

BROKER RESPONSIBILITY COURSE

May 2012



What is the Purpose of this Course?

- Review regulations concerning brokers':
 - Management
 - Operations
 - Supervision
- Discuss
 - Law of Agency
 - Planning & Organization of Business Entities
 - Needed written policies and procedures
 - Records retention and control
 - Advertising
 - Recruitment and training of agents
- Case study of a hypothetical TREC complaint



What is the difference between the Real Estate License Act and TREC Rules

- Real Estate License Act
 - Statute
 - Creates TREC and give Powers to TREC (“enabling statute”)
- TREC Rules
 - Adopted by TREC to enforce statute
 - Cannot be contrary to statute
 - Cannot supersede authority in statute
 - Can implement or interpret
 - Part of Texas Administrative Code (22 TAC § 535.5)

A man in a grey suit, blue shirt, and red tie is shown from the chest up, looking upwards and to the left with a thoughtful expression, his hand resting on his head. A speech bubble above him contains the text "WHAT'S THE DIFFERENCE?".

WHAT'S THE DIFFERENCE?

Who Must Take This Course?

- Broker who sponsors salespersons
- Designated broker of a business entity
- Licensee who supervises others
 - for 6 months or more during current license period
- TREC requires it for the foregoing as a condition of license renewal
- Receive 6 hours elective credit
- Those who may but are not required to take this course include:
 - Anyone who wants to take it
 - Broker can require his licensees to take it (written policy)



Definitions

- ***Person means:***

individual

partnership

corporation

limited liability company

other legal entity

state agency or governmental subdivision



Definitions (cont.)

- ***Business Entity (Entity) means***
any entity defined in the Business Organizations Code

corporation

LLC

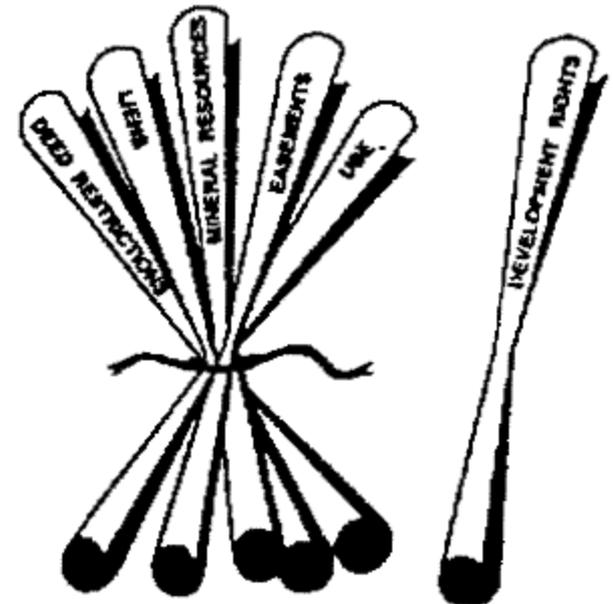
partnership



Definitions (cont.)

- ***Real Estate means:***
any interest in real property

BUNDLE OF PROPERTY RIGHTS



Definitions (cont.)



- ***Real Estate Broker means***
 - (1) person
 - (2) for another person
 - (3) for compensation or in expectation of compensation
 - (4) does an activity listed in the laundry list
 - (see materials for list next slide)

Brokerage Activity in Definition

- sells, exchanges, purchases, or leases;
- offers to sell, exchange, purchase, or lease;
- negotiates the listing, sale, exchange, purchase, or lease;
- lists real estate for sale, lease, or exchange;



Brokerage Activity in Definition (cont.)

- auctions real estate;
- deals in options in real estate;
- aids in locating or obtaining real estate;
- procures prospects;
- controls the acceptance or deposit of rent in a SFR;
- Provides written opinion, about price if:
 - does not refer to it as an appraisal;
 - provides it in the ordinary course of business; and
 - relates to management, acquisition, disposition, or encumbrance or real estate

Definitions (cont.)

- **Real Estate Broker** also includes:
 - (1) an employee to sell real estate;
 - (2) one who charges a fee to promote the sale of real estate by listing in a real estate listing publication or referring information about the real estate to brokers



Search
ALL Local
MLS
Listings
[Click Here](#)

Definitions (cont.)

- ***Designated Broker means:***
- Individual
- Has active broker license
- Designated by a licensed Entity
- To act on Entity's behalf
- Must be an officer (corp.) or manager (LLC) or general partner (partnership)



Definitions (cont.)

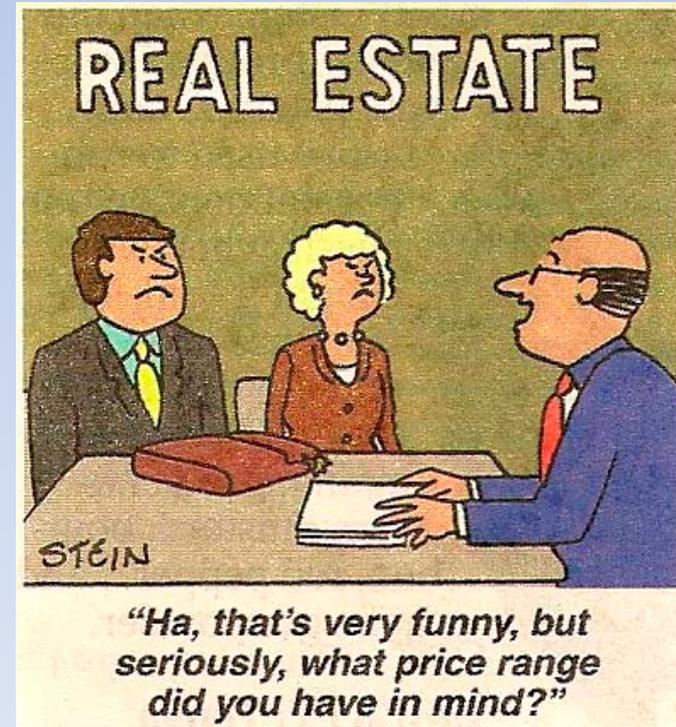
- ***Salesperson means:***

Person

Associated with a broker

Performs real estate

brokerage for the broker



Acting as Agent v Acting as Principal

- When licensee performs a brokerage function licensee becomes someone's agent (acting for another).
- If licensee acts for his own account, then licensee is not acting as a broker by definition.
- TREC may discipline licensees when acting as a broker or salesperson and when acting in their own account in some cases (misrepresentation, dishonesty or fraud)





Chapter 2 Authority, Competency, Training, Selection, and Recruitment

Scope of Licensee's Authority – Broker's Responsibility

- Broker MUST advise salesperson of the scope of his authorized activities
- Broker is responsible for salesperson's authorized acts
 - Unless scope is limited
 - Authorized acts are revoked in writing
 - Broker is not required to directly supervise
- If broker lets salesperson go beyond the authorized acts then those are deemed to be authorized.

Establish Competency Standards

- Broker should create competency standards for salesperson
- Examples include
 - Education (specify areas of practice)
 - Experience (resid., com'l, farm and ranch, etc.)
 - Geographical limitations. These competency standards may be communicated in office policies,
- Put competency standards in office policies or independent contractor agreements or other places.

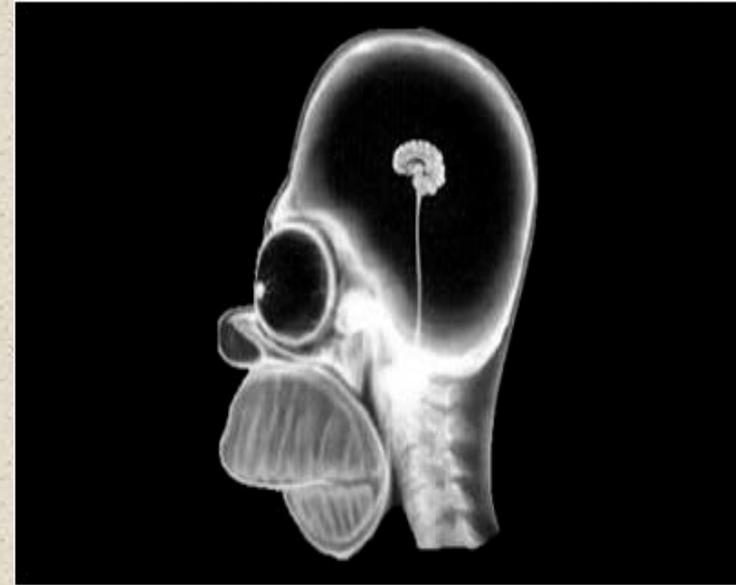


Examples of Competency Considerations

- Is licensee capable of selling a high rise office building in downtown Dallas?
 - If not, what skills and knowledge are needed to practice real estate in this area?
- Should broker assist a licensee in completing contracts?
- Are leasing agents familiar with Texas landlord/tenant laws
- Should a licensee understand crops and mineral rights to perform farm and ranch sales?

