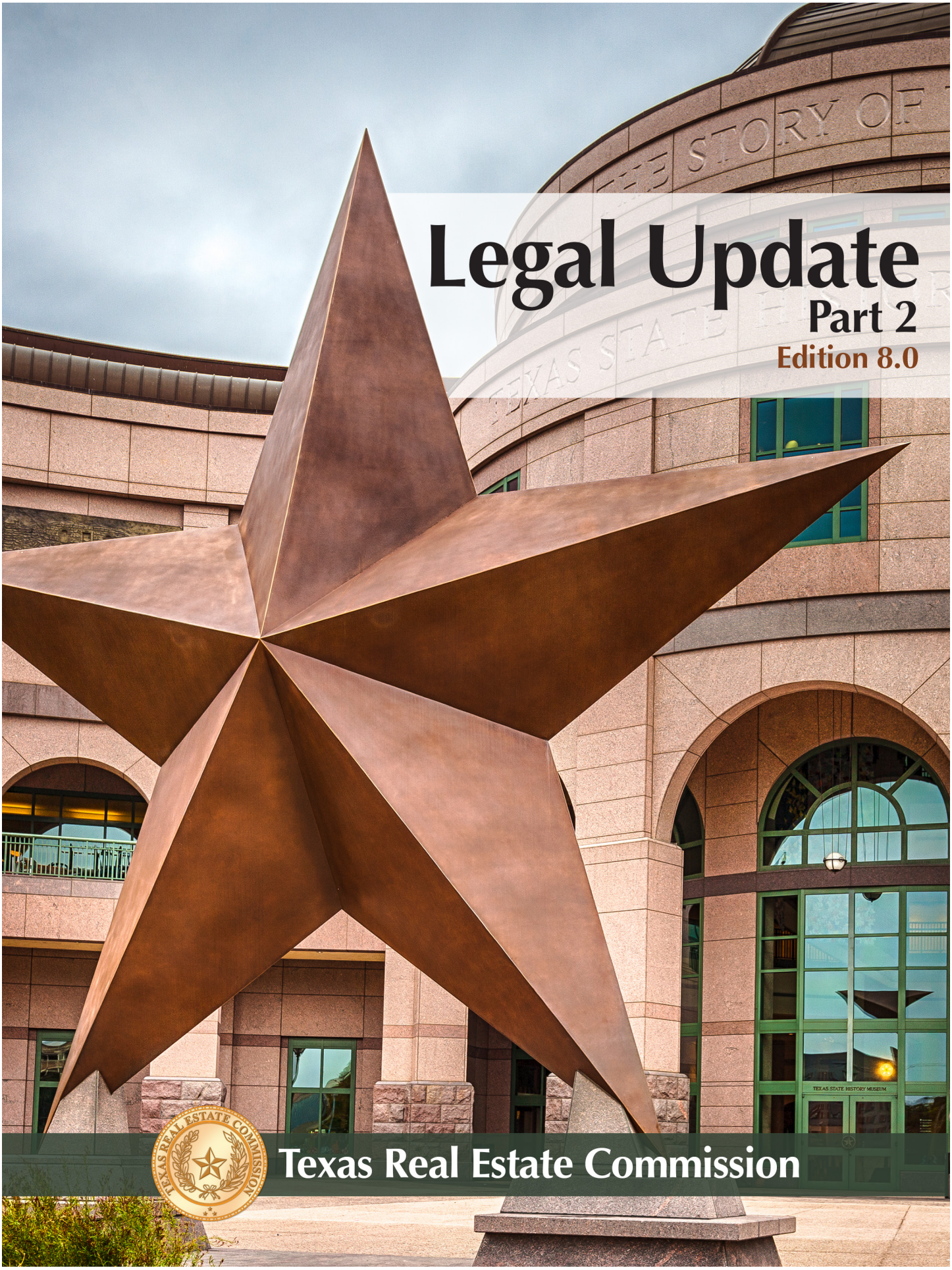

Legal Update

Part 2

Edition 8.0

Texas Real Estate Commission

Legal Update Part 2
Edition 8.0

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Chapter 1

Do the Right Thing!
Ethics Requirements for Engaging in Real Estate

As a license holder, you are a fiduciary and have an ethical and legal relationship of trust with your client when engaging in the real estate business. A fiduciary is expected to be loyal to the principal to whom he or she owes the duty. There must be no conflict of interest between fiduciary and principal, and the fiduciary must not profit from the position as a fiduciary without the knowledge and informed consent of the principal. Texas law places responsibilities upon all license holders regarding ethics and conduct. An agent may also belong to a real estate trade association that requires members to follow a code of ethics. The law and trade association codes of ethics are similar yet not identical; however, both require ethical conduct to ensure public trust in the agent and the profession. Acting in an ethical way involves distinguishing between right and wrong and then making the right choice.

Title 22 of the Texas Administrative Code (TAC) Chapter 531 contains the canons of professional ethics and conduct. This chapter will cover some of those canons and will provide examples of enforcement actions to illustrate situations in which a

license holder has not exercised the standard of duty and care when representing a client. The canons also mirror the federal anti-discrimination laws in forbidding discrimination in real estate activities. Fair Housing and anti-discrimination laws will be covered later in the course.

Fidelity (22 TAC §531.1)

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

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

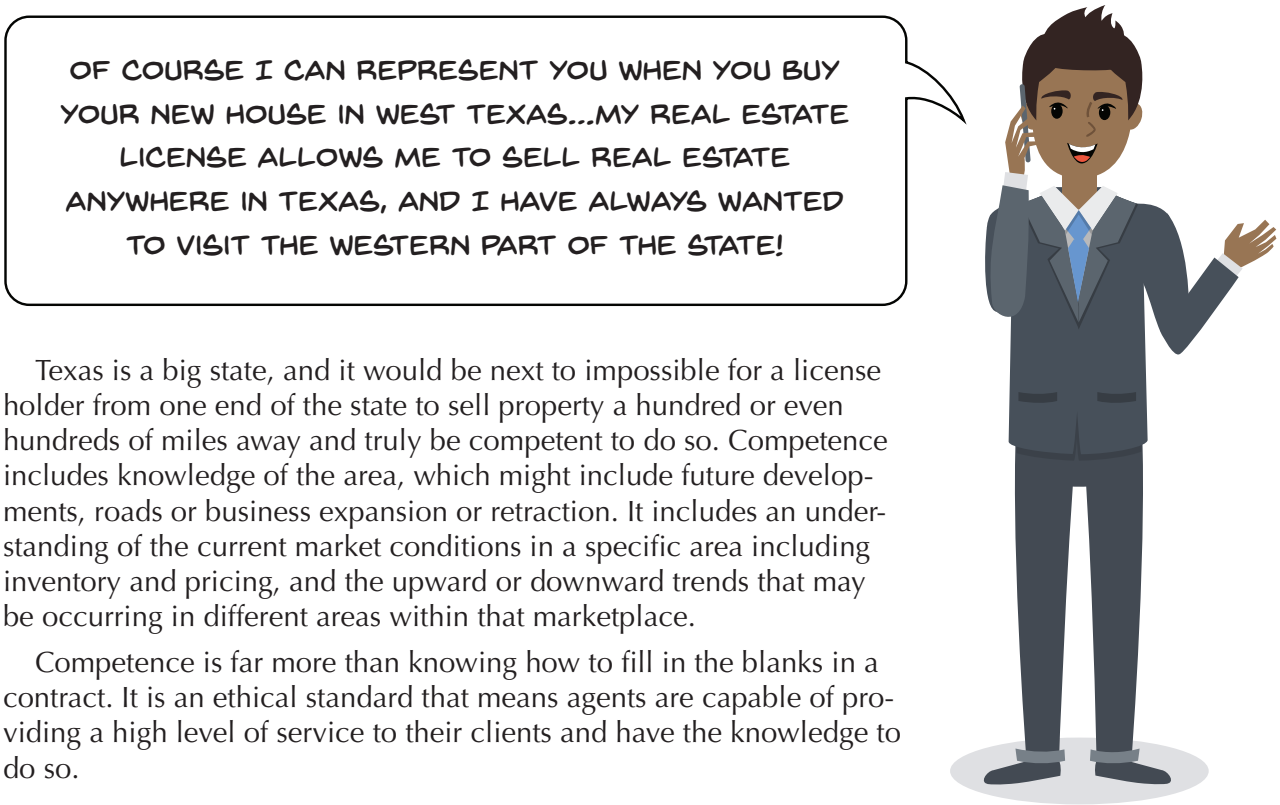
Integrity (22 TAC §531.2)

A real estate broker or sales agent has a special obligation to exercise integrity in the discharge of the license holder's responsibilities, including employment of prudence and caution, in order to avoid misrepresentation, in any wise, by acts of commission or omission.

Competency (22 TAC §531.3)

It is the obligation of a real estate agent to be knowledgeable as a real estate brokerage practitioner. The agent should

* be informed on market conditions affecting the real estate business and pledge to continuing education in the intricacies involved in marketing real estate for others;
* be informed on national, state, and local issues and developments in the real estate industry; and
* exercise judgment and skill in the performance of the work.



Texas is a big state, and it would be next to impossible for a license holder from one end of the state to sell property a hundred or even hundreds of miles away and truly be competent to do so. Competence includes knowledge of the area, which might include future developments, roads or business expansion or retraction. It includes an understanding of the current market conditions in a specific area including inventory and pricing, and the upward or downward trends that may be occurring in different areas within that marketplace.

Competence is far more than knowing how to fill in the blanks in a contract. It is an ethical standard that means agents are capable of providing a high level of service to their clients and have the knowledge to do so.

DISCUSSION

1. Briefly discuss other areas of competency in real estate.
2. Is it appropriate for an agent to sell property to his or her family in an area unfamiliar to the agent? Why or why not?
3. An agent joins MLSs in several cities. Does that meet the competency requirement?
4. A license holder has a client who wants to look only at new builders' houses (no pre-owned properties) in a city 300 miles away. Does that change anything with regard to the agent's responsibility?

Consumer Information (22 TAC §531.18)

The legislature has determined that it is important for consumers of real estate services to know where they can file a complaint or apply for assistance from real estate recovery funds when they have a problem with a license holder. Effective February 1, 2016, Texas Real Estate Commission (TREC) promulgated a new Consumer Protection Notice form and amended rule §531.18 regarding requirements for delivery of the new mandatory form. Each active real estate broker shall provide the mandatory notice form by

* displaying it in a readily noticeable location in each place of business the broker maintains; and
* providing a link to it labeled "Texas Real Estate Commission Consumer Protection Notice," in at least a 10-point font, in a readily noticeable place on the homepage of the business websites of the broker and sponsored sales agents.

TREC and TAR: What's the Difference?

