. In particular, in Texas, The Real Estate License Act is strongly based upon the Code of Ethics. Visit the Web site of the National Association of REALTORS® at www.realtor.org.

The Role of Agency in Real Estate

Agency relationships are the backbone of the modern real estate industry. A seller typically hires a broker to list and find a buyer for his or her home or 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 home or property and negotiate the transaction. Buyers and sellers expect that the brokers and salespeople who help them are on their side.

The Agent

In the context of real estate, 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.

Only a broker can enter into an agency relationship with a seller, buyer, landlord or tenant. However, a licensed salesperson functions as the general agent of his or her supervising broker and acts as the principal’s agent on behalf of the broker. In everyday language, most people refer to the salesperson as an agent.
Seller A visited the brokerage firm of Broker B. Salesperson C was in the office and signed a listing agreement with Seller A. Salesperson C is a general agent of Broker B and was authorized to sign on her behalf. The listing agreement established an agency relationship between Broker B and Seller A, but the general agency relationship between Salesperson C and Broker B also authorizes the salesperson to act as the seller’s agent on behalf of the broker.

This can cause complications if one salesperson in an office is working with the buyer and another salesperson in the same brokerage is working with the seller. In this situation, the supervising broker becomes a dual agent. In Texas, when the broker represents both the buyer and the seller in the same transaction, they must do it under the state laws as an intermediary. This is discussed in detail in the pre-licensing Agency class.

**The Principal**

In a real estate transaction, the principal engages the professional advice and service of his or her agent to aid in the sale, purchase, exchange or lease of real property. The principal, or client, may take the role of a seller, a prospective buyer, an owner wanting to lease his or her property to another person or an individual seeking property to rent. Throughout this course, we will use *seller* to refer generally to both sellers and landlords, and we will use *buyer* to refer generally to both buyers and tenants.

The principal may also be a property owner seeking professional management of property. Agency laws and regulations do apply to property management relationships, but in this course, we will focus on agency relationships with buyers and sellers.

**The Third Party**

The third party is also known as the customer. This individual may be a prospective seller, purchaser, landlord or tenant who expresses real interest and is prepared to and capable of completing a contract toward the sale, purchase or rental of real property.
Who’s Who?

Here are the four parties involved in this particular sale between Buyer and Seller. Read the following description of his or her involvement in this transaction.

In this scenario the buyer is purchasing the property through the listing company. The buyer has no representation.

Buyer is a 3rd Party
I’ve been negotiating with Seller through Salesperson to purchase Seller’s home.

Seller
Salesperson has been representing my interests in the sale of my home.

Salesperson
I work in the Listing Broker's brokerage, and I’ve been negotiating on behalf of Seller in this transaction.

Listing Broker
I’ve had no direct involvement in this transaction, but I am Salesperson’s sponsoring broker.

Note: Sometimes the buyer has their own agent. A selling broker and a selling agent would be added to the group. The selling broker and agent would be representing the interest of the buyer and negotiating on his or her behalf.
Let’s Review

Using the following words, fill in the blanks of the questions below.

Either party  Principal  Listing Agreement
Third party  Exclusive Agency  General Agency
Special Agent  Broker  Customer
Open listings  Fiduciary  Exclusive Right to Sell

1. The _______ is the written contract between the owner of real property and the agent representing the owner in the marketing and sale of that property.
2. _______ allow for a seller to list his or her property concurrently with a number of competing brokers.
3. _______ listings release the owner from any obligation to pay a commission in the event that the owner secures the sale of the property and are listed with only one broker.
4. The _______ listing agreement guarantees the listing broker payment if the property is sold during the term of the agreement.
5. The Texas Real Estate License Act says that agency relationships can be terminated at any time by _______.
6. Agency relationships are _______ in nature because one person places trust and confidence in another to responsibly handle the obligations of the position as his or her representative.
7. The _______ is the individual that authorizes another person to act on his or her behalf.
8. The _______ is the individual with whom the agent and principal enter into real estate negotiations; he or she is also sometimes referred to as the _______.
9. Associated licensees usually also have a relationship of _______ with their sponsoring brokers.
10. The _______ may not enter into or sign contracts on behalf of his or her principal.
11. The _______ is the special agent for all of the buyers and sellers.
Answer Key

1. The **listing agreement** is the written contract between the owner of real property and the agent representing the owner in the marketing and sale of that property.

2. **Open listings** allow for a seller to list his or her property concurrently with a number of competing brokers.

3. **Exclusive agency** listings release the owner from any obligation to pay a commission in the event that the owner secures the sale of the property and are listed with only one broker.

4. The **Exclusive Right to Sell** listing agreement guarantees the listing broker payment if the property is sold during the term of the agreement.

5. The Texas Real Estate License Act says that agency relationships can be terminated at any time by **either party**.

6. Agency relationships are **fiduciary** in nature because one person places trust and confidence in another to responsibly handle the obligations of the position as his or her representative.

7. The **principal** is the individual that authorizes another person to act on his or her behalf.

8. The **third party** is the individual with whom the agent and principal enter into real estate negotiations; he or she is also sometimes referred to as the **customer**.

9. Associated licensees usually also have a relationship of **general agency** with their sponsoring brokers.

10. The **special agent** may not enter into or sign contracts on behalf of his or her principal.

11. The **broker** is the special agent for all of the buyers and sellers.

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**Leasing Real Estate**

Between September 2015 and September 2016 the Texas Real Estate Commission received over 170 complaints against licensees that were in regard to leasing and property management problems. That represented a little over 14% of total complaints for the same period. Most of these cases involved misappropriation, commingling, failure to properly account for rents or security of deposits received or negligence in the
performance of property management duties. The reason that is important is to recognize the additional knowledge required to avoid liability when working in the leasing or property management specialties.

The first thing to realize is that your sponsoring broker is responsible for anything and everything you do. It is imperative that licensees read their office policy manual and determine what the broker has authorized them to do. Many brokers require some specific classes or training before authorizing an agent to do leasing or property management.

Listing a property for lease is similar to listing a property for sale, but there are some important differences. Some of the differences may be:

- You may have a choice of being paid based on one month's rent or on the entire lease amount.
- You may have a choice to be paid on renewals or if the tenant decides to buy the property.
- MLS does accept listings for lease with the owner’s consent
- If your company is going to hold deposits, your broker must have an escrow (trust) account in his or her name to hold the money. Agents cannot have trust accounts.
- The owner may want you to have vendors do repairs or make ready. Most listing agreements have a place to determine how those repairs will be paid for.

You will need information from the owner about his or her expectations for:

- Monthly rent
- Terms for the lease
- Late charges
- Pets
- Security Deposits
- Utilities
- Guest
- Vehicles
- Yard, pool and spa maintenance
• Key boxes
• Repairs

Being the leasing agent is a very different role from being the property manager. A leasing agent turns the security deposit over to the owner. The owner collects the monthly rentals. Usually once the property is leased, the leasing agents job is finished. It was for that one transaction. Situations arising after the lease is signed, such as rekeying the home, tenant walk through, and problems occurring during the leasing period are considered property management services and fall outside the scope of the services that a leasing agent provides. It increases the licensee’s liability if they start doing property management duties without written contract with the owner.

The property manager’s role is on-going. They collect the rent, take care of needed repairs and maintenance, pay the bills and keep the property going. They are responsible for any necessary evictions. They are usually paid some percentage of the monthly rentals. Most property managers also offer leasing services.

The property management agreement authorizes the broker to do or not to do certain things. TREC does not rule on contract disputes, however if a broker is in violation of their agreement, TREC could rule that it was negligence on the part of the broker or his agent.

Under most property management agreements, the broker becomes responsible for being certain the lease complies with the Texas Property Code. Both landlords and tenants have rights established by law.

The Real Estate Center at Texas A&M University publishes a copy of the Landlord/Tenants Guide for Texas. A copy of the guide can be downloaded free at https://assets.recenter.tamu.edu/documents/articles/866.pdf or a hardcopy can be obtained for a fee from the Real Estate Center. Every property manager needs this guide.
A few examples of things the property manager must be aware of are:

On September 1st, 2011 a house bill changed the fire alarm polices for rental properties: HB 1168 applies to a home, mobile home, duplex unit, condominium unit, or any dwelling unit in a multi-unit residential structure that is being leased to a tenant. It essentially makes state law consistent with model codes (some local ordinances already require a smoke alarm in each separate bedroom) by requiring at least one smoke alarm to be placed in each bedroom or in the room used for sleeping, in the case of an efficiency unit. In addition, if multiple bedrooms are served by the same hallway, there must be a smoke alarm in the hallway in the immediate vicinity of the bedrooms; and if the unit has multiple levels, there must be a smoke alarm on each level.

Another one of the challenges for landlords on residential property is to understand what they are required to do in the way of repairs to the property. The Texas Property Code spells out the answer in Subchapter B, Chapter 92, Texas Property Code.

The landlord must make a diligent effort to repair or remedy any condition when:

- the tenant has specified the condition in a notice to the person who collects rent or to the place where the rent is normally paid
- the tenant is current in rent payments when the notice is given, and the condition:
  1. materially affects the health or safety of an ordinary tenant or
  2. arises from the landlord's failure to provide and maintain in good operating condition a device to supply hot water of a minimum temperature of 120 degrees Fahrenheit. The notice must be in writing only if the written lease so requires.

Unless the problem is caused by normal wear and tear, the landlord has **no duty** to repair conditions caused by:

- the tenant
- a lawful occupant of the apartment
- a member of the tenant's family
• a tenant’s guest or invitee

A landlord is liable to a tenant as provided by this subchapter if:

1. the tenant has given the landlord notice to repair or remedy a condition by giving that notice to the person to whom or to the place where the tenant's rent is normally paid;
2. the condition materially affects the physical health or safety of an ordinary tenant;
3. the tenant has given the landlord a subsequent written notice to repair or remedy the condition after a reasonable time to repair or remedy the condition following the notice given under Subdivision (1) or the tenant has given the notice under Subdivision (1) by sending that notice by certified mail, return receipt requested, or by registered mail;
4. the landlord has had a reasonable time to repair or remedy the condition after the landlord received the tenant's notice under Subdivision (1) and, if applicable, the tenant's subsequent notice under Subdivision (3);
5. the landlord has not made a diligent effort to repair or remedy the condition after the landlord received the tenant's notice under Subdivision (1) and, if applicable, the tenant's notice under Subdivision (3); and
6. the tenant was not delinquent in the payment of rent at the time any notice required by this subsection was given.

A tenant’s judicial remedies under Section 92.056 shall include:

• an order directing the landlord to take reasonable action to repair or remedy the condition;
• an order reducing the tenant's rent, from the date of the first repair notice, in proportion to the reduced rental value resulting from the condition until the condition is repaired or remedied;
• a judgment against the landlord for a civil penalty of one month 's rent plus $500;
• a judgment against the landlord for the amount of the tenant's actual damages; and
• court costs and attorney 's fees, excluding any attorney 's fees for a cause of action for damages relating to a personal injury.

A landlord who knowingly violates Section 92.006 by contracting orally or in writing with a tenant to waive the landlord 's duty to repair under this subchapter shall be liable to the tenant for actual damages, a civil penalty of one month 's rent plus $2,000, and reasonable attorney 's fees. For purposes of this subsection, there shall be a rebuttable presumption that the landlord acted without knowledge of the violation. The tenant shall have the burden of pleading and proving a knowing violation. If the lease is in writing and is not in violation of Section 92.006, the tenant's proof of a knowing violation must be clear and convincing.

Just a few of the things required for rental property by the Texas Property Code include:

The Property to be equipped with certain types of locks and security devices, including (with some exceptions):

(1) window latches on each window;
(2) a keyed doorknob lock or keyed deadbolt lock on each exterior door;
(3) a sliding door pin lock on each exterior sliding glass door of the dwelling;
(4) a sliding door handle latch or a sliding door security bar on each exterior sliding glass door of the dwelling; and
(5) a keyless bolting device and a door viewer on each exterior door of the dwelling.
(6) the security devices must be rekeyed and the smoke alarms must be tested each time a new tenant occupies the Property.

Remember, the Property Manager is standing in the shoes of the owner and becomes responsible for seeing that all of the requirements are met. It is not hard to see why this specialty requires special training.

Property Management Q&A (taken from the TREC Broker Responsibility Course)
1. Do all property managers have to be licensed?
It depends on what the property manager is doing for the property owner. If the duties include showing or leasing the property for the owner for which the manager gets paid, a license is required.

A license is also required for any person who controls the acceptance or deposit of rent from a resident of a single-family residential real property unit [TRELA 1101.002(1)(A)(x) and TREC Rule §535.4(g)].

2. May a sales agent be the owner of a property management company?
Yes. A sales agent may own the firm but the business must be conducted through the sales agent’s sponsoring broker.

3. I have a property management company and engage in leasing activity. May I have some of my unlicensed employees solicit business for me?
No. A rental agent who solicits a prospect by phone must be licensed.

4. May an unlicensed assistant show a property to a broker’s client if all the assistant does is open the door and walk silently through the house with the clients?
No. Rule 535.4(c) states that a person must be licensed as a broker or sales agent to show a broker’s listings. A license holder’s unlicensed assistant cannot perform any activities that require a license, and therefore, cannot “show” a property. The rules do not define what “show” a property means.

Generally, in rule interpretation, one should look at the plain language meaning of the word and then put it into context. Merriam Webster Dictionary defines to “show” as “to cause or permit to be seen.” Taking the plain language meaning then, unlocking a house is “causing or permitting” the home to be seen. So, if an unlicensed assistant opens the house for a buyer, that constitutes showing a house.
Further, reading the rule in the context of the law’s purpose of consumer protection, to allow an unlicensed person to open and enter a house for sale would effectively bypass the legislative requirement of requiring fingerprint-based criminal history background checks for all license holders before granting or renewing a real estate license. This requirement is in place to ensure that a person with an inappropriate criminal background will not receive a license that would allow him or her to open and enter homes for sale.

This is a change from a previous interpretation that was contained in an old article regarding unlicensed assistants. After the criminal background check requirement became law, that interpretation became outdated and was no longer correct. So, an unlicensed assistant cannot show the property for a license holder; this applies to both homes for sale and for lease.

(Source: TREC Broker Responsibility Course)

Questions and answers from the TREC FAQS

Q: Is a real estate license necessary in order to be an apartment locator?
A: Yes. TREC requires licensure if the person seeks or has an expectation of compensation for offering to locate a unit in an apartment complex to a prospective tenant. [TRELA §1101.002(6)] In addition, a person may not engage in business as a residential rental locator (apartment locator) unless the person is licensed as a real estate broker or sales agent. [TRELA §1101.351(a)(2), Rule 535.4(k)]

Q: Is TREC interested in compliance by residential rental locators?
A: Yes. The Commission members have instructed the staff to enforce the law vigorously. Unlicensed individuals who conduct residential rental location activity are subject to administrative penalties and criminal charges. [TRELA §1101.757 & §1101.759]

Q: Must a person be licensed to locate apartment units for prospective tenants and be paid by the owner of the apartments?
A: Yes, unless the person is an employee of the owner of the apartments or otherwise exempt, residential rental locators are required to be licensed as either a real estate broker or sales agent.