Licensee's Competency

- Broker **MUST** maintain **WRITTEN** policies to ensure that salesperson is competent to perform the authorized activities.
- Broker **MUST** assure that salesperson receives education that broker deems necessary to obtain and maintain competency
- Competency is achieved through
 - actual transactional experience
 - additional training



Background Checks

- Broker may want to consider a background check policy for persons in the office (employees, agents, contractors)
- May need to consult attorney about Background Check Policy and implementation
 - creation of the proper authorizations
 - contracting the background check service
 - interpreting background reports
 - criteria to use when making decisions based on information in background reports.

Recruiting Licensees from Other Brokerages



Join Us or Die.

- Neither RELA or TREC Rules prohibit a broker from making offers to engage salespersons sponsored by competition
- Certain customs and courtesies in some areas may exist but are not enforceable
- Any questionable recruitment practice should be discussed with an attorney for the purpose of avoiding allegations of interference with contractual relationships

Case Study (Competency)

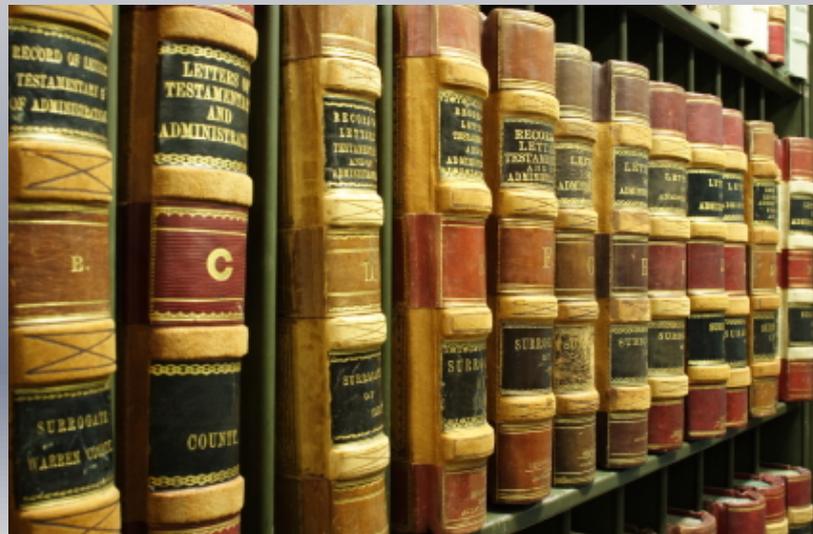
- Agent had little experience with condo sales.
- Buyer informed agent he could only afford \$200 in the POA fee
- Condo docs showed fee to be \$323
- Agent did not get condo docs to buyer timely and did not review POA fee or Settlement Statement
- Sponsoring broker did not know about the transaction, or that it involved a condo, or that agent had minimal condo experience
- Broker took a reprimand

Agency



Law of Agency

- Law of agency governs relationship between clients and brokers.
- A broker who “represents” a party is that party’s agent (§1101.557)



Creation of the Agency Relationship

- Can be an agent through written or verbal authority
- Payment of compensation does not determine agency
 - a broker may receive compensation from the other party principal, the other broker, or from more than one party if all parties consent
- Agency relationship occurs when principal and agent consent to the representation
 - By written agreement
 - By oral agreements
 - By the actions of the broker and principal (by implication).

Types of Agency

- Many ways to classify types of agency, but can be classified by the authority given:
 - actual authority
 - agency by ostensible authority
 - agency by ratification

I  **MY AGENT**

Agency by Actual Authority

- Created by express or oral contract
- Outlines what authority the agent has; known as express authority
- Even with express authority, implied authority can also arise
 - Implied authority is the right to perform certain acts even if not specified in the contract.
 - May arise from custom in the industry, common usage, or conduct of the parties

Agency by Ostensible Authority

- Exists when the causes another person to believe that another was his agent
- Principal may be bound by the act of the agent
- Ostensible agent does not have express authority
- Declarations of the agent alone are not sufficient; arises only by acts of the principal.
- Sometimes called agency by estoppel or agency by apparent authority
- Example: Listing broker who also works with buyer
- Licensee has obligation to make it clear to the parties whom the broker represents in the transaction.



Agency by Ratification

- Agency that is affirmed after the fact
- Example: Agent with no written or oral agreement secures a contract & principal agrees.
- Can be ratified by the action of the parties
- Question is whether a principal ratified an unauthorized act by the agent
- If the principal fails to repudiate the acts of the agent or the acceptance of the benefits is evidence of ratification.

**THE
RIGHT
KIND
OF
WRONG**

Agency Liabilities

- Common bases for suits against licensees in Texas include:
 - misrepresentations (as to a property's condition, size, amenities, features, encumbrances, etc.)
 - breach of contract
 - negligence
 - slandering title
 - failure to disclose known defects
 - failing to inform the client of property's appreciation in value
 - engaging in conduct that constitutes real estate fraud
 - expressions of opinion.



Agency Liabilities (cont.)

- When someone sues because of action of a salesperson, the broker will be sued even if broker had no knowledge of the alleged bad acts
- The seller's failure to make the disclosure may create liability for agent.
- Broker's actions may create liability for the principal
- RELA states:
 - a party is not liable for misrepresentation or concealment by a licensee unless the party knows of the falsity of the misrepresentation or concealment and failed to disclose his knowledge

Agency Liabilities (cont.)

- Expressions of opinion are generally not actionable, provided that opinion was not negligently provided and a reasonable person understands it to be an opinion
- Always quote source when giving information as it provides affirmative defenses in some cases and can reduce confusion and potential liability.



Special Agency

- Normally broker-principal is a special agency relationship
- Special agent does not have authority to bind the principal
- Broker's authority is limited to the specific matters for which he was hired

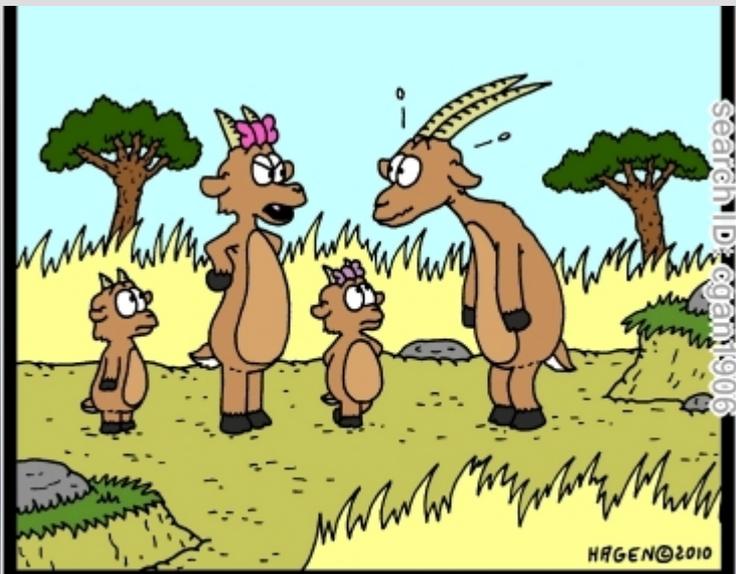


General Agency

- General agent can bind principal as long as agent is acts within the scope of his duties
- Example: salesperson and the sponsoring broker is a general agency
- Principal can be held liable for acts of general agent
- Does not typically exist between broker and principal.
- Sometimes special agencies can be converted to general agencies

Duties of the Agent to the Principal

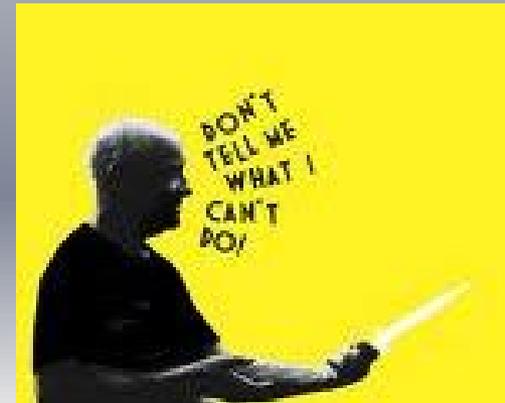
- Agent is a fiduciary
- Duty of trust, confidence, and honest business dealing is owed to principal
- Example: Agent will not disclose lawful information the principal does not want disclosed
- Example: Confidences



No, you can't go and have a drink with your friends:
Your one and only duty is to protect us from predators!

