Texas Law of Agency
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Lesson One: Agency Concepts Disclosure of Agency—Relationship between Principle and Agent

Lesson Topics
This lesson focuses on the following topics:

- Introduction
- What is Agency?
- License Act Statute and Rules
- Roles People Play in Agency Relationships – Client or Customer
- Why Study Agency?
- Relationship Between the Principal and the Agent

Lesson Learning Objectives
At the conclusions of this lesson you will be able to:

- Explain applicable agency terminology
- Explain how an agency relationship is formed.
- Identify the different types of agency
- Explain how common agency practiced in real estate
- Describe your role in agency
- Understand how to determine type of agency to practice
- Recognize how historical aspects have influenced the current agency practice
- Describe agency in every day real estate practice.
- Identify who the principals and license holders are in an agency relationship.
- Explain what role your broker plays in agency
- Describe what role your client plays in agency
- Describe what your role is in agency
- List the types of agency license holders practice
Introduction
Agency relationships make up the foundation of the real estate industry. It was one of the reasons the National Association of REALTORS® (NAR) and the Texas Real Estate Commission was formed. To enhance the professionalism of license holders by recognizing an agency relationship between the broker and his or her client and to educate all parties about the duties imposed in the relationship.

Given the current evolution of differing agency practices, there is a crucial need for clarification of agency concepts and assumptions for all parties, the license holder, seller, buyer, tenant and landlord.

A license holder who is confused about her role, or loyalty, or understanding of their duties, inevitably sends signals about that confusion to the consumer. Such confusion breeds mistrust and frustration among the public and results in increased litigation, liability and regulation for the license holder.

The license holder needs to be educated in various types of agency relationships today and the duties involved in each type of relationship. All brokers in Texas do not practice the same type of agency.

What is Agency
An agency relationship is the fiduciary relationship resulting when one person, called the agent, represents the interests of another person, called the principal, in dealings with others.

What does this mean?
One person—broker or sales agent
Another person—broker, seller, buyer, tenant or landlord
Dealings with others—customer, other broker or sales agent

In a real estate transaction, an agency relationship is formed by mutual consent, between the broker, all sponsored sales agents, and with the client in writing.
How Are Agency Relationships Created?
An agency relationship is created by mutual consent by the client and license holder delegating authority to the broker to consent to act on his or her behalf. Both parties must consent for the agency relationship to be legal. A good business practice is to get the consent in writing. An agency relationship does not need to be a contract with the elements of offer, acceptance, and consideration.

An agency relationship can be established by words, deeds, or acts of either party. Commissions agreements paid by one party to another does not necessarily create or confirm an agency agreement.

Agency—A relationship created when one person, the principal, delegates to another, the agent, the right to act on his or her behalf in business transactions and to exercise some degree of discretion while so acting. An agency gives rise to a fiduciary or statutory relationship and imposes on the agent, as the representative of the principal, certain duties, obligations and high standards of good faith and loyalty. (The Language of Real Estate, sixth edition)

Agency Terminology
The first hurdle to understanding agency relationships is the vocabulary used when discussing these relationships.

- Broker
- Sales Agent
- Sub-Agent
- Customer
- Other Broker
- Seller Representation
- Seller
- Client
- Buyer Representation
- Buyer
- Principal
- Fiduciary
- Third Party
• Tenant Representation
• Landlord Representation

**Broker**—An individual licensed by the Texas Real Estate Commission to act independently in running a real estate brokerage business. A broker can also sponsor sales agents who have met the educational requirements by the Texas Real Estate Commission. A broker is licensed to sell, buy, lease or exchange real property for others and to charge a fee for services rendered. A broker is a special agent for clients and has a general agency with his or her sponsored sales agents.

**Sales Agent**—Is licensed by the Texas Real Estate Commission and has met their educational requirements to become licensed. They have a general agency relationship with their sponsoring broker. A sales agent works on behalf of the sponsoring broker by taking listings, buyer agreements, leases and property managements in the name of the sponsoring broker.

**Sub-agent**—A licensee sponsored by another broker who represents the listing broker and the listing broker’s client with specific common law duties. This takes place when the sub-agent does not represent the customer (buyer) when selling the listing broker’s listing. Buyer needs to be fully informed and agree they do not want representation by the sub-agent in writing.

**Customer**—A consumer who has not signed any representation agreement with any licensee in Texas. They want to buy, sell, rent or manage a rental without a license holder representing them. There are still duties that must take place when working with them by both license holders: Honesty, Fairness, Disclosure, Good Faith and Competency.

**Other Broker (also known as the cooperating broker)**—A licensed holder who wants to sell your listing.

**Seller Representative**—License holder who has a written agreement signed by both parties to represent a property owner in the marketing and sale of their property. Fiduciary duties take place and you have a special agency relationship with them.

**Seller**—a consumer who owns real estate by title.
Client—Known as the principal, seller, buyer, tenant or landlord. The person who hires a broker to represent them in a transaction.

Buyer Broker— A broker who represents the buyer in a fiduciary capacity to purchase a property.

Buyer—A consumer who wants to buy real estate.

Principal—One of the main parties to a transaction. They are in a fiduciary relationship, the person who hires a real estate license holder to represent him or her in a specific transaction.

Fiduciary—A relationship that implies a position of trust and confidence wherein one person is usually entrusted to sell, lease or manage for another. The fiduciary describes the faithful relationship owed by the license holder with the duties of Obedience, Loyalty, Disclosure, Confidentiality, Accountability and Reasonable Care.

Third Party—A person who is not party to a contract but who may be affected by the contract. One who is not a principal to the transaction.

Tenant Representation—A license holder who represents a consumer in leasing property of any type.

Landlord Representation—A broker who represents an owner of rental property. Fiduciary duties apply with many specific authorities of what the license holder can and cannot do with the monies of the broker, repairs, zoning requirements and much more. The landlord retains a reversionary interest in the property so that when the lease ends the property will revert to the landlord.

For each transaction, you should be able to determine who is who. So if a broker takes a listing agreement from a consumer, you should know:

- Who are the parties engaged in the relationship and
- How are they referred to?
  - In conversations
  - Presenting the information on brokerage services
  - Listing agreements
Before representing a consumer, you will need to be proficient in agency so that you can explain the options of representation well and explain the benefits to the consumer. They must see the benefit and value of representation before they will let you represent them.

Do you know who you represent at all times? If you do not, you may be violating agency law and confidential information.

**The License Holder (Agent)**

A Texas license holder is any individual acting as a representative for another individual in dealings with Principal. The License Holder is authorized by the person he or she represents to act on that person’s behalf with limitations. A license holder is either the broker, sales agent or a subagent.

**Sub-Agent**

A sub-agent owes the same fiduciary duties to the listing agent’s client, the seller, does. Sub-agency usually arises when a cooperating sales associate from another brokerage, who is not the buyer’s agent, shows property to a buyer. The sub-agent works with the buyer to show the property but owes fiduciary duties to the listing broker and the seller. Although a sub-agent cannot assist the buyer in any way that would be detrimental to the seller, a buyer customer can expect to be treated honestly and fairly by the sub-agent. Unless the Listing Broker cooperates with sub-agents, the sub-agent may not get a commission. The sub-agent is working without a contract that states they will be paid for services rendered for selling a specific property. Still today, if you do not represent the buyer by a buyer’s agreement in writing you automatically become a sub-agent and represent the seller even though you did not list the property. Not all brokers cooperate with sub-agents in Texas. Always look to see if you will be compensated before you show a property in MLS. Automatic compensation is not the rule in MLS. Should the cooperating commission not be what your fee is you will negotiate with your buyer to get the difference.

**Dual Agent**
A disclosed dual agent (this is when the sales agent sells their own listing) represents both the buyer and the seller in the same real estate transaction. In such relationships, dual agents owe limited fiduciary duties to both buyer and seller clients. Because of the potential for conflicts of interest in a dual-agency relationship, all parties must give their informed consent. Disclosed dual agency is legal in most states, but often requires written consent from all parties. In Texas this is known as intermediary with the permission of the broker, seller and buyer in writing. Full disclosure is a must.

Designated agents (also called appointed agents) are chosen by a managing broker to act as an exclusive agent of the seller or buyer. This allows the brokerage to avoid problems arising from dual-agency relationships for licensees at the brokerage. The designated agents give their clients full representation, with all of the attendant fiduciary duties.

**Buyers Agent**

The buyer’s representative (also known as a buyer’s agent) is hired by prospective buyers to work in the buyer's best interest throughout the transaction. The buyer can pay the agent directly through a negotiated fee, or the buyer's rep may be paid by the seller or through a commission split with the seller’s agent.

**The Principal**

The principal is the individual that a license holder authorizes in writing, to act on his or her behalf. This person may also be referred to as the broker or sales agent. The license holder must be authorized by the principal to represent the client in a transaction.

**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.
**Principal-Agent-Third Party**

The third party negotiates through the agent who has the listing on the property known as the license holder representing the principal.

The license holder is obligated to treat the third party license holder and buyer or customer fairly and honestly. The license holder may sometimes even provide helpful services to the third party, but the license holder is the fiduciary of the principal and, therefore, must represent the principal's interests first.

The license holder is bound by certain duties and ethics owed to the principal. Written agreements are typically used and serve to provide detailed information about the duties pledged by both the principal and license holder. In Texas Real Estate these documents are known as Listing Agreements, Buyer Agreements, Leases and Property Management Agreements. They are very clear on what you can and cannot do. Any and all authorizations must be in writing and come from the Principal's and the Broker’s Policy and Procedure manuals.

**Authority**

The amount of authority that an agent has differs depending upon the arrangement.

**Types of Agency**

**Broker and Sales Agent Agency** is called a general agency relationship. You have duties required by the sponsoring broker that are spelled out in the Broker’s Policy and Procedures Manual. The sales agent and broker associate takes their duties from the broker and principal. At no time does the sales agent or broker associate make decisions outside of the Law of Agency and the sponsoring Broker’s Policy and Procedures.

**Authority**

Your independent contractor agreement and the sponsoring Broker’s Policy and Procedural Manual will define what you can do and what you cannot do.

**UNIVERSAL AGENCY**

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. A legal guardian, for example, has all of the power of a universal agent.

**Authority**
Your agreement or power of attorney will define what you can do and what you cannot do.

**General Agency** has more limited authority than a UNIVERSAL AGENT but is usually authorized to manage some or all of the principal’s affairs in certain specified areas. A sales person or a broker associated can take listing agreements, contracts, leases, buyer representation agreements in the broker’s name.

As an example, the Texas Real Estate Commission now requires the broker of record to name their designated broker to act as the broker of record in running their real estate office or business. Many of the duties would be spelled out in the Management Agreement like it is in the Sale’s Agent’s Independent Contractor Agreement and the Broker’s Policy and Procedures Manual.

**Authority**
Sales agents usually also have a relationship of general agency with their supervising brokers; broker associates and sales agents have the authority to act in the broker’s name in real estate transactions and the Broker’s Policy and Procedure Manual.

A PROPERTY MANAGER, who must have a broker’s license, usually has a general agency relationship with the owner of the property, who is the landlord client. The broker is authorized to collect rents, budget expenses for the property, procure tenants, hire employees and generally run the property on behalf of the owner. There must be specific duties for a sales agent to be involved with a Property Management Department licensed by a broker. The duties must be spelled out in writing.

**Authority**
The employment contract, normally a property management agreement, spells out what the broker can and cannot do.

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. They are known as broker associates.
Authority
Your Independent Contractor Agreement and the sponsoring Broker’s Policy and Procedural Manual will define what you can do and what you cannot do.

SPECIAL AGENCY
The *special agent* has the most limited authority of any type of license holder. The special agent can be known as a LIMITED AGENCY. Usually, the SPECIALAGENT only has authority in one specific transaction. An example is a listing agreement. You have specific duties and can only perform on what is authorized in writing. The special agent may not enter into or sign contracts on behalf of his or her principal. In the real estate industry, the license holder generally has a relationship of SPECIAL AGENCY with the principal.

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 Agency Relationship
The only requirement for establishing an agency relationship is the consent of both parties. Most brokers will require the sales agents to have it in writing. In Texas if you do not have an agreement saying you will be paid for service rendered, spelling out what your fee is, you are not protected on a commission.

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.

*Note:* 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 agreed to by all parties to the transaction in writing, whereas express agency may be granted orally.

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. This is used in a court of law when there is a lawsuit filed by a consumer. The judge or the jury will decide who is at fault by implied actions, conduct and the process. Again in real estate all transactions are in writing to reduce liability.

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.

**What is Agency?**

Agency is the relationship created when one party authorizes another party to represent him or her, in writing, to act in his or her best interest. Consent must be given by both parties, (license holder and principal (client)). For example, the relationship between a license holder and a seller (principal-client) is an agency relationship. Another would be a license holder and a buyer principal-client is an agency relationship.

*Agency relationships* have the distinct duty of becoming a *fiduciary*. This is because one person places trust and confidence in another to responsibly handle the obligations of the agency laws as his or her agent.

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

In the early 1900s, the common way, of doing real estate, was with open listings. The relationship between the seller and the broker was not an exclusive relationship. The seller was free to work with as many brokers as they wanted and only the broker that brought the buyer got paid. Cooperation between brokers barely existed because every broker wanted to be THE broker that got paid.

In 1908, a group of Real Estate Boards called the National Association of Real Estate Exchange's (NAREE) endorsed exclusive agency (representing the seller) and mandatory cooperation between brokers. The broker who brought the buyer to the transaction also represented the seller, through the listing broker. The agent bringing the buyer was called a sub-agent. NAREE eventually became the National Association of Real Estate Boards (NAREB) and then the National Association of REALTORS® (NAR).

Both the listing broker and the sub-agent represented the seller. The buyer had no representation. The worst part was many times the buyer did not realize they had no representation. Brokers liked exclusive representation and discovered MLS was a good way to publish information about their listings and offers of compensation to sub agents.
MLS began to grow quickly in the 1920s. Most MLSs were run by REALTOR® organizations. MLS required mandatory offers of cooperation and compensation to sub-agents.

The real estate business operated the same way for over a half century. In the 1960s, buyers began to question their lack of representation in real estate transactions. The National Association of REALTORS® began to require participants and subscribers of the MLS to notify buyers, in writing, that they were not being represented. Texas developed the notice “Information on Brokerage Services” that discloses types of representation. License holders are mandated to deliver to all consumers interested in any or all real estate and have the consumer ratify they received the Notice. More and more buyers became aware of the non-representation and started demanding representation. Today buyer representation is the norm, not the exception.

Roles People Play in Agency Relationships
So what representation were sellers receiving that buyers were not getting?

The parties in a real estate transaction are defined as either a client (seller, buyer, lessor, lessee, tenant, landlord, property manager) or a customer (seller, buyer, lessor, lessee, tenant, landlord, property manager). Everyone is entitled to honesty, fairness and disclosure throughout the entire transaction: before, during and after. The seller, called the client or principal, was the one being represented. In addition to the honesty, fairness and disclosure they were receiving fiduciary duties from the license holders known as brokers and sales agents. Fiduciary duties include: obedience, loyalty, disclosure (not just about the property, but anything the agent knows that may affect the client in negotiations), confidentiality, accounting and reasonable care. The buyer was a customer, not a client. Customers receive honesty, fairness, disclosures, good faith and competency.

Needless to say, the sellers were receiving a much encompassing share of representation from license holders than buyers. Sub-agency is still practiced but is slowly disappearing. The reason is a sub-agent has no protection for payment of commission, unless the listing broker cooperates with sub-agents.

In the 70s, brokers began to consider representing buyers. One of the problems was the possibility of dual agency. Dual agency creates a lot of liability for brokers. Think how impossible it would be for a broker to give 100% loyalty to both the buyer and the seller. Think how impossible it would
be for a broker to comply with the fiduciary obligations of confidentiality while complying with the
duty of full disclosure about everything to both parties. This is like being married to two (2) people
at the same time. It cannot be done.

Today there are many forms of agency. Every state has their own laws. Our Texas legislature has
created a very good way brokers can represent sellers only at times, buyers only at times, and
when the buyer and seller come together in one transaction, a safe method for the broker to
handle both sides of the transaction. To prevent the broker from becoming a common law dual
agent, Texas has specific laws called the Intermediary Laws. The broker who is representing both
the buyer and the seller in the same transaction becomes the intermediary. Intermediary
transactions will be discussed further in Lesson Six.

An agency relationship requires the consent of both parties, in writing, to establish. The consent
can happen in writing or orally or by action of the parties. Most license holders will not take oral
contracts. Confidential information obtained, even in the pursuit of an agency relationship, may
obligate the broker to keep confidential information confidential forever. Confidentiality is
perpetual!

Agency relationships are the backbone of the modern twenty-first century real estate industry. A
seller typically hires a broker to represent them in the marketing and sale of the property and to
find a buyer for his or her home or property. Buyers often search the Internet and drive
communities before selecting a license holder. 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
license holders 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, negotiates, writes contracts, exchanges or leases of real
property for others. They are known as the license holder.

Only a broker can enter into an agency relationship with a seller, buyer, landlord or tenant.
However, a licensed sales agent 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 sales agent as an agent.
Example:
- 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 the listing agreement on her behalf.
- The listing agreement established an agency relationship between Broker B and Seller A.
- 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.

The Principal
In a real estate transaction, the principal engages the professional advice and service of his or her license holder 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; in those relationships the landlord and tenant are spelled out in a Property Management Agreement or a lease.

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. Examples could be a buyer agent’s buyer, a listing broker’s seller, the other agent or the tenant or landlord.

Activity: Who’s Who?
Below are four parties involved in a particular sale between Buyer and Seller. Read the following description of his or her involvement in this transaction.
Buyer
I’ve been negotiating with Seller through Sales Agent to purchase Seller’s home.

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

Sales Agent
I work in Supervising Broker’s brokerage, and I’ve been negotiating on behalf of Seller in this transaction.

Broker
I’ve had no direct involvement in this transaction, but I am this Sales Agent’s supervising broker.

Choose the correct term (party) for the blanks below.

Terms (party)

<table>
<thead>
<tr>
<th>Buyer</th>
<th>Seller</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broker</td>
<td>Sales Agent</td>
</tr>
</tbody>
</table>

1. I am the third party (customer). _______
2. I am the principal (client). _______
3. I am, technically, the Sales Agent. _______
4. I am not technically the Sales Agent, but I have the authority to act as the Sales Agent. _______

Correct Answer:
1. Buyer
2. Seller
3. Broker
4. Sales Agent
License Act Statute and Rules
The Texas Real Estate Commission (TREC) regulates educational and licensing programs to maintain standards of the real estate profession and interprets legislation that affects the real estate profession.

Texas Real Estate Commission
The Texas Real Estate Commission (TREC) is the governing body for real estate professionals in the state of Texas. This Commission was established in 1949 by the Texas Legislature.

It also oversees the following entities laws:
- Texas Occupations Code, Chapter 1101—The Real Estate License Act
- Texas Occupations Code, Chapter 1102—Real Estate Inspectors
- Texas Occupations Code, Chapter 1303—The Residential Service Company Act
- Texas Property Code, Chapter 221—The Texas Timeshare Act
- Texas Appraiser Licensing and Certification Board

History of The Texas Real Estate License Act

The 1955 amendments required applicants for original licensure to pass a written examination as one step in qualifying for licensure and required each licensee to post a bond for the protection of the public. The 1963 amendments required applicants for broker licensure either to have been a licensed salesman for one year or to have successfully completed 30 classroom hours of study in basic real estate courses approved by the Commission.

The 1967 amendments increased the prerequisites for applying for broker licensure to one year of licensure and 90 classroom hours of study in courses approved by the Commission or certified by accredited institutions of higher education. It also provided that after one has been licensed as a salesman for one full year, as a prerequisite to that licensure renewal, he must have completed 30 classroom hours of study in courses as aforesaid. The 1971 amendments provided for the
establishment of a Real Estate Research Center in the Department of Agriculture at Texas A&M University.

The **1975 amendments** rearranged the License Act to aid in its administration. In addition, the following substantive changes were made:

1. The definition of "real estate broker" was expanded to include salesmen for subdivisions and "advance fee" operators.
2. The broad "regular employee" exemption was removed.
3. Commissioners' per diem was increased.
4. Residency requirements to establish eligibility to apply for licensure were increased to six months.
5. The prerequisites for applying for broker licensure were increased to two years of licensure and 180 class hours of study in courses approved by the Commission or certified by accredited institutions of higher education. Also, as a prerequisite to applying for salesman licensure, the applicant must have completed 30 classroom hours of study in courses accepted by the Commission and on the second and third certification of salesman licensure privileges the applicant/licensee must show evidence of completion of an additional 30 classroom hours of study in connection with each certification. Beginning January 1, 1977, an applicant for salesman licensure must have completed 90 classroom hours of study or six semester hours.
6. Real Estate Recovery Fund provisions were put into the Act to replace surety bond requirements. The monies have been invested as reflected in Note 3.
7. Changes were made in the section of the Act concerning violations with a view to raising the level 2 of responsibility required of the licensee when dealing with the public.

Effective **September 1, 1979**, amendments to the Act made the following changes:

1. The number of Commissioners was increased to nine; the additional three members must be representatives of the general public who are not licensed as brokers or salesmen and have no financial interest in a real estate practice.
2. Terms of appointees named to replace incumbents will expire on January 31 of odd-numbered years; officers will be elected in February of each year.

3. Commission Rules opposed by standing committees in both houses of the legislature will not take effect or be repealed on receipt of opposing statements.

4. Persons required by law to register as lobbyists are prohibited from serving as the Commission’s general counsel and Commission members.

5. The Commission is expressly subject to the Open Meeting Law and the Administrative Procedure and Texas Register Act.

6. Lawfully admitted aliens may apply for licensure; the residency requirement was reduced to 60 days.

7. Nonresidents licensed as brokers by other states and Texas residents may apply for broker licensure if they:
   a) Meet the requirements of Section 7(c); or
   b) Satisfy requirements effective on or after January 1, 1985; or
   c) Satisfy current educational requirements and furnish proof of broker licensure in another state with not less than two years active experience in the other state as a salesman or broker during the 36-month period preceding the filing of the application; or
   d) Have been licensed within the previous year as a broker by the Commission.

8. Salesman applicants who have been licensed within the preceding year are not held to current educational requirements although continuing educational requirements must be met.

9. The Commission is obligated to provide examination results within 30 days of the completion of an examination.

10. Applicants for original licensure must complete at least three classroom hours of course work on federal, state, and local laws governing housing discrimination, housing credit discrimination, and community reinvestment or at least three semester hours of course work on constitutional law.
11. Procedures for obtaining payment from the Real Estate Recovery Fund were streamlined, and the limit for a single transaction was increased to $20,000.00; the aggregate limit per licensee was increased to $50,000.00.
12. Sponsoring brokers are no longer indispensable parties to an appeal from a disapproved salesman application.
13. The Commission was given the authority to charge and collect fees not to exceed certain amounts.
14. Rehearings of license revocations, suspensions, or denials may be heard by the Commission members.
15. The Commission is prohibited from issuing another license for one year following the revocation of a license previously held.
16. Complaint procedures were set out.
17. Discrimination was made an express cause for suspension or revocation of licensure.
18. Persons requesting a determination of their moral character may obtain such prior to filing an application. In addition, the Residential Service Company Act vested authority in the Commission, effective August 27, 1979, to license and regulate persons providing services of a residential service company as defined in the Act.

Effective April 23, 1981, August 31, 1981 and September 1, 1981, amendments to the Act made the following changes:

Effective August 29, 1983, amendments to the Act made the following changes:

1. Real estate salesmen were permitted to be paid by a former sponsoring broker for work done while under that broker’s sponsorship.
2. The Act was declared substantive in nature.
3. The provisions of the Act prohibiting public members of the Commission from serving because of a relationship by consanguinity or affinity to a licensee were removed.
4. The amount of per diem for Commission members was increased to $75.00.
5. The Commission was authorized to expend funds from the real estate license fund to administer the Residential Service Company Act, dependent upon the existence of certain conditions.

6. Salesmen subject to annual education requirements must complete the annual education requirements before applying for broker licensure.

7. The effective date of the 1975 amendments was specified in those revisions of the Act effective on that date.

8. Language concerning prior requirements for licensure was removed.

9. Claimants against the Recovery Fund must now give notice to the licensee debtor.

10. Use of the Recovery Fund to pay a commission is prohibited.

11. The Commission, rather than the courts, is charged with the duty of revoking a license for a payment from the Fund.

12. The fees authorized by the Act were amended.

13. The Commission is no longer required to issue a new license for each salesman associated with a broker when the broker changes his place of business.

14. Inactive salesman licenses may be activated if a request and fee is received at any time before the license expires.

15. The Commission was given jurisdiction over licensees buying property when the licensees engage in misrepresentation or dishonest or fraudulent action.

16. The Commission is authorized to discipline a licensee who fails to replace a check returned to the Commission.

17. Section 15 of the Act was recodified.

18. The definition of unauthorized practice of law by a licensee was clarified and the Texas Real Estate Broker-Lawyer Committee was recreated in Section 16 of the Act. The Commission was authorized to require the use of approved contract forms.

Effective September 1, 1985, amendments to the Act made the following changes:

1. The Commission was required to collect a fee of $15 for a transcript evaluation.

2. The registration of real estate inspectors was replaced with a licensing process calling for the following:
a. Successful completion of not less than ninety classroom hours of core real
   estate inspection courses;
b. Payment of fees not to exceed amounts set forth in the Act;
c. Passing of an appropriate licensing examination.

3. The Commission was authorized to take disciplinary action against inspector
   licensees and to administer a real estate inspection recovery fund.

4. Persons registered under the previous inspector law were given until January 1,
   1986 to comply with the new Act.

Effective September 1, 1987, amendments to the Act made the following changes:

1. The fees for filing an original application for real estate broker licensure and for
   annual certification of real estate broker licensure status were increased by $110
   on a temporary basis, ending August 31, 1989.
2. The Commission was required to deposit $27.50 of the temporary fee increase to
   the credit of the Foundation School Fund (193) and $82.50 to the credit of the
   General Revenue Fund (001).

Effective September 1, 1989, amendments to the Act made the following changes:

1. A licensed auctioneer need not have a real estate license for the purpose of
   auctioning real property.
2. An expired licensed salesman may now apply for late renewal without a broker.
3. The examination and all licensing requirements must be satisfied within six (6)
   months from the date the application is filed (previously was one year).
4. Brokers and salesmen must provide evidence of at least 15 hours of approved
   continuing education courses during the term of the current license. Applies to
   licenses expiring after 8/31/91.
5. Attorneys are still exempt from the Act. However, licensees can no longer share
   their compensation with an attorney. Attorneys may receive compensation directly
   from the seller or buyer.
6. Section 15(1)(B) allowing the Commission to institute disciplinary action in the case where a licensee failed to satisfy a final money judgment for contractual obligations incurred in the pursuit of his real estate business was repealed.

7. A licensee does not incur civil or criminal liability for failing to inquire about, make disclosure related to, or release information to whether a previous owner or occupant had, may have had, has or may have AIDS or HIV. However, a licensee who has actual knowledge that a previous occupant had or has AIDS or HIV shall provide that information to a prospect upon receiving a specific request for such information.

8. Explicit language is now in the Act stating that the Act does not prohibit a licensee from acting as agent for more than one party if the representation is disclosed to the parties and the parties consent.

9. A licensee may disclose information about sales prices or terms for the purpose of facilitating the listing, selling, leasing, financing, or appraising of real property without liability unless such a disclosure is otherwise specifically prohibited by statute or written contract.

10. The $110 temporary fee increase adopted by the legislature in 1987 was not renewed.

11. The Commission will begin a program of voluntary certification of appraisers. Brokers and salesmen may still perform appraisals, but certain licensees may seek to be certified in the field of appraising.

Effective **July 1, 1991**, the authority to certify real estate appraisers was transferred from the Commission to the Texas Appraiser Licensing and Certification Board, an independent subdivision of the Commission. Section 22 of the Act was repealed. The Commission provides administrative support and assistance to the new board which has sole responsibility for the licensing and certification of appraisers for federally related transactions.
Effective September 1, 1991, amendments to the Act made the following changes:

1. An exemption for licensed auctioneers was modified to make it clearer that the exemption does not permit the auctioneer to provide brokerage services other than the calling of the auction.

2. Provisions of Section 5 relating to the composition and qualifications of Commission members were rewritten in current language recommended by the Sunset Advisory Commission, and the Commission’s existence was continued to September 1, 2003.

3. The Administrator is required to prepare and maintain a written policy statement regarding equal employment opportunity, including personnel policies, an analysis of the Commission work force and methods to address areas of significant underutilization.

4. The Commission is obligated to inform its members and employees of necessary information concerning qualifications for office or employment and standards of conduct.

5. The Commission is required to prepare a written plan to provide access to its programs to the disabled or persons who do not speak English.

6. The Commission is prohibited from adopting rules restricting competitive bidding or advertising by its licensees.

7. A provision creating a legislative veto over the Commission’s rulemaking was deleted.

8. Section 7(a) was amended to clarify that applicants are not required to have completed all nine core real courses.

9. Section 7 was reorganized, and a provision was added to provide for notification of examination results if the examination is graded or reviewed by a national testing service.

10. Section 7A was amended to permit the Commission to accept relevant educational experience or supervised video instruction for mandatory continuing education (MCE) requirements and to approve core real estate courses for MCE credit. The Commission is required to approve real estate related courses approved by the State Bar of Texas for minimum continuing legal education.
11. An exemption from MCE requirements was provided for certain brokers who had been licensed or at least 10 years and who requested the exemption and paid a fee prior to October 31, 1991, pursuant to a notice sent by the Commission.

12. Section 8 was amended to increase the minimum amount in the Real Estate Recovery Fund to $1 million and to transfer any excess over $3.5 million, or over the total amount paid from the Fund during the previous four fiscal years, whichever is greater, to the general revenue fund. The limit on a single claim was increased from $20,000 to $50,000, and the aggregate claim limit was increased from $50,000 to $100,000. Brokers are required to give consumers information about the availability of the Fund.

13. Broker annual renewal and original application fees were increased by $200; $50 shall be deposited to the credit of the Foundation School Fund; $150 shall be deposited to the credit of the general revenue fund.

14. An inactive broker status was provided in new Section 13A, subject to mandatory continuing education (MCE) for return to active status within 36 months. Return to active status after 36 months requires satisfaction of current education for original licensing and successful completion of an examination.

15. The requirement for complaints to be under oath (verified) was removed.

16. The provision in Section 15(c) requiring disclosure of certain information related to AIDS or HIV-related illnesses was removed.

17. The Commission is prohibited from investigating complaints filed more than four years after the date of the incident.

18. Provisions of Sections 17 and 18 relating to hearings were deleted, and hearings are made subject to the Administrative Procedure and Texas Register Act, Article 6252-13a, Texas Civil Statutes.

19. The licensing of real estate inspectors provided in Section 18C was replaced with a three-level licensing program in new Section 23. A nine-member advisory committee of inspectors known as the Texas Real Estate Inspector Committee is created to recommend rules relating to applications, experience, education, examinations, standards and other issues involving the registration and licensing of inspectors. Existing inspectors are required to provide proof of completion of 75
inspections and an additional 38 hours of core real estate inspection courses in order to obtain a license under the new law. The new advisory committee is required to conduct hearings and recommend the entry of final orders in contested cases involving inspectors. Any excess above $600,000 in the Real Estate Inspection Recovery Fund shall be transferred to the real estate inspector regulation account for use by the Commission in regulation of real estate inspectors.

20. The Commission is authorized to assess administrative penalties not to exceed $1,000 for each Effective August 30, 1993, an amendment to the Act limited the $200 fee increase for applying for or renewing a real estate broker license to individuals only.

Effective September 1, 1993, amendments to the Act made the following changes:

1. The definition of the term "real estate" was narrowed to exclude an interest given as security for the performance of an obligation.
2. The Commission was authorized to employ a general counsel, attorneys, investigators and support staff.
3. Limited liability companies became subject to licensing requirements if the companies provide real estate brokerage services.
4. A new core real estate course, Law of Agency, was established; the course becomes mandatory for new salesman applicants beginning September 1, 1994.
5. The Commission was authorized to accredit courses of study in real estate inspection.
6. The Commission was authorized to collect a fee for filing a request for a license due to a change of name or return to active status, or for a license history.
7. Requirements for an inactive broker to return to active status were reduced to 15 hours of MCE courses.
8. A 60-day residency requirement for applicants was deleted, and nonresidents who were previously licensed as a Texas real estate salesman or broker are eligible to apply if the application is filed within one year of the expiration of the previous license.
9. The Commission was authorized to issue investigative subpoenas.

10. Specific guidelines were provided for licensees representing more than one party in the same transaction.

11. A provision was added excusing licensees from inquiring about or disclosing death occurring on a property by natural causes, suicide, or accident unrelated to the condition of the property.

12. Section 23 of the Act relating to real estate inspectors was largely rewritten to establish a new three-level provide guidelines for the relative roles of the Commission and the Texas Real Estate Inspector Committee, and to permit previously licensed inspectors to be relicensed without meeting current requirements.

Effective **September 1, 1995, an amendment** to the Act increased the fees collected by the Commission for the Texas Real Estate Research Center from $15 to $20 for broker renewals and original applications and from $7.50 to $17.50 for salesman renewals and original applications. The amendment separated these fees from the filing fees collected by the Commission and required the Commission to transmit the fees to the Research Center quarterly.

Effective **January 1, 1996, amendments** to the Act made the following changes:

1. Mandatory continuing education (MCE) requirements for renewal of an active real estate license will be standardized at 15 hours, eliminating an 8 hour requirement for licenses issued for one year.

3. Additional legal topics will be added to the statutory list of acceptable MCE course topics, and the Commission will be authorized to require a final examination for MCE courses conducted by alternative delivery systems such as computers.

4. A definite termination date will be required in all contracts in which real estate licensees agree to perform services for which a license is required.

5. Negotiating with a buyer or tenant represented on an exclusive basis by another broker will be prohibited.
6. Real estate licensees will be required to disclose their representation of a party to another party or a licensee representing another party at the first contact regarding a transaction. The disclosure may be made orally or in writing. Licensees will be required to provide a party a copy of statutory information concerning the duties of a broker and agency relationships. Brokers may act as intermediaries and appoint licensees associated with the broker to work with the parties with the written consent of the parties. Intermediaries are required to act so as not to favor one party over the other.

7. Residential rental locators will be required to be licensed as a real estate broker or salesman, and the Commission will be required to adopt regulations and establish standards relating to permissible forms of advertising by residential rental locators.

8. The Commission will be authorized by rule to provide a waiver of some or all of the requirements for obtaining a real estate license if the applicant was previously licensed in this state within the five-year period prior to the filing of the application.

Effective **September 1, 1997, amendments** to the Act made the following changes:

1. The definition of “person” was broadened to include individuals and any other entity.
2. Exemptions were provided for partnerships or limited liability partnerships acting through a partner who is a real estate broker or for persons registered under new Section 9A.
3. A new core real estate course, Law of Contracts, will be required for salesperson applications filed on or after January 1, 1998.
4. The minimum length of a MCE course was shortened from three hours to one hour.
5. Persons acting as agents selling, buying, leasing or transferring an easement or right-of-way for use in connection with telecommunication, utility, railroad, or pipeline service are required to be registered with the Commission after January 1, 1998. Registrants will pay annual fees totaling $150 (filing fee of $80, $20 to the Research Center, and $50 to the Real Estate Recovery Fund).
6. The Commission was authorized to adopt rules, conduct investigations and take disciplinary action regarding easement or right-of-way agents.
7. The Act was clarified to permit any person to file a complaint.
9. The Commission was permitted to authorize staff to file complaints and conduct investigations concerning judgments paid from a recovery fund, conviction of a criminal offense or failure to make good a check issued to the Commission.
10. The Commission was required to adopt prior to October 1, 1997, rules requiring licensed inspectors to use standard inspection report forms.
11. Three members of the Inspector Committee may be licensed real estate brokers as well as licensed professional inspectors.
12. The Commission was required to adopt rules permitting inspector applicants to substitute additional education or experience in lieu of statutory requirements of having held a license under sponsorship and performing inspections under supervision of another inspector.
13. The term “salesman” was replaced by the term “salesperson” and the Commission was required to use the term “salesperson” in documents and rules no later than January 1, 1999.
14. A definite termination date is no longer required for property management agreements.
15. Written memorandums will not be required to enforce agreements between real estate licensees for payment of a commission.
16. The Commission was authorized to extend education, experience and examination waivers for prior real estate licensees from five years to six years.

Effective June 19, 1999, amendments to the Act made the following changes:
1. The legislature increased the penalty for violating the Act or an order of the Commission to a Class A misdemeanor, punishable by a fine of up to $4,000 and up to one year of confinement in the county jail.
2. The Commission’s exclusive authority to enforce the Residential Service Company Act, Article 6573b, by bringing an injunctive action was also clarified.
Effective September 1, 2001, amendments to the Act made the following changes:

1. A person desiring a salesperson license must apply for an inactive license without a sponsoring broker but cannot practice until sponsored by a broker who has notified the Texas Real Estate Commission (TREC) of the sponsorship and paid the fee for issuance of an active license.

2. TREC is authorized to prescribe the content of core real estate courses. For applications filed on or after January 1, 2002, an applicant for a broker license will be required to complete 18 semester (270 classroom) hours of core real estate courses, an increase of 90 classroom hours over current law. The total number of classroom hours for a broker license (900) will be unaffected. An applicant for a salesperson license will be required to complete 8 semester (120 classroom) hours of core courses, 60 classroom hours of which must be in Principles of Real Estate, an increase of 30 hours over current law. The total number of classroom hours for the salesperson license (180) will be unaffected.

3. TREC is authorized to prescribe the title, content, and duration of continuing education (MCE) courses required of real estate licensees.

4. A specific date for determining whether the balance of the real estate recovery fund has fallen below $1 million is deleted, and TREC is authorized to adopt rules to provide for collection of assessments whenever TREC determines assessments should be made to ensure availability of sufficient funds to pay claims. A requirement that claimants show the judgment is not subject to a stay or discharge in bankruptcy has been removed.

5. The maximum fee TREC may charge for requesting a real estate examination is increased from $50 to $100. The fee for a transcript evaluation was increased from $15 to $20.

6. Language that appears to restrict who may file a complaint has been deleted, and reprimands and administrative penalties also may be imposed for violations listed in Section 15(a). Agreements for services to be performed by licensees have been excluded from the provisions of Chapter 39 of the Business & Commerce Code relating to notice and cancellation. The Internet is added to the kinds of advertising subject to the requirements of Section 15(a)(6)(P) of the Act.
7. The members of the commission are permitted to authorize staff to file complaints and act against licensees who fail to complete continuing education courses under the TREC rule relating to license renewal or who fail to provide information in connection with a renewal application.

8. The criminal offense for acting as a real estate broker, salesperson, or easement or right-of-way agent without a license or registration was upgraded from a Class B to a Class A misdemeanor, consistent with the amendment to Article 6573a.1 adopted in 1999.

9. TREC is authorized to assess administrative penalties not to exceed $1000 against any person who violates the Act or a rule or order adopted by the Commission. If the person charged with the violation was engaged in unlicensed activity and was not licensed as a broker or salesperson in the four year period preceding the date of the violation, TREC is authorized to consider each day the violation continued or occurred a separate violation for the purposes of penalty assessment. The section permits delegation of authority by the administrator to another employee and corrects a citation to the Administrative Procedure Act. The section also permits delegation of authority to the staff hearings officer to conduct hearings and assess penalties. Administrative penalties paid by unlicensed persons would be deposited into either the real estate recovery fund or the real estate inspection recovery fund.

10. A late license renewal provision for inspectors was deleted, eliminating an additional fee for certain late renewal applications. Persons whose licenses expire will be required to file another application for a license with no additional education or examination required for a two-year period.

11. TREC is authorized to charge a fee not to exceed $20 for the filing of a request to issue an inspector license relating to a change of name, return to active status, or change in sponsoring professional inspector.

12. Inspector continuing education is increased from 4 to 8 hours per year for real estate inspectors and from 8 to 16 hours per year for professional inspectors, beginning with licenses expiring on or after December 31, 2001.
13. The criminal offense for acting as an inspector without a license was upgraded from a Class B to a Class A misdemeanor, consistent with the amendment to Article 6573a.1 adopted in 1999.

14. A specific date for determining whether the balance of the real estate inspection recovery fund has fallen below $300,000 was deleted. TREC is authorized to adopt rules to provide for collection of assessments whenever TREC determines assessments should be made to ensure availability of sufficient funds to pay claims. A requirement that claimants show the judgment is not subject to a stay or discharge in bankruptcy has been removed. The maximum payments has been increased from $7,500 to $12,500 per transaction and from $15,000 to $30,000 per inspector, for causes of action arising on or after September 1, 2001.

15. The criminal offense for acting as a residential rental locator without a license was upgraded from a Class B to a Class A misdemeanor, consistent with the amendment to Article 6573a.1 adopted in 1999.

16. The commission is authorized to delegate authority to a staff hearings officer to conduct hearings and enter final decisions in contested cases involving residential service companies. A final decision of a hearing examiner is appealable to the commission as provided by commission rule. A residential service contract is excluded from the provisions of Chapter 39 of the Business & Commerce Code relating to notice and cancellation.

As part of an ongoing, non-substantive revision, article 6573a, Texas Civil Statutes, was repealed and replaced with Chapters 1101 and 1102, Texas Occupations Code, effective June 1, 2003.

Effective September 1, 2003, amendments to the Act made the following changes:

1. The maximum fee for filing an original application for a salesperson license is increased to not more than $75, the maximum fee for reviewing a license history is increased to not more than $20, and maximum fee for filing a core instructor application is set at not more than $40.
2. A maximum fee for filing a continuing education instructor application is set at not more than $40; clarification that the $20 change of sponsoring broker or return to active status fee does not apply to requests associated with an original salesperson license.

3. A list of locations that the commission may provide for consumer notices regarding complaints includes that the notices may be prominently displayed on a licensee’s web site.

4. The legislature deleted a provision requiring a joint application with a real estate broker for a real estate salesperson license.

5. A person may apply for an inactive salesperson license without a sponsoring broker and an inactive salesperson cannot practice until sponsored by a broker who has notified the Texas Real Estate Commission of the sponsorship. The licensed broker is not required to pay the sponsorship fee to change to active status an original inactive salesperson license notwithstanding the requirement in section 1101.367(b).

6. The definition of “face to face meeting” is replaced with a definition of “substantive dialogue”. “Substantive dialogue” is defined as a meeting or written communication that involves a substantive discussion relating to specific real property. Provides that a licensee must disclose the Information About Brokerage Services information at the first substantive dialogue.

7. A list of locations that the commission may provide for consumer notices regarding the Real Estate Recovery fund includes that the notices may be prominently displayed on a licensee’s website.

8. If the licensee requests, an administrative hearing involving violations of Occupations Code Sections 1101.652(a)(3) or (b) only shall be held in the county in which the principal place of business of the licensee is located.

9. Any applicant for a professional real estate inspector license must satisfy the Commission as to the applicant’s honesty, integrity and trustworthiness.

10. The number of additional classroom hours that the commission may require of inspector applicants for substitution of additional education is increased from 60 to
320 hours in lieu of the number of inspections and previous licensure requirements for licensing.

11. The commission is authorized to provide for 2 year renewals of inspector licenses.

12. A list of locations that the commission may provide for consumer notices regarding complaints includes that the notices may be prominently displayed on a licensed inspector’s website.

13. The requirement that licenses of salespersons and brokers must be prominently displayed at the broker’s place of business is removed unless the salesperson or broker is a residential rental locator.

Effective September 1, 2005, amendments to the Act made the following changes:

1. A fee for attendance at an instructor training program for instructors who wish to teach the TREC required legal and ethics continuing education courses is established.

2. The four-year complaint limitation period also applies to real estate inspectors (persons licensed under Occ. Code Chap. 1102) is clarified.

3. The amendments provide for the issuance of a provisional moral character determination under Section 1101.353.

4. The salesperson education requirements are revised to require 14 semester hours (210 classroom hours) prior to filing an application; revises the salesperson annual education requirements to require 4 additional semester hours (60 classroom hours) for the first renewal; and repeals the salesperson annual education requirements for the subsequent two years; the net requirement of 18 semester hours remains the same.

5. The commission shall automatically approve core courses and State Bar of Texas CLE courses as elective credit courses to satisfy the nine hours of non-legal MCE required by Section 1101.455.

6. A broker who represents a party or who lists real property under an exclusive agreement must inform the party of material information related to the transaction, including the receipt of an offer by the broker; must answer the party’s questions and must present any offer to or from the party; a broker who represents a party is
prohibited from telling another broker to negotiate directly with the broker’s client; for purposes of Section 1101.157, a license holder who has additional authority to bind a party under a power of attorney or a property management agreement is considered a party to the lease or sale; an inquiry to an employee of a builder or developer about contract terms or forms does not violate Section 1101.652(b)(22) if the person does not have authority to bind the employer to the contract; the delivery of an offer to a party does not violate Section 1101.652(b)(22) if the party’s broker consents to the delivery and a copy of the offer is sent to the party’s broker; provides an exception to the requirement of sending a copy of the offer to the party’s broker if the party is a governmental agency using a sealed bid process that does not allow a copy to be sent to the broker.

7. A broker who agrees to represent both a buyer and a seller must agree to act as an intermediary.

8. TREC obtains enforcement authority over a licensee who engages in misrepresentation, dishonesty or fraud when selling or buying real property in the name of the spouse or a first degree relative of the licensee.

9. A licensee must notify the commission within 30 days of the date of a final conviction of a felony or a criminal offense involving fraud.

10. A person is not eligible for a license under Chapter 1101 until the person has repaid the full amount paid on behalf of the person under the Recovery Trust Account provisions under subchapter M, whether that person’s license was revoked or expired.

11. Professional inspectors under a corporate or LLC entity are subject to licensing and renewal requirements under Occupations Code Chapter 1102.

12. Continuing education requirements are increased to 16 hours for apprentice and real estate inspectors.

Effective September 1, 2007, amendments to the Act made the following changes:

1. Amends Section 1101.006 to continue the Texas Real Estate Commission, Chapters 1101, 1102, and 1303 of the Occupations Code, and Chapter 221, Property Code until September 1, 2019.
2. A person may not be a member of the commission or commission employee if they or their spouse are also an officer, employee, or paid consultant of a Texas trade association.

3. Provides a procedure for removal of a commission member who is ineligible for membership.

4. Adds Section 1101.059 to detail specific training required for a new commission member, to include information regarding the law, its programs and functions, rules and budget, results of most recent formal audits, open meetings laws, and ethics.

5. Amends Section 1101.101(a) to require the commission to appoint an administrator rather than permit the commission to appoint an administrator.

6. Amends Section 1101.102 to require the commission to develop policies that separate the policymaking responsibilities of the commission and the management responsibilities of the administrator and staff.

7. Removes language from Section 1101.151(b) authorizing the commission to authorize specific employees to conduct hearings and issue final decisions in contested cases.

8. Amends Section 1101.152(a) to require the commission to adopt rules that set reasonable fees for, among other things, applications, renewals, transcript evaluations, approval of educational programs and instructors, and criminal background checks in connection with the annual renewal of a license.

9. Adds Sections 1101.158, 1101.159, and 1101.160 to authorize the commission to appoint advisory committees to perform advisory functions assigned by the commission. The advisory committees may hold meetings by telephone or video conference. The commission is required to develop and implement a policy to encourage the use of negotiated rulemaking and alternative dispute resolution to assist in the resolution of internal and external disputes and to designate a trained person to manage and coordinate the implementation of the policy.

10. Amends Section 1101.201(a) to delete a provision regarding maintenance of complaints that are filed with and resolved by the commission.
11. Amends Section 1101.203 to require the commission to maintain specific information relating to the parties, the subject matter, and the disposition of complaints filed with the commission.

12. Amends Section 1101.204 to authorize commission staff to open complaints and conduct investigations of suspected violations of the laws subject to TREC’s jurisdiction. The bill requires the commission to prioritize complaints using a risk-based analysis, giving highest priority to complaints filed by consumers.

13. Amends Section 1101.301 to provide that, in establishing accreditation standards for proprietary schools or programs, the commission shall require a school to establish that at least 55% of the graduates have passed the licensing exam the first time the exam is taken before the school can renew its accreditation for an additional two year period.

14. Amends Section 1101.303 to clarify that the commission may authorize a continuing education provider or course of study accreditation for a two year period under both chapters 1101 and 1102.

15. Adds Sections 1101.304 and 1101.305 to require the commission to adopt rules to collect and publish data relating to exam passage rates for graduates of the accredited schools. The rules must provide the method by which to calculate, collect, and post on the commission’s website exam passage rates for each school. A program or school that a person is a ‘graduate’ of is the program or school last attended before taking the exam. The commission may appoint a committee to review the performance of an educational program, report findings, and temporarily suspend a program. The committee is not authorized to revoke the program’s accreditation, but the commission may temporarily suspend the accreditation of a school or program in the same manner as a license issued under Subchapter N of Chapter 1101.

16. Amends Section 1101.364(b) to establish that a person is entitled to hearing on denial of license subject to Chapter 2001, Government Code, the Administrative Procedure Act (the APA).

17. Amends Section 1101.451 to provide that a person whose license has been expired for 90 days or less may ‘late renew’ by paying a fee of 1.5 times the
required renewal fee. If the license has been expired for more than 90 days—but
less than one year—the renewal fee paid is 2 times the renewal fee. For those
persons whose license has been expired for one year or more, the person may not
‘late renew’, but must retake the examination and comply with all other
requirements for obtaining an original license.

18. A person who takes an online mandatory continuing education course may not
complete the course in less than 24 hours.

19. Amends Section 1101.457(b) to clarify that a late renewal fee described in Section
1101.451 is in addition to any other fee that the commission may charge a licensee
for late completion of mandatory continuing education requirements.

20. Amends Section 1101.657(a) to provide that a person is entitled to a hearing
conducted by the State Office of Administrative Hearings (SOAH) subject to the
APA if the commission proposes to deny, revoke, or suspend the person’s license
or registration or assess an administrative penalty.

21. Amends Section 1101.658(a) to provide conforming language regarding a
person’s right to appeal a decision under Subchapter N.

22. Amends subchapter N to authorize the commission to order a person regulated by
the commission to pay a refund to a consumer in addition to any other penalty or
sanction; to authorize the commission to adopt rules setting forth procedures for
informal disposition of contested cases; to authorize the commission to enter a
final order in a disciplinary proceeding or in a proceeding assessing an
administrative penalty even though the person’s license has expired; and to
provide a procedure for the temporary suspension of a license or registration by a
disciplinary panel consisting of three commission members to determine whether
a license should be temporarily suspended if the panel believes that the licensee’s
continued practice poses a threat to public welfare.

23. Amends Section 1101.701 to permit the commission to impose an administrative
penalty and to impose other disciplinary action—such as suspension or
revocation—in a single enforcement procedure.

24. Amends Section 1101.702 to increase the amount of an administrative penalty to
$5,000 per violation. The commission is required to adopt a schedule of
administrative penalties based on certain enumerated criteria to ensure that the penalty is appropriate to the violation.

25. Amends Section 1101.703(a) to authorize the administrator to issue a notice of violation after investigation reveals that a violation occurred. The notice must include a brief summary of the alleged violation and the administrator's recommendation of disciplinary action, which may include any combination of disciplinary action and administrative penalty. The person would have a right to a hearing to contest the violation and/or penalty.

26. Amends Section 1101.704 to provide that if the person fails to timely respond in writing to the administrator's notice of violation, the commission is required to approve the administrator's determination by default and order the recommended sanction.

27. Amends Section 1101.705 to authorize a SOAH administrative law judge to conduct commission hearings and issues findings of fact, conclusions of law, and proposals for decision.

28. Amends Section 1101.707 to provide a procedure by which a person may appeal a commission order by filing a petition for judicial review and a method by which to stay enforcement of the penalty.

29. Adds Section 1101.7085 to permit a court to uphold or reduce the amount of an administrative penalty if the court sustains the commission’s order.

30. Amends Section 1101.709 regarding calculation of the penalty and interest and release of a supersedeas bond.

31. Adds Section 1101.710 to clarify that a hearing under the subchapter is subject to the Administrative Procedure Act.

32. Adds Section 1101.759 to authorize the commission to issue a cease and desist order after notice and opportunity for a hearing under certain circumstances.

33. Amends Section 1102.051(a) to make the Real Estate Inspector Committee an advisory committee appointed by the commission.

34. Amends Section 1102.114 to require an applicant for a license under chapter 1102 to provide proof that the applicant carries liability insurance with a minimum limit of $100,000 per occurrence.
35. Amends Section 1102.203 to require a person renewing an unexpired licensed under chapter 1102 to provide proof that the applicant carries liability insurance with a minimum limit of $100,000 per occurrence.

36. Amends Section 1102.205 to authorize the commission to approve a continuing education program for licensed inspectors and clarify that an inspector licensee must complete at least 16 classroom hours of core or continuing education real estate inspection courses.

37. Amends Section 1102.251, Occupations to remove statutory caps on the reasonable and necessary fees the commission is required to charge and collect to cover the cost of administering this chapter.

38. Amends subchapter I, Chapter 1102 to provide a procedure for the temporary suspension of a license by a disciplinary panel consisting of three commission members to determine whether a license should be temporarily suspended if the panel believes that the licensee’s continued practice poses a threat to public welfare.

39. Repeals various provisions in Chapter 1101 regarding the filing of complaints and hearings; Chapter 1102 regarding appointments to the Texas Real Estate Inspector Committee and membership requirements and committee powers and duties; and Chapter 1103 regarding hearings.

Effective January 1, 2008, amendments to the Act made the following changes:

1. Amends Section 1101.005(5) to provide that a person acting under a court order or under the authority of a will or trust instrument to conduct a real estate transaction is not subject to the Real Estate License Act to make clear that a person operating under such authority may not engage in the regular business of real estate brokerage without a real estate license.

2. Amends Section 1101.057(a) to remove the “illness or disability” clause from the list of reasons for removal of a member from the commission. Thus a member may be removed for failing to discharge the member’s duties for a substantial part of the member’s term, regardless of whether the reason for such failure is based on illness or disability.
3. Amends Section 1101.152(a) to require the commission to adopt rules to charge and collect reasonable fees, including a fee for certain purposes. Includes amongst these fees a fee for conducting a criminal history check for issuing or renewing a real estate license (license).

4. Amends Section 1101.302(b) to increase the surety bond requirement for an educational institution authorized by the commission to offer a real estate or real estate inspector education program or course of study from $10,000 to $20,000.

5. Adds Section 1101.3521 to require that an applicant for a license or renewal of an unexpired license submit a complete and legible set of fingerprints, on a form prescribed by the commission, to the commission or to the Department of Public Safety (DPS) for the purpose of obtaining criminal history record information from DPS and the Federal Bureau of Investigation; requires the commission to conduct a criminal history check of each applicant for a license or renewal of a license using certain information.

6. Amends Section 1101.356(a) to require an applicant for a broker license to complete 2 semester hours (30 clock hours) of real estate brokerage as part of the 18 semester hours (270 clock hours) of core real estate courses required for a broker's license.

7. Adds Section 1101.4521 to require an applicant for the renewal of an unexpired license to comply with the criminal history record check requirements of Section 1101.3521.

8. Amends Section 1101.455 to provide that a member of the legislature licensed under this chapter, notwithstanding the number of hours required by Subsection (e), is only required to complete three hours of continuing education on the legal topics under Subsection (e).

9. Amends Section 1101.652(a) to permit the commission to take disciplinary action against a license holder if he or she fails to timely notify the commission that he or she has entered a guilty plea to a felony or a criminal offense involving fraud.

10. Amends Section 1101.655(a) to permit the commission to revoke a license, approval, or registration issued by the commission under Chapters 1101 and 1102,
Occupations Code, upon payment from the real estate recovery trust account on behalf of the licensee.

11. Amends Section 1102.111(b) to require the commission by rule to provide for substitution of relevant experience and, rather than or, additional education in lieu of the number of inspections and previous licensure requirements for real estate and professional inspector licensing, and provides that rules adopted under this section may not require more than 7 years of relevant experience and 320 of additional education.

12. Amends Section 1102.402, to permit the commission to revoke a license, approval, or registration issued by the commission under Chapters 1101 and 1102 upon payment from the real estate recovery trust account on behalf of the licensee. A person is unable to obtain an inspector license, regardless of whether the license was revoked or expired, until the person has repaid in full the amount paid from the fund on the person's account, plus interest at the legal rate.

13. Amends Section 1102.1035 to repeal the licensing and renewal requirements for professional inspector corporations and limited liability companies.

Effective **May 12, 2009, amendments** to the Act made the following changes:

1. Requires the Commission to adopt rules to charge and collect fees, rather than reasonable fees, in amounts reasonable and necessary to cover the costs of administering this chapter, including a fee for certain actions.

2. Amends Section 1101.152(b) to require TREC to adopt rules to set and collect fees in amounts reasonable and necessary to cover the costs of implementing, rather than reasonable fees to implement, the continuing education requirements for license holders, including a fee for certain applications and activities.

3. Amends Section 1101.153(b) to provide that of the $200 professional fee associated with filing an original application and annual renewal for an individual broker license, $50 is required to be transmitted to Texas A&M University to support, maintain, and carry out the purposes, objectives, and duties of the Texas Real Estate Research Center; $50 is to be deposited to the credit of the foundation
school fund; and $100, rather than $150, is to be deposited to the credit of the
general revenue fund.
4. Amends Section 1101.154(a) to provide that the fee for the issuance or renewal of
a salesperson license is the amount of the fee set under Section 1101.152 (Fees)
and an additional $20, rather than $17.50, fee.
5. Amends Section 1101.606 to require an aggrieved person to verify to TREC, if the
person is precluded by action of a bankruptcy court from executing a judgment or
perfecting a judgment lien as required by Subsection (a), that the person has made
a good faith effort to protect the judgment from being discharged in bankruptcy;
authorizes TREC by rule to prescribe the actions necessary for an aggrieved
person to demonstrate that the person has made good faith effort under
Subsection (c) to protect a judgment from being discharged in bankruptcy.
6. Amends Section 1101.652 to authorize TREC to suspend or revoke a license or
take other disciplinary action if the license holder enters a plea of guilty or nolo
contendere to or is convicted of a felony or a criminal offense involving fraud and
the time for appeal has elapsed or the judgment or conviction has been affirmed
on appeal, without regard to an order granting community supervision that
suspects the imposition of the sentence.

Effective **September 1, 2011, amendments** to the Act made the following changes:
1. Amends §1101.002, Occupations Code, to remove “appraisal of real property” by
adding “provides a written opinion as to the estimated price of real property” to the
definition of “broker” to clarify the distinction between written price opinions
routinely performed by brokers and “appraisal of real property” that requires
licensure under Occupations Code Chapter 1103; adds “controls the acceptance
or deposit of rent from a resident of a single-family residential real property unit” to
the definition of “broker” to require licensing for that type of activity; adds a
definition of “business entity” to include a domestic or foreign entity as defined in
the Business Organizations Code.
2. Amends §1101.005, Occupations Code, to change the exception for licensure for
attorneys licensed in “any” state to attorneys licensed in “this” state only; eliminates
the exception for licensure for a partnership or limited liability partnership acting through a partner who is a licensed broker.

3. Adds §1101.161, Occupations Code, to authorize the commission to solicit and accept gifts, grants and donations.

4. Amends §1101.301, Occupations Code, to change the first time examination pass rate benchmark for pre-license education programs from 55% to an average percentage of examinees; requires an education program accredited by the commission to meet or exceed the benchmark for each license category before the commission may renew the program’s accreditation for the license category; authorizes the commission to deny accreditation if an applicant at any time owns or controls an educational program that has been revoked.

5. Amends §1101.351, Occupations Code, to require a license of a business entity before the entity may act as a broker.

6. Amends §1101.352, Occupations Code, to require an applicant to provide the commission with the applicant’s current mailing address, telephone number and email address if available and to require an applicant to notify the commission of any change to such information while an application is pending.

7. Amends §1101.355, Occupations Code, to require errors and omissions insurance of at least $1 million for a licensed business entity if the designated broker agent of the entity owns less than 10% of the entity; requires the designated agent of a business entity to be a licensed broker in active status and good standing before the business entity may act as a broker; requires a business entity that receives compensation on behalf of a license holder to be licensed as a broker.

8. Amends §1101.356, Occupations Code, to require an applicant for a broker license to have at least four years of active experience in this state as a license holder during the preceding 60 month period before the date the application is filed, rather than 2 years of active experience in the preceding 36 month period; authorizes the commission to establish “active experience” by rule.

9. Amends §1101.357, Occupations Code, to require an applicant for a broker license who does not satisfy the requirements §1101.356 to have at least four years of active experience in another state as a license holder during the preceding 60
month period before the date the application is filed, rather than 2 years of active experience in the preceding 36 month period.

10. Amends §1101.358, Occupations Code, to reduce the pre-license education course hours from 210 total to 180 core hours, to specify the core courses required for pre-license education, and to remove related education requirements.

11. Amends §1101.367(c), Occupations Code, to delete the term “annual”.

12. Amends §1101.401(f), Occupations Code, to change the period in which an applicant must satisfy an examination requirement from six months to one year.

13. Amends §1101.451(e) and (f), Occupations Code, to change the maximum period of time in which a person can late renew a license from one year to six months.

14. Amends §1101.452(a), Occupations Code, to delete the term “annual”.

15. Amends §1101.453, Occupations Code, to require proof of errors and omissions insurance of at least $1 million for a licensed business entity to renew a license if the designated broker agent owns less than 10% of the entity; requires the designated agent of a business entity to be a licensed broker in active status and good standing before the entity may renew its license as a broker.

16. Amends §1101.454(a), Occupations Code, to increase the education requirements for the first renewal of a salesperson license from 60 to 90 core hours and to remove related education requirements.

17. Amends §1101.455(b), Occupations Code, to delete the term “annual”.

18. Adds §1101.458, Occupations Code, to require brokers who sponsor salespersons and any licensees, either brokers or salespersons, who are authorized by brokers to supervise other licensees to take a 6 hour Mandatory Broker Responsibility course to renew a license; the course may be used to meet Mandatory Continuing Education (MCE) requirements; the renewal requirement does not apply to brokers who are exempt from MCE requirements.

19. Amends §1101.502, Occupations Code, to change the reference to a “corporation, limited liability company, partnership or other entity” to a “business entity”.

20. Adds §1101.5041, Occupations Code, to require fingerprinting and background checks for an application for or renewal of an easement or right of way certificate.
21. Amends §1101.552, Occupations Code, to require a license holder to provide the commission with the license holder’s current mailing address, telephone number and email address if available and to require a license holder to notify the commission of any change to such information.

22. Amends §1101.554, Occupations Code, to change the term “custody” to “copy” to remove the requirement that a broker retain custody and control of a sponsored salesperson’s license and to require the commission to mail a copy of the salesperson’s license to the sponsoring broker.

23. Adds §1101.6561, Occupations Code, to authorize the commission to suspend or revoke an educational program accreditation or take other any other action authorized under Chapter 1101 against an education program that violates the Chapter or a rule adopted under the Chapter.

   a) Requires the commission to adopt rules necessary to implement §1101.301, §1101.356(b-1), and §1101.458 as added not later than December 1, 2011.
   b) Provides that §1101.552(e) regarding addresses, telephone numbers, and email addresses, if available, applies only to a broker or salesperson license issued or renewed on or after December 1, 2011.
   c) Provides that §1101.502(b) and §1101.5041 regarding fingerprinting requirements as added apply only to an application or renewal of a certificate of registration filed on or after December 1, 2011.
   d) Provides that §1101.458 regarding broker responsibility education course as added applies only to a license issued or renewed on or after September 1, 2012.
   e) Provides that §1101.352 regarding addresses, telephone numbers, and email addresses, if available, §1101.355 regarding E&O insurance for business entity applicants, and §1101.401 regarding application expiration as amended apply only to an application for a real estate broker or salesperson license submitted on or after the effective date.
f) Provides that §1101.356 and §1101.357 regarding experience requirement as amended apply only to an application for a real estate broker license submitted on or after January 1, 2012.

g) Provides that §1101.358 regarding education requirements as amended applies only to an application for a real estate salesperson license submitted on or after September 1, 2012.

h) Provides that §1101.454 regarding education requirements as amended apply only to the renewal of a real estate broker or salesperson license that expires on or after September 1, 2012.

i) Provides that §1101.451 regarding late renewals and §1101.453 regarding E&O insurance to renew a business entity license apply to the renewal of a real estate salesperson or broker license on or after the effective date.

j) Provides that a person who holds a license as a real estate broker issued before the effective date may continue to renew that license without complying with the changes made to §1101.356 and §1101.357.

k) Provides that §1101.002 and §1101.005 as amended apply to conduct engaged in on or after the effective date.

25. Provides an effective date of September 1, 2011.

This was a new direction for License Holders in Texas in practicing agency in Texas.

TREC regulates all of the following individuals:

- Real estate brokers and sales agents
- Real estate inspectors
- Easement/right-of-way agents
- Education providers for real estate and inspection courses
- Developers of timeshares
- Residential service companies
The primary act that we will deal with in this course is The Real Estate License Act, which outlines the license law for the real estate profession, including the Laws of Agency.

In addition, TREC also established the Rules of the Texas Real Estate Commission, which interprets and expands upon some of the statutes of the Texas Real Estate License Act.

Texas Real Estate Commission updates the license act every two years when the legislature is in session. The Texas Association of REALTORS® works with the commission in these new recommended laws to the legislature. The Texas Real Estate Commission Rules are updated monthly or as needed.

Occupations Code
Title 7. Practices and professions related to real property and housing
Subtitle a. Professions related to real estate
Chapter 1101. Real estate brokers and sales agents
Subchapter a. General provisions

Sec. 1101.001. SHORT TITLE. This chapter may be cited as The Real Estate License Act. Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.

Sec. 1101.002. DEFINITIONS. In this chapter:

(1) "Broker":

(A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts:

(i) sells, exchanges, purchases, or leases real estate;
(ii) offers to sell, exchange, purchase, or lease real estate;
(iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate;
(iv) lists or offers, attempts, or agrees to list real estate for sale, lease, or exchange;
(v) auctions or offers, attempts, or agrees to auction real estate;
(vi) deals in options on real estate, including a lease to purchase or buying, selling, or offering to buy or sell options on real estate;
(vii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;
(viii) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate;
(ix) procures or assists in procuring property to effect the sale, exchange, or lease of real estate;
(x) controls the acceptance or deposit of rent from a resident of a single-family residential real property unit;
(xi) provides a written analysis, opinion, or conclusion relating to the estimated price of real property if the analysis, opinion, or conclusion:
   (a) is not referred to as an appraisal;
   (b) is provided in the ordinary course of the person's business; and
   (c) is related to the actual or potential management, acquisition, disposition, or encumbrance of an interest in real property; or
(xii) advises or offers advice to an owner of real estate concerning the negotiation or completion of a short sale; and
(B) includes a person who:
   (i) is employed by or for an owner of real estate to sell any portion of the real estate; or
   (ii) engages in the business of charging an advance fee or contracting to collect a fee under a contract that requires the person primarily to promote the sale of real estate by:
      (a) listing the real estate in a publication primarily used for listing real estate; or
      (b) referring information about the real estate to brokers.
(1-a) "Business entity" means a "domestic entity" or "foreign entity" as those terms are defined by Section 1.002, Business Organizations Code, that is qualified to transact business in this state.

(2) "Certificate holder" means a person registered under Subchapter K.

(3) "Commission" means the Texas Real Estate Commission.

(4) "License holder" means a broker or sales agent licensed under this chapter.

(5) "Real estate" means any interest in real property, including a leasehold, located in or outside this state. The term does not include an interest given as security for the performance of an obligation.

(6) "Residential rental locator" means a person who offers for consideration to locate a unit in an apartment complex for lease to a prospective tenant. The term does not include an owner who offers to locate a unit in the owner's complex.

(7) "Sales agent" means a person who is sponsored by a licensed broker for the purpose of performing an act described by Subdivision (1).

(8) "Subagent" means a license holder who:

(A) represents a principal through cooperation with and the consent of a broker representing the principal; and

(B) is not sponsored by or associated with the principal's broker.


Amended by:
Acts 2011, 82nd Leg., R.S., Ch. 1064 (S.B. 747), Sec. 1, eff. September 1, 2011.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 2, eff. January 1, 2016.

Sec. 1101.004. REAL ESTATE BROKERAGE.

(a) A person is engaged in real estate brokerage if the person, with the expectation of receiving valuable consideration, directly or indirectly performs or offers, attempts, or agrees to perform for another person any act described by Section 1101.002(1), as a part of a transaction or as an entire transaction.
(b) A person is not engaged in real estate brokerage, regardless of whether the person is licensed under this chapter, based solely on engaging in the following activities:

(1) constructing, remodeling, or repairing a home or other building;
(2) sponsoring, promoting, or managing, or otherwise participating as a principal, partner, or financial manager of, an investment in real estate; or
(3) entering into an obligation to pay another person that is secured by an interest in real property.


Amended by:
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 5, eff. January 1, 2016.

Sec. 1101.005. APPLICABILITY OF CHAPTER. This chapter does not apply to:

(1) an attorney licensed in this state;
(2) an attorney-in-fact authorized under a power of attorney to conduct not more than three real estate transactions annually;
(3) a public official while engaged in official duties;
(4) an auctioneer licensed under Chapter 1802 while conducting the sale of real estate by auction if the auctioneer does not perform another act of a broker;
(5) a person conducting a real estate transaction under a court order or the authority of a will or written trust instrument;
(6) a person employed by an owner in the sale of structures and land on which structures are located if the structures are erected by the owner in the course of the owner’s business;
(7) an on-site manager of an apartment complex;
(8) an owner or the owner’s employee who leases the owner's improved or unimproved real estate; or
(9) a transaction involving:

(A) the sale, lease, or transfer of a mineral or mining interest in real property;
(B) the sale, lease, or transfer of a cemetery lot;  
(C) the lease or management of a hotel or motel; or  
(D) the sale of real property under a power of sale conferred by a deed of trust  
or other contract lien.

_Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003._

_Amended by:_  
Acts 2005, 79th Leg., Ch. 62 (H.B. 1236), Sec. 1, eff. May 17, 2005.  
Acts 2007, 80th Leg., R.S., Ch. 297 (H.B. 1530), Sec. 1, eff. September 1, 2007.  
Acts 2011, 82nd Leg., R.S., Ch. 1064 (S.B. 747), Sec. 2, eff. September 1, 2011.  
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 6, eff. January 1, 2016.

**Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.**  
(a) The commission may suspend or revoke a license issued under this chapter or  
Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter  
1102 if the license holder:  
(1) enters a plea of guilty or nolo contendere to or is convicted of a felony or a  
criminal offense involving fraud, and the time for appeal has elapsed or the  
judgment or conviction has been affirmed on appeal, without regard to an order  
granting community supervision that suspends the imposition of the sentence;  
(2) procures or attempts to procure a license under this chapter or Chapter  
1102 for the license holder by fraud, misrepresentation, or deceit or by making  
a material misstatement of fact in an application for a license;  
(3) fails to honor, within a reasonable time, a check issued to the commission  
after the commission has sent by certified mail a request for payment to the  
license holder’s last known business address according to commission records;  
(4) fails to provide, within a reasonable time, information requested by the  
commission that relates to a formal or informal complaint to the commission  
that would indicate a violation of this chapter or Chapter 1102;
(5) fails to surrender to the owner, without just cause, a document or instrument that is requested by the owner and that is in the license holder's possession;

(6) fails to notify the commission, not later than the 30th day after the date of a final conviction or the entry of a plea of guilty or nolo contendere, that the person has been convicted of or entered a plea of guilty or nolo contendere to a felony or a criminal offense involving fraud; or

(7) disregards or violates this chapter or Chapter 1102.

(a-1) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder:

(1) engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of:

(A) the license holder;

(B) the license holder's spouse; or

(C) a person related to the license holder within the first degree by consanguinity;

(2) fails or refuses to produce on request, within a reasonable time, for inspection by the commission or a commission representative, a document, book, or record that is in the license holder's possession and relates to a real estate transaction conducted by the license holder; or

(3) fails to use a contract form required by the commission under Section 1101.155.

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;

(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;

(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;
(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;
(5) makes a false promise that is likely to influence a person to enter into an agreement when the license holder is unable or does not intend to keep the promise;
(6) pursues a continued and flagrant course of misrepresentation or makes false promises through an agent or sales agent, through advertising, or otherwise;
(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;
(9) fails within a reasonable time to properly account for or remit money that is received by the license holder and that belongs to another person;
(10) commingles money that belongs to another person with the license holder's own money;
(11) pays a commission or a fee to or divides a commission or a fee with a person other than a license holder or a real estate broker or sales agent licensed in another state for compensation for services as a real estate agent;
(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;
(13) accepts, receives, or charges an undisclosed commission, rebate, or direct profit on an expenditure made for a principal;
(14) solicits, sells, or offers for sale real property by means of a lottery;
(15) solicits, sells, or offers for sale real property by means of a deceptive practice;
(16) acts in a dual capacity as broker and undisclosed principal in a real estate transaction;
(17) guarantees or authorizes or permits a person to guarantee that future profits will result from a resale of real property;
(18) places a sign on real property offering the real property for sale or lease without obtaining the written consent of the owner of the real property or the owner's authorized agent;
(19) offers to sell or lease real property without the knowledge and consent of the owner of the real property or the owner's authorized agent;
(20) offers to sell or lease real property on terms other than those authorized by the owner of the real property or the owner's authorized agent;
(21) induces or attempts to induce a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract;
(22) negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;
(23) publishes or causes to be published an advertisement, including an advertisement by newspaper, radio, television, the Internet, or display, that misleads or is likely to deceive the public, tends to create a misleading impression, or fails to identify the person causing the advertisement to be published as a licensed broker or agent;
(24) withholds from or inserts into a statement of account or invoice a statement that the license holder knows makes the statement of account or invoice inaccurate in a material way;
(25) publishes or circulates an unjustified or unwarranted threat of a legal proceeding or other action;
(26) establishes an association by employment or otherwise with a person other than a license holder if the person is expected or required to act as a license holder;
(27) aids, abets, or conspires with another person to circumvent this chapter;
(28) fails or refuses to provide, on request, a copy of a document relating to a real estate transaction to a person who signed the document;
(29) fails to advise a buyer in writing before the closing of a real estate transaction that the buyer should:
(A) have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer; or
(B) be provided with or obtain a title insurance policy;
(30) fails to deposit, within a reasonable time, money the license holder receives as escrow or trust funds in a real estate transaction:
   (A) in trust with a title company authorized to do business in this state; or
   (B) in a custodial, trust, or escrow account maintained for that purpose in a banking institution authorized to do business in this state;
(31) disburses money deposited in a custodial, trust, or escrow account, as provided in Subdivision (30), before the completion or termination of the real estate transaction;
(32) discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of race, color, religion, sex, disability, familial status, national origin, or ancestry, including directing a prospective buyer or tenant interested in equivalent properties to a different area based on the race, color, religion, sex, disability, familial status, national origin, or ancestry of the potential owner or tenant; or
(33) disregards or violates this chapter.


Amended by:
Acts 2005, 79th Leg., Ch. 825 (S.B. 810), Sec. 9, eff. September 1, 2005.
Acts 2007, 80th Leg., R.S., Ch. 297 (H.B. 1530), Sec. 9, eff. September 1, 2007.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 69, eff. January 1, 2016.
Sec. 1101.558. REPRESENTATION DISCLOSURE.

(a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.

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

Explanation—Broker represents a client who could be seller, buyer, tenant or landlord must disclose either by voice communication or written notice, to anyone who the license holder comes in contact with at first contact. What is first contact?

- Property Calls
- All showings
- Referrals
- Other brokers or sales agents
- Other brokers or sales agent’s clients

(1) another party to the transaction; or


(2) another license holder who represents another party to the transaction.

Explanation—Broker or sales agent who has an agreement with a buyer, seller, tenant or landlord.

(b-1) At the time of a license holder's first substantive communication with a party relating to a proposed transaction regarding specific real property, the license holder shall provide to the party written notice in at least a 10-point font that:

Explanation—Substantive communication, more than two (2) words about a specific property inquiry. It could be your listing or another broker’s listing.
(1) describes the ways in which a broker can represent a party to a real estate transaction, including as an intermediary;

Explanation—Discussion to a member of the public who is interested of any kind in real estate the duties that are performed when represented by a license holder and the duties when not represented by a license holder. Discussion if the consumer is interested in any of the listings listed by your broker and company. This would be the explanation of Intermediary. Intermediary is only for in-house sales.

(2) describes the basic duties and obligations a broker has to a party to a real estate transaction that the broker represents; and

Explanation—Fiduciary duties of obedience, loyalty, disclosure, confidentiality, accountability and reasonable care.

(3) provides the name, license number, and contact information for the license holder and the license holder’s supervisor and broker, if applicable.

Explanation—Must show who the broker or designated broker’s contact information and the sales agent contact information.

(b-2) The commission by rule shall prescribe the text of the notice required under Subsections (b-1)(1) and (2) and establish the methods by which a license holder shall provide the notice.

Explanation Texas Real Estate Commission by their rules will state what type and size the font needs to be in the Information about Brokerage Services and how the broker and sales agent will provide the notice to the other parties required by law.
(c) A license holder is not required to provide the notice required by Subsection (b-1) if:
   (1) the proposed transaction is for a residential lease for less than one year and a sale is not being considered;
   (2) the license holder meets with a party who the license holder knows is represented by another license holder; or
   (3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.

Explanation—Individuals that do not have to have the Information About Brokerage Services presented to by the license holder.

(d) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.

(e) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.


Amended by:
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 58, eff. January 1, 2016.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 92, eff. January 1, 2016.

Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.
   (a) A broker may act as an intermediary between parties to a real estate transaction if:

Explanation—By written policy of the broker or record in the policy and procedure manual will spell out his or her policy on Intermediary and how in-house transactions take place. When it says between the parties it means they will be overseeing the transaction to be sure the transaction adheres to the law in the Texas Real Estate Commission License Act.
(1) the broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and

*Explanation*—*First written consent will be stated in the listing agreement, buyer agreement, lease and property management agreement.*

(2) the written consent of the parties states the source of any expected compensation to the broker.

*Explanation*—*In the buyer’s agreement it states the license holder shall ask the seller to pay the commission, but any part or all of the commission not paid by the seller the buyer agrees to pay all or the difference.*

(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d).

*Explanation*—*This means consent to proceed to intermediary as long as the client agreed in the agreements. It does not mean they have approved the appointee sales agents.*

(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560 to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

*Explanation*—*Appointees usually mean the listing agent is appointed to the seller and the buyer agent is appointed to the buyer. This requires three (3) licensees to proceed,*
the broker who is the intermediary, the sales agent appointed to work with the seller and the sales agent appointed to work with the buyer.

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

Sec. 1101.560. ASSOCIATED LICENSE HOLDER ACTING AS INTERMEDIARY.

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

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

Explanation—This could be another broker called a broker associate who has their license with the owner broker or whose broker license is registered with the Texas Real Estate Commission. The broker associate duties an intermediary would be the same as stated above.

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

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

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

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

Explanation—A written notice must be given to the buyer and seller who the appointees are appointed by the broker or the broker associate. The buyer and seller have the right to challenge these appointees (sales agents) where than the broker would have to appoint a different sales agent. This is known as a second consent agreement for appointees notice.
(c) A license holder appointed under this section may provide opinions and advice during negotiations to the party to whom the license holder is appointed.

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

Section 1101.561. DUTIES OF INTERMEDIARY PREVAL.

(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.

Explanation—The practice of intermediary by the broker reduces the liability of dual agency if the procedures are clearly adhered to.

(b) A broker must agree to acts as an intermediary under this subchapter if the broker agrees to represent in a transaction:

(1) A buyer or tenant; and
(2) A seller or landlord.

Added by Acts 2001, 77th Leg., ch 1421, Sec.2 eff. June 1, 2001.
Amended by: Acts 2005, 79th Leg.m, Ch 825 (S.B. 8100, Sec, 8, eff. September 1, 2005.

Rules of the Commission

535.156 Dishonesty; Bad Faith; Untrustworthiness

(a) A license holder's relationship with the license holder's principal is that of a fiduciary.

Explanation—These are the duties of Obedience, Loyalty, Disclosure, Confidentiality, Accountability and Reasonable Care.

A license holder shall convey to the principal all known information which would affect the principal's decision on whether or not to make, accept or reject offers.
Explanation—This has to do when a seller, through the license holder, has received an offer or offers on their property. It would help to get as much information on the buyer as possible, such as a finance letter that financing has been approved by the underwriter, or if there are multiple offers on the property and how to handle the presentation of all of them at the same time if possible. The seller needs to know at all times if any other offers are to be submitted even if the seller tells you not to bring any other offers. Your obligation is to keep your client-seller informed of any and all interest in his property.

However, if the principal has agreed in writing that offers are not to be submitted after the principal has entered into a contract to buy, sell, rent, or lease a property, the license holder shall have no duty to submit offers to the principal after the principal has accepted an offer.

Explanation—The license holder has no duty to submit other offers if the client instructed the license holder in writing. But to reduce your liability you still have to tell them if another offer is possible. A situation like this would need broker guidance or an attorney. A seller could tell you not to submit additional offers and then find out after closing that another offer was offered and you did not tell the client. They would be very upset with you for not communicating the information on another offer. Of course the seller could not terminate the accepted offer, but could place the other offer as a back-up contract.

(b) The license holder must put the interest of the license holder’s principal above the license holder’s own interest. A license holder must deal honestly and fairly with all parties; however, the license holder represents only the principal and owes a duty of fidelity to such principal.

Explanation—Within reason, any and all information needs to be given to your client within a reasonable time. Waiting until the next day may be very liable. Return phone calls and get information to the other broker by same communication as it was delivered. Do not withhold information in a coop when the buyer is waiting impatiently to hear the seller’s response. You represent the seller first and the buyer is owed honesty, fairness, disclosure, good faith and competency. So you must keep everyone in the loop and convey all information upon receipt. Your client comes first, the buyer second and the
agent third. You will communicate to the respective agent who is representing the other party.

(c) A license holder has an affirmative duty to keep the principal informed at all times of significant information applicable to the transaction or transactions in which the license holder is acting as agent for the principal. Explanation—When you represent a seller, buyer, tenant, landlord, from the beginning of your agreement you must communicate often. Often does not mean once a month. It means either daily, every other day or once a week. When you are having the agreement signed, you discuss communication and how! Then you adhere to the instructions of communication from your client.

(d) A license holder has a duty to convey accurate information to members of the public with whom the license holder deals. Explanation—When a member of the public has any inquiry about real estate, you must first determine who you represent before you open your mouth. If the member of the public is inquiring on one of your or your broker’s listings, you must remember you represent all of those sellers. Because you must adhere to fiduciary duties—remember that one of them is confidentiality. If you are asked why the seller is selling, will seller take less from list price, have they had any offers, what did that property sell for, you must remember that you cannot disclose any of that information without the seller’s permission in writing. But you can give any information that is public information such as the information in the MLS listing and nothing else.

NOTE: The Texas Occupations Code is the collection of statutes and laws that govern many occupations in Texas, including health professions, cosmetology, accounting and law enforcement, as well as the real estate profession. You can find the complete Texas Occupations Code by typing the following address into your web browser: http://www.capitol.state.tx.us/statutes/oc.toc.htm

Subchapter N. in The Texas Real Estate Act
Prohibited Practices and Disciplinary Proceedings
SEC. 1101.651. CERTAIN PRACTICES PROHIBITED.

(a) A licensed broker may not pay a commission to or otherwise compensate a person directly or indirectly for performing an act of a broker unless the person is:
   (1) a license holder; or
   (2) a real estate broker licensed in another state who does not conduct in this state any of the negotiations for which the commission or other compensation is paid.

Explanation—Unless the individual does not have a real estate license the broker cannot pay them. You, as an agent, cannot pay anyone without going through your sponsoring broker.

(b) A sales agent may not accept compensation for a real estate transaction from a person other than the broker that is sponsoring the sales agent or was sponsoring the sales agent when the sales agent earned the compensation.

Explanation—You cannot accept any commission paid directly to you from a builder, for sale by owner, another agent or another broker unless the commission goes through your sponsoring broker.

(c) A sales agent may not pay a commission to a person except through the broker that is sponsoring the sales agent at that time

Explanation—Again you cannot pay a referral fee or give any of your money to anyone unless it goes through your broker. If you want to give part or all of your commission to family members who buy through you, you must have your broker’s permission. You cannot pay them directly before closing or after closing.
(d) A broker and any broker or sales agent appointed under Section 1101.560 who acts as an intermediary under Subchapter L may not:

1. disclose to the buyer or tenant that the seller or landlord will accept a price less than the asking price, unless otherwise instructed in a separate writing by the seller or landlord;

Explanation—This applies to every situation. When negotiating a price for a client, you never disclose any conversation you have with your seller that they will take less or your buyer that they will pay more. It is a must in in-house transactions as well as a coop.

2. disclose to the seller or landlord that the buyer or tenant will pay a price greater than the price submitted in a written offer to the seller or landlord, unless otherwise instructed in a separate writing by the buyer or tenant;

Explanation—When doing an in-house (intermediary) or a coop transaction, you do not disclose to the other sales agent that your buyer will offer more or less.

3. disclose any confidential information or any information a party specifically instructs the broker or sales agent in writing not to disclose, unless:

   (A) the broker or sales agent is otherwise instructed in a separate writing by the respective party;

   (B) the broker or sales agent is required to disclose the information by this chapter or a court order; or

   (C) the information materially relates to the condition of the property;

Explanation—Fiduciary duties of confidentiality apply in all of these examples. The only exceptions would be:

- Court order
- Condition of the property (many conditions), foundation, mold, radon gas, lead base paint, sink hole, termite damage, structure of the property, (if you know you have to tell)
• Nationality or racial mix-up of the neighborhood
• Dishonest practices such as not telling a zoning change in the neighborhood, etc.

Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.
Amended by: Acts 2015, 84th Legislature, R.S., Chapter 1158 (S.B. 699), Section 68, effective January 1, 2016.

It is important to note that a violation of a federal law is also a violation of the Real Estate License Act. These laws include the:

• The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) introduced meaningful federal enforcement mechanisms. It outlawed: refusal to sell or rent a dwelling to any person because of race, color, religion, sex, or national origin.
• Equal Credit Opportunity Act (ECOA), which establishes as unlawful discrimination in lending on the basis of a prospective borrower’s race, color, religion, national origin, sex, marital status, and age.
• Americans with Disabilities Act (ADA), which identifies disabilities that are “protected” under laws that prohibit unlawful discrimination. The ADA also establishes guidelines for buildings with public access or employees along with certain rental units for providing reasonable access to people with disabilities. Another federal law is the federal fair housing law, which prohibits discrimination based on race, color, religion, national origin, sex, familial status, and disability. HUD has delegated the enforcement of this law, in most cases, to the states’ attorneys general.
• Truth-in-Lending Act (TILA or Regulation Z), which provides for meaningful disclosure of credit terms to prospective borrowers seeking financing that includes mortgages.
• Real Estate Settlement Procedures Act (RESPA) that prohibits the payment of referral fees between and among providers of closing/settlement services. At the federal level, both TILA and RESPA are now being enforced by the Consumer Protection Finance Bureau (CFPB).
• US Department of Housing and Urban Department Government agency oversees home mortgage lending practices and sells foreclosed homes. Some of the services are:
  o Learn about homeownership
  o Get rental help
  o Avoid foreclosure
  o Find homeless resources
  o Talk to a housing counselor
  o File a housing discrimination complaint
  o Use the HUD resource locator

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.

(a) The commission may suspend or revoke a license issued under this chapter or Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter 1102 if the license holder:

(1) enters a plea of guilty or nolo contendere to or is convicted of a felony or a criminal offense involving fraud, and the time for appeal has elapsed or the judgment or conviction has been affirmed on appeal, without regard to an order granting community supervision that suspends the imposition of the sentence;

(2) procures or attempts to procure a license under this chapter or Chapter 1102 for the license holder by fraud, misrepresentation, or deceit or by making a material misstatement of fact in an application for a license;

Explanation—Many applicants have been known to falsify educational requirements, lie on the application and find a school or broker to support the lies. The Commission does an excellent job in rejecting these applications because they do a thorough background check on everyone who tries to get a real estate license.

(3) fails to honor, within a reasonable time, a check issued to the commission after the commission has sent by certified mail a request for payment to the license holder’s last known business address according to commission records;
Explanation—Many license holders as well as applicants send the Commission hot checks. This delays the process or renewal of a license. Credit cards are the norm for fees to the Commission. The Commission does not have time to go around the state of Texas and collect “Insufficient Checks”.

(4) fails to provide, within a reasonable time, information requested by the commission that relates to a formal or informal complaint to the commission that would indicate a violation of this chapter or Chapter 1102;
Explanation—Chapter 1101 of the Occupational Code is for real estate inspectors. When a complaint is filed against a license holder, they should immediately respond to the Texas Real Estate Commission. If it is a very serious violation to the License Act, the license holder may be found guilty of the complaint.

(5) fails to surrender to the owner, without just cause, a document or instrument that is requested by the owner and that is in the license holder’s possession;
Explanation—It is required by the License Act and the REALTOR® Code of Ethics to provide the client a copy of everything they sign immediately or very close to immediately. Document when they signed it and keep in file. This is one of the biggest complaints by many clients and third parties like title companies.

(6) fails to notify the commission, not later than the 30th day after the date of a final conviction or the entry of a plea of guilty or nolo contendere, that the person has been convicted of or entered a plea of guilty or nolo contendere to a felony or a criminal offense involving fraud; or
Explanation—If you are a license holder you immediately notify the Texas Real Estate Commission of the conviction of any type or you may be in jeopardy of losing your license indefinitely.

(7) disregards or violates this chapter or Chapter 1102.
Explanation—This also applies to inspectors.

(a-1) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder:
   (1) engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of:
      (A) the license holder;
      (B) the license holder's spouse; or
      (C) a person related to the license holder within the first degree by consanguinity;

Explanation—Always disclose in a listing agreement, sales contract, appointed agent in an intermediary, buyer, tenant, landlord agreement that you are a license holder or related to any party to the transaction—even if it is your 5th cousin. Disclose, disclose, disclose.

(2) fails or refuses to produce on request, within a reasonable time, for inspection by the commission or a commission representative, a document, book, or record that is in the license holder’s possession and relates to a real estate transaction conducted by the license holder; or

Explanation—License holder must present the Broker Policy and Procedure Manual, files, emails, telephone call lists, checklists, advertising, closing statements, seller disclosures, inspections, addenda used, notes, etc. any time the Commission requests anything. If they do not itemize them for you, know that you have to give everything for that specific complaint.

(3) fails to use a contract form required by the commission under Section 1101.155.

Explanation—Section 1101.155 has to do with promulgated forms. The only exception
to those forms is if the client has an attorney that will draft the specific form or if the owners have their own forms. If the license holder does not use the promulgated forms you cannot give advice and opinions of any kind. Talk to your broker and in-house counsel if this occurs to find out what you can and cannot do in the transaction.

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;
(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;
(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;
(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;
(5) makes a false promise that is likely to influence a person to enter into an agreement when the license holder is unable or does not intend to keep the promise;
(6) pursues a continued and flagrant course of misrepresentation or makes false promises through an agent or sales agent, through advertising, or otherwise;
(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;
(9) fails within a reasonable time to properly account for or remit money that is received by the license holder and that belongs to another person;
(10) commingles money that belongs to another person with the license holder's own money;
(11) pays a commission or a fee to or divides a commission or a fee with a person
other than a license holder or a real estate broker or sales agent licensed in another state for compensation for services as a real estate agent;

(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;

(13) accepts, receives, or charges an undisclosed commission, rebate, or direct profit on an expenditure made for a principal;

*Example*—*Uses a certain vendor and the vendor gives you a kickback.*

(14) solicits, sells, or offers for sale real property by means of a lottery;

(15) solicits, sells, or offers for sale real property by means of a deceptive practice;

*Explanation*—*Solicit and advertise certain services that are really not a part of the transaction. In other words lies to get the listing, buyer, tenant or landlord.*

(16) acts in a dual capacity as broker and undisclosed principal in a real estate transaction;

*Explanation*—*Sells your own rental property and does not tell the buyer you are a licensed broker; buy a property and not disclose you are a license holder; lease a property and not tell the tenant you are the owner and not disclose you’re a license holder; manage rental property and not disclose you are a license holder.*

(17) guarantees or authorizes or permits a person to guarantee that future profits will result from a resale of real property;

(18) places a sign on real property offering the real property for sale or lease without obtaining the written consent of the owner of the real property or the owner’s authorized agent;

*Explanation*—*You cannot put a sign in the yard of any property or anywhere without the written permission of the seller. This applies to all types of listings and rentals.*
(19) offers to sell or lease real property without the knowledge and consent of the owner of the real property or the owner’s authorized agent;
Explanation—Unscrupulous license holders were selling properties of individuals who were in financial straits or were of an age where ownership title was not clear to them. You cannot or should not sell any property without a listing agreement and permission of the owner or heirs.

(20) offers to sell or lease real property on terms other than those authorized by the owner of the real property or the owner’s authorized agent;
Explanation—There are many examples of this. Telling a member of the public the owner will paint or repair items the seller has not agree to. Net listings cannot be sold unless the license holder has given a competitive market analysis or a broker’s price opinion before they can enter into a net listing. This is where a seller will say I want $60,000 and you can sell it for whatever price and keep the profit.

(21) induces or attempts to induce a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract;
Explanation—The most common is when there is an agency agreement with a license holder and another license holder comes along and tells them to break the representation agreement and work with the second license holder. Another example would be if a license holder would be practicing law by telling a broker to terminate their contract and buy another property.

(22) negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;
Explanation—You cannot go directly to a client that has an outstanding agreement with a license holder. Examples would be listing, buyer, tenant and landlord agreements. Many
times when a license holder does not return telephone calls, emails or texts, the other license holder gets frustrated and makes contact with the client. There are other ways to get the license holder to respond. Contact the sales agent's broker or manager.

(23) publishes or causes to be published an advertisement, including an advertisement by newspaper, radio, television, the Internet, or display, that misleads or is likely to deceive the public, tends to create a misleading impression, or fails to identify the person causing the advertisement to be published as a licensed broker or agent;

Explanation—The Texas Real Estate Commission has spent years trying to educate brokers, sales agent’s, broker’s teams, and everyone on advertising. The advertising should be crystal clear who the broker is and who the sales agent is. The public should never have to guess. This is the most important part of any and all types of advertising. The Information about Brokerage Service is also part of advertising and must be placed accordingly by the Texas Real Estate Commission.

(24) withholds from or inserts into a statement of account or invoice a statement that the license holder knows makes the statement of account or invoice inaccurate in a material way;

Explanation—There are many issues where property management companies have not accounted for all fees or communicated on a regular basis to the landlord. Fraud and misrepresentation are possible and the consumer’s fund must be handled with reasonable care.

(25) publishes or circulates an unjustified or unwarranted threat of a legal proceeding or other action;

Explanation—Threatening anyone, especially license holders who use this tactic, to get their way is a violation of the Texas Real Estate License Act.
(26) establishes an association by employment or otherwise with a person other than a license holder if the person is expected or required to act as a license holder;
Explanation—You cannot use your license as a sales agent to work for a corporation, relocation company, bank, etc. unless they have a broker’s license for you to be sponsored by. Working for a builder who does not have a broker’s license, you cannot list and sell, all you can do is sell the properties the builder owns and builds.

(27) aids, abets, or conspires with another person to circumvent this chapter;
Explanation—An example of this is helping someone get educational hours by signing a certificate when the license holder did not educate themselves for the hours of the course. A license holder asking a school, instructor or admin to sign them in if the license holder was late or not in the class for all hours they will be credited for.

(28) fails or refuses to provide, on request, a copy of a document relating to a real estate transaction to a person who signed the document;
Explanation—You must give a copy of everything the client or customer has signed or not signed that pertains to the transaction. Information About Brokerage Services should be given in a hard copy format.

(29) fails to advise a buyer in writing before the closing of a real estate transaction that the buyer should:
(A) have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer; or
(B) be provided with or obtain a title insurance policy;
Explanation—This verbiage is in the promulgated forms. If you sell a builders home, it is not in their contracts, but you still have to provide it. See approved by the Texas Real Estate Commission Notice to Prospective Buyer Addenda (TREC no. Op-C).

(30) fails to deposit, within a reasonable time, money the license holder receives as escrow or trust funds in a real estate transaction:
Explanation—License holder has two (2) business days from the effective date of the contract to deposit earnest money with title company or trust fund. It must be receipted to show proof of deposit (see (A) and (B)). Failure to do so could jeopardize your client’s rights in the contract. Seek legal advice and talk with your broker if you have not deposited the earnest money within the time frame that is required.

(A) in trust with a title company authorized to do business in this state; or
(B) in a custodial, trust, or escrow account maintained for that purpose in a banking institution authorized to do business in this state;
(31) disburses money deposited in a custodial, trust, or escrow account, as provided in Item (30), before the completion or termination of the real estate transaction;
(32) discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of race, color, religion, sex, disability, familial status, national origin, or ancestry, including directing a prospective buyer or tenant interested in equivalent properties to a different area based on the race, color, religion, sex, disability, familial status, national origin, or ancestry of the potential owner or tenant; or

Explanation—This applies to Fair Housing, discrimination and protected classes. Take a course on local, state, and federal Fair Housing Laws.

(33) disregards or violates this chapter.


Amended by:
Acts 2005, 79th Leg., Ch. 825 (S.B. 810), Sec. 9, eff. September 1, 2005.
Acts 2007, 80th Leg., R.S., Ch. 297 (H.B. 1530), Sec. 9, eff. September 1, 2007.
Acts 2009, 81st Leg., R.S., Ch. 23 (S.B. 862), Sec. 6, eff. May 12, 2009.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 69, eff. January 1, 2016.

**Why Study 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, what is 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 REALTOR® Code of Ethics.

Note: Visit the Web site of the National Association of REALTORS® by typing the following address into your web browser: www.realtor.org. You need to sign in so you will need the required information to access the NAR website. Do you know what your number is? If not, research on the NAR website.

For a license holder to be a professional it is essential that they understand and be able to explain agency laws to consumers. Potential legal problems can be avoided by the timely disclosure of agency. Before showing a property, leasing a property, listing a property, selling a property, you need to know what type of agency your broker practices and know it well. You need to know how to explain the “Information About Brokerage Services” form (TREC form) and understand every word stated. Who the agent represents is confusing and if you do not understand agency you cannot expect the consumer to have faith or trust in you.

When you get your license, you will need a broker to sponsor you. Interview two or three brokers before you select the broker you will be representing in real estate. You are a walking sign for your broker and your actions and conduct will reflect on both yourself and the broker’s company. You will have a general agency relationship with your broker and you need to understand what your agency relationship is. General agency is an on-going relationship. It will cover many transactions. It makes the broker liable and responsible for your transactions. It also means that any client your broker represents, you do too. Everyone sponsored by the broker acts as unit.
The relationship with a client is called **special agency**. It is for one specific transaction. The license holder in the transaction is the broker. Your broker makes the decision regarding the types of agency your company will offer. You need to know what type of agency your broker practices before you start to work with consumers. The broker is the agent in the transaction, not the sales person who is acting for the broker. The agency relationship is between the broker and the principal (buyer or seller). The sales agent or broker associate is acting for the broker. Too many sales agents do not understand agency relationships and say things out of context thereby breaking the confidentiality the agency relationship requires. Examples include telling other agents to bring offers, saying the seller is disparate, saying why the seller is selling, saying the seller will take less, and more. All of this is confidential unless your seller says you can tell others this in writing.

Making decisions for your client without their permission is an error and doing what you feel is right as a license holder can be very different than what the principal and your broker’s policy is when you consider your company is acting as one unit. Your conduct and what you say can also be very different than what is required by law. The study of agency is essential for a licensee to comply with the law when working with all clients and customers.

**Agency Terminology**

Below word-bank has a list of words used in describing agency law. From this word bank, choose the word that best completes the sentences that follow. Some words and phrases may not be used, and some terms may be used more than once.

<table>
<thead>
<tr>
<th>WORD BANK</th>
<th>Third Party Client</th>
<th>Agent Ratification</th>
<th>For Third Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority</td>
<td>Property</td>
<td>General Agent</td>
<td></td>
</tr>
<tr>
<td>Principal</td>
<td>Special Agent</td>
<td>Universal Agent</td>
<td></td>
</tr>
<tr>
<td>In Writing</td>
<td>Express Agreement(s)</td>
<td>Implied Agreement(s)</td>
<td></td>
</tr>
</tbody>
</table>

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1. An individual who is authorized to represent the interests of another is a(n) _______.

2. A real estate license holder is usually a _______ which means that he or she has limited authority in a specific transaction.

   The principal is also known as the _______.

4. The license holder works _______ the third party to negotiate on behalf of the principal.

5. An agency relationship can be created by _______ or _______.

6. The _______ is also known as the customer.

7. _______ is the power to perform certain actions for the principal.

8. The only requirement for establishing an agency relationship is the _______ of both parties.

9. Although not required, it is highly encouraged that the terms of agency relationships are expressed _______.

10. Most agency relationships are formed by _______.

**Correct Answer:**

1. Agent
2. Special agent
3. Client
4. With
5. Express agreement or implied agreement
6. Third Party
7. Authority
8. Express
9. In writing
10. Express agreement

Relationship Between the Principal and the License Holder
The license holder acts as a fiduciary for a principal (the buyer or the seller). A fiduciary relationship is one where one party (the client) puts complete trust in another party (the license holder).

The client relies on the knowledge of the license holder and trust that they are receiving accurate information. The license holder is charged with protecting the client from loss or harm. That relationship requires the license holder to have 100% loyalty to the client, and full disclosure of any issue that may affect the client’s negotiations.

The license holder must take care to look at the property and the transaction the way they would look at it if they were buying the property themselves. They must check out every issue that could have a negative effect on their client. The client ultimately makes the decision to purchase or not to purchase, but the client needs the license holder’s knowledge, information and disclosures to make a good decision.

The license holder must take care to not say things to other agents or parties that may violate their duty of confidentiality or may in any way harm their client. The duty of reasonable care makes the license holder responsible for protecting the client from any foreseeable harm. The license holder must pay attention and make the client aware of any situation that might cause them harm in the future.

Before You Go
Choose the correct term (party) for the blanks below.
Terms (party):

Sub-agent  Customer  Client

1. A _______ gets honesty, fairness and information about the property from the license holder.
2. A _______ gets honesty, fairness and information about the property, plus fiduciary duties from the license holder.
3. A _______ works with a buyer while representing a seller through the listing broker.

Correct Answer:
1. Customer
2. Client
3. Sub-agent

Lesson Summary
Agency relationships are formed when one party, the principal, authorizes another party, the license holder, to act as his or her representative. The third party then negotiates the transaction with the principal through the license holder, and the license holder represents the principal’s best interests. This relationship is fiduciary in nature because the principal places his or her trust and confidence in the license holder to responsibly handle the obligations of the position as the principal’s representative.

The agent can have varying degrees of authority. Universal agents have the most power in their principals’ affairs. General agents, such as business managers, usually have a great deal of power in one or two limited areas. However, most real estate professionals act as special agents, which means that they have a limited amount of power in one specific transaction. Sometimes an individual acts outside of the scope of his or her
authority. If the principal agrees to unauthorized actions after they have occurred, the actions have been authorized by ratification and an agency relationship is created. Agency relationships are usually formed through express agreements, in which the principal expressly designates a license holder. Written agreements provide the best protection for the license holder and the client, but oral agreements are valid. An agency agreement may also be implied by either party.

Real estate agency relationships did not exist until the early 1900s, when real estate vendors began to organize and formed what is now known as the National Association of REALTORS®. Before this organization was established, vendors acted in their own interests in negotiating real estate transactions. The National Association of REALTORS® created a Code of Ethics that served as the basis for individual state license laws and acts.

The real estate profession is dependent upon agency relationships. Buyers, sellers, landlords and tenants seek out brokers and sales agents to represent their interests in a transaction. Although both brokers and sales agents can act as agents in transactions, only a broker can technically enter into an agency relationship. The licensed sales agent is a general agent of his or her supervising broker and functions as the principal’s agent through the supervising broker. However, in everyday language, most people call the sales agent an agent.
Lesson Two: Basic Agency Relationships, Disclosures and Duties to the Client

Lesson Topics
This lesson focuses on the following topics:

- Agency Defined
- Authority of Agent in Agency Relationships
- Classification of Agency Fiduciary Duties and Responsibilities
- Information About Brokerage Service
- Disclosure of Representation

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

- Understand the complexity and interpretation of agency and the law.
- Know laws that pertain to real estate agency law.
- Determine if you are in sync with your broker.
- Explain and know the difference between a client and a customer.
- Understand who you represent, when, how, during and after.
- Define the difference between a broker, sales agent, a sub-agent, disclosed dual agent, buyer agent, seller agent, leasing agent and a property manager agent, and appointed agents.
- Name and understand six fiduciary duties a license holder owes a client.
- Name and understand five duties a license holder owes a customer.
- Explain and understand how to disclose agency.
- Understand and be able to explain the “Information About Brokerage Services” notice.
- Explain how to find agency in the Texas Real Estate Commission Rules.
- Describe how to find agency in the Texas Real Estate Commission License Act.
How Do Consumers Select Their License Holder?

Please note the Texas Real Estate Commission now has two classifications for license holders, they are broker and sales agent, both classified in the Texas Real Estate License Act as license holder.

How do consumers select their license holder?

- Mostly by friends who have used a license holder
- Signs in the neighborhood,
- Previous used services of a license holder
- A telephone call to a real estate office.

Unfortunately, the consumer does not realize how important it is to qualify agents about their knowledge of the agency laws in Texas. This is the most important service a license holder can provide a consumer.

Most consumers who want to sell their property think:

- Agent production
- Marketing plan
- Competitive market analysis
- Signs in yard, color, size
- Advertising
- Local, state and national affiliations
- Internet visibility
- Colored pictures
- Virtual tours
- Open houses, etc.
- Size of the real estate company
- Number of sales agents are in the real estate company
These marketing actions are what most license holders do but all license holders are not proficient in Agency Law. Lawsuits mostly result in a license holder not upholding and understanding their fiduciary duties under agency law.

**Examples of Lawsuits Against License Holders**

The following examples are from the NAR website: [https://www.nar.realtor/publications/legal-pulse/agency-highlights-2q-2016](https://www.nar.realtor/publications/legal-pulse/agency-highlights-2q-2016)


Broker was responsible for damages resulting from its licensee’s breach of fiduciary duty to his client.

Buyers purchased a vacant movie theater with plans to convert the property into a dinner theater. After purchasing the property, the buyers learned the project was not possible, and they sued the brokerage firm and licensee who assisted them with the transaction. The buyers claimed that the licensee did not adequately investigate use of the property, improperly advised them regarding development of the property, and failed to disclose an alternative option agreement offered by the sellers. After a bench trial, the court held that the licensee breached his duty to the buyers. The court found the brokerage firm was also liable, but held that the firm was only responsible for only a portion of the damages.

On appeal, the buyers argued that the brokerage firm should be responsible for all of the damages because the licensee was an agent of the firm. The appellate court reversed the judgment and found the broker liable for all damages plus interest because the licensee was acting with the scope of his employment. The broker was liable for $180,619.22 in damages and interest, as well as the buyers’ costs on appeal.

**Questions to answer on the previous lawsuit:**

- What did you learn from this lawsuit?
- Is research important before you list, sell, lease a property? And why
• Are zoning local laws for the use of a specific property type important?
• Would a buyer need to know about parking space, noise levels, liquor license, etc.?
• Should you sell a specific property where you do not have the experience or knowledge?

**No commission is worth losing your license.**

A broker could be liable for a licensee’s conduct in the course of a real estate transaction even if the conduct was fraudulent, because the conduct occurred within the scope of the licensee’s agency.

Buyer brought a fraudulent nondisclosure action against the seller, who also acted as his own representative in the transaction, and the seller’s real estate broker. The buyer alleged that he discovered a number of defects after closing on the property. The circuit court entered summary judgment for the broker.

On appeal, the court held that the licensee’s duty of disclosure extends to the licensee’s real estate broker. If the seller/licensee withheld information from the buyers, he did so during his work as a licensee to facilitate a sale. The broker was the licensee’s principal, and was liable for the acts of an agent, even if those acts were fraudulent. The seller/licensee was not acting outside the scope of his agency during the transaction, and engaging in fraud does not render the conduct outside the scope of agency. Furthermore, disputed issues of fact precluded summary judgment. The court reversed the judgment and remanded the case for further proceedings.

What did you learn from this case?
You need to familiarize yourself with your broker’s policy on lawsuits and errors and omission insurance.

What is your cost and what resources do you have to protect yourself?

The Texas Real Estate Commission has a recovery fund that may help you pay costs of a lawsuit, but you need to discuss this with your broker.

Failure to do so could cost you and your family a major financial loss. Yes, your broker is liable for your actions, you are as well. You are liable financially as well.

Your Broker’s Policy and Procedures Manual should spell this out signed by you and your broker.


A seller was vicariously liable for the licensee’s statement regarding a foul odor on the sold property.

After buying a home, the purchasers discovered that a foul odor on the property was due to septic and oil tanks that were buried on the property. The purchasers sued the seller and the seller’s representative for breach of contract and misrepresentation. During the transaction, the licensee, who acted as a dual agent for purchasers and sellers in the transaction, told the purchasers that the odor was merely “sea air”.

Before trial, the licensee settled with the purchasers. The trial court found that the seller was not liable on the claims, but that he was vicariously liable for the licensee’s negligent misrepresentation. However, no damages were awarded against the seller because the purchasers’ damages were less than the settlement amount paid by the licensee. Since the seller was not liable on the direct claims against him, the court found him to be the winning party in the suit and awarded him attorneys’ fees. On appeal, the court upheld the liability determination, but vacated the damages and attorneys’ fees awards. The case
was remanded for a clearer statement of decision on damages and attorneys’ fees by the lower court.

What did you learn from this case?

- Be sure your broker allows you to sell your own listings by representing both buyer and seller. Legally you can if your broker permits it.
- Only the most experienced license holder should sell their own listings due to liability reasons.
- Communication and understanding with the buyer and seller is important so that they know you are representing them both.
- Buyer and seller understand you cannot give them advice and opinions.
- Buyer and seller know you cannot negotiate for them.

We will discuss Risk Management for the license holder in other chapters. This is an ongoing subject and needs to be implemented on day one when your license becomes active and every day forward.

**Agency Defined**

An agent is one who represents another, called a client or principal, in transactions with third parties. The principal delegates the authority to act on his or her behalf. The relationship between a broker and a client is called special or limited representation. The agency only exists for one specific transaction.

A special or limited agent is not authorized to make decisions for or sign anything that binds the client.

An agency relationship creates fiduciary duties owed to the principal by the agent. The relationship is formed, by mutual consent, when the broker and client sign:

- Listing agreement,
- Buyer’s representation agreement,
- Lease agreement,
What does Agency mean to you?

Can you draw a diagram reflecting the flow of authority?

In each transaction can you name who is who as it pertains to agency and what classification they are and who they represent?

Authority of Agent in Agency Relationships
Relationships do not have to be expressed in writing, nor be supported by consideration. Likewise, necessary consent can be manifest by the conduct of the parties sufficient to permit a trier of fact to conclude that an agent has accepted a delegation of authority from a principal to act on the principal’s behalf.

In the real estate brokerage industry; however, most agency relationships, at least with sellers, buyers, tenants, and landlords, are clearly intended by the parties and are reflected in a written agreement.

The law is crystal clear that the execution of a representation agreement by a real estate broker and a principal/client renders the broker the agent for the seller, buyer, tenant, or landlord for the purpose of fulfilling the agreement.
Example of case in point:


In this case, a real estate broker, Duffy, sued a seller, Setchell, for a commission. Setchell denied Duffy was entitled to a commission and asserted instead the sale, which was procured by another broker, Brown, was voidable because Brown acted as the buyer’s agent without clearly disclosing his status to the seller.

Setchell had listed his farm with Duffy. However, Setchell’s neighbor, White, wanted to purchase additional farmland and contacted Brown to pursue the possibility of acquiring Setchell’s farm. White eventually authorized Brown to offer Setchell $800.00 per acre for his farm. Brown then negotiated a sales contract with Setchell for slightly less than $800.00 per acre, but never told Setchell that White was the buyer until Brown secured Setchell’s signature on a sales contract and a listing agreement requiring Setchell to pay Brown a commission.

Upon learning of the sales contract between Setchell and White, Duffy demanded a commission from Setchell. Rather than pay two commissions, Setchell refused to complete the sale to White. Duffy then sued Setchell for his commission and White sued Setchell for specific performance the sales contract.

The court held that Brown was clearly an agent for White because White first approached him about acquiring Setchell’s farm and authorized him to offer Setchell $800.00 an acre. Brown then negotiated a contract on the terms specified by White. The court further concluded that Brown also became Setchell’s agent when Setchell executed a listing agreement with Brown contemporaneously with Setchell’s execution of the sales contract with White. Brown’s creation of an agency relationship with Setchell without advising Setchell that he was negotiating the sale as an agent for White rendered Brown an undisclosed dual agent. Setchell was therefore entitled to rescind the contract.
with White. Since a sale was never consummated, Duffy was not entitled to any commission under his listing agreement with Setchell.

Now let us review to the errors of these license holders and how their errors could have been prevented.

This transaction happened back in 1975 and still happens today when license holders try to go around the agency laws. No one should have to guess who you represent.

In Chapter One the License Act said that the license holder will always disclose who they represent verbally or written (See 1101.558. REPRESENTATION DISCLOSURE).

Brown (license holder) never disclosed to the seller Satchell that he represented the buyer. Brown (license holder) crossed Duffy (license holder) sign by contacting seller Satchell directly without going through Duffy (license holder). So far we have not mentioned the REALTOR Code of Ethics, but Brown allegedly violated one or more of the articles and violated MLS Rules and Regulations for excluding Duffy (license holder) in the transaction.

When Brown got the seller to sign a listing agreement and a sales contract, he should have disclosed that he was representing the buyer and possibly be an intermediary transaction selling his own listing. Was the listing agreement valid since seller Satchell had signed a listing agreement with license holder Duffy?

Nowhere does it mention that license holder Brown disclosed to buyer White that license holder Brown was representing both seller Duffy and buyer White.

By listing and selling his own listing he cannot negotiate. He can only give duties of honesty, fairness, disclosure, good faith and competency. As we can see he violated many sections from the Texas Real Estate Commission License Act and the Texas Real Estate Commission Rules. There are many unknowns in this case, but Brown was very incompetent in this transaction.
Duffy did the right thing by getting a listing agreement signed. Being a diligent listing agent he should have gotten an updated survey for the acreage. Duffy also should have given him the Information About Brokerage Services before the listing agreement was signed.

Also, when the courts decide entitlement to commission, the license holders always lose. The courts do not look at commission entitlement like the REALTOR family does (“Procuring Cause”).

As REALTORS we normally do not sue members of the public unless it is a blatant offense against the license holder. It is not in the best interest of our real estate industry to sue members of the public. We have our own process at the Texas Association of REALTORS Professional Standards Committee.

Are you practicing agency as your Broker’s Policy and Procedures Manual requires you to?

So many license holders are prating real estate without realizing they have to practice the same as the sponsoring broker for the sales agent and broker associate. These are some questions you need to know from your broker:

- What type of agency does your broker practice?
- Does your broker have a statement of agency policy?
- Have you read the agency policy and signed the policy saying you will adhere to it?
- Does your broker practice intermediary?
- Does your broker cooperate with sub-agents?
- Does your broker work with both buyers and sellers in the same transaction?
- Does your broker practice single agency?
- What disclosure forms does your broker have for you to disclose who you represent?
- What type of training does your broker have so you can understand agency?
• Does your broker require buyer representation agreements when working with buyers?
• Does your broker allow you to lease property?
• Are you familiar with your broker’s policy on property management?
• Do you know how to explain agency?
• Do you know how to explain the “Information About Brokerage Services”?
• Do you know how to present the “Information About Brokerage Services”?
• Do you know how and where this disclosure is required?
• What procedures does your broker have to protect client’s confidentiality?
• What is the difference between dual agent and intermediary?
• Does your broker have a policy for staff on agency?
• Does your broker have a policy on selling unlisted property?
• Does your broker have a policy on selling to members of your family?
• Does your broker have errors and omission insurance?
• Do you know what your cost for errors and omission insurance is and when you pay your fee to your broker?
• Do you know how much of the deductible you are responsible for if a lawsuit is filed against you?

Knowing the answers to these questions will help you have a better understanding of what your broker is expecting out of you and what you can expect from your broker. Working with a member of the public cannot be taken lightly.

License Holders Duties to Their Principal
An agency relationship is a fiduciary relationship. The real estate broker is normally acting for another (the client/principal) who wants to buy, sell, lease, manage or exchange real estate. The real estate broker is a SPECIAL AGENT of the principal. The broker was hired and given the authority for certain defined acts.

Usually, the acts include specific duties to reveal to his or her principal:
The existence of all offers to purchase the property
The identity of all buyers
The financial capacity of potential buyers
Whether the buyer is prepared to pay a price higher than the offered price.

By the same token a broker is obligated to keep confidential any information that might injure the principal if it were revealed. This includes disclosure as to why the seller is selling or if he or she will sell below listed prices.

This is the same for the buyer whether he or she can pay or will pay more for the property than his or her original offer price.

If the license holder knows of defects of the property, the license holder is mandated by law of disclosing the defect. Additionally, the license holder should be versed in:

- Locating or marketing property
- Advertising
- Negotiating,
- Handling the paper work (i.e. contracts)
- Knowing the correct and updated forms to use
- Putting a sign in the yard
- Scheduling inspections
- Staging the property
- Internet marketing
- Open houses
- Scheduling showings
- Scheduling closings
- Following up on loan status of the buyer
- Knowing what disclosures should take place on each transaction
- Monitoring the transaction until a successful closing and funding takes place
A real estate sales agent is an agent of the real estate broker who sponsored the sales agent or broker associate. This relationship is called “GENERAL AGENCY”. The real estate sales agent has the same duties to the client that the broker has.

A GENERAL AGENCY is one who is authorized by a principal to perform any and all acts associated with the continued operation of a particular job or a certain business of the principal. The essential feature of a GENERAL AGENCY is the continuity of service, such as that provided by a property manager of a large project. Most real estate license holders are treated as SPECIAL AGENTS when they are given limited authorization to act under a listing agreement, buyer agreements, leases, and property management agreements bind the principal, their broker in the name of the broker.

Your employment or independent contract with your broker allows you to take listing agreements, buyer representation agreements, lease agreements, property management agreements in the name of your broker. As a sales agent, your first agency relationship is and was with your broker who sponsored you. Remember, you do not make decisions outside of your Broker’s Policy and Procedures Manual or your client. Always refer to the policy and procedures manual or instructions from your broker. If your broker is not available then go to your manager. If the manager is not available, do not ask an agent in your office what to do. Wait until you can discuss the matter with the broker or sales manager, or designated broker.

In a GENERAL AGENCY relationship, the broker is responsible for all of the sales agent’s acts within the scope of their authority. It is the broker’s responsibility to ascertain that their sales agents are well trained and capable of performing the duties the broker has given them the authority to do. All information a sales agent gives to a member of the public should be accurate information. Those duties are in The Broker’s Policy and Procedure Manual. Even though the broker is responsible for your actions, you are also responsible for all your actions.
The amount of authority that a license holder has differs depending upon the agreement in writing.

Next are some examples of authority given to you and your broker through representation agreements.

**Listing Agreement**

**Broker’s Authority:** (Paragraph 11 from the Texas Association of REALTORS® a listing agreement)

A. Broker will use reasonable efforts and act diligently to market the Property for sale, procure a buyer, and negotiate the sale of the Property.

B. Broker is authorized to display this Listing on the Internet without limitation unless one of the following is checked:

   (1) Seller does not want this Listing to be displayed on the Internet.
   (2) Seller does not want the address of the Property to be displayed on the Internet.

**Notice:** Seller understands and acknowledges that, if box 11B(1) is selected, consumers who conduct searches for listings on the Internet will not see information about this Listing in response to their search.

C. Broker is authorized to market the Property with the following financing options:

   (1) Conventional
   (2) VA
   (3) FHA
   (4) Cash
   (5) Texas Veterans Land Program
   (6) Owner Financing
   (7) Other

D. In addition to other authority granted by this Listing, Broker may:
(1) Advertise the Property by means and methods as Broker determines, including but not limited to creating and placing advertisements with interior and exterior photographic and audio-visual images of the Property and related information in any media and the Internet;
(2) Place a “For Sale” sign on the Property and remove all other signs offering the Property for sale or lease;
(3) Furnish comparative marketing and sales information about other properties to prospective buyers;
(4) Disseminate information about the Property to other brokers and to prospective buyers, including applicable disclosures or notices that Seller is required to make under law or a contract;
(5) Obtain information from any holder of a note secured by a lien on the Property;
(6) Accept and deposit earnest money in trust in accordance with a contract for the sale of the Property;
(7) Disclose the sales price and terms of sale to other brokers, appraisers, or other real estate professionals;
(8) In response to inquiries from prospective buyers and other brokers, disclose whether the Seller is considering more than one offer (Broker will not disclose the terms of any competing offer unless specifically instructed by Seller);
(9) Advertise, during or after this Listing ends, that Broker “sold” the Property; and
(10) Place information about this Listing, the Property, and a transaction for the Property on an electronic transaction platform (typically an Internet-based system where professionals related to the transaction such as title companies, lenders, and others may receive, view, and input information).

E. Broker is not authorized to execute any document in the name of or on behalf of Seller concerning the property.
RESIDENTIAL BUYER/TENANT REPRESENTATION

AGREEMENT

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

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2014

____________________________________________________________

1. Parties: The parties to this agreement are:
   
   Client: ____________________________________________________________
   
   Address: __________________________________________________________________
   
   City, State, Zip: __________________________________________________________________
   
   Broker: ____________________________________________________________
   
   Address: __________________________________________________________________
   
   City, State, Zip: __________________________________________________________________
   
   Phone: __________________________________________________________________
   
   Email: __________________________________________________________________

2. 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.

3. DEFINITIONS:
A. “Acquire” means to purchase or lease.

B. “Closing” in a sale transaction means the date legal title to a property is conveyed to a purchaser of property under a contract to buy. “Closing” in a lease transaction means the date a landlord and tenant enter into a binding lease of a property.

C. “Market area” means that area in the State of Texas within the perimeter boundaries of the following areas: ________________________________.

D. “Property” means any interest in real estate including but not limited to properties listed in a multiple listing service or other listing services, properties for sale by owners, and properties for sale by builders.

4. **TERM:** This agreement commences on ________________________________ and ends at 11:59 p.m. on ________________________________.

5. **BROKER’S OBLIGATIONS:** Broker will: (a) use Broker’s best efforts to assist Client in acquiring property in the market area; (b) assist Client in negotiating the acquisition of property in the market area; and (c) comply with other provisions of this agreement.

6. **CLIENT’S OBLIGATIONS:** Client will: (a) work exclusively through Broker in acquiring property in the market area and negotiate the acquisition of property in the market area only through Broker; (b) inform other brokers, salespersons, sellers, and landlords with whom Client may have contact that Broker exclusively represents Client for the purpose of acquiring property in the market area and refer all such persons to Broker; and (c) comply with other provisions of this agreement.

7. **REPRESENTATIONS:**
   
   A. Each person signing this agreement represents that the person has the legal capacity and authority to bind the respective party to this agreement.
B. Client represents that Client is not now a party to another buyer or tenant representation agreement with another broker for the acquisition of property in the market area.

C. Client represents that all information relating to Client’s ability to acquire property in the market area Client gives to Broker is true and correct.

D. Name any employer, relocation company, or other entity that will provide benefits to Client when acquiring property in the market area: __________________________.

8. INTERMEDIARY: (Check A or B only.)

☐ A. Intermediary Status: Client desires to see Broker’s listings. If Client wishes to acquire one of Broker’s listings, Client authorizes Broker to act as an intermediary and Broker will notify Client that Broker will service the parties in accordance with one of the following alternatives.

1) If the owner of the property is serviced by an associate other than the associate servicing Client under this agreement, Broker may notify Client that Broker will: (a) appoint the associate then servicing the owner to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the owner; and (b) appoint the associate then servicing Client to the Client for the same purpose.

2) If the owner of the property is serviced by the same associate who is servicing Client, Broker may notify Client that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Client; and (b) appoint the associate servicing the owner under the listing to the owner for the same purpose.

3) Broker may notify Client that Broker will make no appointments as described under this Paragraph 8A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

☐ B. No Intermediary Status: Client does not wish to be shown or acquire any of Broker’s listings.
Notice: If Broker acts as an intermediary under Paragraph 8A, Broker and Broker’s associates:

- may not disclose to Client that the seller or landlord will accept a price less than the asking price unless otherwise instructed in a separate writing by the seller or landlord;
- may not disclose to the seller or landlord that Client will pay a price greater than the price submitted in a written offer to the seller or landlord unless otherwise instructed in a separate writing by Client;
- may not disclose any confidential information or any information a seller or landlord or Client specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- shall treat all parties to the transaction honestly; and
- shall comply with the Real Estate License Act.

9. **COMPETING CLIENTS:** Client acknowledges that Broker may represent other prospective buyers or tenants who may seek to acquire properties that may be of interest to Client. Client agrees that Broker may, during the term of this agreement and after it ends, represent such other prospects, show the other prospects the same properties that Broker shows to Client, and act as a real estate broker for such other prospects in negotiating the acquisition of properties that Client may seek to acquire.

10. **CONFIDENTIAL INFORMATION:**
    
    A. During the term of this agreement or after its termination, Broker may not knowingly disclose information obtained in confidence from Client except as authorized by Client or required by law. Broker may not disclose to Client any information obtained in confidence regarding any other person Broker represents or may have represented except as required by law.
    
    B. Unless otherwise agreed or required by law, a seller or the seller’s agent is not obliged to keep the existence of an offer or its terms confidential. If a listing agent receives multiple offers, the listing agent is obliged to treat the competing buyers fairly.
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.

C. Earned and Payable: A person is not obligated to pay Broker a commission until such time as Broker’s commission is earned and payable. Broker’s commission is earned when: (1) Client enters into a contract to buy or lease property in the market area; or (2) Client breaches this agreement. Broker’s commission is payable, either during the term of this agreement or after it ends, upon the earlier of: (1) the closing of the transaction to acquire the property; (2) Client’s breach of a contract to buy or lease a property in the market area; or (3) Client’s breach of this agreement. If Client acquires more than one property under this agreement, Broker’s commissions for each property acquired are earned as each property is acquired and are payable at the closing of each acquisition.

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.

E. Acquisition of Broker’s Listing: Notwithstanding any provision to the contrary, if Client acquires a property listed by Broker, Broker will be paid in accordance with the terms of Broker’s listing agreement with the owner and Client will have no obligation to pay Broker.

F. In addition to the commission specified under Paragraph 11A, Broker is entitled to the following fees.
1) **Construction**: If Client uses Broker’s services to procure or negotiate the construction of improvements to property that Client owns or may acquire, Client ensures that Broker will receive from Client or the contractor(s) at the time the construction is substantially complete a fee equal to:

_________________________________________.

2) **Service Providers**: If Broker refers Client or any party to a transaction contemplated by this agreement to a service provider (for example, mover, cable company, telecommunications provider, utility, or contractor) Broker may receive a fee from the service provider for the referral.

3) **Other**: ____________________________________.

G. **Protection Period**: “Protection period” means that time starting the day after this agreement ends and continuing for _______ days. Not later than 10 days after this agreement ends, Broker may send Client written notice identifying the properties called to Client’s attention during this agreement. If Client or a relative of Client agrees to acquire a property identified in the notice during the protection period, Client will pay Broker, upon closing, the amount Broker would have been entitled to receive if this agreement were still in effect. This Paragraph 11G survives termination of this agreement. This Paragraph 11G will not apply if Client is, during the protection period, bound under a representation agreement with another broker who is a member of the Texas Association of REALTORS® at the time the acquisition is negotiated and the other broker is paid a fee for negotiating the transaction.

H. **Escrow Authorization**: Client authorizes, and Broker may so instruct, any escrow or closing agent authorized to close a transaction for the acquisition of property contemplated by this agreement to collect and disburse to Broker all amounts payable to Broker.

I. **County**: Amounts payable to Broker are to be paid in cash in _______ County, Texas.

12. **MEDIATION**: The parties agree to negotiate in good faith in an effort to resolve any dispute that may arise related to this agreement or any transaction related to or contemplated by this agreement. If the dispute cannot be resolved by negotiation, the parties will submit the dispute to mediation before resorting to arbitration or litigation and will equally share the costs of a mutually acceptable mediator.
13. **DEFAULT**: If either party fails to comply with this agreement or makes a false representation in this agreement, the non-complying party is in default. If Client is in default, Client will be liable for the amount of compensation that Broker would have received under this agreement if Client was not in default. If Broker is in default, Client may exercise any remedy at law.

14. **ATTORNEY’S FEES**: If Client or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this agreement or any transaction related to this agreement, such party will be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney’s fees.

15. **LIMITATION OF LIABILITY**: Neither Broker nor any other broker, or their associates, is responsible or liable for any person’s personal injuries or for any loss or damage to any person’s property that is not caused by Broker. Client will hold Broker, any other broker, and their associates, harmless from any such injuries or losses. Client will indemnify Broker against any claims for injury or damage that Client may cause to others or their property.

16. **ADDENDA**: Addenda and other related documents which are part of this agreement are:

- ☐ Information About Brokerage Services
- ☐ Protect Your Family from Lead in Your Home
- ☐ Protecting Your Home from Mold
- ☐ Information about Special Flood Hazard Areas
- ☐ Information Concerning Property Insurance
- ☐ For Your Protection: Get a Home Inspection
- ☐ General Information and Notice to a Buyer
- ☐ ____________________________

17. **SPECIAL PROVISIONS:**
18. ADDITIONAL NOTICES:

A. Broker's fees and the sharing of fees between brokers are not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS® or any listing service.

B. In accordance with fair housing laws and the National Association of REALTORS® Code of Ethics, Broker’s services must be provided without regard to race, color, religion, national origin, sex, disability, familial status, sexual orientation, or gender identity. Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, or age).

C. Broker is not a property inspector, surveyor, engineer, environmental assessor, or compliance inspector. Client should seek experts to render such services in any acquisition.

D. If Client purchases property, Client should have an abstract covering the property examined by an attorney of Client’s selection, or Client should be furnished with or obtain a title policy.

E. Buyer may purchase a residential service contract. Buyer should review such service contract or the scope of coverage, exclusions, and limitations. The purchase of a residential service contract is optional. There are several residential service companies operating in Texas.

CONSULT AN ATTORNEY: Broker cannot give legal advice. This is a legally binding agreement. READ IT CAREFULLY. If you do not understand the effect of this agreement, consult your attorney BEFORE signing.

<table>
<thead>
<tr>
<th>Broker's Printed Name</th>
<th>License No.</th>
<th>Client’s Printed Name</th>
</tr>
</thead>
</table>

☐ Broker’s Signature       Date  Client’s Signature       Date
Buyer Agreement Authority: (Paragraphs taken from the Texas Association of REALTORS® buyer agreement)

2. 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.

5. BROKER’S OBLIGATIONS: Broker will: (a) use Broker’s best efforts to assist Client in acquiring property in the market area; (b) assist Client in negotiating the acquisition of property in the market area; and (c) comply with other provisions of this agreement.

10. CONFIDENTIAL INFORMATION:
   A. During the term of this agreement or after its termination, Broker may not knowingly disclose information obtained in confidence from Client except as authorized by Client or required by law. Broker may not disclose to Client any information obtained in confidence regarding any other Buyer/Tenant Representation Agreement between person Broker represents or may have represented except as required by law.
   B. Unless otherwise agreed or required by law, a seller or the seller’s agent is not obliged to keep the existence of an offer or its terms confidential. If a listing agent receives multiple offers, the listing agent is obliged to treat the competing buyers fairly.
Residential Leasing and Property Management Agreement

AUTHORITY OF BROKER:

A. Leasing and Management Authority: Owner grants to Broker the following authority which Broker may exercise when and to the extent Broker determines to be in Owner’s interest:

1. advertise the Property for lease at Owner’s expense by means and methods that Broker determines are reasonably competitive, including but not limited to creating and placing advertisements with interior and exterior photographic and audio-visual images of the Property and related information in any media and the Internet;
2. place “For Lease” signs or other signs on the Property in accordance with applicable laws, regulations, ordinances, restrictions, and owners’ association rules;
3. remove all other signs offering the Property for sale or lease;
4. submit the Property as a listing with one or more Multiple Listing Services (MLS) at any time the Property is marketed for lease and to change or terminate such listings;
5. authorize other brokers, their associates, inspectors, appraisers, and contractors to access the Property at reasonable times for purposes contemplated by this agreement and to lend keys and disclose security codes to such persons to enter the Property;
6. duplicate keys and access devices, at Owner’s expense, to facilitate convenient and efficient showings of the Property and to lease the Property;
7. place a key box on the Property;
8. employ scheduling companies to schedule showings by other brokers at any time the Property is marketed for lease;
9. verify information and references in rental applications from prospective tenants;
10. negotiate and execute leases on Owner’s behalf for the Property at market rates and on competitively reasonable terms for initial terms of not less than
months and not more than months and in accordance with any instructions in Paragraph 20;

(11) negotiate and execute any amendments, extensions, or renewals to any leases for the Property on Owner’s behalf;

(12) terminate leases for the Property, negotiate lease terminations, and serve notices of termination;

(13) collect and deposit for Owner rents, security deposits, and other funds related to the Property in a trust account and pay from that account: any compensation and reimbursements due Broker under this agreement; and (b) other persons as this agreement may authorize.

(14) account for security deposits that Broker holds in trust to any tenants in the Property in accordance with applicable law, this agreement, and any lease of the Property and make deductions from the deposits in accordance with the lease and applicable law;

(15) collect administrative charges including but not limited to, application fees, returned check fees, and late charges from tenants in the Property or from prospective tenants;

(16) Institute and prosecute, at Owner’s expense, actions to: (a) evict tenants in the Property; (b) recover possession of the Property; or (c) recover lost rent and other damages;

(17) settle, compromise, or withdraw any action described in Paragraph 4A(16);

(18) negotiate and make reasonable concessions to tenants or former tenants in the Property;

(19) report payment histories of tenants in the Property to consumer reporting agencies;

(20) obtain information from any holder of a note secured by a lien on the Property and any insurance company insuring all or part of the Property;

(21) hire contractors to repair, maintain, redecorate, or alter the Property provided that Broker does not expend more than $ for any single repair, maintenance item, redecoration, or alteration without Owner’s consent;
(22) hire contractors to make emergency repairs to the Property without regard to the expense limitation in Paragraph 4A (21) that Broker determines are necessary to protect the Property or the health or safety of an ordinary tenant; (23) contract, at Owner's expense, in either Broker's or Owner's name, for utilities and maintenance to the Property during times that the Property is vacant, including but not limited to, electricity, gas, water, alarm monitoring, cleaning, pool and spa maintenance, yard maintenance, and other regularly recurring expenses that Broker determines are reasonable to maintain and care for the Property; and (24) perform other necessary services related to the leasing and management of the Property.

B. Record Keeping: Broker will:

(1) maintain accurate records related to the Property and retain such records for not less than 4 years;

(2) file reports with the Internal Revenue Service related to funds received on behalf of Owner under this agreement (for example, Form 1099); and

(3) remit, each month, the following items to Owner: (a) funds collected by Broker for Owner under this agreement, less authorized deductions; and (b) a statement of receipts, disbursements, and charges. Owner may instruct Broker in writing to remit the items to another person or address.

C. Security Deposits:

(1) During this agreement, Broker will maintain security deposits received from tenants in a trust account and will account to the tenants for the security deposits in accordance with the leases for the Property.

(2) Except as stated in Paragraph 4(I), after this agreement ends, Broker will deliver to Owner or the Owner's designee the security deposit held by Broker under an effective lease of the Property, less deductions authorized by this agreement, and will send written notice to the tenant that states all of the following:

(a) that this agreement has ended;

(b) the exact dollar amount of the security deposit;
(c) the contact information for the Owner or the Owner’s designee; and
(d) that Owner is responsible for accounting for and returning the tenant’s security deposit.

(3) If Broker complies with this Paragraph 4C, Owner will indemnify Broker from any claim or loss from a tenant for the return of a security deposit. This Paragraph 4C survives termination of this agreement.

D. Deductions and Offset: Broker may disburse from any funds Broker holds in a trust account for Owner:

(1) any compensation due Broker under this agreement;
(2) any funds Broker is authorized to expend under this agreement; and
(3) any reimbursement Broker is entitled to receive under this agreement.

E. Insurance and Attorneys:

(1) Broker may not file a claim for a casualty loss with the carrier insuring the Property. Broker may communicate with the carrier to facilitate the processing of any claim Owner may file or other matters that Owner instructs Broker to communicate to the carrier.

(2) Broker may not directly or indirectly employ or pay a lawyer to represent Owner. Broker may communicate with Owner’s attorney in accordance with Owner’s instructions.

F. Information about Trust Accounts, MLS, and Keybox:

(1) Trust Accounts: A trust account must be separate from Broker’s operating account and must be designated as a trust, property management, or escrow account or other similar name. Broker may maintain one trust account for all properties Broker leases and manages for others.