Q: Must the permission of the owner authorizing the agent to offer the unit for rent be in writing?
A: No, the permission may be in writing or oral. If the permission is given over the telephone, for example, the license holder should document who gave the permission and how it was given in case that information is later requested by TREC in connection with a complaint.

Q: Is a locator permitted to rebate a portion of the locator's fee to the tenant?
A: Yes, as with all license holders, this can only be done with the prior consent of the person the locator represents.
[Rule 535.147(d)] In addition, if advertising a rebate to the tenant of a portion of the license holder’s commission, the ad must disclose that the rebate is subject to consent of the party the license holder represents. [Rule 535.154(m)]

Q: Is it permitted to submit an invoice to an apartment complex falsely claiming that the locator has procured a tenant for the apartment complex?
A: No. The Commission can issue an order revoking the license of a locator found to have engaged in this practice. [TRELA §1101.652(b)(24)]

Q: Are locators subject to the agency disclosure requirements of The Real Estate License Act?
A: It depends. Unless an exception applies, a locator representing either party must disclose that representation on the first contact with the other party. If the transaction concerns a residential lease of less than one year and a sale is not being considered, the locator is not required to provide the tenant with a copy of the statutory information about agency (Information about Brokerage Services). [TRELA §1101.558(c)]
Rules of the Commission 535.146
Since we have determined that managing property and holding money for consumers brings in a lot of complaints to TREC, let’s review what the rules have to say about the Broker’s trust account.

TX Real Estate Commission

(1) “Trust money” means client's money, earnest money, rent, unearned fees, security deposits, or any money held on behalf of another person.
(2) “Trust account” means an account managed by one party for the benefit of another in a banking institution authorized to do business in Texas.

(b) Acceptance of Trust Money

(1) Any trust money accepted by a broker is held in a fiduciary capacity and must be maintained in a designated trust account maintained by the broker or delivered to an escrow agent authorized in Texas in accordance with the agreement of the principals of the transaction.
(2) A sales agent shall not maintain a trust account. Any trust money received by a sales agent must be immediately delivered to the sales agent's sponsoring broker.
(3) Unless a different time to deposit trust money is expressly agreed upon in writing by the principals to the transaction, any trust money received by the broker must be deposited in a trust account or delivered to an authorized escrow agent within a reasonable time, which the Commission has determined to be not later than the close of business of the second working day after the date the broker receives the trust money.
(4) The broker shall not:
    (A) commingle trust money with the broker's personal money or other non-trust money; or
    (B) deposit or maintain trust money in a personal account or any kind of business account.
(5) The following is prima facie evidence of commingling trust money with the broker's own money:
   (A) placing trust money in a broker’s personal or operating account; or
   (B) paying operating expenses or making withdrawals from a trust account for any purpose other than proper disbursement of trust money.

(c) Trust account requirements.
   (1) The trust account must be clearly identified as a trust account;
   (2) The broker may, but is not required to, maintain separate trust accounts for each client or type of trust money maintained by the broker, such as earnest money deposits or security deposits received for the management of rental property.
   (3) If trust money held by a broker is deposited in an interest bearing account:
      (A) the money must be available for disbursement at the appropriate time; and
      (B) unless otherwise provided for by an agreement signed by the party depositing the money with the broker, any interest earned on the money must be distributed to any parties to whom the money is disbursed.
   (4) A broker may deposit and maintain a reasonable amount of money in the trust account to cover bank service fees, including fees charged for insufficient funds. Detailed records must be kept for any funds deposited under this exception.
   (5) If a broker acquires ownership of trust money held in a trust account, including entitlement to compensation, such money must be removed from the trust account not later the 30th day after the date the broker acquires ownership of the money.
   (6) The broker must retain a documentary record of each deposit or withdrawal from the trust account and provide an accounting to each beneficiary of trust money at least monthly if there has been any activity in the account.
   (7) A broker may only authorize another license holder to withdraw or transfer money from any trust account but the broker remains responsible and accountable for all trust money received by that broker and all deposits to or disbursements from the trust account.
(8) If a broker deposits trust money in the form of a check in a trust account and the check is dishonored by the financial institution on which it was drawn, the broker shall immediately notify all parties to the transaction in writing.

(d) Disbursement of trust money.

(1) A broker may only disburse money from the broker's trust account in accordance with the agreement under which the money was received.

(2) If any or all of the parties to a real estate transaction make a written demand for payment of trust money, the broker must pay the trust money to the party or parties entitled to the money within a reasonable time, which the Commission has determined to be not later than the 30th day after the date the demand is made.

(3) If by a subsequent written agreement, all parties to a real estate transaction authorize the broker maintaining trust money to disburse the trust money in a manner not in accordance with the agreement under which the money was received, the broker must pay the trust money to the party or parties entitled to the money under the subsequent written agreement within a reasonable time, which the Commission has determined to be not later than the 30th day after the date the broker receives the subsequent written agreement.

(4) The broker must immediately notify all parties in writing of any disbursement of trust money under subsections (d)(2) or (3).

(5) If the broker cannot reasonably determine to which party or parties the trust money should be paid, the broker may pay the trust money into the registry of a court and interplead the parties.

(e) Records. A broker must maintain all documentation regarding a trust account for four years from the date the document is received or created by the broker.


Monthly Accounting of Money Required - New Rule effective January 1, 2016

Effective January 1, 2016, TREC Rule 535.146(c)(6) requires all brokers to provide accountings, at least monthly, to each beneficiary of trust money being held by the broker.
Any time a broker is holding money in trust and there is any activity in the trust account, the broker is now required to provide an accounting for that money at least monthly. For brokers managing property, it is not enough to just send the money to the owner. Brokers are now required to provide a written accounting along with the money. Brokers must keep a documentary record as evidence of compliance with this rule.

This rule applies to:

- a broker who holds earnest money;
- a broker who holds property management money (rent, security deposits, etc.);
- a broker who holds unearned fees;
- any other money a broker holds on behalf of another person in a trust account.

(Source: TREC Broker Responsibility Course)

**WHO CAN SIGN A CHECK?**

A trust account is used to hold trust funds. TREC Rule 535.146 defines trust funds as money that a license holder accepts belonging to others that is held in a fiduciary capacity. And while a sales agent may not have his or her own trust account — remember only a broker can hold a trust account — a broker may designate a sales agent as an authorized signatory on the broker's trust account. However, the broker remains fully responsible for all activity regarding the account [TREC Rule §535.2(c)].

Because a broker can only designate another license holder as a signatory on a trust account, an unlicensed assistant may not sign checks for a trust account. An operating account differs from a trust account because an operating account typically involves money that belongs to the business itself or the business's owner and does not include money, belonging to another person, that is held in a fiduciary capacity. Take, for example, the bank account from which office expenses are paid: rent, utility bills, or employee salaries. An unlicensed person may be a signatory on an operating account, and a sales agent may also be a signatory on an operating account.

Source: TREC Broker Responsibility Course
Security Deposits

Most residential leases and rental agreements in Texas require a security deposit. This is a dollar amount, usually one month’s rent, that’s intended to cover damage to the premises beyond normal wear and tear, and to cushion the financial blow if a tenant skips out early on the lease without paying. Here’s a summary of Texas landlord-tenant laws that cover the use and return of security deposits.

Does Texas law limit how much a landlord can charge a tenant for a security deposit?

No. In Texas, there’s no statutory limit on security deposits at the state level, but check your city and county laws to see if your municipality has set a cap on security deposits for residential rentals.

What about when a tenant moves out? What is the deadline in Texas for returning a security deposit?

Under Texas law, a landlord must return the tenant's security deposit within 30 days after the tenant has moved out. Landlord need not refund deposit if lease requires tenant to give written notice of tenant’s intention to surrender the premises and tenant fails to do so. Tenant must provide landlord with new address.

How does a tenant protect their security deposit?


During the exhausting process of moving into a new apartment, the last thing on your mind is moving-out day, but since your landlord is probably holding a sizable chunk of your money in the form of a security deposit, it's risky not to prepare for the end of your tenancy right from the beginning. Before you start unpacking dishes and hanging prints on the walls, take a few simple steps to avoid the misunderstandings and disagreements that have made disputes over security deposits legendary.
Look Under the Hood
The tenant should give the unit a thorough inspection before they move in. (Better yet, do it before you sign the lease!) It's best to inspect the premises before you move in; it will be easier to spot problems while the place is bare.

Check the place over for damage, dirt, mildew, and obvious wear and tear. Don't neglect to check out things that might not be readily apparent, such as water pressure and sink drainage in the kitchen and bathrooms, the operation of appliances, the appearance of floors and walls, and the condition of the pads under the carpet.

Use a Move-In Checklist
Make a detailed inventory of what you find. The best way to do this is with a good checklist. The more you record about the unit when you move in, the better position you'll be in when moving out to show that certain problems already existed before you moved into the unit.

Ideally, you and your landlord should fill out the checklist together to prevent any disputes or disagreements. Otherwise, it's smart to bring along a roommate or a friend so that there's at least one other witness to the condition of the unit at move-in time. If you spot problems, describe specifically what is wrong. Rather than simply noting "damage to carpet," for example, state "cigarette burns, frayed edges in carpet next to picture window." The more detailed you are, the clearer it is that you're not responsible for those damages. You and your landlord should both sign the checklist after completing it. Make a copy so that each of you has one.

At the end of your tenancy, you'll make another inspection of the same items, noting their condition at move-out time. If items that were okay at move-in are now damaged, your landlord may hold you responsible for fixing them, but you'll be protected from being billed for damage that existed before you moved in.

Move in and move pictures are also helpful for both landlords and tenants.
What Can the Landlord Deduct from the Security Deposit?

<table>
<thead>
<tr>
<th>Ordinary Wear and Tear: Landlord's Responsibility</th>
<th>Damage or Excessive Filth: Tenant's Responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Curtains faded by the sun</td>
<td>Cigarette burns in curtains or carpets</td>
</tr>
<tr>
<td>Water-stained linoleum by shower</td>
<td>Broken tiles in bathroom</td>
</tr>
<tr>
<td>Minor marks on or nicks in wall</td>
<td>Large marks on or holes in wall</td>
</tr>
<tr>
<td>Dents in the wall where a door handle bumped it</td>
<td>Door off its hinges</td>
</tr>
<tr>
<td>Moderate dirt or spotting on carpet</td>
<td>Rips in carpet or urine stains from pets</td>
</tr>
<tr>
<td>A few small tack or nail holes in wall</td>
<td>Lots of picture holes or gouges in walls that require patching as well as repainting</td>
</tr>
<tr>
<td>A rug worn thin by normal use</td>
<td>Stains in rug caused by a leaking fish tank</td>
</tr>
<tr>
<td>Worn gaskets on refrigerator doors</td>
<td>Broken refrigerator shelf</td>
</tr>
<tr>
<td>Faded paint on bedroom wall</td>
<td>Water damage on wall from hanging plants</td>
</tr>
<tr>
<td>Dark patches of ingrained soil on hardwood floors that have lost their finish and have been worn down to bare wood</td>
<td>Water stains on wood floors and windowsills caused by windows being left open during rainstorms</td>
</tr>
<tr>
<td>Warped cabinet doors that won't close</td>
<td>Sticky cabinets and interiors</td>
</tr>
<tr>
<td>Stains on old porcelain fixtures that have lost their protective coating</td>
<td>Grime-coated bathtub and toilet</td>
</tr>
<tr>
<td>Moderately dirty mini-blinds</td>
<td>Missing mini-blinds</td>
</tr>
<tr>
<td>Bathroom mirror beginning to &quot;de-silver&quot; (black spots)</td>
<td>Mirrors caked with lipstick and makeup</td>
</tr>
</tbody>
</table>
Clothes dryer that delivers cold air because the thermostat has given out
Dryer that won’t turn at all because it’s been over-loaded
Toilet flushes inadequately because mineral deposits have clogged the jets
Toilet won’t flush properly because it’s stopped up with a diaper

**Leasehold Estates**

A leasehold estate is a type of property estate that allows for the use and occupancy of a property that a tenant (lessee) does not actually own. The owner of a leasehold estate owns the “right” to use and occupy the property, for a limited period of time, without owning the property itself. Instead, he or she has personal property ownership of the right of possession, for the duration of his or her lease. This means that while the tenant occupies the property, he or she will have to pay the landlord (lessor) rent.

A leasehold estate is a term used to describe the level of ownership interest in a property. There are two ways to describe land ownership: freehold estates or leasehold estates. In a freehold estate, the property owner has actual ownership and possession of the land (or real estate), and his or her ownership lasts for an unspecified period of time. In a leasehold estate, the tenant has possession of the property (but does not own it), and his or her estate in the property lasts for a specified period of time.

There are four types of leasehold estates.

**Estate for Years**

A lease created under an estate for years (also known as a tenancy for years) stipulates a specific starting and ending time. Usually, the amount of time in this type of lease can be any amount of time: days, weeks, months or years. Once the lease expires, neither the landlord nor tenant needs to act to terminate it. Instead, once the terms of the lease have expired, it is implied that the contract is terminated. In order to renew the lease, the
landlord and tenant must come together and expressly agree to either renew the existing lease or create a new one. (Remember, even a 3 month lease is an “estate for years.”)

**Periodic Estate**

A periodic estate (also known as a periodic tenancy) has a fixed lease period; this means that the lease is automatically renewed at the end of each lease period until the landlord or tenant act to terminate it. A prime example would be a month-to-month lease. In a month-to-month lease, the tenant and landlord have the option of terminating the lease agreement at the end of the month; however, if neither expressly terminates the lease, then it is understood that the lease is renewed. If the periodic estate renews every month, unless the lease specifies a different time requirement for a notice to terminate, it normally requires a 30 day notice from either the landlord or the tenant to terminate.

**Estate at Will**

In a lease under an estate at will (that is, a tenancy at will), the landlord and tenant have all of the typical rights and obligations under any other type of leasehold estate, except that the tenant or landlord both have the right to terminate the agreement at any time. There is no written lease agreement and no exact time expectation. However, the landlord and tenant must give notice, usually 30 days, before ending the right to occupy. Any notice to end the tenancy needs to be given at the start of the rental period. It differs from license to occupy as a license to occupy is not exclusive and can be given to more than one person. An estate at will is exclusive.

**Tenancy at Sufferance**

A tenancy at sufferance occurs when a tenant remains in possession of the property beyond his or her lease's terms, without the consent of the landlord. When this occurs, the tenant is referred to as the holdover tenant because he or she no longer has a standard tenant-landlord relationship. When a tenant remains in possession of a property beyond his or her legal tenancy, the landlord has the right to evict him or her. However, if the tenant offers to pay the landlord rent, and the landlord accepts, the tenancy at sufferance becomes a periodic estate.
Lease Agreements (The parties are the landlord and the tenant)

A lease is essentially a mixture of ownership conveyance and a contract. It is an agreement between a tenant (lessee) and landlord (lessor) that allows the tenant to occupy the landlord’s property for a specified period of time and fixed rate. Usually a comprehensive lease will define the tenant and landlord's rights and obligations, the timeframe of the contract and the amount of money that the tenant must pay for use of the property.