Specific Disclosure Issues

- **Sales Information** - Can licensee disclose sales price information after closing?
- RELA provides that a licensee, or not-for-profit real estate board, may provide information about real property sales prices or terms of the sale for purposes of facilitating, selling, leasing, financing, or appraising real property. (MLS)
- Problems occur when trying to get around MLS duty to report sales price



Specific Disclosure Issues (cont.)

- **HIV Issues**
- Fair housing laws provide that AIDS or an HIV-related illness is a disability (protected class)
- RELA provides licensee has no duty to make inquiry or disclosure about whether a previous occupant had or may have had AIDS or an HIV related illness.

Specific Disclosure Issues (cont.)

- **Death**
- Under RELA, a licensee has no duty to inquire about or disclose death on the property caused by suicide, natural causes, or accidents unrelated to the condition of the property.
- Murder? Death caused by property condition?



Specific Disclosure Issues (cont.)

- **Sex Offender Registration**
- Section 62.056(e) of the Code of Criminal Procedure provides that a person's broker, does not have a duty to make a disclosure to a prospective buyer or lessee about registered sex offenders
- May such matters be disclosed? Conscience?

Duties Owed the Principal

- Generally, a broker owes the principal the duty of:
 - performance
 - loyalty (includes full disclosure)
 - reasonable care, and
 - accounting



I'm supposed to do what?

Performance

- Performance
 - broker is to use best efforts and diligence
 - to obey lawful instructions



Loyalty

- Work for best interest of principal
- In-house sale conflict of interest
 - resolved by the intermediary relationship by following the procedures outlined in RELA.
- May advance broker's own interest in profit to the detriment of principal



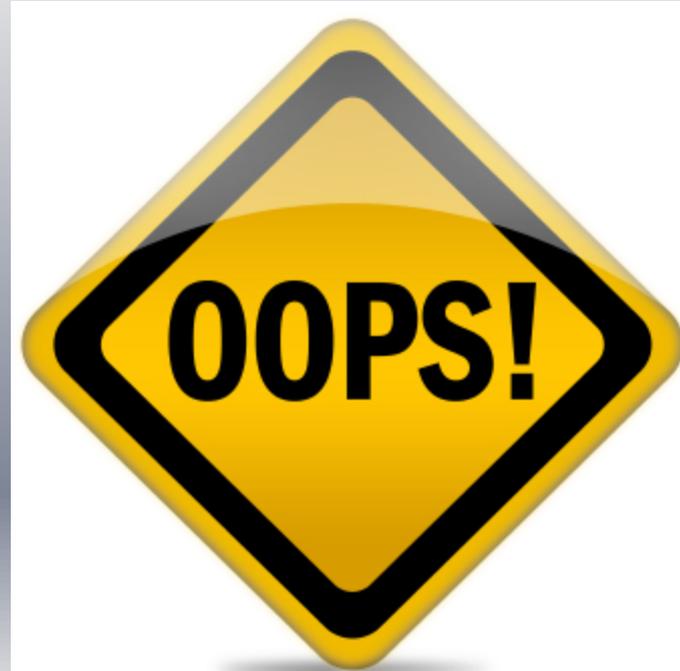
Full Disclosure

- Licensee must convey all known information concerning offers and to keep the principal informed of significant information
- Examples:
 - nondisclosure in the flip sale
 - disclose if the agent owns an interest in the buyer
 - Written disclosure if licensee is a principal in the transaction (for entities = 10% rule)



Reasonable Care

- Generally involves broker's competence and expertise
- The broker has a duty to:
 - disclose knowledge of material facts
 - not to give legal interpretations of the documents
- Standards of conduct concerning reasonable care are in
 - RELA
 - TREC Rules
 - customary practice in the industry



Reasonable Care (cont.)

- Examples of custom and practice:
 - Is it customary and reasonable to obtain information about a prospect's financial ability?
 - Should a listing broker advise his or her client about changes in values during a listing period?
 - What types of questions should a buyer's broker suggest that the buyer ask about the property and the history of the property?

Accounting



- Accounting requires any money accepted in trust for another or on behalf of another must be promptly remitted to the person or deposited in a trust or escrow account according to the terms of an agreement.
- May not commingle
- May not accept undisclosed fee or rebate

Duties of the Principal to the Agent

- Principal owes to agent:
 - performance
 - compensation
 - reimbursement
 - indemnification

Performance

- Performance by principal is to do whatever can be done reasonably to accomplish the purpose of the agency



Compensation

- Normally specified in the listing agreement or buyer representation agreement
- Earned v. Payable



Reimbursement

- Generally, the principal must reimburse the agent for expenses made on the principal's behalf
 - Agreement should control
 - Does not include cost of business
 - Requires exercise of good faith and in client's best interest



Indemnification

- May arise when the agent suffers a loss through no fault of his own while performing duties on behalf of the principal
- Example: Broker makes statement when relying on a representation by the principal



Duties to Third Parties

- Broker may have duties to those who are not his principal
- Fair and honest business practices (“fairness duty in TREC rules)
- Liable to third parties for misrepresentations about property condition



Duties to Third Parties (cont.)

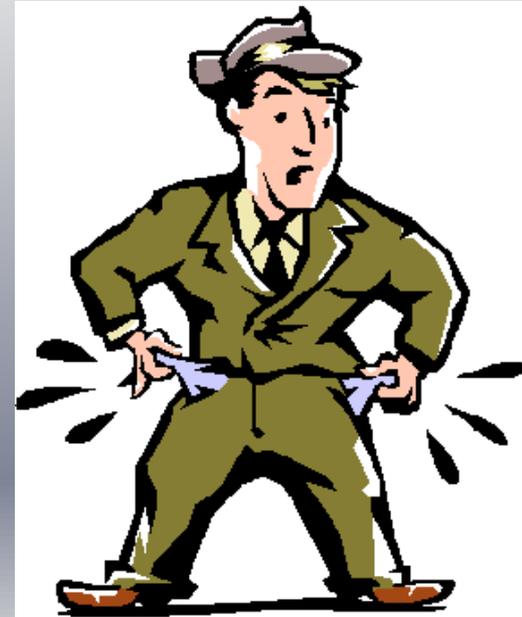
- RELA requires at least 3 affirmative disclosures to a third party
 - significant defects in the condition
 - advising a purchaser to have the abstract of title
 - making clear to the parties which party the broker is working for
- If acting as a principal must disclose that he is licensed
- If broker receives a request for a copy of document from a person who signed the document, the licensee is obliged to provide it



**Invitor invites invitee to
occupiers' liability party.**

Buyer Brokerage

- Can act as broker under oral understanding or written agreement (wiser)
- Broker can represent either party and be paid by either party, or both parties, provided that all commissions are disclosed.
- If listing broker refuses to compensate buyer's broker?
 - look to the purchaser or some other source
 - does not have an agreement with a seller and therefore cannot sue the seller for a commission.



Fee for Services and Rebates

- Compensation based on services performed
- Rebates of fees to principals do not violate the RELA.



Minimal Level of Services

- RELA requires minimum level of service by a broker who represents a party under an exclusive agreement
- Must:
 - inform the party of material information including the receipt of an offer by the broker,
 - answer the party's questions, and
 - present an offer to or from the party



Dual Agency?? Does it exist?