(2) MLS: MLS rules require Broker to accurately and timely submit all information the MLS requires for participation including leased data. Participants and Subscribers to the MLS may use the information for market evaluation or appraisal purposes. Participants and Subscribers are other brokers and other real estate professionals such as appraisers and may include the appraisal district. Any information filed with the MLS becomes the property
of the MLS for all purposes. Submission of information to MLS ensures that persons who use and benefit from the MLS also contribute information. 

(3) Keybox: A keybox is a locked container placed on the Property that holds a key to the Property. A keybox makes it more convenient for brokers, their associates, inspectors, appraisers, and contractors to show, inspect, or repair the Property. The keybox is opened by a special combination, key, or programmed device, so that authorized persons may enter the Property. Using a keybox will probably increase the number of showings, but involves risks (for example, unauthorized entry, theft, property damage, or personal injury). Neither the Association of REALTORS® nor MLS requires the use of a keybox.

G. Performance Standard: Broker will:

(1) use reasonable care when exercising Broker’s authority and performing under this agreement; and

(2) exercise discretion when performing under this agreement in a manner that Broker believes to be in Owner’s interest, provided that Broker will treat any tenant honestly and fairly.

H. Inability to Contact Owner: If Broker is unable to contact Owner for days, Broker is authorized to contact the person below for the sole purpose of attempting to reestablish contact with Owner.

Name: Phone: ______________
Address: ________________
E-mail: ____________________

I. Foreclosure: If Broker receives notice of the Owner’s delinquency in the payment of:

(1) any mortgage or other encumbrance secured by the Property; (2) property taxes;
(3) property insurance; or (4) owners’ association fees, Broker may give Owner 15 days to cure the delinquency during which period Owner authorizes Broker to freeze any funds held by Broker and no disbursements will be made to Owner related to this agreement or the Property. If after the 15 day period, the delinquency is not cured and the foreclosure process is initiated, Owner authorizes Broker to deduct from any other
funds being held by Broker for Owner any remaining Broker Fees or funds due to Broker related to services performed under this agreement. Additionally, Owner authorizes Broker to return any security deposit being held by Broker to a tenant of the Property in addition to any prorated amount of rent being held by Broker and Broker may terminate this agreement. This paragraph does not preclude the Broker from seeking any other remedies under this agreement or at law that may be available to the Broker.

These forms can be downloaded and read in detail to understand the authority a license holder has. Only members of the Texas Association of REALTORS® can use their forms. They are copywriter. The Texas Real Estate Commission anyone can use the promulgated forms because they are a Consumer Agency for Consumers who buy, sell, lease or manage real estate property.

**Universal Agent**

Universal agents have the authority to perform every type of transaction that a principal may lawfully delegate to the agent (very liable) A universal agent has a great deal of authority in his or her principal’s affairs. Universal agents can do anything on behalf of the principal that is allowed by law.

Power of attorney has a universal agency with the party. Most brokers will not allow their sales agents or broker associates to be power of attorney for any client.

Example: A senior citizen is no longer or willing to handle his or her affairs. The senior delegates through a power of attorney, to a trusted entity, the authority to handle their affairs. Most brokers will not allow their sales agents or broker associates to do this because of the liability to the broker.

A legal guardian, for example, has all of the power of a UNIVERSAL AGENT.

**General Agent**
A general agent is more restricted than a UNIVERSAL AGENCY. The agent is authorized to conduct ongoing series of transactions for the broker. Brokers and sales agents have this type of agency relationship.

Examples of activities that the sales agent can perform are: taking listings, representing buyers through a buyer’s agreement, leasing rental property by writing a lease agreement, completing competitive market analysis or a broker’s opinion, holding open houses, showing property, answering the telephone at the broker’s office and handling property calls and other activities authorized by the broker. 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.

**Special Agent**

A special agent has specific or limited authority. Representing a seller through a listing agreement, representing a buyer through a buyer’s agreement are agents for specific transactions. There is no agreement for future business with these principals except for the specific transaction they are hired for. Special agency is the more limited authority than general agency or of any type of agency. 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, both the broker and his or her sales agents generally have a relationship of special agency with the principal.

**Broker Associates**

*Broker Associates have a relationship of general agency with their supervising brokers.* Broker associates and sales agents have the authority to act in the supervising broker’s name in real estate transactions. Many broker associates who place their license with another broker have no authority in running his or her business. The authority comes from the sponsoring broker only. They are just like a sales agent, but because they have a broker’s license their classification is broker associate and not as a sales agent.
Dual Agent
A dual agency would take place in an intermediary transaction where the sales agent represents both the buyer and seller. In Texas, the intermediary process allows a sales agent to sell their own listing without practicing dual agency. In a dual agent relationship with the buyer and seller, you cannot give advice and opinions. The buyer and seller must agree to complete the transaction that you represent both of them. Authority is limited and very liable.

EXPRESSION AGREEMENTS and some IMPLIED AGREEMENTS grant actual authority to the license holder the following agency classifications are primarily for interpretation by a judge or a jury when a lawsuit prevails.

Agency by Actual Authority
Agency by actual authority exists where the license holder is employed by the principal by either an express or oral contract. This type of agency generally outlines in detail what authority the agent has to act on behalf of and to bind the principal. When this is specifically given to a license holder either in writing or verbally, it is considered to be express authority. Along with express authority there is often created a certain amount of implied authority. Implied authority is the right to do certain acts on behalf of the principal even though the acts may not have been specified in the contract. This authority may arise from custom in the industry, common usage, or conduct of the parties (inference or implication as to the agent’s right to act).

(Reference: Language of Real Estate)

Agency by Ostensible Authority
Agency by ostensible authority is also called an agency by estoppel for agency by apparent authority. It is the classic creation of the agency relationship without the agent even knowing it. This occurs when the conduct on the part of the principal would lead a reasonably prudent purchaser to believe that the license holder had the authority he or
she purports to exercise. In these situations, the agency relationship and all its liability is created as the agency relationship arises.

In order to establish an agency by estoppel, two elements must be established:

1. The principal must have held the license holder out in other instances, or in the particular transaction as possessing authority to be an agent, or he or she must have knowingly acquiesced in the license holder’s authority; and
2. The person dealing with the license holder must have relied on the conduct of the principal to the third party’s detriment.

In either case, it requires the principal’s participation to create an OSTENSIBLE AGENCY. Declarations of the agent alone are not sufficient; it requires the actions of the principal to create the apparent authority.

(Reference: Language of Real Estate)

**Agency by Ratification**

Agency by ratification is created when a principal ratifies or approves of an action that was originally performed without authorization, thereby accepting the benefits associated with the representation. If an agency relationship is created by ratification, the legal consequences are just the same as if the action has been expressly authorized beforehand.

**Agency Coupled with an Interest**

Agency coupled with an interest is a particular type of agency relationship where the license holder has an interest or estate in the property as part or all of his or her compensation. An agency coupled with an interest is generally considered to be irrevocable, all though it may be terminated pursuant to an express agreement between the parties. It may not be terminated by unilateral act on behalf of the principal.
Agency Liability

One of the major factors in any agency relationship is the liability that the license holder or the principal impose on each other. Duties for both license holder and principal need to be understood and discussed to reduce as much liability as possible. A license holder should NEVER make decisions, say or imply information without his or her principal authorization in writing. There are many court cases to prove this analogy.

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.

Other actions within the scope of the agent’s authority fall under AGENCY BY 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 as well as what the listing or buyer agreement says.

What if the Agent Exceeds their Authority?

Broker C is Seller D’s agent, and they have been negotiating with Buyer D in the sale of Seller D’s house, which is vacant because Seller D has already moved into a new home in a different state. Yesterday, Buyer D called Broker C to say that she will purchase the house if she can move in 2 weeks before the closing date.

Broker C says that this is fine, and she tells Buyer D that 2 weeks of rent will be added to the purchase price. Broker C did not have the authority to agree to this term. However, when she tells the seller, the seller is happy to receive 2 weeks of rent when the house would have otherwise sat vacant. Because the seller has accepted the actions, can he then sue the broker at a later date?

The seller accepted the broker’s actions, which ratified those actions. Generally, once
Unauthorized actions have been ratified, the principal CANNOT turn around and sue the agent for acting outside of the scope of his or her authority. It would be prudent for the license holder to get the authorization in writing, after the fact. An agent must act only within the scope of his or her authority. However, if the principal agrees to the unauthorized actions after they have occurred, the actions were approved by RATIFICATION of the client/principal.

Although our example scenario seemed to work out for all parties involved, it is extremely risky (not to mention unprofessional) for a license holder to act outside of the scope of his or her authority. What happens if the principal does not accept the actions? The broker or sales agent may have a lawsuit to deal with. For this reason, it is important that the license holder only perform those actions within the scope of his or her authority. This is violated daily by license holders. Examples would include (not inclusive) a license holder not:

- Giving security deposits back according to the lease agreement,
- Depositing earnest money according to the Texas Real Estate Commission License Act (two business days after the effective date)
- Taking the option check to the title company
- Not delivering the option check in the time stated in contract
- Not giving copies of documents to the parties
- Giving confidential information about your client to other sales agents or members of the public
- Giving out Sold information without the permission of the property owner
- Keeping the status of their listing current in MLS
- Not returning telephone calls
- Not presenting all offers
- Handling multiple offers in an unfair manner
- Not communicating with their client as agreed to
- Not presenting or delivering the Information About Brokerage Services
- Not explaining agency to members of the public
- Going directly to the owner of another broker’s listing
• Working with a buyer who has signed an exclusive buyer agreement with another broker
• Not returning telephone calls, text messages or emails.
• Not keeping status of their listings on the Internet and search engines
• Using outdated forms
• Failure to have a Broker's Policy and Procedure Manual
• Not disclosing who they (license holder) represent
• Failure of broker not supervising their sales agent and broker associates
• Broker's allowing sales agents to practice real estate when they are not licensed
• Broker's allowing sales agents to practice real estate when their license is not active
• License holders practicing intermediary outside of the law and with proper documentation and disclosure of appointees
• License holders not providing sellers with a competitive market analysis or a broker price opinion
• Adding wording is special provisions in the contract

Classification of Agency Fiduciary Duties and Responsibilities
In today's world, there are many classifications of agents. Remember that each state has their own agency laws and may use different forms of these classifications. You need to know the laws in Texas on agency and the types of agency practiced.

Seller's Agent (also known as the Owner's Agent or Listing Agent, Sales Agent)
The broker becomes the owner's agent by entering into an agreement with the owner, usually through a written listing agreement, or by agreeing to act as a sub-agent by accepting an offer of sub-agency from the listing broker. All fiduciary duties are owed to the seller. If the listing broker does not offer sub-agency, you will not get paid a commission of any kind if the customer buys the property. This is why you need to get a buyer's agreement signed to protect yourself on a commission. Understand that you do
not automatically get a commission when there are no agreements outstanding saying you will be paid a commission. Never, never, never include your commission in special provisions of a contract. The contract is between the buyer and seller, not the other agent.

Do you know what fiduciary duties are? Write them down and let’s discuss them later in this chapter.

**SUB-AGENT** *(also known as the Other Broker-Sales Agent)*

A sub-agent owes the same fiduciary duties to the listing agent’s client as the listing sales agent or broker does who has the listing.

Sub-agency usually arises when a cooperating sales agent from another brokerage, who is not the buyer's agent, shows property to a buyer-customer. In such a case, the sub-agent works with the buyer as a customer but owes fiduciary duties to the listing broker and the seller. Although a sub-agent cannot assist the buyer in any way that would be detrimental to the seller, a buyer-customer can expect to receive these duties *(honestly, fairness, disclosure, good faith and competency)* by the sub-agent. It is important that sub-agents fully explain their limited duties to buyers and communicate to the buyer the sub-agent does not represent them. The license holder *(sub-agent)* must give the Information About Brokerage Service and explain representation to the buyer. The buyer must consent to representation and if they still do not agree to representation through an agency agreement you need to get it in writing that you explained buyer representation and the customer did not want any representation. Ask your broker for a form or how to handle this in writing. Do not draw the information yourself or you will be practicing law. Your broker should have legal counsel on any forms that are used.

The customer also needs to ratify the Information About Brokerage Services acknowledging he or she received the notice. Ask your broker what his or her policy is when working as a sub-agent. Some brokers do not allow sub-agency only buyer agency.
When a license holder becomes a sub-agent, there are always two different brokerage companies in the transaction. No one represents the buyer-customer. The two sales agents and the listing broker represent the seller-principal.

**BUYER’S AGENT** (also known as a Buyer’s Representative)

The broker becomes the buyer’s agent by mutual consent and upon entering into an agency representation agreement to represent the buyer, usually through a written buyer representation agreement. A buyer’s agent can assist the owner-customer where customer duties enter into play through the listing broker, but does not represent the seller/owner and must place the interests of the buyer first. All fiduciary duties are owed to the buyer. You owe the seller (customer) honesty, fairness, disclosure, good faith and competency.

What are the fiduciary duties? Memorize them and write them down to discuss later in this chapter.

**INTERMEDIARY** (an in-house transaction only.)

Before we explain intermediary, understand this is a legal process to sell in-house listings only. Intermediary is not for selling other broker's listings.

The Texas Real Estate License Act states the following:

Sec. 1101.559. BROKER ACTING AS INTERMEDIARY. (When 3 license holders are involved—the broker, sales agent representing the seller, and the sales agent representing the buyer).

(a) A broker may act as an intermediary between parties to a real estate transaction if:

   (1) The broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and
(2) The written consent of the parties states the source of any expected compensation to the broker.

(b) A written listing agreement to represent a seller or landlord and a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d)* in the Texas Real Estate License Act.

* Sec. 1101.651(d) CERTAIN PRACTICES PROHIBITED.

(d) A broker and any broker or sales agent appointed under Section 1101.560 who acts as an intermediary under Subchapter L may not:

   (1) disclose to the buyer or tenant that the seller or landlord will accept a price less than the asking price, unless otherwise instructed in a separate writing by the seller or landlord;

   (2) disclose to the seller or landlord that the buyer or tenant will pay a price greater than the price submitted in a written offer to the seller or landlord, unless otherwise instructed in a separate writing by the buyer or tenant;

   (3) disclose any confidential information or any information a party specifically instructs the broker or sales agent in writing not to disclose, unless:

       (A) the broker or sales agent is otherwise instructed in a separate writing by the respective party;

       (B) the broker or sales agent is required to disclose the information by this chapter or a court order; or

       (C) the information materially relates to the condition of the property;

   (4) treat a party to a transaction dishonestly; or
(5) violate this chapter.

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

Amended by: Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 68, eff. January 1, 2016.

(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560* to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

Texas Real Estate License Act Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.

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

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

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

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

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

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

(2) the broker provides written notice of the appointment to all parties involved in the real estate transaction.
(c) A license holder appointed under this section may provide opinions and advice during negotiations to the party to whom the license holder is appointed.

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

Questions for you to answer to see if you understand intermediary with three license holders:

- Who is the intermediary?
- Who are the parties?
- Who is the associated license holder?
- Who are the appointed sales agents?
- Before the contract is written, how do you inform the buyer and seller who the appointees are?

Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.

(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.

(b) A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction:

(1) A buyer or tenant; and

(2) A seller or landlord.

Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.
Amended by: Acts 2005, 79th Leg., Ch. 825 (S.B. 810), Sec. 8, eff. September 1, 2005.

LISTING AGREEMENT
Texas Association of REALTORS® Listing Agreement
1. **Parties:** The parties to this agreement (this Listing) are:

   **Seller:** ___________________________________________________________
   Address: __________________________________________________________________
   City, State, Zip: _________________________________________________________
   Phone: ______________________ Fax ____________________________
   Email: ________________________________

   **Broker:** ___________________________________________________________
   Address: __________________________________________________________________
   City, State, Zip: _________________________________________________________
   Phone: ______________________ Fax ____________________________
   Email: ________________________________
Seller appoints Broker as Seller’s sole and exclusive real estate agent and grants to Broker the exclusive right to sell the Property.

2. **PROPERTY:** “Property” means the land, improvements, and accessories described below, except for any described exclusions.
   
   A. **Land:** Lot _____________, Block _________________, Addition, City of ________, in County, Texas known as __________ (address/zip code), or as described on attached exhibit. *(If Property is a condominium, attach Condominium Addendum.)*
   
   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 and satellite dish system and equipment, 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) satellite dish systems, (ii) garage doors, (iii) entry gates, and (iv) 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:
      ____________________________________________________________.

3. **LISTING PRICE:** Seller instructs Broker to market the Property at the following price: $_______ (Listing Price). Seller agrees to sell the Property for the Listing Price or any other price acceptable to Seller. Seller will pay all typical closing costs charged to sellers of residential real
estate in Texas (seller’s typical closing costs are those set forth in the residential contract forms promulgated by the Texas Real Estate Commission).

4. TERM:
   A. This Listing begins on and ends at 11:59 p.m. on ________.
   B. If Seller enters into a binding written contract to sell the Property before the date thisListing begins and the contract is binding on the date this Listing begins, this Listing will not commence and will be void.

5. BROKER COMPENSATION:
   A. When earned and payable, Seller will pay Broker:

      ☐ (1) % of the sales price.

      ☐ (2) ________________________________________________.

   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.

Broker's compensation is not payable if a sale of the Property does not close or fund as a result of: (i) Seller's failure, without fault of Seller, to deliver to a buyer a deed or a title policy as required by the contract to sell; (ii) loss of ownership due to foreclosure or other legal proceeding; or (iii) Seller's failure to restore the Property, as a result of a casualty loss, to its previous condition by the closing date set forth in a contract for the sale of the Property.

D. Other Compensation:

(1) Breach by Buyer Under a Contract: If Seller collects earnest money, the sales price, or damages by suit, compromise, settlement, or otherwise from a buyer who breaches a contract for the sale of the Property entered into during this Listing, Seller will pay Broker, after deducting attorney's fees and collection expenses, an amount equal to the lesser of one-half of the amount collected after deductions or the amount of the Broker's Compensation stated in Paragraph 5A. Any amount paid under this Paragraph 5D(1) is in addition to any amount that Broker may be entitled to receive for subsequently selling the Property.

(2) Service Providers: If Broker refers Seller or a prospective buyer to a service provider (for example, mover, cable company, telecommunications provider, utility, or contractor) Broker may receive a fee from the service provider for the referral. Any referral fee Broker receives under this Paragraph 5D(2) is in addition to any other compensation Broker may receive under this Listing.

(3) Other Fees and/or Reimbursable Expenses: ____________________________.

E. Protection Period:

(1) “Protection period” means that time starting the day after this Listing ends and continuing for days. “Sell” means any transfer of any fee simple interest in the Property whether by oral or written agreement or option.
(2) Not later than 10 days after this Listing ends, Broker may send Seller written notice specifying the names of persons whose attention was called to the Property during this Listing. If Seller agrees to sell the Property during the protection period to a person named in the notice or to a relative of a person named in the notice, Seller will pay Broker, upon the closing of the sale, the amount Broker would have been entitled to receive if this Listing were still in effect.

(3) This Paragraph 5E survives termination of this Listing. This Paragraph 5E will not apply if:

(a) Seller agrees to sell the Property during the protection period;

(b) the Property is exclusively listed with another broker who is a member of the Texas Association of REALTORS® at the time the sale is negotiated; and

(c) Seller is obligated to pay the other broker a fee for the sale.

F. County: All amounts payable to Broker are to be paid in cash in ________________ County, Texas.

G. Escrow Authorization: Seller authorizes, and Broker may so instruct, any escrow or closing agent authorized to close a transaction for the purchase or acquisition of the Property to collect and disburse to Broker all amounts payable to Broker under this Listing.

6. LISTING SERVICES:

☐ A. Broker will file this Listing with one or more Multiple Listing Services (MLS) by the earlier of the time required by MLS rules or 5 days after the date this Listing begins. Seller authorizes Broker to submit information about this Listing and the sale of the Property to the MLS.

Notice: MLS rules require Broker to accurately and timely submit all information the MLS requires for participation including sold data. MLS rules may require that the information be submitted to the MLS throughout the time the Listing is in effect. Subscribers to the MLS may use the information for market evaluation or appraisal purposes. Subscribers
are other brokers and other real estate professionals such as appraisers and may include the appraisal district. Any information filed with the MLS becomes the property of the MLS for all purposes. Submission of information to MLS ensures that persons who use and benefit from the MLS also contribute information.

B. Seller instructs Broker not to file this Listing with one or more Multiple Listing Service (MLS) until ________ days after the date this Listing begins for the following purpose(s): ________________.

(NOTE: Do not check if prohibited by Multiple Listing Service(s).)

C. Broker will not file this Listing with a Multiple Listing Service (MLS) or any other listing service.

Notice: Seller acknowledges and understands that if this option is checked: (1) Seller’s Property will not be included in the MLS database available to real estate agents and brokers from other real estate offices who subscribe to and participate in the MLS, and their buyer clients may not be aware that Seller’s Property is offered for sale; (2) Seller’s Property will not be included in the MLS’s download to various real estate Internet sites that are used by the public to search for property listings; and (3) real estate agents, brokers, and members of the public may be unaware of the terms and conditions under which Seller is marketing the Property.

7. ACCESS TO THE PROPERTY:
   A. Authorizing Access: Authorizing access to the Property means giving permission to another person to enter the Property, disclosing to the other person any security codes necessary to enter the Property, and lending a key to the other person to enter the Property, directly or through a keybox. To facilitate the showing and sale of the Property, Seller instructs Broker to:

   (1) access the Property at reasonable times;
(2) authorize other brokers, their associates, inspectors, appraisers, and contractors to access the
Property at reasonable times; and

(3) duplicate keys to facilitate convenient and efficient showings of the Property.

B. **Scheduling Companies:** Broker may engage the following companies to schedule appointments and to authorize others to access the Property: ________________.

C. **Keybox:** A keybox is a locked container placed on the Property that holds a key to the Property. A keybox makes it more convenient for brokers, their associates, inspectors, appraisers, and contractors to show, inspect, or repair the Property. The keybox is opened by a special combination, key, or programmed device so that authorized persons may enter the Property, even in Seller’s absence. Using a keybox will probably increase the number of showings, but involves risks (for example, unauthorized entry, theft, property damage, or personal injury). Neither the Association of REALTORS® nor MLS requires the use of a keybox.

(1) Broker ☐ is ☐ is not authorized to place a keybox on the Property.

(2) If a tenant occupies the Property at any time during this Listing, Seller will furnish Broker a written statement (for example, TAR No. 1411), signed by all tenants, authorizing the use of a keybox or Broker may remove the keybox from the Property.

D. **Liability and Indemnification:** When authorizing access to the Property, Broker, other brokers, their associates, any keybox provider, or any scheduling company are not responsible for personal injury or property loss to Seller or any other person. Seller assumes all risk of any loss, damage, or injury. **Except for a loss caused by Broker, Seller will indemnify and hold Broker harmless from any claim for personal injury, property damage, or other loss.**
8. **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 $_____.

9. **INTERMEDIARY:** *(Check A or B only.)*

   ☐ A. Intermediary Status: Broker may show the Property to interested prospective buyers who Broker represents. If a prospective buyer who Broker represents offers to buy the Property, Seller authorizes Broker to act as an intermediary and Broker will notify Seller that Broker will service the parties in accordance with one of the following alternatives.

   (1) If a prospective buyer who Broker represents is serviced by an associate other than the associate servicing Seller under this Listing, Broker may notify Seller that Broker will: (a) appoint the associate then servicing Seller to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Seller; and (b) appoint the associate then servicing the prospective buyer to the prospective buyer for the same purpose.

   (2) If a prospective buyer who Broker represents is serviced by the same associate who is servicing Seller, Broker may notify Seller that Broker will: (a) appoint another
associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the prospective buyer; and (b) appoint the associate servicing the Seller under this Listing to the Seller for the same purpose.

(3) Broker may notify Seller that Broker will make no appointments as described under this Paragraph 9A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

☐B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who Broker represents.

Notice: If Broker acts as an intermediary under Paragraph 9A, Broker and Broker’s associates:

- may not disclose to the prospective buyer that Seller will accept a price less than the asking price unless otherwise instructed in a separate writing by Seller;
- may not disclose to Seller that the prospective buyer will pay a price greater than the price submitted in a written offer to Seller unless otherwise instructed in a separate writing by the prospective buyer;
- may not disclose any confidential information or any information Seller or the prospective buyer specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- may not treat a party to the transaction dishonestly; and
- may not violate the Real Estate License Act.

10. CONFIDENTIAL INFORMATION: During this Listing or after it ends, Broker may not knowingly disclose information obtained in confidence from Seller except as authorized by Seller or required by law. Broker may not disclose to Seller any confidential information regarding any other person Broker represents or previously represented except as required by law.
11. BROKER’S AUTHORITY:

A. Broker will use reasonable efforts and act diligently to market the Property for sale, procure a buyer, and negotiate the sale of the Property.

B. Broker is authorized to display this Listing on the Internet without limitation unless one of the following is checked:

☐ (1) Seller does not want this Listing to be displayed on the Internet.

☐ (2) Seller does not want the address of the Property to be displayed on the Internet.

Notice: Seller understands and acknowledges that, if box 11B(1) is selected, consumers who conduct searches for listings on the Internet will not see information about this Listing in response to their search.

C. Broker is authorized to market the Property with the following financing options:

☐ (1) Conventional  ☐ (5) Texas Veterans Land Program

☐ (2) VA  ☐ (6) Owner Financing

☐ (3) FHA  ☐ (7) Other

☐ (4) Cash

D. In addition to other authority granted by this Listing, Broker may:

(1) advertise the Property by means and methods as Broker determines, including but not limited to creating and placing advertisements with interior and exterior photographic and audio-visual images of the Property and related information in any media and the Internet;
(2) place a “For Sale” sign on the Property and remove all other signs offering the Property for sale or lease;

(3) furnish comparative marketing and sales information about other properties to prospective buyers;

(4) disseminate information about the Property to other brokers and to prospective buyers, including applicable disclosures or notices that Seller is required to make under law or a contract;

(5) obtain information from any holder of a note secured by a lien on the Property;

(6) accept and deposit earnest money in trust in accordance with a contract for the sale of the Property;

(7) disclose the sales price and terms of sale to other brokers, appraisers, or other real estate professionals;

(8) in response to inquiries from prospective buyers and other brokers, disclose whether the Seller is considering more than one offer (Broker will not disclose the terms of any competing offer unless specifically instructed by Seller);

(9) advertise, during or after this Listing ends, that Broker “sold” the Property; and

(10) place information about this Listing, the Property, and a transaction for the Property on an electronic transaction platform (typically an Internet-based system where professionals related to the transaction such as title companies, lenders, and others may receive, view, and input information).

E. Broker is not authorized to execute any document in the name of or on behalf of Seller concerning the Property.

12. **SELLER’S REPRESENTATIONS**: Except as provided by Paragraph 15, Seller represents that:

   A. Seller has fee simple title to and peaceable possession of the Property and all its improvements and fixtures, unless rented, and the legal capacity to convey the Property;
B. Seller is not bound by a listing agreement with another broker for the sale, exchange, or lease of the Property that is or will be in effect during this Listing;

C. any pool or spa and any required enclosures, fences, gates, and latches comply with all applicable laws and ordinances;

D. no person or entity has any right to purchase, lease, or acquire the Property by an option, right of refusal, or other agreement;

E. Seller is current and not delinquent on all loans and all other financial obligations related to the Property, including but not limited to mortgages, home equity loans, home improvement loans, homeowner association fees, and taxes, except ________________;

F. Seller is not aware of any liens or other encumbrances against the Property, except ________________;

G. the Property is not subject to the jurisdiction of any court;

H. all information relating to the Property Seller provides to Broker is true and correct to the best of Seller’s knowledge; and

I. the name of any employer, relocation company, or other entity that provides benefits to Seller when selling the Property is: ____________.

13. SELLER’S ADDITIONAL PROMISES: Seller agrees to:

A. cooperate with Broker to facilitate the showing, marketing, and sale of the Property;

B. not rent or lease the Property during this Listing without Broker’s prior written approval;

C. not negotiate with any prospective buyer who may contact Seller directly, but refer all prospective buyers to Broker;

D. not enter into a listing agreement with another broker for the sale, exchange, lease, or management of the Property to become effective during this Listing without Broker’s prior written approval;
E. maintain any pool and all required enclosures in compliance with all applicable laws and ordinances;

F. provide Broker with copies of any leases or rental agreements pertaining to the Property and advise Broker of tenants moving in or out of the Property;

G. complete any disclosures or notices required by law or a contract to sell the Property; and

H. amend any applicable notices and disclosures if any material change occurs during this Listing.

14. LIMITATION OF LIABILITY:

A. If the Property is or becomes vacant during this Listing, Seller must notify Seller’s casualty insurance company and request a “vacancy clause” to cover the Property. Broker is not responsible for the security of the Property nor for inspecting the Property on any periodic basis.

B. Broker is not responsible or liable in any manner for personal injury to any person or for loss or damage to any person’s real or personal property resulting from any act or omission not caused by Broker’s negligence, including but not limited to injuries or damages caused by:

(1) other brokers, their associates, inspectors, appraisers, and contractors who are authorized to access the Property;

(2) other brokers or their associates who may have information about the Property on their websites;

(3) acts of third parties (for example, vandalism or theft);

(4) freezing water pipes;

(5) a dangerous condition on the Property;

(6) the Property’s non-compliance with any law or ordinance; or
(7) Seller, negligently or otherwise.

C. Seller agrees to protect, defend, indemnify, and hold Broker harmless from any damage, costs, attorney's fees, and expenses that:

(1) are caused by Seller, negligently or otherwise;

(2) arise from Seller's failure to disclose any material or relevant information about the Property; or

(3) are caused by Seller giving incorrect information to any person.

15. SPECIAL PROVISIONS:

16. DEFAULT: If Seller breaches this Listing, Seller is in default and will be liable to Broker for the amount of the Broker’s compensation specified in Paragraph 5A and any other compensation Broker is entitled to receive under this Listing. If a sales price is not determinable in the event of an exchange or breach of this Listing, the Listing Price will be the sales price for purposes of computing compensation. If Broker breaches this Listing, Broker is in default and Seller may exercise any remedy at law.

17. MEDIATION: The parties agree to negotiate in good faith in an effort to resolve any dispute related to this Listing that may arise between the parties. If the dispute cannot be resolved by negotiation, the dispute will be submitted to mediation. The parties to the dispute will choose a mutually acceptable mediator and will share the cost of mediation equally.

18. ATTORNEY’S FEES: If Seller or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this Listing or any transaction related to or contemplated by this Listing, such party will be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney’s fees.
19. **ADDENDA AND OTHER DOCUMENTS:** Addenda that are part of this Listing and other documents that Seller may need to provide are:

- ☒ A. Information About Brokerage Services;
- ☐ B. Seller Disclosure Notice (§5.008, Texas Property Code);
- ☐ C. Addendum for Seller’s Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (required if Property was built before 1978);
- ☐ D. Residential Real Property Affidavit (T-47 Affidavit; related to existing survey);
- ☐ E. MUD, Water District, or Statutory Tax District Disclosure Notice (Chapter 49, Texas Water Code);
- ☐ F. Request for Information from an Owners’ Association;
- ☐ G. Request for Mortgage Information;
- ☐ H. Information about Mineral Clauses in Contract Forms;
- ☐ I. Information about On-Site Sewer Facility;
- ☐ J. Information about Property Insurance for a Buyer or Seller;
- ☐ K. Information about Special Flood Hazard Areas;
- ☐ L. Condominium Addendum to Listing;
- ☐ M. Keybox Authorization by Tenant;
- ☐ N. Seller’s Authorization to Release and Advertise Certain Information; and
- ☐ O. ________________________________.

20. **AGREEMENT OF PARTIES:**

   A. **Entire Agreement:** This Listing is the entire agreement of the parties and may not be changed except by written agreement.
B. Assignability: Neither party may assign this Listing without the written consent of the other party.

C. Binding Effect: Seller’s obligation to pay Broker earned compensation is binding upon Seller and Seller’s heirs, administrators, executors, successors, and permitted assignees.

D. Joint and Several: All Sellers executing this Listing are jointly and severally liable for the performance of all its terms.

E. Governing Law: Texas law governs the interpretation, validity, performance, and enforcement of this Listing.

F. Severability: If a court finds any clause in this Listing invalid or unenforceable, the remainder of this Listing will not be affected and all other provisions of this Listing will remain valid and enforceable.

G. Notices: Notices between the parties must be in writing and are effective when sent to the receiving party’s address, fax, or e-mail address specified in Paragraph 1.

21. ADDITIONAL NOTICES:

A. Broker’s compensation or the sharing of compensation between brokers is not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS®, MLS, or any listing service.

B. In accordance with fair housing laws and the National Association of REALTORS® Code of Ethics, Broker’s services must be provided and the Property must be shown and made available to all persons without regard to race, color, religion, national origin, sex, disability, familial status, sexual orientation, or gender identity. Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, or age).

C. Broker advises Seller to contact any mortgage lender or other lien holder to obtain information regarding payoff amounts for any existing mortgages or liens on the Property.
D. Broker advises Seller to review the information Broker submits to an MLS or other listing service.

E. Broker advises Seller to remove or secure jewelry, prescription drugs, other valuables, firearms and any other weapons.

F. Statutes or ordinances may regulate certain items on the Property (for example, swimming pools and septic systems). Non-compliance with the statutes or ordinances may delay a transaction and may result in fines, penalties, and liability to Seller.

G. If the Property was built before 1978, Federal law requires the Seller to: (1) provide the buyer with the federally approved pamphlet on lead poisoning prevention; (2) disclose the presence of any known lead-based paint or lead-based paint hazards in the Property; (3) deliver all records and reports to the buyer related to such paint or hazards; and (4) provide the buyer a period up to 10 days to have the Property inspected for such paint or hazards.

H. Broker cannot give legal advice. READ THIS LISTING CAREFULLY. If you do not understand the effect of this Listing, consult an attorney BEFORE signing.
9. INTERMEDIARY: (Check A or B only.)

A. Intermediary Status: Broker may show the Property to interested prospective buyers who Broker represents. If a prospective buyer who Broker represents offers to buy the Property, Seller authorizes Broker to act as an intermediary and Broker will notify Seller that Broker will service the parties in accordance with one of the following alternatives.

*Explanation—If the seller checks this box, it means the seller has given listing broker permission to show this listing to any and all buyers.*

If the buyer wants to buy the listing the paragraph continues to explain what the listing broker will do.

(1) If a prospective buyer who Broker represents is serviced by an associate other than the associate servicing Seller under this Listing, Broker may notify Seller that Broker will:

*Explanation—If the buyer is represented by one of the broker’s sales agents other than the listing agent, the broker will appoint the sales agents to represent the seller and buyer (3 licensees).*

(a) appoint the associate then servicing Seller to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Seller; and
(b) appoint the associate then servicing the prospective buyer to the prospective buyer for the same purpose.

Explanation: When there are three (3) licensees, appointments can be made and both sales agents can give advice and opinions, negotiate, adhere to confidentiality, and all duties required in a fiduciary capacity.

Before the contract is written the buyer and seller must agree and approve the appointed licensees to be sure there is not a conflict of interest. The broker will determine what form is to be used to get the approval of the appointees.

(2) If a prospective buyer who Broker represents is serviced by the same associate who is servicing Seller, Broker may notify Seller that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the prospective Buyer; and (b) appoint the associate servicing the Seller under this Listing to the Seller for the same purpose.

Explanation—This is when there are only two license holders and to be able to give advice and opinions the broker must appoint another license holder to represent one of the parties. The transaction cannot go any further unless both buyer and seller agree to the appointees (sales agents or broker associates). This must be done before the contract is written.

(3) Broker may notify Seller that Broker will make no appointments as described under this Paragraph 9A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.
Explanation—This is when a sales agent or a broker associate sells their own listing. There can be no appointees which means the broker is still the intermediary to oversee the sales agent or broker associate selling their own listing adhering to the laws. The agent cannot give advice and opinions. Their duties are honesty, fairness, disclosure, good faith, and competency. It takes a very good license holder to be able to sell their own listing and not give advice and opinions. The seller-client and the buyer-client must understand that no one is representing them by providing fiduciary duties. All the sales agent can do is to be a conduit of passing information back and forth to the parties.

B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who Broker represents.

Notice: If Broker acts as an intermediary under Paragraph 9A, Broker and Broker’s associates: may not disclose to the prospective buyer that Seller will accept a price less than the asking price unless otherwise instructed in a separate writing by Seller; may not disclose to Seller that the prospective buyer will pay a price greater than the price submitted in a written offer to Seller unless otherwise instructed in a separate writing by the prospective buyer; may not disclose any confidential information or any information Seller or the Prospective buyer specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property; may not treat a party to the transaction dishonestly; and may not violate the Real Estate License Act.

Explanation—If the seller checks this box, no license holder in the company may show the listing—only other brokers.

Who is the intermediary?

You need to know what your broker’s policy on agency practice is. Not all brokers practice intermediary for many legal reasons. Do you know what they are?
Do not assume all brokers do intermediary. Do you know why?

Intermediary is explained in the Information About Brokerage Services notice.

Your agreements determine if the principal will agree to intermediary appointments. Do you know what appointments mean?

What notice does your broker use to disclose who the appointments are to the principals before the contract is written?

Buyer Agreements
8. INTERMEDIARY: (Check A or B only.)

A. Intermediary Status: Client desires to see Broker’s listings. If Client wishes to acquire one of Broker’s listings, Client authorizes Broker to act as an intermediary and Broker will notify Client that Broker will service the parties in accordance with one of the following alternatives.

1) If the owner of the property is serviced by an associate other than the associate servicing Client under this agreement, Broker may notify Client that Broker will: (a) appoint the associate then servicing the owner to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the owner; and (b) appoint the associate then servicing Client to the Client for the same purpose.

2) If the owner of the property is serviced by the same associate who is servicing Client, Broker may notify Client that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Client; and (b) Appoint the associate servicing the owner under the listing to the owner for the same purpose.

3) Broker may notify Client that Broker will make no appointments as described under this Paragraph 8A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may
facilitate the transaction but will not render opinions or advice during negotiations to either party.

B. No Intermediary Status: Client does not wish to be shown or acquire any of Broker’s listings.

Notice: If Broker acts as an intermediary under Paragraph 8A, Broker and Broker’s associates:

- may not disclose to Client that the seller or landlord will accept a price less than the asking price unless otherwise instructed in a separate writing by the seller or landlord;
- may not disclose to the seller or landlord that Client will pay a price greater than the price submitted in a written offer to the seller or landlord unless otherwise instructed in a separate writing by Client;
- may not disclose any confidential information or any information a seller or landlord or Client specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- shall treat all parties to the transaction honestly; and
- shall comply with the Real Estate License Act.

The agreements spell out your AUTHORITY. You must adhere to exactly what it says or you could be in violation of the Texas agency laws.

If there are three license holders, the intermediary-broker can appoint a sales agent to both the buyer and seller by policy and procedure. By having appointments each sales agent can give advice and opinions. The intermediary is always the broker and the broker cannot be involved in any of the negotiations and never be one of the appointees. The documents required for each principal include the following:

- The Information on Brokerage Services
- The listing agreement
• The buyer agreement
• The second consent agreement noting who the appointed sales agents are by the broker

All principals to the transaction must agree to go forward in an intermediary transaction. If they do not agree to intermediary and the appointments, the transaction can only take place by one of the sales agents representing one of the clients. The other client would have to be referred to another brokerage. The broker must have a written policy on intermediary. The broker is required to treat each party honestly and fairly and to comply with The Texas Real Estate License Act.

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

Notice that the broker must appoint two different agents to the two different parties. And since the broker is the intermediary for both the buyer and the seller the broker can never be an appointed licensee.

*Note: Intermediary transactions have many strict rules that you will learn more about in Lesson Six.*

**Appointed License Holder**

When one of the broker’s sales agents is representing a buyer and the buyer wants to purchase a listing in the same brokerage firm that another of the broker’s sales agents has listed, the broker may act as an intermediary between the parties and may appoint the two sales agents to each principal to assist the two different parties to give advice and opinions and assist during negotiations. The two appointed sales agents are known as
appointed licensees. The appointments must be presented to both principals and have them agree to the appointees.

*Note:* Intermediary transactions have many strict rules that you will learn more about in Lesson Six.

**Disclosed Dual Agent**

Selling your own listing—Intermediary with no appointments

Dual agency is a relationship in which the brokerage firm represents both the buyer and the seller in the same real estate transaction. Dual agency relationships do not carry with them all of the traditional fiduciary duties to clients. Instead, dual agents owe limited fiduciary duties examples would be to not give advice and opinions to the principals. All you can do during the transaction is almost the same duties you give a customer.

Because of the potential for conflicts of interest in a dual agency relationship, it’s vital that the buyer and seller give their informed consent. In many states, this consent must be in writing. Your broker will require you to put the consent of the appointees in writing before the contract is written. Disclosed dual agency, in which both the buyer and the seller are told that the agent is representing both of them, is legal in most states. Be sure that you know your broker’s policy on selling your own listing.

**Designated Agency (not legal in Texas)**

The practice in Texas is intermediary. Intermediary replaced dual agency and DESIGNATED AGENCY.

Designated agency is a brokerage practice that allows the managing broker to designate which licensees in the brokerage will act as an agent of the seller and which will act as an agent of the buyer. Designated agency avoids the problem of creating a dual agency relationship for licensees at the brokerage. The designated agents give their clients full representation, with all of the attendant fiduciary duties. The broker still has the responsibility of supervising both groups of licensees.
Non-Agency Other-Wise Known as a Facilitator or Transaction Broker (not in Texas)
Some states permit a real estate licensee to have a type of non-agency relationship with a consumer. These relationships vary considerably from state to state, both as to the duties owed to the consumer and the name used to describe them. The duties owed to the consumer in a non-agency relationship are less than the complete, traditional fiduciary duties of an agency relationship.

Fiduciary Duties and Responsibility
The Texas Real Estate License Act of 2016 states the following:

Sec. 1101.002. DEFINITIONS.
In this chapter:
(1) "Broker":
(A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts:
(i) sells, exchanges, purchases, or leases real estate;
(ii) offers to sell, exchange, purchase, or lease real estate;
(iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate;
(iv) lists or offers, attempts, or agrees to list real estate for sale, lease, or exchange;
(v) auctions or offers, attempts, or agrees to auction real estate;
(vi) deals in options on real estate, including a lease to purchase or buying, selling, or offering to buy or sell options on real estate;
(vii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;
(viii) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate;
(ix) procures or assists in procuring property to effect the sale, exchange, or lease of real estate;
(x) controls the acceptance or deposit of rent from a resident of a single-family residential real property unit;

(xi) provides a written analysis, opinion, or conclusion relating to the estimated price of real property if the analysis, opinion, or conclusion:

   (a) is not referred to as an appraisal;
   (b) is provided in the ordinary course of the person's business; and
   (c) is related to the actual or potential management, acquisition, disposition, or encumbrance of an interest in real property; or

(xii) advises or offers advice to an owner of real estate concerning the negotiation or completion of a short sale; and

(B) includes a person who:

   (i) is employed by or for an owner of real estate to sell any portion of the real estate; or
   (ii) engages in the business of charging an advance fee or contracting to collect a fee under a contract that requires the person primarily to promote the sale of real estate by:

       (a) listing the real estate in a publication primarily used for listing real estate; or
       (b) referring information about the real estate to brokers.

(1-a) "Business entity" means a "domestic entity" or "foreign entity" as those terms are defined by Section 1.002, Business Organizations Code that is qualified to transact business in this state.

(2) "Certificate holder" means a person registered under Subchapter K.

(3) "Commission" means the Texas Real Estate Commission.

(4) "License holder" means a broker or sales agent licensed under this chapter.

(5) "Real estate" means any interest in real property, including leasehold, located in or outside this state. The term does not include an interest given as security for the performance of an obligation.

(6) "Residential rental locator" means a person who offers for consideration to locate a unit in an apartment complex for lease to a prospective tenant. The term does not include an owner who offers to locate a unit in the owner's complex.
(7) "Sales agent" means a person who is sponsored by a licensed broker for the purpose of performing an act described by Subdivision (1).

(8) "Sub-agent" means a license holder who:

(A) represents a principal through cooperation with and the consent of a broker representing the principal; and

(B) is not sponsored by or associated with the principal's broker.


Amended by:
Acts 2011, 82nd Leg., R.S., Ch. 1064 (S.B. 747), Sec. 1, eff. September 1, 2011.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 2, eff. January 1, 2016.

When a license holder acts as broker or sales agent he or she must uphold the following duties to all principals they represent. Remember the acronym is OLD CAR: Obedience, Loyalty, Disclosure, Confidentiality, Accountability and Reasonable care:

- Obedience
  - What does obedience mean to you? How do you obey your principal?
  - Give an example of how you are obedient to your client.

- Loyalty
  - What does loyalty mean to you? How do you stay loyal to your principal?
  - Give an example of how you can be loyal to your client.

- Disclosure
  - What do you disclose? When?
  - Give an example of what you should disclose and why.

- Confidentiality
  - What do you never tell about your client-principal?
  - Give an example of confidential information from the buyer and seller.

- Accountability
  - What do you need to be accountable about or for?
Give examples of accountability for the seller and buyer.

- Reasonable care
  - Define reasonable care.
  - Give examples of reasonable care for the seller and buyer.

Local, State and National Laws

There are many laws the license holder needs to know or disclose or not disclose such as fair housing questions. Some other things to keep in mind are:

Local
- Zoning
- Municipal Utility Districts
- Homeowner Associations
- Permits for construction on property
- Ordinances and Regulations

State
- Agency
- Deceptive Trade Practice
- Fair Housing
- Texas Real Estate Licensing Act
- Property Code
- Property Inspections
- Auctions
- Due Process
- Common Laws
- Property Management
- Mineral Rights
- Water Rights
National

- Antitrust
- Fair Housing
- Federal Housing Administration
- Housing and Urban Development
- Fair Credit Reporting
- Federal Trade Commission
- Federal Truth and Lending Act
- Real Estate Settlements Procedures Act
- Consumer Federal Protection Act

These laws are not conclusive, but every one of them directly touches the real estate business. You will come in contact with these laws without even knowing it, so be careful with what you say and do. Education and research is the key to learning. Stay educated.

Explaining Fiduciary Duties to your Clients and Common Law Duties to the Customer

These duties are just like a relationship where you are committed through an engagement or marriage. They apply to all consumers you represent.

Obedience—Compliance with a listing agreement, buyer agreement, lease, property management agreement, verbal request or law or submission to another's (principal) authority.

Loyalty—Your loyalty is to your client and not to other agents in the office or other brokers, or customers.

Disclosure—What you can disclose and what you cannot disclose. License holders need to know in each transaction what they must disclose. Example: Homeowner’s Association—what documents must be disclosed to the buyer or tenant? A license holder needs to know what they are and what they are for to be able to explain to other
parties. As the principal’s agent, you need to have the knowledge of what is required. Disclosure is more than property defects; it is a list of specific items for each transaction.

Confidentiality—You do not tell or say innuendos that are not authorized. Example: A customer calls and asks you “why a seller is selling?” You cannot give this information unless the seller authorized you to do so. Another would be “will the seller take less for the list price?” This is confidential information. Make a list of items you cannot tell or relay so you know what and how to handle confidential information.

Accountability—This is really communication to the principal about what is happening with the duration of the listing or a sale. Be accountable to your principal by keeping them informed.

Reasonable Care—Common sense prevails. If you do not have common sense you cannot practice reasonable care! You cannot protect your clients from legal issues, only what you are licensed to do and what you are authorized to do by your broker and principal.

**Customer Duties**
When a license holder acts as a broker or sales agent, he or she must uphold the following duties to all customers they transact business with:

Honesty—When working with a customer you have to be honest but not tell the customer any confidential information. You must tell them your represent the seller when you first meet them and talk about representation. You do not represent them if you do not have mutual consent.

Fairness—Even though you do not represent them you can do certain things such as help with financing, set up inspections, write an offer; however, you cannot give advice and opinions, nor can you negotiate on their behalf.
Disclosure—This applies to all license holders. Do you know what disclosures have to be given in all transactions? It does not mean confidential information.

Good Faith—Is fair and open dealing in a transaction with all parties and the other broker. This is often thought to require sincere, honest intentions regardless of the outcome of an action.

Competency—This for the license holder to be competent in knowing what they can and cannot do when working with a customer as it pertains to agency duties. The license holder or sales agent is only a conduit to pass information back and forth with limited duties to the client and customer. Know the difference between a client and a customer. The duties are not the same. You are not a fiduciary to the customer. If you are working with a customer and show a property where the listing broker offered sub-agency, you are representing the listing broker’s seller and not the buyer.

**Duty of Honesty and Fair Dealing**

Texas Administrative Code
Title 22 Examining Boards
Part 23 Texas Real Estate Commission - Rules
Chapter 535 General Provisions
Subchapter N Suspension and Revocation of Licensure
Rule §535.156 Dishonesty; Bad Faith; Untrustworthiness

a) A license holder’s relationship with the license holder's principal is that of a fiduciary. A license holder shall convey to the principal all known information which would affect the principal’s decision on whether or not to make, accept or reject offers; however, if the principal has agreed in writing that offers are not to be submitted after the principal has entered into a contract to buy, sell, rent, or lease a property, the license holder shall have no duty to submit offers to the principal after the principal has accepted an offer.
(b) The license holder must put the interest of the license holder’s principal above the license holder’s own interest. A license holder must deal honestly and fairly with all parties; however, the license holder represents only the principal and owes a duty of fidelity to such principal.

(c) A license holder has an affirmative duty to keep the principal informed at all times of significant information applicable to the transaction or transactions in which the license holder is acting as agent for the principal.

(d) A license holder has a duty to convey accurate information to members of the public with whom the license holder deals.

Source Note: The provisions of this §535.156 adopted to be effective January 1, 1976; amended to be effective May 24, 1976, 1 TexReg 1253; amended to be effective June 9, 1981, 6 TexReg 1922; amended to be effective May 27, 1998, 23 TexReg 5437; amended to be effective October 1, 2000, 25 TexReg 8646; amended to be effective January 1, 2015, 39 TexReg

This means that even if the license holder is acting as the agent for one party, he or she must be honest with other parties and treat them fairly.

In addition, “a license holder has a duty to convey accurate information to members of the public with whom the license holder deals” (§535.156d).

License holders can be held liable for any dishonest or fraudulent statements. License holders must, therefore, attempt to learn accurate information to avoid misrepresentation and fraud.

The agent must inform the third party of any known material facts about the property. This includes the disclosure of latent, or hidden, defects about the property that may not be identified in an ordinary inspection but could alter the customer’s decision regarding the property.

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

However, the Texas Real Estate Commission License Act states that the license holder is not required to disclose information relating to occupants:

**Sec. 1101.556. DISCLOSURE OF CERTAIN INFORMATION RELATING TO OCCUPANTS.**

Notwithstanding other law, a license holder is not required to inquire about, disclose, or release information relating to whether:

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

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

Do you know what deaths in Texas MUST be disclosed?

*Answer: Homicides or a death that occurred because of the property condition, such as mold, radon gas, broken stairs, and other serious conditions the property could have been responsible for the death must be disclosed.*

The license holder is also not required to disclose to third parties any issues with the property that are not material facts. The licensee should be aware, however, that the seller is required to give the buyer a Seller’s Disclosure Form. Ask your broker what
Seller Disclosure Form to use. Do not take it upon yourself to select the one you like. The broker’s error and omissions insurance and legal counsel will determine the Seller Disclosure form your broker will use. You will use the same one for all property that is listed by your broker and you.

On this form, the seller must disclose any facts about the property that may affect the buyer’s decision to buy the property. The license holder should never attempt to fill out the Seller Disclosure form required by state law and to define for a seller which facts or issues should be disclosed. If a seller asks for advice, the license holder should always refer the seller to seek legal counsel.

We will discuss this further in the section on seller’s agents.

**FAST FACT**

On February 20, 2004, Virginia Erickson was found guilty of “acting negligently or incompetently as listing agent”. The Texas Real Estate Commission found that she knew or should have known that the buyer had failed to deposit the earnest money, as was stipulated by the Texas Real Estate Commission promulgated sale contract. Erickson did not inform the seller of this important information. The Texas Real Estate Commission reprimanded her broker’s license and charged her with a $750.00 fine.

**DUTY OF REASONABLE CARE**

As set forth in the Rules of the Texas Real Estate Commission, the license holder must conduct real estate transactions with care and diligence, ensuring representation of the principal to the best of the agent’s ability and in the best interest of the principal, and treating the third party with competent fairness. With this understanding in place, the licensee holder can be held liable for any loss resulting from his or her negligence.

The duty of reasonable care generally implies competence and expertise on the part of the licensee. This is required because licensees have been issued a license and permitted to hold themselves out to the public and to be qualified by training and experience to provide a special service in real estate. The duty of reasonable care
includes two components: integrity and competency.

Texas Real Estate Commission Rules—Chapter 531 Canons of Professional Ethics and Conduct

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

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

§531.2 Integrity
A real estate broker or sales agent has a special obligation to exercise integrity in the discharge of the license holder's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission.

§531.3 Competency
It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage Practitioner. The agent should:

(1) be informed on market conditions affecting the real estate business and pledged to continuing education in the intricacies involved in marketing real estate for others;
(2) Be informed on national, state, and local issues and developments in the real estate Industry; and
(3) Exercise judgment and skill in the performance of the work.

§531.18 Consumer Information
(a) The Commission adopts by reference Consumer Protection Notice TREC No. CN 1-2. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, and www.trec.texas.gov.

(b) Each active real estate broker shall provide the notice adopted under subsection (a) by:

1. Displaying it in a readily noticeable location in each place of business the broker maintains; and
2. Providing a link to it labeled "Texas Real Estate Commission Consumer Protection Notice", in at least a 10 point font, in a readily noticeable place on the homepage of the business website of the broker and sponsored sales agents.

§531.19 Discriminatory Practices

(a) No real estate license holder shall inquire about, respond to or facilitate inquiries about, or make disclosure of an owner, previous or current occupant, potential purchaser, lessor, or potential lessee of real property which indicates or is intended to indicate any preference, limitation, or discrimination based on the following:

1. Race;
2. Color;
3. Religion;
4. Sex;
5. National origin;
6. Ancestry;
7. Familial status; or
8. Disability.

(b) For the purpose of this section, disability includes AIDS, HIV-related illnesses, or HIV infection as Defined by the Centers for Disease Control of the United States Public Health Service.

§531.20 Information About Brokerage Services
(a) The Commission adopts by reference Information About Brokerage Services Form, TREC No. IABS 1-0 (IABS Form). The IABS Form is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, and www.trec.texas.gov.

(b) Each active real estate broker and sales agent shall provide:

(1) a link to the Information about Brokerage Services notice labeled "Texas Real Estate Commission Information About Brokerage Services", in at least a 10 point font, in a readily noticeable place on the homepage of the business website of the broker and sales agent; and

(2) The Information about Brokerage Services notice as required under §1101.558, Texas Occupations Code.

(c) For purposes of §1101.558, Texas Occupations Code, the Information about Brokerage Services notice can be provided:

(1) By personal delivery by the broker or sales agent;

(2) By first class mail or overnight common carrier delivery service;

(3) In the body of an email; or

(4) As an attachment to an email, or a link within the body of an email, with a specific reference to the Information about Brokerage Services notice in the body of the email.

(d) Providing a link to the Information about Brokerage Services notice in a footnote or signature block in an email does not satisfy the requirements of subsection (c).

(e) License holders may reproduce the Information about Brokerage Services published by the Texas Real Estate Commission, provided that the text of the Information about Brokerage Services notice is copied verbatim and the spacing, borders and placement of text on the page must appear to be identical to that in the published version of the Information about Brokerage Services notice, except that the Broker Contact Information section may be prefilled.

These are the Canons of the Texas Real Estate Commission and can be found in the
Rules. The Canons are the backbone of the Texas Real Estate License Act and the Texas Real Estate Commission Rules.

Reasonable care also includes the expectation that a license holder has a greater knowledge of the real estate industry than a layperson. The principal (and the third party) can expect that a licensee will act as a competent real estate professional, according to the standards of the industry.

**NOTE:** License holders are NOT expected to have expert knowledge in areas outside of the real estate profession. Real estate professionals should not attempt to give advice on law, accounting, inspecting, engineering or other areas outside of the realm of the Texas Real Estate License Act. Brokers, sales agents and broker associates should always recommend that clients and customers seek qualified professionals for those types of services.

As set forth in the Rules of the Texas Real Estate Commission, competency includes the following:

**§531.3 Competency.**

It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage practitioner. The agent should:

- Be informed on market conditions affecting the real estate business and pledged to continuing education in the intricacies involved in marketing real estate for others;
- Be informed on national, state and local issues and developments in the real estate industry; and
- Exercise judgment and skill in the performance of the work.

**Fast Fact:** On March 15, 2002, William Brewer was found guilty of negligence. He
failed to obtain permission from the seller before he disposed of personal items from
the seller’s property. He received a reprimand of his broker’s license.

Texas Administrative Code Title 22 Examining Boards Part 23
Texas Real Estate Commission
Chapter 535 General Provisions
Subchapter N. Suspension and Revocation of Licensure
Rule §535.146 Maintaining Trust Money

Duty of Accounting

a) Definitions. In this section:

(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 than 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.

Source Note: The provisions of this §535.146 adopted to be effective September 8, 2014, 39 TexReg 7139; amended to be effective January 1, 2016, 40 TexReg 8246
Basically, if a license holder holds any funds for any party, the status of these funds must be available at all times, the details of the financial transaction should be recorded accurately and proof should be issued to the parties involved. Daily, weekly or monthly communication is a must to your client. Communication and how often to communicate needs to be spelled out in the agreement and the license holder needs to be obedient and comply.

In Texas, most license holders prefer to have an independent entity, usually the title company, hold the earnest money in an escrow account. However, if the license holder elects to hold this money in the trust of others, he or she must set up a separate account in the broker's name for this purpose. Texas license law makes it illegal to commingle (mix) monies of other parties with the license holder’s personal or business accounts.

Furthermore, the license act requires that the funds are deposited into the account within a reasonable time, allowing up to the close of the second business day from the signing of the contract for the deposit to be made. The money will be held in the escrow account until the closing, at which time the agent must release the funds to the appropriate party. In the event that the transaction does not close, the money can only be released upon written consent of all parties involved. The duty of ACCOUNTING still exists after the agency relationship has been terminated.

**Fast Fact**
On April 26, 2002, TREC found Kelvin Kidd guilty of commingling and failing to properly account for a security deposit belonging to another person. TREC suspended his sales agent’s license for 3 months and required that his license be probated after that until he completed payments under a Bankruptcy plan.

**EXAMPLE**
Sales agent A represents Seller B, and she is holding an open house for the seller’s property. She has a conversation with Buyer C, and she gives the buyer her card. At this point, sales agent A is required to explain that she is the seller’s agent, but she
is not required to disclose this in writing. The next day, buyer C comes into the office where sales agent A works, and they discuss the property. Now, the sales agent and the buyer are having “substantive dialogue”, and sales agent A must give the buyer a written statement, the Information About Brokerage Services notice explaining agency law. This notice does not disclose who you represent. You need to tell them who you represent!

Texas Real Estate Commission does not require that any particular form be used for the notice Information About Brokerage Services. However, the notice must be printed in at least 10-point type and include a written statement, with exact wording from Texas Real Estate Commission. The one exception to the exact wording requirement is that the license holder may substitute buyer for tenant and seller for landlord, as appropriate. Here is the wording that must be used:

Types of Real Estate License Holders:

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

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

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

A LICENSE HOLDER CAN REPRESENT A PARTY IN A REAL ESTATE TRANSACTION:
AS AGENT FOR OWNER (SELLER/LANDLORD): The broker becomes the property owner’s agent through an agreement with the owner, usually in a written listing to sell or property management agreement. An owner’s agent must perform the broker’s minimum duties above and must inform the owner of any material information about the property or transaction known by the agent, including information disclosed to the agent or sub-agent by the buyer or buyer’s agent.

AS AGENT FOR BUYER/TENANT: The broker becomes the buyer/tenant’s agent by agreeing to represent the buyer, usually through a written representation agreement. A buyer's agent must perform the broker’s minimum duties above and must inform the buyer of any material information about the property or transaction known by the agent, including information disclosed to the agent by the seller or seller’s agent.

AS AGENT FOR BOTH—INTERMEDIARY: To act as an intermediary between the parties the broker must first obtain the written agreement of each party to the transaction. The written agreement must state who will pay the broker and, in conspicuous bold or underlined print, set forth the broker’s obligations as an intermediary. A broker who acts as an intermediary:

- Must treat all parties to the transaction impartially and fairly;
- May, with the parties written consent, appoint a different license holder associated with the broker to each party (owner and buyer) to communicate with, provide opinions and advice to, and carry out the instructions of each party to the transaction.
- Must not, unless specifically authorized in writing to do so by the party, disclose:
  - That the owner will accept a price less than the written asking price;
  - That the buyer/tenant will pay a price greater than the price submitted in a written offer; and
  - Any confidential information or any other information that a party specifically instructs the broker in writing not to disclose, unless required to do so by law.
AS SUB-AGENT: A license holder acts as a sub-agent when aiding a buyer in a transaction without an agreement to represent the buyer. A sub-agent can assist the buyer but does not represent the buyer and must place the interests of the owner first.

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

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

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

Signature lines follow.

The acronym OLD CAR may help you remember the fiduciary duties.

O  Obedience—the broker/salespeople will comply with the client’s legal instructions.

L  Loyalty—the broker/salespeople will act 100% in the client’s best interest.

D  Disclosure—full and complete disclosure about any knowledge the broker/salespeople have that may influence the client’s desire to buy, sell or exchange property.
C  Confidentiality—the broker/salespeople shall keep all of the client's confidential information to themselves unless required by law to disclose. (Property condition disclosures are not confidential information.)

A  Accounting—the broker/salespeople, shall be accountable for all of the client's funds or documents given to the agent to hold.

R  Reasonable Care—the broker/salespeople will use care when performing their duties and will protect the client from foreseeable harm.
It is important to recognize that this notice of representation comes in **two steps**.

**Step One**

Let’s look at what T RELA says:

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

1. a meeting that occurs at a property that is held open for any prospective buyer or tenant; or
2. a meeting or written communication that occurs after the parties to a real estate transaction have signed a contract to sell, buy, or lease the real property concerned.
A license holder shall provide to a party to a real estate transaction at the time of the first substantive dialogue with the party the written statement prescribed by Subsection (d) unless:

(1) the proposed transaction is for a residential lease for not more than one year and a sale is not being considered; or

(2) the license holder meets with a party who is represented by another license holder.

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

The first step is to educate the consumer. We do that by providing them with the Information About Brokerage Services (IABS) notice.

**Information from the Texas Real Estate Commission website as of 1-1-16,**

A new mandatory form was adopted (TREC No. IABS 1-0). The new form is organized to be easier to read and understand. Additionally, the new form requires the sales agent or broker to fill in relevant contact information before providing the form.

NOTE: This contact information is required to be filled in at all times. It is a violation to provide a blank IABS without the contact information.

License holders must provide a link to the IABS form in a readily noticeable place, in at least 10 point font and labeled “Texas Real Estate Commission Information About Brokerage Services”.
A sales agent or broker must also provide the form at the first substantive communication with a prospective client by one of following four methods: (1) by personal delivery; (2) by first class mail or overnight common carrier delivery service; (3) in the body of an email; or (4) as an attachment to an email, or a link within the body of an email, with a specific reference to the IABS Form in the body of the email.

NOTE: you are not allowed to include a link to the IABS in the signature line or footnote of an email.

That is the written statement about which Texas Real Estate License Act refers to. It tells the consumer about every legal possible agency relationship they may encounter in Texas. The Information About Brokerage Services notice talks about Buyer Representation, Seller Representation and what happens if the buyer and seller come together in one transaction. It also explains sub-agency.

Agents **should read and re-read** the Information about Brokerage Services form until they thoroughly understand it and can easily explain it to consumers.

Many agents wrongfully believe the IABS form is an agency disclosure. It is **NOT** a disclosure. Nowhere does it explain to the consumer how you and your company work. That that brings us to Step Two.

**Step Two**

TRELA says

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

(1) another party to the transaction; or

(2) another license holder who represents another party to the transaction.

Both of these requirements must be met to be in compliance with TRELA.
Example: You are answering telephones at your office. A buyer you do not know calls and ask about a property another agent in your office has listed. Remember, your company is one unit. You are all representing the seller of that property. If you are going to comply with part two above you will disclose that your company is representing the seller of the property they are inquiring about. A statement like “Yes, our company is representing that seller. How may I help you?” The potential buyer wants to see the property at 2 PM. They cannot come to your office first. When you meet them at the property, remind them that right now you are representing the seller and provide them with the IABS form. Suggest that when you finish looking, you all go back to your office to talk about their possible need for representation.

Note: Always consider your safety before agreeing to meet someone at the property.

Agency vs. Contractual obligations
It is important to note here that when an agency relationship is created through a listing agreement or a buyer representation agreement, the license holder and the principal have contractual obligations to each other, in addition to all duties and obligations of the agency relationship. The agency relationship can be terminated at any time, but the contractual relationship will probably still exist after the termination of the agency relationship.

Example: Seller Z has listed his home with Broker Z. Their listing agreement creates an agency relationship but is also a binding contract on both parties. If Seller Z wishes to cancel his listing, he may owe damages to Broker Z, unless Broker Z has not fulfilled her side of the contract.

We will discuss this in detail further in the course. Always consult an attorney for advice pertaining to your specific situation.

Before You Go
Choose either “Yes” or “No” for the below statements:

1. At an open house do you have to let the visitors know, orally or in writing, that you are there representing the seller?
2. At an open house are you obligated to give the IABS form to all the visitors?
3. You are going to meet with a seller this afternoon about a new listing. Are you required to give the potential seller an Information About Brokers Services notice?

Correct Answers

1. Yes
2. No
3. Yes

Lesson Summary

This lesson focused on defining agency terms, explaining how much authority various types of agents have during representation and what is owed to both customers and clients.

Everyone is entitled to honesty, fairness and complete disclosure about property condition. In addition to honesty, fairness and property disclosure clients are entitled to fiduciary duties from their agent. The definition of “their agent” includes the broker representing them and all of his or her associated licensees.

Fiduciary duties include:

- Obedience of all legal instructions from the seller
- 100% loyalty
- Full disclosure of property condition plus any facts helpful to client during negotiations
- Confidentiality, a duty that never ends even after termination of the agency
- Accounting of money, paperwork, etc.
- Reasonable care, protecting client from any foreseeable harm

Agency disclosure laws were discussed and explained. Agents must tell everyone at first contact whom they are representing if anyone. A new Information About Brokerage Services form that became available in January 2016 was reviewed. TREC rules regarding the new form were included in the information.
**Review of Agency**
The following are the various types of relationships buyers and sellers may enter into with a real estate license holder in Texas:

**Seller Agent:** Broker represents the owner or landlord as an agent; does not represent the buyer or tenant; must place owner’s interests first.

**Seller Sub-agent:** A broker who agrees to work for the seller agent who in turn represents the owner. Be sure the listing broker is offering sub-agency cooperation or you may be working for free.

**Buyer Agent:** Broker represents a buyer or tenant as an agent; does not represent the owner; must place the buyer's interest first.

**Customer:** Is not represented by any license holder. Duties of common law of honesty and fairness shall be given by all parties.

**Intermediary:** Broker is the intermediary and does not represent either the buyer or the seller; must obtain written consent from all principals; must fulfill stipulated intermediary duties. Not all license holders practice intermediary. You need to know what your broker's agency practices are before your work with a consumer.

**Agency Interference**
- **Non-interference:** Broker may not negotiate the sale or lease of real property knowing that the buyer has signed an exclusive buyer agency agreement with another license holder.
- **Material Facts:** Broker must disclose related material facts, including receipt of all offers.
- **Present all Offers:** Broker must present all offers to the seller.

**Disclosure Requirements**
A license holder representing a client must disclose such representation UPON FIRST CONTACT WITH:

- Another party to the transaction or
- Another license holder who represents another client to the transaction

License holders must provide to a prospective party, of a transaction UPON FIRST SUBSTANTIVE DIALOGUE on a specific property, the Information About Brokerage Services Notice 2016.

BROKER’S MINIMUM DUTIES (required by law):

- Client comes first—Whoever you have a written agreement with and mutual consent is your client.
- Must disclose material information received—Material Information is information that directly affects the transaction. Example, the buyer has bad credit, or the seller is behind in their mortgage payments and property will be foreclosed on.
- Must answer questions and present offers—All offers have to be presented until the last initials. Even if you have an offer verbally accepted you must still present the other offer. Legal advice might be advised here. Too many license holders hold offers because they have offers working. This is against the License Act and a license holder could lose their license over this if the client did not authorize this type of conduct.
- Must treat all parties honestly and fairly—These are duties given to the customer-buyer or tenant. If the license holder would explain the pros and cons of representation most of the time they will agree to let you represent them. Explain the different types of duties and what you can do when your represent them and what you cannot do representing them. Unfortunately, most license holders do not know the duties and are not able to explain representation.

To avoid disputes, agreements should be in writing and establish license holder duties, obligations under the agreement and who will pay broker, when, where and how. The agreement should be acknowledged by all parties.
Reading Material:

A THEORY OF AGENCY LAW

By Paula J. Dalley – University of Pittsburgh of Law Review

Paula writes a theory of agency law that explains the pros and cons of the agency relationship. This helps to better understand what the license holder is dealing with.
Lesson Three: Duties and Disclosures to Third Parties

Lesson Topics
This lesson focuses on the following topics:

- General Duties of Honesty and Fairness
- Define Third Party/Obligations to Third Party
- Avoiding Disclosure and Misrepresentation Problems
- Section 5.008 of the Texas Property Code (Seller’s Disclosure)
- Stigmatized Properties

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

- Understand where the laws, rules and regulations come from for all license holders.
- Understand the disciplines for license holders
- Answer questions regarding a license holder’s duties to customers (unrepresented seller, buyer, tenant, landlord who are referred to as third parties).
- Identify other third parties
- Discuss lawsuits involving third parties
- Name at least three ways the Seller Disclosure is of value to license holders and sellers.
- List at least three ways a license holder can avoid claims of misrepresentation.
- Describe the meaning of stigmatized property.
General Duties of Honesty and Fairness
A duty of honesty and fairness is owed to other brokers and their clients, customers, and third parties. All parties are entitled to complete disclosure regarding the property. From the Texas Real Estate Commission License Act Sec. 1101.652(b):

(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;

(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;

From the Texas Property Code: §5.008 Seller’s Disclosure of Property Condition:

(a) A seller of residential real property comprising not more than one swelling unit located in this state shall give to the purchaser off the property a written notice as prescribe by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed by this section.

(b) The notice must be executed and must, at a minimum, rea substantially similar to the following:

Please see the Texas Property Code for the remainder of what is the minimum required for a Seller Disclosure to include. There have been many amendments over the years since the Seller Disclosure went into effect in 1993.

The Seller Disclosure form is the Texas Real Estate Commission Disclosure. It is not promulgated, but the Property Code says at a minimum the Seller Disclosure must have the Texas Real Estate Commission information. There are different seller disclosures available to the license holder. The broker needs to determine the disclosure he or she wants to use for their sales agents and broker associates. Sales agents do not make the decision as to what seller disclosure to use, the broker does. The broker includes the seller disclosure to use in his or her policy and procedure manual.
CONCERNING THE PROPERTY AT __________________________ 

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER'S AGENTS.

Seller ☐ is ☐ is not occupying the Property. If unoccupied, how long since Seller has occupied the Property? _______________________

1. The Property has the items checked below [Write Yes (Y), No (N), or Unknown (U)]:

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<thead>
<tr>
<th>Item</th>
<th>Yes</th>
<th>No</th>
<th>Unknown</th>
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<td>Range</td>
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<td>Oven</td>
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<td>Microwave</td>
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<td>Dishwasher</td>
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<td>Trash Compactor</td>
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<td>Disposal</td>
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<td>Window Screens</td>
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<td>Rain Gutters</td>
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<td>Security System</td>
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<td>Fire Detection Equipment</td>
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<td>Intercom System</td>
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<td>TV Antenna</td>
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<td>Smoke Detector</td>
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<td>Satellite Dish</td>
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<td>Intercom System</td>
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<td>Ceiling Fan(s)</td>
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<td>Smoke Detector-Hearing Impaired</td>
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<td>Central A/C</td>
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<td>Carbon Monoxide Alarm</td>
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<td>Wall/Window Air Conditioning</td>
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<td>Plumbing System</td>
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<td>Emergency Escape Ladder(s)</td>
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<td>Pool</td>
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<td>Cable TV Wiring</td>
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<td>Fences</td>
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<td>Attic Fan(s)</td>
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<td>Spa Hot Tub</td>
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<td>Pool Equipment</td>
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<td>Central Heating</td>
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<td>Automatic Lawn Sprinkler System</td>
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<td>Fireplace(s) &amp; Chimney (Wood burning)</td>
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<td>Septic System</td>
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<td>Fireplace(s) &amp; Chimney (Mock)</td>
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<td>Natural Gas Lines</td>
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<td>Outdoor Grill</td>
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<td>Gas Fixtures</td>
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<td>Liquid Propane Gas</td>
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<td>Sauna</td>
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<tr>
<td>Gas Fixtures</td>
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<tr>
<td>Pool Heater</td>
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</table>
Texas Law of Agency

_____LP Community (Captive)  _____LP on Property

Garage: _______ Attached  _____Not Attached  _______ Carport

Garage Door Opener(s):  _____Electronic  _____Control(s)

Water Heater:  _____Gas  _____Electric

Water Supply:  City  _____Well  _______ MUD  _____Co-op

Roof Type:  Age: ____________________________ (approx.)

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair?

☐ Yes  ☐ No  ☐ Unknown. If yes, then describe. (Attach additional sheets if necessary):

________________________________________________________________________________________________________________________________________________________

2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766, Health and Safety Code?

☐ Yes  ☐ No  ☐ Unknown. If the answer to this question is no or unknown, explain (Attach additional sheets if necessary):

________________________________________________________________________________________________________________________________________________________

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for the installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

_______Interior Walls  ___________ Ceilings

_______Exterior Walls  ___________ Doors

_______Roof  ___________ Foundation/Slab(s)

_______Walls/Fences  ___________ Driveways

_______Plumbing/Sewers/Septics  ___________ Electrical Systems

Other Structural Components (Describe): _____________________________________________________________

___________________________________________________________________________________________

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

___________________________________________________________________________________________

4. Are you (Seller) aware of any of the following conditions? Write Yes (Y) if you are aware, write No (N) if you are not aware.

_______Active Termites (includes wood destroying insects)  ___________ Previous Structural or Roof Repair
If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

___________________________________________________________________________________________

___________________________________________________________________________________________

* A single blockable main drain may cause a suction entrapment hazard for an individual.

5. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair?☐ Yes (if you are aware) ☐ No (if you are not aware)

If yes, explain. (Attach additional sheets if necessary):

_______________________________________________________________________________________________

_____________________________________________________________

6. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair?

☐ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

☐ Homeowners’ Association or maintenance fees or assessments.

☐ Any “common area” (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

☐ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

☐ Any lawsuits directly or indirectly affecting the Property.

☐ Any condition on the Property which materially affects the physical health or safety of an individual.

☐ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

☐ Any portion of the property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

_______________________________________________________________________________________________

_____________________________________________________________

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If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide, a beach protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

<table>
<thead>
<tr>
<th>Signature of Seller</th>
<th>Date</th>
<th>Signature of Seller</th>
<th>Date</th>
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<tbody>
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The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

<table>
<thead>
<tr>
<th>Signature of Purchaser</th>
<th>Date</th>
<th>Signature of Purchaser</th>
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Section 5.008, Texas Property Code, provides as follows:

§ 5.008. SELLER’S DISCLOSURE OF PROPERTY CONDITION.

(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed by this section.

(b) The notice must be executed and must, at a minimum, read substantially similar to the following:


(c) A seller or seller’s agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV-related illnesses, or HIV infection.

(d) The notice shall be completed to the best of seller’s belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice and by that act is in compliance with this section.

(e) This section does not apply to a transfer: (the individuals who are exempt from furnishing a residential seller disclosure)

(1) Pursuant to a court order or foreclosure sale;
(2) by a trustee in bankruptcy;
(3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
(6) from one co-owner to one or more other co-owners;
(7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;
(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree; (9) to or from any governmental entity;
(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or
(11) of real property where the value of any dwelling does not exceed five percent of the value of the property. (f) The notice shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within seven days after receiving the notice.


Investors are not exempt from furnishing a seller disclosure, whether they have lived in the property or not. Never, never assist the owner of the property in filling out this disclosure. If they need help, they might call a licensed inspector to assist them. The exemptions to this disclosure are the following:

According to the Texas Real Estate License Act Section 1101:652(b)(7):

(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;

What information related to agency are license holders required to provide under The Texas Real Estate License Act? (Updated September 7, 2016)
License holders have two requirements under Section 1101.558, Representation Disclosure, of The Real Estate License Act:

1. To disclose which party they represent to other parties or license holders who represent another party in a proposed real estate transaction
2. To provide information about brokerage services to prospective buyers, sellers, tenants, and landlords.

The first requirement is a disclosure, which can be provided orally or in writing. The second requirement is a written notice, which must be provided to prospective parties to a proposed transaction for a property through the Information About Brokerage Services form promulgated by the Texas Real Estate Commission.

Sec. 1101.558. REPRESENTATION DISCLOSURE.

(a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.

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

(1) another party to the transaction; or
(2) another license holder who represents another party to the transaction.

(b-1) At the time of a license holder’s first substantive communication with a party relating to a proposed transaction regarding specific real property, the license holder shall provide to the party written notice in at least a 10-point font that:

(1) describes the ways in which a broker can represent a party to a real estate transaction, including as an intermediary;
(2) describes the basic duties and obligations a broker has to a party to a real estate transaction that the broker represents; and
(3) provides the name, license number, and contact information for the license holder and the license holder’s supervisor and broker, if applicable.

(b-2) The commission by rule shall prescribe the text of the notice required under Subsections (b-1) (1) and (2) and establish the methods by which a license holder shall provide the notice.
(c) A license holder is not required to provide the notice required by Subsection (b-1) if:

(1) the proposed transaction is for a residential lease for less than one year and a sale is not being considered;
(2) the license holder meets with a party who the license holder knows is represented by another license holder; or
(3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.


THIRD PARTY DEFINITION—Definition of third-party: Someone who may be directly involved but is not a principal to the transaction (i.e. non-principal, vendor, customer, other broker, appraiser, lender, title company, inspector or surveyor).

Example: You have a listing and represent the seller. A broker, another real estate company, represents a buyer and makes an offer on your listing. The negotiations are successful and your listing becomes contract pending. The other broker’s buyer is your customer and the buyer agent is considered a third party.

Example: You have a buyer agreement with a buyer who is your client. You sell the other broker’s listing and the negotiations are successful and you have a contract pending for your buyer. The other broker’s seller is your customer and the listing agent is a third party.

Both examples mean you have specific common law duties to the customer and the other broker. The Texas Real Estate Commission Rules and the Texas Real Estate Commission License Act have specific duties you must adhere to as well as your fiduciary duties to your client who you represent. This is why you need to know the difference between client and customer.

Client—The person who employs an agent to perform a service for a fee; also called a principal.
Customer—The unrepresented third party in an agency relationship known as the customer.

**Obligations and Duties to Non-Principals**

A real estate broker who represents a seller, buyer, tenant or a landlord is not without any duties or obligations whatsoever to the non-principal (non-represented customer or other broker). A broker’s fiduciary obligations to his or her client do not in any way relieve the broker of a duty to treat the opposing party honestly and with fairness. A fiduciary obligation to a seller is never a defense to a tort action brought by a buyer against a real estate broker for misrepresentation. Nor is proof of an agency relationship an element of an action for intentional negligent or misrepresentation.* (*Reference: Tennat v. Lawton, 26 Wash. App. 701, 615 P.2d 1305 (1980). Agent of seller must take reasonable steps to avoid giving false information to buyer.)

A non-principal or third party cannot possibly rely upon the authority of an agent to bind a principal when the party is not aware that the agent is an agent at all. *(Reference: Theory of Agency Law by Paula J. Dailey)*

In the Texas Real Estate Commission’s Canon and Rules the duties to the Third Party are as follows.

1. primary duty of the real estate agent is to represent the interests of the agent’s client,*

   **Explanation**—License holder duties to their client are primarily confidentiality (one of the fiduciary duties). You can never tell any information you learned during your agency relationship about your client during and after closing.

2. the agent's position, in this respect, should be clear to all parties concerned in a real estate transaction; *

   **Explanation**—At all times, you must disclose whom you represent. When dealing with other sales agents, prospective buyers, all inquiries, you must disclose you are the agent of the seller.
3. the agent, in performing duties to the client, shall treat other parties to a transaction fairly:* (non-principals, third party, customer and other broker)

Explanation—Common law duties are honesty, fairness, disclosure, good faith, competency. When working with a coop broker, sales agent, broker associate and they have brought you an offer on your listing, you must practice the common law duties as stated above.

*Reference: Texas Real Estate Commission Rules Canon Fidelity, Chapter 531.1 (1).

(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting*

Explanation—So if you do not disclose you are the buyer, seller, tenant or landlord agent to anyone you encounter in acting as a license holder you are violating the Texas Real Estate License Act. Example: When you take property calls for any listings in your company, you are to disclose to the caller you are the agent for the seller before you give them any information. When any inquiry of company listings, including yours, you must disclose you are the agent for the sellers of all company listings.

*Reference: Texas Occupations Code (Texas Real Estate License Act) Section 1101.652(b)(7-Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.)

A third party will rely on the principal’s agent for the information they deliver for their client.

**Disclosures to Third Party**

**Section 1101.652.(a-1)(1)**

(1) engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of:

(A) the license holder;
(B) the license holder’s spouse; or

(C) a person related to the license holder within the first degree by consanguinity;

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;

(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;

(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;

(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;

(5) makes a false promise that is likely to influence a person to enter into an agreement when the license holder is unable or does not intend to keep the promise;

(6) pursues a continued and flagrant course of misrepresentation or makes false promises through an agent or sales agent, through advertising, or otherwise;

(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;

(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;

(9) fails within a reasonable time to properly account for or remit money that is received by the license holder and that belongs to another person;

(10) commingles money that belongs to another person with the license holder's own money;
(11) pays a commission or a fee to or divides a commission or a fee with a person other than a license holder or a real estate broker or sales agent licensed in another state for compensation for services as a real estate agent;
(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;
(13) accepts, receives, or charges an undisclosed commission, rebate, or direct profit on an expenditure made for a principal;
(14) solicits, sells, or offers for sale real property by means of a lottery;
(15) solicits, sells, or offers for sale real property by means of a deceptive practice;
(16) acts in a dual capacity as broker and undisclosed principal in a real estate transaction;
(17) guarantees or authorizes or permits a person to guarantee that future profits will result from a resale of real property;
(18) places a sign on real property offering the real property for sale or lease without obtaining the written consent of the owner of the real property or the owner's authorized agent;
(19) offers to sell or lease real property without the knowledge and consent of the owner of the real property or the owner's authorized agent;
(20) offers to sell or lease real property on terms other than those authorized by the owner of the real property or the owner's authorized agent;
(21) induces or attempts to induce a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract;
(22) negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;
(23) publishes or causes to be published an advertisement, including an advertisement by newspaper, radio, television, the Internet, or display, that
misleads or is likely to deceive the public, tends to create a misleading impression, or fails to identify the person causing the advertisement to be published as a licensed broker or agent;
(24) withholds from or inserts into a statement of account or invoice a statement that the license holder knows makes the statement of account or invoice inaccurate in a material way;
(25) publishes or circulates an unjustified or unwarranted threat of a legal proceeding or other action;
(26) establishes an association by employment or otherwise with a person other than a license holder if the person is expected or required to act as a license holder;
(27) aids, abets, or conspires with another person to circumvent this chapter;
(28) fails or refuses to provide, on request, a copy of a document relating to a real estate transaction to a person who signed the document;
(29) fails to advise a buyer in writing before the closing of a real estate transaction that the buyer should:
   (A) have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer; or
   (B) be provided with or obtain a title insurance policy;
(30) fails to deposit, within a reasonable time, money the license holder receives as escrow or trust funds in a real estate transaction:
   (A) in trust with a title company authorized to do business in this state; or
   (B) in a custodial, trust, or escrow account maintained for that purpose in a banking institution authorized to do business in this state;
(31) disburses money deposited in a custodial, trust, or escrow account, as provided in Subdivision (30), before the completion or termination of the real estate transaction;
(32) discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of race, color, religion, sex, disability, familial status, national origin, or ancestry, including directing a prospective buyer or tenant interested in equivalent properties to a different area based on the race, color,
religion, sex, disability, familial status, national origin, or ancestry of the potential owner or tenant; or
(33) disregards or violates this chapter.

These mandates apply to third parties as well as to your clients. Learn them well and if you do not understand what they mean, discuss with your broker.


*Amended by:*
Acts 2005, 79th Leg., Ch. 825 (S.B. 810), Sec. 9, eff. September 1, 2005.
Acts 2007, 80th Leg., R.S., Ch. 297 (H.B. 1530), Sec. 9, eff. September 1, 2007.
Acts 2009, 81st Leg., R.S., Ch. 23 (S.B. 862), Sec. 6, eff. May 12, 2009.
Acts 2015, 84th Leg., R.S., Ch. 1158 (S.B. 699), Sec. 69, eff. January 1, 2016.

If the Texas Real Estate Commission, after a hearing, finds you in violation of any of these acts the discipline can be:

*Sec. 1101.654. SUSPENSION OR REVOCATION OF LICENSE OR CERTIFICATE FOR UNAUTHORIZED PRACTICE OF LAW.*

(a) The commission shall suspend or revoke the license or certificate of registration of a license or certificate holder who is not a licensed attorney in this state and who, for consideration, a reward, or a pecuniary benefit, present or anticipated, direct or indirect, or in connection with the person's employment, agency, or fiduciary relationship as a license or certificate holder:

(1) drafts an instrument, other than a form described by Section 1101.155, that transfers or otherwise affects an interest in real property; or
(2) advises a person regarding the validity or legal sufficiency of an instrument or the validity of title to real property.
(b) Notwithstanding any other law, a license or certificate holder who completes a contract form for the sale, exchange, option, or lease of an interest in real property incidental to acting as a broker is not engaged in the unauthorized or illegal practice of law in this state if the form was:

   (1) adopted by the commission for the type of transaction for which the form is used;
   (2) prepared by an attorney licensed in this state and approved by the attorney for the type of transaction for which the form is used; or
   (3) prepared by the property owner or by an attorney and required by the property owner.

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

**Sec. 1101.656. ADDITIONAL DISCIPLINARY AUTHORITY OF COMMISSION.**

(a) In addition to any other authority under this chapter, the commission may suspend or revoke a license, place on probation a person whose license has been suspended, or reprimand a license holder if the license holder violates this chapter or a commission rule.

(b) The commission may probate a suspension, revocation, or cancellation of a license under reasonable terms determined by the commission.

(c) The commission may require a license holder whose license suspension or revocation is probated to:

   (1) report regularly to the commission on matters that are the basis of the probation;
   (2) limit practice to an area prescribed by the commission; or
   (3) continue to renew professional education until the license holder attains a degree of skill satisfactory to the commission in the area that is the basis of the probation.

*Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003.*
Failure to Disclose to Non-Principals

Failure to disclose who you represent can result in a multitude of misunderstandings, liability and errors. There is little training on disclosure and it is probably one of the most important steps in agency. The examples of when disclosure takes place will help to clarify when this takes place.

The last thing you want to have happen is to have a member of the public thinking you represent them by your actions and conduct.

Example: You receive a property call and the caller starts to ask you questions about a specific property your company has listed. You begin to answer those questions with no disclosure that you represent the seller on the property. The caller’s questions are: “why is the seller selling” and you tell the caller why the seller is selling; “how long has the property been on the market” and you tell the caller; “has the seller received any offers on the property”, and you tell the caller. By this scenario, you have violated the Texas Real Estate License Act and a fiduciary duty of confidentiality.

How should the call have been handled? By immediately disclosing you are the agent of the seller by your broker having the listing. By doing this it is crystal clear that you are not the agent of the caller. Any questions the seller/principal/client has not authorized to tell in writing, CANNOT be disclosed. The listing agent would share what can be disclosed and not be disclosed within the law of Texas. You would have to tell the caller their questions are of a confidential nature and you would have to get the seller’s permission to answer their questions. This way you have disclosed who you represent and that you cannot give out confidential information. If the caller is serious about buying they will then give you their name and contact information. You also need to deliver the Information About Brokerage Services before you call or meet them to discuss further any information about the property. Whatever is public knowledge you can discuss. A good way to measure what you can share is what information is in the MLS as an active listing.
At all times you need to know who you represent, memorize your fiduciary duties, common law duties, the Information About Brokerage Services notice and your broker’s policy and procedures on agency.

We will now explore additional directives license holders must adhere to that come with discipline for your actions and conduct if you are a REALTOR® and a subscriber of the Multiple Listing Service (MLS).

REALTOR® Code of Ethics by the National Association of REALTORS®

Preamble

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. REALTORS® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment. Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which REALTORS® should dedicate themselves, and for which they should be diligent in preparing themselves. Realtors®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow REALTORS® a common responsibility for its integrity and honor. In recognition and appreciation of their obligations to clients, customers, the public, and each other, REALTORS® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. REALTORS® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property,
willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of REALTORS®.

Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, REALTOR® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where REALTORS® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain.

The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal. In the interpretation of this obligation, REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, “Whatsoever ye would that others should do to you, do ye even so to them.”

This Preamble explain who we are as REALTORS®. As long as we practice real estate accordingly, the public would trust us a lot more.

If you are sponsored by a broker who is a member of the Association of REALTORS® and MLS, you as well will become a member. By joining the REALTOR® Association you will sign an application agreement that says you will abide by the REALTOR® Code of Ethics and failure to do so could result in losing your membership.

There are seventeen Articles and eighty-eight Standards of Practice (clarification and additional interpretation of the Article they are under.) You cannot use the term REALTOR® unless you are a member of the local association, Texas Association and the National Association of REALTORS®. The public thinks everyone with a license is a
REALTOR®, and this also is a misunderstanding because of license holders not disclosing they are or are not a REALTOR®.

State law supercedes the Code of Ethics. When members of the public know we subscribe to and practice the Code of Ethics we are conducting ourselves one step above the law! That is a strong impression to present to members of the public.

You can download a copy of the REALTOR® Code of Ethics:

Under the Code of Ethics these are the Articles that pertain to Third Parties that you must adhere to if you are a REALTOR®.

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

Case #1-2: Honest Treatment of All Parties

As the exclusive agent of Client A, REALTOR® B offered Client A’s house for sale, advertising it as being located near a bus stop. Prospect C, who explained that his daily schedule made it necessary for him to have a house near the bus stop, was shown Client A’s property, liked it, and made a deposit. Two days later, REALTOR® B read a notice that the bus line running near Client A’s house was being discontinued. He informed Prospect C of this, and Prospect C responded that he was no longer interested in Client
A’s house since the availability of bus transportation was essential to him. REALTOR® B informed Client A and recommended that Prospect C’s deposit be returned. Client A reluctantly complied with REALTOR® B’s recommendation, but then complained to the Board of REALTORS® that REALTOR® B had not faithfully protected and promoted his interests; that after Prospect C had expressed his willingness to buy, REALTOR® B should not have made a disclosure that killed the sale since the point actually was not of major importance. The new bus route, he showed, would put a stop within six blocks of the property.

In a hearing before a Hearing Panel of the Board’s Professional Standards Committee, REALTOR® B explained that in advertising Client A’s property, the fact that a bus stop was less than a block from the property had been prominently featured. He also made the point that Prospect C, in consulting with him, had emphasized that Prospect C’s physical disability necessitated a home near a bus stop. Thus, in his judgment, the change in bus routing materially changed the characteristics of the property in the eyes of the prospective buyer, and he felt under his obligation to give honest treatment to all parties in the transaction, that he should inform Prospect C, and that in so doing he was not violating his obligation to his client.

The Hearing Panel concluded that REALTOR® B had not violated Article 1, but had acted properly under both the spirit and the letter of the Code of Ethics. The panel noted that the decision to refund Prospect C’s deposit was made by the seller, Client A, even though the listing broker, REALTOR® B, had suggested that it was only fair due to the change in circumstances.

**Standard of Practice 3-7**

When seeking information from another REALTOR® concerning property under a management or listing agreement, REALTORS® shall disclose their REALTOR® status and whether their interest is personal or on behalf of a client and, “if on behalf of a client, their relationship with the client”.

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Standard of Practice 12-6

Realtors®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as Realtors.

Example: One of my agents wants to sell her home without listing the property with our firm or any other firm. She’s not advertising the property through the MLS, either. What disclosure must she make about her status as a real estate agent?

Answer: She should inform any buyer that she is a licensed real estate sales agent acting on her own behalf—either in writing before entering into a sales contract or by disclosing the information in Paragraph 4 of the sales contract. This disclosure is required by TREC rules.*

*Texas Real Estate Commission Rules:
Part 23 Texas Real Estate Commission
Chapter 535 General Provisions
Subchapter N Suspension and Revocation of Licensure
Rule §535.144 When Acquiring or Disposing of Own Property or Property of Spouse, Parent or Child
*(a) For purposes of §1101.652(a-1)(1) of the Act "license holder" includes a license holder acting on behalf of:

(1) the license holder's spouse, parent or child;
(2) a business entity in which the license holder is more than a 10% owner; or
(3) a trust for which the license holder acts as trustee or of which the license holder or the license holder's spouse, parent or child is a beneficiary.

(b) A license holder engaging in a real estate transaction on his or her own behalf or in a capacity described by subsection (a), is obligated to disclose in writing that he or she is a licensed real estate broker or sales agent acting on his or her own behalf or in a capacity described by subsection (a) in any contract of sale or rental agreement or in any other writing given before entering into any contract of sale or rental agreement.
(c) A license holder acting on his or her own behalf or in a capacity described by subsection (a) shall not use the license holder's expertise to the disadvantage of a person with whom the license holder deals.

In addition, Standard of Practice 12-6 requires REALTORS® to disclose their status as owners or landlords and as REALTORS® or real estate license holders when advertising unlisted real property for sale. Similar rules apply when license holders intend to acquire property on their own behalf.

These disclosure requirements are intended to ensure the public is informed of an agent's license status when buying real estate from the license holder, and to avoid claims that a real estate license holder was using her undisclosed license status and expertise to take advantage of a member of the public.

The Code of Ethics outlines similar requirements in Article 4 and Standard of Practice 4-1.

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

**Standard of Practice 4-1**
For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by Realtors® prior to the signing of any contract.
Standard of Practice 16-10
REALTORS®, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord’s representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord’s representative or broker not later than execution of a purchase agreement or lease.

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

Standard of Practice 16-12
REALTORS®, acting as representatives or brokers of sellers/landlords or as sub-agents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement.

Membership in these organizations allow members and members of the public to file complaints under the Code of Ethics. If found in violation after a hearing of due process comes discipline. Discipline for a violation of an Article or Article of the Code of Ethics are:

Section 14. Nature of Discipline
(a) Letter of Warning with copy to be placed in member’s file;
(b) Letter of Reprimand with copy to be placed in member’s file;
(c) Requirement that member attend the ethics portion of the Board Indoctrination Course or other appropriate course or seminar specified by the Hearing Panel which the respondent could reasonably attend taking into consideration cost, location, and duration;
(d) Appropriate and reasonable fine not to exceed $15,000 (Revised 5/13);
(e) Membership of individual suspended for a stated period not less than thirty (30) days nor more than one (1) year with automatic reinstatement of membership in good standing at the end of the specified period of suspension. The thirty (30) day minimum and one (1) year maximum do not apply where suspension is imposed for a remediable violation of a membership duty (e.g., failure to pay dues or fees or failure to complete educational requirements). The Directors may order suspension unconditionally, or they may, at their discretion, give the disciplined member the option of paying to the Board, within such time as the Directors shall designate, an assessment in an amount fixed by the Directors, which may not exceed $15,000 and which can be utilized only once in any three (3) year period, in lieu of accepting suspension. But, if the conduct for which suspension is ordered consists of failure to submit a dispute to arbitration, the Directors may not permit the disciplined member to avoid suspension without submitting to the arbitration in addition to paying the assessment, unless in the meanwhile the dispute has been submitted to a court of law without any objection by any party that it should be arbitrated; $15,000 is the maximum fine that may be assessed.

(f) Expulsion of individual from membership with no reinstatement privilege for a specified period of one (1) to three (3) years, with reinstatement of membership to be by application only after the specified period of expulsion, on the merits of the application at the time received (decision should be written clearly articulating all intended consequences, including denial of MLS participatory or access privileges); (Revised 4/96)

(g) Suspension or termination of MLS rights and privileges may also be utilized. Suspension of MLS services may be no less than thirty (30) days nor more than one (1) year; termination of MLS services shall be for a stated period of one (1) to three (3) years; (Revised 5/02)

(h) Realtors® who participate in MLS or otherwise access MLS information through any Board or Association in which they do not hold membership are subject to the Code of Ethics in that Board or Association on the same terms and conditions as Board members. Discipline that may be imposed may be the same as but shall not exceed the discipline that may be imposed on members. Boards entering into regional
or reciprocal MLS agreements are encouraged to include provisions requiring signatory Boards to respect, to the extent feasible, decisions rendered by other Boards involving suspension or expulsion from membership or from MLS. (Revised 4/96)

(i) Members may also be required to cease or refrain from continued conduct deemed to be in violation of the Code, or to take affirmative steps to ensure compliance with the Code, within a time period to be determined by the hearing panel. Where discipline is imposed pursuant to this subsection, the decision should also include additional discipline (e.g., suspension or termination of membership) that will be imposed for failure to comply by the date specified, and to continue to comply for a specified period not to exceed three (3) years from the date of required compliance. (Adopted 05/14)

In addition to imposing discipline, the Hearing Panel can also recommend to the Board of Directors that the disciplined member be put on probation. Probation is not a form of discipline. When a member is put on probation the discipline recommended by the Hearing Panel is held in abeyance for a stipulated period of time not longer than one (1) year. Any subsequent finding of a violation of the Code of Ethics during the probationary period may, at the discretion of the Board of Directors, result in the imposition of the suspended discipline. Absent any subsequent findings of a violation during the probationary period, both the probationary status and the suspended discipline are considered fulfilled, and the member’s record will reflect the fulfillment. The fact that one or more forms of discipline will be held in abeyance during the probationary period does not bar imposition of other forms of discipline which will not be held in abeyance. (Revised 05/14)

In addition to any discipline imposed, Boards and Associations may, at their discretion, impose administrative processing fees not to exceed $500 against each respondent found in violation of the Code of Ethics or other membership duties. Any administrative processing fee will be in addition to, and not part of, any disciplinary sanction imposed. Boards and Associations shall determine in advance when, and under what circumstances, administrative processing fees will be imposed so that imposition is a matter of administrative routine. (Revised 5/13)
MLS Rules and Regulations

8.01 The Other Participant shall disclose clearly to the Listing Participant whether the Other Participant is acting as an owner’s subagent or as a buyer’s agent at the first contact with the Listing Participant, whether by telephone, written communication or by face to face contact. If the Other Participant fails to make such disclosure as set forth in the preceding sentence, the Listing Participant should request the Other Participant to make such disclosure prior to concluding such first contact. The failure of the Listing Participant to make such request of the Other Participant shall not waive or release the Other Participant from any obligation to furnish timely the agency disclosure set forth in this section.

You can download the MLS Rules and Regulations here:
http://www.ntreis.net/documents/Forms_18920129199.pdf

The following is the discipline if “Standards of Conduct for Participants, after a hearing, is found in violation of any or all of the following Section 22”.

SECTION 22 - STANDARDS OF CONDUCT FOR PARTICIPANTS

22.01 Participants shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that Other Participants have with clients.

22.02 Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on Listed Property without written consent of the seller/landlord.

22.03 Participants acting as subagents or as buyer/tenant representatives or brokers shall not attempt to extend a Listing Participant’s offer of cooperation and/or compensation to other brokers without the consent of the Listing Participant.

22.04 Participants shall not solicit a listing which is currently listed exclusively with another Participant. However, if the Listing Participant, when asked by another
Participant, refuses to disclose the expiration date and nature of such listing, i.e., an exclusive right to sell, an exclusive agency, or other form of contractual agreement between the Listing Participant and the owner, the Other Participant may contact the owner to secure such information and may discuss the terms upon which the Other Participant might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing.

22.05 Participants shall not solicit buyer/tenant agency agreements from buyers/tenants who are subject to exclusive buyer/tenant agency agreements. However, if a buyer/tenant agent, when asked by another Participant, refuses to disclose the expiration date of the exclusive buyer/tenant agency agreement, the Other Participant may contact the buyer/tenant to secure such information and may discuss the terms upon which the Other Participant might enter into a future buyer/tenant agency agreement or, alternatively, may enter into a buyer/tenant agency agreement to become effective upon the expiration of any existing exclusive buyer/tenant agency agreement.

22.06 Participants shall not use information obtained from the Listing Participant, through offers to cooperate received through MLS or other sources authorized by the Listing Participant, for the purpose of creating a referral prospect to a third broker, or for creating a buyer/tenant prospect unless such use is authorized by the Listing Participant.

22.07 The fact that an agency agreement has been entered into with a Participant does not preclude or inhibit any Other Participant from entering into a similar agreement after the expiration of the prior agreement.

22.08 The fact that a prospect has retained a Participant as an exclusive representative or exclusive broker in one or more past transactions does not preclude Other Participants from seeking such prospect’s future business.
22.09 Participants are free to enter into contractual relationships or to negotiate with sellers/landlords, buyers/tenants, or others who are not represented by an exclusive agent but shall not knowingly obligate them to pay more than one commission except with their informed consent.

22.10 When a Participant is contacted by the client of another Participant regarding the creation of an agency relationship to provide the same type of service, and such Participant has not directly or indirectly initiated such discussions, such Participant may discuss the terms upon which such Participant might enter into a future agency agreement or, alternatively, may enter into an agency agreement which becomes effective upon expiration of any existing exclusive agreement.

22.11 In cooperative transactions, Participants shall only compensate Other Participants (principal brokers) and shall not compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with Other Participants without the prior express knowledge and consent of the Other Participant.

22.12
   a) Participants are not precluded from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another Participant. A general telephone canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed "general" for purposes of this rule.
   b) The following types of solicitations by Participants and Subscribers are prohibited:
      i) Telephone or personal solicitations of property owners whose properties are exclusively listed with another Participant and who have been identified by a real estate sign, multiple listing compilation, or other information
service as having exclusively listed their property with another Participant; and
ii) Mail or other forms of written solicitations of prospects whose properties are exclusively listed with another Participant when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, “for sale” or “for rent” signs, or other sources of information intended to foster cooperation with Participants.

22.13 Prior to entering into a representation agreement, Participants have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid, exclusive agreement with another broker to provide the same type of real estate service.

22.14 Participants, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord’s representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord’s representative or broker not later than execution of a purchase agreement or lease.

22.15 On unlisted property, Participants acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact with the seller/landlord on behalf of that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. Such Participants shall make any request for anticipated compensation from the seller/landlord at first contact.

22.16 Participants, acting as representatives or brokers of sellers/landlords or as subagents of Listing Participants, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement.
22.17 Participants are not precluded from contacting the client of another Participant for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers’ exclusive agreements. However, information received through the MLS or any other offer of cooperation may not be used to target clients of Other Participants to whom such offers to provide services may be made.

22.18 Participants, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the Listing Participant’s offer of compensation to subagents or buyer/tenant representatives or brokers or make the submission of an executed offer to purchase/lease contingent on the Listing Participant’s agreement to modify the offer of compensation.

22.19 All dealings concerning exclusively Listed Property, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client’s representative or broker, and not with the client. Before providing substantive services (such as writing a purchase offer or presenting a Competitive Market Analysis) to prospects, Participants shall ask prospects whether they are a party to any exclusive representation agreement. Participants shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements.

22.20 These Rules are not intended to prohibit ethical albeit aggressive or innovative business practices, and do not prohibit disagreements with Other Participants involving commissions, fees, compensation, or other forms of payment or expenses.

22.21 Participants shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices nor shall Participants make false or misleading claims about their own
businesses to include but not limited to, falsification of comparable data reported to the MLS.

22.22 Participants and Subscribers, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This requirement does not preclude Participants from establishing agreements with the associated licensees governing assignability of exclusive agreements.

(Reference: http://www.ntreis.net/resources/forms.asp)

Multiple listing membership consists of participants and subscribers. Participants are the broker or appraiser and the subscribers are the sales agents or broker associates.

Multiple listing service discipline includes:
- Fines
- Suspension from MLS
- Letter of Reprimand in member’s file.
- Letter of Warning in member’s file.

If you compare the Texas Real Estate Commission License Act, the REALTOR Code of Ethics and the MLS Rules and Regulations, they are very comparable in the conduct and actions of the license holder.

Through the courts a lawsuit can be overwhelming and costly; through the Texas Real Estate Commission a complaint can be costly and result in the loss of your license; through the REALTOR® family if a complaint is filed and after a hearing found guilty of the Code of Ethics, it can be costly and embarrassing with part of the discipline requiring more education; an MLS complaint and after a hearing a fine or suspension from MLS could be the results.
The REALTOR® process and the Texas Real Estate Commission is more effective and keeps members in line as to what is required to have a real estate license. The REALTOR® will always come through this process before going to the courts. The time and expense is triple what you would pay by going through the entities that you have a available to you by having a Texas Real Estate License.

Your resources for filing a complaint or for additional services are:

- Texas Association of REALTORS® for ethics and Commission.
- MLS for MLS infractions on the rules
- Texas Real Estate Commission only for infractions to the License Act. The Commission does not handle Commission disputes or listing agreements.
- Texas Association of REALTORS® has many services for its members: additional forms for transactions and disclosures, a legal hotline to call anytime to ask a legal question and exceptional training to advance your career.

Websites to refer too:

- Texas Association of REALTORS®: https://www.texasrealestate.com/
- MLS: http://www.ntreis.net/resources/forms.asp
- Texas Real Estate Commission: http://www.trec.texas.gov/
- Texas Real Estate Commission License Act:
  http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
- Texas Real Estate Commission Rules:

All of the information applies to third parties and other brokers as well as the seller representative, buyer representative, tenant representative and landlord representative.
You as the license holder need to know how to apply these rules and regulations in every transaction.

If you represent the seller you need to know what your duties are to the seller, the buyer-broker and his or her client.

If you represent the buyer you need to know what your duties are to the buyer, listing broker and his or her client the seller.

If you represent the seller and a sub-agent brings an offer on your listing you need to know what your duties are to the sub-agent, customer and your seller. Clarify from the sub-agent that they have informed the buyer that the sub-agent represents the seller and not the customer. You need to have documentation to that affect to inform your seller, the sub-agent represents him or her. To protect your seller and yourself, you need to be sure you have confirmation that the buyer understands they have no representation by any license holder. That you and the sub-agent represent the seller. Read your Broker’s Policy and Procedures Manual on how to handle.

Other third parties can be appraisers, lenders, title company closers, inspectors and surveyors. No one represents them and they are not to be given any confidential information about your client.

Inspection reports are confidential and cannot be given to anyone except the buyer by the inspector. The inspector has an agency relationship with the buyer and the inspector is representing them during the inspection. The inspector cannot discuss the results of the inspection except with the buyer. The buyer would have to give permission to the inspector to give a copy to anyone else. As a seller’s agent, you want to know what repairs are needed or just what the report said, you cannot expect the inspector to tell you or give you the report without the buyer’s permission.
The title company is the agent of the buyer and seller, with limited authority. They cannot share information without the buyer or seller’s authorization.

The appraiser is an agent for the lender. He is not at liberty to give out information unless the lender allows.

The mortgage company is the agent of the buyer, again the confidentiality plays a big part and none of his or her information can be shared without his or her permission. So everyone has an agent in one way or the other. Can you tell who the third parties are in your transaction?

**Non-Fiduciary Duties Including Honesty and Fairness**

A duty of honesty and fairness is owed to non-principals, customers, other brokers, customers, member of the public and vendors to the transaction.

- All parties are entitled to complete disclosure regarding the property. The Texas Real Estate License Act, Tex. Occ. Code 1101.652(b)(3) and (4)
- All parties are entitled to know who the broker is representing. Tex. Occ. Code 1101.652(b)(7)
- A broker is obligated to advise all parties to have the abstract examined Tex. Occ. Code 1101.652(b)(29)
- If a broker or agent receives a request for a copy of a document by a person that signed the document, the licensee is obligated to return the document. Tex. Occ. Code 1101.652(b)(28)
- All licensees, when engaging in real estate on their own behalf, are obligated to inform anyone in the transaction they are licensed and shall not use their expertise to the disadvantage of any party. TREC Rules 535.144.
Definition of and Obligations to Non-Principals and Third Parties

In property management, there may be obligations to a vendor in the transaction. Brokers contract with vendors for service to maintain or repair the properties. Vendors expect to be paid. If the agent works within the scope of their authority and the vendor knows who the owner is, the agent is normally not liable for the debt.

If a vendor relied on the fact he believed the agent was acting under authority from the principal/owner the principal may still be liable to the vendor; however, if the agent was acting outside their scope of authority the owner may have a cause of action against the license holder. If the vendor never knows the identity of the owner, the license holder will probably be liable to the vendor for payment. This is why you need to tell the vendor who you represent.

Avoiding Disclosure and Misrepresentation Problems

The broker, as the listing agent, has an obligation to use their best efforts and diligence to market the property according to the principal’s instructions. The broker has the obligation to obtain the best price available for the principal.

The broker (and all of the broker’s sales agents) owe the principal 100% loyalty. Loyalty also means the agent will not put their own interest ahead of the client’s interest. Putting the client’s interest first is the essence of the agent’s fiduciary responsibility. A broker that puts their own interest above that of the client may face breach of fiduciary duties allegations.

When one broker represents both the buyer and the seller in one transaction, the conflict is resolved by the intermediary relationship as defined by the act. It is important to follow the procedures defined in the Act. We will learn about the procedures in Lesson Six.
Texas Real Estate Commission Rules require that the license holder disclose all known information that may affect the principal's decision to accept or reject offers, or buy or reject the property, and keep the principal informed of all significant information.

A broker must ascertain a seller knows about any appreciation in value before agreeing to sell the property. If a broker has more than a 10% interest in the entity purchasing the property, it must be disclosed to the seller. If a broker is working on behalf of his spouse, parent or child must be disclosed (Texas Real Estate Commission Rule 535.144 (b)). A broker must exercise competence and skill to protect the client from harm.

(a) For purposes of §1101.652(a-1)(1) of the Act "license holder" includes a license holder acting on behalf of:
   (1) the license holder's spouse, parent or child;
   (2) a business entity in which the license holder is more than a 10% owner; or
   (3) a trust for which the license holder acts as trustee or of which the license holder or the license holder's spouse, parent or child is a beneficiary.

(b) A license holder engaging in a real estate transaction on his or her own behalf or in a capacity described by subsection (a), is obligated to disclose in writing that he or she is a licensed real estate broker or sales agent acting on his or her own behalf or in a capacity described by subsection (a) in any contract of sale or rental agreement or in any other writing given before entering into any contract of sale or rental agreement.

(c) A license holder acting on his or her own behalf or in a capacity described by subsection (a) shall not use the license holder's expertise to the disadvantage of a person with whom the license holder deals.

All money must be timely deposited into a properly set up escrow account. The broker must never comingle escrow money with their own funds.
Texas Real Estate Commission Rules §535.146 Maintaining Trust Money

(a) Definitions. In this section:

(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 than 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.

Note: Sales agents cannot open escrow or trust accounts in their name. Only brokers can have trust accounts to hold money for clients. Most purchase money escrow is held by a title company that is also acting as the escrow agent for the transaction.

Brokers cannot collect undisclosed rebates, bonuses or profit on expenses without disclosure to and approval from their client. Any monies paid, that are not the commission, must be on the closing statement.
This is in the Texas Real Estate Commission and the REALTOR Code of Ethics.

Article 6
REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client's knowledge and consent.

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

Standard of Practice 6-1
REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion.

Listing agents have to be particularly careful to disclose things they know about the property.

One area that has caused litigation in more than one situation is square footage. Your broker will probably not want you to take on the responsibility of measuring the property. Sales agents must be cautious to tell members of the public when they are relying on the information from a third party. Most brokers use the square footage “as per the tax rolls” or “per appraisal”. Builder plans should not be used because they are not accurate. It has been proven the building spec-plan square footage is never the same as the finished product. Ask your broker and errors and omission insurance company. The square footage can be a major discrepancy and very liable if you quote from a source that should not be used.
Always disclose the source of your information when you are relying on the words of other sources (i.e. “The seller says there are hardwood floors under the carpet.”). Verify or do not advertise.

Other things agents need to ask questions about and disclose include:

- Zoning
- Previous inspection reports
- History of foundation or other repairs
- Municipal utility districts

A seller of real estate in Texas may be required to provide to a buyer one or more notices regarding the property in question. Failure to provide the proper notice may result in liability for the seller of the real estate and/or the real estate licensee handling the transaction.

**MUD Notice Information**

If a property is located within a Municipal Utility District (MUD), the seller is required by the Texas Water Code to provide to a buyer, prior to the buyer's entering into a sales contract, a notice regarding the MUD in which the property is located. The notice provides information regarding the tax rate, bonded indebtedness, and standby fee, if any, of the MUD.

A seller will typically know if a MUD is providing service to a property because the MUD assessment will be listed on the tax bill that the county sends to the property owner. The property seller will frequently not; however, have access to the MUD notice required to be given to the buyer and may require the assistance of a real estate licensee to obtain the proper notice. One method you may use to obtain the proper notice is to contact an agent for the MUD and request a copy of the most current notice. The name, address, and phone number of all MUDs in Texas are available through the Texas Commission on Environmental Quality's website.
After entering the website, you may look up any MUD by going to the first search field entitled "Search by Water District Name or Number". Type in the name of the MUD for which you are seeking information and press enter. The website will provide information regarding that MUD, including contact information for the MUD's agent. You may then contact the MUD's agent to obtain a copy of the current notice form.

Section 49.455(b)(9) of the Water Code requires that all MUDs file the particular form of Notice to Purchasers that the seller must furnish to a buyer in the property records of the county in which the MUD is located with all information completed.

**Certificated Service Area Information**
When a retail water or wastewater utility obtains a certificate of convenience and necessity (CCN) from the Public Utility Commission of Texas (PUC), it secures the exclusive right to supply water or sewer service to a specified area. This type of entity is referred to as a certificated service area.

**Background and Notice Required**
In some cases, individuals purchase lots for residential or commercial purposes without realizing that the extension of water or sewer services may require additional expense on the individual's part, and that there might be a delay in the utility's ability to provide the services. This is problematic in areas served by private utilities, nonprofit water supply and sewer service corporations, and special utility districts, which typically have service areas outside a municipality's jurisdiction.

Except in connection with certain specified transactions and interests (such as mortgages, leases, and sales of governmental properties, among others), Section 13.257 of the Water Code requires sellers of property located outside a municipality's jurisdiction to provide a statutory notice to a purchaser of unimproved real property that extension of water or sewer services may require additional expense on the individual's part and that there might be a delay in the utility's ability to provide the services. The notice must be executed by seller and purchaser either as a separate document or as part of the contract.
of sale and must be provided to the purchaser before the execution of the contract. TAR’s unimproved property contract forms satisfy this requirement: see Paragraph 6(E)(6) of Form 1607, Unimproved Property Contract (for residential sales), and Paragraph 25(C) of Form 1807, Commercial Contract—Unimproved Property. In addition, at the closing, the seller and purchaser must execute and acknowledge a separate copy of the notice with current information and subsequently record it in the real property records of the county in which the property is located.

If the seller fails to provide the notice, the purchaser may terminate the contract; however, if the seller provides the notice at or before the closing of the purchase and sale contract and the purchaser elects to close despite the seller’s failure to timely provide the notice at the time of contract execution, then the purchaser waives his or her rights to terminate the contract and recover damages.

**Obtaining Information Regarding Certificated Service Areas**

If the seller of an unimproved property that is not currently receiving water or wastewater service does not know the name of the certificated service provider for the property, it is possible to search the PUC’s Water and Sewer CCN Viewer by property address to obtain that information.

*(Reference: Texas Association of REALTORS)*

**Man Made Lakes and Who Owns the Land Underneath the Water**

If you have a listing where the buyer wants to construct waster facilities on the lake in front of the property, verify who owns the land under the water.
INFORMATION ABOUT ON-SITE SEWER FACILITY

CONCERNING THE PROPERTY AT ______________

A. DESCRIPTION OF ON-SITE SEWER FACILITY ON PROPERTY:

(1) Type of Treatment System: □ Septic Tank □ Aerobic Treatment □ Unknown
    ____________________________________________________________

(2) Type of Distribution System: ________________________________ □ Unknown
    ____________________________________________________________

(3) Approximate Location of Drain Field or Distribution System: __________
    ____________________________________________________________

(4) Installer: ________________________________________________ □ Unknown
    ____________________________________________________________

(5) Approximate Age: _________________________________________ □ Unknown
    ____________________________________________________________

B. MAINTENANCE INFORMATION:

(1) Is Seller aware of any maintenance contract in effect for the on-site sewer facility? □ Yes □ No
    If yes, name of maintenance contractor: _________________________
    Phone: ___________________________ contract expiration date: ______
    (Maintenance contracts must be in effect to operate aerobic treatment and certain non-standard on-site sewer facilities.)

(2) Approximate date any tanks were last pumped? ________________
    ____________________________________________________________

(3) Is Seller aware of any defect or malfunction in the on-site sewer facility? □ Yes □ No
    If yes, explain: ______________________________________________
    ____________________________________________________________

(4) Does Seller have manufacturer or warranty information available for review? □ Yes □ No
    ____________________________________________________________

C. PLANNING MATERIALS, PERMITS, AND CONTRACTS:

(1) The following items concerning the on-site sewer facility are attached:
    □ planning materials □ permit for original installation □ final inspection when OSSF was installed
    □ maintenance contract □ manufacturer information □ warranty information □ ______________
    ____________________________________________________________

(2) “Planning materials” are the supporting materials that describe the on-site sewer facility that are submitted to the permitting authority in order to obtain a permit to install the on-site sewer facility.

(3) It may be necessary for a buyer to have the permit to operate an on-site sewer facility transferred to the buyer.
Lead Based Paint Disclosures
Federal law requires that potential properties that were built before 1978 disclose the possibility that the property has lead based paint in the home. Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X, to protect families from exposure to lead from paint, dust, and soil. Section 1018 of this law directed HUD and EPA to require the disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of housing built before 1978.

Before ratification of a contract for housing sale or lease, sellers and landlords must:

- Give an EPA-approved information pamphlet on identifying and controlling lead-based paint hazards ("Protect Your Family From Lead In Your Home" pamphlet, currently available in English, Spanish, Vietnamese, Russian, Arabic, Somali).
- Disclose any known information concerning lead-based paint or lead-based paint hazards. The seller or landlord must also disclose information such as the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.
- Provide any records and reports on lead-based paint and/or lead-based paint hazards which are available to the seller or landlord (for multi-unit buildings, this requirement includes records and reports concerning common areas and other units, when such information was obtained as a result of a building-wide evaluation).
- Include an attachment to the contract or lease (or language inserted in the lease itself) which includes a Lead Warning Statement and confirms that the seller or landlord has complied with all notification requirements. This attachment is to be provided in the same language used in the rest of the contract. Sellers or landlords, and agents, as well as homebuyers or tenants, must sign and date the attachment.
- Sellers must provide homebuyers a 10-day period to conduct a paint inspection or risk assessment for lead-based paint or lead-based paint hazards. Parties may mutually agree, in writing, to lengthen or shorten the time period for inspection. Homebuyers may waive this inspection opportunity.

The regulations became effective on September 6, 1996 for transactions involving owners of more than four residential dwellings and on December 6, 1996 for transactions involving owners of 1 to 4 residential dwellings.

Sellers and lessors must retain a copy of the disclosures for no less than three years from the date of sale or the date the leasing period begins.
Section 5.008 of the Texas Property Code

Section 5.008, Texas Property Code, provides as follows:

5.008. SELLER'S DISCLOSURE OF PROPERTY CONDITION.

(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed by this section.
(b) The notice must be executed and must, at a minimum, read substantially similar to the following: [See TREC No. OP-H]

(c) A seller or seller's agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV related illnesses, or HIV infection.

(d) The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice and by that act is in compliance with this section.

(e) This section does not apply to a transfer:
   (1) pursuant to a court order or foreclosure sale;
   (2) by a trustee in bankruptcy;
   (3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
   (4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
   (5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
   (6) from one co-owner to one or more other co-owners;
   (7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;
(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;
(9) to or from any governmental entity;
(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or
(11) of real property where the value of any dwelling does not exceed five percent of the value of the property.

(f) The notice shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. **If a contract is entered without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within seven days after receiving the notice.**

**TREC form OP-H** is exactly like the law requires. This Seller’s Disclosure is an optional form furnished by the Texas Real Estate Commission. Other organizations also provide Seller’s Disclosure Notices. Some brokers provide their own Seller’s Disclosures. All of the notices must include the things required by the Property Code. Many of the forms add additional items to the required forms that provide valuable information about the property to the potential buyers.

The more the buyer knows about the property, before deciding to purchase the property, the less likely the seller or the agents will experience future litigation.

The seller’s disclosure of property condition is required. The form they use to give the disclosure is optional.

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

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**SELLER’S DISCLOSURE OF PROPERTY CONDITION**

CONCERNING THE PROPERTY AT: ____________________________________________________________

This notice is a disclosure of seller’s knowledge of the condition of the property as of the date signed by seller and is not a substitute for any inspections or warranties the purchaser may wish to obtain. It is not a warranty of any kind by seller or seller’s agents.

Seller ___ is ___ not occupying the Property. If unoccupied, how long since Seller has occupied the Property? ____________________________________________________________

1. The Property has the items checked below [Write Yes (Y), No (N), or Unknown (U)]:

<table>
<thead>
<tr>
<th>Item</th>
<th>Yes</th>
<th>No</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Range</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dishwasher</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washer/Dryer Hookups</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Security System</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Oven</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trash Compactor</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Window Screens</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fire Detection Equipment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Smoke Detector</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Smoke Detector-Hearing Impaired</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carbon Monoxide Alarm</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Emergency Escape Ladder(s)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TV Antenna</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ceiling Fan(s)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central A/C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plumbing System</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Patio/Decking</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pool</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pool Equipment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fireplaces &amp; Chimney</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Wood burning)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Microwave</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Disposal</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Rain Gutters</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intercom System</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Cable TV Wiring</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attic Fan(s)</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Wall/Window Air Conditioning</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Public Sewer System</td>
<td></td>
<td></td>
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<tr>
<td>Outdoor Grill</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Sauna</td>
<td></td>
<td></td>
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<tr>
<td>Pool Heater</td>
<td></td>
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<td></td>
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<tr>
<td>Automatic Lawn Sprinkler System</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fireplaces &amp; Chimney</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Mock)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Natural Gas Lines</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liquid Propane Gas</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Garage: ___ Attached</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Garage Door Opener(s)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water Heater:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water Supply:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roof Type: ___</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age: (approx.)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair? ___ Yes ___ No ___ Unknown. If yes, then describe. (Attach additional sheets if necessary): ____________________________________________________________

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2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766, Health and Safety Code? [ ] Yes [ ] No [ ] Unknown. If the answer to this question is no or unknown, explain (Attach additional sheets if necessary):

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer’s family who will reside in the dwelling is hearing impaired; (2) the buyer has given the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for the installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

<table>
<thead>
<tr>
<th>Interior Walls</th>
<th>Ceilings</th>
<th>Floors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exterior Walls</td>
<td>Doors</td>
<td>Windows</td>
</tr>
<tr>
<td>Roof</td>
<td>Foundation/Slab(s)</td>
<td>Sidewalks</td>
</tr>
<tr>
<td>Walls/Fences</td>
<td>Driveways</td>
<td>Intercom System</td>
</tr>
<tr>
<td>Plumbing/Sewers/Septics</td>
<td>Electrical Systems</td>
<td>Lighting Fixtures</td>
</tr>
</tbody>
</table>

Other Structural Components (Describe):

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

4. Are you (Seller) aware of any of the following conditions? Write Yes (Y) if you are aware, write No (N) if you are not aware.

- Active Termites (includes wood destroying insects)
- Previous Structural or Roof Repair
- Termite or Wood Rot Damage Needing Repair
- Hazardous or Toxic Waste
- Previous Termites Damage
- Asbestos Components
- Previous Termites Treatment
- Urea-formaldehyde Insulation
- Previous Flooding
- Radon Gas
- Improper Drainage
- Lead Based Paint
- Water Penetration
- Aluminum Wiring
- Located in 100-Year Floodplain
- Previous Fires
- Present Flood Insurance Coverage
- Unplatted Easements
- Landfill, Settling, Soil Movement, Fault Lines
- Subsurface Structure or Pits
- Single Blockable Main Drain in Pool/Hot Tub/Spa*
- Previous Use of Premises for Manufacture of Methamphetamine

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

* A single blockable main drain may create a suction entrapment hazard for an individual.
Seller's Disclosure Notice Concerning the Property at ____________________________

5. Are you (Seller) aware of any item, equipment, or system in or on the property that is in need of repair? ☐ Yes (if you are aware) ☐ No (if you are not aware) If yes, explain. (Attach additional sheets if necessary):

6. Are you (Seller) aware of any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

☐ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.
☐ Homeowners' Association or maintenance fees or assessments.
☐ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.
☐ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.
☐ Any lawsuits directly or indirectly affecting the Property.
☐ Any condition on the Property which materially affects the physical health or safety of an individual.
☐ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.
☐ Any portion of the property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

7. If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

Signature of Seller ____________________________ Date ____________________________
Signature of Seller ____________________________ Date ____________________________

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Signature of Purchaser ____________________________ Date ____________________________
Signature of Purchaser ____________________________ Date ____________________________

TREC No. OP-H
Recommend Inspections

Recommend that the buyer have an inspection performed by a professional property inspector. You can provide a list of qualified inspectors to the prospective buyer, but you should not be present to mediate the conversation between the inspector and the prospective buyer. Make sure that you do not appear to require the buyer to use any particular inspector; this should always be the buyer’s choice.

If the initial inspection reveals defects in the property and the appropriate repairs are made, encourage the prospective buyer to review the property a second time to ensure that the repairs were done to his or her satisfaction.

If the buyer does not want to have an inspection done, you may want to have him or her sign or initial a statement that says that you recommended that he or she obtain an inspection.

Avoid Stating Personal Opinions

Be careful when stating personal opinions to any one about the property. Make sure that you have a source for any fact or opinion you state about the property. Watch words and phrases like “Original”, “New”, “Finest quality”, “No problem” or “This problem will only need a small repair”. A consumer could make a lawsuit out of those seemingly innocent phrases under the Deceptive Trade Act.

It is the license holder’s responsibility to provide known facts about the property, not opinions. If an opinion is asked of the license holder, he or she should refer the consumer to a specialist (property inspector, attorney, licensed vendor, plumber, etc.) who can provide unbiased and informed assistance to the consumer. Avoid, however, recommending a specific inspector. If the consumer is dissatisfied with the work of that individual, the license holder could be held liable. The Texas Real Estate Commission lists all the licensed inspectors in Texas on their website:

http://www.trec.texas.gov/inspector/default.asp
Keep detailed notes of the entire transaction, from the first meeting to closing. This will provide you with a paper trail in case litigation or an investigation ever does occur.

**Salesperson Liable for Nondisclosure**
In 2013, a federal district court in Kansas found a real estate salesperson (“Buyers’ Representative”) liable for failing to disclose to his clients (“Buyers”) the existence of a dam on the purchased property and a related agreement with the local government that required Buyers to maintain the dam.
In 1981, Dan Rich and his family (“Sellers”) purchased land on which an earthen dam, built by the Soil Conservation Service in 1951, is located. At the time of purchase, Sellers entered into an agreement (“Agreement”) with the City of Hutchinson (“City”) that required Sellers to maintain the dam including, at their own expense, removing tree growth from the dam. Under the Agreement, the duty to maintain the dam would be passed on to any future buyers of the property. The Agreement was recorded with the County Register of Deeds.

Sellers built a home on the property and moved in. Over the years, Sellers received numerous notices from the City and the Kansas Department of Water Resources informing them that they were failing to comply with their dam maintenance duties. While the letters threatened to take action against Sellers if they did not come into compliance, no such action was ever taken, and tree growth on the dam continued unhindered.

In 2008, Sellers retained Karen Gilliland (“Sellers’ Representative”), a real estate broker with Astle Realty, to list the property for sale. Sellers informed Sellers’ Representative of the dam and told her about the Agreement, including the fact that it had been registered with the County. Sellers filled out a disclosure statement which failed to identify either the dam or the existence of the Agreement, and Sellers’ Representative listed the property on the MLS without disclosing the existence of the dam or the Agreement.

Soon after the property was listed, Buyers expressed an interest in purchasing it and entered into an exclusive buyer agency agreement with Buyers’ Representative, a salesperson with Astle Realty. The buyer agency agreement required Buyers’ Representative to disclose all known adverse material facts to Buyers.

Prior to an offer being made, Buyers’ Representative and Sellers' Representative met to discuss the property. At this meeting, they discussed the existence of the dam, and Sellers’ Representative informed Buyers’ Representative of the Agreement and Sellers’ ongoing obligations to maintain the dam.
Buyers’ Representative never disclosed the existence of the dam or the Agreement to Buyers. Later that year, Buyers purchased the property. Soon after that, Buyers became aware of the Agreement and their duties, as owners of the land, to maintain the dam. (At trial, Buyers testified that they had been unaware of the very existence of the dam until after the purchase, but the Court discredited this testimony as unbelievable.) Buyers also discovered that the work required to bring the dam into compliance could cost them up to a million dollars.

Buyers sued Buyers’ Representative, Sellers’ Representative, and Astle Realty. Their claims against Sellers’ Representative included fraud by silence, negligent misrepresentation, and violations of the Kansas Consumer Protection Act. Their claim against Buyers’ Representative and Astle Realty was for breach of contract under the exclusive buyer’s agreement.

The court dismissed all claims against Sellers’ Representative, holding that under Kansas law, a seller’s agent owes no duty to a buyer except to disclose all adverse material facts actually known by the agent. In addition, a seller’s agent has no duty to conduct independent inspections of property or to verify the accuracy or completeness of any statements made by the seller. Sellers’ Representative’s only duty to Buyers was to “competently pass on what was known,” and the court held that by informing Buyers’ Representative of the dam and the maintenance duties imposed on Buyer by the Agreement, Sellers’ Representative had fulfilled such duties.

However, the court did find that Buyers’ Representative and Astle Realty had breached the exclusive buyer agency agreement entered into with Buyers. Because Sellers’ Representative had informed Buyers’ Representative of the existence of the Agreement and the duties it imposed, and Buyers’ Representative had failed to pass along this information to his clients, he and Astle Realty breached their contractual obligation to disclose all adverse material facts known to them about the property. The court imposed damages of $202,500 against Buyers’ Representative and Astle Realty, finding that this award would suffice to cover the Buyers’ costs of tree removal.
TEXAS REAL ESTATE CONSUMER NOTICE
CONCERNING
HAZARDS OR DEFICIENCIES

Each year, Texans sustain property damage and are injured by accidents in the home. While some accidents may not be avoidable, many other accidents, injuries, and deaths may be avoided through the identification and repair of certain hazardous conditions. Examples of such hazards include:

- malfunctioning, improperly installed, or missing ground fault circuit protection (GFCI) devices for electrical receptacles in garages, bathrooms, kitchens, and exterior areas;
- malfunctioning arc fault protection (AFCI) devices;
- ordinary glass in locations where modern construction techniques call for safety glass;
- malfunctioning or lack of fire safety features, such as smoke alarms, fire-rated doors in certain locations, and functional emergency escape and rescue openings in bedrooms;
- malfunctioning carbon monoxide alarms;
- excessive spacing between balusters on stairways and porches;
- improperly installed appliances;
- improperly installed or defective safety devices;
- lack of electrical bonding and grounding; and
- lack of bonding on gas piping, including corrugated stainless steel tubing (CSST).

To ensure that consumers are informed of hazards such as those, the Texas Real Estate Commission (TREC) has adopted Standards of Practice requiring licensed inspectors to report these conditions as "Deficient" when performing an inspection for a buyer or seller, if they can be reasonably determined.

These conditions may not have violated building codes or common practices at the time of the construction of the home, or they may have been "grandfathered" because they were present prior to the adoption of codes prohibiting such conditions. While the TREC Standards of Practice do not require inspectors to perform a code compliance inspection, TREC considers the potential for injury or property loss from the hazards addressed in the Standards of Practice to be significant enough to warrant this notice.

Contract forms developed by TREC for use by its real estate license holders also inform the buyer of the right to have the home inspected and can provide an option clause permitting the buyer to terminate the contract within a specified time. Neither the Standards of Practice nor the TREC contract forms require a seller to remedy conditions revealed by an inspection. The decision to correct a hazard or any deficiency identified in an inspection report is left to the parties to the contract for the sale or purchase of the home.
Stigmatized Property

Buyers may not buy stigmatized property because of something that happened there, rather than a property condition. Some of the things that may stigmatize a property are meth lab, drugs, homeless occupants, murder, crime, death in a property, ghosts, ethnic rituals or beliefs, etc. Many times the property sells, but at a lower than market value price. These issues bring up many questions for real estate licensees.

In real estate, stigmatized property is property which buyers or tenants may shun for reasons that are unrelated to its physical condition or features. These can include death of an occupant, murder, suicide, serious illness such as AIDS, and belief that a house is haunted. The concept is controversial and subject to personal opinions. The following article by Ken LaMance discusses selling stigmatized properties:

What is Stigmatized Property?

Stigmatized property is a home or apartment where there has been a suicide, murder, cult activity, AIDS, famous adulteries, or other misfortunes and crimes. Examples include the house that Nicole Simpson was murdered in, which sold for much less than desired. Homes that Christie Brinkley’s ex-husband had affairs in had to be taken off the market.

The general rule in property buying and selling is caveat emptor—let the buyer beware. Also, a seller cannot be held responsible for failing to do something. Based on these traditional legal rules, sellers do not have to tell buyers whether the property is stigmatized.

Are There Any Exceptions to Caveat Emptor?

The main exception to this rule, however, is where the seller makes a “misrepresentation,” or lies, about an aspect of the house. A seller has a duty to reply truthfully about important facts, and in a manner not aimed
toward misleading the buyer. Even silence or evasive answers can constitute a misrepresentation if an average buyer would have been misled.

The next exception to the general rules is that a seller must disclose an important fact affecting the price of the property where that fact would not have been thought of by the buyer. For example, in some states, a buyer must inform a seller that a house is haunted, because a reasonably prudent buyer could not be expected to take this possibility into consideration.

However, sellers do not have to tell buyers if previous owners had AIDS or if registered sex offenders live nearby. The buyer is responsible for finding out this information on her own. Ultimately, a seller should use commonsense and disclose information that materially affects the price of the property, and that the buyer wouldn’t have been expected to ask about.

**What Types of Stigmas Must Be Disclosed?**

The seller has the duty to disclose stigmas which could affect the value of the property. These stigmas can include, but are not limited to:

- **Phenomena—Haunting**, ghost sightings and any other unexplained events which could affect the value of the property must be disclosed.

- **Murder/Suicide**—Some states require that murders and suicides which took place on the property be disclosed to the buyers. Many of these laws have a time limit though. For example, California only requires that the deaths be disclosed if they took place within the last three years.

- **Other Criminal Activity**—Most states require that criminal activity be disclosed, such as drug dealing or prostitution.
• Debt—Some states require that outstanding debt from the previous owner be disclosed so that buyers can be forewarned about harassing calls and visits from creditors.

Should My Agent Disclose the History of My Property?
The answer will be on a state by state basis. If your property is in California, for example, you and your real estate agent have an obligation to disclose murders or suicides. In Tennessee though, no such duty exists. In a state which does not require stigmatized property to be disclosed, a seller's agent can be liable for breaking the fiduciary relationship if the agent discloses the information without your permission.

What Should I Do if I Bought Property and Discover It Is Stigmatized?
You may want to consult an attorney. In a lawsuit against the seller you may be entitled to compensation for any necessary repairs. An experienced real property lawyer can advise you of your rights and represent you in court.


Each state has their own laws regarding stigmatized property issues. The Texas Real Estate License Act answers some of those questions.

Sec. 1101.556. DISCLOSURE OF CERTAIN INFORMATION RELATING TO OCCUPANTS.
Notwithstanding other law, a license holder is not required to inquire about, disclose, or release information relating to whether:

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

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

The two things covered in 1101.556 are very different.

(1) Aids and HIV illnesses are included in the handicapped laws of the Federal Fair Housing Act. For this reason having aids or an HIV illness, is a protected class. Disclosure of protected classes is not permitted.

(2) Even though, license holders are not required to disclose the death on a property from natural causes, suicide, or accident unrelated to the property it is not prohibited.