In a lease, the landlord has a right to collect payment and also has a reversionary right; this means that he or she has the power to retake the property after the lease term has expired. Therefore, the landlord's interest in the property is known as a *leased fee estate* plus a *reversionary right*. The tenant’s ownership interest in a leased property is known as a *leasehold estate*.

TREC does not provide lease agreements. Brokers can have the agreements drawn by a Texas Attorney or TAR members can use the TAR lease agreement. Residential lease agreements are different than lease on income producing properties.

Some of the things that will need to be in a residential lease agreement are:

- The names of the parties
- The address and legal description of the property
- The term of the listing- beginning date and ending date
- Will the lease automatically renew to a month to month status when the lease ends?
- If the tenant plans to leave at the end of the lease what notice is required?
- Monthly rent, when it is due, can it be pro-rated on 1\textsuperscript{st} or last month
- Are there restrictions on how the rent is paid (cash, check, cashier's check, etc.) and where is it paid?
- When will the rent be late and how much are the late charges?
- What happens if a check is returned by the bank marked “nsf” or “account closed”?
• What are the rules about pets?
• How much is the security deposit and will the tenant receive interest on the money?

**Notices about Security Deposits**

1. §92.108, Property Code provides that a tenant may not withhold payment of any portion of the last month’s rent on grounds that the security deposit is security for unpaid rent.
2. Bad faith violations of §92.108 may subject a tenant to liability up to 3 times the rent wrongfully withheld and the landlord’s reasonable attorney’s fees.
3. The Property Code does not obligate a landlord to return or account for the security deposit until the tenant surrenders the Property and gives the landlord a written statement of the tenant’s forwarding address, after which the landlord has 30 days in which to account.
4. “Surrender” is defined in Paragraph 16 of this lease.
5. One may view the Texas Property Code at the Texas Legislature’s website which is [http://www.statutes.legis.state.tx.us/](http://www.statutes.legis.state.tx.us/).

• What things can the landlord deduct from the security deposit?
• Who is responsible for deposits and payments of the utilities?
• Who all will occupy the property? What about visitors?
• Are there any rules for the property that tenant needs to be aware of?
• Is the landlord going to require the tenant to sign any inventory or condition forms?
• What property maintenance will tenant be responsible for?
• How will repairs notices be given to the landlord?
• Can the landlord access the property? When?
• What if the tenant does not vacate as agreed?
• What liability do each of the parties have?
• What happens if the tenant defaults under the lease?
• What about sub-letting?
Types of Leases

The responsibilities of lessor and lessee differ among the various types of leases, and the mode and frequency of rent payments depends upon the category that the lease falls under. Consider the following descriptions of the different types of commercial leases:

1. Gross lease
2. Net lease
3. Percentage lease
4. Variable lease
5. Ground lease
6. Oil and gas lease
7. Lease purchase
8. Sale-leaseback

Gross Lease

In a gross lease the tenant pays a simple, flat rent every month. A gross lease assumes that the tenant will be responsible for the payment of a fixed monthly charge, whereas the landlord will be responsible for the property's maintenance, security, taxes, utilities and all other operating expenses. In some cases, the tenant may also pay utility bills.

Net Lease

In a net lease, the tenant pays a base rent rate plus all or part of the operating expenses. In practice, net leases are used for commercial properties only. With such an agreement, the rent paid to the lessor, or landlord, is called net. Any additional payments that a tenant is responsible for are also called nets. This establishes a tiered naming system. For example, the most common types of net leases are double- and triple-net leases, called net-net leases and net-net-net leases, respectively.

As we cover the specifics of a double- and triple-net lease, try not to get caught up in the specifics of what constitutes a net. Instead, understand that any net lease that only requires a tenant to pay a base rent and part of the property's operating expenses is a
A double-net lease. Any leasehold that requires a tenant to pay all of a property’s operating expenses is a triple-net lease.

**Double-Net Lease**

A *double-net*, or *net-net*, lease usually charges for community area maintenance and property taxes in addition to the base rent. The name reflects the amount of charges for which a tenant is responsible: the rent being the first *net*, and the base maintenance and property taxes being the second *net*.

**Triple-Net Lease**

A *triple-net*, or *net-net-net*, lease requires the tenant to pay a prorated portion of all the operating expenses for the property. In some cases, a triple-net lease will even require a tenant to pay the interest on the lessor’s loan. As with a double-net lease, the name reflects the amount of charges for which the tenant is responsible. The additional payments, such as the interest on the lessor’s loan, comprise the third *net* that the lessor must pay.

The expenses that a tenant must pay can be both fixed and variable. For example, the property taxes owed will, more or less, be the same every month; however, the utilities will probably change. Consequently, the taxes the lessee will pay are a fixed cost, and the utility payments will be variable.

**Calculating a Net Lease**

As was previously noted, a net lease requires a tenant to pay fixed and variable operating expenses. This means that calculating the money that a tenant owes on a property depends upon the month’s utilities and maintenance requirements. Because of this, we will solve for a particular month. For the purposes of this exercise, assume that the expenses listed are the only expenses for which the tenant is responsible. That is to say, assume that the given values account for all of the property’s expenses and that the lessee is not responsible for the lessor’s interest on his or her loan.
Company Name | Company ABC
---|---
Type of building | Multi-tenant office building
Space that Company ABC leases | 2,000 square feet
Total space in Building X | 10,000 square feet
Utilities for the entire building for subject month | $400
Taxes for entire building for subject month | $500
Base rent for Building X | $10 per square foot per mo.

**Step 1: Percentage of Total Space Used**
Company ABC is responsible for the percentage of the bills, the utilities and taxation used by its office. To find out how much of the bills are Company ABC’s, we must first establish how much of the building it uses. Consider the following:

2,000 sq ft is 1/5 of the 10,000 sq ft building. 1/5 of anything is 20% of it. Or

2,000 divided by 10,000 = .20 or 20%

Company ABC uses 20% of the entire office building.

**Step 2: Prorating the Monthly Expenses**
We now have the amount of the office building that Company ABC uses expressed as a percentage: 20%. We can multiply this value by the sum of the monthly bills to see how much Company ABC needs to pay. This is the proration step.

Utilities and Taxes for the entire building are $900. $900 x .20=$180

For this month, Company ABC must pay an additional $180 on top of its base rent.
**Step 3: Establishing a Base Rent**

The standard rental rate for Building X is $10 per square foot. Consequently, if we multiply 10 by the amount of feet that Company ABC rents, we can establish the company’s base rent.

\[
2,000 \text{ ft} \times \$10 = \$20,000
\]

Every month, Company ABC owes a base rent of $20,000.

**Step 4: Calculating the Total Month Expense**

Now that we have what Company ABC owes every month, as well as its expenses for the subject month, we can add these two figures together to calculate how much Company ABC owes its lessors in all.

\[
180 + 20,000 = \$20,180
\]

For this month, under the company’s triple-net lease, Company ABC owes the landlords $20,180.

**Percentage Lease**

*Percentage leases* are usually used for commercial lease agreements. In this type of lease, the tenant pays a base rent amount and a percentage of his or her business profits to the landlord. A percentage lease may be applied to either a gross or net lease. For example, a business may have to pay just a base rent and a percentage of its profits to the landlord (in the case of a gross-percentange lease), or a business may have to pay a base rent, a percentage of the property’s operating expense and a percentage of its business profits (in the case of a net-percentange lease). This type of lease is most suitable for retail businesses where location is a prime factor in determining the business’s income.
Variable Lease

A variable lease is a leasehold agreement in which the base rent changes. It can take the form of a graduated lease or an index lease.

A graduated lease agreement is one in which the amount of rent increases at fixed future dates. Generally, this type of lease commences at a low rental rate and increases steadily over the course of the rental agreement.

An index lease also allows for a graduated increase of rent at periodic intervals; however, the increases are relative to some economic indicator, such as the Consumer Price Index, which is a monthly index of the prices of general commodities and is used to calculate national inflation levels. Instead of increasing at fixed intervals by fixed amounts, as in a graduated lease, the amount by which the rent increases depends upon variations in the specified index. Consequently, the amount by which the rent increases could change.

Ground Lease

The leasing of bare, undeveloped land is carried out through a ground lease. Ground leases are used to distinguish between ownership of the site and ownership or the developments on a site. Generally, ground leases take the form of net leases and last for a duration of 30–99 years. Although only a long lease will prove worthwhile for a lessee, ground leases that exceed 99 years are rare. As previously noted, many states will transfer leaseholds that exceed 99 years into fee simple, or freehold estates.

It is interesting to note that upon expiry of a ground lease, the land as well as any construction on the land reverts back to the original landowner. The ground lease may also have a provision for the structure on the leased land to be destroyed before the land reverts back to the owner.

Many business locations are built on leased ground. Most ground leases are net leases where the tenant (lessee) pays all of the expenses to maintain the land plus the lease fees. When the lease expires, the land and the building built there go back to the original
owner (lessor), or his or her heirs, of the land. Some ground leases are negotiated where the building must be destroyed and the original owner or their heirs get the land back clear of improvements.

Hawaii is a particular interesting place that uses many ground leases. Many of the homes in Hawaii are built on leased land. Properties for sale in MLS are usually marked either FS (fee simple ownership) or LH (lease-hold ownership). Naturally the lease hold properties cost less to purchase, however the new owner will be taking on the lease fees to the fee simple owner that owns the land. Some of the land owners would be willing to sell their rights but that would be a separate negotiation.

**Oil and Gas Lease**

Subsurface rights to a property may be leased or entirely owned by a separate party than the party that holds ownership of the property's land or developments. One of the most common leases relating to subsurface, or mineral, rights is an oil and gas lease. An oil and gas lease grants the exclusive right to extract any oil or gas from the ground beneath a property.

In practice, the duration of this type of leasehold is expressed in years, and requires the drilling party to pay the reversionary owner royalties.

**Sale-Leaseback**

A sale-leaseback agreement is a way for property owners to free up capital while maintaining the same overhead expenses. It is, in essence, a financing technique dating back to the 1940s, whereby a business owner can sell his or her interest in a property and then lease it back at the same monthly rate, usually from an investor owner and, in doing so, free up capital for other business ventures. Consider the following example:

Business Owner A owns her property. She is doing relatively well and would like to open a branch office across town. Rather than take out a new loan, she decides to sell her property to an investment buyer, who then leases it back to her on a long-term lease.
investment owner assumes Business Owner A’s mortgage. Consequently, she immediately receives whatever payments she has made on the mortgage (gathered in the form of equity), which she can then use to establish her new branch office. She and the investor agree on some amount of rental payments acceptable to each.

She has freed up capital without establishing another loan. Freehold interest in the subject property, however, transfers from Business Owner A to the investment owner. Business Owner A is now a tenant, with the exclusive right to occupy the premises stated in the sale-leaseback agreement. She still has possession of the property and the investor has a long-term investment.

In the United States sale-leaseback agreements are commonly used for commercial properties only and usually take the form of net leases.

The use of sale-leasebacks has spread to other countries. France has expanded the system for common use on residential properties.

**Let’s Review**

Using the following words, fill in the blanks of the questions below.

<table>
<thead>
<tr>
<th>Brokers</th>
<th>4 years</th>
<th>Leasing agent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Holdover</td>
<td>Gross</td>
<td>Triple net</td>
</tr>
<tr>
<td>Estate for years</td>
<td>Texas A&amp;M</td>
<td>Tenancy at Sufferance</td>
</tr>
<tr>
<td>Sale and leaseback</td>
<td>Commingling funds</td>
<td>Property manager</td>
</tr>
</tbody>
</table>

1. John has listed a property for lease. He put up his sign and listed it in MLS. John is a ________.

2. A guide for helping owners and property managers that are renting property is the Landlord-Tenant Guide published by the real estate center at ________.
3. Mary takes care of several properties that owners are renting. She collects the rents, takes all the repair requests for tenants, maintains the properties and does make ready repairs between tenants. Mary is a _______.

4. Only _______ can open trust accounts for real estate transactions.

5. Bob has a trust account for deposits and rents. One month when times were hard Bob needed money to pay his office rent. He decided to take the money out of the trust account for just a few days. Bob did repay the account. Bob is guilty of _______.

6. According to the Rules of the Commission, a broker must maintain their records of trust account for _______.

7. Ann signed a six month lease with her landlord. It starts in July 1st and ends on December 31st. Ann has an _______.

8. Becky open her own insurance office. Becky pays her landlord a fixed amount of rent each month plus her share of all the expenses for the building. Becky has a _______ lease.

9. Tony was excited that he was able to find a building he can lease for his office that just has a flat fee for rent. The landlord pays all of the expenses. Tony has a _______ lease.

10. Doug’s lease ended last month. His landlord refused to renew his lease. Doug refused to get out. He tried to pay the rent and the landlord sent it back. Doug is a _______ tenant. This is a _______.

11. John owns a 10 story office building downtown where he runs his company. John really wants to expand his business but does not have the cash to do so. John finds an investor that is interested in buying the business, as a long term investment, if John is willing to sign a long term lease. Perfect solution for John. This transaction will be a _______.

Answer Key

1. John has listed a property for lease. He put up his sign and listed it in MLS. John is a leasing agent.
2. A guide for helping owners and property managers that are renting property is the Landlord-Tenant Guide published by the real estate center at Texas A&M.

3. Mary takes care of several properties that owners are renting. She collects the rents, takes all the repair requests for tenants, maintains the properties and does make ready repairs between tenants. Mary is a property manager.

4. Only brokers can open trust accounts for real estate transactions.

5. Bob has a trust account for deposits and rents. One month when times were hard Bob needed money to pay his office rent. He decided to take the money out of the trust account for just a few days. Bob did repay the account. Bob is guilty of commingling funds.

6. According to the Rules of the Commission, a broker must maintain their records of trust account for 4 years.

7. Ann signed a six month lease with her landlord. It starts in July 1st and ends on December 31st. Ann has an estate for years.

8. Becky opens her own insurance office. Becky pays her landlord a fixed amount of rent each month plus her share of all of the expenses for the building. Becky has a triple net lease.

12. Tony was excited that he was able to find a building he can lease for his office that just has a flat fee for rent. The landlord pays all of the expenses. Tony has a gross lease.

13. Doug’s lease ended last month. His landlord refused to renew his lease. Doug refused to get out. He tried to pay the rent and the landlord sent it back. Doug is a holdover tenant. This is a tenancy at sufferance.

14. John owns a 10 story office building downtown where he runs his company. John really wants to expand his business but does not have the cash to do so. John finds an investor that is interested in buying the business, as a long term investment, if John is willing to sign a long term lease. Perfect solution for John. This transaction will be a sale and leaseback.
Discharge of Leases

There are several ways a lease can be discharged:

- **Upon expiration of the primary term or month-to-month term after proper notice has been provided.** Landlords and tenants either one can decide not to renew the lease once it expires. Most lease agreements require either of the parties to notify the other party if they intend to end the tenancy. Most of the time the required notice is 30 to 60 days before the expiration of the lease.