- RELA states *“a broker must agree to act as an intermediary...if the broker agrees to represent in the transaction (1) a buyer or tenant; and (2) a seller or a landlord.”*
- Eliminates dual agency
- Creates duty to get written consent to act as an intermediary

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"Sure, it's a lot of work being a double agent, but you get two retirement plans!"

Intermediary

- Defined as “a broker who is employed to negotiate a transaction between the parties...and for the purpose may be an agent to the parties to the transaction.” A real estate broker who acts as an intermediary between the parties
- 5 duties or limitations set out (see materials)
- Must first obtain written consent from each party to act as an intermediary
- Written consent must state the source of any expected compensation.



Intermediary (cont.)

- A written listing or buyer rep. agreement, which authorizes the intermediary, is sufficient to establish written consent if the written agreement sets forth, in conspicuous bold or underlined print, the real estate broker's obligations
- Intermediary may appoint, in WRITING a licensee associated with the broker to communicate with and carry out instructions of one party, and another for the same purpose to the other party

Property Management Responsibilities

- Particular Issues with Vendors and Suppliers
 - If agent acts for principal known to the vendor and agent has authority, then principal is liable to vendor
 - Ostensible authority may apply
 - Ratification may apply
 - If agent acts outside scope of authority, principal can recover against agent

"I don't do rentals."



Don't be silly.
Starting a rental
division has never
been easier.

Property Management (cont.)

- If broker discloses he is agent but does not disclose the principal, then broker will probably be personally liable
- If agency and principal are undisclosed then agent is liable
- Agent is always liable for any tort or deceit he commits

Termination of Agency

- Agency is personal; can be terminated at will by either principal or agent
- Termination can be unilateral or mutual
- Completion of the objective will terminate the agency
- Unilateral termination may lead to contractual liability



Termination by Operation of Law

- Happens upon:
 - death of either the principal or the agent
 - insanity of either party
 - change of law
- If the agency terminates, the fiduciary duty may not end
 - Example: broker cannot become a principal in the same transaction and shed fiduciary obligations
 - The agency relationship is presumed to continue

Case Study (Agency)

- Facts of case show agent was confused about which forms to provide and what type of agency relationship was established.
- Agent inserted a poorly drafted clause in an amendment that lead to a dispute.

Chapter 4

Organizational Structure



Business Entities

- This is a basic review of business entities. Consult an attorney for application to a particular enterprise.
- A business entity needs to be licensed as a broker to be paid commissions.
- To be licensed, the business entity must designate an individual broker who is responsible for the actions of the entity as a licensee.
- The designated broker must be:
 - an officer of the corporation
 - a manager of the limited liability company
 - a general partner of the partnership.
- If the designated broker owns less than 10 % of entity, the entity must obtain E&O (at least \$1 million)

Assumed Name

- Entity may have one legal name and do business under another name (assumed name)
- If an entity has an assumed name, it should file the assumed name with the Secretary of State, county clerk, and TREC



Types of Legal Entities

- Corporations
- General Partnerships
- Limited Partnerships
- Limited Liability Partnerships
- Limited Liability Companies
- Sole Proprietorship



Corporation



Chartered by filing of articles of incorporation with the Secretary of State (now known as a certificate of formation).

Corporations have the designation *inc* or *corp* after their names.

For-profit corporations are owned by shareholders whose ownership interest is evidenced by shares

- Governance of a corporation lies with its board of directors
- Operated by officers, including a president, secretary and treasurer
- Maintains bylaws

Corporation (cont.)

- Shareholders may have a shareholder agreement
- “Subchapter S” is a type of corporation
 - makes a special election with the IRS that no there is no tax at the corporate level
 - income is allocated to the stockholders and taxed as individual income.
- “C corporations” (most typical)
 - pay income tax at the corporate level
 - Shareholder distributions are income to shareholders

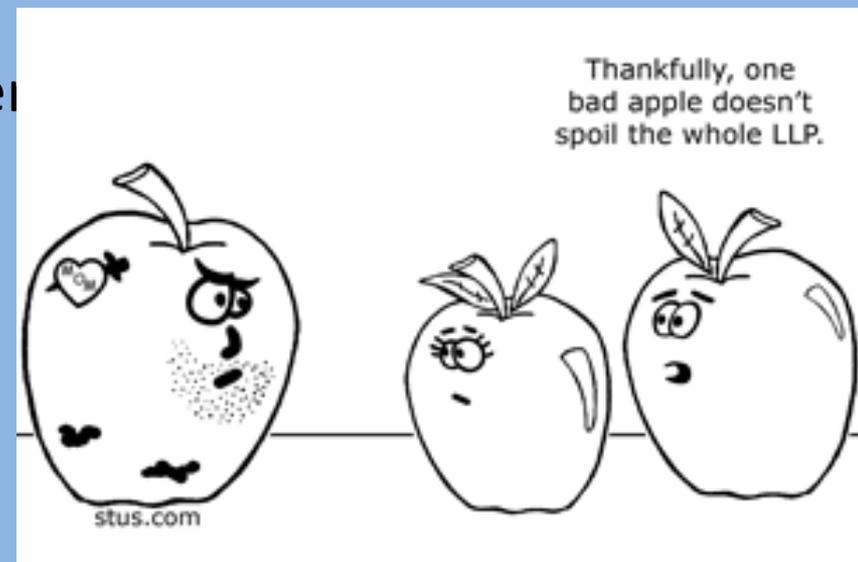
General Partnership

- Does not limit liability
- All partners are liable for partnership debts
- No written agreement is required; but recommended
 - Lack of written provision triggers Partnership Act



Limited Partnership

- Created by filing with the Secretary of State
- Use designation *LP* or *LLLP*
- Partners execute a limited partnership agreement to define duties of the general partner and limited partners
- Taxation of income is not at the entity level
 - Income is allocated to the partner (pursuant to limited partnership agreement).
- Owned by both the limited and general partner(s)



Limited Partnerships & Limited Liability Partnerships

- General partner has:
 - unlimited liability for the obligations of the partnership
 - power to manage the limited partnership
- General partner may be a legal entity (corporation)
- Limited partners have:
 - limited liability
 - rights to profits
 - approval rights over important decisions (pursuant to partnership agreement)
- Limited partner does not have management right
- Commonly used by lawyers and accountants
- For a partnership to be licensed, an individual broker who is a general partner must be the designated broker.

Limited Liability Company

- Limited liability companies (LLC) are popular
- Created by filing articles of organization with the Secretary of State
- Designed to be a hybrid of a corporation and a limited partnership
- Has:
 - limited liability
 - pass-through tax status
 - no requirement for a general partner, owners of a limited liability company are members
- LLC owners are members
- LLC is run by its managers
 - manager does not have liability for the LLC's obligations,
 - no board of directors and use a company agreement
- Managed through a company agreement
- Uses designation *LLC*
- To be licensed, the *LLC* must designate an individual broker, who is a manager

Sole Proprietorship

- Individual engaging in business
- No formal organization
- May maintain an assumed name
- Personally liable for business obligations and income is taxed as personal



Case Study (Business Entity License)

- LLC was the GP of a Partnership conducting brokerage activity
- LLC was not aware that LLC also had to have a license
- LLC filed for license and disclosed that it had engaged in brokerage activity without a license
- 6 month probation and \$1000 penalty

Chapter 5

Operational Policies and Procedures



Written Policies Required

- Brokers must maintain written policies and procedures addressing
 - the relationship between the broker and agents
 - competency of agents
 - compensation issues
 - maintenance of trust accounts
 - maintenance of business records