TREC – *Texas Real Estate Commission: a governmental licensing agency that protects the public*

TAR – *Texas Association of REALTORS®: a professional trade organization*

- » provides services to its members
- » attempts to influence TREC's rules and regulations

Have you ever heard anybody confuse TREC with TAR? The Texas Real Estate Commission is the governmental licensing agency that issues real estate sales agent and real estate broker licenses.

TREC's mission is to safeguard the public interest and protect consumers of real estate services.

The Texas Association of REALTORS® is a professional trade association whose members are some (but not all) of the Texas Real Estate Commission license holders. TAR provides services to its members. TAR is an advocate for its members and property owners. REALTOR® is a registered trademark of the National Association of Realtors (NAR). All members of TAR (except affiliates) are also members of NAR and thus can use the REALTOR® trademark. Not all TREC license holders are members of TAR and NAR. Those who are not members may not use the REALTOR® trademark. It is improper to call all TREC license holders "REALTORS®." As a recent advertisement for TAR stated: "All REALTORS® are real estate agents, but not all real estate agents are REALTORS®."

TREC		TAR
State agency charged to enforce the Real Estate License Act, Inspector License Act, Residential Service Company Act, and other laws, adopt rules related to the laws it enforces, and protects consumers from misconduct by license holders	**Purpose**	Trade association comprised of real estate license holders whose purpose is to provide services to its members (e.g., education, governmental advocacy, MLS, general legal services, dispute resolution among members, and others)
Adopts Rules that have the force of law	**Lawmaking**	N/A
May not lobby the Texas Legislature (but it can provide information)	**Legislative Actions**	TREPAC may lobby the Legislature and influence the adoption of new laws
Establishes standards of conduct and ethics through TREC Rules	**Ethics**	Adopts the REALTOR® Code of Ethics
Enforces the Texas Real Estate Licensing Act and the TREC Rules	**Discipline**	Enforces the REALTOR® Code of Ethics
Impose penalties, loss of license	**Potential Punishment**	Loss of membership; loss of use of MLS
Promulgates Residential and Farm and Ranch forms	**Forms Produced**	Provides various additional forms not promulgated by TREC
Mandatory if license holder is providing the form	**Use of Forms**	Voluntary
Available to anyone (license holders and general public)	**Availability of Forms**	Forms are copyrighted for use only by TAR members
Cannot provide direct legal advice to license holders	**Legal Advice**	Provides direct legal advice through the Legal Hotline
18 hours of CE required every 2 years	**Continuing Education (CE) Requirements**	Ethics class required every 4 years (fulfilled by the TREC Legal II class)
Creates the following required courses (with assistance of the Real Estate Center at Texas A&M): • Legal I & II • Broker Responsibility	**CE Courses**	Creates a wide variety of elective courses
All meetings are open to the public	**Meetings**	Its meetings are open only to members and permitted guests
N/A	**Discounts**	Provides discounts for equipment and services purchased by members

DISCUSSION

REALTOR® is a registered trademark that is often used incorrectly to describe all real estate agents. What are some similar incorrect uses of other registered trademarks or trade names?

TREC Case Study 1

The Fraud Adviser

A sales agent managed a property. A water heater burst, flooding the property and damaging the tenant's belongings. The agent informed the owner that the tenant's losses were not covered by the owner's insurance policy. The agent advised the owner that the tenant would pay the owner's deductible in exchange for the owner's making a claim for the tenant's losses. The agent acknowledged that this was fraud, but she thought it was unfair that the tenant should have to pay anything.

DISCUSSION

1. Did the sales agent act ethically in trying to prevent the tenant's having to pay for damage that was not her fault?
2. What else could the sales agent have done?

TREC Case Study 2

The Fictitious Bid

A broker received a listing from a lender who owned the property. As part of the broker's duties to the lender-client, the broker hired contractors to remove junk or trash left on the property after an eviction or foreclosure. The client required that if the contractor's bid exceeded $500, the broker had to solicit a second bid from another contractor. At least three times, the broker created a fictitious second bid. The work was performed competently and the bid (although only one) was for a reasonable amount. Each time, the winning bidder was another company with which the license holder had an ongoing working relationship. The broker did not receive money or other benefit from the contractor who won the bid. It appeared that the broker was trying to help a friend who was having financial difficulty. In addition, the bid otherwise appeared to be reasonable, and the work was performed competently.

DISCUSSION

Assuming there was no harm to the lender, is the broker liable?

Court Case

BADMAND HOLDINGS LLC V. XIE (TEX. APP. DALLAS NOV. 4, 2016

Two persons, a medical doctor and a lawyer, formed a limited liability company and were the LLC's only members, each owning 50 percent. The LLC owned a condominium. The doctor-member listed the condominium for sale through a real estate broker. The buyers, represented by a real estate agent, saw the listing and made an offer.

The buyers signed the contract in April 2013, and the doctor-member of the LLC initialed each page and signed the last page of the contract on behalf of the LLC. The buyers deposited earnest money and the option fee. When the lender ordered an appraisal, the appraiser was not allowed inside the condominium. The listing agent informed the buyers' agent that the property was being taken off the market. The title company attempted to return the earnest money to the buyers, but they refused. After the closing date passed, the buyers sued the LLC for breach of contract and sought specific performance.

The LLC claimed that there was no valid and binding contract because the doctor-member did not have authority to sign the contract on behalf of the LLC.

At trial, the buyers showed that they were ready, willing, and able to perform under the contract, had done everything required of them to purchase the property, and were just waiting for the appraisal. The buyers testified that they knew the LLC was the seller of the property, but they did not know if the doctor-member was the only person involved with the LLC. The buyers trusted their agent and never asked whether there was a "business resolution authorizing the [sale] of this property" because "the property is listed in [the] market." The buyers did not check to see whether the LLC had a "corporate resolution" to sell the property because it was "assum[ed] the [seller's] agent checked on that before listing it." The buyer "trust[ed] the agent who's listing the property that they have done their due diligence on that."

The lawyer-member of the LLC testified that the LLC's operating agreement required unanimous consent of its two members to buy or sell property and that he did not consent to the sale of the condominium or even know the condominium had been listed for sale. He said that the act in listing the condominium for sale "was a clear mistake" because of the doctor-member's lack of authority.

The trial court found in favor of the buyers and ordered specific performance of the contract.

On appeal, the LLC contended that the evidence was insufficient to support the judgment, claiming there was no actual or apparent authority to represent the LLC and, consequently, the contract is not enforceable. The appellate court affirmed, citing the Texas Business Organizations Code, which explains the authority of a limited liability company as follows:

* Except as provided by this title and Title 1, each governing person of a limited liability company and each officer of a limited liability company vested with actual or apparent authority by the governing authority of the company is an agent of the company for purposes of carrying out the company's business.
* An act committed by an agent of a limited liability company for the purpose of apparently carrying out the ordinary course of business of the company, including the execution of an instrument, document, mortgage, or conveyance in the name of the company, binds the company unless:
  - » the agent does not have actual authority to act for the company; and
  - » the person with whom the agent is dealing has knowledge of the agent's lack of actual authority.

* An act committed by an agent of a limited liability company that is not apparently for carrying out the ordinary course of business of the company binds the company only if the act is authorized in accordance with this title.

It was undisputed that the doctor was a member of the LLC and one of its two decision makers. As a result, the doctor was a "governing person" of the LLC, which made him an agent of the LLC.

Chapter 2

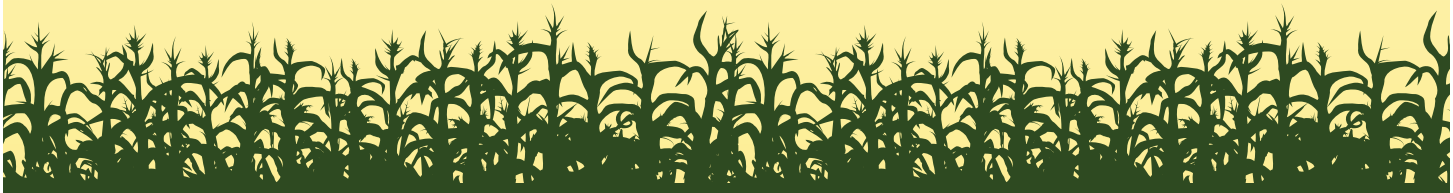
Fair Housing and Anti-Discrimination Standards

Title VII of the Federal Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988, is commonly known as the Fair Housing Act. It was intended to protect consumers from discrimination in all types of housing transactions. The Fair Housing Act prohibits discrimination against certain protected classes in the sale, rental, or advertising of dwellings, in the provision of brokerage services, or in the availability of residential real estate-related transactions.

How can you remember the protected classes?

FAMILIAL STATUS
RACE
E
SEX
HANDICAP

COLOR
O
RELIGION
NATIONAL ORIGIN



You will notice that you are left with the E and the O. If you do not violate the Fair Housing Act, you are providing Equal Opportunities, but if you are in violation, you will most likely need to contact your Errors and Omissions Insurance provider!

Discriminatory Practices (22 TAC §531.19)

TREC specifically addresses anti-discrimination requirements in the following rule, which applies to all license holders (regardless of the field in which a license holder may specialize):

(a) No real estate license holder shall inquire about, respond to or facilitate inquiries about, or make a disclosure of an owner, previous or current occupant, potential purchaser, lessor, or potential lessee of real property which indicates or is intended to indicate any preference, limitation, or discrimination based on the following:
   1. race,
   2. color,
   3. religion,
   4. sex,
   5. national origin,
   6. ancestry,
   7. familial status, or
   8. disability.

(b) For the purpose of this section, disability includes AIDS, HIV-related illnesses, or HIV infection as defined by the Centers for Disease Control of the United States Public Health Service.

In addition to the protected classes under the federal Fair Housing Act, owners or operators of HUD-assisted housing, or housing whose financing is insured by

HUD, as well as Federal Housing Administration (FHA)-approved lenders may not discriminate on the basis of sexual orientation and gender identity in HUD-housing programs. Be aware that municipal ordinances may provide more protection by including additional protected classes, such as students or sexual orientation.

A recent ruling in the U.S. District Court for the District of Colorado expanded the coverage of the Fair Housing Act to include discrimination against LGBT people, classifying the discrimination as "sex stereotyping."

Smith v. Avanti

Gender Stereotyping of LGBT Couple Violates Fair Housing Act

Avanti, a landlord in Boulder, Colorado, refused to rent properties she owned to plaintiffs Tonya and Rachel Smith and their two children because of "kids and noise" and their "unique relationship." Rachel is a transgender woman. She and Tonya have been married for five years and have two children. The plaintiffs argued that discrimination based on sex stereotypes, such as whom a woman should be attracted to, marry or have children with, is "discrimination based on sex" under the FHA.

Although courts have previously ruled that the Fair Housing Act does not extend protections based on a person's sexual orientation, the U.S. District Court for the District of Colorado agreed that discrimination against women for not conforming to gender stereotype norms is discrimination based on sex. The judge stated that "such stereotypical norms are no different from other stereotypes associated with women, such as the way she should dress or act (e.g., that a woman should not be overly aggressive, or should not act macho), and are products of sex stereotyping."