- **Most month to month leases require a 30-day notice to terminate.** It is actually a little better to give the notice a few days earlier but have the lease end on the last day of the month and be vacated before that date. If a tenant is occupying a property for a portion of any month they may owe rent for the entire month.

- **If a lease expires and neither party has suggested termination the lease will usually convert to a month to month lease until the tenant renews the lease.**

- **The new lease can have a different rental amount and different terms.** Once signed the new lease governs the tenancy

- **By agreement of both the landlord and tenant.** The end of a lease is as important as its beginning. A change in business climate or in the parties’ goals may signal that it’s time to terminate the lease and release the parties from their duties. A clean break will provide peace of mind, discharge all obligations, and lead to an amicable conclusion. A termination is the definitive end of the parties’ commitments under the lease. If well-drafted, it can help prevent future misunderstandings and disputes. Although no document can insulate one from later lawsuits or claims, a clear termination and release can strengthen a defense if such claims arise. Note that the termination of a lease is not the end of a relationship. It may open avenues of discussion with the other party that might otherwise have been closed. You can review your mutual expectations and concerns, assess the venture’s successes and failures, and lay the groundwork for future agreements and interactions. A thorough evaluation of each party’s performance allows for a better understanding of what will be required on termination and can help the parties in all their future dealings.
• A landlord and tenant can mutually agree to end a lease arrangement at any time. If you have a written lease, the termination of that lease must also be in writing. Even if you do not have a written lease agreement, putting the termination in writing will protect both parties. The termination should also specify when all of the lease liabilities will end and the date on which the tenant will vacate the premises. The termination must be signed by both parties to be valid.

• Landlords should make sure that your procedures for allowing mid-term termination of a lease are clear and consistent. The should consider drafting a procedures manual for use on their properties, and apply its terms equally among the tenants. Failure to do so could result in charges of discrimination and later lawsuits.

• The lease may require the tenant to make a payment (or a fee) for early termination. However, this amount can't be more than the landlord's actual and reasonable loss that occurred as a result of the termination (e.g., lost rent, advertising costs, etc.). If the tenant pays a fee in connection with the lease termination, and the property is rented immediately thereafter with no corresponding costs, the tenant is entitled to a refund of that entire fee.

• Be clear about the disposition of money in the agreement. To ensure a clean break with few misunderstandings, address issues of the security deposit, last month’s rent, and any other monetary sums before signing the termination.


Many tenants who sign a lease for their apartment or rental unit plan to stay for the full amount of time required in the lease. But despite best intentions, they may want (or need) to leave before the lease is up—for example, if you’re a student at the University of Texas at Austin and only want to stay in your apartment for the period of time that school is in session. Or perhaps you’re moving in with your boyfriend or girlfriend. Sometimes, you may need to move in order to be closer to your new job or an elderly parent who needs your help.
Leaving before a fixed-term lease expires without paying the remainder of the rent due under the lease is called breaking the lease. Here’s a brief review of tenant rights in Texas to break a lease without further liability for the rent.

**Tenant Rights and Responsibilities When Signing a Lease in Texas**

A lease obligates both you and your landlord for a set period of time. Under a typical lease, a landlord can’t raise the rent or change other terms, until the lease runs out (unless the lease itself provides for a change, such as a rent increase mid-lease). A landlord can’t force you to move out before the lease ends, unless you fail to pay the rent or violate another significant term, such as repeatedly throwing large and noisy parties. In these cases, landlords in Texas must follow specific procedures to end the tenancy. For example, your landlord must give you three days’ notice (unless the lease specifies a shorter or longer time) to pay the rent or leave (Texas Prop. Code Ann. § 24.005) before filing an eviction lawsuit.


If an exception for a breach of the lease does not apply, most states require the landlord to mitigate the damages by re-renting the rental unit. The landlord is not required to rent to an unqualified tenant, but must take reasonable steps to re-rent the property.

If the landlord incurs costs from the tenant's unlawful termination, the landlord may sue the tenant if the damages exceed the tenant's security deposit. A landlord should only sue the former tenant after re-renting the property. By waiting until the property has been re-rented, the landlord can accurately assess the loss. The landlord can sue for the cost to find a tenant, for the time the rental property remained vacant, for attorney fees if such a clause was included in the lease agreement, and for the difference between the rent paid by the new tenant and the old tenant's rent amount.

Discharge by operation of law

Family Violence

Section 92.016 of the Texas Property Code gives a tenant the right to vacate a property and avoid liability for future rent and other amounts due under a lease following family violence in certain situations. This includes, but is not limited to, certain types of violence between lease occupants, regardless of whether they are related. To exercise this early termination option when another occupant is involved, a tenant must obtain a court order as described in Section 92.016, deliver a copy of the order to the landlord, and vacate the property.

Sexual Offences and Stalking

In some circumstances, Texas law allows survivors of sexual assault, attempted sexual assault, stalking, and parents of child sexual abuse victims to break their leases early without having to pay a penalty.

Certain parts of the law only apply to leases signed on or after January 1, 2014, so it's important to consult with a lawyer. In general, tenants who were sexually assaulted or stalked on the leased premises (or any dwelling on the leased premises) must give their landlord notice that they are breaking their leases within six months of the offense.

There are several other requirements a tenant must satisfy so the tenant should talk with an attorney.

Military Entrance, Deployment or Transfer

A tenant who is a service member or a dependent of a service member may vacate the dwelling leased by the tenant and avoid liability for future rent and all other sums due under the lease for terminating the lease and vacating the dwelling before the end of the lease term if:

- The lease was executed by or on behalf of a person who, after executing the lease or during the term of the lease, enters military service; or
A service member, while in military service, executes the lease and after executing the lease receives military orders for a permanent change of station; or
to deploy with a military unit for a period of 90 days or more.

The Rental Unit Is Unsafe or Violates Texas Health or Safety Codes. If your landlord does not provide habitable housing under local and state housing codes, a court would probably conclude that you have been “constructively evicted;” this means that the landlord, by supplying unlivable housing, has for all practical purposes “evicted” you, so you have no further responsibility for the rent. Texas law (Tex. Prop Code Ann. §§ 92.056, 92.0561) sets specific requirements for the procedures you must follow before moving out because of a major repair problem. The problem must be truly serious, such as the lack of heat or other essential service.

Your Landlord Harasses You or Violates Your Privacy Rights. Texas does not have a state law that specifies the amount of notice your landlord must give you to enter rental property. If your landlord repeatedly violates your rights to privacy, or does things like removing windows or doors, turning off your utilities, or changing the locks, you would be considered “constructively evicted,” as described above; this would usually justify you breaking the lease without further rent obligation.

Landlord’s Duty to Mitigate Damages

If you don't have a legal justification to break your lease, the good news is that you may still be off the hook for paying all the rent due for the remaining lease term. This is because under Texas law (Tex. Prop. Code Ann. § 91.006), your landlord must make reasonable efforts to re-rent your unit—no matter what your reason for leaving—rather than charge you for the total remaining rent due under the lease. So you may not have to pay much, if any additional rent, if you break your lease. You need pay only the amount of rent the landlord loses because you moved out early. This is because Texas requires landlords to
take reasonable steps to keep their losses to a minimum—or to “mitigate damages” in legal terms.

So, if you break your lease and move out without legal justification, your landlord usually can’t just sit back and wait until the end of the lease, and then sue you for the total amount of lost rent. Your landlord must try to re-rent the property reasonably quickly and subtract the rent received from new tenants from the amount you owe. The landlord does not need to relax standards for acceptable tenants—for example, to accept someone with a poor credit history.

Also, the landlord is not required to rent the unit for less than fair market value, or to immediately turn his or her attention to renting your unit disregarding other business. Also, the landlord can add legitimate expenses to your bill—for example, the costs of advertising the property.

If your landlord re-rents the property quickly (more likely in college towns and similar markets), all you’ll be responsible for is the (hopefully brief) amount of time the unit was vacant.

The bad news is that if the landlord tries to re-rent your unit, and can’t find an acceptable tenant, you will be liable for paying rent for the remainder of your lease term. This could be a substantial amount of money if you leave several months before your lease ends. Your landlord will probably first use your security deposit to cover the amount you owe. But if your deposit is not sufficient, your landlord may sue you, probably in small claims court where the limit is $10,000 in Texas.

**How to Minimize Your Financial Responsibility When Breaking a Lease**

If you want to leave early, and you don’t have legal justification to do so, there are better options than just moving out and hoping your landlord gets a new tenant quickly. There’s a lot you can do to limit the amount of money you need to pay your landlord—and help ensure a good reference from the landlord when you’re looking for your next place to live.
You can help the situation a lot by providing as much notice as possible and writing a sincere letter to your landlord explaining why you need to leave early. Ideally you can offer your landlord a qualified replacement tenant, someone with good credit and excellent references, to sign a new lease with your landlord.


**Employment Relationship between Brokers and Principals**

Property owners usually hire brokers through the use of Listing Agreements or Property Management Agreements. Buyers usually hire brokers through the use of a Buyer’s Representation Agreement. These documents are employment contracts between the broker and the principal. The documents spell out the rights and the responsibility for both the principals (clients) and the broker. The documents usually address compensation.

We have discussed Listing Agreement and Buyer’s Representation Agreements. It is important to note that these agreements between the broker and the principal is **special agency**. It specifically is for one transaction. TREC rules say these agreements must have definite termination dates and cannot renew automatically.

The other fact about special agency is that the agent **cannot sign anything for the client or bind the client in any transaction**. In paragraph 11 E of the TAR listing agreement, it says, “Broker is not authorized to execute any document in the name of or on behalf of the seller concerning the property.”

Property Management Agreements are usually **general agency** agreements. They can be for several properties. They can automatically renew after the initial term. The broker is authorized to negotiate for and execute leases, etc. on behalf of the owner.

**Note:** Your agreement with your broker is also general agency. It is for many transactions. It is ongoing, does not expire. You can execute documents (listing agreements, buyer...
representation agreements, etc.) on behalf of your broker. Your execution binds the broker.

The buyer or the seller hires a broker to represent his or her interests. It is a relationship of trust. The principal is trusting that the broker will do everything he or she can to represent his or her interest and protect his or her from foreseeable harm. The broker owes the principal fiduciary duties. He or she must put the principals’ interest ahead of his or her own interest.

There are many laws and many rules to help guide the agent, but the best guidance probably comes from the desire to do what is right. Always do what is right.

The principal owes the broker the ability to show the property at reasonable times. He or she owes the broker his or her availability. For example, if the broker receives an offer on the property there must be a way to contact the seller within a reasonable amount of time. The principal owes the broker compensation as contracted and reimbursement for expenses to protect the property.

An interesting thing about the real estate brokerage business is that the principal hires a broker whom he or she may not ever meet. The broker’s associated agents will be handling this duty of trust. Sales agents have a huge responsibility to represent the broker well while doing the best possible job for the principal.

**Independent Contractor Agreements**

Most brokers and most sales agents are glad that agents are independent contractors according to federal tax laws. To assure IRS that it is an independent contractor relationship the broker needs to be diligent in getting an Independent Contractor Agreement signed when a new agent is coming to the company and then getting a Statement of Understanding annually to ascertain the relationship has not changed. Paragraph, 8 B of the Independent Contractor Agreement says that the salesperson will sign and deliver the Statement of Understanding to the broker annually.
The Statement of Understanding spells out the major difference in how a broker must treat an independent contract from an employee.

I, the above-named Associate, state as follows:

1. I am a _broker_ salesperson duly licensed in the State of Texas and am affiliated as an independent contractor with the above-named Broker.
2. I have paid all of my own license fees and membership dues required under the Independent Contractor Agreement with Broker and have not received reimbursement from Broker.
3. I have paid all of my own automobile and transportation expenses and have not received reimbursement from Broker.
4. I have paid all entertainment and other incidental expenses in connection with soliciting listings and procuring prospects and have not received reimbursement from Broker.
5. Broker has not required me to maintain any specific schedule.
6. I have not had to consult with Broker regarding scheduling of my vacations or working hours.
7. I have received no salary or sick pay and I am compensated on a commission basis.
8. I have paid my own income and FICA taxes.
9. My association with Broker may be terminated by either party at any time upon notice given to the other party; but the rights of the parties to any fees which accrued before termination are not divested by the termination.

Notice that independent contractors pay all of their own expenses including FICA and income tax. Income tax, based on your projected income, is to be paid to IRS quarterly by the sales agent.

If you have never been an independent contractor before, you will probably need to hire a good tax consultant to help you set up your business. Many of the expenses you have
will be tax deductible. Keeping track of those expenses can be challenging (especially business mileage). Have a good system from the beginning of your real estate career. Let’s look at the written contracts been a broker and their independent contractors. When students pass the real estate exam and begin looking for a broker, they will probably be asked to sign a similar document.
INDEPENDENT CONTRACTOR AGREEMENT FOR SALES ASSOCIATE

1. **Parties:** The parties to this agreement are:
   Broker: ____________________________________________; and
   Associate: _________________________________________

2. **TERM:** This agreement commences on
   _________________________________________________ (Commencement Date) and
   ends at such time as either party terminates this agreement in accordance with
   Paragraph 21.

3. **DEFINITIONS:**
   A. “Brokerage services” means assistance and services to prospects that are
      reasonably necessary to negotiate and bring about the successful closing of
      transactions for the sale, purchase, or lease of real estate.
   B. “Files” means any documents, instruments, contracts, written agreements,
      disclosures, memoranda, books, publications, records, correspondence, reports,
      data, lists, compilations, studies, surveys, images, and all other data, whether in
      written or electronic format, which are related to Broker’s real estate business. The
      term “files” includes excludes Associate’s prospect lists.
   C. “Prospect” means: (1) a buyer, prospective buyer, seller, prospective seller, landlord,
      prospective landlord, tenant, or prospective tenant of real estate; or (2) a client or
      customer of Broker or Associate.
   D. “Real estate business” means all business related to the acts of a real estate broker
      as defined by Section 1101.002, Occupations Code (the Real Estate License Act).

4. **BEST EFFORTS:** Associate will use Associate’s best professional efforts to:
   A. solicit listings and prospects for Broker’s real estate business; and
   B. provide brokerage services to prospects procured by or assigned to Associate.
5. **EXCLUSIVE ASSOCIATION:** Associate will perform the services contemplated by this agreement exclusively for Broker. Associate may not engage in the brokerage of businesses or in the management of property without Broker’s knowledge and written consent.

6. **LEGAL AND ETHICAL COMPLIANCE:** When delivering brokerage services to prospects and when otherwise performing under this agreement, the parties agree to comply with all applicable laws and standards of practice, including but not limited to the Real Estate License Act, the Rules of the Texas Real Estate Commission, the Code of Ethics of the National Association of REALTORS®, the bylaws of the national, state, and applicable local associations of REALTORS®, any rules and regulations of any listing services to which the parties may subscribe, and any standards or policies Broker adopts.

7. **LICENSES AND TRADE ASSOCIATIONS:**
   A. **Broker’s License and Membership Status:** Broker is a licensed real estate broker in the State of Texas and is a member of the National Association of REALTORS®, the Texas Association of REALTORS®, and the following local associations of REALTORS®:

   Broker will maintain Broker’s license and REALTOR® membership status active and in good standing at all times while this agreement is in effect.

