



## ***Texas Real Estate Commission***

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### ***MEMORANDUM***

**TO:** TREC Commission Members

**FROM:** Paul Jordan, Commissioner

**RE:** Meeting November 4, 2003 regarding TAR's proposed amendment to Section 535.2(b)

**DATE:** November 21, 2003

A meeting to discuss the Texas Association of Realtors' (TAR) proposed rule change to 22 TAC §535.2 was held on November 4, 2003. I conducted the meeting, and Wayne Thorburn and Loretta DeHay attended on behalf of TREC. Ron Walker, Director of Legal Services for TAR, Aaron Farmer, Texas Discount Realty, and numerous other persons spoke either for the proposed rule or against the rule. Individuals in attendance provided valuable input on various alternatives that may be acceptable to all parties. After a broad-ranging discussion that included problems with interpretations of existing law, lack of complaints filed with the commission to justify promulgating a rule that would effectively put "fee for service" (FFS) brokers out of business, and the perceived need to clarify existing rules to establish a minimum service requirement, I offered a concept of a rule to undertake as a compromise to the TAR rule.

Conceptually, the rule would require that licensees must offer to provide certain minimum services to their clients. The client can choose not to use the services; however, the licensee must be ready, willing and able to provide the services which may be structured at an extra cost or no cost if the services are requested by the client during the term of the listing agreement. The fee for the minimum services need not be built into the bottom line fee if the licensee and client agree that the licensee will only provide MLS access. In addition, if the listing agreement contemplates less than full service, the client must be advised in writing that the client is not to seek to obtain such services from a licensee representing another party to the transaction given that such a licensee is prohibited from assisting the client.

It is not fair to say that the conceptual rule was universally accepted by the meeting's participants, but appears to be a compromise that preserves the integrity of the agency relationship while allowing limited service brokers to operate with minimum adjustments to their business model.

The central focus of the meeting was the extent of the fiduciary duties owed by a licensee to a client when the licensee represents the client under a listing contract. It was generally agreed that there is confusion in the industry as to what a consumer can expect from a broker in an agency relationship where both parties to the relationship have agreed that the broker will only provide MLS access, and the client will negotiate the contract on his or her own behalf.

Section 535.2 of the rules currently requires a broker who represents a principal under a listing contract to negotiate the best possible transaction for a principal. General common-law fiduciary duties include performance, loyalty, reasonable care and accounting. TREC's code of ethics and other rules require, among other things, that a licensee act with fidelity, integrity,

and competency. Furthermore, a licensee must convey all information to the client of which the licensee has knowledge and that may affect the client's decision.

All parties at the meeting were in general agreement that a real estate license is not necessary to advertise the sale of property for a seller. Therefore, no fiduciary duties attach when a licensee agrees solely to advertise the property in MLS. While the issue was raised as to whether such an agreement may be characterized as an "exclusive listing agreement" for purposes of MLS access, it is clear that such a determination is outside TREC's jurisdiction or purview. However, there was general consensus among the FFS brokers at the meeting that a broker who enters into what is characterized as an exclusive listing agreement that provides MLS access only is offering more than just basic advertising. Therefore, if the parties to a listing contract agree that an agency relationship is to be established with an "exclusive listing agreement" what services must a broker be ready, willing, and able to provide to the client under the agreement and under the conceptual rule?

TAR has recommended in its proposed revision to section 535.2 of the Rules that a broker must, at a minimum, accept and present all offers on behalf of the client, answer the client's questions, and help the client fill out forms. However, the FFS brokers present at the meeting felt that a rule requiring licensees to offer the minimum services, without an absolute requirement that the services must be provided in all cases would harmonize with the FFS business model. The FFS brokers agreed, however, that in order to effectively address concerns regarding informed consent, they could abide by a rule that required all brokers to offer the minimum services if a client could freely choose whether to accept those services at the outset or during the course of the agreement. If a client initially chose not to utilize the minimum services but later decided that he needed the broker's assistance, the broker must provide the minimum services as necessary during the term of the listing agreement. Thus, the licensee must offer the minimum services utilizing whatever fee structure is feasible for the parties, the client is not required to pay for the services he will not need, and the broker still has a fiduciary responsibility to the client during the term of the agreement to provide the services that may be needed on a fee for service basis.

While TAR's original proposal exempted builders and government agencies, all parties at the meeting were in agreement that there is no justification for exempting certain agency relationships from the general rule.

Finally, it must be noted that there was lively discussion concerning an existing statutory provision, section 1101.652(b)(22), Texas Occupations Code, that prohibits a licensee from negotiating with a person knowing that the person is represented by another licensee in an exclusive listing agreement. Disciplinary action may be taken against a license holder acting as a broker or salesperson who "negotiates or attempts to negotiate the sale, exchange, or lease of real property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction." There are no exceptions or waivers authorized by statute.

FFS brokers and brokers who represent builders or government agencies would not violate the rule by entering into an agreement with a party where the party wants to negotiate the sale of the property without the broker's assistance. The potential violators would be the buyers' agents or cooperating agents who contact a represented party as indicated in the MLS.

Potential violators may wish to rely on the provision of 1101.652(b)(22) to avoid contacting represented parties listed in MLS who elect to negotiate the sale of the property on their own behalf. However, it is important to note that industry practice has long supported the "contact the seller directly" model without strict enforcement of the statutory provision. In practice, it seems the rule has been interpreted to mean "don't contact the seller directly without the consent of the seller's broker." While not controlling, it is worth noting that the National

Association of Realtors' Code of Ethics, Standard of Practice 16-13 provides that "[A]ll dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's agent or broker, and not with the client, except with the consent of the client's agent or broker or except where such dealings are initiated by the client." Again, in this instance, there seems to be little justification for exempting certain agency relationships from the general rule.

The participants had one important point of agreement relative to the above rule: the delivery of an offer or counter-offer directly to the seller is not negotiation or an attempt to negotiate and therefore not a prohibited activity.

It is important to note that modifications to section 1101.652(b)(22), Texas Occupations Code, require legislative action. In light of our limited ability to address the issues presented and based on the above discussion, 22 TAC §535.2 could be revised as follows:

(d) A licensee is required to offer to provide the following services, at a minimum, under a listing contract with the client:

- (1) accept and present to the client offers and counter-offers to buy, sell, or lease the client's property or property the client seeks to buy or lease;
- (2) assist the client in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and
- (3) answer the client's questions relating to the offers, counter-offers, and notices.

(e) While a client may choose not to utilize the services required by subsection (d), during the term of the listing contract, a licensee must convey to the client all information made known to the licensee as required by subsection (b) and must be ready, willing and able to provide the client the services required by subsection (d).

(f) If a listing contract contemplates the client choosing not to utilize the licensee retained by the client to obtain the services required by subsection (d), the listing contract shall instruct the client that the client is not to seek to obtain the services outlined in subsection (d) from another licensee that may be involved in the transaction.

(g) If a listing contract contemplates the client choosing not to utilize the licensee retained by the client to obtain the services required by subsection (d), the listing agreement shall conspicuously set forth the provisions of subsections (d) and (f). The licensee shall call the client's attention to such provisions of the listing contract and the provisions of subsections (d) and (f) shall be acknowledged in writing by the client.

Subsection (d) above references the requirements of subsection (b). For your convenience, the full text of section 535.2 is set forth below.

(a) A broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision. A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent.

(c) A broker is responsible for the proper handling of escrow monies placed with the broker, although the broker may authorize other persons to sign checks for the broker.