Acknowledgments

MCE Advisory Committee
Jan Agee, Arlington, TX
Loretta Dehay, Austin, TX
Louise Hull, Victoria, TX
Chuck Jacobus, Bellaire, TX
Larry Jokl, Brownsville, TX
Kathleen McKenzie-Owen, Pipe Creek, TX
Tom Morgan, Austin, TX
Minor Peeples, Corpus Christi, TX
Ron Walker, Austin, TX
Avis Wukasch, Georgetown, TX

Real Estate Center Staff
Gary W. Maler, Director
Denise Whisenant, Education Coordinator
David S. Jones, Communications Director
Nancy McQuistion, Associate Editor
Kammy Baumann, Assistant Editor
Robert P. Beals II, Art Director
JP Beato III, Graphics Designer
Brian Pope, Associate Editor
In cooperation with the Texas Real Estate Commission, the Real Estate Center at Texas A&M University developed this real estate ethics curriculum with the assistance of an advisory committee of active licensees, attorneys and education providers. Real estate licensees are encouraged to acquire additional information and to take courses in specific, applicable topics.

This curriculum has been developed using information from publications, presentations and general research. The information is believed to be reliable, but it cannot be guaranteed insofar as it is applied to any particular individual or situation. The laws discussed in this curriculum have been excerpted, summarized or abbreviated. For a complete understanding and discussion, consult a full version of any pertinent law. This curriculum contains information that can change periodically. This curriculum is presented with the understanding that the authors and instructors are not engaged in rendering legal, accounting or other professional advice. The services of a competent professional with suitable expertise should be sought.

The authors, presenters, advisory committee, Real Estate Center and Texas Real Estate Commission disclaim any liability, loss or risk personal or otherwise, incurred as a consequence directly or indirectly from the use and application of any of the information contained in these materials or the teaching lectures and media presentations given in connection with these materials.

When using this course for three hours of Ethics MCE credit as required by the Texas Real Estate Commission, the student course manual must be reproduced and used in its entirety, without omission or alteration.
Contents

Chapter 1. Canons of Professional Ethics ......................................................1
  Fidelity ........................................................................................................1
  Integrity ......................................................................................................1
  Competency ..............................................................................................2
  Consumer Information Form 1-1 ..............................................................2
  Discriminatory Practices ..........................................................................2
  TREC Complaints ....................................................................................2
  Commission Investigations ......................................................................3
  Association Complaints ..........................................................................4

Chapter 2. Agency Relationships .................................................................5
  Fiduciary Duties ........................................................................................5
  Information About Brokerage Services and Agency Disclosure ...............5
  Disclosure of Agency Representation .....................................................6
  Intermediary Brokerage Relationship Services .......................................7
  Subagency ................................................................................................12
  Conflicts of Interest ................................................................................12
  Conflicts Arising in Early Termination of Agency .....................................13

Chapter 3. Offers .....................................................................................15
  Minimum Services ..................................................................................15
  Presentation of Multiple Offers ..............................................................17
  Seller’s Acceptance ..............................................................................18
  Revocation of Offers/Counteroffers ......................................................18
  Effective Date ........................................................................................18
Canons of Professional Ethics

Title 22 of the Texas Administrative Code (TAC), Chapter 531 includes five canons of professional ethics and conduct. The canons apply to real estate licensees and are included in the rules of the Texas Real Estate Commission (TREC). Acting as a fiduciary, the real estate licensee must exercise a standard of duty and care when representing a client in a real estate transaction. The licensee must subordinate his or her own interest to the client’s interest. The canons also support the Federal Fair Housing Act in forbidding discrimination in real estate activities. These canons are similar in content to general business ethics and common law agency principles from a variety of sources including case law, statutory law and the REALTOR® Code of Ethics. The five canons are:

**Fidelity (22TAC 531.1)**

A licensee represents the interests of the agent’s client. The agent, in performing duties to the client, must

- make his or her position clear to all parties concerned in a real estate transaction;
- treat other parties to a transaction fairly;
- be faithful and observant to the trust placed in the agent;
- perform his or her duties scrupulously and meticulously; and
- place no personal interest above the interest of his or her client.

**Integrity (22TAC 531.2)**

A licensee

- has a special obligation to perform his or her responsibilities; and
- uses caution to avoid misrepresentation by acts of commission or omission.

Notes

The duties of fidelity, integrity, and competency are aspirational goals expressed in the preambles to the Code of Ethics of the National Association of REALTORS® and the Code of Ethics of the CCIM Institute (Certified Commercial Investment Member).

The Code of Ethics of the National Association of Real Estate Brokers (the Realtists) imposes a duty on Realtists to protect the public against misrepresentation, unethical practices, or fraud in their practices (Part I, §3).
Competency (22TAC 531.3)

A licensee should

☑ be knowledgeable as a real estate practitioner;
☑ be informed on market conditions that affect the real estate business;
☑ continue his or her education in the intricacies involved in marketing real estate for others;
☑ stay informed about national, state and local issues and developments in the real estate industry; and
☑ exercise judgment and skill in the performance of his or her work.

Consumer Information Form 1-1 (22TAC 531.18)

Each real estate inspector or active real estate broker licensed by the Texas Real Estate Commission must display Consumer Information Form 1-1 prominently in each place of business that the broker or inspector maintains.

Discriminatory Practices (22TAC 531.19)

No real estate licensee shall inquire about, respond to or facilitate inquiries about or make a disclosure, which indicates or is intended to indicate any preference, limitation or discrimination based on protected classes.

Protected classes include race, color, religion, sex, national origin, ancestry, familial status, or handicap of an owner, previous or current occupant, potential purchaser, lessor or potential lessee of real property.

A handicapped individual includes a person who had, may have had, has or may have AIDS, HIV-related illnesses or HIV infection as defined by the Centers for Disease Control of the U.S. Public Health Service.

TREC Complaints

A person may file a complaint with TREC against a real estate licensee if the person believes the licensee violated the Real Estate License Act. Assuming that the commission has jurisdiction over the complaint, the commission will typically investigate the allegations by interviewing the parties and witnesses and gathering relevant information. After review of the information, TREC’s enforcement division will notify the licensee if it intends to initiate disciplinary proceedings against the licensee. After a hearing or other settlement procedure, the
commission will render a decision. If the evidence establishes a violation of the Real Estate License Act, the commission may impose disciplinary action which may include:

- a reprimand;
- suspension of the license;
- revocation of the license;
- a fine;
- probation; or
- any combination of the foregoing.

**Commission Investigations**

The commission is required to maintain a system to promptly and efficiently act on complaints filed with it and must maintain a file on each complaint. The commission must also ensure that it gives priority to the investigation of complaints filed by a consumer and any enforcement case resulting from the consumer complaint. The commission is required to assign priorities and investigate complaints using a risk-based approach based on the degree of potential harm to the consumer, potential for immediate harm to a consumer, overall severity of the allegations and the complaint, number of license holders potentially involved in the complaint, previous complaint history of the license holder, and the number of potential violations in the complaint.

In addition to suspension and revocation, the commission may order a licensee to pay a refund to a consumer as provided in an agreement resulting from an informal settlement conference, or an enforcement order, in addition to imposing an administrative penalty or other sanctions.

The commission is required to adopt procedures governing informal disposition of the contested case, which, if utilized, may expedite disciplinary matters and avoid formal hearings. These informal dispositions must provide the complainant and the license holder the opportunity to be heard. They require the presence of a public member of the commission for a case involving a consumer complaint, and at least two staff members of the commission with experience in the regulatory area that is the subject of the proceeding.