8. **INDEPENDENT CONTRACTOR:**
   A. **Contractor:** Associate is an independent contractor and is not Broker’s employee. Broker will not withhold any amounts for taxes from the fees paid to Associate under this agreement, unless ordered to do so by a court of law or the Internal Revenue Service. Broker will not pay any amounts for FICA, unemployment compensation, or worker’s compensation for Associate.
   
   B. **Statement of Understanding:** On or about the first day of each calendar year this agreement is in effect, Associate will execute and deliver to Broker a Statement of Understanding, a copy of which is attached to this agreement.
   
   C. **Not a Partnership:** This agreement does not create a partnership between the parties. Except as provided by this agreement, neither party is liable to the other party for any expense or obligation incurred by the other party.
9. ASSOCIATE’S AUTHORITY:
   A. Signing Brokerage Service Agreements: Associate may sign listing agreements, buyer or tenant representation agreements, and commission agreements on Broker’s behalf provided that Associate complies with Paragraph 6 and any standards and policies Broker adopts with respect to signing such agreements.
   B. Submission of Agreements: All listings, representation agreements, commission agreements, and other agreements for brokerage services that Associate procures or signs must be taken in Broker’s name and must be submitted to Broker within ____________________________ days after the listing, representation agreement, commission agreement, or other agreement is taken by Associate.
   C. Cancellations or Termination of Brokerage Service Agreements: Associate may not cancel, terminate, or compromise any agreement to which Broker is a party without Broker’s written approval.
   D. Other Agreements: Unless specifically authorized by this agreement or by Broker in writing, Associate may not bind or obligate Broker to any agreement or relationship.

10. FILES AND CONFIDENTIALITY OF OPERATIONS:
   A. Obligation to Maintain a File: In any transaction related to Broker’s real estate business in which Associate is involved, Associate must maintain a file at Broker’s office that contains all applicable items described under the definition of “files” under Paragraph 3B. Associate will maintain the file in a format that Broker regularly maintains such files in Broker’s office.
   B. Confidentiality of Files: The parties agree that all files related to Broker’s real estate business are Broker’s confidential business property. Associate agrees to hold all files and information in the files confidential and not disclose such information to any person without Broker’s knowledge and consent unless:
      (1) required by law or a court order to disclose such information; or
      (2) such information is otherwise public information.
   C. Prospects and Operations: Unless required by law or expressly permitted by Broker, Associate may not furnish any person with information about:
      (1) Broker’s prospects or Broker’s relationship with any prospects; or
(2) Broker’s policies and business operations.

D. **Survival**: This Paragraph 10 survives termination of this agreement.

E. **NOTICE**: All Internet data that is composed, transmitted, or received on the Broker’s computers or network is considered to be part of the Broker’s records and, as such, is subject to: (1) Broker’s review; and (2) disclosure to law enforcement agencies or as the law may otherwise require. The unauthorized use, installation, copying, or distribution of trademark or patented material on the Internet or by other means is prohibited.

11. **OWNERSHIP OF LISTINGS AND REPRESENTATION AGREEMENTS**: All listings, representation agreements, commission agreements, and other agreements for brokerage services in which Broker is named as a party are owned exclusively by Broker.

12. **RECEIPT OF MONEY BY ASSOCIATE**:
   A. **Compliance with Contracts**: Associate must promptly deposit all checks or funds Associate receives in trust for others in accordance with the contracts under which the checks or funds are received. Associate may not maintain a separate trust, escrow, or management account for real estate business purposes.
   B. **Receipt of Brokerage Fees**: Unless otherwise authorized by Broker, Associate must deliver any compensation for brokerage services received from any client, customer, escrow agent, title company, prospect, or any other person to Broker for disbursement in accordance with this agreement, including but not limited to any check, credit card, debit card, draft, or any negotiable instrument made payable or issued to Associate.

13. **FACILITIES**: Broker will furnish to Associate the following office facilities at Broker’s office for uses related to Broker’s real estate business:

   ______________________________________________________
   ______________________________________________________
   ______________________________________________________
   ______________________________________________________

   Performance under this agreement does not require Associate to be present in Broker’s office.

14. **ADVERTISING**:
   A. All advertising related to Broker’s real estate business, including brokerage services performed by Associate, may be placed only by Broker or only with Broker’s
knowledge and consent. Broker will, at Broker’s discretion, include Associate’s name in such advertising when appropriate. Associate will not cause any advertisement that is related to Broker's real estate business to be published without Broker’s prior knowledge and consent.

B. “Advertising” includes any written or oral statement which is intended to induce the public to use Associate’s or Broker's services, and includes without limitation all publications, newsletters, radio or television broadcasts, all electronic media including e-mail and the Internet, business stationery, business cards, signs, and billboards.

15. ASSIGNMENT OF PROSPECTS:
   A. **Definition**: Under this Paragraph 15, “assign” means to appoint an associate to deal with a prospect on Broker’s behalf.
   
   B. **Assignments**: Broker gives to Associate the right, together with Broker, to deal with prospects that Associate procures and with prospects that Broker assigns to Associate. Broker retains the right and sole discretion to assign leads and prospects that are procured by Broker through Broker’s real estate business to any of Broker’s associates as Broker determines appropriate.
   
   C. **Reassignments**: Broker may reassign a prospect with whom Associate deals to another associate if:
      (1) Broker determines that a reassignment of the prospect is necessary for the orderly, ethical, or lawful operation of Broker’s real estate business; (2) Associate is not capable of continuing to service the prospect; or (3) this agreement terminates. This provision applies to all prospects, regardless of who procured the prospect.
   
   D. **No Interference**: Associate may not interfere with any assignments or reassignments of prospects or leads that Broker may make.

16. ASSOCIATE’S FEES:
   A. **Brokerage Fees are Paid to Broker**: All fees and compensation that Broker or Associate earn for providing brokerage services to prospects (for example, fees earned under listing agreements, buyer or tenant representation agreements, agreements between brokers) are payable to and belong to Broker.
   
   B. **Amount of Associate’s Fees**: Broker will pay Associate fees for the brokerage
services that Associate provides under this agreement at the rates or in the amounts specified in:
- (1) the attached fee schedule.
- (2) [_____], which is incorporated into this agreement.

C. When Associate’s Fees are Earned and Payable: Associate’s fees under this agreement are earned at the time Broker’s fees are earned under the applicable agreements for brokerage services that Associate performs for Broker. Associate’s fees under this agreement are payable when Broker receives Broker’s fees under the applicable agreements for brokerage services, unless the fees are subject to arbitration, litigation, or a court order.

D. Disputes between Associates: If another associate of Broker claims a fee from a transaction for which Associate also claims a fee, the amount of the fee payable to Associate will be divided between Associate and the other associate claiming the fee in accordance with an agreement between them. If no such agreement is reached, the dispute will be resolved by Broker’s internal dispute resolution policy; and, if no such policy exists, by arbitration. Before disbursing any fee, Broker may require written authorization from any associate claiming the fee. Associate agrees not to hold Broker liable for holding, in trust, any disputed funds between associates.

E. Delinquent Brokerage Fees: Broker is not liable to Associate for any fees not collected from a prospect. Broker retains complete discretion to enforce or not enforce any agreement for brokerage services with a prospect.

F. Bonuses: Associate may not accept any fee, bonus, or other compensation directly; whether such is in money, gift cards, credit cards, trips, or other benefits or personal property. All fees, bonuses, and other compensation must be paid to Broker for distribution in accordance with this agreement. Unless otherwise agreed in writing between the parties to this agreement, bonuses will be considered as part of the gross compensation Broker receives under the applicable agreements for brokerage services and will be disbursed in accordance with:
- (1) the attached fee schedule.
- (2) which is incorporated into this agreement.

G. Fees upon Reassignment of Prospects: If Broker reassigns a prospect with whom Associate deals to another associate or if Broker reassigns a prospect with whom another associate deals to Associate, Broker will pay Associate a fee in accordance
with:
- (1) the attached fee schedule.
- (2)__, which is incorporated into this agreement.

H. Other: If an attached fee schedule or other document incorporated into this agreement does not specifically address the amount of the fee or compensation due to Associate under any given circumstances, the amount of the fee or compensation will be an amount that Broker determines is reasonable and equitable.

I. Assignment of Fees: Associate may not assign any interest in fees or compensation due under this agreement to any other person.

17. EXPENSES:
   A. No Liability for Another’s Expense: Unless the parties agree otherwise, Broker is not liable for any expense incurred by Associate. Unless the parties agree otherwise, Associate is not liable to Broker for the expenses for the office facilities that Broker will provide under this agreement.

   B. Special Expenses: “Special expenses” means expenses that Broker incurs for __________________________________________________________________________________________

   (Note: Special expenses may include items such as desk fees, transaction fees, E&O premiums, franchise fees, etc.). Special expenses will be:

   - (1) deducted from the gross fees that Broker receives under this agreement for brokerage services and paid to the providers of the special services before calculating Associate’s fees payable under this agreement.
   - (2) invoiced to Associate by Broker and will become payable upon receipt of the invoice.
   - (3) charged to Associate in accordance with:
     - (a) the attached fee schedule.
     - (b)____, which is incorporated into this agreement.

   C. License and Membership Fees: Each party is responsible to pay all their respective license and membership fees. Associate must immediately reimburse Broker any fee, expense, or penalty that Broker incurs as a result of:

     (1) the parties’ association; or
(2) Associate’s failure to maintain Associate’s license or REALTOR® membership status as required by this agreement.

D. Automobile Expenses: Associate will furnish his or her own automobile and pay all such expenses. Broker is not liable or responsible for Associate’s automobile or its expenses. Associate must maintain liability and property damage insurance satisfactory to Broker and must name Broker as an additional insured in any such policy. Upon execution of this agreement, Associate must deliver to Broker satisfactory evidence of the insurance required by this agreement and must deliver evidence of the renewal of such insurance at the time the insurance policy is renewed. If Associate fails to maintain the required insurance in full force and effect at times this agreement is in effect, Broker may:

(1) purchase insurance that will provide Broker with the same coverage as required by this paragraph and Associate must immediately reimburse Broker for such expense; or

(2) terminate this agreement.

E. Other Expenses: Associate is responsible for all of Associate’s expenses necessary to perform the services required of Associate under this agreement, including but not limited to, license fees, association dues, entertainment costs, club dues, mobile phone expenses, education expenses, computer service access charges, periodical expenses, and other related expenses. Although not obligated to do so, if Broker pays any such expense for or on behalf of Associate, Associate will reimburse Broker such amount upon demand.

18. OFFSET: Broker retains the right of offset for all purposes. Broker may deduct amounts Associate owes Broker from any amounts Broker owes to Associate under this agreement.

19. DEFENSE OF DISPUTES AND LITIGATION:
   A. Cooperation: If a dispute, litigation, or complaint against Broker or Associate occurs in a transaction in which Associate is involved and which is related to Broker’s real estate business, the parties will cooperate fully with each other in defending the action.
   B. Insurance Deductible: If Broker and Associate are named as defendants in a dispute, litigation, or complaint, any deductible for errors and omissions insurance
that may cover the defense or payment of any liability under the dispute, litigation, or complaint will be paid as follows:

C. **Mutual Defense:** If any defense expenses are not paid by an errors and omissions insurer, Broker and Associate will share all such expenses and costs related to defend the dispute, litigation, or complaint in the same proportion as they would share the fee resulting from the transaction as if there were no dispute, litigation, or complaint; provided that both Broker and Associate are named as defendants or respondents to the dispute, litigation, or complaint. If either party determines that it cannot mutually defend a dispute, litigation, or complaint with the other party, each party will be responsible for its own costs to defend the dispute, litigation, or complaint from the time one party notifies the other of such a determination.

D. **Defense Management in a Mutual Defense:** If the parties mutually defend a dispute, litigation, or complaint, Broker maintains sole discretion to:

1. determine whether to defend or compromise the dispute, litigation, or complaint;
2. employ attorneys or other experts;
3. direct the course of any defense strategy; and
4. determine the terms and conditions of any compromise or settlement, provided that Broker may not obligate Associate to pay anything of value without Associate’s written consent.

E. **Liability for Damages:** Except as provided in Paragraph 19F, each party is responsible for the payment of any amounts for which it is found liable. The sharing of defense costs provided in this Paragraph 19 does not apply to the payment of damages for which a party is found liable by a court of law, arbitrator, or state agency.

F. **Reimbursement and Indemnity:** If Broker is found to be liable by a court, arbitrator, or government agency as a result of Associate’s negligence, misrepresentations, fraud, false statements, violation of the Real Estate License Act, or violation of any other state or federal statute, Associate will indemnify and reimburse Broker all such amounts and all attorney’s fees, costs, and other expenses necessary to defend the action including those defense costs that were previously shared under this Paragraph 19.

G. **Survival:** This Paragraph 19 survives the termination of this agreement.
20. **PROSECUTION OF CLAIMS:** For all matters related to Broker’s real estate business, Broker retains sole discretion to prosecute, complain, compromise, or settle any claim that Broker may have against any other person, including but not limited to other brokers, and Broker’s or Associate’s clients, customers, and prospects.

21. **TERMINATION:**
   
   A. **Either Party may Terminate:** Either party may terminate this agreement, with or without cause, by providing written notice to the other party.
   
   B. **Entitlement to Fees:** Any fee to Associate that remains unpaid on the date of termination will be paid in accordance with:
      
      - (1) the attached fee schedule.
      - (2)______, which is incorporated into this agreement.
   
   C. **Services to Prospects:** Upon termination of this agreement, all negotiations and other brokerage services with prospects commenced by Associate before termination will be assumed by Broker. Associate will cooperate with Broker to provide for an orderly transition and assumption of such service by Broker.
   
   D. **Associate’s Obligations upon Termination:** At the time this agreement ends, Associate must:
      
      - (1) cease all negotiations and other dealings that concern Broker’s real estate business commenced by Associate before this agreement ends;
      - (2) provide Broker a written list of all current listings and pending sales and leases;
      - (3) turn over to Broker all files related to Broker’s real estate business and that Associate may have or control; and
      - (4) turn over to Broker all Broker’s personal property including but not limited to keysafes, signs, equipment, supplies, manuals, forms, and keys.
   
   E. **Files:** Associate may not remove any files related to Broker’s real estate business from Broker’s office without Broker’s prior knowledge and consent. Associate is entitled to copies of relevant documents concerning pending transaction in which Associate has a bona fide interest. Broker will not unreasonably withhold copies of such documents.

22. **NOTICES:** All notices under this agreement must be in writing and are effective when hand-delivered, mailed, sent by facsimile transmission, or sent by electronic mail from one party to the other.
23. SPECIAL PROVISIONS:

[Blank]

24. AGREEMENT OF THE PARTIES:

A. **Addenda:** Attached to and incorporated into this agreement are:
   - (1) the Fee Schedule dated ________________;
   - (2) the Statement of Understanding (which should be reviewed and signed each year);
   - (3) IRS Form W-9; and
   - (4) ____________________________________________

B. **Entire Agreement:** This document contains the entire agreement between the parties and may not be changed except by written agreement.