Notice the law does not cover murder, homicide or death caused because of the property so disclosure would be advisable. Ask your broker how he or she wants you to handle this. Many times when a murder has taken place the property has also become notorious, which is also a disclosure issue. If pictures of the property have been on TV or the address in the newspaper, the average buyer will want to know, and the law would say is entitled to know.

Texas law also says that neither the seller nor the license holder has any duty to disclose registered sex offenders. Again the disclosure is not prohibited it is just not required.

If you are selling a family with children you might want to consider giving them the website to search for sex offenders in the neighborhood they are considering buying.
https://records.txdps.state.tx.us/SexOffender/

Disclosure issues are an interesting dilemma for agents that owe a duty of full disclosure to their clients. Depending on the representation the license holder may have different responsibilities of disclosure.
If a license holder representing a seller feels strongly that an issue needs to be disclosed, the license holder should talk with the seller and the broker. If the disclosure is not mandatory and you are representing the seller, their permission to disclose is needed. If the license holder and the seller cannot agree, the license holder may not want to list the property.

If the seller is telling the license holder to not disclose a specific item that is a mandatory disclosure, the license holder cannot agree. The duty of obedience does not include doing anything illegal. If the license holder cannot educate the seller that this is a mandatory disclosure, the license holder may want to terminate the listing.

If the license holder representing the buyer knows something about the property that would affect the buyer’s decision to buy or lease the property, the license holder will disclose it when permitted.

An example of a Texas stigmatized property case was Guerrero vs. Sanchez. The record shows that in December of 1987, Ernesto and Norma Guerrero saw a vacant house on the east side of El Paso and noticed that a sign at the house indicated that it was a Veterans Administration (VA) property. The Guerreros called the VA to inquire about the house, and the VA referred them to Century 21 Casablanca Realty (Casablanca). At that time, Casablanca was the management broker for the VA in El Paso County. Through Rosalinda Ruiz, an agent of Casablanca, they set up an appointment to see the house on January 9, 1988, and Ruiz showed them the house on that date.

Both Guerreros testified at trial that upon seeing the house, they immediately liked it and wanted to buy it. The record shows that Guerrero then met with Angel Sanchez, the broker operating as Casablanca, in his office on January 14, 1988 and made a bid for the purchase of the house. They tendered to Sanchez at that time a check for $500 earnest money. The VA accepted the bid on January 25, 1988. The final papers were signed, and the deal was finally closed on March 23, 1988, making Guerreros the owners of their dream house.

The Guerreros allege their dream, however, quickly turned into a nightmare. The record shows that while back at their rented home later that same evening, they saw a television news program...
about Michelle Noble, who had been tried and **acquitted** of child molestation charges. The accusations against Ms. Noble charged that she had molested several children in her home, the home that Guerreros had just bought. This news soured their feelings toward the house, and they contacted Sanchez the following day to see if the deal could be canceled. The record shows that Sanchez then wrote a letter to the VA inquiring about a possible repurchase of the house by the VA due to the unusual circumstances. The response by the VA to this inquiry was that they would not cancel the sale. The Guerreros never moved into the house, and they made no mortgage payments. The VA eventually foreclosed.

The Guerreros sued Sanchez and Ruiz individually as well as Casablanca under the Texas Deceptive Trade Practices (DTPA), alleging that prior to the closing of the sale of the house, Sanchez and Ruiz knew that Noble had lived there and withheld this information from them in the attempt to induce them to complete the transaction. At the close of the evidence, the trial court directed a verdict in favor of Ruiz, and she is not a party to this appeal. The record shows that the jury found that Sanchez knowingly engaged in false, misleading, or deceptive acts or practices and that he knowingly engaged in an unconscionable action or course of action and that such actions were a producing cause of damages to the Guerreros. The jury awarded the Guerreros the sum of $120,000; $20,000 for the closing costs paid by the Guerreros; and $100,000 for their mental anguish.

This case was appealed and the decision of the trial court was affirmed. 
*(Source: LEAGLE, Sanchez v Guerrero)*

This is an interesting case. Even though, the accused child molester was acquitted the court found the property to be stigmatized to the point it needed to be disclosed to a potential buyer. It also points out the liability of the broker. Even though, Ruiz was the one showing them the property; she was dismissed from the case. The broker was held fully liable.

All of the following are a requirement under Texas law:

- All parties are entitled to complete disclosure regarding the property.
- All parties are entitled to know who the broker is representing.
A broker is obligated to advise all parties to have the abstract of title examined by an attorney.

If a broker or agent receives a request for a copy of a document by the party that signed the document, the license holder is obligated to return the document.

All license holders, when engaging in real estate on their own behalf, are obligated to inform anyone in the transaction they are licensed and shall not use their expertise to the disadvantage of any party.

Cases

In the cases discussed below, the buyer sued the real estate professional for failure to disclose a property condition, even though that condition was disclosed in an inspection report or a disclosure form. In all three of these cases, the real estate professionals were found not to have breached their fiduciary duties. In one of the cases, however, the licensee could be liable for fraud based on his own statements, separate from the inspection report, regarding the property condition.


A licensee could be liable for fraud if he had knowledge of previous water intrusion, even though agreement contained As-Is provision.

A seller had purchased her home from her parents. She provided the later buyers of the home with a disclosure form indicating no prior flooding or water intrusion. The seller did not fill in the form herself, but provided the answers to her real estate agent. The seller’s agent became a dual agent for the seller and the new buyers in their transaction. When the new buyers looked at the house, the representative said that there had been “an inch or so” of water in the basement in the past, despite the fact that the disclosure form did not admit any water issues. The buyers ordered an inspection and the resulting report did mention evidence of water intrusion. Despite the inspection and the representative’s statement, the buyers purchased the home on an As-Is basis. Later storms caused flooding at the house, even after the buyers took remedial action. The buyers sued the
seller’s representative, claiming negligence, negligent misrepresentation, breach of fiduciary duty, and fraud. The trial court dismissed the claims.

On appeal, the court upheld the judgments for the licensee on the negligence and fiduciary duty claims, but reversed the trial court’s decision on the fraud argument. The higher court said that the seller’s representative might be responsible for fraud, because he had made statements about water penetration in addition to the reports provided. The As-Is disclaimer was not specific enough to bar the fraud claim against the licensee. The case was sent back to the trial court for further proceedings on the fraud issue.

A licensee was not liable for failing to disclose structural defects when the licensee did not know of problems beyond what was in the disclosure form.

The seller’s disclosure form indicated the property had termites and termite damage. The inspection report also noted major defects and moisture issues on the property. The buyers requested repairs from the seller, but did not re-inspect the home. The buyers claimed that the seller’s representative concealed or failed to disclose the defects to them. The court decided that the seller’s representative was not liable to the buyers because the buyers were aware of the defects. There was also no evidence that the licensee was aware of any termite damage beyond what was disclosed to the buyers. The court affirmed summary judgment in favor of the licensee.

Brokers were not liable for failing to disclose defects when the defects were noted in the disclosure form, even though the buyer claimed a page was missing from his copy of the form.

A buyer sued an inspector and real estate brokers, arguing that they failed to disclose structural defects and toxic mold. The disclosure form noted these defects, but the buyer
claimed that the page with that information was missing from his copy. The trial court decided that the defects were disclosed to the buyer and dismissed his case against the brokers. The appeals court upheld that decision.

**Property Condition Cases from Earlier Editions**

In 2015, the supreme courts of Vermont and Montana both addressed the important issue of a real estate licensee’s duty to disclose adverse conditions on the property. The following case, decided early in the year, reached the same conclusion as the Watterud case, which was decided in the fourth quarter of 2015 and is discussed later below. In both cases, the court determined that a real estate licensee need only disclose those conditions, of which he or she is aware, and need not independently verify or investigate the facts.


The buyer sued the seller’s representative, alleging she had misrepresented the condition of the property. The seller’s disclosure statement indicated there were no current problems with the roof, flooding, draining, or grading. A potential buyer, however, told the seller’s representative she had seen flooding in the parking lot and the roof needed repairs. The Vermont Supreme Court stated that a real estate licensee does not have a duty to independently verify the seller’s representations about the property unless the licensee is aware of facts indicating the seller’s representations are false. In this instance, the statements told to the licensee were vague rumors. The real estate licensee did not have a duty to share that information or investigate further.


The buyer discovered the property was subject to a lawsuit after closing on the transaction. The buyer filed suit against the seller’s representative for failure to disclose the existence of the lawsuit, that the property was located in a FEMA floodway area, that the property was originally built as a mobile trailer rather than a wood frame structure,
and that the property was subject to zoning restrictions. The buyer also asserted a claim against the title company for failing to tell him title was encumbered. At a bench trial, the seller’s real estate professional was found liable for $3,323 in damages for failing to disclose the pending lawsuit, but the court entered a verdict for the seller's rep and the title company on the other claims.

Purchasers allege that sellers and the real estate broker failed to disclose the property was subject to an agreement under which a portion of the property was transferred to a municipal water district, that a levee was to remain on the property, and that the property was subject to flooding. A jury found the sellers and the broker liable for negligent misrepresentation and fraud, and the broker was also liable for breach of fiduciary duty. Damages of $330,000 were awarded to the purchasers.

The seller’s representative was found liable for failing to disclose that the property was subject to a lawsuit. The real estate professional was liable for failing to disclose that property was subject to an agreement transferring a portion of the property to another entity.

Lesson Summary
Lesson Three established the duties that are owed to parties in the transaction that are not being represented by the license holder.

A Third Party can be a buyer that is looking at a listing broker’s listed property, with the listing agent, and has no representation. The listing broker is representing the seller and the buyer is simply a customer. A Third Party can also be a buyer that is being shown the property by an agent with a different broker. The license holder may or may not represent the buyer regardless the relationship for the listing agent is that this buyer is a third party. All customers and clients are entitled to honesty, fairness and full disclosure about property condition.
All license holders must be careful to disclosure everything they know about the condition of the property to avoid being guilty of deception or misrepresentation. A Seller's Disclosure is required by the Texas Property Code. The Texas Real Estate Commission has an approved form that can be used for that purpose. The disclosure is valuable to both the seller and the broker as a protection from future law suits. The disclosure provides a place for a buyer’s signature and gives the seller and the broker proof of what was disclosed to the buyer.

Sometimes the things about a property that must be disclosed are not physical issues. License holders must be aware of situations that may create a stigmatized property. Anytime the property address or photos have been in the news, on TV or just anything negative everyone in the area knows, the broker must decide if this is an issue that the average buyer would want to know before making a decision to purchase. License holders can be found deceptive if a court decides they knew and did not disclose an issue regarding a stigmatized property. It also can be that you did not disclose who you represent.
Lesson Four: Seller Agency

Lesson Topics
This lesson focuses on the following topics:

- Introduction
- Texas Statue of Frauds
- Preparing to Take a Listing
- Listing Agreements
- Exclusive Seller Agency
- Benefits of Seller Agency Relationships
- Sub-Agency
- Disclosure Issues

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

- Describe how to market to sellers
- Explain the components of a listing agreement to the seller.
- Understand your relationship with the seller
- Explain the benefits of an exclusive relationship with the seller.
- List ways you will be able to assist the seller by understanding and keeping his or her obligations according to the contract.

Introduction
As discussed earlier in this course, the safest way to enter into an agency relationship is through a written agreement. In the real estate profession, most license holders use written listing and buyer representation agreements rather than rely upon oral agreements or implied agency.

Remember that in Texas to be entitled to or to be paid a commission or any compensation, the agreement must be in writing. The law is “Texas Statue of Frauds”
law. For anything to be enforceable, it must be in writing.

**Texas Statue of Frauds**


Texas has a law known as the "statute of frauds" which requires that some contracts must be written to be valid. In Texas, contracts involving the following are subject to the statute of frauds and, generally, have to be in writing to be enforceable: a. the sale of real estate; loan agreements involving more than $50,000; b. contracts for commissions from certain oil, gas or mineral sales; c. contracts that cannot be performed within one year; d. contracts to pay off someone else's debts; e. leases for more than one year; f. certain medical care contracts; and g. contracts concerning a marriage or non-marital cohabitation must be in writing and signed by the person making the agreement.

In Texas, the "statute of frauds" is found in Chapter 26 of the TEXAS BUSINESS & COMMERCE CODE and it is titled "STATUTE OF FRAUDS." However, a court may employ the principals of equity to avoid the application of the statute of frauds. Equity will act to avoid the statute of frauds in circumstances where enforcing the statute would itself amount to a fraud. Before using equity to circumvent the statute of frauds, the Texas Supreme Court has consistently required a showing that fraud would result in not doing so. Those circumstances are limited, however, because otherwise the exceptions would render the statute meaningless.

The Statute of Frauds is the Legislature's directive that courts enforce promises covered by the statute only if such promises are in writing. Equity can avoid the strictures of that directive only by some positive rule which will insure its exercise for . . . the prevention of an actual fraud as distinguished from a mere wrong . . . so surely as to leave the statute itself, through the exactness of the exception, with some definiteness of operation. Promissory estoppel and partial performance have been recognized as equity-based exceptions to the traditional statute of frauds.
Promissory estoppel allows enforcement of an otherwise unenforceable oral agreement when (1) the promisor makes a promise that he should have expected would lead the promisseree to some definite and substantial injury; (2) such an injury occurred; and (3) the court must enforce the promise to avoid the injury. Promissory estoppel avoids the traditional statute of frauds when the alleged oral promise is to sign an existing document that satisfies the statute of frauds. Under the partial performance equitable exception, an oral agreement that does not satisfy the traditional statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a fraud. The actions asserted to constitute partial performance must be "unequivocally referable" to the alleged oral agreement and corroborate the existence of that agreement; they must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced; otherwise, they do not tend to prove the existence of the parol agreement relied upon by the plaintiff.

When you are reviewing your situation to determine whether the statute of frauds may interfere with your ability to enforce your contract, keep in mind that some factual situations, such as those briefly described above, may provide you with sufficient argument to overcome the defendants' defense and give you an opportunity to enforce the contractual obligation. As is almost always the case, though, every situation is different and dependent of the facts of the transaction.


REALTORS® arbitrate commissions based on procuring cause. In a court of law, the judge will require a written agreement between the parties that one party agreed to pay a commission for services rendered before the judge will proceed with the demand for commission. Be sure you discuss this with your broker on commissions to be paid to you by your broker.
Failure to have this agreement with your broker in writing may cause you not to get paid your fees for transactions under your broker.

**Preparing to Take a Listing**

**Types of Listings**

Three common types of listings are:

1. **Exclusive Right to Sell**: Provides the greatest amount of protection on a commission.
2. **Exclusive Agency**: Allows sellers to reserve the right to sell the property themselves and not owe a broker a commission.
3. **Open Listing**: Allows the owner and any other license holder to sell the property and only pay the commission to whomever sells the property. The listing Broker is not the exclusive agent in this type of listing agreement.

The designated broker determines what type of listings he or she will allow his or her sales agents or broker associates to list.


**SECTION 7 - LISTING PROCEDURES.**

7.01 Each property listing filed with the MLS must be an “exclusive right-to-sell (or lease)” or an “exclusive agency” listing. Listing type may not be published or displayed to customers or clients. Open listings, net listings, and non-agency listings will not be accepted for filing with the MLS. The exclusive right to sell listing is the conventional form of listing submitted to the MLS in that the owner authorizes the Listing Participant to make blanket unilateral offers of compensation to Other Participants (who are acting either as subagents of the owner, buyer agents, or in other agency or non-agency capacities as defined by law). The exclusive agency listing also authorizes the Listing Participant, as exclusive agent, to make blanket unilateral offers of compensation to Other Participants (who are acting either as
subagents of the owner, buyer’s agents, or in other agency or non-agency capacities as defined by law), but the owner reserves the right to sell the property on an unlimited or restrictive basis. Exclusive agency listings and exclusive right-to-sell listings with named reservations/prospects exempted will be clearly distinguished by a simple designation, such as a code or symbol from the exclusive right-to-sell listings with no named reservations/prospects exempted, as such listings can present special risks of procuring cause controversies and administrative problems which are not posed by the exclusive right-to-sell listing with no named reservations/prospects exempted. Each Qualified Listing Agreement must contain a provision expressly authorizing the Listing Participant to file the listing with the MLS.

(Source: http://www.ntreis.net/documents/Forms_18920129199.pdf)

All listings come with fiduciary duties. Before you can take a listing, preparation is a must so you can be an expert in the area of your listing. There are several items to consider before you take your first listing.

**Zone Marketing**

First, you have to decided what type of listings you want. There are many ways to get listings, but first you have to decide on a target market by zone marketing. In the 20th century, we called it farming and then decided since we are not farmers and it is now the 21st century, it’s time to put technology at the forefront.

Let’s talk about the different markets we can consider to zone market ourselves.

- Neighborhood you live in
- For Sale By Owners
- Expired listings
- High end property
- Condominiums
- Rentals
You need to decide what type of properties you want to market. You must research the market and become the authority for the area and the properties. You would research all the solds for three years, two years, and one year. Analyze sold information and determine the following:

- List date to sold date
- List price to sales price
- Sales with pools
- Sales with no pools
- Dollar per square foot
- Days on the market

To get results, you need the address, city, number of bedrooms, number of baths, pools or no pools, garage, year built, square footage, dollar per square foot, list price, sold price, sold date and sales price to list price, and days on the market. If you use MLS, the programs are there to give you the statistics. If you are not a member of MLS, you can use an Excel spreadsheet and add the information as you obtain the data.

To be able take a listing, you need to know what is for sale, what has sold, and what has expired. You never want the homeowner to know more than you. You would preview all active listings surround the subject property.
You also need to know how to do a competitive market analysis or a broker’s price opinion. The Texas Real Estate Commission states you shall have data to support how you came up with a recommended list price and recommended sales price.

**Texas Real Estate Commission Rule: §535.17**

a) A real estate license holder may not perform an appraisal of, or provide an opinion of value for, real property unless the license holder is licensed or certified under Texas Occupations Code, Chapter 1103.

(b) If a real estate license holder provides a broker price opinion or comparative market analysis under the Act, the license holder shall also provide the person for whom the opinion or analysis is prepared with a written statement containing the following language: "THIS IS A BROKER PRICE OPINION OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL OR OPINION OF VALUE. In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation."

(c) The statement required by subsection (b) of this section must be made part of any written opinion or analysis report and must be reproduced verbatim.

(d) A salesperson may prepare, sign, and present a broker price opinion or comparative market analysis for the salesperson's sponsoring broker, but the salesperson must submit the broker price opinion or comparative market analysis in the broker's name and the broker is responsible for it.

Source Note: The provisions of this §535.17 adopted to be effective January 1, 1976; amended to be effective March 1, 1991, 15 TexReg 7435; amended to be effective August 19, 1991, 16 TexReg 4284; amended to be effective April 14, 1998, 23 TexReg 3682; amended to be effective July 1, 1999, 24 TexReg 4824; amended to be effective January 1, 2004, 28 TexReg 9541; amended to be effective January 1, 2011, 35 TexReg 11674;
amended to be effective November 1, 2011, 36 TexReg 7326; amended to be effective January 1, 2015, 39 TexReg 9669

A professional license holder never emails the competitive market analysis or broker’s opinion unless the client requests it. You are sending confidential information and the confidential information should never leave your hands. Also, members of the public do not know how to interpret all of the information you will have for them to review. You also lose the chance to get the listing agreement signed after you give your presentation.

Other items to know about your zone market is:

- Demographics
- Property taxes
- Zoning requirements
- Disclosures, if any
- Financing for properties and availability
- Neighborhood profile
- Restaurants
- Grocery stores
- Medical
- Public transportation
- Schools
- Police
- Fire
- Crime watch
- Homeowners Association and what is required disclosures in sale

Now we will discuss the paper work involved when taking a listing so that you are adhering to your fiduciary duties.
Listing Agreements

The seller generally hires the real estate broker to act as his or her license holder through a written listing agreement. The listing agreement is the written contract between the owner of real property and the license holder representing the owner in the marketing and sale of a specific property.

We will use the Texas Association of REALTORS® listing agreement to discuss a listing agreement that adheres to Texas law. Look for inserts from the Texas Real Estate License Act, Texas Real Estate Commission Rules, The REALTOR® Code of Ethics, and MLS Rules and Regulations.

22. Parties: The parties to this agreement (this Listing) are:

Seller: ______________________________________________________
Address: _____________________________________________________
City, State, Zip: ________________________________________________
Phone: ______________ Fax: ___________ Email: _________________

Broker: ______________________________________________________
Address: _____________________________________________________
City, State, Zip: ________________________________________________
Phone: ______________ Fax: ___________ Email: _________________

Seller appoints Broker as Seller’s sole and exclusive real estate agent and grants to Broker the exclusive right to sell the Property.

Texas Real Estate Commission Rules §535.2.(f)

(f) Listings and other agreements for real estate brokerage services must be solicited and accepted in a broker’s name.
Paragraph 1 spells out the parties to the listing agreement. The seller’s name should be the same name on the title when he or she bought the property. If it is an estate, the name would be the trustee for the property. If the property is owed by the bank, the bank will tell you whose name to use. Also, if this is a sale where an estate is selling the property, you need all signatures of each heir to the listing agreement. The reason is an heir could refuse to sell the property or pay you your commission. Never date your listing agreement until you have all signatures.

Under the broker section, you put your broker’s name and address with your name next to the broker. Your broker’s policy and procedures manual will tell you what name to take the listing in. The broker’s name always goes in this part. Not just the agent’s name or team name.

23. **PROPERTY:** “Property” means the land, improvements, and accessories described below, except for any described exclusions.

   F. **Land:** Lot _____________, Block _________________, Addition, City of ____________, in County, Texas known as __________ (address/zip code), or as described on attached exhibit. *(If Property is a condominium, attach Condominium Addendum.)*

   G. 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 and satellite dish system and equipment, 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.
H. 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) satellite dish systems, (ii) garage doors, (iii) entry gates, and (iv) other improvements and accessories.

If the seller does not have a copy of the deed, then you need to verify the legal description off of the tax roles. If you use Zip Forms, you can fill in the correct information.

Failure to have the correct legal description could cause you to sell the wrong property. The legal description is very important. Copy it verbatim into the listing agreement.

Paragraph 2-B has to do with what comes with the property. You do not need to delete any item if it is not on the property. In the third paragraph, it says “if any.”

Paragraph C has to do with accessories the seller is leaving with the property. If he or she is not leaving any item, the seller needs to remove it from the property before they put it on the market. Examples would be mirrors, chandeliers, speakers, etc.

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

E. Owners' Association: The property  ☐ is  ☐ is not subject to mandatory membership in a property owners' association.

Paragraph D is where you would list what the seller is not leaving that he or she cannot remove from the property. It says it will be removed prior to possession, but it is highly recommended the seller remove the item(s) before he or she puts the property on the market.

Paragraph E – If the property is in a mandatory homeowner’s association, you need to have a discussion about who will pay for the resale certificate and the documents that are available should the buyer request them. The promulgated addenda says the buyers can
get the documents themselves, but they normally want the seller to get them and pay for them.

Check with the homeowner’s association or the management company to see what their fees are and how long it takes for them to complete the documents and have them delivered to the buyer. The property code allows management companies and all homeowner’s associations 10 business days to get the forms to the seller or buyer. Title companies can order them, but there is never enough time for the buyer to review and then terminate contract, get the earnest money back if he or she does not approve the documents. “Property Owner” and “Homeowner Association” are the same thing. “Property owner” is in the Texas Property Code.

24. LISTING PRICE: Seller instructs Broker to market the Property at the following price:

$_______ (Listing Price). Seller agrees to sell the Property for the Listing Price or any other price acceptable to Seller. Seller will pay all typical closing costs charged to sellers of residential real estate in Texas (seller’s typical closing costs are those set forth in the residential contract forms promulgated by the Texas Real Estate Commission).

Texas Real Estate Commission Rules

§535.17 BROKER PRICE OPINION OR COMPARATIVE MARKET ANALYSIS

(a) A real estate license holder may not perform an appraisal of, or provide an opinion of value for, real property unless the license holder is licensed or certified under Texas Occupations Code, Chapter 1103.

(b) If a real estate license holder provides a broker price opinion or comparative market analysis under the Act, the license holder shall also provide the person for whom the opinion or analysis is prepared with a written statement containing the following language: “THIS IS A BROKER PRICE OPINION OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL OR OPINION OF VALUE. In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation.”
(c) The statement required by subsection (b) of this section must be made part of any written opinion or analysis report and must be reproduced verbatim.

(d) A salesperson may prepare, sign, and present a broker price opinion or comparative market analysis for the salesperson’s sponsoring broker, but the salesperson must submit the broker price opinion or comparative market analysis in the broker's name and the broker is responsible for it.

Source Note: The provisions of this §535.17 adopted to be effective January 1, 1976; amended to be effective March 1, 1991, 15 TexReg 7435; amended to be effective August 19, 1991, 16 TexReg 4284; amended to be effective April 14, 1998, 23 TexReg 3682; amended to be effective July 1, 1999, 24 TexReg 4824; amended to be effective January 1, 2004, 28 TexReg 9541; amended to be effective January 1, 2011, 35 TexReg 11674; amended to be effective November 1, 2011, 36 TexReg 7326; amended to be effective January 1, 2015, 39 TexReg 9669

Real estate professionals should avoid using the term “value” without an appropriate prior qualifier that makes it very clear to your audience that you are not offering “an opinion of value;” that is the legal definition of an appraisal. License holders in Texas cannot do appraisals unless they have an appraiser’s license or an appraisers certificate.


http://www.trec.texas.gov/newsandpublic/Publications/AdvisorIssues/Advisor20151214.pdf

“What Do You Think This Property is Worth?” All of us who are licensed in the real estate profession have been asked this question hundreds of times by property owners. The license holder tries to answer the question for a customer or client each time you do a Comparative Market Analysis (CMA) or a Broker Price Opinion (BPO). NEVER give a price until you have completed the competitive market analysis or a broker’s price opinion. As a license holder, you are allowed to perform this task in the name of your broker as a distinct service and for a separate fee. This is a very particular
skill you can learn to do competently. But when you do so, be careful to ensure you stay clearly within your area of expertise – and do not exaggerate the skill you’ve developed. Real estate brokers and sales agents do not offer “opinions of value” – that area of expertise requires an appraiser license in Texas. So there is no such thing as a “broker opinion of value” (BOV) in Texas!

Realize that clearly establishing your area of expertise is one of the requirements of your professional license. Your license allows you to perform many skilled tasks associated with real property analysis, marketing, sale and transfer, but it also requires you to perform these tasks competently, that is, with a minimum level of expertise. And to refrain from engaging in activities – even those permitted by your license – if you have not developed that expertise. For example, you would never attempt to complete a 1031 Exchange without acquiring the knowledge and skill to do so competently. And your license also does not allow you to trespass into other real estate transaction-related tasks which require separate and distinct licenses. You already know and accept this.

As you are likely aware, as a license holder you are allowed to create a CMA or a BPO relating to the estimated price of real property as part of the ordinary course of business if the analysis, opinion or conclusion is related to the actual or potential management, acquisition, disposition or encumbrance of an interest in real property. Most importantly, the CMA or BPO cannot be referred to as an appraisal, and you are required to use a disclaimer that specifically informs the user or reader that this is not an appraisal and was not developed following the guidelines in the Uniform Standards of Professional Appraisal Practice (USPAP). See Tx Occup Code Sec. 1103.102(1)(A)(xi)
(Source: http://www.trec.texas.gov/newsandpublic/Publications/AdvisorIssues/Advis
REALTORS® Code of Ethics

Code of Ethics and Standards of Practice of the National Association of REALTORS®

Article 1
Standard of Practice 1-3
REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

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

Article 11
Standard of Practice 11-1
When REALTORS® prepare opinions of real property value or price they must
1. Be knowledgeable about the type of property being valued,
2. Have access to the information and resources necessary to formulate an accurate opinion, and
3. Be familiar with the where the subject property is located.

Unless lack of any of these is disclosed to the party requesting the opinion in advance.

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

1. Identification of the subject property
2. Date prepared
3. Defined value or price
4. Limiting conditions, including statements of purpose(s) and intended user(s)
5. Any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
6. Basis for the opinion, including applicable market data
7. If the opinion is not an appraisal, a statement to that effect
8. Disclosure of whether and when a physical inspection of the property’s exterior was conducted
9. Disclosure of whether and when a physical inspection of the property’s interior was conducted
10. Disclosure of whether the REALTOR® has any conflicts of interest.

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

Paragraph 3 is the list price the seller has agreed to after he or she reviews your Competitive Market Analysis. You never tell anyone any other price than the list price in your listing agreement. It also says seller will pay his or her closing costs only unless he or she agrees to additional closing costs in the contract. You need to be familiar with closing costs for both buyers and sellers in your market area. Later, we will talk about preparing approximate closing costs statement for the seller.

25. TERM:
   C. This Listing begins on and ends at 11:59 p.m. on ________.
   D. If Seller enters into a binding written contract to sell the Property before the date this Listing begins and the contract is binding on the date this Listing begins, this Listing will not commence and will be void.

Texas Real Estate License Act; Section 1101.652 Grounds for Suspension or Revocation of License.
(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;


7.11 Listings filed with the MLS must specify a definite expiration date as negotiated between the Listing Participant and the owner(s). Each listing filed with the MLS will expire on the date specified in the listing agreement unless extended by a written notice of renewal or extension and such renewal or extension is filed with the MLS within seventy-two (72) hours after the expiration date of the listing. If notice of renewal or extension is dated after the expiration of the original listing then a new listing must be secured for the listing to be entered in the MLS.

(Source: http://www.ntreis.net/documents/Forms_18920129199.pdf)

Read the last sentence in paragraph 4: If a contract is received prior to the listing agreement going into effect, the listing terminates and no commission is due.

26. BROKER COMPENSATION:

A. When earned and payable, Seller will pay Broker:

☐ (1) % of the sales price.

☐ (2) _______________________________________________________.

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.

Do you know “When earned and payable, Seller will pay Broker” means? The most common way a commission is earned is a separate agreement in writing between the broker and all owners of the property that someone will pay a broker a commission upon closing and funding of the sale of the property. You do this by a written listing agreement or a separate agreement in writing. There are other examples of entitlement to commissions. It would either be under specific performance law suit or if the listing broker brought a ready, willing, and able buyer and the seller refused to accept the offer. Or breach of the listing agreement. This would have to be determined by a court of law.

Commissions can be a percentage of the sales price, a flat fee, or payable up front. The broker determines what commissions are to be paid, how they are paid, and what form of money to be paid. Remember “Commissions are negotiable” and you must have your broker’s permission to variate from your Broker’s Commission Schedule for Listings. All commissions are negotiable.

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.

Broker’s compensation is not payable if a sale of the Property does not close or fund as a result of: (i) Seller’s failure, without fault of Seller, to deliver to a buyer a deed or a title policy as required by the contract to sell; (ii) loss of ownership due to foreclosure or other
legal proceeding; or (iii) Seller’s failure to restore the Property, as a result of a casualty loss, to its previous condition by the closing date set forth in a contract for the sale of the Property.

Commissions are always paid to the broker. You need to know what your broker requires in the listing file before you receive your part of the commission after closing and funding. Some brokers will allow the title company to cut the check to the agent, but only after the broker puts the commission allocation in writing and delivered to the title company.

**Texas Real Estate Commission Rules**

535.3 COMPENSATION TO OR PAID BY A SALES AGENT

A salesperson may not receive a commission or other valuable consideration except with the written consent of the salesperson’s sponsoring broker or the broker who sponsored the salesperson when the salesperson became entitled to the commission or other valuable consideration. A salesperson may not pay a commission or other valuable consideration to another person except with the written consent of the salesperson’s sponsoring broker.

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D. Other Fees:

1. *Breach by Buyer Under a Contract:* If Seller collects earnest money, the sales price, or damages by suit, compromise, settlement, or otherwise from a buyer who breaches a contract for the sale of the Property entered into during this Listing, Seller will pay Broker; after deducting attorney’s fees and collection expenses, an amount equal to the lesser of one-half of the amount collected after deductions or the amount of the Broker’s Fee stated in Paragraph 5A. Any amount paid under this Paragraph 5D(1) is in addition to any amount that Broker may be entitled to receive for subsequently selling the Property.

Hopefully, brokers never have to sue for a commission. But if a buyer defaults or breaches terms of the contract, a listing broker is entitled to a commission. A judge would make the decision regarding all expenses and total commission.
Your broker will determine if these fees are allowed and how they will be disbursed. Any additional fees need to be on the closing statement. Some brokers pay out the fees to the sales agent or broker associates based on their contract with the sponsoring broker. The sales agent or broker associate do not necessarily get one hundred percent of the fee, unless the sponsoring broker allows it in his or her policy and procedures manual or the sales agents’ contract with their sponsoring broker. A sales agent or a broker associate can have the service provider pay it to their client. The Real Estate Settlements Procedure Act frowns on license holders receiving any fees outside of closing.

RULE §535.147SPLITTING FEE WITH UNLICENSED PERSON

(a) Except as otherwise provided by the Act or Rules, a broker or salesperson may not share a commission or fees with any person who engages in acts for which a license is required and is not actively licensed as a broker or salesperson.

(b) An unlicensed person may share in the income earned by a business entity licensed as a broker or exempted from the licensing requirements under the Act if the person engages in no acts for which a license is required and does not lead the public to believe that the person is in the real estate brokerage business.

(c) A broker or salesperson may not share a commission or fees with an unlicensed business entity created by a license holder for the purpose of collecting a commission or fees on behalf of the license holder.

(d) A license holder may rebate or pay a portion of the license holder's fee or commission to a party in the transaction when the salesperson has the written consent of the salesperson's sponsoring broker and the party represented by the license holder. A commission or fee may not be paid to any party to the transaction in a manner that misleads a broker, lender, title company, or governmental agency regarding the real estate transaction or the financial resources or obligations of the buyer. A license holder who intends to pay a portion of the license holder's fee or
commission to a party the license holder does not represent must obtain the written consent of the party represented by the license holder before making the payment.

Source Note: The provisions of this §535.147 adopted to be effective January 1, 1976; amended to be effective March 11, 1981, 6 TexReg 725; amended to be effective October 1, 2000, 25 TexReg 8646; amended to be effective August 31, 2004, 29 TexReg 8297; amended to be effective January 1, 2011, 35 TexReg 11691; amended to be effective January 1, 2015, 39 TexReg 9669

Transaction fees – retainer fee for expenses for various items prior to closing. They could be a dollar amount the seller would pay the listing broker for any expenses the listing broker incurred and the listing expires or terminates and the listing broker chooses another broker to list the property with.

Reimbursable expenses – Marketing expenses such as an aerial picture of the property, use of a drone, and advertising in specialty magazines. These additional fees cannot be charged without the written authorization by the broker.

E. Protection Period:

(1) “Protection period” means that time starting the day after this Listing ends and continuing for ___________ days. “Sell” means any transfer of any interest in the Property whether by oral or written agreement or option.

(2) Not later than 10 days after this Listing ends, Broker may send Seller written notice specifying the names of persons whose attention was called to the Property during this Listing. If Seller agrees to sell the Property during the protection period to a person named in the notice or to a relative of a person named in the notice, Seller will pay Broker, upon the closing of the sale, the amount Broker would have been entitled to receive if this Listing were still in effect.

(3) This Paragraph 5E survives termination of this Listing. This Paragraph 5E will not apply if:

(a) Seller agrees to sell the Property during the protection period;
(b) the Property is exclusively listed with another broker who is a member of the Texas Association of REALTORS® at the time the sale is negotiated; and
(c) Seller is obligated to pay the other broker a fee for the sale.

What is the protection period?
This is how you protect the commission. You write in the listing agreement the number of days after the listing expires the owner(s) still owe you a commission if any of the
buyers you have submitted in writing try to buy the property by contacting the owner(s) directly after the listing expires for the purpose of cutting out the listing broker. The caveat is the listing broker must submit the name of those buyer/tenants in writing to the owner(s) of the property.

5.3(a) – Seller agrees to sell the property during the protections period and the property is not listed with another broker.
5.3 (b) States that if the owner(s) of the property lists their property with another Broker, the protection period no longer applies.
5..3 (c) If another broker brought the buyer through the property during the listing period, the seller/owner(s) will owe the other broker a commission.

F. County: All amounts payable to Broker are to be paid in cash in ________________ County, Texas.

The county should be where the title company and the property are located. If they are not in the same county, put both of them to protect the listing broker.

6. LISTING SERVICES:

☐ A. Broker will file this Listing with one or more Multiple Listing Services (MLS) by the earlier of the time required by MLS rules or 5 days after the date this Listing begins. Seller authorizes Broker to submit information about this Listing and the sale of the Property to the MLS.

Notice: MLS rules require Broker to accurately and timely submit all information the MLS requires for participation including sold data. Subscribers to the MLS may use the information for market evaluation or appraisal purposes. Subscribers are other brokers and other real estate professionals such as appraisers and may include the appraisal district. Any information filed with the MLS becomes the property of the MLS for all purposes. Submission of information to MLS ensures that persons who use and benefit from the MLS also contribute information.

☐ B. Broker will not file this Listing with a Multiple Listing Service (MLS) or any other listing service.

This paragraph has to do with the Multiple Listing Services the broker is a member of as a participant. The seller/owner(s) needs to be told that the property information belongs to the Multiple Listing Service. The broker is mandated by the Multiple Listing Services Rules and Regulations to input the listing into Multiple Listing Service within two days from the effective date.
SECTION 7 - LISTING PROCEDURES

7.01 Each property listing filed with the MLS must be an “exclusive right-to-sell (or lease)” or an “exclusive agency” listing. Listing type may not be published or displayed to customers or clients. Open listings, net listings, and non-agency listings will not be accepted for filing with the MLS. The exclusive right to sell listing is the conventional form of listing submitted to the MLS in that the owner authorizes the Listing Participant to make blanket unilateral offers of compensation to Other Participants (who are acting either as subagents of the owner, buyer agents, or in other agency or nonagency capacities as defined by law). The exclusive agency listing also authorizes the Listing Participant, as exclusive agent, to make blanket unilateral offers of compensation to Other Participants (who are acting either as subagents of the owner, buyer’s agents, or in other agency or nonagency capacities as defined by law), but the owner reserves the right to sell the property on an unlimited or restrictive basis. Exclusive agency listings and exclusive right-to-sell listings with named reservations/prospects exempted will be clearly distinguished by a simple designation, such as a code or symbol from the exclusive right-to-sell listings with no named reservations/prospects exempted, as such listings can present special risks of procuring cause controversies and administrative problems which are not posed by the exclusive right-to-sell listing with no named reservations/prospects exempted. Each Qualified Listing Agreement must contain a provision expressly authorizing the Listing Participant to file the listing with the MLS.

7.02 Forms of listing agreements will be available for use by Participants upon request. Although NTREIS does not require the use of any prescribed form of listing agreement, each Listing Participant is encouraged to use forms of listing agreements which provide the owner with a choice of authorizing the Listing
Participant to offer compensation to Other Participants acting either (i) as subagents of the owner, or (ii) as buyer’s agents, or (iii) in other agency or nonagency capacities as defined by law. Listing Participants are encouraged to explain to the owner that Other Participants may be either the subagent of the Listing Participant and the owner or the agent of the buyer/tenant. The Listing Participant is encouraged to explain to the owner the availability of various agency and nonagency relationships of parties to a real estate transaction and the real estate brokers involved in that transaction.

7.03 Each listing filed with the MLS must have the necessary signatures of the property owner(s), an adequate legal description, and otherwise satisfy any other legal requirements to make the listing a valid, binding, and enforceable agreement.

7.04 All information should be legibly entered on the Data Input Sheet, complete with all information requested and signed by required party(s).

7.05 Each listing of property for sale or lease located within the primary service area of NTREIS must be filed by the Listing Participant with the MLS within seventy-two (72) hours from the effective date of the listing, unless the owner(s) expressly otherwise directs in writing restricting the filing with the MLS. Listings of properties located outside the State of Texas may be filed with the MLS and will be accepted if submitted voluntarily by a Participant.

7.06 Each Listed Property may be filed in only one Property Type per category and one geographic area of the MLS; except, however, if a property is listed for sale and for lease simultaneously, such listing may appear in both categories. Participants and Subscribers shall properly classify the category of Listed Property. Listed Properties may be listed in each category for which such Properties satisfy the requirements by using the subdivided listing function. It is, however, not permitted to file a Listed Property in more than one Property Type under a single category.
Notwithstanding the foregoing, Listed Property which an owner is willing to partition or subdivide may be identified by a special code or symbol and may be filed in the appropriate Property Type Classifications. Only NTREIS staff will be authorized to delete duplicate listings upon written request from the MLS Provider. For listings appearing in the MLS more than once, the Participant will be fined $50.00 each day the listing appears as a duplicate. NTREIS staff is also authorized to correct a listing with an incorrect list price upon written request from the MLS Provider.

7.07 Any special contingency or condition to a listing agreement, including any reservation of rights by an owner(s), must be specified and noted to Participants. Care should be exercised to ensure that different codes or symbols are used to denote exclusive agency listings and exclusive right-to-sell listings with reservations/prospects.

7.08 A property may be listed for sale or for lease or both for sale and for lease by an owner with the same Participant or, unless prohibited by the listing agreement, with different Participants (or another broker). No listing of property for sale may be filed with the MLS by a Participant while such property is listed for sale with another broker. No listing of property for lease may be filed with the MLS by a Participant while such property is listed for lease with another broker. Unless prohibited by the listing agreement, if an owner lists property for sale and for lease with different Participants (or another broker), the owner shall specify in writing to each Listing Participant or other broker, as the case may be, whether or not only a “For Sale” sign or only a “For Lease” sign or both signs may be placed on the Listed Property. A Participant who has listed a property for lease must obtain authority in the listing agreement from the owner with respect to posting signs on the property.
7.09 Listed Property may be advertised only by the Listing Participant or owner(s), unless otherwise authorized in writing by the Listing Participant, regardless of the advertising means except as provided in Section 17 of these Rules.

7.10 All information concerning a Listed Property must be as accurate and complete in every detail as may be ascertainable by the Listing Participant. The Listing Participant shall verify and confirm the accuracy of all information furnished to Other Participants and the public. Listing Participant shall ensure that listings shall not contain language which is offensive or is in violation of the Federal Fair Housing Act, as amended from time to time. Participants should exercise caution and discretion before disseminating information of a confidential nature concerning Listed Property to Other Participants and the public. The Listing Participant shall make available to Other Participants and Subscribers, upon request, a copy of the seller’s disclosure notice, if the seller has furnished such disclosure notice to the Listing Participant.

7.11 Listings filed with the MLS must specify a definite expiration date as negotiated between the Listing Participant and the owner(s). Each listing filed with the MLS will expire on the date specified in the listing agreement unless extended by a written notice of renewal or extension and such renewal or extension is filed with the MLS within seventy-two (72) hours after the expiration date of the listing. If notice of renewal or extension is dated after the expiration of the original listing then a new listing must be secured for the listing to be entered in the MLS.

7.12 Additional information concerning Listed Property, such as extension of a listing, a new loan commitment, availability of a second mortgage, change of price, and similar matters must be filed with the MLS within seventy-two (72) hours after receipt of such information by the Listing Participant and authorized in writing by the owner.
7.13 By submitting a listing to the MLS for filing, the Listing Participant warrants and represents to each Other Participant that the Listing Participant has a fully executed Qualified Listing Agreement signed by each property owner(s) or with respect to real property located outside the State of Texas, signed by the listing broker for such real property (i) granting the Listing Participant the exclusive right to sell and/or to lease the Listed Property or appointing the Listing Participant as the exclusive agent of the owner(s) for the sale and/or lease of the Listed Property, (ii) authorizing the Listing Participant to make blanket unilateral offers of compensation to all Other Participants, (iii) authorizing the Listing Participant to submit prices, terms and statistical information to the MLS as contemplated by these Rules and (iv) authorizing the Listing Participant to make the listing immediately available for showing upon entry into the MLS. Incomplete listing information (submitted either by use of Data Input Sheet or via computer transmission) may cause the listing to be rejected by the MLS Staff.

7.14 Except for intra-office use only or as authorized by a Participant, Lock Box combinations and/or security system codes must not be disclosed on any MLS documents or forms or disclosed orally at any MLS function. Participants and Subscribers are advised to familiarize themselves with the current Electronic Keycard/Keybox Rules. The use of any recording or non-recording lock boxes must comply with all policies of NAR.

7.15 All property listings filed with the MLS are subject to these Rules upon signature(s) by the owner(s) and Listing Participant or Subscriber.

7.16 The full gross listing sales price or rental rate, as applicable, must be stated in the listing agreement and in the MLS. Listings which authorize the Listing Participant to market the Listed Property within an authorized price range may be filed with the MLS; however, the Listing Participant must enter
the highest price within the range in the field for the listing price and provide in the appropriate fields full information concerning the range of prices for the Listed Property.

7.17 NTREIS may not fix, control, specify, recommend, suggest, record nor monitor commission rates or professional service fees for brokerage services to be rendered by a Participant. NTREIS may not fix, control, specify, recommend, suggest, record, nor monitor the division of any brokerage commissions or professional service fees between Participants or between Participants and nonparticipants.

7.18 When a Participant is suspended from the MLS for failing to abide by a membership duty (i.e., violation of the Code of Ethics, Association Bylaws, the Bylaws of NTREIS, the Rules, or other membership obligations except failure to pay appropriate dues, fees or charges), all listings currently filed with the MLS by the suspended Participant shall, at the Participant’s option, be retained in the MLS until sold, leased, withdrawn, or expired, and shall not be renewed or extended by the MLS beyond the expiration date of the listing in effect when the suspension became effective. If a Participant has been suspended from the Association or MLS (or both) for failure to pay appropriate dues, fees or charges, the MLS Staff will withdraw all of the suspended Participant’s listings which are filed with the MLS. Notices of suspension/termination will serve as notification that listings of Participant will be withdrawn from the MLS.

7.19 When a Participant of the MLS is expelled or terminated from the MLS for failing to abide by a membership duty (i.e., violation of the Code of Ethics, Association Bylaws, Bylaws of NTREIS, the Rules, or other membership obligations except failure to pay appropriate dues, fees or charges) all listings currently filed with the MLS by the expelled (terminated) Participant shall, at the Participant’s option, be retained in the MLS until sold, leased, withdrawn, or expired, and shall not be renewed or extended by the MLS beyond the
expiration date of the listing in effect when the expulsion (termination) became effective. If a Participant has been expelled (terminated) from the Association or MLS (or both) for failure to pay appropriate dues, fees or charges, the MLS Staff will withdraw all of the expelled or terminated Participant’s listings which are filed with the MLS. Notices of suspension/termination will serve as notification that listings of Participant will be withdrawn from the MLS.

7.20 When a Participant resigns from the MLS, the MLS Provider will withdraw all of the resigned Participant’s listings which are filed with the MLS within ten (10) days after written notice of resignation is received.

7.21 If a Participant does not hold a valid Texas real estate broker’s license, or a license or certification by an appropriate state regulatory agency to engage in the appraisal of real property, such Participant’s membership in the MLS will automatically terminate immediately and all listings of such Participant will be withdrawn immediately from the MLS by MLS Staff.

7.22 Listings of property may be withdrawn from the MLS by the Listing Participant before the expiration date of the listing agreement provided the Listing Participant has written authorization from the owner(s) of such property for such withdrawal. Owners do not have the unilateral right to require the MLS to withdraw or cancel a listing without the Listing Participant’s concurrence; however, when an owner(s) can document that the owner’s exclusive relationship with the Listing Participant has been terminated, the MLS may remove the listing at the request of the owner. A Listing Participant shall not withdraw or cancel a Listed Property for the purpose of concealing the sale or the sales price.

7.23 A Participant or any licensee affiliated with a Participant who has an interest in Listed Property shall disclose that interest when the listing is filed with the MLS and such information shall be disseminated to all Participants.
7.24 Listing information may be submitted by a Participant via computer transmission (as opposed to submitting a fully completed Data Input Sheet). By submitting listing information via computer transmission, a Participant warrants and represents that such Participant has a fully executed Qualified Listing Agreement and Data Input Sheet in such Participant’s office and further covenants with NTREIS and all Other Participants to retain a copy of such Qualified Listing Agreement and Data Input Sheet for a period of at least one year after the date the Listed Property is sold or leased, or the listing expires, whichever occurs later.

7.25 Participants who are engaged in the appraisal of real property are encouraged to share with the MLS factual data relating to property sold and closed which is not otherwise reported through the MLS when the submission of such data is not in violation of any fiduciary obligation of such Participant; however, such factual data will not be included in any MLS Compilation.

7.26 Only photos/drawings of or maps to real property will be accepted in the MLS system.

7.27 As used in this section, “Media” means and includes all photos, virtual tours, and other renditions of Listed Property submitted electronically by a Participant or Subscriber. Each Participant or Subscriber who submits Media to the MLS grants the MLS and other Participants and Subscribers the right to reproduce and display the Media in accordance with these Rules. Each Participant or Subscriber who submits Media to the MLS warrants and represents to NTREIS that such Participant or Subscriber has ownership of or the authority from the owner to submit such Media to the MLS and to grant NTREIS a non-exclusive license authorizing the MLS and other Participants and Subscribers the right to publish the Media anywhere the MLS Media may appear. Media submitted by a Participant or Subscriber may only be used for
the specified purpose of displaying the Listed Property. NTREIS reserves the right to reject and/or remove from the MLS any Media intended for customer viewing only containing any text, personal advertising, or personal promotion of a Subscriber or Participant. Before a Participant or Subscriber uses Media from a previous listing submitted to the MLS, that Participant or Subscriber shall obtain the written consent of the former Listing Participant to use such Media.

NOTE: In order to assure compliance with the Rules, each Participant or Subscriber who engages a third party photographer and submits photos to the MLS is advised to obtain a written agreement with the photographer either assigning all rights, including copyrights to the photographs, to the Participant or Subscriber or obtaining a right to grant NTREIS a non-exclusive license to publish the photographs in accordance with these Rules.

The following are alternative provisions which may be included in the agreement with the photographer:

“Photographer hereby assigns all right, title, and interest, including copyrights, in photographs to [insert name of Participant/ Subscriber] and agrees to execute any further documents which may reasonably be necessary to effect such assignment.” Or

“Photographer hereby authorizes [insert name of Participant/Subscriber] to grant a non-exclusive license to NTREIS to reproduce, distribute, and display photographs taken by Photographer.”

7.28 NTREIS does not permit the name, phone number, e-mail address, or web address of the listing agent or other similar information that is not descriptive in nature and relevant to an accurate portrayal of the Listed Property to be placed in the Property Description section of a listing. The same restrictions are applicable to the “Property Photograph” section, the “Picture Description”
section, and the Driving Directions section. Only a true current photograph of Listed Property may be placed in the “Property Photograph” section without decorative borders, other embellishments, or any digitally enhanced modifications that would misrepresent the true condition or appearance of the property. Notwithstanding the foregoing, only properties listed as incomplete construction may have a representative photo of the proposed house. A statement affirming that a representative photo is in use should be included in the “Photo Description” section of the listing information. Any alleged violation of this Rule will be subject to the enforcement procedures of Sections 11 and 12 of these Rules.

(Source: http://www.ntreis.net/documents/Forms_18920129199.pdf)

If the seller/owner chooses not to have the listing inputted into the Multiple Listing Services, you need to talk this over with the broker to see if you should take the listing. Is the seller/owner(s) are truly motivated or is this a private sale?

7.ACCESS TO THE PROPERTY: A and B
This is where the seller gives permission to allow access to the property by other brokers, customers, buyers, inspectors, appraisers, and your broker’s sales agents and broker associates at reasonable times. Your broker determines reasonable times. The seller/owner(s) give permission to make additional keys and to place a key box on the property. If appointments are going to be made by an outside vendor or scheduling company, you would place their name in paragraph B. Your broker determines who you will use as a scheduling company.

7.ACCESS TO THE PROPERTY.C 1-2.
Learn the difference between a keybox, lockbox, combination box, etc. There are many types of boxes to put on property to access the key. Your broker will determine what boxes you are to use for occupied and vacant property. At your expense, you will purchase these boxes if your broker does not provide them. Be sure your broker has
error and omissions insurance to cover the broker and you if someone enters the property unauthorized resulting in theft, property damage, or personal injury. You must have permission in writing to put a key box or any box that will hold the keys to the property.

If there is a tenant in the property, written permission must be in your file stating the seller has received the tenant’s permission to access the property. If the tenant does not give permission, the keybox cannot be on the property. Showings would have to be by appointment only. The tenant would have to be there to let the broker, sales agent or broker associate into the property.

7: ACCESS TO THE PROPERTY D. LIABILITY AND INDEMNIFICATION
Even though this paragraph is a disclaimer paragraph, you need to take this paragraph very serious and be sure you do everything possible to reduce any damage, loss or theft. Advising the seller/owner(s) to remove valuables, jewelry, medicine, and money from the property while it is on the market is a risk management procedure when taking any listing. Your broker will have or should have a policy and procedures on reducing risk when taking a listing.

7. ACCESS TO THE PROPERTY:
   A. Authorizing Access: Authorizing access to the Property means giving permission to another person to enter the Property, disclosing to the other person any security codes necessary to enter the Property, and lending a key to the other person to enter the Property, directly or through a keybox. To facilitate the showing and sale of the Property, Seller instructs Broker to:
      (1) access the Property at reasonable times;
      (2) authorize other brokers, their associates, inspectors, appraisers, and contractors to access the Property at reasonable times; and
      (3) duplicate keys to facilitate convenient and efficient showings of the Property.
B. Scheduling Companies: Broker may engage the following companies to schedule appointments and to authorize others to access the Property: ________________.

C. Keybox: A keybox is a locked container placed on the Property that holds a key to the Property. A keybox makes it more convenient for brokers, their associates, inspectors, appraisers, and contractors to show, inspect, or repair the Property. The keybox is opened by a special combination, key, or programmed device so that authorized persons may enter the Property, even in Seller’s absence. Using a keybox will probably increase the number of showings, but involves risks (for example, unauthorized entry, theft, property damage, or personal injury). Neither the Association of REALTORS® nor MLS requires the use of a keybox.

   (1) Broker ☐ is ☐ is not authorized to place a keybox on the Property.
   (2) If a tenant occupies the Property at any time during this Listing, Seller will furnish Broker a written statement (for example, TAR No. 1411), signed by all tenants, authorizing the use of a keybox or Broker may remove the keybox from the Property.

D. Liability and Indemnification: When authorizing access to the Property, Broker, other brokers, their associates, any keybox provider, or any scheduling company are not responsible for personal injury or property loss to Seller or any other person. Seller assumes all risk of any loss, damage, or injury. Except for a loss caused by Broker, Seller will indemnify and hold Broker harmless from any claim for personal injury, property damage, or other loss.

8. COOPERATION WITH OTHER BROKERS A.
First off, your broker will tell you what fees are to be paid to a buyer’s agent and a subagent. The sales agent or broker associate do not set fees, the broker of record sets the fees to pay the buyer broker or other broker sub agent.

The broker comes up with these fees based on his or her cost of doing business for his or her company. The broker determines his or her expenses and then how much income he or she needs to cover the expenses. The broker then determines how many listing,
sales, leases, referral fees, and any additional income to project the amount of business he or she needs to receive to cover business expenses. This is how the broker determines his or her commission fees.

You will need your broker’s permission to negotiate commissions and if so how much. All commissions are paid to the broker only. Whether and how much to pay a subagent is also determined by the broker. Subagency is not an automatic cooperation in the sale of your listing. We will discuss subagency in detail later. Non-cooperation with subagents is due to liability to the seller and listing broker and sales agent and broker associate.

You will fill in the applicable percentage or the flat cooperating fee for the other broker who is a member of the Multiple Listing Service if they sell your listing.

8. COOPERATION WITH OTHER BROKERS:

Your broker will have a fee structure for your review so you know what to fill in for non-members of the Multiple Listing Service. Before they show your listing or before they write an offer on your listing, you need a copy of their license to see if they are a broker, sales agent, broker associate or subagent. If your broker chooses to only cooperate with buyer agents, you would have to inform the subagent non-MLS member that your broker only cooperates with buyer agents. If he or she is the broker and a buyer’s agent, your broker would be wise to cooperate with the license holder.

8. 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 $_____.

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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 $_____.

9. **INTERMEDIARY (CHECK A OR B ONLY.)**

A. Intermediary Status – This is for in-house sales only if you or another sales agent or broker associate sells this property. If the seller understands that he or she is giving your broker and company permission to show and sell his or her property as long as you follow the requirements for disclosure, the process and duties are under intermediary. This paragraph also explains if you sell the listing, another sales agent or broker associate sells the listing.

Another lesson will go into detail on intermediaries, as well as the Notice under paragraph 9 A and B.

B. No Intermediary Status
This means no one in your company can sell the listing as well as you, as the listing agent.

9. **INTERMEDIARY: (Check A or B only.)**

☐ A. Intermediary Status: Broker may show the Property to interested prospective buyers who Broker represents. If a prospective buyer who Broker represents offers to buy the Property, Seller authorizes Broker to act as an intermediary and Broker will notify Seller that Broker will service the parties in accordance with one of the following alternatives.

(1) If a prospective buyer who Broker represents is serviced by an associate other than the associate servicing Seller under this Listing, Broker may notify Seller that Broker will: (a) appoint the associate then servicing Seller to communicate with, carry out instructions of, and provide opinions and advice
during negotiations to Seller; and (b) appoint the associate then servicing the prospective buyer to the prospective buyer for the same purpose.

(2) If a prospective buyer who Broker represents is serviced by the same associate who is servicing Seller, Broker may notify Seller that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the prospective buyer; and (b) appoint the associate servicing the Seller under this Listing to the Seller for the same purpose.

(3) Broker may notify Seller that Broker will make no appointments as described under this Paragraph 9A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

☐ B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who Broker represents.

**Notice:** If Broker acts as an intermediary under Paragraph 9A, Broker and Broker’s associates:

- may not disclose to the prospective buyer that Seller will accept a price less than the asking price unless otherwise instructed in a separate writing by Seller;
- may not disclose to Seller that the prospective buyer will pay a price greater than the price submitted in a written offer to Seller unless otherwise instructed in a separate writing by the prospective buyer;
- may not disclose any confidential information or any information Seller or the prospective buyer specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- may not treat a party to the transaction dishonestly; and
- may not violate the Real Estate License Act.
One of your fiduciary duties is confidentiality. Whatever you learn before, during, and after the entire listing process, you can never disclose what you have learned about your client. This duty survives closing.

10. **CONFIDENTIAL INFORMATION:** During this Listing or after it ends, Broker may not knowingly disclose information obtained in confidence from Seller except as authorized by Seller or required by law. Broker may not disclose to Seller any confidential information regarding any other person Broker represents or previously represented except as required by law.

Example: A husband and wife have listed their property with you and the wife tells you her husband, a financial planner, is going to jail for mail fraud and stealing money from his clients. This is why they are selling. You can NEVER tell anyone that the wife told you this private information. Other examples would be if you told another agent to bring an offer and your seller would take less.

11. **BROKER’S AUTHORITY**

A. This is what you were hired to do by taking the listing.

"Reasonable efforts“ – Define to yourself with your broker.

"Act Diligently" Always be prepared to show, sell or market your listing.

B. You must have the permission of the seller/owner(s) permission to upload the listing to the internet. When this first was available, there was concern for privacy and intrusion for purposes such as felony acts or worse. This can still happen, but sellers should be sure all valuables are put away as well as to secure entry to the property. They have the choice of the property being displayed or the address to displayed.

A Notice explains what will be shown and what will not be displayed on the internet.

C. What type of financing is applicable to sell the property. Each seller/owner(s) have the right to select type of financing to sell the property in regards to closing costs to the seller/owner’s and their net dollars.
D. This section lists specifically what the agent is authorized to do, covering:

1. Permission to advertise in the different media
2. Place a for sale sign on the property – You need permission in writing to put a sign on any property. Note that the Texas Real Estate License Act Sec. 1101.652 state that putting signs on the sellers’ property without permission is grounds for license suspension or revocation.
3. Permission to show sold information in the Multiple Listing Services to a potential buyer. You NEVER give the information for buyers to keep.
4. Permission to give out graphics, seller disclosures, surveys, and any documents required by law to potential buyers and other brokers.
5. Permission to get existing mortgage information and any and all second liens to be paid off. Seller to get and furnish, to sales agent or broker associate.
6. Permission to accept earnest money on the seller/owner(s) behalf and deposit in appropriate escrow account allowable by law.
7. Permission to disclose the sales price to the Multiple Listing Service and appraisers. Sold information is confidential and should not be given to anyone who is not a part of the Multiple Listing Service and appraisers.
8. Permission to disclose multiple offers without disclosing the contents of the offers.
9. Allows the broker to advertise that he or she sold the property
10. Permission to upload your property to search engines so those who are interested can see the information electronically.

E. Under section E., the broker cannot execute, initial or sign any document on behalf of the seller/owner(s).

11. BROKER’S AUTHORITY:

A. Broker will use reasonable efforts and act diligently to market the Property for sale, procure a buyer, and negotiate the sale of the Property.
B. Broker is authorized to display this Listing on the Internet without limitation unless one of the following is checked:
☐ (1) Seller does not want this Listing to be displayed on the Internet.
☐ (2) Seller does not want the address of the Property to be displayed on the Internet.

**Notice:** Seller understands and acknowledges that, if box 11B(1) is selected, consumers who conduct searches for listings on the Internet will not see information about this Listing in response to their search.

C. Broker is authorized to market the Property with the following financing options:

☐ (1) Conventional  ☐ (5) Texas Veterans Land Program
☐ (2) VA  ☐ (6) Owner Financing
☐ (3) FHA  ☐ (7) Other
☐ (4) Cash

D. In addition to other authority granted by this Listing, Broker may:

1. advertise the Property by means and methods as Broker determines, including but not limited to creating and placing advertisements with interior and exterior photographic and audio-visual images of the Property and related information in any media and the Internet;
2. place a “For Sale” sign on the Property and remove all other signs offering the Property for sale or lease;
3. furnish comparative marketing and sales information about other properties to prospective buyers;
4. disseminate information about the Property to other brokers and to prospective buyers, including applicable disclosures or notices that Seller is required to make under law or a contract;
5. obtain information from any holder of a note secured by a lien on the Property;
6. accept and deposit earnest money in trust in accordance with a contract for the sale of the Property;
7. disclose the sales price and terms of sale to other brokers, appraisers, or other real estate professionals;
(8) in response to inquiries from prospective buyers and other brokers, disclose whether the Seller is considering more than one offer (Broker will not disclose the terms of any competing offer unless specifically instructed by Seller);
(9) advertise, during or after this Listing ends, that Broker “sold” the Property; and
(10) place information about this Listing, the Property, and a transaction for the Property on an electronic transaction platform (typically an Internet-based system where professionals related to the transaction such as title companies, lenders, and others may receive, view, and input information).

E. Broker is not authorized to execute any document in the name of or on behalf of Seller concerning the Property.

Explanation of Paragraph 12. Seller’s Representations

A. The seller/owner(s) can sell the property and has a “Fee Simple Title.” In The Language of Real Estate, John W. Reilly defines Fee Simple Title as “The maximum possible estate one can possess in real property. A fee simple estate is the least limited interest and the most complete and absolute ownership in land; it is of indefinite duration, freely transferable, and inheritable. The title company will verify when they do a title search. If there are any clouds on the title, the seller/owner(s) will have to have the clouds removed before transfer of title can take place.

B. Seller/Owner(s) represent they do not have another listing agreement with another broker during the listing agreement period with the listing broker.

C. Seller/Owner(s) represent they have secured the property and complied with applicable laws and ordinances. Property owners who have pools, spas, etc MUST have all gates with locks and latches.

D. Seller/Owner(s) represent that no individual or entity has any right to the purchase of the property.

E. Seller/Owner(s) represent they are current on any and all loans and the property is not in any stage of a foreclosure.

F. Seller/Owner(s) represent there are no liens on the property that they are aware
of. This does not mean there are not any.

G. Seller/Owner(s) represents their property is not help up in a jurisdiction of any court of law for any reason

H. Seller/Owner(s) represents all information given to listing broker including “Seller Disclosure Statement”, Existing Survey, any additional documentation is true to the best of their knowledge.

I. This paragraph would only apply if the seller/owners would be selling their property to a relocation company associated with the seller/owner’s employer.

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**12. SELLER’S REPRESENTATIONS:** Except as provided by Paragraph 15, Seller represents that:

A. Seller has fee simple title to and peaceable possession of the Property and all its improvements and fixtures, unless rented, and the legal capacity to convey the Property;

B. Seller is not bound by a listing agreement with another broker for the sale, exchange, or lease of the Property that is or will be in effect during this Listing;

C. any pool or spa and any required enclosures, fences, gates, and latches comply with all applicable laws and ordinances;

D. no person or entity has any right to purchase, lease, or acquire the Property by an option, right of refusal, or other agreement;

E. Seller is current and not delinquent on all loans and all other financial obligations related to the Property, including but not limited to mortgages, home equity loans, home improvement loans, homeowner association fees, and taxes, except ______________;

F. Seller is not aware of any liens or other encumbrances against the Property, except ______________;

G. the Property is not subject to the jurisdiction of any court;

H. all information relating to the Property Seller provides to Broker is true and correct to the best of Seller’s knowledge; and

I. the name of any employer, relocation company, or other entity that provides benefits to Seller when selling the Property is: ____________.
13. SELLER’S ADDITIONAL PROMISES:

Seller agrees to:

A. Cooperate with listing broker to show the property and make it available during reasonable times.

B. Not lease the property during the listing period without the listing broker’s approval in writing.

C. Not negotiate or sell property with anyone but the listing broker.

D. Not enter into another listing agreement with another broker during the listing period with the current listing broker. The seller/owner(s) can post date a listing agreement with another broker if they so choose.

E. This is basically the same as 12.C. It is important the seller/owner’s adhere to applicable laws and ordinances if they have any pools, spas, etc. Your broker should have addenda to go in your file, which the seller/owners sign stating that they are in compliance with all applicable laws and ordinances. Applicable law could be the Texas Property Code. An ordinance would be what the city requires.

F. Provide the listing broker copies of any existing leases and to explain in writing what the seller/owners agreement with tenant(s) is regarding showing and selling the property. This could be a real problem if the tenant does not cooperate with showings and moving out of the property by the time the closing and funding takes place.

G. Fill out the “Seller Disclosure Statement” to the best of their knowledge and sign the disclosure, any existing contract, if any. It is rare that there is an existing contract, but it could happen. If they are furnishing an existing survey, the seller/owner(s) have to fill out the T-47 Affidavit and sign it before a notary for the title company and lender to approve.

H. Any current paperwork that has information that changes during the listing period must be updated to comply with existing file on the listing. Your broker would have a policy on this. Example: It is discovered that the property has foundation problems after the listing is taken, so the “Seller Disclosure” would have to be updated. Any change in the paper work would have to be update in writing.
13. **SELLER’S ADDITIONAL PROMISES:** Seller agrees to:

A. cooperate with Broker to facilitate the showing, marketing, and sale of the Property;
B. not rent or lease the Property during this Listing without Broker’s prior written approval;
C. not negotiate with any prospective buyer who may contact Seller directly, but refer all prospective buyers to Broker;
D. not enter into a listing agreement with another broker for the sale, exchange, lease, or management of the Property to become effective during this Listing without Broker’s prior written approval;
E. maintain any pool and all required enclosures in compliance with all applicable laws and ordinances;
F. provide Broker with copies of any leases or rental agreements pertaining to the Property and advise Broker of tenants moving in or out of the Property;
G. complete any disclosures or notices required by law or a contract to sell the Property; and
H. amend any applicable notices and disclosures if any material change occurs during this Listing.

14. **LIMITATION OF LIABILITY:**

This is the liability of the broker with certain considerations. This by no means relieves the listing broker, sales agent and broker associate of negligence, incompetency, and lack of knowledge for the fiduciary duties that come with representing a client.

A. If the property becomes vacant, it is the seller/owner’s responsibility to contact their insurance company and get the appropriate coverage. Failure to do so could cause loss of coverage. The broker needs to be sure the property is tended, including doors locked at all times, windows locked, lights turned off, and thermostats are set according to the current weather.

B. The listing broker is not liable for any manner of personal injury or damage to the property not caused by the listing broker. The following includes acts or causes that could take place for which the broker is not liable for if the broker has not been negligent.
1. The listing broker is not liable if other brokers, sales agents, broker associates, customers, buyers, tenants, appraisers, inspectors or anyone else having access to the property are hurt or maimed while on the property.

2. The listing broker is not liable if other brokers copy and paste the property information on their websites.

3. The listing broker is not liable if the property is broken into or robbed.

4. The listing broker is not liable if the pipes freeze on the property. If the listing broker and listing agent are negligent and do not keep the property in adequate condition (i.e. keep heat on, dripping faucets, ) and the pipes freeze, the broker could be liable. Discuss this with the seller/owner(s) on how they want you to handle the property in winter months and get it in writing. If they do not keep the heat on, then they would be liable for the pipes freezing.

5. The listing broker is not liable if there are conditions on the property that would cause issues during and after the sale. Examples would be springs under the property, sink holes, mold, etc.

6. The listing broker is not liable if the seller/owner(s) are not in compliance with any law or ordinance. This does not relieve the broker of knowing what those laws are and what city and county ordinances apply.

7. The listing broker is not liable if the seller/owner’s at any time before, during and after are negligent.

14.C – LIMITATIONS OF LIABILITY

C. The seller/owner(s) represent they will protect, defend, indemnify, and hold the listing broker harmless from any damage, costs, attorney fees, and expenses that are caused by the seller. In other words, in theory the seller/owners will not hold the listing broker liable for any action caused by the seller. In the real world, if there is a law suit, the listing broker is the first person or entity that the seller, owner, buyers, tenant, landlords, attorneys, other brokers go after.
14. LIMITATION OF LIABILITY:
   A. If the Property is or becomes vacant during this Listing, Seller must notify Seller’s casualty insurance company and request a “vacancy clause” to cover the Property. Broker is not responsible for the security of the Property nor for inspecting the Property on any periodic basis.

   B. Broker is not responsible or liable in any manner for personal injury to any person or for loss or damage to any person’s real or personal property resulting from any act or omission not caused by Broker’s negligence, including but not limited to injuries or damages caused by:
      (1) other brokers, their associates, inspectors, appraisers, and contractors who are authorized to access the Property;
      (2) other brokers or their associates who may have information about the Property on their websites;
      (3) acts of third parties (for example, vandalism or theft);
      (4) freezing water pipes;
      (5) a dangerous condition on the Property;
      (6) the Property’s non-compliance with any law or ordinance; or
      (7) Seller, negligently or otherwise.

   C. Seller agrees to protect, defend, indemnify, and hold Broker harmless from any damage, costs, attorney’s fees, and expenses that:
      (1) are caused by Seller, negligently or otherwise;
      (2) arise from Seller’s failure to disclose any material or relevant information about the Property; or
      (3) are caused by Seller giving incorrect information to any person.

15. SPECIAL PROVISIONS:
   Be sure you only write in special provisions items that pertain to an existing paragraph. Otherwise, you could be found guilty of practicing law. Be sure you check with your broker before you add anything under Special Provisions.

   15. SPECIAL PROVISIONS:
PARAGRAPH 16. DEFAULT
If the seller breaches this listing, it means they do not comply with every paragraph of the listing agreement. The seller will also owe the LISTING BROKER the full commission based on the listed price.

If the listing broker breaches the listing agreement, the seller may sue the listing broker. The seller/owner(s) can terminate the listing agreement if the listing broker breaches the listing agreement. This is why you need to know what each paragraph means so you can adhere to your responsibility. Failure to do so could cause you a lot of liability and cost you your license.

16. DEFAULT: If Seller breaches this Listing, Seller is in default and will be liable to Broker for the amount of the Broker’s compensation specified in Paragraph 5A and any other compensation Broker is entitled to receive under this Listing. If a sales price is not determinable in the event of an exchange or breach of this Listing, the Listing Price will be the sales price for purposes of computing compensation. If Broker breaches this Listing, Broker is in default and Seller may exercise any remedy at law.

PARAGRAPH 17. MEDIATION
The parties need to understand this does not take away their right to pursue matters in a court of law. A majority of judges are requiring mediation in before it goes to a jury. Mediation is the best way to resolve issues before attorneys get involved to save everyone a lot of money. Both parties select the mediator and pay for the cost of mediation. The parties do not need to accept the results of the mediation. They then would drop the issue or go to court.

17. MEDIATION: The parties agree to negotiate in good faith in an effort to resolve any dispute related to this Listing that may arise between the parties. If the dispute cannot be resolved by negotiation, the dispute will be submitted to mediation. The parties to the dispute will choose a mutually acceptable mediator and will share the cost of mediation equally.
PARAGRAPH 18. ATTORNEY FEES
Whoever wins in the lawsuit, their attorney fees and court costs are paid by the non-prevailing party who lost in the lawsuit.

18. ATTORNEY’S FEES: If Seller or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this Listing or any transaction related to or contemplated by this Listing, such party will be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney’s fees.

PARAGRAPH 19. ADDENDA AND OTHER DOCUMENTS
Here you would check the box for the appropriate addenda that are pertinent to your listing agreement’s property. You can see the Information about Brokerage Services is automatically checked. The list of addenda are not conclusive. Some of the addenda are promulgated by the Texas Real Estate Commission and others are from the Texas Association of REALTORS. You will need to take a contract class to learn when to use the addenda for appropriate properties.

In section O, you would list any forms required by your broker to keep in the file. Be sure you are not using outdated forms. Never use a form that you have not gotten off the website for the Texas Real Estate Commission and your broker’s form inventory. When you become a member of the Texas Association of REALTORS®, you can use their forms as well. To become a member of the Texas Association of REALTORS®, you need to be sponsored by a broker who is a member of the local, state and national association of REALTORS®. The same applies to the Multiple Listing Service.

19. ADDENDA AND OTHER DOCUMENTS: Addenda that are part of this Listing and other documents that Seller may need to provide are:

☒ A. Information About Brokerage Services;
☐ B. Seller Disclosure Notice (§5.008, Texas Property Code);
☐ C. Addendum for Seller’s Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (required if Property was built before 1978);
☐ D. Residential Real Property Affidavit (T-47 Affidavit; related to existing survey);
☐ E. MUD, Water District, or Statutory Tax District Disclosure Notice (Chapter 49, Texas Water Code);
☐ F. Request for Information from an Owners’ Association;
☐ G. Request for Mortgage Information;
☐ H. Information about Mineral Clauses in Contract Forms;
☐ I. Information about On-Site Sewer Facility;
☐ J. Information about Property Insurance for a Buyer or Seller;
☐ K. Information about Special Flood Hazard Areas;
☐ L. Condominium Addendum to Listing;
☐ M. Keybox Authorization by Tenant;
☐ N. Seller’s Authorization to Release and Advertise Certain Information; and
☐ O. ________________________________.

PARAGRAPH 20. AGREEMENT OF PARTIES:
A. The sellers and listing broker agree the listing agreement and addenda are the only agreements between the parties.
B. Agreement(s) and addenda are not assignable. You cannot give the listing to another broker and the seller/owner(s) cannot give/assign the listing agreement to another broker.
C. The commission agreement is binding to any heirs, administrators, executors, etc.
D. All seller/owner(s) are bound by this listing agreement.
E. Texas law governs this listing agreement and all documents
F. Severability means “the act of removing something attached to or is a part of an agreement. If for any reason a paragraph(s) agreement is found invalid or unenforceable, then those would be removed, but the rest of the listing agreement would apply. Let your broker worry about this.
G. Everything needs to be in writing. NEVER, NEVER transact business without putting it in writing.
20. AGREEMENT OF PARTIES:

A. Entire Agreement: This Listing is the entire agreement of the parties and may not be changed except by written agreement.
B. Assignability: Neither party may assign this Listing without the written consent of the other party.
C. Binding Effect: Seller’s obligation to pay Broker earned compensation is binding upon Seller and Seller’s heirs, administrators, executors, successors, and permitted assignees.
D. Joint and Several: All Sellers executing this Listing are jointly and severally liable for the performance of all its terms.
E. Governing Law: Texas law governs the interpretation, validity, performance, and enforcement of this Listing.
F. Severability: If a court finds any clause in this Listing invalid or unenforceable, the remainder of this Listing will not be affected and all other provisions of this Listing will remain valid and enforceable.
G. Notices: Notices between the parties must be in writing and are effective when sent to the receiving party’s address, fax, or e-mail address specified in Paragraph 1.

PARAGRAPH 21. ADDITIONAL NOTICES:

A. This is more of a disclosure stating commissions are not fixed by or between brokers, the Association of REALTORS®, Multiple Listing Service or any other entity. Commissions are determined by the individual brokers based on their cost of doing business. Commissions are negotiable. Be sure you know your broker’s policy on commissions and negotiating them.
B. This is regarding federal, state and local fair housing law. You cannot discriminate based on race, color, religion, national origin, sex, disability, familial status, sexual orientation or gender identity. You need to know what the local ordinance is where the property is located. Some local ordinances state creed, status as a student, marital status or age.
C. The seller/owner(s) need to contact any mortgage company or bank that they plan to use to pay off their loan. Failure to do this may cost the seller/owner(s) a full month’s interest. The title company will contact them as well to get a final pay
off, but the seller/owner(s) need to do it as well.

D. The broker is advising the seller/owner(s) to check the information inputted into the Multiple Listing Service. There is an input sheet used prior to inputting the listing into Multiple Listing Service for the seller/owners to review and approve.

E. The broker also has informed the seller/owner(s) to remove all valuables, jewelry firearms, any weapons, medicine and drugs, money, etc. Remove all valuables.

F. Repeat of the seller/owner(s)’ responsibility to adhere to city ordinances and laws pertaining to certain items on the property, such as swimming pools, fences, pets, etc. The broker affirms he or she has alerted them and used a disclosure signed by the seller/owner(s).

G. The broker has advised the seller/owner(s) that if the property was built before 1978, federal law requires disclosure to buyer or tenant to:
   1. Provide the buyer with the federally approved pamphlet on lead poisoning prevention
   2. Disclose the presence of any known lead-based paint or lead-based paint hazards in the property
   3. Deliver all records and reports to the buyer related to such paint or hazards; and
   4. Provide the buyer a period up to then (10) days to have the property inspected for such paint or hazards.

21. ADDITIONAL NOTICES:

   A. Broker’s compensation or the sharing of compensation between brokers is not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS®, MLS, or any listing service.

   B. In accordance with fair housing laws and the National Association of REALTORS® Code of Ethics, Broker’s services must be provided and the Property must be shown and made available to all persons without regard to race, color, religion, national origin, sex, disability, familial status, sexual orientation, or gender identity. Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, or age).

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C. Broker advises Seller to contact any mortgage lender or other lien holder to obtain information regarding payoff amounts for any existing mortgages or liens on the Property.

D. Broker advises Seller to review the information Broker submits to an MLS or other listing service.

E. Broker advises Seller to remove or secure jewelry, prescription drugs, other valuables, firearms and any other weapons.

F. Statutes or ordinances may regulate certain items on the Property (for example, swimming pools and septic systems). Non-compliance with the statutes or ordinances may delay a transaction and may result in fines, penalties, and liability to Seller.

G. If the Property was built before 1978, Federal law requires the Seller to: (1) provide the buyer with the federally approved pamphlet on lead poisoning prevention; (2) disclose the presence of any known lead-based paint or lead-based paint hazards in the Property; (3) deliver all records and reports to the buyer related to such paint or hazards; and (4) provide the buyer a period up to 10 days to have the Property inspected for such paint or hazards.

H. Broker cannot give legal advice. READ THIS LISTING CAREFULLY. If you do not understand the effect of this Listing, consult an attorney BEFORE signing.

Unauthorized Practice of Law

Texas Real Estate Commission License Act. Sec. 1101.654. Suspension or Revocation of License or Certificate for Unauthorized Practice of Law.

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

(a) The commission shall suspend or revoke the license or certificate of registration of a license or certificate holder who is not a licensed attorney in this state and who, for consideration, a reward, or a pecuniary benefit, present or anticipated, direct or indirect, or in connection with the person's employment, agency, or fiduciary relationship as a license or certificate holder:

(1) drafts an instrument, other than a form described by Section 1101.155, that transfers or otherwise affects an interest in real property; or
(2) advises a person regarding the validity or legal sufficiency of an instrument or the validity of title to real property.

(b) Notwithstanding any other law, a license or certificate holder who completes a contract form for the sale, exchange, option, or lease of an interest in real property incidental to acting as a broker is not engaged in the unauthorized or illegal practice of law in this state if the form was:

(1) adopted by the commission for the type of transaction for which the form is used;

(2) prepared by an attorney licensed in this state and approved by the attorney for the type of transaction for which the form is used; or

(3) prepared by the property owner or by an attorney and required by the property owner.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

The listing agreement outlines the terms and conditions of each party, namely, the license holder’s responsibility to represent the principal to the best of his or her ability in accordance with the law of agency and the principal’s responsibility to pay the stated commission or fee to the broker for his or her expertise and service. All commission and fees are paid to the broker. The broker then pays the sales agent or the broker associate. You need to know your broker’s policy on the payment of fees and commissions. A broker may have clerical employees who handle this, but you need to know the policy of the broker and how and when you get paid.

Before you list any property you need to be familiar with what forms your broker requires you to use in transactions. You, as the sales agent, do not select what forms to use. The sales agent and broker associate need to read and memorize what the form says to be able to explain it to your client. Failure to become familiar with the form can damage your credibility when discussing and presenting the listing process to the seller/owner(s) of the property.
A listing agreement should be detailed and comprehensive so as to avoid any misunderstandings regarding the obligations and intentions of each party. All relevant details and facts should be included so that both parties know when the terms of the agreement have been fulfilled.

At a minimum, the listing agreement should include the following information:

- The parties to the agreement
- Property legal description
- Personal property exclusions
- Personal property staying
- List price
- Term of listing agreement (effective date and termination dates)
- Broker compensation
- Protection period
- Listing services-mls or no mls
- Access to property
- Cooperation with other brokers
- Intermediary
- No intermediary
- Confidential information
- Brokers authority
- Financing to sell
- Seller representations
- Limitation of liability
- Default
- Mediation
- Attorney fees
- Addenda to be included or other documents
- The statement that explains agency law (the Information About Brokerage Services form fulfills this requirement)
• Explanation of agency duties to the principal and the third party
• Balance of the seller’s mortgage
• Balance of any second liens Other consents and agreements between license holder and owner(s) include: Written permission to market the property in a reasonable manner
• Written permission to keep a keybox on the premises
• Written consent for an intermediary, if applicable
• Fair Housing language and logo
• Dated signatures of involved parties

Below is a sample listing agreement from the Texas Association of REALTORS® e used by members. The Texas Real Estate Commission does not promulgate listing agreements nor do they have any.

This agreement is provided for educational purposes only. These forms that are mandated by the Texas Association of REALTORS® are modified on a periodic basis. The license holder should make sure that he or she is using the most current form in his or her practice. How do you know if you are using a current form? Never use a form that has not been downloaded from the Texas Real Estate Commission or the Texas Association of REALTORS® websites. These websites keep their forms current. If your broker has their own forms, make sure you do not use forms that have been in the office for a long period of time. You should check with your broker to be sure they are the most current. In the 21st century, technology is used to keep us all current on everything. If you are not technologically literate, you will find real estate very difficult.
RESIDENTIAL REAL ESTATE LISTING AGREEMENT
EXCLUSIVE RIGHT TO SELL

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

©Texas Association of REALTORS®, Inc.
2014

____________________________________________________________

1. Parties: The parties to this agreement (this Listing) are:

   Seller: __________________________________________________________
   Address: __________________________________________________________
   City, State, Zip: ____________________________________________________
   Phone: ___________________ Fax: ______________________________
   Email: ______________________________
   Broker: __________________________________________________________
   Address: __________________________________________________________
   City, State, Zip: ____________________________________________________
   Phone: __________________ Fax: ______________________________
   Email: ______________________________

Seller appoints Broker as Seller’s sole and exclusive real estate agent and grants to Broker the exclusive right to sell the Property.

2. PROPERTY: “Property” means the land, improvements, and accessories described below, except for any described exclusions.

   I. Land: Lot ____________, Block ________________, Addition, City of ________, in
   County, Texas known as ________ (address/zip code), or as described on attached
   exhibit. (If Property is a condominium, attach Condominium Addendum.)

   J. 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

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fans, mail boxes, television antennas and satellite dish system and equipment, 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.

K. 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) satellite dish systems, (ii) garage doors, (iii) entry gates, and (iv) other improvements and accessories.

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

____________________________________________.

M. Owners’ Association: ________________________________.

3. LISTING PRICE: Seller instructs Broker to market the Property at the following price: $_______ (Listing Price). Seller agrees to sell the Property for the Listing Price or any other price acceptable to Seller. Seller will pay all typical closing costs charged to sellers of residential real estate in Texas (seller’s typical closing costs are those set forth in the residential contract forms promulgated by the Texas Real Estate Commission).

4. TERM:

   E. This Listing begins on and ends at 11:59 p.m. on ________.

   F. If Seller enters into a binding written contract to sell the Property before the date this Listing begins and the contract is binding on the date this Listing begins, this Listing will not commence and will be void.

5. BROKER COMPENSATION:

   A. When earned and payable, Seller will pay Broker:

      ☐ (1) % of the sales price.

      ☐ (2) ________________________________ .
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.

Broker's compensation is **not** payable if a sale of the Property does not close or fund as a result of: (i) Seller's failure, without fault of Seller, to deliver to a buyer a deed or a title policy as required by the contract to sell; (ii) loss of ownership due to foreclosure or other legal proceeding; or (iii) Seller's failure to restore the Property, as a result of a casualty loss, to its previous condition by the closing date set forth in a contract for the sale of the Property.

D. **Other Compensation:**
   1. **Breach by Buyer Under a Contract:** If Seller collects earnest money, the sales price, or damages by suit, compromise, settlement, or otherwise from a buyer who breaches a contract for the sale of the Property entered into during this Listing, Seller will pay Broker, after deducting attorney's fees and collection expenses, an amount equal to the lesser of one-half of the amount collected after deductions or the amount of the Broker's Compensation stated in Paragraph 5A. Any amount paid under this Paragraph 5D(1) is in addition to any amount that Broker may be entitled to receive for subsequently selling the Property.
(2) Service Providers: If Broker refers Seller or a prospective buyer to a service provider (for example, mover, cable company, telecommunications provider, utility, or contractor) Broker may receive a fee from the service provider for the referral. Any referral fee Broker receives under this Paragraph 5D(2) is in addition to any other compensation Broker may receive under this Listing.

(3) Other Fees and/or Reimbursable Expenses: ____________________________.

E. Protection Period:
(1) “Protection period” means that time starting the day after this Listing ends and continuing for days. “Sell” means any transfer of any fee simple interest in the Property whether by oral or written agreement or option.
(2) Not later than 10 days after this Listing ends, Broker may send Seller written notice specifying the names of persons whose attention was called to the Property during this Listing. If Seller agrees to sell the Property during the protection period to a person named in the notice or to a relative of a person named in the notice, Seller will pay Broker, upon the closing of the sale, the amount Broker would have been entitled to receive if this Listing were still in effect.
(3) This Paragraph 5E survives termination of this Listing. This Paragraph 5E will not apply if:
   (a) Seller agrees to sell the Property during the protection period;
   (b) the Property is exclusively listed with another broker who is a member of the Texas Association of REALTORS® at the time the sale is negotiated; and
   (c) Seller is obligated to pay the other broker a fee for the sale.

F. County: All amounts payable to Broker are to be paid in cash in ________________ County, Texas.

G. Escrow Authorization: Seller authorizes, and Broker may so instruct, any escrow or closing agent authorized to close a transaction for the purchase or acquisition of the Property to collect and disburse to Broker all amounts payable to Broker under this Listing.

6. LISTING SERVICES:
   ☐ A. Broker will file this Listing with one or more Multiple Listing Services (MLS) by the earlier of the time required by MLS rules or 5 days after the date this Listing begins. Seller
authorizes Broker to submit information about this Listing and the sale of the Property to the MLS.

Notice: MLS rules require Broker to accurately and timely submit all information the MLS requires for participation including sold data. MLS rules may require that the information be submitted to the MLS throughout the time the Listing is in effect. Subscribers to the MLS may use the information for market evaluation or appraisal purposes. Subscribers are other brokers and other real estate professionals such as appraisers and may include the appraisal district. Any information filed with the MLS becomes the property of the MLS for all purposes. Submission of information to MLS ensures that persons who use and benefit from the MLS also contribute information.

B. Seller instructs Broker not to file this Listing with one or more Multiple Listing Service (MLS) until _________ days after the date this Listing begins for the following purpose(s): __________________.
   (NOTE: Do not check if prohibited by Multiple Listing Service(s).)

C. Broker will not file this Listing with a Multiple Listing Service (MLS) or any other listing service.

Notice: Seller acknowledges and understands that if this option is checked: (1) Seller’s Property will not be included in the MLS database available to real estate agents and brokers from other real estate offices who subscribe to and participate in the MLS, and their buyer clients may not be aware that Seller’s Property is offered for sale; (2) Seller’s Property will not be included in the MLS’s download to various real estate Internet sites that are used by the public to search for property listings; and (3) real estate agents, brokers, and members of the public may be unaware of the terms and conditions under which Seller is marketing the Property.

7. ACCESS TO THE PROPERTY:
   A. Authorizing Access: Authorizing access to the Property means giving permission to another person to enter the Property, disclosing to the other person any security codes necessary to enter the Property, and lending a key to the other person to enter the
Property, directly or through a keybox. To facilitate the showing and sale of the Property, Seller instructs Broker to:

(1) access the Property at reasonable times;
(2) authorize other brokers, their associates, inspectors, appraisers, and contractors to access the Property at reasonable times; and
(3) duplicate keys to facilitate convenient and efficient showings of the Property.

B. **Scheduling Companies:** Broker may engage the following companies to schedule appointments and to authorize others to access the Property: ________________.

C. **Keybox:** A keybox is a locked container placed on the Property that holds a key to the Property. A keybox makes it more convenient for brokers, their associates, inspectors, appraisers, and contractors to show, inspect, or repair the Property. The keybox is opened by a special combination, key, or programmed device so that authorized persons may enter the Property, even in Seller’s absence. Using a keybox will probably increase the number of showings, but involves risks (for example, unauthorized entry, theft, property damage, or personal injury). Neither the Association of REALTORS® nor MLS requires the use of a keybox.

(1) Broker ☐ is ☐ is not authorized to place a keybox on the Property.
(2) If a tenant occupies the Property at any time during this Listing, Seller will furnish Broker a written statement (for example, TAR No. 1411), signed by all tenants, authorizing the use of a keybox or Broker may remove the keybox from the Property.

D. **Liability and Indemnification:** When authorizing access to the Property, Broker, other brokers, their associates, any keybox provider, or any scheduling company are not responsible for personal injury or property loss to Seller or any other person. Seller assumes all risk of any loss, damage, or injury. **Except for a loss caused by Broker, Seller will indemnify and hold Broker harmless from any claim for personal injury, property damage, or other loss.**
8. **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 procure[s] 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 $_____.

9. **INTERMEDIARY:** *(Check A or B only.)*

   ☐ A. Intermediary Status: Broker may show the Property to interested prospective buyers who Broker represents. If a prospective buyer who Broker represents offers to buy the Property, Seller authorizes Broker to act as an intermediary and Broker will notify Seller that Broker will service the parties in accordance with one of the following alternatives.

   (1) If a prospective buyer who Broker represents is serviced by an associate other than the associate servicing Seller under this Listing, Broker may notify Seller that Broker will: (a) appoint the associate then servicing Seller to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Seller; and (b) appoint the associate then servicing the prospective buyer to the same purpose.

   (2) If a prospective buyer who Broker represents is serviced by the same associate who is servicing Seller, Broker may notify Seller that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the prospective buyer; and (b) appoint the associate servicing the Seller under this Listing to the Seller for the same purpose.

   (3) Broker may notify Seller that Broker will make no appointments as described under this Paragraph 9A and, in such an event, the associate servicing the parties
will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

☐B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who Broker represents.

**Notice:** If Broker acts as an intermediary under Paragraph 9A, Broker and Broker’s associates:

- may not disclose to the prospective buyer that Seller will accept a price less than the asking price unless otherwise instructed in a separate writing by Seller;
- may not disclose to Seller that the prospective buyer will pay a price greater than the price submitted in a written offer to Seller unless otherwise instructed in a separate writing by the prospective buyer;
- may not disclose any confidential information or any information Seller or the prospective buyer specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- may not treat a party to the transaction dishonestly; and
- may not violate the Real Estate License Act.

10. **CONFIDENTIAL INFORMATION:** During this Listing or after it ends, Broker may not knowingly disclose information obtained in confidence from Seller except as authorized by Seller or required by law. Broker may not disclose to Seller any confidential information regarding any other person Broker represents or previously represented except as required by law.

11. **BROKER’S AUTHORITY:**

   A. Broker will use reasonable efforts and act diligently to market the Property for sale, procure a buyer, and negotiate the sale of the Property.

   B. Broker is authorized to display this Listing on the Internet without limitation unless one of the following is checked:

      ☐ (1) Seller does not want this Listing to be displayed on the Internet.
☐ (2) Seller does not want the address of the Property to be displayed on the Internet.

Notice: Seller understands and acknowledges that, if box 11B(1) is selected, consumers who conduct searches for listings on the Internet will not see information about this Listing in response to their search.

C. Broker is authorized to market the Property with the following financing options:

☐ (1) Conventional ☐ (5) Texas Veterans Land Program
☐ (2) VA ☐ (6) Owner Financing
☐ (3) FHA ☐ (7) Other
☐(4) Cash

D. In addition to other authority granted by this Listing, Broker may:

(1) advertise the Property by means and methods as Broker determines, including but not limited to creating and placing advertisements with interior and exterior photographic and audio-visual images of the Property and related information in any media and the Internet;
(2) place a “For Sale” sign on the Property and remove all other signs offering the Property for sale or lease;
(3) furnish comparative marketing and sales information about other properties to prospective buyers;
(4) disseminate information about the Property to other brokers and to prospective buyers, including applicable disclosures or notices that Seller is required to make under law or a contract;
(5) obtain information from any holder of a note secured by a lien on the Property;
(6) accept and deposit earnest money in trust in accordance with a contract for the sale of the Property;
(7) disclose the sales price and terms of sale to other brokers, appraisers, or other real estate professionals;
(8) in response to inquiries from prospective buyers and other brokers, disclose whether the Seller is considering more than one offer (Broker will not disclose the terms of any competing offer unless specifically instructed by Seller);
(9) advertise, during or after this Listing ends, that Broker “sold” the Property; and
(10) place information about this Listing, the Property, and a transaction for the Property on an electronic transaction platform (typically an Internet-based system where professionals related to the transaction such as title companies, lenders, and others may receive, view, and input information).

E. Broker is not authorized to execute any document in the name of or on behalf of Seller concerning the Property.

12. SELLER’S REPRESENTATIONS: Except as provided by Paragraph 15, Seller represents that:

A. Seller has fee simple title to and peaceable possession of the Property and all its improvements and fixtures, unless rented, and the legal capacity to convey the Property;
B. Seller is not bound by a listing agreement with another broker for the sale, exchange, or lease of the Property that is or will be in effect during this Listing;
C. any pool or spa and any required enclosures, fences, gates, and latches comply with all applicable laws and ordinances;
D. no person or entity has any right to purchase, lease, or acquire the Property by an option, right of refusal, or other agreement;
E. Seller is current and not delinquent on all loans and all other financial obligations related to the Property, including but not limited to mortgages, home equity loans, home improvement loans, homeowner association fees, and taxes, except ____________________;
F. Seller is not aware of any liens or other encumbrances against the Property, except ____________________;
G. the Property is not subject to the jurisdiction of any court;
H. all information relating to the Property Seller provides to Broker is true and correct to the best of Seller’s knowledge; and
I. the name of any employer, relocation company, or other entity that provides benefits to Seller when selling the Property is: ____________.
13. **SELLER’S ADDITIONAL PROMISES:** Seller agrees to:

A. cooperate with Broker to facilitate the showing, marketing, and sale of the Property;
B. not rent or lease the Property during this Listing without Broker’s prior written approval;
C. not negotiate with any prospective buyer who may contact Seller directly, but refer all prospective buyers to Broker;
D. not enter into a listing agreement with another broker for the sale, exchange, lease, or management of the Property to become effective during this Listing without Broker’s prior written approval;
E. maintain any pool and all required enclosures in compliance with all applicable laws and ordinances;
F. provide Broker with copies of any leases or rental agreements pertaining to the Property and advise Broker of tenants moving in or out of the Property;
G. complete any disclosures or notices required by law or a contract to sell the Property; and
H. amend any applicable notices and disclosures if any material change occurs during this Listing.

14. **LIMITATION OF LIABILITY:**

A. If the Property is or becomes vacant during this Listing, Seller must notify Seller’s casualty insurance company and request a “vacancy clause” to cover the Property. Broker is not responsible for the security of the Property nor for inspecting the Property on any periodic basis.

B. Broker is not responsible or liable in any manner for personal injury to any person or for loss or damage to any person’s real or personal property resulting from any act or omission not caused by Broker’s negligence, including but not limited to injuries or damages caused by:

1. other brokers, their associates, inspectors, appraisers, and contractors who are authorized to access the Property;
2. other brokers or their associates who may have information about the Property on their websites;
3. acts of third parties (for example, vandalism or theft);
4. freezing water pipes;
(5) a dangerous condition on the Property;
(6) the Property's non-compliance with any law or ordinance; or
(7) Seller, negligently or otherwise.

C. Seller agrees to protect, defend, indemnify, and hold Broker harmless from any
damage, costs, attorney's fees, and expenses that:
(1) are caused by Seller, negligently or otherwise;
(2) arise from Seller's failure to disclose any material or relevant information
about the Property; or
(3) are caused by Seller giving incorrect information to any person.

15. SPECIAL PROVISIONS:

16. DEFAULT: If Seller breaches this Listing, Seller is in default and will be liable to Broker for
the amount of the Broker's compensation specified in Paragraph 5A and any other compensation
Broker is entitled to receive under this Listing. If a sales price is not determinable in the event of
an exchange or breach of this Listing, the Listing Price will be the sales price for purposes of
computing compensation. If Broker breaches this Listing, Broker is in default and Seller may
exercise any remedy at law.

17. MEDIATION: The parties agree to negotiate in good faith in an effort to resolve any dispute
related to this Listing that may arise between the parties. If the dispute cannot be resolved by
negotiation, the dispute will be submitted to mediation. The parties to the dispute will choose a
mutually acceptable mediator and will share the cost of mediation equally.

18. ATTORNEY'S FEES: If Seller or Broker is a prevailing party in any legal proceeding brought
as a result of a dispute under this Listing or any transaction related to or contemplated by this
Listing, such party will be entitled to recover from the non-prevailing party all costs of such
proceeding and reasonable attorney's fees.

19. ADDENDA AND OTHER DOCUMENTS: Addenda that are part of this Listing and other
documents that Seller may need to provide are:
20. AGREEMENT OF PARTIES:

A. Entire Agreement: This Listing is the entire agreement of the parties and may not be changed except by written agreement.

B. Assignability: Neither party may assign this Listing without the written consent of the other party.

C. Binding Effect: Seller’s obligation to pay Broker earned compensation is binding upon Seller and Seller’s heirs, administrators, executors, successors, and permitted assignees.

D. Joint and Several: All Sellers executing this Listing are jointly and severally liable for the performance of all its terms.

E. Governing Law: Texas law governs the interpretation, validity, performance, and enforcement of this Listing.

F. Severability: If a court finds any clause in this Listing invalid or unenforceable, the remainder of this Listing will not be affected and all other provisions of this Listing will remain valid and enforceable.
G. Notices: Notices between the parties must be in writing and are effective when sent to the receiving party's address, fax, or e-mail address specified in Paragraph 1.

21. ADDITIONAL NOTICES:
A. Broker's compensation or the sharing of compensation between brokers is not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS®, MLS, or any listing service.
B. In accordance with fair housing laws and the National Association of REALTORS® Code of Ethics, Broker's services must be provided and the Property must be shown and made available to all persons without regard to race, color, religion, national origin, sex, disability, familial status, sexual orientation, or gender identity. Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, or age).
C. Broker advises Seller to contact any mortgage lender or other lien holder to obtain information regarding payoff amounts for any existing mortgages or liens on the Property.
D. Broker advises Seller to review the information Broker submits to an MLS or other listing service.
E. Broker advises Seller to remove or secure jewelry, prescription drugs, other valuables, firearms and any other weapons.
F. Statutes or ordinances may regulate certain items on the Property (for example, swimming pools and septic systems). Non-compliance with the statutes or ordinances may delay a transaction and may result in fines, penalties, and liability to Seller.
G. If the Property was built before 1978, Federal law requires the Seller to: (1) provide the buyer with the federally approved pamphlet on lead poisoning prevention; (2) disclose the presence of any known lead-based paint or lead-based paint hazards in the Property; (3) deliver all records and reports to the buyer related to such paint or hazards; and (4) provide the buyer a period up to 10 days to have the Property inspected for such paint or hazards.
H. Broker cannot give legal advice. READ THIS LISTING CAREFULLY. If you do not understand the effect of this Listing, consult an attorney BEFORE signing.
Page 1

Notice that:

- TAR Forms are only available to TAR members.
- Paragraph 2A of this form informs you to add a Condominium Addendum if this is a condominium.
- Paragraphs 2B Improvements and 2C Accessories are the same items that are listed on the TREC purchase agreement 20-12. The listing is the time to discuss what the seller plans to leave.

Review the following questions about page 2 of the TAR Listing Agreement.

1. If you take a listing to begin in the future and the seller signs a contract before that date, are you entitled to a commission?
   
   *Answer: No, paragraph 4B*

2. If you have a listing and during the term the property is foreclosed on, are you entitled to a commission?

   *Answer: No, paragraph 5C*
3. If the listing broker brings a buyer to the property that has offered the amount the seller wanted, on terms the seller wanted, is the commission earned?
   Answer: Yes, paragraph 5B2

4. When is the commission in number 3 payable? (1) closing and funding (2) sellers refusal to sell (3) sellers breach (4) all three
   Answer: (4) all three, paragraph 5C

5. Is the seller obligated to pay the usual seller closing cost under the listing agreement?
   Answer: Yes, paragraph 3

Review the following questions regarding page 3 of the TAR listing agreement.

1. If the listing broker receives a referral fee from a moving company he has referred the buyer to, is the broker obligated to reduce his commission by the amount of the referral fee?
   Answer: No, paragraph 5D2

2. How long is the protection period?
   Answer: The parties decide Paragraph E1

3. Does the broker have to do anything to have the protection period put into effect?
   Answer: Yes. Paragraph E2

4. Is the protection period still in effect if the seller has relisted with another REALTOR®?
   Answer: No, Paragraph E3

5. If seller authorizes broker to put the property in MLS, he/she is acknowledging, broker must enter all information, including sold information, into MLS. True or False
   Answer: True, Paragraph 6A
Review the following questions regarding pages 4, 5 and 6 of the TAR Listing Agreement.

1. Does the seller have to authorize the use of a lockbox?
   Answer: Yes, Paragraph 7C

2. When authorizing access to the property, who has the liability for property damage or personal injury?
   Answer: Seller, Paragraph 7D

3. The listing broker and the seller can agree that the broker will share a different amount of commission with MLS members and non-MLS members. True or False.
   Answer: True, Paragraph 8 A & B

4. The seller is obligated to authorize the broker to act as an Intermediary. True or False.
   Answer: False, Paragraph 9 A & B

5. The Listing Agreement includes the rules for a broker to become an Intermediary. True or False.
   Answer: True, Paragraph 9A

6. Can the seller give or not give the broker permission to advertise the property on the internet?
   Answer: Yes, Paragraph 11B

7. Can the seller choose the type financing they want the broker to advertise is available for their property?
8. Does the broker have the authority to disclose the terms of an offer to other buyers or their brokers?
Answer: No, Paragraph 11D8

Review the following questions regarding Pages 7-10 of the TAR Listing Agreement.

1. True or False. The seller is representing they are current on all loans on the property.
   Answer: True, Paragraph 12E

2. True or False. The seller is obligated to disclose to broker any employer or relocation company that will be providing benefits during this sale.
   Answer: True, Paragraph 12I

3. True or False. Seller promises they will refer all buyer prospects to the broker.
   Answer: True, Paragraph 13C

4. True or False. Seller represents that any pool or spa, enclosures, gates, etc. are according to current laws and will be maintained.
   Answer: True, Paragraph 12C

5. Who is responsible for obtaining a vacancy clause endorsement from the insurance company when the property becomes vacant?
   Answer: The seller, Paragraph 14A

6. True or False. The Listing Agreement says the broker is responsible for frozen water pipes.
   Answer: False, Paragraph 14B

7. Who pay all cost of any law suit and attorney fees in a law suit that was caused by the seller, according to the Listing Agreement?
   Answer: Seller, Paragraph 14C
Types of Listing Agreements

There are four possible listing agreements that can be made between the agent and principal: open listings, exclusive agency listings, exclusive right-to-sell listings and net listings.

Open Listings

With an open listing, the seller maintains the right to list his or her property with more than one broker. In addition, if the seller in an open listing finds a buyer himself or herself, he or she is not liable to a broker for commission.

Consider the following scenario:

Seller signed open listing agreements with Brokers A, B and C. All three brokers advertise and market the property, potentially drawing in more buyers than if only one broker were marketing the property. All three brokers find ready and willing buyers, and the seller has three offers to consider. The seller decides to accept the offer from the buyer that Broker B found. Seller will owe commission to Broker B but not to the other brokers.

Many sellers do prefer open listings because they believe that listing with more than one broker will result in more prospective buyers.
However, open listings can be complicated. First, the seller has no obligation to inform competing brokers when the property becomes subject to a purchase and sale agreement. Brokers, therefore, are reluctant to put much time and effort into marketing a property that could be sold without their knowledge at any time. Also, because there are multiple brokers involved, it is sometimes difficult to determine which broker is eligible for the commission.

Furthermore, brokers do not feel protected in this type of agreement because it may occur that a licensee who diligently advertises a property will not be rewarded for his or her efforts if another licensee secures the sale of the property. Even if the compensated agent benefits from the marketing effort of others, the commission is earned only by the individual who closes the sale. For these reasons, real estate professionals generally avoid open listings. Under an open listing NO ONE is really working for the seller and open listing are not eligible for listing in MLS.

**Exclusive Seller Agency**
With an exclusive agency listing agreement, the seller agrees to list only with one broker. All other brokers have to work through the listing broker. However, the seller can still sell the property himself or herself.

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, or the individual who found a ready, willing and able buyer and whose actions put into motion the fulfillment of the agency obligations.
Exclusive Right-To-Sell

Unlike the open listing or the exclusive agency listing, the exclusive right-to-sell agreement gives the broker complete rights to the commission during the listing term.

Under an exclusive right-to-sell listing agreement, the following terms apply:

- The seller is not allowed to list the property with any other broker.
- The broker will still be owed commission or other compensation per the terms of the agreement if the seller procures his or her own buyer.

Basically, 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 sales agent, who holds exclusive rights to the commission.

It is obvious to see why real estate professionals generally favor the exclusive right-to-sell agreements over open or exclusive agency relationships. Holding an exclusive right to commission ensures that the licensee will not be dedicating time and effort to a fruitless real estate transaction. This agent is truly working for the seller.

Also, many real estate professionals argue that exclusive right-to-sell arrangements are in the seller’s best interests, as well. 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 marketable value, for fear that another broker may secure the sale of the property before they do and consequently receive the commission.
**Net Listings**

The Rules of the Texas Real Estate Commission states the following regarding net listings:

A “net listing” is a listing agreement in which the broker’s commission is the difference (“net”) between the sales proceeds and an amount desired by the owner of the real property. A broker may not take net listings unless the principal requires a net listing and the principal appears to be familiar with current market values of real property. When a broker accepts a listing, the broker enters into a fiduciary relationship with the principal, whereby the broker is obligated to make diligent efforts to obtain the best price possible for the principal. The sum of a net listing places an upper limit on the principal’s expectancy and places the broker’s interest above the principal’s interest with reference to obtaining the best possible price. If a net listing is used, a broker should modify the listing agreement so as to assure the principal of not less than the principal’s desired price and to limit the broker to a specified maximum commission (§535.16. Listings).

A net listing can be issued in conjunction with an open listing, an exclusive agency listing or an exclusive right-to-sell listing. With this type of agreement, the seller sets a minimum net price. The licensee obtains as commission any amount over the net price. The licensee obtains as commission any amount over the net price.

**Example**

Seller Z sets a minimum net of $80,000. The broker seeks to obtain at least a 6% commission. At what amount would the broker list this house?

\[
\text{Commission} = 80,000 \times 0.06 = 4,800 \text{ }\]

\[
\text{Total Amount} = 80,000 + 4,800 = 84,800.00
\]

If the broker wanted to make a 6% commission, he or she would need to sell the property for at least $84,800. If the broker is able to negotiate a purchase price higher than that amount, he or she will then have an even higher commission.
However, the Texas Real Estate Commission requires that a seller’s agent be honest with the seller about the true value of the property.

**Example**

Seller Z has set the minimum net amount at $80,000. Her broker suspects that the property is worth much more than that and sets the listing price at $100,000. A buyer submits an offer for this amount, and the broker pockets the $20,000 difference, which is 25% commission.

In this scenario, the broker breached a duty of loyalty and disclosure of facts by not being honest with the seller about the true value of the house.

Because of the potential complications of net listings, many real estate professionals advise against them, and they are not commonly used.

Most Multiple Listing Services (MLS) require exclusive seller’s agency to list the property with their service. They do not accept open listings.

There are two types of exclusive seller agency. The first type is the “**exclusive right to sell agency**” agreement. The Texas Association of REALTORS® (TAR) Listing Agreement is an agreement for the exclusive right to sell. That means the listing broker will get paid regardless of who sells the property. All other agents have to work through the listing broker, and the seller agrees to refer all interested parties to the listing agent. The majority of listings are exclusive right to sell listings. The seller pays the total commission to the listing broker. The listing broker pays the “other broker”.

The second type of exclusive seller agency is called “**exclusive agency**”. It means there are some situations that may happen that the seller would not owe a commission to the listing broker. The seller has reserved the right to sell the property on their own, as a “For Sale by Owner” and pay no one a commission. It may be an exclusive agency listing for the term of the listing or a limited term and limited to a named buyer or buyers.
Under an exclusive agency listing the property can be in MLS and all other brokers must work through the listing broker to sell the property. Members of TAR have access to Addenda that can be used with the Exclusive Right to Sell Listing Agreement to convert it to an Exclusive Agency Agreement. Most MLS services require the listing agent to disclose which type listing it is in MLS by the designation of ER or EA.

**Amendment to Listing Agreement**

Seller A wants to sign an exclusive right-to-sell listing with Broker A. However, her friend, Potential Buyer B, is contemplating purchasing the property, and the seller does not want to pay a commission to the broker if her friend ends up purchasing the property. What can Broker A do to protect himself and meet his client’s needs?

Broker A can add an amendment to the exclusive right-to-sell listing that releases the seller from her obligation to pay commission if Potential Buyer B purchases the property. Most brokers use standard listing agreement forms, such as those provided by the Texas Association of REALTORS® to members of the organization. If a broker wants to change any of the terms of the standard listing agreement, he or she can add an amendment, rather than having to hire an attorney to rewrite the entire agreement. The broker may still need to have an attorney draft the amendment.

Consult your attorney for specific advice about your situation.

**Benefits of Seller Agency Relationships**

Under an open listing, no one was working for the seller. Only the agent that brought the buyer developed any relationship with the seller. No one was marketing the property or had any obligation to bring the seller the best value for the property. From the broker’s perspective why would they spend time or money marketing a property that they have no guarantee of being paid? They certainly were not going to market it to other brokers. The brokers and the agents become competitors, all trying to find the buyer first.
When the exclusive right to sell listing became available, it was a win-win for both the seller and the broker. Suddenly the seller and the broker both had benefits, and both had responsibilities. Both had the goal of getting the property sold for the greatest value.

When the broker becomes the seller’s exclusive agent, they owe all of the fiduciary duties to the seller. The broker has the responsibility to educate the seller regarding the price at which the property will realistically sell. The broker has a responsibility to market the property to the best of his/her ability. The broker has the responsibility to protect the seller from foreseeable harm. The seller has the responsibility of making the property available for showings, protecting the broker from liability, and paying the broker as agreed.

Under an exclusive agency agreement, the broker still has the same responsibility but has less protection regarding payment. Some brokers are willing to take that risk, for a limited period, to get the listing now rather than later.

**Sub-Agency**

In Sec. 1101.002 of the Texas license law, a *sub-agent* is defined as a license holder who:

- Represents a principal through cooperation with and the consent of a broker representing the principal.
- Is not sponsored by or associated with the principal’s broker.

In the real estate profession, sub-agency occurs most frequently when the seller authorizes the listing agent to engage someone other than the listing agent to facilitate the real estate transaction. The cooperating agent is a sub-agent of the broker and is an agent of the principal seller, responsible to both parties.

**NOTE**

If a primary agent employs a sub-agent without the principal’s authority to do so, then the principal has no obligation to that sub-agent.
To accept the offer of sub-agency, the licensee interested in cooperating with the agent and principal must take action. The acceptance of a sub-agency offer can involve any or all of the following steps:

- Inquiring about the property
- Showing the property
- Writing an offer on the property
- Presenting an offer on the property

In the event that a sub-agent intentionally misrepresents a material fact or conceals critical information in a real estate transaction, the Texas Real Estate License Act protects the primary agent and principal from liability, unless these parties had knowledge of the misrepresentation and did not disclose this information.

Sub-agency is when both the listing broker and the agent (with a different company) that is working with a buyer both represent the seller. Sub-agency still exists and is legal in Texas. It is used less every year. Most buyers today want representation. Under sub-agency, the buyer has no representation.

During sub-agency, the buyer is a customer, entitled to honesty, fairness and disclosure of the condition of the property. The seller is receiving fiduciary duties from the listing agent. The sub-agent owes the same fiduciary duties to the seller through the listing broker. It puts the buyer in a disadvantaged position when no one is working on their behalf.

**Disclosure Issues**

The challenge for the listing agent is to educate the seller that the disclosures are good protection for the seller as well as for the agent. Real estate transactions can be a hotbed for lawsuits. Many times a buyer that would not be affected by a disclosure given up front is livid when they are not told about an issue until the neighbors tell them after closing.
If an issue is disclosed on the Seller’s Disclosure form, the seller has a good defense if the buyer later tries to say they were not told something. Remind sellers that things that were disclosed to them when they bought the property are still disclosure issues and should be on the disclosure they are going to prepare for the new buyer.

Good business practice dictates that the agent has a blank Seller’s Disclosure and Lead Based Paint Addendum in their listing packet so they can get them filled out quickly. It works best to leave the documents with the sellers to complete and pick them up the next day when you go to take measurements, put up your sign, etc. You want the information on the disclosure to be the seller’s words, not your words. When an agent is present while the seller is completing the form, it can be tempting to try to help them. When the agent does that they take on liability for the answer. Good advice for the seller is “when in doubt, disclose”.

One very litigious subject in Texas is foundation issues. Because of our soil, foundation issues are very common in some areas. If the agent has concerns about the foundation, they should ask the seller if they have ever had an engineer’s or foundation company’s report. If they have, the agent will need copies of all the reports and invoices describing any work that has been done. Those items will need to be disclosed to any potential buyers. If the buyer wants to get their own foundation report, encourage them to do so. One thing the agent needs to understand is that, even though, the work has been done on a foundation, the underlying issue that caused the problem may still exist. Never tell a potential buyer that the fact the work has been done is necessarily positive about the property. Allow the buyer to make their own conclusion based on the reports or from a professional foundation company.

**Before You Go**

In addition to the listing agreement what are two blank forms agents should have in their pre-listing package?

*(Answer: Blank Seller’s Disclosure and Lead Based Paint Disclosure)*
1. When a broker has a listing agreement that guarantees them a commission regardless of who sells the property it is an ______ agreement.

2. When the broker has a listing agreement that the seller has retained the right to sell alone and owe no one a commission it is an ______ agreement.

3. How many brokers (companies) are involved in a sub agency transaction? ______

**Correct Answer**

1. Exclusive Right to Sell
2. Exclusive Agency
3. Always two

When inputting the listing into the Multiple Listing Service, there are things you will need to know that apply to the real estate business. The following is the Input Sheet for review.
### Residential Data Input Form

#### Listing Information

- **Property Type**
  - RES - Condo
  - RES - Farm/Ranch
  - RES - Half Duplex
  - RES - Single Family
  - RES - Townhouse

- **Listing Type**
  - EA with Reservations
  - ER with Reservations
  - Exclusive Agency
  - Exclusive Right to Sell/Lease

- **Transaction Type**
  - For Sale
  - For Sale/Lease

- **Lease MLS #**

- **Housing Type**
  - Apartment
  - Attached or 1/2 Duplex
  - Condo/Townhome
  - Designated Historical Home
  - Doublewide Mobile w/Land
  - Farm/Ranch House
  - Garden/Zero Lot Line
  - Hi Rise
  - Historical/Conservation Dist.
  - Interval Ownership
  - Lake House

- **Style of House**
  - A-Frame
  - Colonial
  - Contemporary/Modern
  - Craftsman
  - Early American
  - English
  - French
  - Geo/Dome
  - Loft
  - Mediterranean
  - Mid-Century Modern
  - Oriental
  - Other
  - Prairie
  - Ranch
  - Southwestern
  - Spanish
  - Split Level
  - Studio
  - Traditional
  - Tudor
  - Victorian

- **Construction**
  - Block
  - Brick
  - Common Wall
  - Concrete
  - Fiber Cement
  - Frama/Brick Trim
  - Glass
  - Log
  - Metal
  - Other
  - Rock/Stone
  - Siding
  - Steel
  - Stucco
  - Tilt Wall
  - Vinyl Siding
  - Wood

- **Construction Status**
  - New Construction - Complete
  - New Construction - Incomplete
  - Prewowned
  - Proposed
  - Unknown

- **List Price**

- **List Date**

- **Expire Date**

- **Year Built**

- **Sqft**

- **Sqft Source**
  - Appraiser
  - Building Plan
  - Other Documentation
  - Owner
  - Tax

- **Will Subdivide**
  - No
  - Subdivided
  - Yes

- **Parcel ID**

- **Multi Parcel ID**
  - Yes
  - No

- **Accessory Unit**
  - Yes
  - No

---

This is a form for inputting data regarding residential properties. It includes fields for various types of properties, their construction details, and other relevant information. Each field is marked with an asterisk (*) indicating it is required. The form is designed for use in the Texas Law of Agency context, as indicated by the header.
Page one of the Input Form includes different items to cover any and all properties. So you would only fill in the boxes that apply to your listing.

- **Property Type**: This is where you would put the type of property for your listing, for example condo, single family, or townhouse. You need to know the difference in each property type.

- **Listing Type**: Earlier, we talked about the different types of listings. Exclusive Right to Sell/Lease will be the listing of choice. Your broker will tell you what type of listings you can take.

- **Transaction Type**: You would choose if the property is for sale or for lease or both.
• **Housing Type**: The listing you take will be specifically one of the types of housing listed (e.g. apartment, doublewide mobile, lake, ect.). Single Family Dwelling would be Single Detached.

• **Construction Status**: You would mark if the property is new or preowned or new construction or new construction incomplete. Most listings are preowned.

• **Construction**: This has to do with the type of exterior. it is all brick, brick with siding, stone, concrete, etc. The listing agent would choose the appropriate type of housing that is applicable.

• **Will Subdivide**: This has to do with new construction. For pre-own construction, you would put NO.

• **List Price**: This is the list price the seller/owner(s) agreed to in the listing agreement.

• **List Date**: This date is the effective date of the listing agreement.

• **Expire Date**: This date is the date the listing expires.

• **Year Built**: Verify the age of the property by the County Tax Rolls.

• **Square Feet of Living Area**: You obtain the square feet of the living area only from the Tax Rolls. If the seller has a current appraisal, you would use the square footage in the appraisal. Never use builder plans because the property is never the same after the property is built.

• **Square Feet Source**: You always have to say where you got the square footage. If you cannot support the square footage you are using, you cannot use it. This is a very controversial issue determining whose square feet you should use. Your broker will tell you what source to use. Do not make this decision on your own.

• **Parcel ID**: This is the account number used by the County Appraisal District for the property for the purpose of property taxes.

• **Mutl Parcel ID**: If the listing was a duplex, condominium, townhouse, etc., you would answer yes. If your listing is a single family dwelling, you would answer no.

• **Accessory Unit**: This is if the property has a storage unit in the back yard or any additional unit on the property. If there is, you would answer yes. If there is not, you would answer no.
- **Accessory Unit Type**: If it has an additional unit, you would need to put what its use is.
- **Location Information**: This includes local address, verify zip codes, legal description, and the Multiple Listing Service Area in which the property is located. You would put in the Area and the Sub Area. If the property is in a Planned Development, you would put the name of the Planned Development. This is mainly gated communities.

School District
Listing the right schools in the Multiple Listing Service is a must. You can call the school districts to get the correct schools for the listed property.
Room Details
The next few pages have to do with types of rooms, measurements rounded down, and what amenities comes with each room.

<table>
<thead>
<tr>
<th>Master Bedroom</th>
<th>Lvl</th>
<th>Length</th>
<th>Width</th>
</tr>
</thead>
</table>

Features
- Cedar Closet
- Coffee Bar
- Custom Closet System
- Dual Master Baths
- Dual Sinks
- Fireplace in Master
- Garden Tub
- Hollywood Bath
- Jetted Tub
- Laundry Chute
- Linen Closet
- Medicine Cabinet
- Separate Shower
- Separate Vanities
- Shower Body Sprays
- Sitting Area in Master
- Steam Shower
- Walk-In Closets

* Interior Features
  - Bay Windows
  - Built-in Wine Cooler
  - Cable TV Available
  - Central Vac
  - Decorative Lighting
  - Dry Bar
  - Electric Shades
  - Elevator
  - Flat Screen Wiring
  - High Speed Internet Available
  - Intercom
  - Loft
  - Multiple Staircases
  - Other
  - Paneling
  - Plantation Shutters
  - Skylights
  - Smart Home System
  - Sound System Wiring
  - Vaulted Ceilings
  - Wainscoting
  - Water Filter
  - Water Purifier
  - Water Softener
  - Wet Bar
  - Window Coverings
**Interior Features**
You would walk each room and list/check off the interior features. You would need to know the age and if it was an upgrade or added by the owner. You would need the invoices as well.

* Alarm/Security Y/N
  - □ Yes
  - □ No

Alarm/Security Type
- □ Burglar
- □ Carbon Monoxide Detector
- □ Exterior Security Light(s)
- □ Fire Sprinkler System
- □ Fire/Smoke
- □ Firewall(s)
- □ Leased
- □ Monitored
- □ Other
- □ Owned
- □ Pre-Wired
- □ Smoke Detector
- □ Unknown
- □ Wireless

**Alarm/Security**
If the answer is yes, you need to know if the equipment and system is owned by the owner and if not, will the security company remove the equipment. The listing agent needs to know the security codes and the password with the Security Company in case someone sets off the alarm. For every item listed, you need to have a yes or no and know who controls or owns the systems. Sometimes, you might have to verify information yourself. You do not want to always rely on what the seller/owner(s) tell you because they may not remember or may give you wrong information.
Roof

Do not guess what type of roof it is. You need to know the age, type of roofing, and if the roof is an overlay. Additional information you might need is if there were any claims that were filed with homeowner’s insurance because of hail damage or any other weather casualty. Ask the owner/seller(s) if they made the repairs or kept the money.

Be sure you have copies in your file and make notes of any repairs, leaks or water damage. If you do not have invoices for said repairs you cannot state that the roof was repaired.
Kitchen Equipment
Check off what is applicable for the property. You also need to know the brand names, the age of the appliances, any repairs and dates of repairs, and the type of utility that is used for the appliance.

The other items you will need to know about include:

- Pools
- Handicap
- Flooring
- Fireplace and features
- Foundation *
- Parking features
- Lot size (acreage)
- Easements *
- Lot description
- Type of fence
- Exterior features
- Soil *
- Restrictions *
- Street/utilities
- Heating and cooling
- Mud district *
- Green features
- Green certifications
- Energy efficiency
- Financial information
- Homeowner’s association *
- Home owner’s association dues
- Homeowners association includes
- Possession
• Possible short sale *
• Loan type
• Payment type, payment, balance, mortgage interest rate, origination mortgage date lender
• Preferred title company, phone number and location
• Unexempt taxes
• Agent and office information
• Variable fee *
• Buyer agent commission *
• Subagent commission *
• CBS code
• Keybox type
• Shackle code
• Keybox combination code
• Seller type
• Owner name
• Showing
• How and to whom to make showing appointments
• Name of search engines property will show up on
• Driving directions to the property
• Property description
• Excludes
• Private remarks
• Intra office remarks
• Pictures of the interior and exterior to post online and in MLS
• Documents to upload such as copy of the plat, survey and seller disclosure

Then there is the owner’s signature(s) ratifying that they approve of the information you are about to share with members of the Multiple Listing Service and all of the websites assigned to the search engines.
As you see you need to know everything about the property. By taking steps to be prepared and knowledgeable, you are adhering to your Fiduciary duties to your client. Members of the public have no idea all the work that is involved in listing one piece of real estate. These steps are basically what a license holder will do for every parcel of real estate where they represent the seller/owner(s) and market their property(s). I have asterisked the items I wish to cover in detail for you.

**Foundation**

If there has been foundation work, you need to find out if there is a warranty and if the warranty is transferable. You need a schematic of the piers that were put under the foundation work and all repairs that were done because of the insertion of piers.

If you list a property and you think there is a foundation problem, you need to recommend to the seller/owner(s) to get the foundation inspected by a licensed and bonded foundation company. You cannot recommend anyone to them because of the liability. Ask your broker how to handle foundation inspections. A property that has foundation problems is a big negative and affects the value of the property. Your research will tell you what the market sales prices are without foundation problems. Then you make the adjustment for the condition and repair. If the seller/owner(s) are not willing to do the foundation work, you need to talk to your broker about taking the listing.

**Easements**

If the seller has a copy of their survey, it will show what and where the easements are. If they do not, when the property sells, the buyer will need to have one to decide if they want to buy the property. Easements can be an issue. If there is a pool on the property and an easement is under the pool, the pool would have to be dismantled to access the easement. These are things you have no control over, but you need to know about possibilities and disclose them to a potential buyer.
Restrictions
If there is an existing homeowner’s association, there will be restrictions on the property. Each homeowner’s association has covenants, conditions and restrictions (CC&R’s). CC&Rs are a set of rules established by a developer or homeowner’s association that govern residences in a particular neighborhood or condominium. CC&Rs may put restrictions on parking, paint colors, noise-levels, and pets, for example.

CC&Rs are usually attached to the title of a property and should be reviewed during the home purchase process. CC&Rs can be changed by a vote from the community of homeowners. Check the bylaws to see what the percentages are before you quote how many votes it takes to change the covenants, conditions and restrictions. At the time of sale, the buyer can request the documents along with the resale certificate. Either the buyer or seller can pay for the documents. It is important that the buyers know what these restrictions are before they buy the property. Failure to disclose can cause liability problems for the broker and sales agent.

MUD Notice
MUD and CCN Notices. Texas Association of REALTORS®.
https://www.texasrealestate.com/for-texas-realtors/mud-and-ccn-notices

A seller of real estate in Texas may be required to provide to a buyer one or more notices regarding the property in question. Failure to provide the proper notice may result in liability for the seller of the real estate and/or the real estate licensee handling the transaction.

MUD notice information
If a property is located within a Municipal Utility District (MUD), the seller is required by the Texas Water Code to provide to a buyer prior to the buyer’s entering into a sales contract a notice regarding the MUD in which the property is located. The notice provides information regarding the tax rate, bonded indebtedness, and standby fee, if any, of the MUD.
A seller will typically know if a MUD is providing service to a property because the MUD assessment will be listed on the tax bill that the county sends to the property owner. The property seller will frequently not, however, have access to the MUD notice required to be given to the buyer and may require the assistance of a real estate licensee to obtain the proper notice. One method you may use to obtain the proper notice is to contact an agent for the MUD and request a copy of the most current notice. The name, address, and phone number of all MUDs in Texas are available through the Texas Commission on Environmental Quality's website.

After entering the website, you may look up any MUD by going to the first search field entitled "Search by Water District Name or Number." Type in the name of the MUD for which you are seeking information and press enter. The website will provide information regarding that MUD, including contact information for the MUD's agent. You may then contact the MUD's agent to obtain a copy of the current notice form.

Section 49.455(b)(9) of the Water Code requires that all MUDs file the particular form of Notice to Purchasers that the seller must furnish to a buyer in the property records of the county in which the MUD is located with all information completed.

(Source: https://www.texasrealestate.com/for-texas-realtors/mud-and-ccn-notices)

This is the license holder's responsibility to inform the seller of their duty to disclose this information. It is state law and in the Texas Property Code.

**HOA**

The documents for a homeowner's association are the following: Articles of Incorporation, bylaw, covenants, conditions and restrictions (CC&R's), resale certificate, financials, and
any assessments. You also need to verify that the seller/owners(s) are current on their dues. If they are not, the closing will not take place until they are paid either at closing or prior to closing.

**Short Sale**
If the property is close to foreclosure, the property might be able to be considered for a Short sale. Only the lender on the existing mortgage can make this determination. A license holder should not handle a “short sale” unless they have taken courses or have experience in this type of transaction.

**Variable Fee**
A variable fee is when the listing broker has agreed to take less commission if the listing broker sells the property themselves. If the property has been listed with a variable rate, the listing broker must disclose this to any buyer who has made an offer on the property and there are multiple offers.

**Buyer Commission**
In the listing agreement, review what was discussed under commission and what the listing broker will pay a buyer broker.

**Subagent Commission**
If the listing broker does not cooperate with sub agents, there will be no commission to any subagent who shows the property. They will have to get their commission from the buyer.

**Lesson Summary**
The seller generally hires the real estate broker to act as his or her agent through a written *listing agreement* to represent and market his or her property. This document outlines the terms and conditions of both the seller and the license holder, including the license holder’s commitment to represent the seller as his or her agent and the seller’s promise to compensate the agent for services rendered. This agreement should be
detailed and should include all necessary facts about the transaction.

Your broker will determine what listing agreements a sales agent or a broker associate will use when listing property.

There are four general types of listing agreements: open, exclusive agency, exclusive right-to-sell and net listings. With an open listing, the seller maintains the right to list his or her property with more than one broker. In addition, if the seller in an open listing finds a buyer himself or herself, he or she is not liable to a broker for commission. Some sellers prefer open listings because they believe that listing with more than one broker will result in more prospective buyers, but real estate professionals generally avoid open listings because of the potential for complications, as well as the fact that few licensees want to invest time and effort into marketing a property that could get sold by another licensee. Open listings are very common in commercial real estate.

With an exclusive agency listing agreement, the seller agrees to list only with one broker. However, the seller can still sell the property himself or herself, and it has happened that a seller conspired with a buyer who was located by the listing broker to wait until the listing agreement expired to close the deal. In this way, sellers attempt to avoid having to pay commission. If that happens, the listing broker can only collect commission by proving that he or she was the procuring cause of the sale, or the individual who found a ready, willing and able buyer and whose actions put into motion the fulfillment of the agency obligations.

Because of potential complications of both open listings and exclusive agency listings, most real estate professionals list property in residential real estate by using the exclusive right-to-sell listings. Under this type of listing, the seller is not allowed to list the property with any other broker and the broker will still be owed commission or other compensation per the terms of the agreement if the seller procures his or her own buyer.
A net listing can be issued in conjunction with an open listing, an exclusive agency listing or an exclusive right-to-sell listing. With this type of agreement, the seller sets a minimum net price. The license holder obtains as commission any amount over the net price. However, many real estate licensees advise against these because of the possibility of fraud, not to mention that a buyer could submit an offer too low to give the license holder any commission. The Texas Real Estate License Act states that any license holder in the state of Texas will do a Competitive Market Analysis or a Broker’s Price Opinion before he or she enters into any listing agreement for the net dollars to be earned. Most brokers use exclusive right-to-sell agreements in multiple listing services. Depending upon the terms of the listing, the listing broker may choose to share his or her commission with the buyer broker.

The listing agreement does not just create an agency relationship; it also creates a contractual relationship. Therefore, although any party may terminate the agency relationship at any time, the party may still be held to contractual duties. In that situation, the party may owe the other party damages.

If the sales agent or broker associate follows his or her sponsored broker’s policy and procedures and is familiar with the manual and directives the broker gives him or her, it shall reduce liability for everyone concerned. Your broker must also comply with his or her errors and omission insurance to be able to defend the company and his or her sales agents and broker associates.
Lesson Five: Buyer Agency

Lesson Topics

This lesson focuses on the following topics:

- Introduction
- The Creation of Buyer Agency
- Benefits of Buyer Agency Relationships
- Buyer Representation Agreement
- Deciding to Represent the Buyer
- Written Notification of Compensation to Broker
- Buyer's License Holder Disclosures

Lesson Learning Objectives

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

- Describe the Information about Brokerage Services Agreement
- Explain why and when the Texas Real Estate Commission Requires brokerage information be given to the consumers
- Discuss each paragraph of the Buyer Representation Agreement
- Answer questions regarding the Buyer's Representation Agreement.
- Identify the factors to consider when deciding to represent a buyer.
- Explain the value of a written agreement with the buyer.
- List the disclosures that need to be disclosed to the buyer.
- Explain why the disclosures are required
Introduction
http://realtytimes.com/todaysheadlines1/item/22102-19990615_brokerage2

In 1983, the Federal Trade Commission (FTC) released a report that would blow the lid off the real estate industry. The Residential Real Estate Brokerage Industry was the first report of its kind to examine the real estate industry. What it found was not flattering.

The report indicated that in cooperative transactions, 72% of potential home buyers believed that the real estate practitioner working with them was working for them. This was in direct contradiction to the reality of business practices at the time in which all licensees either worked for the sellers as listing agents or for the seller as sub-agents to the listing agents while working with the buyers.

By failing to disclose whom the agent/broker truly represented, the real estate industry made itself appear deceitful and untrustworthy, a taint that continues to affect practitioners today. Consumers reacted, and within two years, the NAR formed its first Agency Task Force to study agency issues. It was the NAR's policy at that time to encourage state REALTOR® associations to work with their state legislatures to enact statutes providing for mandatory agency disclosure.

The Emergence of the Buyer's Agent
After the report, buyer's agents also came into being, but against great resistance. Tom Early, principal of The Buyer's Real Estate Brokerage, Inc. and past president of the National Association of Exclusive Buyer's Agents (NAEBA) was one of the first buyer's brokers in the nation.
"I have experienced every kind of tactic to stop buyer representation. I was offered 1 percent coop while others were offered 2 1/2 percent," says Early. "Some insisted that I go to the office and sign an agreement to take lower coop fees. I had brokers say, 'I won't let you show our listings.'

"That is illegal. Those kinds of tactics were used in the early days, and they are still being used now. In three separate arbitrations, I always won."

Buyer's agency was slow to take hold until the early 1990s. In wasn't until 1991 that the NAR's Presidential Advisory Group on Agency recommended that a standard of conduct in the REALTOR® Code of Ethics be created to include NAR members working with buyers.

About the same time, the National Association of REALTORS® (NAR) purchased the Real Estate Buyer's Agency Council, (REBAC) an association of exclusive buyer's agents. Under the new management, however, the organization's agenda changed. No longer was the training and support geared for exclusive buyer's agents but for agents who wished to represent both buyers and sellers.

According to Early, the original intent of REBAC was education: to offer buyer agency courses and put together the Accredited Buyer's Representative designation, the ABR. "The intent now is to supply an educational program resulting in the ABR designation for traditional agents," says Early. "The ABR program is to teach agents how to work with the buyer and keep your broker out of trouble. It's basically a broker liability course."

As liability suits and arbitrations between buyer's representatives, listing brokers and consumers increased across the nation, traditional brokers found themselves forced to allow buyer's representation under the protective statutes and common law of dual agency and designated agency.
But making things easier for single agents wasn’t the National Association of REALTOR’S® first priority - it was reducing liability for all practitioners, particularly the listing broker. While buyer’s agents screamed for protection and support, the National Association of REALTORS® went another direction, protecting the broker through non-agency relationships and suggesting that agency be addressed through personal contracts between consumers and agents.

Meanwhile, a Facilitator/Non-Agency PAG was appointed to assess the advantages and disadvantages to both licensees and consumers within a pure non-agency relationship.

The National Association of REALTORS® Presidential Advisory Group (PAG)

The National Association of REALTORS® Presidential Advisory Group on the Facilitator Concept released several recommendations concerning agency disclosure legislation and it is still forwarded to legislators who are considering their votes on proposed statutes. The recommendations include legislative drafting guidance that would clarify the law of agency as applied to real estate brokerage.

- Legislation should include well-defined duties for each type of brokerage relationship.
- Legislation should clarify the common law of agency as applied to real estate brokerage relationships by creating a statutory agency relationship and by creating a presumption that the relationship is one of statutory agency unless the licensee and the client enter into an agreement specifically providing for a different type of representation.
- Legislation should contain clear guidance on disclosed dual agency.
- Legislation should provide for the ability on the part of a broker in an in-company transaction to designate an individual licensee within the broker’s company to represent the seller, and to designate another individual licensee within the company to represent the buyer, without creating a dual agency relationship.
Legislation should eliminate or modify the consumer's vicarious liability for the acts of the licensee.

