

History of New Draft Advertising Rule §535.154

Last year, the Executive Committee of the Commission began to work to revise the current advertising rule. The reason for this initiative began with the numerous comments received by Commission members and TREC staff regarding the difficulty of understanding how to be in compliance with the rule. In addition, there is an ongoing concern that the proliferation of the use of multiple DBAs by multiple sales agents under a single broker makes it difficult for the consuming public or another license holder to know who is the responsible broker. Recall that if any registered DBA of the broker (that does not contain a sales agent's name) is used, the current rule does not require the licensed broker's name to be used in the same advertisement.

Last spring, the Chair of the Commission appointed a Broker Working Group to review and make recommendations regarding the new statutory IABS form and Consumer Notice, and to draft a proposal for a new advertisement rule. The directive from Chair Wukasch for the advertisement rule was to try and create a rule that (1) is simple enough for most brokers to understand and apply; and (2) lets the consumer know who is the responsible broker. Staff presented several suggested revisions for the group to consider. After lengthy discussions over three meetings and several changes to the original proposal, the group was unable to reach a consensus on a few provisions. These mostly centered on the requirements for identification of the license holder in advertisements. Concerns were raised that TREC's current interpretation of the rule and TRELA Section 1101.652(b) (23), were either too expansive (i.e. should not allow "Realtor" or "Realty" as sufficient indicators of brokerage service) or not expansive enough (why not allow "Properties", or "Real Estate").

Section 1101.652(b) (23) makes it a violation if a license holder "publishes or causes to be published an advertisement, including an advertisement by newspaper, radio, television, the Internet, or display, that misleads or is likely to deceive the public, tends to create a misleading impression, or fails to identify the person causing the advertisement to be published as a licensed broker or agent." The group agreed to return the last draft version of the proposed rule to the Commission's Executive Committee so they could decide.

The attached proposal for a new advertisement rule is designed to clarify requirements while ensuring that the public can clearly identify the responsible broker in all advertising. Some key changes in the new rule are:

- Each broker must advertise using their name as licensed or a designated "primary assumed business name (DBA)". The broker may also use other registered assumed business names in the advertisement (including team names) along with the required "primary" name.
- Each advertisement must contain the phrase "Licensed by the Texas Real Estate Commission", which would satisfy the requirements of TRELA section 1101.652(b) (23). [One other option might be to follow the statute literally and identify each license holder name in each advertisement as "broker" or "agent".]
- Clearly distinguish between an assumed name and an alternate name (an existing item of confusion).
- Change the disclosure requirements on social media platforms to be less cumbersome.
- Consolidate all deceptive or misleading advertisement provisions of the rule into one section.
- Change the time to report starting or stopping the use of an assumed name from 30 days to 10 days.

This draft is a starting point for the group discussions. The Executive Committee will consider all comments received during the Strategic Plan Listening Tour in March, as well as any written comments, prior to proposing the rule for public comment. Plenty of time will be allowed to transition to any new rule requirements. Keep in mind however, that although the Commission always considers the ramifications of rule changes on license holders, the Commission's primary mission is one of consumer protection.

§535.154 Advertisement.

(a) The following must be included and readily noticeable in each advertisement:

(1) the broker's name in at least half the size of the largest contact information in the advertisement; and

(2) the phrase "Licensed by the Texas Real Estate Commission" in at least a quarter of the size of the largest contact information in the advertisement.

(b) A designation such as "agent," "broker" or a trade association name that serves clearly to identify the license holder as a real estate agent may be used in an advertisement in lieu of the requirement in subsection (a)(2) until [DATE TBD].

(c) If the name of a sales agent appears in an advertisement, the name must be as shown on the license issued by the Commission or an alternate name registered with the Commission.

(d) For the purposes of this section:

(1) "Advertisement" is any form of communication by or on behalf of a license holder designed to attract public attention or patronage related to real estate brokerage and includes, but is not limited to, all publications, brochures, radio or television broadcasts, all electronic media including email, text messages, social media, the Internet, business stationery, business cards, displays, signs and billboards. Advertisement does not include:

(A) a communication from a license holder to the license holder's current client;

(B) a broker's name only on signage on the broker's main or branch office building; or

(C) an "open house" sign at, or a sign providing directions to, real property listed for sale, rental or lease.

(2) "Alternate name" means a name used by an individual license holder other than the name shown on the license issued by the Commission, such as a middle name, maiden name, or nickname. It does not include a common derivative of a name, such as Kim for Kimberly or Bill for William, which is considered the same as the name shown on the license.