In consumer cases involving more serious allegations, the commission has some authority to take immediate, temporary action. In such a case, a disciplinary panel consisting of three commission members determines whether a person’s license to practice should be temporarily suspended. If the disciplinary panel determines from the information that a person licensed to practice would constitute a continuing threat to the public welfare by continuing to practice, the panel must temporarily suspend that person’s license.

---

*Notes*
Association Complaints

The Association of REALTORS®, the Realtist Organization and other trade associations receive complaints alleging ethics violations against their members. Such complaints may be directed to the local association to which the member belongs. Typically, a grievance panel will conduct an initial review to determine if the complaint alleges a violation of the organization’s code of ethics. Additionally, the grievance panel will determine if the matter is appropriate for review by its organization given its specific rules. After the grievance panel’s review, a hearing may be called. The hearing panel, made up of peers, hears the testimony and presentation of evidence. The hearing panel will decide if any violation of the association’s code of ethics occurred. The hearing panel may order disciplinary action against the respondent, which may include:

- a reprimand;
- fine;
- probation;
- suspension of membership;
- revocation of membership;
- or any combination of the foregoing.

The panels advise the parties of any rights to appeal the decision.

NAR’s Code of Ethics and the CCIM Code of Ethics prohibit their members from the following:

- denying equal professional services to any person on the basis of protected class;
- being a party to any agreement or plan to discriminate on the basis of protected classes;
- discriminating in their employment practices on the basis of protected classes;
- volunteering information regarding racial, religious, or ethnic composition of any neighborhood;
- engaging in any activity that may result in panic selling; and
- printing or distributing material that indicates any preference or limitation or discrimination based on a protected class (Art. 10).

CCIM members may provide demographic information when involved in the sale or lease in commercial property if the information is needed to complete the transaction and is obtained from a recognized, reliable, independent, and impartial source (SP10–3).

Part I, §2 of the Realtist Code of Ethics provides that a Realtist should never be instrumental in establishing, reinforcing or extending restrictions that limit the use or occupancy of property to any racial, religious or national origin groups.
Agency Relationships

Agency relationships can be confusing, not only to buyers and sellers, but to brokers and their agents, as well. Increasing your understanding of this important concept will greatly aid you and your clients in future transactions. It is important to keep in mind the difference between a customer and a client.

☑ Customer — a person(s) who is unrepresented by an agent but may receive information and assistance from a licensee (for example, a listing broker who assists a buyer who is not represented)

☑ Client — a person(s) whom the agent has agreed to represent

Fiduciary Duties

A fiduciary is a person who has a high duty of care for another person, the client. The law requires the fiduciary to place the client’s interest ahead of his or her interest. When a licensee begins to provide agency services to a party, or a party believes that such services are being provided, the fiduciary relationship begins.

Fiduciary relationships are common and can involve attorneys, trustees, investment brokers and real estate agents, among others. The principal, or client, is the person with whom the licensee has a fiduciary relationship. Although the licensee’s duty is to act in the principal’s interest, the licensee owes a duty of honesty and fairness to all parties in the transaction.

Information About Brokerage Services and Agency Disclosure

At the first substantive dialogue with a client or prospect, always provide the Information About Brokerage Services form, which is a written statement containing the statutory information relating to brokerage services. The statute permits the Information About Brokerage Services to appear in any format as long as it is in at least ten-point type (1101.558(e)).

Notes

The duty to treat other parties to a transaction honestly is also found in Article 1 of the NAR Code of Ethics and the CCIM Code Ethics, and is expressed as a theme in the Realtist Code of Ethics.

The duty to disclose who the agent represents at the first contact with the other party in the transaction or the other party’s agent is also expressed in NAR’s and CCIM’s Codes of Ethics (SP 16-10, 11, & 12).
The commission publishes a form entitled Information About Brokerage Services that most licensees use to comply with the statute.

A substantive dialogue is a meeting or written communication that involves a substantive discussion relating to specific real property. A substantive dialogue does not include a dialogue at an open house or a meeting after the time of the contract. The Information About Brokerage Services form is not required if the transaction is a residential lease for one year or less and a sale is not being considered. For example, a face-to-face meeting with a prospective client in which you are discussing properties is a substantive dialogue. Any written correspondence (including e-mail or other electronic means) about specific properties constitutes a substantive dialogue. A telephone conversation by itself may not constitute a meeting that would require providing the form, but any written follow-up or face-to-face meeting would require that the client receive the form. However, a telephone conversation could, arguably, be classified as a meeting at which a substantive dialogue occurs.

The Information About Brokerage Services form is not required if the licensee is meeting with a party represented by another licensee. For example, if you are the listing broker and happen to meet a buyer you know is represented by a buyer’s agent, you do not need to provide the form.

The form published by the commission provides for signatures. The signatures are not required by statute; however, it is prudent to request acknowledgement of the principal’s receipt of the form.

**Disclosure of Agency Representation**

Keep in mind that the Information About Brokerage Services form only informs parties as to the potential representation and does not disclose the licensee’s agency or representation. A licensee representing a party is required to disclose such representation at the first contact with another party to the transaction or another licensee who represents another party to the transaction. This agency disclosure may be oral or in writing. For example, when making an appointment with a listing agent or seller to show a property, a buyer’s agent must disclose that he or she represents the buyer. This could be accomplished by stating that you represent a buyer interested in the property. Other examples include when the

☑ listing agent meets a prospect at an open house; or
☑ listing agent meets a prospect at the listed property.

When making appointments through a centralized showing service, the disclosure is not required to the service.

---

*Notes*

The NAR and CCIM Codes of Ethics require the member to advise their clients of any potential for the member to represent more than one party in the transaction. This communication is required at the time a listing or buyer representation agreement is signed (SP 1-12 & 13).
Intermediary Brokerage Relationship Services

Intermediary status was created by statute in 1996 to acknowledge that a broker may be in the position of assisting two principals involved in the same transaction. A broker who represents the buyer and the seller in the same transaction must act as an intermediary. An intermediary is a broker who is employed to negotiate a transaction between parties and, for that purpose, may act as an agent of the parties. For a broker to negotiate a transaction for two principals as an intermediary, the broker first must obtain written permission from the parties to act in such capacity, and the agreement must state the source of any expected compensation.

When entering into an agreement with a principal, the agreement may address whether the intermediary relationship is a possibility. To authorize the possibility of an intermediary relationship in a listing agreement or buyer representation agreement, the statute requires that the agreement be in writing and that the following be in bold print:

- Intermediary may not disclose that the seller will accept a price less than the asking price, unless authorized in writing to do so by the seller;
- Intermediary may not disclose that the buyer will pay a price greater than the price submitted in a written offer, unless authorized in writing to do so by the buyer;
- Intermediary may not disclose confidential information, unless authorized in writing to disclose the information, or required to do so by the Texas Real Estate License Act, or a court order or if the information materially relates to the condition of the property;
- Intermediary may not treat a party dishonestly; and that the intermediary may not violate the Real Estate License Act.

Note: The foregoing are requirements under Section 1101.651(d) of the Real Estate License Act.

The intermediary may appoint different associated licensees to communicate with and carry out instructions of the respective parties. The appointment of associated licensees requires the written consent of the parties and written notification of appointments to the parties. The appointed licensees must still comply with the requirements listed above.

Each appointed licensee may provide opinions and advice to his or her respective party. The intermediary is required to treat both parties fairly and impartially. The appointed licensees are not subject to the intermediary’s duty of impartiality.

