

Broker Responsibility

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Acknowledgments

Texas Real Estate Commission

R. Scott Kesner, Chair
Jan Fite Miller, Vice Chair
Jason Hartgraves, Secretary
Leslie Lerner
Benjamin "Ben" Peña
Barbara Russell
DeLora Wilkinson
Micheal Williams
Mark Woodruff
Chelsea Buchholtz, Executive Director

Broker Responsibility Writing Group

Rick Albers
Lori Levy
Kerri Lewis
Leesa Rispoli
Avis Wukasch

TREC Writing Staff

Jennifer Grube
Mark Moore
Jennifer Wheeler

Texas Real Estate Research Center Staff

Gary Maler, Director
David Jones, Communications Director
Cheryl Pruitt, Program Coordinator
Robert Beals II, Associate Editor, Art Director
JP Beato III, Graphics Specialist, Photographer
Alden DeMoss, Graphic Designer

Texas Real Estate Research Center Advisory Committee

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JJ Clemence
W. Douglas Jennings
Besa Martin
Walter F. "Ted" Nelson
Stephen D. "Doug" Roberts
C. Clark Welder
Jan Fite-Miller, Ex-Officio

Foreword

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Contents

1	Chapter 1: Introduction
1	Purpose
1	Who Must Take This Course?
1	Standard Test for the Course
1	Regulations for Brokers
2	Chapter 2: Scope and Competency
2	Subject Matter Competency
3	Geographic Competency
3	Best Practices for Contract Overview
3	Broker or Brokerage Firm
3	Broker or Broker's Designee (Delegated Supervisor)
4	Training
4	Coaching
4	TREC Form Approval Process
5	Chapter 3: Fiduciary Responsibilities
5	Fiduciary Responsibilities as a Broker
5	§531.1 Fidelity
5	Virtual Open Houses and Showings
6	Advanced Intermediary Issues – Levels of Intermediary Relationships
6	Intermediary in a Lease Transaction
7	iBuyers
8	Chapter 4: Property Management and Trust Accounts
8	Who Does This Chapter Apply To?
8	What is Property Management That Is Regulated by the Commission?
9	TREC Rule §535.2 - Broker Responsibility – Excerpts Regarding Trust Accounts
9	Summary on Trust Accounts
11	Chapter 5: Delegated Supervisors and Teams
11	Delegated Supervisors
11	Team Leads
11	TREC Notification of Delegation
11	Managing Teams
12	How Is a Consumer Protection Notice Form Completed? Where Does It Go?
12	How Should an Information About Brokerage Services Form (IABS) be Completed? Where Does It Go?
13	Licensed Entities and DBAs

14	Chapter 6: Advertising and Registration of Names
14	What is a Broker's Responsibility Regarding an Agent's Advertisement?
14	TREC Advertisement Rules
14	What is the Difference Between a DBA and a Team Name?
15	How Does "Branding" Fit Into the Advertisement Rules?
15	Registration of Names with TREC
16	What Constitutes Advertisement?
16	TREC Rule Requirements for Every Advertisement
16	TREC Rule Prohibitions for Advertisements
16	Examples of Acceptable Advertising
19	Chapter 7: Written Policies
19	TREC Required Broker Policies and Procedures
20	Other Policies to Reduce Risk
20	Copyright Basics and How Copyright Impacts Real Estate Brokerages
22	Digital Millennium Copyright Act (DMCA)
23	Website Accessibility
24	Succession Planning
26	Chapter 8: Additional Broker Duties
26	Additional Broker Duties Under §535.2 - Recordkeeping & Timely Responses
26	TREC Complaints
26	Emergency Preparedness
26	Condemnation (Eminent Domain)
28	Appendix A: TREC Rule §535.2 – Broker Responsibility
30	Appendix B: Sample Transaction Checklist
31	Appendix C: Addendum for "Back Up" Contract (11-7)
32	Appendix D: TREC Rule §535.146 - Managing Trust Money
34	Appendix E: Consumer Protection Notice Form (CN 1-2)
35	Appendix F: Information About Brokerage Services Form (IABS 1-0)
36	Appendix G: TREC Rule §535.154 - Registration and Use of Alternate, Team and Assumed Business Names Used in Advertisements and TREC Rule §535.155 – Advertising
39	Appendix H: Who's On Deck: Broker Succession Planning
42	Appendix I: TREC Enforcement Questionnaire
43	Appendix J: Broker Emergency Plan Example

Chapter 1

Introduction

Learning Objectives

After this chapter, you will be able to

- * Explain the purpose of the Broker Responsibility course.
- * Identify who is required to take the course.
- * List two regulations that brokers must follow to be in compliance with TREC.

Purpose

The purpose of this course is to address the regulatory aspects of the management, operation, and supervision of a real estate brokerage firm in Texas. The course provides an understanding and working knowledge of a broker's responsibilities and obligations under Title 22 of the Texas Administrative Code (TAC), TREC Rule §535.2, which sets out specific requirements and best practices for brokers. See Appendix A where this Rule is listed in its entirety.

Who Must Take This Course?

Section §535.92 of the Texas Real Estate Commission (TREC, the Commission) Rules requires a broker who sponsors one or more sales agent at any time during the current license period; a broker or designated broker of a business entity that sponsors one or more sales agent at any time during the designated broker's current license period; or is a delegated supervisor under TREC Rule §535.2(e) to complete this six-hour broker responsibility course to renew a license.

Any license holder may take this course for six hours of elective continuing education (CE) credit. Additionally, a sponsoring broker may, by policy, require certain license holders and employees to take this course. Effective January 1, 2019, any license holder who leads, supervises, directs, or manages a team must be delegated as a supervisor by the broker and is required to complete this course before license renewal.

Standard Test for the Course

TREC rules require a standard test, developed by TREC, to be given to all instructors and students of this course. Instructors must pass the test with a grade of 80 percent or higher to be able to teach the course [TREC



Rule §535.74 (b)]. Students are given the test as part of class instruction with the correct answers reviewed by the instructor. [TREC Rule §535.72(g)].

Regulations for Brokers

There are a number of regulations and standards with which brokers may need to comply; some of the more notable include:

- * Chapter 1101 of the Texas Occupations Code (TRELA, Act)
- * Title 22 Texas Administrative Code, Chapters 531–543 (TREC Rules)
- * Texas Property Code, Chapters 91 & 92 (Landlord and Tenant)
- * Texas Department of Insurance, Procedural Rule 53
- * Real Estate Settlement Procedures Act (RESPA)
- * Truth-in-Lending Act (TILA)
- * Consumer Financial Protection Bureau rules
- * Can-Spam Act & Federal Trade Commission Telemarketing Sales Rules (Do Not Call-Email-Fax)
- * National Association of REALTORS® (NAR) Code of Ethics (Voluntary Standard)

Chapter 2

Scope and Competency

Learning Objectives

After this chapter, you will be able to

- * Describe two techniques a broker can apply to confirm that his or her agent is subject-matter competent.
- * Define geographic competency.
- * List several actions a broker may take to ensure that brokerage offices train agents to use contracts and handle real estate transactions correctly.

A broker must advise a sales agent of the scope of the agent's authorized activities and ensure that the agent is competent to conduct those activities. TREC rules address two separate aspects of competency, subject matter and geographic.

Subject Matter Competency

There is a difference in the knowledge a license holder needs to properly represent a client in different types of transactions. Some examples include residential versus commercial, farm and ranch, and property management. A license holder who has been working on residential transactions is not automatically qualified to perform real estate brokerage activities in other areas.

A license holder must be competent in the area in which the license holder is working. This has been emphasized with recent changes to TREC rules.

- * To be competent, a license holder must be educated in the characteristics involved in the specific type of real estate being brokered for others. [TREC Rule §531.3(4) – added September 2019]
- * A broker must have written policies and procedures to ensure that each sponsored sales agent receives additional educational instruction the broker may deem necessary to obtain and maintain competency in the scope of the sponsored sales agent's practice. At a minimum, when a sales agent performs a real estate brokerage activity for the first time, the broker must require that the sales agent receive coaching and assistance from an experienced license holder competent for that activity. [TREC Rule §535.2(i)(5) – added December 2018]



TREC Case Study 1

Nobody's Watching Me

Facts – The broker automatically assigned each agent that was new to the real estate business a coach for their first year. The agent that the broker chose to supervise one of the new agents was not involved in the day-to-day correspondence of the new agent's real estate transaction and was not properly registered with the Commission to act as a delegated supervisor. Despite this, the selected coach was listed as the agent handling the transaction on the buyer's representation agreement and contract. The new agent was unsupervised during the transaction. The agent failed to verify that repairs were completed before closing and failed to provide information to the buyers regarding the on-site sewer.

Result – The broker entered into an agreed order resulting in a reprimand and a \$1000 administrative penalty. The agent handling the transaction entered into an order, which included a reprimand and a \$1500 penalty for failing to verify that repairs were completed before closing and failing to provide information to the buyers regarding the on-site sewer. The agent assigned to supervise the agent handling the transaction was issued an advisory letter for failing to make his position clear to

Case Study continued...

the parties by listing his name as the agent handling the transaction on the buyer's representation agreement and contract when he was not involved in handling the transaction.

Consider this...

What could the coach have done better?