Senior Housing Exemptions

The Fair Housing Act allows some senior housing facilities to refuse to sell or rent to families with children under 18. To qualify for this exemption, the facility must prove at least one of the following:

* housing provided under a program HUD has determined to be designed and operated to assist elderly persons,
* intended for and solely occupied by persons age 62 or older, or
* intended and operated for occupancy by persons age 55 or older and satisfies additional requirements.

DISCUSSION

Can you think of any senior housing examples in your area?

How would this apply in the context of a commercial real estate transaction?

Working together in a group, choose a common type of rental tenant from this list.

- » Students
- » Senior Citizens
- » Mixed Sex Roommates
- » Male Roommates
- » Female Roommates
- » Voucher Recipients
- » Families with Children

Make a list of common misconceptions of the tenant group you chose, and prepare to discuss the list to the rest of the class. Are all the traits mentioned here shared by all these individual groups? Are these perceptions discriminatory?

Advertising

Agents have to advertise to find the most qualified applicants for the properties they manage. They can advertise the property attributes and/or amenities, but they should not advertise the property as something that would be "great for students" or something that would be "perfect for empty nesters." Either one of those could be seen as an advertisement that discriminates against applicants with children.

A good practice is to include the Fair Housing logo or a disclaimer indicating that the brokerage does not discriminate based on race, color, religion, national origin, sex, disability or familial status. Agents should be aware of any other protected classes in their area and may wish to include those protected classes in any disclaimer.

Steering

Steering occurs when an agent attempts to direct a potential tenant to a specific location or property. The agent's job is to show clients the properties that are available within the area that meets the criteria the clients have provided, such as the number of bedrooms, baths, price range, school districts, commuting distance, etc. Using language such as "There are lots of children in this neighborhood," or "This is a nice quiet neighborhood," could be interpreted as a form of steering.

When presenting possible properties to a potential tenant, and the prospect is not interested in looking at a property in a specific area, the agent can delete those properties from the tour.

DISCUSSION

Should you show a handicapped person a property in a recreational area based on your assumption that the prospect would not use those facilities?

How does steering apply in the context of a commercial real estate transaction?

Screening Applicants and Applications

The application and screening process should be clear and presented to potential applicants before they present a rental application for a specific property. A best practice is to attach a copy of the qualifying criteria to the MLS property listing or to provide that information to potential applicants before accepting (and especially before processing) applications. Some information that one might provide in an application packet includes a cover letter explaining the brokerage's policies, the IABS form, residential qualifying criteria, privacy policy on personal information, an application and any other information specific to the brokerage's application.

The policy should be presented consistently to all applicants to avoid the perception of discriminating against anyone. On occasion, a landlord might have special exclusions (e.g., no pets perhaps), that are "property specific," which should be presented in a clear and standard fashion. Once a written policy is created, the broker should ensure that each agent in the brokerage uses it. If a potential applicant requests a deviation from the written policy (e.g., an accommodation for a disability), the agent should consult his or her broker who may need to seek legal assistance.

Questions on the application should not be about physical or mental disabilities or drug or alcohol use. Questions about prior evictions, prior money judgments, bankruptcies and reasons for moving from their current home may be appropriate.

Disparate Impact

Disparate impact refers to housing and other areas that adversely affects one group of people of a protected characteristic more than another, although the rules appear to be neutral. It means that a policy that seems to be race-neutral can be

found to be discriminatory if the policy affects a specific protected class more than the general public.

Disparate impact usually applies where the discrimination is unintentional. A landlord's screening policy may appear harmless on its face, but it may unfairly limit some renters' choices when it comes to housing. An example of a possible adverse impact is when the income requirement is unreasonably high and results in a larger number of minority prospects not qualifying. Disparate impact enforcement decisions have provided fair housing advocates with a means of pursuing claims where the impact was present, but the action was unintentional. Once such a claim is presented and the complainant or government has established a prima facia case that disparate impact has occurred, the burden of proof shifts, and it comes incumbent upon the landlord to then justify the policy and show that it is not discriminatory on its face and as applied.

Disparate impact must be determined on a case-by-case basis, making it more difficult to identify. It is imperative that landlords reflect on the overall effect of policies and daily decisions.

Consider the following policy fixes that could prevent disparate impact discrimination.

* When screening tenants, agents should not demand applicants work full time in order to qualify. It may have a disparate impact on individuals who may have disabilities or who are receiving assistance.
* Occupancy limits can make it hard for families to afford a place to live. The two-person per bedroom rule may not be advisable if it limits choices for larger families or those with young children.
* Charging rent based on the number of occupants, which is common with student rentals, can more adversely affect families with children, making housing unaffordable or more burdensome.
* Crime provisions in leases or rules should take into account not only safety and security, but also possible disparate impacts, especially if there is an argument that the requirement in the provision is unreasonably high.
* Some landlords alter late fee requirements by adding a surcharge to each month's rent and then offering that amount back as an incentive for on-time payments. This practice may result in some protected groups paying higher rent for the same units.

Reasonable Accommodation

It is discrimination for any person to refuse to make reasonable accommodations in rules, policies, or services, when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a property, including public and common use areas. A reasonable accommodation exists when an occupant requests a voluntary exception to the standard rules or policies to accommodate his or her disability. The requested accommodation must be reasonable and should not present an undue burden on the landlord. If the accommodation is not reasonable, or if it would put an undue hardship on the landlord, the request may be denied. In that case, a letter explaining the denial should be sent to the tenant giving the facts for the decision, explaining how those facts were discovered, and offering to meet with the tenant.

An agent should not offer a prospective tenant or occupant an accommodation for something perceived to be a disability before it is requested, because it may subject the agent to a claim of discrimination.

Reasonable Modification

A reasonable modification is different from a reasonable accommodation. Reasonable modification is generally something that requires a change to the property

or the landlord's rules or procedures. An agent may require a tenant to pay for a modification to the property and require that the modification be removed when the tenant vacates the property. If the modification is something that is already required by law, the landlord is responsible for the cost of the modification. Reasonable modifications may include structural changes made to an existing property in order to afford a person full enjoyment of the premises. A request for reasonable modification can be made at any time during the tenancy. An example is a request to replace doorknobs with door levers because the tenant's arthritis makes it difficult to use doorknobs.

DISCUSSION

Break into small groups and consider this scenario.

An agent was hired to manage a residential property. The first applicant to view the property was a couple with legal custody of five minor children. They submitted their application and fees and waited to hear back from the listing agent. The background check revealed good credit ratings (both above 700), no lease or landlord violations, no criminal histories, and good rental references from previous landlords. The landlord refused to rent to the couple because he was concerned the children might damage the property, which was a clear violation of Fair Housing Act.

1. What were some of the results of these actions?
2. How could this situation have been prevented?
3. Have you ever worked with a landlord that you believed wanted to discriminate against possible tenants?
4. How did you handle the situation?

For more information on the federal Fair Housing Act, visit HUD's website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/ FHLaws/yourrights.

Court Case

DODD V. CLEARWATER BAY PROPERTY OWNERS ASSOCIATION, 2016 WL 5415445 (E.D. TEX. SEPT. 28, 2016) (MEM. OP.)

The Marables entered into an oral agreement with Dodd to sell their property to Dodd through a rent-to-own type of agreement in late 2013. Shortly after Dodd moved into the property, the property was vandalized. The Clearwater Bay Property Association (POA) took action against the Marables to prevent Dodd from living on the property. Thereafter, the Marables learned that there was a deed restriction affecting their property stating that "[no] lot shall be conveyed to any person of African descent." The Marables stated they did not know there were any deed restrictions affecting the property or that there was a homeowners' association when they purchased the property. Dodd then sued Clearwater Bay Property Owners Association (POA) for violations of the Fair Housing Act (FHA) and the Texas Fair Housing Act (TFHA).

The POA argued the Marables do not belong to a protected class under the FHA and that the POA had legitimate reasons for any alleged rejections because the structure the Marables attempted to rent or sell to Dodd was in violation of other deed restrictions that did not violate the FHA. The POA also argued that the Marables' claims regarding the racial deed restriction were moot because the language was removed shortly after it was brought to the POA's attention.

The court granted summary judgment in favor of the POA because the POA showed that the same decision would have been made regardless of the alleged discrimination. The POA presented evidence that the structure the Marables attempted to rent to Dodd was a garage less than 1000 square feet. This violated two race-neutral deed restrictions prohibiting structures less than 1000 square feet and prohibiting the use of a garage as a residence. The court further held the structure was not a dwelling as contemplated by the FHA and TFHA because it was a garage with no running water, electricity, or sewage.

Chapter 3

Agency

IABS Redux (aka Information About Brokerage Services form Pop Off!)

The requirement to give the Information About Brokerage Services form to a client or prospect at the first substantive communication has been a statutory requirement for several years. On February 1, 2016, use of a new mandatory IABS form took effect, along with a new requirement to post the IABS on a license holder's business website homepage and some specific rules regarding types of acceptable delivery at the first substantive communication (TREC Rule 531.20). TREC and TAR published articles about the requirements, posted information on their websites, featured it in talks around the state and made several videos to help license holders come into compliance with the regulations.

It has been almost two years now, so why are we still talking about IABS requirements? A wise woman (who happened to be the Chair of the Texas Real Estate

Commission) once told an audience of license holders that TREC will stop repeating material when, "y'all stop making the same mistakes over and over again!"

IABS Pop Off

Agents won't be required to write out the IABS rule 100 times nor have their knuckles rapped, but this oral pop quiz should help everyone stop "…making the same mistakes…"

In-House Sales (aka Intermediary)

Assume you want to represent both sides of the transaction. Can you be a dual agent?

No, dual agency violates TRELA. Beginning in 2003, the only legal way to represent both sides of a transaction is through the "intermediary" process.

Assume you want to represent both sides of the transaction in the capacity of an intermediary. How do you decide to become an intermediary?

The agent cannot make that decision. Only the clients can make that decision, and that decision has to be made by both parties in writing.

The steps of the intermediary process in a purchase and sale transaction are detailed below.