Notes

Brokers or firms will have specific company policies in place that address whether the firm authorizes the intermediary relationship, whether appointments will be made, how appointments are to be made, and other procedures that must be followed. Each licensee should be familiar with his or her company’s policies and procedures. If the licensee questions whether the company’s policies are in compliance with the Real Estate License Act, the licensee should address such questions to his or her broker.
If appointments are made:

1. there must be a written authorization from both parties for the broker to act as an intermediary (this may be done in the written buyer representation agreement and the written listing agreement);

2. the intermediary may not appoint himself or herself to either party;

3. the intermediary cannot make appointments to one party without also making appointments to the other party;

4. the intermediary must give a written notice to each principal that appointments have been made and identify the respective appointees to the principals; and

5. the appointees must keep confidential information confidential.

An intermediary is not required to make appointments in every transaction. There should be clear company policies regarding appointments.

**Example 1.** Agent A lists a shopping center. Agent B, working for the same company, comes in with a buyer. In this example, the broker’s policy in such a situation is to appoint Associate A to the seller and Associate B to the buyer. In this case, the intermediary (broker) does not provide any opinions or advice to either party during negotiations. Each associate may provide opinions and advice during negotiations to the parties to whom each is appointed. The intermediary (broker) and the appointed associates remain obligated to comply with the items under §1101.651(d).
**Example 2.** Assume the same facts as Example 1, except now the broker’s policy is that he does not make appointments. In this example, the associates may not provide opinions or advice during negotiations to the party(s) each is servicing. The associates may facilitate the transaction and assist the parties as neutral service providers.

**Example 3.** In a multiagent brokerage, Associate A brings in both the buyer and seller. The Real Estate License Act permits the broker to select an appropriate course of action in this example.

**Alternative 1**—The intermediary may choose to make no appointments, in which case the intermediary (broker) and Associate A may not provide opinions or advice to either party during negotiations and remain obligated to comply with the items under §1101.651(d). Associate A and the intermediary may process or facilitate the transaction.
Alternative 2—The intermediary may choose to reassign one or both of the parties to another agent. In the following example, the buyer is reassigned to Associate B. The intermediary (broker) does not provide any opinions or advice to either party during negotiations. Each associate may provide opinions and advice during negotiations to the parties to whom each is appointed. The intermediary (broker) and the appointed associates remain obligated to comply with the items under §1101.651(d). The broker must have written consent for appointments. The issue of compensation is a matter of the brokerage’s policy and is an internal concern.

Example 4. What if the broker is a solo practitioner? May the solo practitioner act as an intermediary? Yes, but the solo practitioner cannot make appointments of associated licensees. The intermediary (broker) does not provide any opinions or advice to either party during negotiations and remains obligated to comply with the items under §1101.651(d). No appointments are possible. The intermediary may process or facilitate the transaction.

Notes
Example 5. When a broker owns a small brokerage and actively lists and sells property, may the broker appoint himself or herself to one of the parties?

The broker shall not appoint himself or herself to one of the parties because the broker would be in two different roles. The broker may choose to make no appointments, and the broker and Associate B would not provide opinions or advice during negotiations. Each could process or facilitate the transaction. Alternatively, the broker could reassign the seller to another agent in the example above and make appointments.

Example 6. A broker orally agrees to represent a buyer. The buyer now wants to buy one of the broker’s listings. The broker must get a written consent from both buyer and seller to act as an intermediary before proceeding and the written consent must comply with statutory requirements (Sec. 1101.559). One practical solution is to have a written buyer representation agreement containing the consent for the broker to act as an intermediary.

What happens if the buyer does not agree to give written consent to act as an intermediary? The agent must advise the buyer that he or she is no longer represented and that fiduciary duties are owed to the seller under the listing agreement.

A related question is: “I have a listing and an unrepresented buyer wants to make an offer. Must I act as an intermediary?” No. A broker representing one party (client) to a transaction in which the other party is unrepresented (customer) is not an intermediary. One may assist the buyer and represent the seller in this example. Agents should check with their brokers about this situation as many companies have policies addressing this and other situations.

Notes
Subagency

“Subagent” means a license holder who represents a principal through cooperation with and consent of a broker representing the principal. The subagent is not sponsored by or associated with the principal’s broker. Subagency is less common today than in previous years. It would commonly occur when a buyer was not represented, but utilized the services of a broker who sold or leased to the buyer a property that was listed by another brokerage firm. It is akin to the contractor subcontractor relationship. The subagent acts for the listing broker and, therefore, indirectly for the seller’s interest. While a subagent is considered an agent of the principal, the subagent should obtain the consent of the listing agent before attempting to negotiate directly with the principal. Any broker who acts as a subagent should exercise caution so that the buyer is aware of the relationship and is not confused.

Conflicts of Interest

☑ When buying, selling or leasing property on his or her account, the licensee must disclose in writing that he or she is a licensee.

☑ The licensee may not use his or her expertise to the disadvantage of the other party.

☑ The licensee may not act in the dual capacity as an agent and undisclosed principal in the transaction.

☑ The licensee must exercise extreme care when purchasing property either currently or recently listed by his or her broker.

☑ A mortgage broker may not act as a mortgage broker and a real estate licensee in the same transaction without knowledge and written consent from the mortgage applicant.

☑ If you receive a commission, rebate or fee from a service provider, you must obtain your principal’s consent and you must also disclose to the person being referred to the service provider that you are receiving the commission, rebate or fee.

☑ The licensee may not receive compensation (money, trips, bonus bucks) from more than one party without the knowledge and consent of all parties to the transaction.

---

Notes
The licensee may not interfere with the exclusive agency relationship of another broker.

If the licensee represents two buyers who are making offers on the same property, the licensee should obtain the consent of both buyers to represent competing buyers.

Conflicts Arising in Early Termination of Agency

The agency relationship is a highly personal relationship. It requires continuing consent of the principal and the agent. Agency may be terminated at any time by either party; however, an early termination without cause may expose the terminating party to liability under the agency agreement. If an agent continues to offer the property for sale without the consent of the principal, it constitutes a violation of the Real Estate License Act. Upon receipt of a notice of termination from a principal, the agent should cease acting as the principal’s agent. A listing agent should cease all advertising. For example, remove signs, remove MLS listing, remove information from web site, etc.

If a principal approaches a licensee and informs the licensee that the principal is subject to an existing exclusive agency relationship with another broker, the licensee should not provide any services until confirmation that the prior agency relationship has been terminated. The licensee should not interfere with an existing exclusive agency relationship under any circumstances. For example, the licensee should not suggest to the principal how the existing agency relationship should be terminated.
Minimum Services

Commission regulations have addressed this issue in a number of ways.

Under 22 TAC §535.156. The licensee

☑ has an obligation to submit all offers.

☑ must convey all known information that will affect the principal’s decision to make, accept or reject offers.

☑ must deal fairly and honestly with all parties, but he or she owes a duty of fidelity to his or her principal.

☑ has an affirmative duty to keep the principal informed, at all times, of significant information applicable to the transaction.

☑ The licensee has a duty to convey accurate information.

Under commission rules (22 TAC 535.2), brokers are obligated to negotiate the best possible transaction for their clients. In 2005, the legislature amended Section 1101.557 of the Real Estate License Act to clarify a broker’s duty to negotiate. The amendment states that a broker who exclusively represents a client may not instruct another broker to violate the Real Estate License Act by telling another broker to negotiate directly with the broker’s client.