Answer: The coach should have made clear to the new agent that the consumer being represented will need to understand the role of the coach in the transaction. The new agent's name will appear on all listing and buyer representation agreements and contracts. If the broker has a policy that allows the coach's name on those documents it should appear as the second name. In addition, the new agent's coach should ensure all transactions be handled with the same diligence and care they would show any client being represented by their broker/brokerage firm. This includes any due diligence to ensure repairs were completed by insisting the listing agent provide all receipts from the seller for repairs performed, provide the scope of the work, and show the work was paid in full. Any and all disclosures required by the transaction should be provided to the buyer.

a license holder provides services to a client [TREC Rule §531.3(1) – added by the Commission, effective September 2019]

And, even before this recent emphasis, a lack of subject matter or geographic competence already violated The Real Estate License Act ("incompetency" could lead to discipline under TRELA Section 1101.652(b)(1)).

DISCUSSION

1. What are some policies and procedures a broker can have in place to ensure that the broker's agents are competent in the discipline type they want to practice in?
2. How can brokers help ensure their agents are geographically competent?

Best Practices for Contract Overview

Broker or Brokerage Firm

A broker should have a policy regarding training and oversight of documents prepared for consumers by the broker's license holders (both sales agents and associated brokers). The policy, at a minimum, would indicate which documents are required for the broker (brokerage) working file. The documents should be held by the broker in an appropriate and secure location. The location could be a virtual platform or a hard copy in a filing cabinet. The broker should ensure, through training and oversight, that when their license holders complete contracts, all of the required documents have been submitted to the broker. Some brokerage policies state that all written agreement/contracts should be submitted for review by the broker or their designee within two business days of being signed or executed. A sample checklist (see Appendix B) is provided to show how some brokers ensure all required documents are in the file. Some broke ages also require their agents to submit the listing/sale to the broker or their designee as another layer of compliance checking.

Broker or Broker's Designee (Delegated Supervisor)

The broker may have an experienced license holder review all documents submitted by license holders. The best practice is for this license holder to be a delegated supervisor and thus be required to take this course. This will increase their understanding of the responsibility they have been delegated by the broker. A broker should have experienced agents or managers (authorized by the broker) work side by side with new agents through their initial transactions. In fact, this best practice is now required by TREC Rule §535.2(i)(5) as discussed under subject matter competency above.

Geographic Competency

Another subset of the general issue of competency is geographic competency. Geographic incompetency has been an issue throughout the history of real estate (maybe Hammurabi shouldn't have been providing advice about that property in Crete).

Incompetency can occur when someone lacks expertise in the area that they are buying or selling for. Consider a Lubbock agent (with no connection or experience in coastal properties) advising on a Corpus Christi beach property; or, consider an agent consulting in a more narrow geographic area such as eastern Travis County vs. western Travis County.

This longstanding issue has been emphasized by recent changes to The Real Estate License Act and Rules.

- * A license holder must consider market conditions for the specific geographic area in which the license holder is providing a service [TRELA Section 1101.652(a)(6) – added by the Legislature, effective September 2019].
- * To be competent, a license holder must be informed on local market issues and conditions affecting real estate in the geographic area where

Training

All contract documents should be introduced and thoroughly explained to agents so that they understand the proper use of those documents. A broker may wish to give agents assignments to complete contract documents in a mock setting so that they can be reviewed with the trainer. Providing a Transaction Checklist that highlights the required documents needed for listings and sales is helpful to ensure that all documents are included.

Coaching

Coaching should always be available to all agents. A coach can work with an agent on all aspects of their business, including the proper usage of contract documents. This includes answering any questions the agent has and helping the agent become comfortable in the presentation of those forms to customers and clients.

TREC Case Study 2

Show Me the Money, Or Not!

Facts – The buyer’s broker failed to request or collect the earnest money and option fee from the buyers. The seller’s agent contacted the broker several times when the money had not been delivered. The broker did not respond to the seller’s agent. The broker delivered the option fee to the escrow agent after the option fee period expired.

Result – The broker entered into an agreed order resulting in a reprimand, a requirement to complete 30 hours in an agency law course, and a \$1500 administrative penalty for acting negligently in terminating a contract, incorrectly completing an IABS form, and for failing to respond within two days to sponsored sales agents, clients, and license holders representing other parties in a real estate transaction.

Consider this...

What does this case study have to do with broker responsibility?

Answer: The broker and the agent are fiduciaries to the client and must act in the best interest of the client. The broker must ensure sponsored agents understand the importance of the timely delivery of the option fee. Late delivery could harm the client since a valid option period may not be created. Another part of broker responsibility is timely responding to license holders, including those representing other parties. See TREC Rule §535.2(j).

TREC Form Approval Process

The Broker-Lawyer Committee prepares the forms that are adopted by TREC. The forms are updated when necessary due to legal changes by the legislature or by the courts. The forms are also updated when appropriate based on comments and suggestions from license holders, interested stakeholders, and consumers.

When the Broker-Lawyer Committee presents new forms or revised forms to the Commission, the Commission may adopt or reject the recommended form. If rejected, the form will be sent back to the Broker-Lawyer Committee to address the general or specific concerns of the Commission.

If the Commission approves the form, it is then published for public comment in the Texas Register. The Broker-Lawyer Committee will review all comments and determine if any changes are appropriate. If the form does not require changes, the Broker-Lawyer Committee will recommend that the Commission approve the form. The Commission can then take final action to adopt the form at its next regular meeting. In the motion to adopt the form, a proposed date will be set for the mandatory use of the form and the old form will be repealed on that same date. If the motion passes, the new form may be used as soon as it is available. Use will become mandatory on the date set by the motion.

Contract Overview Discussion Questions

1. Is there a general misunderstanding of the Option Fee language in Paragraph 5?
2. How should brokers handle outdated forms when they are received?
3. How should a listing broker or agent handle receiving an incomplete seller’s disclosure notice? How should a buyer’s broker or agent handle receiving an incomplete seller’s disclosure?
4. Is there a general misunderstanding of the back-up contract process?
5. Do brokers and agents have proper training on the use of the Lead Based Paint Addendum; and do they understand the ramifications of improper use?
6. How often do brokers review a contract that has no effective date? How should this be handled?
7. Are brokers training their agents to discuss with the seller the importance of leaving the utilities on in accordance with paragraph 7A of the One to Four Family Residential Contract?

Chapter 3

Fiduciary Responsibilities

Learning Objectives

After this chapter, you will be able to

- * Identify three fiduciary duties a broker owes to his or her clients.
- * Identify key components of hosting virtual open houses and showings.
- * Identify the two levels of intermediary.
- * Explain what tasks should be performed to assist the seller if the seller receives an offer from an iBuyer.

Being a fiduciary is one of the key components of the relationship the broker has with a client. In fact, TREC Rule §535.2(b) states that a broker owes the highest fiduciary obligation to the client and is obligated to convey to the client all information known to the agent which may affect the principal's decision, unless prohibited by other law.

Fiduciary Responsibilities as a Broker

In broad terms, the fiduciary duties a broker owes to a client include

- loyalty;
- good faith;
- refraining from self-dealing;
- integrity;
- fair and honest dealing; and
- full disclosure.

In the simplest terms, being a fiduciary means always putting the client's interests above your own.

All clients that sales agents work with are technically their broker's clients. All of a broker's sales agents have a fiduciary duty to all of the broker's clients, not just the client the sales agent is working with. TREC Rule §531.1 recognizes the special fiduciary relationship that is created when brokers and sales agents act as an agent for a client. Brokers should train all agents to understand what it means to be a fiduciary. Take a minute to read the rule now.

§531.1 Fidelity

A real estate broker or salesperson, while acting as an agent for another, is a fiduciary. Special obligations



are imposed when such fiduciary relationships are created. They demand:

- (1) that 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; that, however, the agent, in performing duties to the client, shall treat other parties to a transaction fairly;
- (2) that the real estate agent be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in performing the agent's functions; and
- (3) that the real estate agent place no personal interest above that of the agent's client.

Virtual Open Houses and Showings

As virtual open houses and showings become more popular, brokerages that use this method should have a policy for allowing and performing them.

Permission (preferably in writing) from the seller to have a virtual open house or showing before posting, hosting, or showing is required.

There are two types of virtual open houses and showings. One is live and interactive and the other is recorded.

Live and interactive virtual open houses and showings involve walking around the property and discussing the property while projecting live on social media (for example, Facebook or Instagram) or other online conferencing platforms (for example, Zoom or Google Hangouts). A live and interactive open house more

closely resembles a traditional open house.

The other type of virtual open houses or showings is recorded. This type of virtual open house or showing uses a pre-recorded video, shot in advance and saved to places like Facebook or YouTube. This type of virtual open house or showing can be offered for viewing at any time.

A live or recorded virtual open house or showing requires a video camera or smart phone with a camera and a stabilizer to ensure a professional result.

Even after obtaining written permission for a virtual open house or showing, brokers and sales agents must be aware of all the background they are showing when they are taking videos or live-streaming. The seller walking in the background scantily clad might be entertaining, but also might create a liability.

Advanced Intermediary Issues – Levels of Intermediary Relationships

Refresher: There are two levels of intermediary relationship.

Level 1. The brokerage represents both sides of the transaction without appointing separate agents to give “opinions and advice” to each party.

Level 1 comes into existence immediately in every intermediary transaction at the time it is discovered that the buyer client is interested in the seller client’s property. At that instant, there has not yet been an opportunity for the broker to appoint separate agents to give opinions and advice to each of the parties. The intermediary relationship can continue at this point without the broker making any appointments.

If no appointments are made, no opinions or advice can be given. Be careful if you elect to not make appointments. It is difficult to represent the parties without giving opinions and advice.

Level 2. The broker makes a decision to appoint separate agents to give opinions and advice to each party.