Legislature (or state real estate commission) should promulgate mandatory agency disclosure forms and rules providing for meaningful, timely and mandatory written disclosure.

Legislation should specify how brokerage relationships end, and describe the licensee's duties upon the termination of a client relationship.

Legislation should address the licensee's disclosure duties with respect to property condition and address broker liability issues.

Legislation specifically should state that it abrogates the common law as applied to real estate brokerage relationships.

In 1996, the National Association of REALTOR’S® Professional Standards Committee created a Non-Agency Working Group, which recommended changes to the National Association of REALTOR’S® Code of Ethics to ensure that it included National Association of REALTOR’S® members who wished to practice non-agency.

In 1998, the National Association of REALTOR’S® president, Sharon Millett, appointed a new Presidential Advisory Group on Buyer Representation Liability Issues, chaired by Maryann Bassett, who also served as the chair of the 1992 Facilitator Non-Agency Presidential Advisory Group. The purpose of the Presidential Advisory Group was to analyze liability issues faced by buyer representatives including the review of judicial decisions; each state’s legislation and/or regulations regarding the duties of licensees to purchasers and which limit licensee liability; buyer representation contracts from various states; market research; training materials, and the National Association of REALTOR’S® Code of Ethics.
What the Presidential Advisory Group found was that buyer's representation is here to stay; the majority of residential transactions involve some form of buyer representation, and that the term "buyer representative," in some states, includes specific statutory duties owed to the consumer. Included among the factors influencing the establishment of standard of care for buyer representatives are state laws and regulations; judicial decisions; local practices; and the National Association of REALTOR'S® Code of Ethics and Standards of Practice, Graduate Real Estate Institute (GRI), Real Estate Buyer’s Agent Council (REBAC) and other education programs, Policy positions taken by the Board of Directors and image campaign representations to the public.

What is conspicuously absent from the report is any reference whatever to single agency or to exclusive buyer's agency, despite the fact that the purpose of the Presidential Advisory Group was to examine buyer' representation liability issues. The reason is revealed in the report's findings and conclusions: "Since agency relationships may impose a higher standard of care on a licensee and may create vicarious liability for the consumer, they should be created with specific written agreement between the consumer and the licensee."

According to the Presidential Advisory Group chair, Maryann Bassett, the problems with establishing agency relationships rest in the collective law of agency, which differs from state to state. If the specific duties of the licensee can be outlined by statute, and the state legislatures allow the statutes to supersede the common law of agency, then the industry can move forward with well-defined licensee duties and disclosure of said duties.

"A common law agency relationship imposes certain fiduciary responsibilities and liabilities for a licensee and vicarious liability for a consumer. Consequently, laws should be encouraged mandating that agency relationships only be established through written agency agreements outlining all of the licensee's duties and responsibilities and any vicarious liability to the consumer," said Bassett.
This is how it would work, according to the Presidential Advisory Group. A managing broker can use designated agency, in which individual licensees within the brokerage can act as exclusive agents for buyers and designated exclusive agents without creating an agency relationship between the consumers and the broker. But this scenario still raises questions of ethics. The Presidential Advisory Group admits that because buyer’s representation has only been widely practiced since about 1994, that few widely accepted specific standards of care of duties to a buyer have been established.

Some states are already voting down the concept of designated agency as a definition of non-agency. Transactional brokerage, another form of non-agency, may be the next weapon in the National Association of REALTORS® arsenal against broker liability.

Editor’s note: REBAC has responded to this article with the following:

*In the June 15 article Evans cites Early, an Ohio REALTOR and past president of the National Association of Exclusive Buyer’s Agents (NAEBA), to provide a look back at the infancy of buyer agency. While his recollections of those days indeed reflect the initial resistance to buyer representation, his memory seems to fail him somewhat when he recalls the mission and development of REBAC, one of the first organizations to directly address that resistance.*

*Citing Early, Evans writes that REBAC’s original aim was the education that led to the Accredited Buyer’s Representative (ABR) designation, but now the “program is to teach agents how to . . . keep your broker out of trouble. It’s basically a broker liability course.”*

*Not true, says REBAC executive director Janet Branton. “Put most simply, REBAC’s mission has always been to prepare its members to serve the needs of the home-buying consumer. And it still is.” Broker liability, while covered, is just a minor part of*
the comprehensive two-day designation course, which itself is the cornerstone of an entire curriculum of buyer representation education.

Education, however, is but one-member service, albeit the most important. To support its 42,000 members, REBAC, the largest of the National Association of REALTORS’ institutes, societies and councils, provides a full range of member services, including: member and consumer publications, press relations, buyer representation advocacy, consumer and member-to-member referrals, and new product development.

Likewise, Early’s assertion that REBAC was an organization of exclusive buyer’s representative prior to its 1996 sale to the National Association of REALTORS is not true as well says Tom Dooley, chairman and CEO of REBAC the four years before NAR ownership, “In the years it was owned by the North American Consulting Group, REBAC’s scope was always to provide training and expertise for real estate professionals in all approaches to buyer representation, and to recognize consumers’ right to select the approach they prefer.”

Before that, when owned by Denver REALTOR Barry Miller — and with rolls barely numbering 300 — REBAC’s focus was indeed on Exclusive Buyer Representation. But that soon changed. As Dooley puts it, “From the moment NACG acquired REBAC; the scope was expanded to include the full range of approaches to buyer representation. To reflect this change, an entirely new designation program (ABR) was instituted, replacing the CBR designation (Certified Buyer Representative) in effect under the previous ownership.”

In the transition from NACG to NAR ownership, that vision did not change. “We realize that homebuyers differ in the types working relationship they prefer,” says Branton. “So REBAC has to encompass the entire scope of buyer representation to include all the types of services our members offer.”
That reflects something that Branton said was right on target in the article. “Buyer representation is here to stay. In fact, over fifty percent of all homebuyers now rely on the assistance of buyer’s representatives. And the vast majority express keen satisfaction with the service they get.”

REBAC also agrees with the assertion in the article that the field of buyer representation is continually evolving. New tools, new approaches, new legislation, new technology all mandate consistent attention. Because of this, problems are bound to arise — which the article also points out — especially because of the inconsistency in the laws governing agency from state to state. However, Branton notes that despite the differences in legislation, the majority of states have incorporated into their codes most or all of NAR’s recommendations for agency disclosure and buyer representation.

“Yet one thing is for sure”, Branton concludes. “The vast majority of American consumers know that when they look to buy a home, they can be confident that they can be represented professionally, effectively and exclusively by real estate specialists who represent only their interests in their pursuit of a successful home buying experience.”

(Source: http://realtytimes.com/todaysheadlines1/item/2210219990615_brokerage2)

Buyers as Clients

With the increase in the practice of buyer agency in north America, especially since the late 1990s in most areas, agents (acting under their brokers) have been able to represent buyers in the transaction with a written "buyer agency agreement" not unlike the "listing agreement" between brokers and sellers (often referred to as a seller’s agency). The real estate licensee, upon entering into a written agreement with a buyer, agrees to work solely for the buyer and in return, the buyer agrees to exclusive representation.
At this point, a real estate brokerage owes the buyer the duties of

- Obedience
- Loyalty to the buyer by acting in the buyer's best interest.
- Disclosure to other parties in the transaction that the licensee has been engaged as a buyer's agent.
- Confidentiality by not disclosing facts that could influence the buyer’s ability to negotiate the best terms.
- Accountability
- Reasonable care
- The broker negotiates price and terms on behalf of the buyers and prepares standard real estate purchase contract by filling in the blanks in the contract form.

The buyer's agent acts as a fiduciary for the buyer

**Case Summary**

The Ontario Superior Court of Justice released a decision which highlights the obligations of parties signing a buyer-agency agreement.

*Buyer pays price for jilting agent.*

Bob Aaron. Legal Tree: [http://www.legaltree.ca/node/864](http://www.legaltree.ca/node/864)

In the fall of 2005, Helen Clubine was looking at properties in the Orangeville area with her real estate agent Zoi Boussoulas.

By early January, 2006, Clubine had inspected a property known as Willow Hall several times, and was finally ready to put in an offer to purchase it.

At the time the offer was being prepared and signed, Boussoulas presented Clubine with a standard form buyer-agency agreement (now known as a buyer representation agreement), which gave the broker exclusive authority to act as the buyer’s agent until June 30, 2006.
This form, which is commonly used in the real estate industry, provides that the broker is entitled to be paid commission if the buyer enters into an agreement to purchase any property, during the running of the agreement. If the seller does not pay the commission, or all of it, the buyer is required to pay it.

The form also has a holdover clause which entitles the broker to commission if the buyer, within 180 days after the agency agreement expires, enters into an agreement to buy a property shown or introduced to him or her by the agent while the agreement was in force. In paragraph 4, Clubine agreed: "if I fail to advise you of any property of interest to me that came to my attention during the currency of this Agreement and I arrange a valid offer to purchase the property during the currency of this agreement or within the holdover period after expiration of this agreement, I agree to pay you the amount of commission set out above."

A later amendment to the agreement set the buyer’s agent’s commission at 2.5 per cent.

Willow Hall was listed at $825,000 but needed major renovations. Clubine instructed Boussoulass to prepare and submit an initial offer of $575,000. It was rejected.

Eventually, Boussoulass submitted a final offer of $750,000, but the vendors’ bottom line was $765,000. The listing and selling agents offered to kick in $10,000 of their commission, but by that time the buyer lost interest in it.

Clubine and Boussoulass had an "unpleasant" telephone conversation in the aftermath of the transaction, and their friendship came to an end.
Clubine later purchased another property using a different agent, and that fact came to the attention of Homelife/Vision Realty Inc., the company where Boussoulas worked. Ken Kakoullis, the Homelife broker, wrote to Clubine advising that she had breached the terms of the buyer-agency agreement, and owed his company $21,774.50.

Clubine denied any responsibility for payment, alleging that Boussoulas had orally agreed to terminate the agreement, and that it was not explained to her that Clubine was responsible for paying commission if she bought another property.

Eventually, Homelife/Vision sued Clubine for its lost commission. The matter came up for trial before Justice Darla Wilson in March of this year, and her decision was released earlier this month. Justice Wilson found no fault with the actions of the real estate agent.

"The evidence establishes that she is an experienced real estate agent who conducted herself in a professional manner throughout," the judge wrote in her decision. "I do not accept the evidence offered by Ms. Clubine that she signed (a buyer-agency) agreement without satisfying herself of her obligations under that contract."

The judge concluded, "Ms. Clubine was angry that she did not get the Willow Hall property for the price that she wanted and she blamed Ms. Boussoulas for the outcome. She chose to enter into an agreement with another agent, which resulted in the purchase of a property during the period of time covered by the agreement with the Plaintiff and consequently, she owes the Plaintiff the 2.5 per cent commission which amounts to $21,774.50," plus interest and costs.
Buyer representation agreements have an important role in the real estate process. The lesson of this case is that buyers should always be aware of their risks and responsibilities when signing one.

(Source: http://www.legaltree.ca/node/864)

**Exclusive Buyer Agency**
Method of exclusive service.

Real estate firms in the United States can represent both buyers and sellers in the same transaction, and when representing both, derive profit from both the seller and buyer side of the transaction. While some states have, at the insistence of REALTOR® trade groups, created various forms of dual agency to allow one company and in some cases an individual agent to represent both sides, other states have continued to hold such practices as illegal. In the opinion of Exclusive Buyer Agency, it is not possible to faithfully represent the best interests of opposing clients, in the same transaction, simultaneously.

The service structure for Exclusive Buyer Agency real estate practitioners is to show buyers all possible listings from other cooperating brokers as well as all other sources, such as for sale by owners. Then, they assist the buyer with evaluation and negotiation and advocate in the buyer's best interests without restriction.

In their booklet "Shopping for a Home Loan" The United States Department of Housing and Urban Development’s (HUD's) settlement cost booklet (page 6) recommends that home buyers consider using an Exclusive Buyer's Agent in their home search.
The Exclusive Buyer's Agency business model of unconflicted buyer representation eliminates the possibility of the buyer being confronted with the conflicts of interest which may be associated with the Dual, Limited or Designated Agency business models.

(Source: ttps://en.wikipedia.org/wiki/Exclusive_buyer_agent)


IV. Shopping for a House
Role of the Real Estate Agent or Broker
Frequently, the first person you consult about buying a home is a real estate agent or broker. Although these agents and brokers provide helpful advice, they may legally be representing the interests of the seller and not yours. You can ask your family and friends for recommendations.

It is your responsibility to search for an agent who will represent your interests in the real estate transaction. If you want someone to represent only your interests, consider hiring an “exclusive buyer’s agent”, who will be working for you.

Even if the real estate agent represents the seller, state laws usually require that you are treated fairly. If you have any questions concerning the behavior of an agent or broker, you should contact your State’s Real Estate Commission or licensing department.

Sometimes, the real estate broker will offer to help you obtain a mortgage loan. He or she may also recommend that you deal with a particular lender, mortgage broker, title company, attorney, or settlement/closing agent.
You are not required to follow the real estate broker’s recommendation, and you should compare the costs and services offered by other providers before making a decision.

(Source: http://www.hud.gov/offices/hsg/ramh/res/Settlement-Booklet-January-6-REVISED.pdf)

Additional Case Summaries
Buyer Representation

A brokerage was permitted to collect a commission from the brokerage representative’s client when the client violated the exclusive buyer’s representation agreement and bought a property with another licensee. The defendant buyer executed an exclusive buyer’s agreement with a salesperson in the plaintiff’s brokerage firm. In the agreement, the buyer agreed to pay the brokerage a commission if the buyer purchased a property during the time of representation and confirmed that the buyer was not working with any other real estate professionals. Five months into the six-month exclusive buyer’s representation agreement, the buyer informed the buyer’s representative that he had purchased a property with another brokerage firm with which he also had an exclusive buyer’s representation agreement. The appellate court upheld the trial court’s finding that the buyer had breached the buyer’s representative agreement and ruled that the broker did not have to seek compensation from the buyer’s purchase when it would have been a futile effort. The representation agreement provided that the brokerage would “whenever feasible, seek compensation from the seller or seller’s agent,” but the brokerage did not perform any services related to the buyer’s purchase transaction so it would not be entitled to compensation. In such an instance, the court determined that the law does not require a party to perform an act that would be a “mere futility.”
Texas Law of Agency

(Source: Real Estate Brokerage Essentials® Fourth Edition.
(Agency case summaries are provided for informational purposes only. Agency law varies
by jurisdiction, so please be aware that a case decision is legal precedent only for its
jurisdiction.)

Texas Laws, Rules and Ethics
Texas Real Estate Commission License Act
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.558. REPRESENTATION DISCLOSURE.
   (a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.
   (b) A license holder who represents a party in a proposed real estate transaction shall
disclose, orally or in writing, that representation at the time of the license holder's first
contact with:
      (1) another party to the transaction; or
      (2) another license holder who represents another party to the transaction.
   (b-1) At the time of a license holder's first substantive communication with a party
relating to a proposed transaction regarding specific real property, the license holder
shall provide to the party written notice in at least a 10-point font that:
      (1) describes the ways in which a broker can represent a party to a real estate
transaction, including as an intermediary;
      (2) describes the basic duties and obligations a broker has to a party to a real
estate transaction that the broker represents; and
      (3) provides the name, license number, and contact information for the license
holder and the license holder's supervisor and broker, if applicable.
   (b-2) The commission by rule shall prescribe the text of the notice required under
Subsections (b-1) (1) and (2) and establish the methods by which a license holder
shall provide the notice.
   (c) A license holder is not required to provide the notice required by Subsection (b-1)
if:
      (1) the proposed transaction is for a residential lease for less than one year and
a sale is not being considered;
(2) the license holder meets with a party who the license holder knows is represented by another license holder; or
(3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.
(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(21) induces or attempts to induce a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract;
(22) negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Texas Real Estate Commission Rules
Chapter 535 GENERAL PROVISIONS
SUBCHAPTER N
SUSPENSION AND REVOCATION OF LICENSURE

Although a license holder, including one acting as agent for a prospective buyer or prospective tenant, may not attempt to negotiate a sale, exchange, lease, or rental of property under exclusive listing with another broker, the Act 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.
Code of Ethics of the National Association of REALTORS®

Article 16
Realtors® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients.

Standard of Practice 16-5
REALTORS® shall not solicit buyer/tenant agreements from buyers/tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a REALTOR®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the REALTOR® may contact the buyer/tenant to secure such information and may discuss the terms upon which the REALTOR® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement. When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement.

Standard of Practice 16-8
The fact that an exclusive agreement has been entered into with a REALTOR® shall not preclude or inhibit any other REALTOR® from entering into a similar agreement after the expiration of the prior agreement.

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)
The laws are quite specific about disclosing who you represent, but also of all license holders’ duty to ask the question “Have you signed a Buyer Representation Agreement with another License Holder in the state of Texas. If they say no they have not, you need to get them to put that in writing and have the buyer(s) sign it and place in your file. Should this situation come up, you can protect yourself and be entitled to a commission. Never take their “NO” literally until they sign off on it. The license holder who is asking the question should also be specific about why he or she is asking the question. Buyers’ failure to tell the truth could have them owe a commission to another license holder.

**Case Summary #2**

Buyer Representations


Buyer’s representative was not liable for false representation where she did not know a mold test conducted by the sellers was insufficient or invalid. A home inspection recommended a professional conduct a mold inspection. The sellers refused to pay for a professional mold test and did their own. The sellers told the buyers that the mold test was negative, and the buyer’s representative told the buyers that the seller’s mold tests was sufficient and that the buyer should move forward. After closing, the buyers learned that the house was full of mold. Buyers sued the buyers’ representative for breach of fiduciary duty and false representation. The appellate court reversed a jury verdict in favor of the buyers because the buyers did not prove that the buyers’ representative knew that the seller’s mold test was insufficient or invalid.

(Source: Reference: Real Estate Brokerage Essentials® Fourth Edition)

(Agency case summaries are provided for informational purposes only. Agency law varies by jurisdiction, so please be aware that a case decision is legal precedent only for its jurisdiction.)
Texas Laws, Rules and Ethics

Texas Real Estate Commission License Act

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;
(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;
(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Texas Real Estate Commission Rules

Dishonesty; Bad Faith; Untrustworthiness


RULE §535.156

(c) A license holder has an affirmative duty to keep the principal informed at all times of significant information applicable to the transaction or transactions in which the license holder is acting as agent for the principal.
(d) A license holder has a duty to convey accurate information to members of the public with whom the license holder deals.

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

Standard of Practice 2-1
Realtors® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines.

Article 13
REALTORS® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

Never, never interpret inspection reports. Unless you have a source to back up your statements, do not make them. Telling the buyer that the Seller’s Mold test was in violation of the Texas Real Estate Commission License Act, the Texas Real Estate Commission Rules and the Code of Ethics of the National Association of REALTORS®.
(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)
Case Summary #3
Dual Agency

A broker firm was found liable for misrepresentation when one of its salespeople acted as a dual agent and misrepresented to the buyer the status of a planned access road to the seller’s property. The broker’s salesperson was involved in subdividing vacant land and represented the seller of this land. Prior to representing the buyer, she had a discussion about the lack of an access road to the vacant land with a civil engineer. The civil engineer told the seller’s representative that it would take at least a year for the required preliminary work, including permitting, before any construction could begin. However, acting as a dual agent, the salesperson represented to the buyers that the access road was usable and that the buyers knew everything about the road. After the transaction closed, the buyers could not secure a building permit because the access road was built without a permit. The buyers sued the brokerage firm and the seller, alleging breach of fiduciary duty and negligence-based claims. A jury returned a verdict for $318,200.47 and found the brokerage seventy (70) percent at fault, making the brokerage firm liable for $222,740.33. The appellate court affirmed the jury’s verdict.

(Source: Real Estate Brokerage Essentials® Fourth Edition.)

(Agency case summaries are provided for informational purposes only. Agency law varies by jurisdiction, so please be aware that a case decision is legal precedent only for its jurisdiction.)

Texas Laws, Rules and Ethics
Texas Real Estate License Act
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.
(a) A broker may act as an intermediary between parties to a real estate transaction if:

(1) the broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and

(2) the written consent of the parties states the source of any expected compensation to the broker.

(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d).

(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560 to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

**Texas Real Estate Commission License Act**

Sec. 1101.560. ASSOCIATED LICENSE HOLDER ACTING AS INTERMEDIARY.

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

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

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

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

(1) the written consent of the parties under Section 1101.559 authorizes the broker to make the appointment; and
(2) the broker provides written notice of the appointment to all parties involved in the real estate transaction.

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

Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.

(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.

(b) A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction:

   (1) a buyer or tenant; and
   (2) a seller or landlord.

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.

(a) The commission may suspend or revoke a license issued under this chapter or Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter 1102 if the license holder:

   (1) acts negligently or incompetently;
   (2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;
   (3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;
   (4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;
   (5) makes a false promise that is likely to influence a person to enter into an agreement when the license holder is unable or does not intend to keep the promise;
(6) pursues a continued and flagrant course of misrepresentation or makes false promises through an agent or sales agent, through advertising, or otherwise;
(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Texas Real Estate Commission Rules
CHAPTER 535 GENERAL PROVISIONS
SUBCHAPTER N SUSPENSION AND REVOCATION OF LICENSURE
RULE §535.145 False Promise

For purposes of §1101.652(b) (5) of the Act "false promise" includes both oral and written promises. The fact that a written agreement between the parties to a real estate transaction does not recite a promise made by a real estate license holder to one of the parties or that a person did not detrimentally rely on the false promise will not prevent the Commission from determining that a false promise was made. In determining whether this section has been violated, neither a written contractual provision disclaiming oral representations nor the Texas Rules of Evidence Rule 1004, the parol evidence rule, shall prevent the Commission from considering oral promises made by a license holder.


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

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

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

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

Case Summary #4
Breach of Fiduciary Duties

The seller, the seller’s representative, the buyer’s representative, and the buyer and seller representatives’ brokerage firm (“defendants”) were not liable for a breach of fiduciary duty or negligent misrepresentation when the defendants failed to notify the buyer of a discrepancy between the appraisal record and the MLS listing. The seller’s representation added the square footage of a sunroom to the house’s total MLS listing
based on the estimate provided by the seller. The sunroom square footage was not included in the county’s appraisal record. The buyer sued the defendants arguing that the MLS listing’s representation of the square footage was false, and it was therefore deceptive and misleading for the defendants not to inform the buyer that the true square footage of the house was much less than the MLS listing represented. The court found that there was no evidence to support the claim that the sunroom should not have been included in the MLS listing, that the county’s appraisal was not the definitive record, and that none of the defendants had an affirmative duty to disclose the discrepancy.

(Source: Real Estate Brokerage Essentials® Fourth Edition.)
(Agency case summaries are provided for informational purposes only. Agency law varies by jurisdiction, so please be aware that a case decision is legal precedent only for its jurisdiction.)

Case Summary

*Misrepresentation by Real Estate Agent: Wrong Square Footage in MLS Listing.*
Larry Tolchinsky. About Florida Law.

**Misrepresentations: Negligent and Fraudulent**
Florida law says if a real estate agent knew or should have known that a representation made to a buyer is not correct, whether or not the agent makes the representation or the seller does it, then that agent can be held liable for damages. In many instances, an agent has a duty to investigate whether or not his or her statements are true and to give all interested parties correct information. That’s being a professional. It’s also not being negligent under Florida law.

In Florida, a negligent misrepresentation occurs when a real estate professional provides inaccurate or wrong information in a residential real estate transaction, but
does not do so intentionally. It’s a mistake. It can be spoken or written. It’s a mistake and even if it was an innocent mistake; if the real estate agent or broker knew or should have known the information was incorrect they will be held liable to the injured party if they have been damaged because of the mistake or omission.

A fraudulent misrepresentation occurs when it’s more than a mistake: the agent or broker is aware that something is being misrepresented; they knew the information was wrong, and that someone is relying upon that misinformation, allowing the person who relied upon the information to be hurt and damaged.

1. Buyer Beware?
Many people are surprised that there’s not any “caveat emptor” or “buyer beware” protection for sellers and their real estate agents in cases of negligent misrepresentation. After all, if the agent didn’t know and just made a mistake, then isn’t the buyer just as responsible for investigating the property’s condition? Yes they are, but the seller still has a duty to disclose (to address this duty, we recommend having a seller’s disclosure statement part of any residential purchase and sales agreement).

Here, the Florida Supreme Court has made it clear that the doctrine of “buyer beware” doesn’t apply to people who are buying homes here in the Sunshine State. Sellers and their agents have a duty to disclose facts that materially affect the value of residential property which are not readily observable and are not known to a buyer. Here, it’s considered part of basic justice and fair dealing that there is a duty of disclosure. Johnson v. Davis, 480 So.2d 625, 629 (Fla. 1985).

2. Case Example: The Wrong Square Footage in the MLS Listing
Consider the case of Miller v. Sullivan, 475 So.2d 1010 (Fla. 1st DCA 1985). Mark and Patricia Sullivan decided to sell their home here in Florida, and signed a listing agreement with a licensed Florida real estate broker named Betty
Hilgendorf to help them. The Florida real estate broker did what most everyone does here, which is list the home for sale in the MLS (Multiple Listing Service).

In the MLS listing for the Sullivan’s home, the square footage was shown as being “measured” at 1417 square feet. This was the number that Betty Hilgendorf was given by her clients, the Sullivans.

Meanwhile, another real estate broker, Edward Luce, had been hired by Robert Miller to help him find a house to buy. Luce found the Sullivan home in the MLS, showed the MLS listing printout to Miller, and Miller liked it. Miller liked it so much that he ended up buying the home.

According to trial testimony, Mr. Miller relied upon the MLS printout of the listing which stated that the house measured at 1417 square feet, and that he also relied upon his broker’s explanation to him that this square footage included the heated and cooled area of the house. When he agreed to buy the home, he thought he was getting 1417 square feet.

Mr. Miller then discovered that the 1417 was not an accurate number. The correct number was 1092. There was only 1092 square feet of heated and cooled area. There was an additional square footage of non-heated and non-cooled area which involved the garage and the utility room. That additional area was around 300 square feet.

So, the buyer got less square footage than he thought he had bought. Around 25% less. The square footage listed in the MLS was wrong.

Mr. Miller sued. He sued not just his broker, Mr. Luce, but also the seller’s broker, Ms. Hilgendorf, and the sellers, too. He sued the two brokers for breach of contract, fraud (fraudulent misrepresentation), and negligence (negligent
misrepresentation). He sued the sellers for breach of contract and fraud (no negligence here).

In court, Mr. Miller lost his case against the sellers. The court ruled there was no evidence that Mr. and Mrs. Sullivan had made any representations, fraudulent or negligent, about the square footage to Miller. Additionally, there was no evidence that the listing agreement was incorporated into the sales contract between the seller and the buyer. The sellers were held to be not liable to the buyer for the misrepresentation of the square footage of the home. This was a “summary judgment” by the trial court judge that was approved by the appeals court.

However, the case could continue as to their real estate broker Betty Hilgendorf—no summary judgment for her. If the buyer could provide evidence to a jury that she had breached her duty of “honesty, candor, and fair dealing” to the buyer, then she would be liable for the misrepresentation in the MLS Listing.

Key facts here, according the court, are:

Whether the square footage figure on the MLS listing is understood in the real estate community to represent heated and cooled area or the total enclosed or covered area of a house.

Whether Hilgendorf, as listing agent, had a duty to double-check by measuring the square footage figure provided by the Sullivans.

Whether the representation in the listing agreement that the square footage had been “measured” means that such measurement had been made by the listing agent or simply by the seller. A good piece of advice is to at least speak with an experienced Florida real estate lawyer to learn about your rights. Most real estate lawyers, like
Larry Tolchinsky, offer a free initial consultation (over the phone or in person, whichever you prefer) to answer your questions.


Texas Law, Rules and Ethics
MLS Rules and Regulations
Section 7 - Listing Procedures. Multiple Listing Service Rules and Regulations of North Texas Real Estate Information Systems, Inc.
http://www.ntreis.net/documents/Forms_18920129199.pdf

7.10 All information concerning a Listed Property must be as accurate and complete in every detail as may be ascertainable by the Listing Participant. The Listing Participant shall verify and confirm the accuracy of all information furnished to Other Participants and the public. Listing Participant shall ensure that listings shall not contain language which is offensive or is in violation of the Federal Fair Housing Act, as amended from time to time. Participants should exercise caution and discretion before disseminating information of a confidential nature concerning Listed Property to Other Participants and the public. The Listing Participant shall make available to Other Participants and Subscribers, upon request, a copy of the seller’s disclosure notice, if the seller has furnished such disclosure notice to the Listing Participant.

(Source: http://www.ntreis.net/documents/Forms_18920129199.pdf)

Code of Ethics of the National Association of REALTORS®.

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

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

**Texas Real Estate License Laws**

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.

(a) The commission may suspend or revoke a license issued under this chapter or Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter 1102 if the license holder: e Texas Real Estate Commission License Act.

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;

(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;

(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;

(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

**Texas Real Estate Commission Rules**

CHAPTER 535  GENERAL PROVISIONS

SUBCHAPTER N  SUSPENSION AND REVOCATION OF LICENSURE

RULE §535.156  Dishonesty; Bad Faith; Untrustworthiness
(d) A license holder has a duty to convey accurate information to members of the public with whom the license holder deals.


Errors and omissions insurance and other statistics show that misrepresentation often tops the list of claims against real estate brokers and their sales agents. Such claims are most commonly brought by disgruntled purchasers who discover, after closing rather than before, defects in the physical condition or other undesirable characteristics of or near the property. Brokers are thus prudent to develop policies and practices that will eliminate the possibility of such claims, or at least minimize the risk that purchasers will encounter such problems after closing. To do so, brokers need a clear understanding of the legal basis on which misrepresentation claims are brought, including claims of intentional misrepresentation, fraud and negligent misrepresentation. Where such claims arise despite the broker’s exercise of practices designed to minimize them, the broker’s diligence will often place him or her in the best possible position to defend against and defeat a claim for liability.

(Source: Real Estate Brokerage Essentials®)

Definitions

Misrepresentation is a false statement or concealment of a material fact made with the intention of inducing some action by another party. A court will grant relief in the form of damages or rescission if the misrepresented fact is material to the transaction. Misrepresentation can be an affirmative statement such as “This house does not have termites.” It can also be a concealment of a material fact known to one party who knows the fact is not reasonable ascertainable by the other party.
An example is a seller who knows of a serious defect in the support beams, yet does not disclose this fact to the buyer. This failure to disclose is sometimes called “negative fraud”. However, if the buyer clearly does not believe or rely on the misrepresentations, or makes his or her own inspection and relies on this investigation, the contract cannot be rescinded on a defense of misrepresentation.

Statement of opinion is not normally material facts. For example “This house is a great buy at $50,000 because it is worth much more than that,” is a statement of opinion, often known as “puffing.” Note the difference between the statements. “The taxes are low” and “The taxes are $500” where actual taxes are $1,000. It would be no defense to a broker that the seller told the broker the taxes were $500—this is information the broker should verify. However, the person making the representation possesses some superior knowledge, then the representation, even though opinion is treated as fact. If a builder, for instance, says, “The foundation appears to be properly laid” he or she may be liable if in fact it is not.

Courts have held that a broker who represents that he or she does not think the property is on filled land may be liable if it turns out the land is filled and the buyer suffers damages. Although misrepresentations usually are oral or written statements, they could be a nod of the head, pointing out false boundaries, or displaying a forged map – in other words, any action that may convey false message. Common subjects for misrepresentation lawsuits are statements regarding easements, sewer connections, high water, proposed special assessments, number of legal units, and condition of roof.

A person need not actually intend to misrepresent a fact. A broker or salesperson would be liable if he or she knows or should have known of the falsity of a statement. Thus, if a broker makes a negligent misrepresentation of a material fact to induce the buyer to buy and the buyer relies on this fact made by the seller’s agent within the scope of authority of the agency.
If the broker fails to disclose a material fact, an aggrieved buyer usually has a successful case against the broker when:

1. The broker has knowledge of facts unknown to or beyond the reach of the buyer that materially affect the value or desirability of the property, and the broker fails to disclose these facts.
2. The broker intends to defraud the buyer by such nondisclosure.
3. The buyer suffers actual damages as a result of the misrepresentation.

Some consequences of misrepresentation are:

- The real estate licensee can have his or her license suspended or revoked.
- The defrauded party can collect damages or have the contract rescinded.
- The seller may not have to pay a commission to a misrepresenting broker; the seller may be jointly and severally liable to the purchaser.
- The buyer may be able to keep the property and sue the seller for the difference between the purchase price and the lesser actual value.
- The buyer may be able to collect damages for expenditures made in reliance on the misrepresentation.

(Source: [https://www.realtown.com/words/misrepresentation](https://www.realtown.com/words/misrepresentation))

**Fraud**

Fraud. John W. Reilly. The Language of Real Estate. 7th Edition

Fraud includes any form of deceit, trickery, breach of confidence, or misrepresentation by which one party attempts to gain some unfair or dishonest advantage over another. Unlike negligence, fraud is a deceitful practice or material misstatement of a material fact, known to be false, and done with intent to deceive, or with reckless indifference as to its truth, and relied on by the injured parties to their damage. For example, in response to a buyer’s question regarding termites, the seller produces a falsified termite report not disclosing known defects or remaining “silent” can be considered fraud; in some cases, silence may not be golden.
It is important to distinguish between fraud in the inducement and fraud in the execution if a contract. If the party knows what he or she is signing, but the consent to sign is induced by fraud, the contract is voidable. If the party does not actually know what he or she is signing because of deception as to the nature of such an act, and if the deceived party did not intend to enter into a contract at all, then the contract is void. The voidable contract is binding, until rescinded, whereas the void contract has no force or effect whatsoever.

The state of limitations for a court action based on fraud is generally computed from the date of the fraud or from the time the defrauded person could discover or should have discover, the fraud.

In accordance with the REALTORS® Code of Ethics, it is the duty of a REALTOR® to protect the public against fraud, misrepresentation, or unethical practices in real estate. All state licensing laws provide that a broker’s license can be suspended or revoked for fraudulent acts.

(Source: The Language of Real Estate. 7th Edition)

In The Language of Real Estate-7th Edition, John W. Reilly defines negligence as the failure to due ordinary or reasonable care under the circumstances.

**Minimizing Misrepresentation Liability**

The National Association of REALTORS® Real Estate Brokerage Essentials® Fourth Edition lists some steps to minimize the risk of liability for misrepresentation include:

- Advise the buyer of all material defects that are known to be present
- Do not make statements of fact that have not been verified, either with the seller of by an independent investigation.
- Conduct a careful visual inspection of the property and make only those representations that are consistent with the results of that inspection.
Disclose to prospective buyers any defects, evidence of defects, or other unusual conditions that may suggest the possibility of defects, revealed by the examination.

- Document information provided to the buyer including answers to questions about the condition of the property, either by a memorandum in the file or by a letter to the buyer. Document research done on the condition of the property, including identification of any sources of information consulted.
- Encourage buyers to consider using a licensed home inspector or other professional to determine the condition of the property or to assess the significance of a “red flag”.
- Be informed about current real estate matters, including the nature of “red flags” of particular defects that are common to properties in the market. If discovered, discuss the red flags with the seller or seller’s agent and investigate them further. If an investigation is inconclusive, be sure the buyer is aware of any “red flags” and its potential significance in writing.

(Source: Real Estate Brokerage Essentials® Fourth Edition)

There are many more steps that can be taken to reduce misrepresentation, fraud, and negligence. Have a group discussion and see what else you can come up to reduce these acts.
Information About Brokerage Services

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

**Types of Real Estate License Holders:**
- **A Broker** is responsible for all brokerage activities, including acts performed by sales agents sponsored by the broker.
- **A Sales Agent** must be sponsored by a broker and works with clients on behalf of the broker.

A broker's minimum duties required by law (a client is the person or party that the broker represents):
- Put the interests of the client above all others, including the broker's own interests;
- Inform the client of any material information about the property or transaction received by the broker;
- Answer the client's questions and present any offer to or counter-offer from the client; and
- Treat all parties to a real estate transaction honestly and fairly.

A license holder can represent a party in a real estate transaction:

**As Agent for Owner (seller/landlord):** The broker becomes the property owner's agent through an agreement with the owner, usually in a written listing to sell or property management agreement. An owner's agent must perform the broker's minimum duties above and must inform the owner of any material information about the property or transaction known by the agent, including information disclosed to the agent or subagent by the buyer or buyer's agent.

**As Agent for Buyer/Tenant:** The broker becomes the buyer/tenant's agent by agreeing to represent the buyer, usually through a written representation agreement. A buyer's agent must perform the broker's minimum duties above and must inform the buyer of any material information about the property or transaction known by the agent, including information disclosed to the agent by the seller or seller's agent.

**As Agent for Both - Intermediary:** To act as an intermediary between the parties, the broker must first obtain the written agreement of each party to the transaction. The written agreement must state who will pay the broker and, in conspicuous bold or underlined print, set forth the broker's obligations as an intermediary. A broker who acts as an intermediary:
- Must treat all parties to the transaction impartially and fairly;
- May, with the parties' written consent, appoint a different license holder associated with the broker to each party (owner and buyer) to communicate with, provide opinions, and advice to, and carry out the instructions of each party to the transaction;
- Must not, unless specifically authorized in writing to do so by the party, disclose:
  - that the owner will accept a price less than the written asking price;
  - that the buyer/tenant will pay a price greater than the price submitted in a written offer, and
  - any confidential information or any other information that a party specifically instructs the broker in writing not to disclose, unless required to do so by law.

**As Subagent:** A license holder acts as a subagent when aiding a buyer in a transaction without an agreement to represent the buyer. A subagent can assist the buyer but does not represent the buyer and must place the interests of the owner first.

To avoid disputes, all agreements between you and a broker should be in writing and clearly establish:
- The broker's duties and responsibilities to you, and your obligations under the representation agreement;
- Who will pay the broker for services provided to you, when payment will be made, and how the payment will be calculated.

License holder contact information: This notice is being provided for informational purposes. It does not create an obligation for you to use the broker's services. Please acknowledge receipt of this notice below and retain a copy for your records.

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

Buyer/Tenant/Seller/Landlord Initials | Date
Exclusive Buyer’s Agent

One of the first things license holders do when encountering either in person, telephone, online or internet an unrepresented buyer is to give the unrepresented buyer the “Information about Brokerage Services” notice.

Your explanation should be the following:

“For your protection as a consumer in Texas, you should understand your rights as a consumer selling, purchase, leasing or hiring a license holder as a property manager.

The Texas Real Estate Commission requires all license holders to deliver this Notice to all consumers before the license holder discusses or presents any information about a specific property”.

Let’s examine what the Texas Real Estate Commission says about disclosing representation and delivering the Information about Brokerage Services Notice.

Texas Real Estate License Act.

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.558. REPRESENTATION DISCLOSURE.

(a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158 , Sec. 92, eff. January 1, 2016.

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

(1) another party to the transaction; or

(2) another license holder who represents another party to the transaction.

(b-1) At the time of a license holder’s first substantive communication with a party relating to a proposed transaction regarding specific real property, the license holder shall provide to the party written notice in at least a 10-point font that:

(1) describes the ways in which a broker can represent a party to a real estate transaction, including as an intermediary;
(2) describes the basic duties and obligations a broker has to a party to a real estate transaction that the broker represents; and
(3) provides the name, license number, and contact information for the license holder and the license holder's supervisor and broker, if applicable.

(b-2) The commission by rule shall prescribe the text of the notice required under Subsections (b-1) (1) and (2) and establish the methods by which a license holder shall provide the notice.

(c) A license holder is not required to provide the notice required by Subsection (b-1) if:

(1) the proposed transaction is for a residential lease for less than one year and a sale is not being considered;
(2) the license holder meets with a party who the license holder knows is represented by another license holder; or
(3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Texas Real Estate License Act is quite specific and requires that a license holder who already represents a party in a proposed real estate transaction must disclose that the license holder represents a party upon first contact. An example would be a call on a company listing; you would have to tell them you represent the seller of the property they are calling on before you can give them any information. Another example is when showing a buyer who you represent, you would disclose to any license holder or seller that you are the buyer’s agent and that you represent him or her. There should never be any question who you represent. You are someone’s agent at all times and you need to be aware of this fact.
Texas Real Estate License Act

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.

(a) The commission may suspend or revoke a license issued under this chapter or Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter 1102 if the license holder:

(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

In addition to establishing a relationship with a consumer to represent him or her in a sale or a lease, you need to explain your Broker Policy and Procedures.


Standard of Practice 1-13

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

1) the Realtor®'s company policies regarding cooperation;
2) the amount of compensation to be paid by the client;
3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord’s agent, etc., and
5) the possibility that sellers or sellers’ representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties.
Explanation of the Information about Brokerage Services Form

Paragraph One – Types of Real Estate License Holders
There are two (2) types of licenses in Texas for real estate, broker and sales agent, classified as license holder in the Texas Real Estate Commission License Act.

Paragraph Two – A broker’s minimum duties required by law.
(A client is the person or party the broker represents):

- Puts the interests of the client above all other, including the broker’s own interest;
  (When you represent a buyer, seller, tenant, you have fiduciary duties and this is one of them)
- Inform the client of any material information about the property or transaction received by the broker;
  (If you receive any information about the property you have listed or are selling, you need to tell your client immediately. No matter if you represent a buyer, seller, or tenant, if you have any knowledge about a material information or defect you need to inform them.)
- Answer the client’s questions and present any offer to or counter-offer from the client;
  (Clients have many questions; if you do not know tell them and go find out. If you have one or more offers on a property you must present them all.)
- Treat all parties to a real estate transaction honestly and fairly.
  (These are your duties you owe to a consumer you do not represent.)

A License Holder Can Represent A Party In A Real Estate Transaction: This section explains to the consumer the different types of agency relationships you or another agent may have with a seller, buyer, tenant, and landlord.
Before we go any further you need to know what type of agency your broker practices. Not all brokers practice the same type of agency for their brokerage. There are many different types of agency a broker can practice: buyer agency, seller agency, single agency or both buyer and seller agency in the same transaction. This would be an intermediary policy for the broker and his or her sponsored license holders. Different states practice different types of agency, but Texas only has buyer, seller, single or intermediary transaction.

AN AGENT FOR THE OWNER (SELLER/LANDLORD) (This could be single agency or a seller agency.)

The broker becomes the property owner’s agent through an agreement with the owner, usually in a written listing agreement to sell or a property management agreement. An owner’s agent must perform the broker’s minimum duties above and must inform the owner of any material information about the property or transaction known by the agent, including information disclosed to the agent or subagent by the buyer or buyer’s agent.

Now why is this important for a seller/landlord to know? Because they do not realize, unless they are represented by an agent in writing, the agent working with the buyer must tell buyer or buyer’s agent everything the seller has said. The relationship with a buyer who is not represented is a subagent.

AS AGENT FOR THE BUYER/TENANT: (Could be a single agency or a buyer agency)

The broker becomes the buyer/tenant’s agent by agreeing to represent the buyer, usually through a written representation agreement. A buyer’s agent must perform the broker’s minimum duties above and must inform the buyer of any material information about the property or transaction known by the agent including information disclosed to the agent by the seller or seller’s agent.

Why is this important for the buyer/tenant to know? Because the buyer does not realize if he or she is not represented by an agent, that all of his or her confidential information has
to be given to the seller. The agent cannot negotiate or give them him or her any advice and opinions.

AS AGENT FOR BOTH – INTERMEDIARY (When you sell your own listing or when you sell a company listing)

You need to memorize what disclosures and agreements are required in an intermediary transaction. This is not a type of agency; this is a process on how to sell company listings within the law so you do not cross the boundaries of dual agency.

This would be how you explain it, for in-house transactions and representation by processing the transaction intermediary.

AS SUBAGENT – (This is when a license holder works with buyers who he or she does not represent by mutual consent.)

A license holder acts as a subagent when aiding a buyer in a transaction without an agreement to represent the buyer. A subagent can assist the buyer but does not represent the buyer and must place the interest of the owner first.

In other words, you are a subagent of the listing broker and his or her client, the seller. Your duty of loyalty is to the seller and not the buyer. Your duties to the seller would be fiduciary. The buyer needs to understand this and know that you cannot give him or her advice and opinions. You can assist the buyer by showing the property, writing the offer, and assist during the process of closing. You are obligated to tell the seller any information the buyer tells you that is in the best interest of the seller. Educating the buyer on this will definitely leave an impact and reconsideration for the license holder to represent and establish a Client – Agent relationship by signing a Buyer Representation Agreement.

TO AVOID DISPUTES, ALL AGREEMENTS BETWEEN YOU AND A BROKER SHOULD BE IN WRITING AND CLEARLY ESTABLISHED.
• The broker’s duties and responsibilities to you, and your obligations under the representation agreement.
  ▪ (You need to explain to the consumer what this means: Obedience, Loyalty, Disclosure, Confidentiality, Accountability and Reasonable Care. You might want to tell the consumer, if you are a REALTOR®, you also abide by a Code of Ethics.)
• Who will pay the broker for services provided to you, when payment will be made and how the payment will be calculated.
  (This would be the time to talk about your Broker’s Commission Schedule and how commissions are split and paid.)

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

You would fill in the form before you present or deliver it to the consumer and highlight this paragraph in yellow highlighter. If they will not acknowledge the Information about Brokerage Services form, reevaluate whether you would want to share any of your time or expertise. This Notice is for their knowledge, whether they have bought and sold real estate before or not. Remember, you should know more than the consumer about what is required to buy, sell, rent or manage real estate.

All types of transaction are in the name of the broker. Sales agents are sponsored by the broker and handle all transaction in the broker’s name and for the broker. The broker and sales agent have an agency relationship called general agency. The sales agent handles real estate transactions representing the broker and the broker’s real estate company.

After you have explained to the unrepresented buyer what the “Information about Brokerage Services” notice is, you will ask them to acknowledge receipt of the notice with
signatures so the notice can be placed in your file. This proves the “Information about Brokerage Services” form was delivered according to the Texas Real Estate License Act.

**Representation Agreement Forms**

Texas Real Estate Commission does not promulgate Listing Agreements or Buyer Representation Agreements.

If your sponsoring broker is a REALTOR®, you will become a REALTOR® by joining the local, state and national Association of REALTORS®. You will then have access to the Texas Association of REALTORS® library of forms.

The Texas Association of REALTORS® furnishes a Buyer Representation Agreement for its’ members only. It is copyrighted form. If your broker is not a member of the local, state, and national Association of REALTORS® the broker should have a buyer representation agreement for you to use that was written by a Texas attorney.
Buyer Representation Agreement

19. **Parties:** The parties to this agreement are:

   **Client:**

   ______________________________________________________________
   Address:
   ______________________________________________________________
   City, State, Zip:
   ______________________________________________________________

   **Broker:**

   ______________________________________________________________
   Address:
   ______________________________________________________________
   City, State, Zip:
   ______________________________________________________________

   Phone: __________________________________________________________
   Email: __________________________________________________________

20. **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.
21. **DEFINITIONS:**

   A. “Acquire” means to purchase or lease.

   B. “Closing” in a sale transaction means the date legal title to a property is conveyed to a purchaser of property under a contract to buy. “Closing” in a lease transaction means the date a landlord and tenant enter into a binding lease of a property.

   C. “Market area” means that area in the State of Texas within the perimeter boundaries of the following areas: ________________________________.

   D. “Property” means any interest in real estate including but not limited to properties listed in a multiple listing service or other listing services, properties for sale by owners, and properties for sale by builders.

22. **TERM:** This agreement commences on ________________________________ and ends at 11:59 p.m. on ________________________________.

23. **BROKER’S OBLIGATIONS:** Broker will: (a) use Broker’s best efforts to assist Client in acquiring property in the market area; (b) assist Client in negotiating the acquisition of property in the market area; and (c) comply with other provisions of this agreement.

24. **CLIENT’S OBLIGATIONS:** Client will: (a) work exclusively through Broker in acquiring property in the market area and negotiate the acquisition of property in the market area only through Broker; (b) inform other brokers, salespersons, sellers, and landlords with whom Client may have contact that Broker exclusively represents Client for the purpose of acquiring property in the market area and refer all such persons to Broker; and (c) comply with other provisions of this agreement.

25. **REPRESENTATIONS:**

   A. Each person signing this agreement represents that the person has the legal capacity and authority to bind the respective party to this agreement.
B. Client represents that Client is not now a party to another buyer or tenant representation agreement with another broker for the acquisition of property in the market area.

C. Client represents that all information relating to Client’s ability to acquire property in the market area Client gives to Broker is true and correct.

D. Name any employer, relocation company, or other entity that will provide benefits to Client when acquiring property in the market area:

______________________________.

26. INTERMEDIARY: (Check A or B only.)

☐ A. Intermediary Status: Client desires to see Broker’s listings. If Client wishes to acquire one of Broker’s listings, Client authorizes Broker to act as an intermediary and Broker will notify Client that Broker will service the parties in accordance with one of the following alternatives.

4) If the owner of the property is serviced by an associate other than the associate servicing Client under this agreement, Broker may notify Client that Broker will: (a) appoint the associate then servicing the owner to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the owner; and (b) appoint the associate then servicing Client to the Client for the same purpose.

5) If the owner of the property is serviced by the same associate who is servicing Client, Broker may notify Client that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Client; and (b) appoint the associate servicing the owner under the listing to the owner for the same purpose.

6) Broker may notify Client that Broker will make no appointments as described under this Paragraph 8A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.
☐ B. No Intermediary Status: Client does not wish to be shown or acquire any of Broker’s listings.

Notice: If Broker acts as an intermediary under Paragraph 8A, Broker and Broker’s associates:

- may not disclose to Client that the seller or landlord will accept a price less than the asking price unless otherwise instructed in a separate writing by the seller or landlord;
- may not disclose to the seller or landlord that Client will pay a price greater than the price submitted in a written offer to the seller or landlord unless otherwise instructed in a separate writing by Client;
- may not disclose any confidential information or any information a seller or landlord or Client specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the property;
- shall treat all parties to the transaction honestly; and
- shall comply with the Real Estate License Act.

27. COMPETING CLIENTS: Client acknowledges that Broker may represent other prospective buyers or tenants who may seek to acquire properties that may be of interest to Client. Client agrees that Broker may, during the term of this agreement and after it ends, represent such other prospects, show the other prospects the same properties that Broker shows to Client, and act as a real estate broker for such other prospects in negotiating the acquisition of properties that Client may seek to acquire.

28. CONFIDENTIAL INFORMATION:

A. During the term of this agreement or after its termination, Broker may not knowingly disclose information obtained in confidence from Client except as authorized by Client or required by law. Broker may not disclose to Client any
information obtained in confidence regarding any other person Broker represents or may have represented except as required by law.

B. Unless otherwise agreed or required by law, a seller or the seller’s agent is not obliged to keep the existence of an offer or its terms confidential. If a listing agent receives multiple offers, the listing agent is obliged to treat the competing buyers fairly.

29. 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.**

C. Earned and Payable: A person is not obligated to pay Broker a commission until such time as Broker’s commission is *earned and payable*. Broker’s commission is *earned* when: (1) Client enters into a contract to buy or lease property in the market area; or (2) Client breaches this agreement. Broker’s commission is *payable*, either during the term of this agreement or after it ends, upon the earlier of: (1) the closing of the transaction to acquire the property; (2) Client’s breach of a contract to buy or lease a property in the market area; or (3) Client’s breach of this agreement. If Client acquires more than one property under this agreement, Broker’s commissions for each property acquired are earned as each property is acquired and are payable at the closing of each acquisition.

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.

E. Acquisition of Broker’s Listing: Notwithstanding any provision to the contrary, if Client acquires a property listed by Broker, Broker will be paid in accordance with the terms of Broker’s listing agreement with the owner and Client will have no obligation to pay Broker.

F. In addition to the commission specified under Paragraph 11A, Broker is entitled to the following fees.

1) Construction: If Client uses Broker’s services to procure or negotiate the construction of improvements to property that Client owns or may acquire, Client ensures that Broker will receive from Client or the contractor(s) at the time the construction is substantially complete a fee equal to: ________________________________.

2) Service Providers: If Broker refers Client or any party to a transaction contemplated by this agreement to a service provider (for example, mover, cable company, telecommunications provider, utility, or contractor) Broker may receive a fee from the service provider for the referral.

3) Other: ________________________________.

G. Protection Period: “Protection period” means that time starting the day after this agreement ends and continuing for _______ days. Not later than 10 days after this agreement ends, Broker may send Client written notice identifying the properties called to Client’s attention during this agreement. If Client or a relative of Client agrees to acquire a property identified in the notice during the protection period, Client will pay Broker, upon closing, the amount Broker would have been entitled to receive if this agreement were still in effect. This Paragraph 11G survives termination of this agreement. This Paragraph 11G will not apply if Client is, during the protection period, bound under a representation agreement with another broker who is a member of the Texas Association of REALTORS® at the time the acquisition is negotiated and the other broker is paid a fee for negotiating the transaction.
H. **Escrow Authorization:** Client authorizes, and Broker may so instruct, any escrow or closing agent authorized to close a transaction for the acquisition of property contemplated by this agreement to collect and disburse to Broker all amounts payable to Broker.

I. **County:** Amounts payable to Broker are to be paid in cash in _______ County, Texas.

30. **MEDIATION:** The parties agree to negotiate in good faith in an effort to resolve any dispute that may arise related to this agreement or any transaction related to or contemplated by this agreement. If the dispute cannot be resolved by negotiation, the parties will submit the dispute to mediation before resorting to arbitration or litigation and will equally share the costs of a mutually acceptable mediator.

31. **DEFAULT:** If either party fails to comply with this agreement or makes a false representation in this agreement, the non-complying party is in default. If Client is in default, Client will be liable for the amount of compensation that Broker would have received under this agreement if Client was not in default. If Broker is in default, Client may exercise any remedy at law.

32. **ATTORNEY’S FEES:** If Client or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this agreement or any transaction related to this agreement, such party will be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney’s fees.

33. **LIMITATION OF LIABILITY:** Neither Broker nor any other broker, or their associates, is responsible or liable for any person’s personal injuries or for any loss or damage to any person’s property that is not caused by Broker. Client will hold broker, any other broker, and their associates, harmless from any such injuries or losses. Client will indemnify Broker against any claims for injury or damage that Client may cause to others or their property.
34. **ADDENDA:** Addenda and other related documents which are part of this agreement are:

- ☐ Information About Brokerage Services
- ☐ Protect Your Family from Lead in Your Home
- ☐ Protecting Your Home from Mold
- ☐ Information about Special Flood Hazard Areas
- ☐ Information Concerning Property Insurance
- ☐ For Your Protection: Get a Home Inspection
- ☐ General Information and Notice to a Buyer

35. **SPECIAL PROVISIONS:**

36. **ADDITIONAL NOTICES:**

A. Broker’s fees and the sharing of fees between brokers are not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS® or any listing service.

B. In accordance with fair housing laws and the National Association of REALTORS® Code of Ethics, Broker’s services must be provided without regard to race, color, religion, national origin, sex, disability, familial status, sexual orientation, or gender identity. Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, or age).
C. Broker is not a property inspector, surveyor, engineer, environmental assessor, or compliance inspector. Client should seek experts to render such services in any acquisition.

D. If Client purchases property, Client should have an abstract covering the property examined by an attorney of Client’s selection, or Client should be furnished with or obtain a title policy.

E. Buyer may purchase a residential service contract. Buyer should review such service contract or the scope of coverage, exclusions, and limitations. The purchase of a residential service contract is optional. There are several residential service companies operating in Texas.

CONSULT AN ATTORNEY: Broker cannot give legal advice. This is a legally binding agreement. READ IT CAREFULLY. If you do not understand the effect of this agreement, consult your attorney BEFORE signing.

_______________________________________
Broker’s Printed Name           License No.   Client’s Printed Name

_______________________________________

☐ Broker’s Signature                Date     Client’s Signature                Date

☐ Broker’s Associate’s Signature, as an authorized agent of Broker

_______________________________________
Broker’s Associate’s Printed Name, if applicable   Client’s Printed Name

_______________________________________
Client’s Signature                Date
Buyer Agreement Paragraphs

1. PARTIES – Ask them for their legal names and how they would like to take title in a property should they find a home that is to their liking. Do not just put their pet names in there. Use legal names only.

The address should be where their residence is now. Do not use business addresses. You want to be sure you have correct email address and telephone numbers to communicate with them.

2. APPOINTMENT – The seller/owner(s) appoint the license holder as their exclusive agent to represent them in purchasing/renting a home in a market area. What does market area mean? This is addressed in another paragraph.

3. DEFINITIONS –
   A. “Acquire” means to purchase, buy, lease, or rent.
   B. “Closing” – This means in a sale, the date legal title to a property is conveyed to the buyer and closing and funding takes place.
   C. “Market Area” - Where will the buyer be buying property in Texas. You can use zip codes, counties or city limits. Know this before you fill this form out. The buyer may say one area to look, but may buy in another area he or she did not tell you. So protect yourself in getting paid a commission or fee.
   D. “Property” - Think about what types of property you sell in residential real estate and the sources you use to find property to show. Here they list the MLS, builders, and other properties that might not be in the MLS or a new home. Be creative and think of other sources to research the market for your buyer/tenants.

4. TERM – You must have an effective date and an ending date. These dates are not necessarily like listing agreements dates. These dates are variables. As an example, dates could be for one day, two weeks, 48 hours, 30 days or whatever is agreeable to the buyer/tenant. You need to discuss this with your broker.
The Texas Real Estate License Act requires you to have an ending date:

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.
(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;

5. BROKER’S OBLIGATIONS –
A. Will make every effort to find a property for the buyer
B. Negotiate for the buyer/tenant to obtain the best possible price
C. Comply with all provisions of the Buyer/Tenant Agreement

6. CLIENT’S OBLIGATIONS –
A. Work only with the broker as to the terms of this agreement and negotiate through the broker only.
B. Inform other brokers, sellers, builders, For Sale By Owners, friends, relatives who their agent is to represent them and negotiate exclusively only with the broker
C. Comply with all provisions of the Buyer/Tenant Agreement

7. REPRESENTATIONS –
A. Broker and buyer/tenant can bind each party to this agreement
B. Buyer/tenant has not signed another Buyer/Tenant Representation Agreement with another broker
C. Buyer/tenant attests all information given to the broker is true
D. Name of relocation company if applicable

8. INTERMEDIARY
You need to know the difference between “Intermediary Status” and “No Intermediary Status”. Discuss intermediary in depth with your broker to clarify what type of agency your broker practices.
9. COMPETING CLIENTS – This is more of a disclosure to the buyer/tenant that you have other agreements of representation with other consumers and you will continue to work with them as well as showing properties they have already looked at.

10. CONFIDENTIAL INFORMATION - This is one of the fiduciary duties you have when you represent a consumer in a real estate transaction. You cannot discuss or share any information you have learned about your client before, during, and after the client and agent relationship. You are obligated by the client, Texas law, and the Code of Ethics. The only information you can disclose is if your client authorizes you to in writing.

11. BROKER’S FEES
   A. Commission – Set by your broker. You cannot negotiate commissions without permission from your broker. Your broker will tell you what the broker’s fees are for buyers, seller, leases, property management, and referral fees. Commissions are negotiable but not by the sales agent.
   B. Source of commission payment – This paragraph is overlooked and mostly is difficult to discuss with buyer if you are not experienced in evaluating and believing in the service you provide. What it says is the broker will seek a commission from the seller and should the seller not agree to a commission or pay the broker’s buyer fee, the buyer will pay the broker’s commission.
   C. Earned and Payable – Self-explanatory. You do not earn a commission until you have a closing and it funds. It also explains the entitlement to commission if buyer breaches the contract.
   
   D. Additional Compensation – The Texas Real Estate License Act says you can receive more than one commission with the permission of your clients. For your broker’s protection and yours, you would want this in writing and signed by the client. Ask your broker for the form.

SUBCHAPTER N. PROHIBITED PRACTICES AND DISCIPLINARY PROCEEDINGS.
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.652. Grounds for Suspension or Revocation of License

(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF REALTORS®


In a transaction, Realtors® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the Realtor®’s client or clients.

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

E. Acquisition of Broker’s Listing

If the buyer buys one of the broker’s listings, the compensation to the broker will be paid by the seller in the listing agreement and the buyer will owe no commission.

F. In addition to the commission in paragraph 11.A, Broker may entitle to additional fees if applicable.

a. Construction – If client owns land and a house will be built, the commission owed will be paid to the broker as stated in this agreement.

b. Vendors – In this buyer’s agreement states service providers. This also could be called referral fees paid to the broker for referring business to them, such as cable companies, residential service companies, contractors, utilities,

c. Other – Be careful. What is “other”? The Real Estate Settlement Procedures Act is very specific that kick backs are against the law. All fees must be listed on the closing statement. If they are not listed on the closing statement at time of closing,
the referral fee can be interpreted as an illegal kick back. Be sure you have this in writing and submitted to the buyer that you are receiving these fees.

SUBCHAPTER N. PROHIBITED PRACTICES AND DISCIPLINARY PROCEEDINGS.
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE

(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Code of Ethics of the National Association of REALTORS®.

Article 6
REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent.

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

Standard of Practice 6-1
REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion.

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)
G. Protection Period

Do not overlook this paragraph before the Buyer Representation Agreement expires. You will want to submit a list of properties you showed the buyer(s) and have them sign off on the list and date it. What you are doing is protecting your commission in case the buyer goes directly to the listing broker or the seller of any property you have shown them as well as procured a property they buy. If the buyer has signed another buyer representation agreement with another broker, you might not be able to claim the commission. Should the buyers purchase a home that you have shown them and you were the procuring cause, you may be able to file for arbitration jointly with your broker with the Texas Association of REALTORS® based on procuring cause.

You can request arbitration within six (6) months from the closing date with the Texas Association of REALTORS. Their forms are online at the Texas Association of REALTORS® web site. Download and fill them out with as much detail as possible. Your broker needs to sign the forms and submit them to the Texas Association of REALTORS® Board Service Department. [www.texasrealestate.com](http://www.texasrealestate.com/)

Since the commission is and will be paid to your broker, REALTOR® arbitration has to be filed by the broker.


**Article 17**

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.
In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award. The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award.

Standard of Practice 17-1
The filing of litigation and refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate.

Standard of Practice 17-2
Article 17 does not require REALTORS® to mediate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to mediate through the Board’s facilities. The fact that all parties decline to participate in mediation does not relieve REALTORS® of the duty to arbitrate.

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board. Standard of Practice 17-3 Realtors®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other REALTORS® absent a specific written agreement to the contrary.

Standard of Practice 17-4
Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker
as respondent and arbitration may proceed without the listing broker being named as a respondent.

When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction.

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

4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers.

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

**Standard of Practice 17-5**

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

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

H. Escrow Authorization
This is authorizing the title company to disburse funds due and owed to the broker at the time of closing.

I. County: This should be the county in which the property is located, not your office. Be sure the closing is in this county you have specified in the Buyer Agreement.

12. Mediation
Mediation has become the preferred alternative dispute-resolution approach in Texas and has had a very high success rate. In mediation, a third, disinterested party facilitates communication between the disputing parties to enable them to move toward a point of agreement. The mediator does not need to be a subject area expert. The mediator does not make decisions as to right or wrong. A skilled mediator will set the ground rules for the discussions, keep the parties focused by asking probing questions, and help each of the parties listen to what the other party has to say. If the parties reach agreement, they will reduce the agreement to writing and will be legally bound to the new contract that they have created. If they do not reach agreement, they will usually move on to either binding arbitration or litigation.

The four most frequently cited advantages of mediation are the following:

- Low cost
- Fast – less cumbersome and costly as in litigation
- Private – whereas everything that happens or is said in court is public
- Wind-Win – Offering an opportunity for both parties to win
The cost of mediation is shared equally by the parties. The fee will be determined by the mediator and will vary, depending on the complexity of the issues, the experience of the mediator, complexity of the case, and time involved.

Reference: Texas Promulgated Contracts Contributing Author Peggy Santmyer.

Mediation is an informal, off the record negotiation facilitated by a neutral third party, the mediator. It is usually referred to as “non-binding,” which means that, if the process is unsuccessful, the result is an impasse and the parties are right where they were before. The parties have no obligation to reach an agreement, and the mediator cannot order or direct the outcome. All communication throughout the process is confidential, and not to be used again later for any purpose.

“Nonbinding” does not mean that, if the process results in a signed, written settlement agreement, the agreement is not binding and enforceable. To the contrary, a signed, written mediated settlement agreement is as binding and enforceable as any contract. Mediation is not “arbitration.” In arbitration, the neutral is a private judge, hired and paid by the parties to render a decision which, like a court order or judgment, is final and binding on the parties.

In this type of mediation in this example the mediator is compensated evenly by the parties. The process begins with an agreement regarding the choice of the mediator, and a date, place and time for the meeting.

13. Default
   - Clearly explains default by either the broker or client (buyer/tenant)
   - Default by the buyer/tenant – May be liable for the commission to the broker
   - Default by the broker – Buyer/tenant may have legal recourse against the broker
14. Attorney Fees
Whoever is the prevailing party, all fees, court costs, attorney fees are paid by the non-prevailing party.

15. Limitation of Liability
Read this paragraph that covers personal injury. You need to be sure you have insurance to cover personal injury.

16. Addenda:
Check the boxes of the addenda that are applicable to the buyer/tenant representative agreement. Your broker will also tell you what every Residential Buyer/Tenant Representation Agreement should have as addenda. Read the addenda and understand what they are for and what they mean. A copy is for your broker file, your file and the buyer/tenants file.

17. Special Provisions
Do not put anything in this paragraph without your broker's permission and advice.

18. Additional Notices:
A. Broker Fees -- It is imperative you are trained in questions and answers on broker commissions. There are many reasons why you need to be proficient in this area; it can cause you and your broker to be found in violation of federal antitrust laws.

Antitrust and Real Estate for REALTORS. 2003. National Association of REALTORS:

One of the bedrock principles of antitrust compliance is that neither associations nor their members collectively set the price of services provided by real estate professionals. That is the decision that is made independently by each broker/firm. The broker's sales agents and broker associates must take care to present pricing
policies to consumers in a manner that is consistent with the fact that the fees or prices are independently established. This means they should never respond to a question about fees by suggesting that all competitors in the market follow the same pricing practices or to a question about fees by suggesting that all competitors in the market follow the same pricing practices or to a policy of the local association or Multiple Listing Services that supposedly prohibits or discourages price competition. Additionally, the obligations of a member of the REALTOR Association impose a higher standard with regards to the statement made about competitors. Article 15 of the REALTOR Code of Ethics states.

“REALTORS shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices.”

The National Association of REALTORS Professional Standards Committee has said the Article logically flows from the REALTOR’S duty established in Article 12 “to present a true picture in … representations.”

This includes comparisons with competitors and comments or opinions offered about other real estate professionals. While the Article is not intended to limit or inhibit the free flow of the commercial and comparative information that is often of value to potential users of the many and varied services that REALTORS provide, it does require a good faith effort to ensure that statements and representations are truthful and accurate.

The path to managing this risk is really consistent with the philosophy of the REALTOR organization. By focusing on the positive and presenting it honestly, the potential risks posed by the antitrust laws will be minimized and you will not only have avoided that legal and ethical liability, but you will probably elevate yourself and your firm in the eyes of the most important audience, the people who are going to be selecting you to represent them in the sale or purchase of their home.
NEVER SAY THINGS that could be understood to suggest a conspiracy or falsely disparage a competitor:

- This is the rate every firm charges
- I’d like to lower the commission, but no one else in the MLS will show your house unless the commission is __X__%
- I have to charge you this rate because this is the rate the Association of REALTORS set for all real estate agents.
- Before you decide to list with XYZ Realty you should know that because they are “discount” brokers, member of the association won’t show their listings.

Focus on the positive aspects of doing business with you and the services that distinguish your firm and you.

- I have a marketing program that gets results. Let me explain my sixty-day marketing plan and all it includes.
- Our company has been in business for X Years and has serviced thousands of clients with the highest professionalism. We choose to charge X% and our clients have chosen to pay X% because of the service we provided.
- I appreciate your comments. My interest is in helping you meet your goals by getting you the best price, in the quickest amount of time, with the least amount of problems. Let me show you how I do it.

(Source: Antitrust and Real Estate for REALTORS. 2003)

You and your broker need to prepare you with dialogue to be clear that your broker sets the commissions for services rendered. The sales agent cannot reduce commissions without the broker’s permission. When commissions are reduced, so are services and marketing.

B. Be familiar with fair housing laws and local, state and federal directives stating that we as license holders cannot discriminate against anyone for race, color, religion, national origin, sex, disability, familial status, sexual orientation or gender identity.
C. The buyer should get an inspection by a licensed inspector or any other inspector for any concerns the buyer has about the property or surrounding properties, land, business, structures, etc.

D. The Texas Real Estate License Act states a buyer should receive either an abstract of title, reviewed by an attorney or a title policy before closing on the property. The buyer needs to know any exceptions, liens, judgements, tax liens, etc on the property, if any.

**Texas Real Estate License Act**


*Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE*

(29) fails to advise a buyer in writing before the closing of a real estate transaction that the buyer should:

(A) have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer; or

(B) be provided with or obtain a title insurance policy;

E. Residential Service Companies are available and licensed by the Texas Real Estate Commission. They can go to the Texas Real Estate Commission website and review by contacting the companies and asking questions. Many buyers think the residential service companies cover every item in the property, and they do not. They all have limitations and deductibles paid for each service call.

**Consult an Attorney**

You will see this on all forms. If the consumer does not understand any document, contract, etc, they should consult an attorney. This is an oxymoron since all of our forms are written by attorneys. We still have to tell them.

Signature
The form is signed by the broker or broker’s sales agent and the client. Be sure your license number is on the signature page.

Review the following questions regarding pages 1 and 2 of the Buyer/Tenant Representation.

1. *The market area in the Representation Agreement should be an area with boundaries that can be identified on a map. True or False.*

   Answer: True, Paragraph 3C (a specific city or specific county for example)

2. *A client that signs a Representation Agreement promises only to work with the named broker to acquire property in the market area. True or False.*

   Answer: True, Paragraph 6

3. *“The property” would include For Sale by Owner property and Builder’s new homes. True or False.*

   Answer: True, Paragraph 3D

4. *The client represents they have not signed a representation agreement with anyone else in the same market area during this term. True or False.*

   Answer: True, Paragraph 7B

5. *If the buyer/client authorizes the broker to act as an Intermediary and the home the buyer decides to purchase is listed by another agent in the broker’s office, who does the form say the broker will appoint to help the parties?*
Answer: The agent serving the seller to help the seller and the agent serving the buyer client to the buyer. Paragraph 8A1

6. If the buyer/client authorizes the broker to act as an Intermediary and the home the buyer decides to purchase is listed by the same agent that is representing them, the broker has two choices when making appointments. What are the two choices?

Answer: Paragraph 8A2 appoint a different associate to help the buyer client or Paragraph 8A3 make no appointments

Review the following questions found on pages 3-5 of the Buyer’s Representation Agreement.

1. Who agrees that the broker will be paid a certain amount of money when the buyer/client purchases a home in the market area?

Answer: The parties, Paragraph 11A

2. Where is the buyer’s agent going to try to collect the money?

Answer: Seller, landlord or their agents, Paragraph 11B

3. If the buyer’s agent cannot collect the money from the persons named in question #2, who will pay the agent according to the buyer agreement?

Answer: Buyer Client, Paragraph 11B4.

4. If the seller or the listing agent offered more money to the buyer’s agent than the buyer agreed to, who gets to keep the excess?

Answer: Buyers’ Broker, Paragraph 11D
5. Is the buyer’s broker entitled to the commission if the buyer breaches the agreement according to the form?

*Answer: Yes, it is earned and payable, Paragraph 11C*

6. If the buyer falls when looking at property is the buyer's agent responsible for the buyer’s injuries?

*Answer: No, Paragraph 15*

7. Who is liable for court cost and legal fees in a legal proceeding?

*Answer: The non-prevailing party. Paragraph 14*

**Deciding to Represent the Buyer**

This is considered the consulting time to get to know one another. Agents may encounter buyers can be walking into the office, on property calls, at open houses, through referrals, and through other agents and clients. Just like buyers and sellers, the sales agent has the right to decide if he or she wants to represent a buyer/tenant. And to be able to make the decision, you have to get to know them before you invest time and money to find the right property. There can be many reasons you choose not to represent or represent.

Things to consider before deciding to represent a buyer/tenant:

- Experience in buying and selling real estate
- Financing obtainable
- Do they have a house to sell before they can buy?
- Who will make the final decision to buy the property?
- Employment of each buyer
- Tenure of employment
- Motivation
- Savings for down payment and closing costs
• Type of property they are looking for
• Time frame to buy - now, yesterday or in the future
• Are they working with other agents?
• Have they worked with other agents and what was their experience?
• Buyer credit
• Buyer debt
• Buyer income
• Conflict of interests
• Related to friends
• Will they agree to Exclusive Buyer Representation?
• Were they willing to acknowledge the Information about Brokerage Services form?
• Knowledge in technology
• Intermediary

With the responsibility that comes with a client, you must be sure you do all you can to reduce your risks and that you have a serious, sincere buyer who is willing to cooperate and help you in the transaction by being loyal, honest, and will communicate in a timely fashion.

After you have considered and analyzed the buyer’s present situation, you can then make an educated and intelligent decision to represent or not represent.

Both the buyer and the agent have important decisions to make when the buyer decides to hire an agent, and the agent decides to accept the agency relationship.

When the agent, on behalf of the broker, decides to represent a buyer they are accepting all the fiduciary duties for the buyer: 100% loyalty, obedience, full disclosure about everything the agent knows, total confidentiality, diligently accounting for all paperwork and monies and taking care to protect the buyer from all foreseeable harm.
Remember that the Information About Brokerage Services describes buyer representation as follows:

**IF THE BROKER REPRESENTS THE BUYER:** The broker becomes the buyer's agent by entering into an agreement to represent the buyer, usually through a written buyer representation agreement. A buyer's agent can assist the owner but does not represent the owner and **must place the interests of the buyer first**. The owner should not tell a buyer's agent anything the owner would not want the buyer to know because a buyer’s agent must disclose to the buyer any material information known to the agent.

Before an agent makes a decision to represent a buyer the agent will want to ascertain the buyer is financially able to purchase a home. Requiring a buyer to furnish the agent with a letter from a lender stating the lender has verified the buyer’s credit, employment, income and the amount they will qualify for, is a reasonable requirement. When a buyer goes to be prequalified by a lender, it tells the agent they are a serious buyer. If a buyer refuses to go to a lender to be prequalified, it is reason to wonder if they are just not serious or if they have something to hide.

If the buyer is going to be paying cash for the property, the agent can require them to bring a copy of a statement or letter from their bank showing the money they will need on deposit. Sellers have a reasonable right to the expectation that the buyers looking at their homes are qualified to buy.

Another big consideration is deciding if this is a serious buyer. Asking how long they have been looking for a property can help give the agent insight. Asking the potential buyer if they find a great home today, if they will be ready to buy today can also give some insight into their motivation or what objections the agent may face.
Since one of the fiduciary duties is obedience, the agent will want to consider if they believe this buyer is going to have realistic expectations. Will the agent be able to and want to follow their instructions?

If an agent spends a lot of time with unqualified buyers, they may miss the qualified buyers. One of the tricks to success for agents is to prospect for many, many leads and dispose of the unqualified ones and keep the gold.

**Advantages and Disadvantage of Exclusive Buyer Agency**

**Advantages for the buyer:**

- Exclusive service that is in the best interest of the buyer
- Buyer has an agent that can show all properties to the buyer without any hassle to the buyer
- Sales agent will have current information on properties available for sale.
- Buyers can communicate to the sales agent any property they acquire knowledge about and the sales agent can and will research the property for them.
- Sales agent can give the buyer information that the buyer would not normally know about the property(s)
- Sales agent has access to sold information that the buyer does not
- Sales agent knows how to negotiate a sale in a multiple offer situation.
- Sales agent knows what is the best financing.
- Sales agent knows reputable title companies to handle the buyers’ paper work in the process of getting clear title and removing any judgments, liens, etc removed.
- Sales agent knows about the necessary property disclosures as to homeowner associations, municipal utility districts, etc.
- Sales agent is knowledgeable about the use of the property in certain residential neighborhoods
- Sales agent can estimate closing costs
- Sales agent knows how to write a contract in the buyer’s best interest
- Sales agent has a customer relationship with the seller when selling another broker’s listing
• Sales agent is bound by the duty of confidentiality and cannot reveal any confidential information about the buyer to sellers or other agents.

Disadvantages for the buyer:
• There could be a conflict of interest if two buyers want to buy the same company listing.
• A dual agency could arise if not handled properly
• If they become unhappy with their sales agent, they cannot terminate the agreement without the permission and consent of the broker. In Texas, consumers can terminate the agency relationship on the spot, but they may owe a commission to the buyer broker. This is why the buyer needs to talk with the buyer before the termination of the agency relationship takes effect.
• If the buyer terminates the agency relationship, they revert to customer duties that are totally different than fiduciary duties.
• The customer duties are honesty, fairness, disclosure, good faith and competency
• The sales agent can no longer give advice and opinions and becomes a facilitator.

Duties of the Agent to the Buyer
We learned previously how the fiduciary duties of agency relationships apply to relationships with sellers. Now let’s see how these duties apply to duties with represented buyers who have agreed to and signed a buyer’s agreement

A seller’s agent maintains confidentiality about all matters that are not required by law to be disclosed to buyers and their agent. The seller’s agent, for example, would not tell a buyer about the quality of the school districts or traffic problems if these facts might negatively affect the buyer’s decision to buy the property.

The buyer’s agent, on the other hand, MUST seek out all helpful information about the property, even the information that the seller’s agent is not required to disclose.
The buyer's agent would try to obtain information on all of the following:

- Condition of property and any
- Property defects, if any
- Characteristics of neighborhood and surrounding areas
- How many homes in the subdivision
- How many rentals are in the neighborhood
- Age of property
- Length of time the property has been on the market
- Reasons the owner is selling the property
- Any offers on the property
- Any price reductions on the property and why
- Why the property has not sold
- What utilities are available
- What personal property is staying with the property
- School district
- Reasons other prospective buyers, if any, refused the purchase of the property
- Appropriate amount to pay for the property, regardless of the actual listing price
- Contractual terms that are not in the best interest of the principal
- Type of financing available on the property
- Any previous inspection reports
- Any existing survey
- Seller's disclosure is current
- Any repairs since seller owned the property
- Any upgrades to the property
- Size of the lot
- Square footage of the interior property
- Measurement of garage
- Room sizes
- Fireplace – Wood burning
In addition, the buyer’s agent is required to maintain confidentiality for the buyer. For example, if the buyer is willing to pay more than originally offered, the buyer’s agent would not disclose this to the seller or the seller’s agent.

The buyer’s agent is also held to Texas Real Estate Commission’s requirement regarding the abstract or title policy. As discussed earlier, the license holder should, at the time of signing a purchase and sale offer, explain in writing that the buyer should either have the abstract examined by the buyer’s attorney or be provided with or obtain a title insurance policy. If the license holder neglects to do this, then he or she will be ineligible for compensation or commission and could have his or her license suspended or revoked. If you sell a builder’s home and they use their contract, this provision notice to the buyer is not in their contracts. There is an addendum on the Texas Real Estate Commission website under Forms that has it. It is called
NOTICE TO PROSPECTIVE BUYER

As required by law, I advise you to have the abstract covering the property known as _____________________________ (Address) examined by an attorney of your own selection OR you should be furnished with or obtain a policy of title insurance.

If the property is situated in a Utility District, Chapter 49 of the Texas Water Code requires you to sign and acknowledge the statutory notice from the seller of the property relating to the tax rate, bonded indebtedness or standby fee of the District.

DATED: _____________________ , __________.

Brokerage Company Name

Broker or Sales Associate

I have received a copy of this NOTICE TO PROSPECTIVE BUYER.

Prospective Buyer

Prospective Buyer

This form has been approved by the Texas Real Estate Commission (TREC) for use when a contract of sale has not been promulgated by TREC. The form should be presented before an offer to purchase is signed by the prospective buyer. Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, 512-936-3000 (http://www.trec.texas.gov). TREC Notice to Prospective Buyer. OP-C replaces MA-C.
Providing Services for the Client

A buyer’s agent might provide some or all of the following services for the buyer:

- Show the buyer suitable properties
- School district,
- Zoning,
- Traffic problems,
- Property taxes,
- Community
- Utilities
- Prepare a market analysis of the property
- Educate the buyer how offers are presented to the seller
- Educate the buyer on what the seller’s choices are
- Educate the buyer on how multiple offers are handled
- Negotiate for the buyer, not the seller
- Maintain confidentiality
- Refer the buyer to a reputable loan officer
- Communicate with the buyer through the entire closing process
- Attend the closing with the buyer and review the statement with the closer and the buyer.

FAST FACT

On February 27, 2004, Rita Rene Burchell was found guilty of acting negligently as a buyer’s agent. TREC found that she received a termite report for the buyer but did not review it, nor did she give the buyer a copy of the report until the date of closing. TREC suspended her salesperson’s license for one month and probated it for six months.
Renunciation by the Agent

The agent can renounce the agency relationship, subject to the agent’s liability for damages, if the principal is damaged. Walter E. Heller & Co. v. Barnes, 412 S.W.2d 747, (Tex.Civ.App.-ElPaso 1967); Tatum v Preston Carter Co., supra)

The agent can, and should, terminate the agency if the principal requests the agent to perform an illegal act, or an act that would result in harm or cause damages to another. Some principals are so demanding and unreasonable that they simply are not worth the effort. This is almost always a “people” problem, not a legal problem. Personalities sometimes clash too much to create an effective marketing effort. For the real estate license holder's protection, any termination should be in writing with the reason stated.


A Connecticut appellate court has considered whether a buyer’s representative could collect a commission from a client when the client violated the exclusive representation agreement and bought a property while working with another licensee.

Christopher G.L. Jones (“Buyer”) met with a salesperson (“Buyer’s Representative”) of NRT New England, LLC (“Brokerage”) to find a property for him and his fiancée. During the initial meeting, the Buyer indicated that he was not working with any other real estate professionals.

After reviewing the types of properties the Buyer was interested in, the Buyer signed an exclusive buyer’s representation agreement with the Brokerage that ran from January to June 2011. The Buyer agreed to pay the Brokerage a commission if the Buyer purchased a property during the time of representation. In the agreement, the
Buyer also acknowledged that he was not working with any other real estate professionals.

The Buyer's Representative began searching for the type of properties that the Buyer was seeking. She devoted several months to this search and the evidence showed that she had spent hundreds of hours investigating various properties.

In May 2011, the Buyer told the Buyer's Representative that he was purchasing a property that he learned about from another brokerage, H. Pearce Real Estate (“H. Pearce”). The Buyer’s Representative later learned that the Buyer had also entered into an exclusive representation agreement with H. Pearce. Neither real estate brokerage knew of the other's agreement.

Following the close of the Buyer’s purchase, the Brokerage placed a broker’s lien on the property for the amount of commission it would have received from the transaction. The Brokerage then filed a lawsuit against the Buyer seeking to foreclose the broker's lien and also alleged breach of contract. The court ruled the Buyer had breached the contract and awarded the Brokerage the commission amount. The Buyer appealed this ruling.

The Appellate Court of Connecticut affirmed the ruling of the trial court. The Buyer made two arguments on appeal. First, he argued that the Brokerage had not strictly complied with the statutory terms of the state’s broker lien law. Second, he argued that the Brokerage had not sought compensation from his property purchase, which he believed the representation agreement required.

The court determined that the Brokerage had substantially complied with the broker lien law and so rejected the Buyer’s first argument. The Buyer argued that the Brokerage had failed to use capital letters in describing its lien rights in the representation agreement and also the agreement cited an erroneous statutory subsection. Due to these errors, the Buyer argued the Brokerage could not enforce its
lien rights. The court rejected this argument, finding that capital letters were not required (no such requirement existed in the statute and the legislature did require this in other statutes but not here) and the citing of the wrong subsection should not deny the Brokerage a commission. Thus, the Brokerage had substantially complied with the broker lien law.

Next, the court ruled that the Broker did not have to seek compensation from the Buyer’s purchase when it would have been a futile effort. The representation agreement provided that the Brokerage would “whenever feasible, seek compensation from the [s]eller or [s]eller’s agent” and then goes on to state that compensation may not always be available. The Brokerage had performed no services related to the Buyer’s purchase transaction and so was not entitled to compensation, and the court agreed that the law does not require a party to perform an act “which would be a mere futility.” Therefore, the court affirmed the trial court’s award to the Brokerage.

Jury Verdict Reinstated

(Source: https://ecarvoice.wordpress.com/2016/08/16/brokers-lien-enforced-by-buyers-rep/)

OCTOBER 21, 2015
Read the full decision: Marchese v. Miller, 866 N.W.2d 404 (Unpublished)(Wis. Ct. App. 2015) (link is external).

A Wisconsin appellate court has considered whether the evidence supported a jury finding that a real estate professional made a misrepresentation to clients during their purchase of a property.

Paul and Colleen Marchese (“Buyers”) made an offer to purchase a vacant lot from Treul Enterprises, LLC (“Seller”) on which they would build a home. Total Realty, LLC
(“Buyer’s Representative”) represented the Buyers, and one of the firm’s salespeople prepared the offer. The property had a storm water retention pond on it that needed to be removed before the Buyers could build on the property and so the offer stated that the Seller would obtain approval to move the pond within ten days of acceptance. The Seller accepted the Buyers’ offer.

Nine days after submitting the offer, the Buyers had not heard anything from the Sellers about the pond. The Buyers drafted an addendum (“Addendum”) to the purchase agreement, which stated that the purchase money would not be released to the Seller until the retention pond was moved and all issues with the homeowners’ association related to the pond were resolved. The Buyer's Representative later sent the Buyers a fully executed version of the Addendum.

The Buyers continued to question the Buyer’s Representative about the removal of the pond, but nothing happened prior to the closing. The transaction closed, but Addendum was not included in the closing documents. The Buyer’s Representative did not alert the Buyers that the Addendum had not been included in the transaction documents and also that the Seller did not plan on removing the pond. Because the Addendum was not included in the purchase documents, the purchase money was released to the Seller at closing. The Seller never moved the pond and the Buyers had to buy another property on which to build their home.

The Buyers filed a lawsuit against the Buyer’s Representative and the Seller, alleging intentional misrepresentation and unfair trade practices against both parties and alleging negligence against the Buyer's Representative. A jury returned a verdict in favor of the Buyers, but the trial court vacated the verdict against the Buyer’s Representative by determining that the evidence did not support the verdict. The Buyers appealed this ruling.

The Court of Appeals of Wisconsin reversed the trial court and reinstated the jury verdict. The court first looked at the evidence supporting the consumer fraud
allegations. The consumer fraud statute is designed to protect consumers from false or misleading facts provided by sellers. Here, the Buyer’s Representative admitted to marketing the property as ready to build and even used the pond as a positive in materials by asserting that the pond constituted a dug foundation. The Seller testified that approval of a new drainage plan by the county was needed before the pond could be moved, and that had not been done prior to the marketing of the property. The court found that the evidence supported the jury verdict.

Next, the court considered whether the Buyer’s Representative made an intentional misrepresentation related to the Addendum by suggesting that the Addendum wouldn’t “be a problem.” The Seller had testified that he had told the Buyer’s Representative multiple times that the pond would not be moved until the lot was paid for, which was contrary to what the Buyers were told. Since the Sellers’ statements were a material fact that was not disclosed, the court ruled that the evidence supported the jury verdict.

Finally, the court examined the negligence allegations. The trial court ruled that the Buyers had failed to provide expert testimony and so could not establish negligence. The court disagreed, as other testimony established that it is customary for the real estate professionals to provide all the information related to the closing to the settlement agents, which did not happen here because the Addendum was not provided. The Buyer’s Representative also testified that it was their responsibility to explain the closing statement to the client. Based on this evidence, the court also reinstated the negligence finding by the jury. The court reversed and sent the case back to the trial court for entry of judgment against the Buyer’s Representative.


June 11, 2014

Read the full decision: Horiike v. Coldwell Banker (link is external)

In Horiike v. Coldwell Banker et. al., a California court of appeal held that where a listing salesperson and a buyer’s rep are both licensed with the same broker, they each owe the same fiduciary duties to both parties to the transaction.

In 2006, the owners of a luxury residence in Malibu hired Chris Cortazzo (“Listing Rep”) to sell their home. Listing Rep, who was licensed under Coldwell Banker Residential Brokerage Company (“Broker”), listed the property on an MLS. The MLS provided Listing Rep with public record information on the home, including a statement that the size of the home’s living space was 9,434 square feet. Nonetheless, apparently relying on a letter from the property’s architect, Listing Rep listed the property on the MLS as offering “approximately 15,000 square feet of living areas.” Listing Rep also prepared a flier for the property, which also listed the living area as approximately 15,000 square feet.

A few months later, a couple made an offer on the property, and asked Listing Rep for verification of the square footage. Listing Rep provided the letter from the architect stating that the living area was approximately 15,000 square feet. The couple requested the certificate of occupancy, which was not available. After sellers refused the couple’s request for an extension to inspect the property, the deal fell through. Shortly thereafter, Listing Rep revised the MLS listing to state that the living area square footage was “0/O.T.” meaning zero square feet and other comments.

Meanwhile, Hiroshi Horiike (“Purchaser”) engaged Chizuko Namba (“Buyer’s Rep”) who also held her license with Broker. Buyer’s Rep saw listing for the Property and arranged a showing, at which Listing Rep gave Buyer’s Rep a copy of the flier stating that the living space of the home was 15,000 square feet.
Purchaser bought Property. Sometime later, in preparing to do work on the residence, Purchaser determined that the square footage of the home was significantly less than 15,000 square feet. He filed a complaint against Listing Rep and Broker, alleging intentional and negligent misrepresentation and breach of fiduciary duty, among other counts. At trial, after the presentation of Purchaser’s case to the jury, Listing Rep moved for nonsuit on the count of breach of fiduciary duty. The trial court granted the motion, holding that Listing Rep owed no fiduciary duty to Purchaser.

The appellate court reversed, stating that “a broker’s fiduciary duty to his client requires the highest good faith and undivided service and loyalty.” And where, as in this case, a dual agency relationship has been created by merit of two salespersons licensed under the same broker representing a buyer and a seller, each salesperson owes not only his or her own client those fiduciary duties, but also owes them to the other salesperson’s client.

The record from trial showed that Listing Rep knew that the square footage of the property had been recorded differently in different documents. Furthermore, stated the appellate court, Listing Rep’s act of changing the MLS listing from “approximately 15,000 square feet” to “0/O.T.” suggested that the square footage of the property required further explanation, and “a fiduciary must tell its principal all of the information it possesses that is material to the principal’s interests.” Therefore, concluded the court, a trier of fact could determine that Listing Rep had breached his fiduciary duty to Purchaser “by failing to communicate all of the material information he knew about the square footage.”

The case was remanded to trial, and proceedings are ongoing. Purchaser was awarded his costs to appeal the trial court’s judgment.

(Source: https://www.nar.realtor/legal-case-summaries/listing-salesperson-held-to-owe-duty-to-buyer)
McCue v. Deppert: Court Finds for Broker in Claim for Intentional Interference With Contractual Relations Against Purchaser Who Made Direct Contact With Seller

January 1, 1952

In McCue v. Deppert, the Superior Court of New Jersey addressed allegations by a broker against a purchaser for malicious interference with a listing contract. The court held that the buyer, who was initially shown the subject property by the broker, and who misrepresented to the seller that there was no broker involved, was liable to the broker for damages.

Kramer (Owner) orally listed farm property for sale with McCue (Broker). The asking price was $35,000. Owner later lowered the price to $30,000. A few months later, Deppert (Buyer) visited Broker’s office and a sales associate of McCue’s, Lang, took Deppert to Owner’s property, showed him the house, and told him the asking price. Deppert informed Lang that he was interested in the property, but did not wish to acquire all the acreage and outbuildings. Lang suggested that they confer with Broker to make arrangements with Owner to sell the property with less acreage. Deppert told Lang he was not in a position to do anything that day, but that he would return in a few weeks with his wife to look at the house.

Buyer never again communicated with Broker’s office, but instead went to the property and questioned neighbors about the Owner. Buyer then went to Owner’s home and discussed the purchase of the property. In response to Owner’s questions, Buyer told Owner that he was not sent by a broker. A sale was consummated between Owner and Buyer for $25,000. Owner testified that he sold for this amount because “there was no broker charge.” When the contract for sale was drafted, it included a warranty by Buyer that there was no broker involved. At this time, the listing agreement was still in effect. Broker sued Buyer for malicious interference with contract. The trial court removed the case in favor of Buyer, and Broker appealed.
The Court noted that this case involved an unlawful interference with Broker's business resulting in a deprivation of prospective or potential economic advantage. The court also noted that the right to pursue the real estate brokerage business is a property right that the law protects against such interference. The court added “if one intentionally causes temporal loss or damage to another without justifiable cause and with malicious purpose to inflict it, that other may recover, in an action of tort, the damage that he has sustained as a natural and proximate result of the wrong.” Further, “an injury to a person's business by procuring others not to deal with him, or by getting away his customer, if unlawful means are employed, such as fraud, or intimidation, or if done without justifiable cause, is an actionable wrong.” Additionally, “a misrepresentation made by the defendant for the purpose of securing a benefit without the knowledge that it will be detrimental to the plaintiff is an unjustifiable and malicious act.”

The Court stated that it was not essential that Broker prove that he actually earned his commission under the brokerage agreement. The court also stated that “while . . . the procurement of a ready, willing and able purchaser is a condition precedent to the duty of an owner to pay a real estate broker's commission, if the conduct of the defendant prevented that condition from happening, he cannot rely on his own wrongful acts as a shield from liability.”

In this situation, the plaintiff must merely prove facts which would support a finding that, except for the tortious interference, he would have consummated the sale and made a profit. Further, the court noted that malicious interference extends not only to the contract, but also to the right to conduct negotiations which might culminate in such a contract.

The Court held that a jury could have found that Buyer became interested in the property through Broker's efforts, determined to buy it, and, but for Buyer's representation to the Owner that no broker was involved, it was reasonably probable that plaintiff would have consummated the sale. The court also held
that the jury could have found that Buyer’s representation that no broker was involved was untrue and made with the intention of eliminating Broker from the transaction. The court held that such a finding would constitute an unjustifiable interference with Broker’s prospective economic advantage. Thus, it reversed and remanded the case.

Sustick v. Slatina: Court Finds for Broker on Claim of Tortious Interference With Contract Against Buyers Who Purchased Property Directly From Seller

January 1, 1957
In Sustick v. Slatina, the Superior Court of New Jersey, Appellate Division, addressed a broker’s allegations of tortious interference with contract by a real estate purchaser. The court held that the purchasers interfered with the broker's opportunity to earn a commission when they told the broker they were no longer interested and then purchased the home directly from the seller.

Sustick (Broker), a licensed real estate broker, sold a home owned by the Slatinas (Buyers). When Buyers sought to purchase a new house, they solicited Broker's assistance. On July 15, 1956, Broker showed Buyers a home owned by Marotta (Seller). At that time, Buyers did not indicate to Broker that they had previously seen the house. Buyers expressed interest in the home and requested that Broker ascertain the price. When Broker approached Seller regarding the home, he first inquired whether Seller would pay a commission should he produce a buyer. Seller indicated he would, but in his answer to a request for a written "exclusive" contract, he said that it was not necessary to put it into writing. Seller indicated that he wanted $33,000, but he would take $32,500. On Seller's request, Broker provided the names and address of the prospective buyers.
Buyers made a counter-offer of $29,000, which Broker submitted to Seller, who indicated he would need at least $32,000 if he were to pay a commission. Broker could not convince Buyers to raise their counter-offer, and Mrs. Slatina told him they were no longer interested in the property. About a month later, Broker discovered the house was occupied and, upon knocking the door, Mrs. Slatina answered. Mrs. Slatina told Broker that they had purchased the property from Seller and that if any commission was due, it should come from the seller. Broker sued Buyers and Seller for tortious interference with contract. A jury returned a verdict for Broker and awarded him $1,375. Buyers and Seller appealed.

The Court stated: "[t]he right to pursue a lawful business is a property right that the law protects against unjustifiable interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such right constitutes its wrongful invasion, and is properly treated as tortious." The court noted that while a broker has the right to enjoy the fruits of his efforts free from unjustifiable interference, he is not protected against fair and legitimate competition, and that interference with the opportunity of a broker to earn a commission is actionable unless the defendants act in the exercise of an equal or superior right. In adjudicating what types of conduct are actionable, the court stated that the ultimate inquiry is "whether the conduct was both injurious and transgressive of generally accepted standards of common morality or of law."

The Court found that both Buyers and Seller were liable to Broker. Buyers had previous dealings with Broker and knew he was licensed. They solicited him to find a new home and he interested them in Seller's property. Nevertheless, without giving Broker a reasonable opportunity to conclude a satisfactory deal, and after telling him they were no longer interested, they went directly to Seller and purchased the property at a lower price, all at the expense of Broker. Likewise, Seller knew Broker was licensed, promised him a commission, learned material information from Broker, and acted in concert with Buyers for the purpose of profiting at Broker's expense. Thus, the court affirmed liability for all three defendants.

Price v. Martin: Virginia Court Addresses Undisclosed Dual Agency. National Association of REALTORS® Legal Case Summaries

January 1, 1966
In Price v. Martin, the Supreme Court of Appeals of Virginia addressed the issue of undisclosed dual agency. The court held that a broker cannot act as agent for the buyer and seller in the same transaction without the consent of both, that without such consent the transaction is voidable, and that it may be repudiated by the principal without proof of injury on his part.

In July 1964, Rupe (broker) approached Martin (seller) regarding property owned by Martin. Martin told Rupe she would not list the property with him, but would consider selling it for $75 per front foot (thought to be 250 feet). In November 1965, a potential buyer, Price, contacted Rupe regarding the purchase of the Martin property. After some preliminary investigation and valuation, Price authorized Rupe to buy the property for him.

On December 17, 1965, Rupe presented Martin with Price's offer, which was consistent with the terms she had expressed the previous year. Martin informed Rupe of the actual front footage (260 feet), countered with a higher price, and agreed to pay Rupe a commission. Martin also made clear to Rupe that there was another potential purchaser who held a right of first refusal. Rupe prepared a sales contract which included Martin's proposed terms, but he failed to insert a clause regarding the other potential purchaser's rights. After Martin signed the contract, Rupe informed Price of the new terms, and Price also signed it. Rupe failed to mention the other purchaser's right of first refusal to Price.

Several days later, Martin informed Rupe that the other purchaser had exercised his right to purchase. The next day, Rupe informed Price that there was a problem with the sale. On the advice of counsel, Martin sought a declaratory judgment to determine
the rights of the parties. The trial court enjoined Price from asserting rights under the contract and Price appealed.

The Virginia Supreme Court of Appeals observed that Rupe became Price’s agent when Price specifically authorized him to attempt to purchase the Martin property on his behalf, and that Rupe became a dual agent when Martin agreed to pay him a commission and made him her agent to collect the down payment. The court found that an agent has a fiduciary relationship with his principal and as long as that relationship continues, he has a legal obligation to provide loyal service. Initially, Rupe was solely Price’s agent. When Rupe also became Martin’s agent, that did not terminate Rupe’s legal duty to Price. The court held that Rupe violated his fiduciary duties to both Price and Martin when he did not inform Price of the rights of the other potential purchaser. Rupe was acting in the capacity of an undisclosed dual agent, and the contract was voidable because an agent cannot act for both the seller and the buyer in the same transaction without their intelligent consent.

(Source: National Association of REALTORS® Legal Case Summaries)

The Creation of Buyer Agency

Agency relationships can be created in writing, orally and accidently. The very best way to create an agency relationship is in writing with a Buyer’s Representation Agreement. The agreement confirms the obligation and the rights of both the buyer and the broker.

Creating buyer agency orally is another alternative unless your company is listing the property you are showing. If one broker represents both the buyer and the seller in one transaction, the broker MUST act as an intermediary. (We will study intermediary brokerage in the next lesson.)
When you are showing property listed by other brokers, builder’s properties, for sale by owner property and you represent the buyer orally, it is a buyer agency relationship. The problem for the agent is that the agent still owes the buyer all of the fiduciary duties. The buyer owes the agent nothing. Not a very good thing for the agent.

The Statute of Frauds says that the broker can never make a claim regarding real estate unless everything is in writing. The same rules do not apply to clients.

Accidental agency is likely to happen when you are showing property that is listed by your company to a buyer with no Buyers Representation Agreement containing permission to become an intermediary. You cannot be in an intermediary transaction without written permission from both parties.

When showing property listed by your company you have two choices:

1. Ascertain the buyer understands they are just a customer, and you and your company are representing the seller only or
2. Get a Buyer’s Representation Agreement signed with an agreement that your company has permission to be an intermediary. (The assumption is being made that the listing agent got that same permission in the listing agreement when the listing was signed.)

If the buyer thinks you are working for him/her and the paperwork say you are working for the seller only, you are in an undisclosed dual agency. Undisclosed dual agency is illegal, and a serious, liability filled place to be.

Benefits of Buyer Agency Relationships

Many buyers are reluctant to sign an exclusive agreement with one agent. Just like a seller, if they have no representation, no one is working for them. A buyer’s agent must be able to explain to the buyer how valuable their services will be. A buyer's agent is in the home market every day and can diligently be watching for the perfect home for them.
The buyer’s agent will help them to negotiate an acceptable price for the home they choose.

Their agent will be able to explain the TREC contract forms to them and know when a situation warrants them seeing an attorney. Buying a home is a major investment. The buyer needs and deserves a professional buyer’s agent on their side.

The benefit to the agent of having a buyer work exclusively with them is dependent on the agent’s ability to explain why that is important to the buyer. Educate the buyer about paragraph 11 A-E of the Buyer’s Representation Agreement.

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.**

C. Earned and Payable: A person is not obligated to pay Broker a commission until such time as Broker's commission is earned and payable. Broker's commission is earned when: (1) Client enters into a contract to buy or lease property in the market area; or (2) Client breaches this agreement. Broker’s commission is payable, either during the term of this agreement or after it ends, upon the earlier of: (1) the closing of the transaction to acquire the property; (2) Client’s breach of a contract to buy or lease a property in the market area; or (3) Client’s breach of this agreement. If Client acquires more than one property under this agreement, Broker’s commissions for each property acquired are earned as each property is acquired and are payable at the closing of each acquisition.

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.

E. Acquisition of Broker’s Listing: Notwithstanding any provision to the contrary, if Client acquires a property listed by Broker, Broker will be paid in accordance with the terms of Broker’s listing agreement with the owner and Client will have no obligation to pay Broker.
Paragraph 11 A says that the buyer agrees the broker will be paid a certain amount. Paragraph 11 B says the broker will try to collect it first from the seller or the seller’s agent. (If they can collect it all from the seller or the seller’s agent the buyer will owe nothing.)

Paragraph 11 D says if the broker receives more than stated in paragraph A, the broker will get to keep it. Again the buyer will owe nothing.

Only if the buyer decides to buy a property that the seller or the seller’s agent is not offering to pay you at least the amount that you and the buyer have agreed upon does the buyer have any responsibility to pay you.

It is easy to explain to a buyer that when they begin to go out to look without you that they can get into a situation causing the seller or the seller’s agent to refuse to pay you. Then the buyer may become responsible for the commission. That is especially true on new construction. You must be with them on the first visit to the property.

It is to the buyer's advantage to be sure to look at property only with you. They get all your services and most of the time someone else pays.

Paragraph 11 E says that if the buyer buys a property listed by your company the agents will all be paid from the amount the seller pays the broker. The buyer will owe nothing.

Explain to the buyer you can show them new construction and for sale by owners. Tell them always to call you first, so you can protect them from owing the commission. Be sure the buyer knows that you will be offering them valuable services and that if the two of you work together, your services to them may very well be free.

Written Notification of Compensation to Broker
A written agreement is the safest way to outline the expectations and obligations of the parties involved. The written agreement ensures that you will be eligible for compensation. Also, if any other problems arise over the course of the agency
relationship, the written agreement acts as a record of the defined contractual terms and expressed intentions of the agent and principal.

In the real estate industry, the *listing agreement* is the written agreement that creates an agency relationship between a seller and a broker, and the *buyer representation agreement* creates the relationship between a buyer and a broker.

When Buyer A and Broker B were discussing the terms of their agency relationship, Buyer A initially agreed to pay 8% of the purchase price for commission. However, after shopping around, Buyer A came back to the broker and stated her intent to only pay 5% of the purchase price. They put these terms in writing and signed a Buyer Representation Agreement. After closing, Buyer A wrote Broker B a check for 5% of the purchase price. Broker B, however, insisted that Buyer A owed him a total of 8%. Can Broker B sue to obtain the total 8%?

In Texas, this broker probably would NOT be able to sue because the buyer has fulfilled the terms of the written agreement.

The Statute of Frauds says that all agreements must be written and signed by the party to be charged.

**Buyer’s License Holder Disclosures**

The buyer’s agent has many disclosures to make to the buyer and to third parties in the transaction.

Everyone in the transaction is entitled to know who the agent is working for. If the agent or the broker have relatives that have any personal interest in the transaction, all parties are entitled to know that. If the broker or any of the broker’s agents are acting on their own behalf that must be disclosed to the seller.
The broker must be sure the buyer understands whether the broker is representing them exclusively or if this is an intermediary transaction (one company representing both the buyer and the seller).

**Notice to Buyer Regarding the Abstract or Title Policy**

All agents need to be aware of TREC’s requirement regarding the abstract or title policy. The license holder should, at the time of signing a purchase and sale offer, explain in writing that the buyer should either have the abstract examined by the buyer’s attorney or be provided with or obtain a title insurance policy. If the license holder neglects to do this, then he or she will be ineligible for compensation or commission and could have his or her license suspended or revoked.

**NOTE:** If the parties are signing a TREC promulgated contract form the Notice about the Abstract is in Paragraph 6 of the form. The Notice is also in the TREC Notice to Purchaser and the TAR Buyer’s Representation Agreement.

The Texas Real Estate License Act states the following:

**Section 1101.555. Notice to buyer regarding abstract or title policy**

When an offer to purchase real estate in this state is signed, a license holder shall advise each buyer, in writing, that the buyer should:

- Have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer.
- Be provided with or obtain a title insurance policy.

**There is Danger in Implied Agreements**

Buyer B attended an open house and discussed the property with Salesperson C. The next day, Buyer B came to Salesperson C’s office, and they talked about Buyer B’s price range and needs. Buyer B decided that the property he had seen the day before was out of his price range, but Salesperson C quickly mentioned that she would be happy to help
Buyer B find a property. Buyer B agreed to this, and Salesperson C located three suitable properties, owned by sellers that Salesperson C represents.

What has Salesperson C done wrong?
Salesperson C did not tell the buyer that she is a seller’s agent. Therefore, it is possible that this buyer was under the impression that Salesperson C was acting in his interests, when in fact the salesperson was acting in the sellers’ interests.

An implied agency relationship arises when a party assumes consent to the relationship based solely upon inferences formed from communication with the other party—from a party’s actions, conduct or words. In the previous example, neither party explicitly stated the nature or terms of the relationship, but it is possible that the salesperson would be held to the duties of an agency relationship.

The concept of implied agency is especially relevant to the real estate industry, where sellers’ agents commonly provide helpful services for buyers. If a buyer encounters an agent who engages him or her in friendly conversation, asks about his or her price range, takes him or her to look at properties and even helps him or her obtain financing, how is that buyer to know that the agent is not representing his or her interests?

To prevent implied agency, it is vital that all real estate professionals disclose agency relationships to all potential customers. The agent must give oral disclosure of agency representation upon initial contact with a party; written disclosure is required upon substantive discussion.

A buyer’s agent must disclose to the buyer any knowledge that the agent has (if the disclosure is not prohibited), that might affect the buyer’s decision to purchase. Full disclosure would include things about the property, about the surrounding area, about things that may have stigmatized the property, personal things about the seller, etc. (only personal things about the seller that the agent has knowledge about, not gossip).
If the broker is representing the buyer exclusively, the broker has no duty of confidentiality to the seller. If the broker knows things about the seller that may help the buyer during negotiations, the broker or their agent must disclose those things to the buyer. For example, if the seller (who is listed with another company) has been transferred and the seller’s agent told you that the seller is in a hurry to sell that would be valuable information for the buyer during negotiations. (Shame on the seller’s agent.)

The buyer’s broker must keep the buyer informed of developments that happen between the time of contract and closing. A good business practice is that when the agent learns of any new development, they call the buyer immediately and then follow up with an e-mail or letter.

**Activity: Identify the Agreement**

Here are five sentences that relate to the creation of agency relationships in the real estate industry. A Word Bank is provided from which to choose the term that best identifies the type of agreement being described. Some terms may be used twice, and some may not be used at all.

**Word Bank**

Chose the correct word or term from the below word bank to fill in the blanks.

<table>
<thead>
<tr>
<th>implied agency</th>
<th>express agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>oral agreement</td>
<td>listing agreement</td>
</tr>
<tr>
<td>written agreement</td>
<td>ratification authority</td>
</tr>
<tr>
<td>implied authority</td>
<td>buyer representation agreement</td>
</tr>
</tbody>
</table>

1. Broker B and Seller A sign a written agreement establishing Broker B’s authority to market Seller A’s property. This type of agreement is a(n) __________.

2. Seller A asks Broker B to represent her interests, and Broker B agrees. This is a(n) __________.
3. The written agreement that creates agency between the broker and the buyer is the __________.

4. Salesperson A assists Buyer B with locating a property. Salesperson A does not disclose that she represents the seller, and they never sign an agreement. This situation could possibly create a relationship of __________.

5. In Texas, a broker could not sue for commission if he or she had only a(n) __________ with the principal.

Correct Answer
1. Listing agreement
2. Express agreement
3. Buyer representation agreement
4. Implied agency
5. Oral agreement

Lesson Summary
In Lesson Five we reviewed the TAR Buyer's Representation Agreement thoroughly. Explanations of different ways the Broker can collect their compensation were discussed and students were encouraged to discover the many ways a buyer can receive professional service from an agent and pay nothing.

The danger of implied agency was explored and the value of written agency agreements was emphasized.

Agents have a big decision to make when deciding to represent anyone. Buyers present an interesting risk because so little is known about them in the beginning. Agents are encouraged to have the buyer get prequalified by a lender to determine their financial ability to buy a home. Determining how serious the buyer is about buying is harder to
determine. Questions concerning the length of time they have been looking can help the agent to determine the reasons the buyer is still looking.

Being careful to create buyer agency in writing, so that all parties understand their rights and obligations is important. Assuming someone understands can lead to an accidental implied agency or even an unauthorized dual agency.

Suits for compensation are not possible in Texas unless the agreement to pay is in writing and signed by the party to be charged.

Buyers are entitled to disclosures about whom the broker is representing as well as about the property condition and any other issue an average buyer would want to know.
Lesson Six: Representing More Than One Party in a Transaction Intermediary Brokerage

Lesson Topics
This lesson focuses on the following topics:

- History of Dual Agency and Intermediary
- The Path from Dual Agency to Intermediary
- Representing More Than One Party in a Transaction
- Intermediary Brokerage
- Specialized Intermediary Applications
- Intentional vs Unintentional Dual Representation

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

- Identify intermediary laws and be able to answer questions about them.
- Explain the authorizations required from the consumer.
- Describe the benefits and the places to be cautious in an intermediary transaction.

History of Dual Agency and Intermediary


Agency relationships are created when one person — a broker, for example — agrees to act on another's behalf or represent them in transactions with a third party.

Once an agency relationship is established, an agent owes their client “fiduciary duties” — they must act in the client’s best interests, with honesty and good faith, while
avoiding conflicts of interest or “self-dealing” that puts their own interests ahead of the client’s.

Anyone attempting to represent the interests of more than one party generally must disclose that they are acting as a “dual agent” — if the practice is allowed at all. In Texas it is allowed only if the broker practices Intermediary.

The rules governing real estate brokers’ agency relationships to their clients and the duties they owe them are determined at the state level, and no two states have taken exactly the same approach. So if you are coming from a different state, forget all you learned in agency.

Until about 20 years ago, agency relationships were largely determined by general statutes and common-law precedents. Few, if any, states had laws on the books that pertained specifically to the formation of agency relationships between real estate brokers and their clients.

For decades, the real estate industry had relied on the practice of subagency, in which a cooperating broker who brought a buyer to a transaction acted as a subagent of the listing broker.

Both agents in a transaction had a contractual obligation to help the seller obtain the best price for their property.

Subagency, in theory, helped protect brokers from accusations that they were acting as undisclosed dual agents. But in the 1980s, regulators and consumer groups began to question whether buyers were getting a fair shake under subagency.

State courts began siding with buyers, ruling that the services cooperating brokers and their agents provided to them could, in fact, create agency relationships.
The real estate industry, in an attempt to clear up confusion and protect brokers from lawsuits, began pushing state lawmakers and regulators to explicitly define agency relationships and the duties real estate brokers owed to buyers and sellers.

For the first time, states began adopting statutes that recognized forms of representation in real estate transactions such as single agency, dual agency and designated agency, spelling out brokers’ duties in each situation.

Although subagency and dual agency are still permitted in many states, brokers and their agents are usually required to provide disclosures to consumers informing them of how services are being provided.

Single agency: Brokers practicing single agency may represent buyers or sellers, but not both, in the same transaction.

Disclosed dual agency: A broker or agent practicing disclosed dual agency may represent the interests of both the buyer and seller in the same real estate transaction, but is usually expressly prohibited from disclosing either party’s confidential information.

Designated agency: Brokers practicing designated agency may assign separate agents to represent the seller and the buyer in the same transaction. Many states consider the broker in such transactions to be a dual agent. (This is called Intermediary in Texas)

The adoption of laws and regulations governing real estate brokers’ agency relationships to their clients helped clarify the rules, and provide brokers with legal defenses they could employ in court.

But lawsuits continued — often because brokers or their agents failed to provide disclosures, or because their clients maintained that they had breached their fiduciary duties.
Real estate industry lawyers developed another approach to limit brokers’ legal liabilities: Do away with agency representation altogether.

Transaction brokerage: Although never endorsed by the National Association of REALTORS®, 25 states — including Florida, Texas, Michigan and Colorado — now allow “transaction brokerage” and other non-agency relationships.

Transaction brokers act only as deal facilitators, providing services to buyers and sellers without representing them in a true agency capacity.

A review of laws and regulations in the 50 states and Washington, D.C., by Inman News found most, including many that have adopted transaction brokerage, also allow brokers to establish agency relationships with more than one client through dual or designated agency.

Dual agency, wherein a single agent represents both the buyer and the seller in a transaction, with fiduciary duties to both, is permitted in all but eight states: Alaska, Colorado, Florida, Kansas, Maryland, Oklahoma, Texas and Vermont.

Except for Vermont, all of those states allow designated agency (Alaska, Colorado, Maryland and Texas), transaction brokerage (Florida, Kansas and Oklahoma) or both (Alaska, Colorado and Texas). Vermont allows a single broker to represent both buyer and seller in a “limited agency” role only when both buyer and seller are existing clients.

States that differentiate between real estate “clients” and “customers”: Vermont is one of at least 22 states that leaves open another potential avenue for double-ending deals by allowing real estate brokers to provide differing levels of service to represented “clients” and unrepresented “customers.”
An agent representing a seller as a client while providing more limited services to a buyer as an unrepresented “customer” may be able to avoid splitting the commission paid by the seller with a cooperating broker.

Some states that define “customers” and “clients” also spell out the administrative or “ministerial” services, such as showing a house that may be provided to unrepresented customers.

(Source: http://www.inman.com/2011/11/01/real-estate-brokers-can-double-end-deals-in-any-state/)


Despite more than two decades of tinkering with the laws, regulations, customs and practices governing REALTOR®-client relationships, real estate brokers still view agency issues as their single greatest potential legal liability.

But brokers are double-ending fewer deals than a decade ago in several large markets examined by Inman News, despite the fact that laws in all 50 states and Washington, D.C., still provide avenues for them to do so.

Not only can representing both sides in a transaction be fraught with risk, but the rise of third-party listing portals like Realtor.com, Zillow.com and Trulia makes it easier for buyers to research homes and find an agent themselves.

Some REALTORS®, particularly those who represent buyers exclusively, view that trend as a positive one. They say consumers may be shortchanged when a listing agent working for the seller also attempts to represent the buyer’s interests, a practice known as “dual agency.”
But others say dual and designated agency can also benefit consumers, and that it would be impractical for buyers and sellers to always be represented by agents who work at different brokerages or offices.

As long as agency relationships are disclosed and agents fulfill their duties to their clients, defenders say, the interests of both buyer and seller can be served.

Agents and brokers surveyed about the prevalence and acceptability of more than three dozen controversial real estate practices were less concerned about designated agency than dual agency.

Among more than 500 agents and brokers surveyed, three out of four said it's acceptable (67.1 percent) or even desirable (7.6 percent) for two agents from the same office to represent the buyer and seller in the same transaction.

A slim majority objected to a single agent representing both the buyer and the seller, with 25.9 percent viewing the practice as “unacceptable” and 32.4 percent calling it “not desirable.”

Even in instances when the buyer and seller are represented by different agents who work at the same brokerage company — a practice often referred to as “designated agency” — critics say there’s a danger that confidential information will be disclosed, hurting the negotiating position of one or both parties.

Nearly three out of four agents and brokers surveyed said its “common” for two agents from the same office to represent the buyer and seller in a single real estate transaction. And 41 percent said it was common for individual agents to double-end a deal, working with both the buyer and seller in the same real estate transaction.

The fact remains that when agency representation disclosures aren’t provided — or when agents breach the fiduciary duties they owe to their clients — brokers may find
themselves in court. REALTOR® Associations have lobbied for and won numerous changes to state laws and regulations, largely aimed at reducing their legal exposure while preserving their ability to earn commission on both the buyer and seller sides of a real estate transaction.

The National Association of REALTORS® surveys real estate brokers, agents, attorneys and educators every other year to identify legal issues of concern. Problems that can arise from agency representation issues — including breaches of fiduciary duty, dual agency, and agency disclosure and buyer representation— remained the top-ranked issue in National Association of REALTORS® 2011 Legal Scan.

Agency representation outranked property disclosures, ethics, fair housing laws and the Real Estate Settlement Procedures Act (RESPA) as legal issues of concern.

More than 57 percent of those surveyed said dual agency is the basis for a significant number of legal disputes, and 83 percent placed it among their top three current issues.

Many of the nearly 400 respondents to National Association of REALTORS® survey said agents and even some brokers don’t seem to understand dual agency, can’t explain it to their clients, and don’t make the required disclosures.

A growing number of states now allow “transaction brokerage,” an approach developed by real estate industry lawyers to limit brokers’ legal liabilities in working with buyers and sellers in the same transaction by doing away with agency representation altogether.

Although National Association of REALTORS® has never endorsed transaction brokerage, Florida, Georgia, Pennsylvania, Massachusetts, Michigan, Colorado and 18 other states now permit REALTORS® to act merely as deal facilitators, providing services to buyers and sellers without representing them in a true agency capacity.
In Florida, brokers and their sales associates are presumed to be providing services as transaction brokers and, since 2006, are no longer required to provide consumers with disclosures informing them of that fact. Only brokers and agents who wish to represent clients in a “single agency” relationship are required to provide agency disclosures.

National Association of REALTORS® latest survey of members showed 18 percent of REALTORS® practiced transaction brokerage in 2010, up from 10 percent the year before. The percentage of REALTORS® practicing buyer and seller agency with disclosed dual agency dropped from 41 percent to 32 percent.

National Association of REALTORS® 2011 Member Profile also revealed that both of those groups were outnumbered by the 33 percent of REALTORS® who said they work with either buyers or sellers, but in “single agency” relationships.

That’s up from the 29 percent of REALTORS® who identified themselves as practicing single agency in 2009.

Only 10 percent of REALTORS® identified themselves as working exclusively with buyers, while 7 percent said they enter into agency relationships only with sellers.

Many states allow real estate brokerages to provide “two-tiered” services to consumers, serving a seller as a represented “client” while providing more limited services to a buyer in the same transaction as an unrepresented “customer,” for example.

If everybody agrees to such an arrangement, a lone agent can avoid splitting the commission paid by the seller with a cooperating broker, while still limiting exposure to any legal claims that the agent violated the fiduciary duties owed to a client.
Pitfalls of subagency

The state laws and regulations governing real estate broker-client relationships today were all put in place after the industry practice that had prevailed for decades — “subagency” — came under fire from regulators and consumer groups.

Until 1993, when National Association of REALTORS® amended the model rules governing REALTOR®-affiliated multiple listing services, many Multiple Listing Services required that listing brokers make offers of compensation to cooperating brokers contingent on the cooperating broker acting as the listing broker’s subagent.

In other words, not only were buyers technically unrepresented, but the agent they may have presumed was working on their behalf actually had a contractual obligation to the seller to help the listing broker obtain the best price for their property.

From the perspective of the broker and agent, one advantage of subagency was that if both agents involved in a transaction were working for the seller, they couldn’t be accused of acting as undisclosed dual agents or breaching duties owed to the buyer — or so they thought.

Regulators and consumer groups began casting subagency in an unfavorable light in the 1980s, and an explosion of lawsuits provided further motivation for the real estate industry to push for overhaul of Multiple Listing Service Rules and state laws governing agency.

State courts, applying common-law precedents, began to rule that the services cooperating brokers and their agents were providing for buyers — such as representing them in negotiations — created agency relationships between them.

That meant cooperating brokers and their agents could be liable to claims that they were acting as undisclosed dual agents of both the buyer and seller.
National Association of REALTORS® and its member associations lobbied for state laws defining agency and non-agency roles for REALTORS® that would take precedence over common law. Under the patchwork of regulations that resulted, subagency is still allowed in many states.

And it’s still possible to double-end deals in every United States state — either by practicing disclosed dual agency, designated agency or transaction brokerage, or by providing “two-tiered” services to a buyer and seller.

**Shrinking appetite for “double-dipping”**

Statistics suggest that despite the many permissible avenues for agents to “double-dip” (another term for taking a commission for both the buyer and seller sides of a real estate transaction) brokerages are losing their appetite for such deals — or are having a harder time guiding consumers down that path.

In order to attract more consumers to their Internet data exchange (IDX) websites, many brokers now advertise not only the homes they represent, but all of the listings in a given market.

That can help brokers land more clients. But by the time they pick up the phone, buyers may already have their heart set on a listing represented by another broker, reducing the likelihood that one office or agent will handle both ends of the deal.

Consumers are also able to begin the house-hunting process on third-party sites that run ads for buyer’s agents alongside of listings, such as Zillow and Trulia. When buyers find a home they're interested in on a third-party website, they may end up contacting the agent whose ad appears next to the listing instead of the listing broker.

National Association of REALTORS® officially sanctioned listing portal, REALTOR®.com, this year has also been experimenting with running agent lead forms
next to listings in test markets, and is now in the process of launching the ad program nationwide.

Whether the trend is driven by the fear of lawsuits or greater independence on the part of consumers, statistics compiled by four of the nation’s largest Multiple Listing Services show declines in same-broker or same-office transactions during the last decade.

At Phoenix-based Arizona Regional Multiple Listing Service, the proportion of same-office transactions has fallen by nearly 38 percent in the last decade, dipping from 22.6 percent in 2001 to 14.1 percent last year (view charts).

The percentage of same-office transactions handled by Arizona Regional Multiple Listing Service members actually peaked at the tail end of the boom, hitting 22.9 percent in 2007 as home sales bottomed out.

Same-agent transactions — a subset of same-office transactions — followed a similar pattern, peaking at 19.2 percent of closings by ARMLS members in 2007 before retreating to 9.4 percent last year.

There’s been a similar trend at the largest Multiple Listing Service in the Northeast, Rockville, Maryland. - based Metropolitan Regional Information Systems Inc. (MRIS), where 21.7 percent of transactions in 2002 were handled by an agent or agents working out of the same office.

The percentage of same-office sales dropped to 15.8 percent in 2009, a low for the decade, before rebounding to 16.4 percent last year, Metropolitan Regional Multiple Listing Service reported.

The 24 percent decline in the rate of same-office transactions was eclipsed by an even steeper, 30 percent drop in the share of same agent transactions handled by
Metropolitan Regional Multiple Listing Service members, which fell from 14.5 percent to 10.1 percent during the same period.

In the year 2000, 34.6 percent of transactions in the market served by the Houston Association of REALTORS® (HAR) were handled by agents at the same brokerage.

The rate fell steadily for 10 years, reaching a low of 15.1 percent last year — a 56 percent reduction in the share of same-broker transactions. From 2000 through 2010, same-agent sales never accounted for more than 1 percent of transactions handled by Houston Association of REALTORS® members.

(Although Texas has banned dual agency, brokers can act as an “intermediary” between a buyer and seller. Brokers acting as intermediaries may, but are not required to, appoint individual agents to carry out the instructions of the buyer and seller.)

The Multiple Listing Service for the metro Chicago market and surrounding areas, Midwest Real Estate Data LLC, (MRED), analyzed records going back to 2007 and found same-broker sales dropped from 22.3 percent in 2007 to 15.2 percent in 2009, and have stayed in that vicinity since then. Midwest Real Estate Data, (MRED) did not provide a further breakdown of same-agent sales.

(Note: “Same office” transaction data from ARMLS and MRIS does not include “same broker” transactions in which agents worked out of different offices. “Same broker” transaction data from MRED and HAR includes transactions in which agents did not work in same office.)

**Profit motives**

For those who are comfortable with the potential ethical issues and legal complications, double-ending deals are a tempting shortcut to larger commission checks.
In transactions where the buyer and seller are each represented exclusively by a single agent employed by different brokers, the commission paid by the seller to the listing broker — typically between 5 to 6 percent — is split evenly between the listing broker and the cooperating broker.

When the buyer and seller are represented by a single dual agent — or two designated agents at the same brokerage — the seller may still pay the same commission, unless they have negotiated for a reduced “dual” or “variable” rate commission with their broker in advance.

The lone brokerage involved in a dual or designated agency transaction can stand to make twice as much, after paying its own agent or agents a commission split, as it would in representing just one side of a transaction.

Franchisors that collect commission-based royalties from their affiliated brokers benefit in much the same way when their brokers are able to handle both sides of a transaction.

Agents representing buyers as designated agents in a transaction that involves a listing represented by their own brokerage stand to make no more than they do when representing buyers as single or exclusive agents in transactions involving another broker’s listing.

But when a single agent represents both the buyer and the seller — or simply provides services to both as a transaction facilitator or non-agent — that agent can make twice the money, a practice derided by critics as “hogging.”

The commission generated by each sale — which is paid by the seller out of sale proceeds — doesn’t increase. But there’s no cooperating broker to share it with.
Some critics say buyers lose out in such situations, since their interests may not be represented as diligently as if they worked with an agent who represented them alone.

The California Association of Realtors, in soliciting contributions to its REALTOR® Action Fund, claims that the lobbying it has done to preserve dual agency in the state “saves” REALTORS® thousands of dollars each year.

The amount of savings claimed in pitches for political contributions varies from $2,203 per year to $4,058 per year, and $3,439 is the figure cited most often.

California Association of REALTORS® spokeswoman Lotus Lou said the group currently estimates that preserving dual agency generates $1,873 in annual savings for the average agent and $4,627 per brokerage, but was unable to provide specifics on how those estimates were derived.

“Each agent and firm makes that additional amount, respectively, because of dual agency,” Lou said.


The 1995 Texas legislature introduced a new concept of agency representation into Texas Real Estate Brokerage Law, effective January 1 1996, called intermediary. An intermediary is defined under the Texas Real Estate License Acts as “a broker who is employed to negotiate a transaction between the parties and for that purpose may be an agent to the parties to the transaction.”

**Note:** Only the sponsoring broker (the intermediary broker) will act as the intermediary, unless he or she delegates to another broker within the same firm.
Texas Real Estate License Act
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.558. REPRESENTATION DISCLOSURE.

(a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.

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

(1) another party to the transaction; or

(2) Another license holder who represents another party to the transaction.

(b-1) At the time of a license holder's first substantive communication with a party relating to a proposed transaction regarding specific real property, the license holder shall provide to the party written notice in at least a 10-point font that:

(1) describes the ways in which a broker can represent a party to a real estate transaction, including as an intermediary;

(2) describes the basic duties and obligations a broker has to a party to a real estate transaction that the broker represents; and

(3) provides the name, license number, and contact information for the license holder and the license holder's supervisor and broker, if applicable.

(b-2) The commission by rule shall prescribe the text of the notice required under Subsections (b-1) (1) and (2) and establish the methods by which a license holder shall provide the notice.

(c) A license holder is not required to provide the notice required by Subsection (b-1) if:

(1) the proposed transaction is for a residential lease for less than one year and a sale is not being considered;

(2) the license holder meets with a party who the license holder knows is represented by another license holder; or

(3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.
Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.
(a) A broker may act as an intermediary between parties to a real estate transaction if:
   (1) the broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and
   (2) the written consent of the parties states the source of any expected compensation to the broker.
(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d).
(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560 to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

Sec. 1101.560. ASSOCIATED LICENSE HOLDER ACTING AS INTERMEDIARY.
(a) A broker who complies with the written consent requirements of Section 1101.559 may appoint:
   (1) a license holder associated with the broker to communicate with and carry out instructions of one party to a real estate transaction; and
   (2) another license holder associated with the broker to communicate with and carry out instructions of any other party to the transaction.
(b) A license holder may be appointed under this section only if:
   (1) the written consent of the parties under Section 1101.559 authorizes the broker to make the appointment; and
   (2) the broker provides written notice of the appointment to all parties involved in the real estate transaction.
(c) A license holder appointed under this section may provide opinions and advice during negotiations to the party to whom the license holder is appointed.
Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.

(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.

(b) A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction:
   (1) a buyer or tenant and
   (2) a seller or landlord.
   (3) In the same transaction

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

The brokers in Texas wanted to profit from representing both sides in a transaction, but the legal problems with common law dual agency were becoming apparent. It was obvious that some guidelines and reforms were needed.

With the legal uncertainty and liability created by the discovery and exposure of massive undisclosed or under-disclosed dual agency across the United States, many consumer groups were unhappy.

The Federal Trade Commission was most concerned, particularly about anti-competitive practices and adequate consumer representation. The National Association of REALTORS® was concerned as well because so many if its members were being sued for undisclosed agency.

This is why the Texas legislature finally stepped in and in 1993 amended the Texas Real Estate License Act so as to create a new form of agency law known as “statutory dual agency” that would allow brokers to safely practice dual agency by giving consumers certain disclosure notices. Legislative bodies in the United States were acting in similar manners to help their states attempt to solve the issue of dual agency.
Unfortunately, the bold move did not solve the conflict. Shortly after the 1993 law was enacted, a Minnesota court, in the landmark case of Dismuke, V. Edina Realty, ruled that while statutory notices, much like the Texas notice “Information about Brokerage Services,” could satisfy the requirements for statutory dual agency, those same notices would not satisfy the requirements for the common law dual agency. As a result, the Texas Legislature needed to respond again.

At the 1995 session, the legislature, under Senate Bill 489, eliminated statutory dual agency and replaced it with a new form of agency known as statutory intermediary brokerage. At the heart of this new relationship is a broker, known as an intermediary, who has a set of clearly defined rules for representing both sides in the same real estate transaction.

Bokusky v. Edina Realty: Edina Realty Settles Federal Class Action Suit Alleging Dual Agency Violations

January 1, 1993

In Bokusky v. Edina Realty, the district court addressed alleged dual agency violations by a real estate agency. The court order certified a federal class action suit against Edina Realty (Edina). Thereafter, in what Edina's president called a "prudent business decision," Edina settled federal and state claims for dual agency violations.

Bokusky v. Edina Realty, 1993 WL 515827 (D. Minn. 1993). [Note: This opinion was not published in an official reporter and therefore should not be cited as authority. Please consult counsel before relying on this opinion.]

January 1, 1993

Note: This case is not published in an official reporter and may not be cited as authority. Consult with counsel before relying on this case.
In the Minnesota state district court case, Dismuke v. Edina Realty, the Plaintiffs, a class of 6,000 sellers of residential property sued Edina Realty over exclusive listing agreements. The one-count complaint alleged breach of fiduciary duty. In its response, Edina filed a Motion for Summary Judgment asserting that its disclosure statement was "a sufficient disclosure of the dual agency relationship at issue" and that it satisfied statutory disclosure requirements. The plaintiffs also filed a Motion for Summary Judgment, contending that the disclosure statement was inadequate under common law.

In ruling on Edina’s summary judgment motion, the state district court held that, while the disclosure statement appeared to comply with the state's statutory requirements, the statute did not eliminate common law disclosure requirements. As such, the issue of whether the form disclosure was full and adequate under the common law presented a question of fact which would ultimately need to be decided by a jury. The state court judge granted summary judgment to the plaintiffs holding that Edina breached its fiduciary duty to disclose to the class members the consequences and effect of dual representation. Thereafter, the parties reached a three-part settlement under which the court vacated the summary judgment.

The settlement could cost Edina as much as $21 million. First, Edina agreed to issue each class member coupons for reduction in commissions on future sales of houses by Edina. Depending on the number of coupons redeemed, and the value of the homes sold, the coupons could be worth $13 million. Second, the settlement allowed class members to exercise stock options within ten years of the settlement date. Estimates valued this part of the settlement at $5.6 million. Third, Edina was directed to pay $2.5 million to cover plaintiffs' attorneys' fees and other costs of the litigation.

Dismuke v. Edina Realty, 1993 WL 327771 (Minn. Dist. Ct. 1993). [Note: This opinion was not published in an official reporter and therefore should not be cited as authority. Please consult counsel before relying on this opinion.]
The class of plaintiffs consisted of buyers and sellers of residential property wherein agents of Edina represented both the buyer and seller in the same transaction. The plaintiffs maintained that Edina agents "systematically failed to disclose the inherent conflict of interests in dual agency transactions" by relying solely on a form disclosure of the agency relationship contained within the purchase agreement. In a six-count federal complaint, the plaintiffs alleged breach of a Minnesota statute requiring written disclosure of dual agency, breach of a Minnesota Department of Commerce Regulation governing representation of multiple parties in a transaction, fraud, breach of fiduciary duty, breach of contract, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs sought damages in the amount of $200 million. Treble damages were available.

(Source: Dismuke v. Edina Realty: Minnesota Realty Firm Settles Class Action Suit for Failure to Disclose Dual Agency)


Although most home sales go off without a hitch, when things do go wrong buyers and sellers tend to blame their own — and each other’s — real estate agents.

When disputes end up in court, the outcome often hinges not only on the conduct of the brokers or agents involved, but on whom they represented — one, both or neither parties — and the "duty of care" their clients were owed.

Thanks in part to more than two decades of lobbying by the real estate brokerage industry, the duties brokers and agents owe their clients are explicitly defined by state licensing laws and regulations, listing agreements and disclosures.)
But those duties vary from state to state — and even from transaction to transaction — because they depend on the legal relationship that brokers and agents establish when providing services to consumers.

Each form of broker-client relationship has its own set of rights, responsibilities and legal pitfalls.

As one judge put it in deciding a lawsuit in which a real estate agent was accused of breaching her fiduciary duty to her client, “Ultimately, the precise duties of a real estate broker must be determined by an examination of the nature of the task the real estate agent undertakes to perform and the agreements he makes with the involved parties.”

Real estate broker-client relationships are better defined than they were two decades ago, when general statutes and common law precedents often prevailed. But they remain a source of confusion for consumers and real estate professionals alike.

When consumers expect a level of service they may not actually be entitled to — or agents have legal responsibilities they are not aware of — lawsuits are the inevitable result.

**Source of lawsuits**

Disputes arising from agency representation issues continue to be the top legal concern of real estate brokers, agents, attorneys and educators, according to a survey conducted every two years by the National Association of REALTORS®.

Nearly 73 percent of those surveyed by National Association of REALTORS® in 2011 identified agency issues as one of the top three sources of disputes involving real estate professionals that result in litigation, complaints to state real estate commissions, arbitration or mediation.
Agency issues appeared in the top three lists of those surveyed as a source of disputes more often than property condition disclosures (68 percent), ethics (53 percent), third-party liability (49 percent), fair housing (48 percent), technology (48 percent) and antitrust issues (47 percent).

NAR's 2011 Legal Scan also identified and categorized 705 lawsuits involving real estate professionals that were decided or settled in 2009 and 2010 (the list, compiled from Westlaw state and federal case-law databases, is not comprehensive, and does not include complaints to real estate commissions or those resolved through arbitration or mediation).

Agency issues accounted for 159 of those cases — a 36 percent increase from 2009 — second only to commission disputes, at 168 (up 4 percent from 2009).

NAR tallied 151 lawsuits related to property condition disclosures (unchanged from 2009), and 147 cases based on alleged violations of the Real Estate Settlement Procedures Act (RESPA), up 44 percent from the last survey. Fair housing lawsuits (126 cases) were up 75 percent, the largest increase among major topic areas.

Among lawsuits revolving around agency issues, nearly half (73 cases) involved accusations that a broker or agent had breached their fiduciary duty to their client or clients.