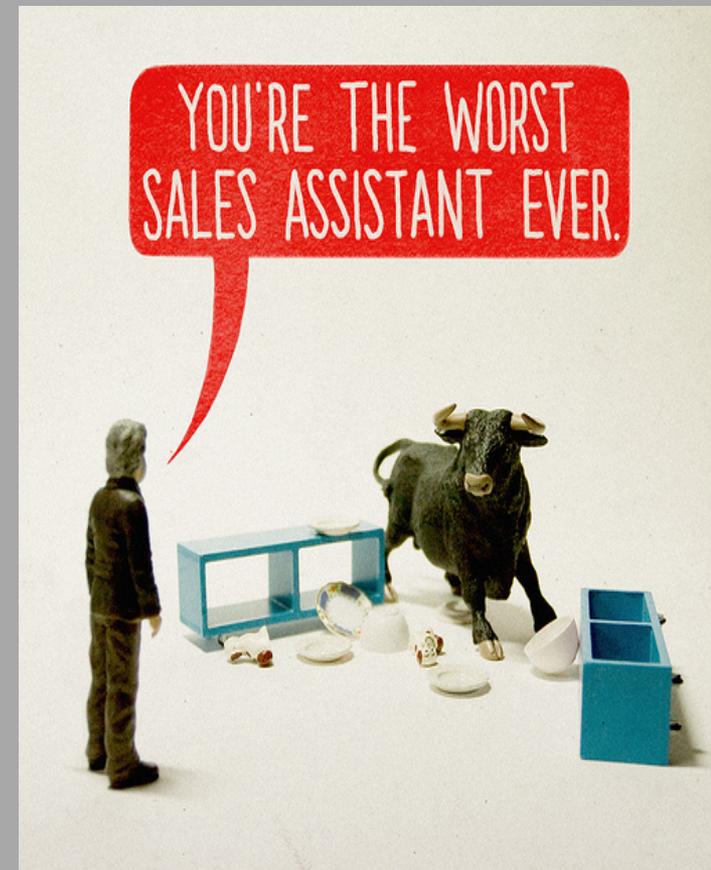


Errors and Omissions Policy

- E&O is a contract between insurance company and broker
- Brokers should create a written risk management policy that includes
 - broker safety
 - client safety
 - cell phone use
 - checklists for office personnel
 - listing and contract files
 - copyright and license obligations
 - other risk management issues

Unlicensed Assistants

- Unlicensed may not conduct any of the activities for which licensure is required
 - Constitutes criminal activity to engage in licensed activity
 - Licensee who employs the unlicensed might be criminally charged as well
 - TREC may take disciplinary action against a licensee who pays or associates with an unlicensed person who engages in

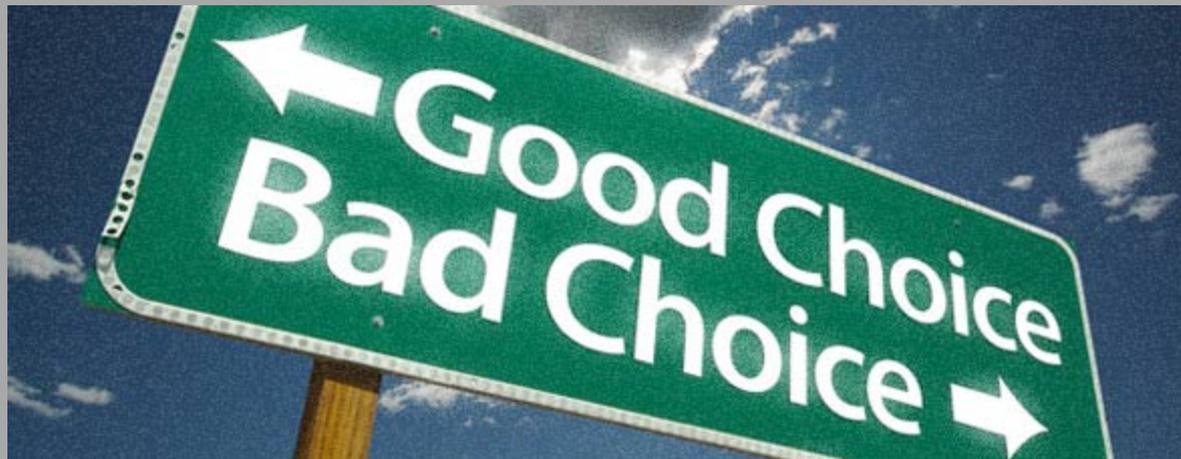


Direct Activities by Unlicensed Assistants

- Direct activities include:
 - negotiating a listing
 - “showing property” (note merely unlocking door)
 - Negotiating a contract or lease
 - Other activities in definition of “broker”

Indirect Activities by Unlicensed Assistants

- TREC has published an FAQ to answer questions concerning unlicensed assistants
- See FAQ at pages 20-22



Teams, Groups, and Individuals

- This section is a brief discussion about advertising issues related to “team” names



Advertising Teams (cont.)

- A licensee broker or salesperson may not place an advertisement that in any way implies that the salesperson is the person responsible for the operation of a real estate brokerage business
- An advertisement must contain the name of the broker (either the individual name of the entity's name)
 - If broker uses an assumed name, use of assumed name in Ad complies
 - If assumed name or the corporate name contains the name of a salesperson, the advertisement must also include the name of the broker

Advertising Teams (cont.)

- **Licensee Anderson is Team leader**
- ***Is it permissible to advertise as “Edra Anderson and Associates?”***
 - No
 - Consumers may be confused as to who is responsible for the brokerage operations
 - Edra Anderson Group and The Edra Anderson Team are OK if the broker’s name or assumed name is also in the AD
 - Edra Anderson Group or Edra Anderson Team are corporate names and corporation holds broker license, then the designated officer’s name should be included In developing a policy regarding teams, a licensee

Advertising Teams (cont.)

- Ask:
 - Who will hold the licenses of salespersons in a team?
 - Will E & O policy cover the acts of team?
 - How will a team be compensated?
 - Who is responsible for day-to-day activities of the team?
 - Is team using a name other than its own name? Is the name TREC?
 - Is the brokerage name used in all advertising?

Online Community Policy (e-mail, social networks, agent websites)

- Care with social media and on-line communications are needed
- Need to avoid defamation and copyright infringement
- Make sure written statements
 - If doubt exists, qualify or describe as opinion
- Always quote source, even blogs from others
- Publish contact information for those who may object to contact publisher

Defamation

- What can a licensee do if someone publishes a defamatory statement?
 - Ask publisher to remove the statement
 - Ask for a correction or retraction in a printed document. If the publisher does not remove the statement
- Defamation is:
 - the act of harming the reputation of another
 - by making a false statement to a third person
 - by slander (spoken words) or libel (printed words)



Defamation (cont.)

- Usually requires a showing of damage or harm
- Defamation *per se* is when it is of such a significant matter that the law does not require a showing of harm.
- Consult attorney before publishing a statement that can be seen as harmful to another

Sudden End to Sponsoring Broker

- Death or incapacity of sponsoring broker
- May need written policy
- License of sponsoring broker becomes inactive
- If broker is a business entity and Des. Brkr. dies or becomes incapacitated, license goes inactive
- Licensees under sponsorship go inactive

Case Study

- Agt. negotiated lease and was going to manage property.
- Agt. had rent sent to agent's home and agent deposited money in her own account
- Owner informed broker and broker made good on the money taken
- Broker had written policy not allowing agents to engage in management, but agent claimed that broker permitted it nonetheless
- Agent stopped any management activity, paid amounts due, and took a 1-years probated suspension and paid a penalty of \$2,400.