C. **No Assignment:** Neither party may assign this agreement or any interest in this agreement without the written consent of the other party.

D. **Heirs and Successors:** The parties’ obligations under this agreement and the parties’ entitlement to any compensation, reimbursement, or indemnity under this agreement inures to the benefit of the respective party’s successors, permitted assigns, heirs, executors, and administrators.

E. **Controlling Law:** The laws of the State of Texas govern the interpretation, validity, performance, and enforcement of this agreement.

F. **Severable Clauses:** If any clause in this agreement is found to be invalid or unenforceable by a court of law, the remainder of this agreement will not be affected and all other provisions of this agreement will remain valid and enforceable.

G. **Waiver:** Waiver of any provision in this agreement by any party is effective only if the waiver is in writing. A waiver, whether in writing or otherwise, may not be construed as a waiver of any subsequent breach or failure of the same provision or any other provision of this agreement.

☐ This is intended to be a legally binding agreement. READ IT CAREFULLY. If you do not understand the effect of this agreement, consult your attorney BEFORE signing.
STATEMENT OF UNDERSTANDING

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.

©Texas Association of REALTORS®, Inc. 2007

It is suggested that this statement be executed annually.

(1) CONCERNING THE INDEPENDENT CONTRACTOR AGREEMENT BETWEEN

____________________________________________________________
(Broker) and
____________________________________________________________
(Associate)

I, the above-named Associate, state as follows:

(1) I am a ☐ broker ☐ salesperson duly licensed in the State of Texas and am affiliated as
an independent contractor with the above-named Broker.
(2) I have paid all my own license fees and membership dues required under the Independent
Contractor Agreement with Broker and have not received reimbursement from Broker.
(3) I have paid all of my own automobile and transportation expenses and have not received
reimbursement from Broker.
(4) I have paid all entertainment and other incidental expenses in connection with soliciting
listings and procuring prospects and have not received reimbursement from Broker.
(5) Broker has not required me to maintain any specific schedule.
(6) I have not had to consult with Broker regarding scheduling of my vacations or working hours.
(7) I have received no salary or sick pay and I am compensated on a commission basis.
(8) I have paid my own income and FICA taxes.

Agent to send to Broker annually!
(9) My association with Broker may be terminated by either party at any time upon notice given to the other party; but the rights of the parties to any fees which accrued before termination are not divested by the termination.

__________________________________________
Associate Date

**Understanding the Broker’s Office Policy**

In the Texas Real Estate License Act in Chapters 1101 and 1102, it is provided that broker supervision issues such as planning and organization, occupational policies and procedures, recruitment and training of personnel, records and control, and real estate firm analysis and expansion be addressed by the broker. A broker is mandated to have a brokerage policy manual.

Brokers must ascertain that sales agents know the scope of their authorized activities.

**TREC Rules §535.2(i).**


A broker shall maintain, on a current basis, written policies and procedures to ensure that:

1. Each sponsored salesperson is advised of the scope of the salesperson’s authorized activities subject to the Act and is competent to conduct such activities.
2. Each sponsored salesperson maintains their license in active status at all times while they are engaging in activities subject to the Act.
3. Any and all compensation paid to a sponsored salesperson for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.
4. Each sponsored salesperson is provided on a timely basis, before the effective date of the change, notice of any change to the Act, Rules, or Commission promulgated contract forms.
(5) In addition to completing statutory minimum continuing education requirements, each sponsored salesperson receives such additional educational instruction the broker may deem necessary to obtain and maintain, on a current basis, competency in the scope of the sponsored salesperson’s practice subject to the Act.

(6) Each sponsored salesperson complies with the Commission’s advertising rules.

(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146. (8) Records are properly maintained pursuant to Subsection (h).


Other disclosure issues the Brokerage Companies Policy Manuel should cover are:

- Being sure every buyer is furnished with a Seller’s Disclosure of Property Condition
- Using the Lead Based Paint Addendum on all property sold that was built before 1978
- Disclosing any relationship the broker or the agent has with a buyer or a seller
- Being careful to always tell where information was obtained i.e. square footage per tax rolls, hardwood floors under carpet per seller, etc
- Advising every buyer to get an abstract examined by an attorney or get a policy of title insurance
- Advising buyers of activity going on in the area such as widening the runways at an airport, discussion of taking this property to build a new highway, etc.
- Advising the buyer of any known activity that may have stigmatized the property
- Advising buyer that property is in a mandatory homeowners’ association and explaining how and why they will want to review the documents
- Advising buyer of any statutory tax districts property is in i.e. MUDS or PIDS
- Disclosing any income earning relationship the company or the agent has with a Residential Service Company
The policy should also make clear what cannot be disclosed such as any of the fair housing protected classes.

Agents also need to understand that a death on the property due to natural causes, suicide or an accident not related to the property is not required by law to be disclosed. Registered sex offenders are not required by law to be disclosed.

Article from the TREC Broker Responsibility Course

(1) TREC Case Summaries Below is a sample of sanctions from recent TREC orders against brokers for failing to have required written policies.

(2) Agreed Orders were reached with the brokers following TREC’s receipt of complaints against their sponsored salespeople (mostly advertising violations).

(3) Broker K – Reprimand and assessment of an administrative penalty of $4,000 for the following violations: * Failing to advise a sponsored salesperson of the scope of the salesperson’s authorized activities (two counts) [TREC Rules §535.2(a)] * Failing to ensure that a sponsored salesperson’s advertising complies with TREC Rule 535.154 (two counts) [TREC Rules §535.2(g)] * Failing to maintain on a current basis required written policies and procedures (two counts) [TREC Rules §535.2(i)]

(4) Broker L – Reprimand and assessment of an administrative penalty of $1,000 for the following violations: * Failing to advise a sponsored salesperson of the scope of the salesperson’s authorized activities [TREC Rules §535.2(a)] * Failing to maintain on a current basis required written policies and procedures [TREC Rules §535.2(i)]

(5) Broker M – Reprimand and assessment of an administrative penalty of $1,000 for the following violations: * Failing to maintain on a current basis required written policies and procedures [TREC Rules §535.2(i)] * Placing an advertisement that in any way causes a member of the public to believe that a person not authorized to conduct real estate brokerage is personally engaged in real estate brokerage [TREC Rules §535.154(g)(2)]
Equal Opportunity in Housing

Both agents that participate in real estate sales and real estate leasing must be aware of the federal fair housing laws.

The Civil Rights Act of 1866 was passed by Congress on April 9, 1866, over the veto of President Andrew Johnson. It granted all citizens of the United States – without exception – a set of basic rights regardless of their race, color, or previous condition of servitude. Among the rights granted by this Act are the rights to "make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." The right to make and enforce contracts is the foundation of property ownership and, according to the Civil Rights Act of 1866, fair access to property ownership includes equality in making, fulfilling, modifying, and terminating contracts, as well as equal enjoyment of the benefits, terms, and conditions of the contractual relationship.

In the more than 100 years that elapsed between the passage of the Civil Rights Act of 1866 and the passage of the Fair Housing Act, there were only two serious attempts made to legislate fair housing practices. Both of these efforts only dealt with federally-funded housing. In 1962, John F. Kennedy issued Executive Order 11063, which prohibits discrimination in the selling or leasing of property owned or funded by the federal government, including those properties relying upon Veterans Administration (VA) and Federal Housing Administration (FHA) loans. The Civil Rights Act of 1964 included a prohibition against discrimination on the basis of race, color, and national origin in any program or service funded by the federal government.

Shortly after the assassination of Dr. Martin Luther King Jr., Congress passed the Civil Rights Act of 1968. Title VIII of this Act, also known as the Fair Housing Act, prohibits discrimination in real estate practices. The Department of Housing and Urban Development, commonly referred to as HUD, enforces the Act. The law applies to most, if not all, activities in which real estate licensees may engage, including selling, appraising, managing, and renting real property. Real estate licensees are in violation of
the law if their actions or words are discriminatory, even if they have no intention to discriminate.

**Transactions Not Covered by the Federal Fair Housing Act**

The Fair Housing Act defines a dwelling as any building, structure, or portion of a building that is occupied as – or designed or intended for occupancy as – a residence by one or more families. The definition also includes any vacant land offered for sale or lease for the construction of a building, structure, or portion of a building that is intended to be occupied as a residence. This definition is important because the Fair Housing Act does not cover non-dwelling buildings. Therefore, the fair housing laws do not apply to commercial transactions unless those transactions include property that would be properly defined as a dwelling.

The federal Fair Housing Act is primarily intended to prohibit discrimination in the sale, rental, and advertisement of dwellings. Although commercial property transactions are not normally included under the Act, they are covered by other laws, such as the Americans with Disabilities Act.

Even in the case of dwellings, however, the federal Fair Housing Act does not cover all transactions. There are four general circumstances under which a dwelling is exempt from the federal Fair Housing Act. Licensees should remember that even though the federal law allows these exemptions, the laws of their state may not. In most states, including Texas, these exemptions do not apply if a real estate licensee is involved in the transaction, so licensees should also be aware that their participation in the process may negate the exemption.

**Single-Family Residences Sold by Owner**

The sale or rental of a single family residence is not bound by the Act, provided that:

- The property owner does not own or own any interest in more than three single-family residences at one time.
- In cases where the owner is not the most recent resident of the property being
sold, that owner is only granted one exempt sale in any 24-month period.

- The owner does not use the facilities or services of a real estate licensee, broker, salesman, or anyone else engaged in the business of selling or renting dwellings.
- The owner does not use any discriminatory advertising.

For this exemption to apply, it is important that the person making the sale or arranging the rental not be in the business of selling or renting dwellings. This exemption applies only to those individuals who are incidentally selling their own property, not to people who are professional real estate dealers or investors. The Fair Housing Act judges a person to be in the business of selling or renting if:

- That person has within the preceding 12 months participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein.
- That person has within the preceding 12 months participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein.
- That person is the owner of any dwelling that is designed for or intended for occupancy by or occupied by five or more families.

**Rental of Rooms or Units in Owner-Occupied Property**

This law does not apply to the rental of rooms or units in a dwelling containing living quarters occupied or intended to be occupied by no more than four families living independently of each other if the owner actually occupies one of the living units as his residence.

**Dwellings Belonging to Religious Organizations or Private Clubs**

Nothing in the law prohibits a religious organization or private club from limiting the sale, rental, or occupancy of a dwelling that it owns or operates for other than commercial purposes to persons of the same religion or club. Private clubs may show preference to club members under similar circumstances.
Housing for Older Persons

Housing for older persons is also exempt from the familial status requirements of the Fair Housing Act if one or more of the following three conditions apply:

1. The housing is occupied only by persons who are 62 years of age or older.
2. 80% of the housing units have at least one occupant who is 55 years old or older.
3. The housing is provided under any state or federal program that the Secretary of Housing and Urban Development determines is designed and operated to provide assistance to the elderly.

STOP!!
If a seller is selling their own home, by themselves. that they are living in and it has been their only home for six years, are they covered by the Federal Fair Housing Act? No

If a seller is selling their home that is in a senior citizens’ retirement area are they exempt from discriminating because of a buyer’s religion? No

Texas Fair Housing Laws

States, cities, counties and other municipalities can all have their own Fair Housing laws in addition to the Federal Fair Housing Act. Texas protected classes are the same as Federal Law. Some Texas cities have additional protected classes. Real estate licensees must be aware of any additional protected classes in their own areas.

Texas has regulations especially for multi-family dwellings like apartment dwellings. Apartment managers must be very careful that fair housing laws are not violated. All of the various areas in an apartment complex must be open to all of the tenants. Supervision of children in pool areas or workout areas is permitted.

All landlords have to be aware of making exceptions to some of their policies if that is necessary for a handicapped person to live there. For example, providing a reserved...
parking place for a person in a wheel chair may be needed to allow the person to live in that dwelling.

Landlords have to allow tenants to make modification to their property to accommodate their handicap. The modifications must be paid for by the tenant and the landlord can require the property to be put back to its’ original condition when the tenant moves out.

Landlords cannot forbid assistance animals to help a handicapped tenant for being there even if they have a no pet policy.

Article 10 of the NAR Code of Ethics illustrates the REALTOR®s commitment to fair housing. A charge alleging that a REALTOR® has violated a fair housing law may also form the basis of a charge alleging a violation of Article 10. The REALTOR® can have nothing to do with any plan or agreement to discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin with respect to any real estate transaction.

In addition to the protected classes under the Federal Fair Housing Act the National Association of REALTORS® has added sexual orientation as a protected class for their members.

In 2005 the state of Hawaii also added sexual orientation and gender identity or expression to the list of classes protected under fair housing law.

**Housing Discrimination**

Under the federal Fair Housing Act, there are seven protected classes. It is illegal to discriminate against someone because of his or her:

1. Race  
2. Color  
3. National origin  
4. Gender
5. Familial status
6. Religion
7. Disability

Notice that age is not a protected class under the Federal Fair Housing Act. As long as the prospect of an age to legally contract that is all that is required.

It is a violation of federal law to discriminate against someone in the sale or letting of residential real estate on the basis of his or her membership in one of these seven protected classes. Some individual states and local jurisdictions, such as counties and cities, have introduced legislation to protect additional classes. It is, therefore, necessary for licensees to review state laws and local ordinances regarding housing discrimination to ensure that their conduct satisfies any additional requirements.

All of the protected classes listed earlier were established by the Civil Rights Act of 1968 except sex (gender), familial status, and disability. Sex was added in 1974 by the Housing and Community Development Act. A 1988 amendment to the federal Fair Housing Act itself added familial status and handicap.

While some of these classes may seem self-explanatory, the definitions of “disability” and “familial status” may be a little less clear. For example, a disability does not necessarily mean a physical disability. The next few screens will define the terms “disability” and “familial status.”

STOP!!
An acronym to help you remember the protected classes under the Federal Fair Housing Act is “REALTORS CAN REALLY SELL HOUSE FAST NOW’. See if you can fill in the blanks

R ____________ Race
C ____________ Color
Definition of Disability

The law states that a *disability* is any physical or mental impairment that limits one or more of a person’s major life activities, such as walking, talking, hearing, seeing, breathing, learning, performing manual tasks, and caring for oneself. This definition thus includes a variety of conditions, such as being infected with HIV or having AIDS, being an alcoholic, and having a learning disability. It is worth noting here that while alcoholism is considered a disability, being addicted to illegal drugs is not.

A disability can be actual or perceived. This means that if a real estate professional believes that a prospect may have a disability of any kind, and, as a result, refuses to rent, offer services, or show housing, then that professional has violated the federal Fair Housing Act. This is true regardless of whether or not the person is actually disabled.

Real estate professionals and lessors must make reasonable accommodations for people with disabilities. A landlord or real estate professional must make any accommodation that helps a disabled person acquire and enjoy his or her dwelling, though the parties providing accommodation(s) are not required to suffer undue hardship in doing so. For brokerages, this could mean providing Braille versions of pamphlets and handouts. For a lessor, this could mean allowing a person with an assistive animal to keep his or her animal indoors, even if tenants are generally forbidden to keep pets.