Buyer representation was an issue in 24 cases, and dual agency a factor in 20 other lawsuits. In nine other cases, transaction brokerage or other non-agency forms of representation were in dispute. Clients alleged agents had created vicarious liability for them in seven cases. (Under the principle of vicarious liability, buyers and sellers are liable for misrepresentations made by agents who are representing them in an agency capacity). Agency disclosures were at issue in four other lawsuits.
Breach of fiduciary duty

Three out of the top 10 biggest damage awards identified by NAR in 2009 and 2010 involved breach of fiduciary duty — including a $744,789 jury award in a case in which a Louisiana real estate agent was accused of derailing a deal by accepting a second offer while a counteroffer was still pending (Markovich v. Prudential Gardner Realtors).

Real estate professionals surveyed by NAR said breach of fiduciary duty can be something of a catch-all for consumers who aren’t satisfied with the outcome of a transaction. But many said agents don’t understand what it means to be a fiduciary — to put their clients’ interests ahead of their own.

One real estate broker in Michigan introduced a seller whose home had been on and off the market for four years to a buyer who offered him $70,900 in cash plus a “viatical” — an ownership stake in another person’s life insurance policy — supposedly worth $638,100.

A year later, the seller received $172,046 for his viatical — 27 percent of its face value — after the buyer’s “life settlement company” was placed in receivership by Michigan securities regulators and its assets liquidated.

A jury found the broker guilty of breaching his fiduciary duty to his client, and awarded the seller $25,000 in damages. The seller appealed the award as “grossly inadequate,” but the decision was upheld by the Michigan Court of Appeals (Elgersma v Re/Max of Grand Rapids Inc.).

In another case, husband and wife agent teams in Louisiana were accused of breaching their fiduciary duties to their clients for allegedly failing to explain the importance of property disclosures or instructing them on how to complete a disclosure form.
The sellers maintained that the agents—who also represented the buyer in the transaction—breached their fiduciary duties because they failed to explain the importance of property disclosures, or instruct them on how to complete the form.

The judge presiding over the case agreed that the agents’ “habit of allowing a seller to fill out the property disclosure form without benefit of their experience and instruction is disconcerting at best. Realtors are fiduciaries and they owe clients the benefit of their experience and knowledge.”

But the sellers had resisted the agents’ advice to disclose new floors they had installed on a list of alterations they had made the house, the judge noted, which should have alerted them that other work they had done “was (also) an alternation that needed to be disclosed,” the judge ruled in the agents’ favor (Hof v. GBS Properties LLC).

**Transaction brokerage**

By limiting or eliminating the fiduciary duties that brokers and agents owe their clients, lawmakers in more than two dozen states have reduced the legal liability of REALTORS® providing services in non-agency relationships such as transaction brokerage. But that hasn’t stopped consumers from filing lawsuits testing those defenses.

NAR’s 2011 legal scan identified nine lawsuits challenging licensees who practiced transaction brokerage or another form of non-agency representation, up from one case involving transaction brokerage in the 2009 report.

In a Florida case, a development company asked a real estate agent to evaluate a beachfront property that had been advertised as being suitable for a multi-unit development. Based on the agent’s analysis, the developer bought the property for $4.9 million.
When the developer learned that the property was only zoned for a single-family home, he sued the agent, claiming she had breached her fiduciary duty and committed professional negligence. A U.S. District Court judge dismissed the case against the agent and her broker, finding that the agent had provided services as a transaction broker and did not owe a fiduciary duty to the developer (Century Land Development v. Weits).

In a case that went all the way to the Wyoming Supreme Court, a couple whose home was condemned as a complete loss when its foundation crumbled less than two years after they bought it found the agents on both sides of the deal couldn’t be held responsible, because they’d acted as transaction “intermediaries.”

The home’s basement walls had been constructed of unreinforced cement block, and a previous inspection of the home had characterized some sections of the basement wall structurally unstable and that the home was not suitable for occupation. Nearby homes constructed by the same builder in the 1960s had similar problems, and the previous owners of the home had purchased it “as is” without having inspections done, according to court testimony.

Because the buyers had failed to provide any facts demonstrating that any of the issues with the home were “actually known” to their agent, there was no proof that she had breached her duties as an intermediary.

Similarly, the buyers couldn’t argue that the agent representing the sellers as an intermediary had perpetuated material misrepresentations of the seller that she “should have known” were false. Only issues that were “actually known” were relevant, the Wyoming Supreme Court ruled (Throckmartin v. Century 21 Top Realty).

The extent to which real estate brokers and agents are expected to put their skill, competency and experience to work to uncover issues about a property that their
clients may think they “should know” goes beyond property defects — particularly in the world of commercial real estate.

When a Colorado real estate broker advertised an operational 12-site recreational vehicle park in the multiple listing services as a “turn-key business opportunity,” he reportedly didn’t know that it lacked the proper county and state water, sewage and land use permits. When the buyer sued the broker, he was off the hook, because as a transaction broker he had “no duty as a matter of law to conduct an investigation of the resort to verify that it could in fact operate as a 12-site RV park,” the Colorado Court of Appeals ruled (Barfield v. Hall Realty).

**Dual agency**

Dual agency may be the most talked about agency issue, though it’s not the most litigated. Legal in 42 states, Realtors often debate its ethical implications.

Real estate professionals surveyed by NAR said that in general, agents don’t understand dual agency and cannot explain it to their clients, exposing the agents to lawsuits.

Brokers practicing dual agency have a more limited duty of loyalty to their clients — by definition, they can’t be advocates for both — and must be particularly vigilant about maintaining client confidentiality. An agent who tells a seller during negotiations how much a buyer might be willing to pay would be breaching fiduciary duties to the buyer, for example.

But clients served by dual agents may also conclude that their agent has withheld crucial information or advice from them in order to keep a deal on track.

In Baltimore County, Md., a jury awarded $90,000 to buyers who said they relied on a property disclosure and the assurances of their dual agent that the home’s septic
system worked properly or could be repaired for $10,000 held in escrow. The system failed a “perc test” conducted after the closing.

In another case in Shasta County, Calif., buyers filed suit against their dual agent, claiming they had to live in a trailer for a year because the sellers of a home they purchased failed to disclose that the house was unpermitted, not up to code, and not legal for occupancy. A trial court awarded $180,000 in damages.

Although liability was determined in 13 of 20 lawsuits involving dual agency tracked by NAR, only three of those cases resulted in damage awards against real estate licensees.

But even when they are off the hook for damages, agents practicing dual agency may still find themselves stuck with large legal bills.

A would-be buyer who lost her $31,000 deposit after failing to obtain financing to close on a $610,000 home under contract in Rocky Hill, Conn., sued the seller, the dual agent representing both parties, and a mortgage broker recommended by the agent.

The judge in the case ruled that the agent and her broker were negligent and had “significantly contributed” to the circumstances that led to the would-be buyer losing her deposit.

Instead of advising her client to exercise a contingency clause and obtain a refund of her deposit when she was initially unable to qualify for a large enough mortgage, the agent referred her to a mortgage broker who attempted to put together more complicated financing involving a home equity line of credit on the would-be buyer's existing home, and a second mortgage on the home she intended to buy.
In the hopes of keeping the deal alive, the agent and her broker also “pressured (their client) to permit them to sell her house,” assuring her “that her deposit was safe and that the (they) would be able to effectuate a quick sale” of her existing home.

But the agent wasn’t the only one to blame, the judge ruled. The would-be buyer had a “cavalier attitude throughout the transaction,” the judge ruled, and the fact that she nearly doubled her disclosed income to $15,000 a month after she was initially turned down for financing undermined her credibility.

“Quite frankly, the plaintiff’s negligence, manipulation and dishonesty preclude her from recovering any money damages from these defendants,” the judge ruled in dismissing claims against the seller, the agent and broker, and mortgage broker.

But the judge also refused to order the would-be buyer to pay the agent and her broker’s attorney fees and expenses, which totaled $58,330.

Although their client had signed a buy sell agreement stipulating that the prevailing party in any legal dispute would be entitled to recoup their costs, the agent and her broker “are clearly not ‘the prevailing party,’” the judge ruled (Dalia Giedrimiene v. George J. Emmanuel).

**Buyer representation**

The demise of subagency created a new class of agency, with its own set of rights and obligations buyer representation.

National Association of REALTORS® 2011 Legal Scan turned up 24 lawsuits involving buyer representation, although only one out of 13 cases in which liability was determined resulted in a judgment against an agent.

In that case, a buyer’s agent in Louisiana rescheduled a closing date on a sale that was pending as Hurricane Katrina struck the Gulf Coast. When that date also proved
unfeasible, the agent failed to get written agreement to extend the date again, but advised the buyer she did not have to appear. The seller canceled the contract, and the agent had to pay $20,000 to the buyer plus $27,900 in attorney fees (Ziegler v. Pansano).

Real estate professionals surveyed by National Association of REALTORS® said they worry that lawsuits over buyer representation are becoming more common, with agents risking disputes over procuring cause (dispute based on entitlement to a commission) if they don't make disclosures and obtain signed representation agreements.

Agency disclosures
National Association of REALTORS® found agency disclosures were at issue in four lawsuits, including a case in which the South Dakota Supreme Court backed up a ruling by the state’s real estate commission that the assignment of a purchase agreement to a new buyer does not relieve brokers of their duty to obtain an agency agreement from their new client and provide the required disclosures.

The case arose when an agent helped a would-be buyer negotiate a purchase agreement on a piece of ranch land that was contingent on the buyer selling his own land. Because the agent worked at the same firm as the listing agent, he entered into a “limited agency agreement” with the would-be buyer — South Dakota’s term for disclosed dual agency—and provided the necessary disclosures.

Although the would-be buyer was unable to sell his own property, he agreed to assign his right to purchase the property to another buyer for $25,000.

The agent also worked with the new buyer to close the deal, but did not enter into a new agency agreement or disclose his role as a limited agent. After the deal closed, the buyer claimed that the agent had misrepresented the extent to which covenants on 240 acres of the ranch he’d purchased would restrict its use and development.
The buyer filed a complaint with the South Dakota Real Estate Commission. The commission then charged the agent with failing to execute an agency agreement with the new buyer, or disclosing that both he and the listing agent worked for the same firm.

The agent maintained that the assignment of the purchase agreement to the new buyer had also transferred the agency agreement.

The commission disagreed, fining the agent $1,000 for unprofessional conduct and assessed $6,177 in costs. The agent was also given the choice of completing six hours of training and a three-hour ethics course, or having his license suspended for two months.

The agent appealed the decision, and won a circuit court ruling in his favor. But the South Dakota Supreme Court ultimately sided with the state’s real estate commission.

Agency agreements and disclosures, the state’s high court ruled, “Are intended to protect the consumer and ensure that consumers are specifically informed of and accept the nature of the agency relationship.”

Although the assignment of the purchase agreement did transfer all of the would-be buyer’s “rights, privileges and obligations” to the new buyer, it did not address the effect on the agency agreement.

“REALTORS® cannot delegate to their clients, by way of assignment or otherwise, their professional duty to properly inform their clients by ‘clear and complete explanation’ their ‘representation of the interests of the seller or buyer,’” the court ruled, citing South Dakota statute (Leonard v. South Dakota). “This obligation is all the more fundamental here because Leonard’s firm represented both the buyer and the seller.”
As we discussed in Lesson One, for many years the real estate industry represented sellers only. The listing broker and the broker working with the buyer (the sub-agent) both represented the seller. The buyer had no representation. During the years that sub-agency was the only choice, Multiple Listing Services systems required that when a listing broker listed a property in Multiple Listing Services it was an **automatic offer of sub-agency**.

In the mid 1980s, brokerages began to experiment with buyer/tenant representation. Brokerages started to appear that represented buyers or tenants only. Buyer brokers wanted to use and get paid through the Multiple Listing Services system. Eventually, the Multiple Listing Services system was changed to offer sub-agency compensation, buyer agency compensation or both. The offer of sub-agency was no longer automatic. The seller and the listing broker now decide if they want to offer sub-agency. This is why you see no commission to a sub-agent by the listing broker. They do not want an agent from another company representing their seller/client.

An important thing for license holders to understand is that payment and representation are two (2) separate issues. In Texas the broker can represent the buyer and get paid by the seller or the seller’s broker... The broker can represent the seller and get paid by the buyer or the buyer’s broker. Payment does not determine representation.

**Broker's Pathway to Intermediary for In-House Transactions**

Seller client documents include:

- Information about Brokerage Services-TREC
- Consumer Protection Notice - TREC
- Exclusive Right to Sell Residential Real Estate Listing Agreement
  - Intermediary Authorized by Seller
Texas Law of Agency

- Who commission to be paid to, when and how
- Intermediary Relationship Notice

Buyer client documents include:
- Information about Brokerage Services
- Consumer Protection Notice
- Exclusive Right to Represent Residential Buyer/Tenant Representation Agreement
  - Intermediary Authorized to Buyer
  - Who commission to be paid to, when and how
  - Intermediary Relationship Notice (reaffirm consent of appointees and Intermediary)

These Forms are for an Intermediary In-House Transaction.

Texas Real Estate License Act
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm
Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.

(a) A broker may act as an intermediary between parties to a real estate transaction if:

(1) the broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and
(2) the written consent of the parties states the source of any expected compensation to the broker.

(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under Section 1101.651(d).

(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under Section 1101.560 to
communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.
(a) The duties of a license holder acting as an intermediary under this subchapter supersede the duties of a license holder established under any other law, including common law.
(b) A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction:
   (1) A buyer or tenant; and
   (2) a seller or landlord.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

The license holder's file should have additional forms and addenda based on the broker's policy and procedures for taking listings and buyer representation agreements. This meets the requirement of the Texas Real Estate Commission License Act.

If a license holder with XYZ Realty has an Exclusive Right to Sell Residential Listing Agreement with a seller/client and another license holder with XYZ Realty has a buyer/client with a signed Exclusive Right to Represent Residential Buyer/Tenant Representation Agreement who wants to buy XYZ Realty listing, the above forms apply.

The Path from Dual Agency to Intermediary Brokerage

One of the broker’s concerns was the liability they would be exposed to if one of their listed properties was sold to a buyer by another of their agents who was representing the buyer. In Texas, that representation would have been a common law dual agency.

- Under common law, both represented clients would be entitled to all fiduciary duties. How does a broker give one hundred percent (100%) loyalty to two different
clients? How does the broker keep the confidentiality of both clients while delivering full disclosure to both clients?

- Texas Real Estate Commission discouraged brokers from participating in dual agency. It is easy to understand why brokers were concerned.

Buyer brokerage grew very slowly in Texas during that period. Most buyer brokerages represented only buyers and did not take any listings. If they received a listing or had a lead on a listing, the broker would refer out the lead as a referral to another broker. This was done with the permission of the consumer in writing.

Most real estate companies that had listings did not represent buyers, but still sold their own listings. They still treated buyers as a customer. Sub-agency was still a common way for brokers to do business, but the reality in this scenario is that the sales agents and the broker treated the customer as a client. This was the liability and still is today. Customers have to know they are not being represented and that they have the choice to have a broker represent them through their sales agent or the broker. This is where the customer is uneducated as well as the license holder. When a consumer is not represented, the license holder still has certain duties and they are:

- Honesty
- Fairness
- Disclosure
- Good Faith
- Competency
- The license holder cannot give advice and opinions.
- The license holder cannot give any confidential information about the seller to the consumer who is not represented.
- But the license holder can give the confidential information to the seller that they acquire by working as a subagent when they do not represent the buyer.
This has to be explained to the consumer.

**Example:**
You encounter a buyer who wants information about buying property. After you present him the Information about Brokerage Services notice and explain what it says, you ask if he wants to be represented by a license holder. The consumer says no. He just wants information about buying real estate. You would than tell him your limitations on what you can tell them and what you cannot tell them.

Examples of what you cannot tell them are:
- How long the property has been on the market?
- Why the seller is selling
- How many price reductions there have been?
- Have there been any offers on the property

The buyer is going to ask why you cannot give him or her the answer and this is when you say those types of questions are confidential and you can only provide the answers you represent him or her.

Consumers need to see the value to them, not you. Be sure they do not think the only reason you want to represent them is because of your commission. You want to present the Fiduciary Duties to a Client and the Common Law Duties to a Customer.

The first red flag that they do not want you or the representation is if they resist ratifying the Information about Brokerage Services Notice.

In 1993, the Texas legislation added some language to the licensing act that gave instructions to the broker on how to be a “disclosed dual agent”. The “statutory law” (Intermediary) took precedence over common law. Dual representation in Texas began to grow. There was still confusion because agents continued to give advice and opinions
to both clients. **Under statutory dual agency, the agents were all to remain neutral, and no one was to receive advice and opinions.**

On January 1, 1996 the dual agency laws were replaced in the licensing act with intermediary representation rules. In 1997, the Texas Legislature made one other change, saying the broker that is going to represent both parties in a transaction **MUST** act as an intermediary.

One of the big differences between dual agency and “statutory law” is the broker’s ability, in an intermediary transaction, to appoint two different sales agents in their firm, to assist the two different parties. The intermediary (broker) cannot appoint another license holder to work with the buyer and seller without their permission in writing. An appointed license holder **can** give advice and opinions to the party they are appointed to, subject to the rules of intermediary.

The Texas Legislature worked hard to create laws that allow agents to do what agents do best, serve their clients. All the agent and broker must do now is learn the statutory law and follow it explicitly. It does not offer 100% protection from legal action, but it is the best protection available for Texas brokers and agents when one company chooses to represent both the buyer and the seller.


Published on Sep 7, 2016

**Key Takeaways**

- A transaction involving different agents for buyer and seller, who operated at the same brokerage, has reached the California Supreme Court.
The court will decide whether the listing agent owed fiduciary duties to the buyer in the 2007 transaction.

If a buyer and seller in a real estate transaction are each represented by separate agents from the same brokerage, do those agents owe a fiduciary duty to both buyer and seller?

The California Supreme Court may soon decide that question for the more than 400,000 agents and brokers in the Golden State. The court will hear oral arguments today over interpretations of a statute that will determine whether the listing agent that participated in the 2007 sale of a Los Angeles home for $12.25 million owed fiduciary duties to the buyer.

In April 2014, an appeals court said he did — and now the case is going to the state’s highest court.

A live stream of the hearing, set to begin at 9 a.m. Pacific, can be found here. (It will be the fourth case heard, according to the docket.)

**Potential repercussions**

**The argument for leaving well enough alone**

The listing agent and his brokerage, Coldwell Banker Residential Brokerage Company, and the firm's supporters—including the California Association of Realtors—say that if the appellate decision is allowed to stand, it could have wide-reaching negative implications for the real estate industry.

According to CAR, which represents more than 160,000 agents and brokers, half of all of its member agents work for real estate brokerage firms where 50 or more licensees work under the same broker's license.
“Reversing the trial court, the opinion up-ends California law and creates a public-policy nightmare for prospective buyers and sellers of California residences,” Coldwell Banker’s attorneys said in their petition for review.

“Given the prevalence of national and regional brokerage firms, salespersons from the same firm often end up on opposite sides of residential transactions.”

The attorneys’ petition says that upholding the appellate court opinion could cause the following consequences:

- Deprive buyers and sellers in “intra-firm transactions” of the “undivided loyalty of an exclusive agent.” “The salespersons will owe fiduciary duties to parties whose interests inherently conflict,” wrote the attorneys.
- Force agents to disclose “sensitive information about the client’s motivations or the salesperson’s personal beliefs” to the “other side” in the transaction.
- Force agents to “ferret out sensitive information from, and provide counsel to, complete strangers.”
- Limit the pool of properties available for buyers
- Raise transaction costs

“The opinion will be deeply disruptive. Because compliance with fiduciary duties to one client will frequently entail a breach of fiduciary duties to the other, salespersons risk being sued no matter what they do,” they said.

“The opinion inevitably will trigger an increase in litigation that will cause a concomitant increase in insurance premiums. Alternatively, large firms may avoid intra-firm transactions altogether, which would shut buyers and sellers off from huge portions of the market.”

The appeal court’s ruling creates “a startling, dangerous new regime that will severely impair intra-firm transactions” and “have disastrous consequences for California real
estate consumers, brokerages and salespersons,” Coldwell Banker’s attorneys said in a separate filing.

**The buyer responds**

On the opposite side, the buyer plaintiff and supporters of the appeal’s court decision — including the National Association of Exclusive Buyers Agents — argue that the decision is based on a statute whose meaning is “unambiguous” and was intended to protect unwary buyers.

“Section 2079 was enacted as part of legislation designed to protect consumers from salespersons with greater knowledge and bargaining power,” Horiike’s attorneys said in response to Coldwell Banker’s petition.

“The Legislature’s purpose in enacting the statute was to provide real estate licensees with a comprehensive declaration of their duties and for consumers to be aware of the inherently conflicting duties in a dual agency situation.”

“A motivating factor that originally propelled this legislation was the fact that intra-company sales yield the greatest net profits for brokerages, thus prompting the potential for abuse,” the buyer’s attorneys added.

They asserted that only a broker, not a salesperson, contracts with a buyer or seller and that a salesperson’s duties flow from the broker.

“Coldwell Banker’s position is that the public will be worse off if this Court enforces the plain meaning of [the statute] because brokers will then find it more difficult to represent both sides in a real estate transaction,” Horiike’s attorneys said.

“Coldwell Banker’s assumption that dual agencies benefit the public is questionable. Consumer advocates have condemned the practice, which studies have shown results in higher prices.
“In adopting the legislation at issue, the Legislature itself observed that dual agency creates irreconcilable conflicts of interest that are ameliorated only in part by ensuring that the conflicts are disclosed to consumers.

“When a broker like Coldwell Banker chooses to represent both parties to a sale, it must meet its fiduciary duties to both sides. And it can do so only if the salesperson best situated to fulfill those duties is also required doing so.”

What happened?
A foreign buyer searches for a home
In 2003, Hong King-based millionaire Hiroshi Horiike started looking for a home in Los Angeles and hired Chizuko Namba, an agent in Coldwell Banker’s Beverly Hills office.


In 2006, Chris Cortazzo, an agent in Coldwell Banker’s Malibu West office, listed a custom Malibu home for $16.75 million in a multiple listing service, saying the property had approximately “15,000 square feet of living area,” according to attorneys for Horiike.

In February 2007, a Mr. and Mrs. Lee agreed to purchase the home for $13.8 million, but they raised questions about the advertised size of the property, the attorneys said.

In a disclosure form, Cortazzo had his assistant handwrite a note: “Buyer is advised to hire a qualified specialist to verify the square footage of home. Broker does not guarantee or warrant square footage.”

He also urged independent verification of the square footage in a separate letter.
The Lees backed out of the deal when the sellers refused a six-day extension to inspect the property.

In July 2007, Cortazzo allegedly changed the square footage on the MLS listing to zero and indicated there were “other comments” available. At the same time, the sellers lowered the asking price to $14.995 million.

On Nov. 1, 2007, Cortazzo showed the property to Horiike, Namba and Horiike’s colleague Tsutomu Yokoi. This was the one and only day Horiike and Cortazzo met and the first time Namba and Cortazzo met.

During the showing, Cortazzo gave Horiike an MLS listing sheet and a copy of a one-page color flier advertising that the home had 15,000 square feet of living area.

Later that day, Horiike decided to make an offer on the property. Namba gave him a seven-page “Disclosure Regarding Real Estate Relationships,” which he acknowledged receiving.

The form explained that Coldwell Banker represented both the seller and the buyer and was therefore acting as a “dual agent.”

**No guarantees**

Attorneys for Horiike contend that Horiike “completely trusted” Cortazzo because of his Coldwell Banker affiliation and that the disclosure form said Coldwell Banker was acting as a dual agent “through one or more associate licensees” — one of which was Cortazzo.

Afterwards, Horiike said he believed that his agents were Coldwell Banker, Cortazzo and Namba.
During escrow, Cortazzo forwarded to Namba a copy of a 1998 building permit for the property listing its “total development square footage” at 11,050, according to a filing from Coldwell Banker’s attorneys.

No “living area” calculation was included, they said.

(Over the course of the litigation, the buyer’s expert and the defendants’ expert would come up with different square footage figures for what constituted “living areas.”)

Namba read the permit and sent it to Horiike and Yokoi in Hong Kong, but Horiike never read it, relying on Yokoi to ensure it was consistent with what they had been told, the attorneys said.

“Neither Namba nor Cortazzo asked Horiike to review the permit, and neither alerted him to the fact that the home might be smaller than the advertised 15,000 square feet of living area,” Horiike’s attorneys said.

They noted that “the only practical difference” between the fiduciary duty owed to a seller client and the non-fiduciary duty owed to a third-party buyer is the fiduciary duty by the seller’s representative to investigate facts that may not be obvious from a brief visual inspection of the property.

When the brokerage becomes a dual agent, then both salespeople are responsible for ensuring the broker satisfies its duties — including a duty to investigate — to both of the firm’s clients, the buyer’s attorneys said.

“In this case, it would have been a simple matter for Cortazzo to satisfy his fiduciary duty to Horiike,” they said, by pointing out the square footage discrepancies and recommending he hire a specialist, as Cortazzo did for the Lees.
“His earlier recommendation is evidence that he knew he had an obligation to make the same recommendation to Horiike, yet he chose to remain silent,” the buyer’s attorneys said.

“Had Horiike hired a specialist to measure the property, he would have discovered that the advertised size was inaccurate, a discovery that might have scuttled the deal and, at least, would have affected the selling price — and Cortazzo’s commission.”

But Cortazzo said he did offer warnings, albeit not handwritten ones.

The MLS listing sheet he gave Horiike said that “Broker/Agent does not guarantee the accuracy of the square footage” and “Buyer is advised to independently verify the accuracy,” Coldwell Banker’s attorneys said.

Horiike also acknowledged that he had received two other written advisories about the square footage — his attorneys characterized them as “boilerplate” — but allegedly never read them.

“[B]ecause Namba described the documents she sent Horiike as standard forms that simply required his signature, Horiike signed the documents without asking that they be translated,” his attorneys said.

Escrow closed in December 2007. Cortazzo received $275,625 as his commission on the deal, and Coldwell Banker profited over $100,000 in addition to Cortazzo’s and Namba’s commissions, Horiike’s attorneys said.

In May 2009, while preparing to add to the home, Horiike discovered the original building permit.

In November 2010, he filed suit against Coldwell Banker and Cortazzo for negligent representation, breach of fiduciary duty, and other claims.
Namba was not named in the suit.

**Contradictory rulings**

In a 2012 trial, the court ruled in favor of Cortazzo and Coldwell Banker, ruling that Cortazzo did not owe a fiduciary duty to Horiike.

The jury also found that Cortazzo made a “false representation of material fact” to Horiike, but did not find Cortazzo liable because he had “reasonable grounds” for believing the representation was true when he made it.

In April 2014, an appeals court overturned that decision.

“The buyer contends that the salesperson had a fiduciary duty equivalent to the duty owed by the broker,” the appeals court said.

“We agree. When a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker.”

The court sent the case back to a lower court for a new trial, saying that the jury’s findings do not resolve whether Cortazzo breached his fiduciary duty to Horiike.

“Cortazzo knew the square footage of the property had been measured and reflected differently in different documents,” the court said.

“He did not explain to Horiike that contradictory square footage measurements existed. A trier of fact could conclude that although Cortazzo did not intentionally conceal the information, Cortazzo breached his fiduciary duty by failing to communicate all of the material information he knew about the square footage.
“He did not even provide the handwritten advice given to other potential purchasers to hire a specialist to verify the square footage.”

What does the statute actually say?

At issue in the case is how a particular California statute, Civil Code section 2079.13 (b) should be interpreted:

“The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.”

In this instance, “the agent” refers to a broker and “associate licensees” are the agents or brokers under the broker.

Horiike’s attorneys say the statute’s language is “clear and unambiguous”: “[S]ection 2079 .13 expressly states that when a broker is the dual agent of both the buyer and the seller in a real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and seller as the broker does.”

Coldwell Banker’s attorneys disagree.

They contend that agents involved in an “in-house” or “intra-firm” deal owe a fiduciary duty only to their buyer or seller client and owe non-fiduciary duties of honesty and fair dealing to the buyer or seller who is not their client.

To assert otherwise, they say, would impute the brokerage’s dual fiduciary duties downward to their salespersons, which Coldwell Banker says the California Legislature did not intend when crafting the statute.
“The most reasonable reading is that the Legislature merely intended to confirm that associate licensees and their brokers are in an agency relationship, and therefore whatever duty the associate licensee owes to a particular buyer or seller is imputed to the broker,” Coldwell Banker’s attorneys said.

Horiike’s attorneys say Coldwell Banker is correct that a broker’s liabilities are not imposed on his or her agents.

“However, Horiike has never argued that Cortazzo is vicariously liable for the misconduct of Coldwell Banker. Quite the opposite, Horiike seeks to hold Coldwell Banker liable for the misconduct of Cortazzo,” they said.


A California Supreme Court case has some in the industry wondering where the fix is -- or if it exists at all.

Key Takeaways

- Some industry experts say that limiting brokerages to working exclusively with buyers or sellers is the only way to circumvent fiduciary duty and conflicts of interest.
- Others say that such limitations would be unrealistic, particularly for real estate teams and franchises.
When Hong Kong-based millionaire Hiroshi Horiike toured a home in Los Angeles in late 2007 with Coldwell Banker agent Chris Cortazzo, who was listing the property, nobody on the tour knew that it would eventually result in oral arguments in front of the California Supreme Court.

But that’s what happened earlier this week when lawyers representing Horiike on one side and Coldwell Banker and Cortazzo on the other side told the justices two stories: one involving a breach of fiduciary duty and the other involving a transaction wherein the listing agent mistakenly misrepresented some attributes of the property and the buyer didn’t read everything that he signed.

**The nuts and bolts of the case**

Horiike claims that because his agent, Chizuko Namba, was an agent in Coldwell Banker’s Beverly Hills office—while Cortazzo operated out of the Malibu West Coldwell Banker office—the brokerage and Cortazzo owed him the same fiduciary duty as Namba.

He claims that Cortazzo and Coldwell Banker violated their fiduciary duty toward him by not clarifying the square footage of the home he was purchasing — fliers advertised 15,000 square feet of living area, but the home’s square footage was actually 11,500.

Horiike filed suit in 2010. Namba, his agent, was not named in the lawsuit.

An appeals court ruling agreed with Horiike, and now it’s up to the California Supreme Court to make a decision that could have major repercussions for how real estate is practiced in the state.

If listing agents owe fiduciary duties to buyers that could create “a public-policy nightmare for prospective buyers and sellers of California residences,” according to the petition for review filed by Coldwell Banker and Cortazzo’s lawyers.
What could this mean for California real estate?

Possibly nothing—there is a chance that the justices will decide to overturn the appeals court ruling in favor of Horiike (which overturned the original ruling in favor of Cortazzo and Coldwell Banker), and then it will be business as always for agents and brokers in the golden state.

However, if the justices decide to uphold the appeals court ruling in favor of Horiike, then according to the Coldwell Banker/Cortazzo petition for review, the following could happen:

- Buyers and sellers in “intra-firm transactions” would be deprived of the “undivided loyalty of an exclusive agent.” “The salespersons will owe fiduciary duties to parties whose interests inherently conflict,” wrote the attorneys.
- Agents would be forced to disclose “sensitive information about the client’s motivations or the salesperson’s personal beliefs” to the “other side” in the transaction.
- Agents would have to “ferret out sensitive information from, and provide counsel to, complete strangers.”
- The pool of properties available for buyers would be limited.
- Transaction costs would likely go up.

In other words, buyer’s agents and listing agents might have to disclose sensitive information about each other’s clients if they are working under the same brokerage—and some industry insiders also argue that brokerages might feel obligated or compelled to prevent their agents’ buyers from looking at or purchasing homes that are also listed with the brokerage.

“What the plaintiffs here are arguing is that whenever you have a common broker, then both agents need to do the work for both clients,” said June Barlow, vice president and general counsel at California Association of Realtors. “The plaintiff actually said so—the person representing the seller should have gone directly to the buyer and
counseled them individually to get everything verified. Can you imagine a buyer being approached by the person who’s working with the seller? Which agent do they listen to?”

**One or the other?**

While the California Supreme Court justices are making up their minds, there are some steps that agents can take today to ensure they aren’t in a courtroom facing angry clients tomorrow.

Some Inman readers stated that by deciding to represent only one side in the transaction — buyers or sellers, but not both — brokerages could navigate the waters of fiduciary duty more easily.


**Representing More than One Party in a Transaction**

(Do you know what that means?)

Let’s look at what the Texas Real Estate License Act says about dual representation:

Sec. 1101.559. BROKER ACTING AS INTERMEDIARY.

(a) A broker may act as an intermediary between parties to a real estate transaction if:

(1) the broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and

(listing agreement consent or a buyer representative agreement consent)

(2) the written consent of the parties states the source of any expected compensation to the broker.

(written consent who is paying the broker for listing the property written consent who is paying the broker for the sale of the property, written consent who is paying for the buyer services)
Explanation

The broker has a policy and procedures manual that has a section on agency for in-house transactions. The broker’s policy and procedures are written according to the Texas Real Estate Commission License Act. If your broker does not practice intermediary, then your broker is either a buyer agency, seller agency or a single agency real estate company.

- The buyer agency only works with buyers and does not take listings.
- A seller agency only works with sellers and only lists property, but does not sell their listings.
- Single agency is a broker who works with both buyers and sellers, but never in the same transition.

When you are interviewing brokers you need to ask them what type of agency the broker practices and if they have a policy and procedure manual that details the type of agency they practice.

All brokers do not practice intermediary, which means they work either with both buyers and sellers in the same transaction.

To be able to do intermediary, the broker must follow the “statutory law” and have written procedures in place.

(b) A written listing agreement to represent a seller or landlord or a written agreement to represent a buyer or tenant that authorizes a broker to act as an intermediary in a real estate transaction is sufficient to establish written consent of the party to the transaction if the written agreement specifies in conspicuous bold or underlined print the conduct that is prohibited under SECTION 1101.651(D).
(You need sufficient consent for the intermediary-broker to proceed and appoint the license holders who will assist the seller in the transaction and appoint the license holder who will assist the buyer in the transaction. And who the buyer and seller pay the commission to and when. Intermediary is for in-house transactions only)

**Prohibited under Section 1101.651(d) of the Texas Real Estate License Act**

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

(d) A broker and any broker or sales agent appointed under Section 1101.560 who acts as an intermediary under Subchapter L **MAY NOT:**

1. disclose to the buyer or tenant that the seller or landlord will accept a price less than the asking price, unless otherwise instructed in a separate writing by the seller or landlord;
2. disclose to the seller or landlord that the buyer or tenant will pay a price greater than the price submitted in a written offer to the seller or landlord, unless otherwise instructed in a separate writing by the buyer or tenant;
3. disclose any confidential information or any information a party specifically instructs the broker or sales agent in writing not to disclose, unless:
   A. the broker or sales agent is otherwise instructed in a separate writing by the respective party;
   B. the broker or sales agent is required to disclose the information by this chapter or a court order; or
   C. the information materially relates to the condition of the property;
4. treat a party to a transaction dishonestly; or
5. violate this chapter. SECTION 1101.651

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

If you do not know what is confidential, the above list is some of the information you cannot share with anyone unless your client authorizes you in writing to tell or give out information.
This is confidential information, which is one of your fiduciary duties.

(c) An intermediary shall act fairly and impartially. Appointment by a broker acting as an intermediary of an associated license holder under SECTION 1101.560 to communicate with, carry out the instructions of, and provide opinions and advice to the parties to whom that associated license holder is appointed is a fair and impartial act.

The intermediary-broker is never one of the appointed license holders. The sales agents who are appointed are the ones who communicate with the parties, carry out their instructions, and provide opinions and advice in the name of the broker.

Sec. 1101.560. ASSOCIATED LICENSE HOLDER ACTING AS INTERMEDIARY.

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

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

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

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

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

Listing Agreement or the Buyer Representation Agreement

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

Explanation:

(2). When you get consent for an intermediary transaction in the listing agreement and buyer agreement, it does not say who the appointees will be.
Before the contract is written, the buyer and seller need to know who the appointees (their names) are (sales agents or broker associates).

The buyer and seller need to agree to the license holders who are the appointed to carry out negotiations, counters, advise and opinions. The reason this has to be done is for conflicts. The buyer and seller may have a conflict with one of the appointed license holders. This is not as important for disqualifying an appointed license holder as it is for the buyer or seller to have this right before the contract is written. This must be written in your broker’s policy and procedures manual for you to be competent to handle a transaction where your broker is an intermediary.

Note the particular concern in the third paragraph of the Notification of Intermediary Relationship Notice.

In the written listing agreement and the written buyer/tenant representation agreement, both the owner and the prospect previously authorized Broker to act as an intermediary if a prospect who Broker represents desires to buy or lease a property that is listed by the Broker. When the prospect makes an offer to purchase or lease the Property, Broker will act in accordance with the authorizations granted in the listing agreement and in the buyer/tenant representation agreement.”

Broker will not appoint licensed associates to communicate with, carry out instructions of, and provide opinions and advice during negotiations to each party. If Broker makes such appointments, Broker appoints:
_________________________________________to the owner; and

_________________________________________to the prospect.

If for some reason, one of the parties or both checks no appointments, the intermediary will have to sell the listing without buyer representation or refer the buyer to another real estate broker.
The Texas Real Estate Commission has put in place three steps to reach an intermediary transaction.

**First Step**
A listing is taken between the owners of a property and the broker by both signing a listing agreement ("Exclusive Right To Sell"). During this time, there is full fiduciary duties and disclosure between the broker and the seller.

A buyer agreement is taken between the buyers and the broker by both signing a “Buyer Representation Agreement.” During this time there is full fiduciary duties and disclosure between the broker and the buyer.

Some brokers show buyers their listing before they go into a Buyer Representation Agreement so they can represent their seller with full fiduciary duties and disclosure. Only the broker and the broker’s legal counsel can make this a policy for his or her company.

**Second Step**
When the represented buyer decides to make an offer on one of the broker’s listings, the broker is representing the seller as well. This is a potential conflict, and when it arises, the broker is not an intermediary. The potential conflict is dual agency taking place before the broker can begin the intermediary process. Before the transaction can go any further, the intermediary process must begin immediately.

**Third Step**
This is when the Intermediary Relationship Notice is given to the parties before the contract is written. Be sure the broker has trained the sales agents or broker associates to present the Notice and be prepared to discuss it, what to say, and how to handle. You could lose the sale at this point.

Only after both buyer(s) and seller(s) have signed the notice can the license holders give advice and opinions.
Make a list of:

- What types of advice would you give a client buyer?
- What types of opinions would you give a client buyer?

Questions to review and consider:

1. Does a buyer or seller have to consent to the license holder appointed to them?
2. What if the broker/intermediary appoints a license holder to a party and they do not get along?
3. Can a broker refuse to appoint?
4. Can a sales agent or broker associate refuse the appointments?
5. If no appointments are made, can any of the license holders give advice and opinions?
6. What is the liability of a sponsoring broker who has appointed one agent to represent the buyer and the same license holder to represent the seller?
7. What if the two (2) appointed sales agents or broker associates give conflicting advice or opinions?
8. What is the role of the intermediary if the appointed license holder asks for advice?
9. Can an intermediary appoint an assistant of a license holder?
10. Can an intermediary appoint a husband as one appointee and the wife the other appointee?

The intermediary must comply with all aspects of the Texas Real Estate License Act in order to be able to sell their own in-house listings. If any of the requirements are not met, it seems the intermediary status could or would convert to unappoint intermediary status. What does this mean? No advice and opinions. You would have some very unhappy buyers and sellers.

Let's review what no advice and opinions mean.

1. You cannot tell the buyer if the seller will take less than the listed price.
2. You cannot tell the buyer if the seller will negotiate to a lesser price.
3. You cannot tell the seller if the buyer will offer more money.
4. You cannot tell the seller if the buyer will negotiate to a higher price.
5. You cannot tell the seller why buyer offered the price he or she offered.
6. You cannot tell the buyer why the seller is selling.
7. You cannot tell the buyer if the seller has had other offers.
8. You cannot tell the buyer how long the seller has had the property on the market.
9. You cannot tell the seller the buyer’s income.
10. You cannot tell the seller why the buyers made an offer on their home or made other offers on other homes.
11. You cannot tell the buyer what to offer.
12. You cannot tell the seller what to counter.

All you can do is be a facilitator transferring information back and forth between the buyer and seller through their agent or if you are selling your own listing,

You can then explain to them the information they need to make an objective decision in investing in real estate.

Most buyers and sellers do not make their decision selecting a license holder on how a license holder will represent them in a transaction. Their decisions have nothing to do with the type of service they will receive. Explain the difference without disparaging your fellow license holder.

Sec. 1101.561. DUTIES OF INTERMEDIARY PREVAIL.

(a) The duties of a license holder acting as an intermediary under this section supersede the duties of a license holder established under any other law, including common law.

This is how the statutory law reduces liability to some degree from being sued for practicing dual agency. Dual agency is legal in Texas under common law, but license holders in Texas do not practice it.
(b) A broker must agree to act as an intermediary under this section if the broker agrees to represent in a transaction: (in-house transaction only)

(1) a buyer or tenant; and
(2) a seller or landlord.

(Added by Acts 2001, 77th Leg., ch. 1421, Sec. 2, eff. June 1, 2003. Amended by: Acts 2005, 79th Leg., Ch. 825, Sec. 8, eff. September 1, 2005)

The Texas Real Estate Licensing Act relates several facts. The Texas Real Estate License Act requires written permission from both the buyer and the seller for the broker to act as an intermediary.

LISTING AGREEMENT

9. INTERMEDIARY: (Check A or B only.)

☐ A. Intermediary Status: Broker may show the Property to interested prospective buyers who Broker represents. If a prospective buyer who Broker represents offers to buy the Property, Seller authorizes Broker to act as an intermediary and Broker will notify Seller that Broker will service the parties in accordance with one of the following alternatives.

(1) If a prospective buyer who Broker represents is serviced by an associate other than the associate servicing Seller under this Listing, Broker may notify Seller that Broker will: (a) appoint the associate then servicing Seller to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Seller; and (b) appoint the associate then servicing the prospective buyer to the prospective buyer for the same purpose.
(2) If a prospective buyer who Broker represents is serviced by the same associate who is servicing Seller, Broker may notify Seller that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the prospective buyer; and (b) appoint the associate servicing the Seller under this Listing to the Seller for the same purpose.
(3) Broker may notify Seller that Broker will make no appointments as described under this Paragraph 9A and, in such an event, the associate servicing the parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

☐ B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who broker represents.

How does the seller notify the Seller as to making appointments or not and to whom?

Through the Intermediary Relationship Agreement.

Buyer/Tenant Agreement
8. INTERMEDIARY: (Check A or B only.)
A. Intermediary Status: Client desires to see Broker's listings. If Client wishes to acquire one of Broker's listings, Client authorizes Broker to act as an intermediary and Broker will notify Client that Broker will service the parties in accordance with one of the following alternatives.

1) If the owner of the property is serviced by an associate other than the associate servicing Client under this agreement, Broker may notify Client that Broker will: (a) appoint the associate then servicing the owner to communicate with, carry out instructions of, and provide opinions and advice during negotiations to the owner; and (b) appoint the associate then servicing Client to the Client for the same purpose.

2) If the owner of the property is serviced by the same associate who is servicing Client, Broker may notify Client that Broker will: (a) appoint another associate to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Client; and (b) appoint the associate servicing the owner under the listing to the owner for the same purpose.

3) Broker may notify Client that Broker will make no appointments as described under this Paragraph 8A and, in such an event, the associate servicing the
parties will act solely as Broker’s intermediary representative, who may facilitate the transaction but will not render opinions or advice during negotiations to either party.

B. No Intermediary Status: Client does not wish to be shown or acquire any of Broker’s listings.

The written permission must state who will compensate the broker.

In the listing agreement, paragraph 5.A says seller will pay the commission:

5. BROKER COMPENSATION: A. When earned and payable, Seller will pay Broker:
   
   ❑ % of the sales price.
   
   ❑ (2) _____________________________________________________________________.

In a buyer/tenant representation agreement, paragraph 11 says if seller does not pay commission buyer will.

11. BROKER’S FEES: A. Commission: The parties agree that Broker will receive a commission calculated as follows: ( ) % 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.

12. 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.

A written listing agreement with the seller and a written buyer’s representation agreement with the buyer that authorizes the broker to act as an intermediary are sufficient authorization to sell in-house listings. It is not the consent of appointees.
A broker who acts as an intermediary in a transaction:

- If Broker acts as an intermediary under Paragraph 8A, Broker and Broker's associates:
  
  o may not disclose to Client that the seller or landlord will accept a price less than the asking price unless otherwise instructed in a separate writing by the seller or landlord;
  
  o may not disclose to the seller or landlord that Client will pay a price greater than the price submitted in a written offer to the seller or landlord unless otherwise instructed in a separate writing by Client;
  
  o may not disclose any confidential information or any information a seller or landlord or Client specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Texas Real Estate License Act or a court order or if the information materially relates to the condition of the property;
  
  o shall treat all parties to the transaction honestly; and
  
  o shall comply with the Texas Real Estate License Act.

With the parties’ consent, the broker may appoint two different sales agents in his or her real estate company to help the two different parties.

(Note that the broker must have at least two license holders in his or her firm besides himself or herself to make appointments; a total of 3 license holders. The broker can never be an appointed sales agent or a broker associate.)

The parties must be notified in writing of the license holder’s appointments (Intermediary Relationship Notice is to be approved prior to the contract being written.)

During negotiations, appointed license holders may give advice and opinions, to the party they have been appointed to provided they are not selling their own listing.
It is important for agents to understand that an intermediary relationship does not exist unless there is written consent by both the buyer and seller and the broker. The broker has to have three or more license holders. You cannot create an intermediary relationship orally.

What are the parties agreeing to when they give this written permission? There is still a potential conflict of interest in an intermediary transaction if the parties are giving permission without understanding what they are agreeing to.

The parties are agreeing to limit the fiduciary duties they will receive when they give the broker permission to be an intermediary. They are certainly waiving their right to one hundred percent (100%) loyalty. And they are waiving their right to full disclosure of anything confidential about the other party to the transaction.

Parties must be giving “informed consent.” Ascertain the buyer and the seller understands what they are giving permission for.

**FIDUCIARY DUTIES ARE LIMITED DURING AN INTERMEDIARY TRANSACTION**

<table>
<thead>
<tr>
<th>FIDUCIARY DUTIES</th>
<th>YOUR COMPANY REPRESENTING THE BUYER OR THE SELLER ONLY</th>
<th>YOUR COMPANY BEING AN INTERMEDIARY, REPRESENTING BOTH</th>
</tr>
</thead>
<tbody>
<tr>
<td>OBEEDIENCE</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>LOYALTY</td>
<td>100%</td>
<td>LIMITED</td>
</tr>
<tr>
<td>DISCLOSURE</td>
<td>YES, EVERYTHING YOU KNOW ABOUT THE OTHER PARTY and PROPERTY DISCLOSURE</td>
<td>NO NOTHING ABOUT THE OTHER PARTY-PROPERTYDISCLOSURE ONLY</td>
</tr>
<tr>
<td>CONFIDENTIALITY</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>ACCOUNTING</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>
Court Case


On August 31, 1996, the Fradys listed their farm with May, agreeing to pay May a six percent (6%) commission in the event he was able to procure a ready, willing, and able buyer during the listing term. The listing expired on March 1, 1997. After the listing expired, May and Frady discussed renewing and extending the listing agreement, but a new listing agreement was never signed.

In May 1997, another REALTOR contacted May, ultimately resulting in an Earnest Money Contract that was to closed on August 1, 1997. The Earnest Money Contract contained a commission agreement providing for the payment to be made of six percent (6%) “on the closing of the sale”. The transaction did not close.

On September 15, 1997, the same buyer signed a second Earnest Money Contract with the Fradys, which did not provide for the payment of a commission to May. May filed suit to recover his commission. The Fradys defended, saying that the contract that provided for the commission was terminated by its own terms and that the commission was not payable until “on closing of the sale,” which sale was never completed.

The court held that the agreement was not contingent on the closing the sale under the Earnest Money Contract, noting that the broker effects a sale and is entitled to a commission if the seller may enforce specific performance of the contract. The court additionally held that the provision “on the closing of the sale” simply fixed payments of May’s commission upon the transfer of equitable title of the property, and not on the closing of the first Earnest Money Contract. The court noted that if an enforceable
contract results between a buyer and a seller, the seller necessarily accepts the buyer’s readiness, willingness, and ability to perform in the absence of a special agreement to the contract.

(Source: Keeping Current with Texas Real Estate MCE: 2010-2011)

Never include a commission in a contract of sale or an earnest money contract. Only by separate agreement, should commission agreements between the party and the broker be separate and never included in the contract in special provisions.

More Questions About Intermediary. TREC Advisor.

Q: In what way does the new legislation prohibit or permit disclosed dual agency?

A: The new legislation does not prohibit disclosed dual agency, so licensees may act as dual agents with appropriate disclosure and consent.

Q: Is the licensee required under any circumstance to provide the “written statement” to buyer prospects at properties held open for prospective buyers?

A: An encounter at an open house is not a meeting for the purposes of the new law. A licensee would not be required to provide the statutory statement at the open house. However, at the first face-to-face meeting thereafter with the buyer regarding a specific property and during which substantive discussions occur, the licensee will be required to provide the statement.

Q: When acting as an appointed licensee, what “agency” limitations does the licensee have when communicating with a buyer/tenant or seller/landlord that an agent representing one party only doesn’t have?
A: The appointed licensee may not, except as permitted by Section 15C(j) of TREL, disclose to either party confidential information received from the other party. A licensee representing one party would not be prohibited from revealing confidential information to the licensee’s principal, and if the information were material to the principal's decision, would be required to reveal the information to the principal.

Q: If a buyer's agent is required to disclose that licensee’s agency status to a listing broker when setting up an appointment showing, must the listing broker also disclose to the buyer’s agent that the listing broker represents the seller?

A: Yes, on the first contact with the licensee representing the buyer.

Q: Does the TREC encourage brokerage companies to act for more than one party in the same transaction?

A: No.

Q: Must the intermediary broker furnish written notice to each party to a transaction when the broker designates the appointed licensees?

A: Yes.

Q: How is a property “showing” different from a proposed transaction?

A: The question appears to be “may an associate show property listed with the associate's broker while representing the buyer without first being appointed by the intermediary, and if so, why?” Yes. Only showing property does not require the associate to be appointed, because it does not require the licensee to give advice or opinions (only an appointed associate may offer opinions or advice to a party). If no appointments will be made, of course,
the associate will be working with the party and will not be authorized to provide opinions or advice.

Q: Does TREC recommend that licensees provide a written disclosure of agency?

A: It is the licensee’s choice as to whether disclosure is in writing or oral, just as it is the licensee’s choice as to whether proof of disclosure will be easy or difficult.

Q: Our company policy requires all buyers and sellers to agree to the intermediary practice before commencing to work with them. Does the law permit a broker employment agreement to specify this practice only?

A: If by “broker employment agreement” you mean a listing contract or buyer representation agreement, yes.

Q: What are the differences between the duties provided to the seller or landlord by the intermediary broker and the duties provided to the buyer or tenant by the appointed licensee?

A: The intermediary and the appointed licensees do not provide duties; they perform services under certain duties imposed by the law. The intermediary is authorized to negotiate a transaction between the parties, but not to give advice or opinions to them in negotiations. The appointed licensee may provide advice or opinions to the party to which the licensee has been appointed. Both intermediary and appointed licensee are obligated to treat the parties honestly and are prohibited from revealing confidential information or other information addressed in Section 1101.561.

Q: Must each party’s identity be revealed to the other party before an intermediary transaction can occur?

A: Yes. If associates are going to be appointed by the intermediary, the law provides that the appointments are made by giving written notice to both parties. To give notice,
the intermediary must identify the party and the associate(s) appointed to that party. The law does not require notice if no appointments are going to be made. The law provides that the listing contract and buyer representation agreement are sufficient to establish the written consent of the party if the obligations of the broker under Section 15C(j) are set forth in conspicuous bold or underlined print.

Q: As a listing agent I hold open houses. If a buyer prospect enters who desires to purchase the property at that time, can I represent that buyer and, if so, must my broker designate me as an appointed licensee and provide the parties with written notice before I prepare the purchase offer?

A: As a representative of the seller, you would be obligated to disclose your representation to the buyer at the first contact. The disclosure may be in writing or oral. As an associate of the listing broker, you can enter into a buyer representation agreement for your broker to act as an intermediary in a transaction involving this buyer and the owner of the property. If the owner has similarly authorized the broker to act as an intermediary, it will depend on the firm’s policy whether appointments are to be made. If appointments are not going to be made, you may proceed in the transaction as an unappointed licensee with a duty of not favoring one party over the other. If appointments are going to be made, the parties must both be notified in writing before you may provide opinions or advice to the buyer in negotiations.

Q: I have a salesman’s license through a broker and I also have a licensed assistant. Can that assistant be an appointed licensee under me as an intermediary?

A: Your broker, not you, will be the intermediary. The intermediary may appoint a licensed associate to work with a party. If the licensed assistant is an associate of the broker, the licensed assistant could be appointed by the intermediary to work with one of the parties. If the licensed assistant is not an associate of the broker, the licensed assistant cannot be appointed. Note: If the licensed assistant is licensed as a salesman, the licensed assistant must be sponsored by, and acting for, a broker to be
authorized to perform any act for which a real estate license is required. If the licensed assistant is sponsored by a broker who is not associated with the intermediary, the licensed assistant would not be considered an associate of the intermediary either.

Q: I am a listing agent and a buyer prospect wants to buy the property I have listed. How can I sell my own listing?
A: See the three alternatives discussed in the previous issue of the Advisor. You could alter the agency relationships and only represent one party, you could be appointed to work with one party and another associate could be appointed to work with the other party, or no appointments would be made, or you could work with the parties being careful not to favor one over the other or provide advice or opinions to them.

Q: Must the respective appointed licensees each provide an opinion of value to the respective buyer prospect and seller prospect?
A: At the time a property is listed, the licensee is obligated to advise the owner as to the licensee’s opinion of the market value of the property. Once appointments have been made, the appointed associates are permitted, but not required, to provide the party to whom they have been appointed with opinions and advice during negotiations.

Q: How can the intermediary broker advise the seller or buyer on value, escrow deposit amount, repair expenses, or interest rates?
A: When the listing contract or buyer representation agreement has come into existence, and no intermediary status yet exists, the broker may advise the parties generally on such matters. Offers from or to parties not represented by the intermediary’s firm may have made the parties knowledgeable on these matters. Once the intermediary status has been created, however, the intermediary broker may not express opinions or give advice during negotiations. Information about such matters which does not constitute an opinion or advice may be supplied in response to question. For example, the intermediary could tell the buyer what the prevailing
interest rate is without expressing an opinion or giving advice. The seller’s question about the amount of earnest money could be answered with the factual answer that in the broker’s experience, the amount of the earnest money is usually $1,500 to $2,000, depending on the amount of the sales price. If the buyer asks what amount of money should be in the offer, the intermediary could respond with the factual statement that in the intermediary’s experience, those offers closest to the listing price tend to be accepted by the seller. The intermediary also could refer the party to an attorney, accountant, loan officer or other professional for advice.

Q: I was the listing agent for a property that didn’t sell but was listed by another broker after the expiration of my agreement. I now have a buyer client who wants to see that same property. Must the new broker, or my broker, designate me as an appointed licensee or how may I otherwise act?

A: Assuming an agreement with the listing broker as regards cooperation and compensation, you may represent the buyer as an exclusive agent. You cannot be appointed by the intermediary because you are not an associate of the listing broker, and from the facts as you describe them, no intermediary status is going to arise. Confidential information obtained from the seller when you were acting as the seller’s agent, of course, could not be disclosed to your new client, the buyer.

Q: How is the intermediary broker responsible for the actions of appointed licensees when a difference of opinion of property value estimates is provided?

A: Brokers are responsible for the actions of their salesmen under TREL. Opinions of property values may be different and yet not indicative of error or mistake by the salesmen. If a salesman makes an error or mistake, the sponsoring broker is responsible to the public and to TREC under Section 1(c) of TREL.
Q: Although both the buyer and the seller initially consented to the intermediary broker practice at the time each signed a broker employment agreement, must each party consent again to a specific transaction to ensure there are not potential conflicts?

A: TRELAs does not require a second written consent. TRELAs does require written notice of any appointments, and the written notice would probably cause any objection to be resolved at that point. A broker would not be prohibited from obtaining a second consent as a business practice, so that potential conflicts are identified and resolved. The earnest money contract, of course, would typically identify the parties and show the intermediary relationship if the broker attaches the TREC-approved addendum in lieu of Paragraph 8 of the contract.

Q: In the absence of the appointed licensees, can the intermediary broker actually negotiate a purchase offer between the parties?

A: Yes. See the answer to the question relating to the duties of an intermediary.

Q: May a licensee include the statutory statement in a listing agreement or buyer representation agreement, either in the text of the agreement, or as an exhibit?

A: Yes, but the licensee should provide the prospective party with a separate copy of the statutory statement as soon as is practicable at the first face to face contact or substantive conversation on a specific property.

(Source: https://www.trec.texas.gov/newsandpublic/publications/AdvisorIssues/advisor199603.pdf)

On June 9th, 1995 Governor George W. Bush signed into law Senate Bill No. 489, which takes effect January 1, 1996. The bill amends Section 15C of The Real Estate License Act (TRELA) to permit a broker who obtains the written consent of both parties to act as an intermediary between the parties in negotiating the transaction. As an intermediary, the broker must not act to the disadvantage of either party and not reveal confidential information obtained from a party. With the written consent of the parties, the intermediary broker also may appoint other licensees associated with the broker to work with the parties in the transaction. In its final form, the bill neither prohibits nor authorizes the practice of dual agency.

The intermediary bill also requires a licensee who represents a party to disclose that representation at the time of the first contact with another party or another licensee representing the other party. Unlike the current Texas Real Estate Commission (TREC) rule, the bill permits this disclosure of agency to be either oral or in writing. The bill further specifies the text of a statement about duties of a broker acting as agent of the buyer, agent of the seller, or as intermediary between the parties. This statement must be provided to the party by the licensee at the time of the first face-to-face meeting with the party. A face-to-face meeting is defined in the bill as “a meeting at which a substantive discussion occurs with respect to specific real property,” the statement is not required for meetings at open houses or after the parties have signed the contract, for residential leases for not more than one year if no sale is being considered, or for meetings with a party who is represented by another licensee.

TREC will provide more information about the intermediary law and its impact on current TREC rules in the next issue of the Advisor. It is anticipated that copies of the statutory statement will be available from TREC prior to the effective date of the law. Licensees are permitted by the law to print the statement in any format that uses at least 10-point type.

It is the opinion of TREC’s general counsel that licensees should not attempt to act as intermediaries or use the statutory statement prior to the effective date of the
intermediary bill. Since Texas Real Estate Licensing Act does not currently recognize an intermediary status, licensees who act as intermediaries prior to January 1, 1996 would fall within common law agency and be considered dual agents by the courts if the licensees provide opinions and advice to the parties.

(Source: http://www.trec.texas.gov/newsandpublic/publications/AdvisorIssues/advisor199508.pdf)


Effective January 1, 1996, Texas real estate brokers may act as intermediaries between parties in a real estate transaction. Guidelines for establishing an intermediary relationship with parties and appointing associates to work with the parties are provided in Senate Bill Number 489, passed by the 74th Legislature. The bill amends The Real Estate License Act (TRELA) to require real estate licensees who represent a party to disclose that representation upon the first contact with a party or another licensee representing that party. Licensees are also required to provide a party to a prospective real estate transaction with a copy of statutory language concerning agency relationships and brokerage services. Questions and answers have been developed to assist licensees in complying with the provisions of the new law (see page 4 this issue). The Commission has approved an addendum to TREC earnest money contracts for voluntary use by intermediaries (see related article below). Copies of the new law, the addendum and English and English/Spanish versions of the required statutory information are available by TRECFax.

(Source: Broker intermediary relationship permitted January 1, 1996. TREC Advisor.)
Intermediary Question and Answers. TREC Advisor.

The following questions and answers have been developed to assist licensees in complying with the provisions of the new law. These answers are intended to address general situations only and are not intended as legal opinions addressing the duties and obligations of licensees in specific transactions. What licensees say and do in a specific transaction may cause these general answers to be inapplicable or inaccurate. Licensees should consult their own attorneys or legal advice concerning the new law’s effect on their brokerage practices.

Q: Explain how a typical intermediary relationship is created and how it would operate.

A: At their first face to face meeting with a seller or a prospective buyer, the salesmen or brokers associated with a firm would provide the parties with a copy of the statutory information about agency required by The Real Estate License Act (TRELA). The statutory information includes an explanation of the intermediary relationship. The brokerage firm would negotiate a written listing contract with a seller and a written buyer representation agreement with a buyer. In those documents, the respective parties would authorize the broker to act as an intermediary and to appoint associated licensees to work with the parties in the event that the buyer wishes to purchase a property listed with the firm. At this point, the broker and associated licensees would be functioning still as exclusive agents of the individual parties. The listing contract and buyer representation agreement would contain in conspicuous bold or underlined print the broker’s obligations set forth in Section 1101.651 of the Texas Real Estate License Act. When it becomes evident that the buyer represented by the firm wishes to purchase property listed with the firm, the intermediary status would come into play, and the intermediary may appoint different associates to work with the parties. The intermediary would notify both parties in writing of the appointments of licensees to work with the parties. The associates would provide advice and opinions to their
respective parties during negotiations, and the intermediary broker would be careful not to favor one party over the other in any action taken by the intermediary.

Q: What is the difference between a dual agent and an intermediary?

A: A dual agent is a broker who represents two parties at the same time in accordance with common law obligations and duties. An intermediary is a broker who negotiates the transaction between the parties subject to the provisions of Section 1101.559 of The Texas Real Estate License Act. The intermediary may, with the written consent of the parties, appoint licensees associated with the intermediary to work with and advise the party to whom they have been appointed. In a dual agency situation in which two salesmen are sponsored by the same broker but are working with different parties, the broker and the salesmen are considered to be agents of both parties, unable to act contrary to the interests of either party.

Q: In what way does the new legislation prohibit or permit disclosed dual agency?

A: Disclosed dual agency is not specifically addressed in the new legislation. Since disclosed dual agency is not prohibited, licensees may, with appropriate disclosure and consent of the parties, act as dual agents.

Q: What is the advantage for the broker in acting as an intermediary?

A: If the broker and associates are going to continue to work with parties they have been representing under listing contracts or buyer representation agreements, the intermediary role is the only statutorily addressed vehicle for handling “inhouse” transactions, providing both parties the same level of service.

Q: If a salesman or associated broker lists a property and has also been working with a prospective buyer under a representation agreement, how can the salesman or associated broker sell this listing under the new law?
A: There are three alternatives for the brokerage firm and the parties to consider:
(1) the firm, acting through the salesman or associated broker, could represent one of the parties and work with the other party as a customer rather than as a client (realistically, this probably means working with the buyer as a customer and terminating the buyer representation agreement).
(2) if the firm has obtained permission in writing from both parties to be an intermediary and to appoint licensees to work with the parties, the salesman or associated broker could be appointed by the intermediary to work with one of the parties.

Note: Another licensee would have to be appointed to work with the other party under this alternative. The law does not permit an intermediary to appoint the same licensee to work with both parties.
(3) if the firm has obtained permission in writing from both parties to be an intermediary, but does not appoint different associates to work with the parties, the salesman or broker associate could function as a representative of the firm. Since the firm is an intermediary, the salesman and associated broker also would be subject to the requirement not to act so as to favor one party over the other.

Q: If a salesman may provide services to a party under the new law without being appointed, why would a broker want to appoint a salesman to work with a party?

A: Appointment following the procedures set out in the new law would permit the salesman to provide a higher level of service. The appointed salesman may provide advice and opinions to the party to whom the salesman is assigned and is not subject to the intermediary’s statutory duty of not acting so as to favor one party over the other.
Q: Is an intermediary an agent?

A: Yes, but the duties and obligations of an intermediary are different than for exclusive, or single, agents

Q: What are the duties and obligations of an intermediary?

A: Section 15C requires the intermediary to obtain written consent from both parties to act as an intermediary. A written listing agreement to represent a seller/landlord or a written buyer/tenant representation agreement which contains authorization for the broker to act as an intermediary between the parties is sufficient for the purposes of Section 1101.651 if the agreement sets forth, in conspicuous bold or underlined print, the broker’s obligations under Section 15C(j) and the agreement states who will pay the broker. If the intermediary is to appoint associated licensees to work with the parties, the intermediary must obtain written permission from both parties and give written notice of the appointments to each party. The intermediary is also required to treat the parties fairly and honestly and to comply with Texas Real Estate License Act. The intermediary is prohibited from acting so as to favor one party over the other, and may not reveal confidential information obtained from one party without the written instructions of that party, unless disclosure of that information is required by Texas Real Estate License Act (TRELA), court order, or the information materially relates to the condition of the property. The intermediary and any associated licensees appointed by the intermediary are prohibited from disclosing without written authorization that the seller will accept a price less than the asking price or that the buyer will pay a price greater than the price submitted in a written offer.

Q: Can salesmen act as intermediaries?

A: Only a broker can contract with the parties to act as an intermediary between them. In that sense, only a broker can be an intermediary. If, however, the broker intermediary does not appoint associated licensees to work with the parties in a
transaction, any salesman or broker associates of the intermediary who function in that transaction would be required to act just as the intermediary does, not favoring one party over the other.

Q: Can there be two intermediaries in the same transaction?

A: No.

Q: Can a broker representing only the buyer be an intermediary?

A: Ordinarily, no; the listing broker will be the intermediary. In the case of a For Sale By Owner or other seller who is not already represented by a broker, the broker representing the buyer could secure the consent of both parties to act as an intermediary.

Q: May an intermediary appoint a subagent in another firm to work with one of the parties?

A: Subagency is still permitted under the law, but a subagent in another firm cannot be appointed as one of the intermediary’s associated licensees under the provisions of Section 1101.560.

Q: May the same salesman be appointed by the intermediary to work with both parties in the same transaction?

A: No; the law requires the intermediary to appoint different associated licensees to work with each party.

Q: May more than one associated licensee be appointed by the intermediary to work with the same party?
A: Yes.

Q: How should an intermediary complete Paragraph 8 of the Texas Real Estate Commission TREC contract forms?

A: Brokers who are acting as intermediaries after January 1 should use the Texas Real Estate Commission TREC addendum approved for that purpose in lieu of completing Paragraph 8 (see "voluntary intermediary addendum approved for use January 1," page 1).

Q: May a broker act as an intermediary prior to January 1, 1996, the effective date of the TRELA amendment?

A: No.

Q: What is the difference between an appointed licensee working with a party and a licensee associated with the intermediary who has not been appointed to work with one party?

A: During negotiations the appointed licensee may advise the person to whom the licensee has been appointed. An associated licensee who has not been appointed must act in the same manner as the intermediary, that is, not giving opinions and advice and not favoring one party over the other.

Q: Who decides whether a broker will act as intermediary, the broker or the parties?

A: Initially, the broker, in determining the policy of the firm. If the broker does not wish to act as an intermediary, nothing requires the broker to do so. If the broker’s policy is to offer services as an intermediary, both parties must authorize the broker in writing before the broker may act as in intermediary or appoint licensees to work with each of the parties.
Q: When must the intermediary appoint the licensees associated with the intermediary to work with the parties?

A: This is a judgment call for the intermediary. If appointments are going to be made, they should be made before the buyer begins to receive advice and opinions from an associated licensee in connection with the property listed with the broker. If the broker appoints the associates at the time the listing contract and buyer representation agreements are signed, it should be clear that the appointments are effective only when the intermediary relationship arises. The intermediary relationship does not exist until the parties who have authorized it are beginning to deal with each other in a proposed real estate transaction; for example, the buyer begins to negotiate to purchase the seller’s property. Prior to the creation of the intermediary relationship, the broker will typically be acting as an exclusive agent of each party. It is important to remember that both parties must be notified in writing of both appointments. If, for example, the listing agent is "appointed" at the time the listing is taken, care must be taken to ensure that the buyer is ultimately also given written notice of the appointment. When a buyer client begins to show interest in a property listed with the firm and both parties have authorized the intermediary relationship, the seller must be notified in writing as to which associate has been appointed to work with the buyer.

Q: Can the intermediary delegate to another person the authority to appoint licensees associated with the intermediary?

A: The intermediary may delegate to another licensee the authority to appoint associated licensees. If the intermediary authorizes another licensee to appoint associated licensees to work with the parties, however, that person must not appoint himself or herself as one of the associated licensees, as this would be an improper combination of the different functions of intermediary and associated licensee. It is also important to remember that there will be a single intermediary even if another licensee has been authorized to make appointments.
Q: May a broker act as a dual agent after January 1, 1996?

A: Dual agency is not prohibited, but the broker who attempts to represent both parties may be subject to common law rules if the broker does not act as an intermediary. Brokers who do not wish to act as exclusive agents of one party should act as a statutory intermediary as provided by 1101.559 and call themselves “intermediaries” rather than “dual agents.”

Q: What are the agency disclosure requirements for real estate licensees after January 1, 1996?

A: To disclose their representation of a party upon the first contact with a party or a licensee representing another party.

Q: Is disclosure of agency required to be in writing?

A: After January 1, 1996, the disclosure may be oral or in writing.

Q: Will use of TREC 3 be required after January 1?

A: No, TREC is repealing the rule requiring use of TREC 3 (see October Commission Meeting Highlights, page 3, this issue).

Q: Will licensees be required to provide parties with written information relating to agency?

A: Yes. Section 15C will require licensees to provide the parties with a copy of a written statement, the content of which is specified in the statute. The form of the statement may be varied, so long as the text of the statement is in at least 10 point type.
Q: Are there exceptions when the statutory statement is not required?

A: Yes; the statement is required to be provided at the first face to face meeting between a party and the licensee at which substantive discussion occurs with respect to specific real property. The statement is not required for either of the following:

1. a transaction which is a residential lease no longer than one year and no sale is being considered; -or-
2. a meeting with a party represented by another licensee.

Q: Are the disclosure and statutory information requirements applicable to commercial transactions, new home sales, farm and ranch sales or transactions other than residential sales?

A: Except as noted above, the requirements are applicable to all real estate transactions. Licensees dealing with landlords and tenants are permitted by the law to modify their versions of the statutory statement to use the terms “landlord” and “tenant” in place of the terms “seller” and “buyer.”

Q: What are the penalties for licensees who fail to comply with Section 1101.652?

A: Failure to comply is a violation of Texas Real Estate License Act TRELA, punishable by reprimand, by suspension or revocation of a license, or by an administrative penalty (fine).

(Source: https://www.trec.texas.gov/newsandpublic/publications/AdvisorIssues/advisor199511.pdf)
If you’re a broker who represents two parties in one transaction, such as a buyer and a seller or a tenant and a landlord, you’re working as an intermediary. Being an intermediary can be a complicated process with legal ramifications if it’s done improperly.

Once you decide to act as intermediary, there are certain things you cannot do. A broker and any sponsored licensee under that broker acting as intermediary may not:

- Disclose to the prospective buyer that the seller will accept a price less than the asking price, unless authorized in writing to do so by the seller.
- Disclose to the seller that the prospective buyer will pay a price greater than the price submitted in a written offer, unless authorized in writing to do so by the buyer.
- Disclose confidential information, unless authorized in writing to disclose the information or required to do so by the Real Estate License Act, a court order, or if the information materially relates to the condition of the property.

The Real Estate License Act requires these prohibitions to be in bold print in any listing agreement or buyer’s representation agreement that authorizes intermediary. It also requires in bold print that a broker and any sponsored licensee under that broker acting as intermediary may not treat a party to the transaction dishonestly or violate the Real Estate License Act. The Texas Association of REALTORS® listing agreements and buyer representation agreements contain these statements.

There’s much more to know about acting as intermediary. Use the flowchart (NOTE: page doesn't exist on current site) in “Working both sides of one transaction” in the June 2013 issue of Texas REALTOR® to help you answer many of the questions associated with the intermediary process.

When a broker represents the seller and the buyer (or landlord and tenant) in the same transaction, the obligations of intermediary are numerous. That broker must answer an avalanche of questions to ensure compliance with the law. For example: Was written consent given? Do appointments have to be made? Can I give advice? This chart will help you answer many of the questions associated with the practice of intermediary.

Start
Are the buyer and the seller both represented by the same broker (whether specifically by the broker or through licensees sponsored by that broker)?

Is the buyer represented by Broker A and the seller represented by Broker B (whether specifically by those brokers or through licensees sponsored by those brokers)?

Does one party choose to leave and be represented by another broker (or sponsored licensee of another broker)?
Once you decide to act as intermediary, a broker and any sponsored licensee under that broker acting as intermediary may not:

- Disclose to the prospective buyer that the seller will accept a price less than the asking price, unless authorized in writing to do so by the seller.
- Disclose to the seller that the prospective buyer will pay a price greater than the price submitted in a written offer, unless authorized in writing to do so by the buyer.
- Disclose confidential information, unless authorized in writing to disclose the information or required to do so by the Real Estate License Act, a court order, or if the information materially relates to the condition of the property.

The Real Estate License Act requires these prohibitions to be in bold print in any listing agreement or buyer’s representation agreement that authorizes intermediary. It also requires in bold print that a broker and any sponsored licensee under that broker acting as intermediary may not treat a party to the transaction dishonestly or violate the Real Estate License Act. The Texas Association of REALTORS® listing agreements and buyer representation agreements contain these statements.

- Broker appoints sponsored licensees to buyer and seller. Broker may not appoint himself. If broker appoints a sponsored licensee for the seller, he must appoint a different sponsored licensee for the buyer and vice versa.
- Requires written consent of the parties and written notification of the appointments to the parties
- Appointed licensees can provide advice and opinions to parties.

Reference: Lori Levy, General Counsel, Texas Association of REALTORS®

Single Agency Brokerage

Brokers today have many agency options, but they must practice the same type of agency throughout their duration as a brokerage firm.

A single agency brokerage only represents a buyer or a seller but never in the same transaction.

So the single agency brokerage works with both buyers and sellers.

- When one of our represented buyers want to buy one of our listings we refer them to a different license holder for representation.
- They never represent both buyer and seller in the same transaction.

This is called “single agency.” These agencies never represent both parties in a transaction. These brokers would check box 9B in the listing agreement and Buyer's Representation Agreement: “NO INTERMEDIARY STATUS”.

“B. No Intermediary Status: Seller agrees that Broker will not show the Property to prospective buyers who Broker represents”

When a buyer or seller has been represented, and then reverts back to customer status, the sales agent must make sure the party understands the difference in services he or she will be receiving from the sales agent.

We will discuss in Lesson Seven confidentiality that was received while this party was a client will never terminate. The duty of confidentiality goes into perpetuity.
Intermediary Brokerage
In today’s real estate profession in Texas, it is not unusual for a broker to have a written agency policy that says:

- Sometimes we represent buyers only.
- Sometimes we represent sellers only.
- When one of our represented buyers wants to buy one of our listings, we represent both under the rules of Intermediary.
- When we are operating as an intermediary, and there are two different agents, we will appoint those two agents to assist the two parties and to give advice and opinions during negotiations to their respective parties.
- If one agent is representing both the buyer and the seller we (allow or do not allow) one agent to handle both sides of the transaction:
  1. **If we allow** one agent to do both sides of the transaction, there will be no appointments. The agent will act as the broker’s intermediary representative. The agent must take care to remain neutral. No advice and no opinions can be given.
  2. **If we do not allow** one agent to do both sides of the transaction, the broker will appoint a different agent to one of the parties.

Note that not all brokers can make appointments. A sole practitioner broker or a broker with only one agent does not have two agents to appoint. Two agents are required to make appointments, and the broker can never be one of them. The broker has duties to both parties and must remain neutral. **No appointments mean any advice, no opinions.**

A sole practitioner can be an intermediary, but there must be at least three agents in a firm for the broker to make appointments.

The following is paragraph 9 of the Listing Agreement. The Buyer’s Representation Agreement reads the same way: The seller must agree to allow Intermediary Status or not allow it. **If the seller says no to Intermediary, no one in the listing company, that is representing a buyer, will be able to show the property.**
How do the appointments get made?

Paragraph 9A above tells the party three different possibilities regarding appointments that the broker has the right to do in an intermediary transaction. When a party agrees to allow the broker to be an intermediary, the party has agreed to the appointment options the broker may make.

One challenge is that the agent does not become appointed until the parties have accepted the appointments in writing. The appointment is what gives the agent the right to give advice and opinions.
The Texas Association of REALTORS® (TAR) provides a form for their members called the Intermediary Relationship Notice. If you are not a member of Texas Association REALTORS®, your broker will be able to furnish you a similar form. The form is used to disclose those license holders who have been appointed and to give the buyer and the seller notice and for the buyer and the seller to accept the appointments.

There is always potential for conflict. The Texas Real Estate Commission License Act has emphasized “informed consent”. Examples of “informed consent” when taking a listing seller consenting to have you represent them in the sale of their property, a buyer consenting to representation in finding them real estate, a tenant consenting to representation in leasing a property and a landlord consenting to represent them in managing their rental property. “Informed consent” and “mutual consent” must have all of the parties to the transaction consenting to the agreements they are about to sign. Never, never proceed in an intermediary transaction without “informed consent.”
INTERMEDIARY RELATIONSHIP NOTICE

To: ___________________________ (Seller or Landlord)
and ___________________________ (Prospect)

From: ___________________________ (Broker’s Firm)

Re: ___________________________ (Property)

Date: ___________________________

A. Under this notice, “owner” means the seller or landlord of the Property and “prospect” means the above-named prospective buyer or tenant for the Property.

B. Broker’s firm represents the owner under a listing agreement and also represents the prospect under a buyer/tenant representation agreement.

C. In the written listing agreement and the written buyer/tenant representation agreement, both the owner and the prospect previously authorized Broker to act as an intermediary if a prospect who Broker represents desires to buy or lease a property that is listed by the Broker. When the prospect makes an offer to purchase or lease the Property, Broker will act in accordance with the authorizations granted in the listing agreement and in the buyer/tenant representation agreement.

D. Broker ☐ will ☐ will not appoint licensed associates to communicate with, carry out instructions of, and provide opinions and advice during negotiations to each party. If Broker makes such appointments, Broker appoints:

_______________________________________ to the owner, and
_______________________________________ to the prospect.

E. By acknowledging receipt of this notice, the undersigned parties reaffirm their consent for broker to act as an intermediary.

F. Additional Information: (Disclose material information related to Broker’s relationship to the parties, such as personal relationships or prior or contemplated business relationships.)

The undersigned acknowledge receipt of this notice

__________________________________________________________________________
Seller or Landlord Date Prospect Date

__________________________________________________________________________
Seller or Landlord Date Prospect Date

(TAR-1400) 1-7-04

Page 1 of 1
What is the advantage of assigning these roles to other licensees? When a broker acts as an intermediary, he or she waives the right to give advice and offer opinions to either party. However, if licensees are appointed to each party, these representatives can communicate advice and opinions freely with their respective clients as long as no confidential information is disclosed. For this reason, appointing licensees is a viable option in a situation where the two parties prefer more guidance from their agents.

This figure illustrates intermediary relationships with and without appointments.

<table>
<thead>
<tr>
<th>WITHOUT APPOINTMENTS</th>
<th>WITH APPOINTMENTS</th>
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<tbody>
<tr>
<td><strong>Budget Brokerage</strong></td>
<td><strong>Speedy Sales</strong></td>
</tr>
<tr>
<td>Supervising Broker, Marla Smith</td>
<td>Supervising Broker, John Wilson</td>
</tr>
<tr>
<td>Marla represents Seller</td>
<td>Marla represents Buyer</td>
</tr>
<tr>
<td>Denise (Salesperson) represents Seller</td>
<td>James (Salesperson) represents Buyer</td>
</tr>
</tbody>
</table>

In the first illustration, Marla of Budget Brokerage must refrain from giving any advice or opinions to the buyer and the seller. John of Speedy Sales must also refrain from giving advice or opinions to the buyer or the seller, but the appointed licensees, Denise and James, may advise their respective clients.

There are many potential liabilities of an intermediary agency relationship. If the agent has not provided full disclosure and obtained the written consent of both principals to participate in the intermediary agency, serious consequences can arise.
Although many real estate licensees view intermediary agency as a hazardous business practice, there are some compelling reasons to consider intermediary agency. Some real estate professionals argue that when an intermediary agent represents both parties, the real estate transaction runs more smoothly and the negotiations are more efficient due to an open line of communication and streamlined approach.

For example, when a principal’s agent works in cooperation with the representative of the third party, the agent is not in a position to verify the actions of that representative. If the agent represents both parties, he or she can be sure of the disclosures made to each party and can monitor the transaction at each level to ensure the laws of agency are upheld and both parties receive equal treatment.

As stated previously, some agents find this role too complicated due to the nature of the differing obligations to each party, and prefer to concentrate their efforts on one principal. Essentially, intermediaries may enjoy more control over the real estate transaction, although their agency relationship is more involved and requires a more attentive approach.

**Consider the following scenario:**

A couple comes to Broker F’s office looking for a small two-bedroom house on the north side of town. She listens to their expectations and quickly discovers that she already represents a seller who has listed a property in this area that fits the couple’s desired property description. Her agency relationship changes with both the buyer and seller at the point when she decides to show this property to the couple, and she obtains the consent of both parties. Broker F is a sole practitioner and cannot do appointments.

She is now the intermediary between the two and must treat them the same, making certain that she never gives one party an advantage over the other.
This means that she cannot offer her advice or opinion to either and that she has an obligation to provide the couple with the same market data used by the seller to determine the listed price so that the couple can make an informed decision on what to offer for the property. As the intermediary, her basic duties are writing the offer, presenting the offer and managing the negotiation of the transaction in a strictly unbiased manner.

When a buyer’s agent (who is working in an office where the policy is to do intermediary transactions with appointments) is getting ready to help the buyer create an offer on an in house listing, the first thing they should get signed is the written Notice of Intermediary form containing the names of the appointed agents. Usually, the buyer agent’s name will be shown as appointed to the buyer. Usually, the listing agent’s name will be shown as appointed to the seller. **Once the buyer signs the form, it frees the buyer’s agent to give advice and opinions.** The buyer and their agent can then continue to write the offer.

The notice is not part of the contract, but when the contract is delivered to the listing agent, the Intermediary Relationship Notice should be on top. The listing agent should get the form signed by the seller before presenting the offer. **Once the form is signed, the listing agent is free to give advice and opinions to the seller.** The agent can then present the offer.

**Note:** You only use the Intermediary Relationship Notice when your broker is acting as an intermediary (representing both the buyer and the seller in the same transaction).

If your broker is not appointing two sales agents, there are no appointments and “will not appoint” will be checked on the form. No names will be listed of sales agents when there are no appointments.

If the broker is appointing two different agents to the two different parties the “will appoint” box will be checked, and the two sales agents’ names will be listed.
Being an Intermediary is Optional

Sometimes brokers incorrectly believe that they must be an intermediary to handle both the buyer and seller sides of the transaction. They must be an intermediary to represent both parties. Nothing in the law prevents the listing broker from selling a property to a buyer customer as long as the customer understands that the seller will be getting preferential advice and opinions and the buyer is not represented and will not receive advice and opinions.

Just as a customer can purchase a suit from a department store, a customer can purchase a home from XYZ Realty. In both situations, the sales agent represents the seller. The sales agent can give customer service but must not violate the loyalty to the seller whom they represent.

For example, if you are a sole practitioner you could be an intermediary but you do not have two agents to appoint. If you are the listing broker and are showing the home to a buyer that has a law degree, the buyer is very capable of representing themselves. Another example might be a buyer that is an investor that buys and sells a lot of property or a commercial broker with a real estate license. If your seller on this property needs a lot of help and a lot of advice and opinions, it may be better to allow the buyer to represent themselves so that you can continue to give advice and opinions to the seller who really needs it.

If a broker becomes an intermediary with no appointments, no one can receive advice or opinions.

Another example would be an agent that has been representing a buyer and finds a “For Sale by Owner” property they believe the buyer would be interested in. The first thing the agent will do is contact the seller, to see if the seller will give them permission to show the property. The agent would negotiate for the seller to pay any commission on behalf of the buyer. The agent would get those things in writing before showing the property. In this example, the agent may continue treating the buyer as the client and may treat the seller as a customer. All parties need to understand who the broker is working for.
When Not to be an Intermediary?

There are times when being an intermediary is not a good option. If the listing broker or any of the listing broker’s sales agents are buying a company listing for their own account, there is no doubt the broker or the agent is representing themselves. The essence of an agency relationship is putting the interest of the client above that of the agent. It would be safer if the seller was represented by a different firm or at a minimum was advised to get a professional appraisal and talk with their own attorney before proceeding.

Watch Out for Greed

Brokers must be careful to not allow greed to cause them to violate their fiduciary duties. For example, broker Jim is interested in purchasing a property that his sponsored agent Mary has had listed for several months. The property has been listed at $125,000 which seems to be a reasonable price. Broker Jim makes an offer on the property for $115,000, and the seller is happy to accept it. The transaction is to close in 3 weeks.

Two weeks after the signed contract was executed the firm received an offer from another buyer for the full list price of $125,000.

It may be tempting for broker Jim to go forward with both transactions and make an extra $10,000. That would be a violation of the broker’s fiduciary duties to the seller. The interest of the seller must come first. The licensing act also says the broker must keep the client informed of anything material.

Violations of fiduciary duties and violations of the licensing act may have serious consequences.

- Losing the commission on the transaction
- Loss of your real estate license and your livelihood
- Law suits for damages

A National Association of REALTORS® magazine article, in October 2014, regarding broker liability contained the following paragraph:
“Breach of fiduciary duty lawsuits, as in previous years, accounted for the largest single number of residential real estate-related court cases, although in the cases where a determination was made, licensees were found liable only 40 percent of the time. This topic generated a significant number of court decisions (a 29 percent increase over 2011 in case law and jury verdicts) focusing on not only breach of fiduciary duty but also undisclosed dual agency and conflicts over the duties owed to a customer by a buyer’s representative.”

**Specialized Intermediary Applications**
Real estate transactions can consist of many more types of real estate than residential property. The agency laws and disclosures we have been discussing apply to all types of real estate. Residential and commercial leasing and sales, farm and ranch leasing and sales, condominium leasing and sales, apartment leasing, real estate exchanges, etc. are all covered by the same laws.

It is important that any broker offering intermediary services be totally familiar with Texas law and be able to educate their sales agents. That need for knowledge doubles when handling a transaction on a type of property the broker and the agent are not completely experienced with. If there are questions regarding how to handle representation in any transaction, the broker must get help from legal advisors before proceeding.

**Intentional vs Unintentional Dual Representation**
When a broker acts as an intermediary in a transaction and follows the laws explicitly that is intentional dual representation. There are several ways an agent can expose themselves and their broker to charges of dual representation that was not intended or was accidental.

Accidental dual representation is most likely to happen when an agent shows a property listed by her/his company and allows the buyer to believe they are being represented
without written permission to be an intermediary. The permission is usually given when the buyer signs a Buyer’s Representation Agreement. Without written permission the company is not an intermediary; they are an undisclosed dual agent.

The following are four actual complaints where brokers/agents were found guilty and penalized because they tried to do an Intermediary transaction and did not have written permission, among other complaints. These were all in the 4th Quarter of 2014.

<table>
<thead>
<tr>
<th>Agreed two-year suspension of broker license fully probated for two years.</th>
<th>Consumer Complaint: Broker, while still a salesperson, represented buyers and sellers in a written offer situation without providing the parties with an Information About Brokerage Services form at the time of the first substantive dialogue and without obtaining the buyers’ and sellers’ written consent to an intermediary relationship. She accepted compensation for a real estate transaction from a person other than the broker with whom she was associated at the time of the transaction. She acted negligently or incompetently by not determining the record owners of a property before she offered it for sale, added an effective date to a contract document before it was fully executed, and used language that did not clearly distinguish between the sale of real property and the sale of a note the was secured by a lien on real property.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreed administrative penalty of $3,500.00.</td>
<td>Consumer Complaint: Respondent, on behalf of her sponsoring broker, was the listing agent for a property. Respondent prepared an offer on behalf of a prospective buyer. Respondent did not obtain written consent to act as an intermediary, and prepared an Intermediary Relationship Notice incorrectly as it indicated that Respondent would be appointed as the agent for both the seller and the prospective buyer. Respondent forwarded the sales contract to the prospective buyer without flagging the changes made by</td>
</tr>
</tbody>
</table>

| Agreed reprimand of salesperson. Agreed administrative penalty of $1,000.00. | |

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Another way an agent can easily fall into accidental agency happens when the agent is showing another broker’s listing, and that seller has offered sub-agency through the MLS system. MLS permits the listing broker to offer compensation and cooperation to buyer's agents, sub-agents or both. If a seller and the listing broker offer sub-agency it must be declined or any agent showing the property is automatically representing the seller through the listing broker.

The best way to avoid accidental dual representation when showing other broker's listings is to follow the disclosure laws. The licensing act says that if the agent is representing anyone, they must disclose that to any other agent or another party at first contact. If an

<table>
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<tr>
<th>Consumer Complaint:</th>
<th>Agree two-year suspension of broker license fully probated for two years.</th>
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<tr>
<td></td>
<td>Agreed administrative penalty of $3,750.00.</td>
</tr>
<tr>
<td></td>
<td>Agreed reprimand of broker.</td>
</tr>
<tr>
<td></td>
<td>Agreed administrative penalty of $2,500.00.</td>
</tr>
</tbody>
</table>

seller. The prospective buyer did not realize changes had been made until the transaction neared closing. The prospective buyer objected to the changes, decided not to close on the property, and did not receive a full refund of his earnest money.

<table>
<thead>
<tr>
<th>Consumer Complaint:</th>
<th>Respondent acted as an intermediary between parties to a real estate transaction without first obtaining written consent from each party for the Respondent to act as an intermediary in the transaction. Respondent acted negligently or incompetently by failing to complete contract forms. Respondent failed to maintain required records for at least four years from the termination of a contract.</th>
</tr>
</thead>
</table>

Consumer Complaint:
Respondent did not obtain written consent to act as an intermediary. A salesperson sponsored by Respondent prepared a sales contract regarding the property and indicated that Respondent was acting as intermediary. Respondent failed to properly supervise or advise its sponsored salesperson of the scope of the salesperson's authorized activities under The Real Estate License Act.

The best way to avoid accidental dual representation when showing other broker's listings is to follow the disclosure laws. The licensing act says that if the agent is representing anyone, they must disclose that to any other agent or another party at first contact. If an
agent calls for an appointment and tells the listing agent “I am representing the buyer”, they have declined sub-agency if it was offered.

If the seller happens to be at home when the buyer and the buyer's agent arrive at the property again the buyer's agent should tell the seller “I am here representing the buyer”. If you get in the habit of doing what the law requires, you will not have to worry about sub-agency being offered.

Another hotbed of liability for accidental dual representation is open houses. Remember everyone in the listing broker's office represents the seller and owes the seller fiduciary duties.

Even if you are holding the open house for the listing agent, you are there representing the seller. You owe it to the seller to try to sell this house first. You are not free to talk to potential buyers about other properties until they have ruled this house out.

The law says you must tell everyone at first contact when you are representing anyone. This disclosure can be oral or in writing. So you are required to notify everyone that comes into the open house that you are here representing the seller. Open houses are not exempt from this disclosure.

You do not have to deliver the IABS form to people that attend your open house. However, if one of the attendees becomes really interested in the property you need to give the IABS and if the buyers want you to represent them too, get the Buyer's Rep Agreement with permission to be an intermediary and a Notice of Intermediary signed, before writing an offer.

**Activity: Buyer’s Agent, Seller’s Agent or Intermediary?**

Here we present five scenarios regarding agency relationships. Consider the situation, and then decide if the agent is acting as the buyer's agent, the seller's agent or as an intermediary.
1. Buyer A asks Agent A for advice with negotiations. Agent A says, “I’m sorry. That would contradict my client’s interests.”

Agent A is the:

☐ Buyer’s agent  ☐ seller’s agent  ☐ intermediary

Feedback: The correct answer is “seller’s agent.” The agent represents his or her client’s interests; therefore, a seller’s agent would treat the buyer fairly but would not give the buyer advice. The buyer’s agent would give the buyer advice with negotiations, and the intermediary would not give advice to either party.

2. Agent B explains to the buyer and the seller that she is required to remain neutral to both parties throughout the transaction.

Agent B is the:

☐ Buyer’s agent  ☐ seller’s agent  ☐ intermediary

Feedback: The correct answer is “intermediary.” A buyer’s agent or seller’s agent represents his or her client’s interests, but the intermediary must remain neutral towards both parties.

3. Buyer C originally offered $150,000 on the house, but Agent C suspects that she is willing to offer more. Agent C tells the seller about her suspicion.

Agent C is the:

☐ Buyer’s agent  ☐ seller’s agent  ☐ intermediary

Feedback: The correct answer is “seller’s agent.” Information such as a buyer’s intent to pay more than offered is considered confidential information. Buyer’s agents must
not disclose the buyer’s confidential information, and intermediaries must maintain confidentiality for both parties. The seller’s agent, however, has no such obligation and should always tell the seller any information that the buyer discloses.

4. Seller D and Buyer D are involved in a purchase and sale transaction, and Agent D learns that the neighborhood’s school has the lowest test scores in the city. Agent D immediately discloses this information to the buyer.

Agent D is the:

☐ Buyer’s agent ☐ seller’s agent ☐ intermediary

Feedback: The correct answer is “buyer’s agent.” The seller’s agent and the intermediary are required to disclose material facts about the property to the buyer, but information such as a school’s test scores is not considered a material fact. The buyer’s agent, on the other hand, would want to find out this type of information on behalf of his or her client.

5. Agent E appoints Salesperson X to represent the interests of the buyer and Salesperson Y to represent the interests of the seller.

Salesperson X is the:

☐ Appointed licensee ☐ seller’s agent ☐ intermediary

Feedback: The correct answer is “appointed licensee.” When an intermediary appoints a salesperson or other associated licensee to represent the interests of a party, that licensee becomes the party’s appointed licensee. Appointed licensees are able to give advice and opinions to the party they are appointed to.
Before You Go

Review below questions and scenarios.

1. Can a sole practitioner be an intermediary?
2. Can a sole practitioner make appointments?
3. Are you required to give the IABS form to everyone at an open house?
4. Are you required to let attendees at an open house know you are representing the seller?
5. A listing broker sponsors 25 agents. Mary, one of the agents in the firm, gets a new listing. How many agents in the firm represent that seller?

Correct Answer

1. Yes
2. No, they have no one to appoint
3. No
4. Yes
5. 26

Lesson Summary

A broker can have four positions in an agency relationship: the seller’s agent, the buyer’s agent, a sub-agent or an intermediary agent.

The seller’s agent typically enters into the agency relationship with the seller through a listing agreement, which expressly sets forth the terms of the relationship and the compensation agreement. The seller’s agent owes fiduciary duties to the seller. In addition, the seller’s agent might provide services for the seller such as advice with negotiations and help with the closing process. Sometimes, the seller’s agent will also provide helpful services to the buyer. As long as these actions ultimately benefit the seller, there is no breach of loyalty or conflict of interest.

An agency relationship between a buyer and a broker can be created by oral or written agreement or through behaviors that imply authorization. Many licensees choose to use
a buyer representation agreement to expressly set forth the terms of the agency relationship and the compensation agreement. The buyer's agent owes fiduciary duties to the buyer. In addition, the buyer’s agent might provide services for the buyer such as advice with negotiations, assistance with loan applications and help with the closing process.

In Texas, a sub-agent is a license holder who represents a principal through the principal’s agent and is not sponsored by or associated with the principal’s agent. Sub-agency frequently occurs when the seller allows the listing agent to appoint another agent to facilitate the transaction.

Sub-agency sometimes occurs through the multiple listing services, which is a sizeable inventory of properties in a specified area that is maintained by the real estate brokerage industry and is viewable by all members of that multiple-listing organization.

When a listing broker enters a property in MLS they can choose to co-operate with and compensate either buyer agents, sub-agents or both. If sub-agency is offered and the person showing the property does not want to be the seller’s sub-agent, the offer of sub-agency must be declined. Telling the listing agent of the seller that the showing agent is representing the buyer is a decline of sub-agency.

In a relationship of single agency, the agent (broker) represents only one party to the transaction; an intermediary agent (broker), on the other hand, represents both parties to the transaction. A salesperson may not act as an intermediary; this relationship must be formed at the level of the supervising broker. The salesperson is an associated licensee.

To enter into an intermediary relationship, the agent must have the written consent of both parties and must put the source of compensation in writing. The intermediary broker may choose to appoint salespeople to represent each prospective party. Because it is difficult, if not impossible, for an intermediary to fully represent the conflicting interests
of both the buyer and the seller, the intermediary is not held to the duty of 100% loyalty. Instead, the intermediary must treat both parties equally and honestly and maintain confidentiality of both parties.

Appointed licensees can give advice and opinions to the party they are appointed to. An intermediary with no appointments means no advice, no opinions to either party.
Lesson Seven: Creation and Termination of Agency

Lesson Topics
This lesson focuses on the following topics:

- Rules of The Texas Real Estate Commission
- How and When is Agency Created
- How Agency is Terminated
- Duties of Agency that Survive Termination

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

- Recognize the many ways an agency relationship can be formed.
- Identify situations that may result in accidental agency.
- Describe Texas agency laws and how the laws protect real estate agents.

Rules of the Texas Real Estate Commission
In addition to The Real Estate License Act, brokers and sales agents must also comply with the rules of the Texas Real Estate Commission. Rules are separate interpretations of the Texas Real Estate License Act.

The following is for you to understand how the rules of the Texas Real Estate Commission (TREC) apply to the Texas Real Estate License Act (TRELA).

What is Administrative Law?
There are two main types of administrative law:

- rules and regulations and
- administrative decisions.

Both are made by government agencies or commissions which derive their authority from a state legislature. Most of these agencies or commissions are part of the executive
branch of government.

**What are Administrative Rules and Regulations?**
The laws passed by the state legislature do not go into detail about how the law is to be applied and enforced, or about the procedures to be used. This is the role of executive departments and agencies, which promulgate and administer rules and regulations that govern how the law will be carried out. Like statutes and case law, these rules and regulations are considered primary and binding law for citizens of the jurisdiction.

**How a Bill Becomes a Law in Texas**

**Introducing a Bill**
A representative or senator gets an idea for a bill by listening to the people he or she represents and then working to solve their problem. A bill may also grow out of the recommendations of an interim committee study conducted when the legislature is not in session. The idea is researched to determine what state law needs to be changed or created to best solve that problem. A bill is then written by the legislator, often with legal assistance from the Texas Legislative Council, a legislative agency which provides bill drafting services, research assistance, computer support, and other services for legislators.

Once a bill has been written, it is introduced by a member of the house or senate in the member's own chamber. Sometimes, similar bills about a particular issue are introduced in both houses at the same time by a representative and senator working together. However, any bill increasing taxes or raising money for use by the state must start in the House of Representatives.

House members and senators can introduce bills on any subject during the first 60 calendar days of a regular session.

After 60 days, the introduction of any bill other than a local bill or a bill related to an emergency declared by the governor requires the consent of at least four-fifths of the
members present and voting in the house or four-fifths of the membership in the senate.

After a bill has been introduced, a short description of the bill, called a caption, is read aloud while the chamber is in session so that all of the members are aware of the bill and its subject. This is called the first reading, and it is the point in the process where the presiding officer assigns the bill to a committee. This assignment is announced on the chamber floor during the first reading of the bill.

The Committee Process
The chair of each committee decides when the committee will meet and which bills will be considered. The house rules permit a house committee or subcommittee to meet:

1. in a public hearing where testimony is heard and where official action may be taken on bills, resolutions, or other matters;
2. in a formal meeting where the members may discuss and take official action without hearing public testimony; or
3. in a work session for discussion of matters before the committee without taking formal action. In the senate, testimony may be heard and official action may be taken at any meeting of a senate committee or subcommittee. Public testimony is almost always solicited on bills, allowing citizens the opportunity to present arguments on different sides of an issue.

A house committee or subcommittee holding a public hearing during a legislative session must post notice of the hearing at least five calendar days before the hearing during a regular session and at least 24 hours in advance during a special session. For a formal meeting or a work session, written notice must be posted and sent to each member of the committee two hours in advance of the meeting or an announcement must be filed with the journal clerk and read while the house is in session. A senate committee or subcommittee must post notice of a meeting at least 24 hours before the meeting.

After considering a bill, a committee may choose to take no action or may issue a report on the bill. The committee report, expressing the committee's recommendations regarding action on a bill, includes a record of the committee's vote on the report, the text
of the bill as reported by the committee, a detailed bill analysis, and a fiscal note or other impact statement, as necessary. The report is then printed, and a copy is distributed to every member of the house or senate.

In the house, a copy of the committee report is sent to either the Committee on Calendars or the Committee on Local and Consent Calendars for placement on a calendar for consideration by the full house. In the senate, local and noncontroversial bills are scheduled for senate consideration by the Senate Administration Committee. All other bills in the senate are placed on the regular order of business for consideration by the full senate in the order in which the bills were reported from senate committee. A bill on the regular order of business may not be brought up for floor consideration unless the senate sponsor of the bill has filed a written notice of intent to suspend the regular order of business for consideration of the bill.

**Floor Action**

When a bill comes up for consideration by the full house or senate, it receives its second reading. The bill is read, again by caption only, and then debated by the full membership of the chamber. Any member may offer an amendment, but it must be approved by a majority of the members present and voting to be adopted. The members then vote on whether to pass the bill. The bill is then considered by the full body again on third reading and final passage. A bill may be amended again on third reading, but amendments at this stage require a two-thirds majority for adoption. Although the Texas Constitution requires a bill to be read on three separate days in each house before it can have the force of law, this constitutional rule may be suspended by a four-fifths vote of the house in which the bill is pending. The senate routinely suspends this constitutional provision in order to give a bill an immediate third reading after its second reading consideration.

The house, however, rarely suspends this provision, and third reading of a bill in the house normally occurs on the day following its second reading consideration. In either house, a bill may be passed on a voice vote or a record vote. In the house, record votes are tallied by an electronic vote board controlled by buttons on each member's
desk. In the senate, record votes are taken by calling the roll of the members.

If a bill receives a majority vote on third reading, it is considered passed. When a bill is passed in the house where it originated, the bill is engrossed, and a new copy of the bill which incorporates all corrections and amendments is prepared and sent to the opposite chamber for consideration. In the second house, the bill follows basically the same steps it followed in the first house. When the bill is passed in the opposite house, it is returned to the originating chamber with any amendments that have been adopted simply attached to the bill.

**Action on the Other House's Amendments and Conference Committees**

If a bill is returned to the originating chamber with amendments, the originating chamber can either agree to the amendments or request a conference committee to work out differences between the house version and the senate version. If the amendments are agreed to, the bill is put in final form, signed by the presiding officers, and sent to the governor.

Conference committees are composed of five members from each house appointed by the presiding officers. Once the conference committee reaches agreement, a conference committee report is prepared and must be approved by at least three of the five conferees from each house. Conference committee reports are voted on in each house and must be approved or rejected without amendment. If approved by both houses, the bill is signed by the presiding officers and sent to the governor.

**Governor's Action**

Upon receiving a bill, the governor has 10 days in which to sign the bill, veto it, or allow it to become law without a signature. If the governor vetoes the bill and the legislature is still in session, the bill is returned to the house in which it originated with an explanation of the governor's objections. A two-thirds majority in each house is required to override the veto. If the governor neither vetoes nor signs the bill within 10 days, the bill becomes a law. If a bill is sent to the governor within 10 days of final adjournment, the governor
has until 20 days after final adjournment to sign the bill, veto it, or allow it to become law without a signature.

**Constitutional Amendments**

Proposed amendments to the Texas Constitution are in the form of joint resolutions instead of bills and require a vote of two-thirds of the entire membership in each house for adoption. Joint resolutions are not sent to the governor for approval, but are filed directly with the secretary of state. A joint resolution proposing an amendment to the Texas Constitution does not become effective until it is approved by Texas voters in a general election.

*Source: http://www.house.state.tx.us/about-us/bill/*

First the Texas Real Estate Commission Commissioners draft the changes or amendments to the existing Texas Real Estate Commission License Act. The Texas Real Estate License Act is state law.

The Texas Real Estate Commission rules can be written, changed, amended without going through the legislature. The Texas Real Estate Commission with the Administrator, Commissioners and Texas Real Estate Commission attorney write the rules and are included in the Texas Register for comments.

**Texas Register**

A weekly publication, the Texas Register serves as the journal of state agency rulemaking for Texas. Information published in the Texas Register includes proposed, adopted, withdrawn and emergency rule actions, notices of state agency review of agency rules, governor's appointments, attorney general opinions, and miscellaneous documents such as requests for proposals. After adoption, these rulemaking actions are codified into the Texas Administrative Code.
The rules adopted by the Texas Real Estate Commission are located in Title 22 of the Texas Administrative Code. Each rule is identified by a section number in the Code of the Texas Administrative Code.

The rules are also divided into chapters relating to different subjects. Chapter 535 relates to the provisions of the Texas Real Estate License Act.

Lengthy rules may be divided below the subsection level using the following structure:

§ - Section
   (a) – subsection
      (1) Paragraph
         (A) - subparagraph
            (i) – clause
               (I) Sub clause

The Texas Real Estate Commission Rules were first effective January 1, 1976.

CHAPTER 531, CANONS OF PROFESSIONAL ETHICS AND CONDUCT for Real Estate license holders.

Many of these rules deal with fiduciary duties that a license holder owes the principal and the general duties that all license holders owe all clients and customers.

§531.1 Fidelity
A real estate broker or salesperson, while acting as an agent for another, is a fiduciary. Special obligations are imposed when such fiduciary relationships are created. They demand (1) that the primary duty of the real estate agent is to represent the interest of the agent’s client, and the agent’s position, in this respect, should be clear to all parties concerned in a real estate transaction; that, however, the agent, in performing duties to the client, shall treat other parties to a transaction fairly, (2) that the real estate agent be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in
performing the agent’s functions, and (3) that the real estate agent place no personal interest above that of the agent’s client.

§531.2 Integrity
A real estate broker or salesperson has a special obligation to exercise integrity in the discharge of the licensee’s responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission.

§531.3 Competency
It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage practitioner. The agent should:

(1) be informed on market conditions affecting the real estate business and pledged to continuing education in the intricacies involved in marketing real estate for others;
(2) be informed on national, state and local issues and developments in the real estate industry; and
(3) exercise judgment and skill in the performance of the work.

§531.18 Consumer Information
(a) The Commission adopts by reference Consumer Protection Notice TREC No. CN 1-2. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, and www.trec.texas.gov.
(b) Each active real estate broker shall provide the notice adopted under subsection (a) by:

(1) displaying it in a readily noticeable location in each place of business the broker maintains; and
(2) providing a link to it labeled "Texas Real Estate Commission Consumer Protection Notice", in at least a 10-point font, in a readily noticeable place on the homepage of the business website of the broker and sponsored sales agents.
§531.19 Discriminatory Practices
No real estate license holder shall inquire about, respond to or facilitate inquiries about, or make a disclosure of an owner, previous or current occupant, potential purchaser, lessor, or potential lessee of real property which indicates or is intended to indicate any preference, limitation, or discrimination based on the following:

(1) race;
(2) color;
(3) religion;
(4) sex;
(5) national origin;
(6) ancestry;
(7) familial status; or
(8) disability.

For the purpose of this section, disability includes AIDS, HIV-related illnesses, or HIV infection as defined by the Centers for Disease Control of the United States Public Health Service.

§531.20 Information About Brokerage Services
The Commission adopts by reference Information about Brokerage Services Form, TREC No. IABS 1-0 (IABS Form). The IABS Form is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

Each active real estate broker and sales agent shall provide:

(1) a link to the IABS Form labeled "Texas Real Estate Commission Information About Brokerage Services", in at least a 10 point font, in a readily noticeable place on the homepage of the business website of the broker and sales agent; and

(2) the IABS Form as required under §1101.558, Texas Occupations Code.

¹Source Note: The provisions of this §531.19 adopted to be effective February 19, 1990, 15 TexReg 656; amended to be effective May 21, 2014, 39 TexReg 3855
For purposes of §1101.558, Texas Occupations Code, the IABS Form can be provided:

(1) by personal delivery by the broker or sales agent;
(2) by first class mail or overnight common carrier delivery service;
(3) in the body of an email; or
(4) as an attachment to an email, or a link within the body of an email, with a specific reference to the IABS Form in the body of the email.

Providing a link to the IABS Form in a footnote or signature block in an email does not satisfy the requirements of subsection (c).

License holders may reproduce the IABS Form published by the Commission, provided that the text of the IABS Form is copied verbatim and the spacing, borders and placement of text on the page must appear to be identical to that in the published version of the IABS Form, except that the Broker Contact Information section may be prefilled.

It is critical that all license holders understand the six (6) canons on professional conduct and ethics. To adhere to the fiduciary duties you must comply with these canons.

**How and When Agency Created**

The law of agency is a part of the law of contracts. Agency is created by an agreement between two (2) parties; one party is the fiduciary, the license holder for the principal, and represents the principal’s interest when dealing with third parties. Third parties can be anyone other than the license holder and the principal. Therefore it takes two (2) parties to create an agency relationship, the principal and the agent; but for the law of agency to work, it requires three (3) parties:

(1) Principal
(2) License holder
(3) Third Party

To represent a consumer there must be “mutual consent” by all parties to have an agency relationship and to create one.
The following are the different types of agency:

**Actual Agency**
An agency in which the agent is in fact employed by a principal

**Agency by Estoppel**
An agency created by operation of law and established by a principal’s actions that would reasonably lead a third person to conclude that an agency exists.

**Agency by Necessity**
An agency arising during an emergency that necessitates the agent’s acting without authorization from the principal; the relation between a person who in exigent circumstances acts in the interest of another without being authorized to do so.

It is a quasi-contractual relation formed by the operation of legal rules and not by the agreement of the parties.

**Agency by operation of law**
See agency by estoppel

**Agency coupled with an interest**
An agency in which the agent is granted not only the power to act on behalf of a principal but also a legal interest in the estate or property involved.

**Agency in Fact**
An agency created voluntarily, as by a contract. Agency in fact is distinguishable from an agency relationship created by law, such as agency by estoppel

**Apparent Agency**
See agency by estoppel
Exclusive Agency
The right to represent a principal, esp. either to sell the principal’s products or to act as the seller’s real estate agent within a particular market free from competition. Also termed exclusive franchise.

“Contracts involving the element of exclusive agency generally fall into three (3) classes:

1. Where the contract does not prevent the principal from making direct sales but deprives him or her of the right to appoint other agents;
2. Where the agent is the only one with any right to sell
3. Where the exclusive agency is accompanied with as stipulated right to commissions on all sales whether made through the agent or not.

Express Agency
An actual agency arising from the principal's written or oral authorization of a person to act as the principal’s agent.

Financing Agency
A bank, finance company, or other entity that in the ordinary course of business:
- Makes advances against goods or documents of title
- By arrangement with either the seller or the buyer intervenes to make or collect payment due or claimed under a contract for sale as by purchasing or paying the seller’s draft, making advances against it or taking it for collection, regardless of whether documents of title accompany the draft.

General Agency
A principal’s delegation to an agent, without restriction, to take any action connected with a particular trade, business or employment. Also termed Universal Agency
Implied Agency
An actual agency arising from the conduct by the principal that implies an intention to create an agency relationship. Also Express Agency.

Ostensible Agency
See agency by estoppel.

Agency by Ratification
When a principal ratifies the acts of the agent after the agency function has been performed.

Special Agency
An agency in which the agent is authorized only to conduct a single transaction or a series of transactions not involving continuous service.

Undisclosed Agency
An agency relationship in which an agent deals with a third party who has no knowledge that the agent is acting on a principal’s behalf. The fact that the agency is undisclosed does not prohibit the third party from seeking redress from the principal or the agent.

Universal Agency
See general Agency.

Source: Black’s Law Dictionary

When Agency is Created
Written Agreement
There are many different ways agency can be created. In order to have an agency relationship, there must be authorization by the principal and acceptance by the broker.
Much of the time that happens when a formal written listing agreement or a written buyer’s representation agreement is signed by the party and the license holder.

A written agreement that spells out the duties and rights of both the license holder and the principal is the best way to create agency. It is easy to determine when agency was created when there is a written agreement.

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.

Note:

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, whereas express agency may be granted orally.

Agency Created by Oral Agreements

An agency agreement can be formed orally. If a buyer says “I want you to find me a house” and the agent says “I would love to do that” an agency agreement has been formed. The agent owes that buyer all of the same duties that they would owe a buyer on a written agreement. On the other hand, the buyer owes the agent nothing. In Texas, in order to bring a suit for commission, the agreement to pay the agent must be in writing. The agency relationship began when the buyer gave authorization for the agent to act and the agent accepted.

Example:

Seller B and Broker A agreed to enter into an agency relationship. Broker A promised to represent the seller and find a buyer for the property, and Seller B promised to pay Broker A commission of 6% of the purchase price. However, Broker A and Seller B
did not sign a written agreement. Broker A kept her side of the promise and found a buyer for Seller B’s property. The transaction closed smoothly, but after closing, Seller B refused to pay the commission. Do you think Broker A can sue the seller to obtain her commission?

In Texas, this broker would NOT be able to sue the seller for commission. Let’s learn why.

An oral agreement exists when a broker or salesperson promises orally to act on behalf of a seller or buyer. This oral agreement is binding on the broker or salesperson and creates an agency relationship. The broker or salesperson will be held to all duties of an agent.

However, oral agreements are generally NOT enforceable on the seller or buyer, especially when it comes to terms of compensation. Texas law states that in order for a broker to sue for commission or other compensation, the agency agreement must be in writing.

**Agency Created by Actions or by Accident. (Also called Implied Agency)**

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.
Many times agency is created when an agent counsels with a buyer and begins to help them look for property without being clear about representation. If the agent is showing other brokers listings and sub-agency has not been offered, a buyer agency has probably been created by actions. If, however, the agent is showing a property listed by their company and disclosure has not been made to the buyer that the agent is representing the seller, the company has accidentally became an undisclosed dual agent. Sometimes it is left up to the court to determine if an agency relationship existed and when it began.

**Gratuitous Agency (Free)**

The agent can, of course, agree to work for no compensation. This is called *gratuitous agency*, and although no payment changes hands, the agent is still held to all duties of an agency relationship.

Agency does not require the agent to be paid. The fact is, the agent may just be trying to do a favor for a friend and end up exposing themselves and their company to an agency law suit. If the advice the agent gives turns out to be bad advice and the party has a loss because they relied on that advice, the court may find the agent had become their agent and was negligent. The court would determine when the agency relationship was created.

Broker E’s sister is shopping for a house, and Broker E tells her that, if she wants, he can represent her as the buyer’s agent. Broker E then says that he won’t charge her any commission. Is this acceptable?

Sometimes, a broker may choose to market a property for a friend or family member, or he or she may help a friend or family member purchase a property. Often in this situation, the broker will not charge the friend or family member for his or her service.

Even though no payment changes hands, the agent is still held to all responsibilities, liabilities, duties and obligations of an agency relationship. As with every other agency relationship, it is highly recommended that the agent have all terms and expectations
Important Facts Regarding Creating an Agency Relationship:

- Does NOT require writing or payment
- DOES require authorization by the principal and acceptance by the agent.

Watch What You Say

An agent must be aware of whom they are representing at all times. Before meeting with any customer or client, think about who you are representing. Do not say things that could be misconstrued by a customer and make them think you are working for them rather than with them. Until you become their agent do not say things like:

- I will take care of everything.
- I will find a good home for you.
- Just leave it to me.
- I can help you get a good deal.

Regardless of how the agency relationship is created, a number of duties and responsibility for both the license holder and principal begin immediately.

Antitrust Laws and Commission Rates

Federal antitrust laws, particularly the Sherman Antitrust Act, have had a major impact on the real estate industry. The purpose of federal antitrust laws is to promote competition in an open marketplace. To some people not familiar with the real estate business, it appears that all real estate brokers charge the same fee. In fact and in practice nothing is further from the truth. Real estate brokers (only) establish their fees from a complex integration of market facts and the cost to business. All real estate brokerage fees are a result of a negotiated agreement between the owner and the broker.

Cooperation is generally a good thing. But when you get together with competitors to decide prices and other business practices, you can run afoul of antitrust laws.
See how well you know what kind of behavior is acceptable and what might trigger an investigation by the Federal Trade Commission.

Answer true or false.

1. Setting the same fees and commission splits as a competitor does not violate antitrust laws as long as you don’t go through a formal agreement.
2. It is an antitrust violation for a broker to force his or her sales agents to charge a certain commission.
3. Two sales agents within the same firm can charge different commissions, if that’s acceptable to the broker.
4. Though competitors cannot agree to set pricing structures, they can agree to divide territorial boundaries or other types of market segment.
5. It is an antitrust violation if more than 70% of sales agents in one city charge the same commission rate.
6. A broker can be held liable for antitrust violations by one of his or her sales agents even if the broker was unaware of the violation.
7. Which of the following terms is acceptable when discussing your commission?
   a. Standard
   b. Prevailing
   c. Typical
   d. Common
8. You may not ask a seller/owner what an agent from another firm said he or she would charge to sell the owner’s property.
9. If you are present when a discussion takes a turn toward a possible antitrust violation, you should leave as discreetly as possible.
10. A Multiple Listing Service cannot require a minimum commission to input listings into the Multiple Listing Service.
Answers and Discussion:

1. False – Even an informal discussion can be the basis for a price fixing agreement that violates antitrust laws. Never discuss your firm’s commissions with a competitor.

2. False – Commissions are set by the broker based on his or her expenses to run his or her firm. All brokers do not charge the same commissions for real estate transactions.

3. True – It may be true, but sales agents have no authority to reduce commission at any time unless the broker agrees to it in writing.

4. False – Under the federal law, this is considered “steering” and a broker cannot delegate territories to their sales agents.

5. False – Brokers and sales agents can charge the same commission as long as the broker arrived at the commission schedule independently and not with discussion with other brokers.

6. True – A broker should practice due diligence in training their sales agents on how to discuss commission and how the broker arrived at the commission schedule the firm uses to do business. Untrained sales agents can get the broker into a serious liable transaction with the federal government.

7. Never use any of those terms in discussing commissions with anyone.

8. False – There is no reason to ask this question since your services is what should prevail. Even if the consumer baits you and says all brokers charge the same commission, your reply, if any, should be you have no knowledge since you are not sponsored by that broker.

9. False and True. You should leave, but you should say why you are leaving. Example: I am leaving the room because I am not a part of this discussion on commissions, state your name and leave.

10. True – Class action lawsuits proved that many license holders thought the Multiple Listing Service set commissions for all brokers. Again, commissions are set by individual brokers.
It usually comes as a surprise when our words or actions are interpreted other than how we intended. But regardless of what we intend, how we’re interpreted can mean everything in an antitrust investigation.

Consider, for example, this scenario: Two competing brokers are having lunch together when the conversation turns to improving the bottom line. One broker comments, “We’ve considered reducing the compensation we offer to cooperating brokers, but we worry that other companies won’t show our properties. We’d be less concerned if other companies initiated the same policy.”

If both brokers ultimately initiate the compensation reduction policy, this seemingly innocent statement could be used as the basis for charges of price fixing. Although managing brokers within a company can talk freely about how to enhance revenue, they risk violating antitrust law when those discussions leave company boundaries.

Antitrust laws are intended to protect consumers and promote normal marketplace competition by preventing such trade restraints as price fixing, group boycotts, and monopolies. According to federal and state law, companies must establish their fee structures and business relationships independent of competitors, acting in their own best business interests in an economically rational manner.

Therefore, a statement such as “Our company charges x percent commission, which is standard for our area,” is inherently problematic because it implies that competitors have agreed on what to charge.
To maintain a free market, companies are also prohibited from conspiring to boycott or injure competitors and service providers.

An illegal agreement among competitors to restrain trade is implied by this statement: “The policy of our area is not to allow salespeople from outside our town to show our listed properties. We feel our local salespeople know the area and can do a better job showing and selling the properties located here. We’ll gladly pay other salespeople a referral fee if we make a sale to their customer or client.”

Consider another example, affecting a service provider: “To save marketing costs for our clients, our company and two others have decided to withdraw advertising from the local newspaper until it lowers its rates.”

This agreement among companies to terminate or limit their advertising in a particular publication is almost certainly an unlawful group boycott. However, if several companies decide on their own not to advertise, there’s no violation. The essence of a boycott or restraint of trade is collective action that’s the product of a tacit or explicit agreement. Similarly, implying that area brokers have agreed not to show properties listed at reduced commission rates—whether true or not—could be interpreted as a group boycott. It would therefore be unwise to say, “Mr. Seller, if I reduce the commission rate on your listing, none of the other salespeople will show it.”

What if, at a staff meeting, a broker announces, “Effective immediately, we’re initiating a policy of offering varying compensation rates to cooperating brokerages”? Does that create antitrust problems? No. A company can refuse to do business or alter the business arrangements with a competitor or service provider at any time. However, a red flag would go up if a number of different companies instituted such a policy.
Trade groups, such as REALTOR® associations and MLSs, are subject to particular antitrust scrutiny because of their potential to influence a marketplace of multiple companies. Warning bells should sound along with comments like the following: “Our local association members work very well together. All member companies offer the same share of the commission to any company that shows your property and brings you a ready, willing, and able purchaser.”

**Enforcement and Penalties**

The U.S. Department of Justice Antitrust Division prosecutes serious and willful violations of the antitrust laws by filing criminal suits that can lead to large fines and imprisonment. In other cases, the Justice Department or the Federal Trade Commission can file civil action seeking to forbid future violations and remedy the anticompetitive effects of past violations. Antitrust lawsuits can also be brought by private parties and state attorneys general.

The language of conspiracy is in place whenever two or more people appear to be working together to control price, injure another business, or limit market access.

The moral: Practice safe speech by thinking before you speak.


Real estate licensees are subject to the federal antitrust laws, enforced under the Sherman Antitrust Act, that prohibit unfair trade practices in the United States. These laws are rooted in the idea that competition creates the largest choice of products and services for consumers, providing them the broadest range of price and quality. The most common antitrust violations that are associated with the real estate industry
include:

- price fixing,
- boycotting
- competitors
- allocating customers or markets.

**Price Fixing**

Price fixing is the establishment of prices at a determined level for goods or services without allowing for the influence of open-market competition. In real estate, a licensee provides his or her expertise and service to the principal in exchange for compensation. If brokers in a particular market conspire to set the same commission rates for all real estate licensees in that market, they are guilty of price fixing. The law states that a broker must determine the rate of compensation without the influence of any other broker. For this reason, discussion of rates among brokers or licensees from different firms is greatly discouraged, as it could easily be construed as an attempt to establish a set rate.

Likewise, any professional organization such as a multiple listing service cannot deny a broker’s participation in the organization based on the rate of commission he or she charges, nor can the service set a fee or amount of commission.

Here are some suggestions to prevent the appearance of price fixing:

- Avoid discussing fees or rates with any other firms.
- Never tell a client that your rate or fee is “the going rate”.
- Make it clear that fees and rates are generally negotiable.
- If you do set firm rates/fees, make it clear that those are only for your own company.

**Boycotting Competitors**

When two or more parties agree to abstain from dealings with other parties to limit competition, they are essentially boycotting their competitors. In real estate, this may occur if a brokerage is unfairly denied access to a particular real estate professional
organization or if two or more brokers agree to withhold their cooperation from certain brokers. When the one hundred percent brokerages, discount brokerages and virtual office websites, noncooperation from other brokers were prevalent a lot of class action laws suits prevailed and this stopped the boycotting across the United States.

**Allocating Customers or Markets**

If two or more brokers agree to divide a market area up so that each broker only covers a certain segment of that market area, the allocation of these segments is illegal because it restricts open-market competition. For example, if Brokers A, B, C and D are the four major brokers in a city, they cannot have an agreement to exclusively represent the northern, southern, eastern and western areas of the city, respectively. Allocation of markets does not pertain solely to geographic regions; it is also illegal to divide the market in terms of property values.

**Penalties for Antitrust Violations**

Under the Sherman Antitrust Act, individuals found guilty of violations can face fines up to $100,000 and three years of imprisonment. Corporate entities face fines as high as $1 million. In addition, the party who committed the violation may owe civil damages to any injured parties. As you can see, the penalties for violating antitrust laws can be severe.

**How Agency is Terminated**

There are many ways to terminate an agency relationship. Once the relationship is terminated, the agent no longer has authority to act for the principal. The principal is required to inform third parties (that dealt with the agent) that the agency relationship has been terminated. Ways to terminate an agency relationship include:

**Lapse of Time**

If the parties agree to set a time period for the agency relationship, the agency relationship terminates when the time period passes. For example, you hire a person to be your agent for one year. After one year passes, the agency relationship automatically terminates unless you extend it.
Purpose Achieved

Some agents are hired to achieve a certain purpose. Once that purpose is achieved, the agency relationship is automatically terminated (but you can extend it). A prime example is when professional sports players hire an agent to only negotiate contracts.

Mutual agreement: Both parties can agree to terminate the relationship. If both parties agree to part ways, the reason for the termination does not matter.

Certain events: An agency relationship will automatically terminate upon the occurrence of certain events. Such events include death, insanity, or bankruptcy of either the principal or agent. A court of law will usually step in and terminate the agency relationship if one of the parties refuses to do so. Both parties may also specify particular events that can cause termination.

By Acts of the Parties

- Accomplishment of purpose
- Expiration
- Mutual Agreement
- Renunciation by the Agent
- Revocation by the Principal
- Abandonment of the Agent

By Operation of Law

- Death of the Party
- Property Destroyed
- Illegality
- Bankruptcy of Owner

Termination of Agency

Once it has been determined that an agency agreement exists, it can be terminated by acts of the parties or by operation of law.
Termination by Acts of the Parties
Termination of an agency agreement by acts of the parties can be accomplished by either party or by both parties. If both parties agree to terminate the agency agreement, it is simple to agree to the termination by mutual consent. The termination can also be accomplished by completion of the agency objective (i.e., the property being sold) or by expiration of the stipulated length of time as set out in the listing agreement or agency contract.

Termination by One Party
Termination of the contract by one of the parties tends to be more complicated. A principal may unilaterally revoke the agency or listing agreement at any time if there is cause to do so but may be exposed to contractual liability if he or she is in default under the agreement. If there is no cause to terminate the brokerage service agreement, the broker will likely have the right to recover the amount of compensation due under the agreement or the reasonable value of services and reimbursement for expenses. Conversely, the agent may be able to renounce the contract if the agent feels that the principal is not helping to complete the agency objective. The agent may be liable for damages if there is no just cause to terminate the contract. In both cases, what is “just cause” is a fact question that has to be determined by a court.

Termination by Operation of Law
Termination of the agency relationship by operation of law occurs upon the death of either the principal or the agent, insanity of either party, or change of law. Since the agency contract is a contract for personal services and is often purely unilateral, the death of either party terminates the obligations of either party. This can always be modified, however, if the broker is a corporation, the seller is a corporation, or either is an entity rather than a natural person (i.e., a trust or limited partnership). Similarly, insanity of either party limits the contractual capacity of either party to the point that the principal-agent relationship cannot be completed. Determinations and definitions of sanity are difficult to determine. If a change of law or supervening illegality makes
a contract become illegal, any contract that is illegal is void. An excellent example of this arose recently. The listing broker earned a substantial commission by negotiating the sale of several savings and loans. While the transaction was pending, however, Congress made the payment of commissions to brokers for this type of sale illegal. The broker was then denied the commission because of supervening illegality. It was legal initially, but it became illegal during the pendency of the transaction.

Once the confidential relationship is established, it cannot just be disregarded or ignored. If the agent takes advantage of the principal because of insider information, or if the agent advises someone else to do so, the fiduciary duty has been breached. Therefore, even if the agency terminates, the fiduciary duty may not end. For instance, a broker cannot become a principal on the same transaction and shed fiduciary obligations. The agency relationship is presumed to continue once it is established. The agency liabilities may continue far beyond the termination of the agency relationship.

**Duration and Termination of Agency**

The relation of principal and agent can only be terminated by the act or agreement of the parties to the agency or by operation of law. “An agency, when shown to have existed, will be presumed to have continued, in the absence of anything to show its termination, unless such a length of time has elapsed as destroys the presumption”.

The agent’s duty to act on behalf of the principal comes to an end on the termination of agency. The timeframe for termination of an agency can be stipulated by a particular statute or instrument. In such a case, if the instrument specifies in plain and unambiguous terms that an agency will terminate without action on the part of the principal or agent upon the expiration of the time specified in the instrument, the agency will in fact, terminate. If, after the expiration of the time so stipulated in the contract, the parties continue their relationship as principal and agent, a rebuttable presumption is raised that their relations are governed by
the original contract and that the contract is renewed for a similar period. For instance, if the parties entered into a contract for one year and continued to act under the contractual terms after one year, the court will presume that the parties in fact intended to keep the contract alive for another year.

On the other hand, if the parties did not fix any appropriate time for the termination of contract, the contract is deemed to be terminated after a reasonable time. “What constitutes a reasonable time during which the authority continues is determined by the nature of the act specifically authorized, the formality of the authorization, the likelihood of changes in the purposes of the principal, and other factors”. Moreover, the burden of proving the termination or revocation of an agency rests on the party asserting it.

“Parol evidence cannot be admitted to add another term to an agreement even if the writing contains nothing relating to the particular provision to which the parol evidence is directed”. Thus, courts will not admit parol evidence while determining the duration of an agency contract where the written contract is viewed as integrated, or unambiguous, or both. An agency continuing for a reasonable time can be terminated by one party only after giving sufficient notice to the other party.

An agency created for a specific purpose as well as an agency created by a power of attorney is terminated once the particular purpose for which it was created was accomplished. After the termination of the agency, the agent is free of any fiduciary duty to the principal arising from the agency relationship. According to the Uniform Durable Power of Attorney Act § 5, an affidavit executed by the attorney in fact under a power of attorney, stating that he/she did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the non-revocation of the power at that time.
The parties can terminate the agency by mutual agreement. An agency relationship requires the mutual assent of the parties and both the parties have power to withdraw their assent. An agency may not be terminated by the act of one of the parties and should be done mutually. The mutual abandonment of an agency is a question of fact, since it is a matter of intention of both the parties. The court will ascertain such intent from the surrounding facts and circumstances of the transaction as well as implied from the conduct of the parties.

An agency contract may be cancelled on the basis of an express stipulation in the contract. In such a case, the parties will have a right of cancellation at the will of either party or upon the happening of a contingency or the nonperformance of some expressed condition. The principal cannot cancel such an agreement at will so long as the agent fulfills his/her part of the agreement. However, the principal can cancel the agency contract for any justifiable cause.

An agency may be revoked at the will of the principal when an agency is not coupled with an interest, and no third party's rights are involved. The party terminating the agency must show good cause. Thus, when A enters into a contract whereby B is to provide A for a stated period of time with goods or services, which both parties realize are for use in a particular enterprise owned by A, in the absence of a specific clause so providing, A cannot escape his obligations under that contract by voluntarily selling his interest in the enterprise before the expiration of the expressed contract term. Therefore, if the right to cancel an agency contract is dependent upon some contingency, the cancellation must be justified by establishing the happening of such contingency.

An agency cannot be terminated at will during certain specific instances. For example, in the matter of distributorship or sales agency contracts of indefinite duration, an at-will termination is not feasible. In such a case, the distributor might have made substantial investment in establishing or furthering the distributorship.
Hence, the agreement may be terminated only after a reasonable time has lapsed and reasonable notice of termination is given.

An agency contract to be performed to the principal’s satisfaction can generally be canceled at will by the principal. Similarly, a power of attorney constituting a mere agency may be revoked at any time, with or without cause.

A principal may unilaterally cancel an agency without incurring liability for breach of contract under the following instances: misconduct or habitual intoxication of the agent which interferes with his/her employment, the refusal of the agent to obey reasonable instructions or to permit the principal to make a proper audit of his/her accounts, serious neglect or breach of duty by the agent, dishonesty or untrustworthiness of the agent, the agent’s failure to pay an indebtedness owing to the principal, disloyalty of the agent like using the agency to make secret profits.

Ordinarily, an agent may renounce the agency relationship by expressly notifying the principal, either orally or in writing. An agent’s cessation of all relations with the principal, and abandonment by the agent may be treated as a renunciation. However, mere violation of instructions by the agent will not amount to renunciation.

Although agency can be terminated at will, law stipulates that notice must be given to the party affected by termination. However, express notice to the agent that the agency has been revoked, or to the principal that the agency is renounced, is not always necessary if the affected party actually knows, or has reason to know the facts resulting in such revocation or renunciation. The principal shall provide sufficient notice to third parties as to the revocation of agent’s authority. Otherwise, the acts of an agent after his/her authority has been revoked may bind a principal as against third persons who rely upon the agency’s continued existence. This may often happen to transactions initiated by the agent before the revocation of
authority, and the rule is applied in favor of persons who have continued to deal with insurance agents, purchasing agents, and the like.

There is no need to provide any formal written notice to third persons of the ending of an agency relationship. Actual notice of termination is sufficient in the case of third parties and such notice may be shown by a written or oral communication from the principal or the agent, or it may be inferred from the circumstances. For instance, a third party is deemed to have actual notice if he/she has knowledge of the fact that the principal has appointed another agent for the same purpose.

The character of the notice also differs with respect to third parties. Thus, actual notice must be brought home to former customers who have dealt with the agency more directly, while notice by publication will be sufficient as to other persons. In addition, an agency may be terminated by operation of law. The death of the principal operates as an immediate and absolute revocation of the agent’s authority, unless the agency is one coupled with an interest. The rule is the same even if the agency is created with more than one principal. Where the power or authority is created by two or more principals jointly and one of them dies, the agency will be terminated unless it is coupled with an interest. However, an agency may be made irrevocable by statute, notwithstanding the death of the principal.

Regarding the termination of agency upon the death of the principal, two views are prevailing. According to one view, unless the agency is one coupled with an interest, it will terminate on the death of the principal, notwithstanding the fact that the agent and third person are ignorant of the fact. Another view is that if the third person dealing with the agent acts in good faith and in ignorance of the principal’s death, the revocation of the agency on the death of the principal takes effect only from the time that the agent receives notice of such death. In such a case, “the principal’s estate may be bound where the act to be done is not required to be done in the name of the principal”.

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Similarly, death of the agent will revoke an agency not coupled with an interest and this is the rule when there are two or more agents. However, in the case where a sub agent is appointed by the agent, the authority of a subagent is terminated by the death of the agent, unless the agent appointed the subagent at the principal’s request. In that event, the subagent derives his/her authority from the principal and not from the agent.

The loss of capacity of a party resulting from temporary or permanent mental incompetency may result in the termination or suspension of the agency relationship.

Thus, the termination of the agent’s authority due to the loss of capacity of the principal may not affect the rights of third persons if such third persons do not have notice of such fact. Also, if the agent’s authority is coupled with an interest, it is not suspended by the principal's insanity.

Similarly, bankruptcy of the principal is a valid reason for the termination of agency and the agent is divested of any authority to deal with any assets or rights of property of which the principal was divested by reason of the bankruptcy, irrespective of whether the agent receives notice of the bankruptcy. A power of attorney may be terminated by the bankruptcy of the principal. The mere insolvency of the principal will not automatically terminate agent’s authority. The determinant fact is whether the law has assumed control over the principal’s property. Likewise, the bankruptcy or insolvency of an agent terminates his or her authority to conduct transactions on behalf of the principal.

A change in value of the subject matter or a change in business conditions may terminate or suspend the agent’s authority if the agent should reasonably infer that the principal would not consent if aware of such facts. Similarly, a change in legal identity of, or merger by, the principal is a valid ground for termination of an agency contract.
The loss or destruction of the subject matter of the agency or the termination of the principal’s interest is yet another ground for terminating the agent’s authority. The agent’s authority ceases when the agent has notice of the fact. However, destruction of subject matter will not always result in termination of agency, especially when the subject matter can be replaced without substantial detriment to either party.

In addition, a change of law making the required act illegal may terminate an agency contract. If the authority or power of an agent is coupled with an interest, it is not revocable by the act, condition, death, or mental incapacity of the principal before the expiration of the interest, unless there is some agreement to the contrary. A power is coupled with an interest where the agent receives title to all or a part of the subject matter of the agency. In order to support a claim of power coupled with an interest, either legal title or equitable title is sufficient. A power coupled with an interest will survive to the personal representative of the agent upon the agent’s death.


Because agency relationships must be consensual, both parties or either party may choose to end the relationship at any time. This is called termination by action of the parties. In addition, the occurrence of certain events, like the death of the principal or agent, will terminate an agency relationship by operation of law.
Look at the following chart to learn about the different methods of termination.

**Action of the Parties**

**Revocation**

The client (the principal) may, at any time, fire the agent. The client must usually give written notice of the revocation, and if the client breaches the terms of the contract, he or she may be liable for damages. The principal may NOT end an agency relationship wrongfully to avoid paying a commission.

**Renunciation**

The agent may, at any time, decide to leave an agency relationship. The agent must usually give written notice of the renunciation, and the agent could be liable for damages if the contract is breached.

**Operation of Law**

**Mutual Agreement**

Both parties may agree to end the agency relationship at any time. It is wise to put the mutual agreement in writing.
Death, Incapacity or Bankruptcy
In most states, the death of the agent or principal terminates the agency relationship. Most states also provide for the relationship to be dissolved if either party becomes incompetent or files for bankruptcy. Note that an agent generally has no authority to act if the principal dies or becomes incompetent, even if the agent has no knowledge of the event.