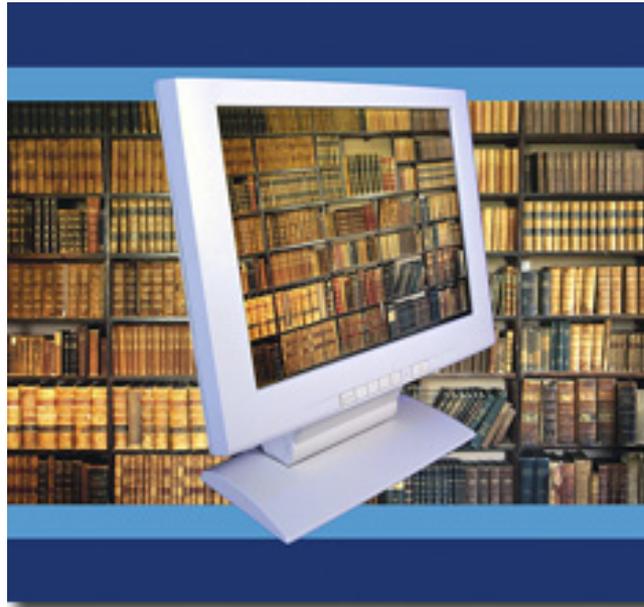
Chapter 6

Records Retention and Control

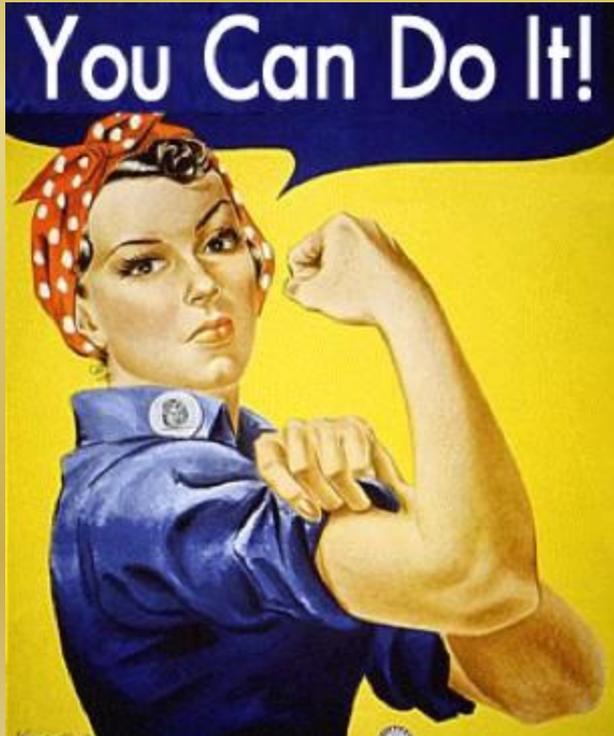


Paper vs. Electronic

- Retain “executed” copies signed by all parties
- Maintain a chronological filing
- Digital records are fine, but must be able to reproduce or transmit upon request



Salesperson's Scope of Authorized Activities



- Broker must advise salesperson of the scope of authorized activities
- Broker is responsible for the authorized acts
 - Unless scope is limited or revoked in writing
- Broker is not required to supervise salesperson directly
- If a broker permits salesperson to conduct activities beyond stated scope then those are deemed authorized acts

Authorized Acts (cont.)

- May want to define the authorized acts in the independent contractor agreement and review periodically
- Any delegation to another licensee must be in writing
 - Delegation does not relieve broker from responsibility

Records

- Records need to be kept at least 4 years
 - from the date of closing or termination
 - Format of all recordkeeping is flexible provided that a copy is readily
- Records include:
 - Disclosures
 - commission agreements
 - work files
 - contracts and related addenda
 - receipts and disbursements of compensation
 - property management contracts
 - documents required by USPAP
 - sponsorship agreements



Required Written Policies

- Must maintain written policies to ensure
 - salespersons maintain licenses active
 - compensation to salespersons are paid with broker's written consent
 - Salespersons get timely notice of any change to RELA, TREC Rules, or contract forms (before effective)



Required Written Policies (cont.)

- Designated broker is responsible to see that written policies required of brokers is satisfied by business entities that are licensed
- TREC rules related to policies do not create an employer/employee relationship

Required Written Policies (cont.)

- Must have written policy to ensure that:
 - salespersons receive additional education broker deems necessary
 - Maintain competency in the scope of practice
 - Salespersons' advertising comply with TREC Rules
 - trust accounts have appropriate controls by broker

Retention Considerations

- Consider the following related to a retention policy:
 - secure executed copies
 - use a chronological filing system
 - keep separate physical disk records
 - be able to convert digital record for delivery
 - remove transactional records from collective records
 - develop a written policy concerning access to records



Recordkeeping and Retention for IRS



- Use similar practices required by TREC, but for 7 years
- Need to document independent contractor status
 - Keep executed independent contractor agreements

Privacy of Personal Information

- Confidentiality for a fiduciary does not have a termination date
 - unless in writing otherwise





Chapter 7

Advertising

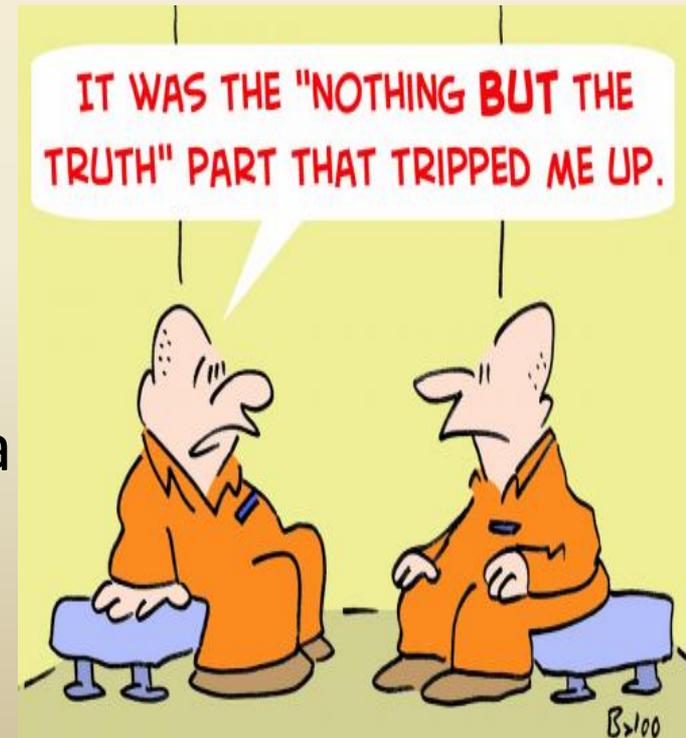
Advertising Compliance Issues

- Discussion concerns only RELA and TREC Rules
 - Not other statutes or rules (Reg Z)
- Brokers are to ensure that each salesperson complies with advertising rules
 - broker should be able to demonstrate reasonable measures in place
- Broker may wish to consider:
 - how salespersons' advertisements are reviewed and by whom
 - periodic education of salespersons
 - how to document corrections to Ads



Advertising Compliance Issues (cont.)

- RELA provides that a licensee may not publish Ad that:
 - misleads
 - is likely to mislead or
 - is likely to deceive the public or
 - tends to create a misleading impression or
 - does not identify the publisher as a broker or agent;



Advertising Compliance Issues (cont.)

- RELA also prohibits licensee from:
 - offering property without the knowledge and consent of the owner or the owner's agent;
 - offering property on terms other than those terms authorized by the owner or the owner's agent;
 - making misrepresentations or false promises through advertising or otherwise
 - placing a sign on property without the written consent of the owner or the owner's agent

Service Providers

- If Ad promotes a service provider and the licensee expects compensation, disclosure that the licensee may receive compensation is required.
- Advertisements may not rank service providers unless the ranking is based on disclosed objective criteria.

Offering Courses

- A licensee may not advertise that he or she offers TREC-approved courses unless approved to offer such courses



Definition of Advertising

- Definition of advertisement is broad and includes all types of media including:
 - publications, stationery, business cards
 - signs, billboards
 - radio, television, electronic media
 - the Internet, e-mail, text messages, social networking websites
- Does not include:
 - communication from licensee to client
 - information in a virtual office

Disclosures

- Each page on a website is an advertisement and must include required disclosures
- Ads in e-mail, discussion groups, text messages, and social networking must include required disclosures
- If space is limited, can include a hyperlink to the disclosures (“TREC DISCLOSURE”).