In most cases, the broker decides to appoint separate agents to give opinions and advice to each party. If the broker makes appointments, the broker must give written notice to the parties of the names of the representatives at the time the appointments are made.

Whether the broker operates at Level 1 or Level 2, it is critical that the broker comply with TRELA Section 1101.651(d), which addresses confidential information. Unless the client consents otherwise in a separate writing, the broker may not disclose confidential

information, including that the seller or landlord will accept or pay a price different than the asking price or the price in a written offer. When no appointments are made, the broker is even more limited in what can be told to the clients – no opinions or advice can be given.

Intermediary in a Lease Transaction

Let’s complicate the issues by changing from a sale transaction to a lease transaction and adding some facts.

- * A broker owns and manages a commercial office building.
- * The broker’s agent knows someone looking for lease space.
- * The person looking for space expresses interest to the agent about leasing an office in the broker’s building.

Can there be an intermediary relationship?

Before one can even think about intermediary relationships, it must be disclosed to the potential client that broker is the owner and landlord, creating a conflict. If the client does not want to be represented by the brokerage, the intermediary relationship question is never reached (because the prospective tenant is not a client).

If the client desires to continue with representation by the brokerage, the representation of the client can only be done through the intermediary process, since Texas law says the only way to represent both sides of a transaction is as an intermediary.

Can the intermediary relationship be a Level 1 relationship?

If no appointments are made to give advice and opinions, the broker, being the owner of the building, has a distinct advantage because the broker is effectively representing themselves without anybody being appointed to represent the prospective tenant. If full disclosure has been made to the prospective tenant about the broker’s ownership and management of the building, and the prospective tenant desires to continue working with the brokerage, can the broker/owner move forward with the level 1 intermediary transaction?

Requirements for a Level 2 intermediary relationship?

Under the statute, the broker is the intermediary and not permitted to be appointed to advise either side of the transaction. In order to move to Level 2 of the intermediary relationship, the broker must deliver written notices of appointments, one appointment to represent the tenant and another appointment to represent the landlord. Can this be accomplished if the landlord is also the broker?

Group Exercise

Break into small groups and take 10-15 minutes answering each question. Assume this is a lease transaction (like that described in the previous section). Each group will report to their answers to the class.

Questions for Group Exercise:

1. Can the transaction move forward without there being an intermediary relationship if nobody in the brokerage represents the broker?
2. Is it rational to say that the broker does not represent themselves?
3. Is it a good idea for the broker to try to have her brokerage represent the tenant?

How do the answers change if:

4. The building is actually owned by a partnership in which the broker owns more than a 10% interest?

5. The building is actually owned by a partnership in which the broker owns a 10% interest or less?

Adding one more layer of complexity:

6. How do the answers change if the brokerage is a limited liability company (LLC) and the broker's business partner (also a licensed broker) is the designated broker for the LLC? The two partners each own 50% of the brokerage company.
7. How do the answers change if the property is a residential rental property?
8. How do the answers change if the property is a historic residential house that has been converted into small offices? Does it make any difference if the house has been converted into shared office space (co-working spaces similar to WeWork or Regius)?

TREC Case Study 3

You Can't Have It Both Ways

Facts – An agent entered into a listing agreement on behalf of her sponsoring broker and then entered into a buyer's representation agreement with a potential buyer for the property. The agent did not get written consent for the broker to act as an intermediary in the transaction. The broker's policies and procedures failed to address intermediary transactions.

Result – The broker entered into an agreed order resulting in a reprimand and \$750 administrative penalty. The agent entered into an agreed order resulting in a reprimand and an administrative penalty of \$1,500.

Consider this...

Can a sales agent be an intermediary?

Answer: No, the broker is the intermediary. See TRELA Section 1101.551(1). And the broker needs to have policies to ensure competency in that and other areas. See TREC Rule § 535.2(i)(1).

iBuyers

An iBuyer is a buyer who uses an automation valuation model (or sometimes a local license holder) to determine the price for a residential property they might be willing to pay and make a cash offer on a seller's property. The data used in determining these offers is vast and varied depending on the iBuyer. These offers are generally below market value and may have stages in the transaction when the agreed price can be renegotiated. Why would a seller consider an offer such as this? All sellers have their own motivations for selling. The seller could be experiencing a need to sell quickly, or may not wish to experience the hassle of maintaining a house that is "show ready" during the sales process.

As a broker, training should include what tasks should be performed for a seller when any type of offer is received including and not limited to iBuyer offers. Offers should be read carefully, and brokers should recommend that the seller read it carefully, as well. Be careful to avoid giving legal advice. However, please note the events that could occur which may result in the iBuyer having the option to renegotiate the price. Those events could lead to an inspection for a fee by an inspector, an appraisal by an appraiser, or in some cases the contract can be renegotiated for any reason before closing.

The real estate market is ever changing and iBuyers, which were numerous in some areas at certain times, may not be as prevalent in other situations.

Chapter 4

Property Management and Trust Accounts



What Is Property Management That Is Regulated By The Commission?

Under TRELA Section 1101.002(1)(A)(x), property management means to control the acceptance or deposit of rent from a resident of a single-family residential real property unit. So if what the brokerage is doing does not fall into that (ex. commercial property management), it is not property management regulated by TREC. However, there might be other duties that apply for other reasons.

More specifically, a person controls the acceptance or deposit of rent for a single-family residential property when the person has the authority to:

- * use the rent to pay for services related to managing the property;
- * determine where to deposit the rent; or
- * sign checks or withdraw money from a trust account.

Is there anything special about property management for sales agents?

Yes, a number of things apply here.

- * Do the brokerage policies and procedures allow property management? If allowed, do the policies address how to engage in property management?
- * Second, if allowed, is the sales agent competent to do property management? (see Chapter 2 of this book).
- * Finally, both the brokerage and designated broker (if the brokerage is an entity) are expressly responsible for the agent's property management.

First, consider whether the brokerage policies and procedures allow property management. And, even if the policies prohibit it, what checks and balances are there to ensure that the policy is being followed?

Second, even if the policies and procedures allow property management, the agent must still be competent to perform property management activities (see Chapter 2). A broker must especially supervise a sales agent when the agent first starts engaging in these activities (see Chapter 2 and TREC Rule §535.2(i)(5)).

Finally, a broker is responsible for "any property management activity" engaged in by the sales agent.

Learning Objectives

After this chapter, you will be able to

- * Discuss what property management duties are regulated under TRELA.
- * Identify who is responsible for all residential property management duties within a brokerage.
- * Identify in whose name the trust account must be in and who is responsible for it.
- * Know how often a trust account report must be given to a client.

Property management requires specialized skills and supervision. It is also the only subject area for which a broker is directly responsible for in the broker responsibility rule.

Who Does This Chapter Apply To?

This chapter applies to a broker who engages in property management. It is also relevant to a sales agent who engages in property management, as well as delegated supervisors for a brokerage that engages in property management. A license holder is a delegated supervisor when Rule §535.2(e) applies.

Trust accounts are more broad than just property management, but because a broker does not typically handle other people's money outside of a property management context (e.g., rent, security deposits); trust accounts are also included in this chapter.

Tip of the Day

READ, READ, READ – reading policies solves a lot of problems.

Rules are boring. Why do I have to read them? Isn't that what lawyers are for?

Although rules seem dry and boring to some, many questions can be answered by simply reading the rule. Every broker who sponsors agents should read TREC Rule §535.2 frequently, including a delegated supervisor and a designated broker for a broker that sponsors agents. This chapter focuses on property management and trust accounts, so read the following regarding property management and trust accounts. Do that now. We'll wait.

TREC Rule §535.2 Broker Responsibility – Excerpts Regarding Trust Accounts

Read these relevant excerpts from TREC Rule §535.2 now.

- (c) A broker is responsible for the proper handling of trust funds placed with the broker and must comply with §535.146 of this title.
- (d) A broker is responsible for any property management activity by the broker's sponsored sales agent that requires a real estate license.
- (h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:
 - ...
 - (6) property management contracts;
 - ...
- (i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:
 - ...
 - (7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146.

TREC Case Study 4

Property Management & Trust Accounts – A Cautionary Tale

Facts – A sales agent managed property through an unlicensed entity. The sales agent was sponsored by three different brokers over the period of time the property management took place. Two of the brokers believed that they were not responsible for the agent's property management because the agent had a business entity running the property management. The third broker required the agent to obtain a license for the entity and acted as the entity's designated broker. None of the sponsoring brokers had any control over the accounts set up for the agent's property management. The third broker set up the proper accounts, however, the agent refused to deposit the trust money into the broker's account. The agent failed to remit money to property owners and failed to provide accountings for the managed properties.

Result – Broker 1 entered into an agreed order resulting in a reprimand and a \$2500 administrative penalty. Broker 2 entered into an agreed order resulting in a reprimand and a \$1500 administrative penalty. Broker 3 entered into an agreed order resulting in a reprimand and a \$1000 administrative penalty. The agent's license was revoked and the agent was assessed a \$122,000 administrative penalty.

Consider this...

1. **Can a sales agent have multiple brokers – one for property management, and one for sales and leasing?**

Answer: No, an agent can have only one broker.

2. **What did the brokers do wrong here?**

Answer: There was no supervision of activities. In addition, the sales agent's actions were egregious and a broker "is responsible for any property management activity" under TREC Rule §535.2(d).

Summary on Trust Accounts

What do I really need to know about trust accounts?

In addition to the detail in TREC Rules §535.2 and §535.146, it is important to note the following.