Section 1101.652(b) (22) of the act provides that a broker may not negotiate a transaction directly with a principal in the transaction if the broker knows that the principal is subject to an exclusive agency relationship with another broker. The amendment to Section 1101.557 provides that the mere delivery of an offer by one broker to a client of another broker does not violate Section 1101.652(b)(22) if the delivery is made with the consent of the client’s broker and the client’s broker receives a copy of the offer. Section 1101.557 also provides that the broker who exclusively represents a client must, at a minimum,
1. answer the client’s questions if there are any about the offer or issues related to the offer;

2. keep the client informed of material information; and

3. present offers to or from the parties.

For example, a listing broker may NOT instruct a buyer’s broker to negotiate directly with the seller. Instead, he or she may request the buyer’s broker deliver an offer to the seller. If the buyer’s broker delivers the offer to the seller at the listing broker’s request, the buyer’s broker must send a copy of the offer to the listing broker and may not engage in any other activity with the seller that constitutes a negotiation. All the buyer’s broker may do is perform the administrative task of delivering the offer to the seller. If the listing broker receives an offer, the listing broker must inform the seller that an offer has been received. The listing broker may not withhold any material information from the client. A buyer’s broker might refuse to deliver the offer to the seller and, instead, might send the offer to the listing broker. The listing broker would then be required under law to inform the seller that the offer has been submitted. Regardless of whether the buyer’s broker delivers the offer to the seller at the listing broker’s request or delivers it to the listing broker, the seller should receive the offer promptly and the listing broker should be aware that an offer has been made.

If the seller wishes to make a counter-offer to the buyer’s broker, the listing broker is obligated to communicate the offer to the buyer’s broker. A sophisticated seller who needs little or no assistance from the listing agent might prepare a counter-offer and either (a) send it to the listing broker who may do nothing more than deliver it to the buyer’s broker or (b) deliver it to the buyer’s broker and send a copy of the listing broker. In either case, the listing broker is aware that negotiations are taking place and stands ready to assist the seller if necessary.

If the seller wants to engage in oral negotiations with the buyer or buyer’s broker, the buyer’s broker should not engage in such discussions unless the listing broker is present (either in person or phone or otherwise). Any subsequent offer back from the buyer to the seller should be communicated under this same procedure.

Section 1101.557 also addresses a few technical questions related to property managers, builders and governmental sealed bid procedures. If a property manager has the authority to

---

Notes
bind the owner to a lease, the property manager is considered to be the party in the transaction. The property manager does not need to communicate the offers to the owner if the property manager has the authority to enter into the lease and make such decisions for the owner.

If the seller is a builder, the buyer’s broker may ask the builder’s employee or sales representative about specific forms or contractual terms the builder may require. These inquiries do not violate the Real Estate License Act. The delivery of any offer to the builder should follow the same procedures as outlined previously. If the buyer’s broker is assisting the buyer in bidding on a HUD- or VA-foreclosed property and the government requires that such bids be submitted through a sealed process, the buyer’s broker does not have to deliver a copy of the offer to the listing broker.

Presentation of Multiple Offers

If a broker receives more than one offer, all offers must be presented to the seller unless instructed otherwise by the seller. No offer has a priority of presentation over another. The broker should submit all offers promptly. For example, if a licensee receives a written offer at 9 a.m. and presents it to the seller and then receives a second offer at 3 p.m. (before the seller has accepted the first offer), the licensee has the duty to submit the later offer to the seller for his or her consideration.

In the same example, if the agent representing the second buyer is aware that multiple offers have been received, the listing agent should notify the agent representing the first buyer that multiple offers have been received. The same would be true regardless of the number of offers. The listing agent should keep the terms and conditions confidential so as not to give one buyer a significant negotiating advantage over another. A broker is obligated to place his client’s interest first and is also obligated to treat other parties in the transaction honestly and fairly.

A contract for the sale of real estate must be in writing, signed by the parties to be charged with performance, in order to be enforceable. The agents, therefore, should take care to make no representations as to acceptance of an offer until all parties have signed and communicated acceptance.

---

**NAR 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 whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/06)
Seller’s Acceptance

The seller has the option of accepting or rejecting all offers, including a full-price offer. A seller should not counter multiple offers. If multiple buyers were to accept the seller’s counteroffer, the seller potentially could be bound to sell the property to different buyers. The seller could:

- reject all the offers and invite the prospects to submit better offers;
- accept one offer and reject the other(s);
- make a counteroffer to one prospect (reject others or not respond to the others);
- reject all offers; or
- do nothing.

A seller is not bound to accept any offer, even at full price. In refusing a full-price offer, the seller may be obligated to pay a fee to the listing broker.

Licensees should recognize that two or more offers are rarely identical, even if they offer the same price. Significant distinctions usually can be made based on the various contingencies contained in most contracts — date of possession, ability of the buyer to secure a particular level of financing on certain terms and so on. The documentation of the decision-making process should support the seller’s choice as the one most likely to reach closing with the fewest difficulties.

Revocation of Offers/Counteroffers

A buyer or seller may revoke any offer or counteroffer prior to acceptance by the other party.

Effective Date

TREC-promulgated contract forms instruct the broker to fill in the date of final acceptance as the effective date. Final acceptance occurs on the date that the person receiving the offer communicates acceptance to the person making the offer. Acceptance must be unequivocal.

Notes
Disclosure Requirements

Texas Real Estate License Act

Under the Texas Real Estate License Act, the commission may suspend or revoke a license or take disciplinary action against a licensee, if a licensee fails to:

- disclose to a potential purchaser any latent structural defect or any other defect known to the licensee;
- disclose to all parties which party he or she represents;
- disclose to all parties that he or she is receiving compensation from more than one party, if applicable;
- disclose to principal the licensee’s acceptance, receipt or charge of a commission, rebate or direct profit on expenditures made for the principal;
- disclose that the licensee is a principal in a transaction, if applicable;
- provide copies of any document in a real estate transaction upon request to the person who signed that document;
- advise a purchaser in writing before closing a transaction that the purchaser should have an attorney review an abstract of title or obtain an owner’s policy of title insurance;
- disclose the party that the licensee represents at the time of first contact with another party to the transaction (or that party’s broker); and

NAR’s and CCIM’s Codes of Ethics prohibit members from selling or acquiring an interest in real estate for themselves, their immediate families, members of their firms, or entities in which they have an ownership interest without making their true position known (Art. 4). Such disclosures must be in writing before signing a contract (SP 4-1). Part I, §9 of the Realtist Code of Ethics requires the Realtist to disclose if he or she has a personal interest in the property being purchased.

Notes

NAR’s and CCIM’s Codes of Ethics prohibit members from exaggerating, misrepresenting, or concealing pertinent facts relating to the property or the transaction (Art. 7). Part I, §3 of the Realtist Code of Ethics requires the member to offer properties without exaggeration, concealment, or misleading information.

The duty to disclose who the agent represents at the first contact with the other party in the transaction or the other party’s agent is also expressed in NAR’s and CCIM’s Codes of Ethics (SP 16-10, 11, & 12).

The prohibition against receiving compensation from more than one party without the knowledge and consent of all parties is also found in Article 7 of NAR’s and CCIM’s Codes of Ethics and in Part I, §6 of the Realtist Code of Ethics.
provide the Information About Brokerage Services form at the first substantive dialogue with a party to the transaction unless that party is represented by another licensee.

Under other statutes or common law, a licensee might also face civil liability for failure to disclose. The licensee does not have a duty to inspect the property.