1. **The seller must be the broker's client.** There must be a principal/agent relationship with the seller. The broker will have a fiduciary duty to the seller client under the Real Estate License Act. Most commonly, that relationship is created through a written listing agreement.
2. **The buyer must also be the broker's client.** There must be a principal/agent relationship with the buyer. The broker will have a fiduciary duty to the buyer client under the Real Estate License Act. That relationship can be created through a Buyer's Representation Agreement; however, many relationships are created orally. Remember, a written agreement is not required for a broker to owe all of the agent and fiduciary responsibilities to the buyer, but the buyer has no obligation to pay the broker a commission or assist in obtaining a commission unless that agreement is in writing.
3. **The broker must give the seller a statutory disclosure in writing,** explaining the intermediary process. The disclosure must state the conduct that is prohibited by §1101.651(d) of the Real Estate License Act. The disclosure is similar, but not the same as the short explanation about intermediary contained in the IABS form. The wording of disclosure must be in bold or underlined print. Most commonly, that written disclosure is included as a part of the listing agreement.
4. **The broker must give the buyer the same statutory disclosure in writing,** explaining the intermediary process and that it is required to be given to the seller. The disclosure is similar, but not the same as the short explanation about intermediary contained in the Information About Brokerage Services form. The wording of the disclosure must be in bold or underlined print. Some, but not all, buyer representation agreements contain the required intermediary disclosure.
5. **The seller must consent in writing to the intermediary relationship.** The written consent can be given preemptively, prior to the intermediary situation arising or given once the potential intermediary situation presents itself. The written consent must state the source of any expected compensation. Most commonly, the consent is given preemptively by checking a box in the listing agreement.

6. **The buyer must consent in writing to the intermediary relationship.** The written consent can be given preemptively, prior to the intermediary situation arising or given once the potential intermediary situation presents itself. The written consent must state the source of any expected compensation. Some, but not all buyer representation agreements contain a provision allowing a buyer to preemptively consent to and intermediary situation.

The intermediary situation must present itself. The intermediary situation presents itself when the broker's buyer client becomes interested in the property available for sale by the broker's seller client. Once the buyer client expresses interest in the seller client's property, the intermediary relationship comes into effect, but only if both the seller and the buyer have preemptively given written consent to the intermediary relationship. If written consent has not been previously obtained from both the seller and the buyer, then written consent must be obtained at this time to avoid violating the Real Estate License Act. To move forward without written consent from both parties would be acting as a dual agent, which is illegal in Texas.

This is basic intermediary status, but there are two different levels of intermediary status and some preliminary rules to remember:

1. All relationships are between the broker and the client (seller/buyer). Sales agents do not have clients directly. Sales agents service clients on behalf of and through their broker. As a result, the broker is the intermediary. Every sales agent under the broker must automatically act as an intermediary if the broker has intermediary status.
2. If the broker is not an intermediary, and both the seller and the buyer are the broker's clients, the broker's fiduciary duty to the buyer will require disclosure to the buyer any confidential information known about the seller that could give the buyer a negotiation advantage (and vice versa); however, disclosing that confidential information would be a violation of broker's fiduciary duty to the other client.
3. Any licensed broker can operate at the basic intermediary status level. The basic intermediary status level can be achieved if the broker has
   - no sales agents, or
   - only one sales agent, or
   - multiple sales agents.

Level I – Basic Intermediary Status

At the basic intermediary status, the intermediary must be impartial to both clients. The broker and all of the broker's agents must comply with the provisions of the law that were required to be given in writing (in bold or underlined print) to the parties prior to their agreement to allow an intermediary situation. Any broker or sales agent appointed as an intermediary

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

Level II – Opinions and Advice Intermediary Status

A higher level of service can be given to the clients if the broker appoints separate license holders associated with the broker to each party. The broker and all other sales agents under the broker remain at the basic intermediary status; however, the two separate appointed license holders (and only the two appointed license holders) may provide opinions and advice to the party to which they are appointed. The broker and all other sales agents under the broker may not provide opinions or advice to either party.

After reaching basic intermediary status, the only action necessary to achieve the higher level of opinions and advice intermediary status is for the broker to notify the buyer and the seller:

- that the broker desires to appoint associated license holders to communicate with, carry out instructions of and provide opinions and advice during negotiations to each party (but only if the buyer and the seller authorized those types of appvointments with their prior written consent), and
- the names of the appointed associated license holders.

Failure Along the Way

If a broker or agent fails at any of the steps leading up to the basic intermediary status, the intermediary relationship fails to be created. Moving forward without a proper intermediary relationship means representing both the buyer and the seller as clients without the protection of intermediary status. If there is no intermediary status, then the broker is acting as a dual agent. It is illegal to act as a dual agent.

If the broker is successful in reaching the basic intermediary status but failed to give (or decided not to give) the proper notice to the buyer and the seller concerning appointments, then the higher level of opinions and advice intermediary status is not achieved and the broker and all sales agents remain at the basic intermediary status.

DISCUSSION

1. Why would anyone want to have all of the obligations to act as a fiduciary for a buyer and be required to perform properly under the Real Estate License Act but not have a corresponding obligation from the buyer to pay for those services?
2. What level of interest by the buyer is required before the intermediary situation presents itself? Could it be sending information on the listing to the buyer? What if the buyer
   - » states he/she wants information about the listing,
   - » attends an open house at the property,
   - » is given a tour of the property, or
   - » submits an offer to purchase the property?

TREC Case Study 3

Playing Both Sides

A sales agent, without his broker's knowledge or consent, worked on both sides of a transaction. He eventually executed an intermediary agreement and signed for his broker. Even after executing the agreement, the real estate agent favored one side over the other.

DISCUSSION

Do sales agents have authority to appoint themselves as intermediaries?

TREC Case Study 4

The Eternal Listing

A broker entered into a six-month listing agreement with the sellers, stating in writing that the sellers could cancel the agreement if they were unhappy with her services. Approximately seven weeks later, the sellers gave notice first by email and then by certified mail that they were canceling the agreement. The broker demanded a termination fee. When the parties could not agree on the fee amount, the broker refused to terminate the agreement.

The broker left the MLS listing in her name and changed the property status from "active" to "temporarily off market." The broker left the property status as "temporarily off market" for the remaining four months of the agreement.

DISCUSSION

1. Should the broker have changed the property status?
2. How should the broker have handled the situation with the client?

TREC Case Study 5

Two-Faced Representation

A broker owned a property that he wanted to sell. Because he was having legal and money issues, he put the property in his brother's name. He then "represented" his brother as the seller but wrote "buyer's agent" on the contract. He did not provide an IABS form to his brother or any of the three tenants/purchasers of three separate properties. He represented both sides of the transaction without written consent, and it was usually unclear whom he represented when he took actions. He even told one of the potential buyers that she could sign her husband's name "because they were married." Finally, without a written agreement by the parties, he had the seller (his brother) hold the earnest money until weeks after taking the buyer's $8000 cash down payment.

DISCUSSION

What were the broker's violations?

Court Cases

MCCARTHY V. REALTY AUSTIN, LLC, 500 S.W.3D 677, (TEX. APP. AMARILLO AUG. 19, 2016)

A property owner built a large home in 1998 in Austin. As soon as he had finished construction, he listed the residence for sale. Over the ensuing years, he used a number of different real estate brokers in an attempt to sell the property, all to no avail. On April 7, 2011, he engaged a brokerage firm to sell the residence and entered into a listing agreement with an addendum. The addendum provided for the payment of a 2.5 percent commission to the broker who procured the buyer. The listing broker was unsuccessful in her attempts to sell the property.

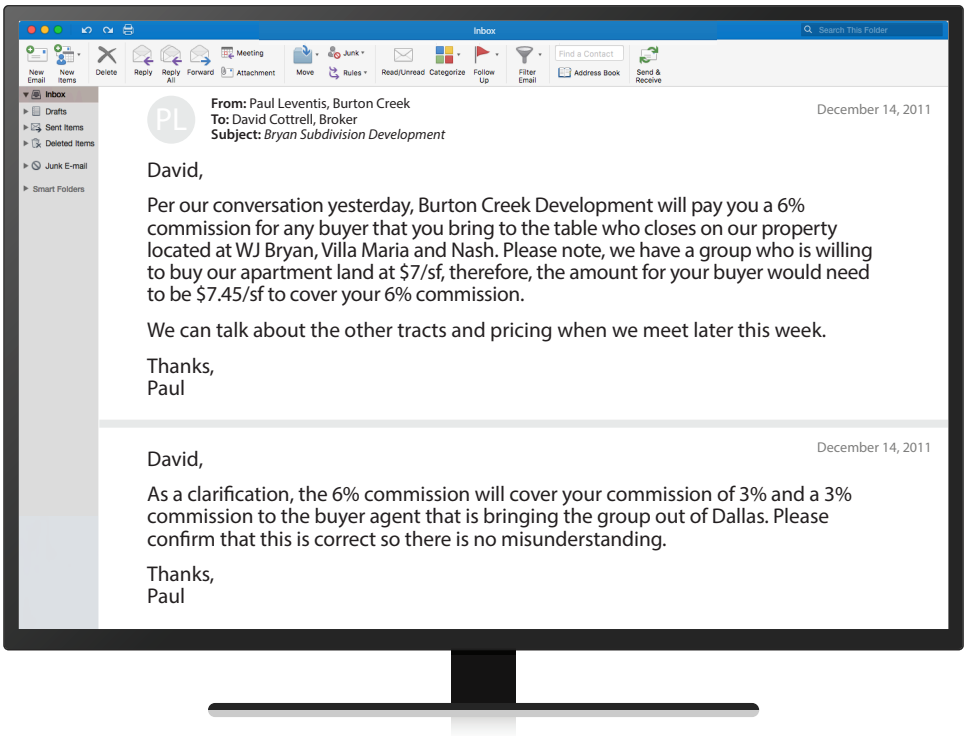
In February 2013, a prospect buyer had engaged the services of a buyer broker who knew that this large residence might be available for a short-term lease. This prospect decided to offer to lease the property. The prospect's broker submitted a proposed lease and an agreement between brokers, which provided a mechanism for the prospect's broker to earn a commission if the tenant decided to purchase the property. The owner rejected the proposal but eventually entered into a lease agreement with the tenant. The agreement provided that the listing agreement would govern any sales commissions due the brokers. The tenant's broker agreed. The brokers were paid a leasing commission.

Subsequently the tenant began to look for property to purchase and contacted the broker that had listed the leased property for lease. Eventually, in 2013, the tenant entered into a memorandum with the property owner, which served as a contract to purchase the property. The broker testified that she was acting solely as the seller's broker. She was the only broker paid a commission in the sale of the property.

The broker who originally procured the tenant learned of the sale while it was pending. He called the seller's broker and offered to assist, but his offer of assistance was not accepted. He then sued, after closing, to collect a commission. The case was tried before a jury that found the tenant's broker was the procuring cause of the purchase and awarded the tenant's broker a $250,000 commission plus costs and fees against the seller. The seller appealed.

Upon review, the appellate court noted that simply introducing the property in question to the buyer, without more, is not sufficient to earn a commission. The broker must produce a buyer who is ready, willing, and able to buy the property at issue while the contract is in force. The evidence indicated that the tenant's broker never talked to the buyer about purchasing the property and had virtually no contact with the tenant after the lease agreement was executed. At the time of the purchase, the tenant's broker had no agency agreement with the tenant to represent him in the purchase of any real estate. The court held there is no evidence that the tenant was ready and willing to purchase that property during the time the tenant's broker represented the tenant. The court reversed the decision of the trial court.