- * A trust account is in the broker's name and the broker is responsible for it. The broker may, however, authorize another license holder (such as a sales agent) to withdraw or transfer money but the broker is still responsible for the account. See TREC Rule §535.146(c)(7).

- * The trust account must be clearly identified as a trust account. If the bank won't do that, refer to TREC Rule §535.146(c)(1) – it's required.
- * A trust account holds other people's money. That means it cannot be used for operations or other expenses. It cannot be borrowed. It cannot be used for that "emergency medical expense that will be paid back next week, I swear."
- * Especially relevant to property management of a rental property, a broker must provide (at least) a monthly accounting to clients. The only exception to that is when there is no trust account activity. See TREC Rule §535.146(c)(6).

TREC Case Study 5

How Do You Account for THIS?

Facts – An agent managed property and failed to remit rent. The agent kept rent in an operating account and not a trust account. The broker did not have a trust account and did not monitor the agent's property management activities. There was not a trust account for the rent because the agent believed that they only needed one for security deposits, which the agent did not keep. There was a dispute over the amount of money owed to the property owner, but the agent refused to turn over any money, including the amount the agent admitted was owed.

Result – The broker entered into an agreed order resulting in an administrative penalty of \$1500 for negligent supervision. A final order was entered against the agent revoking their license and imposing a \$13,500 administrative penalty.

Consider this...

1. *Who should control a trust account? Why?*

Answer: The broker, because the broker is in charge and holds trust money as a fiduciary for their client. See TREC Rule §535.146(b). The broker may, however, authorize another license holder to withdraw or transfer money from the account. [TREC Rule §535.146(c)(7)]

2. *Why is a broker required to supervise a sponsored agent's property management activities?*

Answer: In property management, money is handled frequently through security deposits, rent, and repairs. It often involves an absentee owner with none of the checks and balances that might exist in other situations (such as a lender, a title company, agents on the other side of a transaction, or even a lawyer).

TREC Case Study 6

You Can "Trust" Me

Facts – An agent conducted property management using an unlicensed corporate entity. The agent entered into a lease agreement and collected and deposited rent and security deposits into the company's operating account along with other money. Business expenses were also paid from that same account. The agent did not immediately deliver trust money to the sponsoring broker or deposit trust money in a separate trust account maintained by the broker.

Result – The Broker entered into an agreed order resulting in a two year probated suspension and a \$2,000 administrative penalty. The agent entered into an agreed order resulting in a reprimand and a \$3,000 administrative penalty.

Consider this...

List the actions the agent failed to perform correctly while conducting property management.

Answer:

- (a) the agent used an unlicensed corporate entity
- (b) the agent comingled money in an operating account
- (c) the agent did not deliver the trust money to the broker
- (d) the agent did not deposit money into a separate trust account

Chapter 5

Delegated Supervisors and Teams

Learning Objectives

After this chapter, you will be able to

- * Define the four main functions a team lead or delegated supervisor may perform.
- * Explain how a broker designates an agent as a delegated supervisor for their brokerage.
- * List three factors a broker should consider before allowing teams or groups in the brokerage.
- * Describe how to complete an Information About Brokerage Services (IABS) form.
- * Recognize the requirements for licensed business entities and their brokers.

Delegated Supervisors

TREC Rule §535.2(e) gives a broker the ability to delegate to another license holder the responsibility to assist the broker in making sure the brokerage operates in compliance with the Act and Rules. There are many roles a delegated supervisor may have, such as contract review, contract training, and answering contract questions. Keep in mind that even when duties are delegated to a supervisor, the broker retains the overall responsibility for the supervision of sponsored license holders.

Team Leads

The leaders of teams and groups are required to be delegated as supervisors and take this Broker Responsibility course. TREC considers a license holder to be a leader of a team if the license holder “leads, supervises, directs, or manages a team.”

TREC Notification of Delegation

The broker must notify TREC of any delegation of a supervisor in writing within 30 days of any delegation that has lasted or is anticipated to last more than three consecutive months. [TREC Rule §535.2(e)] This can be accomplished in two ways.

- 1 For a sales agent, the broker can use the Relationship Management tool in the broker’s online account with TREC. The broker simply checks a box entitled “DELG Spvsr” beside the delegated supervisor’s or team lead’s name.
2. For a sales agent or an associated broker, the



broker completes TREC’s Notice of Delegation of Supervising License Holder form, sign it, and mail it to TREC.

Once delegated by the broker as a supervisor, the delegated supervisor (including a team leader) will not be able to renew their license without completing the Broker Responsibility course.

The broker is also required to notify TREC within 30 days after the delegated supervisor role ends, by either of the two methods set out above, with one exception. An associated broker or newly licensed broker is responsible for notifying TREC in writing when they are no longer associated with a broker or no longer acting as a delegated supervisor for the broker. [TREC Rule §535.2(e)]

Managing Teams

What is a team?

One or more sponsored agents or brokers associated with a broker who join together to perform brokerage activities or to advertise together.

Why a team?

There are likely as many answers to this question as there are teams in the real estate business today. One of the common answers to the question of joining a team is “I joined a team because the team pays for things like signs, advertising, and contract to close services.” One of the common answers to the question of creating a team is “I have grown my business to a place where I cannot handle all the leads and take care of the clients properly.

Rather than just referring business to other agents, I wanted to train people to take care of clients to my standard and help them grow a business inside my business.”

Who is responsible for the brokerage activities of a team or group?

The broker, as a sole proprietor or the designated broker for an entity, is always ultimately responsible. Even if the team or group is led by an associated broker, responsibility is still taken by THE broker.

As the broker or the designated broker for an entity what should be considered before allowing teams or groups in the brokerage?

A broker should consider having a policy that establishes the criteria a license holder must meet in order to be allowed to create a team or group. Examples of criteria to consider are years in the business; additional training beyond minimum CE; units or volume of closed transactions; and having a broker’s license (this list is not exhaustive). The broker and their attorney should draft a policy on what responsibilities, if any, the broker will delegate to the team leader for their team or group. For example, will the broker delegate review of advertising for the team, review of contracts and listing agreements, or answering contract questions? Or will the broker delegate no responsibilities? Keep in mind that **ULTIMATELY** the **BROKER** is responsible for all authorized activities.

How Is a Consumer Protection Notice Form Completed? Where Does It Go?

The first part is eas . This notice must be displayed in a readily noticeable location in each place of business the broker maintains. A real estate broker must just use the TREC Consumer Protection Notice Form ID CN 1-2– with no changes whatsoever. See Appendix E.

Second, link it to the broker’s business website in accordance with TREC Rule §531.18(b).

Finally, for brokers who sponsor sales agents, sales agents must link it to their websites, as well. It may not be a violation for the broker, but the broker will still have to deal with the infraction.

How Should An Information About Brokerage Services (IABS) Form Be Completed? Where Does It Go?

First, unlike the Consumer Protection Notice, it must be completed before it is delivered or posted to a business website. Don’t over think it. See Appendix F.

If in doubt, check the TREC website. Search by “information about brokerage services” for articles and even some videos.

Second, make sure the completed form is linked on the business website [TREC Rule §531.20(b)]. A common mistake is posting a blank form, which is a violation. Another common mistake is putting the same name in every blank. Read the form. Here’s some help.

Tip of the Day

Where do I put the IABS link in my email?

It must go ABOVE the signature block. [TREC Rule §531.20(c)(3) (“in the body of an email”)]

Licensed Broker/Brokerage Name or Primary Assumed Business Name

Who holds the brokerage license? Write the name here. The DBA that is registered with TREC, is also acceptable.

Designated Broker of Brokerage

If this is not a business entity, the best practice is to simply put “N/A.” The designated broker is always an individual and every active business entity brokerage must have one.

Licensed Supervisor of Sales Agent/Associate

This could be a delegated supervisor. If no individual is registered with TREC, the best practice is to simply put “N/A.” The broker’s policies and procedures should address this as well.

Sales Agent/Associate’s Name

This is the sales agent, if any, who the IABS applies to. A broker associate name could also go here, and it may be relevant what the policies and procedures allow. If the person filling out the form is not a sales agent or broker associate, the best practice is to simply put “N/A.”

Finally, like with the Consumer Protection Notice, a broker should help sponsored sales agents with this form.

Group Exercise

Break into groups and fill out an IABS form using this imaginary scenario:

- * Julie Jones is a sales agent.
- * Her broker is Merry Holiday Realty owned by Merry Smith, the designated broker.
- * Julie is on the Superfantastic Team with Merry Holiday Realty.
- * The team leader of Superfantastic is John Griswold. He is a licensed supervisor and a broker.
- * Josephine Creighton is the sales manager for Merry Smith’s office. She is a licensed supervisor.

TREC Case Study 7

What We Have Here is a Failure to Communicate

Facts - A sales agent negotiated a listing but did not provide the sellers with a comparative market analysis (CMA) or broker price opinion (BPO). When the agent listed the property on the MLS, the agent listed the wrong subdivision for the property and incorrectly listed the property as having hardwood floors. The agent also failed to list any amenities associated with the subdivision. The agent provided an IABS that failed to list the sponsoring broker or designated broker or their license numbers. Further, the agent's website listed the agent as CEO and did not have a link to the IABS. The agent's two Facebook pages did not have a link to the IABS or CPN.

Result – The broker entered into an agreed order resulting in a one-year probated suspension and a \$3250 administrative penalty. The designated broker entered into an agreed order resulting in a reprimand and \$2000 administrative penalty. The sales agent entered into an agreed order resulting in a one-year probated suspension and a \$2600 administrative penalty.

Consider this...