**Deceptive Trade Practices Act**

Brokers who violate the Deceptive Trade Practices – Consumer Protection Act (DTPA) often do so by failing to disclose to their principals information of which they have actual knowledge or by affirming misrepresentations, regardless of whether the brokers had actual knowledge that these representations were false or incorrect. Among other things, the DTPA prohibits brokers from representing that:

- goods or services have characters, uses or benefits that they do not;
- goods or services are of a particular standard, quality or grade that they are not;
- an agreement confers rights, remedies or obligations that it does not;
- salespersons, representatives or agents have authority to negotiate the final terms of a transaction when they do not;
- a guarantee or warranty confers rights or remedies that it does not; and
- work or services have been performed when they have not.

The act also requires that brokers disclose, at the time of the transaction, information that was known concerning goods or services if the failure to disclose was intended to induce consumers into a transaction they would not have entered had the information been disclosed.

**Notes**

A party to a real estate transaction may sue the broker for violation of the DTPA. The DTPA now applies only to real estate transactions of $500,000 and less or transactions relating to the principal’s homestead. In transactions between $100,000 and $500,000, the DTPA can be waived if the contract is negotiated by independent legal counsel and does not involve a homestead. Similar causes of action may be alleged under §27.01, Business and Commerce Code, which does not have limitations on the amount of recovery.

NAR’s and CCIM’s Codes of Ethics prohibit the member from receiving any commission, rebate, or profit on expenditures without the client’s knowledge and consent (Art. 6). Any referral fees received for referring a person to a service provide must be disclosed to the client or customer to whom the recommendation is made.
Advertising

Truthfulness in advertising is the most fundamental concept in all applicable statutory law, rules and regulations. The laws allow brokerage firms to advertise and promote their services and special expertise, as long as those advertisements are truthful.

Section 1101.652(b) (23) of the Real Estate License Act authorizes TREC to take disciplinary action against a licensee who is responsible for an advertisement (in any media) that is likely to deceive the public or that in any manner tends to create a misleading impression, or one that fails to identify the advertiser as a licensed real estate broker or agent.

To ensure compliance, a broker who is familiar with the rules should review all marketing materials and advertising copy. Questionable marketing materials should be submitted to the broker’s legal counsel for review and approval.

If a broker starts or stops using an assumed name, 22 TAC§535.154 requires the broker to notify TREC.

An advertisement (such as classified ads, websites, print advertising and e-mail), placed by a licensee must include an additional designation such as “agent,” “broker” or a trade association name which serves clearly to identify the advertiser as a real estate agent.

Some licensees use inducements in their advertising, such as offering a free market analysis, a free home evaluation or similar enticements. This kind of advertising is permissible. However, the terms related to the availability of the offered product or service should be detailed carefully. Hidden “hooks,” (when an offered service is not free) can render promotional material misleading and deceptive.

Marketing Listed Properties

According to 22 TAC §535.156(d), a licensee has a duty to convey accurate information to members of the public with whom he or she deals. In addition, 22 TAC §535.154 addresses the following specifics:

- Before advertising any property, a licensee must have the consent of the owner or the owner’s authorized agent. The consent may be obtained in the written listing agreement or other appropriate agreement signed by the owner.

Notes

Article 12 of NAR’s and CCIM’s Codes of Ethics require members to: (1) present a true picture in their advertisements; and (2) disclose their professional status (broker, REALTOR®, etc.). The advertising of inducements is permitted if the advertisements clearly state any conditions required to obtain the inducement (SP 12-3). Advertisements of listed property must disclose the firm’s name (SP 12-5).
Listings may be taken only in the broker’s name and not in a salesperson’s name.

All advertising must include information identifying the advertiser as either a broker or salesperson.

The salesperson’s name is not required in advertisements, but the broker’s name must be included.

In no case shall a broker or salesperson place an advertisement which in any way implies that the salesperson is the person responsible for the operation of a real estate brokerage.

Written consent of the owner is required to place a sign on the property.

**Regulation Z**

Regulation Z, which was issued after Congress passed the Truth in Lending Act, generally covers advertisements for residential property only and does not govern loans primarily for commercial, investment or agriculture purposes. Regulation Z applies regularly to banks, mortgage companies and other arrangers of credit. Brokers who advertise credit terms are subject to Regulation Z as well.

There are three major disclosure requirements in advertising residential mortgage loans:

1. If an advertisement includes information about loan terms, those terms must actually be available to a qualified borrower.

2. If an advertisement states a rate of finance charge (defined as interest, points and loan fees), the advertisement must use the words “annual percentage rate” (APR). The advertisement must state the APR, and, if the finance charge can increase over the terms of the loan, the ad must disclose that fact.

3. Additional disclosure is triggered if an advertisement contains any of the following: the amount or percentage of any down payment, the number of payments or term of the repayment period, the amount of any regular installment payment on the loan or the amount of any finance charges. If any of these triggers appears in the advertisement, all of the following information must be disclosed in the advertisement:
   - amount of percentage of the down payment (e.g., $5,000 down, 10 percent down or zero down);
   - terms of repayment ($650 per month for 30 years);
• annual percentage rate (the interest rate); and
• whether the rate may be increased at a later date.

The mere mention of the APR alone will not trigger these additional disclosure requirements. If specific information is mentioned in the advertisement, such as $150,000 assumable note at 7.25 percent APR, the disclosure requirements are triggered, and the advertisement must contain all of the above information. The safest practice is to mention only the APR in the advertisement and suggest that prospects call for further information.

**Fair Housing Laws (applicable to residential and commercial transactions)**

Advertising also is governed by guidelines issued by the U.S. Department of Housing and Urban Development (HUD) pursuant to Section 804(c) of the Federal Fair Housing Act (the Act). Section 804(c) prohibits advertisements that state a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin. The act applies to publishers, as well as to the party placing the advertisement. Brokers should be extremely careful about loosely worded ads that may inadvertently imply a limitation or preference with respect to a protected class. HUD regulations also require diversity among the models in advertising photography.

**Prohibited Words and Phrases**

**Racial and Ethnic Terms**

The use of words describing current or potential residents, the neighbors or the neighborhood in racial or ethnic terms may constitute a violation of the Fair Housing Act and the Real Estate License Act. HUD has published a list of words and phrases that should never be used including “white private home,” “Hispanic resident,” “Oriental neighborhood,” or “predominantly African-American schools.”

**Religious Preference**

Advertisements must not contain any explicit preferences or limitations concerning religion. However, the advertisement may describe amenities without stating a preference, such as “apartment complex with chapel” or “kosher meals available.” If the legal name of the entity

---

*Notes*
contains a religious reference, such as “Methodist Village Apartments,” the advertisement should include a disclaimer stating that the owner-lessor does not discriminate.

**Gender Preference**

Advertisements must contain no explicit reference for the gender of the renter. One exception is for shared living spaces. Accordingly, a female advertiser may advertise, “female roommate wanted.” Other common phrases permissible in advertising include “bachelor apartment” or “mother-in-law suite”. These phrases are commonly used as physical descriptions of the available premises.

**Disablilities**

Advertisements must not discriminate or exclude persons with disabilities. Descriptions of properties as well as of services and amenities are permissible — such as “jogging trails,” “great view”. It is also permissible to describe conduct required of potential tenants. Advertising for “nonsmoking” or “sober” tenants does not violate the Act.

**Familial Status**

Advertisements must not contain limitations on the number or age of children or express a preference for adults, couples or single persons. There is an exemption for developments that qualify as housing for older persons in one of two ways. The first is housing intended for and occupied solely by persons 62 years of age or older. The second is housing intended for occupancy by at least one person at least 55 years of age or older per unit. Occupancy standards (the number of residents per bedroom) may apply and are adopted by statute or ordinance.