Fulfillment of Purpose
The relationship ends when its purpose is completed (such as with the closing of a real estate transaction).

The very best way agency can be terminated is to accomplish the purpose that the agency was created for, i.e. the agent sold and closed the house for the seller or found a home for a buyer and it has closed.

Extinction of the Subject Matter
If the subject matter of the relationship ceases to exist, then the relationship is dissolved (such as if the home in a transaction burns down).

Expiration
The agency relationship ends upon the expiration date. If there is no expiration date in the agreement, a reasonable time period can be set. Under Texas law, it is illegal for agents to enter into agreements for agency that do not have a termination date not subject to prior notice.

NOTE:
Agency cannot be terminated wrongfully by the principal in order to avoid paying commission to the agent.

After the agency relationship has been terminated, the agent must still maintain
confidentiality to the principal unless required by a subpoena or court order to disclose that information. The agent also continues to owe the principal the duty of accounting, if necessary.

Duties of Agency that Survive Termination
A fiduciary duty that never terminates is the duty of confidentiality. Any confidential information that an agent learns of during an agency relationship with a principal must remain confidential forever.

When agent Sue goes on a listing appointment, she may become the seller’s agent for that short period of time. The seller is asking questions and taking advice and opinions from Sue. If Sue does not make it very clear, i.e. “Right now I do not represent you. Do not tell me anything of a confidential nature”, any confidential information the seller tells her must be kept confidential forever.

If the above seller chooses to list with a different company, Sue does not get the listing. A week later if Sue is showing that property to a buyer she is representing, Sue has a problem. She has to keep the seller’s confidential information and she owes full disclosure to the buyer. Obviously Sue cannot do both.

Anytime an agent cannot perform all fiduciary duties for a client, the client must be notified. Sue will need to tell her buyer client that she knows things of a confidential nature about the seller that she will not be able to disclose to her. It usually softens the blow a little if Sue tells the buyer that her confidential information will never be revealed either.

The duty of accounting survives termination of the agency when needed. The final duty of an agent is to maintain confidentiality of confidential information for his or her client forever. Confidential information includes such facts as the principal’s motivations in the transaction and the principal’s willingness to accept a different price than listed or offered.
Case Study

A potential buyer asks the seller's agent about the seller's motivations for selling. The agent knows that the seller has been transferred to another state and needs to sell the house immediately. Revealing this information to the buyer would let him or her know that the seller might be desperate and may accept a lower price than offered.

How should the agent respond?

The agent should simply respond by saying, “That's confidential information.”

Additionally, an agent cannot act on confidential information to obtain an unfair advantage over the principal.

An agent could not, for example, inform a prospective buyer that the agent owned property that was similar to that of the agent's principal but was priced at less than the asking price of the principal's property.

The agent cannot keep information related to material facts of the property confidential. We will discuss later in this lesson what information the agent is required to disclose to a third party. In addition, an agent would have to disclose confidential information under court order or subpoena.

The agent continues to owe the principal the duty of confidentiality after the agency relationship has been terminated.

**FAST FACT**

On March 21, 2002, Kelly Mayo was found guilty of placing his interest above the principal’s interest. TREC found that Mayo refused to sign a release of earnest money form and insisted upon a commission payment, even though Mayo did not have a written agreement with the principal. TREC reprimanded Mayo’s salesperson’s license and charged him with a fine of $250.
Activity: Crossword Puzzle

The following crossword puzzle deals with terminology and facts relating to sales and commissions. Read the clues, then fill in the crossword.

Across

1. He or she may not receive compensation directly from a client.
3. It is an antitrust violation to _______ customers or markets.
6. They prohibit unfair trade practices in the United States.
8. If brokers in a particular market conspire to set the same commission rates for all real estate licensees in that market, they are guilty of _______.

Down

2. _______ is a term used for a person or company that holds an exclusive right to sell a product.
4. A _______ is a contract that gives one party the exclusive right to sell a product in a specified area.
5. _______ is a term used for a person or company that sells a product on consignment.
7. _______ is a legal document that grants someone the right to sell a product for another person.
10. _______ is a term used for a person or company that buys and sells a product for his own account.
11. _______ is a term used for a person or company that buys a product for resale to another person.
12. _______ is a term used for a person or company that sells a product on consignment.
10. Even though no payment changes hands, a relationship of _______ agency is still held to all responsibilities, liabilities, duties and obligations of an agency relationship.

11. A multiple listing service cannot deny a broker’s participation in the organization based on the rate of _______ he or she charges.

12. To be eligible to collect a commission, the person who conducted the brokerage activity must have had a valid real estate license when the action _______.

Down

2. The licensee whose actions started a chain of events that resulted in a sale.

4. A _______, willing and able buyer.

5. One example of this is if two or more brokers agree to withhold their patronage from certain brokers.

7. Individuals found guilty of antitrust violations can face fines up to $100,000 and _______ years of imprisonment.

9. One requirement for the licensee to be eligible to collect a commission is that the compensation agreement be in writing and signed by the person to be charged.
Crossword Puzzle Activity Answers

Before You Go

Review the following scenarios:

A. Steve’s listing contract with his seller does not expire for three months, but he has received a letter from the seller telling him he no longer wants Steve to represent him. How should Steve handle this?

Steve should stop advertising or showing the property, pick up signs, remove from the Multiple Listing Service, notify his broker, notify his office, delete from any search engine on the internet, cancel any advertising and mailing.
B. Which fiduciary duty does not terminate?

*Confidentiality never ends*

C. Which is the best way for an agency agreement to terminate?

*Use a termination of agency agreement and have client and license holder sign the “Termination of Agency” and give the client a copy and place a copy in the office file and the license holders file.*

Sales agents need to know the broker’s policy and procedures for termination of an agency relationship.

Things to know from your broker:

- Do you have the authorization to terminate an agency relationship?
- Do you have the authorization to discuss with your principal they may owe a commission even though they have terminated the agency relationship?
- Does your broker require you to have the principal talk with the broker before giving any termination?
- What is your broker’s policy and procedure on terminations of any type?
- What does your broker require you to do when terminating an agency agreement?

Discuss and know the procedures and policy before you have any representation with a principal.

**Lesson Summary**

In lesson seven we looked at the two primary administrative laws which were:

- rules and regulations and
- administrative decisions.
Both are made by government agencies or commissions which derive their authority from a state legislature. We also understood the process of a bill changing into a law in Texas. An idea for a bill starts when a representative or senator listens to the people he or she represents and wants to work to solve their problem.

Additionally, we also looked at the many different ways agency relationships can be created:

- Written agency agreements
- Oral agency agreements
- Implied agency
- Accidental agency
- Gratuitous agency

The real estate agent has the same fiduciary duties to the client regardless of how the agency is created.

Clients however have no duties that can be enforced unless the agreement is in writing and the client has signed it.

Different ways agency can be terminated were discussed. Clients have a right to fire their agent and tell them to stop working. If that happens the agent must stop working, stop advertising, remove from MLS, take down signs, etc. The contract, however, still exists and the client may owe the broker money.

One of the fiduciary duties that survives closing is confidentiality. If an agent learns something, during an agency relationship or in pursuit of an agency relationship, that is of a confidential nature, that must be kept confidential forever.

Finally, it is important to note that only a broker can receive compensation or commission. A salesperson’s compensation must come from his or her supervising broker, either as a salary or percentages of commissions, but the salesperson cannot directly receive
compensation from a buyer or seller.

Real estate licensees are subject to the federal antitrust laws, enforced under the Sherman Antitrust Act, that prohibit unfair trade practices in the United States. The most common antitrust violations that are associated with the real estate industry include price fixing, boycotting competitors and allocating customers or markets. Price fixing occurs in real estate when brokers conspire to set the same commission rates. A broker must always set his or her fees and rate independently of other brokers.

If two or more parties agree to abstain from conducting business with other parties, such as if a broker is unfairly denied access to a professional organization or if two or more brokers conspire to not conduct business with another broker, they are guilty of boycotting. Finally, brokers cannot agree to divide a market so that each broker handles a certain area or property value. Violations of antitrust laws carry severe penalties; individuals can face a fine of up to $100,000 and 3 years of imprisonment, and corporations can face fines as high as $1 million. In addition, the party who committed the violation could be sued by injured parties for damages.
Lesson Eight: Clarifying Agency Relationships

Lesson Topics
This lesson focuses on the following topics:

- Agency Relationships
- Disclosure Policy
- Understanding the Broker's Office Policy

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

- Describe your relationship with your broker.
- Identify at least three things that must be disclosed to buyer's and seller's.
- Recognize the need for you to read and understand your broker's office policy.

Agency Relationships
In the previous chapter we listed the different types of agency relationships that can and do exist. In real estate you will primarily have agency representations, which we will list, that you will be dealing with every day you are active in the real estate business. The other types of agency are really determined by a court of law or a judge. Depending on the lawsuit, the decisions can be costly and effects your business and reputation. If you follow and educate yourself in the following agency representations, you will reduce your liability to some degree and enhance your services to your clients.

There are many license holders who do not know the difference between a client and a customer. They also think they can practice real estate anyway they want to when sponsored by a broker. Those license holders are walking time bombs for a major lawsuit to be served upon them.
Daily agency relationships that you will be practicing and need to understand and practice include the following:

- Broker
- Seller
- Buyer
- Landlord
- Tenant

Review your broker’s policy and procedure manual as well.

**Broker**

When you get your license and a broker agrees to sponsor you by a written agreement this establishes your first agency relationship as you start your real estate career... This type of agency is called “general agency”. So there is no confusion on your part, this agreement should establish the following:

**Exclusive Association**

Sales agent or broker associate will perform the services contemplated by the independent contractor agreement exclusively for the Broker who sponsored you.

Sales agent or broker associate may not engage in the brokerage of businesses or in the management of property without the broker’s knowledge and written consent. In other words you cannot have separate real estate business, services without your broker’s written permission

You also cannot have a property management company without your broker’s permission. If you want to have a property management company, your broker would need to be the broker for the management company if you do not have a broker’s license.

You represent the broker in every transaction and the law of agency “general agency” allows you to conduct business in your broker’s name only.
• Agreements
• Contracts
• Listing agreements
• Referrals
• Commissions
• Addenda’s
• Emails
• Social networks
• Texts
• Business cards
• Stationary and envelopes
• Marketing material
• Mailing material
• All real estate signs
• Websites
• All advertising

Your broker will have a policy and procedure manual on how the broker wants you to handle each situation. The sales agent or broker associate never transacts real estate business any other way than what the broker has authorized—both by training and in the policy and procedure manual.

Your agency agreement does not create a partnership between you and your broker. You never commit your broker financially to anything without his or her permission.

Neither broker or sales agent or broker associate is liable to the other party for any expense or obligation incurred by the other party.
Sales Agent or Broker Associates Authority
Sales agents or broker associates can sign listing agreements, buyer or tenant representation agreements on the broker's behalf provided sales agent and broker associate comply with broker's policy and procedure.

All listings, representation agreements, and other agreements for brokerage services that sales agent procures or signs must be taken in the broker's name and must be submitted to broker upon completion of all required paper work.

Cancellations or Termination of Brokerage Service Agreements may not be cancelled or terminated without the broker's approval.

Seller, Buyer, Tenant or Landlord Agency
The relationship between the principal and license holder holds special legal significance. It is a fiduciary relationship involving great trust and confidence with the agent in the role of a fiduciary.

The Canons of the Texas Real Estate Commission rules are Fidelity, Integrity, Competency, Consumer Information, Discriminatory Practices and Information about Brokerage Services.

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

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

- The broker must represent the interest of the client as his or her primary duty. When you represent a client through mutual consent and in a written agreement, one of the duties is the clients’ interests. This takes in many examples of “interest of client”: keeping confidential information of your client to yourself, being available at all times when the client needs you, advising your client of negative feedback as to the marketing and selling of the property, advising a buyer what they need to complete to buy or rent property in detail communication.

- The broker must be faithful to the client and be observant of the duty of trust. This is a relationship you have with the client. The client should be able to trust you in your daily dealings and to know you are faithful to him or her at all times.

- The broker may not place his or her personal interest above the client’s interest. The client’s opinions are first and yours are second unless the opinions of the clients are legally liable. Than you have a duty to be honest and explain to the client why his or her opinion is not appropriate.

- The broker must disclose to his or her client any conflict of interest or any matter that would materially affect the client’s decision in a transaction. If you are related to a buyer, landlord or tenant or seller this could be a conflict of interest. You must disclose the relationship and if the client gives you permission to proceed in writing than you can proceed.

- The broker must be clear to all parties in a transaction whom the broker represents. When speaking with a consumer at any time about your broker’s listing you must disclose you represent the seller(s), when you are showing property or going through an open house, you must disclose that you represent the buyer, (if you do) and same for a tenant or landlord. You need to disclose to tenants that you do not represent them you represent the landlord. If you receive a
property call on your broker’s listings, you must disclose that you are the agent of the seller.

- When performing brokerage duties, the broker is to act meticulously and scrupulously.
  You must be sure contracts, leases, listing agreements are filled out in detail with accurate information. In other words, no blanks if they are applicable to transaction. Legal names not pen names, correct legal description verified by you, the sales agent, or broker associate. Be cautious with the information you use and not use it if you do not verify the information first.

- The broker must keep the client informed of material information related to a transaction, including but not limited to the receipt of any offer.
  All activity must be communicated to the client. Never withhold information no matter what it is. All offers are to be presented until the last signature and date is completed. The Texas Real Estate License Act is very specific about this.

- The broker must be available to answer the client’s questions. Return all telephone calls, texts, emails timely to your client, but to all as well.

- The broker must give the client a proper accounting of all funds received in the transaction.
  When you receive the earnest money and the option money for the buyer, you must communicate this to both the buyer and seller. When leasing property, you want to communicate to the tenant and landlord all deposits, rental monies and any additional monies given to you in the transaction.

- The broker may not commingle any funds held for another with the broker’s own funds.
  If the broker and you have a property management company, the funds for rental properties and the broker’s business operating account or personal checking account may not be commingled. You must have separate accounts for management of client’s properties.
These duties apply to all sales agents and broker associates since you do business in the name of the broker and represent the broker in all transactions as well as the license holder’s professional conduct.

The REALTOR® Code of Ethics Article One applies to your duties to your client.

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

**Standard of Practice 1-1**
REALTORS®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics.

**Standard of Practice 1-2**
The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means. The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities. As used in this Code of Ethics, “client” means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®’s firm has an agency or legally recognized non-agency relationship; “customer” means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®’s firm; “prospect” means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or Realtor®’s firm; “agent” means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by
state law or regulation; and “broker” means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity.

Standard of Practice 1-3
REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

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

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

Standard of Practice 1-6
Realtors® shall submit offers and counter-offers objectively and as quickly as possible.

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

Standard of Practice 1-8
REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to
continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a Pre-existing contract has been terminated. The obligation of REALTORS® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. REALTORS® shall not knowingly, during or following the termination of professional relationships with their clients:

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

Information concerning latent material defects is not considered confidential information under this Code of Ethics.

**Standard of Practice 1-10**
REALTORS® shall, consistent with the terms and conditions of their real estate licensure and their property management agreement, competently manage the property of clients with due regard for the rights, safety and health of tenants and others lawfully on the premises.
Standard of Practice 1-11
REALTORS® who are employed to maintain or manage a client’s property shall exercise due diligence and make reasonable efforts to protect it against reasonably foreseeable contingencies and losses.

Standard of Practice 1-12
When entering into listing contracts, REALTORS® must advise sellers/landlords of:
1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities.
2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
3) any potential for listing brokers to act as disclosed dual agents, e.g. buyer/tenant agents.

Standard of Practice 1-13
When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:
1) the REALTOR®'s company policies regarding cooperation;
2) the amount of compensation to be paid by the client;
3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord’s agent, etc., and
5) the possibility that sellers or sellers’ representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties.
**Standard of Practice 1-14**
Fees for preparing appraisals or other valuations shall not be contingent upon the amount of the appraisal or valuation.

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

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

**Disclosure Policy**
**What Can Happen**
Buyer B attended an open house and discussed the property with Salesperson C. The next day, Buyer B came to Salesperson C’s office, and they talked about Buyer B’s price range and needs. Buyer B decided that the property he had seen the day before was out of his price range, but Salesperson C quickly mentioned that she would be happy to help Buyer B find a property. Buyer B agreed to this, and Salesperson C located three suitable properties, owned by sellers that Salesperson C represents.

**What has Salesperson C done wrong?**
Salesperson C did not tell the buyer that she is a seller’s agent. Therefore, it is possible that this buyer was under the impression that Salesperson C was acting in his interests, when in fact the salesperson was acting in the sellers’ interests.

An *implied agency* relationship arises when a party assumes consent to the relationship based solely upon inferences formed from communication with the other party—from a
party’s actions, conduct or words. In the previous example, neither party explicitly stated the nature or terms of the relationship, but it is possible that the salesperson would be held to the duties of an agency relationship.

The concept of implied agency is especially relevant to the real estate industry, where sellers’ agents commonly provide helpful services for buyers. If a buyer encounters an agent who engages him or her in friendly conversation, asks about his or her price range, takes him or her to look at properties and even helps him or her obtain financing, how is that buyer to know that the agent is not representing his or her interests?

To prevent implied agency, it is vital that all real estate professionals disclose agency relationships to all potential customers. The agent must give oral disclosure of agency representation upon initial contact with a party; written disclosure is required upon substantive discussion.

It is easy to see how important it is to make sure everyone in the transaction understands whom the broker is working for.

Following the agency disclosure laws and letting everyone know at first contact when the agent is representing anyone, is a big step in risk management for the sales agent and the broker. The broker’s agency policy should make it clear this is expected of all sales agents.

Handing out the Information About Brokerage Services (IABS) form to all unrepresented customers at the first substantive dialog should also be a requirement of the broker’s agency policy. Many brokers require sales agent to attend training classes that help them understand the IABS form and know how to explain it to a customer.

What is “Substantive Dialogue”? 
The licensee has the obligation to give written disclosure of agency to all unrepresented parties. Section 1101.558 of the Real Estate License Act outlines when written disclosure
of the agency relationship must be made. In this section, “substantive dialogue” means a meeting or written communication that involves a substantive discussion relating to specific real property. The term does not include:

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

A license holder shall provide to a party to a real estate transaction at the time of the first substantive dialogue with the party the written statement prescribed by Subsection (d) unless:

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

If a broker or salesperson is representing a party, he or she must disclose the agency relationship to potential or actual third parties. Oral or written disclosure of the relationship is acceptable upon initial contact with a third party. Upon substantive dialogue, the agent must give the third party a written statement that describes agency law.

**Example**

Salesperson A represents Seller B, and she is holding an open house for the seller’s property. She has a conversation with Buyer C, and she gives the buyer her card. At this point, Salesperson A is required to explain that she is the seller’s agent, but she is not required to disclose this in writing. The next day, Buyer C comes into the office where Salesperson A works, and they discuss the property. Now, the salesperson and the buyer are having “substantive dialogue”, and Salesperson A must give the buyer a written statement explaining agency law.
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.

Texas Real Estate Commission Rules §535.2 Broker Responsibility
(a) A broker is required to notify a sponsored sales agent in writing of the scope of the sales agent's authorized activities under the Act. Unless such scope is limited or revoked in writing, a broker is responsible for the authorized acts of the broker’s sales agents, but the broker is not required to supervise the sales agents directly. If a broker permits a sponsored sales agent to conduct activities beyond the scope explicitly authorized by the broker, those are acts for which the broker is responsible.

(b) A broker owes the highest fiduciary obligation to the principal and is obliged to convey to the principal all information known to the agent which may affect the principal's decision unless prohibited by other law.

(c) A broker is responsible for the proper handling of trust funds placed with the broker and must comply with §535.146 of this title.

(d) A broker is responsible for any property management activity by the broker's sponsored sales agent that requires a real estate license.

(e) A broker may delegate to another license holder the responsibility to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of license holders sponsored by the broker.
Any such delegation must be in writing. A broker shall provide the name of each delegated supervisor to the Commission on a form or through the online process approved by the Commission within 30 days of any such delegation that has lasted or is anticipated to last more than six months. The broker shall notify the Commission in the same manner within 30 days after the delegation of a supervisor has ended. It is the responsibility of the broker associate or newly licensed broker to notify the Commission in writing when they are no longer associated with the broker or no longer act as a delegated supervisor.

(f) Listings and other agreements for real estate brokerage services must be solicited and accepted in a broker's name.

(g) A broker is responsible to ensure that a sponsored sales agent’s advertising complies with §535.154 of this title.

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:

   (1) disclosures;
   (2) commission agreements such as listing agreements, buyer representation agreements, or other written agreements relied upon to claim compensation;
   (3) work files;
   (4) contracts and related addenda;
   (5) receipts and disbursements of compensation for services subject to the Act;
   (6) property management contracts;
   (7) appraisals, broker price opinions, and comparative market analyses; and
   (8) sponsorship agreements between the broker and sponsored sales agents.
(i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:

(1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities.

(2) Each sponsored sales agent 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 sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.

(4) Each sponsored sales agent 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 sales agent 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 sales agent's practice subject to the Act.

(6) Each sponsored sales agent 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) of this section.

(j) A broker or supervisor delegated under subsection (e) of this section must respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within three calendar days.
(k) A sponsoring broker or supervisor delegated under subsection (e) of this section shall deliver mail and other correspondence from the Commission to their sponsored sales agents within 10 calendar days after receipt.

(l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.

(m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored sales agent.

TREC Case Summaries
Below is a sample of sanctions from recent TREC orders against brokers for failing to have required written policies. Agreed Orders were reached with the brokers following TREC’s receipt of complaints against their sponsored salespeople (mostly advertising violations).

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)]

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)]

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)]
• (Source: TREC Broker Responsibility Course)

Lesson Summary
In lesson eight, more was learned about the broker’s role in a real estate office. The broker is the supervisor and responsible for the activities of all of the agents.

The broker has to ascertain that each agent is fully aware of the things they are authorized to do in regard to real estate.

The broker must develop systems where he is sure all of the agents in the firm have active, current licenses.

The broker must maintain a policy manual that address the brokers requirements on disclosures on agency, property condition, etc. The agents must know that some disclosures are required, some are optional and some are forbidden by law.

The Texas Real Estate License Act requires the broker to have an office policy manual for agents. Agents have the responsibility to read and comply with the broker’s polices.
Lesson Nine: Employment Issues

Lesson Topics
This lesson focuses on the following topics:

- Employment Law
- Employment Relationship Between Brokers and Principals
- Independent Contractor Agreements
- Employment and Compensation of Personal Assistants
- Relationships Between Brokers and Agents
- Compensation Issues

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

- Differentiate between employment and being an independent contractor.
- Explain what your duties are to assist the broker in keeping your independent contractor status.

Employment Law
Texas Labor Code § 201.072. Service as Real Estate Broker
In this subtitle, “employment” does not include:

(1) service performed by an individual as a real estate broker or salesperson if:
(A) the individual engages in activity described by the definition of “broker” in Section 1101.002, Occupations Code;
(B) the individual is licensed as a broker or salesperson by the Texas Real Estate Commission;
(C) substantially all remuneration for the service, whether in cash or other form of payment, is directly related to sales or other output, including the performance of the service, and not to the number of hours worked; and
(D) the service is performed under a written contract between the individual and the person for whom the service is performed, and the contract provides that the individual is not treated as an employee with respect to the service for federal tax purposes; or
(2) service performed by an individual as an instructor of a person licensed or seeking a license as a real estate broker or salesperson if:
(A) the individual instructs in an educational program or course approved by the Texas Real Estate Commission; and
(B) the service is performed under a written contract between the individual and the person for whom the service is performed and the contract provides that the individual is not treated as an employee with respect to the service for federal tax purposes.

Internal Revenue Services (IRS)

It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

Select the Scenario that Applies to You:

- **I am an independent contractor or in business for myself**
  If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax obligations if you are self-employed (an independent contractor), see our Self-Employed Tax Center.

- **I hire or contract with individuals to provide services to my business**
  If you are a business owner hiring or contracting with other individuals to provide services, you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.
Determining Whether the Individuals Providing Services are Employees or Independent Contractors

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be:

- An independent contractor
- An employee (common-law employee)
- A statutory employee
- A statutory nonemployee
- A government worker

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There
is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

**IRS Form SS-8**
If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (PDF) can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker’s status.

Be aware that it can take at least six months to get a determination, but a business that continually hires the same types of workers to perform particular services may want to consider filing the Form SS-8 (PDF).

**Employment Tax Obligations**
Once a determination is made (whether by the business or by the IRS), the next step is filing the appropriate forms and paying the associated taxes.

**Employment Tax Guidelines**
There are specific employment tax guidelines that must be followed for certain industries.

**Misclassification of Employees**
**Consequences of Treating an Employee as an Independent Contractor**
If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that worker (the relief
provisions, discussed below, will not apply). See Internal Revenue Code section 3509 for more information.

**Relief Provisions**
If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977. See Publication 1976, Section 530 Employment Tax Relief Requirements (PDF) for more information.

**Misclassified Workers Can File Social Security Tax Form**
Workers who believe they have been improperly classified as independent contractors by an employer can use Form 8919, Uncollected Social Security and Medicare Tax on Wages to figure and report the employee’s share of uncollected Social Security and Medicare taxes due on their compensation. See the full article Misclassified Workers to File New Social Security Tax Form for more information.

**Voluntary Classification Settlement Program**
The Voluntary Classification Settlement Program (VCSP) is a new optional program that provides taxpayers with an opportunity to reclassify their workers as employees for future tax periods for employment tax purposes with partial relief from federal employment taxes for eligible taxpayers that agree to prospectively treat their workers (or a class or group of workers) as employees. To participate in this new voluntary program, the taxpayer must meet certain eligibility requirements, apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS.

*Source: https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee*
The Internal Revenue Service (IRS) sets forth guidelines to determine whether a licensee is an employee of a company or an independent contractor. No particular item on these lists is a deciding factor. Rather, the IRS uses these guidelines to get an idea of the amount of control that a supervising broker has over his or her affiliated licensees.

If a supervising broker has a high amount of control over the day-to-day activities of his or her affiliated licensees, including having set work hours, sales quotas and set procedures, then the licensees are probably the broker’s employees. Employees generally do not have to pay their own business expenses, receive a guaranteed salary and are eligible for any company benefits, such as health insurance, tuition reimbursement or retirement plans.

<table>
<thead>
<tr>
<th>EMPLOYEE</th>
<th>INDEPENDENT CONTRACTOR</th>
</tr>
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<tbody>
<tr>
<td>- The licensee receives a guaranteed monthly salary.</td>
<td>- The licensee is paid from commissions, not from a salary.</td>
</tr>
<tr>
<td>- The supervising broker pays his or her agent’s license fees.</td>
<td>- The licensee pays his or her own business expenses, including license fees.</td>
</tr>
<tr>
<td>- The supervising broker sets quotas and sales requirements for his or her agents.</td>
<td>- The company usually does have a procedures manual; if the company does have a manual, it is suggested procedures, not required procedures.</td>
</tr>
<tr>
<td>- The supervising broker regulates the day-to-day activities of his or her agents.</td>
<td>- The supervising broker cannot require the licensee to attend training seminars or sales meetings or to work set hours.</td>
</tr>
<tr>
<td>- The supervising broker does not set individual goals for each agent; rather, the agents are considered a team.</td>
<td>- The licensee is not eligible for</td>
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</tbody>
</table>
Most real estate sales agents work as independent contractors and are not covered by employment laws. Many real estate brokers and sales agents are now hiring assistants and other staff as employees. Therefore brokers and some sales agents must acquaint themselves with basic employment laws. In addition to the office manual for sales agents, a firm that hires employees needs an employee manual. The broker may want to obtain legal assistance when creating their employee manual.

Most (non-license holder) workers in a real estate office will probably be ruled as employees by IRS.

**Lawsuits That Were Filed Against Brokers**

**Salesperson’s Independent Contractor Status Affirmed**

June 9, 2015

Massachusetts’s highest court has considered a broker could classify salespeople as independent contractors pursuant to the state license law, rather than applying the state’s independent contractor statute.

A group of real estate salespeople (“Salespeople”) who were formerly associated with a group of collectively owned real estate brokerages (collectively, “Brokerages”) brought a class action lawsuit against the Brokerages for allegedly misclassifying the Salespeople as independent contractors instead of employees. Based on this alleged misclassification, the Salespeople claimed that there were violations of the state’s wage payment laws, including minimum wage and overtime requirements, and other penalties for the misclassification.
All of the Salespeople were involved in the sale or leasing of apartments while they were associated with the Brokerages. The Salespeople only received payment from commissions earned through successful transactions, and they had to pay a monthly desk fee to the Brokerage. They also had to spend a certain amount of time in the office answering the phone and showing prospective clients apartments. The Salespeople were also required to undergo specified training, adhere to a dress code, and could be subject to discipline if they failed to meet their productivity targets.

The trial court ruled that a provision in the state’s license law allowed the Brokerages to properly classify the Salespeople as employees, irrespective of the language in the state’s independent contractor statute. The Salespeople appealed this ruling.

The Superior Judicial Court of the Commonwealth of Massachusetts affirmed the ruling in favor of the Brokerages. The court first considered the differing requirements found in the state’s independent contractor classification statute and the real estate license laws. The state’s independent contractor statute is designed to protect individuals from being classified as an independent contractor when they are in fact an employee. An individual is presumed to be an employee unless the following factors can be demonstrated: the individual is free from control and direction in connection with the service he/she is providing; the service provided is outside the usual course of business for the entity; and the individual is independently engaged in the trade or profession for the service provided. If an employer misclassifies an individual as an independent contractor, there are civil and criminal penalties that may be imposed, including fines.

The real estate license laws create two classes of licensees: brokers and salespeople. Brokers and salespeople both participate in the selling or leasing of property, but only brokers can receive a commission and salespeople are required to be affiliated with a broker. The license law provides that salespeople can be affiliated with brokers either as employees or as independent contractors, and brokers are required to maintain a degree of supervision over their salespeople.
Using the rules of statutory construction, the court found that the license law controlled the relationship between the broker and the salespeople and so affirmed the ruling in favor of the Brokerages. The two statutes were in conflict, since the license law required broker supervision of the salespeople yet allowed them to operate as independent contractors, while the independent contractor statute demands that the independent contractor not be involved in the usual business of the entity and also be individually established in the trade or business for which they are providing the service.

Since it would be impossible for a salesperson to satisfy both statutes, the court found that the real estate license law should control because that statute is specific to the real estate industry, whereas the other statute was more general. The court also found that it would be unfair to potentially subject brokers to criminal penalties when they are following the express language of the state’s license law allowing them the ability to classify their salespeople as independent contractors.

Therefore, the court entered judgment in favor of the Brokerages because the Salespeople could not allege misclassification under the state’s independent contractor statute.


[Note: This opinion is not published in an official reporter and therefore should not be cited as authority. Please consult counsel before relying on this opinion].

**Editor’s Note:** Special thanks to Mike McDonagh, General Counsel for the Massachusetts Association of REALTORS®, for alerting NAR Legal Affairs to this decision.

Independent Contractor Status: Caught in the Crosshairs

May 2014 | By: Robert Freedman

*Lawsuits focus on the conflicts between state labor laws and real estate license laws when assessing the broker-associate relationship.*

When Nesto Monell hung his real estate license with Jacob Realty in the Boston area in 2012, he was required to attend training, share front-desk time with other associates, fulfill office-hours duty, own a day planner, obtain a cell phone with a 617 area code, and adhere to a dress code.

As an independent contractor, he received a Form 1099 instead of a W-2 from his broker and was paid on a commission basis. But Monell, along with five colleagues at Jacob Realty and at three other companies owned by the brokers, filed suit in late 2012, claiming the requirements they had to meet and the supervision they received constituted an employee-employer relationship.

A Massachusetts Superior Court ruled in favor of the brokers last July. But this case and two others pending in California have caught the attention of the real estate industry because they involve what many have assumed to be a settled area of law: real estate sales associates as independent contractors.

“Many states have adopted statutes that explicitly provide for real estate agents to be deemed independent contractors despite challenges like these, so these cases might be aberrational as opposed to signifying a trend of things to come,” says Lesley Walker, NAR associate counsel. “Even so, because the independent contractor status of associates is so important to our industry, NAR is looking at this as a national issue. How these cases are resolved could send a message to other jurisdictions.”
A central issue in these cases is the conflict between how state employment and labor laws treat independent contractors and what brokers must do to comply with their responsibilities under real estate license laws.

In Monell et al v. Boston Pads, Massachusetts law allows brokers to treat their sales associates as either employees or independent contractors. (Regardless of which path they choose, brokers must supervise their associates.) That sets up a conflict with state labor laws, which deem supervisory duties to be a factor in determining whether an independent contractor relationship exists.

“It’s difficult to exercise supervision over your sales associate in accordance with the real estate license laws and also maintain the independent contractor relationship in compliance with the state labor laws,” says Walker.

In its ruling last year in favor of the brokerage, the court said the real estate law prevailed for two reasons:

- The real estate statute had been amended after the independent contractor statute came into effect, indicating that the legislature intended the real estate statute to control.
- The real estate statute is the more specific statute.

Monell and the other plaintiffs are appealing the ruling in the state’s Supreme Judicial Court; the appeal is scheduled to be heard in the fall. The Massachusetts Association of REALTORS® and the Greater Boston Real Estate Board are preparing a brief in support of the brokers. “We will clearly explain why it would be unfair and inconsistent with the legislature’s intent to permit this type of misclassification claim to proceed in the real estate industry,” says William G. Mullen III, legal counsel and director of risk management for the Greater Boston Association of REALTORS®.

Peter Ruffini, president of the Massachusetts Association of REALTORS®, agrees with the necessity of keeping the status quo. “It’s vital to the real estate industry that brokers
and agents continue to have the ability to affiliate as independent contractors or as employees,” he says.

The two California cases, Cruz v. Redfin Corp. in Alameda County Superior Court and Bararsani v. Coldwell Banker Residential Brokerage in Los Angeles Superior Court, have not yet gone to trial. They were both filed late last year and are seeking class certification. “If these cases are found in favor of the plaintiffs, in states where there are conflicts between real estate and employment laws, that could propel interest in lawsuits in other parts of the country,” Walker says. “Having an employer-employee relationship for a broker could be more expensive, more burdensome, and more time-consuming.”


**Employee vs. Independent Contractor**

Once you make the decision to hire an assistant, your next consideration is whether the assistant will be an employee or independent contractor. This is a significant decision, as it indicates whether you will be liable for certain tax withholdings.

According the 2012 NATIONAL ASSOCIATION OF REALTORS® Member Profile, 56 percent of the personal assistants employed by REALTORS® are hired as independent contractors and 44 percent are hired as employees.

If your assistant is an employee, then you will be the employer responsible for the same tax withholding as other employees receive: federal income tax, FICA (Social Security and Medicare), FUTA (federal unemployment compensation), state income tax, and state unemployment compensation. You may also be required to carry workers’ compensation insurance. If the assistant is hired as an independent contractor, the assistant is responsible for his or her tax obligations unless otherwise required by the language and intent of the particular state law.
Generally, an assistant will be considered an employee if you retain the right to control what the assistant does and how it is done. Since the need for an assistant derives from a salesperson’s excessive workload and the assistant’s activities will directly impact the salesperson’s work, the salesperson may want to retain a significant amount of control over the assistant’s actions.

If this is true for your situation, it’s most likely that your assistant will be an employee, and you—the hiring professional—will be responsible for all tax withholdings. Because of the nature of the job to be performed, more than likely an unlicensed assistant should be treated as an employee. For more information on employer tax responsibilities, visit the Internal Revenue Service Guide to Employment Taxes for Businesses.

If the assistant is given more freedom to do his or her job as he or she sees fit, you may consider the assistant an independent contractor. In this case the assistant, and not the hiring professional, is responsible for the tax withholdings. However, labeling an assistant an independent contractor requires careful planning with an accountant and an attorney, as the financial liability for making a mistake in this area is great. If a court later deems the assistant to be an employee rather than an independent contractor, you may be liable for paying taxes and penalties that can run back as far as seven years and possibly back wages to the assistant who was incorrectly categorized.


**Lawsuits Challenge Independent Contractor Status**
March 27, 2014 | By: Robert Freedman

Real estate sales associates operating as independent contractors would seem to be a settled area of law, but three lawsuits were filed last year in which associates claimed they were employees and wanted to be compensated as such.
They argued that, based on the kinds of tasks they were required to do and the supervision they were subject to by their brokers, they were hardly working as independent contractors.

Two of the cases are in California and they’re pending. The third is in Massachusetts and late last year the state’s Superior Court ruled in favor of the brokers, saying state law gives the brokers a choice to classify their associates as either employees or independent contractors, and the brokers had properly classified them as the latter. The case is now in appeal, and the Massachusetts and Boston associations of REALTORS® are filing a friend-of-the-court brief in support of the brokers.

“We’re hopeful when considering the appeal that the state Supreme Judicial Court will reaffirm the lower court decision that real estate agents may affiliate with their broker as independent contractors and should not automatically be viewed as employees under Commonwealth law,” says John Dulczewski, executive director of the Greater Boston Association of REALTORS®.

Given the market’s tough conditions this past year or so, some sales associates might be attracted to the income stability that comes with a paycheck. After all, to succeed today you have to deal with inventory shortages, high home prices, tough financing conditions, and stagnant incomes among buyers.

With this as the backdrop, it’s helpful for brokers to take care in how they structure and maintain the independent contractor relationship they have with their sales associates.

First, know your state law. In Massachusetts, the lawsuit has exposed two areas of law that are in conflict. The state’s real estate law says sales associates can be either employees or independent contractors and it requires brokers to exercise supervisory authority over them, no matter what their status is. That conflicts with the state’s employment law, which defines independent contractors in such a way that such supervision can appear to undermine a contractor’s independence.
“It’s somewhat impossible to exercise supervision over your sales associate pursuant to the real estate license laws and also maintain the independent contractor relationship in compliance with the state labor and employment laws,” says Lesley Walker, NAR associate counsel.

Second, work with an attorney to draft an appropriate independent contractor contract and be sure your associates have signed it.

Third, be aware of what constitutes independent contractor status in your state. How much supervisory control is appropriate? If associates have to buy their own tools of the trade, including their phone, how much say do brokers have over what they can require? And can associates enter into relationships with other entities beyond the brokerage?

“Whether or not there’s an independent contractor relationship is determined not by the intent of the parties but the reality of how the relationship is playing out,” says Walker. That means it’s not what you say, but what you do. In the five-minute video above, Walker talks about the cases and what to consider as you look at your own situation.


**Independent Contractor Status in Real Estate—2015 White Paper Report**

Updated July 14, 2016

A recent wave of litigation is challenging the longstanding practice within the real estate industry of brokers choosing to classifying real estate agents as independent contractors, as opposed to employees. The outcome of these cases could potentially have a wide-reaching impact on the manner in which brokers have traditionally done business, and as a result, the issue of worker classification has garnered the attention and interest of NAR’s membership. However, the real estate industry is not alone, as the issue of worker classification has been raised in several industries in various jurisdictions throughout the
country, and the Department of Labor has made it clear that it will aggressively pursue worker misclassification as a top priority.

This memo outlines the present independent contractor classification issue facing the real estate industry and discusses the various ways state and federal laws approach the issue. A state law chart is included at the end of the memo, which compiles relevant language from state labor laws and state real estate statutes that address the issue of real estate salespeople as independent contractors. The state law chart is intended to serve as a good starting point for states to review and understand the manner in which their states approach the independent contractor classification of real estate salespeople. In addition, this memo highlights the recent and ongoing litigation that has given rise to the recent interest in and attention to the issue of real estate agents’ status as independent contractors.

**Issue**

While the issue of worker classification has been challenged in a variety of industries, the real estate industry’s regulatory structure presents a unique framework within which to operate when it comes to worker classification. The hallmark characteristic of an independent contractor relationship is one where the worker is generally free of control. However, state real estate statutes specifically require brokers to exercise supervision over their agents. Since the requirement of a broker to exercise supervision over agents is in direct conflict with one of the basic tenants of an independent contractor relationship, it is difficult for a broker to both comply with labor laws in order to establish an independent contractor relationship, while also fulfilling their supervisory duties under state real estate laws.

Fortunately, both federal and state legislatures have recognized the unique aspects presented by the real estate industry by addressing the independent contractor issue directly through statutory carve outs. Many state workers’ compensation acts specifically exempt real estate agents from the definition of “employee” under the statute. For
example, the Alabama Worker’s Compensation Statute states “a licensed real estate agent operating under a licensed broker shall not be considered an employee for the purposes of this chapter.” In Pennsylvania, the workers’ compensation statute does not apply to “any person who is a licensed real estate salesperson or associate real estate broker affiliated with a licensed real estate broker”, and Louisiana’s workers’ compensation statute exempts any real estate broker or salesperson licensed to do business in the state of Louisiana and operating under the auspices of a licensed broker in the state of Louisiana from application of the act. Alabama, Pennsylvania and Louisiana are not alone. There are approximately twenty-nine states that exempt real estate agents from the application of the workers’ compensation statute.

The issue of independent contractor status of real estate salespeople is also addressed in several state real estate statutes.

There are roughly twenty-two state real estate statutes that contain language expressly permitting a real estate broker to treat their real estate salespeople as independent contractors while simultaneously exercising their mandatory supervisory duties under the statute.

Utah’s real estate statute creates a presumption that an independent contractor relationship exists unless there is “clear and convincing evidence that the relationship was intended by the parties to be an employer employee relationship”. Louisiana’s real estate statute outlines a three-prong test for establishing a real estate salesperson or associate as an independent contractor of their affiliated broker. Under the statute, an independent contractor relationship has been successfully established if:

1) the real estate salesperson or associate broker is a licensee,
2) substantially all remuneration for services performed is directly related to sales output rather than number of hours worked, and
3) there is a written agreement specifying that the real estate salesperson or associate broker will not be treated as an employee.
There are several other states, including Indiana, Michigan, and South Dakota, that have also addressed this issue head on and legislatively helped eliminate a conflict between the labor laws and the real estate statute. Indiana’s workers’ compensation statute provides a similar test to that outlined in Louisiana’s real estate statute to determine the independent contractor status of a real estate professional, and Indiana’s real estate statute presumes an independent contractor relationship, unless otherwise specified in a written contract between the principal broker and the associated salesperson or broker. Michigan’s labor laws exclude from the definition of “employment” the services performed by real estate salespeople if the real estate salesperson is compensated principally or wholly by way of commission.

Further, Michigan’s real estate statute defines an “independent contractor relationship" as a relationship between a real estate broker and an associate broker or real estate salesperson where there is both a written agreement between the parties stating that the associate broker or real estate salesperson is not considered an employee for federal and state income tax purposes and not less than 75% of the annual compensation paid by the broker to the associate broker or real estate salesperson is from commissions from the sale of real estate.

Effective July 1, 2016, the Wisconsin worker’s compensation statute will be amended to include a safe harbor similar to the IRS safe harbor for the treatment of real estate licensees as independent contractors. The amended statute also includes the ability for brokers to exclude real estate agents from workers’ compensation coverage. And, in order to remove any suggestion of a default employer/employee relationship between a real estate company or sole proprietor broker and a licensee, the Wisconsin real estate license law was also amended to remove all employer and employee references, and instead make reference to firm and agent. State legislatures are not alone in recognizing the unique nature of the real estate industry and the corresponding need to carve out real estate professionals from general application of particular statutes. The United States Internal Revenue Service ("IRS") considers real estate agents to be "statutory nonemployees" if three factors are met. First, the real estate agent must be licensed.
Second, substantially all payments for the licensed real estate agent’s services must be directly related to their sales or other output rather than based on number of hours worked, and lastly, the real estate agent’s services must be performed pursuant to an agreement that states the real estate agent will not be treated as an employee for federal tax purposes. While satisfaction of the aforementioned IRS test relates only to the federal tax treatment of real estate agents, it demonstrates the federal government’s recognition of the unique nature of the real estate industry and, as such, the need to treat it differently than other industries.

Even more recently, the passage of the final regulations under the Affordable Care Act ("ACA") demonstrated recognition on behalf of the federal government that different treatment of the real estate industry is needed. The ACA requires large employers (defined under the ACA as those with fifty or more employees) to offer their full-time employees health care coverage that is affordable and has a minimum standard of value. This requirement is known as the “Shared Responsibility for Employers”. However, the ACA recognizes that those real estate agents that are recognized as “qualified real estate agents” and thus statutory non-employees under the IRS code, will similarly be non-employees for purposes of the “Shared Responsibility for Employers”. Here again, the federal government acknowledged the unique independent contractor relationship between real estate salespeople and brokers.

**Litigation Matters**

Despite recognition on both the federal and state levels as an acceptable practice by real estate brokers, plaintiffs have challenged whether real estate agents can properly be classified as independent contractors under various state laws. The recent uptick in litigation has generated concern among brokers across the country. Brokers are worried about what this litigation means to their businesses and whether they are exposing themselves to legal liability by classifying their real estate salespeople as independent contractors.
In a California lawsuit, *Bararsani v. Coldwell Banker*, the plaintiff filed a class action lawsuit against Coldwell Banker Residential Brokerage (“Coldwell Banker”) alleging that Coldwell Banker improperly classified affiliated sales associates as independent contractors when they were actually employees of the broker. In addition, the plaintiff alleged that Coldwell Banker violated the California Labor Code by failing to reimburse certain business expenses and maintain proper records.

In July 2013, the defendants filed a Demurrer seeking to dismiss the plaintiffs’ amended complaint, asserting that the amended complaint was without basis because the California Business & Professions Code Section 10032 (“Code”) sets out the relevant three-part test for classification of real estate professionals as independent contractors, which defendants alleged were satisfied. Plaintiffs filed an opposition to the defendants’ Demurrer. While the language in the Code cited by defendants expressly permits real estate professionals to be treated as independent contractors or as employees, the Code does not require that real estate professionals be treated as independent contractors. The court denied defendants’ Demurrer, asserting that California law permits a worker to be classified as an independent contractor for some purposes, but not all, and stating that the court would apply a multi-factor common law test to determine whether plaintiffs were properly classified as independent contractors for purposes of this case.

In addition, the court also denied plaintiffs’ motion to invalidate mandatory arbitration and class action waiver clauses contained in independent contractor agreements executed by class members. Therefore, individuals who executed such agreements would be bound by such clauses, and therefore, ineligible as class members.

The parties later entered into settlement discussions, and on January 13, 2016, the court granted final approval of a class action settlement and entry of order and judgement in the case. The settlement order contained no finding or admission of wrongdoing by Coldwell Banker; however, likely due to the considerable expense and time it takes to defend a class action lawsuit, Coldwell Banker agreed to pay the sum of $4,500,000 which was distributed among the certified class members. The settlement order certified the
class for settlement purposes, which Coldwell Banker was able to successfully limit to only those agents who had not signed an agreement to arbitrate.

In a Massachusetts case, *Monell et al. v. Boston Pads*, the plaintiffs alleged that their former broker misclassified them as independent contractors rather than employees, thereby violating the Massachusetts independent contractor statute.

Plaintiffs alleged that, among other things, the defendants required plaintiffs to own day planners, pay desk fees each month, have cell phones with a “617” area code, complete office hours duty in some cases, and were subject to disciplinary action if productivity goals were not met. The court denied the plaintiffs’ motion for summary judgment, which argued that the defendants could not establish the plaintiffs as independent contractors under Massachusetts’s independent contractor statute. Instead, the court ordered summary judgment in favor of the defendants, finding that the Massachusetts real estate statute required the broker to exercise some degree of supervision over the plaintiffs in order to comply with real estate license laws and acknowledging that it was impossible to read the real estate statute and the independent contractor statute in harmony. The Massachusetts independent contractor statute contains a presumption that an individual is an employee unless three specific factors are met, which is commonly referred to as the “ABC test”. However, given the real estate statute’s supervision requirement, it would be difficult, if not impossible, for brokers to meet the independent contractor statute’s three-factor test. Recognizing the inherent conflict, the court turned to the rules of statutory construction, under which the court determined the real estate statute, as the more specific statute, must control. The plaintiffs’ appealed the trial court’s decision and the Massachusetts Supreme Court granted direct review of the case.

In a positive win for the real estate industry, the Massachusetts Supreme Court affirmed the lower court’s ruling, holding that the Massachusetts independent contractor statute does not apply to real estate salespersons. Instead, the Massachusetts Supreme Court held that, as the more specific statute, the real estate license law controls.
In reaching its decision, the court noted that despite the level of supervision and control brokers are required to exercise over their salespeople under the real estate license laws, the real estate statute expressly permits a broker to classify their salespeople as employees or independent contractors.

The court observed that compliance with the various controls set forth in the real estate licensing statute makes it difficult for a real estate salesperson to meet the “ABC Test” in the independent contractor statute, but that it could not have been the legislature’s intent to exclude real estate salespersons from independent contractor status. In construing both the independent contractor statute and the real estate licensing laws together, and taking into consideration the legislative purpose behind these laws, the court determined that the real state licensing laws control. This decision preserves Massachusetts brokers’ longstanding practice and ability to continue to choose to classify their salespeople as independent contractors.

In another California case, *Cruz et. al. v. Redfin*, the plaintiffs alleged that Redfin’s field agents were misclassified as independent contractors when in reality the field agents were employees. Plaintiffs alleged this misclassification denied them various wages and benefits they were otherwise entitled to as employees. The plaintiffs also alleged that in addition to requiring them to obtain a smartphone, laptop and GPS, Redfin maintained complete control over the plaintiffs and provided the plaintiffs with training and supervision as to how they were to perform their duties. Similar facts are alleged in another case filed against Redfin Corporation, *Galen v. Redfin Corporation*. In this case, the plaintiff alleged that he was also improperly classified as an independent contractor, rather than as an employee. While Galen attempted to pursue this action in state court, Galen had signed an independent contractor agreement with Redfin, which contained a mandatory arbitration clause. While the trial court denied the defendant’s motion to compel arbitration, the Court of Appeals reversed the ruling, holding that the parties had entered into an independent contractor agreement containing a mandatory arbitration clause, whereby the parties agreed that any claims not settled by mediation would be resolved by binding arbitration. The plaintiff appealed, and the Supreme Court of California granted
review of the Court of Appeals decision in order to determine, in part, whether the plaintiff’s statutory misclassification claims are covered by the mandatory arbitration clause in the independent contractor agreement.

An unfavorable outcome in these cases could lead to a drastic shift in the way the real estate industry has historically done business in those states. For decades, the industry has primarily relied on the independent contractor model for conducting its business. If a broker’s ability to treat real estate salespeople as independent contractors is limited, then brokers will be forced to take on more costs and responsibilities, such as the provision of employee benefits and payment of various employment taxes, than previously accounted for within a broker’s business model. A resulting shift away from the independent contractor model may result in a significant reduction in the number of real estate agents, as brokers struggle with the increased costs of employing agents. In addition, brokers would have to assume heightened control over real estate salespeople, resulting in significant decrease in the freedom and flexibility that real estate agents currently enjoy in an independent contractor relationship.

**Conclusion**

The independent contractor relationship between brokers and their salespeople is a longstanding tradition in the real estate industry. NAR supports the protection of, and efforts to further secure, the right of brokers to choose whether to classify their real estate salespeople as employees or as independent contractors. As a means of achieving protection of this practice, NAR encourages states to review their existing labor and employment statutes, along with their real estate statute, and determine if those laws sufficiently secure brokers’ ability to classify real estate agents as independent contractors. In some states, it may be appropriate to urge legislatures to make a direct and unequivocal carve out for the treatment of real estate salespeople as independent contractors. This will help solidify the status of real estate salespeople as independent contractors and avoid future litigation challenging this practice. As discussed, many states, along with the federal government, already recognize real estate salespeople as nonemployees, but in light of the recent litigation regarding this matter, NAR and its
membership are taking proactive measures to gain increased clarity of a real estate broker’s ability to classify real estate salespeople as independent contractors.

For additional information, questions or assistance with respect to this issue, you may contact Joe Molinaro, NAR Managing Director, Smart Growth and Housing Opportunity, Community and Political Affairs (jmolinaro@realtors.org) or Lesley Walker, NAR Senior Counsel (lwalker@realtors.org).


**Discrimination in the Workplace**

Discrimination is the act of treating someone differently based solely upon membership in a certain class or group or a certain trait, including gender, race, sexual orientation, height, weight, age or ability.

Federal anti-discrimination laws designate certain classes as protected from discrimination. Most of these laws affect businesses with 15 or more employees. Real estate brokerages that operate primarily with independent contractors are probably not subject to some of these laws, but knowledge of these laws can help a licensee protect himself or herself. In Texas, the Texas Commission on Human Rights enforces employment discrimination laws.

There are many federal laws that you need to be in compliance with as it pertains to employment and independent contractor status. These include:

**Federal Equal Employment Opportunity (EEO) Laws**

*What Are the Federal Laws Prohibiting Job Discrimination?*

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
• the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
• the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;
• Title I and Title V of the Americans with Disabilities Act of 1990, as amended (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
• Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government;
• Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about an applicant, employee, or former employee; and the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. 5 U.S.C. 2302. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions cannot be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The Office of
Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

Additional information about the enforcement of the CSRA may be found on the OPM website at http://www.opm.gov/er/address2/guide01.htm; from OSC at (202) 653-7188 or at http://www.osc.gov/; and from MSPB at (202) 653-6772 or at http://www.mspb.gov/.

Discriminatory Practices

What Discriminatory Practices Are Prohibited by These Laws?

Under Title VII, the American with Disability Act (ADA), Genetic Information Nondiscrimination Act (GINA), and the Age Discrimination in Employment Act (ADEA), it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Discriminatory practices under these laws also include:

- harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, or age;
• retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
• employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information; and
• denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws Equal Employment Opportunity Commission (EEOC) enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

Note: Many states and municipalities also have enacted protections against discrimination and harassment based on sexual orientation, status as a parent, marital status and political affiliation. For information, please contact the Equal Employment Opportunity Commission (EEOC) District Office nearest you.

**What Other Practices Are Discriminatory Under These Laws?**

**Title VII**

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.
National Origin Discrimination

- It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.
- A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to assure that employees hired are legally authorized to work in the U.S. However, an employer who requests employment verification only for individuals of a particular national origin, or individuals who appear to be or sound foreign, may violate both Title VII and Immigration Reform and Control Act (IRCA); verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

Additional information about Immigration Reform and Control Act (IRCA) may be obtained from the Office of Special Counsel for Immigration-Related Unfair Employment Practices at 1-800-255-7688 (voice), 1-800-237-2515 (TTY for employees/applicants) or 1-800-362-2735 (TTY for employers) or at http://www.usdoj.gov/crt/osc.

Religious Accommodation
- An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship.

Sex Discrimination
Title VII's broad prohibitions against sex discrimination specifically cover:
- Sexual Harassment—This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment
for persons of either gender, including same sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)

- Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

Additional rights are available to parents and others under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor. For information on the FMLA, or to file an FMLA complaint, individuals should contact the nearest office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The Wage and Hour Division is listed in most telephone directories under U.S. Government, Department of Labor or at http://www.dol.gov/esa/public/whd_org.htm.

Age Discrimination in Employment Act
The Immigration Reform and Control Act (ADEA)'s broad ban against age discrimination also specifically prohibits:

- statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
- discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Equal Pay Act
The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions.
Note that:

- Employers may not reduce wages of either sex to equalize pay between men and women.
- A violation of the EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex.
- A violation may also occur where a labor union causes the employer to violate the law.

**Titles I and V of the Americans with Disabilities Act, as amended**

The ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination:

**Individual with a Disability**

An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having a disability. An entity subject to the ADA regards someone as having a disability when it takes an action prohibited by the ADA based on an actual or perceived impairment, except if the impairment is both transitory (lasting or expected to last six months or less) and minor. Major life activities are basic activities that most people in the general population can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, thinking, and eating. Major life activities also include the operation of a major bodily function, such as functions of the immune system normal cell growth, brain, neurological, and endocrine functions.

"Qualified"

An individual with a disability is "qualified" if he or she satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.
Reasonable Accommodation
Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters.
Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids. A person who only meets the "regarded as" definition of disability is not entitled to receive a reasonable accommodation.

Undue Hardship
An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer's business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Prohibited Inquiries and Examinations
Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.
Drug and Alcohol Use

Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA’s restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 made major changes in the federal laws against employment discrimination enforced by EEOC. Enacted in part to reverse several Supreme Court decisions that limited the rights of persons protected by these laws, the Act also provides additional protections. The Act authorizes compensatory and punitive damages in cases of intentional discrimination, and provides for obtaining attorneys’ fees and the possibility of jury trials. It also directs the EEOC to expand its technical assistance and outreach activities.

Title II of the Genetic Information Nondiscrimination Act of 2008

GINA prohibits discrimination against applicants, employees, and former employees on the basis of genetic information. This includes a prohibition on the use of genetic information in all employment decisions; restrictions on the ability of employers and other covered entities to request or to acquire genetic information, with limited exceptions; and a requirement to maintain the confidentiality of any genetic information acquired, with limited exceptions.

Employers and Other Entities Covered by EEO Laws

Which Employers and Other Entities Are Covered by These Laws?
Title VII, the ADA, and GINA cover all private employers, state and local governments, and education institutions that employ 15 or more individuals. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.
The ADEA covers all private employers with 20 or more employees, state and local governments (including school districts), employment agencies and labor organizations.

The EPA covers all employers who are covered by the Federal Wage and Hour Law (the Fair Labor Standards Act). Virtually all employers are subject to the provisions of this Act. Title VII, the ADEA, GINA, and the EPA also cover the federal government. In addition, the federal government is covered by Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, which incorporate the requirements of the ADA. However, different procedures are used for processing complaints of federal discrimination. For more information on how to file a complaint of federal discrimination, contact the EEO office of the federal agency where the alleged discrimination occurred.

The CSRA (not enforced by EEOC) covers most federal agency employees except employees of a government corporation, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and as determined by the President, any executive agency or unit thereof, the principal function of which is the conduct of foreign intelligence or counterintelligence activities, or the General Accounting Office.

The Commission

What Is EEOC and How Does It Operate?

EEOC is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964. The Commission is composed of five Commissioners and a General Counsel appointed by the President and confirmed by the Senate. Commissioners are appointed for five-year staggered terms; the General Counsel's term is four years. The President designates a Chair and a Vice-Chair. The Chair is the chief executive officer of the Commission. The Commission has authority to establish equal employment policy and to approve litigation. The General Counsel is responsible for conducting litigation.
EEOC carries out its enforcement, education and technical assistance activities through 53 field offices serving every part of the nation.

The nearest EEOC field office may be contacted by calling: 1-800-669-4000 (voice) or 1-800-669-6820 (TTY).

Source: https://www.eeoc.gov/facts/qanda.html

Additionally, employers have to be aware of and comply with:

- IRS rules requiring an employer to pay the employer's portion of the FICA and withdraw the employee's portion from their wages.
- To pay at least the federal minimum wage and time and a half for overtime.
- Child Labor Laws

**Summary of the Texas Child Labor Law**

**General**

The purpose of the Texas Child Labor Law is to ensure that a child is not employed in an occupation or manner that is detrimental to the child's safety, health, or well-being.

Except as specifically authorized by the statute, it is illegal to employ a child under 14 years of age. One of the principal exemptions in the statute allows the Texas Workforce Commission (Commission) to adopt rules which authorize the employment of children under 14 years of age as performers in a motion picture or a theatrical, radio, or television production. Pursuant to that authority, the Commission has adopted Texas Commission Rules Section §817.31, §817.32 and §817.33 which set out the procedures for authorization of work by a child actor. These rules also contain provisions designed to ensure that employment does not interfere with a child's education and does not pose a threat to the child's health, safety, or general well-being.
The Commission or its designee may, during working hours, inspect a place of business where there is good reason to believe a child is or has been employed within the last two years and collect information about the employment of children there. Knowingly or intentionally hindering such an investigation is a violation of the law.

**Definitions**

In this chapter:

1. "Child" means an individual under 18 years of age.
2. "Commission" means the Texas Workforce Commission.
3. "Delivery of newspapers" means the distribution of newspapers on or the maintenance of a newspaper route. The term does not include direct sales of newspapers to the general public.

**General Exemptions**

This chapter does not apply to employment of a child:

1. employed:
   a. in a non-hazardous occupation;
   b. under the direct supervision of the child's parent or an adult having custody of the child; and
   c. in a business or enterprise owned or operated by the parent or custodian.
2. 11 years or older engaged in delivery of newspapers to the consumer;
3. participating in a school-supervised and school-administered work-study program approved by the Commission;
4. employed in agriculture during a period when the child is not legally required to be attending school;
5. employed through a rehabilitation program supervised by a county judge;
6. engaged in non-hazardous casual employment that will not endanger the safety, health, or well-being of the child and to which the parent or adult having custody of the child has consented; or
7. 16 years or older engaged in the direct sale of newspapers to the general public.
In this section, "employment in agriculture" means engaged in producing crops or livestock and includes:

1. cultivating and tilling the soil;
2. producing, cultivating, growing, and harvesting an agricultural horticultural commodity;
3. dairying; and
4. raising livestock, bees, fur-bearing animals, or poultry.

For the purposes of general exemption No. 6, the Commission by rule may define non-hazardous casual employment that the Commission determines is dangerous to the safety, health, or well-being of a child.

Effective September 1, 2007, the state child labor law was amended by adding general exemption No.7, which permits minors 16 or older to sell newspapers directly to the general public.

**Hours of Employment Under State and Federal Law**

**Texas State Law**
A child 14 or 15 years of age may not work more than eight hours in one day or more than 48 hours in one week. A child who is 14 or 15 years of age and is enrolled in a term of a public or private school may not work between the hours of 10 p.m. and 5 a.m. on a day that is followed by a school day or between the hours of midnight and 5 a.m. on a day that is not followed by a school day. A child who is 14 or 15 years of age and is not enrolled in summer school may not work between the hours of midnight and 5 a.m. on any day that school is recessed for the summer.

**Federal Law**
Under the Fair Labor Standards Act (FLSA) a child 14 or 15 years of age may not work during school hours, may not work more than three hours on a school day or 18 hours during a school week, and may not work more than eight hours on a non-school day or 40 hours during a non-school week. Furthermore, a child 14 or 15 years of age may work
only between 7 a.m. and 7 p.m. during the school year. Between June 1 and Labor Day, a child may work between the hours of 7 a.m. and 9 p.m. A child 16 or 17 years of age have no restrictions on the number of hours or times of day they may work.

**Hardship Exemption**

The Commission may adopt rules for determining whether hardships exist. If, on the application of a child, the Commission determines that a hardship exists for that child, the hours’ restrictions do not apply to that child. Commission Rule Section §817.22 provides the procedure which must be followed in seeking a hardship waiver of the hour restrictions for a child 14- and 15-years of age.

**Penalties**

An offense under this Act is a Class B misdemeanor with the exception of the offense of employing a child to sell or solicit, which is a Class A misdemeanor. It is a defense to prosecution of a person employing a child who does not meet the minimum age requirement for a type of employment, that the person relied in good faith on an apparently valid certificate of age presented by the child that showed the child to meet the age requirement for that type of employment. In addition to the criminal penalty noted above, if an employer violates the provisions of this Act, the Commission may assess an administrative penalty against that employer in a amount not to exceed $10,000.

**Appeals**

Any violation or assessment of a penalty under this provision of the Child Labor Act may be appealed to a hearings examiner of the Texas Workforce Commission. No later than 30 days after a Commission order assessing a penalty becomes final, the employer may file a petition for judicial review of the order.

**Injunctive Relief**

The Attorney General may seek injunctive relief in district court against an employer who repeatedly violates the requirements established by this Act relating
to the employment of children. The Commission has adopted, by rule (TWC §817.21), the federal regulations governing the employment of 14- and 15-year olds in occupations prohibited by the U.S. Department of Labor.

**Permitted Occupations for 14- and 15-Year Olds**

A child who is 14 or 15 years of age may be employed in the following occupations in retail, food service, and gasoline service establishments:

1. Office and clerical work (including operation of office machines).
2. Cashiering, selling, modeling, art work, work in advertising departments, window trimming and comparative shopping.
3. Price marking and tagging by hand or by machine. Assembling orders, packing and shelving.
4. Bagging and carrying out customers' orders.
5. Errand and delivery work by foot, bicycle, and public transportation.
6. Cleanup work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers or cutters.
7. Kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of such work such as, but not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, and coffee grinders.
8. Work in connection with cars and trucks if confined to the following:
   - Dispensing gasoline and oil
   - Courtesy service on premises of gasoline service station
   - Car cleaning, washing and polishing
   - Other occupations permitted by this section
   But not including work:
   - Involving the use of pits, racks or lifting apparatus or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring.
9. Cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing and stocking goods when performed in areas physically separate from areas where meat is prepared for sale and outside freezers or meat coolers.
Prohibited Occupations for 14- and 15-Year Olds

A child who is 14 or 15 years of age may NOT be employed in:

1. Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;
2. Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;
3. The operation of motor vehicles or service as helpers on such vehicles;
4. Public messenger service;
5. Occupations which the Secretary of Labor may, pursuant to Section 3(l) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;
6. Occupations in connection with:
   (a) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;
   (b) Warehousing and storage;
   (c) Communications and public utilities;
   (d) Construction (including demolition and repair);

Except such office (including ticket office) work, or sales work, in connection with paragraph 6(a)(b)(c) and (d) of this section as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

7. Work performed in or about boiler or engine rooms;
8. Work in connection with maintenance or repair of the establishment or equipment;
9. Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes;
10. Cooking;
   (a) Including the use of electric and gas grilles that entail cooking over an open flame;
(b) Including the use of deep fryers that are not equipped with and utilize devices that automatically lower and raise the baskets into and out of oil or grease.
(c) Including the cleaning of kitchen surfaces and non-power driven kitchen equipment - including the filtering, transporting, and dispensing of oil and grease - but only when the temperature of the surfaces, equipment, oil and grease exceeds 100 F.

11. Baking;
12. Occupations which involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers;
13. Work in freezers and meat coolers and all work in the preparation of meats for sale;
14. Loading or unloading goods to and from trucks, railroad cars, or conveyors;
15. All occupations in warehouses except office and clerical work.

The Commission has adopted, by rule (TWC §817.23), the federal regulations governing the employment of a child 16- and 17-years of age in occupations declared hazardous by the U.S. Department of Labor.

Prohibited Occupations for 16- and 17-Year Olds (Also prohibited for 14- and 15-year olds)

These occupations are commonly referred to as "Hazardous Occupation Orders" and include work:

1. In or about plants or establishments manufacturing or storing explosives
2. Involving the driving of motor vehicles and outside helpers
   a. on any public road or highway
   b. in or about any place where logging or sawmill operations are in progress, or
   c. in excavations
(Under certain conditions, driving a motor vehicle for a commercial purpose is NOT considered a hazardous occupation under state or federal law.)

3. Connected with coal mining
4. Involving logging operations and sawmill operations
*5. Operating or assisting to operate power-driven woodworking machines
6. Involving exposure to radioactive substances and to ionizing radiations
7. Operating or assisting to operate power-driven hoisting apparatus such as elevators, cranes, derricks, hoists, and high-lift trucks
*8. Operating or assisting to operate power-driven metal forming, punching, and shearing machines
9. In connection with mining, other than coal
*10. Operating or assisting to operate power-driven meat processing machines
11. Operating or assisting to operate power-driven bakery machines
*12. Involving the operating of power-driven paper-products machines, scrap paper balers and paper box compactors
(Under certain conditions, loading a baler or box compactor is NOT considered a hazardous occupation under state or federal law.)
13. Manufacturing brick, tile and kindred products
*14. Operating or assisting to operate power-driven circular saws, band saws and guillotine shears
15. Wrecking, demolition and ship-breaking operations
*16. Roofing operations and work on or about a roof
*17. Connected with excavation operations

The hazardous occupation orders denoted with an asterisk (*) have apprentice or student-learner exemptions.

**Apprentice and Student Learner Exemptions**

1. Apprentice:
   a. employed in a recognized apprentice able trade;
   b. work is incidental to training;
c. intermittent, short, and under close journeyman supervision; and registered
or under written agreement about work standards.

2. Student-learner: a. enrolled in authorized cooperative vocational training program;
and employed under a written agreement providing that:
   1. work is incidental to training;
   2. work is intermittent, short, and under close supervision;
   3. safety instructions are given by school and employer; and a schedule of
      organized and progressive work is prepared.

Federal Child Labor Law Amendments

There have been some important changes to the Child Labor Laws affecting Hazardous
Occupation Orders No. 2, No. 12 and No. 16.

Changes to Hazardous Occupation Order No. 2:

No employee 16-years-old (including 14 & 15 year olds) may drive on public
roadways as part of their employment.

Seventeen-year-olds may drive on public roadways as part of their employment,
but ONLY if all the following requirements are met:

- The driving is limited to daylight hours;
- The 17-year-old holds a state license valid for the type of driving involved in the
  job performed;
- The 17-year-old has successfully completed a state approved driver education
  course and has no record of any moving violation at the time of hire;
- The automobile or truck is equipped with a seat belt for the driver and any
  passengers and the employer has instructed the youth that the seat belts must be
  used when driving;
- The automobile or truck does not exceed 6,000 lbs. gross vehicle weight;

The driving may NOT involve:

- Towing vehicles;
• Route deliveries or sales;
• Transportation for hire of property, goods, or passengers;
• Urgent, time sensitive deliveries, such as pizza or floral delivery;
• Transporting more than three passengers, including employees of the employer;
• Driving beyond a 30-mile radius from the youth's place of employment;
• More than two trips away from the primary place of employment in any single day
doing the employer's goods to a customer (other than urgent, time-sensitive
deliveries which are prohibited);
• More than two trips away from the primary place of employment in any single day
to transport passengers, other than employees of the employer; and,
• Such driving is only occasional and incidental to the 17-year-old's employment.
This means that the youth may spend no more than 1/3 of the work time in any
workday and no more than 20% of the work time in any workweek driving.

These requirements apply whether the youth is driving a personal or employer-owned
vehicle. Employers can guard against violations of the new requirements by securing
documentation from 17-year-old employees who drive as part of their job. Such
documentation would include evidence of the employee's age, completion of a driver
education course, clean driving record and appropriate State driver's license.

**Changes to Hazardous Occupation Order No. 12:**
Minors 16 years of age or older are permitted to load—but not operate or unload—certain
power-driven balers and compactors, but ONLY if all the following requirements are met:

- The employer must ensure that the equipment meets, and continues to meet, the
  American National Standards Institute (ANSI) standards. ANZI Z245.5-1997 for
  scrap paper balers or Standard ANSI Z245.2-1997 for paper box compactors
- Prior to permitting minors 16- and 17-years of age to load materials into balers and
  compactors, the employer must provide a notice and post a notice on each piece
  of equipment that:
    1. identifies the specific ANSI standard listed above that the employer is stating
       that the equipment to be loaded by the young workers meets; and
2. states that 16- and 17-year olds may only load this piece of equipment, and;
3. states that no one under age 18 may not operate or unload this piece of equipment.
   o The equipment must include an on-off switch incorporating a key-lock or other system, and the control of the system must be maintained in the custody of employees who are 18 years of age or older.
   o The on-off switch of the equipment must be maintained in an off position when the equipment is not in operation.
   o The equipment cannot be operated while it is being loaded.

It is the responsibility of the employer to make the initial determination that the equipment to be loaded by 16- and 17-year olds meet the appropriate ANSI standards. It is also the employer’s responsibility to provide the notice and post it on each piece of equipment which is loaded by 16- or 17-year old workers

**Changes to Hazardous Occupation Order No. 16:**

This order prohibits the employment of minors under 18 years of age from performing roofing occupations and on or about a roof. This includes:

- Work performed on the ground;
- Work in connection of installation, alteration, maintenance, repair or painting of a roof;
- Work in close proximity to a roof;
- Installation of telecommunications equipment, gutters, flashing, and HVAC equipment on a roof;
- Work from scaffolding or ladders in close proximity to a roof;
- The use of the roof to access other work places;
- Work in the construction of the bases of roofs, installation of roof trusses, sheathing of roofs, or erecting roofs on metal buildings.
Texas Child Labor Law Amendments

Texas state law prohibits

1) the employment of anyone under 14 years of age and unaccompanied by a parent to sell or solicit goods or services for any person other than an exempt organization or a business owned or operated by a parent, and
2) the employment of a child to sell or solicit goods or services for any person other than an exempt organization unless parental permission is granted on a form prescribed by the Commission at least seven days before employment begins.

Texas state law was amended to allow the driving of a motor-vehicle for a commercial purpose under certain conditions. Under state, but not federal law, a person may employ a child to operate a motor vehicle for a commercial purpose if the child:

1. has a valid driver's license;
2. does not need a commercial license to perform the job;
3. operates a vehicle with no more than two axles and not in excess of 15,000 pounds gross vehicle weight; and
4. performs the job:
   a. under the direct supervision of the child's parent; and
   b. for a business owned or operated by the child's parent.

Texas state law was amended to prohibit employment of a child in a sexually oriented business and to require a sexually oriented business to maintain certain photographic identification records and provides for a criminal penalty.

When both Federal and State laws apply, the law setting the more stringent standard should be observed. For information regarding the Federal child labor standards, contact your local office of the US Department of Labor Wage and Hour Division.

It should be noted that this summary is not the complete text of the Texas Child Labor Law, nor is it written in the exact language of that law. It is intended as an informal educational tool for the benefit of employers and employees in Texas.
Employers also need to comply with the following that we will also discuss in more detail:

- The Family and Medical Leave Act (FMLA)
- COBRA
- The Equal Pay Act of 1963

According to healthinsurance.org, COBRA is defined as “the Consolidated Omnibus Budget Reconciliation Act of 1985, federal legislation that allows you—if you work for an insured employer group of 20 or more employees—to continue to purchase health insurance for up to 18 months if you lose your job, or your employer-sponsored coverage is otherwise terminated.

The insured is responsible for the full cost of the premiums (plus a 2 percent administrative fee) if COBRA is elected.”

**The Equal Pay Act of 1963**

**MINIMUM WAGE**

**SEC. 206. [Section 6]**

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility,
and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Additional Provisions of Equal Pay Act of 1963

An Act

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963."
Declaration of Purpose
Not Reprinted in U.S. Code [Section 2]

(a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex-
   (1) depresses wages and living standards for employees necessary for their health and efficiency;
   (2) prevents the maximum utilization of the available labor resources;
   (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
   (4) burdens commerce and the free flow of goods in commerce; and
   (5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

[Section 3 of the Equal Pay Act of 1963 amends section 6 of the Fair Labor Standards Act by adding a new subsection (d). The amendment is incorporated in the revised text of the Fair Labor Standards Act.]

Effective Date
Not Reprinted in U.S. Code [Section 4]

The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: Provided, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended) [subsection (d)(4) of this section], the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.
Employee Retirement Income Security Act (ERISA)

History
In 1961, U.S. President John F. Kennedy created the President’s Committee on Corporate Pension Plans. The movement for pension reform gained some momentum when the Studebaker Corporation, an automobile manufacturer, closed its plant in 1963. Its pension plan was so poorly funded that Studebaker could not afford to provide all employees with their pensions. The company created a program in which 3,600 workers who had reached the retirement age of 60 received full pension benefits, 4,000 workers aged 40–59 who had ten years with Studebaker received lump sum payments valued at roughly 15% of the actuarial value of their pension benefits, and the remaining 2,900 workers received no pensions.

In 1963, Senator John L. McClellan (D) of Arkansas began an investigation through the Permanent Investigations Senate Subcommittee into labor leader George Barasch, alleging misuse and diversion of $4,000,000 of union benefit funds. After three years, the investigation had failed to find any wrongdoing, but had resulted in several proposed laws, including McClellan’s October 12, 1965, bill setting new fiduciary standards for plan trustees. Additionally, due much in part to his "dismay" over Barasch's sole control over union benefit plan funds, Senator Jacob K. Javits (R) of New York also introduced bills in 1965 and 1967 increasing regulation on welfare and pension funds to limit the control of plan trustees and administrators and address the funding, vesting, reporting, and disclosure issues identified by the presidential committee. His bills were opposed by business groups and labor unions, which sought to retain the flexibility they enjoyed under pre-ERISA law. Provisions from all three bills ultimately evolved into the guidelines enacted in ERISA.
On September 12, 1972, NBC broadcast an hour-long television special, Pensions: The Broken Promise that showed millions of Americans the consequences of poorly funded pension plans and onerous vesting requirements. In the following years, Congress held a series of public hearings on pension issues and public support for pension reform grew significantly.

ERISA was enacted in 1974 and signed into law by President Gerald Ford on September 2, 1974, Labor Day. In the years since 1974, ERISA has been amended repeatedly.

**Pension Plans**

ERISA does not require employers to establish pension plans. Likewise, as a general rule, it does not require that plans provide a minimum level of benefits. Instead, it regulates the operation of a pension plan once it has been established.

Under ERISA, pension plans must provide for vesting of employees' pension benefits after a specified minimum number of years. ERISA requires that the employers who sponsor plans satisfy certain minimum funding requirements.

ERISA also regulates the manner in which a pension plan may pay benefits. For example, a defined benefit plan must pay a married participant's pension as a "joint-and-survivor annuity" that provides continuing benefits to the surviving spouse unless both the participant and the spouse waive the survivor coverage.

The Pension Benefit Guaranty Corporation was established by ERISA to provide coverage in the event that a terminated defined benefit pension plan does not have sufficient assets to provide the benefits earned by participants. Later amendments to ERISA require an employer who withdraws from participation in a multiemployer pension plan with insufficient assets to pay all participants' vested benefits to contribute the pro rata share of the plan's unfunded vested benefits liability.
There are two main types of pension plans: defined benefit plans and defined contribution plans. Defined benefit plans provide retirees with a certain level of benefits based on years of service, salary and other factors. Defined contribution plans provide retirees with benefits based on the amount and investment performance of contributions made by the employee and/or employer over a number of years.

Health Benefit Plans
ERISA does not require that an employer provide health insurance to its employees or retirees, but it regulates the operation of a health benefit plan if an employer chooses to establish one.

There have been several significant amendments to ERISA concerning health benefit plans:

- The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides some employees and beneficiaries with the right to continue their coverage under an employer-sponsored group health benefit plan for a limited time after the occurrence of certain events that would otherwise cause termination of such coverage, such as the loss of employment.
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits a health benefit plan from refusing to cover an employee's pre-existing medical conditions in some circumstances. It also bars health benefit plans from certain types of discrimination on the basis of health status, genetic information, or disability.

Other relevant amendments to ERISA include the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act.

During the 1990s and 2000s, many employers who promised lifetime health coverage to their retirees limited or eliminated those benefits. ERISA does not provide for vesting of
health care benefits in the way that employees become vested in their accrued pension benefits. Employees and retirees who were promised lifetime health coverage may be able to enforce those promises by suing the employer for breach of contract, or by challenging the right of the health benefit plan to change its plan documents to eliminate promised benefits.

**Pension Vesting**
Before ERISA, some defined benefit pension plans required decades of service before an employee's benefit became vested. It was not unusual for a plan to provide no benefit at all to an employee who left employment before the specified retirement age (e.g. 65), regardless of the length of the employee's service.

Under the Pension Protection Act of 2006, employer contributions made after 2006 to a defined contribution plan must become vested at 100% after three years or under a 2nd-6th year gradual-vesting schedule (20% per year beginning with the second year of service, i.e. 100% after six years). (ref. 120 Stat. 988 of the Pension Protection Act of 2006.) The Technical Explanation of H.R.4, of the PPA, Page 156 Vesting Rules, states that the PPA amends both the ERISA and Code. Different rules apply with respect to employer contributions made before 2007. Employee contributions are always 100% vested. Accrued benefits under a defined benefit plan must become vested at 100% after five years or under a 3rd-7th year gradual vesting schedule (20% per year beginning with the third year of vesting service, and 100% after seven years). (ref. 26 U.S.C. 411(a)(1)(B), 29 U.S.C. 203(a)(2).)

**Pension Funding**
ERISA established minimum funding requirements for pension plans, which includes defined benefit plans and money purchase plans but not profit sharing or stock bonus plans.

Before the Pension Protection Act of 2006 (PPA), a defined benefit plan maintained a funding standard account, which was charged annually for the cost of benefits earned
during the year and credited for employer contributions. Increases in the plan's liabilities due to benefit improvements, changes in actuarial assumptions, and any other reasons were amortized and charged to the account; decreases in the plan's liabilities were amortized and credited to the account. Every year, the employer was required to contribute the amount necessary to keep the funding standard account from falling below $0 at year-end.

In 2008, when the PPA funding rules went into effect, single-employer pension plans no longer maintain funding standard accounts. The funding requirement under PPA is simply that a plan must stay fully funded (that is, its assets must equal or exceed its liabilities). If a plan is fully funded, the minimum required contribution is the cost of benefits earned during the year. If a plan is not fully funded, the contribution also includes the amount necessary to amortize over seven years the difference between its liabilities and its assets. Stricter rules apply to severely underfunded plans (called "at-risk status").

The PPA has different funding requirements for multiemployer pension plans, which preserve most of the pre-PPA funding rules, including the funding standard account. Under PPA, increases and decreases in the plan's liabilities are amortized, but the amortization period for benefit improvements adopted after 2007 are shortened. As with single-employer plans, multiemployer pension plans that are significantly underfunded are subject to restrictions. The restrictions, which may limit the plan's ability to improve benefits or require the plan to reduce employees' benefits, vary depending whether a pension plan's funding status is termed "endangered", "seriously endangered", or "critical". The restrictions accompanying each deficient funding status are progressively more severe as funding status worsens.

Source: https://en.wikipedia.org/wiki/Employee_Retirement_Income_Security_Act
The Family and Medical Leave Act (FMLA)

Overview
The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

- Twelve workweeks of leave in a 12-month period for:
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee’s spouse, child, or parent who has a serious health condition;
  - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
  - any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty”; or
- Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin (military caregiver leave).

Key News
On February 23, 2015, the U.S. Department of Labor’s Wage and Hour Division announced a Final Rule to revise the definition of spouse under the Family and Medical Leave Act of 1993 (FMLA) in light of the United States Supreme Court’s decision in United States v. Windsor, which found section 3 of the Defense of Marriage Act (DOMA) to be unconstitutional. The Final Rule amends the definition of spouse so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live. More information is available at the Wage and Hour Division’s FMLA Final Rule Website.
Worker’s Compensation Laws
Click here to view the Texas Workers’ Compensation Act. This document is from the Texas Department of Insurance, Division of Workers’ Compensation. It has been prepared to reflect changes to the Texas Workers’ Compensation Act through the 83rd Legislature, 2013. Efforts have been made to ensure the accuracy of this document; however, the text of the legislative bills controls if there is a discrepancy.

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 reviewed the TAR Listing Agreement and Buyer’s Representation Agreements in Lessons Four and Five. It is important to note that these agreements between the broker and the principal are 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 and 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 their interest. It is a relationship of trust. The principal is trusting that the broker will do everything he can to represent his or her interest and protect them from foreseeable harm. The broker owes the principal fiduciary duties. He must put the principals’ interest ahead of his own interest.

There are many laws and 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 owes the broker his availability. For example, if the broker receives an offer on the property there must be away 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 brokers 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 contractor from an employee. For example: 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.
(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.
Independent Contractor Agreement between

B. Associate's License and Membership Status: Associate is a licensed real estate □ salesperson □ broker in the State of Texas and □ is □ will become a member of the National Association of REALTORS®, the Texas Association of REALTORS®, and the following local associations of REALTORS®:

Associate will maintain Associate'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 ______, 20__ 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 in 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 38. 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.

(TAR-2301) 8-16-07 Initiated for Identification by Associate _______ and Broker _______ Page 2 of 8
Independent Contractor Agreement between

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.

(TAR-2301) 8-16-07 Initialed for Identification by Associate ________ and Broker ________
Independent Contractor Agreement between

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.
Independent Contractor Agreement between

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,

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

D. Automobile Expenses: Associate shall 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.

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Independent Contractor Agreement between

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 Licensing 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 keys, 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 transactions 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:

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) ____________________________

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Independent Contractor Agreement between

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 (to be completed annually)

Texas Association of Realtors’
STATEMENT OF UNDERSTANDING

It is suggested that this statement be executed annually.

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.

(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

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Employment and Compensation of Personal Assistants

Many agents have found they were able to increase their productivity by using personal assistants to help them. Before hiring an assistant, it is important an agent consider what duties they want the assistant to be able to perform for them.

Unlicensed personal assistants can do limited activities that do not require a license. An unlicensed assistant can create advertising, put new listings in MLS, put up signs, put on lockboxes, make deliveries, etc. Because of some changes in 2016, opening the door for a showing is considered a showing and requires a license, so the unlicensed assistant can no longer do that. TREC specifically allows the unlicensed assistant to be the hostess at an open house but must be careful to direct all questions to the licensed agent.

Often agents want an assistant that can do telemarketing for them to find buyers or sellers. Prospecting for buyers and sellers requires a real estate license. The agent will need to look for someone to hire that has an active real estate license. There are many people with a real estate license that want to be an employee rather than an independent contractor.

IRS would probably not consider a personal assistant as an independent contractor. An assistant works under the direct supervision of their employer. Many times they have required work hours. Those things fall under the definition of an employee.

The agent hiring the assistant has now become an employer. Review the limited list of laws an employer should be aware of at the beginning of this Lesson. Talk with your broker and an attorney before hiring an employee. Be sure you are prepared to pay the employee at least minimum wages and prepared to withhold FICA and income tax from their check. Remember you will pay the employers’ portion of FICA. You will need a good tax consultant to guide you.
Activity: Legal or Not?
Sabrina Samson is an unlicensed assistant working for Rita Wilson at Speedy Sales. Below are five tasks that Sabrina performed today. Indicate whether each one is legal or not for Sabrina to have performed.

1. Animation of Sabrina at an OPEN HOUSE. Sabrina should be standing in front of a house with a sign that says OPEN HOUSE TODAY. She greets a potential buyer and hands the buyer some brochures.
   □ LEGAL □ NOT LEGAL

2. Sabrina answers the phone. Phone rings, she answers and says, “Good afternoon, Speedy Sales, this is Sabrina speaking!”
   □ LEGAL □ NOT LEGAL

3. Sabrina is on the phone. She says, “That property is listed at $140,000." (pause) “Oh yes, it’s in excellent condition!”
   □ LEGAL □ NOT LEGAL

4. Sabrina is showing a property to a potential buyer. She walks through the house with the buyer and says, “I’m sure you would love this property!”
   □ LEGAL □ NOT LEGAL

Relationships Between Brokers and Agents
Brokers and their agents have a general agency agreement. The sales agent is the agent of the broker and acts on the broker’s behalf.

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.

Compensation Issues
Rules of the Commission

535.3 Compensation to or Paid by a Salesperson

A salesperson may not receive a commission or other valuable consideration except with the written consent of the salesperson’s sponsoring broker or the broker who sponsored the salesperson when the salesperson became entitled to the commission or other valuable consideration.

A salesperson may not pay a commission or other valuable consideration to another person except with the written consent of the salesperson's sponsoring broker.

Foreign Brokers (Any broker not licensed in Texas is called a foreign broker)

(a) A broker licensed in Texas may cooperate with a foreign broker and share earned commissions with a foreign broker.
(b) Only Texas license holders may handle negotiations physically conducted within Texas.
(c) A resident of a foreign country or territory that does not require a person to be licensed to act as a real estate broker is considered to be licensed as a foreign broker for the purposes of §1101.651 of the Act, if the person practices as a real estate broker in compliance with the law of the foreign country.

Sec. 1101.651. CERTAIN PRACTICES PROHIBITED.
(a) A licensed broker may not pay a commission to or otherwise compensate a person directly or indirectly for performing an act of a broker unless the person is:
   (1) a license holder; or
   (2) a real estate broker licensed in another state who does not conduct in this state any of the negotiations for which the commission or other compensation is paid.

(b) A salesperson may not accept compensation for a real estate transaction from a person other than the broker with whom the salesperson is associated or was associated when the salesperson earned the compensation.
(c) A salesperson may not pay a commission to a person except through the broker the salesperson is associated at that time.

Only licensed entities can earn or receive commissions. TREC licenses not only sales agents and brokers but corporations and partnerships.

One of the common violations is paying a commission to a corporation that does not have a corporate real estate license. In addition to being licensed as a corporation by the state, a corporation has to have a corporate real estate license to sell real estate.

Many sales licensees decide to incorporate. Someone in the corporation must have a broker’s license in order for the corporation to get a real estate licensee.
Example: John has a real estate sales license and is sponsored by broker Dan. John, at the advice of his attorney or CPA, incorporates. Since John does not have a broker’s license and doesn’t want to hire someone with a broker’s license to join his corporation, John’s corporation cannot get a real estate license. If broker Dan writes checks to John’s corporation for commissions, he is guilty of violating the licensing act. The broker has paid an unlicensed entity.

Broker Dan must pay all commissions to John under the name that is on John’s sales license. If John wants to sign the checks over to a corporate bank account that is acceptable.

Before You Go
Review these scenarios:

What should the sales agent send to the broker annually to show he/she understands they are an independent contractor?

Answer: Complete the Statement of Understanding and submit it to the broker annually.

Name two things an unlicensed assistant cannot do?

Answer:
1. They cannot open the door for a showing and
2. They cannot prospect for buyers or sellers

Lesson Summary
In this lesson we looked at the differences between being an employee and an independent contractor. Most real estate licensees are independent contractors.

The Internal Revenue Service uses a set of guidelines to determine if a licensee is an employee of a brokerage or an independent contractor. If a supervising broker has a high amount of control over the general day-to-day activities of his or her affiliated
licensees, then the licensees are probably considered employees. If, on the other hand, the salespeople and associate brokers are allowed a high degree of independence over the day-to-day activities of their work and if they are paid commissions, not a salary, then they are probably independent contractors. Most real estate brokerages are operated with independent contractors, not with employer-employee relationships.

Many brokers hire employees as staff for their office and independent contracts as the sales force. Brokers that have both employees and independent contractors will need a policy manual for each. The broker will probably want to have legal help in creating the employee manual. There are many employment laws that have to be considered. If an agent plans to hire an assistant, they will need a basic understanding of employment laws.

A broker is allowed to hire unlicensed assistants to perform certain tasks, such as greeting buyers at open houses, performing clerical duties and performing accounting functions, among other duties. An unlicensed assistant may not perform any task for which a license is required, including but not limited to procuring prospects, showing properties, answering questions about the price or condition of the property, negotiating transactions and writing or amending agreements. All unlicensed assistants must work directly for a licensed salesperson or broker, and they must be supervised. Because a supervising broker is likely to exert a great deal of control over his or her unlicensed assistants, it is likely that they would be considered employees, not independent contractors.

Many brokers use the TAR Independent Contractor Agreement for a basic contract between themselves and their agents. Agents are obligated to complete and deliver an annual Statement of Understanding to the broker.

Agents must be cautious not to ask their unlicensed assistants to do anything that requires a license. Assistants can do things like write advertising, put up signs, deliver paperwork, etc. Contact with customers and clients must be handled by the licensed agent. All money
for real estate services that is going to or from a sales agent must be through or with the permission of the broker.
Lesson Ten: Agency, Ethics and the Law

Lesson Topics
This lesson focuses on the following topics:

- Distinction between State Law, Professional Ethics, and Personal Morals
- Federal and State Law Relating to all License Holders TREL and Rules of the Commission (Ethics)
- Professional Codes of Ethics
- Minimum Ethical Standards

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

- Identify the role of the Texas Real Estate Commission in protecting the public and describe its structure.
- Summarize the basic components of the Real Estate License Act.
- Recognize the violations that an agent must be aware of in real estate practice.
- Explain the rules of the Texas Real Estate Commission and how they ensure protection of the real estate consumer.

Distinction between State Law, Professional Ethics, and Personal Morals
State laws are rules that are enforced by authority. Real estate laws can be both state and/or federal laws. Even city laws have an effect on our day to day activity. In court cases where there are no state or federal laws that cover the issue, court cases develop common law that becomes a precedent for future issues. Even when we do not agree with a certain law, we know we must follow the law. If we do not, there are consequences.

Ethics are motivation based on ideas of right and wrong. For example, our National Association of REALTORS® Code of Ethics is a written document defining expectations...
Morals are values that we attribute to a system of beliefs. The human race is affected by the environment in which we are raised. No two humans are raised the same way. As a result of the way we are raised, our morals are developed as to what is right and wrong.

Opinions can vary greatly as to what is ethical, moral, right or wrong. Knowing what is in the Texas Real Estate Licensing Act and the REALTOR Code of Ethics is the best way to practice real estate. However nothing can take the place of good judgment and common sense. Real estate is a unique business where situations occur that you may have never encountered or prepared for. A good moral compass is essential to be a good real estate professional. Consequences for violating your own moral compass are more personal. You have to live with yourself. This could certainly affect your business if clients believe you do not always do what is correct and right.

How a Law Becomes a Law in Texas

Legislation refers to the preparation and enactment of laws by a legislative body through its lawmaking process. The legislative process includes evaluating, amending, and voting on proposed laws and is concerned with the words used in the bill to communicate the values, judgments, and purposes of the proposal. An idea becomes an item of legislative business when it is written as a bill. A bill is a draft, or tentative version, of what might become part of the written law. A bill that is enacted is called an act or statute.

Ideas for legislation can come from legislators who have experience in a particular field, or legislators can copy legislation because an idea that works well in one jurisdiction can be useful to its neighbors. Legislators also receive proposals from the
National Conference of Commissioners on Uniform State Laws; a conference of 250 lawyers appointed by governors to represent the states. The Council of State Governments, the American Law Institute, the American Bar Association, and numerous other organizations all produce model acts for legislatures. Protection and promotion of social and economic interests of particular groups also motivate legislation. Interests groups usually become involved in the legislative process through lobbyists.

The general procedure of enactment of legislation is governed by the relevant constitution. When a bill is first introduced by a sponsor it is referred to a committee. If the bill must go through more than one committee, the first committee must refer it to the second. To accommodate interested and affected groups and to eliminate technical defects a bill can be amended. If the committee recommends that the bill be passed, the bill is placed on the agenda for action by the full legislative body, or floor action. After a lengthy and complex procedure of deliberation and debates, legislators vote on the final passage of the bill. In bicameral legislatures (legislatures that are divided into to two bodies as Senate and House in the United States government) the bill must be passed through both houses in exactly the same form to become the law. When the two houses cannot agree on a final form for the bill, a complex procedure of compromise is attempted. Once the bill is approved by both houses and is put into final form, it must be signed by the executive. An executive can refuse to sign a bill and can return it to the legislature with a veto message explaining why. If the executive signs the bill, it is filed and becomes law.

(Source: An Overview of Business Law
http://lizajennifer.tripod.com/gregsresourcecenterforparalegals/id6.html)

**Federal and State Law Relating to all License Holders**

Many federal laws guide the actions of all real estate license holders:

Read them and become familiar with what they say, what you can do and what you cannot do.
Truth and Lending Act of 1968

Truth and Lending Act of 1968 promotes informed use of consumer credit and requires lenders to make disclosures to borrowers about terms and cost to standardize the manner in which the costs associated with borrowing are calculated and disclosed.

Truth in Lending. Office of the Comptroller of the Currency


The Truth in Lending Act (TILA) protects you against inaccurate and unfair credit billing and credit card practices. It requires lenders to provide you with loan cost information so that you can comparison shop for certain types of loans.

For loans covered under TILA, you have a right of rescission, which allows you three days to reconsider your decision and back out of the loan process without losing any money. This right helps protect you against high-pressure sales tactics used by unscrupulous lenders.

Truth in Lending Act (TILA) does not tell banks how much interest they may charge or whether they must grant a consumer loan. Learn more. Read Facts for Consumers: Home Equity Credit Lines on the Federal Trade Commission Web site and Office of the Controllers of the Currency’s (OCC) Answers about Consumer Loans.

Federal law authorizes the Office of the Controllers of the Currency’s (OCC) to order supervised institutions to make monetary and other adjustments to the accounts of consumers where an annual percentage rate (APR) or finance charge was inaccurately disclosed under certain circumstances. An interagency policy statement on administrative enforcement and related questions and answers provide additional information for consumers and institutions.
The Federal Fair Housing Act of 1968


The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) introduced meaningful federal enforcement mechanisms. It outlaws: Refusal to sell or rent a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

Types of Banned Discrimination

The Civil Rights Act of 1968 prohibited the following forms of discrimination:

- Refusal to sell or rent a dwelling to any person because of his/her race, color, religion or national origin. People with disabilities and families with children were added to the list of protected classes by the Fair Housing Amendments Act of 1988; gender was added in 1974 (see below).
- Discrimination against a person in the terms, conditions or privilege of the sale or rental of a dwelling.
- Advertising the sale or rental of a dwelling indicating preference of discrimination based on race, color, religion or national origin (amended by Congress as part of the Housing and Community Development Act of 1974 to include sex [18] and, as of 1988, people with disabilities and families with children.)
- Coercing, threatening, intimidating, or interfering with a person's enjoyment or exercise of housing rights based on discriminatory reasons or retaliating against a person or organization that aids or encourages the exercise or enjoyment of [fair housing] rights.

Texas Fair Housing Act

http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.301.htm

Sec. 301.001. SHORT TITLE. This chapter may be cited as the Texas Fair Housing Act. Added by Acts 1993, 73rd Leg., ch. 268, Sec. 40, eff. Sept. 1, 1993.

Sec. 301.0015. Texas Workforce Commission.

The powers and duties exercised by the Commission on Human Rights under this chapter are transferred to the Texas Workforce Commission. A reference in this chapter to the "commission" means the Texas Workforce Commission.

Sec. 301.002. Purposes.

The purposes of this chapter are to:

(1) provide for fair housing practices in this state;
(2) create a procedure for investigating and settling complaints of discriminatory housing practices; and
(3) provide rights and remedies substantially equivalent to those granted under federal law.

Sec. 301.003. Definitions.

In this chapter:

(1) "Aggrieved person" includes any person who:
   (A) claims to have been injured by a discriminatory housing practice; or
   (B) believes that the person will be injured by a discriminatory housing practice that is about to occur.
(2) "Complainant" means a person, including the commission that files a complaint under Section 301.081.
(3) Repealed by Acts 2003, 78th Leg., ch. 302, Sec. 4(3).
(4) "Conciliation" means the informal negotiations among an aggrieved person, the respondent, and the commission to resolve issues raised by a complaint or by the investigation of the complaint.
(5) "Conciliation agreement" means a written agreement resolving the issues in conciliation.
(6) "Disability" means a mental or physical impairment that substantially limits at least one major life activity, a record of the impairment, or being regarded as having the impairment. The term does not include current illegal use or addiction to any drug or illegal or federally controlled substance and does not apply to an individual because of an individual's sexual orientation or because that individual is a transvestite.

(7) "Discriminatory housing practice" means an act prohibited by Subchapter B or conduct that is an offense under Subchapter I.

(8) "Dwelling" means any:
   (A) structure or part of a structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families; or
   (B) vacant land that is offered for sale or lease for the construction or location of a structure or part of a structure described by Paragraph (A).

(9) "Family" includes a single individual.

(10) "Respondent" means:
   (A) a person accused of a violation of this chapter in a complaint of discriminatory housing practice; or
   (B) a person identified as an additional or substitute respondent under Section 301.084 or an agent of an additional or substitute respondent.

(11) "To rent" includes to lease, sublease, or let, or to grant in any other manner, for a consideration, the right to occupy premises not owned by the occupant.

(12) "Person" means:
   (A) an individual;
   (B) a corporation, partnership, association, unincorporated organization, labor organization, mutual company, joint-stock company, and trust; and
   (C) a legal representative, a trustee, a trustee in a case under Title 11, U.S.C., a receiver, and a fiduciary.
Sec. 301.004. Familial Status.
A discriminatory act is committed because of familial status if the act is committed because the person who is the subject of discrimination is:

1. pregnant;
2. domiciled with an individual younger than 18 years of age in regard to whom the person:
   A. is the parent or legal custodian; or
   B. has the written permission of the parent or legal custodian for domicile with that person; or
3. in the process of obtaining legal custody of an individual younger than 18 years of age.

Subchapter B. Discrimination Prohibited
Sec. 301.021. SALE OR RENTAL.
(a) A person may not refuse to sell or rent, after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or in any other manner make unavailable or deny a dwelling to another because of race, color, religion, sex, familial status, or national origin.
(b) A person may not discriminate against another in the terms, conditions, or privileges of sale or rental of a dwelling or in providing services or facilities in connection with a sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin.
(c) This section does not prohibit discrimination against a person because the person has been convicted under federal law or the law of any state of the illegal manufacture or distribution of a controlled substance.

Sec. 301.022. Publication.
A person may not make, print, or publish or effect the making, printing, or publishing of a notice, statement, or advertisement that is about the sale or rental of a dwelling and that indicates any preference, limitation, or discrimination or the intention to make
a preference, limitation, or discrimination because of race, color, religion, sex, disability, familial status, or national origin.

Sec. 301.023. Inspection.
A person may not represent to another because of race, color, religion, sex, disability, familial status, or national origin that a dwelling is not available for inspection for sale or rental when the dwelling is available for inspection.

Sec. 301.024. Entry into Neighborhood.
A person may not, for profit, induce or attempt to induce another to sell or rent a dwelling by representations regarding the entry or prospective entry into a neighborhood of a person of a particular race, color, religion, sex, disability, familial status, or national origin.

Sec. 301.025. Disability.
(a) A person may not discriminate in the sale or rental of, or make unavailable or deny, a dwelling to any buyer or renter because of a disability of:
   (1) the buyer or renter;
   (2) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
   (3) any person associated with the buyer or renter.

(b) A person may not discriminate against another in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of:
   (1) the other person;
   (2) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
   (3) any person associated with the other person.

(c) In this section, discrimination includes:
   (1) a refusal to permit, at the expense of the person having a disability, a reasonable modification of existing premises occupied or
to be occupied by the person if the modification may be necessary to afford the person full enjoyment of the premises;

(2) a refusal to make a reasonable accommodation in rules, policies, practices, or services if the accommodation may be necessary to afford the person equal opportunity to use and enjoy a dwelling; or

(3) the failure to design and construct a covered multifamily dwelling in a manner:

(A) that allows the public use and common use portions of the dwellings to be readily accessible to and usable by persons having a disability;

(B) that allows all doors designed to allow passage into and within all premises within the dwellings to be sufficiently wide to allow passage by a person who has a disability and who is in a wheelchair; and

(C) that provides all premises within the dwellings contain the following features of adaptive design:

(i) an accessible route into and through the dwelling;

(ii) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) reinforcements in bathroom walls to allow later installation of grab bars; and

(iv) kitchens and bathrooms that are usable and have sufficient space in which an individual in a wheelchair can maneuver.

(d) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for persons having physical disabilities, commonly cited as "ANSI A 117.1," satisfies the requirements of Subsection (c)(3)(C).

(e) Subsection (c) (3) does not apply to a building the first occupancy of which occurred on or before March 13, 1991.
(f) This section does not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(g) In this subsection, the term "covered multifamily dwellings" means:

(1) buildings consisting of four or more units if the buildings have one or more elevators; and

(2) ground floor units in other buildings consisting of four or more units.

Sec. 301.026. Residential Real Estate Related Transaction.

(a) A person whose business includes engaging in residential real estate related transactions may not discriminate against another in making a real estate related transaction available or in the terms or conditions of a real estate related transaction because of race, color, religion, sex, disability, familial status, or national origin.

(b) In this section, "residential real estate related transaction" means:

(1) the making or purchasing of loans or the provision of other financial assistance:

(A) to purchase, construct, improve, repair, or maintain a dwelling; or

(B) to secure residential real estate; or

(2) the selling, brokering, or appraising of residential real property.

Sec. 301.027. Brokerage Services.

A person may not deny another access to, or membership or participation in, a multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or discriminate against a person in the terms or conditions of access, membership, or participation in such an organization, service, or facility because of race, color, religion, sex, disability, familial status, or national origin.
Subchapter C. Exemptions

Sec. 301.041. Sales and Rentals Exempted.

(a) Subchapter B does not apply to:

(1) the sale or rental of a single-family house sold or rented by the owner if:

(A) the owner does not:

(i) own more than three single-family houses at any one time; or
(ii) own any interest in, nor is there owned or reserved on the person's behalf, under any express or voluntary agreement, title to or any right to any part of the proceeds from the sale or rental of more than three single-family houses at any one time; and

(B) the house is sold or rented without:

(i) the use of the sales or rental facilities or services of a broker, agent, or salesperson licensed under Chapter 1101, Occupations Code, or of an employee or agent of a licensed broker, agent, or salesperson, or the facilities or services of the owner of a dwelling designed or intended for occupancy by five or more families; or
(ii) the publication, posting, or mailing of a notice, statement, or advertisement prohibited by Section 301.022; or

(2) the sale or rental of the rooms or units in a dwelling containing living quarters occupied by or intended to be occupied by not more than four families living independently of each other, if the owner maintains and occupies one of the living quarters as the owner's residence.

(b) The exemption in Subsection (a)(1) applies only to one sale or rental in a 24-month period if the owner was not the most recent resident of the house at the time of the sale or rental.

Sec. 301.042. Religious Organization, Private Club, and Appraisal Exemption.

(a) This chapter does not prohibit a religious organization, association, or society or a nonprofit institution or organization operated, supervised, or
controlled by or in conjunction with a religious organization, association, or society from:

(1) limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion; or

(2) giving preference to persons of the same religion, unless membership in the religion is restricted because of race, color, or national origin.

(b) This chapter does not prohibit a private club that is not open to the public and that, as an incident to its primary purpose, provides lodging that it owns or operates for other than a commercial purpose from limiting the rental or occupancy of the lodging to its members or from giving preference to its members.

(c) This chapter does not prohibit a person engaged in the business of furnishing appraisals of real property from considering in those appraisals factors other than race, color, religion, sex, disability, familial status, or national origin.

Sec. 301.043. Housing for Elderly Exempted.
The provisions of this chapter relating to familial status do not apply to housing:

(1) that the commission determines is specifically designed and operated to assist elderly individuals under a federal or state program;

(2) intended for, and solely occupied by, individuals 62 years of age or older; or

(3) intended and operated for occupancy by at least one individual 55 years of age or older for each unit as determined by commission rules.

Sec. 301.044. Effect on Other Law.

(a) This chapter does not affect a reasonable local or state restriction on the maximum number of occupants permitted to occupy a dwelling or a restriction relating to health or safety standards.
(b) This chapter does not affect a requirement of nondiscrimination in any other state or federal law.

Subchapter D. Administrative Provisions

Sec. 301.062. RULES. The commission may adopt rules necessary to implement this chapter, but substantive rules adopted by the commission shall impose obligations, rights, and remedies that are the same as are provided in federal fair housing regulations.

Sec. 301.063. Complaints.
As provided by Subchapters E and F, the commission shall receive, investigate, seek to conciliate, and act on complaints alleging violations of this chapter.

Sec. 301.065. Reports and Studies.
(a) The commission shall, at least annually, publish a written report recommending legislative or other action to carry out the purposes of this chapter.
(b) The commission shall make studies relating to the nature and extent of discriminatory housing practices in this state.

Sec. 301.066. COOPERATION WITH OTHER ENTITIES.
The commission shall cooperate with and may provide technical and other assistance to federal, state, local, and other public or private entities that are designing or operating programs to prevent or eliminate discriminatory housing practices.

Sec. 301.067. Subpoenas and Discovery.
(a) The commission may issue subpoenas and order discovery in investigations and hearings under this chapter.
(b) The subpoenas and discovery may be ordered to the same extent and are subject to the same limitations as subpoenas and discovery in a civil action in district court.
Sec. 301.068. Referral to Municipality.
The commission may defer proceedings under this chapter and refer a complaint to a municipality that has been certified by the federal Department of Housing and Urban Development as a substantially equivalent fair housing agency.

Sec. 301.069. Gifts and Grants.
(a) The commission may accept gifts and grants from any public or private source for administering this chapter.
(b) Gifts and grants received shall be deposited to the credit of the fair housing fund in the state treasury.
(c) Money deposited to the credit of the fund may be used only for administering this chapter.

Sec. 301.070. Accessibility Assistance and Information for Landlords.
The commission shall provide to landlords technical and other assistance relating to the accessibility requirements under this chapter.

SUBCHAPTER I. Criminal Penalty
Sec. 301.171. Intimidation or Interference.
(a) A person commits an offense if the person, without regard to whether the person is acting under color of law, by force or threat of force intentionally intimidates or interferes with a person:
(1) because of the person's race, color, religion, sex, disability, familial status, or national origin and because the person is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings; or
(2) because the person is or has been or to intimidate the person from:
(A) participating, without discrimination because of race, color, religion, sex, disability, familial status, or national origin, in an activity, service, organization, or facility described by Subdivision (1); or
(B) affording another person opportunity or protection to so participate; or
(C) lawfully aiding or encouraging other persons to participate, without discrimination because of race, color, religion, sex, disability, familial status, or national origin, in an activity, service, organization, or facility described by Subdivision (1).

(b) An offense under this section is a Class A misdemeanor.

(Source: http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.301.htm)


Regulation X

Real Estate Settlement Procedures Act
The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. 2601 et seq.) (the Act) became effective on June 20, 1975. The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. The Act also prohibits specific practices, such as kickbacks, and places limitations upon the use of escrow accounts. The Department of Housing and Urban Development (HUD) originally promulgated Regulation X which implements RESPA.

Congress has amended RESPA significantly since its enactment. The National Affordable Housing Act of 1990 amended RESPA to require detailed disclosures concerning the transfer, sale, or assignment of mortgage servicing. It also requires disclosures for mortgage escrow accounts at closing and annually thereafter, itemizing
the charges to be paid by the borrower and what is paid out of the account by the servicer.

In October 1992, Congress amended RESPA to cover subordinate lien loans.

Congress, when it enacted the Economic Growth and Regulatory Paperwork Reduction Act of 1996,¹ further amended RESPA to clarify certain definitions including “controlled business arrangement,” which was changed to “affiliated business arrangement.” The changes also reduced the disclosures under the mortgage servicing provisions of RESPA.

In 2008, HUD issued a RESPA Reform Rule (73 Fed. Reg. 68204, November 17, 2008) that included substantive and technical changes to the existing RESPA regulations and different implementation dates for various provisions. Substantive changes included a standard Good Faith Estimate form and a revised HUD-1 Settlement Statement that were required as of January 1, 2010. Technical changes, including streamlined mortgage servicing disclosure language, elimination of outdated escrow account provisions, and a provision permitting an “average charge” to be listed on the Good Faith Estimate and HUD-1 Settlement Statement, took effect on January 16, 2009. In addition, HUD clarified that all disclosures required by RESPA are permitted to be provided electronically, in accordance with the Electronic Signatures in Global and National Commerce Act (E-Sign).

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (July 10, 2010) (Dodd-Frank Act) granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB) and, with respect to entities under its jurisdiction, generally granted authority to the CFPB to supervise for and enforce compliance with RESPA and its implementing regulations. In December 2011, the CFPB restated HUD’s implementing regulation at 12 CFR Part 1024 (76 Fed. Reg. 78978) (December 20, 2011). On January 17, 2013, the CFPB issued a final rule to amend Regulation X (78 Fed. Reg. 10695) (February 14, 2013). The final rule
implemented certain provisions of Title XIV of the Dodd-Frank Act and included substantive and technical changes to the existing regulations. Substantive changes included modifying the servicing transfer notice requirements and implementing new procedures and notice requirements related to borrowers’ error resolution requests and information requests. The amendments also included new provisions related to escrow payments, force-placed insurance, general servicing policies, procedures, and requirements, early intervention, continuity of contact, and loss mitigation. The amendments are effective as of January 10, 2014.

On July 10, 2013, September 13, 2013, and October 22, 2014, the CFPB issued final rules to further amend Regulation X (78 Fed. Reg. 44685) (July 24, 2013), (78 Fed. Reg. 60381) (October 1, 2013), and (79 Fed. Reg. 65299) (November 3, 2014). The final rules included substantive and technical changes to the existing regulations, including revisions to provisions on the relation to State law of Regulation X’s servicing provisions, to the loss mitigation procedure requirements, and to the requirements relating to notices of error and information requests. On October 15, 2013, the CFPB issued an interim final rule to further amend Regulation X (78 Fed. Reg. 62993) (October 23, 2013) to exempt servicers from the early intervention requirements in certain circumstances. The Regulation X amendments are effective as of January 10, 2014. The amendments issued on January 17, 2013; July 10, 2013; September 13, 2013; October 15, 2013; and October 22, 2014 are collectively referred to in this document as the “2013-2014 Amendments.” On December 31, 2013, the CFPB published final rules implementing Sections 1098(2) and 1100A(5) of the Dodd-Frank Act, which direct the CFPB to publish a single, integrated disclosure for mortgage transactions, which includes mortgage disclosure requirements under the and Truth in Lending Act (TILA) and sections 4 and 5 of RESPA. These amendments are referred to in this document as the “TILA-RESPA Integrated Disclosure Rule” or “TRID,” and are applicable to covered closed-end mortgage loans for which a creditor or mortgage broker receives an application on or after August 1, 2015. As a result, Regulation Z now houses the integrated forms, timing, and related disclosure requirements for most closed-end consumer mortgage loans. The new integrated
disclosures are not used to disclose information about reverse mortgages, home equity lines of credit (HELOCs), chattel-dwelling loans such as loans secured by a mobile home or by a dwelling that is not attached to real property (i.e., land), or other transactions not covered by the TILA-RESPA Integrated Disclosure rule. The final rule also does not apply to loans made by a creditor who makes five or fewer mortgages in a year. Creditors originating these types of mortgages must continue to use, as applicable, the Good Faith Estimate, HUD-1 Settlement Statement, and Truth in Lending disclosures.

Subpart A – General Provisions Coverage – 12 CFR 1024.5(a)
RESPA is applicable to all “federally related mortgage loans,” except as provided under 12 CFR 1024.5(b) and 1024.5(d), discussed below. “Federally related mortgage loans” are defined as:

Loans (other than temporary loans), including refinancing that satisfy the following two criteria:

- First, the loan is secured by a first or subordinate lien on residential real property, located within a State, upon which either:
  - A one-to-four family structure is located or is to be constructed using proceeds of the loan (including individual units of condominiums and cooperatives); or
  - A manufactured home is located or is to be constructed using proceeds of the loan.

Second, the loan falls within one of the following categories:

- Loans made by a lender, creditor, dealer;
- Loans made or insured by an agency of the federal government;
- Loans made in connection with a housing or urban development program administered by an agency of the federal government;
- Loans made and intended to be sold by the originating lender or creditor to FNMA, GNMA, or FHLMC (or its successor); or
- Loans that are the subject of a home equity conversion mortgage or reverse mortgage issued by a lender or creditor subject to the regulation.

4 A lender includes financial institutions either regulated by, or whose deposits or accounts are insured by any agency of the federal government.

5 A creditor is defined in Sec. 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)). RESPA covers any creditor that makes or invests in residential real estate loans aggregating more than $1,000,000 per year.

6 Dealer is defined in Regulation X to mean a seller, contractor, or supplier of goods or services. Dealer loans are covered by RESPA if the obligations are to be assigned before the first payment is due to any lender or creditor otherwise subject to the regulation.


“Federally related mortgage loans” are also defined to include installment sales contracts, land contracts, or contracts for deeds on otherwise qualifying residential property if the contract is funded in whole or in part by proceeds of a loan made by a lender, specified federal agency, dealer or creditor subject to the regulation.

Exemptions – 12 CFR 1024.5(b)
The following transactions are exempt from coverage:

- A loan primarily for business, commercial or agricultural purposes (definition identical to Regulation Z, 12 CFR 1026.3(a)(1)).

- A temporary loan, such as a construction loan. (The exemption does not apply if the loan is used as, or may be converted to, permanent financing by the same financial institution or is used to finance transfer of title to the first user of the property.) If the lender issues a commitment for permanent financing, it is covered by the regulation.
• Any construction loan with a term of two years or more is covered by the regulation, unless it is made to a bona fide contractor. “Bridge” or “swing” loans are not covered by the regulation.

• A loan secured by vacant or unimproved property where no proceeds of the loan will be used to construct a one-to-four family residential structure. If the proceeds will be used to locate a manufactured home or construct a structure within two years from the date of settlement, the loan is covered.

• An assumption, unless the mortgage instruments require lender approval for the assumption and the lender approves the assumption.

• A conversion of a loan to different terms which are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

• A bona fide transfer of a loan obligation in the secondary market. (However, the mortgage servicing requirements of Subpart C, 12 CFR 1024.30-41, still apply.) Mortgage broker transactions that are table funded (the loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds) are not secondary market transactions and therefore are covered by RESPA. Similarly, neither the creation of a dealer loan or consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction.

**Partial Exemptions for Certain Mortgage Loans – 12 CFR 1024.5(d)**

Most closed-end mortgage loans are exempt from the requirement to provide the Good Faith Estimate, HUD-1 settlement statement, and application servicing disclosure requirements of 12 CFR 1024.6, 1024.7, 1024.8, 1024.10, and 1024.33(a). Instead, these loans are subject to disclosure, timing, and other requirements under TILA and Regulation Z. Specifically, the aforementioned provisions do not apply to a federally related mortgage loan that:
• Is subject to the special disclosure (TILA-RESPA Integrated Disclosure) requirements for certain consumer credit transactions secured by real property set forth in Regulation Z, 12 CFR 1026.19(e), (f), and (g); or
• Is subject to the partial exemption under 12 CFR 1026.3(h) (i.e., certain no-interest loans secured by subordinate liens made for the purpose of down payment or similar home buyer assistance, property rehabilitation, energy efficiency, or foreclosure avoidance or prevention. (12 CFR 1026.3(h))

Note that a creditor may not use the TILA-RESPA Integrated Disclosure forms instead of the GFE, HUD-1, and Truth in Lending forms for transactions that continue to be covered by TILA or RESPA that require those disclosures (e.g., reverse mortgages).

Summary of Applicable Disclosure Requirements:
Use TILA-RESPA Integrated Disclosures (See Regulation Z):
• Most closed-end mortgage loans, including:
  • Construction-only loans
  • Loans secured by vacant land or by 25 or more acres

Continue to use existing TIL, RESPA Disclosures (as applicable):
• HELOCs (subject to disclosure requirements under Regulation Z, 12 CFR 1026.40)
• Reverse mortgages9 (subject to existing TIL and GFE disclosures)
• Chattel-secured mortgages (i.e., mortgages secured by a mobile home or by a dwelling that is not attached to real property, such as land) (subject to existing TIL disclosures, and not RESPA)

But note: in both cases, there is a partial exemption from these disclosures under 12 CFR 1026.3(h) for loans secured by subordinate liens and associated with certain housing assistance loan programs for low- and moderate-income persons.
Open-end reverse mortgages receive open-end disclosures, rather than GFEs or HUD-1s.

Subpart B – Mortgage Settlement and Escrow Accounts
Examiners should note that certain provisions in subpart B (12 CFR 1024.6, 1024.7, 1024.8, and 1024.10) are applicable only to limited categories of mortgage loans. See the discussion of 12 CFR 1024.5(d) above.

Special Information Booklet – 12 CFR 1024.6
For mortgage loans that are not subject to the TILA RESPA Integrated Disclosure rule (see 12 CFR 1026.19(e), (f) and (g),* a loan originator is required to provide the borrower with a copy of the Special Information Booklet at the time a written application is submitted or no later than three business days after the application is received. If the application is denied before the end of the three-business-day period, the loan originator is not required to provide the booklet. If the borrower uses a mortgage broker, the broker rather than the lender, must provide the booklet. The booklet does not need to be provided for refinancing transactions, closed-end subordinate lien mortgage loans and reverse mortgage transactions, or for any other federally related mortgage loan not intended for the purchase of a one-to-four family residential property. (12 CFR 1024.6(a)(3); 12 CFR 1026.19(g)(1)(iii))

A loan originator that complies with Regulation Z (12 CFR 1026.40) for open-end home equity plans (including providing the brochure entitled “What You Should Know About Home Equity Lines of Credit” or a suitable substitute) is deemed to have complied with this section.

*NOTE: the Special Information Booklet may also be required under 12 CFR 1026.19(g) for those closed-end mortgage loans subject to the TILA-RESPA Integrated Disclosure Rule. A discussion of those requirements is located in the Regulation Z examination procedures.
Good Faith Estimate (GFE) of Settlement Costs – 12 CFR 1024.7 Standard GFE Required

For closed-end reverse mortgages, a loan originator is required to provide a consumer with the standard GFE form that is designed to allow borrowers to shop for a mortgage loan by comparing settlement costs and loan terms. (See GFE form at Appendix C to 12 CFR Part 1024.)

Overview of the Standard GFE
The first page of the GFE includes a summary of loan terms and a summary of estimated settlement charges. It also includes information about key dates such as when the interest rate for the loan quoted in the GFE expires and when the estimate for the settlement charges expires.

A “loan originator” is defined as a lender or mortgage broker. 12 CFR 1024.2(b).

The second page discloses settlement charges as subtotals for 11 categories of costs. The third page provides a table explaining which charges can change at settlement, a trade-off table showing the relationship between the interest rate and settlement charges, and a shopping chart to compare the costs and terms of loans offered by different originators.

GFE Application Requirements

- The loan originator must provide the standard GFE to the borrower within three business days of receipt of an application for a mortgage loan. A loan originator is not required to provide a GFE if before the end of the three-business-day period, the application is denied or the borrower withdraws the application.
- An application can be in writing or electronically submitted, including a written record of an oral application.
A loan originator determines what information it needs to collect from a borrower and which of the collected information it will use in order to issue a GFE. Under the regulations, an “application” includes at least the following six pieces of information:

1) the borrower’s name;
2) the borrower’s gross monthly income;
3) the borrower’s Social Security number (e.g., to enable the loan originator to obtain a credit report);
4) the property address;
5) an estimate of the value of the property; and
6) the mortgage loan amount sought. In addition, a loan originator may require the submission of any other information it deems necessary.

A loan originator will be presumed to have relied on such information prior to issuing a GFE and cannot base a revision of a GFE on that information unless it changes or is later found to be inaccurate.

While the loan originator may require the borrower to submit additional information beyond the six pieces of information listed above in order to issue a GFE, it cannot require, as a condition of providing the GFE, the submission of supplemental documentation to verify the information provided by the borrower on the application. However, a loan originator is not prohibited from using its own sources to verify the information provided by the borrower prior to issuing the GFE. The loan originator can require borrowers to provide verification information after the GFE has been issued in order to complete final underwriting.

- For dealer loans, the loan originator is responsible for providing the GFE directly or ensuring that the dealer provides the GFE.
- For mortgage brokered loans, either the lender or the mortgage broker must provide a:
  - A loan originator is prohibited from charging a borrower any fee in order to GFE within three business days after a mortgage broker receives either an
application or information sufficient to complete an application. The lender is responsible for ascertaining whether the GFE has been provided. If the mortgage broker has provided the GFE to the applicant, the lender is not required to provide an additional GFE. obtain a GFE unless the fee is limited to the cost of a credit report.

GFE Not Required for Open End Lines of Credit – 12 CFR 1024.7(h)
A loan originator that complies with Regulation Z (12 CFR 1026.40) for open-end home equity plans is deemed to have complied with 12 CFR 1024.7.

Availability of GFE Terms – 12 CFR 1024.7(c)
Regulation X does not establish a minimum period of availability for which the interest rate must be honored. The loan originator must determine the expiration date for the interest rate of the loan stated on the GFE. In contrast, Regulation X requires that the estimated settlement charges and loan terms listed on the GFE be honored by the loan originator for at least 10 business days from the date the GFE is provided. The period of availability for the estimated settlement charges and loan terms as well as the period of availability for the interest rate of the loan stated on the GFE must be listed on the GFE in the “important dates” section of the form.

After the expiration date for the interest rate of the loan stated on the GFE, the interest rate and the other rate related charges, including the charge or credit for the interest rate chosen, the adjusted origination charges and the per diem interest can change until the interest rate is locked.

Key GFE Form Contents – 12 CFR 1024.7(d)
The loan originator must ensure that the required GFE form is completed in accordance with the Instructions set forth in Appendix C of 12 CFR Part 1024.
First Page of GFE

- The first page of the GFE discloses identifying information such as the name and address of the “loan originator” which includes the lender or the mortgage broker originating the loan. The “purpose” section indicates what the GFE is about and directs the borrower to the Truth in Lending disclosures and HUD’s website for more information. The borrower is informed that only the borrower can shop for the best loan and that the borrower should compare loan offers using the shopping chart on the third page of the GFE.

- The “important dates” section requires the loan originator to state the expiration date for the interest rate for the loan provided in the GFE as well as the expiration date for the estimate of other settlement charges and the loan terms not dependent upon the interest rate. While the interest rate stated on the GFE is not required to be honored for any specific period of time, the estimate for the other settlement charges and other loan terms must be honored for at least 10 business days from when the GFE is provided.

- In addition, the form must state how many calendar days within which the borrower must go to settlement once the interest rate is locked (rate lock period). The form also requires disclosure of how many days prior to settlement the interest rate would have to be locked, if applicable.

- The “summary of your loan” section requires disclosure of the initial loan amount; loan term; initial interest rate; initial monthly payment for principal, interest and any mortgage insurance; whether the interest rate can rise, and if so, the maximum rate to which it can rise over the life of the loan, and the period of time after which the interest rate can first change; whether the loan balance can rise if the payments are made on time and if so, the maximum amount to which it can rise over the life of the loan; whether the monthly amount owed for principal, interest and any mortgage insurance can rise even if payments are made on time, and if so, the maximum amount to which the monthly amount owed can ever rise over the life of the loan; whether the loan has a prepayment penalty, and if so, the maximum amount it could be; and whether the loan has a balloon payment, and if so, the
amount of such payment and in how many years it will be due. Specific instructions are provided with respect to closed-end reverse mortgages.

- The “escrow account information” section requires the loan originator to indicate whether the loan does or does not have an escrow account to pay property taxes or other property related charges. In addition, this section also requires the disclosure of the monthly amount owed for principal, interest and any mortgage insurance. Specific instructions are provided with respect to closed-end reverse mortgages.

- The bottom of the first page includes subtotals for the adjusted origination charges and charges for all other settlement charges listed on page two, along with the total estimated settlement charges.

**Second Page of GFE**

The second page of the GFE requires disclosure of all settlement charges. It provides for the estimate of total settlement costs in eleven categories discussed below. The adjusted origination charges are disclosed in “Block A” and all other settlement charges are disclosed in “Block B.” The amounts in the blocks are to be added to arrive at the “total estimated settlement charges” which is required to be listed at the bottom of the page.

Disclosure of Adjusted Origination Charge (Block A) Block A addresses disclosure of origination charges, which include all lender and mortgage broker charges. The “adjusted origination charge” results from the subtraction of a “credit” from the “origination charge” or the addition of a “charge” to the origination charge.

- Block 1 – the origination charges, which include lender processing and underwriting fees and any fees paid to a mortgage broker.

Origination Charge Note: This block requires the disclosure of all charges that all loan originators involved in the transaction will receive for originating the loan (excluding any charges for points). A loan originator may not separately charge any additional fees for getting the loan such as application, processing or
underwriting fees. The amount in Block 1 is subject to zero tolerance, i.e., the amount cannot change at settlement.

- **Block 2** – a “credit” or “charge” for the interest rate chosen. Credit or Charge for the Interest Rate Chosen
  
  **Note: Transaction Involving a Mortgage Broker.** For a transaction involving a mortgage broker,
  
  Block 2 requires disclosure of a “credit” or charge (points) for the specific interest rate chosen. The credit or charge for the specific interest rate chosen is the net payment to the mortgage broker (i.e., the sum of all payments to the mortgage broker from the lender, including payments based on the loan amount, a flat rate or any other compensation, and in a table funded transaction, the loan amount less the price paid for the loan by the lender.)

When the net payment to the mortgage broker from the lender is positive, there is a “credit” to the borrower and it is entered as a negative amount. For example, if the lender pays a yield spread premium to a mortgage broker for the loan set forth in the GFE, the payment must be disclosed as a “credit” to the borrower for the particular interest rate listed on the GFE (reflected on the GFE at Block 2, checkbox 2). The term “yield spread premium” is not featured on the GFE or the HUD-1 Settlement Statement.

Points paid by the borrower for the interest rate chosen must be disclosed as a “charge” (reflected on the GFE at Block 2, third checkbox). A loan cannot include both a charge (points) and a credit (yield spread premium).

**Transaction Not Involving a Mortgage Broker.** For a transaction without a mortgage broker, a lender may choose not to separately disclose any credit or charge for the interest rate chosen for the loan in the GFE. If the lender does not include any credit or charge in Block 2, it must check the first checkbox in Block 2 indicating that “The credit or charge for the interest rate you have chosen is included in ‘our origination charge’ above.” Only one of the boxes in Block 2 may be checked, as a credit and charge cannot occur together in the same transaction.
The 2008 RESPA Reform Rule changed the definition of “mortgage broker” to mean a person or entity (not an employee of a lender) that renders origination services and serves as an intermediary between a lender and a borrower in a transaction involving a federally related mortgage loan, including such person or entity that closes the loan in its own name and table funds the transaction. The definition will also apply to a loan correspondent approved under 24 CFR 202.8 for Federal Housing Administration (FHA programs). The definition would also include an “exclusive agent” who is not an employee of the lender.

Disclosure of Charges for All Other Settlement Services (Block B)

Block B is the sum of charges for all settlement services other than the origination charges.

- Block 3 – required services by providers selected by the lender such as appraisal and flood certification fees;
- Block 4 – title service fees and the cost of lender’s title insurance;
- Block 5 – owner’s title insurance;
- Block 6 – other required services for which the consumer may shop;
- Block 7 – government recording charges;
- Block 8 – transfer tax charges;
- Block 9 – initial deposit for escrow account;
- Block 10 – daily interest charges;
- Block 11 – homeowner’s insurance charges.

Third Page of GFE

The third page of the GFE includes the following information:

- A tolerance chart identifying the charges that can change at settlement (see discussion on tolerances below);
- A trade-off table that requires the loan originator to provide information on the loan described in the GFE and at the loan originator’s option, information about
alternative loans (one with lower settlement charges but a higher interest rate and one with a lower interest rate but higher settlement charges);

- A shopping chart that allows the consumer to fill in loan terms and settlement charges from other lenders or brokers to use to compare loans; and
- Language indicating that some lenders may sell the loan after settlement but that any fees the lender receives in the future cannot change the borrower’s loan or the settlement charges.

**Tolerances on Settlement Costs – 12 CFR 1024.7(e) and (i)**

The 2008 RESPA Reform Rule established “tolerances” or limits on the amount actual settlement charges can vary at closing from the amounts stated on the GFE. The rule established three categories of settlement charges and each category has different tolerances. If, at settlement, the charges exceed the charges listed on the GFE by more than the permitted tolerances, the loan originator may cure the tolerance violation by reimbursing to the borrower the amount by which the tolerance was exceeded, at settlement or within 30 calendar days after settlement.

**Tolerance Categories**

Zero tolerance category. This category of fees is subject to a zero tolerance standard. The fees estimated on the GFE may not be exceeded at closing.

These fees include:

- The loan originator’s own origination charge, including processing and underwriting fees;
- The credit or charge for the interest rate chosen (i.e., yield spread premium or discount points) while the interest rate is locked;
- The adjusted origination charge while the interest rate is locked; and
- State/local property transfer taxes.
- Ten percent tolerance category. For this category of fees, while each individual fee may increase or decrease, the sum of the charges at
settlement may not be greater than 10 percent above the sum of the amounts included on the GFE. This category includes fees for:
  o Loan originator required settlement services, where the loan originator selects the third party settlement service provider;
  o Loan originator required services, title services, required title insurance and owner’s title insurance when the borrower selects a third-party provider identified by the loan originator; and o Government recording charges.

- No tolerance category. The final category of fees is not subject to any tolerance restriction. The amounts charged for the following settlement services included on the GFE can change at settlement and the amount of the change is not limited:
  o Loan originator required services where the borrower selects his or her own third-party provider;
  o Title services, lender’s title insurance, and owner’s title insurance when the borrower selects his or her own provider;
  o Initial escrow deposit;
  o Daily interest charges; and homeowner’s insurance

**Identification of Third-Party Settlement Service Providers**

When the loan originator permits a borrower to shop for one or more required third-party settlement services and select the settlement service provider for such required services, the loan originator must list in the relevant block on page two of the GFE the settlement service and the estimated charge to be paid to the provider of each required service. In addition, the loan originator must provide the borrower with a written list of settlement service providers for those required services on a separate sheet of paper at the time the GFE is provided.

Binding GFE – 12 CFR 1024.7(f)
The loan originator is bound, within the tolerances provided, to the settlement charges and terms listed on the GFE provided to the borrower, unless a new GFE is provided prior to settlement (see discussion below on changed circumstances). This also means that if a lender accepts a GFE issued by a mortgage broker, the lender is subject to the loan terms and settlement charges listed in the GFE, unless a new GFE is issued prior to settlement.

Changed Circumstances – 12 CFR 1024.2(b), 1024.7(f)(1) and (f)(2) Changed circumstances are defined as:

- Acts of God, war, disaster, or other emergency;
- Information particular to the borrower or transaction that was relied on in providing the GFE that changes or is found to be inaccurate after the GFE has been provided;
- New information particular to the borrower or transaction that was not relied on in providing the GFE; or
- Other circumstances that are particular to the borrower or transaction, including boundary disputes, the need for flood insurance, or environmental problems.

Changed circumstances do not include the borrower’s name, the borrower’s monthly income, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any information contained in any credit report obtained by the loan originator prior to providing the GFE, unless the information changes or is found to be inaccurate after the GFE has been provided. In addition, market price fluctuations by themselves do not constitute changed circumstances.

Changed circumstances affecting settlement costs are those circumstances that result in increased costs for settlement services such that the charges at settlement would exceed the tolerances or limits on those charges established by the regulations.

Changed circumstances affecting the loan are those circumstances that affect the borrower’s eligibility for the loan. For example, if underwriting and verification indicate that
the borrower is ineligible for the loan provided in the GFE, the loan originator would no longer be bound by the original GFE. In such cases, if a new GFE is to be provided, the loan originator must do so within three business days of receiving information sufficient to establish changed circumstances. The loan originator must document the reason that a new GFE was provided and must retain documentation of any reasons for providing a new GFE for no less than three years after settlement.

None of the information collected by the loan originator prior to issuing the GFE may later become the basis for a “changed circumstance” upon which it may offer a revised GFE, unless: 1) it can demonstrate that there was a change in the particular information; or 2) that the information was inaccurate; or 3) that it did not rely on that particular information in issuing the GFE. A loan originator has the burden of demonstrating nonreliance on the collected information, but may do so through various means including through a documented record in the underwriting file or an established policy of relying on a more limited set of information in providing GFEs.

If a loan originator issues a revised GFE based on information previously collected in issuing the original GFE and “changed circumstances,” it must document the reasons for issuing the revised GFE, such as its nonreliance on such information or the inaccuracy of such information.

**Borrower Requested Changes – 12 CFR 1024.7(f)(3)**

If a borrower requests changes to the mortgage loan identified in the GFE that change the settlement charges or the terms of the loan, the loan originator may provide a revised GFE to the borrower. If a revised GFE is provided, the loan originator must do so within three business days of the borrower’s request.

**Expiration of Original GFE – 12 CFR 1024.7(f)(4)**

If a borrower does not express an intent to continue with an application within 10 business days after the GFE is provided, or such longer time provided by the loan originator, the loan originator is no longer bound by the GFE.
Interest Rate Dependent Charges and Terms – 12 CFR 1024.7(f)(5)

If the interest rate has not been locked by the borrower, or a locked interest rate has expired, all interest rate-dependent charges on the GFE are subject to change. The charges that may change include the charge or credit for the interest rate chosen, the adjusted origination charges, per diem interest, and loan terms related to the interest rate. However, the loan originator’s origination charge (listed in Block 1 of page 2 of the GFE) is not subject to change, even if the interest rate floats, unless there is another changed circumstance or borrower-requested change.

If the borrower later locks the interest rate, a new GFE must be provided showing the revised interest rate dependent charges and terms. All other charges and terms must remain the same as on the original GFE, unless changed circumstances or borrower-requested changes result in increased costs for settlement services or affect the borrower’s eligibility for the specific loan terms identified in the original GFE.


RESPA – The Real Estate Settlement Procedures Act

DEFINITION of 'Real Estate Settlement Procedures Act - RESPA'.

This act was designed to protect potential homeowners and enable them to become more intelligent consumers. RESPA requires that lenders provide greater amounts of information to prospective borrowers at certain points in the loan settlement process.

(Source: http://www.investopedia.com/terms/r/real-estate-settlement-procedures-act-respa.asp)
https://en.wikipedia.org/wiki/Real_Estate_Settlement_Procedures_Act

Passed by the United States Congress in 1974 and codified as Title 12, Chapter 27 of the United States Code, 12 U.S.C. §§ 2601–2617, the main objective of the Real Estate Settlement Procedures Act (RESPA) was to protect homeowners by assisting them in becoming better educated while shopping for real estate services, and eliminating kickbacks and referral fees which add unnecessary costs to settlement services. RESPA requires lenders and servicers to provide borrowers with pertinent and timely disclosures regarding the nature and costs of a real estate settlement process. RESPA was also designed to prohibit abusive practices such as kickbacks and referral fees, the practice of dual tracking, and imposes limitations on the use of escrow accounts.