BURTON CREEK DEV., LTD. V. COTTRELL (TEX. APP. AMARILLO DEC. 14, 2016)



In 2010, Burton Creek owned a subdivision development in Brazos County, Texas. The Subdivision consisted of four tracts identified as Lots 1, 2, 3, and 4. Burton Creek placed a sign on Lot 1 which provided that a "[s]hopping center was coming soon." Without a formal written broker's agreement, Cottrell, a licensed broker, began looking for entities interested in purchasing all or part of Lot 1.

In late 2010, Cottrell introduced CVS Pharmacy to a portion of the tract out of Lot 1. After some research and discussion, the parties never reached an agreement for the sale of that property. Subsequently, on December 14, 2011, a representative with Burton Creek sent Cottrell the following email on behalf of Burton Creek:

David,

Per our conversation yesterday, Burton Creek Development will pay you a 6% commission for any buyer that you bring to the table who closes on our property located at WJ Bryan, Villa Maria and Nash. Please note, we have a group who is willing to buy our apartment land at $7/sf, therefore, the amount for your buyer would need to be $7.45/sf to cover your 6% commission.

We can talk about the other tracts and pricing when we meet later this week.

Thanks,
Paul

Later that same day, the Burton Creek representative sent Cottrell a second email, as part of the same email chain.

David,

As a clarification, the 6% commission will cover your commission of 3% and a 3% commission to the buyer agent that is bringing the group out of Dallas. Please confirm that this is correct so there is no misunderstanding.

Thanks,
Paul

In March 2012, Burton Creek began negotiating with Stripes. Burton Creek sent Cottrell an email depicting a site plan for an apartment deal and a layout for Stripes. These negotiations also failed to produce an agreement for the sale of the property.

Later that same month, Cottrell was contacted by a representative of RaceTrac Petroleum, which was interested in the northeast corner of Lot 1. Cottrell introduced RaceTrac to Burton Creek. In April, Burton Creek sent Cottrell an email.

> "[h]ere is the site plan that shows the location behind the corner where racetrack [sic] is looking. I will see you and the Coffee Shop guy at 10:00 a.m. this morning."

Subsequent email discussions and site visits occurred in which Cottrell was copied or involved. Cottrell was copied on nearly all emails exchanged between the parties, including a draft of the first contract for the sale and purchase of a partial tract of land out of Lot 1. Cottrell was copied on an email wherein RaceTrac advised Burton Creek that they had a proposed offer and wanted to meet. Cottrell attended a subsequent meeting between the parties; however, no final contract was executed at that time.

Thereafter, RaceTrac and Burton Creek continued to negotiate for a substantial period without Cottrell's input. A final contract of sale was negotiated and closed without Cottrell's input or assistance when, in January 2013, Burton Creek sold a portion of Lot 1 to Gingercrest, Inc., an entity related to RaceTrac, for $850,252.50. Thereafter, Cottrell made a demand on Burton Creek that they pay a commission equaling six percent of the sales price. When Burton Creek did not respond, Cottrell sued for recovery of the real estate commission he believed Burton Creek owed.

Burton Creek filed a general denial and raised the affirmative defense of statute of frauds. The trial court entered a summary judgment in favor of Cottrell and Burton Creek appealed.

The issue on appeal is whether the email chain of December 14, 2011, satisfies the requirements of the statute of frauds provisions of RELA. Burton Creek maintains that the series of emails does not itself, or by reference to some other writing, identify with reasonable certainty the property, the sale of which would trigger an obligation to pay Cottrell a real estate commission.

The statute of frauds applicable to an agreement to pay a real estate brokerage commission is set forth in section §1101.806(c) of the Texas Occupations Code.

That provision states as follows:

> [a] person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document [Tex. Occ. Code Ann. §1101.806(c)].

Texas courts have interpreted this provision as requiring

* a written agreement or memorandum,
* signed by the person to be charged with the commission,
* containing a promise to pay a definite commission,
* naming the broker to whom the commission is to be paid, and
* either by itself or by reference to some existing writing, identify with reasonable certainty the property to be conveyed.

Partial performance is a well-recognized exception to the statute of frauds. Under this exception, contracts that have been partially performed, but do not otherwise meet the requirements of the statute of frauds, may still be enforced in equity if denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he or she has no adequate remedy, and the other party would reap an unearned benefit.

It has been often stated that allowing a broker to recover on the ground of the broker's performance alone would permit enforcement of any commission agreement fully performed by the broker whether or not it complies with [RELA]. This would be in direct opposition to the expressed will of the Legislature and would unduly expose the public to fraudulent claims for commissions. Burton Creek maintains that Cottrell's "agreement" does not strictly comply with RELA because it does not describe the property actually sold with "reasonable certainty" sufficient to satisfy the statute of frauds. While Cottrell contends the email chain would meet the requirements of the statute of frauds "but for the property description." He also contends he has conclusively proven his claim falls within the partial performance exception, thereby obviating the need to satisfy the requirement that the property be described with reasonable certainty.

Because it is undisputed that the email chain did not describe the property subject to the commission agreement with "reasonable certainty" to satisfy the statute of frauds, this case ultimately turns on the question of whether the partial performance exception applies to the facts of this case.

When a real estate broker's commission agreement fails to adequately describe the property, the doctrine of partial performance may permit enforcement notwithstanding the statute of frauds if

* the broker fully performed;
* the other party knowingly accepted the broker's services by completing the transaction arranged by the broker and receiving the benefits from the transaction;
* the other party has acknowledged in writing his obligation for a commission; and
* documentary evidence establishes the commission due.

Cottrell's summary judgment evidence is extensive. First, it includes the email chain Cottrell proffers as the basis of his commission claim, which states:

> "Burton Creek Development will pay you a %6 [sic] commission for any buyer that you bring to the table who closes on our property located at WJ Bryan, Villa Maria and Nash."

As such, the email satisfies four of the five elements Texas courts have interpreted RELA's statute of frauds to require:

* a written agreement or memorandum;
* signed by the person to be charged with the commission;
* containing a promise to pay a definite commission; and
* naming the broker to whom the commission is to be paid, lacking only in the final requirement that the writing, either by itself or by reference to some existing writing, identify with reasonable certainty the property conveyed.

Cottrell proffered a warranty deed from Burton Creek Development, Ltd. to Gingercrest, Inc. for the sale of a specifically described tract of land, which was out of Lot 1 of the Briar Meadows Creek Subdivision, Phase III. This establishes that the property described is, in fact, a smaller tract of land out of Burton Creek's property located at "WJ Bryan, Villa Maria and Nash" roads. Accordingly, Cottrell provided sufficient "affirmative corroboration" of the missing terms necessary to establish that he was entitled to a commission on the sale of that property. The summary judgment evidence establishes the applicability of the partial performance exception to RELA's statute of frauds.

Under these limited circumstances, the court held that application of the statute of frauds would work an injustice rather than prevent it because enforcement of the statute would cause Cottrell, the party acting in reliance of the real estate broker's commission agreement, to suffer a substantial detriment, for which he has no adequate remedy, and Burton Creek to reap an unearned benefit.

SAN SEBASTIAN REALTY CO. V. HUERTA, 2015 TEX. APP. LEXIS 12850 (TEX. APP. HOUSTON 14TH DIST. DEC. 22, 2015)

A real estate broker entered into a commercial real estate listing agreement with the owners of a commercial property. Represented by the broker, the owners executed a commercial lease with a tenant. The lease included an option for the tenant to purchase the property, which specified the method for exercising the option and the terms and conditions of the option.

According to the broker, the tenant exercised the option in July 2013, but the owner refused to convey the property to the tenant or pay the broker's fee. The broker sued for breach of the listing agreement. The broker also asserted that the owner accepted the tenant's offer by accepting and negotiating the tenant's earnest money check for $1000.

The owners contended that the listing agreement provided for payment of the broker's fee when the fee was both earned and payable. The owners did not dispute that the broker had earned its broker's fee, but argued that the broker had presented no competent evidence that the fee had become payable.

The owners argued that the broker's fee had not become payable because the tenant's letter allegedly notifying the owners that he was exercising the option never reached them, the buyer never agreed to purchase the property on the terms and conditions stated in the purchase option, and the owners never refused to sell to the tenant on other terms. According to the owners, they never received any letter from the tenant because the broker negligently drafted the lease and inserted an incorrect address for receipt of the notice. The owners also asserted that before they had a chance to accept or reject the tenant's exercise of the option, the tenant withdrew that offer. The owner acknowledged that they received and cashed a $1000 check from the tenant with "Earnest Money" in the memo line, but stated that the tenant's monthly rent was $1000, and that they treated it as the monthly rental payment, in part because the tenant sent no additional money for that month. They also provided the tenant a receipt indicating his payment was for rent.

The trial court signed an order granting the owner's motion for summary judgment. The broker appealed.

The court noted that the broker's fee becomes payable only when the sale of the property closes and is funded (which all parties concede had not happened) or when the owners refuse to sell the property after the fee has been earned. There is no competent evidence the owners had refused to sell the property. The tenant informed the owner that he did not want to purchase the property on the terms in the option. The owner had expressed a willingness to sell to the tenant on modified terms, but no sale had yet taken place, and the fact that no sale had taken place cannot constitute evidence that the owners refused to sell.

The court affirmed the summary judgement in favor of the owners.

MAIDA DEV., LLC V. TARANTINO PROPS., 2016 TEX. APP. LEXIS 8285 (TEX. APP.—AMARILLO AUG. 2, 2016, PET. DENIED) (MEM. OP.)

Maida, a licensed real estate agent and the principal of Maida Development, LLC (MD), began communications with Pohl, a real estate agent working for Tarantino Properties, Inc., regarding the sale of an apartment complex (Shoal Creek property) in Austin. Through email, Pohl agreed to make an offer to the seller of the Shoal Creek property on MD's behalf. Pohl passed on some communications from the seller to MD regarding the price and suggested other properties that MD may have been interested in buying. However, Maida prepared three formal written offers to purchase the Shoal Creek property, two of which specifically stated that Maida was acting as principal on his own behalf in the transaction. MD's offers were rejected by the seller because the price was too low.

Ultimately, MD was not successful in purchasing the Shoal Creek property, and MD sued Pohl, Tarantino Properties, and Anthony Tarantino (Pohl's sponsoring broker) for breach of fiduciary duty. The defendants argued they never agreed to act as intermediaries in the transaction and thus were not agents of MD. The trial court granted summary judgment in favor of the defendants. MD appealed.

The issues is whether the communications between Maida and Pohl created a principal-agent relationship regarding the sale of the Shoal Creek property.