**Misrepresentations in Advertising**

The courts have interpreted the DTPA in a manner that creates liabilities for innocent misrepresentation or misstatement of fact as well as for negligent or intentional acts. The act makes brokers particularly vulnerable to claims if they rely upon information furnished to them by homeowners if: (1) such information is not verified or (2) the agent does not disclose the source of the information and state that the agent has no reason to believe it to be inaccurate.

Accurately describing the characteristics and qualities of a property will greatly reduce the likelihood of claims against the broker. Brokers should make a serious effort to keep current
with applicable laws since liabilities, penalties and sanctions can be substantial, including possible suspension or revocation of a license.

**Square Footage in Advertising**

Mistakes in the square footage of a property are one of the most frequent grounds for claims against brokers. There is no uniform or standard method for calculating square footage. Many brokers rely on data from the central appraisal district; however, that is no guarantee of accuracy. Many properties have additions or converted garages, porches or patios that are not reflected in the appraisal district’s data. Always quote the source of the measurements being used. If there are multiple sources with different measurements, provide all sources.

**Internet Advertising**

Generally, an Internet website is considered an advertisement. The Internet is a medium where merchants, professionals, vendors and others place information designed to gain public attention and solicit and attract business. Each page on a broker’s Internet site is considered a separate advertisement. A licensee must disclose his or her status as a broker or salesperson on each page. Disclosure at the top or bottom of each page declaring that all persons and firms named in this advertisement are licensed brokers or salespersons is permitted. While e-mail is a vehicle of communication through which business is conducted, it may also be considered an advertisement.

**Removing a Listing From a Website**

The Real Estate License Act prohibits any misleading or false advertisements. If a real estate licensee advertises listings on the Internet and fails to remove the listings within a reasonable time after the listing sells, the licensee could be accused of misrepresenting the status of available property in his or her advertisement.

---

**Notes**
Listing Services

Most Multiple Listing Services (MLS) in Texas have rules and regulations related to the display of MLS data on a MLS participant’s website (known as IDX or IDL rules). Typically, by participating in the MLS, the participant authorizes other participants to display information about the participant’s listings on their websites provided that they are in compliance with the MLS’s IDX or IDL rules. Similar rules may apply to commercial MLSs (CMLS) or commercial information exchanges (CIEs).

Brokers who participate in MLSs, CMLSs, or CIEs should be aware of the IDX or IDL rules, opt-out procedures under such rules and how to comply with such rules when displaying listings of other participants. **Brokers who are not participants in such services may not advertise or display information about another broker’s listing without consent from the listing broker.** The display or advertisement of another broker’s listing, whether through IDX or IDL or otherwise, may not create any type of misleading impression (for example, implying that the person causing the advertisement to be published is the listing broker).
Dispute Resolution

Mediation

Texas statutes define a mediation resolution procedure as a forum before an impartial person (the mediator) designed to facilitate communication between parties and to promote reconciliation, settlement or understanding but does not make decisions or give awards. In a successful mediation, the parties agree on a settlement in writing which then becomes binding on both parties. Mediators are neither judges nor arbitrators. They are neutral facilitators in establishing dialogue among the parties to reach a settlement. A mediator may not impose his or her judgment on the issues.

The mediator need not be an attorney or hold any special license or credential, but should possess some knowledge of the subject matter, the outcome of prior cases involving the controversy and recoveries for similar matters in local courts. Although the mediator should remain neutral, his or her expertise may provide valuable guidelines for settlement.

There are numerous mediation service providers, such as county supported mediation services, private mediators, university law schools and REALTOR® Associations. Contact your county or district court clerk for a list of mediators in your area.

In 1987 mediation became one of the five statutorily recognized Alternative Dispute Resolution (ADR) procedures in Chapter 154 of the Texas Civil Practices and Remedies Code. Many Texas judges require court-ordered mediation before hearing a case. The Real Estate Center at Texas A&M University surveyed practitioners to determine how often mediation is used to settle real estate disputes. Researchers found that mediation was used to settle a high percentage of disputes.

Notes
Arbitration

Texas statutes define arbitration as a forum where parties and counsel present their positions before an impartial third party who renders a specific award. The parties must agree in writing to arbitrate a dispute. There are numerous arbitration providers, such as the American Arbitration Association, private attorneys, private arbitrators and REALTOR® Associations. Typically the arbitration procedure calls for a complaint or petition to be filed describing the dispute. The respondent will be given the opportunity to respond. A hearing is convened at which the parties present evidence and make arguments. The arbitrator(s) renders an award. The prevailing party may seek to enforce the award as a judgment by requesting that a court of law do so. Arbitration awards may be appealed on procedural or due process grounds.
Forged Report

Facts

A salesperson assisted his clients in choosing a residential property for purchase and beginning the mortgage loan process. After receiving an appraisal report, the lender requested that a structural engineer inspect the garage floor. The salesperson engaged a professional engineer to inspect the garage floor. The engineer submitted a letter to the salesperson indicating the garage floor would have no adverse impact on the integrity of the house foundation. The letter included the statement, “The cracked slab in the garage can be replaced, repaired with epoxy or over-poured with a new concrete topping.” Before forwarding the letter to the lender, the salesperson deleted the sentence referring to repair or replacement of the cracked slab in the garage without the knowledge or consent of the engineer.

After reviewing the engineer’s letter, the lender requested an additional engineer’s report concerning separations in the brick veneer of the property, a condition which had been noted in the appraisal report. The engineer could not evaluate this problem with another visual inspection of the property and the buyers were unable to pay for the second engineer’s report.

The salesperson altered the date of the original engineer’s letter in order to give the appearance that it referred to a subsequent inspection and added language indicating that no correction was recommended. The salesperson sent the altered copy to the lender with the intention that it be accepted as a genuine copy of the engineer’s letter. The loan was approved. Subsequently, the lender required the original letter, and the salesperson was forced to reveal his actions in creating altered copies of the letter.
Conclusion
The salesperson engaged in conduct which constitutes dishonest dealings, bad faith, or untrustworthiness. The salesperson is also guilty of continued and flagrant misrepresentation.

Disciplinary Action
The salesperson’s license was revoked.

Allowance? What allowance?

Facts
A salesperson assisted his clients in executing a sales contract for a residential property. A few days later, the parties executed an amendment to the contract requiring the seller, at seller’s cost, to make certain repairs and for the seller to pay the buyer $1,000 at closing so that the buyer could complete other repairs (the repair allowance). The salesperson instructed his office to submit the executed amendment to the title company; however, he failed to follow through to determine if his instructions had been completed. The amendment was not submitted to the title company.

The buyers sold and closed their present residential property and on the same date closed on the new residential property. The repair allowance for the new property was not reflected on any closing documents. Although the buyers became aware of this fact immediately prior to signing the closing documents, they chose not to delay closing because they would be left without a residence to move into for an unknown period. Also, the salesperson assured the buyers he had confirmation of a fax of the amendment to the title company sent prior to closing, and he assured the buyers the matter could be resolved after closing. After closing the salesperson made an unsuccessful demand upon the seller to submit the repair allowance to the buyers. The salesperson then paid the buyers $1,000 for repairs to the property.

Conclusions
The salesperson acted negligently or incompetently in performing his duties as a licensee.

Disciplinary Action
The salesperson was formally reprimanded for his actions.
A Listing Without End

Facts
A broker completed a listing agreement for owners of a residential property. The agreement, which was between a corporation (for which the broker was a principal) and the sellers, contained a term of three months. The broker negotiated a sales contract between a buyer and the sellers. After the escrow agent acknowledged receipt of the contract and earnest money, the broker requested that the escrow agent disburse the commission to the unlicensed corporation for which she was principal. The buyer later terminated the contract, and the seller released the earnest money back to the buyer. The seller then terminated the listing agreement, which had already expired. The broker continued to market the property, stating to the seller’s attorney that the seller did not properly terminate the listing agreement. The broker continued to market the property for another year without authorization.