Purpose
It was created because various companies associated with the buying and selling of real estate, such as lenders, real estate agents, construction companies and title insurance companies were often engaging in providing undisclosed kickbacks to each other, inflating the costs of real estate transactions and obscuring price competition by facilitating bait-and-switch tactics.

For example, a lender advertising a home loan might have advertised the loan with a 5% interest rate, but then when one applies for the loan one is told that one must use the lender's affiliated title insurance company and pay $5,000 for the service, whereas the normal rate is $1,000. The title company would then have paid $4,000 to the lender. This was made illegal, in order to make prices for the services clear so as to allow price competition by consumer demand and to thereby drive down prices.

On July 21, 2011, administration and enforcement of the Real Estate Settlement Procedures Act (RESPA) was transferred from the Department of Housing and Urban Development to the Consumer Financial Protection Bureau (CFPB).
General Requirements

RESPA outlines requirements that lenders must follow when providing mortgages that are secured by federally related mortgage loans. This includes home purchase loans, refinancing, lender approved assumptions, property improvement loans, equity lines of credit, and reverse mortgages.

Under RESPA, lending institutions must:

- Provide certain disclosures when applicable, including a Good-Faith Estimate of Settlement Costs (GFE), Special Information Booklet, HUD-1/1A settlement statement and Mortgage Servicing Disclosures.
- Provide the ability to compare the GFE to the HUD-1/1a settlement statements at closing
- Follow established escrow accounting practices
- Not proceed with the foreclosure process when the borrower has submitted a complete application for loss mitigation options, and
- Not pay kickbacks or pay referral fees to settlement service providers (e.g., appraisers, real estate brokers/agents and title companies)

Good-Faith Estimate of Settlement Costs

For closed-end reverse mortgages, a lender or broker is required to provide the consumer with the standard Good Faith Estimate (GFE) form. A Good Faith Estimate of settlement costs is a three-page document that shows estimates for the costs that the borrower will likely incur at settlement and related loan information. It is designed to allow borrowers to shop for a mortgage loan by comparing settlement costs and loan terms. These costs include, but are not limited to:

Origination charges:

- Estimates for required services (e.g., appraisals, credit report fees, flood certification)
- Title insurance
- Per diem interest
Escrow deposits, and
Insurance premiums

The bank or mortgage broker must provide the GFE no later than three business days after the lender or mortgage broker received an application, or information sufficient to complete and application, the application.

**Kickbacks and Unearned Fees**

A person may not give or receive a fee or anything of value for a referral of mortgage loan settlement business. This includes an agreement or understanding related to a federally related mortgage. Fees paid for mortgage-related services must be disclosed. Additionally, no person may give or receive any portion, split, or percentage of a fee for services connected with a federally related mortgage except for services actually performed.

**Permissible Compensation:**

- A payment to an attorney for services actually rendered;
- A payment by a title company to its agent for services actually performed in the issuance of title insurance;
- A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;
- A payment to a cooperative brokerage and referral arrangements between real estate agents and real estate brokers;
- Normal promotional and education activities that are not conditioned on the referral of business, and do not involve the defraying of expenses that otherwise would be incurred by a person in a position to refer settlement services; and
- An employer’s payment to its own employees for any referral activities.

It is the responsibility of the lender to monitor third party fees in relationship to the services rendered to ensure no illegal kickbacks or referral fees are made.
Borrower Requests for Information and Notifications of Errors

Upon receipt of a qualified written request, a mortgage servicer is required to take certain steps, each of which is subject to certain deadlines. The servicer must acknowledge receipt of the request within 5 business days. The servicer then has 30 business days (from the request) to take action on the request.

The servicer has to either provide a written notification that the error has been corrected, or provide a written explanation as to why the servicer believes the account is correct. Either way, the servicer has to provide the name and telephone number of a person with whom the borrower can discuss the matter. The servicer cannot provide information to any credit agency regarding any overdue payment during the 60-day period.

If the servicer fails to comply with the "qualified written request", the borrower is entitled to actual damages, up to $2,000 of additional damages if there is a pattern of noncompliance, costs and attorney’s fees.

Criticisms

However, critics say that kickbacks still occur. For example, lenders often provide captive insurance to the title insurance companies they work with, which critics say is essentially a kickback mechanism. Others counter that economically the transaction is a zero sum game, where if the kickback were forbidden, a lender would simply charge higher prices. One of the core elements of the debate is the fact that customers overwhelmingly go with the default service providers associated with a lender or a real estate agent, even though they sign documents explicitly stating that they can choose to use any service provider.

There have been various proposals to modify the Real Estate Settlement Procedures Act. One proposal is to change the "open architecture" system currently in place, where a customer can choose to use any service provider for each service, to one where the services are bundled, but where the real estate agent or lender must pay
directly for all other costs. Under this system, lenders, who have more buying power, would more aggressively seek the lowest price for real estate settlement services.

While both the HUD-1 and HUD-1A serve to disclose all fees, costs and charges to both the buyer and seller involved in a real estate transaction, it is not uncommon to find mistakes on the HUD.

Both buyer and seller should know how to properly read a HUD before closing a transaction and at settlement is not the ideal time to discover unnecessary charges and/or exorbitant fees as the transaction is about to be closed. Buyers or sellers can hire an experienced professional such as a real estate agent or an attorney to protect their interests at closing.

Sources
"Regulation X Real Estate Settlement Procedures Act" (PDF). CFPB Consumer Laws and Regulations. Consumer Financial Protection Bureau. March 2015. Retrieved 18 May 2016. This article incorporates text from this source, which is in the public domain.

Jump up ^ "Recent Changes to the Law Governing Qualified Written Requests". Retrieved 2016-04-13. Jump up ^ 12 USC 2605(f)
(Source: https://en.wikipedia.org/wiki/Real_Estate_Settlement_Procedures_Act)

Texas Property Code

TITLE 1. General Provisions
Chapter 1. General Provisions
Sec. 1.001. Purpose of Code.
(a) This code is enacted as a part of the state's continuing statutory revision program begun by the Texas Legislative Council in 1963 as directed by the legislature in Chapter 448, Acts of the 58th Legislature, Regular Session, 1963
(Article 5429b-1, Vernon's Texas Civil Statutes). The program contemplates a topic-by-topic revision of the state's general and permanent statute law without substantive change.

(b) Consistent with the objectives of the statutory revision program, the purpose of this code is to make the law encompassed by this code more accessible and understandable by:

   (1) rearranging the statutes into a more logical order;
   (2) employing a format and numbering system designed to facilitate citation of the law and to accommodate future expansion of the law;
   (3) eliminating repealed, duplicative, unconstitutional, expired, executed, and other ineffective provisions; and
   (4) restating the law in modern American English to the greatest extent possible.

The Code Construction Act (Chapter 311, Government Code) applies to the construction of each provision in this code, except as otherwise expressly provided by this code.

Sec. 1.003. Internal References.
In this code:

   (1) a reference to a title, chapter, or section without further identification is a reference to a title, chapter, or section of this code; and
   (2) a reference to a subtitle, subchapter, subsection, subdivision, paragraph, or other numbered or lettered unit without further identification is a reference to a unit of the next larger unit of this code in which the reference appears.

TITLE 1. General Provisions
Chapter 2. Nature of Property
Sec. 2.001. Manufactured Housing.

   (a) Except as provided by Subsection (b), a manufactured home is personal property.
(b) A manufactured home is real property if:
   (1) the statement of ownership and location for the home issued under
       Section 1201.207, Occupations Code, reflects that the owner has elected
       to treat the home as real property; and
   (2) a certified copy of the statement of ownership and location has been
       filed in the real property records in the county in which the home is located.
(c) In this section, "consumer," "document of title," "first retail sale," "manufactured home," and "mobile home" have the meanings assigned by
   Chapter 1201, Occupations Code.
(d) To (h) Repealed by Acts 2003, 78th Leg., ch. 338, Sec. 52(2).
   (i) This section does not require a retailer or retailer's agent to obtain a
       license under Chapter 1101, Occupations Code.

Sec. 2.002. Dry Fire Hydrants: Agreement Is Personal.
   (a) An agreement between an owner, lessee, or occupant of real property and
       a fire-fighting agency relating to the connection of a dry fire hydrant to a source
       of water on the property or the installation of a dry fire hydrant on the property
       may not bind a subsequent owner, lessee, or occupant of the real property.
   (b) In this section:
       (1) "Dry fire hydrant" means a fire hydrant that is connected to a stock tank,
           pond, or other similar source of water from which water is pumped in case
           of fire.
       (2) "Fire-fighting agency" means any entity that provides fire-fighting
           services, including:
           (A) a volunteer fire department; and
           (B) a political subdivision of this state authorized to provide fire-
               fighting services.
TITLE 2. Conveyances
Chapter 5. Conveyances
Subchapter A. General Provisions
Sec. 5.001. Fee Simple.

(a) An estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law. Words previously necessary at common law to transfer a fee simple estate are not necessary.

(b) This section applies only to a conveyance occurring on or after February 5, 1840.

Sec. 5.002. Failing As a Conveyance.
An instrument intended as a conveyance of real property or an interest in real property that, because of this chapter, fails as a conveyance in whole or in part is enforceable to the extent permitted by law as a contract to convey the property or interest.

Sec. 5.003. Partial Conveyance.

(a) An alienation of real property that purports to transfer a greater right or estate in the property than the person making the alienation may lawfully transfer alienates only the right or estate that the person may convey.

(b) Neither the alienation by deed or will of an estate on which a remainder depends nor the union of the estate with an inheritance by purchase or descent affects the remainder.

Sec. 5.004. Conveyance by Authorized Officer.

(a) A conveyance of real property by an officer legally authorized to sell the property under a judgment of a court within the state passes absolute title to the property to the purchaser.

(b) This section does not affect the rights of a person who is not or who does not claim under a party to the conveyance or judgment.
Sec. 5.005. Aliens.
An alien has the same real and personal property rights as a United States citizen.

Sec. 5.006. Attorney's Fees in Breach of Restrictive Covenant Action.
(a) In an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim.

(b) To determine reasonable attorney's fees, the court shall consider:
   (1) the time and labor required;
   (2) the novelty and difficulty of the questions;
   (3) the expertise, reputation, and ability of the attorney; and
   (4) any other factor.

Sec. 5.007. Vendor and Purchaser Risk Act.
(a) Any contract made in this state for the purchase and sale of real property shall be interpreted as including an agreement that the parties have the rights and duties prescribed by this section, unless the contract expressly provides otherwise.

(b) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part of the property is destroyed without fault of the purchaser or is taken by eminent domain, the vendor may not enforce the contract, and the purchaser is entitled to recover any portion of the contract price paid.

(c) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part of the property is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not relieved from the duty to pay the contract price, nor is the purchaser entitled to recover any portion of the price already paid.
(d) This section shall be interpreted and construed to accomplish its general purpose to make uniform the law of those states that enact the Uniform Vendor and Purchaser Risk Act.
(e) This section may be cited as the Uniform Vendor and Purchaser Risk Act.

Sec. 5.008. Seller's Disclosure of Property Condition.
(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed by this section.
(b) The notice must be executed and must, at a minimum, read substantially similar to the following:
SELLER'S DISCLOSURE NOTICE

CONCERNING THE PROPERTY AT

________________________________________________________

Street Address and City)

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER'S AGENTS.

Seller ☐ is ☐ is not occupying the Property. If unoccupied, how long since Seller has occupied the Property? ________________________

8. The Property has the items checked below [Write Yes (Y), No (N), or Unknown (U)]:

- Range
- Oven
- Microwave
- Dishwasher
- Trash Compactor
- Disposal
- Washer/Dryer
- Window Screens
- Rain Gutters
- Security System
- Fire Detection
- Intercom System
- Security Equipment
- Smoke Detector
- Satellite Dish
- TV Antenna
- Smoke Detector-Hearing Impaired
- Ceiling Fan(s)
- Exhaust Fan(s)
- Central A/C
- Carbon Monoxide Alarm
- Wall/Window Air Conditioning
- Plumbing System
- Emergency Escape
- Public Sewer System
- Ladder(s)
- Cable TV Wiring
- Fences
- Patio/Decking
- Attic Fan(s)
- Spa
- Pool
- Hot Tub

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Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair?

☐ Yes  ☐ No  ☐ Unknown. If yes, then describe. (Attach additional sheets if necessary):
______________________________________________________________________________________________________________________________________________________________
______________________________________________________________________________________________________________________________________________________________

9. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766, Health and Safety Code?

☐ Yes  ☐ No  ☐ Unknown. If the answer to this question is no or unknown, explain (Attach additional sheets if necessary):
______________________________________________________________________________________________________________________________________________________________
______________________________________________________________________________________________________________________________________________________________

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within 10 days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for the installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

10. Are you (Seller) aware of any known defects/malfunctions in any of the following? Write Yes (Y) if you are aware, write No (N) if you are not aware.

________Interior Walls
________Ceilings
________Floors

________Central Heating
________Automatic Lawn Sprinkler System

________Fireplace(s) & Chimney (Wood burning)
________Septic System
________Fireplace(s) & Chimney (Mock)

________Natural Gas Lines
________Outdoor Grill
________Gas Fixtures

________Liquid Propane Gas
________Sauna

________Pool Heater

________LP Community (Captive)
________LP on Property

Garage: _______ Attached
________Not Attached
________Carport

Garage Door Opener(s): _______ Electronic
________Control(s)

Water Heater: _______ Gas
________Electric

Water Supply: City
________Well
________MUD
________Co-op

Roof Type: Age: ____________________________ (approx.)
Exterior Walls
Roof
Walls/Fences
Plumbing/Sewers/Septics
Doors
Foundations
Walls/Fences
Driveways
Electrical

Other Structural Components (Describe):

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

11. Are you (Seller) aware of any of the following conditions? Write Yes (Y) if you are aware, write No (N) if you are not aware.

<table>
<thead>
<tr>
<th>Condition</th>
<th>Yes/No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Termites (includes wood destroying insects)</td>
<td></td>
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<tr>
<td>Previous Structural or Roof Repair</td>
<td></td>
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<tr>
<td>Termite or Wood Rot Damage Needing Repair</td>
<td></td>
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<tr>
<td>Previous Termite Damage</td>
<td></td>
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<tr>
<td>Previous Termite Treatment</td>
<td></td>
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<tr>
<td>Previous Flooding</td>
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<tr>
<td>Improper Drainage</td>
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<tr>
<td>Water Penetration</td>
<td></td>
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<tr>
<td>Located in 100-Year Floodplain</td>
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<tr>
<td>Present Flood Insurance</td>
<td></td>
</tr>
<tr>
<td>Coverage</td>
<td></td>
</tr>
<tr>
<td>Landfill, Settling, Soil Movement, Fault Lines</td>
<td></td>
</tr>
<tr>
<td>Single Blockable Main Drain in Pool/Hot Tub/Spa*</td>
<td></td>
</tr>
<tr>
<td>Previous Use of Premises for Manufacture of Methamphetamine</td>
<td></td>
</tr>
</tbody>
</table>

*Indicates location-related issue
* A single blockable main drain may cause a suction entrapment hazard for an individual.

12. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair?

☐ No (if you are not aware) If yes, explain. (Attach additional sheets if necessary): ______________________________________________________________________________________________________________________

13. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair?

☐ No (if you are not aware) If yes, explain. (Attach additional sheets if necessary):

☐ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

☐ Homeowners' Association or maintenance fees or assessments.

☐ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others).

☐ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

☐ Any lawsuits directly or indirectly affecting the Property.

☐ Any condition on the Property which materially affects the physical health or safety of an individual.

☐ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

☐ Any portion of the property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

___________________________________________________________________________

14. If the property is located in a costal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit maybe required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

Signature of Seller                                     Date       Signature of Seller                                    Date

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.
(c) A seller or seller's agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV related illnesses, or HIV infection.

(d) The notice shall be completed to the best of seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required by the notice is unknown to the seller, the seller shall indicate that fact on the notice, and by that act is in compliance with this section.

(e) This section does not apply to a transfer:

(1) pursuant to a court order or foreclosure sale;
(2) by a trustee in bankruptcy;
(3) to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
(6) from one co-owner to one or more other co-owners;
(7) made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;
(8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;
(9) to or from any governmental entity;
(10) of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or
(11) of real property where the value of any dwelling does not exceed five percent of the value of the property.
(f) The notice shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within seven days after receiving the notice.

(g) In this section:

(1) "Blockable main drain" means a main drain of any size and shape that a human body can sufficiently block to create a suction entrapment hazard.

(2) "Main drain" means a submerged suction outlet typically located at the bottom of a swimming pool or spa to conduct water to a recirculating pump.

Sec. 5.009. Duties of Life Tenant.

(a) Subject to Subsection (b), if the life tenant of a legal life estate is given the power to sell and reinvest any life tenancy property, the life tenant is subject, with respect to the sale and investment of the property, to all of the fiduciary duties of a trustee imposed by the Texas Trust Code (Subtitle B, Title 9, Property Code) or the common law of this state.

(b) A life tenant may retain, as life tenancy property, any real property originally conveyed to the life tenant without being subject to the fiduciary duties of a trustee; however, the life tenant is subject to the common law duties of a life tenant.

Sec. 5.010. Notice of Additional Tax Liability.

(a) A person who is the owner of an interest in vacant land and who contracts for the transfer of that interest shall include in the contract the following bold-faced notice:

NOTICE REGARDING POSSIBLE LIABILITY FOR ADDITIONAL TAXES

If for the current ad valorem tax year the taxable value of the land that is the subject of this contract is determined by a special appraisal method that allows
for appraisal of the land at less than its market value, the person to whom the land is transferred may not be allowed to qualify the land for that special appraisal in a subsequent tax year and the land may then be appraised at its full market value. In addition, the transfer of the land or a subsequent change in the use of the land may result in the imposition of an additional tax plus interest as a penalty for the transfer or the change in the use of the land. The taxable value of the land and the applicable method of appraisal for the current tax year is public information and may be obtained from the tax appraisal district established for the county in which the land is located.

(b) This section does not apply to a contract for a transfer:
   (1) under a court order or foreclosure sale;
   (2) by a trustee in bankruptcy;
   (3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
   (4) by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;
   (5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
   (6) of only a mineral interest, leasehold interest, or security interest; or
   (7) to or from a governmental entity.

(c) The notice described by Subsection (a) is not required to be included in a contract for transfer of an interest in land if every transferee under the contract is:
   (1) a person who is a co-owner with an owner described by Subsection (a) of an undivided interest in the land; or
   (2) a spouse or a person in the lineal line of consanguinity of an owner described by Subsection (a).

(d) The notice described by Subsection (a) is not required to be given if in a separate paragraph of the contract the contract expressly provides for the
payment of any additional ad valorem taxes and interest that become due as a penalty because of:

(1) the transfer of the land; or
(2) a subsequent change in the use of the land.

(e) If the owner fails to include in the contract the notice described by Subsection (a), the person to whom the land is transferred is entitled to recover from that owner an amount equal to the amount of any additional taxes and interest that the person is required to pay as a penalty because of:

(1) the transfer of the land; or
(2) a subsequent change in the use of the land that occurs before the fifth anniversary of the date of the transfer.


Sec. 5.011. Seller's Disclosure Regarding Potential Annexation.

(a) A person who sells an interest in real property in this state shall give to the purchaser of the property a written notice that reads substantially similar to the following:

**Notice Regarding Possible Annexation**

If the property that is the subject of this contract is located outside the limits of a municipality, the property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality’s extraterritorial jurisdiction, contact all municipalities located in the general proximity of the property for further information.
(b) The seller shall deliver the notice to the purchaser before the date the executory contract binds the purchaser to purchase the property. The notice may be given separately, as part of the contract during negotiations, or as part of any other notice the seller delivers to the purchaser.

(c) This section does not apply to a transfer:
   (1) under a court order or foreclosure sale;
   (2) by a trustee in bankruptcy;
   (3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
   (4) by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;
   (5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
   (6) from one co-owner to another co-owner of an undivided interest in the real property;
   (7) to a spouse or a person in the lineal line of consanguinity of the seller;
   (8) to or from a governmental entity;
   (9) of only a mineral interest, leasehold interest, or security interest; or
   (10) of real property that is located wholly within a municipality's corporate boundaries.

(d) If the notice is delivered as provided by this section, the seller has no duty to provide additional information regarding the possible annexation of the property by a municipality.

(e) If an executory contract is entered into without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within the earlier of:
   (1) seven days after the date the purchaser receives the notice; or
   (2) the date the transfer occurs.
Sec. 5.012. Notice of Obligations Related To Membership In Property Owners' Association.

(a) A seller of residential real property that is subject to membership in a property owners' association and that comprises not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice that reads substantially similar to the following:

Notice of Membership In Property Owners' Association Concerning The Property At (Street Address) (Name Of Residential Community)

As a purchaser of property in the residential community in which this property is located, you are obligated to be a member of a property owners' association. Restrictive covenants governing the use and occupancy of the property and all dedicatory instruments governing the establishment, maintenance, or operation of this residential community have been or will be recorded in the Real Property Records of the county in which the property is located. Copies of the restrictive covenants and dedicatory instruments may be obtained from the county clerk.

You are obligated to pay assessments to the property owners' association. The amount of the assessments is subject to change. Your failure to pay the assessments could result in enforcement of the association's lien on and the foreclosure of your property.

Section 207.003, Property Code, entitles an owner to receive copies of any document that governs the establishment, maintenance, or operation of a subdivision, including, but not limited to, restrictions, bylaws, rules and regulations, and a resale certificate from a property owners' association. A resale certificate contains information including, but not limited to, statements specifying the amount and frequency of regular assessments and the style and cause number of lawsuits to which the property owners' association is a party, other than lawsuits relating to unpaid ad valorem taxes.
of an individual member of the association. These documents must be made available to you by the property owners' association or the association's agent on your request.

Date: __________

(a-1) The second paragraph of the notice prescribed by Subsection (a) must be in bold print and underlined.

(b) The seller shall deliver the notice to the purchaser before the date the executory contract binds the purchaser to purchase the property. The notice may be given separately, as part of the contract during negotiations, or as part of any other notice the seller delivers to the purchaser. If the notice is included as part of the executory contract or another notice, the title of the notice prescribed by this section, the references to the street address and date in the notice, and the purchaser's signature on the notice may be omitted.

(c) This section does not apply to a transfer:

(1) under a court order or foreclosure sale;
(2) by a trustee in bankruptcy;
(3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;
(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
(6) from one co-owner to another co-owner of an undivided interest in the real property;
(7) to a spouse or a person in the lineal line of consanguinity of the seller;
(8) to or from a governmental entity;
(9) of only a mineral interest, leasehold interest, or security interest; or
(10) of a real property interest in a condominium.
(d) If an executory contract is entered into without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason within the earlier of:

1. seven days after the date the purchaser receives the notice; or
2. the date the transfer occurs as provided by the executory contract.

(e) The purchaser's right to terminate the executory contract under Subsection (d) is the purchaser's exclusive remedy for the seller's failure to provide the notice required by this section.

(f) On the purchaser's request for a resale certificate from the property owners' association or the association's agent, the association or its agent shall promptly deliver a copy of the most recent resale certificate issued for the property under Chapter 207 so long as the resale certificate was prepared not earlier than the 60th day before the date the resale certificate is delivered to the purchaser and reflects any special assessments approved before and due after the resale certificate is delivered. If a resale certificate that meets the requirements of this subsection has not been issued for the property, the seller shall request the association or its agent to issue a resale certificate under Chapter 207, and the association or its agent shall promptly prepare and deliver a copy of the resale certificate to the purchaser.

(g) The purchaser shall pay the fee to the property owners' association or its agent for issuing the resale certificate unless otherwise agreed by the purchaser and seller of the property. The property owners' association may require payment before beginning the process of providing a resale certificate requested under Chapter 207 but may not process a payment for a resale certificate until the certificate is available for delivery. The association may not charge a fee if the certificate is not provided in the time prescribed by Section 207.003(a).

Sec. 5.013. Seller's Disclosure of Location of Conditions Under Surface of Unimproved Real Property.
(a) A seller of unimproved real property to be used for residential purposes shall provide to the purchaser of the property a written notice disclosing the location of a transportation pipeline, including a pipeline for the transportation of natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum or a petroleum product, or a hazardous substance.

(b) The notice must state the information to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known to the seller, the seller shall indicate that fact in the notice.

(c) The notice must be delivered by the seller on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered without the seller providing the notice as required by this section, the purchaser may terminate the contract for any reason not later than the seventh day after the effective date of the contract.

(d) This section applies to any seller of unimproved real property, including a seller who is the developer of the property and who sells the property to others for resale.

(e) In this section, "hazardous substance" and "hazardous waste" have the meanings assigned by Section 361.003, Health and Safety Code.

(f) A seller is not required to give the notice if:

   (1) the seller is obligated under an earnest money contract to furnish a title insurance commitment to the buyer prior to closing; and
   (2) the buyer is entitled to terminate the contract if the buyer’s objections to title as permitted by the contract are not cured by the seller prior to closing.

Sec. 5.014. Notice of Obligations Related To Public Improvement District.

(a) A seller of residential real property that is located in a public improvement district established under Subchapter A, Chapter 372, Local Government Code, or Chapter 382, Local Government Code, and that consists of not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice that reads substantially similar to the following:
Notice of Obligation to Pay Public Improvement District Assessment to
(Municipality or County Levying Assessment) Concerning The Property At
(Street Address)

As a purchaser of this parcel of real property you are obligated to pay an
assessment to a municipality or county for an improvement project
undertaken by a public improvement district under Subchapter A, Chapter
The assessment may be due annually or in periodic installments. More
information concerning the amount of the assessment and the due dates of
that assessment may be obtained from the municipality or county levying
the assessment.

The amount of the assessments is subject to change. Your failure to pay
the assessments could result in a lien on and the foreclosure of your
property.

Date: ____________________________

Signature of Purchaser

(b) The seller shall deliver the notice required under Subsection (a) to the
purchaser before the effective date of an executory contract binding the
purchaser to purchase the property. The notice may be given separately, as
part of the contract during negotiations, or as part of any other notice the seller
delivers to the purchaser. If the notice is included as part of the executory
contract or another notice, the title of the notice prescribed by this section, the
references to the street address and date in the notice, and the purchaser's
signature on the notice may be omitted.

(c) This section does not apply to a transfer:

(1) under a court order or foreclosure sale;
(2) by a trustee in bankruptcy;
(3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;
(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
(6) from one co-owner to another co-owner of an undivided interest in the real property;
(7) to a spouse or a person in the lineal line of consanguinity of the seller;
(8) to or from a governmental entity;
(9) of only a mineral interest, leasehold interest, or security interest; or
(10) of a real property interest in a condominium.

(d) If an executory contract is entered into without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason not later than the earlier of:

(1) the seventh day after the date the purchaser receives the notice; or
(2) the date the transfer occurs as provided by the executory contract.

(e) The purchaser's right to terminate the executory contract under Subsection (d) is the purchaser's exclusive remedy for the seller's failure to provide the notice required by this section.

Sec. 5.015. Prohibited Fees.
A person who has a right of first refusal in real property that is a condominium subject to Chapter 81 or Chapter 82 may not charge a fee for declining to exercise that right, such as a fee for providing written evidence of the declination.
Sec. 5.016. Conveyance of Residential Property Encumbered by Lien.

(a) A person may not convey an interest in or enter into a contract to convey an interest in residential real property that will be encumbered by a recorded lien at the time the interest is conveyed unless, on or before the seventh day before the earlier of the effective date of the conveyance or the execution of an executory contract binding the purchaser to purchase the property, an option contract, or other contract, the person provides the purchaser and each lienholder a separate written disclosure statement in at least 12-point type that:

1. identifies the property and includes the name, address, and phone number of each lienholder;
2. states the amount of the debt that is secured by each lien;
3. specifies the terms of any contract or law under which the debt that is secured by the lien was incurred, including, as applicable:
   A. the rate of interest;
   B. the periodic installments required to be paid; and
   C. the account number;
4. indicates whether the lienholder has consented to the transfer of the property to the purchaser;
5. specifies the details of any insurance policy relating to the property, including:
   A. the name of the insurer and insured;
   B. the amount for which the property is insured; and
   C. the property that is insured;
6. states the amount of any property taxes that are due on the property; and
7. includes a statement at the top of the disclosure in a form substantially similar to the following:

WARNING: ONE OR MORE RECORDED LIENS HAVE BEEN FILED THAT MAKE A CLAIM AGAINST THIS PROPERTY AS LISTED BELOW. IF A LIEN IS NOT RELEASED AND THE PROPERTY IS CONVEYED
WITHOUT THE CONSENT OF THE LIENHOLDER, IT IS POSSIBLE THE LIENHOLDER COULD DEMAND FULL PAYMENT OF THE OUTSTANDING BALANCE OF THE LIEN IMMEDIATELY. YOU MAY WISH TO CONTACT EACH LIENHOLDER FOR FURTHER INFORMATION AND DISCUSS THIS MATTER WITH AN ATTORNEY.

(b) A violation of this section does not invalidate a conveyance. Except as provided by Subsections (c) and (d), if a contract is entered into without the seller providing the notice required by this section, the purchaser may terminate the contract for any reason on or before the seventh day after the date the purchaser receives the notice in addition to other remedies provided by this section or other law.

(c) This section does not apply to a transfer:
   (1) under a court order or foreclosure sale;
   (2) by a trustee in bankruptcy;
   (3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
   (4) by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
   (5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
   (6) from one co-owner to one or more other co-owners;
   (7) to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;
   (8) between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to one of those decrees;
   (9) to or from a governmental entity;
(10) where the purchaser obtains a title insurance policy insuring the transfer of title to the real property; or
(11) to a person who has purchased, conveyed, or entered into contracts to purchase or convey an interest in real property four or more times in the preceding 12 months.
(d) A violation of this section is not actionable if the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the 30th day after the date on which title to the property is transferred.

Sec. 5.018. Disclosure of Absence Of Certain Warranties.
(a) A seller of residential real property that is exempt from Title 16 under Section 401.005 shall give to the purchaser of the property a written notice that reads substantially similar to the following:

NOTICE OF NONAPPLICABILITY OF CERTAIN WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

The property that is subject to this contract is exempt from Title 16, Property Code, including the provisions of that title that provide statutory warranties and building and performance standards.

(b) A notice required by this section shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property. If a contract is entered into without the seller providing the notice, the purchaser may terminate the contract for any reason on or before the seventh day after the date the purchaser receives the notice.

(c) This section does not apply to a transfer:
   (1) under a court order or foreclosure sale;
(2) by a trustee in bankruptcy;
(3) to a mortgagee by a mortgagor or successor in interest or to a beneficiary of a deed of trust by a trustor or successor in interest;
(4) by a mortgagee or a beneficiary under a deed of trust who has acquired the land at a sale conducted under a power of sale under a deed of trust or a sale under a court-ordered foreclosure or has acquired the land by a deed in lieu of foreclosure;
(5) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
(6) from one co-owner to another co-owner of an undivided interest in the real property;
(7) to a spouse or a person in the lineal line of consanguinity of the seller;
(8) to or from a governmental entity; or
(9) of only a mineral interest, leasehold interest, or security interest.

Sec. 5.019. Notice of Water Level Fluctuations.

(a) This section applies only to the sale of residential or commercial real property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Chapter 11, Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level.

(b) A seller of real property shall give to the purchaser of the property a written notice in substantially the following form:

Notice of Water Level Fluctuations

The water level of the impoundment of water adjoining the property at ____________ (street address and city) or described as ____________ (legal description) fluctuates for various reasons, including as a result of:

(1) an entity lawfully exercising its right to use the water stored in the impoundment; or
(2) drought or flood conditions.

(c) The notice described by Subsection (b) shall be delivered by the seller to the purchaser on or before the effective date of an executory contract binding the purchaser to purchase the property.

(d) If a contract is entered into without the seller providing the notice within the period required by Subsection (c), the purchaser may terminate the contract for any reason within seven days after the date the purchaser receives:

(1) the notice described by Subsection (b) from the seller; or

(2) information described by the notice under Subsection (b) from any other person.

(e) After the date of the conveyance, the purchaser may bring an action for misrepresentation against the seller if the seller:

(1) failed to provide the notice before the date of the conveyance; and

(2) had actual knowledge that the water level described by Subsection (b) fluctuates for various reasons, including the reasons stated in Subsection (b).

(Source: http://www.statutes.legis.state.tx.us/Docs/SDocs/PROPERTYCODE.pdf)

This is just an example of the property code and how we as license holders must be aware of these laws to perform all real estate transaction.

The Real Estate Settlement Procedures Act prohibits the industry from accepting kickbacks as unearned income among other restrictions. Kickbacks would cause the cost of buying and selling property to increase.

Individual states have their own license laws adopted by their state legislature. Real estate commissions are put in place to administer the laws.
Texas Property and Real Estate Laws
Property and real estate law includes homestead protection from creditors; relationships between landlords and tenants; and other matters pertaining to one's home or residence. Property and real estate laws also include zoning regulations, which determine which kinds of structures may be built in a given location. In Texas, for example, there is no limit on how much a landlord may require for a security deposit, but the deposit must be returned to the tenant within 30 days after the termination of the lease.

http://statelaws.findlaw.com/texas-law/texas-homestead-laws.html

Homestead Protection Laws in General
So-called "homestead protection laws," (or "homestead laws") on the books in most states allow property owners to declare a limited piece of their property a "homestead" (based on either property value or acreage) and thus off limits to creditors. Basically, these laws protect real estate from forced sales, intended to prevent homelessness in certain situations. Texas homestead laws predate the state's admission into the union, but are also encoded into the state’s constitution.

Texas Homestead Protections Among the Strongest in the Nation
Texas' homestead laws offer much more protection from creditors than homestead laws in most other states and are staunchly defended by the state’s courts. They don't impose a dollar value on eligible property, limiting the size of the homestead to 10 urban acres or 200 rural acres. A Texas Justice's opinion in a 2011 appellate court case offers the following guidance:

"Indeed, a court must uphold and enforce the Texas homestead laws even though in so doing the court might unwittingly assist a dishonest debtor in wrongfully defeating his creditor."

(Source: http://statelaws.findlaw.com/texas-law/texas-homestead-laws.html)

The time limit for filing a civil suit or prosecuting a criminal case is called the "statute of limitations." In fact, states have several different statutes of limitations for different types of claims. When filing a civil case, it is important to note the statute of limitations for the claim you intend to file. If the statute of limitations has expired, you may not be able to pursue your claim in court -- even if you have a valid case.

In Texas, civil statute of limitations laws are anywhere from one to five years, depending on the severity of the claim. While Texas plaintiffs have one year in which to file a claim for defamation, the time limit is five years for sex crimes.

- Injury to Person - 2 yrs. Civ. Prac. & Rem. §16.003(a); 5 yrs. for sex crimes 16.0045
- Libel/Slander - 1 yr. Civ. Prac. & Rem. §16.002(a)
- Fraud - 4 yrs. Civ. Prac. & Rem. §16.004(a)(4)
- Injury to Personal Property - 2 yrs. Civ. Prac. & Rem. §16.003(a)
- Professional Malpractice - -
- Trespass - 2 yrs. Civ. Prac. & Rem. §16.003(a)
- Collection of Rents -
- Contracts - Written: 4 yrs. real property Civ. Prac. §16.004(a)(3)
- Collection of Debt on Account - 4 yrs. Civ. Prac. & Rem. §16.004(a) (3)
- Judgments

**Contracts**


[https://www.law.cornell.edu/wex/contract](https://www.law.cornell.edu/wex/contract)

**Definition**

An agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality. In some states, the element of consideration can be satisfied by a valid substitute. Possible remedies for breach of contract include general damages, consequential damages, reliance damages, and specific performance.

**Overview**

Contracts are promises that the law will enforce. The law provides remedies if a promise is breached or recognizes the performance of a promise as a duty. Contracts arise when a duty does or may come into existence, because of a promise made by one of the parties. To be legally binding as a contract, a promise must be exchanged for adequate consideration. Adequate consideration is a benefit or detriment which a party receives which reasonably and fairly induces them to make the promise/contract. For example, promises that are purely gifts are not considered enforceable because the personal satisfaction the grantor of the promise may receive from the act of giving is normally not considered adequate consideration. Certain promises that are not considered contracts may, in limited circumstances, be enforced if one party has relied to his detriment on the assurances of the other party.

Contracts are mainly governed by state statutory and common (judge-made) law and private law. Private law principally includes the terms of the agreement between the parties who are exchanging promises. This private law may override many of the rules otherwise established by state law. Statutory law may require some contracts be put in writing and executed with particular formalities. Otherwise, the parties may enter into a binding agreement without signing a formal written document. Most of the principles of the common law of contracts are outlined in the Restatement of the Law.
Second, Contracts, published by the American Law Institute. The Uniform Commercial Code, whose original articles have been adopted in nearly every state, represents a body of statutory law that governs important categories of contracts. The main articles that deal with the law of contracts are Article 1 (General Provisions) and Article 2 (Sales). Sections of Article 9 (Secured Transactions) govern contracts assigning the rights to payment in security interest agreements. Contracts related to particular activities or business sectors may be highly regulated by state and/or federal law.

(Source: See Law Relating To Other Topics Dealing with Particular Activities or Business Sector)

The Texas Real Estate Commission Enforces the License Act
Texas Real Estate Commission and Agency Divisions.
https://www.trec.texas.gov/agency-information/about-trec

The TREC Standards & Enforcement Services (TREC SES) Division ensures that consumers are protected by providing timely, fair, and consistent enforcement of The Real Estate License Act, the Rules of the Commission, Chapter 1102 of the Texas Occupations Code regarding Real Estate Inspectors, the Texas Timeshare Act, and the Residential Service Company Act. TREC SES staff also implement standards for, and review applications for, licensure and determinations of moral character to assess the honesty, integrity, and trustworthiness of applicants, and oversee the sanction of license holders who have violated various legal requirements.

TREC SES handles a high volume of signed written complaints from the public and license holders concerning alleged violations. While most complaints relate to the purchase, lease or inspection of a home, they may also include charges ranging from misleading advertising to unlicensed activity. Once it is determined that the complaint is within the agency’s jurisdiction, the license holder is notified and given an opportunity to respond, and the complaint is investigated.
For those complaints where evidence suggests a violation has occurred, attempts will first be made to resolve the complaint through alternative dispute resolution (ADR) methods, such as informal settlement discussions or mediation. When ADR is not effective or appropriate, TREC SES pursues formal disciplinary action and a hearing may be set at the State Office of Administrative Hearings.

TREC is the state’s regulatory agency for the following:

- Real Estate Brokers and Sales Agents
- Real Estate Inspectors
- Education Providers for Real Estate and Inspection Courses
- Residential Service Companies
- Timeshare Developers
- Easement Or Right-of-Way (ERW) agents

Types of businesses NOT regulated by TREC and who regulates them.

- Real Estate Developers  Not regulated by any specific state agency
- Home Builders See Question #2 of "Consumer Problems" in our Enforcement FAQs
- Homeowners Association  Not Regulated. See Question #5 of “Consumer Problems” in our Enforcement FAQs
- Mortgage Brokers Texas Dept. of Savings & Mortgage Lending
- Property Tax Consultants
- TX Dept. of Licensing and Regulation
- Title Insurance Companies
- TX Dept. of Insurance
- Auctioneers
- TX Dept. of Licensing and Regulation

TREC exists to protect and serve the citizens of Texas. The Commission's programs of education, licensing, and industry regulation ensure that real estate service providers are honest, trustworthy and competent.
TREC requires that all real estate brokers and sales agents meet and maintain specified levels of education to hold a license to act as a real estate agent. Agents are required to follow the provisions of The Real Estate License Act and the Rules of the Texas Real Estate Commission in all transactions and to deal with the public in a competent and honest manner. The Commission also licenses real estate inspectors, residential service companies, real estate schools and registers timeshare properties.

Created in 1949, the Texas Real Estate Commission (TREC) administers four laws:

- Texas Occupations Code, Chapter 1101 - The Real Estate License Act
- Texas Occupations Code, Chapter 1102 - Real Estate Inspectors
- Texas Occupations Code, Chapter 1303 - the Residential Service Company Act
- Texas Property Code, Chapter 221 - the Texas Timeshare Act

TREC has a statutory relationship with three state entities:
The Commission partners with the Real Estate Center at Texas A&M University on research and education projects:

- it appoints two members to the Mortgage Broker Advisory Committee of the Texas Department of Savings and Mortgage Lending and cooperates with that agency on issues affecting real estate license holders and mortgage brokers;
- TREC provides administrative support to the Texas Appraiser Licensing & Certification Board (TALCB) under a memorandum of understanding approved by their governing boards.

(Source: https://www.trec.texas.gov/agency-information/about-trec)

The Commission has the authority to perform the following actions:

- Create and enforce any rules that are necessary to enforce the Texas Occupations Code.
Texas Law of Agency

- Establish a Canon of Conduct and ethics for all license holders
- Conduct hearings and issue disciplinary decisions.
- Adopt rules that require license holders to use TREC-approved, promulgated contract forms, but the Commission may not stop licensee license holder from using a contract form for sale, exchange, option or lease of property that was prepared by the owner or was prepared by an attorney and required by the owner.
- Issue subpoenas for witnesses and production of documents or other evidence.
- Maintain a registry of certificate holders.
- Charge and collect fees pertaining to licensing, applications and other relevant areas.

Texas Real Estate Commission Enforcement Duties

Filing a Complaint

If you feel there has been a violation of the Real Estate Licensing Act or TREC Rules you have a right to file a complaint.

TREC is limited to taking disciplinary action against those who are licensed and regulated by TREC. Commissioners and staff are prohibited from giving legal advice or opinions. If you need legal advice or want to recover money, please consult an attorney.

To file a complaint, complete ALL SECTIONS of the Complaint Form AND provide COMPLETE and LEGIBLE copies of all documentation relevant to the complaint, such as:

- Sales contract (front and back) - all pages and all accompanying forms and attachments
- Lease/rental agreement (front and back)
- Listing/management agreement (front and back)
- Disclosure statements (e.g. Information about Brokerage Services, Intermediary Relationship Notice, Seller’s Disclosure Notice)
- Closing statement (HUD 1)
- Multiple listing service (MLS) printout
- Appraisals
- Inspection report
- Photographs
- Advertising
- Repair bills
- Receipts
- Canceled checks (front and back)
- Monthly statements
- Correspondence, including demand letters and e-mails
- Judgment/civil lawsuit documents (e.g. original petition, settlement documents)
- Other (describe)

DO NOT SEND ORIGINAL DOCUMENTS WITH COMPLAINT--SEND COPIES ONLY.

TEXAS LAW REQUIRES COMPLAINTS TO BE SIGNED. TREC WILL NOT ACCEPT OR PROCESS ANY UNSIGNED COMPLAINTS.

Email, Mail or fax your signed complaint to TREC at the address listed on the pdf icon complaint form. You will be notified by mail when your complaint has been received. If an investigation is opened, the person(s) against whom the complaint is filed will receive a copy of the complaint. After the investigation is concluded, staff will determine whether there is sufficient evidence to take disciplinary action. TREC makes every effort to process complaints in a timely manner; however, each complaint is different. It is important to allow TREC adequate time to fully investigate your complaint. Disciplinary action can include:
  - a formal reprimand,
  - the suspension or revocation of a license,
  - payment of an administrative penalty, or
  - other appropriate action.
Disciplinary History
You can find information about Disciplinary Actions through our online search tool. This is where you can get information about any disciplinary actions that may have been taken against a particular license holder.

Recovery Funds
TREC maintains two recovery funds available to consumers who have been harmed by certain license holders regulated by TREC, one applying to brokers, sales agents, or registered Easement or Right-of-Way agents, and one applying to real estate inspectors. Certain requirements need to be met before you are eligible to receive a payment from either fund. Check out our frequently asked questions on our FAQ page and the Model Application for the Real Estate Recovery Trust Account.

Note
The Texas Occupations Code is the collection of statutes and laws that govern many occupations in Texas, including health professions, cosmetology, accounting and law enforcement, as well as the real estate profession.

The primary mission of TREC according to the Commission's website, is:

The mission of the Texas Real Estate Commission is to assist and protect consumers of real estate services, thereby fostering economic growth in Texas. Through its programs of education, licensing and industry regulation, the Commission ensures the availability of capable and honest real estate service providers.

Texas Real Estate License Act and the Texas Real Estate Commission Rules (Ethics)
The following Section of the License Act defines the minimum level of service a Texas broker can offer their sellers.
Sec. 1101.557. Acting as Agent; Regulation Of Certain Transactions.

(a) A broker who represents a party in a real estate transaction or who lists real estate for sale under an exclusive agreement for a party is that party's agent.

(b) A broker described by Subsection (a):

(1) may not instruct another broker to directly or indirectly violate Section 1101.652(b)(22);

(2) must inform the party if the broker receives material information related to a transaction to list, buy, sell, or lease the party's real estate, including the receipt of an offer by the broker; and

(3) shall, at a minimum, answer the party's questions and present any offer to or from the party.

(c) For the purposes of this section:

(1) a license holder who has the authority to bind a party to a lease or sale under a power of attorney or a property management agreement is also a party to the lease or sale;

(2) an inquiry to a person described by Section 1101.005(6) about contract terms or forms required by the person's employer does not violate Section 1101.652(b)(22) if the person does not have the authority to bind the employer to the contract; and

(3) the sole delivery of an offer to a party does not violate Section 1101.652(b)(22) if:

(A) the party's broker consents to the delivery;

(B) a copy of the offer is sent to the party's broker, unless a governmental agency using a sealed bid process does not allow a copy to be sent; and

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(C) the person delivering the offer does not engage in another activity that directly or indirectly violates Section 1101.652(b)(22).

Section 1101.652(b)(22).
Negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

The following Section of the License Act shows that the legislature considers disclosure of representation an ethical obligation of real estate professionals.


Sec. 1101.558. Representation Disclosure.
(a) Repealed by Acts 2015, 84th Leg., R.S., Ch. 1158, Sec. 92, eff. January 1, 2016.
(b) A license holder who represents a party in a proposed real estate transaction shall disclose, orally or in writing, that representation at the time of the license holder’s first contact with:
   (1) another party to the transaction; or
   (2) another license holder who represents another party to the transaction.
(b-1) At the time of a license holder’s first substantive communication with a party relating to a proposed transaction regarding specific real property, the license holder shall provide to the party written notice in at least a 10-point font that:
   (1) describes the ways in which a broker can represent a party to a real estate transaction, including as an intermediary;
(2) describes the basic duties and obligations a broker has to a party to a real estate transaction that the broker represents; and

(3) provides the name, license number, and contact information for the license holder and the license holder's supervisor and broker, if applicable.

(b-2) The commission by rule shall prescribe the text of the notice required under Subsections (b-1)(1) and (2) and establish the methods by which a license holder shall provide the notice.

(c) A license holder is not required to provide the notice required by Subsection (b-1) if:

(1) the proposed transaction is for a residential lease for less than one year and a sale is not being considered;

(2) the license holder meets with a party who the license holder knows is represented by another license holder; or

(3) the communication occurs at a property that is held open for any prospective buyer or tenant and the communication concerns that property.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Following section of the License Act that list reasons the license holder can have their license revoked. Review them carefully, and you will notice many prohibited acts of untruth, misrepresentation, lack of disclosure and other unethical practices.

Texas Occupations Code. Chapter 1101.
Real Estate Brokers and Sales Agents.
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.652. GROUNDS FOR SUSPENSION OR REVOCATION OF LICENSE.
(a) The commission may suspend or revoke a license issued under this chapter or Chapter 1102 or take other disciplinary action authorized by this chapter or Chapter 1102 if the license holder:
(1) enters a plea of guilty or nolo contendere to or is convicted of a felony or a criminal offense involving fraud, and the time for appeal has elapsed or the judgment or conviction has been affirmed on appeal, without regard to an order granting community supervision that suspends the imposition of the sentence;
(2) procures or attempts to procure a license under this chapter or Chapter 1102 for the license holder by fraud, misrepresentation, or deceit or by making a material misstatement of fact in an application for a license;
(3) fails to honor, within a reasonable time, a check issued to the commission after the commission has sent by certified mail a request for payment to the license holder’s last known business address according to commission records;
(4) fails to provide, within a reasonable time, information requested by the commission that relates to a formal or informal complaint to the commission that would indicate a violation of this chapter or Chapter 1102;
(5) fails to surrender to the owner, without just cause, a document or instrument that is requested by the owner and that is in the license holder’s possession;
(6) fails to notify the commission, not later than the 30th day after the date of a final conviction or the entry of a plea of guilty or nolo contendere, that the person has been convicted of or entered a plea of guilty or nolo contendere to a felony or a criminal offense involving fraud; or
(7) disregards or violates this chapter or Chapter 1102.

(a-1) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder:

1. engages in misrepresentation, dishonesty, or fraud when selling, buying, trading, or leasing real property in the name of:
   - the license holder;
   - the license holder’s spouse; or
   - a person related to the license holder within the first degree by consanguinity;
2. fails or refuses to produce on request, within a reasonable time, for inspection by the commission or a commission representative, a document,
book, or record that is in the license holder's possession and relates to a real estate transaction conducted by the license holder; or

(3) fails to use a contract form required by the commission under Section 1101.155.

(b) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while engaged in real estate brokerage:

(1) acts negligently or incompetently;
(2) engages in conduct that is dishonest or in bad faith or that demonstrates untrustworthiness;
(3) makes a material misrepresentation to a potential buyer concerning a significant defect, including a latent structural defect, known to the license holder that would be a significant factor to a reasonable and prudent buyer in making a decision to purchase real property;
(4) fails to disclose to a potential buyer a defect described by Subdivision (3) that is known to the license holder;
(5) makes a false promise that is likely to influence a person to enter into an agreement when the license holder is unable or does not intend to keep the promise;
(6) pursues a continued and flagrant course of misrepresentation or makes false promises through an agent or sales agent, through advertising, or otherwise;
(7) fails to make clear to all parties to a real estate transaction the party for whom the license holder is acting;
(8) receives compensation from more than one party to a real estate transaction without the full knowledge and consent of all parties to the transaction;
(9) fails within a reasonable time to properly account for or remit money that is received by the license holder and that belongs to another person;
(10) commingles money that belongs to another person with the license holder's own money;
(11) pays a commission or a fee to or divides a commission or a fee with a person other than a license holder or a real estate broker or sales agent licensed in another state for compensation for services as a real estate agent;
(12) fails to specify a definite termination date that is not subject to prior notice in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required under this chapter;
(13) accepts, receives, or charges an undisclosed commission, rebate, or direct profit on an expenditure made for a principal;
(14) solicits, sells, or offers for sale real property by means of a lottery;
(15) solicits, sells, or offers for sale real property by means of a deceptive practice;
(16) acts in a dual capacity as broker and undisclosed principal in a real estate transaction;
(17) guarantees or authorizes or permits a person to guarantee that future profits will result from a resale of real property;
(18) places a sign on real property offering the real property for sale or lease without obtaining the written consent of the owner of the real property or the owner's authorized agent;
(19) offers to sell or lease real property without the knowledge and consent of the owner of the real property or the owner's authorized agent;
(20) offers to sell or lease real property on terms other than those authorized by the owner of the real property or the owner's authorized agent;
(21) induces or attempts to induce a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract;
(22) negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;
(23) publishes or causes to be published an advertisement, including an advertisement by newspaper, radio, television, the Internet, or display, that misleads or is likely to deceive the public, tends to create a misleading impression, or fails to identify the person causing the advertisement to be published as a licensed broker or agent;
(24) withholds from or inserts into a statement of account or invoice a statement that the license holder knows makes the statement of account or invoice inaccurate in a material way;
(25) publishes or circulates an unjustified or unwarranted threat of a legal proceeding or other action;
(26) establishes an association by employment or otherwise with a person other than a license holder if the person is expected or required to act as a license holder;
(27) aids, abets, or conspires with another person to circumvent this chapter;
(28) fails or refuses to provide, on request, a copy of a document relating to a real estate transaction to a person who signed the document;
(29) fails to advise a buyer in writing before the closing of a real estate transaction that the buyer should:
(A) have the abstract covering the real estate that is the subject of the contract examined by an attorney chosen by the buyer; or
(B) be provided with or obtain a title insurance policy;
(30) fails to deposit, within a reasonable time, money the license holder receives as escrow or trust funds in a real estate transaction:
(A) in trust with a title company authorized to do business in this state; or
(B) in a custodial, trust, or escrow account maintained for that purpose in a banking institution authorized to do business in this state;
(31) disburses money deposited in a custodial, trust, or escrow account, as provided in Subdivision (30), before the completion or termination of the real estate transaction;
(32) discriminates against an owner, potential buyer, landlord, or potential tenant on the basis of race, color, religion, sex, disability, familial status, national origin, or ancestry, including directing a prospective buyer or tenant interested in equivalent properties to a different area based on the race, color, religion, sex, disability, familial status, national origin, or ancestry of the potential owner or tenant; or

(33) disregards or violates this chapter.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Do You Know?
Review the following scenario.

Which of the following could cause an agent to lose their license?

a. misrepresenting the condition of the property
b. commingling money
c. false advertising
d. all of the above

The correct answer is d.

Unauthorized Practice of Law
The Rules of the Commission address the caution agents must take regarding the unauthorized practice of law.

TEXAS Administrative Code.
Chapter 537-Rule §537.11.
(a) When negotiating contracts binding the sale, exchange, option, lease or rental of any interest in real property, a real estate licensee shall use only those contract forms promulgated by the Texas Real Estate Commission (the Commission) for that kind of transaction with the following exceptions:

(1) transactions in which the license holder is functioning solely as a principal, not as an agent;
(2) transactions in which an agency of the United States government requires a different form to be used;
(3) transactions for which a contract form has been prepared by a principal to the transaction or prepared by an attorney and required by a principal to the transaction; or
(4) transactions for which no standard contract form has been promulgated by the Commission, and the license holder uses a form prepared by an attorney at law licensed by this state and approved by the attorney for the particular kind of transactions involved or prepared by the Texas Real Estate Broker-Lawyer Committee (the committee) and made available for trial use by license holders with the consent of the Commission.

(b) A license holder may not:

(1) practice law;
(2) offer, give or attempt to give legal advice, directly or indirectly;
(3) give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate;
(4) give opinions concerning the status or validity of title to real estate; or
(5) attempt to prevent or in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer.

(c) This section does not limit a license holder's fiduciary obligation to disclose to the license holder's principals all pertinent facts which are within the knowledge of the license holder, including such facts which might affect the status of or title to real estate.

(d) A license holder may not undertake to draw or prepare documents fixing and defining the legal rights of the principals to a real estate transaction.
(e) In negotiating real estate transactions, a license holder may prepare forms using only forms that have been approved and promulgated by the Commission or such forms as are otherwise permitted by these rules.

(f) When filling in a form authorized for use by this section, the license holder may only fill in the blanks provided and may not add to or strike matter from such form, except that a license holder shall add factual statements and business details desired by the principals and shall strike only such matter as is desired by the principals and as is necessary to conform the instrument to the intent of the parties.

(g) A license holder may not add to a promulgated contract form factual statements or business details for which a contract addendum, lease or other form has been promulgated by the commission for mandatory use.

(h) This section does not prevent the license holder from explaining to the principals the meaning of the factual statements and business details contained in an instrument so long as the license holder does not offer or give legal advice.

(i) It is not the practice of law as defined in this Act for a real estate license holder to complete a contract form which is either promulgated by the Commission or prepared by the committee and made available for trial use by license holder with the consent of the Commission.

(j) Contract forms prepared by the committee for trial use may be used on a voluntary basis after being approved by the Commission.

(k) A contract form prepared by the committee and approved by the Commission to replace a previously promulgated form may be used by license holders on a voluntary basis before the effective date of rules requiring use of the replacement form.

(l) When a transaction involves unusual matters that should be reviewed by legal counsel before an instrument is executed, or if the instrument must be acknowledged and filed of record, the license holder shall advise the principals that each should consult a lawyer of the principal's choice before executing the instrument.

(m) A license holder may not employ, directly or indirectly, a lawyer nor pay for the services of a lawyer to represent any principal to a real estate transaction in which the license holder is acting as an agent. The license holder may employ and pay for the services of a lawyer to represent only the license holder in a real estate transaction,
including preparation of the contract, agreement, or other legal instruments to be executed by the principals to the transactions.

(n) A license holder shall advise the principals that the instrument they are about to execute is binding on them.

(o) Forms approved or promulgated by the Commission may be reproduced only from the following sources:

(1) numbered copies obtained from the Commission, whether in a printed format or electronically reproduced from the files available on the Commission's website;

(2) printed copies made from copies obtained from the commission;

(3) legible photocopies made from such copies; or

(4) computer-driven printers following these guidelines:

(A) The computer file or program containing the form text must not allow the end user direct access to the text of the form and may only permit the user to insert language in blanks in the forms. Blanks may be scalable to accommodate the inserted language. The Commission may approve the use of a computer file or program that permits a principal of a license holder to strike through language of the form text. The program must be:

   (i) limited to use only by a principal of a transaction; and
   (ii) in a format and authenticated in manner acceptable to the Commission.

(B) Typefaces or fonts must appear to be identical to those used by the Commission in printed copies of the particular form.

(C) The text and order of the text must be identical to that used by the Commission in printed copies of the particular form.

(D) The name and address of the person or firm responsible for developing the software program must be legibly printed below the border at the bottom of each page in no less than six-point type and in no larger than 10-point type.
(p) Forms approved or promulgated by the Commission must be reproduced on the same size of paper used by the commission with the following changes or additions only:

1. The business name or logo of a broker, organization or printer may appear at the top of a form outside the border.
2. The broker's name may be inserted in any blank provided for that purpose.

(q) Standard Contract Forms adopted by the Commission are published by and available from the Commission at P.O. Box 12188, Austin, Texas 78711-2188 or www.trec.texas.gov.


The Cannons of Professional Ethics are included in the Rules of the Texas Real Estate Commission

Canons of Professional Ethics and Conduct.


http://txrules.elaws.us/rule/title22_chapter531

531.1 Fidelity

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

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

531.2 Integrity
A real estate broker or salesperson has a special obligation to exercise integrity in the discharge of the license holder's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission.

Think About This…
On July 15\textsuperscript{th}, Sally's client Sam asked her to deliver a Notice of Termination to the seller while his contract was still in the option period.

The next few days were really busy and Sally neglected to deliver the Termination. By the time she got it to the listing agent the option period had expired. Now the seller is saying that he did not receive the notice during the option period and he wants Sam to release the earnest money to him.

What did Sally do wrong? What should Sally do to make this up to her client? How do you think TREC would look at it if a complaint is filed?

531.3 Competency
It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage practitioner. The agent should:

(1) be informed on market conditions affecting the real estate business and pledged to continuing education in the intricacies involved in marketing real estate for others;
(2) be informed on national, state, and local issues and developments in the real estate industry; and
(3) exercise judgment and skill in the performance of the work.
Think About This…

Marvin has a salespersons license. Real estate sales have slowed down and Marvin decides to start doing Property Management. He has had no training or experience in managing property and he does not talk with his broker about his decision.

Marvin opened a checking account so that he can keep his client’s money separate from his. It is not a trust account. He just starts taking properties to manage.

Thing go well for a few months, then one of his owners and he have a disagreement and the owner filed a complaint. Do you think TREC or Marvin’s broker will have a problem with Marvin’s activity?

§531.18 Consumer Information

(a) The Commission adopts by reference Consumer Protection Notice TREC No. CN 1-2. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

(b) Each active real estate broker shall provide the notice adopted under subsection (a) by:

(1) displaying it in a readily noticeable location in each place of business the broker maintains; and

(2) providing a link to it labeled "Texas Real Estate Commission Consumer Protection Notice", in at least a 10-point font, in a readily noticeable place on the homepage of the business website of the broker and sponsored sales agents.

(Source: http://txrules.elaws.us/rule/title22_chapter531)
531.19 Discriminatory Practices

(a) No real estate license holder shall inquire about, respond to or facilitate inquiries about, or make a disclosure of an owner, previous or current occupant, potential purchaser, lessor, or potential lessee of real property which indicates or is intended to indicate any preference, limitation, or discrimination based on the following:

(1) race;
(2) color;
(3) religion;
(4) sex;
(5) national origin;
(6) ancestry;
(7) familial status; or
(8) disability.

(b) For the purpose of this section, disability includes AIDS, HIV-related illnesses, or HIV infection as defined by the Centers for Disease Control of the United States Public Health Service.

§531.21 Information About Brokerage Services.
Texas Administrative Code.
Title 22. Part 23. Chapter 531.

(a) The Commission adopts by reference Information About Brokerage Services Form, TREC No. IABS 1-0 (IABS Form). The IABS Form is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

(b) Each active real estate broker and sales agent shall provide:

(1) a link to the IABS Form labeled "Texas Real Estate Commission Information About Brokerage Services", in at least a 10 point font, in a readily noticeable place on the homepage of the business website of the broker and sales agent;

and

(2) the IABS Form as required under §1101.558, Texas Occupations Code.

(c) For purposes of §1101.558, Texas Occupations Code, the IABS Form can be provided:

(1) by personal delivery by the broker or sales agent;

(2) by first class mail or overnight common carrier delivery service;

(3) in the body of an email; or
(4) as an attachment to an email, or a link within the body of an email, with a specific reference to the IABS Form in the body of the email.

(d) Providing a link to the IABS Form in a footnote or signature block in an email does not satisfy the requirements of subsection (c).

(e) License holders may reproduce the IABS Form published by the Commission, provided that the text of the IABS Form is copied verbatim and the spacing, borders and placement of text on the page must appear to be identical to that in the published version of the IABS Form, except that the Broker Contact Information section may be prefilled.


Professional Code of Ethics

The National Association of REALTORS® Code of Ethics has been guiding Real Estate Professionals for over 100 years.


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

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which Realtors® should dedicate themselves, and for which they should be diligent in preparing themselves. Realtors®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow Realtors® a common responsibility for its integrity and honor.
In recognition and appreciation of their obligations to clients, customers, the public, and each other, Realtors® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. Realtors® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of Realtors®. (Amended 1/00)

Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, Realtors® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where Realtors® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain.

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

Duties to Clients and Customers

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

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

**Article 3**
REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker.

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

**Article 5**
REALTORS® shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.
Article 6
REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent. When recommending real estate products or services (e.g., homeowner’s insurance, warranty programs, mortgage financing, title insurance, etc.), REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the REALTOR® or REALTOR®’s firm may receive as a direct result of such recommendation. (Amended 1/99)

Article 7
In a transaction, REALTORS® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the REALTOR®’s client or clients. (Amended 1/93)

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

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

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

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

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

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

Article 12
REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)
Article 13
REALTORS® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

Article 14
If charged with unethical practice or asked to present evidence or to cooperate in any other way, in any professional standards proceeding or investigation, REALTORS® shall place all pertinent facts before the proper tribunals of the Member Board or affiliated institute, society, or council in which membership is held and shall take no action to disrupt or obstruct such processes. (Amended 1/99)

Duties to Other REALTORS®

Article 15
REALTORS® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices.

Article 16
REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients

Article 17
In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.
In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.

Do you know?
Review this statement.

Article 2 of the Code of Ethics says that REALTORS® shall avoid ______ relating to the property or the transaction.

a. exaggeration, misrepresentation, or concealment of pertinent facts
b. lawsuits, exaggeration and misrepresentation
c. disclosure of pertinent facts, representations or exaggeration
d. none of the above

*The correct answer is a.*

**Minimum Ethical Standards**  
Remember that laws and codes of ethics are the minimum standards. Doing what is moral and what is right comes from within oneself. A real estate professional building a long term business does the right thing.

One of the interesting things about the real estate industry is that so many people are involved in a transaction and all of them have different duties and obligations. Be understanding of others in the transaction. Be aware of how their duties may be different than yours. You and your company are usually the only ones that have a duty of care for your buyer or seller. Take that duty seriously.
Duties Owed

- Buyer’s Agent – Fiduciary Duties to the buyer.
- Seller’s Agent – Fiduciary Duties to the seller.
- Mortgage Broker – Usually No fiduciary duties to anyone.
- Mortgage Banker – Fiduciary duties to their investors.
- Underwriter – Only duty is to protect the lender and the investors.
- Title Companies – No fiduciary duties—their duty is to be neutral.
- Appraiser – Their duties are to the lender.
- Residential Service Policy sales persons, repair persons, insurance sales people all work for and represent their companies.

Do you know?

Review this scenario.

Many different people are involved in a real estate transaction. They are all representing __________.

a. the same people
b. different people
c. some must remain neutral
d. both b and c are correct

The correct answer is d.

Lesson Summary

In this lesson we looked at the differences between laws, ethics and morals. There are many federal and state laws that real estate agents must be aware of, including the Federal Fair Housing Act, RESPA, DTPA, the Consumer Financial Protection Bureau and the Safe Act.
The Texas Real Estate Commission (TREC), which was established in 1949, is the governing body for real estate professionals in the state of Texas. TREC regulates real estate inspectors, easement and right-of-way agents, education providers for real estate and inspection courses, timeshare developers, residential service companies and real estate brokers and salesperson.

The Texas Real Estate License Act (TRELA) contains all of the statutes relating to licensing requirements for real estate brokers and salespeople, as well as all of the duties of licensees and other rules. This Act also deals with the duties of licensees acting as agents. TRELA first defines terms that are used in the Act, including broker, license holder, real estate, salesperson and sub-agent. Another important function of the Act is to list prohibited practices and violations, as well as outline disciplinary procedures.

In addition to the Texas Real Estate License Act, brokers and salespeople must also comply with the Rules of the Texas Real Estate Commission. Chapter 531, Canons of Professional Ethics and Conduct for Real Estate Licensees, provides interpretations of and expands upon TRELA. Many of these rules deal with the fiduciary duties that an agent owes the principal and the general duties that all brokers and salespeople owe all parties.

The National Association of REALTORS® Code of Ethics has been guiding real estate licensees to do the right thing for over 100 years. Parts of the Texas Real Estate License Act are based on the Code of Ethics. In recognition and appreciation of their obligations to clients, customers, the public, and each other, Realtors® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. Realtors® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial
economic harm, bring such matters to the attention of the appropriate Board or Association of Realtors®

Morals are something people develop during their lifetime based on beliefs of right and wrong. Opinions of morals can differ based on cultural beliefs, religious beliefs, etc.
Lesson Eleven: Deceptive Trade Practices and Consumer Protection

Lesson Topics
This lesson focuses on the following topics:

- Fraud vs Misrepresentation
- Deceptive Trade Practices and Consumer Protection Act
- Damages
- Defenses
- Ethical and Legal Concerns

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

- Differentiate between fraud and misrepresentation.
- Answer questions regarding encounters with buyers and sellers regarding disclosures.
- List three penalties the court may assess for a fraud violation.

Fraud vs Misrepresentation

In law, fraud is deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. Fraud itself can be a civil wrong (i.e., a fraud victim may sue the fraud perpetrator to avoid the fraud and/or recover monetary compensation), a criminal wrong (i.e., a fraud perpetrator may be prosecuted and imprisoned by governmental authorities) or it may cause no loss of money, property or legal right but still be an element of another civil or criminal wrong.

The purpose of fraud may be monetary gain or other benefits, such as obtaining a driver's license or qualifying for a mortgage by way of false statements.
A hoax is a distinct concept that involves deliberate deception without the intention of gain or of materially damaging or depriving a victim.

**As a Civil Wrong**

In common law jurisdictions, as a civil wrong, fraud is a tort. While the precise definitions and requirements of proof vary among jurisdictions, the requisite elements of fraud as a tort generally are the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact does rely, to the harm of the victim. Proving fraud in a court of law is often said to be difficult. That difficulty is found, for instance, in that each and every one of the elements of fraud must be proven, that the elements include proving the states of mind of the perpetrator and the victim, and that some jurisdictions require the victim to prove fraud by clear and convincing evidence.

The remedies for fraud may include rescission (i.e., reversal) of a fraudulently obtained agreement or transaction, the recovery of a monetary award to compensate for the harm caused, punitive damages to punish or deter the misconduct, and possibly others

In cases of a fraudulently induced contract, fraud may serve as a defense in a civil action for breach of contract or specific performance of contract.

Fraud may serve as a basis for a court to invoke its equitable jurisdiction.

**As a Criminal Offense**

In common law jurisdictions, as a criminal offence, fraud takes many different forms, some general (e.g., theft by false pretense) and some specific to particular categories of victims or misconduct (e.g., bank fraud, insurance fraud, forgery). The elements of fraud as a crime similarly vary. The requisite elements of perhaps most general form of criminal fraud, theft by false pretense, are the intentional deception of a victim by false representation or pretense with the intent of persuading the victim to part with...
property and with the victim parting with property in reliance on the representation or pretense and with the perpetrator intending to keep the property from the victim.

**United States**
The U.S. government's 2006 fraud review concluded that fraud is a significantly underreported crime, and while various agencies and organizations were attempting to tackle the issue, greater co-operation was needed to achieve a real impact in the public sector. The scale of the problem pointed to the need for a small but high-powered body to bring together the numerous counter-fraud initiatives that existed.

To establish a claim of fraud, most jurisdictions in the United States require that each element be plead with particularity and be proved with clear, cogent, and convincing evidence (very probable evidence). The measure of damages in fraud cases is computed using the "benefit of bargain" rule, which is the difference between the value of the property had it been as represented and its actual value. Special damages may be allowed if shown proximately caused by defendant's fraud and the damage amounts are proved with specificity.

**Cost**
The typical organization loses five percent of its annual revenue to fraud, with a median loss of $160,000. Frauds committed by owners and executives were more than nine times as costly as employee fraud. The industries most commonly affected are banking, manufacturing, and government.

**Types of Fraudulent Acts**
 Fraud can be committed through many media, including mail, wire, phone, and the Internet (computer crime and Internet fraud). International dimensions of the web and ease with which users can hide their location, the difficulty of checking identity and legitimacy online, and the simplicity with which hackers can divert browsers to dishonest sites and steal credit card details have all contributed to the very rapid
growth of Internet fraud. In some countries, tax fraud is also prosecuted under false billing or tax forgery.

**Anti-Fraud Movements**

Beyond laws that aim at prevention of fraud, there are also governmental and non-governmental organizations that aim to fight fraud. Between 1911 and 1933, 47 states adopted the so-called Blue Sky Laws status. These laws were enacted and enforced at the state level and regulated the offering and sale of securities to protect the public from fraud. Though the specific provisions of these laws varied among states, they all required the registration of all securities offerings and sales, as well as of every US stockbroker and brokerage firm. However, these Blue Sky laws were generally found to be ineffective. To increase public trust in the capital markets the President of the United States, Franklin D. Roosevelt, established the U.S. Securities and Exchange Commission (SEC). The main reason for the creation of the SEC was to regulate the stock market and prevent corporate abuses relating to the offering and sale of securities and corporate reporting. The SEC was given the power to license and regulate stock exchanges, the companies whose securities traded on them, and the brokers and dealers who conducted the trading.

**Detection**

For detection of fraudulent activities on the large scale, massive use of (online) data analysis is required, in particular predictive analytics or forensic analytics. Forensic analytics is the use of electronic data to reconstruct or detect financial fraud. The steps in the process are data collection, data preparation, data analysis, and the preparation of a report and possibly a presentation of the results. Using computer-based analytic methods Nigrini’s wider goal is the detection of fraud, errors, anomalies, inefficiencies, and biases which refer to people gravitating to certain dollar amounts to get past internal control thresholds.

The analytic tests usually start with high-level data overview tests to spot highly significant irregularities. In a recent purchasing card application these tests identified
a purchasing card transaction for 3,000,000 Costa Rica Colons. This was neither a fraud nor an error, but it was a highly unusual amount for a purchasing card transaction. These high-level tests include tests related to Benford's Law and possibly also those statistics known as descriptive statistics. These high-tests are always followed by more focused tests to look for small samples of highly irregular transactions. The familiar methods of correlation and time-series analysis can also be used to detect fraud and other irregularities. Forensic analytics also includes the use of a fraud risk-scoring model to identify high risk forensic units (customers, employees, locations, insurance claims and so on). Forensic analytics also includes suggested tests to identify financial statement irregularities, but the general rule is that analytic methods alone are not too successful at detecting financial statement fraud.

(Source: https://en.wikipedia.org/wiki/Fraud#Types_of_fraudulent_acts)

**Advance-Fee Scam**


An advance-fee scam is a type of fraud and one of the most common types of confidence trick. The scam typically involves promising the victim a significant share of a large sum of money, in return for a small up-front payment, which the fraudster requires in order to obtain the large sum. If a victim makes the payment, the fraudster either invents a series of further fees for the victim, or simply disappears.

There are many variations on this type of scam, including the 419 scam, the Spanish Prisoner scam, the black money scam and the Detroit-Buffalo scam. The scam has been used with fax and traditional mail, and is now prevalent in online communications like emails.

Online versions of the scam originate primarily in the United States, the United Kingdom and Nigeria, with Ivory Coast, Togo, South Africa, Benin, the Netherlands, and Spain also having high incidences of such fraud. The scam messages often claim
to originate in Nigeria, but usually this is not true. The number "419" refers to the section of the Nigerian Criminal Code dealing with fraud, the charges and penalties for offenders.

History
The modern scam is similar to the Spanish Prisoner scam dating back to the late 18th century. In that con, businessmen were contacted by an individual allegedly trying to smuggle someone connected to a wealthy family out of a prison in Spain. In exchange for assistance, the scammer promised to share money with the victim in exchange for a small amount of money to bribe prison guards. One variant of the scam may date back to the 18th or 19th centuries, as a very similar letter, entitled "The Letter from Jerusalem", is seen in the memoirs of Eugène François Vidocq, a former French criminal and private investigator. Another variant of the scam, dating back to circa 1830, appears very similar to what is passed via email today: "Sir, you will doubtlessly be astonished to be receiving a letter from a person unknown to you, who is about to ask a favour from you...", and goes on to talk of a casket containing 16,000 francs in gold and the diamonds of a late marchioness.

The modern day transnational scam can be traced back to Germany in 1922, and became popular during the 1980s. There are many variants of the letters sent. One of these, sent via postal mail, was addressed to a woman's husband, and inquired about his health. It then asked what to do with profits from a $24.6 million investment, and ended with a telephone number. Other official-looking letters were sent from a writer who said he was a director of the state-owned Nigerian National Petroleum Corporation. He said he wanted to transfer $20 million to the recipient’s bank account – money that was budgeted but never spent. In exchange for transferring the funds out of Nigeria, the recipient would keep 30% of the total. To get the process started, the scammer asked for a few sheets of the company’s letterhead, bank account numbers, and other personal information. Yet other variants have involved mention of a Nigerian prince or other member of a royal family seeking to transfer large sums of
money out of the country—thus, these scams are sometimes called "Nigerian Prince emails".

The spread of e-mail and email harvesting software significantly lowered the cost of sending scam letters by using the Internet. While Nigeria is most often the nation referred to in these scams, they may originate in other nations as well. For example, in 2006, 61% of Internet criminals were traced to locations in the United States, while 16% were traced to the United Kingdom and 6% to locations in Nigeria. Other nations known to have a high incidence of advance-fee fraud include Ivory Coast, Togo, South Africa, the Netherlands, and Spain.

One reason Nigeria may have been singled out is the apparently comical, almost ludicrous nature of the promise of West African riches from a Nigerian prince. According to Cormac Herley, a researcher for Microsoft, "By sending an email that repels all but the most gullible, the scammer gets the most promising marks to self-select." Nevertheless, Nigeria has earned a reputation as being at the center of email scammers, and the number 419 refers to the article of the Nigerian Criminal Code (part of Chapter 38: "Obtaining property by false pretenses; Cheating") dealing with fraud. In Nigeria, scammers use computers in Internet cafés to send mass emails promising potential victims riches or romance, and to trawl for replies. They refer to their targets as Magas, slang developed from a Yoruba word meaning "fool". Some scammers have accomplices in the United States and abroad that move in to finish the deal once the initial contact has been made.

**Implementation**

This scam usually begins with a letter or email purportedly sent to a selected recipient but actually sent to many, making an offer that would allegedly result in a large payoff for the victim.

The email's subject line often says something like "From the desk of barrister [Name]", "Your assistance is needed", and so on. The details vary, but the usual story is that a
person, often a government or bank employee, knows of a large amount of unclaimed money or gold which he cannot access directly, usually because he has no right to it. Such people, who may be real but impersonated people or fictitious characters played by the con artist, could include, for example, the wife or son of a deposed African leader who has amassed a stolen fortune, a bank employee who knows of a terminally ill wealthy person with no relatives, or a wealthy foreigner who deposited money in the bank just before dying in a plane crash (leaving no will or known next of kin), a US soldier who has stumbled upon a hidden cache of gold in Iraq, a business being audited by the government, a disgruntled worker or corrupt government official who has embezzled funds, a refugee, and similar characters. The money could be in the form of gold bullion, gold dust, money in a bank account, blood diamonds, a series of checks or bank drafts, and so forth. The sums involved are usually in the millions of dollars, and the investor is promised a large share, typically ten to forty percent, in return for assisting the fraudster to retrieve or expatriate the money. Although the vast majority of recipients do not respond to these emails, a very small percentage do, enough to make the fraud worthwhile, as many millions of messages can be sent daily.

To help persuade the victim to agree to the deal, the scammer often sends one or more false documents bearing official government stamps, and seals. 419 scammers often mention false addresses and use photographs taken from the Internet or from magazines to falsely represent themselves. Often a photograph used by a scammer is not a picture of any person involved in the scheme. Multiple "people" involved in schemes are fictitious, and in many cases, one person controls many fictitious personas used in scams.

Once the victim's confidence has been gained, the scammer then introduces a delay or monetary hurdle that prevents the deal from occurring as planned, such as "To transmit the money, we need to bribe a bank official. Could you help us with a loan?" or "For you to be a party to the transaction, you must have holdings at a Nigerian bank of $100,000 or more" or similar. This is the money being stolen from the victim; the victim willingly transfers the money, usually through some irreversible channel such
as a wire transfer, and the scammer receives and pockets it. More delays and additional costs are added, always keeping the promise of an imminent large transfer alive, convincing the victim that the money the victim is currently paying is covered several times over by the payoff. The implication that these payments will be used for "white-collar" crime such as bribery, and even that the money they are being promised is being stolen from a government or royal/wealthy family, often prevents the victim from telling others about the "transaction", as it would involve admitting that they intended to be complicit in an international crime. Sometimes psychological pressure is added by claiming that the Nigerian side, to pay certain fees, had to sell belongings and borrow money on a house, or by comparing the salary scale and living conditions in Africa to those in the West. Much of the time, however, the needed psychological pressure is self-applied; once the victims have provided money toward the payoff, they feel they have a vested interest in seeing the "deal" through. Some victims even believe they can cheat the other party, and walk away with all the money instead of just the percentage they were promised.

The essential fact in all advance-fee fraud operations is the promised money transfer to the victim never happens, because the money does not exist. The perpetrators rely on the fact that, by the time the victim realizes this (often only after being confronted by a third party who has noticed the transactions or conversation and recognized the scam), the victim may have sent thousands of dollars of their own money, and sometimes thousands more that has been borrowed or stolen, to the scammer via an untraceable and/or irreversible means such as wire transfer. The scammer disappears, and the victim is left on the hook for the money sent to the scammer.

During the course of many schemes, scammers ask victims to supply bank account information. Usually this is a "test" devised by the scammer to gauge the victim's gullibility; the bank account information isn't used directly by the scammer, because a fraudulent withdrawal from the account is more easily detected, reversed, and traced. Scammers instead usually request that payments be made using a wire transfer service like Western Union and MoneyGram. The reason given by the scammer
usually relates to the speed at which the payment can be received and processed, allowing quick release of the supposed payoff. The real reason is that wire transfers and similar methods of payment are irreversible, untraceable and, because identification beyond knowledge of the details of the transaction is often not required, completely anonymous. However, bank account information obtained by scammers is sometimes sold in bulk to other fraudsters, who wait a few months for the victim to repair the damage caused by the initial scam, before raiding any accounts which the victim didn't close.

Telephone numbers used by scammers tend to come from burner phones. In Ivory Coast a scammer may purchase an inexpensive mobile phone and a pre-paid SIM card without submitting any identifying information. If the scammers believe they are being traced, they discard their mobile phones and purchase new ones.

The spam emails used in these scams are often sent from Internet cafés equipped with satellite internet connection. Recipient addresses and email content are copied and pasted into a webmail interface using a stand-alone storage medium, such as a memory card. Certain areas of Lagos, such as Festac, contain many cyber cafés that serve scammers; cyber cafés often seal their doors outside hours, such as from 10:30pm to 7:00am, so that scammers inside may work without fear of discovery. Nigeria also contains many businesses that provide false documents used in scams; after a scam involving a forged signature of Nigerian President Olusegun Obasanjo in summer 2005, Nigerian authorities raided a market in the Oluwole section of Lagos. The police seized thousands of Nigerian and non-Nigerian passports, 10,000 blank British Airways boarding passes, 10,000 United States Postal money orders, customs documents, false university certificates, 500 printing plates, and 500 computers.

The "success rate" of the scammers is also hard to gauge, since they are operating illegally and do not keep track of specific numbers. One individual estimated he sent 500 emails per day and received about seven replies, citing that when he received a
reply, he was 70 percent certain he would get the money. If tens of thousands of emails are sent every day by thousands of individuals, it doesn't take a very high success rate to be worthwhile.

**Countermeasures**

In recent years, efforts have been made, by both governments, internet companies and individuals, to combat scammers involved in advance-fee fraud and 419 scams. In 2004, the Nigerian government formed the Economic and Financial Crimes Commission (EFCC) to combat economic and financial crimes, such as advanced fee fraud. In 2009, Nigeria's EFCC announced that they have adopted smart technology developed by Microsoft to track down fraudulent emails. They hoped to have the service, dubbed "Eagle Claw", running at full capacity to warn a quarter of a million potential victims.

Some individuals participate in a practice known as scam baiting, in which they pose as potential targets and engage the scammers in lengthy dialogue so as to waste their time and decrease the time they have available for real victims. Details on the practice of scam baiting, and ideas, are chronicled on a website, 419eater.com, launched in 2003 by Michael Berry. One particularly notable case of scam baiting involved an American who identified himself to a Nigerian scammer as James T. Kirk. When the scammer — who apparently had never heard of the television series Star Trek — asked for his passport details, "Kirk" sent a copy of a fake passport with a photo of Star Trek's Captain Kirk, hoping the scammer would attempt to use it and get arrested.

**Common Elements - Fake Cheques**

Fraudulent cheques and money orders, initially credited by their bank to the victim's account, are key elements in many advance-fee scams, such as auction/classified listing overpayment, lottery scams, inheritance scams, etc., and can be used in almost any scam when a "payment" to the victim is required to gain, regain or further solidify the victim's trust and confidence in the validity of the scheme.
The use of cheques in a scam hinges on the practice or law in many countries concerning cheques: when an account holder presents a cheque for deposit, the bank will usually make the funds available to the account holder within 1–5 business days, although cheques, particularly if international, may take longer than that to clear.\[36\] The clearing process may take 7–10 days, and can take up to a month when dealing with foreign banks. The time between the funds appearing as available to the account holder and the cheque clearing is known as the "float", during which time the bank could technically be said to have floated a loan to the account holder to be covered with the funds from the bank clearing the cheque. Even after it has cleared, funds may be reclaimed much later if fraud is discovered.

The cheque given to the victim is typically counterfeit but drawn on a real account with real funds in it. With correct banking information a cheque can be produced that looks genuine, passes all counterfeit tests, and may initially clear the paying account if the account information is accurate and the funds are available. However, whether it clears or not, it eventually becomes apparent either to the bank or the account holder that the cheque is a forgery. This can be as little as three days after the funds are available if the bank supposedly covering the cheque discovers the cheque information is invalid, or it could take months for an account holder to notice a fraudulent debit. It has been suggested that in some cases a genuine cheque, from the payer's account, is issued with intent to defraud: the issuer gets a contact at the paying bank to falsely claim it is a fake weeks or months later when the physical cheque arrives back at the paying bank, so that the issuer regains the funds initially debited.

Regardless of the amount of time involved, subject to certain limits, once the cashing bank is alerted the cheque is fraudulent, the transaction is reversed and the victim's account debited; this may lead to it being put in overdraft. Fraudulent cheques and money orders, initially credited by their bank to the victim's account, are key elements in many advance-fee scams, such as auction/classified listing overpayment, lottery scams, inheritance scams, etc., and can be used in almost
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Western Union and MoneyGram Wire Transfers
A central element of advance-fee fraud is the transaction from the victim to the scammer must be untraceable and irreversible. Otherwise, the victim, once they become aware of the scam, can successfully retrieve their money and alert officials who can track the accounts used by the scammer.

Wire transfers via Western Union and MoneyGram are ideal for this purpose. International wire transfers cannot be cancelled or reversed, and the person receiving the money cannot be tracked. Other non-cancellable forms of payment include postal money orders and cashier's checks, but wire transfer via Western Union or MoneyGram is more common.

Anonymous Communication
Since the scammer's operations must be untraceable to avoid identification, and because the scammer is often impersonating someone else, any communication between the scammer and his victim must be done through channels that hide the scammer's true identity. The following options in particular are widely used.

Web-Based Email
Because many free email services do not require valid identifying information, and also allow communication with many victims in a short span of time, they are the preferred method of communication for scammers. Some services go so far as to mask the sender's source IP address (Gmail being a common choice), making the scammer more difficult to trace to country of origin. While Gmail does indeed strip headers from emails, it is in fact possible to trace an IP address from such an email.

Scammers can create as many accounts as they wish, and often have several at a time. In addition, if email providers are alerted to the scammer's activities and suspend the account, it is a trivial matter for the scammer to simply create a new account to resume scamming.
Email Hijacking/Friend Scams
Some fraudsters hijack existing email accounts and use them for advance-fee fraud purposes. The fraudster impersonates associates, friends, or family members of the legitimate account owner in an attempt to defraud them.[37] A variety of techniques such as phishing, keyloggers, and computer viruses are used to gain login information for the email address.

Fax Transmissions
Facsimile machines are commonly used tools of business, whenever a client requires a hard copy of a document. They can also be simulated using web services, and made untraceable by the use of prepaid phones connected to mobile fax machines or by use of a public fax machine such as one owned by a document processing business like FedEx Office/Kinko's. Thus, scammers posing as business entities often use fax transmissions as an anonymous form of communication. This is more expensive, as the prepaid phone and fax equipment cost more than email, but to a skeptical victim it can be more believable.

SMS Messages
Abusing SMS bulk senders such as WASPs, scammers subscribe to these services using fraudulent registration details and paying either via cash or stolen credit card details. They then send out masses of unsolicited SMSes to victims stating they have won a competition, lottery, reward, or like event, and they have to contact somebody to claim their prize. Typically the details of the party to be contacted will be an equally untraceable email address or a virtual telephone number. These messages may be sent over a weekend when abuse staff at the service providers are not working, enabling the scammer to be able to abuse the services for a whole weekend. Even when traceable, they give out long and winding procedures for procuring the reward (real or unreal) and that too with the impending huge cost of transportation and tax or duty charges. The origin of such SMS messages are often from fake websites/addresses.
A recent (mid-2011) innovation is the use of a Premium Rate 'call back' number (instead of a web site or email) in the SMS. On calling the number, the victim is first reassured that 'they are a winner' and then subjected to a long series of instructions on how to collect their 'winnings'. During the message, there will be frequent instructions to 'ring back in the event of problems'. The call is always 'cut off' just before the victim has the chance to note all the details. Some victims call back multiple times in an effort to collect all the details. The scammer thus makes their money out of the fees charged for the calls.

Telecommunications Relay Services
Many scams use telephone calls to convince the victim that the person on the other end of the deal is a real, truthful person. The scammer, possibly impersonating a person of a nationality, or gender, other than their own, would arouse suspicion by telephoning the victim. In these cases, scammers use TRS, a US federally funded relay service where an operator or a text/speech translation program acts as an intermediary between someone using an ordinary telephone and a deaf caller using TDD or other tele printer device. The scammer may claim they are deaf, and that they must use a relay service. The victim, possibly drawn in by sympathy for a disabled caller, might be more susceptible to the fraud.

FCC regulations and confidentiality laws require operators to relay calls verbatim, and adhere to a strict code of confidentiality and ethics. Thus, no relay operator may judge the legality and legitimacy of a relay call, and must relay it without interference. This means the relay operator may not warn victims, even when they suspect the call is a scam. MCI said about one percent of their IP Relay calls in 2004 were scams.

Tracking phone-based relay services is relatively easy, so scammers tend to prefer Internet Protocol-based relay services such as IP Relay. In a common strategy, they bind their overseas IP address to a router or server located on US soil, allowing them to use US-based relay service providers without interference.
TRS is sometimes used to relay credit card information to make a fraudulent purchase with a stolen credit card. In many cases however, it is simply a means for the con artist to further lure the victim into the scam.

Sometimes, victims are invited to a country to meet government officials, an associate of the scammer, or the scammer themselves. Some victims who travel are instead held for ransom. Scammers may tell a victim that they do not need a visa, or that the scammers will provide one; if the victim does this, the scammers have the power to extort money from the victim. Sometimes victims are ransomed or murdered.

According to a 1995 U.S. State Department report, over fifteen persons were murdered between 1992 and 1995 in Nigeria after following through on advance-fee frauds. In 1999 Norwegian millionaire Kjetil Moe was lured to South Africa by 419 scammers, and murdered. Wealthy George Makronalli was lured to South Africa and killed in 2004.

**Variants**
There are many variations on the most common stories, and also many variations on the way the scam works. Some of the more commonly seen variants involve employment scams, lottery scams, online sales and rentals, and romance scams. Many scams involve online sales, such as those advertised on websites such as Craigslist and eBay, or property rental. This article cannot list every known and future type of advanced fee fraud or 419 scheme; only some major types are described. Additional examples may be available in the external links section at the end of this article.

**Online Sales and Rentals**
Many scams involve the purchase of goods and services via classified advertisements, especially on sites like Craigslist, eBay, or Gumtree. These typically involve the scammer contacting the seller of a particular good or service via telephone or email expressing interest in the item. They will typically then send a fake check
written for an amount greater than the asking price, asking the seller to send the difference to an alternate address, usually by money order or Western Union. A seller eager to sell a particular product may not wait for the check to clear, and when the bad check bounces, the funds wired have already been lost.

Some scammers advertise phony academic conferences in exotic or international locations, complete with fake websites, scheduled agendas and advertising experts in a particular field that will be presenting there. They offer to pay the airfare of the participants, but not the hotel accommodations. They will extract money from the victims when they attempt to reserve their accommodations in a non-existent hotel.

Sometimes, an inexpensive rental property is advertised by a fake landlord, who is typically out of state (or the country) and asking for the rent and/or deposit to be wired to them. Or the con artist finds a property, pretends to be the owner, lists it online, and communicates with the would-be renter to make a cash deposit. The scammer may also be the renter as well, in which case they pretend to be a foreign student and contact a landlord seeking accommodation. They usually state they are not yet in the country and wish to secure accommodations prior to arriving. Once the terms are negotiated, a forged check is forwarded for a greater amount than negotiated, and the fraudster asks the landlord to wire some of the money back.

**Mobile Tower Installation Fraud**

One variant of advanced-fee fraud popular in India is mobile tower installation fraud. The fraudster uses Internet classified websites and print media to lure the public for installation of mobile towers on their property. The fraudster also creates fake websites to appear legitimate.

The victims part with their money in pieces to the fraudster on account of the Government Service Tax, government clearance charges, bank charges, transportation charges, survey fee etc. The Indian government is issuing public notices in media to spread awareness among the public and warn them against mobile tower fraudsters. This fraud is widespread in India and Pakistan.
Other Scams

Other scams involve unclaimed property, also called "bona vacantia" in the United Kingdom. In England and Wales (other than the Duchy of Lancaster and the Duchy of Cornwall), this property is administered by the Bona Vacantia Division of the Treasury Solicitor's Department. Fraudulent emails and letters claiming to be from this department have been reported, informing the recipient they are the beneficiary of a legacy but requiring the payment of a fee before sending more information or releasing the money. In the United States, messages are falsely claimed to be from the National Association of Unclaimed Property Administrators (NAUPA), a real organization, but one that does not and cannot itself make payments.

In one variant of 419 fraud, an alleged hitman writes to someone explaining he has been targeted to kill them. He tells them he knows the allegations against them are false, and asks for money so the target can receive evidence of the person who ordered the hit.

Another variant of advanced fee fraud is known as a pigeon drop. This is a confidence trick in which the mark, or "pigeon", is persuaded to give up a sum of money in order to secure the rights to a larger sum of money, or more valuable object. In reality, the scammers make off with the money and the mark is left with nothing. In the process, the stranger (actually a confidence trickster) puts his money with the mark's money (in an envelope, briefcase, or bag) which the mark is then apparently entrusted with; it is actually switched for a bag full of newspaper or other worthless material. Through various theatrics, the mark is given the opportunity to leave with the money without the stranger realizing. In reality the mark would be fleeing from his own money, which the con man still has (or has handed off to an accomplice).

Some scammers will go after the victims of previous scams; known as a reloading scam. For example, they may contact a victim saying they can track and apprehend the scammer and recover the money lost by the victim, for a price. Or they may say a fund has been set up by the Nigerian government to compensate victims of 419 fraud,
and all that is required is proof of the loss, personal information, and a processing and handling fee. The recovery scammers obtain lists of victims by buying them from the original scammers.

Estimates of the total losses due to the scam are uncertain and vary widely, since many people may be too embarrassed to admit that they were gullible enough to be scammed to report the crime. A United States government report in 2006 indicated that Americans lost $198.4 million to Internet fraud in 2006, averaging a loss of $5,100 per incident. That same year, a report in the United Kingdom claimed that these scams cost the economy £150 million per year, with the average victim losing £31,000. In addition to the financial cost, many victims also suffer a severe emotional and psychological cost, such as losing their ability to trust people. One man from Cambridge shire, UK burnt himself to death with petrol after realizing that the $1.2 million "internet lottery" that he had won was actually a scam. In 2007 a Chinese student at the University of Nottingham killed herself after she discovered that she had fallen for a similar lottery scam.

Other victims lose wealth and friends, become estranged from family members, deceive partners, get divorced, or commit criminal offenses in the process of either fulfilling their "obligations" to the scammers or obtaining more money. In 2008 an Oregon woman lost $400,000 to a Nigerian advance-fee fraud scam, after an email told her she had inherited money from her long-lost grandfather. Her curiosity was piqued because she actually had a grandfather whom her family had lost touch with, and whose initials matched those given in the email. She sent hundreds of thousands of dollars over a period of more than two years, despite her family, bank staff and law enforcement officials all urging her to stop. The elderly are particularly susceptible to online scams such as this, as they typically come from a generation that was more trusting, and are often too proud to report the fraud. They also may be concerned that relatives might see it as a sign of declining mental capacity, and they are afraid to lose their independence.
Victims can be enticed to borrow or embezzle money to pay the advance fees, believing that they will shortly be paid a much larger sum and be able to refund what they misappropriated. Crimes committed by victims include credit-card fraud, check kiting, and embezzlement. San Diego-based businessman James Adler lost over $5 million in a Nigeria-based advance-fee scam. While a court affirmed that various Nigerian government officials (including a governor of the Central Bank of Nigeria) were directly or indirectly involved, and that Nigerian government officials could be sued in U.S. courts under the "commercial activity" exception to the Foreign Sovereign Immunities Act, Adler was unable to get his money back due to the doctrine of unclean hands because he had knowingly entered into a contract that was illegal.

Some 419 scams involve even more serious crimes, such as kidnapping or murder. One such case, in 2008, involves Osamai Hitomi, a Japanese businessman who was lured to Johannesburg, South Africa and kidnapped on September 26, 2008. The kidnappers took him to Alberton, south of Johannesburg, and demanded a $5 million ransom from his family. Seven people were ultimately arrested. In July 2001, Joseph Raca, a former mayor of Northampton, UK, was kidnapped by scammers in Johannesburg, South Africa, who demanded a ransom of £20,000. The captors released Raca after they became nervous. One 419 scam that ended in murder occurred in February 2003, when Jiří Pasovský, a 72-year-old scam victim from the Czech Republic, shot and killed 50-year-old Michael Lekara Wayid, an official at the Nigerian embassy in Prague, and injured another person, after the Nigerian Consul General explained he could not return the $600,000 that Pasovský had lost to a Nigerian scammer.

The international nature of the crime, combined with the fact that many victims do not want to admit that they bought into an illegal activity, has made tracking down and apprehending these criminals difficult. Furthermore, the government of Nigeria has been slow to take action, leading some investigators to believe that some Nigerian government officials are involved in some of these scams. The US government's establishment of the Economic and Financial Crimes Commission (EFCC) in 2004
helped with the issue to some degree, although issues with corruption remain.[32][86] A notable case which the EFCC pursued was that of Emmanuel Nwude, who was convicted for defrauding $242 million out of the director of a Brazilian bank, Banco Noroeste, which ultimately led to the bank's collapse.

Despite this, there has been some recent success in apprehending and prosecuting these criminals. In 2004 fifty-two suspects were arrested in Amsterdam after an extensive raid, after which almost no 419 emails were reported being sent by local internet service providers. In November 2004, Australian authorities apprehended Nick Marinellis of Sydney, the self-proclaimed head of Australian 419ers who later boasted that he had "220 African brothers worldwide" and that he was "the Australian headquarters for those scams". In 2008 US authorities in Olympia, Washington, sentenced Edna Fiedler to two years in prison with 5 years of supervised probation for her involvement in a $1 million Nigerian check scam. She had an accomplice in Lagos, Nigeria, who shipped her up to $1.1 million worth of counterfeit checks and money orders with instructions on where to ship them.

(Source: https://en.wikipedia.org/wiki/Advance-fee_scam)

**Internet Fraud**


An Internet fraud (online scam) is the use of Internet services or software with Internet access to defraud victims or to otherwise take advantage of them; for example, by stealing personal information, which can even lead to identity theft. A very common form of Internet fraud is the distribution of rogue security software. Internet services can be used to present fraudulent solicitations to prospective victims, to conduct fraudulent transactions, or to transmit the proceeds of fraud to financial institutions or to others connected with the scheme. Research suggests that online scams can happen through social engineering and social influence. It can occur in chat rooms, social media, email, message boards, or on websites.

(Source: [https://en.wikipedia.org/wiki/Internet_fraud](https://en.wikipedia.org/wiki/Internet_fraud))
Pyramid Schemes

Pyramid and Ponzi Schemes
A pyramid scheme is a business model that recruits members via a promise of payments or services for enrolling others into the scheme, rather than supplying investments or sale of products or services. As recruiting multiplies, recruiting becomes quickly impossible, and most members are unable to profit; as such, pyramid schemes are unsustainable and often illegal.

Pyramid schemes have existed for at least a century in different guises. Some multi-level marketing plans have been classified as pyramid schemes.

Concept and Basic Models
In a pyramid scheme, an organization compels individuals who wish to join to make a payment. In exchange, the organization promises its new members a share of the money taken from every additional member that they recruit. The directors of the organization (those at the top of the pyramid) also receive a share of these payments. For the directors, the scheme is potentially lucrative—whether or not they do any work, the organization’s membership has a strong incentive to continue recruiting and funneling money to the top of the pyramid.

Such organizations seldom involve sales of products or services with value. Without creating any goods or services, the only revenue streams for the scheme are recruiting more members, or soliciting more money from current members. The behavior of pyramid schemes follows the mathematics concerning exponential growth quite closely. Each level of the pyramid is much larger than the one before it. For a pyramid scheme to make money for everyone who enrolls in it, it would have to expand indefinitely. This is not possible because the population of Earth is finite. When the scheme inevitably runs out of new recruits, lacking other sources of revenue, it collapses. Because in a geometric series, the biggest terms are at the end, most
people will be in the lower levels of the pyramid (and indeed the bottom level is always the biggest single layer).

In a pyramid scheme, people in the upper layers typically profit while people in the lower layers typically lose money. Since at any given time, most of the members in the scheme are at the bottom, most participants in a pyramid scheme will not make any money. In particular, when the scheme collapses, most members will be in the bottom layers and thus will not have any opportunity to profit from the scheme, yet they will have paid to join the scheme. Therefore, a pyramid scheme is characterized by a few people (including the creators of the scheme) making large amounts of money, while most who join the scheme lose money. For this reason, they are considered scams.

The "Eightball" Model
Many pyramids are more sophisticated than the simple model. These recognize that recruiting a large number of others into a scheme can be difficult so a seemingly simpler model is used. In this model each person must recruit two others, but the ease of achieving this is offset because the depth required to recoup any money also increases. The scheme requires a person to recruit two others, who must each recruit two others, and so on.

The "eight-ball" model contains a total of fifteen members. Note that in an arithmetic progression $1 + 2 + 3 + 4 + 5 = 15$. The pyramid scheme in the picture in contrast is a geometric progression $1 + 2 + 4 + 8 = 15$.

Prior instances of this scheme have been called the "Airplane Game" and the four tiers labelled as "captain", "co-pilot", "crew", and "passenger" to denote a person's level. Another instance was called the "Original Dinner Party" which labeled the tiers as "dessert", "main course", "side salad", and "appetizer". A person on the "dessert" course is the one at the top of the tree. Another variant, "Treasure Traders", variously used gemology terms such as "polishers", "stone cutters", etc.
Such schemes may try to downplay their pyramid nature by referring to themselves as "gifting circles" with money being "gifted". Popular schemes such as "Women Empowering Women"[3] do exactly this.

Whichever euphemism is used, there are 15 total people in four tiers (1 + 2 + 4 + 8) in the scheme—with the Airplane Game as the example, the person at the top of this tree is the "captain", the two below are "co-pilots", the four below are "crew", and the bottom eight joiners are the "passengers".

The eight passengers must each pay (or "gift") a sum (e.g., $5,000) to join the scheme. This sum (e.g., $40,000) goes to the captain who leaves, with everyone remaining moving up one tier. There are now two new captains so the group splits in two with each group requiring eight new passengers. A person who joins the scheme as a passenger will not see a return until they advance through the crew and co-pilot tiers and exit the scheme as a captain. Therefore, the participants in the bottom three tiers of the pyramid lose their money if the scheme collapses.

If a person is using this model as a scam, the confidence trickster would take the majority of the money. They would do this by filling in the first three tiers (with one, two, and four people) with phony names, ensuring they get the first seven payouts, at eight times the buy-in sum, without paying a single penny themselves. So if the buy-in were $5,000, they would receive $40,000, paid for by the first eight investors. They would continue to buy in underneath the real investors, and promote and prolong the scheme for as long as possible to allow them to skim even more from it before it collapses.

Although the "captain" is the person at the top of the tree, having received the payment from the eight paying passengers, once they leave the scheme they are able to re-enter the pyramid as a "passenger" and hopefully recruit enough to reach captain again, thereby earning a second payout.
**Matrix Schemes**

Matrix schemes use the same fraudulent non-sustainable system as a pyramid; here, the participants pay to join a waiting list for a desirable product, which only a fraction of them can ever receive. Since matrix schemes follow the same laws of geometric progression as pyramids, they are subsequently as doomed to collapse. Such schemes operate as a queue, where the person at head of the queue receives an item such as a television, games console, digital camcorder, etc. when a certain number of new people join the end of the queue. For example, ten joiners may be required for the person at the front to receive their item and leave the queue. Each joiner is required to buy an expensive but potentially worthless item, such as an e-book, for their position in the queue.

The scheme organizer profits because the income from joiners far exceeds the cost of sending out the item to the person at the front. Organizers can further profit by starting a scheme with a queue with shill names that must be cleared out before genuine people get to the front. The scheme collapses when no more people are willing to join the queue. Schemes may not reveal, or may attempt to exaggerate, a prospective joiner’s queue position, a condition that essentially means the scheme is a lottery. Some countries have ruled that matrix schemes are illegal on that basis.

**Relation to Ponzi Schemes**

While often confused for each other, Pyramid schemes and Ponzi schemes are different from each other. They are related in the sense that both pyramid and Ponzi schemes are forms of financial fraud. However, Pyramid schemes are based on network marketing, where each part of the pyramid takes a piece of the pie / benefits, forwarding the money to the top of the pyramid. They fail simply because there aren't sufficient people. Ponzi schemes, on the other hand are based on the principle of "Robbing Peter to pay Paul" - early investors are paid their returns through the proceeds of investments by later investors. In other words, one central person (or entity) in the middle taking money from one person, keeping part of it and giving the rest to others who had invested in the scheme earlier. Thus, schemes such as the
Anubhav teak plantation scheme (Teak plantation scam of 1998) in India can be called Ponzi schemes. Some Ponzi schemes can depend on multi-level marketing for popularizing them, thus forming a combination of the two.

**Connection to Multi-Level Marketing**

Some multi-level marketing (MLM) companies operate as pyramid schemes and consumers often confuse legitimate multi-level marketing with pyramid schemes.

According to the U.S. Federal Trade Commission legitimate MLM, unlike pyramid schemes: "have a real product to sell. More importantly, MLM's [sic] actually sell their product to members of the general public, without requiring these consumers to pay anything extra or to join the MLM system. MLM's may pay commissions to a long string of distributors, but these commission are paid for real retail sales, not for new recruits."

Pyramid schemes however "may purport to sell a product, but they often simply use the product to hide their pyramid structure". While some people call MLMs in general "pyramid selling" others use the term to denote an illegal pyramid scheme masquerading as an MLM.

The Federal Trade Commission warns, "It's best not to get involved in plans where the money you make is based primarily on the number of distributors you recruit and your sales to them, rather than on your sales to people outside the plan who intend to use the products." It states that research is your best tool and gives eight steps to follow:

- Find—and study—the company’s track record.
- Learn about the product.
- Ask questions.
- Understand any restrictions.
- Talk to other distributors. Beware of shills.
- Consider using a friend or adviser as a neutral sounding board, or for a gut check.
• Take your time.
• Think about whether this plan suits your talents and goals.

Some commentators contend that MLMs in general are nothing more than legalized pyramid schemes.

Legality

Pyramid schemes are illegal in many countries or regions including Canada, the United Kingdom, and the United States.

Franchise fraud is defined by the United States Federal Bureau of Investigation as a pyramid scheme. The FBI website states:

Pyramid schemes—also referred to as franchise fraud or chain referral schemes—are marketing and investment frauds in which an individual is offered a distributorship or franchise to market a particular product. The real profit is earned, not by the sale of the product, but by the sale of new distributorships. Emphasis on selling franchises rather than the product eventually leads to a point where the supply of potential investors is exhausted and the pyramid collapses.

(Source: https://en.wikipedia.org/wiki/Pyramid_scheme)

Fraud is doing something deliberately with the intention of gaining something of value or causing damage to another person. If a real estate agent were to tell a potential buyer that a certain property is sure to double in value in a year while knowing values in this area are going up about 10% a year, the agent would be guilty of fraud. Fraud is intentional and has more severe legal penalties than misrepresentation.

Misrepresentation

Misrepresentation, on the other hand, is just not giving out all of the facts. If an agent fails to tell the buyer that he or she is aware the creek behind this property overflows and the house has flooded twice in the past two years, the agent is guilty of misrepresentation. License holders must be aware that if they know the seller is not being honest on the
seller’s disclosure or is not disclosing everything the license holder can also be found guilty of misrepresentation.

**Liability for Misrepresentation or Concealment**

Seller B lies to her agent, Agent B, about certain defects with the property. Agent B passes on the misinformation to the buyer.

In this situation, would the licensee have any liability? Would the buyer be able to sue the licensee for damages?

Depending upon the specific facts of the situation, probably NOT.

**The Texas Real Estate License Act**

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.805. LIABILITY FOR MISREPRESENTATION OR CONCEALMENT.

(a) In this section, "party" has the meaning assigned by Section 1101.551.
(b) This section prevails over any other law, including common law.
(c) This section does not diminish a broker's responsibility for the acts or omissions of a sales agent associated with or acting for the broker.
(d) A party is not liable for a misrepresentation or a concealment of a material fact made by a license holder in a real estate transaction unless the party:

1. knew of the falsity of the misrepresentation or concealment; and
2. failed to disclose the party’s knowledge of the falsity of the misrepresentation or concealment.

(e) A license holder is not liable for a misrepresentation or a concealment of a material fact made by a party to a real estate transaction unless the license holder:

1. knew of the falsity of the misrepresentation or concealment; and
2. failed to disclose the license holder's knowledge of the falsity of the misrepresentation or concealment.
(f) A party or a license holder is not liable for a misrepresentation or a concealment of a material fact made by a subagent in a real estate transaction unless the party or license holder:

(1) knew of the falsity of the misrepresentation or concealment; and
(2) failed to disclose the party's or license holder's knowledge of the falsity of the misrepresentation or concealment.

(Source: [http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm](http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm))

Generally, an agent will not be held liable for the actions of a principal. If a principal makes false statements and the agent passes these on to the third party, the agent has no liability unless he or she knew the information was false and he or she did not tell the third party of his or her knowledge. A license holder has no duty to personally inspect property or verify statements.

However, the statement “knew of the falsity of the misrepresentation of concealment” is open to interpretation by a court. Some courts have decided that certain information should be within the scope of a licensee’s knowledge and judgment.

For example, suppose that the license holder, when looking at the property, notices that the roof is leaking, and asks the seller about it. If the seller insists there is nothing wrong with the roof, the license holder should proceed with caution. If a court finds that this is within the area where the license holder “should have known” that the information was false, the license holder could be found guilty of passing on false information to the third party. As always, consult an attorney for legal advice in your specific situation.

In addition, the agent’s principal is not responsible for any misrepresentations made by the agent, unless the principal was aware of the misrepresentation and did not tell the third party about his or her knowledge.

Under the warranty of authority rule, an agent also cannot be held liable if the principal cannot fulfill the terms of the agreement with the third party
Warranty of Authority


Warranty of authority is a promise that one is an authorized agent. Where an agent has contracted as an agent (rather than personally) the agent cannot be made personally liable to the third party who has contracted with him. If, however, the agent had no authority to contract and the contract was entered into on the strength of representation of authority made by the agent, he will be so personally liable.

(Source: http://legal-dictionary.thefreedictionary.com/warranty+of+authority)

Example

Seller E does not actually own the property he is trying to sell, but he has a fake title, and there is no way that broker A could have known this. At closing, the truth is discovered. The buyer can sue the seller for this, but broker A has no liability.

A licensee who acts as a supervising broker is, however, responsible for the actions of his or her affiliated salespersons and associate brokers.

Tort Liability

Example 1

Licensee A is the agent for seller A. Licensee A discloses to the buyer that seller A is willing to accept a lower price than the seller listed and seller A never gave licensee A permission to disclose this confidential information.

Example 2

Licensee B is the agent for seller B. Seller B has a lien on the title, which is a material fact that would affect the buyer’s decision in the transaction. Licensee B does not disclose this information to the buyer.

In either of these situations, would the licensee have any liability? Would the client or the third party be able to sue the licensee for damages?
Depending upon the facts of the individual situation, perhaps, real estate licensees can be held liable for intentional or negligent wrongdoings or breaches of duty. This sort of liability is called *tort*, and, as licensees have duties in agency relationships, agents are not exempt from it.

Under tort liability, the injured party can sue the licensee for damages. For example, if a salesperson does not disclose a *material fact* to the third party, which is required as outlined in the Texas Real Estate License Act, then the third party can sue the salesperson. If the salesperson breaches a duty to the client, such as disclosing confidential information to a third party, then the client would be able to sue.

**Possible Outcomes of Negligence or Wrongdoings**
There are four basic outcomes that generally stem from torts:
- Professional sanctions
- Rescission
- Avoidance
- Legal recourse

**Professional sanctions**
The licensee is subject to disciplinary action, including fines and suspension or revocation of his or her real estate license.

**Rescission**
The principal may rescind the purchase and sale agreement.

**Avoidance**
The principal may legally avoid the obligation to pay commission.

**Legal Recourse**
The injured party or parties may have recourse for any damages suffered as a result of the agent’s actions.
Introduction

Prior to 1973, Texas consumer law could be summed up in two words, caveat emptor.1 In 1973, however, the Texas Legislature enacted the Texas Deceptive Trade Practices—Consumer Protection Law.2 The DTPA, as it soon became known, was quickly recognized as one of the foremost consumer protection statutes in the country. Its broad applicability, no-fault liability, and attractive remedial provisions, encourage attorneys to represent consumers. Courts at all levels followed the mandate of section 17.44 to liberally interpret the DTPA consistent with its stated purpose, which was to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”

This mandate, coupled with the language of section 17.43 making it clear that the remedies provided by the DTPA are cumulative to any other procedures or remedies provided for in any other law,4 resulted in an extremely favorable climate for plaintiffs and plaintiffs’ attorneys. But sometimes, too much of a good thing can turn bad. By the early 1990s, the DTPA had become a powerful tool, utilized successfully by consumer attorneys to combat nearly all forms of misrepresentation, deceit, and fraud in the marketplace. The DTPA was also successfully employed, however, in nearly all forms of civil litigation.

Our state’s “consumer protection statute” was the preferred basis for litigation involving multi-million dollar commercial transactions, personal injury arising out of an assault in an apartment complex, professional malpractice,7 and even the traditional slip and fall liability suit.

Actual damages often reached seven figures, additional damages were common, and attorneys’ fees were mandatory. At the same time attorneys and courts were
embracing the liberal provisions of the DTPA, the political climate in Texas was becoming much more conservative. Gradually, "tort became the phrase of the day. The form movement began in earnest as in the mid-1980s. By the end of the 1980s, Texas had enacted substantial changes in the law, and had even attempted to reduce the damages recoverable under the DTPA in non-traditional consumer cases. But the real "reform" would come in 1995, when the Republican controlled legislature enacted a broad reform agenda that included wholesale amendments to the DTPA.12 With the stated goal of "leveling the playing field," the legislature substantially amended the Act in an attempt to limit the amount of damages, preclude application of PA to traditional tort suits, exempt certain large transactions, and make it easier for defendants to force a settlement and recover attorneys' fees for frivolous claim amendments clearly limited the scope of the DTPA and the amount of damages that may be recovered, and gave defendants additional opportunities to settle and a greater likelihood of recovering their attorneys' fees for defending a DTPA claim. The 2003 session of the legislature saw a second major round of "tort reform" legislation that, although not directly dealing with the DTPA, placed limits on recovery against certain defendants, particularly those in the residential construction business of the reformers was to limit the applicability and effectiveness of the DTPA. No one can argue that they did not succeed. The extent of their success, however, is subject to debate. It is clear that the DTPA has been weakened. In absolute terms, the Act does not provide anywhere near the benefits it did for consumers. But an analysis in absolute terms is misleading. To truly evaluate the effectiveness of the DTPA as a tool for consumer attorneys, it must be measured in relative terms.

While the DTPA was being amended and its application limited by the courts and legislature, other available causes of action were being similarly reviewed, reduced. Tort claims have been subject to even greater reform than the DTPA. Available defendants in tort and contract suits are reduced, damages are limited, comparative responsibility is strengthened, and punitive damages are sharply limited in both availability and amount. In contrast to claims based in tort or contract, the DTPA still provides a no-fault standard of recovery, the lowest causation standard, the most
liberal standard for the award of exemplary damages, and mandatory attorneys’ fees. In other words, relative to other available causes of action, the DTPA is still alive and well.

II. Applicability: Proper Party Plaintiff—Consumer
Perhaps the most significant even in the past decade of DTPA reform is a change that was not made. The definition of “consumer” has not been changed since the 1983 amendment, which added the business consumer exception.

Under section 17.45(4) a consumer is: an individual, partnership, corporation, a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more. Words, the DTPA still applies to a broad range of individuals and businesses. It includes any individual purchasing anything, as well as the vast majority of businesses buying for a business purpose. More significantly, because the definition has remained the same for 21 years, there is a large body of case law interpreting it and upon which attorneys can rely.

1. Requirements, to be a consumer, a qualified entity must seek or acquire, purchase or lease, goods or services.

Note that there are three requirements that may be satisfied with alternatives in each category. For example, a consumer may seek by purchase goods; or, acquire by purchase services; or, acquire by purchase goods. Because of the significance of this definition (if you are not a consumer you may not use the Act), it has been one of the most litigated sections of the Act. The focus of the litigation has been the meaning of the terms “seek or acquire,” “purchase or lease,” and “goods or services.”

a. Seek or Acquire
Assuming that the party asserting a claim under the Act is an entity within the scope of the definition of consumer, the next question is did that entity “seek or acquire?” Note that it is only necessary that the entity claiming consumer status prove that it either sought or acquired. In most cases, it is simple to determine whether an entity has sought or acquired something. For example, if someone buys something he or she has acquired it. If someone is in the process of buying something, he or she is seeking it. There is no requirement, however, that there be a contractual relationship, a contract, or a payment. For example, in Martin v. Lou Poliquin Enterprises, Inc.,17 Martin contacted a company to place an advertisement in the local yellow pages. The company failed to properly place the ad and violated the DTPA. The company defended by asserting that because Martin did not pay for its services, there was no consideration and, therefore, Martin was not a consumer. The court held that the DTPA does not require the transfer of consideration. An entity is a consumer if it seeks to purchase goods. The court found the test to be whether the consumer had a good faith intention to purchase, as well as the ability to purchase.18 As noted above, in most cases it is simple to determine if someone has acquired something. For example, anyone who buys something and takes possession of it has clearly “acquired” it. The courts, however, have held that a good may be “acquired” by someone who actually is not the owner of the good or has taken possession of it. The test is whether the objective of the transaction was to benefit the individual claiming consumer status.

In Wellborn v. Sears, Roebuck & Co.,19 a mother brought a DTPA claim on behalf of her deceased son. The claim was based on a defective garage-door opener, bought by the mother for her home. The court held that although there was no contractual relationship between the son and the seller, the son acquired the garage door opener and the benefits it provided. The son acquired the garage door opener when it was purchased for his benefit.
To show that goods or services were purchased for someone else’s benefit, and confer upon that person consumer status, it is necessary to show more than mere use of, or benefit from, the goods. The person claiming consumer status must be an “intended” rather than an “incidental” beneficiary. For example, a tenant may be a consumer with respect to services purchased by a landlord; an employee may be a consumer with respect to goods purchased by an employer; and a purchaser of property may be a consumer with respect to an inspection paid for by the seller. On the other hand, courts have found that a passenger riding in a car is not a consumer with respect to the car; a friend who borrows goods is not a consumer with respect to the goods; an employee who occasionally uses goods is not a consumer with respect to the goods; and a fiancé of a consumer is not a consumer with respect to goods purchased by the consumer.

b. Purchase or Lease
To be a consumer under the DTPA, an entity must do more than merely seek or acquire goods or services. The goods or services must be sought or acquired by “purchase or lease.” An individual who receives services gratuitously is not a consumer for purposes of the Act. In Exxon v. Dunn,21 the court held that the plaintiff was not a consumer with respect to services performed on his car because he was not charged for the services, and, therefore, they were not acquired by purchase. Other cases have held that free games of chance, promotional contests, and free legal services are not “purchased” for purposes of the DTPA.

Goods received as a “gift” or that are paid for by another may still, however, be acquired by purchase. This conclusion is based on the Texas Supreme Court holding in Kennedy v. Sale.22 In Kennedy, an employee who acquired insurance paid for by the employer was held to be a “consumer” for purposes of the DTPA. The court made it clear that although a consumer
must acquire goods or services by purchase, one other than the consumer may make the purchase. Thus courts have held that: a tenant is a consumer as to services purchased by the landlord;

ii) a child is a consumer with respect to services paid for by the parent;

iii) a person who receives legal services paid for by another is a consumer with respect to those services;

iv) a wife is a consumer with respect to services purchased by the husband; and

v) a purchaser is a consumer with respect to accounting services paid for by the seller.

Under the same analysis, a person who receives a gift is a consumer provided the gift giver purchases the gift. In DTPA parlance, the person who received the gift has “acquired by purchase goods.” The question to ask is: has the entity asserting consumer status either sought to purchase goods or services; or, has it acquired goods or services by a purchase?

c. Goods or Services

The final element in consumer status under the DTPA is that the purchase or lease be of “goods or services.” Note that both of these terms are defined by the Act. “Goods” is defined to mean “tangible chattels or real property purchased or leased for use.” It is important to note that the definition of goods includes real estate. “Services” is defined to mean “work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.”

In most cases it is not difficult to determine if something is a good. The term goods includes every tangible thing, including real estate and living creatures. Perhaps the best way to discuss this term is to explain what is held to be excluded from the definitions. The term “goods” has been held to
include everything except “intangibles.” Thus, the Act has been held not to apply to money, accounts receivable, stock, options contracts, certificates of deposit, the proceeds of an insurance policy, trademarks, a limited partnership interest, or a lottery ticket. Consistent with the mandate of section 17.44, the definition of the term services has been liberally interpreted by the courts to include repair or construction contracts, insurance contracts, and professional services, such as medical, legal, accounting, investment and architectural.

The Texas Supreme Court, however, has held that money is not a good, and a person seeking to borrow money is not seeking a service. Therefore, a person seeking to borrow, or merely borrowing money, is not a consumer under the Act. The purchaser of other banking services, however, may be a consumer. Banking services such as checking and savings accounts, preparation of documents, advice regarding certificates of deposit, processing of title documents, loan brokering, and the sale of travelers' checks, have all been held to give rise to consumer status.

When evaluating a transaction to determine whether it is subject to the DTPA, it must be evaluated from the consumer’s perspective. For example, in Flenniken v. Longview Bank & Trust Co., the purchaser of a home sued the bank that provided financing for the builder. The bank, Longview, asserted that Flenniken was not a consumer because Longview only loaned money. The court held that from Flenniken's perspective there was only one transaction, the purchase of a house. The bank's financing of the transaction was merely Easterwood's means of making the sale. Flenniken was a consumer as to anyone who sought to enjoy the benefits of that transaction. In other words, a loan transaction is subject to the DTPA if, viewed from the consumer’s perspective, it is part of a transaction in goods or services.
Finally, note that goods or services must be purchased or leased “for use.” Purchasing or leasing for any purpose including resale, satisfies this requirement. In Big H Auto Auctions v. Saenz Motors, the court held that the ordinary meaning of “use” should be applied to the DTPA. Therefore, purchasing for any purpose is purchasing “for use.”

d. Business Consumer
Once an entity is a “consumer,” it is within the scope of the Act. The DTPA, however, excludes certain business consumers from the definition. A “business consumer” with assets of $25 million or more, or one that is owned or controlled by a corporation or entity with assets of $25 million or more, is not a consumer for purposes of the DTPA. Business consumer is defined by section 17.45(10) to mean “an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use.” The term does not include this state or a subdivision or agency of this state. It is important to note that not all business consumers are excluded from the Act’s definition, only those business consumers with the required assets. For example, X Corp. has assets of $5 million. It recently purchased a widget from Y Corp. In the course of the transaction, Y violated the DTPA. X Corp is a consumer under the Act. Assume, however, that X Corp is a wholly owned subsidiary of Z Corp. Z Corp has assets in excess of $50 million. X Corp is not a consumer under the DTPA.

Note that an individual who seeks or acquires goods for personal use is a consumer regardless of the assets of the individual. For example, if Bill Gates buys an automobile for his family he is a consumer under the DTPA. Finally, it is important to note that the defendant has the burden to prove the business consumer exception as an affirmative defense.
2. Statutory Exemptions

Perhaps the most publicized provisions in the 1995 amendments to the DTPA were those amending section 17.49, exempting certain transactions from the scope of the Act. After passage of the amendments, there was a widely held belief that the DTPA no longer applied to claims against professionals, claims rising out of a personal injury, and most large transactions. As you will see, the scope of the new exemptions to the Act was misunderstood, and widely exaggerated.

Prior to 1995, the exemption provisions of the DTPA were of little consequence. The Act did not apply to newspapers that published advertisements without knowledge of the false, misleading or deceptive nature of the publication; and, nothing in the Act applied to an act or practice authorized by specific rules or regulations of the Federal Trade Commission.44 Many believed these exemptions sounded a death knell for the DTPA. In fact, they simply make clear that the DTPA does not apply to a transaction unless its provisions have been violated.

a. Professional Services

Section 17.49(c) provides that nothing in the DTPA shall apply to “a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill.”45 Note that this section does not exempt all “professional services,” rather it exempts only a service “the essence of which” is advice, judgment, opinion, or other professional skill. Thus, some professional services will be subject to the provisions of the Act, while others will not.46 Additionally, because the focus of the exemption is the rendering of a service, not the occupation of the provider, a professional may render some services subject to the Act, while other services would be exempt.
Two examples demonstrate this: Stuart is a real estate broker. Casey hires Stuart to obtain a property evaluation and sales recommendation regarding some property he intends to sell. Stuart prepares a report indicating the potential value of the property based on several different growth scenarios. The services provided by Stuart involved advice, judgment, and opinion. Stuart is also contacted by Carey. Carey hires Stuart to list his house with the listing service, to place advertisements for the sale and to show the home to potential purchasers. The essence of the service provided by Stuart is not advice, judgment or professional opinion. Although most transactions will have to be individually evaluated to determine if their “essence” is advice, judgment or opinion, it is expected that most services provided by attorneys, physicians, and architects will be classified as “professional” within the scope of this exemption.

(Source: http://www.jtexconsumerlaw.com/V8N2pdf/V8N2deceptive.pdf)

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

In 1995, the Texas Legislature amended the Deceptive Trade Practice Act by adding an exemption for providing a professional service. Courts have not applied the exemption to real estate license holders. Since losing a Deceptive Trade Practice Act case can be so punitive many honest Texas REALTORS® have settled out of court because it was less risky. In 2011, the 82nd Texas Legislature added real estate brokerage as a specific exemption to the Deceptive Trade Practice Act.

Now unless a license holder has committed an unconscionable act, misrepresentation of a material fact, or a failure to disclose with the intention of inducing a consumer into a transaction, the licensee can no longer be held liable under Deceptive Trade Practice Act. Deceptive Trade Practice Act defines an "unconscionable action" as one that "takes
advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree".

Since the Texas Real Estate License Act has always required full disclosure of all material facts about the property, nothing much has changed in the day to day practice of license holders. Many disclosures are required by good business practices as well as Texas Real Estate License Act.

Some examples of required disclosures would include:

- Full disclosure about the condition of the property to all potential buyers.
- Things that have made the property notorious. (Well publicized murder/suicide.)
- Things happening in the area that the average person would want to know (the city is considering a new highway through the area the property is located on).
- Anything a normal buyer would want to know about the property that is not specifically exempted from disclosure.
- Homeowner association documentation, such as covenants, certified restrictions, financials, resale certificate and other documents
- Disclosure of municipal utility districts
- Disclosure of septic tanks and water wells
- Disclosure of foundation issues
- Disclosure of any condition of the property the seller needs to disclose when selling

Some disclosures are not required but are permitted. Examples include:

- The law says that the seller and the agent do not have to disclose death on a property that was by suicide, natural causes or an accident unrelated to the property. However, if the seller chooses to disclose it is permitted.
- The law says neither the seller nor the agent is required to disclose anything about registered sex offenders. If the seller decides to disclose that a registered sex offender occupies the home down the street, it is permitted.
• Sex offenders: As a buyer's sales agent, you need to let them know the web site to go to if they want to check the neighborhood. That website is https://records.txdps.state.tx.us/sexoffender/

• Remember there is always a neighbor who wants to tell EVERYTHING, so use good judgement and think of “What would I want to know about this property.” Even though the buyer does not ask, that does not mean it is not important to them.

Some disclosures are prohibited. Anything regarding a protected class under the Fair Housing Act is prohibited. Therefore, nothing can be disclosed regarding:

Acronym “FRESH CORN” – Helps to remember

F. Familial status
R. Religion
E. Ethnic
S. Sex
H. Handicap
C. Color
O. Orientation
R. Race
N. National origin

Aids and HIV are protected as handicaps. sexual orientation and gender identity are not protected under federal law, but are for NAR members and under some states’ laws.

**Sellers are still liable under the Deceptive Trade Practices Act**

This Texas Act allows consumers to sue sellers of goods or services for deceptive or unfair practices. Under this act, real estate is considered a good and brokerage activity is considered a service. Consumers are defined as individuals, corporations, government bodies or partnerships who seek to purchase a good or service. In real estate, a consumer would be a potential buyer or someone who has purchased real estate, as well as a seller who hires or seeks to hire a licensee to represent his or her interests.
Ethical and Legal Concerns of Deceptive Trade Practice Act

A license holder who violates Deceptive Trade Practice Act may be found to have violated Texas Real Estate License Act, which will impose additional consequences on the license holder. These mostly will result in a charge of misrepresentation and/or concealment of material facts but could also be interpreted as fraudulent misrepresentation. If a representation is found to have occurred where:

1) the falsehood was an obvious falsehood;
2) made with the knowledge of the falsehood; and
3) caused the agreeing party to enter into the agreement,

it would likely be regarded as fraud, which carries both civil and criminal liability. This would also be a violation of the license holder’s fiduciary duty to the client.

This would also be a violation of Article of the REALTOR® Code of Ethics.

Code of Ethics and Standards of Practice


Article 2

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

Standard of Practice 2-1

REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines.
Standard of Practice 2-4

REALTORS® shall not be parties to the naming of a false consideration in any document, unless it be the naming of an obviously nominal consideration.

Standard of Practice 2-5

Factors defined as “non-material” by law or regulation or which are expressly referenced in law or regulation as not being subject to disclosure are considered not “pertinent” for purposes of Article 2.

(Source: https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics)

The operative words in Article 2 are “concealment” along with “misrepresentation”. An agent who violates Deceptive Trade Practice Act may be subject to disciplinary action by Texas Real Estate Commission that could include suspension or revocation of the license, fines, sanctions, disciplinary actions from the Association of REALTORS®, and criminal action. In addition, there may civil liability that may include both compensatory and punitive damages.

Violations of the Deceptive Trade Practice Act

The Deceptive Trade Practice Act contains a “laundry list” of 27 violations. Some violations obviously affect all industries, including the real estate industry; other violations are more specifically applicable to individual industries. It is not necessary to memorize all of these violations. However, becoming familiar with the violations in this Act will help you learn what actions are considered deceptive.

1. Passing off goods or services as those of another
2. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services
3. Causing confusion of misunderstanding as to affiliation, connection, or association with, or certification by another
4. Using deceptive representations or designations of geographic origin in connection with goods or services
5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not
6. Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand
7. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another
8. Disparaging the goods, services, or business of another by false or misleading representation of facts
9. Advertising goods or services with intent not to sell them as advertised
10. Advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity
11. Making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions
12. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law
13. Knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service
14. Misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction
15. Basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating separately the charges for the work and the charge for the warranty or guaranty, if any
16. Disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge
17. Advertising of any sale by fraudulently representing that a person is going out of business
18. Advertising, selling, or distributing a card which purports to be a prescription drug identification card issued under Section 19A, Article 21.07-6, Insurance Code, in accordance with rules adopted by the commissioner of insurance, which offers a
discount on the purchase of health care goods or services from a third party provider, and which is not evidence of insurance coverage, unless:

a. The discount is authorized under an agreement between the seller of the card and the provider of those goods and services or the discount or card is offered to members of the seller;

b. The seller does not represent that the card provides insurance coverage of any kind; and

c. The discount is not false, misleading, or deceptive

19. Using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller’s promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods

20. Representing that a guaranty or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and Sections 2A.212 through 2A.216 to involve obligations in excess of those which are appropriate to the goods

21. Promoting a pyramid promotional scheme, as defined by Section 17.461

22. Representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced

23. Filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however,
that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract.

24. Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

25. Using the term “corporation,” “incorporated,” or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction.

26. Selling, offering to sell, or illegally promoting an annuity contract under Chapter 22, Acts of the 57th Legislature, 3rd Called Session, 1962 (Article 6228a-5, Vernon’s Texas Civil Statutes), with the intent that the annuity contract will be the subject of a salary reduction agreement, as defined by that Act, if the annuity contract is not an eligible qualified investment under that Act.

27. Taking advantage of a disaster declared by the Governor under Chapter 418, Government Code, by:
   a. Selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or
   b. Demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

**Damages**

Lesson 27 of the Texas Business and Commerce Code say that a person who is found guilty of fraud will be liable for court cost, attorney fees, and special witness fees in addition to actual economic damages and exemplary damages.
The Texas Real Estate Commission promulgated contracts state the following:

“ATTORNEY’S FEES: A Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceeding related to this contract is entitled to recover reasonable attorney’s fees and all costs of such proceeding.”

Both fraud and misrepresentation are still actionable under the Deceptive Trade Practices Act.

If a court finds that the conduct of the seller or the agent was committed "knowingly," a court may also award not more than three times the amount of economic damages. If a court finds the conduct of the seller or the agent was committed "intentionally," a court may also award not more than three times the amount of damages for mental anguish and economic damages.

Consumers and other agents can also file complaints with the Texas Real Estate Commission and the Texas Association of REALTORS® if they identify a violation of either Texas Real Estate License Act or the National Association of REALTORS® Code of Ethics.

You may find you are observing another license holder doing something that is damaging a consumer or damaging to the industry. In that event, you may be the one filing the complaint. Discuss the alleged action with your broker, who will advise you as to how the alleged action should be handled in filing a complaint with either the Texas Association of REALTORS or the Texas Real Estate Commission.

**Defenses**

A good rule to follow is “when in doubt disclose”. What might be important to one buyer or tenant may not be important to another buyer or tenant, but trying to determine which buyer would find this information important in making a decision to buy is not practical so always disclose and let the buyer decide if it is material to their transaction.
Real estate license holders are not responsible for what they do not have knowledge of. But if the license holder is working in an area where many of the homes have had foundation issues caused by underground water, it would be tough to prove the license holder had no knowledge. A good defense would be to advise potential buyers in that area to obtain an engineer’s report.

There is a type of misrepresentation called “innocent misrepresentation”. So if the license holder did not know and misrepresented something innocently, it still may be actionable in civil court. If it was a material misrepresentation and cost the buyer anything of value, the court may rescind the transaction. Not a good way to build a business. Anytime you are relying on something another person or entity told you, be sure to disclose where the information is coming from (i.e. “The seller said,” or, “the tax rolls say”). Also, get it in writing. “Information from other Sources”.

Document everything. If the seller or the seller’s license holder tells you anything about the property, it must be passed on to the buyer. Even if a buyer’s license holder learns something new after the buyer is under contract the buyer must be informed always and if you’re concerned discuss with your broker the disclosure and advising a buyer to consult with an attorney if the buyer is concerned about the disclosure.

If you tell a buyer anything in person, follow it up in writing. Have something in your file that shows you told them rather than a he said, she said situation.

Always have the seller complete the Seller’s Disclosure. If you see red flags not explained by the disclosure ask questions. Representing a seller does not include helping them commit fraud. Most sellers will disclose everything about the property in truth form, but there are a few who will not. One example is if they tell you they had an inspection on the property when they bought the property, but cannot find the report. You might also ask them if there were any repairs done when the seller bought the property.
Ethical and Legal Concerns
Remember that the Texas Real Estate License Act and the Code of Ethics of the National Association of REALTORS® are there to guide license holders to make good decisions. The National Association of REALTORS® Code of Ethics is many levels above the law, and the consumer should be told this when you are sharing your services that you abide by the REALTOR® Code of Ethics. Just because it is not a violation of these rules does not always make it right. The Golden Rule of “Do unto others as you would have them do unto you” is always good to consider. If it feels wrong to you to do something it probably is wrong for you to do or say.

One of your concerns will be making money and as a new license holder, the need for money can make you anxious. If you practice good ethical, professional behavior, always putting your client’s interest first, the money will come. When people are getting ready to buy or sell, they talk to their friends about license holders that they have used. Constantly ask for referrals and make sure those recommendations can be glowing.

There is never a transaction (no matter how big) that is worth losing your reputation or your license over.

Case Studies

“As Is” vs. Seller’s Disclosure
RITCHEY V. PINNELL, 357 S.W.3D 410 (TEX.APP. —TEXARKANA 2012, NO PET.)
Ritchey purchased a house in Winnsboro, Texas, from the Pinnells pursuant to a sales agreement that provided that Ritchey accept the property “as is.” Prior to the sale, Mr. Pinnell (not licensed as a plumber nor an electrician) had remodeled the house, doing most of the electrical work and all of the plumbing work himself without obtaining permits from the City of Winnsboro. After the sale had been completed, Ritchey was unable to obtain a certificate of occupancy from the city because the electrical and plumbing work failed to comply with building code requirements. Without a certificate
of occupancy, Ritchey was barred by municipal authorities from occupying the house. Ritchey filed suit against the Pinnells for real estate fraud, alleging that the Pinnells’ failure to disclose in the seller’s disclosure notice that the repairs to the house violated building code requirements amounted to misrepresentation or concealment of a material fact. The Pinnells moved for summary judgment, arguing that the “as is” clause in the purchase agreement defeated the reliance element of statutory real estate fraud. The trial court held in favor of the Pinnells.

The court of appeals reversed the trial court’s decision. Ritchey argued that the trial court erred by granting the summary judgment because there is evidence of fraud, in that the Pinnells made material misrepresentations in the seller’s disclosure notice, and Ritchey relied on those misrepresentations in entering into the “as is” sales agreement. In other words, Ritchey maintains that she was fraudulently induced to enter into the purchase agreement that contained the “as is” clause.

The Pinnells’ disclosure statement to Ritchey stated that they were unaware of, "room additions structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time."

The “As Is” clause in contracts does not defeat the reliance element of statutory real estate fraud for information or omissions in a Seller’s Disclosure Notice.