Although you may not discriminate against people because of a disability, it is not illegal to refuse housing to prospective tenants or to evict current tenants who have a physical or mental impairment that poses a direct threat to other tenants. For example, it would not be illegal to refuse to rent an apartment to an unmedicated schizophrenic with a
history of violence against others, even though the person has a documented mental impairment.

In cases like these, it is important that real estate professionals, landlords, prospective sellers, and other people bound by the Fair Housing Act show that an actual and *direct* threat exists. For example, a tenant with Tourette’s syndrome who cannot help making loud noises throughout the night may pose an indirect threat to other tenants through the long-term effects of sleep loss, but does not pose any immediate, direct threat. The courts have ruled that a landlord must also show that no reasonable accommodation could eliminate the direct threat posed by a tenant.

**Definition of Familial Status**

The federal Fair Housing Act also protects families with children under the age of 18 living with one or more parent or guardian, as well as pregnant women and those planning to adopt. In general, no one may deny housing to an individual simply because that person has or may soon have children.

There is one exception to this prohibition: what the Fair Housing Act calls “housing for older persons.” A dwelling is exempt from the requirement to accommodate families if:

- That dwelling is provided under any state or federal program that the Secretary of Housing and Urban Development determines is designed and operated to provide assistance to the elderly.
- That dwelling is intended for and occupied solely by people who are 62 years of age or older.
- At least 80 percent of all occupied units in that dwelling house at least one person over the age of 55 and the landlord generally adheres to a policy with the demonstrable intent of housing persons over 55.

In some cases, imposing limitations on the number of occupants allowed in a dwelling may constitute discrimination on the basis of familial status. To ensure that fair housing lawsuits regarding this issue remain reasonable, Congress passed the Quality Housing
and Work Responsibility Act of 1998. This Act required HUD to set reasonable limitations on the number of occupants allowed in a dwelling. HUD concluded that a “two occupants per bedroom” rule — taking other factors into consideration — constitutes a good basic model.

The law does not prohibit local regulations regarding the maximum number of persons allowed to occupy a dwelling. In 1991, HUD’s then-General Counsel Frank Keating issued a memo that provided a guideline: "... the Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act .... However, the reasonableness of any occupancy policy is rebuttable..." and nothing "implies that the department will determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom."

The federal Fair Housing Act describes a number of illegal practices. We will cover these in greater detail in the next lesson, but we can examine them briefly here. They include the following actions when these are based on an individual's membership in a protected class:

- Refusals to sell or rent
- Discrimination in terms, conditions, or privileges of sale
- Discrimination in advertising
- Denying availability
- Blockbusting and steering
- Failure to make reasonable accommodations
- Lending discrimination and redlining

There are two discriminatory practices on this list that are not part of everyday language and which thus require special explanation: steering and blockbusting. As previously stated, both of these activities violate the federal Fair Housing Act, and people guilty of such activities – regardless of whether they intended the act or its effects – are held liable.
Steering

*Steering* is the practice of providing real estate advice or other real estate services in a manner that perpetuates segregated housing. All of the following constitute steering:

- Using an individual’s race, gender, or membership in any other protected class as the basis for one’s suggestion that a person live in a specific section of town.
- Using an individual’s membership in a protected class as the basis of one’s refusal to show housing in another section of town.
- Focusing one’s marketing effort in a narrow way that perpetuates the segregation of protected classes.

**Example:** A Vietnamese family comes into Real Estate Licensee X’s office looking for a home. X knows of a good neighborhood with a substantial number of Vietnamese residents, one he thinks the family would enjoy. He shows them only properties in that neighborhood. This is considered steering because he is directing the family away from other, less racially-segregated neighborhoods, and the licensee thereby works to perpetuate segregation. Notice that the licensee does not have any malicious intent here – he is not trying to deprive the family of anything nor does he hold any negative beliefs about them. He may actually think he is being helpful. It is still wrong for X to take this choice out of the family’s hands. They should be allowed to choose for themselves among the various properties he has available, regardless of location.

A real estate licensee should not let a client’s membership in a protected class influence the properties he or she shows that client – not even if the client specifically asks that she do so. For example, if a prospective buyer expresses a wish to live in a Hispanic community, it is recommended that the real estate professional tell the client that he cannot take such factors into consideration, and respond by showing the client a range of listings meeting the client’s other, property-related specifications. The client is free to choose a Hispanic community if he or she so desires, but the real estate licensee can play no role in helping the client to identify or acquire segregated housing.
Blockbusting

Blockbusting refers to the practice of encouraging the panic selling of homes below market value, generally by raising fears that an influx of individuals belonging to a particular minority group will decrease property values in a neighborhood and affect the area negatively. Because it requires this kind of special effort, licensees are unlikely to engage in blockbusting accidentally and without malicious intent; nonetheless, they should remember that intent is not required for their acts to be a violation of the Fair Housing Act.

Blockbusting may also be referred to simply as panic selling. Those wishing to foster this panic selling often cite effects such as a decline in the quality of education and an increased crime rate, even though there is no justification for making these claims. At its core, though, blockbusting is a profit-seeking practice that relies upon mistaken and discriminatory ideas about various protected classes, and uses these to induce people to engage in real estate transactions that are not in their best interests. As such, it violates the Fair Housing Act and encourages people in keeping their discriminatory beliefs. Real estate licensees have an obligation not to let their work or services be influenced by confused and harmful notions about members of the seven protected classes. Engaging in this kind of activity for profit is unethical and it is forbidden by the Fair Housing Act.

General Considerations

Unlike the federal Fair Housing Act, there are NO EXCEPTIONS to the Civil Rights Act of 1866. This means that you may NEVER turn away a qualified tenant or purchaser because of race or color; neither may you publish an advertisement that discriminates against someone on this basis. For example, in the U.S. Supreme Court case Jones v. Mayer Co. (392 U.S. 409 [1968]), the refusal to sell a home because of the prospective buyer’s race was found to be a violation of the law. The court decided that the defendant had violated the Thirteenth Amendment as well as 42 U.S. Code 1982, which provides that all citizens "shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."
It is often difficult to determine whether a specific property or transaction is exempt under the Fair Housing Act, or whether it is exempt from state and local legislation addressing similar issues. Because these cases are complex, any time someone thinks that a property or transaction might be exempt, it is very important to seek legal counsel.

STOP!!

A homeowner is selling his only home he has been living in for 10 years “by owner”.

Is he covered by the Federal Fair Housing Act? No
Could he discriminate because of the number of children a prospect has? Yes

Is he covered by the Civil Rights Act of 1866? Yes
Could he legally discriminate against someone because of their race? No

Fair Housing Complaints

The Secretary of the Department of Housing and Urban Development is in charge of enforcing fair housing law. HUD can initiate action against licensees who violate fair housing law even if a member of the public does not make a complaint. Any person who believes that he or she has been injured by the discriminatory practices of a real estate licensee, or who believes that he or she is being or will be injured, may file a complaint with HUD. Complaints must be in writing and must contain the specific information that HUD requires, such as the date of the incident, its location, the name(s) of the party or parties involved and other pertinent details. All complaints must be filed with HUD within one year of the date that the alleged act of discrimination took place.

HUD investigates some complaints by using what they call “testers.” These are sets of people who are members of various groups – some legally protected, some not – who employ the services of a business. The goal here is to determine whether that business treats the members of different groups in a fair and approximately equal way. For example, suppose someone files a fair housing complaint alleging religious
discrimination: a Jewish family has complained that a real estate licensee only showed them properties near synagogues, even though they had expressed no interest in living near a synagogue. When they asked to see properties in other areas, they were told that the properties they were being shown were those that best fit their needs. The tester in this situation would likely be a non-Jewish family whose housing requirements and qualifications are quite similar to those of the Jewish family. The testers would be sent to the same real estate office. If the non-Jewish family were then shown properties that were not near synagogues, the results of the testing would incriminate the real estate office.

Self-Testing

In the 1997 Omnibus Appropriations Act, Congress established “a privilege for lender-initiated self-tests of residential real estate related to lending transactions” as part of their efforts to ensure fair lending practices. In essence, this privilege allows lenders to conduct self-tests to evaluate their lending practices. If they find discriminatory practices in their business, then they are allowed to remedy these without federal lawsuits. This Act encourages lenders to be critical about their lending practices and to engage in self-testing, which will ideally lead to more equitable lending practices.

Complaints Requiring Immediate Action

Sometimes, when discriminatory action requires an immediate solution HUD will attempt to establish a temporary solution to the complaint while it works on completing a full investigation. HUD may also ask the Attorney General to handle the suit in court to obtain temporary or preliminary relief. A fair housing complaint that requires immediate action meets the following conditions:

- Irreparable harm will more than likely result without immediate action.
- Substantial, compelling evidence exists that indicates a violation of the fair housing laws.

Given the potential for serious harm and clear indication of illegal activity, you can see why these cases would merit immediate action.
**For example:** A tenant is scheduled to move out of her current apartment and into a new apartment. She has submitted her application paperwork electronically and has not yet met the landlord in person, although she has been approved for the apartment. One day she stops by the apartment building with a friend and meets the landlord of the building. The landlord decides that this new tenant looks to be of Middle Eastern descent and feels that he would prefer that there were no Middle Eastern individuals in his building. He revokes the tenant’s lease contract. The tenant’s old lease is up, and she must vacate her previous apartment. If the landlord does not let her move in, then the tenant may not have a residence.

In this situation, time is of the essence. Consequently, HUD might pass the case on to the Attorney General for immediate attention while it files a complete investigatory report.

**Complaint Referrals**

Depending on state and local laws, there may be other venues – in addition to HUD – in which fair housing cases can be filed; in some cases, multiple venues may have jurisdiction over one case. In other words, a real estate licensee may be subject to more than one legal action for any one act of alleged discrimination.

If HUD determines that a state or local agency in the area of the complainant is “substantially equivalent” in powers to HUD, then it will refer the case to the agency for investigation, and notify the complainant of the referral. If the agency does not take action within a 30-day period, then HUD may take back the case.

**Conciliation**

Within 100 days of receiving any complaint, HUD must notify a complainant as to whether it intends to act on the complaint. In addition to full legal proceedings, HUD may also use informal conferences to resolve complaints as well as issues that arise over the course of an investigation.
Sometimes complaints may be the result of a simple misunderstanding, or an investigation may reveal issues that require additional clarification. If HUD believes this is the case, then it can hold an informal meeting to help resolve the issue. In the federal Fair Housing Act this type of informal conference is referred to as conciliation.

_Conciliation_ is an attempt to resolve the issues raised by a complaint or an investigation through informal negotiations between the aggrieved person, the respondent, and the HUD Secretary. With the exception of actual, written agreements that may result from conciliation, nothing said during the course of informal conferences may be made public or used as evidence in subsequent proceedings without the written consent of all parties concerned.

The respondent and the complainant can reach agreement during conciliation. For any such _conciliation agreement_ to be binding both parties must accept it; the agreement may also be subject to the HUD Secretary’s approval. Such agreements must be made public unless there is an agreement to the contrary that is accepted by both the respondent and the complainant.

If a complainant feels that his or her complaint has not been handled properly, then the complainant may seek civil proceedings to resolve the issue. The complainant has this option following conciliation as well. For example, if a conciliation process leads HUD to conclude that dismissal is the best way to handle a case, but the complainant still feels that discrimination occurred, then the complainant may take the issue to the civil courts.

**Penalties and Civil Proceedings**

If HUD determines that a discriminatory practice has occurred or is in the process of occurring, then it can order an administrative hearing on the charges. If an administrative hearing takes place and concludes that there has been a violation of fair housing law, then the person or group who violated the law can be ordered to:

- Compensate the complainant for actual damages, including humiliation, pain, and suffering.
• Provide injunctive or other equitable relief, for example, making the housing available to the complainant.
• Pay the Federal Government a civil penalty. The maximum penalties are $10,000 for a first violation and $50,000 for a subsequent violation within seven years.
• Pay reasonable attorney’s fees and costs.

In addition, if the person charged with the violation is licensed, then the licensing agency must be notified of the decision.

STOP!!
How much??

$____________________ first violation $10,000

$____________________ another violation within seven years. $50,000

Civil Action

Both the complainant and the individual charged with the violation have the right to resolve the matter by a civil action, rather than an administrative proceeding. If the person being charged elects to have the matter resolved by a civil action, then HUD will request that the lawsuit be filed by the Attorney General. The court in such a civil action has the authority to assess sizeable financial penalties, which can also include reparations and relief, court costs, and attorney’s fees.

In any civil action, the burden of proof is on the person making the complaint. In order to have a legal basis for a case, a complainant must show that:

• He or she is a member of a protected class.
• He or she applied for and was qualified to rent or purchase the property but was rejected.
• The property remained available after the rejection – i.e., the property was rented or sold to someone else after it was denied to the qualified person making the complaint.

**Option Agreements**

Option agreements are unilateral contracts to give one party the right to do or not do something without making a commitment to do anything. Option contracts have to have the essential elements of a contract: legal objective, competent parties, mutual agreement, in writing and signed and consideration.

**Option to Purchase**

If a purchaser believes that he or she may want to purchase a specific property in the future, but does not want to be committed to do so until they are sure what is going to be built on the property next door, they may want to negotiate with the owner for an option to purchase. The interested purchaser could offer to give the owner a $5,000 option fee for the owner’s promise to hold the property and allow the purchaser to buy it during the next three years at the terms they agree to now. Consideration for the potential purchaser is the $5,000 option fee. Consideration for the owner is the promise. The owner is obligated to comply IF the buyer decides to exercise their option and buy.

**Option to Terminate**

Paragraph 23 of the Texas contract form creates an option to terminate for the buyer. The option requires separate consideration to make it valid. The buyer can purchase the right to terminate for any reason for a certain number of days. During this time period the buyer can be getting inspections, environmental reports, checking the zoning of the property, and verifying deed restrictions and then can terminate during the time period the parties have agreed to. The parties agree to the amount of the option fee. The option fee is non-refundable. A check for the option fee must be delivered to the seller or the seller’s agent within three days after the effective date of the contract. (In writing, signed by all parties, and acceptance communicated is the effective date)
23. TERMINATION OPTION: For nominal consideration, the receipt of which is hereby acknowledged by Seller, and Buyer’s agreement to pay Seller $___ (Option Fee) within 3 days after the effective date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within ___ days after the effective date of this contract (Option Period). Notices under this paragraph must be given by 5:00 p.m. (local time where the Property is located) by the date specified. If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee to Seller within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded; however, any earnest money will be refunded to Buyer. The Option Fee will not be credited to the Sales Price at closing. Time is of the essence for this paragraph and strict compliance with the time for performance is required.

Contracts for Deed

A contract for deed (also known as a land contract, installment contract or contract of sale) is an agreement between the seller and buyer for the sale of real estate. In a contract for deed, a portion of the purchasing price is deferred. The purchasing price of the property may be made in installments over the life of the contract, and the buyer must pay the remaining balance upon the expiration of the contract.