Deceptive Advertising

- A licensee may not place an advertisement that:
 - implies a salesperson is responsible for the brokerage business
 - causes someone to believe a person not authorized to conduct brokerage is engaged in brokerage
- Deceptive or misleading advertisements may include:
 - Ad that is
 - Ad that misrepresents property, terms, values, services, or policies
 - Advertising another broker's listing without permission
 - Advertising another broker's listing without disclosing name of listing broker
 - failing to remove AD about a listing after it ends
 - an Ad that identifies a salesperson as a broker
 - an Ad that creates confusion

Trade Names

- Advertising may not include a copyrighted trade name without authority to do so



Include Broker's Name

- Ad must clearly and conspicuously contain broker's name

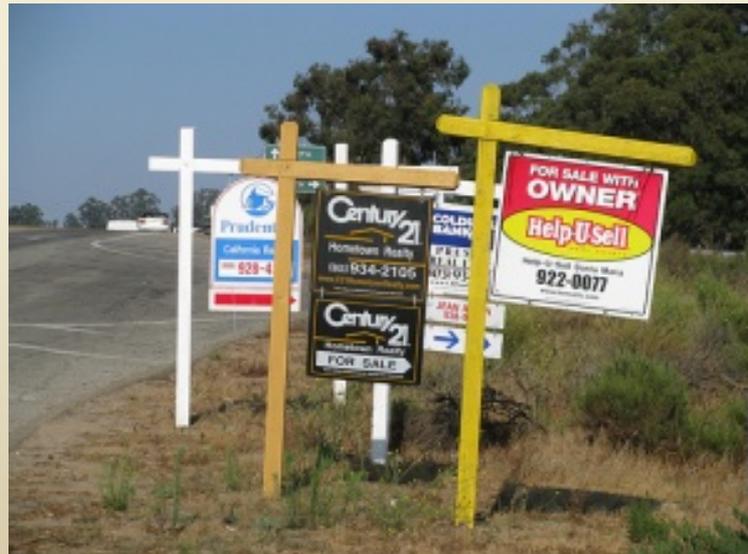
Assumed Names

- Broker's assumed name is the broker's name
 - broker may use the assumed name to satisfy disclosure
- Broker is required to register an assumed name with TREC
 - even if the assumed name is a salesperson's name
 - or a team name
- If the broker's name or assumed name includes a salesperson's name, the Ad must include another name for broker without the salesperson's name or include the designated agent's name for entities
- Must notify TREC within 30 days after the broker or the salesperson starts or stops using assumed name.



Road Signs

- Road signs must clearly and conspicuously identify the advertiser as broker or agent
 - does not apply to directional signs



Safe Harbor Policy

- TREC adopted a safe harbor for licensees as to what is clear and conspicuous in advertising
- Broker's name or assumed name must be at least 50% of the of the largest font of contact information



Designations

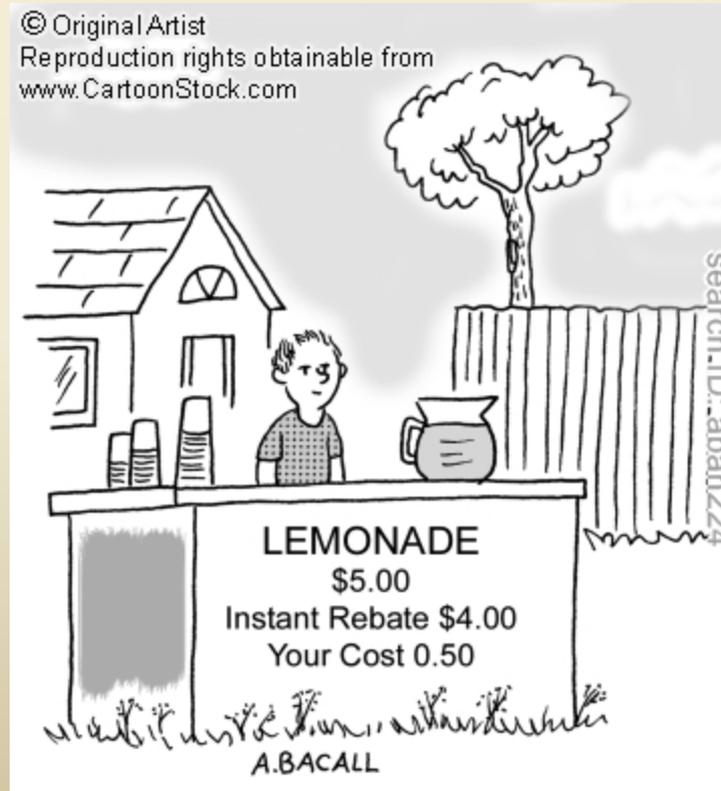
- An Ad must use “agent,” “broker” or “realtor” or other designation to disclose the license status.
- A licensed entity may do business in the name in which it was chartered but still must comply with advertising rules

**IDENTIFY
YOURSELF**



Rebates

- Advertisements promoting rebates must disclose terms of rebates.

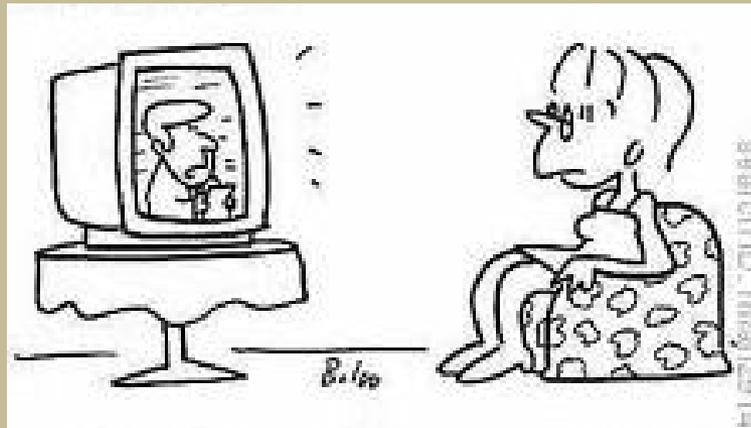


Case Study (Advertising)

- Agent advertised property on Craigslist
- 24 different violations
 - failing to identify broker
 - offering property that was not available
 - failed to identify himself as an agent
 - offered unauthorized rebates
 - contained conflicting and out of date information

Chapter 8

Federal Laws concerning Brokerage



"The Federal Government today authorized a ten-year study of all its five-year studies."

Dodd-Frank (July 2010)

- Mainly targets financial institutions but has impact on real estate brokers and appraisers
- See Appendix F



RESPA Compliance

- RESPA applies to transactions with loans on residential property (1-4 units)
- Requires disclosures that:
 - spell out the costs associated with the transaction
 - outline lender servicing and escrow practices
 - describe business relationships between settlement service providers.
- Intended to help consumers become better shoppers for settlement services
- Intended to eliminate kickbacks and referral fees that increase costs to consumer



RESPA Referrals

- RESPA prohibits giving or accepting anything of value for referrals between settlement service providers
- Also prohibits giving or accepting any part of a charge for services that are not performed
- RESPA allows service providers to pay each other fees for services actually rendered
 - Example: Title company owns building and a broker is a tenant. Must pay market rent



RESPA Information for Borrower

- Not less than 3 days after the time of loan application, lender must give borrower:
 - *Special Information Booklet*
 - *Good Faith Estimate (GFE)*
- Difference between estimated costs and actual costs at closing are subject to certain tolerance levels
- Lender must give borrower a Mortgage Servicing Disclosure Statement
- Borrower is entitled to request to see the HUD-1 at least one day before closing



Affiliated Business Arrangement

- AfBA Disclosure is required if settlement service provider refers the consumer to a provider they own or have an interest
- Must give the disclosure at or prior to the time of referral
- Disclosure must:
 - describe the arrangement
 - give borrower an estimate of the second provider's charges.
- Cannot require the use of the provider (except for an attorney, credit reporting agency, or appraiser who represents the lender)
- Need to consult an attorney if licensee has AfBA



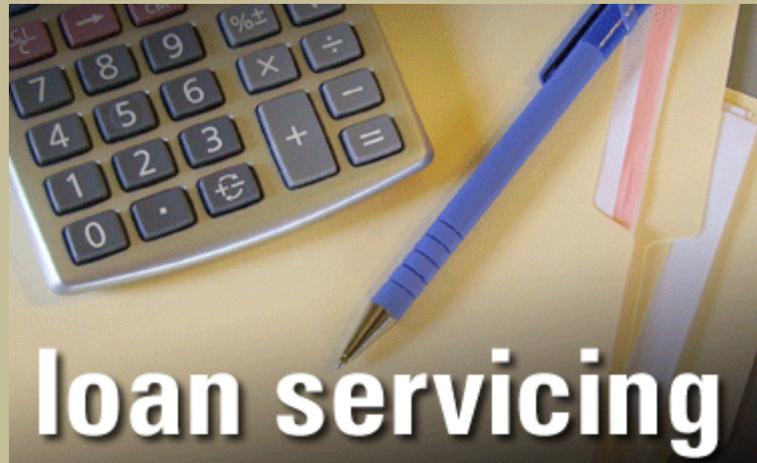
Annual Escrow Statement

- Loan servicers must give borrowers an Annual Escrow Statement once a year
- Summarizes escrow deposits and payments during last 12-months
- Notifies borrower of any shortages or surpluses
- Advises borrower about action to take if shortage or surplus exists



Servicing Transfer Statement

- STS required if the loan servicer sells or assigns servicing
- Must include the name and address of the new servicer, toll-free telephone numbers, and the date the new servicer will begin accepting payments



Common Section 8 RESPA Don'ts

- A title company hosts a monthly dinner and reception for real estate agents.
- A mortgage broker pays for a lock-box for the broker.
- A mortgage lender provides lunch at an open house. (Note a lender could purchase advertising rights from the broker at the open house).
- An insurance company hosts a “happy hour” and dinner outing for real estate agents.
- A home inspector pays for a real estate agent to go to dinner but does not attend the dinner.