Conclusions
The broker acted negligently or incompetently in performing an act for which a person is required to hold a real estate license. The salesperson marketed real property without the knowledge and consent of the owner of the property or the owner’s authorized agent. The broker also committed a violation by attempting to have an unlicensed person (the corporation) act as a license holder.

Disciplinary Action
The broker’s license was suspended for a period of six months. The suspension was fully probated for one year subject to the following terms and conditions:

The broker comply with Chapter 1101, Texas Occupations Code and the Rules of the Texas Real Estate Commission;

1. the broker fully cooperate with the enforcement division of the commission in completing its investigation of any complaints against her;

2. that on a date specified by the commission, the broker provide the commission’s director of enforcement evidence of completion of thirty classroom hours in an agency law course and that these hours are in addition to the MCE hours required for the broker’s next license renewal; and

3. the broker not engage any unlicensed person, including any corporation or LLC, in any brokerage activity.

Notes
4. the broker pay an administrative penalty of $3,000 to the Texas Real Estate Commission.

Friendly Repairs

Facts

A salesperson had been working with friends to find suitable property to purchase. The salesperson suggested that her friends purchase her own home, which was in need of repair. The salesperson agreed to pay for necessary repairs.

Because the buyer could not obtain financing, the buyer’s father agreed to purchase the property. At the time the offer was drafted, the salesperson did not discuss having an inspection performed, and no option was included in the contract and no repairs were agreed upon by the salesperson and the buyer’s father. In the contract the box under “Broker Information and Ratification of Fee” that was checked specified that the broker was representing the seller and buyer as an intermediary. The salesperson was a principal in the transaction and the buyer’s father never authorized Intermediary Brokerage in writing. The contract was executed and the sale of property to the buyer’s father closed.

After closing, the salesperson delayed the completion of the repairs promised to the buyer. The repairs were eventually completed. The salesperson believed that the buyer’s father understood her position as both a licensee and the seller of the property. She also believed that the buyer’s father understood that she was not representing him in the sale of the property. The salesperson believed that she did not indicate she was acting as an intermediary and did not intend to check the box on contract form. The salesperson believed that because of their friendship, all parties to the contract agreed to dispense with any formal agreement for repairs.

Conclusions

The salesperson’s acts and omissions constitute engaging in misrepresentation, dishonesty, or fraud when selling real property in the license holder’s own name.

Disciplinary Action

The salesperson was formally reprimanded and ordered to pay an administrative penalty of $500 to the Texas Real Estate Commission.
Commingling

Facts

A broker maintained an escrow account for the monies held in trust for others, including security deposits and rents collected from the properties managed by the brokerage company. On several occasions the broker used funds from the escrow account for operations of the brokerage and for the expenses of another owner. Over a three-month period, several property owners filed complaints with TREC alleging that they had terminated their property management agreements with the broker and that the broker had not remitted to them any security deposits or rents due to them. Sometime after the complaints were filed with TREC, each owner received their security deposits from the brokerage. The broker replaced all funds that had been improperly withdrawn from the escrow account.

Additionally, the broker, who was the designated officer for a corporation that held a real estate broker license, failed to notify the commission that the corporation used a business name.

Conclusions

The broker acted negligently or incompetently in performing an act for which a person is required to hold a real estate license. The broker commingled money that belonged to another person with the broker’s own money.

Disciplinary Action

The broker’s license was suspended for six months. The suspension was probated subject to the following terms and conditions:

1. the broker will comply with Chapter 1101, Texas Occupations Code and the Rules of the Texas Real Estate Commission;

2. the broker will fully cooperate with the enforcement division of the commission in completing its investigation;

3. the broker will complete 30 classroom hours in a property management course by a specified date in addition to the MCE hours required for the next renewal of the broker’s license; and

4. the broker will not engage in any type of property management services on or before the specified date mentioned above.
Cheated Widow

Facts

A broker executed a contract in his own name to sell a property to a buyer. The broker did not reveal to the buyer that he was a licensed real estate broker acting on his own behalf. The buyer paid the broker $2,000 as earnest money. Two weeks later the buyer paid an additional $18,000 to complete the $20,000 down payment on the sales price of $55,000. The broker provided seller financing of the $35,000 balance by promissory note from the buyer to the broker.

Although the buyer was ready and willing, the broker indicated to her that there were some problems preventing his presence at closing and that he would close at some indefinite future date. The broker continued to delay closing; however, he permitted the buyer to take possession of the property, and she commenced making regular monthly payments to him. The broker also requested the buyer give him funds for tax and insurance payments for the property for 2 ½ calendar years.

The broker then obtained a mortgage on the property. The mortgage company foreclosed on the property for nonpayment by the broker. The buyer filed a complaint with the commission regarding the financial losses and loss of the purchase of the property. The commission requested the broker furnish information and documents for inspection in connection with the complaint. The broker did not respond to the request.

Conclusions

The broker contracted to sell real property to a buyer and was guilty of engaging in misrepresentation or dishonest or fraudulent action when selling real property in his own name. The broker was guilty of failing or refusing on demand to produce a document, book, or record in his possession concerning a real estate transaction conducted by him for inspection by the commission.

Disciplinary Action

The broker’s license was revoked. In addition, a district court ordered the commission to pay the buyer $50,000 from the Real Estate Recovery Trust Account toward satisfaction of a judgment against the broker.
Disclosure of Agency and Intermediary Practice

1. Q: How is a typical intermediary relationship created, and how does it operate?

A: At the first substantive dialogue with a seller or a prospective buyer, the salespersons or brokers associated with a firm provide the parties with a copy of the statutory information about agency required by TRELA. The statutory information would include an explanation of the intermediary relationship.

The brokerage firm negotiates a written listing contract with a seller and a written buyer representation agreement with a buyer. In those documents, the respective parties authorize the broker to act as an intermediary and to appoint associated licensees to work with the parties in the event the buyer wishes to purchase a property listed with the firm. At this point, the broker and associated licensees will be still functioning as exclusive agents of the individual parties. The listing contract and buyer representation agreement must contain the broker’s obligations set. [TRELA Section 1101.651(d)]

When it becomes evident the buyer represented by the firm wishes to purchase property listed with the firm, the intermediary status comes into play, and the intermediary may appoint different associates to work with the parties. The intermediary notifies both parties in writing of the appointments of licensees to work with the parties. The associates provide advice and opinions to their respective parties during negotiations, and the intermediary broker is careful not to favor one party over the other in any action taken by the intermediary.
2. **Q:** What is an intermediary?

**A:** An intermediary is a broker who negotiates the transaction between the parties subject to the representation provisions of the Act. The intermediary may, with the written consent of the parties, appoint two licensees associated with the intermediary to work with and advise the party to whom they have been appointed.

3. **Q:** Is dual agency authorized by the representation provisions?

**A:** Effective September 1, 2005, a licensee may not represent both parties as a dual agent under revisions to the Act [S.B. 810 79th Legislature (2005)]. “A broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction” a buyer or tenant, and a seller or landlord. Occupations Code Section 1101.561(b)]. Because a broker must act as an intermediary under this new provision, a licensee cannot act as a dual agent.

To the extent a dual agency relationship is created by accident or otherwise, a licensee must resolve the matter by complying with the notice and consent requirements of the representation provisions to act as an intermediary or by representing one of the parties only and working with the other party as a customer.