The appellate court affirmed the trial court's summary judgment concluding Pohl's emails to Maida demonstrated Maida did not have control of both the means and details of the process by which Pohl was to accomplish the sale of the Shoal Creek property. The court of appeals explained that Pohl's independent decision-making capacity showed Maida did not exercise the control needed over Pohl's actions that would give rise to an agency relationship between Pohl and Maida. Because there was no agency relationship, there is no fiduciary duty based on an agency relationship. Therefore, MD's breach of fiduciary duty claim fails. Furthermore, because the court determined Pohl did not owe a fiduciary duty to Maida, there can be no issue on the vicarious liability of Tarantino as Pohl's Broker under the Texas Real Estate License Act (TRELA).

Chapter 4

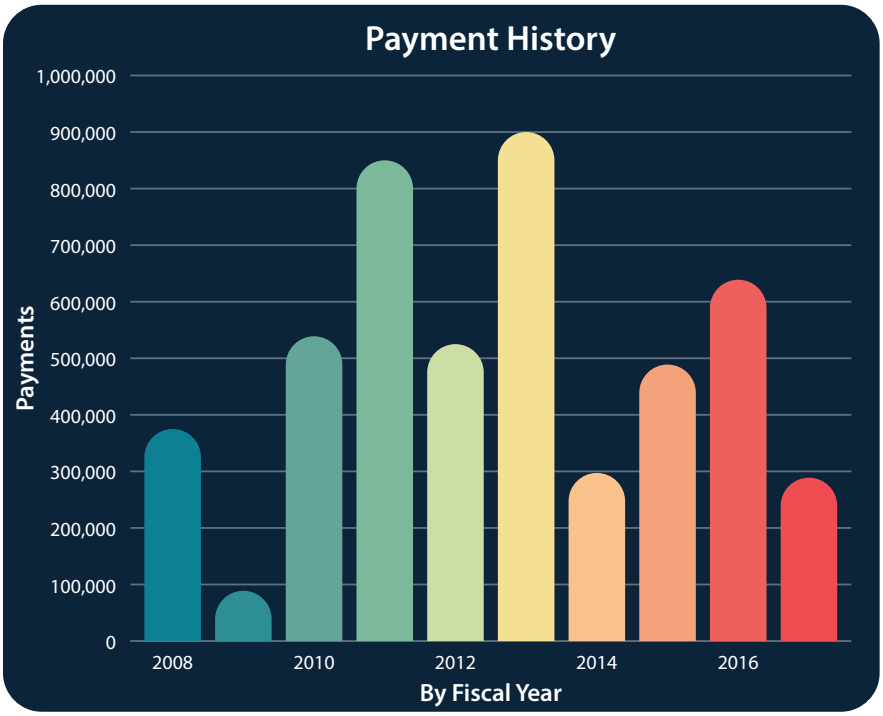
Recovery Fund

Real Estate Recovery Trust Account and Funds

TREC maintains two real estate recovery funds to reimburse consumers who suffer damages caused by TREC license holders: The Real Estate Recovery Trust Account and The Real Estate Inspection Recovery Fund. Consumers may file an application for payment from the Real Estate Recovery Trust Account after filing suit and obtaining a judgment in civil court for damages against a licensed real estate broker, a sales agent or an easement or right-of-way agent. Consumers may also file an application for payment from the Real Estate Inspection Recovery Fund after filing suit and obtaining a judgment in civil court for damages against a licensed inspector. Each recovery fund has different filing requirements and payment limits.

The TREC recovery funds are "funds of last resort." They have been created to reimburse consumers for out-of-pocket damages caused by license holders when the license holders cannot pay for those damages. If a consumer has received any

payment or settlement towards the amount of judgment from a license holder, another defendant, or the license holder's insurance company, the amount of that payment or settlement may reduce the amount the consumer may recover from the TREC recovery funds.



Payment History

Fiscal Year	# of Payments	Total Payments
thru 2007	622	10,352,737.91
2008	14	373,414.95
2009	12	88,299.35
2010	5	536,637.13
2011	20	856,843.03
2012	21	527,323.23
2013	18	904,295.08
2014	13	297,028.02
2015	15	490,540.91
2016	20	636,691.80
2017	12	292,860.75
Total	**772**	**$15,356,672.16**

What are the payment limits for the recovery funds?

Regardless of the number of applicants, payments from the Real Estate Recovery Trust Account may not exceed $50,000 per transaction, with a maximum of $100,000 per license holder for multiple transactions. Payments from the Real Estate Inspection Recovery Fund may not exceed $12,500 per transaction, with a maximum of $30,000 per license holder for multiple transactions.

What is the difference between a recovery fund claim and a complaint with TREC?

The consumer does not have to file a complaint with TREC to apply for payment from one of the recovery funds. When a consumer files a complaint, TREC will investigate and may assess an administrative penalty as part of the disciplinary action taken against a license holder. The administrative penalty is paid to TREC for deposit into the recovery funds. It is not paid to the person who filed the complaint.

A consumer may file an application for payment from only one of the recovery funds and only after the consumer has obtained a civil court judgment awarding damages against a TREC license holder.

Filing a Claim for Reimbursement

Before a consumer can file an application for payment from one of the recovery funds, the consumer must file a lawsuit in court and obtain a civil judgment from the court against a TREC license holder. The lawsuit must be filed in the court within two years after the events giving rise to the claim occurred. Consumers should not wait until a TREC filed complaint is complete before filing a civil lawsuit. After the court grants a judgment in the lawsuit, the consumer must also obtain an abstract of judgment and writ of execution before filing an application for payment from the recovery fund with TREC.

Obtain an Abstract of Judgment

An abstract of judgment is a statement of the relief granted by the court to the plaintiff from the defendant, and when filed of record, becomes a public notice. Each Texas county may have different requirements for obtaining an abstract of judgment. Plaintiffs need to check with the County Clerk's Office in the county where they obtained the judgment and follow those requirements.

After obtaining an abstract of judgment, it should be filed with the County Clerk in the real property records of the county in which the court judgment was obtained. Applicants to the recovery fund must submit a file-stamped copy of the abstract of judgment to TREC with the recovery fund application.

Obtain a Writ of Execution

The application to the recovery fund must also include a writ of execution that has been returned Nulla Bona. A writ of execution is a written order to the constable or sheriff to locate the defendant and demand payment of the judgment. If the defendant has no assets that can be sold to satisfy the judgment, the constable or sheriff will return the writ of execution to the court Nulla Bona, which is a Latin phrase meaning "no goods." The words Nulla Bona must appear on the writ return.

Filing Your Application

After obtaining a judgment, abstract of judgment and writ of execution, an Application for Order Directing Payment from the Real Estate Recovery Trust Account or Real Estate Inspection Recovery Fund can be filed. This application must be filed in the same court and cause number in which the consumer obtained the judgment. A file-stamped copy of the application, along with copies of the original judgment, abstract of judgment, and writ of execution must be sent to TREC. It is not necessary to set a court date at that time. Most claims can be resolved without the need to go to court for a hearing.

Review and Approval

Once TREC receives the application, staff will review the documents submitted and send an acknowledgment letter describing any additional information that is needed. TREC will also send a letter to the license holder asking for any additional information he or she wants to share about the case and letting the license holder know that the license may be revoked if TREC makes a payment from the recovery fund. If the license holder wants to challenge the judgment or the application to a recovery fund, the license holder must do so on his or her own, with or without an attorney. TREC does not represent the license holder in a recovery fund case. TREC's role is to ensure that the statutory requirements for payment from the recovery fund has been met and will only challenge an application in court if one or more of those requirements is not met. Even if TREC denies payment from the recovery fund, that does not vacate the underlying judgment obtained in the original court.

If the application is eligible for payment from the recovery fund, staff will recommend approval and payment of the application to TREC at the next regularly scheduled commission meeting. Depending on the date of the next TREC meeting and the receipt of all information requested, it may take several months to complete this process.

If TREC approves the application for payment, staff will prepare an Order Directing Payment and an Assignment of Judgment. These documents must be reviewed and approved by the Office of the Attorney General. Once approved, the Attorney General will send these two documents to the applicant or his or her attorney with instructions on how to sign the documents, file them with the court, and send them back to the Office of the Attorney General. The Attorney General will return the documents to TREC for final processing. Once TREC receives the documents from

the Attorney General, it usually takes 2-3 weeks for TREC to process the application and mail the check. A consumer may submit an application or hire an attorney to help with the process. Reasonable attorney's fees are eligible for payment from the recovery funds, but only up to the payment limits of each fund.

How Payment from the Recovery Fund Impacts License Holders

What happens to the license holder after payment is made from the recovery fund?

As of January 1, 2016, TRELA requires that a license holder's license be revoked if the amount paid from the recovery fund is not repaid before the 31st day after notice is sent to the license holder that a payment was made.

Can the license holder establish a payment plan to repay TREC and keep his or her license?

Although TREC has the authority to probate the revocation of a license, it rarely exercises this discretion for recovery fund cases. TREC does not exist to act as a lender for license holders who lose a civil lawsuit to consumers.

If a license is revoked following payment from the recovery fund, when can the license holder reapply?

The license holder can reapply at the later of two years from the date of revocation or repayment of the recovery fund payment in full, plus accrued interest.

If a judgment is received against a business entity broker and payment is made from the recovery fund, does that affect the license of the designated broker?

Yes. Effective January 1, 2016, for purposes of payment from the recovery fund, a claim against a business entity broker is also a claim against the business entity's designated broker at the time of the underlying claim. Once payment is made, the licenses of both the business entity and the designated broker will be revoked if the fund is not repaid before the 31st day after the date of notice of payment.

Chapter 5

Hot Topics

Use of Unlicensed Assistants in Real Estate Transactions

Brokers and sales agents often use unlicensed personnel to assist them in conducting their real estate brokerage activities. Care must be taken to ensure that unlicensed personnel do not conduct any of the activities for which a real estate license is required.

Section 1101.758 of the The Real Estate License Act establishes that it is a crime for an unlicensed person to engage in activity for which a real estate license is required. The broker or sales agent who employs an unlicensed person might be criminally charged for the crime as well. In addition, TREC may take disciplinary action against a broker or sales agent who pays or associates with an unlicensed person who engages in activities that require a real estate license. Authority for this disciplinary action is set out in Sections 1101.652(b)(11) and (26) of the License Act. For these reasons, it is important to distinguish between those activities that do

and those that do not require a real estate license. Section 1101.002(1)(A) of the License Act sets forth a list of activities that require a license and are worthy of a close reading.

Preliminarily, the real estate brokerage activities must be "for another" person or entity. This means that persons who are buying, selling or leasing their own property do not need a license; they are acting for themselves and not for another person. The activities must also be for a fee or something of value, or with the intention of collecting a fee or something of value. This means, for example, that an unlicensed person whose neighbor has been transferred out of state may solicit tenants and negotiate a lease on behalf of the neighbor so long as the person does not receive or expect to receive anything of value for helping.

The list of activities requiring a license may be summarized and placed in two categories (but remember, this is a summary only and not all inclusive). First are those activities in which a person directly helps another buy, sell, or lease real property. Activities, such as negotiating a listing agreement with a property owner, spending the afternoon with a couple showing houses for sale or rent, or negotiating a contract to buy or lease real property require a license.