Once the buyer has made all of the required payments, the seller has to convey a valid and legal title to the buyer. However, during the contract, the seller holds the legal title to the property and is liable for payment of any underlying mortgage, but the buyer is entitled to possession and equitable title to the property. The next section covers executory contracts in Texas.

Lease Purchase

A lease purchase agreement is used when a tenant wishes to buy a property but cannot do so right away. With a lease purchase agreement, part of a tenant’s rent is applied to
the purchase of the property. The lessor and lessee set the price of the property in the lease agreement. The title to the property transfers upon full payment of the stated sale price. (NOTE: Real estate agents cannot write a lease purchase. The agreement will need to be created by an attorney)

The Texas Property Code and Executory Contracts
The Texas Property Code considers contracts that do not close for an extended period executory contracts. Usually the purchaser takes possession but does not get legal title until sometime later (often after all payments are made, etc.). **Contracts for Deed, Land Sales Contracts, Lease with Option to buy, and Lease Purchase are all included in executory contracts under Texas state law.**

Effective June 1, 2006, the Texas Property Code considers an option-to-buy that includes a residential lease an executory contract.

**Do not** attempt to use the TREC forms or other such standard forms to create lease-purchase, lease-option contracts or contracts for deed aka land sales contracts. Not TREC, nor any real estate trade association in Texas, drafts standard forms for writing executory contracts. There are significant penalties for a seller that does not comply with the Property Code.

Parties that want to have an executory contract will need to contact an attorney to give them advice and to prepare the contract forms. The best advice the real estate agent can give the parties is not to enter into executory contracts without seeking the assistance of an attorney. Never attempt to create executory contracts by modifying TREC forms.

**Lease Purchase Agreements**
An option agreement, also commonly referred to as a lease purchase, lease option and lease-option-to-buy, combines the components of a basic lease contract with an option-to-purchase contract. The optionee (prospective buyer or tenant) pays the optioner
(landlord or seller) a nonrefundable deposit (option fee) that is applied to the purchase price of the property. The option fee gives the optionee the choice of purchasing the property before the conclusion of his or her lease.

Once the optionee has paid the option fee, he or she must then pay the optioner a monthly rent to compensate for his or her use of the property. A fraction of that monthly payment is usually applied towards the purchase price or down payment of the property. The optionee has the option of purchasing the property (according to the fixed terms in the contract) during the lease of the term; however, he or she loses this option once the lease expires.

**Lesson Summary**

For real estate professionals to be proficient in their industry, they must understand the different real estate contracts that govern their field. We discussed many types of real estate contracts that are vital to real estate professionals: listing agreements, sale contracts, option agreements, leases, contracts for deed and independent contractor agreements.

The sale contract is the most important document in a real estate transaction because it sets forth the terms and details of the agreement between the buyer and the seller. A sale contract contains the price that the buyer is willing to pay and the amount of earnest money that the parties have agreed that the buyer will give. Basically, a sale contract is a buyer’s written offer to purchase real estate.

In Texas, TREC promulgates real estate contract forms; this means that real estate agents must use the promulgated form for the transaction that it has been assigned to. If there is no promulgated form for a specific transaction, then the licensee has the right to contact an attorney for assistance in creating a contract. A licensee can never create a contract; he or she can only fill out forms promulgated by TREC, created by an attorney or created by the client.
Freehold ("More permanent") conveyances of real estate include conveying fee simple title, life estates, and remainder estates. Freehold estates do not have an ending date. Leasehold estates are rental properties and have a specific termination date.

The Statute of Frauds requires all real estate contracts (except leases of under 6 months) to be in writing and to be signed by the parties.

Real estate contracts must include the names of the competent parties, the legal description of the property, the sales price, a legal purpose, consideration, and signatures of the parties. The TREC promulgated contract forms include all of those items and many more. Most contracts are bilateral contracts and the consideration is the exchange of promises.

The deed that transfers the property and the deed of trust that is security for the loan are recorded documents. The deed of trust has the amount of the loan as part of the document but the deed does have the sales price included. Texas is a non-disclosure state and sales prices are not disclosed in public documents.

Offers remain open until they are accepted, rejected or withdrawn. If a party has made an offer, or counteroffer that is still open, they need to withdraw it before making an offer to another party.

Title to property is transferred by a deed. A general warranty deed says the seller is guaranteeing the buyer there is nothing against the property since the beginning of time. A special warranty deed says the seller is guaranteeing the buyer that there is nothing against the property that was put there during the term of his or her ownership. A quit claim deed has no guarantees.

Encumbrances on the title will either be cleared before closing or made an exception to in the title policy.
Title companies will prepare the closing documents that the parties are taking title as tenants in common unless otherwise instructed. Joint tenants with the right of survivorship have rules that all the parties must acquire title at the same time, with the same deed, all have an equal percentage of ownership, and all have the right of possession.

Texas is a community property state and married couples usually own their property as community property.

It is not unusual for sales contracts to include several contingencies that must be satisfied before closing. Mortgage contingencies, sale of other property contingencies, inspection contingencies, etc.

Closing is the date all the money is collected by the escrow agent and the deed is signed by the seller. Funding is the date the funds are released by the lender to the title company and the title company pays the money owed to the seller, brokers, and other vendors.

Possession is usually the same day as funding. If possession is a different date from funding the parties can use a temporary lease agreement. TREC provides both a buyer and a seller’s temporary lease.

The Texas Real Estate Commission contracts are very specific regarding what stays with the property. The contract list both improvements (attached) and accessories (unattached) that stay with the property.

The contracts are “as is” contracts, however the buyer can purchase an option to terminate for a period of time, giving them time for inspections and for due diligence.

A contract is a voluntary arrangement between two or more parties that is enforceable by law. Not all agreements are necessarily contractual, as the parties generally must be deemed to have an intention to be legally bound. In order for a contract to be formed, the parties must reach mutual assent (also called a meeting of the minds).
If an acceptance varies the terms of an offer, it is not an acceptance but a counteroffer and, therefore, simultaneously a rejection of the original offer.

In unilateral contracts one party makes a promise, but the other side does not promise anything. An option to purchase contract is a unilateral contract.

The doctrine of privity, states that only a party to a contract can sue or be sued for breach of the contract.

Promissory estoppel is usually only granted if a court determines that enforcing the promise is essentially the only means by which an injustice to the promisee can be avoided. Unjust Enrichment can be described as “not entitled to”, something of value received in error and not earned by the receiver.

Defenses such as duress or unconscionability may enable the signer to avoid a contract obligation.

Real estate agents must take care to only use the TREC promulgated forms and addenda and to insure not writing things into a contract that could make it uncertain.

If there is a mutual mistake in a contract either party can void the contract. If only one person is mistaken the contract cannot be voided unless there was fraud or misrepresentation involved.

Courts will usually not uphold family agreements.

An attorney will need to prepare an appropriate form for a contract for deed or a lease with an option to buy.

Starting with the effective (final execution) date of the contract, the first day of the period starts the next day. Each day is counted as calendar day.
When a buyer and a seller each perform all of their obligations under the contract including the closing of the transaction, the contract is discharged.

If two parties decide to replace an original contract with a new contract it is called a novation. When both parties agree to terminate and discharge a contract it is a mutual rescission.

The law gives a limited period of time that a contract can be enforced. If the contract can no longer be enforced because of the time limit the contract is discharged by the lapse of time.

If a new law or code prevents a contract from closing, the contract will be discharged because of the impossibility of performance.

If a person is leasing a property and then buys the property before the lease expires, the lease will be discharged by merger. The inferior rights merge into the superior rights.

If the parties compromise on some portion of the contract and then close, it is discharged by accord and satisfaction.

An aggrieved party has the right to decide if they want to exercise their right to terminate the contract when the other party is in default. The injured party can decide to seek compensation for damages or to discharge the contract.

A party injured because of the other party’s breach of contract can (1) sue for damages (2) sue for specific performance or (3) accept the earnest money as liquidated damages, releasing everyone from the contract.

If a party discovers fraud, misrepresentation or a mutual mistake has taken place they can sometimes rescind the contract. To rescind a contract is to terminate it without penalty. The other party cannot sue for damages or specific performance when rescission
is due to fraud, misrepresentation or a mutual mistake. If only one party has made a mistake the contract cannot be rescinded.

The courts can apply three types of damages (1) Actual expenses caused by the breach (2) Liquidated damages (related damage: missed work, doctor bills, pain and suffering, etc. and (3) Exemplary damages (punishment).

The contract establishes the details of the agreement between the buyer and seller and identifies their legal rights and obligations.

Once a sales contract is agreed upon by both parties it starts the process of the title company checking the public records to determine if the seller can transfer good title and checking for any encumbrances that will affect the property.

The effective date of the contract is the date both parties have signed the written contract, initialed any changes and communicated the fact that the contract has been accepted to the other party or their agent.

When an agent delivers something to someone’s agent it is the same as delivering it to the party. Delivering the option money to the listing agent is acceptable. (Only to the seller or his agent, never to the title company.)

The “time is of the essence” statement in paragraph 23 means the time frames in this paragraph are very specific and cannot be performed late. It is the only paragraph in the contract that uses that very legal language. The rest of the contract uses a “reasonable time” theory.

Real estate sale contracts must have a legal property description because courts will use this information to determine whether the subject property can be identified with reasonable certainty.
Metes and bounds is a legal land description method that identifies the exact dimensions and location of a lot in reference to a fixed and permanent monument. The rectangular survey system uses a surveyed grid of meridians, baselines, townships and ranges to describe land. The recorded plat system of land description is also known as the lot-block-tract system, reordered survey or recorded map method.

Earnest money is not required to create a legally enforceable contract. Another purpose of earnest money is to act as liquidated damages in case of default. Once the offer has been accepted, the broker then has the power to deposit the earnest money; however, he or she must do this by the close of the second business day after the contract has been executed. When the broker holds the earnest money, he or she must deposit the funds into an escrow account.

It is very common in Texas for the title company to act as the escrow agent. The title company collects all the money for the sale, collects all the necessary paperwork, prepares the deed, pays all expenses for the sale, etc.

Listing agreements, buyer representation agreements, lease agreements, property management agreements are not available from TREC. Members of the Texas Association of REALTORS® has access to the forms through TAR. Other brokers can have the forms drawn by a Texas licensed attorney.

A listing agreement is a contract between the seller and the agent that gives the agent authority to market or list the seller’s property. In this lesson, we discussed four types of listing agreements: open listings, exclusive agency listings, exclusive right-to-sell listings and net listings. An open listing allows the seller to simultaneously list with multiple brokers. In an exclusive right-to-sell listing, the seller can only list with one broker, and that broker will earn a commission if the property is sold, regardless of whether that particular broker, another broker or the seller is the procuring cause of the sale.
An exclusive agency listing is a combination of the open listing and the exclusive right-to-sell listing; only one broker can list the property, but if the seller procures his or her own buyer, then the seller is not responsible for paying the listing broker a commission. Finally, a net listing can be used with any other listing agreement. In a net listing, the seller agrees to pay the broker a commission that is based on an amount over the seller’s net price. Net listings are listing agreements in which the seller pays as commission any amount over the price set in the contract. The Texas Real Estate Commission requires that net listing agreements can only be made if the principal is absolutely unwilling to consider any other offers and is fully aware of the market value of the property.

The listing agreement spells out that the broker will earn the fee or commission if and when the broker presents an offer from a ready, willing, and able buyer at the listing price or another price acceptable to seller.

The Texas Real Estate License Act says that agency relationships can be terminated at any time by either party. If the seller no longer wants the broker to work for him/her, the broker must stop working. The broker should pick up signs, stop advertising, remove the property from MLS, etc.

A buyer’s agent is expected to find a buyer a home to meet their expectation including looking at new homes, MLS listings, for sale by owners, etc. According to the TAR Buyers Representation Agreement, buyers only owe commission to their agent when the agent is unable to collect it from the seller or the seller’s agent.

Agents who work with buyers and sellers need to understand agency relationships. *Agency relationships are fiduciary* in nature because one person places trust and confidence in another to responsibly handle the obligations of the position as his or her representative.

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. An *agent* is any individual acting as a
representative for another individual in dealings with a third party. The *third party* is the individual with whom the agent and principal enter into real estate negotiations; he or she is also sometimes referred to as the *customer*.

Associated licensees usually also have a relationship of *general agency* with their sponsoring brokers; associated licensees and salespersons have the authority to act in the sponsoring broker’s name in real estate transactions.

The *special agent* has the most limited authority of any type of agent. Usually, the special agent only has authority in one specific transaction. The special agent may not enter into or sign contracts on behalf of his or her principal. All listings and buyer representation agreements are in the name of the broker. The broker is the “special agent” for all buyers and sellers.

An option agreement is a contract between a tenant and landlord that allows the buyer to purchase the property at the end of his or her contract. To have an option agreement, the tenant must pay the option fee (a deposit). The tenant must tell the landlord *before* the lease expires whether or not he or she wishes to purchase the property.

A lease is a contract between a tenant and a landlord that allows the tenant to occupy a property. In exchange for occupying the property, the tenant is required to pay the landlord a monthly rent.

A contract for deed is an agreement between a buyer and a seller that allows the buyer to purchase a property over a period of time. To do this, the buyer must place a down payment on the property and make monthly payments until the end of the contract. At the end of the contract, the buyer must pay the seller the remainder of the balance. Once the buyer has paid the seller the remainder of the balance, the seller must transfer the title to the property to the buyer.

About 14% of TREC complaints between September 2015 and September 2016 had something to do with leasing or property management. Those specialties require some
special training. Brokers are responsible for everything their agents do regarding real estate and frequently require extra training in these fields.

A leasing agent’s job is to just lease the property and then turn everything over to someone else to manage the property. That will be either the owner or someone the owner has hired to do that job.

Property managers’ jobs are on-going. They collect rents, take care of maintenance, process evictions, etc.

The Real Estate Center at Texas A&M University publishes a copy of the Landlord/Tenants Guide for Texas. The guide contains the laws owners or property managers need to know when leasing property.

Only brokers can open trust accounts to hold money for consumers in real estate transactions. Trust money must be deposited into the account by the close of business on the 2nd working day after the broker or agent receives it. Brokers cannot commingle trust money with the own money or their operating account. Brokers must give consumers a monthly accounting of any activity regarding their money. A broker must maintain all documentation regarding a trust account for four years from the date the document is received or created by the broker.

There are four types of leasehold estates. 1) A lease created under an estate for years (also known as a tenancy for years) stipulates a specific starting and ending time 2) A periodic estate has a fixed lease period; this means that the lease is automatically renewed at the end of each lease period until the landlord or tenant act to terminate it 3) In a lease under an estate at will the tenant or landlord both have the right to terminate the agreement at any time. 4) A tenancy at sufferance occurs when a tenant remains in possession of the property beyond his or her lease’s terms, without the consent of the landlord. The tenant is a “holdover” tenant.
The law says the tenant cannot use the security deposit for rent.

There are 8 different types of leases. 1) Gross lease 2) Net lease 3) Percentage lease 4) Variable lease 5) Ground lease 6) Oil and gas lease 7) Lease purchase 8) Sale-leaseback. Ground leases are usually long term, 30-99 years.

*Please return to the course player to take the interactivities and then the lesson quiz.*