4. **Q:** When must the broker act as an intermediary?

**A:** If the broker and associates are going to continue working with parties they have been representing under listing contracts or buyer representation agreements, the intermediary role is the only way to handle "in-house" transactions, providing both parties the same level of service.

5. **Q:** If a salesperson or associated broker lists a property and have also been working with a prospective buyer under a representation agreement, how can the salesperson or associated broker sell this listing under the representation provisions?

**A:** There are three alternatives for the brokerage firm and the parties to consider:

1. The firm, acting through the salesperson or associated broker, can represent one of the parties and work with the other party as a customer rather than as a client. 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 salesperson or associated broker can be appointed by the intermediary to work with one of the
parties. Another licensee has 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 salesperson or broker associate can function as a representative of the firm. Because the firm is an intermediary, the salesperson and associated broker would be subject to the requirement not to act so as to favor one party over the other.

6. Q: If a salesperson may provide services to a party under the representation provisions without being appointed, why would a broker want to appoint a salesperson to work with a party?

A: Appointment following the procedures set out in the representation provisions permits the salesperson to provide a higher level of service. The appointed salesperson may provide advice and opinions to the party to whom the salesperson is assigned and is not subject to the intermediary's statutory duty of not acting so as to favor one party over the other.

7. Q: Is an intermediary an agent?

A: Yes, but the duties and obligations of an intermediary are different than for exclusive, or single, agents.

8. Q: What are the duties and obligations of an intermediary?

A: The representation provisions require 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 the representation provisions. The agreement must set forth, in conspicuous bold or underlined print, the broker's obligations under Section 1101.651(d), and the agreement must state 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 required to treat the parties fairly and honestly and to comply with TREA. The intermediary is prohibited from acting so as to favor one party over the other. The intermediary may not reveal confidential information obtained from one party without the written instructions of that party, unless disclosure of that information is required by TREA.
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.

9. Q: Can salespersons 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 salesperson 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.

10. Q: Can there be two intermediaries in the same transaction?
    A: No.

11. 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 FSBO or other seller who is not already represented by a broker, the broker representing the buyer can secure the consent of both parties to act as an intermediary.

12. 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 representation provisions of the Act.

13. Q: May the same salesperson 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.

14. Q: May more than one associated licensee be appointed by the intermediary to work with the same party?
    A: Yes.

---

Notes
15. **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.

16. **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.

17. **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.
18. 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.

19. Q: May a broker act as a dual agent?

A: A broker may not act as a dual agent under Occupations Code Section 1101.561(b), which provides that “a broker must agree to act as an intermediary under this subchapter if the broker agrees to represent in a transaction” a buyer or tenant, and a seller or landlord.

20. Q: What are the agency disclosure requirements for real estate licensees?

A: To disclose their representation of a party upon the first contact with a party or a licensee representing another party.

21. Q: Is disclosure of agency required to be in writing?

A: The disclosure may be oral or in writing.

22. Q: Are licensees required to provide parties with written information relating to agency?

A: Yes. The representation provisions 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.

23. Q: Are there exceptions when the statutory statement is not required?

A: Yes. The statement must be provided when the first substantive dialogue occurs between a party and the licensee if the discussion occurs with respect to specific real property. The statement is not required for either of the following:

• a transaction that is a residential lease no longer than one year and no sale is being considered; or

• a meeting with a party represented by another licensee.

Notes
24. 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 previously, 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."

25. Q: What are the penalties for licensees who fail to comply with the representation provisions?
   A: Failure to comply is a violation of TREL, punishable by reprimand, by suspension or revocation of a license, or by an administrative penalty (fine).

26. Q: Do the representation provisions prohibit or permit disclosed dual agency?
   A: The representation provisions prohibit disclosed dual agency.

27. 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 representation provisions. A licensee would not be required to provide the statutory statement at the open house. At the first substantive dialogue thereafter with the buyer regarding a specific property and during which substantive discussions occur, the licensee will be required to provide the statement.

28. 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 does not have?
   A: The appointed licensee may not, except as permitted by Section 1101.651(d) of TREL, disclose to either party confidential information received from the other party. A licensee representing one party is not be prohibited from revealing confidential information to the licensee’s principal. If the information is material to the principal's decision, a licensee is required to reveal the information to the principal.
29. 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.

30. Q: Does the TREC encourage brokerage companies to act for more than one party in the same transaction?  
   A: No.

31. Q: Must the intermediary broker furnish written notice to each party to a transaction when the broker designates the appointed licensees?  
   A: Yes.

32. Q: How is a property "showing" different from a proposed transaction? 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?  
   A: 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.

33. Q: Does TREC recommend 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.

34. Q: Our company policy requires all buyers and sellers to agree to the intermediary practice before beginning 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.
35. 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 1101.651(d) of TREL.

36. 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 be 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 1101.651(d) are set forth in conspicuous bold or underlined print.

37. 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 are 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.
38. Q: I have a salesperson'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 can 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 salesperson, 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.

39. 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 question five. You can alter the agency relationships and only represent one party, you can be appointed to work with one party and another associate could be appointed to work with the other party, or no appointments may be made, or you can work with the parties being careful not to favor one over the other or provide advice or opinions to them.

40. 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.

41. 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 is prepared, 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 educated the parties 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 questions.

For example, the intermediary can 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 can 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 can 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 can refer the party to an attorney, accountant, loan officer or other professional for advice.

42. Q: I was the listing agent for a property that did not 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 described, 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.

43. 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 salespersons under TREL. Opinions of property values may be different and yet not indicative of error or mistake by the salespersons. If a salesperson makes an error or mistake, the sponsoring broker is responsible to the public and to TREC under Section 1101.803 of TREL.

44. 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: TREL does not require a second written consent. TREL does require written notice of any appointments, and the written notice would probably cause any objection
to be resolved at that point. A broker is not be prohibited from obtaining a second consent as a business practice, so that potential conflicts are identified and resolved. The sales contract, of course, typically identifies the parties and shows the intermediary relationship if the broker completes the “Broker Identification and Ratification of Fee” at the end of the TREC contract form.

45. 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 question eight relating to the duties of an intermediary.

46. 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 their first substantive dialogue.
TEXAS REAL ESTATE COMMISSION
Box 12188
Austin, TX 78711-2188
800-250-TREC
www.trec.state.tx.us

REAL ESTATE CENTER
Texas A&M University
2115 TAMU
College Station, TX 77843-2115
979-845-2031
http://recenter.tamu.edu

Administrator
TIMOTHY K. IRVINE

Commissioners
JOHN S. WALTON, JR., CHAIRMAN
Lubbock
JOHN D. ECKSTRUM, VICE CHAIRMAN
Conroe
TOM C. MESA, JR., SECRETARY
Pasadena
TROY C. ALLEY, JR.
Arlington
ADRIAN A. ARRIAGA
McAllen
MARY FRANCES BURLESON
Dallas
ROBERT C. DAY
Jacksonville
BILL FLORES
Houston
ELIZABETH LEAL
El Paso

Director
GARY MALER

Advisory Committee
DAVID E. DALZELL, CHAIRMAN
Abilene
D. MARC McDOUGAL, VICE CHAIRMAN
Lubbock
JAMES M. BOYD
Houston
CATARINA G. CRON
Houston
JOHN D. ECKSTRUM
Conroe
Ex-Officio representing the Texas Real Estate Commission
TOM H. GANN
Lufkin
JACQUELYN K. HAWKINS
Austin
BARBARA A. RUSSELL
Denton
DOUGLAS A. SCHWARTZ
El Paso
RONALD C. WAKEFIELD
San Antonio