Common Section 8 RESPA Don'ts (cont.)

- A title company makes a lump-sum payment or pays for other costs toward a function hosted by the real estate agent but does not provide advertising materials or make a presentation at the function.
- A mortgage broker buys tickets to a sporting event for a real estate agent or pays for the real estate agent to play a round of golf.
- A title company sponsors a “getaway” in a tropical location during which only an hour or two is dedicated to education and the remainder of the event is directed toward recreation.
- A mortgage lender only pays a real estate agent for taking the loan application and collecting credit documents if the activity results in a loan.

Permissible under RESPA

- Lender sponsors an educational lunch for agents where employees of the lender are invited to speak.
 - If lender subsidizes the costs of continuing education credits, this activity may be seen as defraying costs the agent would otherwise incur, and may be characterized as an unallowable referral fee
- A title company pays for advertising at an event that various individuals, including real estate agents, will attend; it posts a sign identifying the title company's contribution to the event in a prominent location for all attending to see and distributes brochures regarding the title company's services.
- An insurance company provides notepads, pens, or other office materials reflecting the insurance company's name.



Permissible under RESPA

- A mortgage brokerage sponsors the hole-in-one contest at a golf tournament and prominently displays a sign reflecting the mortgage brokerage's name and involvement in the tournament.
- A real estate agent and mortgage broker jointly advertise their services in a real estate magazine, provided that each individual pays a share of the costs in proportion with his or her prominence in the advertisement.
- A lender pays a licensee fair market value to rent a desk, copy machine, and phone line in the licensee's office for a loan officer to prequalify applicants.

Choice of Title Company

- Discussion in Legal Update Materials

HUD FAQs About RESPA for Industry

- Review FAQ's at Page 33



Insurance Code and P-53 Compliance

- Governs relationship with Title Companies in addition to RESPA
- Title company may:
 - engage in promotional and educational activities that are not conditioned on the referral of business
 - purchase advertising at market rates from any person in any media
 - deliver to a party or the party's agent legal documents or funds in a transaction the title company closes
 - participate in trade associations of other settlement service
 - provide education at market rates, regardless of whether continuing education credit is given or not
- Rule P-53, provides that a title company may not subsidize the business expense of a producer
- A business expense, is any expense that a licensee would normally deduct on a tax return as a business expense

Insurance Code and P-53 Compliance (cont.)

- Rule P-53 additionally prohibits:
 - advertising jointly with a producer real property for sale or lease
 - paying any part for or contributing toward a producer's signs, advertisements, or boxes or similar items
 - hosting an open house
 - paying for or giving prizes, food, beverages, gifts, decorations, entertainment or professional services given at open houses
 - hosting parties or receptions that promote a producer or the producer's properties



DON'T DO IT.

Texas Real Estate Commission Rules

- licensee may not receive compensation from someone other than the person whom the client represents unless the licensee discloses
 - that the licensee will receive the compensation and
 - obtains the client's consent.
- This does not apply to referral fees between licensees.
- If a licensee intends to accept compensation from a service provider for referring a non-client to the service provider:
 - licensee must also obtain the consent of that person (non-client) and the client
 - As used in this rule, the term “service provider” is not limited to
- Here “service provider” is not a Settlement Service Providers as defined by RESPA.

Texas Real Estate Commission Rules (cont.)

- A licensee may not enter into a contract with a service provider to provide services on behalf of the service provider in a transaction if the contract is exclusive
 - Example, if a broker agrees to perform compensable services for a home warranty company (that does not otherwise violate RESPA),
- A licensee may not accept compensation from a service provider if compensation is contingent on a party in the transaction purchasing a contract or service from the service provider.
- A licensee must use Form RSC-1, if the licensee (or the brokerage firm) will receive compensation from the RSC.

Licensees Buying or Selling Their Own Property

- Maintain a policy related to transactions in which a licensee is involved in buying or selling own property.
- Consider:
 - E & O insurance coverage in such transactions
 - how such property is advertised
 - disclosure of the license status
 - if licensee must be represented by another licensee in the firm.



Trust Account Policy

- Any time a broker holds money belonging to another, it must be kept in a trust account
- May not commingle



Trust Account Policy (cont.)

- Security deposits must be held in a trust account.
- Trust accounts must always be in the broker's name.
- A broker is responsible for the proper handling of escrow monies
- Salesperson may not maintain an escrow account or act as an escrow agent.
- A trust or escrow account must be identified as such.
- Money may be held in a noninterest-bearing account
- Trust accounts may be interest-bearing and broker may retain interest if the client agrees.
- Any property manager must have at least one trust account.
 - Need to consider if policy requires separate trust accounts

Trust Account Policy (cont.)

- Keep operating expenses separate from trust accounts
- Have policies on:
 - Which items will be in trust accounts
 - how and when money will be transferred
 - When and how broker is compensated from trust account
- Define items for broker's operating account
 - Payroll
 - office expenses
 - Commissions
 - other operating expenses



Trust Account Policy (cont.)

- Provide an accurate accounting of any money held in trust
- Keep property management agreements current and on hand
- Keep accounting records up to date
- Keep up to date

always up-to-date



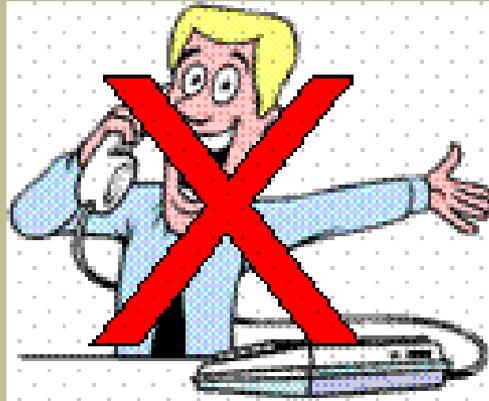
Informing and Responding to Clients

- Supervising brokers, have a duty to:
 - respond to parties in a transaction
 - to provide disclosure of important information to their principal
 - to act honestly and fairly with third parties. A sponsoring broker must
- *Sponsoring broker must promptly respond to a salesperson, the principal and other licensees involved in a transaction*
- Promptness depends on nature of the request, the time of day and the type of transaction.
- A supervising broker should be reasonably available to supervised salespersons



Informing and Responding to Clients (cont.)

- Also have duty to disclose important information to the principal
 - all *known information that would affect the principal's decision on any offer*
 - all *significant information relating to the transaction*
- A principal may direct agent in writing NOT to submit subsequent offers after entering into a contract
- Licensees must be honest and fair to all including non-clients and not provide inaccurate information
- Supervising broker should be available during all normal business hours
- Supervising broker should monitor transactions



**Do-Not-Call Policy, CanSpam,
Fax Policy**

Do-Not-Call



- Licensees who make “cold calls” must comply with National Do-Not-Call registry
- Before making cold call, a licensee must verify if the number is on the do-not-call registry
- Cannot make “cold calls” to numbers in the registry unless EBR exists
- Licensee must update registry at least every 31 days
- Licensee must maintain an internal do not call list

Do Not Call (cont.)

- Cannot call anyone on the internal do not call list (no exceptions)
- Cannot call anyone on national do not call registry unless EBR exists
- EBR exists:
 - They were a party to a transaction with broker in last 18 months
 - They made an inquiry with broker in the last 3 months
- Can always call if consumer grants prior written permission
- Requests to be placed in the internal list must be honored for 5 years
 - Internal list applies to all agents in the firm
 - Should maintain a central internal do not call list

Do Not Call (cont.)

- See FAQ on Do Not Call in Appendix E



CAN SPAM

- See Appendix C and D for FAQ about CAN SPAM



Chapter 9

Anatomy of a Complaint