Why can't a sales agent who actually owns a brokerage call themselves an owner?

Answer: Because that would imply the sales agent is actually in charge of the brokerage when they are not. See TREL A Section 1101.652(b)(23)(C) and TREC Rule §535.155(d)(4). The brokerage is responsible and the designated broker is responsible for the brokerage. See TREC Rule §535.2(l).

Brokers should also check their errors & omissions (E&O) insurance to see if the insurance will cover the entity if the broker is the designated broker for the LLC. Alternatively, will the broker's E&O insurance cover the entity if a broker from another company is the designated broker?

A broker needs to decide what their policy will be. For example, the policy may simply state that once an agent obtains their broker's license they can create an entity, or the policy may need to be more extensive to address sales agents changing from one brokerage to another regarding how agents may be paid into an entity without a license. Brokers will have great teaching moments with new sales agents and possibly with the former broker. This is a business decision for a broker, but it must be made in compliance with the law.

The law is fairly simple; for brokerage practiced with any type of entity in Texas, the entity must be licensed. And, each licensed entity must have a designated broker who is active, in good standing, and a managing office, member or partner of the entity that oversees all real estate brokerage activity. See the TREL A Sections 1101.351 and 1101.355, and TREC Rules §535.1 and §535.4.

The Application for Real Estate Broker License by a Business Entity (BBE-8) can be found at www.trec.texas.gov.

Licensed Entities and DBAs

A sales agent may come to a broker stating that the sales agent's accountant said that the sales agent needs to form an LLC to run their real estate business. The broker should make it clear that the sales agent will need to obtain a broker license for the business entity in order to perform brokerage activities and receive payment into the entity. In addition, the LLC will need to have a designated broker.

Brokers need to have policies regarding business entities in anticipation of these questions from sales agents. Brokers need to consider if they are willing to be the designated broker for these entities. If not, who will be allowed to be in this position for a sales agent?

Chapter 6

Advertising and Registration of Names



Learning Objectives

After this chapter, you will be able to

- * Identify who is responsible for a sales agent's advertising.
- * Distinguish two procedures a broker can establish to keep their agent's advertising in compliance with TREC rules.
- * Discuss the differences between an assumed business name (DBA), a team name, and an alternate name, and how each is registered.
- * Explain how the advertising rules apply to "branding."
- * Name the two items that must appear in every license holder's advertisement.

What Is a Broker's Responsibility Regarding An Agent's Advertisement?

A sponsoring broker is responsible for ensuring that a sales agent's advertising complies with TREC's advertisement rules. [TREC Rule §535.2(g)]

A sponsoring broker must maintain, on a current basis, written policies and procedures to ensure that each sponsored sales agent complies with the Commission's advertisement rules. [TREC Rule §535.2(i)(6)]

A broker may have other obligations or restrictions placed on their agent's advertisement based on a franchise agreement.

A broker must register any DBA used by the brokerage and all team names used by sponsored sales agents and associated brokers before they are used in advertisements. [TREC Rule §535.154]

How can a broker fulfill this responsibility?

- * Review and understand TREC's Advertisement Rules.
- * Develop a comprehensive policy on advertising standards for the brokerage.
- * Train agents and supervisors on the advertising policy.
- * Have a system for review of an agent's advertisement before it goes public.

TREC Advertisement Rules

TREC's advertisement rules were overhauled in 2018 and have been refined a few times since. TREC Rule §535.154, Registration and Use of Alternate, Team and Assumed Business Names, contains definitions and distinctions between the types of names that can be used in advertising, as well who registers each name with TREC.

TREC Rule §535.155, Advertisements, sets out the requirements of what must be in each advertisement, definitions of what constitutes an advertisement and what is considered "misleading" in advertisements based on the statute [TRELA Section 1101.652(b)(23)]. See Appendix G.

What Is the Difference Between a DBA and a Team Name?

A name used in an advertisement cannot be an assumed business name (DBA or "Doing Business As") AND a team name. It will be one or the other, so it is important for brokers to understand the difference.

Assumed Business Name (DBA) is another name for the broker's business that can be used by all sponsored agents or associated brokers. It is a name that the brokerage is generally known by.

- * Any broker (entity or individual) can have a DBA. To use the DBA in an advertisement, the DBA must be registered with TREC.
- * A broker must have the legal authority to use a DBA in Texas before the broker can register the DBA with TREC. Generally, for business entities, this means that the DBA has been filed with the Texas Secretary of State. Individuals and partnership entities will file the DBA in the county or counties where they do business.

- * More than one DBA is allowed for different practice areas. For instance, if a broker has an LP (or LLC or Corp) in which they operate a sales and listing company under the name Wild Horse, LP, a DBA of Wild Horse Realty may be filed with the Secretary of State. “Wild Horse Realty” will need to be registered with TREC as a DBA for the company. There might also be a residential property management section of Wild Horse, LP with a DBA (filed with the Secretary of State) of “Crazy Horse Property Management.” This name should also be registered with TREC.

All sponsored agents and associated brokers in the brokerage who work in residential sales can use the DBA “Wild Horse Realty” in their advertisements to meet the broker name requirement. All sponsored agents and associated brokers who work in property management can use the DBA “Crazy Horse Property Management” in their advertisements to meet the broker name requirement.

- * Keep in mind, TREC does not, and is not required to check a submitted DBA for exclusivity. It is a broker’s responsibility to make sure the DBA chosen is available for use by the broker. Registering the name with TREC will not affect any subsequent lawsuit for trademark infringement or other rights to the name brought by another person.

Team Name is a name used only by a team or group within a brokerage that is not the broker’s licensed name or DBA. Team name is defined as a name used by one or more license holders. This will be important when we discuss branding later in this chapter.

Team Name Requirements and Restrictions

- * Name must end with the word “team” or “group”
- * Cannot use words in name that could mislead the public to mistake a team for a brokerage
- * Prohibited Words – Brokerage, Company, Associates or similar words
- * Common Acceptable Words – Property, Real Estate, Homes, Realty

How Does “Branding” Fit Into The Advertisement Rules?

Branding is “the process involved in creating a unique name and image for a product in the consumers’ mind, mainly through advertising campaigns with a consistent theme. Branding aims to establish a significant and differentiated presence in the market that attracts and retains loyal customers.” [www.businessdictionary.com/definition/branding.html]

For real estate license holders, branding is done mostly through a unique name or slogan. TREC does not regulate slogans or bylines, unless they are misleading

to the public. How and when those are used will be up to the broker to determine in their advertising policy.

However, any name used by a license holder intended to “brand” themselves must meet the requirements for names set out under TREC advertisement rules. The issue mainly surfaces with associated brokers who may have brand name identity already established (perhaps a DBA they use when acting as an independent broker.) It may also occur when sales agents want a “brand” but are not joining forces with others on a team.

The answer to both issues is the same. An associated broker who has a brand name or DBA when acting as their own broker, should convert that name to a team name when associating with another brokerage. That means the name should end in “team” or “group,” and all of the other requirements and prohibitions for team names apply. A sales agent who wants a brand name but is not “on a team” must also convert the brand name they want to use to meet the requirements and prohibitions for a team name. Recall that the definition of a team name is a name used by one or more license holders. Remember, it is the broker who must register the team name for an individual sales agent or associated broker with TREC before it is used.

As an example, Don Crow of Rooster Realty, a stand alone real estate company in Wild Horse Realty’s market, decides to join Wild Horse Realty as an associated broker. The name Rooster Realty will become a team name for Wild Horse Realty, if Don wishes to still use the name. Team or Group will be added to the end of the name, such as “Rooster Realty Group” and it will need to be registered by the broker (not Don) as a team or group name for Wild Horse Realty with TREC. Any advertisement by Don will need to contain both “Rooster Realty Group” and “Wild Horse Realty.”

Registration of Names with TREC

As stated earlier, it is the broker that must register assumed business names (DBAs) and team names with TREC. TREC has an online Name Management Tool that allows a broker to easily manage all DBAs and team names online. Brokers are required to register these names before any license holder uses the names in an advertisement and must notify TREC within 10 days after that name is no longer being used. [TREC Rule §535.154] Addition and removal of names can be done in the Name Management tool directly by the broker, and TREC’s database of registered names for that broker will be updated within 24 hours. TREC has a short video on the Name Management process on its website at <https://www.trec.texas.gov/name-management-tool>.

Each license holder is responsible for registering any alternate name used in advertising. An Alternate Name is a name used by an individual license holder other than their licensed name, such as a nickname, maiden name or married name. Common name derivatives such as “Kim” for “Kimberly” or “Bill” for “William” would not need to be registered. A license holder must register the alternate name with TREC (by filing the form referenced above) before the license holder uses the name in an advertisement and must notify TREC and their sponsoring broker within 10 days after the name is no longer being used.

What Constitutes Advertisement?

The definition of a advertisement in TREC Rule §535.155(b)(1) is very broad and encompasses pretty much anything license holders communicate to the public to attract business. The rule defines a advertisement as “any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services 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 communication from a license holder to a license holder’s current client; and a directional sign that may also contain only the broker’s name or logo.”

TREC Rule Requirements for Every Advertisement

Two simple items must appear in every license holder advertisement in a readily noticeable location:

- * The name of the license holder or team placing the advertisement.
- * The broker’s name (licensed or registered DBA) in at least half the size of the largest contact information for any sales agent, associated broker or team contained in the advertisement.