The second category of activities might be referred to as "indirect" activities and are more troublesome. Section 1101.002(1)(A)(viii) of the License Act requires a license for anyone who procures or assists in procuring prospects to buy, sell, or lease property. Section 1101.002(1)(A)(ix) of the License Act requires a license for anyone who procures or assists in procuring properties to be bought, sold, or leased. Many activities that do not require a license can be conducted legally in a real estate brokerage office. There may sometimes exist only a thin line between those activities that require a license and those that do not. The following Q & A may help license holders accurately draw this line.

May an unlicensed person, identified as such, make calls to determine whether persons are interested in buying or selling property, or have property they wish to sell, and if so, make an appointment for a licensed agent to talk to them?

No. Often referred to as "telemarketing," any such activities conducted in Texas must be conducted by a license holder. In Tex. Atty. Gen. Op. H-1271 (1978), the attorney general concluded that a license was required. Also, TREC Rule 535.4(e) makes it clear that all solicitation work must be conducted by a license holder.

May an unlicensed person open doors for prospective buyers or tenants?

No. Rule 535.4(c) states that a person must be licensed as a broker or sales agent to show a broker's listings. An unlicensed assistant cannot perform any activities for a license holder that requires a license, and therefore, cannot "show" a property. This rule was amended last year to clarify that to "show" includes opening doors, allowing access to a property, or hosting an open house. Bottom line, an unlicensed assistant cannot show property for a license holder; this includes providing access to homes for sale and for lease.

May an unlicensed assistant set an appointment to show a listing?

Yes. Under the general rules stated above, it is permissible for an assistant to call a homeowner and schedule an appointment for the broker to bring a potential buyer to see the home.

May the unlicensed assistant host an open house?

No, effective December 20, 2016, TREC changed the rules so that an unlicensed assistant can no longer host an open house.

May the unlicensed assistant place "for sale" signs, open a property or accompany inspectors, or place newspaper advertisements as directed by the broker?

Yes, subject to the following guidelines. TREC Rule 535.5(g) provides that answering the telephone and acts of a clerical or secretarial nature do not require a license. Clerical or secretarial employees need not be licensed so long as they do not engage in solicitation and do not hold themselves out as licensed agents. Further, TREC Rule 535.5(g) states that an unlicensed clerical or secretarial employee, identified to callers as such, may confirm information concerning the size, price and terms of property advertised. Taken together, this means that an unlicensed person may, after identifying himself or herself as an unlicensed person, confirm information previously advertised to a caller or a person dropping by. The unlicensed person should not give information about property other than that inquired about, and should refer any requests for information regarding another property to a licensed agent. For example, the assistant might confirm that a particular property called about has three bedrooms and one bath, as previously advertised; however, the assistant may not attempt to identify properties that instead have two baths and bring these to the attention of the caller. Such questions must be referred to a license holder. The assistant should not attempt to "qualify" the caller in any respect. Many other duties that are administrative in nature can be safely performed, such as inputting data into a computer or typing a contract; however, only as specifically directed by a license holder. Support personnel can order supplies, schedule maintenance, and do all the other things that are involved in keeping the office open. Bookkeeping and office management functions may be performed by an unlicensed assistant, as discussed immediately below.

What functions may an unlicensed office manager perform?

An unlicensed person may perform administrative tasks such as training or motivating personnel, and those tasks dealing with office administration and personnel matters. An unlicensed person may serve as bookkeeper for the company. However, only a license holder may be a signatory on brokerage trust accounts under TREC Rule 535.146(c)(7). An office manager may also serve as a trainer. However, TREC Rule 535.4(d) states that an unlicensed person may not direct or supervise agents in their work as license holders. Therefore, an unlicensed person may not direct or advise agents in their attempts to help others buy, sell, or lease property. They may not review contracts, or help make "deals" work. These tasks are properly conducted only by a licensed person.

May an unlicensed person assist in arranging financing?

Yes; however, great care must be taken that the person acts solely in an administrative capacity. An unlicensed assistant may be directed by a broker or sales agent to assist a particular buyer in obtaining information and forms to apply for and qualify for a loan. However, these acts should be at the direction of a license holder. Mortgage brokers and loan originators are licensed by the Texas Department of Savings and Mortgage Lending, and any questions regarding the requirements for licensure for a person dealing with financing issues should be directed to that agency.

May an unlicensed person serve as a property manager for rental property?

Those who hold themselves out as "property managers" for others and for compensation must be licensed, provided the person also rent or leases the property for the property owner. In addition, §1101.002(1)(A)(x) of the License Act requires a license for a person who controls the acceptance or deposit of rent from a resident of a single-family residential real property unit. TREC Rule 535.4(g) provides that a person controls the acceptance or deposit of rent if the person has the authority to use the rent to pay for services related to management of the property or has the authority to deposit the rent into a trust account and sign checks or withdraw

money from the account. Many property management activities, such as bookkeeping and arranging for repairs, do not generally require a license. However, only a license holder may be a signatory on brokerage trust accounts under TREC Rule 535.146(c)(7). So long as an unlicensed person carefully limits his or her property management activities to those that do not require a license, neither criminal charges nor TREC disciplinary action would be warranted. Note that a person who acts as an on-site manager at an apartment complex is exempt from licensure under §1101.005(7) of the License Act.

What can a license holder do to avoid criminal or disciplinary actions?

First, a broker should NOT let his or her license or sponsored sales agents' licenses to lapse. The lapse of a license, often inadvertent, is a common basis for disciplinary action on the grounds of improper unlicensed activity. Second, analyze any new factual situation according to the rules above to determine the extent to which the unlicensed person is being allowed to act with discretion, and how close the unlicensed person is "directly" assisting others in buying, selling, or leasing property. If still troubled, the license holder should contact his or her attorney. The license holder may also contact TREC for an informal opinion based on a particular fact situation. A sponsoring broker might gain some protection from disciplinary action by establishing written guidelines and training dictating to both their agents and unlicensed personnel what is allowed and not allowed for a non-license holder.

"You're on Candid Camera," and Other Security Issues

Broker Laverne receives a phone call from an irate seller, Shirley.

Laverne: *Good afternoon, this is Laverne.*

Shirley: *Are you the broker for Niagra Realty and the Ricardo team, you know, Lucy and Ricky?*

Laverne: *Yes, I am. May I help you?*

Shirley: *My name is Shirley Feeney, and I have my house listed with Ricky, the one you just admitted works for you. My home is in a very exclusive neighborhood in Flat, Texas called "River Crest" built by High Tone Homes. This weekend your other agent, Lucy, had an open house at my home. I've sent you three videos showing you exactly how Lucy was NOT representing me when she was in my home. She was even working against me trying to sell other homes. I have hidden cameras all over my house because I want to know everything that goes on, and it's a good thing I do because I caught your agent saying terrible things. I want you to do something about this, and I want you to do it now!*

Laverne: *Oh my, Ms. Feeney, I do apologize. I haven't seen the videos come through in my email yet. Could you give me an example of what was said?*

Shirley: *Of course I can! She told them my price was too high, and they should look at homes in this other neighborhood, Mission Hill, and she tried to get their business while she was in my house! What're you gonna do about this?*

Laverne: *Thank you, Ms. Feeney. I'll watch the videos and get back to you. I hope I can accomplish all of that today, but if you could give me until tomorrow, I'll be sure to call you back by then.*

Heather: *I'll be waiting for your call.*

How to Handle Multiple Offers

Everyone Wants Me!

The excitement of receiving multiple offers is often overshadowed in the current marketplace by a lack of clear understanding of agent responsibilities. The agent (or the buyer) who insists their offer should be accepted just because it was submitted first, or because it is full price, is common when sellers routinely receive 3,5,10,15 and more written offers within hours or days. Often just a small detail will separate one offer from another. A seller who has an informed agent will know that the seller can review all offers and accept one, counter one, or invite all buyers to submit a new offer. To avoid the appearance of favoring one potential buyer over another, communication to all interested parties should be clear as to the process and time-frame that will be used for the offer review.

Because many things, in addition to price, determine what a seller will receive on a particular contract, the agent who represents a seller in a multiple offer situation, needs to develop a way for the seller to compare the offers (perhaps using a spreadsheet). The agent should be sure that the seller is shown information on all of the terms including price, financing, earnest money, option fee, closing costs, concessions, and expected net associated with each offer.

A buyer's agent has similar responsibilities to assist his or her buyer to position the offer in a manner that will be attractive to the seller through price, possession, financing terms, earnest money, option period and more.

It is best to present offers and counter-offers in written form signed by the respective party. Emails discussing terms sent between the agents who are not parties to the contract may be problematic and may unintentionally lead one of the parties to believe that a contract has been accepted or created via the email when the agent does not have the authority to bind his or her principal (leading one to file TREC or other types of complaints.)

It is the seller's decision whether the agent will tell other agents of the existence of multiple offers and then only the existence, not the details. The agent should discuss and may make recommendations to the seller regarding the best way to respond to multiple offers. The agent must be clear in any communications. Communication of the status (or change in the status) of offers that are not accepted or are still under consideration is a courtesy to other agents and their clients. It may lead to better relations and help avoid misunderstandings that may arise in a multiple offer situation.

DISCUSSION

1. Is it appropriate for the seller to counter multiple offers at the same time? Why or why not?
2. Should an agent send emails to other agents specifying the terms that a seller will accept? Why?
3. Is it advisable for an agent to contact several of the agents who have sent in offers attempting to raise the price or improve the terms for their sellers, while ignoring others who also made written offers? Why or why not?
4. Could a seller accept the last offer they receive? What if the price offered is lower than other offers they received?

Rebate Issues

The Commission Non-Splitter

A broker advertised on her website that she offered rebates. A buyer who had already found a house saw the advertisement and then negotiated with her on the amount of the rebate. She offered him half of her commission (about $4,000), and he hired her to close on the house he wanted to buy. Instead of keeping her promise, the broker kept the entire commission, arguing that the law prevented her from making any payments outside closing. She promised to pay the buyer multiple times, before the transaction, during the transaction, immediately after the transaction, and during the next year or two. The buyer even agreed that the money could go to a charity instead of himself.

DISCUSSION

1. Was the broker required to mention consent on her advertisement?
2. Does it matter that the advertisement was on a website?
3. Is her argument valid? If not, how could she have kept her promise?

Rebate Muddle

A broker's website offered to give a rebate to certain buyers and listed the conditions on the website. When completing the buyer representation agreement, the broker's sales agent failed to include all of the conditions for the rebate in the buyer representation agreement. The buyers picked this particular broker with the expectation of receiving the rebate. When the sales agent wrote the buyers' offer, he failed to reference the rebate in the contract (paragraph 11 or elsewhere).