(3) "Assumed business name" (commonly known as a DBA) means any name, including a team or group name, used in business by an individual broker, entity broker, or broker's sponsored sales agent other than the name shown on the broker's license issued by the Commission.

(4) "Broker name" means:

(A) the broker's name as shown on a license issued by the Commission;

(B) the broker's primary assumed business name registered with the Commission;

(C) if an individual, an alternate name registered with the Commission; or

(D) until [DATE TBD], any assumed business name of the broker that is registered with the Commission prior to [DATE TBD].

(5) "Contact information" means any information used to reach a license holder featured in the advertisement, including name, phone number, email address, twitter account #, scan code, and any similar information.

(6) "Party" means a prospective buyer, seller, landlord, or tenant or an authorized legal representative of a buyer, seller, landlord, or tenant, including a trustee, guardian, executor, administrator, receiver, or attorney-in-fact. The term does not include a license holder who represents a party.

(e) A broker that registers more than one assumed business name with the Commission must designate one assumed business name to be the broker's primary assumed business name. The broker's name or primary assumed business name may not include a sales agent's name.

(f) A broker, individually or as the designated broker of a business entity licensed as a broker, must register an assumed business name with the Commission not later than the 10th day after the date the broker, or a sales agent sponsored by the broker, or another broker associated by written agreement in a business relationship with the broker, starts using an assumed business name and

notify the Commission in writing not later than the 10th day after stopping the use of an assumed business name.

(g) A broker may permit a sponsored sales agent or an associated broker to use a broker's assumed business name that is registered with the Commission.

(h) A license holder may not use a copyrighted trade name or an assumed business name unless the license holder has legal authority to use the name.

(i) A license holder must notify the Commission in writing not later than the 10th day after the date the license holder starts or stops using an alternate name.

(j) Each page of an advertisement on the Internet, electronic bulletin board, email or text must comply with this section.

(k) For an advertisement on social media, the account user profile of the license holder must be readily accessible by the viewer and include the information required by this section.

(l) An advertisement containing an offer to rebate to a party a portion of a license holder's compensation must disclose that payment of the rebate is subject to the consent of the party the license holder represents in the transaction. If payment of the rebate is contingent upon a party's use of a selected service provider, the advertisement also must contain a disclosure that payment of the rebate is subject to restrictions.

(m) If an advertisement offers, recommends or promotes the use of a real estate service provider other than the license holder and the license holder expects to receive compensation if a party uses those services, the advertisement must contain a disclosure that the license holder may receive compensation from the service provider.

(n) An advertisement may not contain information regarding the license holder or another service provider that ranks the license holder or provider unless the ranking is based on objective criteria disclosed in the advertisement.

(o) An advertisement may not state or imply that the license holder teaches, offers, sponsors, or conducts Commission approved courses in conjunction with an approved school or other approved organization unless the license holder is approved by the Commission to teach or offer the courses.

(p) For purposes of this section and §1101.652(b)(23) of the Act, a deceptive or misleading advertisement includes, but is not limited to, any advertisement:

(1) that is inaccurate in any material fact;

(2) that makes a material misrepresentation;

(3) that does not comply with the requirements of subsections (a), (b), (c) or (e) of this section;

(4) that identifies a sales agent as, or implies a sales agent is, a broker or is otherwise responsible for the operation of the brokerage;

(5) that causes a member of the public to believe that a person not authorized to conduct real estate brokerage is personally engaged in real estate brokerage;

(6) that contains the name or likeness of an unlicensed member of a team or group that does not clearly identify that the member does not hold a license;

(7) about a property in a manner that creates a reasonable likelihood of confusion regarding the permitted use of the property;

(8) about the value of a property, unless it is based on an appraisal that is disclosed and readily available upon request by a party;

(9) offering to perform the valuation of real property, unless the license holder is licensed under Chapter 1103, Occupations Code;

(10) about a property that is subject to an exclusive listing agreement without the permission of the listing broker and without disclosing the name of the listing broker unless the listing broker has expressly agreed to waive disclosure;

(11) about a listed property that is not discontinued within 10 days after termination of a listing agreement;

(12) about a property after the closing of a transaction unless the current status of the property is included in the advertisement; and

(13) that implies the person making the advertisement was responsible for any transaction regarding a property when the person had no such role.

(g) Commission staff may initiate a complaint for a violation in an advertisement that can be viewed in its original form, whether printed or electronic.

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