Contact information is defined as a y information that can be used to contact a license holder featured in the advertisement, including name, phone number, email address, website address, social media handle, scan code or other similar information. [TREC Rule §535.155(b)(4)]

TREC Rule Prohibitions for Advertisements

An advertisement by a license holder cannot:

- * Mislead or be likely to deceive the public
- * Tend to create a misleading impression

- * Imply that a sales agent is responsible for the operation of the broker’s real estate brokerage business [TRELA Section 1101.652(b)(23)]

This statute casts a very wide net, so truth in advertising should be every broker’s motto. TREC sets out 20 examples of types of advertisements that are considered to violate the statute prohibitions in TREC Rule §535.155(d). Many have to do with a sales agent in some way implying to the public that the agent is responsible for the operation of a brokerage. Others have to do with specific types of offers a license holder might make to induce a consumer to use their services, such as a rebate. The first one is very general and includes any statement that is inaccurate in any material fact or representation.

Take a few minutes to review subsection (d) in Appendix G. Remember, when reviewing agent’s advertisements, the broker is will be the one who needs to identify any of these problem areas.

Examples of Acceptable Advertising

In these examples, Lewkasch Real Estate LLC DBA Money Talks Realty is the brokerage. Here are several acceptable advertisements from a variety of agents and associated brokers sponsored by Lewkasch Real Estate LLC DBA Money Talks Realty:

Example 1

Billy Bob “Bozo” Barnum is an associated broker for Money Talks Realty. Billy Bob registered a DBA for himself as a broker of Three Ring Realty. He created the following ad.



This ad is acceptable because his name and team name are on the sign and the brokerage name he is associated with is on the sign in 1/2 the size of the largest contact information. Note, however, the designated broker must register the team name “Three Ring Realty Team” with TREC before he starts using the sign.

Example 2

Billy Bob decides there are too many words in his name on the ad, created a new ad that shortens his name, and add the word “call.”



This ad is acceptable because his name and team name are on the sign and the brokerage name he is associated with is on the sign in 1/2 the size of the largest contact information. However, Billy Bob must register the alternate name “Bozo” with TREC before he starts using the sign.

Example 3

Jesse Aquino, the team leader of The Aquino Team, which is one of Money Talks Realty’s teams, came up with a logo for the team that he wants to use on all of the team advertising. Could you approve the following yard sign for the team to use?



This yard sign is acceptable because TREC rules do not dictate whether or what type of logo advertisements have as long as the name of the license holder or team and the broker’s name in at least 1/2 the size of the largest contact information is on the advertisement. Note, however, that there may be brokerage or franchise policies that prohibit the use of a separate logo. This is a broker business decision.

Example 4

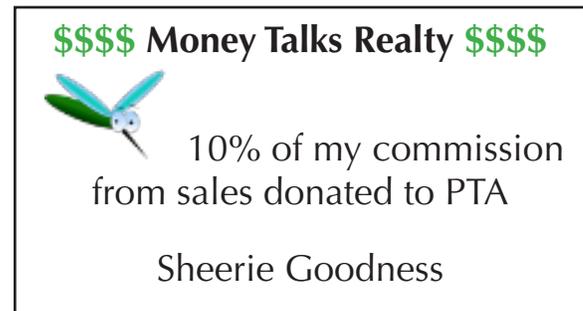
The Aquino Team leases space in an office building for their team office. They put their team name on the side of their office building so their clients can find the



A sign on the side of a building for public viewing is an advertisement. Therefore, the sign should have the brokerage name also in at least half the size of the team name for approval by the broker.

Example 5

Sheerie Goodness, a sales agent sponsored by Money Talks Realty, ran the following advertisement in her child’s school theater program. The school’s mascot is a mosquito.



This ad is acceptable. However, how will the broker ensure that the agent follows through on the promised donation? An ad that makes a promise to attract business is misleading if the promised action does not occur.

TREC Case Study 8

A Case of Missing Identity

Facts – An agent sent advertising mailers using a name that was not registered as an assumed name for their sponsoring broker.

Result – The broker entered into an agreed order resulting in an administrative penalty of \$750 and the agent entered into an agreed order resulting in an administrative penalty of \$500.

Consider this...

It was the agent’s mistake – why did the broker have to pay?

Answer: Because it was also the broker’s mistake. A broker is always responsible for their sponsored sales agent’s advertising. See TREC Rule §535.2(g). That’s the “responsibility” part of “broker responsibility.”

Group Activity

Take 10 minutes and create an outline for an advertising policy for a brokerage. Include what each party, broker, sales agent, associated broker, and team leads are responsible for knowing and doing.

TREC Case Study 9

Put Your Left Foot In...and Your Forms

Facts – An agent placed an advertisement on Facebook offering a giveaway of designer shoes for referrals. The value of the shoes exceeded \$50. When the broker learned of the advertisement, the agent was directed to remove the advertisement. Upon investigation of the matter, the TREC also discovered that the broker's website did not have the IABS or CPN posted.

Result – The broker entered into an agreed order resulting in an administrative penalty of \$750. The agent entered into an agreed order resulting in an administrative penalty of \$2000.

Consider this...

The broker had the agent correct the advertising mistake – why did the broker still have to pay?

Answer: Because during the investigation, other errors were uncovered. And there was no monitoring of the advertisements until after the complaint. See TREC Rules §531.18, §531.20, and §535.2(g).

TREC Case Study 10

Dishonesty is NOT the Best Policy

Facts - Two sponsored sales agents purchased several billboards advertising that money from each closing would result in a donation to provide a service dog for wounded veterans. The ads included the trademark of a charity. Consumers used the brokerage because they believed money was going to the advertised charity for the advertised purpose, but the brokerage did not donate any money to the charity. The broker failed to properly supervise the agents it sponsored.

Result – The broker entered into an agreed order resulting in a \$1,500 administrative penalty. Both agents also entered into agreed orders with two year probated suspensions and a \$1500 administrative penalty each.

Consider this...

1. When does someone know right from wrong?

Answer: By 12-to-15 years old, most people have a good understanding of right and wrong. This is not a training issue and the license holders knew it was wrong. The broker is responsible for this wrongdoing because it involved advertising.

2. What is the definition of integrity?

Answer: Doing the right thing, even when no one is looking. If an agent or a broker wants to establish a solid reputation, they must deliver on their promises and commitments.

Chapter 7

Written Policies



Learning Objectives

After this chapter, you will be able to

- * Name three or more items described in TREC Rule §535.2(i) regarding minimum requirements for written policies and procedures.
- * Explain how to avoid copyright infringement.
- * Understand ADA website accessibility and why it is important for a brokerage and agents.
- * Explain why a broker should consider a succession policy.

TREC Required Broker Policies and Procedures

TREC Rule §535.2(i) requires that brokers maintain current written policies and procedures for their brokerages. Read the section below that outlines broker's responsibilities in this area.

- (i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:
 - (1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities, including competence in the geographic market area where the sales agent represents clients.
 - (2) Each sponsored sales agent maintains their license in active status at all times while they are engaging in activities subject to the Act.
 - (3) Any and all compensation paid to a sponsored sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.
 - (4) Each sponsored sales agent is provided on a timely basis, notice of any change to the Act, Rules or TREC promulgated contract forms before the effective date of the change.
 - (5) In addition to completing statutory minimum continuing education requirements, each sponsored sales agent receives additional educational instruction the broker may deem necessary to obtain and maintain competency in the scope of the sponsored sales agent's practice subject to the Act. At a minimum, when a sales agent performs a real estate brokerage activity for the first time, the broker must require that the sales agent receive training, coaching and assistance from an experienced license holder competent for that activity.
 - (6) Each sponsored sales agent complies with the Commission's advertising rules.
 - (7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with TREC Rule §535.146.
 - (8) Records are properly maintained pursuant to subsection (h) of this section.

TREC Case Study 11

The Devil's In the Details, Or Lack Thereof

Facts – A sales agent promised the buyer a rebate, but did not document the details of the rebate. The agent and buyer later disagreed about the amount of the rebate. The agent did not notify the broker of the promise to give the buyer a rebate and never discussed the dispute with the broker. The broker's written policies provided that "rebates needed to be handled according to TREC guidelines." The broker's policies, as written, did not ensure that agents obtain written consent from the broker before offering a rebate. As a result of the complaint, the broker updated policies so that they clearly explain the broker's policies concerning rebates.

Result – The broker entered into an agreed order resulting in a reprimand and a \$500 administrative penalty for failure to maintain policies and procedures that ensure each of its agents are advised of the scope of authorized activities.

Consider this...

Why wasn't the broker's policy enough to avoid the reprimand and penalty?

Answer: It needed more detail. The policy cannot just "punt" on an issue. It did not mention consent and it did not provide much guidance. Broker responsibility is more than box checking. See TREC Rule §535.2(i)(1).

Other Policies to Reduce Risk

Copyright Basics and How Copyright Impacts Real Estate Brokerages

A broker or sales agent may belong to a local, state and/or national trade association. Membership in those organizations will likely offer resources and forms for members' use. These resources may assist brokers and agents to become compliant or create risk reduction procedures for the brokerage regarding the topics discussed in this chapter.

What is a copyright?

A copyright is a form of legal protection provided to authors of "original works of authorship." It is a work that is independently created and possesses at least some minimal degree of creativity.

The work must be fixed in a tangible form of expression, meaning it should be in sufficiently permanent

form such that the work can be perceived, reproduced, or communicated for more than a short time.

What can be protected?

Things like books, plays, paintings, and photographs.

What can't be protected?

Things like ideas, facts, or short phrases or slogans.

Who owns a copyright?

Generally, the author who created the work. A writer, painter, or photographer is the owner, and has copyright protection automatically from the moment the original work of authorship is produced.