**Splitting Commission with Buyer**

**WU V. RHEE, (WL 5198336, BKRTCY. S.D. TEX. 2012)**

Wu engaged the services of Rhee, a family friend and a real estate licensee. At the time, Rhee was initially hired, Wu had already identified a property and negotiated a sales price. If Wu purchased the property, Rhee’s broker’s duties would have been limited, and he was to keep only $10,000 of the commission and rebate the remainder of it to Wu. The first deal did not close. Later that year, Rhee negotiated a purchase price on behalf of Wu. Once again, Wu and Rhee agreed to split the $60,000
commission. After closing, Rhee explained that his sponsoring broker would have to be paid the commission, and then Rhee would share that commission with Wu. Wu never received any money, then Rhee filed for bankruptcy protection in an effort to discharge the obligation.

Multiple e-mails were exchanged between Rhee and Wu in attempt to negotiate a settlement. The e-mails were amicable and indicated that both sides sought a mutually beneficial and amicable settlement.

In analyzing the fraud issue, the court concluded that Rhee engaged in fraud in a real estate transaction by promising to pay $20,000 to Wu and held that Rhee was responsible for actual damages as well as $5,000 in exemplary damages, because he was aware of the falsity of the promise he made. The court then awarded an additional $25,235.92 in attorney fees. The court also held that Rhee was liable for fraudulent inducement and found that he also violated the Texas Deceptive Trade Practices Act.

While commission agreements have to be in writing for a broker to pursue a commission, the same standard does not apply to principals. The court noted that Wu was not a licensed real estate broker and therefore not familiar with the requirements on commission agreements imposed by T RELA. More importantly, Rhee owed a fiduciary duty to Wu.

The court also found that there was a breach of contract, a cause of action for common law fraud and conversion and ultimately awarded Wu $50,235.92 in damages. The court further noted:

“A fiduciary duty imposes special obligations on a real estate agent. The real estate agent must ‘be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in performing the agent’s functions.’ Additionally, the real estate agent [must] place no personal interest above that of the client.”

The court held that Rhee violated both of these aspects of his fiduciary duty to Wu. Ultimately, TREC paid $50,000 from the Real Estate Recovery Fund on this case.
Not paying a client a promised split of “A fiduciary duty imposes special obligations on a real estate agent. The real estate agent must ‘be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in performing the agent’s functions.’ Additionally, the real estate agent [must] place no personal interest above that of the client.”

The court held that Rhee violated both of these aspects of his fiduciary duty to Wu. Ultimately, TREC paid $50,000 from the Real Estate Recovery Fund on this case.

Not paying a client a promised split of a licensee’s commission (rebate) is a breach of the fiduciary duty of a real estate licensee.

Buyer Representation/Misrepresentation
DEFTERIOS V. DALLAS BAYOU BEND, LTD., 350 S.W.3D 659 (TEX.APP-DALLAS 2011, PET. DENIED)

A developer, Nussbaum, received a call from Defterios, a broker, stating that his client, Flaven, was interested in purchasing the developer’s portfolio of properties. Defterios told the developer that Flaven was the beneficiary of a multimillion dollar trust fund and wanted to use those trust funds to purchase the properties. Flaven eventually signed contracts to buy nine of the properties. The contracts initially called for an August 2004 closing, but the closings were rescheduled a number of times. Defterios told the developer that the reason for the delays was that the trust fund was not releasing the funds.

On many occasions, Defterios told Nussbaum that he had verified the existence of the funds and that the closings were imminent. Over a year after the contracts were signed, however, the deals still had not closed. At that time, Nussbaum came to believe that Flaven did not have the financial resources to close on the properties and that all of Defterios’ representations about Flaven and the trust fund had been false.
As it turned out, Flaven was a Massachusetts truck driver and was not the beneficiary of a multimillion dollar trust fund; he never closed on the contracts.

Eventually, some of the properties were deeded to the lender banks in lieu of foreclosure and others were sold for a loss. Many of the individual investors in the properties lost all the savings they had invested in the properties. The jury found no direct benefit-of-the-bargain damages, but awarded over $12 million in consequential damages to the developer and investors for fraud and negligent misrepresentation.

On appeal, Defterios did not challenge the finding of liability, but argued that the evidence did not support the damages and the types of damages awarded.

The court reviewed the evidence and held that the jury could have reasonably found that Defterios’ misrepresentations were a cause-in-fact of damages to Nussbaum and investors. The evidence showed that Nussbaum did not cancel the contracts with Flaven, because Defterios continually represented that the trust funds had been verified and that Flaven was going to purchase the properties. The evidence showed that if Defterios had not represented that he had verified the existence of the trust funds and that the closings were imminent, the developer would not have extended the closing date and would have put the properties back on the market on September 9, 2004. The evidence also showed that the developer deferred maintenance on the properties because of the contracts with Flaven. By the time the developer realized that Flaven would not purchase the properties, the market had declined, and the properties needed repairs. Nussbaum had to take the properties off the market and make the repairs before he could place the properties back on the market. Additionally, the evidence showed that the properties had to be taken off the market because they were “shop worn” and prospective buyers had lost interest in them.

The jury could have reasonably found from the evidence that the broker’s representations caused the developer to incur expenditures for capital improvements,
operating losses, and a loss in market value that they would not otherwise have incurred if the properties had closed according to the contracts. Again, having reviewed the evidence and the parties’ respective arguments, the court concluded that the jury could have reasonably found that the types of damages incurred by the developer were foreseeable to Defterios. The evidence showed that Defterios was a real estate broker and, as such, was familiar with the market. The jury could have reasonably inferred that a person in Defterios’ position could have contemplated that the types of losses awarded here would be incurred if his representations were false.

A broker can be held liable for ancillary losses to a party that could reasonably have been contemplated due to misrepresentations made by the broker.

Reversionary Interests are Compensable in a Takings Case
EL DORADO LAND COMPANY, L.P. V. CITY OF MCKINNEY, 395 S.W.3D 798, TEX., MARCH 29, 2013

In 1999, El Dorado Land Company sold several acres to the City of McKinney for use as a park. The deed provided that the conveyance was “subject to the requirement and restriction that the property shall be used only as a community park.” If the City decided not to use the property for that purpose, the deed further granted El Dorado the right to purchase the property. The deed labeled this right an option and set the option’s price at the amount the City paid or the property’s current market value, whichever was less.

Ten years after acquiring the property, the City built a public library on part of the land. The City did not offer to sell the property to El Dorado or otherwise give notice before building the library. After learning about the library, El Dorado notified the City by letter that it intended to exercise its option to purchase. After the City failed to acknowledge El Dorado’s rights under the deed, El Dorado sued for inverse condemnation.
The City claimed that this case did not involve a compensable taking of property but a mere breach of contract for which the City’s governmental immunity applied. The trial court agreed and dismissed the lawsuit. The court of appeals upheld the trial court’s decision. The matter was appealed to the Texas Supreme Court.

This case focuses on the nature of El Dorado’s interest in the land. El Dorado argued that its right to purchase is a real property interest because it is a reversionary interest and, more particularly, a right of reentry. The City, on the other hand, contended that El Dorado’s option was not a real property interest but a mere contract right.

El Dorado characterized its reversionary interest as est created in the grantor that may allow the grantor to possess the property when the grantee’s fee simple estate terminates because of a condition that subsequently occurs. El Dorado’s right to possess was contingent on the property’s use. If the City violated the deed restriction, El Dorado had the power to terminate the City’s estate. The deed referred to this power or right as an option, but it effectively functioned as a power of termination, or as El Dorado labels it, a right of reentry. The Supreme Court noted that it has equated this right to an estate or interest in land.

Because a right of reentry requires its holder to make an election does not make it any less a property right, particularly when the holder has made the required election.

The Supreme Court then turned to the issue of whether El Dorado’s reversionary interest could support a takings claim under the Texas Constitution. In other cases, the court has held that reversionary interests similar (but slightly different) from the one in this case are compensable if taken by the state. The court saw no reason to distinguish between the reversionary interest in those cases and in this case. Under Texas law, the possibility of reverter and the right of reentry are both freely assignable like other property interests. Simply put, both the possibility of reverter and the right of reentry are future interests in real estate.
When private property is taken for a public purpose, the Texas constitution requires that the government compensate the owner. When the government takes private property without paying for it, the owner may bring suit for inverse condemnation.

In summary, the Supreme Court ruled that the reversionary interest retained by El Dorado in its deed to the City is a property interest capable of being taken by condemnation. It expressed no opinion on whether a taking occurred in this case.

It reversed and remanded to the trial court for it to determine whether the City violated its deed restrictions by building a public library on a part of the land dedicated for use as a community park and, if so, to what extent the City had taken El Dorado’s interest in the restricted property.

A reversionary provision in a deed creates a property interest that is compensable if taken by the state.

**Attempt to Convert Separate Property to Community Property**

**ESTATE OF CUNNINGHAM, 390 S.W.3D 685, TEX.APP–DALLAS, 2012.**

Cunningham and his first wife divorced in 1978. They had 6 children. He married his second wife on March 15, 1985, and they remained married until his death on November 28, 2008.

During his life, Cunningham owned three tracts of land:
- 5 acres he acquired in 1967 from his parents where he built his home;
- 24 acres he inherited from his parents in 1975 (contiguous to the 5-acre tract); and
- 54 acres he inherited from his parents (not contiguous to the others).

After the second marriage, Cunningham conveyed to his second wife an undivided one-half interest in the 5-acre tract and an undivided one-half interest in 34-acre tract.
out of the 54-acre tract. He later conveyed 5.710 acres of the 54-acre tract to his daughter.

On September 25, 2008, about two months before he died, Cunningham and his second wife executed a document entitled “Agreement to Establish Right of Survivorship to Community Property between Spouses.” Shortly after his death, his second wife filed an application to adjudicate the agreement. The trial court approved the application stating that all the “real and personal property” of Cunningham and his second wife, owned at the time of his death, was community property and the agreement created a right of survivorship in their community property in favor of the second wife.

Four months later, one of the children from the first marriage filed a bill of review asserting Cunningham’s real property had been acquired by inheritance and was his separate property and that the trial court was in error in finding that the agreement converted it to community property. The trial court denied the bill of review and an appeal ensued.

The appellate court found that the agreement did not comply with §4.203 of the Family Code and did not convert Cunningham’s separate property into community property.

The court noted that the Family Code provides that spouses may agree to convert all or part of their separate property to community property. An agreement to convert separate property to community property must be in writing, signed by the spouses, identify the property being converted, and “specify that the property is being converted to the spouses’ community property.” A mere transfer of a spouse’s separate property to the name of the other spouse or to the name of both spouses is insufficient to convert separate property to community property. An agreement to convert separate property to community property is not enforceable if the spouse against whom enforcement is sought did not receive a fair and reasonable disclosure of the legal effect of converting separate property to community property.
The document in this case was a fill-in-the-blank form. It was completed by the second wife’s son and Cunningham’s brother. The form stated in relevant part:

“The parties agree that the following is held as their community property: Home and other real property locate[d] at: 15375 County Road 342 Wills Point TX including all inheritance property.”

“It is agreed that title to all community property of Husband and Wife, specifically identified herein or held as community property shall pass to the surviving spouse upon the death of the first of us to die, without the necessity of probate court proceedings or other legal action other than the recording of this Agreement in the records of the County Clerk of Kaufman County.”

The court found that the agreement did not state the spouses agree to convert all or a part of one spouse’s separate property into community property. The agreement identified only the five-acre tract and did not identify the other two tracts. There was no evidence presented that either Cunningham or his second wife received a fair and reasonable disclosure of the legal effect of converting separate property to community property. The second wife testified they did not discuss the effect of converting Mr. Cunningham’s separate property to community property, nor did they have any documentation explaining the conversion. Therefore, the appellate court found that the agreement did not convert the separate property to community property. The court rendered judgment that the bill of review be granted and remanded the case for further proceedings.

Spouses who want to convert separate property to community property must comply with all of the requirements of §4.203 of the Family Code including a specific agreement to convert one spouse’s separate property to community and there must be evidence that the spouses received a fair and reasonable disclosure of the legal effect of the conversion.
In May 2007, the Harrises signed a listing agreement with Ebby Halliday to sell their residence in Dallas. At that time, the Harrises owned two pit-bull type dogs, which spent most of their time in the backyard. The backyard is fenced on all sides and closed off with three gates. Two of the gates are secured with combination locks. To access the backyard from the front, one must go through at least one of the locked gates.

On May 3, 2008, the listing agent scheduled an appointment to show the property to a potential buyer. The Harrises’ son removed the dogs from the property prior to the showing. After the showing, Mrs. Harris returned home, and the dogs were returned to the backyard. Sometime later in the afternoon, the dogs escaped through an unsecured gate and attacked a neighbor who was walking his own dog.

After retrieving the dogs, the Harrises went to the backyard to try and determine how the dogs escaped. According to Mrs. Harris, a padlock on one of the gates had been unlocked and left in a position which prevented the gate from latching securely. The Harrises concluded that the listing agent failed to secure the gate after showing the property. According to the listing agent and the buyer’s agent, none of the visitors used the gate as the showing was done exclusively through the front of the house.

The Harrises filed suit against Ebby Halliday alleging that the listing agent was negligent by failing to properly secure the gate after the showing. The Harrises also claimed that Ebby Halliday breached the listing agreement by failing to secure the property after a showing. The trial court granted a summary judgment for Ebby Halliday. The Harrises appealed.
The Harrises did not appeal the ruling as to the breach of contract claim and, therefore, considered the appeal only for the negligence claim.

To prevail in a negligence claim, the Harrises would have had to establish a duty, a breach of that duty, and damages that were proximately caused by the breach. Whether or not a breach of a duty has occurred is determined by comparison to the applicable standard of care. The Harrises contended that Ebby Halliday breached the standard of care by failing to, “adequately and properly secure” the property after a showing. The “ordinary care” standard is generally defined as that which an ordinarily prudent person, exercising ordinary care, would have done under the same circumstances.

The court noted that although the Harrises’ response included extensive arguments regarding the existence of a duty, and evidence of breach, their response failed to address the standard of care ground at all, either at trial or on appeal, and ruled that the summary judgment was affirmed on that ground alone.

Agents must exercise a standard of care that a prudent person would ordinarily exercise in securing property following a show, or they could be found negligent for subsequent events resulting from failing to meet that standard.

**Mutual Mistake/Scrivener’s Error**

**SIMPSON V. CURTIS, 351 S.W.3D 374 (TEX.APP.-TYLER 2010, NO PET.)**

The Curtises agreed to sell 85 acres to the Simpsons. The earnest money contract provided that the seller reserves the minerals and timber; however, the reservations were not included in the deed delivered at closing. When the Curtises asked the Simpsons to execute a correction deed, the Simpsons refused, so the Curtises sued.

The trial court held that the failure to include the reservation in the deed was a scrivener’s error and that the Curtises were entitled to reformation of the deed.
The underlying objective of reformation is to correct a mutual mistake made in preparing a written instrument, so that the instrument truly reflects the original agreement of the parties. By implication, reformation requires two elements: an original agreement and a mutual mistake, made after the original agreement, in reducing the original agreement to writing. A mutual mistake is one common to both or all parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provision of a written agreement designed to embody such an agreement. Moreover, if a mistake has been made by a scrivener or typist, an instrument may be reformed and modified by a court to reflect the true agreement of the parties.

The court held that there was sufficient evidence to support the finding that the failure to include the reservation was a scrivener’s error and a mutual mistake. The Simpsons contend, however, that the merger clause in the deed precluded the trial court from considering the variance between the terms of the earnest money contract and the deed in determining the existence of a mutual mistake. The court disagreed. The merger doctrine applies to deeds only in the absence of fraud, accident, or mistake. In an equitable action to reform an instrument that fails to express the real agreement due to mutual mistake, parol evidence is admissible to show the true agreement. Further, the statute of frauds is not an impediment to the introduction of parol evidence to establish an agreement for a mineral interest in an action for reformation based on mutual mistake. Because the court determined that there was a mutual mistake in the signing of the deed, the merger doctrine is inapplicable.

The merger clause in a deed does not apply to parol evidence to establish that the failure to convey mineral interests in the deed when agreed to in the contract was a scrivener’s error and a mutual mistake. A party is entitled to reformation of a deed to correct a mutual mistake made when reducing the terms of an original contract to writing to convey the property.
Real Estate License Required for a Business Broker to Sell Real Estate
SMITH SALES V. METAL SYSTEMS, 397 S.W.3D 305, TEX. APP. – DALLAS, MARCH 5, 2013

The parties entered into a listing agreement in July 2008. Dean, as broker, was granted the exclusive right to sell Metal’s business. The contract lists the sales price as $4,580,000 and notes real estate is included in the sale.

The business broker was to receive four percent on the sale. The business broker later sued the seller for nonpayment of his commission claiming that the seller breached the listing agreement. The seller claimed the business broker could not sue to collect any compensation, because the listing agreement includes real estate and there is no evidence the business broker held a real estate license when he entered into the listing as required by TREL. TREL provides a party may not maintain an action to collect compensation for an act as a broker or salesperson unless the party alleges and proves it was a licensed real estate broker. The trial court granted a summary judgment in favor of the seller on this basis. The business broker appealed.

On appeal, the business broker argued that TREL did not apply, because the listing did not contemplate real estate to be part of the sale for which he was to be paid. He argued that the sale was to be either the sale of the seller’s stock or the sale of the seller’s assets and, if a sale of assets occurred, a real estate broker would be engaged to handle the sale of the real estate assets. However, the agreement contained a check box that asked if real estate was included in the sale, and the box was checked “yes.” The appellate court stated that the business broker’s testimony that real estate was not contemplated by the listing was parol evidence, which must be excluded as the written agreement was not ambiguous. Therefore, since the listing stated that the sale included real estate, a real estate broker license was required. The appellate court affirmed the summary judgment granted by the trial court.
If real estate is included in the listing agreement for the sale of business assets, a business broker who is not licensed by TREC may not maintain an action against the seller for commission.

**Stigma Damage May be Awarded for Remediated Property**

**HOUSTON UNLIMITED, INC. V. MEL ACRES RANCH, 389 S.W.3D 583, TEX. APP. – HOUSTON (14TH DISTRICT), NOVEMBER 15, 2012**

Houston Unlimited (HUI) operated a metal-processing facility. Mel Acres’ property is undeveloped ranchland located across the highway from HUI’s facility. A culvert flows downhill from HUI’s facility, under the highway, and into a stock tank (“the large pond”) on Mel Acres’ property.

In late 2007, Mel Acres’ lessee, a cattle rancher, complained that a number of its calves had died or experienced various defects. Someone associated with the lessee had observed an HUI employee “dumping” the contents of a large drum into the culvert and that pipes were discharging materials from HUI’s process building. Mel Acres retained an environmental consultant, who found arsenic, chromium, copper, nickel and zinc exceeding state action levels in the culvert and copper exceeding state action levels in a large pond.

In December 2007, Mel Acres lodged a complaint with Texas Commission on Environmental Quality (TCEQ). HUI was a “registered large quantity generator,” meaning it was permitted to generate hazardous waste in amounts greater than 1,000 kilograms per month. A TCEQ inspector found that HUI did not have the proper permits, plans or employee training. The investigators found that HUI was illegally discharging industrial waste into and adjacent to state waters and instructed HUI to immediately cease. There was no berm or other structure, as required, to prevent water containing spent blast media and other processing materials from flowing off-site during rain events. Soil and water sampling from the pond revealed chromium, copper, aluminum, and zinc exceeded state action levels. TCEQ concluded that an
unauthorized discharge of industrial hazardous waste occurred at the HUI facility and affected Mel Acres’ property. HUI paid a fine assessed by TCEQ. TCEQ concluded HUI was either negligent or intentional in its violation of TCEQ rules.

Within a week after the TCEQ visit, HUI began to make corrections to resolve the violations. Both HUI and Mel Acres hired their own experts to determine the extent of the damage and whether the contaminant levels on the Mel Acres property had decreased. The experts found and testified to conflicting findings. HUI’s expert found that the levels had decreased to acceptable levels and that there was not continuing damage. Mel Acres’ expert testified that the damage to the Mel Acres’ property was devastating and that many of the contaminant levels still exceeded acceptable limits.

Mel Acres sued HUI for trespass, nuisance and negligence. Mel Acres alleged that it suffered permanent damage, measured by loss in market value of the property. The jury found that HUI did not create a permanent nuisance on the property or commit trespass, but found that HUI’s negligence proximately caused “the occurrence or injury in question” and assessed $349,312.50 as the difference in market value of the property before and after “the occurrence.” The trial court signed a final judgment awarding Mel Acres $349,312.50 in actual damages, pre-judgment interest of $42,965.45, court costs of $14,711.65, and post-judgment interest. HUI appealed.

HUI contended that the evidence was insufficient to prove that HUI caused permanent injury to Mel Acres’ property or any reduction in Mel Acres’ property value.

Mel Acres had disavowed any claim for temporary damages and sought only permanent damages—measured by diminution in market value as a result of contamination. When property is permanently damaged, the appropriate measure of damages is lost market value.
According to Mel Acres, it proved that HUI permanently injured the large pond. Alternatively, Mel Acres suggested that, even if the contamination were temporary, it nevertheless suffered permanent damage because even the temporary contamination created a permanent stigma on the property, resulting in lost market value.

HUI claimed that it caused, at most, temporary injury to the large pond on Mel Acres property, which was alleviated within weeks of its occurrence. It argued that Mel Acres presented no evidence HUI caused permanent injury.

The appellate court agreed that Mel Acres did not have to prove permanent damage, because it was able to prove lost market value by virtue of a permanent stigma created by the temporary contamination.

HUI argued that such stigma damage is precluded under Texas law. However, HUI did not cite any Texas authority precluding recovery of lost market value due to stigma.

The appellate court relied on non-environmental contamination damage cases to hold that it is allowable to recover stigma damages from a remediated physical injury to real estate (for example, property that suffered a flood, a property that was defectively constructed, or a repaired foundation). It also relied on non-Texas cases that awarded permanent stigma damages caused by remediated damage. It reasoned that if recovery were precluded even when lost market value results from a stigma remaining after remediation of physical contamination, Mel Acres would have no recourse for such a loss. Accordingly, Mel Acres could recover lost market value due to stigma, as a form of permanent damage, when the evidence shows the stigma resulted from a physical injury.

The appellate court reviewed the appraisal expert testimony of the parties related to the amount of the stigma. Both parties’ appraisers confirmed that a remediated contaminated property may suffer a permanent stigma.
The court concluded that the evidence was sufficient to support a finding that Mel Acres suffered permanent damage in the form of stigma from temporary contamination. The jury’s figure reflected a 15 percent reduction in value due to a permanent stigma. The appellate court affirmed the trial court’s judgment.

One judge dissented on the basis that he found the expert appraisal testimony did not support the jury’s award and was not reliable to determine the extent of the stigma.

Cured damage can still create stigma, which can result in permanent damage due to lost market value.

**Listing Agreement/Protection Period**

**839 E. 19TH STREET, L.P. V. FRIEDSON, 373 S.W.3D 674 (TEX.APP-HOUSTON [14TH DIST.] 2012, NO PET. HISTORY TO DATE)**

Friedson, a licensed broker and doing business as National Property Income LLC, entered into a listing agreement with an owner of an apartment complex. The listing agreement ended on April 30, 2006, with a “protection period” covering the 90 days after the ending date. Borenstein of 839 E. 19th Street found the Mesa Ridge property in an Internet search and contacted Friedson about the property. Friedson delivered a copy of a title insurance policy, financial information, rent rolls and other due diligence materials to Borenstein. Friedson brokered an offer from 839 E. 19th Street dated April 7, 2006, to purchase the property for $5,800,000. The seller rejected this offer.

After the primary term of the listing agreement with the seller expired, Borenstein contacted Friedson. Friedson entered into a buyer representation agreement with 839 E. 19th Street, covering only the one property owned by the seller. The term of the buyer representation agreement ran from May 9, 2006, through September 29, 2006,
with a “protection period” extending for 120 days after the termination of the agreement.

Friedson brokered a second offer from 839 E. 19th Street dated May 30, 2006, to purchase the property for $6,250,000. This offer expired for lack of acceptance by the seller. After the second offer expired, the seller told Friedson that it had decided not to sell the property. Borenstein represented to Friedson that he was no longer interested in purchasing the property or dealing with its owner.

Friedson did not list the prospects to be protected under the buyer representation agreement during the 120-day “protection period.” 839 E. 19th Street placed the property under contract with the seller on November 6, 2006, which was during the 120-day “protection period.” The seller sold the property to 839 E. 19th Street for $6,350,000.00.

Friedson did not receive a commission. He fixed a broker lien on the property and filed suit. The trial court awarded judgment to Friedson based on a breach of the buyer representation agreement.

The Court of Appeals reversed. It noted that the buyer representation agreement began on May 9, 2006 and that the protection period applied only to property called to the client’s attention during the agreement, namely, between May 9 and September 9 of that year.

Friedson had called the property to the client’s attention in April 2006, so the broker had not satisfied the terms of the protection period for it to apply in this case. Brokers should specifically list any prospects known (clients or properties, as applicable) under protection period provisions of listing or buyer representative agreements, especially if there has been contact prior to the date the listing or buyer representative agreement is signed.
Mold!

ARLINGTON HOME INC. V. PEEK ENVIRONMENTAL CONSULTANTS, INC., 361 S.W.3D 773 (TEX. APP. –HOUSTON [14TH DIST.] 2012)

A buyer brought a cause of action against a real estate broker and a mold assessment consultant for negligence, negligent misrepresentation, and deceptive trade practices. He also brought action against the broker for breach of fiduciary duty after discovering the home contained mold.

The broker, acting on behalf of the buyer, hired a licensed mold assessor to evaluate the property prior to the acquisition. The property was reported to have previous water damage and mold. The licensed mold inspector found no mold on the property at all. There were parts of the property that mold inspector could not access. The buyer subsequently acquired the property, and several months later filed suit because they found a significant presence of mold on the property when the buyer started to remodel the house.

At the time he was hired, the inspector set out the scope of his work in his contract for his services. The house was much bigger than the inspector originally anticipated, but the inspector continued to inspect the property in accordance with the scope he had set out in the contract for his services.

The buyer sued the inspector and the broker for DTPA violations and negligence. The buyer did not sue the inspector for breach of contract.

The jury found that the broker had not breached his fiduciary duty, noting that it was uncontroverted that the mold assessor’s lab results showed no evidence of mold whatsoever, and the broker merely transmitted the report to the buyer and therefore had no responsibility for the contents of the report, nor the veracity thereof. The jury found the inspector was 60% negligent in causing the damage and that the owner was 40% negligent.
The trial judge reversed the jury verdict against the mold assessor by granting a judgment notwithstanding the verdict, holding that the mold assessor’s lab results spoke for themselves (the house had no mold at the time it was inspected), and the jury erred in finding damages against the mold assessor.

It may be important to note that during the trial, the mold assessor testified that the mold must have been brought in by the buyers in their furniture, clothing, rugs, etc., because there was clearly no evidence of mold during the inspection period.

On appeal, the court held that the JNOV was proper On appeal, the court held that the JNOV was proper even though the seller had some experts who testified that mold must had been present in the house at the time of the inspection because of the extent of the mold. Given the scope of work, the court said that the evidence was not sufficient to show that the inspector’s report was wrong. Under the facts of this case, the court held that the buyer could not ignore its breach of contract claims and try to pursue a negligence or DTPA claim.

A broker who merely transmits a mold report to a buyer is not responsible for the truth of the contents of the report.

**Inspectors are Professional for Purposes of DTPA**

**RETHERFORD V. CASTRO, TEX. APP. – WACO, JAN. 4, 2012**

In March 2008, an inspector licensed by TREC inspected a home for buyers who were under contract to buy the home. The inspector noted in the “Roof Structure and Attic” section of the inspection report that it was “Not Functioning or in Need of Repair,” because there was water damage in the attic, and he observed that there was water damage in two rooms of the house. He believed that the water damage was caused by condensation from the metal roof resulting from a lack of ventilation. He indicated that the water damage was not a serious issue. In the report, he gave advice on how to fix the ventilation issues in the attic.
He noted that the roof covering was inspected but stated “No problems were noted.” The buyers closed on the purchase of the house “as is.”

During a rainstorm in October 2008 water started running down the wall of the home in the same place where the water damage was noted on the inspection report. After investigating the matter, the buyers found problems with the roof. A few months later, they repaired the roof but could not afford to replace the roof as was recommended by the roofer. Before making the roof repairs, the buyers engaged who found a number of problems with the roof and opined that the leaks would have been discovered if the first inspector had the necessary experience and knowledge to properly inspect the roof, although he did not know the first inspector or anything about his qualifications.

The person who repaired the roof testified that the black discoloration he observed in the wooden beams in the attic had to have been there for longer than 12 months and that he found approximately 200 screws of varying degrees of looseness on the roof out of approximately 1,500 on the entire roof when his company repaired the roof.

The buyers sued the inspector and alleged violations of the DTPA and a claim for negligent misrepresentation. The trial court entered judgment for the buyers for the cost of the repairs and attorney fees holding that the DTPA applied. The inspector appealed.

The appellate court noted that the DTPA has an exemption for those who render professional services when the essence of that service is based on providing advice, judgment or opinion. A professional service is one that arises “out of acts particular to the individual’s specialized vocation. An act is not a professional service merely because it is performed by a professional; rather, it must be necessary for the professional to use his specialized knowledge or training.” Not every act of a professional qualifies for an exemption under the DPTA (for example, a misrepresentation of fact, a failure to disclose information, an unconscionable act, or breaches of an expressed warranty are not advice, judgment or opinion).
The appellate court also noted that the professions falling under the DTPA’s professional services exemption is not statutorily defined. Generally, lawyers, accountants, and doctors are professionals under this exemption when rendering judgments or opinions. There was no reported case history on the question as to whether a real estate inspector fell under the DTPA’s professional services exemption. The court looked at other vocations that have been classified as professions and looked at the history of law that requires home inspectors to be licensed. The court noted that the inspector licensing statute:

- defines a real estate inspection as “a written or oral opinion as to the condition of the improvements to real property...;”
- uses the term “professional inspector;”
- contains a tiered licensing system with specific experience and education requirements, including an apprenticeship; and
- requires the sponsorship of entry level inspectors by professional inspectors.

After looking at the foregoing and other matters generally related to various professions, the court ruled that a professional real estate inspector fits the definition of a professional and qualifies for the exemption under the DTPA when rendering an opinion, judgment or advice.

The court then reviewed whether the conduct in this case involved services that were providing advice, judgment or an opinion. It found that an inspection report is the inspector’s opinion as to the condition of the house, as it has been statutorily defined as such.

The court then looked to whether any of the exceptions to the DTPA’s professional services exemption applied in this case. The court noted that the buyers complained the inspector was unqualified to inspect a metal roof, that he did not perform the inspection according to TREC rules, he did not inspect the screws on the roof, and he...
went beyond the scope of the inspection when he gave his opinion as to the cause of the water damage in the attic. The court concluded that this case did not involve a claim under the DTPA but, instead, involved claims for breach of contract and negligence.

The appellate court noted that the trial court’s judgment did not refer to the negligent misrepresentation cause of action or contain any conclusions of law regarding the elements to establish recovery on the basis of negligent misrepresentation. Therefore, the court reversed the judgment of the trial court and remanded the case for a new trial on the issue of negligent misrepresentation.

A professional real estate inspector qualifies for exemption under the DTPA when rendering an opinion, judgment or advice. Therefore, claims on such matters cannot be brought under the DTPA but must be pursued on grounds of negligence or breach of contract.

(Source: Texas Real Estate Commission LegalUpdate Edition 6.)

**Lesson Summary**

Because real estate licensees have duties in agency relationships, they can be held liable for negligence or breach of those duties. This kind of liability is called tort liability, which means liability for intentional or negligent wrongdoings or breaches of duty. Under tort liability, the injured party can sue the licensee for damages, or the principal could rescind the purchase and sale agreement or legally avoid paying commission. Depending upon the violation, the licensee could also be subject to disciplinary action.

Agents are not generally responsible for the actions of the principal. For example, if a licensee passes on false statements from the principal to the third party and the licensee had no way of knowing that the statements were false, the licensee would probably not be held liable.
Liability would rest with the principal. In addition, the agent’s principal is not responsible for any misrepresentations made by the agent, unless the principal was aware of the misrepresentation and did not tell the third party about his or her knowledge.

Also, under the warranty of authority rule, an agent is not generally responsible if the principal cannot follow through on an agreement with the third party. A licensee who acts as a supervising broker is, however, responsible for the action of his or her affiliated salespersons and associate brokers.

Earlier in this course, we mentioned that a licensee is not required to disclose or inquire whether an occupant of the property had or has AIDS or an HIV-related illness. The Texas Real Estate License Act also expressly states that a person cannot be held civilly or criminally liable for not disclosing or inquiring about this information.

The majority of lawsuits brought against real estate professionals are under the Texas Deceptive Trade Practices Act, which allows consumers to sue sellers of goods or services for deceptive or unfair practices. This Act contains a “laundry list” of 27 violations, including such practices as attempting to pass off someone else’s goods or services as your own and engaging in deceptive advertising. A court cannot revoke or suspend a real estate professional’s license under the DTPA, but some of the violations overlap with Texas Real Estate Licensing Act violations, for which a real estate professional could have his or her license revoked or suspended.

To help prevent litigation, the agent should always incorporate statements from the seller about the property into the listing agreement, which helps to establish that the information about the property comes from the seller, not from the agent. In addition, the agent should always perform the terms and conditions of the agency agreement, promote the best interests of the client, maintain confidentiality and disclose all information to the third party that may affect the transaction.
Finally, to help prevent litigation under the DTPA, seller's agents should always give the buyer a seller-completed Seller’s Disclosure of Condition Property Form, disclose all known material facts, recommend that the buyer obtain an inspection, avoid stating personal opinions about the property and keep detailed notes of the transaction.
Lesson Twelve: Implementation and Presentation

Lesson Topics

This lesson focuses on the following topics:

- The Broker Working for/with the Seller
- The Broker Working for/with the Buyer
- A Practical Guide to Everyday Practice
- Other Considerations
- Risk Management

Lesson Learning Objectives

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

- Identify three things that are important in everyday practice.
- Describe three important risk management tips you intend to use.

The Broker Working for/with the Seller

When an agent takes a listing the license holder is working for the seller. You will discover that listings can be very lucrative in the real estate business. Listings are also very labor intensive and can be very expensive, especially if license holders take listings that never sell.

A huge part of property selling is the condition, location, and the seller’s motivation. When talking with a potential seller, find out why they are selling. If they have high motivation (i.e. they have found a home and have made an offer, they have been transferred to another city by their employer) you can usually count on the property selling. A seller’s market makes a big difference as well. When inventory is low, it is a seller’s market. When inventory is high, it is a buyer’s market.

The Texas Real Estate Commission License Act requires all license holder’s to do a Competitive Market Analysis or a Broker’s Price Opinion on any listings taken.
Texas Real Estate License Act

http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.002. DEFINITIONS. In this chapter:

(1) "Broker":

(A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts:

(xi) provides a written analysis, opinion, or conclusion relating to the estimated price of real property if the analysis, opinion, or conclusion:

(a) is not referred to as an appraisal;
(b) is provided in the ordinary course of the person’s business; and
(c) is related to the actual or potential management, acquisition, disposition, or encumbrance of an interest in real property;

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Texas Real Estate Commission Rules


§535.17 Broker Price Opinion or Comparative Market Analysis

A real estate license holder may not perform an appraisal of, or provide an opinion of value for, real property unless the license holder is licensed or certified under Texas Occupations Code, Chapter 1103.

If a real estate license holder provides a broker price opinion or comparative market analysis under the Act, the license holder shall also provide the person for whom the opinion or analysis is prepared with a written statement containing the following language:

"THIS IS A BROKER PRICE OPINION OR COMPARATIVE MARKET ANALYSIS AND SHOULD NOT BE CONSIDERED AN APPRAISAL OR OPINION OF VALUE."
In making any decision that relies upon my work, you should know that I have not followed the guidelines for development of an appraisal or analysis contained in the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation."

The statement required by subsection (b) of this section must be made part of any written opinion or analysis report and must be reproduced verbatim.

A salesperson may prepare, sign, and present a broker price opinion or comparative market analysis for the salesperson's sponsoring broker, but the salesperson must submit the broker price opinion or comparative market analysis in the broker’s name and the broker is responsible for it. (Source: https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=23&ch=535&rl=17)

The Texas Real Estate Commission wants all license holders to have supported documentation on how they arrived at the recommend list price and probable sales price for the owner of the property.

Competitive Market Analyses or a Broker’s Price Opinions are detailed reports that take time to put together. The license holder needs to know what has sold, sold price, terms, condition of the property, and any seller concessions to be able to arrive at the recommended list price and probable sales price. The license holder also needs to preview all property for sale in the neighborhood to compare them to the subject property when talking with the seller.

The license holder needs to drive by all solds in the neighborhood and become familiar with sold information to discuss with the seller.

Items to discuss: (Not inclusive)

- Original list price
- Price reductions
• Dates of price reduction
• Days on the market
• Condition of property
• Updates, if any
• Sold price
• Date listed to sold date
• Expired listings
• Property that did not sell and why (call listing agent)

Take time doing a market analysis of the property. Be able to show the seller what has sold, has not sold, and is still for sale. Make sure the seller knows that the prices properties are listed for are not the same as what they will sell for. Be sure the seller understands the value of the market interest during the first few weeks in MLS. Properties that are priced right frequently get multiple offers. Overpriced properties take longer to sell and miss that hot market, often selling for less, as a result.

With an exclusive right-to-sell listing, the license holder has exclusive rights to the listing. The seller cannot list this property with any other broker, and the sales agent is still owed a commission even if the seller procures his or her own buyer. With an open listing, on the other hand, the seller can list the property with any other broker, and with an exclusive agency listing, the seller cannot list with other brokers but will not owe the broker a commission if the seller procures his or her own buyer. Most listings are exclusive right-to-sell listings over types of other listings.

A relationship with your sellers is a longer term relationship than with buyers. Do not take listings unless you believe in your heart you can sell the property. Remember you will owe the seller all of the fiduciary duties, because he or she is your client Use good judgment when listing property. Once you take the listing, put the interest of the seller first at all times.
Question
As you recall, sales agents are required to disclose material facts and latent defects to potential buyers.

As Shelley shows Dave this property, what should she point out?
☐ Shelley should mention that the roof is in need of repairs.
☐ Shelley should mention that a previous owner died in the property.
☐ Shelley should mention that the house is thought to be haunted.

Feedback: Shelley is required to mention that the roof is in need of repairs. However, information such as the fact that a previous owner died in the property by natural causes or an accident unrelated to the property or the legend that a property is haunted is not considered to be a material fact. An agent is not required to disclose information that is not a material fact. In fact, a seller’s agent would NOT disclose this information because he or she is not required to do so and disclosing this information would not be in the seller’s best interest. One thing to be alert to is if there is a major defect and the seller does not want you to disclose it, you need to decline the listing and tell your broker. The broker may want to send a letter to the seller stating that the reason for declining the listing is the seller’s refusal to disclose the material defect.

Question
Dave (buyer)
Hmm… I do think the house is great. But I’m worried about having to get the roof repaired.

Do you think these repairs would be expensive?

How should Shelley respond to this question?

As a real estate professional, Shelley should be able to provide a rough estimate of the cost of repairs.
Shelley should refrain from offering any statement on this matter and should advise the buyer to seek an estimate from a professional.

Providing estimates falls outside of Shelley’s expertise, but she could give her opinion.

**Feedback:** Real estate professionals are not expected to have knowledge of matters outside of the realm of the Texas Real Estate Commission and the License Act, which means that they are not expected to be professional experts on construction, inspections, legal matters or other areas that are not related to the Texas Real Estate Commission License Act and the Texas Real Estate Commission Rules. Because of this, a real estate professional should always refrain from offering advice or opinions in these areas and should refer the client or third party or a professional.

**Case A**

Four months ago, Seller C listed her home with Broker C of Budget Brokerage. Broker C is a busy person, and he assigned Sales Agent C to handle this listing.

Sales Agent C looked over the facts of the property, and she noted that the school district in the area of the home is under-funded and is considered to be one of the worst school districts in the city. She mentioned this to the broker and raised a concern that this information might make it difficult to sell the home. Her broker told her not to worry because Texas law does not require a seller’s agent to disclose that sort of information to buyers. Sales Agent C did give the buyer all disclosures of agency law and agency representation, as well as the Seller’s Disclosure Form that Seller C had filled out. The Seller’s Disclosure Form did not mention the state of the school district.

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

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

Consider this situation. Is Budget Brokerage liable?

**Response**

It is true that Texas license law only requires a license holder to disclose to third parties the material facts about the party or transaction. Such information as the state of the local school district is not considered a material fact. Therefore, the sales agent probably fulfilled his or her duties of disclosure under the Texas Real Estate License Act.

However, under the Deceptive Trade Practices Act, all sellers of goods or services are prohibited from misleading a buyer or engaging in deceptive acts. If a court found that the brokerage or the license holder had misled or deceived the buyer, then there is a possibility that they could be held liable. Deceptive Trade Act penalties if found guilty could be triple damages.

**Case B**

Seller D listed a condo with Sales Agent D. They signed an exclusive right-to-sell listing, which established both an agency relationship and a contractual relationship. Seller D decided to list his condo at $150,000 but told Sales Agent D that he is willing to consider lower offers.

Sales Agent D owns a condo in the same complex and had also, recently, put it up for sale. Her condo is a little smaller than Seller D’s, and she listed it at $135,000.

Yesterday, a buyer came into Sales Agent D’s office looking to purchase a condo and
explained that his price range was $135,000 to $150,000. Sales Agent D asked him what he was looking for, and the features he described matched the descriptions of the condos owned by both Sales Agent D and Seller D.

Sales Agent D then told the buyer about her condo. The buyer requested to see the property, so Sales Agent D immediately took her to the condo.

Did Sales Agent D do anything wrong here?

Response
An agent must place the principal's interest above his or her own. In this situation, the sales agent was obviously acting in her personal interests. Sales agent D did not even mention Seller D's condo, even though the property was within the buyer's price range and matched the qualities he was looking for. Sales agent D has breached her fiduciary duty of loyalty to her client.

If Seller D discovers Sales Agent D's actions and wishes to terminate the listing, will Seller D owe damages to the license holder??

Generally, if a seller wishes to cancel a listing, he or she will owe the broker damages, such as damages for time or other expenses and perhaps damages for an unearned commission. However, in a situation such as this where the sales agent has breached fiduciary duties and therefore has breached the contract, the seller probably will not owe the license holder any damages.

Case C
Buyer F contacted Broker F to purchase a neighborhood property that was listed with Broker F. Broker F showed Buyer F the property, upon which Buyer F commented that the listing price was high and did not submit an offer at that time. Broker F then entered into an agreement to purchase the property from her client, Seller F. The sale closed, and then Buyer F sent a written offer on the property to the broker.
Broker F informed the potential buyer that the property had already been sold. Buyer F later discovered that it was the broker who had purchased the property. Buyer F then filed a lawsuit against Broker F, claiming a breach of fiduciary duties.

Do you think Buyer F’s claim will hold up in court?

**Response**

Broker F was not acting as the buyer’s agent; therefore, the broker was not required to act in the buyer’s best interests. If a court were to find that Broker F’s actions had led the buyer to assume that an agency relationship existed, then Broker F might have breached duties to the potential buyer.

However, if Broker F had been careful to disclose her agency relationship with the seller, gave the buyer the statement about agency law, and did not act in a way that could be construed as representing the buyer, then Broker F was probably acting within the law.

When you are representing a buyer and find a property, you will be working with the seller. Your fiduciary duties will be owed to the buyer you represent. The seller is still entitled to honesty and fairness. If the seller is represented by another company your role with the seller will be limited. If your buyer client is buying a For Sale by Owner property, you will be giving the seller good customer service. Be sure the seller knows that you are working for the buyer.

**The Broker Working for and with the Buyer**

If your company is working for a seller, the buyer that decides to buy that seller’s property has a couple of options. If someone in your company has also been working for the buyer, the company may decide to represent both of them (i.e. work for both of them) in an intermediary transaction. There is no other way in Texas unless the broker has less than three license holders.
If the buyer that enters the picture is unrepresented, your broker may decide to continue to represent the seller and not represent the buyer. There is no agency relationship with this buyer, who will remain a customer. Your company can provide limited services but must be careful only to give advice and opinions to the seller and NO advice and opinions to the buyer. The buyer is to receive honesty, fairness, disclosure, good faith, and competency. These are the common law duties to all unrepresented consumers.

Let’s discuss these common law duties:

- **Honesty** – free from fraud or deception; legitimate, truthful - an honest presentation of facts
- **Fairness** - marked by impartiality and honesty; free from self-interest, prejudice, or favoritism; a very fair person to do business with
- **Disclosure** - the act of making something known: the act of disclosing something
- **something (such as information) that is made known or revealed; something that is disclosed**
- **Good faith** - honesty in dealing with other people; honesty, fairness, and lawfulness of purpose; absence of any intent to defraud, act maliciously, or take unfair advantage
- **Competency** - the quality or state of being legally qualified or adequate to practice real estate with a license.

When you are representing a buyer and showing other brokers’ listings or new property, the buyer will be entitled to advice and opinions.

Ascertain that everyone in the transaction knows who you are representing and who you are not representing,

When you represent the buyer, you provide your fiduciary duties exclusively. Exclusive buyer representation only happens when you are selling other broker’s listings. In other words, your broker does not represent the seller.
Let’s review fiduciary duties:

- Obedience
- 100% loyalty
- Full disclosure
- Confidentiality
- Accountability
- Reasonable care

Remember the requirements of intermediary in the Texas Real Estate Commission License Act and Texas Real Estate Commission Rules if you are representing a buyer and someone in your brokerage firm is representing the seller. You and the other sales agent have the same broker. One broker representing both the buyer and the seller MUST be an intermediary. This is Texas law.

- Intermediary authorization must be in writing by both parties (it is usually in the Buyer’s Representation Agreement and the Seller’s Listing Agreement).
- Second Intermediary Agreement – Before contract is written, the buyer and seller need to know who the appointed license holders are in case there is a conflict of interest.
- No one in the brokerage company can say the buyer will offer more than the offer price or the seller will take less than the listing price.
- Confidential information cannot be given to the other party who you are not appointed too.

If your broker appoints two different agents to help the two parties be sure to get each parties authorization for the appointments (on a forms similar to the Texas Association of REALTORS Notice of Intermediary). Appointments with authorization allow the agents to give advice and opinions to the party they are appointed to.

If your broker is an intermediary but does not make appointments, then no advice and opinions can be given to either the buyer or seller. If you sell your own listing, you cannot give advice and options as well.
Remember that it is sometimes acceptable to have the buyer to be just a customer with no representation if the buyer chooses no representation in writing. If you are representing a seller who really needs advice and opinions and you have an experienced buyer who does not need advice and opinions, your broker and office policy may allow you to continue representing the seller only and give the buyer great customer service but not representation. Again, this is Honesty, fairness, disclosure good faith, and competency. No advice and opinions.

**Case A**
Seller G has listed her property with Sales Agent G.

While Sales Agent G was showing the house, the potential buyer went up to the roof and fell through to the floor beneath. Now the buyer is suing Broker G for medical bills. The seller, on the other hand, is claiming damage to the property and is suing Broker G for repairs.

Is Sales Agent G liable on both counts?

**Response**
Most listing agreements include a provision that states that the license holder is not liable for damages to any person or to the property, unless the license holder has been negligent. Perhaps Sales Agent G would be required to pay damages if it were found that she had knowledge that the roof was not sturdy, or if it were found that she had been negligent in some other way. If no negligence is found on Sales Agent G’s part, then she would probably not be liable for damages to either party.

**Case B**
Sales Agent H represents a seller of Asian descent. They have a written listing agreement. The seller informs Agent H that he only wants the agent to show the property to Asian individuals or families.
How should Sales Agent H respond?

Response
In this situation, the seller’s request violates Fair Housing Act laws. Sales Agent H must explain to the seller that honoring this request would be acting in a discriminatory manner and is prohibited by law. Fair housing laws require the property to be shown and made available to all persons without regard to race, color, religion, national origin, sex, disability or familial status.
Local ordinances may provide for additional protected classes (for example, creed, status as a student, marital status, sexual orientation, or age).

Sales Agent H explains Fair Housing laws to the seller, but the seller continues to insist that Sales Agent H only show the property to people of Asian descent.

What should Sales Agent H do?

To comply with the law, if the client continues to insist upon illegal behavior, Sales Agent H must immediately terminate the listing and leave the relationship.

Case C
Listing Sales Agent J listed a property and entered into the Multiple Listing Service as having an approximate square footage of 6,500 square feet. The listing data form contained a disclaimer notice stating that the information contained in the document was obtained from the seller and was accurate to the best of the listing sales agent’s knowledge.

Buyer J purchased this property with intent to sell it later for a profit. One year later, when Buyer J wished to sell the property, his listing sales agent told him that the property was not 6,500 square feet; rather it measured 5,500 square feet, a considerable difference of 1000 square feet. This difference would make a significant impact upon Buyer J’s listing price. The buyer ordered an independent assessment of the house, which confirmed that
the house measured 5,500 square feet. Buyer J then filed a lawsuit against Listing Sales Agent J for negligent misrepresentation.

Do you think that Buyer J's lawsuit would hold up in court? Why or why not?

Response
The issues that arise from this case are primarily those concerning the agent’s liability. Section 1101.805 of the Texas Real Estate License Act states the following:

Texas Real Estate License Act
http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm

Sec. 1101.805. LIABILITY FOR MISREPRESENTATION OR CONCEALMENT.
  (a) In this section, "party" has the meaning assigned by Section 1101.551.
  (b) This section prevails over any other law, including common law.
  (c) This section does not diminish a broker’s responsibility for the acts or omissions of a sales agent associated with or acting for the broker.
  (d) A party is not liable for a misrepresentation or a concealment of a material fact made by a license holder in a real estate transaction unless the party:
      (1) knew of the falsity of the misrepresentation or concealment; and
      (2) failed to disclose the party's knowledge of the falsity of the misrepresentation or concealment.
  (e) A license holder is not liable for a misrepresentation or a concealment of a material fact made by a party to a real estate transaction unless the license holder:
      (1) knew of the falsity of the misrepresentation or concealment; and
      (2) failed to disclose the license holder’s knowledge of the falsity of the misrepresentation or concealment.
  (f) A party or a license holder is not liable for a misrepresentation or a concealment of a material fact made by a subagent in a real estate transaction unless the party or license holder:
      (1) knew of the falsity of the misrepresentation or concealment; and
(2) failed to disclose the party's or license holder's knowledge of the falsity of the misrepresentation or concealment.

(Source: http://www.statutes.legis.state.tx.us/Docs/OC/htm/OC.1101.htm)

Under the Real Estate License Act, a license holder is not required to verify information that comes from a client or a third party. Unless the license holder had knowledge of the misrepresentation, then he or she would have no liability.

The question of knowledge, however, is open to interpretation by courts. For example, Listing Sales Agent J had probably walked through the property. If a court ruled that a difference of 1000 square feet should have been obvious simply from appearance, then Listing Sales Agent J might have liability. However, the fact that Listing Agent J included a disclaimer stating that all information regarding the property comes from the seller may provide her with some protection. As in all situations, license holders should do their best to put forth accurate information.

A Practical Guide to Everyday Practice
One of the first guides to everyday practice is to get up and show up. If this is your business, you must treat it like a business. If you treat it like a hobby, showing up only when you feel like it, it will be a hobby. In the 21st Century, part-time real estate is no longer viable because of liability and demands of the real estate profession.

To keep your business successful, you will need to find a way to talk with buyers and sellers every day. You need to develop a marketing plan and practice it daily. Daily means how many days and hours you plan to work to be able to make money.

Form Good Habits
- If you are on telephone duty, every buyer who calls about a specific listed property, you need to disclose that you represent the seller and you will answer the buyer’s questions do not involve confidential information. The seller must consent to give out confidential information. Examples of confidential information could be time on
the market, why the seller is selling, has the seller had any offers, verbal offers, sold information, and price reductions. These are just a few. You might want to make a list of confidential questions a buyer or caller would ask you.

- Remember that every lead is a valuable lead. Try to get information from the potential buyer so you can follow-up later. Be helpful, not pushy.
- When you start communicating with an unrepresented buyer or seller, present the Information about Brokerage Services and tell them about agency representation and the services you can provide if you represent them. You also want to discuss what you cannot do if you do not represent them.
- Before you spend a lot of time with a potential buyer, get him or her to go to a live loan processor to discuss his or her financial situation. There is no need to show property of a prospective buyer cannot qualify for a loan or has bad credit or extensive debt.
- Before you ask them to sign a Buyer’s Representation Agreement go over the benefits of representation. If you do not know, why would they sign a buyer representation agreement. Make sure they understand that without a signed Buyer’s Representation Agreement, they are just a customer and you are limited in the services you can provide them. Never let buyers think you are their sales agent and that you represent them if they have not agreed to representation.
- Do Not Allow a Buyer to think they are a client on a company listing without written permission to be an intermediary.
- When working with a seller provide good information regarding the probable price the property will sell for in its’ present condition or the repaired condition if you are recommending repairs. Educate the seller and allow them to set the price. If they are too above the market, you are not obligated to accept the listing.
- If your broker does become an intermediary be sure the buyer and the seller know if two sales agents are going to be appointed to the two parties or if one sales agent will help both parties. The broker must have more than three license holders to make appointments and be able to give advice and opinions. Remember if there is only one agent there will be no appointments and no advice, no opinions to either party.
• Disclose the names of the two appointed license holders on a Notice of Intermediary form and have the buyer and seller approve the appointees by signing the notice.
• Be diligent when filling out a promulgated contract form. Use the current form. Fill in every blank or mark it n/a. Remember everything has to be in the contract. No outside or oral promises count if they are not in the contract.
• Be with your clients every step of the transaction. Be a problem solver. You must keep the client informed of any material information but protect them from any unnecessary stress. They do not need to know you are doing all the work or that you think their lender is doing a lousy job.
• Keep up with your past clients. Most clients tell the National Association of REALTORS® (NAR) they liked their license holder and would use them again, but few do use them again. Don’t let them forget you. Let them know you will take very good care of their referrals.

Other Considerations
Because of the Statute of Limitations, lawsuits must be filed within four years. (The caveat is that, it is four years from the date of discovery, not date of the transaction.) Texas Real Estate Commission complaints can also be filed during a four-year period. Good notes in your file are critical because after three to four years, it is hard to remember what took place the during the transaction. Also, save your emails and texts. Be sure you will be able to reconstruct what happened in the transaction. Brokers are required to keep their files for at least four years after a transaction and seven years for the Internal Revenue Service.

A few other things agent must be aware of are:
• Broker’s fees, or the sharing of fees between brokers, are not fixed, controlled, recommended, suggested, or maintained by the local, state, and national Association of REALTORS®, Multiple Listing Service, or any listing service. Antitrust laws are very clear about price fixing and the liability.
• Fair housing laws require the property to be shown and made available to all persons without regard to race, color, religion, national origin, sex, disability or familial status. Local ordinance may provide for additional protected classes (for example, creed, status as a student, marital status, sexual orientation, or age). Statutes or ordinances may regulate certain items on the property (for example, swimming pools and septic systems). Non-compliance with the statutes or ordinances may delay a transaction and may result in fines, penalties, and liability to seller.

• If the Property was built before 1978, federal law requires the seller to:
  1. provide the buyer with the federally approved pamphlet on lead poisoning prevention;
  2. disclose the presence of any known lead-based paint or lead-based paint hazards in the Property;
  3. deliver all
  4. provide the buyer a period up to 10 days to have the Property inspected for such paint or hazards.

**Risk Management**


Risk management is the identification, assessment, and prioritization of risks (defined in ISO 31000 as the effect of uncertainty on objectives) followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities. Risk management’s objective is to assure uncertainty does not deflect the endeavor from the business goals.

Risks can come from various sources including uncertainty in financial markets, threats from project failures (at any phase in design, development, production, or sustainment life-cycles), legal liabilities, credit risk, accidents, natural causes and
disasters, deliberate attack from an adversary, or events of uncertain or unpredictable root-cause. There are two types of events i.e. negative events can be classified as risks while positive events are classified as opportunities. Several risk management standards have been developed including the Project Management Institute, the National Institute of Standards and Technology, actuarial societies, and ISO standards. Methods, definitions and goals vary widely according to whether the risk management method is in the context of project management, security, engineering, industrial processes, strategies to manage threats (uncertainties with negative consequences) typically include avoiding the threat, reducing the negative effect or probability of the threat, transferring all or part of the threat to another party, and even retaining some or all of the potential or actual consequences of a particular threat, and the opposites for opportunities (uncertain future states with benefits).

Certain aspects of many of the risk management standards have come under criticism for having no measurable improvement on risk; whereas the confidence in estimates and decisions seem to increase. For example, it has been shown that one in six IT projects experience cost overruns of 200% on average, and schedule overruns of 70% financial portfolios, actuarial assessments, or public health and safety.

In ideal risk management, a prioritization process is followed whereby the risks with the greatest loss (or impact) and the greatest probability of occurring are handled first, and risks with lower probability of occurrence and lower loss are handled in descending order. In practice the process of assessing overall risk can be difficult, and balancing resources used to mitigate between risks with a high probability of occurrence but lower loss versus a risk with high loss but lower probability of occurrence can often be mishandled.

Introduction
Intangible risk management identifies a new type of a risk that has a 100% probability of occurring but is ignored by the organization due to a lack of identification ability. For example, when deficient knowledge is applied to a situation, a knowledge risk
materializes. Relationship risk appears when ineffective collaboration occurs. Process-engagement risk may be an issue when ineffective operational procedures are applied. These risks directly reduce the productivity of knowledge workers, decrease cost-effectiveness, profitability, service, quality, reputation, brand value, and earnings quality. Intangible risk management allows risk management to create immediate value from the identification and reduction of risks that reduce productivity.

Risk management also faces difficulties in allocating resources. This is the idea of opportunity cost. Resources spent on risk management could have been spent on more profitable activities. Again, ideal risk management minimizes spending (or manpower or other resources) and also minimizes the negative effects of risks.

According to the definition to the risk, the risk is the possibility that an event will occur and adversely affect the achievement of an objective. Therefore, risk itself has the uncertainty. Risk management such as COSO ERM, can help managers have a good control for their risk. Each company may have different internal control components, which leads to different outcomes. For example, the framework for ERM components includes Internal Environment, Objective Setting, Event Identification, Risk Assessment, Risk Response, Control Activities, Information and Communication, and Monitoring.

**Method**

For the most part, these methods consist of the following elements, performed, more or less, in the following order.

- identify, characterize threats
- assess the vulnerability of critical assets to specific threats
- determine the risk (i.e. the expected likelihood and consequences of specific types of attacks on specific assets)
- identify ways to reduce those risks
- prioritize risk reduction measures based on a strategy
Principles of Risk Management

Risk management should:

- create value – resources expended to mitigate risk should be less than the consequence of inaction
- be an integral part of organizational processes
- be part of decision making process
- explicitly address uncertainty and assumptions
- be a systematic and structured process
- be based on the best available information
- be tailorable
- take human factors into account
- be transparent and inclusive
- be dynamic, iterative and responsive to change
- be capable of continual improvement and enhancement
- be continually or periodically re-assessed

Process

Establishing the context

This involves:

1. identification of risk in a selected domain of interest
2. planning the remainder of the process
3. mapping out the following:
4. the social scope of risk management
5. the identity and objectives of stakeholders
6. the basis upon which risks will be evaluated, constraints.
7. defining a framework for the activity and an agenda for identification
8. developing an analysis of risks involved in the process
9. mitigation or solution of risks using available technological, human and organizational resources.
Identification
After establishing the context, the next step in the process of managing risk is to identify potential risks. Risks are about events that, when triggered, cause problems or benefits. Hence, risk identification can start with the source of our problems and those of our competitors (benefit), or with the problem itself.

Risk sources may be internal or external to the system that is the target of risk management (use mitigation instead of management since by its own definition risk deals with factors of decision-making that cannot be managed).

Source Analysis
Examples of risk sources are:
- stakeholders of a project,
- employees of a company or the
- weather over an airport.

Problem analysis – Risks are related to identified threats.
For example:
- the threat of losing money,
- the threat of abuse of confidential information or
- the threat of human errors, accidents and casualties.

The threats may exist with various entities, most important with shareholders, customers and legislative bodies such as the government.

When either source or problem is known, the events that a source may trigger or the events that can lead to a problem can be investigated. For example: stakeholders withdrawing during a project may endanger funding of the project; confidential information may be stolen by employees even within a closed network; lightning striking an aircraft during takeoff may make all people on board immediate casualties.
The chosen method of identifying risks may depend on culture, industry practice and compliance. The identification methods are formed by templates or the development of templates for identifying source, problem or event. Common risk identification methods are:

- **Objectives-based risk identification** – Organizations and project teams have objectives. Any event that may endanger achieving an objective partly or completely is identified as risk.

- **Scenario-based risk identification** – In scenario analysis different scenarios are created. The scenarios may be the alternative ways to achieve an objective, or an analysis of the interaction of forces in, for example, a market or battle. Any event that triggers an undesired scenario alternative is identified as risk – see Futures Studies for methodology used by Futurists.

- **Taxonomy-based risk identification** – The taxonomy in taxonomy-based risk identification is a breakdown of possible risk sources. Based on the taxonomy and knowledge of best practices, a questionnaire is compiled. The answers to the questions reveal risks.

- **Common-risk checking** – In several industries, lists with known risks are available. Each risk in the list can be checked for application to a particular situation.

- **Risk charting** – This method combines the above approaches by listing resources at risk, threats to those resources, modifying factors which may increase or decrease the risk and consequences it is wished to avoid. Creating a matrix under these headings enables a variety of approaches. One can begin with resources and consider the threats they are exposed to and the consequences of each. Alternatively one can start with the threats and examine which resources they would affect, or one can begin with the consequences and determine which combination of threats and resources would be involved to bring them about.
Assessment

Once risks have been identified, they must then be assessed as to their potential severity of impact (generally a negative impact, such as damage or loss) and to the probability of occurrence. These quantities can be either simple to measure, in the case of the value of a lost building, or impossible to know for sure in the case of an unlikely event, the probability of occurrence of which is unknown. Therefore, in the assessment process it is critical to make the best educated decisions in order to properly prioritize the implementation of the risk management plan.

Even a short-term positive improvement can have long-term negative impacts. Take the "turnpike" example. A highway is widened to allow more traffic. More traffic capacity leads to greater development in the areas surrounding the improved traffic capacity. Over time, traffic thereby increases to fill available capacity. Turnpikes thereby need to be expanded in a seemingly endless cycles. There are many other engineering examples where expanded capacity (to do any function) is soon filled by increased demand. Since expansion comes at a cost, the resulting growth could become unsustainable without forecasting and management.

The fundamental difficulty in risk assessment is determining the rate of occurrence since statistical information is not available on all kinds of past incidents and is particularly scanty in the case of catastrophic events, simply because of their infrequency. Furthermore, evaluating the severity of the consequences (impact) is often quite difficult for intangible assets. Asset valuation is another question that needs to be addressed. Thus, best educated opinions and available statistics are the primary sources of information. Nevertheless, risk assessment should produce such information for senior executives of the organization that the primary risks are easy to understand and that the risk management decisions may be prioritized within overall company goals. Thus, there have been several theories and attempts to quantify risks. Numerous different risk formulae exist, but perhaps the most widely accepted formula for risk quantification is: "Rate (or probability) of occurrence multiplied by the impact of the event equals risk magnitude."
Composite Risk Index

The above formula can also be re-written in terms of a composite risk index, as follows:

\[ \text{composite risk index} = \text{impact of risk event} \times \text{probability of occurrence} \]

The impact of the risk event is commonly assessed on a scale of 1 to 5, where 1 and 5 represent the minimum and maximum possible impact of an occurrence of a risk (usually in terms of financial losses). However, the 1 to 5 scale can be arbitrary and need not be on a linear scale.

The probability of occurrence is likewise commonly assessed on a scale from 1 to 5, where 1 represents a very low probability of the risk event actually occurring while 5 represents a very high probability of occurrence. This axis may be expressed in either mathematical terms (event occurs once a year, once in ten years, once in 100 years etc.) or may be expressed in "plain English" (event has occurred here very often; event has been known to occur here; event has been known to occur in the industry etc.). Again, the 1 to 5 scale can be arbitrary or non-linear depending on decisions by subject-matter experts.

The composite risk index thus can take values ranging (typically) from 1 through 25, and this range is usually arbitrarily divided into three sub-ranges. The overall risk assessment is then Low, Medium or High, depending on the sub-range containing the calculated value of the Composite Index. For instance, the three sub-ranges could be defined as 1 to 8, 9 to 16 and 17 to 25.

Note that the probability of risk occurrence is difficult to estimate, since the past data on frequencies are not readily available, as mentioned above. After all, probability does not imply certainty.

Likewise, the impact of the risk is not easy to estimate since it is often difficult to estimate the potential loss in the event of risk occurrence.
Further, both the above factors can change in magnitude depending on the adequacy of risk avoidance and prevention measures taken and due to changes in the external business environment. Hence it is absolutely necessary to periodically re-assess risks and intensify/relax mitigation measures, or as necessary. Changes in procedures, technology, schedules, budgets, market conditions, political environment, or other factors typically require re-assessment of risks.

**Risk Options**

Risk mitigation measures are usually formulated according to one or more of the following major risk options, which are:

1. Design a new business process with adequate built-in risk control and containment measures from the start.
2. Periodically re-assess risks that are accepted in ongoing processes as a normal feature of business operations and modify mitigation measures.
3. Transfer risks to an external agency (e.g. an insurance company)
4. Avoid risks altogether (e.g. by closing down a particular high-risk business area)

Later research [citation needed] has shown that the financial benefits of risk management are less dependent on the formula used but are more dependent on the frequency and how risk assessment is performed.

In business it is imperative to be able to present the findings of risk assessments in financial, market, or schedule terms. Robert Courtney Jr. (IBM, 1970) proposed a formula for presenting risks in financial terms. The Courtney formula was accepted as the official risk analysis method for the US governmental agencies. The formula proposes calculation of ALE (annualized loss expectancy) and compares the expected loss value to the security control implementation costs (cost-benefit analysis).
Potential Risk Treatments
Once risks have been identified and assessed, all techniques to manage the risk fall into one or more of these four major categories:

- Avoidance (eliminate, withdraw from or not become involved)
- Reduction (optimize – mitigate)
- Sharing (transfer – outsource or insure)
- Retention (accept and budget)

Ideal use of these risk control strategies may not be possible. Some of them may involve trade-offs that are not acceptable to the organization or person making the risk management decisions. Another source, from the US Department of Defense (see link), Defense Acquisition University, calls these categories ACAT, for Avoid, Control, Accept, or Transfer. This use of the ACAT acronym is reminiscent of another ACAT (for Acquisition Category) used in US Defense industry procurements, in which Risk Management figures prominently in decision making and planning.

Risk Avoidance
This includes not performing an activity that could carry risk. An example would be not buying a property or business in order to not take on the legal liability that comes with it. Another would be not flying in order not to take the risk that the airplane were to be hijacked. Avoidance may seem the answer to all risks, but avoiding risks also means losing out on the potential gain that accepting (retaining) the risk may have allowed. Not entering a business to avoid the risk of loss also avoids the possibility of earning profits. Increasing risk regulation in hospitals has led to avoidance of treating higher risk conditions, in favor of patients presenting with lower risk.

Hazard Prevention
Hazard prevention refers to the prevention of risks in an emergency. The first and most effective stage of hazard prevention is the elimination of hazards. If this takes too long, is too costly, or is otherwise impractical, the second stage is mitigation.
Risk Reduction
Risk reduction or "optimization" involves reducing the severity of the loss or the likelihood of the loss from occurring. For example, sprinklers are designed to put out a fire to reduce the risk of loss by fire. This method may cause a greater loss by water damage and therefore may not be suitable. Halon fire suppression systems may mitigate that risk, but the cost may be prohibitive as a strategy.

Acknowledging that risks can be positive or negative, optimizing risks means finding a balance between negative risk and the benefit of the operation or activity; and between risk reduction and effort applied. By an offshore drilling contractor effectively applying HSE Management in its organization, it can optimize risk to achieve levels of residual risk that are tolerable.

Modern software development methodologies reduce risk by developing and delivering software incrementally. Early methodologies suffered from the fact that they only delivered software in the final phase of development; any problems encountered in earlier phases meant costly rework and often jeopardized the whole project. By developing in iterations, software projects can limit effort wasted to a single iteration. Outsourcing could be an example of risk reduction if the outsourcer can demonstrate higher capability at managing or reducing risks. For example, a company may outsource only its software development, the manufacturing of hard goods, or customer support needs to another company, while handling the business management itself. This way, the company can concentrate more on business development without having to worry as much about the manufacturing process, managing the development team, or finding a physical location for a call center.

Risk Sharing
Briefly defined as "sharing with another party the burden of loss or the benefit of gain, from a risk, and the measures to reduce a risk."
The term of ‘risk transfer’ is often used in place of risk sharing in the mistaken belief that you can transfer a risk to a third party through insurance or outsourcing. In practice if the insurance company or contractor go bankrupt or end up in court, the original risk is likely to still revert to the first party. As such in the terminology of practitioners and scholars alike, the purchase of an insurance contract is often described as a "transfer of risk." However, technically speaking, the buyer of the contract generally retains legal responsibility for the losses "transferred", meaning that insurance may be described more accurately as a post-event compensatory mechanism. For example, a personal injuries insurance policy does not transfer the risk of a car accident to the insurance company. The risk still lies with the policy holder namely the person who has been in the accident. The insurance policy simply provides that if an accident (the event) occurs involving the policy holder then some compensation may be payable to the policy holder that is commensurate with the suffering/damage.

Some ways of managing risk fall into multiple categories. Risk retention pools are technically retaining the risk for the group, but spreading it over the whole group involves transfer among individual members of the group. This is different from traditional insurance, in that no premium is exchanged between members of the group up front, but instead losses are assessed to all members of the group.

**Risk Retention**

This involves accepting the loss, or benefit of gain, from a risk when it occurs. True self-insurance falls in this category. Risk retention is a viable strategy for small risks where the cost of insuring against the risk would be greater over time than the total losses sustained. All risks that are not avoided or transferred are retained by default.

This includes risks that are so large or catastrophic that they either cannot be insured against or the premiums would be infeasible. War is an example since most property and risks are not insured against war, so the loss attributed by war is retained by the insured. Also any amounts of potential loss (risk) over the amount insured is retained risk. This may also be acceptable if the chance of a very large loss is small or if the
cost to insure for greater coverage amounts is so great it would hinder the goals of the organization too much. Risk retention or acceptance is common type of risk response on treats and opportunities.

**Risk Management Plan**

Select appropriate controls or countermeasures to measure each risk. Risk mitigation needs to be approved by the appropriate level of management. For instance, a risk concerning the image of the organization should have top management decision behind it whereas IT management would have the authority to decide on computer virus risks.

The risk management plan should propose applicable and effective security controls for managing the risks. For example, an observed high risk of computer viruses could be mitigated by acquiring and implementing antivirus software. A good risk management plan should contain a schedule for control implementation and responsible persons for those actions.

According to ISO/IEC 27001, the stage immediately after completion of the risk assessment phase consists of preparing a Risk Treatment Plan, which should document the decisions about how each of the identified risks should be handled. Mitigation of risks often means selection of security controls, which should be documented in a Statement of Applicability, which identifies which particular control objectives and controls from the standard have been selected, and why.

**Implementation**

Implementation follows all of the planned methods for mitigating the effect of the risks. Purchase insurance policies for the risks that have been decided to be transferred to an insurer, avoid all risks that can be avoided without sacrificing the entity’s goals, reduce others, and retain the rest.
Review and Evaluation of the Plan
Initial risk management plans will never be perfect. Practice, experience, and actual loss results will necessitate changes in the plan and contribute information to allow possible different decisions to be made in dealing with the risks being faced.

Risk analysis results and management plans should be updated periodically. There are two primary reasons for this:

1. to evaluate whether the previously selected security controls are still applicable and effective
2. to evaluate the possible risk level changes in the business environment. For example, information risks are a good example of rapidly changing business environment.

Limitations
Prioritizing the risk management processes too highly could keep an organization from ever completing a project or even getting started. This is especially true if other work is suspended until the risk management process is considered complete.

It is also important to keep in mind the distinction between risk and uncertainty. Risk can be measured by impacts x probability.

If risks are improperly assessed and prioritized, time can be wasted in dealing with risk of losses that are not likely to occur. Spending too much time assessing and managing unlikely risks can divert resources that could be used more profitably. Unlikely events do occur but if the risk is unlikely enough to occur it may be better to simply retain the risk and deal with the result if the loss does in fact occur. Qualitative risk assessment is subjective and lacks consistency. The primary justification for a formal risk assessment process is legal and bureaucratic.
Areas
As applied to corporate finance, risk management is the technique for measuring, monitoring and controlling the financial or operational risk on a firm's balance sheet, a traditional measure is the value at risk (VaR), but there also other measures like profit at risk (PaR) or margin at risk. The Basel II framework breaks risks into market risk (price risk), credit risk and operational risk and also specifies methods for calculating capital requirements for each of these components.

In Information Technology, risk management includes "Incident Handling", an action plan for dealing with intrusions, cyber-theft, denial of service, fire, floods, and other security-related events. According to the SANS organization, it is a six step process: Preparation, Identification, Containment, Eradication, Recovery, and Lessons Learned.

Enterprise
In enterprise risk management, a risk is defined as a possible event or circumstance that can have negative influences on the enterprise in question. Its impact can be on the very existence, the resources (human and capital), the products and services, or the customers of the enterprise, as well as external impacts on society, markets, or the environment. In a financial institution, enterprise risk management is normally thought of as the combination of credit risk, interest rate risk or asset liability management, liquidity risk, market risk, and operational risk.

In the more general case, every probable risk can have a pre-formulated plan to deal with its possible consequences (to ensure contingency if the risk becomes a liability).

From the information above and the average cost per employee over time, or cost accrual ratio, a project manager can estimate:

- the cost associated with the risk if it arises, estimated by multiplying employee costs per unit time by the estimated time lost (cost impact, C where C = cost accrual ratio * S)
- the probable increase in time associated with a risk (schedule variance due to risk, Rs where Rs = P * S):
- Sorting on this value puts the highest risks to the schedule first. This is intended to cause the greatest risks to the project to be attempted first so that risk is minimized as quickly as possible.
- This is slightly misleading as schedule variances with a large P and small S and vice versa are not equivalent. (The risk of the RMS Titanic sinking vs. the passengers’ meals being served at slightly the wrong time).
- the probable increase in cost associated with a risk (cost variance due to risk, Rc where Rc = P*C = P*CAR*S = P*S*CAR)
- sorting on this value puts the highest risks to the budget first.
- see concerns about schedule variance as this is a function of it, as illustrated in the equation above.

Risk in a project or process can be due either to Special Cause Variation or Common Cause Variation and requires appropriate treatment. That is to re-iterate the concern about extremal cases not being equivalent in the list immediately above.

**Project Management**

Project risk management must be considered at the different phases of acquisition. In the beginning of a project, the advancement of technical developments or the response to threats presented by a competitor’s projects, may cause a risk or threat assessment and subsequent evaluation of alternatives (see Analysis of Alternatives). Selection of a response presented by technology options, or competitor threats are important applications of risk management. Once a decision is made, and the project begun, more familiar project management applications can be used.

An example of the Risk Register for a project that includes 4 steps: Identify, Analyze, Plan Response, Monitor and Control.
• Planning how risk will be managed in the particular project. Plans should include risk management tasks, responsibilities, activities and budget.
• Assigning a risk officer – a team member other than a project manager who is responsible for foreseeing potential project problems. Typical characteristic of risk officer is a healthy skepticism.
• Maintaining live project risk database. Each risk should have the following attributes: opening date, title, short description, probability and importance. Optionally a risk may have an assigned person responsible for its resolution and a date by which the risk must be resolved.
• Creating anonymous risk reporting channel. Each team member should have the possibility to report risks that he/she foresees in the project.
• Preparing mitigation plans for risks that are chosen to be mitigated. The purpose of the mitigation plan is to describe how this particular risk will be handled – what, when, by whom and how will it be done to avoid it or minimize consequences if it becomes a liability.
• Summarizing planned and faced risks, effectiveness of mitigation activities, and effort spent for the risk management.

Megaprojects
Megaprojects (sometimes also called "major programs") are large-scale investment projects, typically costing more than US$1 billion per project. Megaprojects include major bridges, tunnels, highways, railways, airports, seaports, power plants, dams, wastewater projects, coastal flood protection schemes, oil and natural gas extraction projects, public buildings, information technology systems, aerospace projects, and defense systems. Megaprojects have been shown to be particularly risky in terms of finance, safety, and social and environmental impacts. Risk management is therefore particularly pertinent for megaprojects and special methods and special education have been developed for such risk management.
Natural Disasters
It is important to assess risk in regard to natural disasters like floods, earthquakes, and so on. Outcomes of natural disaster risk assessment are valuable when considering future repair costs, business interruption losses and other downtime, effects on the environment, insurance costs, and the proposed costs of reducing the risk. There are regular conferences in Davos to deal with integral risk management.

Information Technology
IT risk is a risk related to information technology. This is a relatively new term due to an increasing awareness that information security is simply one facet of a multitude of risks that are relevant to IT and the real world processes it supports.

Petroleum and Natural Gas
For the offshore oil and gas industry, operational risk management is regulated by the safety case regime in many countries. Hazard identification and risk assessment tools and techniques are described in the international standard ISO 17776:2000, and organisations such as the IADC (International Association of Drilling Contractors) publish guidelines for HSE Case development which are based on the ISO standard. Further, diagrammatic representations of hazardous events are often expected by governmental regulators as part of risk management in safety case submissions; these are known as bow-tie diagrams. The technique is also used by organizations and regulators in mining, aviation, health, defence, industrial and finance.

Pharmaceutical Sector
The principles and tools for quality risk management are increasingly being applied to different aspects of pharmaceutical quality systems. These aspects include development, manufacturing, distribution, inspection, and submission/review processes throughout the lifecycle of drug substances, drug products, biological and biotechnological products (including the use of raw materials, solvents, excipients, packaging and labeling materials in drug products, biological and biotechnological products). Risk management is also applied to the assessment of microbiological

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contamination in relation to pharmaceutical products and cleanroom manufacturing environments.

**Risk Communication**

Risk communication is a complex cross-disciplinary academic field related to core values of the targeted audiences. Problems for risk communicators involve how to reach the intended audience, how to make the risk comprehensible and relatable to other risks, how to pay appropriate respect to the audience's values related to the risk, how to predict the audience's response to the communication, etc. A main goal of risk communication is to improve collective and individual decision making. Risk communication is somewhat related to crisis communication. (Source: [https://en.wikipedia.org/wiki/Risk_management](https://en.wikipedia.org/wiki/Risk_management))

For this chapter, we will discuss the risks in the real estate profession and the risks (not all) that are prevalent daily.


The term business risk refers to the possibility of inadequate profits or even losses due to uncertainties e.g., changes in tastes, preferences of consumers, strikes, increased competition, change in government policy, obsolescence etc. Every business organization contains various risk elements while doing the business. Business risks implies uncertainty in profits or danger of loss and the events that could pose a risk due to some unforeseen events in future, which causes business to fail.

For example, an owner of a business may face different risks like in production, risks due to irregular supply of raw materials, machinery breakdown, labor unrest, etc. In marketing, risks may arise due to different market price fluctuations, changing trends and fashions, error in sales forecasting, etc. In addition, there may be loss of assets of the firm due to fire, flood, earthquakes, riots or war and political unrest which may
cause unwanted interruptions in the business operations. Thus business risks may take place in different forms depending upon the nature and size of the business.

Business risks can major by the influence by two major risks: internal risks (risks arising from the events taking place within the organization) and external risks (risks arising from the events taking place outside the organization).

Internal risks arise from factors (endogenous variables, which can be controlled) such as human factors (talent management, strikes), technological factors (emerging technologies), physical factors (failure of machines, fire or theft), operational factors (access to credit, cost cutting, advertisement). External risks arise from factors (exogenous variables, which cannot be controlled) such as economic factors (market risks, pricing pressure), natural factors (floods, earthquakes), political factors (compliance and regulations of government).

**Classification**

The business risk is classified into different 5 main types:

1. **Strategic Risk:** They are the risks associated with the operations of that particular industry. These kind of risks arise from:
   a. Business Environment: Buyers and sellers interacting to buy and sell goods and services, changes in supply and demand, competitive structures and introduction of new technologies.

2. **Transaction:** Assets relocation of mergers and acquisitions, spin-offs, alliances and joint ventures.

3. **Investor Relations:** Strategy for communicating with individuals who have invested in the business.

4. **Financial Risk:** These are the risks associated with the financial structure and transactions of the particular industry.

5. **Operational Risk:** These are the risks associated with the operational and administrative procedures of the particular industry.
6. Compliance Risk (Legal Risk): These are risks associated with the need to comply with the rules and regulations of the government.

7. Other risks: There would be different risks like natural disaster (floods) and others depend upon the nature and scale of the industry.

(Source: https://en.wikipedia.org/wiki/Business_risks)

The understanding of what risk management evolves; we will now show the ways in which it pertains to real estate for the license holder.

The following are areas for risk management in real estate to review and categories for written policies. There are many resources for the REALTOR® Broker from the state and national association of REALTORS®

Digital Millennium Copyright Act (Safe Harbor Provision)

Background Information

In 1998, the Digital Millennium Copyright Act (“DMCA”) was enacted to address certain copyright issues related to online content. Title II of the DMCA, titled the “Online Copyright Infringement Limited Liability Act”, provides online service providers (“OSP”) a “safe harbor,” or liability protection, from copyright infringement in certain circumstances. In a relevant part, the DMCA defines an online service provider as “a provider of online services or network access, or the operator of facilities therefor.” Therefore, an OSP would include real estate brokerages and any individual brokers or agents who provide or host websites, including but not limited to, websites or online portals that allow consumers to search real estate listings and other real estate information over the internet or provide other online services.

Prior to the DMCA, an OSP could be held liable for material posted or stored on its website even if the material was posted by a third-party user. Given the nature of real estate brokerages’ and/or agents’ websites, it would extremely difficult, even impossible, for a company or agent to screen every post or submission by every user for infringing material; therefore, it would be easy to inadvertently host copyrighted
material. Now, as long as the OSP meets certain requirements, an OSP is protected from liability for copyright infringement, when users, not the online service provider, post or submit infringing content on the OSP’s network or system, like a website.

In order to ensure liability protection under the “safe harbor” provision, an OSP must meet the following requirements:

1. The OSP must not have actual or apparent knowledge that the material is infringing;
2. The OSP, if it has the right and ability to control the infringing activity, must not receive a financial benefit that can be directly attributed to the infringing activity; and
3. Upon receiving a notice of claimed infringement (a “takedown notice”), the OSP must act quickly to remove or disable access to it. A takedown notice is a written notification from a copyright holder to an OSP requesting that infringing content be removed from an OSP’s system or network.

In addition to these requirements, an OSP must have designated an agent with the United States Copyright Office to receive takedown notices and paid the applicable fees. Contact information for the “Designated Agent” must also be available on the website, including the name, address, phone number, and email address of the agent. Finally, the OSP must adopt and reasonably implement, and inform users of a policy that provides for termination, in appropriate circumstances, of users who are repeat infringers; and the OSP must accommodate and not interfere with standard technical measures.

To be an effective takedown notice, the notice must include the following:

- a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit OSP to locate the material;

- information reasonably sufficient to permit OSP to contact the complaining party, such as the party’s address, telephone number, and, if available, an electronic mail address at which the party may be contacted;

- a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and

- a statement that the information in the notification is accurate, and under penalty of perjury, that complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

In addition to the liability protection already mentioned, OSPs can also limit their liability for removing material that ultimately may prove not to be infringing. The DMCA provides an additional safe harbor for an OSP if the OSP follows these additional steps:

1. Once the claimed infringing material is removed or access is disabled, the OSP must take reasonable steps to provide notice to the user who originally posted or submitted the content, letting him or her know that the content has been removed or disabled. This user may decide to send a counter notice.

2. Upon receiving a counter notice, the OSP must provide the user who sent the original takedown notice with a copy of the counter notice, and inform that user that the OSP will replace the removed material or enable access to the material in ten (10) business days.

3. The OSP must then replace the removed material or enable access to the material not less than ten (10) nor more than fourteen (14) business days after receiving the counter notice, unless the OSP’s designated agent first receives notice from the user who originally posted or submitted the content.
that he or she has filed an action seeking a court order to restrain the other user from engaging in infringing activity relating to the claimed infringing material.

Policies (recommended only; may be edited by company)

A. Brokerages and any individual agents who maintain or host websites must do the following: Designate a DMCA agent and disclose contact information on the website, including the name, address, telephone and email address of the designated agent.

B. Register with and pay the applicable fees to with the United States Copyright Office. To do this, begin by going to http://dmca.copyright.gov/login.html to login or create an account.

C. Adopt a policy and inform users of the website that the OSP may terminate users who are repeat infringers. (See sample policy for an example).

The designated DMCA agent must comply with the following:

- Designated agents who receive a valid DMCA takedown notice must remove or disable access to the claimed infringing material as quickly as possible. Once the material is removed or disabled, the designated agent will provide written notice to the user who posted or submitted the material.

- If the designated agent receives a valid counter notice, the designated agent must provide the user who sent the original takedown notice with a copy of the counter notice, and inform that user that the OSP will replace the removed material or enable access to it in ten (10) business days. The designated agent must then replace the removed material or enable access to the material not less than ten (10) nor more than fourteen (14) business days after receiving the counter notice, unless the designated agent first receives notice from the user who originally posted or submitted the content that he or she has filed an action requesting a court order to stop the other user from engaging in infringing activity.
To be an effective counter notice, the notice must include the following: 1) a physical or electronic signature of the user; 2) identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled; 3) a statement under penalty of perjury that the user has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; 4) the user’s name, address, and telephone number, and a statement that the user consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the user’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the user will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(Source: 2015 Texas Association of REALTORS®)

Broker Policy and Procedures Manual
- Broker Responsibility Manual
- Property Management Manual
- Errors and Omission Insurance

Field Guide to Errors and Omission Insurance. National Association of REALTORS
https://www.nar.realtor/field-guides/field-guide-to-errors-omissions-insurance

The ever-increasing complexities of real estate transactions and the rising use of litigation have prompted a need for errors and omissions (E&O) insurance programs to reduce the risk to sales associates and the real estate firms they represent against potential lawsuits. The following items address E&O and professional liability insurance, answering many of the questions REALTORS® may have about how E&O insurance works and how to choose a provider. Some state associations also have carriers they recommend (please check with your state association for this information).
The most common benefit that firms offer to independent contractors, licensees, and agents is errors and omissions/liability insurance, at 81%. However, many share the cost of the insurance with their employees. Among salaried licensees and agents, administrative staff, and senior management there is a larger share of firms who pay for errors and omissions/liability insurance.

(Source: https://www.nar.realtor/field-guides/field-guide-to-errors-omissions-insurance)
Real estate is and always has been a very competitive business. The multitude of firms that are active in the business in most markets, the entrepreneurial spirit that is a trademark of the sales people who make up the bulk of the industry, and the relative easy entry into the real estate business combine to insure competition. Over the years the real estate business has benefited from that aspect by seeing the different possible business models employed by competitors. Successful innovations take root and spread among the industry. Less successful ones fall by the wayside.
Our industry finds itself in another period where new business models are being introduced. That increases challenges and competition, just as new models have in the past. The law and our Code of Ethics serve to assure that consumers have the complete and accurate information they need to make their marketplace decisions. In the end, consumers decide which business methods will prevail and survive and which will fail. That, of course, is the heart of the REALTOR® association’s antitrust compliance program.

One of the bedrock principles of antitrust compliance is that neither associations nor their members collectively set the price of services provided by real estate professionals. That is a decision that is made independently by each firm. The firm's sales associates must take care to present pricing policies to prospective clients in a manner that is consistent with the fact that the fees or prices are independently established. This means they should never respond to a question about fees by suggesting that all competitors in the market follow the same pricing practices or to a policy of the local board or association of REALTORS® that supposedly prohibits or discourages price competition.

(Source: https://www.nar.realtor/sites/default/files/BROCHURE.PDF)

**Mortgage Fraud: Recognizing the Signs. National Association of REALTORS®**
https://dev.nar.realtor/sites/default/files/Mortgage-REV.pdf

Financial crimes are one of the fastest growing areas of criminal activity in the United States and one of the fastest growing areas of financial crimes is mortgage fraud. Fraud involves two parties: one makes a false statement of fact material to the business involved and the other party relies on that statement to their detriment. In mortgage fraud false or inaccurate information in connection with a mortgage application is provided and that information causes a lender or another in the chain of approving and funding that loan to make the loan or to make the loan on terms and
conditions different than if the true facts were known.

Mortgage fraud includes a whole category of illegal business dealings. The different schemes that may be used include, but are certainly not limited to, property flipping, equity skimming, application fraud, credit or income misrepresentation or asset and down payment misrepresentation. Mortgage industry professionals and law enforcement break these different schemes into two groups:

1. “Fraud for Housing” in which a borrower will knowingly provide false or at least inaccurate information regarding his or her qualification for the loan. This might be something as innocent sounding as fudging a little on their income levels or employment in order to qualify for the loan or for better terms on a loan. Although we would like to see everyone be able to obtain the American Dream of homeownership, real estate agents must be careful when counseling purchasers to avoid any suggestion that enhancing certain facts may assist a buyer in qualifying for the necessary mortgage. The desire to be helpful cannot override good sense and honesty. The REALTORS Code of Ethics requires members to treat all parties to the transaction honestly, including those providing the financing for the purchase.

2. “Fraud for Profit” which is sometimes referred to as “industry insider fraud” because it typically requires at least the cooperation, if not the participation, of an appraiser, real estate broker, mortgage broker or other real estate professional. Such cooperation or participation does not always require any action on the part of the real estate professional. It can be implicit through the real estate professional’s failure to disclose or correct a representation made by someone else which the professional knows to be false.

The consequences for the housing market differ only as to degree. The latter group causes far more in losses to the mortgage industry and ultimately the public because the people involved are not trying to stay in the property and never intended to make the payments required by the mortgage. Often their schemes will involve multiple
properties and parties. They are motivated to commit mortgage fraud solely by the money that can be taken from a property. When they have done that or the threat of being caught increases they will often disappear. Individuals who provide false information to the lender to help secure their own housing lack the same kind of bad motivation and usually intend to make the payments to stay in the housing. But if they default on the loan because they really were not qualified, the community is still left with foreclosed housing and the individuals with damaged credit and credibility.

Mortgage fraud is accomplished through the use of false documents, identity theft, straw buyers, and sometimes the witting or unwitting assistance of real estate professionals. To protect themselves and their clients, real estate agents must be able to distinguish between legal and illegal mortgage practices. There are a number of different ways in which the real estate agent may inadvertently become involved in these schemes or involve their seller clients. Agents may be asked to interfere in the appraisal process, alter or not include parts of the purchase agreement that is provided to the lender or title company, intercept verifications of income or employment history or help out by hand carrying verifications provided by the buyers or others working with the buyer. Any of these activities could be a part of a mortgage fraud scheme. Some common examples of mortgage fraud as described by the FBI include:

- **Property Flipping** - Property is purchased, falsely appraised at a higher value, and then quickly sold. What makes property flipping illegal is that the appraisal information is fraudulent. The schemes typically involve one or more of the following: fraudulent appraisals, doctored loan documentation, inflating buyer income, etc.

- **Kickbacks** to buyers, investors, property/loan brokers, appraisers, title company employees are common in this scheme. A home worth $200,000 may be appraised for $400,000 or higher in this type of scheme.

- **Silent Second** - The buyer of a property borrows the down payment from the seller through the issuance of a non-disclosed second mortgage. The primary lender believes the borrower has invested his own money in the down payment,
when in fact, it is borrowed. The second mortgage is usually not recorded to further conceal its status from the primary lender.

- **Nominee Loans/Straw Buyers** – The identity of the borrower is concealed through the use of a nominee who allows the borrower to use the nominee's name and credit history to apply for a loan.

- **Fictitious/Stolen Identity** – A fictitious/stolen identity may be used on the loan application. The applicant may be involved in an identity theft scheme: the applicant's name, personal identifying information and credit history are used without the true person's knowledge.

- **Inflated Appraisals** - An appraiser acts in collusion with a borrower and provides a misleading appraisal report to the lender. The report inaccurately states an inflated property value.

- **Equity Skimming** - An investor may use a straw buyer, false income documents, and false credit reports, to obtain a mortgage loan in the straw buyer's name. Subsequent to closing, the straw buyer signs the property over to the investor in a quit claim deed which relinquishes all rights to the property and provides no guaranty to title. The investor does not make any mortgage payments and rents the property until foreclosure takes place several months later.

As is demonstrated in each of the foregoing descriptions, a key element of the problem is the imbalance of information. One side, normally the borrower or someone working with the buyer, conceals information from or affirmatively misleads the lender. Anytime an agent suspects this may be the case, further investigation is warranted to rule out any involvement by the agent or their unwitting client in a fraudulent transaction.

There are several clues which may alert the agent that there may be a problem. One of the most important documents in detecting fraud is the original sales agreement and any addenda to that agreement. It is the document which the real estate agent is most likely to be involved in preparing. Thus, care must be exercised in preserving its accuracy. Things to be sure of:

- The property is clearly identified
• All parties to the transaction are identified and have executed the agreement
• The signatures are legible or properly identified
• All riders and addendums are attached
• There are no blanks or inconsistent information in the purchase and sales agreement
• It accurately reflects the consideration to be paid by the buyer for the property
• Other possible red flags:
  o Down payment assistance programs that charge excessive fees or that attempt to place restrictions on how their participation is reported in contract documentation, including the HUD 1
  o Large seller contributions, possibly in the form of provisions for large decorator or improvement allowances
• Mortgage brokers who refer prequalified buyers to agents
• Statement that the buyer will occupy the property is questionable. For example, the buyer is retaining old property or there is unrealistic commute to the buyer employment
• Buyer has very limited credit history and existing history is with high rate consumer finance companies
• Credit history indicates the repayment of a prior obligation did not include any interest payments
• Unrealistic income for occupation
  Recent drastic increase in income due to a raise or a new job
• Sales contract, appraisal and title work disagree with respect to seller’s name and appraisal shows property or comps previously sold in past year.

If these warning signs are present in your transaction, bring the situation to the attention of your broker. While fraud isn’t involved every time one of these warning signs appear, the few minutes it will take to decide between innocent and fraudulent can save you and your broker time, money and maybe even your license, and
reporting fraud will protect the communities in which you do business.

Mortgage fraud is more than a just a possibility for real estate professionals. Read the following fraud profile which describes one broker’s experience and lesson.

An agent was asked by a friend to help in the acquisition of a distressed property. This friend was in the mortgage brokerage business with her husband. The agent successfully assisted her friend in the purchase. Unbeknownst to the agent, the buyers arranged a simultaneous closing for the same property to another buyer for double the original purchase price. The issues of fraud were as follows:

1. The second buyer was a straw buyer whose loan qualifications were “enhanced”.
2. A fraudulent appraisal was obtained to substantiate the inflated second sale price to the lender funding the loan.
3. The simultaneous closing was doctored to allow the high LTV loan on the second transaction to close first in order to fund and close the first transaction.
4. Participation of the escrow closer is not documented but the closing sequence certainly should have raised questions.
5. Not surprisingly, the straw buyer did not perform on the loan and the lender took a large loss.

**Outcome:** The mortgage broker served Federal prison time. Unfortunately, his name has come up again following his release from prison. The agent was not prosecuted only because there was no evidence that she had any knowledge of the fraudulent second sale to the straw buyer.

**Lesson learned:** If the agent becomes aware of a short-term flip of a property for a lot more money, without justification for a higher value, the agent should be alerted that he or she could be implicated in a loan fraud investigation and take appropriate steps of self-defense. Have your own story you would like to share or want to learn more about mortgage fraud?
Go to: www.realtors.org/letterlw.nsf/pages/1006mortgagefraud

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(Source: https://dev.nar.realtor/sites/default/files/Mortgage-REV.pdf)

Short Sales Policy

What is a Short Sale?
A short sale is one where title has transferred; where the sales price was insufficient to pay the total of all liens and costs of sale; and where the seller did not bring sufficient liquid assets to the closing to cure all deficiencies.

What is a “Potential Short Sale”? 
A potential short sale is one where the listing agent reasonably believes the purchase price may not be enough to cover payment of all liens and costs of sale and the seller is unwilling or unable to bring sufficient liquid assets to the closing.

When first dealing with a potential short sale situation members are urged to consult with their broker, attorney and risk manager to determine the correct approach in their particular market area. The following is a suggested workflow for agents interested in representing sellers who are or who may be in a short sale situation. It is intended to educate members regarding issues that arise in connection with short sales. If modified by a broker as necessary to reflect local and state laws, requirements and procedures and the broker’s own office policies, which should be created with the
advice of the broker’s counsel, it may also be used as a guide for agents operating within a broker’s office.

1. Educate and Prepare Yourself
Ask your broker if your company has policies and procedures regarding short sales. Follow those guidelines to the extent they comport with federal, state, and local laws, MLS rules, the REALTOR® Code of Ethics, and your state’s real estate regulations.

Know the laws, procedures, and timelines regarding foreclosure in your state. These vary widely. Some states use court proceedings to effectuate foreclosures. These are called “judicial foreclosures”. Other states use less formal procedures, such as trustees sales, referred to generally as “non-judicial foreclosures”. Some states, such as California, utilize both. The most obvious difference is that non-judicial states have a much shorter timeline to foreclosure, but generally offer a right of redemption, while states utilizing judicial foreclosures usually take longer to complete the foreclosure process, but the former mortgagor did not generally have recourse after the sale. An informal survey of foreclosure timelines suggests that a foreclosure can take as little as 90 days, and as long as a year or more. It is critical that you understand the procedures and timelines in your state, even if the property you are dealing with is not yet in foreclosure.

Read the most up-to-date material on short sales from reputable sources such as the National Association of REALTORS® and your local and state REALTOR® associations. Be aware that there are a number of illegitimate, ineffective and illegal approaches to short sales that are being heavily promoted to sellers and real estate agents alike. Be mindful that your fiduciary responsibility to your seller applies in a short sale situation just as it applies in any other sale.
Research and read online articles and advice on short sales so you will be prepared for seller questions based on those materials. Sellers can become badly misinformed by relying solely on online short sale advice. Seek out other reputable agents and brokers in your area who are doing short sales. What have they learned? What are their best practices? What are the pitfalls? Speak with local attorneys and CPAs who are proficient in short sales.

2. Gather Information from the Seller and Other Sources
It is important to be aware of how much is owed on the property and whether the seller is in default on any mortgage liens, taxes, or association dues. Ask the seller for copies of the most recent mortgage statement(s) including second mortgages and lines of credit. Ask for the most recent property tax statement and association dues bill. Check with the tax assessor, title company, and association, if necessary, to verify the total debt and any arrears and penalties. Know that the seller is not always aware of the total debt, and may minimize or misstate it if you simply rely on a verbal conversation.

Is the seller in default on any liens? If so, has any legal action been taken by the lienholder(s)? This is where it will be important to know what the local procedures and timelines are. If you see that action has been taken, inform the seller in writing. Sellers do not always know they are about to lose their homes.

Is the seller aware that there may be insufficient equity? This can be important because the seller may believe that the value of their home is higher than it actually is. It is especially important to be as accurate as possible in your market value assessment.

Create a careful Comparative Market Analysis (CMA) or Broker Price Opinion (BPO) using the most current comparable sales. Be realistic about the value. Short sellers cannot usually afford to try a high price first then adjust down over time. Include all costs of sale, such as commissions, closing costs, any interest
and penalties on loans or taxes in default. In your best judgment, will there be positive proceeds or does the seller owe more than the property is currently worth after all selling costs?

Finally, find out whether the loan(s) that might be subject to a deficiency in a short sale are “Recourse” or Non-recourse”. In a recourse loan, the borrower retains personal liability for any deficiency after a sale or foreclosure. The lender has “recourse” to the personal assets of the borrower to make up any deficiency. In a non-recourse loan the lender is limited to whatever funds are available from its security interest in the property itself, and cannot force the borrower to repay any deficiency. Each state has its own rules and in some states a loan can be either recourse or non-recourse depending on factors such as whether it was a purchase money loan or a refinance. These are legal questions. Do not try to answer them yourself. Always recommend professional legal, credit, and tax advice.

3. Meet with the Seller to Discuss and Evaluate the Options

Assume you have concluded the seller owes more than the property is now worth. It is important at this point that you advise the seller, in writing, to obtain separate legal, credit, and tax advice. The decisions the seller will be making all have legal, financial, tax, and credit implications. A short sale should never be the first choice because it carries with it serious negative credit and, possibly, tax consequences. Potential short sellers should always be advised that any action they take other than full payment of the mortgage note will have negative credit consequences. Sellers should be encouraged to consult with a HUD-approved credit counseling agency prior to making any decisions. Sellers should be cautioned that when selecting a credit counselor to carefully check the credentials of the agency as not every credit counselor or foreclosure rescue specialist is going to be HUD-approved. What are the options available to the seller? In rough order of “least damage to credit” to “most damage to credit” they are:
Keep the Property. If the seller is unhappy that the property value is less than the loan balance, but is otherwise under no pressure to sell, keeping the property can be the best solution. Even if there is some short term financial distress, it need not result in loss of the property. Ask if there are family or other resources that can carry the seller through if there is some financial stress. Because of the lack of equity, a refinance may not be possible, but be aware of any special “hardship refinance” programs a particular lender may offer including the Making Home Affordable refinancing and loan modification programs of the Obama Administration. The various programs change frequently. If the sellers must move, could they rent the property (even at a negative cash flow) and sell it later in a better market?

Sell the Property and Bring Cash to Close Escrow. This might not sound appealing, but it can be a good choice for sellers who are in a financial position to pay a deficiency from other liquid assets. This approach avoids the credit damage that even a successful short sale will cause. An alternative in some circumstances is for the seller to agree to convert any deficiency into a personal note, or a note on another property owned by the seller. REALTORS® should always advise sellers to consult appropriate legal and tax professionals before considering such a note.

Attempt a Workout with the Lender. Lenders advise NAR that they must speak with the borrower directly about all options before it will consider approving a short sale. Lenders are increasingly interested in helping financially distressed homeowners stay in their homes, and are required to do so if participating in the Making Home Affordable programs. In some cases, they have been willing to reduce or roll back interest rates, or reduce the allowable payment, to help sellers avoid short sales and foreclosures. It is not generally advisable for the agent to take the lead in representing a property owner in a workout. Workouts are not real estate transactions. They are complex contract modifications, and to date, relatively few homeowners in distress have been able to come to a
permanent agreement with their lender. The homeowner should be advised to consult an attorney if this is the option they choose. Note that new laws and emerging policies and procedures by the Obama Administration, Fannie Mae, Freddie Mac, the VA, the FHA, and private lenders make the workout option more complex, but also present greater opportunities for financially distressed homeowners.

Offer the Lender a “Deed in Lieu of Foreclosure”. If the seller owes more money than the property is worth, is unable to make payments, and is likely to lose the property in foreclosure in the near future, offering to trade the property to the lender in exchange for the cancellation of the note might make sense. This approach is more likely to be successful in states with very long foreclosure timelines. The lender can obtain the property much sooner and may feel that the mitigation of loss is worth the cancellation of the note. Like workouts, this is a contract negotiation, and should be undertaken only after consulting with an attorney.

Offer the Lender a “Short Sale” We will discuss the short sale process in greater detail below. Be aware that, on occasion, lenders have “approved” short sales that included personal notes for the deficiency, and unwitting sellers have signed the notes without a full understanding of the consequences. Note that the lender is not a principal in the transaction. The agent represents the seller, not the lender. In a short sale, the offer is negotiated with the seller, just as in a traditional sale. The offer is then submitted to the lender, not for an “acceptance” but for approval of the terms and net proceeds.

The elements of a successful short sale are generally these:

- The property is worth less than is owed.
- The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property.
• The seller is cooperative and willing to work with a real estate broker to package the short sale.
• The lender is contacted and expresses willingness to entertain a short sale.
• The property is listed, with appropriate caveats and protections for the seller, properly priced, and effectively marketed.
• The lender is presented with an offer, accepted by the seller, along with a completed short sale package and narrative explaining why the short sale is necessary and desirable.
• The lender approves the offer and escrow closes as usual. No proceeds go to the seller.

There are tax consequences associated with these options, some of which have changed under the Mortgage Forgiveness Debt Relief Act of 2007, as amended by P.L. 110-343 (10/3/08). Up to $2 million of qualifying mortgage debt forgiven on the taxpayer’s principal residence from January 1 through December 31, 2012 will not be treated as income for the taxpayer, subject to various restrictions. The limit is $1 million for a married person filing a separate return. Mortgage debt reduced (forgiven) through restructuring, such as a workout or a short sale, as well as mortgage debt forgiven in connection with a foreclosure, all qualify for the tax exclusion. The Act applies only to principal residences, not vacation homes or investment property. Also the exclusion applies only to “acquisition indebtedness”, which is generally defined as debt used to originally build, purchase, or improve a property. Although short sales tend to minimize the difference between what is owed and the proceeds turned over to the lender, thereby minimizing the taxable income potentially accruing to the seller, the possibility remains. Sellers should be advised to consult with tax or legal counsel regarding the impact of the new law and other tax rules on their circumstances.
Allow the Property to go to Foreclosure. Usually this is the worst option. It does the most damage to a property owner’s credit. There are circumstances, however, in which it might make sense for a property owner who has no other resources with which to obtain housing to simply stay in the property as long as possible. Also, as a practical matter, if you are contacted by a homeowner who is days or a few weeks away from a foreclosure sale, it will be difficult to stop the sale, though it is always worth trying.

4. Taking and Servicing the Short Sale Listing – A Typical Workflow
Assuming that after full reflection and consultation with appropriate legal, credit, and tax professionals, and consultation with the lender, the homeowner decides that a short sale makes the best sense. What are the factors that will lead to a successful short sale?

The elements of a successful short sale are typically:

**The property is worth less than is owed.** Establish this by doing a careful CMA or BPO, taking into account that the market may be declining. Pay special attention to similar properties that did not sell. The lender will need to see clearly that there is no chance that the property will sell for enough to cover all liens and closing costs. Short sales are considered by buyers to be distressed properties, and will typically command somewhat less than a non-distressed price. Remember that the lender may be thousands of miles away and not at all familiar with your market. Incorporate local newspaper articles about the local market and MLS statistics to strengthen your analysis.

**The seller has some hardship that makes it impossible or extremely impractical for the seller to keep the property.** What are hardships as defined by most lenders? Most lenders focus on and require “changed financial circumstances”. Loss of job, unusual medical costs, death of an owner, natural disasters, even extended military service for reservists, can be hardships. There should be a nexus between the hardship and the need to sell. A job loss
leading to a problem paying the mortgage is obvious, but an illness might require a family to move closer to specialized medical help, so even without an unbearable financial hardship, the homeowner simply cannot stay. Lenders do not consider a decline in value alone to be a hardship.

The seller is cooperative and willing to work with a real estate broker to package the short sale. Is the seller cooperative and willing to sell? You will need the seller to help write a narrative of the hardship involved. The seller will be asked by the creditor to reveal all details of the seller’s financial situation. If there is a formal short sale application, the seller will have to complete it. This can be embarrassing, and some sellers simply won’t do it. Prepare them and make sure they are willing to do what is required. If they are uncooperative, you will not be able to help them.

Important Note: Many troubled loans today are “subprime loans” and/or “stated income loans”. Be especially careful to explain in writing to all sellers that any representations of the seller’s financial status that were made on the initial loan application will be scrutinized in the short sale application process. Sellers may expose themselves to charges of loan fraud if the short sale application information they provide is inconsistent with the material provided on the initial loan application. In other words, if the seller represented on the original loan application that his income was $10,000/month, but on the short sale application represents that his income recently dropped from a high of $5,000/month to $3,000/month, this will raise the question of loan fraud. If the seller is concerned or has questions, it is advisable for the seller to consult with an attorney before completing a short sale application.

The lender is contacted and expresses willingness to entertain a short sale. Contact the lender’s “loss mitigation” department. Ask for the person who will be responsible for processing the short sale application. Try to speak with the same person each time you call. You will need an authorization letter from
the seller verifying that you have permission to speak with the lender on the seller’s behalf. Let the lender know the situation and your proposed short sale solution. Ask for a list of documents that the lender will require. This may vary with each lender. Ask for copies of any proprietary documents the lender specifically wants to see, such as a particular short sale application form or an income and assets sheet. These also will vary by lender. The lender may ask you and other area brokers to do a Broker Price Opinion (BPO) to verify your evaluation. If there is more than one loan subject to a shortfall, you will need to contact multiple lenders and go through the same process. Some lenders are proactive and will immediately send the short sale requirements to you. Others will be non-committal. Even institutions go into denial when faced with bad news. Unless the lender indicates that it will categorically refuse a short sale under any circumstance (a rare occurrence), you can proceed with the next steps.

The property is listed with appropriate caveats and protections for the seller, properly priced, and effectively marketed.

a. Seller Protections: When you list the property it is important to have a record of the discussion you have had regarding the short sale with the seller. The listing agreement should state that the seller’s acceptance of any offer will be subject to the lender’s approval of the offer without requiring that the seller bring cash to close escrow, and an agreement by the listing broker to accept the commission as approved by the lender. Offers to purchase the property would need the same caveat regarding lender approval. This protects the seller against agreeing unconditionally to sell the home, only to have the lender disapprove the short sale. In such a case, the seller could be sued for specific performance or damages by a frustrated buyer. The seller should also explicitly acknowledge that the seller will receive no proceeds, that there are significant tax, credit, and legal ramifications to a short sale, and that the seller has been strongly urged to consult with an attorney and a tax advisor before signing the listing. Many states and real estate companies have addendums to the listing.
agreement that cover these topics. Click here for sample language used by various state associations. If neither your state nor local association of REALTORS® nor your broker has such a document, you should consider adapting (with the permission of your broker) some of the sample language as an addendum to your listing agreement. Click here to see some typical language from the California Association of REALTORS® Short Sale Listing Addendum.

b. Pricing: It makes no sense in a short sale setting to start with an unreasonably high price. Some sellers will ask that you price the property at a “break-even” price for them initially. Use your best judgment, and follow your broker’s policies and procedures, but know that a price that attracts no offers will hurt your seller. If the foreclosure clock is already running, you may run out of time. Price the home at a realistic market price today. Adjust the price quickly if you see no activity or if you have no offers. To make the short sale work, you will need to get an offer to the lender quickly.

c. Commissions: Short sales present a special problem with conditional compensation being offered to a cooperating broker. As a listing agent, you are not entirely sure what your commission will be until the terms of a short sale are approved by the lender. Your MLS may have adopted NAR-approved language such as the following based upon changes adopted by NAR at the May, 2008 meeting:

**Lender Approval Listings**

Multiple Listing Services must give participants the ability to disclose to other participants any potential for a short sale. As used in these rules, short sales are defined as a transaction where title transfers; where the sale price is insufficient to pay the total of all liens and costs of sale; and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. Multiple Listing Services may, as a matter of local discretion,
require participants to disclose potential short sales when participants know a transaction is a potential short sale. In any instance where a participant discloses a potential short sale, they must also be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract required by the lender as a condition of approving the sale will be apportioned between listing and cooperating participants. All confidential disclosures and confidential information related to short sales must be communicated through dedicated fields or confidential “remarks” available only to participants and subscribers.

d. Marketing: Both for the seller’s sake and to generate lender confidence, your short sale listings should be aggressively marketed. Whatever you would do for an ordinary listing, you should do for a short sale listing. Use multiple pictures, virtual tours, websites, and advertising as appropriate. You may want to accelerate the marketing if there is a foreclosure deadline looming. The lender will need to understand that you have done everything possible to sell the property at the highest price. The lender is not your client. You represent the seller, but everybody should understand that the lender is the true decision-maker. You will want to include the marketing history in the short sale package. Once again, if you have no offers within a reasonable time, adjust the price.

The lender is presented with an offer, accepted by the seller, along with completed short sale package, hardship letter, and narrative explaining why the short sale is necessary and desirable.

- The Offer

- The ideal offer should be from a prequalified or preapproved buyer, with no unusual contingencies, such as the sale of the buyer’s existing residence. It should be flexible in terms of closing. The ideal offer might provide “The close of escrow to occur 30 days after buyer’s receipt of acceptance of the
short sale by the lender”. The ideal buyer is willing to be patient. Of course, not all offers will be ideal. If you receive a very low offer, you may wish to attempt to negotiate it between the seller and the buyer as in an ordinary sale setting. Certainly you should counter terms that affect the seller in a negative way, such as early possession without compensation or inclusion of seller’s personal property. Remember that it is the seller who “accepts” the offer. Once the offer is fully negotiated between buyer and seller, it should be signed by both, subject to the approval by the lender as discussed elsewhere in this document. Recognize that lenders will want to see “as-is” offers without credits for repair or closing costs paid to buyers. Policies regarding short sale counter offers vary widely around the country, and also between brokers. Experience suggests that if you receive an offer on the low side of “reasonable” from a qualified buyer, you may still want to pass the offer along to the lender. In a short sale it is more important to get the lender a bona fide offer than it is to negotiate the perfect sale price. The very fact that an offer is presented to the lender for approval may persuade the lender to put the foreclosure process on hold, at least temporarily. The lender will have every opportunity to disapprove the offer and request a different price. Of course, just as in a traditional sale, all offers you receive must be presented to the seller throughout the course of your agency agreement.

- If your state or local Association of REALTORS®, or your broker, provides a short sale addendum, use it in any counteroffer you make. It is designed to protect the seller against liability to the buyer in the event the lender disapproves the short sale. Click here to see some typical provisions from the California Association of REALTORS® Short Sale Addendum:

If you do not have such an addendum readily available, you may wish to ask your broker for similar language you can use in a counter offer.

- The Completed Hardship Letter, Short Sale Package, and Narrative
Every lender is different, and each short sale package can be different as well. You may choose to submit most of the package to the lender when you obtain the listing, and then pass along the offer, or you may wait until you have an offer to submit a complete package. The following are the most common elements. Some will be required, and some are advisable because they help you explain to the lender why the short sale is a good alternative to foreclosure:

- A hardship letter written by the seller describing the seller’s circumstances. The seller should be as persuasive as possible in describing why the seller is in no position to continue with his or her financial obligations to the lender. This letter can make or break the short sale. The reasons given by the seller should be compelling and the seller should be both honest and frank in their disclosures to the lender. Include corroborating material. If the seller was fired, include the termination letter. If the seller has medical bills, summarize them. If the seller is ill or disabled, the seller should explain how that has made it impossible for the seller to keep the property. If there are tax problems, the seller should describe and document them. If the property was damaged and not covered by insurance, as in several recent natural disasters, the seller should document the damage and the denial of the claim.

- A copy of the purchase contract and all supporting documents signed by both the buyer and seller.

- Written proof of the buyer’s ability to purchase the property, i.e., a completed loan application, pre-approval by a lender or evidence of cash on hand (a current bank statement).

- A copy of the certified escrow instructions.

- A preliminary title report if applicable in your state.

- An estimated net/closing statement (HUD-1) certified by an escrow officer who is acceptable to the lender. It is very important that this estimate be as complete and accurate as possible. Many lenders will reference the closing
statement in their acceptance or rejection. You may receive an approval that states “Lender will accept net proceeds of no less than $273,565 no later than November 30, 2009”. If the estimate of net proceeds is wrong for any reason, you may have to attempt to renegotiate with the lender.

- A completed and signed IRS Form 4506, "Request for Copy of Tax Form".
- A completed and signed personal financial worksheet. This will include assets such as other real estate, stocks, bonds, 401Ks, etc.
- Tax returns for the previous two years.
- Employment paycheck stubs for the past two months.
- Profit and Loss statement (if the seller is self-employed)
- Bank statements for the past two to three months.
- A completed Short Sale Application if the lender provides one. Many don’t.
- Your CMA/BPO with supporting sales data. You want to show that the offer you are presenting is the best market price offer the lender is likely to receive.
- A short narrative, written by you, about the market and market trends in the immediate area of the property being sold. Highlight such data as average time on the market, number of short sale and REO listings in the MLS and price trends. Support your conclusions with material such as recent economic data and newspaper articles. The decision maker may well be in another state and will not necessarily understand why the property is suddenly worth less than the loan.
- Your marketing history, showings, and feedback. Here again, you need to show the lender that you have made a real effort to get the highest price. They must understand that you have done a better job than they would have and that you have presented them with a quick and attractive solution to a deteriorating situation.
- A formal request signed by the seller that the short sale be approved as submitted.
*Important Note*: If there are multiple loans, you will repeat this process for each lender. It can be especially difficult to obtain a short sale approval from a second trust deed holder or other junior lienholder that is “wiped out” in a short sale. You will probably need to request that the first trust deed or mortgage holder offer at least a symbolic sum to the second trust deed holder to secure an approval. Anecdotally, second trust deed holders have recently been accepting partial payments as low as $5,000 on trust deeds of $100,000 or more.

- **Following Up.** Once you have submitted the short sale package, stay in touch with the lender every day if possible. Make sure they acknowledge that the package is complete. Try to talk to the same person in the Loss Mitigation Department each time and document your conversations. This is not a happy decision for the lender. It will get shoved to the bottom of the to-do list over and over again. Lenders are infamous for “losing” short sale paperwork. Keep the seller and the buyer’s agent up to date. If there is a drop-dead time limit to the offer, remind the lender of it often.

- **Subsequent Offers.**

- There are different opinions and practices concerning whether to submit all offers received to the lender, or whether to limit the submission to the first offer the seller accepts. Many lenders will require in writing that all offers be submitted, as a condition of reviewing the short sale package. Consult with your broker concerning the broker’s policy regarding subsequent offers. Remember, once again, that all offers must be submitted to the seller, even if they are not then submitted to the lender.

- In some areas, agents are simply submitting all offers to the lender without having the seller negotiate or accept any particular offer. Recognize that, without an accepted offer signed by both buyer and seller, you will not have a contract even if the lender approves. This approach presents certain practical and risk management issues. Consult with your broker about this practice if it appears to be common in your area, or if you are inclined to follow the practice.
5. The Lender Response and the Close of Escrow

- The lender can do one of several things.
  - Ignore the offer. (This happens.)
  - Refuse the offer, either with or without an indication of what net proceeds would be acceptable.
  - Ask the seller to bring some or all of the shortfall to escrow. This is a typical first response. If the seller is unable or unwilling to do so, you will need to contact the lender immediately with a letter from the seller to that effect.
  - Approve the offer.

- If the lender refuses the offer, try to determine the net proceeds the lender would accept. Go back to the buyer and see if he or she will increase the offer to provide those proceeds. This process can be similar to any counteroffer situation, but it takes more time. If the buyer refuses, obtain a cancellation and go to your back-up buyers (if any) in order. If there are no back-up offers, ask the lender to give you some time to place the property in the MLS as an “approved short sale” at the price and terms the lender will accept. If you then obtain a buyer who agrees to that price and those terms, you can proceed to close normally. Note that you may need a new approval from the lender even if the price and terms are exactly the same. Check with the lender.

- If the lender approves the offer. It will typically be in the form of a demand to escrow (and possibly to you) to the effect that the lender will accept no less than X dollars in proceeds no later than X date. The lender may also attempt to reduce your commission. You can certainly argue with the lender about this, but ultimately, the lender will decide. Fannie Mae has issued a written policy directing its servicers not to reduce commissions below the amount in the listing agreement (if that amount is 6% or less) (Announcement 09-03 (2/24/09)). Freddie Mac has informed NAR that it
does not reduce commissions, and NAR has asked Freddie Mac to confirm this by issuing a written policy. Remember that the lender is not accepting the offer, but is simply agreeing to a smaller payment that the lender would otherwise be entitled to. This is why it is so important that the estimated closing statement be accurate. If the lender approves the short sale, it will not care what problems you might have closing the escrow on time, or what unanticipated costs you face. There will simply be a dollar amount that will need to be available at the close of escrow. Once escrow has the approval letter, you can proceed to close in the ordinary way. The buyer may have requested in the purchase contract that the seller move prior to the close of escrow so there are no holdover or possession problems. Remember that the seller is responsible for all the usual disclosures in your state, county, and city. The seller is still the owner of the property and the seller will be conveying title. You will be responsible for all the usual duties of a real estate agent in your state, county, and city.

6. Final Notes.

- Be aware that the Loss Mitigation and Foreclosure Departments are often different entities, and are staffed by different individuals. The Foreclosure Department might not be aware of what the Loss Mitigation Department has agreed to. In some cases, this has led to the property being foreclosed even after the Loss Mitigation Department has agreed to a short sale. Try to speak with the foreclosure department directly if the foreclosure date is close to your estimated closing date.


**Fiduciary Duties**

A real estate broker who becomes an agent of a seller or buyer, either intentionally through the execution of a written agreement, or unintentionally by a course of conduct, will be deemed to be a fiduciary. Fiduciary duties are the highest duties known to the law. Classic examples of fiduciaries are trustees, executors, and guardians. As a fiduciary, a real estate broker will be held under the law to owe certain specific duties to his principal, in addition to any duties or obligations set forth in a listing agreement or other contract of employment. These specific fiduciary duties include:

- Loyalty
- Confidentiality
- Disclosure
- Obedience
- Reasonable Care and Diligence
- Accounting

**Loyalty**

A duty of loyalty is one of the most fundamental fiduciary duties owed by an agent to his principal. This duty obligates a real estate broker to act at all times solely in the best interests of his principal to the exclusion of all other interests, including the broker’s own self-interest. A corollary of this duty of loyalty is a duty to avoid steadfastly any conflicts of interest that might compromise or dilute the broker’s undivided loyalty to his principal’s interests. Thus, a real estate broker’s duty of loyalty prohibits him from accepting employment from any person whose interests compete with, or are adverse to, his principal’s interests. A classic example of breach of this duty of loyalty by a real estate broker is a broker who purchases property listed with his firm and then immediately resells it at a profit. Such conduct ordinarily is perfectly appropriate and lawful by persons acting “at arm’s length.” But a fiduciary will be
deemed to have “stolen” a profit opportunity rightfully belonging to his principal and thus to have breached his duty of loyalty.

Confidentiality
An agent is obligated to safeguard his principal’s confidence and secrets. A real estate broker, therefore, must keep confidential any information that might weaken his principal’s bargaining position if it were revealed. This duty of confidentiality precludes a broker representing a seller from disclosing to a buyer that the seller can, or must, sell his property below the listed price. Conversely, a broker representing a buyer is prohibited from disclosing to a seller that the buyer can, or will, pay more for a property than has been offered.

CAVEAT: This duty of confidentiality plainly does not include any obligation on a broker representing a seller to withhold from a buyer known material facts concerning the condition of the seller’s property or to misrepresent the condition of the property. To do so would constitute misrepresentation and would impose liability on both the broker and the seller.

Disclosure
An agent is obligated to disclose to his principal all relevant and material information that the agent knows and that pertains to the scope of the agency. The duty of disclosure obligates a real estate broker representing a seller to reveal to the seller:

- All offers to purchase the seller’s property.
- The identity of all potential purchasers.
- Any facts affecting the value of the property.
- Information concerning the ability or willingness of the buyer to complete the sale or to offer a higher price.
- The broker’s relationship to, or interest in, a prospective buyer.
- A buyer’s intention to subdivide or resell the property for a profit.
- Any other information that might affect the seller’s ability to obtain the highest price and best terms in the sale of his property.
A real estate broker representing a buyer is obligated to reveal to the buyer:

- The willingness of the seller to accept a lower price.
- Any facts relating to the urgency of the seller’s need to dispose of the property.
- The broker’s relationship to, or interest in, the seller of the property for sale.
- Any facts affecting the value of the property.
- The length of time the property has been on the market and any other offers or counteroffers that have been made relating to the property.
- Any other information that would affect the buyer’s ability to obtain the property at the lowest price and on the most favorable terms.

**CAVEAT:** An agent’s duty of disclosure to his principal must not be confused with a real estate broker’s duty to disclose to non-principals any known material facts concerning the value of the property. This duty to disclose known material facts is based upon a real estate broker’s duty to treat all persons honestly and fairly. This duty of honesty and fairness does not depend on the existence of an agency relationship.

**Obedience**

An agent is obligated to obey promptly and efficiently all lawful instructions of his principal. However, this duty plainly does not include an obligation to obey any unlawful instructions; for example, an instruction not to market the property to minorities or to misrepresent the condition of the property. Compliance with instructions the agent knows to be unlawful could constitute a breach of an agent’s duty of loyalty.

**Reasonable care and diligence**

An agent is obligated to use reasonable care and diligence in pursuing the principal’s affairs. The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. By reason of his license, a real estate broker is deemed to have skill and expertise in real estate matters superior to
that of the average person. As an agent representing others in their real estate dealings, a broker or salesperson is under a duty to use his superior skill and knowledge while pursuing his principal’s affairs. This duty includes an obligation to affirmatively discover facts relating to his principal’s affairs that a reasonable and prudent real estate broker would be expected to investigate. Simply put, this is the same duty any professional, such as a doctor or lawyer, owes to his patient or client.

**Accounting**

An agent is obligated to account for all money or property belonging to his principal that is entrusted to him. This duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to him that relate to his client’s transactions or affairs.


**Social Media**


Social media platforms like blogs and Facebook provide engaging ways to interact with target audiences, but users must know their risks. With well-crafted policies, regular training, and consultation with counsel, associations and members can minimize exposure to liability concerning key risk areas. These include defamation, advertising, intellectual property theft, antitrust violations, Code of Ethics issues, and state regulatory and statutory liability.

**Defamation and Article 15**

For whatever reason, when people communicate using a keyboard, they became braver and make statements they would never make in person, including statements
that may be defamatory. Black’s Law Dictionary defines defamation as “A false written or oral statement that damages another’s reputation.” The nature of the Internet increases the risk of defamation liability: Publishing a defamatory statement is as easy as typing a nasty comment and clicking "post." A statement published online is often out there forever and can be easy to find. All a plaintiff’s attorney has to do is search for the defamatory statement, hit "print," and head to the courthouse.

Why is this important to associations and REALTORS®? Increasingly, both host social media platforms where association staff, REALTORS® and the public can post comments. This exposes associations and REALTORS® to defamation liability on several fronts: For comments posted by association staff, the REALTOR® (or firm) hosting his site, and for those by third parties.

An association or REALTOR® firm should assume that comments posted by its employees/independent contractors on its website can result in liability. To mitigate this risk, the organization should have a well-crafted social media policy drafted by an attorney. Social media risk management training should also be provided to all staff annually, and perhaps more frequently to association staff that post regularly. This training should be supplemented with risk-management communications throughout the year.

With respect to defamatory third-party postings on association sites, associations enjoy considerable protection under federal law. Section 230 of the Communications Decency Act affords significant immunity for such postings to interactive online service providers, including blogs and other social media platforms provided by associations. Even with this protection, association staff should remove disparaging comments immediately and include a no-tolerance policy for defamatory statements in the association's online terms of use.

Individual REALTORS® and REALTOR® firms operating social media sites technically enjoy Communications Decency Act protection from defamatory third party postings.
However, Article 15 imposes a higher duty on REALTORS® using social media. Article 15, Standard of Practice 15-3 states:

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

This means that REALTORS® and REALTOR® firms have an affirmative obligation to publish clarifications about or remove defamatory comments made by others. Most website hosts do not have this obligation, but REALTORS® have a higher duty.

Please note that recent National Labor Relations Board decisions require social media policies to be narrowly drawn to protect employee speech about the terms and conditions of employment. The NLRB has jurisdiction over all nonsupervisory employees, not just union employees, so it is critical to work with an attorney familiar with this area of the law when drafting a social media policy.

**Advertising**

Blogs and other social media platforms are increasingly being used as an advertising vehicle for members. It is important to remember that many states require real estate licensees to include specific disclosures on all advertisements – for example, the firm name; licensee name; city and state of main/branch office; and states of licensure must be included on all online advertising in Virginia. Therefore, it is very important for members to determine what constitutes advertising in their states and what disclosures are required.

REALTORS® should also relook at Article 12 and its Standards of Practice before engaging in online advertising using social media. I have seen many cases where
REALTORS® did not keep property information current on their sites (see Standard of Practice 12-8). A more blatant example of a potential violation of Article 12 involved a listing agent using Photoshop to create a paved driveway in the MLS picture, when in reality the driveway was dirt. When asked about the discrepancy by the buyer agent, the listing agent replied that he had “engaged in virtual outdoor staging.” I’m guessing an ethics panel would look unfavorably on that tactic.

**Intellectual Property Infringement**

Social media platforms allow users to post comments, pictures, speeches, music, and videos with ease. This functionality obviously has benefits, but it also creates liability risks: It allows members and staff to publicly share information that does not belong to them and potentially infringe on another’s intellectual property rights.

Intellectual property can be broadly defined, but it most often refers to copyright, patent, and trademark rights. Examples of intellectual property that can be protected include articles, books, photographs, speeches, software code, and music (copyright); a new machine (patent); and an association logo (trademark). Registration of copyrighted works is not necessary to confer ownership, so the lack of a copyright mark does not mean that material found on the Internet is unprotected and can be used freely.

Associations and members must take steps to prevent intellectual property infringement on their social media sites. Internally, they should have a social media policy that clearly outlines do's and don'ts. Posting material the association or member does not own without permission should be high on the list of don’ts. Associations and members should frequently train employees/independent contractors on social media policies and intellectual property issues generally.

To reduce liability risk for content posted by third parties, associations and members should prominently display their terms of use on their websites, clearly explaining takedown procedures for infringing material, describing consequences for
infringement, and providing contact information so that a user may notify the association or member of a possible infringement. Ideally, users should be required to click a box acknowledging that they agree to the terms of use when they log on to an association social media platform. Some courts have required this level of agreement before the terms are binding on users.

A safe-harbor provision in the Digital Millennium Copyright Act, which includes elements discussed above, provides substantial protection for associations and members against copyright infringements by third parties. Associations should consult their attorneys about properly utilizing such protections.

**Antitrust Violations**

Associations are especially vulnerable to antitrust liability because they constitute a group of competitors that cooperate for some purpose. Typically, this cooperation is meant to advance the industry generally, and most of this activity complies with the law. However, activity that attempts to interfere with competition is a potential violation of antitrust law—including, for example, price fixing, anticompetitive membership restrictions, and improper standard-setting or certification conduct. Violations can carry severe penalties, both civil and criminal.

A violation can be inferred from an actual or informal agreement to restrain trade. For example, imagine a membership meeting in which a member stands up and suggests that all members should charge a certain commission. If members later start setting the same price for their commissions, it is possible that an antitrust violation may have occurred.

Associations must monitor their social media sites for antitrust red flags. For example, a member might post a comment on an association blog suggesting that all members refrain from doing business with a certain company. Even if no one agrees publicly, staff should encourage users of the site to (in antitrust parlance) "loudly dissociate" from the comment, stating their disagreement and saying they want no part of a
boycotting conspiracy. The anticompetitive post should also be deleted as soon as possible. Other protective measures associations should implement:

- The association should have an antitrust policy.
- The policy should be linked or displayed on all association sites.
- Staff and volunteers should be trained on antitrust law, especially those responsible for monitoring social media platforms.

**Conclusion**

Social media platforms are useful tools for associations and members in their practices, but they can create significant legal problems. Associations and members should work with counsel to establish a social media policy, terms of use, and other policies for staff, volunteers, and members to minimize the liability risk.


**Text Messages Can Form Contract. National Association of REALTORS®.**


Two courts from Massachusetts have determined that parties can enter into a valid real estate purchase contract via text message. However, both courts ruled that no contract was formed via text, as the real estate professional lacked the authority to bind the principal in the first case and the purported agreement failed to satisfy the Statute of Frauds in the second instance.

In *St. John’s Holdings, LLC v. Two Electronics, LLC (link is external)*, a company was seeking space for its medical marijuana facility. After locating a suitable space, the parties began their discussions and the principals for each company met twice to establish a contractual framework for the transaction. Following the second meeting, the owner told the buyer to work through the listing broker for the remainder of the discussions.
After a series of offers were made, the buyer then sent a third offer containing all of the changes requested by the seller. The listing broker then sent the following text:

Steve. It [Seller] wants you [Buyer] to sign first, with a check, and then he will sign. Normally, the seller signs last or second. Not trying to be stupid or contrary, but that is the way it normally works. Can Rick [McDonald] sign today and get it to me today? Tim.

The buyer delivered a signed offer along with the deposit check. The seller never deposited the check nor signed the agreement but instead entered into an agreement to sell the property to another party. The buyer brought a lawsuit claiming that the listing broker’s text created an offer that they accepted by delivering a signed offer and the deposit check to the listing broker.

The Massachusetts Land Court, Essex County, ruled that the text failed to establish a contractual relationship between the parties. The court found that while the parties could form a contract via text message, the parties would need to have a written agreement that contains all of the material terms and is signed in order to satisfy the Statute of Frauds.

The court ruled that the earlier negotiations between the parties had created a contractual framework that satisfied the Statute of Frauds but the listing broker did not have the authority to bind the seller. The principals had negotiated the framework of the agreement that contained all of the material terms and the listing broker had signed his text message, but the listing broker’s text did not constitute an offer to the buyer. While the seller had told the buyer to work through the listing broker, the court concluded that it was clear to all the parties that the listing broker was merely an intermediary and did not have authority to sell the property. Therefore, the seller was not bound by the listing broker’s text and there was no contract between the parties.
Donius v. Milligan involved a residential property on Cape Cod. After the buyers visited the property, the real estate professionals began negotiating the terms of a possible purchase through email and texts. Here are the texts sent back and forth:

May 12
[Buyer’s Rep]: Good afternoon. I emailed an offer over to you [f]or 93[C]ommercial.
[Listing broker]: Hi Mike. Won’t hear back til morning. Talk to you then.

May 13
[BR]: Hi, he said he would split the difference at $962,500.
[LB]: OK. I’ll convey.

May 14
[LB]: Hi Mike. The sellers accept the price.

Following receipt of the last message, the buyer’s representative emailed the listing broker a signed purchase agreement plus a copy of an earnest money check. The check was never sent to the listing broker and the seller never signed the agreement, and the seller then sold the property to another buyer. The buyer brought a lawsuit seeking to enforce the contract.

The Massachusetts Land Court, Barnstable County, ruled that there was no agreement between the parties. While the court found that the parties could create a real estate contract through text messages, the negotiations here did not create a contract. Unlike the first case, the buyer and seller had never discussed the contractual terms, such as a financing clause and inspection clause. Further, the text message failed to satisfy the Statute of Frauds, as the messages did not contain any of the material terms of the transaction except for the price and the messages were not signed by the parties. Thus, there was no contract formed via text message.
Risk Management Tools
What are some of the ways a real estate licensee can help to protect themselves from lawsuits and from being accused of a violation of the Licensing Act or the Code of Ethics?

Ways to spread the risk:

- Errors and Omissions Insurance
- Seller’s Disclosure (make sure it is the seller’s words)
- Create a safety policy for meeting clients for the first time
- Determine that buyers are qualified to buy before showing them property
- Encourage the buyer to get a General Home Inspection and any specific inspections that are recommended.
- Always do a final walk through inspection before closing with your buyers.
- Tell the buyer anytime you are relying on information from a third party.
- Knowledge of the laws and rules (Fair Housing Act, License Act, Rules of the Commission, Code of Ethics)
- Good record keeping (Records that reflect when you gave any of the required disclosures.)
- Print out text or e-mails to keep in the file in case they are needed.
- Residential service policies
- RSC Disclosure Form
- Avoid commission breath
- Concentrate on service to the client (money will come, as a result)

Before You Go
Think about the above risk management tools. Which three do you think are the most important?
Lesson Summary
This lesson was a review of things we covered in more depth in earlier lessons. It focuses on helping the learner be aware of every day practices and provides guidance on risk management.

Every day real estate licensees have to remember how to work with and for buyers and seller. All the rules of disclosure, representation and fiduciary duties, contract rules and how to represent their broker must be on their mind.

If a supervising broker has a high amount of control over the day-to-day activities of his or her affiliated licensees, including having set work hours, sales quotas and set procedures, then the licensees are probably the broker’s employees. Employees generally receive a guaranteed salary and are eligible for any company benefits, such as health insurance, tuition reimbursement or retirement plans, and they usually do not have to pay their own business expenses. On the other hand, independent contractors usually have a great deal of freedom regarding their day-to-day activities; many independent contractors even work from home. Independent contractors are likely to receive only commissions or a percentage of their sales, not a salary, and they are usually not eligible for company benefits.

Unlicensed assistants must work under the direct supervision of a licensed broker or salesperson, and they are not allowed to perform any task for which a license is required. This means that an unlicensed assistant may not procure prospects, show properties, answer questions about the price or condition of the property or negotiate a transaction, among other activities, but he or she is allowed to perform tasks like greeting potential buyers at open houses, typing correspondence and documents, answering the phone, scheduling appointments, writing ads and accounting for funds.
Good agents certainly never want to do harm and hope to represent their clients in a very professional, helpful manner. One to the things agents must spend time thinking about and developing systems to handle are protection of their own safety and good risk management techniques. Having a plan in advance of things going badly can literally be a life saver.