The buyers' receipt of the rebate was conditioned upon their using a preferred title or mortgage company. Although the rebate was mentioned in the buyer representation agreement, the other condition regarding the lender was not. The buyers, not realizing this condition for receipt of the rebate, decided to use a different lender. At closing, the buyers' new lender found out about the promised rebate and refused to permit the broker to pay the rebate to the buyers, although it was included on the closing statement. The buyers were seeking VA financing.

DISCUSSION

What should the broker have done differently?

Broker or Agent Acting as Principal

Agent/Principal All Wrapped Up

A seller fell behind on his mortgage. A sales agent executed a contract with the seller using personal LLC "and/or assigns" as the buyer. The special provisions stated the mortgage would be assumed, but there were no loan assumption documents with the contract. The seller had no idea he was still going to be liable on the note and had executed a deed to the LLC without any mention of the loan assumption. Later, the LLC transferred its right to purchase the property to a third party and noted on that contract the loan was sold as a "wrap." The agent owned 10 percent or more of the LLC.

DISCUSSION

1. Was there a violation of TREC laws or rules?
2. Does it matter that an LLC was used?

The Advantage Taker

A license holder was selling her own property. The buyers/complainants gave her $10,000 as an intended down payment on a seller-financed home. The contract did not reflect the $10,000 down payment. Further, when attempting to close on the property, a lien was found on the property and seller-financing was not possible on the property. This lien prevented the buyers/complainants from purchasing the home. The buyers demanded return of their $10,000 down payment. The license holder returned only $8000 stating the remaining $2000 was for the two months the property was not on the market.

DISCUSSION

1. Should the contract have shown the $10,000 down payment?
2. Was the license holder justified in retaining $2000 of the $10,000 for the two months the property was off the market?
3. Are there any situations when you can hold money like this? What if it was earnest money?
4. How should an agent handle his or her own property listing?

Just Because You Have a Key…

A sales agent purchased a house for himself. A bank foreclosed on the property and then conveyed title to Fannie Mae. After the foreclosure sale, the agent leased the property to a tenant. Fannie Mae evicted the tenant, changed the locks, and listed the property for sale.

The agent then used his supra key to access the property, changed the locks, and again leased the property, this time to a different tenant for 14 months before that tenant, after another legal fight, was also evicted. During that time, the tenant paid rent to the agent, although the agent no longer owned the property and had no legal right to the property. The agent did not attempt to market or sell the property for the rightful owner.

DISCUSSION

1. Are there any facts that would excuse sales agent's conduct?
2. Was this real estate brokerage?

Coming Soon Advertisements

There has been a proliferation of the use of "coming soon" or "pocket" listings over the past year. While there may be legitimate reasons for the use of this marketing method, license holders should be aware that selling property using this method, under some circumstances, may result in a complaint with TREC and a finding that the license holder has violated TREC laws and rules.

Some common characteristics of this practice are

* a license holder has a listing on a property and advertises it on a limited basis as "coming soon," or does not advertise it at all outside of his or her own brokerage ("pocket listing");
* the property is not entered into the local MLS system or other online property listings;
* the property is not available for general showings or open houses; or
* the property is not otherwise given full exposure to the market.

Although TREC does not restrict how a property can be marketed, license holders still must comply with their required fiduciary duties.

Under TREC Rule 531.1, a license holder cannot put his or her self-interest above that of the client. The motivation for and disclosure of the effect of an off-market listing are key factors that TREC will consider when investigating a "coming soon" listing complaint. If the property is being marketed as "coming soon" because the seller is still preparing the property for sale, that is a legitimate use of the method. If, however, the property is being marketed as "coming soon" so the listing broker can try to acquire a buyer before it is exposed to other agents, then it appears that the listing broker may be putting the broker's own financial interest ahead of the client's interest. Unless the listing broker obtained the seller's informed consent after full disclosure to the seller that limited exposure could result in fewer showings and offers, the listing broker may be in violation of TREC rules and subject to disciplinary action. To counter this complaint and potential finding, a broker should fully inform the seller as to the potentially negative effect of any limited exposure to the market and obtain the seller's clear and unambiguous consent, preferably in writing, to the use of any limited exposure marketing method.

Chapter 6

Court Cases

STROSS V. REDFIN CORP., 204 F. SUPP. 3D 915, 917-923, 2016 U.S. DIST., 2016 (W.D. TEX. SEPT. 2, 2016)

This case involves a claim for copyright infringement. The plaintiff is an architectural photographer, a licensed real estate broker and a member of the Austin MLS. To participate in the MLS, a participant must submit a Participant Content Access Agreement (PCAA), which incorporates the MLS rules and forms a binding agreement between the MLS and the participant.

The plaintiff alleges that another MLS participant used over 1,800 of the plaintiff's registered architectural photographs in violation of his copyright. The MLS rules circumscribe a participant's use of the MLS's uploaded compilation. For example:

> Section 7.3 states a participant may display "sold" data only "to support an estimate of value on a particular property for a particular client."
> Section 7.6 prohibits a participant from "recommercializ[ing]" MLS content, or deriving any economic benefit from the utilization, transmission,

retransmission or repackaging of same.

Section 9.24 prohibits a participant from displaying more than 100 sold listings in response to a consumer inquiry.

The plaintiff contends the defendant violated the MLS rules by

* using his photographs of sold listings for purposes other than "to support an estimate of value on a particular property for a particular client," and
* by redistributing and recommercializing his photographs by encouraging customers to "share" his photographs via social media.

The defendant asserts two affirmative defenses:

* it was licensed to use the photographs as it did, and
* the Digital Millennium Copyright Act (DMCA) safe harbor provisions shield it from liability for infringement, which means the plaintiff, by signing the PCAA, granted MLS and its licensees a broad license to use the photographs.

Section 7.10 of the Rules states:

> By the act of submission of any Listing Content to [MLS] or into the MLS Compilation, the Participant and/or Subscriber…thereby does grant, [MLS] (and its service providers and licensees) an irrevocable, worldwide, paid-up, royalty-free, right and license to include the Listing Content in the MLS Compilation, any statistical report or comparables, and to use, copy and create derivative works of it and authorize its use, copying and creation of derivative works **for any purpose consistent with the facilitation of the sale, lease and valuation of real property or such other uses**; provided that with respect to such other use, the Participant has not opted-out of such other use after notice of the same.

Both parties moved for summary judgment.

It is undisputed the plaintiff uploaded his photographs to MLS and agreed to the MLS rules. Based on the language of the rules, the plaintiff granted the MLS a "broad" license to use his photographs "for any purpose consistent with the facilitation of the sale, lease, and valuation of real property or such other uses." The defendant also signed a PCAA, which represents a binding agreement between it and the MLS. The MLS granted the defendant "a non-exclusive, limited-term, revocable license . . . to make copies of, display, perform, and make derivative works of the [MLS] Content specified in certain attachments referencing this Agreement." Under the MLS rules, the defendant may only use the MLS Compilation, including the photographs, in accordance with the MLS rules.

The plaintiff contends the defendant maintained only a narrow license to use the compilation and exceeded the scope of its narrow license by violating the MLS rules, and in turn infringed his copyright.

The court noted that the plaintiff is not a party to the defendant's PCAA with the MLS, nor is he is a third-party beneficiary of that contract. Therefore, the plaintiff lacks standing to sue based on any alleged violation of the narrow license the MLS granted the defendant in the PCAA with the defendant. The court noted that the only license the plaintiff could enforce is the broad license granted under MLS rules. The court stated that the remedies for the plaintiff in the PCAA is to report alleged violations of the rules to the MLS. Under the rules, a participant may seek to have the MLS rules enforced, just not in federal court.

By signing the PCAA, the plaintiff granted MLS a broad license to use his photographs in conjunction with the "sale, lease and valuation of real estate or such other use." The plaintiff retains his copyright for purposes other than those contemplated in the MLS Rules. Were the MLS or its licensees to exceed this broad license, the plaintiff could file a lawsuit alleging copyright infringement. For everything else, the plaintiff must report the issues to the MLS and not in federal court. The court granted the defendant's motion for summary judgment.

RUDER V. JORDAN, 2015 TEX. APP. LEXIS 7450, 2015 WL 4397636 (TEX. APP. DALLAS JULY 20, 2015)

A property owner entered into a residential real estate listing agreement with a broker effective January 10, 2014 to May 30, 2014. The property was listed in the MLS. The owner entered into a contract to sell the house on or about February 5, 2014, and the agent servicing the listing changed the property's status in the MLS listings from "active" to reflect that there was a pending contract. On or about March 14, 2015, the buyer allegedly terminated the contract. The broker received a call from an attorney claiming to represent the owner on March 26, 2014. Following this conversation, the broker instructed the listing agent to change the MLS listing to "active" and the agent complied on or about March 27, 2014. After that, without direction from the seller or the seller's attorney the house was designated as "temporarily off market."

On or about June 26, 2014, the owner posted a review of the agent's services on Zillow stating:

> "Kathy [the agent] has been a realtor since 1990, and sold 14 houses, according to Zillow. I listed my home with her to give her a break. As the result, she kept my home for over 100 days, Temp. OFF Market against my wish. I have been told by over a dozen Realtors that NO ONE will do that for any reason, because they value their reputation. I was asked if it is incompetence, unstable mind, or rage induced by rejection. My answer is I do not know. What I know is I would never recommend her to anyone. This is to inform you of my experience, not to discourage anyone."

The broker and agent sued the owner for breach of contract and defamation, and requested an injunction to remove the defamatory statements. The owner moved to dismiss, and the trial court denied the motion. The owner appealed.

It is undisputed that the defamation claims are based on, related to, or in response to an exercise of the right of free speech. The owner argued that the posted statements constitute actionable, objectively verifiable statements of fact and are substantially true. The broker and agent allege that three statements were false:

* that the house was temporarily off the market for 100 days without reason against the wishes of the owner;
* that over a dozen Realtors said that NO ONE will do that for any reason, because they value their reputation; and
* that the Realtors questioned the agent's competence, mental stability, and whether she suffered 'rage induced by rejection' [sic]. The court addressed each of those statements.

The court noted that the parties agree that the home was actually listed as "temporarily off market" for 64 days, from March 27, 2014, until May 30, 2014. Discrepancies as to details do not demonstrate material falsity for defamation purposes. The gist of the statement is that the owner was dissatisfied with the agent's services because her property was listed as "temporarily off market" for an extended period without her consent. A statement identifying the period as "over 100 days" was, in the mind of an average reader, more damaging to the agent's reputation than an accurate statement than identifying the period as 64 days.

As to the second statement, in the trial court, the broker and agent acknowledged that they could not produce evidence that this statement was false ("told by over a dozen Realtors NO ONE will do this for any reason because they value their reputation"). They failed to meet their burden.

Regarding the third statement, the broker and agent argued that the owner "proposed" or "insinuated" that the agent is incompetent, mentally unstable, or raging from rejection. The court noted that a statement expressing or implying that someone incompetent is a nonactionable statement of opinion. The court reversed the trial court's decision.

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