But there are exceptions...

When a work is made for hire, the author is not the person who actually created the work. Instead, the party that hired the individual is considered the author and the copyright owner of the work.

There are two situations in which a work may be made for hire:

1. When the work is created by an employee within the course and scope of their employment; or
2. When an individual and the hiring party enter into a written agreement signed by both parties that the work is to be considered a "work made for hire" and the work is specially ordered or commissioned for use as a contribution to a collective work (like an encyclopedia); a part of a motion picture or other audio/visual (A/V) work; a translation; a supplementary work; a compilation (like an MLS compilation); an instructional text; a test; answer material for a test; or an atlas.

* "Supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.

This means that if an independent contractor is hired to create something and it is not within one of those nine categories, then it cannot be a work made for hire and the independent contractor will remain the author of the work.

Obtaining a Copyright

A broker should ensure their agents have appropriate copyright protection for their materials. There are three ways to protect copyrights:

1. **Registration:** Timely copyright registration with the U.S. Copyright Office is unnecessary to establish a copyright, but there are some very important benefits to registering a copyright.

Benefits of registration:

- * Public record: Registration creates a public record of ownership.
- * Ability to sue for infringement: A copyright infringement suit cannot be filed without a copyright registration. So while a person might own the copyright at the work's creation even without registration, a person cannot sue for infringement without registering.
- * Presumed valid: Registration establishes prima facie evidence (or a presumption) of the validity of the copyright if the registration is made before or within five years of publication.
- * Statutory damages, attorney's fees, and court costs. More about that in a moment.

How to register a copyright?

To register a work, submit a completed application form, and nonreturnable copy or copies of the work to be registered. This can be done online at www.copyright.gov. While an individual does not have to be an attorney to apply, a person may want to consult or hire an attorney because mistakes may result in delays or even rejection.

2. **Copyright notice:** A copyright notice must include three elements: the symbol (or the term "copyright"), the name of the owner, and the year of first publication. The work does not have to be registered to include a copyright notice. For example, © 2018 John Doe Photography is an acceptable copyright notice.

Benefits of copyright notice:

- * Puts anyone on notice that a specific person or entity owns the work.
 - * Helps eliminate the "innocent infringer" claim. Damages for innocent infringers can be significantly less than damages for someone who knowingly uses a copyrighted work without permission.
3. **Agreements:** When licensing work, understand what rights are granted. For instance, does the license holder only have the right to use the work for a particular purpose?

What is copyright infringement?

Copyright infringement is the violation of one or more of the copyright owner's exclusive rights. A copyright infringement case requires proof of: (1) ownership of a valid exclusive copyright right, and (2) defendant's

infringement of that right. Basically, it's using a work without permission.

Just because proper attribution is given to a work to avoid plagiarism, does not mean the work is being infringed upon. Let's say an agent finds a photograph online and copies and pastes it to their website, but does not include some text that says "Source: John Doe Photography." Unless John Doe Photography has given the agent permission to post that photo, either by specifically entering into an agreement with the agent or through the terms of use on their website, this can be considered copyright infringement.

Copyright infringement should not be confused with Internet Data Exchange (IDX), where all that is needed is attribution. Depending on an MLS's IDX rules, brokers may display listings of other brokers with proper authorization. Consent to display listings on another broker's public website or on a mobile device application controlled by another broker is either presumed or must be established in writing, usually within the MLS system. Most MLS systems have established that by uploading a picture, the broker is agreeing that the picture may be shared.

What are the remedies?

If a suit is brought for copyright infringement, what might happen?

- * **Injunctive relief:** A court can issue an order to stop a defendant from infringing.
- * **Damages:**
 - » Actual damages (which must be proven in court and can be difficult to establish) and wrongful profits, or
 - » Statutory damages: called this because the copyright statute establishes the range of damages.

What about fair use?

Some people say that they are okay copying or using someone else's work in their work because it is "fair use". Fair use means using the material—without the permission of the owner—for a transformative or new purpose. Fair use is an affirmative defense, meaning even if the copyright owner's claims are true, the infringer may still be able to avoid liability. One typically sees fair use applied to commentary, criticism, or parody.

In determining whether any use is a "fair use," a judge or jury will consider all of the following factors:

- * Purpose and character of the use: The less commercial and the more transformative the work, the better. A transformative work adds something new, with a further purpose or different character, altering the first work with new expression, meaning, or message.

- * Nature of the copyrighted work: Was the work factual or creative, published or unpublished? Fictional works, for example, typically get more protection.
- * The amount of original material used.
- * Economic impact: How does this impact the copyright owner's market? The more the use decreases the value of the work, the more economic impact the copyright owner may incur.

The court will review all of these factors, but particularly the effect on the market and whether the work was transformative.

A broker should not rely on fair use.

How does any of this impact a brokerage?

Typically, this impacts real estate brokers and sales agents when using photographs to market a property.

What are some examples of how this might come into play?

1. A seller or photographer provides a photo to an agent or broker, or an agent provides a photo to a broker.
2. The agent or broker uploads a photo to the MLS or submits it to a portal or vendor, who in turn, may allow the photo to be used by other agents and brokers.

For instance, an agent uploads photographs of a property into the MLS. Both the participant and subscriber agreements that agents and brokers sign with the MLS say that by submitting listing content, the agent represents that the agent is authorized to grant authority to the MLS to include the listing content in its compilation. The MLS may enter into other agreements with third parties granting rights to the compilation (that contains listing content) and the MLS may provide an IDX feed to other brokers so that they can display other brokers' listings on their website.

In both of these examples, it is important to ensure that the person granting the rights has authority to do so and that the rights granted match the intended use. If there is one break in that chain and someone does not have the rights they say they do, this can impact everyone who uses that content.

Tip of the Day

Be aware that local MLS rules address copyright requirements and permissions. If a broker is a member, the broker must understand and comply with those requirements.

Relevant Case Law

Adams v. Agrusa

The 9th Circuit Court of Appeals affirmed a judgment that a California sales agent infringed another brokerage's copyright by using photographs of a property in the MLS.

The brokerage entered a property into the MLS with 20 copyright photos, which the brokerage owned and had registered. Each of the photos contained a copyright symbol. The owner terminated the listing agreement and entered into a new listing agreement with a different brokerage. Someone at the new brokerage downloaded the same photos from the MLS, removed the copyright symbol, and then gave the photos to the sales agent, telling the agent to use them in the MLS listing. The previous brokerage filed a lawsuit alleging copyright infringement.

If a court finds that there was infringement, the court has wide discretion in awarding damages for infringement, with statutory damages ranging from \$750 to \$30,000 per work. However, if the infringement was innocent, the court may award damages as low as \$200.

The trial court ruled that the sales agent was an innocent infringer because the copyright symbol had been removed from the photos and there was no other evidence that the sales agent knew about the copyright. The court awarded the brokerage \$250.

Protecting a Brokerage from an Infringement Claim

Know your rights

- * Have a policy that forbids agents from infringing on copyright and give examples.
- * Do not use content, like a photograph, unless you have permission. This includes taking things from the internet.
- * Review existing agreements so that you know what rights you have and make sure your use complies (even website agreements).
- * Ensure future agreements have given you the necessary rights.

Digital Millennium Copyright Act (DMCA)

For a broker, it is sometimes overwhelming to consider all the issues one must be aware of AND create policies to reduce a broker's risk in so many areas. The Digital Millennium Copyright Act (DMCA) is another topic that requires a broker's attention, if the broker has any sort of presence on the internet. On websites or social media sites, when the broker or any associate has placed written content or photographs which have come from a source the broker does not control, a broker may be exposed to copyright liability issues.

Unlike many other risk management issues, with the DMCA, brokers have a possibility of a safe harbor to lessen copyright liability. For example, a sales agent posts a picture of a new listing they have just obtained. The sales agent found the picture on the internet, and did not check for any copyright related to that photograph. This can result in a violation of copyright laws and result in huge legal and settlement costs. Learn the “safe harbor” and take advantage of the knowledge to potentially lessen copyright liability.

The DMCA was enacted to address certain copyright issues related to online content. The DMCA prohibits the distribution of false copyright management information, such as a work’s title, identifying information about the author, identifying numbers or symbols, and the removal or alteration of copyright management information. For example, if a person removes or alters “© 2018 John Doe Photography” from a photo, this can be a violation of the DMCA, if it was done intentionally or knowingly.

The DMCA’s “safe harbor” provision can protect a person from third party infringement, but certain requirements must be met. The DMCA provides online service providers (OSP) a “safe harbor,” or liability protection, from copyright infringement in certain circumstances. An OSP includes real estate brokerages and any individual brokers or agents who provide or host websites, including websites or online portals that allow consumers to search real estate listings and other real estate information over the internet, or who provide other online services.

Before the DMCA, an OSP could be held liable for material posted or stored on its website, even if a third-party user posted the material. It is difficult for company or agent to screen every post or submission by every user for infringing materials; and therefore it is easy to inadvertently host copyrighted material. For example, a brokerage may display listing content of other brokerages on their public-facing websites via an IDX feed.

If the OSP meets certain requirements, the OSP is protected from liability for copyright infringement when users, not the online service provider, post or submit infringing content on the OSP’s website.

In order to ensure liability protection under the “safe harbor” provision, an OSP must meet the following requirements:

- * The OSP must not have actual or apparent knowledge that the material is infringing;
- * The OSP, if it has the right and ability to control the infringing activity, must not receive a financial benefit that can be directly attributed to the infringing activity; and

- * Upon receiving a notice of claimed infringement (a “takedown notice”), the OSP must act quickly to remove or disable access to it.

In addition to these requirements, an OSP must have designated an agent with the United States Copyright Office to receive takedown notices and pay the applicable fees. Go to <http://dmca.copyright.gov/login.html> to login or create an account.

Contact information for the “Designated Agent” must also be available on the website, including the name, address, phone number, and email address of the agent. Information about the OSP, including the OSP’s full legal name and physical street address, as well as any alternate names, must also be available on the website. Finally, the OSP must adopt, implement, and inform users of a policy that provides for termination, in appropriate circumstances, of users who are repeat infringers; and the OSP must accommodate and not interfere with standard technical measures.

Relevant Case Law

Preston Wood v. Urban Living

Preston Wood is an architectural design firm. Urban Living is a real estate development firm. Preston Wood and Urban Living entered into a license agreement to use architectural drawings.

Subsequently, Preston Wood alleged that Urban Living was using the drawings without permission and had removed Preston Wood’s “copyright management information.”

Preston Wood sued Urban Living, and a jury found that Urban Living violated the Digital Millennium Copyright Act 11,516 times. A judge ordered Urban Living to pay \$28.8 million to Preston Wood.

Website Accessibility

The Americans with Disabilities Act (ADA) website accessibility claims are on the rise. With a reported 177% increase in website accessibility lawsuits filed from 2017 to 2018, and a 131% increase in filings during the first quarter of 2019 as compared to the first quarter of 2018, these lawsuits show no signs of slowing down. This striking increase in litigation, along with the 9th Circuit’s recent reversal in *Robles v. Domino’s*, underscores the fact that real estate professionals need to understand and take measures to address website accessibility.

The ADA’s requirement that businesses provide physically accessible spaces is undisputed. However, the ADA is silent on its application to the internet. With the Department of Justice’s failure to provide guidance on this issue, businesses have been left to struggle with how to comply with the ADA in their electronic spaces.

Consumers have turned to the courts to resolve this issue, resulting in a mounting body of case law finding that the ADA's existing accessibility requirements do, in fact, apply to a business's online presence.

In a recent and notable decision, the 9th Circuit reversed the district court's decision in *Robles v. Domino's*. In this case, a visually impaired plaintiff alleged that Domino's Pizza's website and mobile application were inaccessible in violation of the ADA. The district court ruled that websites could not be deemed in violation of the ADA when the Department of Justice has not yet provided specific guidance as to what constitutes ADA website accessibility. The 9th Circuit disagreed. In overturning the district court's decision, the 9th Circuit held that existing guidance already articulates "comprehensible standards" that require websites to provide "full and equal" access to individuals with disabilities, noting that waiting for the Department of Justice to provide guidance would cause an undue delay for the plaintiff's right to full and equal access to Domino's goods and services. The United States Supreme Court is currently considering Domino's appeal, but in the meantime, we can add this case to the accumulating body of precedence that the ADA does, in fact, apply to electronic spaces.

To protect businesses from being the subject of the next ADA website accessibility lawsuit, consider the following:

- * Do not wait to take action. Despite the fact that the Department of Justice has demonstrated its unwillingness to issue additional guidance on website accessibility, courts are overwhelmingly applying the ADA to electronic spaces.

- * Conduct an accessibility audit of the business's websites and mobile applications. Based on the audit results, create and begin executing a plan to address identified accessibility issues
- * Become familiar with the accessibility standards adopted in the Web Content Accessibility Guidelines (WCAG) or hire an expert who is. Although WCAG standards are not part of the ADA or its regulations, federal agencies have adopted the WCAG standards in conforming their own websites, and these guidelines are often cited by courts as the standard for website accessibility.
- * Include an accessibility policy and notice on websites and mobile applications. NAR's accessibility statement may be used on your website, if you are a member of NAR.

Succession Policy

One lesson learned from the COVID-19 pandemic situation is to be prepared for the unexpected! Having a succession policy that sets out the plan for who will be the new designated broker, or who will step up to close out the business, is the best way to minimize disruptions in brokerage operations. Different laws and issues come into play depending on whether the broker is a business entity or individual broker. See the Succession Planning Pointers here to help you prepare a succession policy if you do not already have one. An article on this important subject is attached as Appendix H.

Succession-Planning Pointers

For Business Entities

- Check the entity's governing documents to see who has authority to appoint a new designated broker.
- If it is the same person as the designated broker, contact an attorney to amend the governing documents to add another person to the ownership and/or governance of the entity.
- If it requires unanimous consent of all of the directors, members, or partners, and the designated broker is one of those parties, contact an attorney to amend the governing documents to allow the remaining directors, members, or partners to appoint a new designated broker.
- Identify a successor designated broker either from within the brokerage or outside. Let that person know the plan, and get his agreement to step up when needed.
- Identify the documents needed to change the designated broker at TREC. These will include:
 - o a Change of Designated Broker form, signed by the appropriate governing person/people;
 - o an authorization document from the entity appointing the new designated broker, signed by the appropriate governing person/people; and
 - o either documentation that the new designated broker owns 10 percent or more of the entity or proof of errors and omissions insurance in the amount of at least \$1 million per occurrence.

- Create a written succession plan detailing the name of the designated broker who will be on deck and the documents that will be required to make that happen. Have the governing body sign off on it.
- Keep the plan in a place known to the governing body.

For Individual Brokers

- If the brokerage is intended to continue after the individual broker becomes incapacitated or dies, restructure as a business entity immediately.
- If the individual broker's business assets and name have value and the broker can identify a willing future buyer (business entity or individual), contact an attorney to negotiate and write up a conditional sales contract that is triggered by certain events (retirement can be one of them).
- Alternatively, find another individual broker who may be in the same situation and suggest a reciprocal agreement to step in and finish up pending transactions. The terms of this agreement should be clear and preferably in writing, especially if there is some compensation involved. Depending on how detailed this agreement is, the services of an attorney might be useful.
- Let sales agents and family members know what plan will be followed if something unexpected were to happen.

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Chapter 8

Additional Broker Duties

Learning Objectives

After this chapter, you will be able to

- * Recognize recordkeeping and timely response requirements.
- * Understand broker requirements for handling TREC complaints.
- * Be aware of the importance of having an emergency preparedness policy before an emergency occurs.
- * Be familiar with the concept of condemnation, and how it may apply in a real estate transaction.

Additional Broker Duties Under §535.2 - Recordkeeping & Timely Responses

A broker must also remember to maintain records and respond timely to requests. The key takeaways are these.

- * Keep records for four years.
- * Respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within two calendar days.
- * Deliver correspondence from TREC (yes, that includes emails) to sponsored sales agents within three calendar days after receipt.

This rule also applies to designated brokers for business entities that sponsor one or more sales agents. As always, read the rule for more detail. See Appendix A.

TREC Complaints

What should a broker do when they receive a TREC complaint? What if the complaint only involves a sales agent?

Never, never, ever, ignore a complaint. Respond to TREC within 14 days. It is a violation not to respond timely. It is, in fact, one of the most common violations, and brokers frequently pay an administrative penalty on this issue (and even get SUSPENDED).

Even if the complaint is all about a sales agent the broker sponsors (or formerly sponsored!), the broker is still responsible! It is not a defense to say, "I know nothing" or, "I thought Sales Agent Sam was responding."



If the complaint is about a sales agent the broker currently sponsors (or may have sponsored during the period being complained about), the broker may get a broker questionnaire from a TREC investigator. Fill it out. Not only is it good management, it's the law. See Appendix I.

Emergency Preparedness

Texas is a diverse state. From time to time, a variety of emergencies can arise. Tornadoes, hurricanes, lightning, flood, fire, active shooters and pandemics are a few of the situations that could occur for which a plan is needed. This chapter provides some very basic information for a broker that should also cause the broker to think through what is best for the brokerage and the broker's agents, as well as their families. Brokers can research other resources, create plans, and make those plans known to all who need the information.

The Texas Real Estate Commission has put this information together and has taken care in its preparation, however this information is not guaranteed for accuracy now or in the future. When one is in an emergency situation, try to stay calm and keep others calm, use common sense, and follow directions from local authorities. See Appendix J for an example of an emergency preparedness plan.

Condemnation (Eminent Domain)

In Texas and other parts of the United States, government or quasi-government entities may seize private

property for public use. This process is called “condemnation.” Condemnation is performed under the power of “eminent domain” (the terms are often referred to interchangeably). The Fifth Amendment to the US Constitution says “nor shall private property be taken for public use, without just compensation.” The Texas Constitution also has provisions for “no person’s property shall be taken...for a public use without adequate compensation.” “Public use” is defined in the Texas Constitution as the “ownership, use, and enjoyment of the property,” by the government or another entity granted eminent domain power. The Texas Comptroller maintains an updated list of these entities on their website. This issue has been very contentious in recent years. The more our state grows, the higher the demand for more roads, more water and more power. All of this equals a higher incidence of a need to seize property to meet these demands.

The condemnation process in Texas has two parts.

1. Determination that the property is needed for a “public use.”
2. Determination of the amount of compensation to be paid to the property owner for the taking of the property (commonly called the “condemnation award”).

The determination of the amount of compensation has three phases:

1. Negotiation between the condemning authority and the property owner. The law requires the condemning authority to initially make a “bona fide” offer to the property owner.
2. If an acceptable price is not agreed upon through negotiations, then there is a special commissioner’s hearing and award of damages.
3. If either party is not satisfied with the special commissioner’s award, an appeal may be made to a judge in a civil condemnation lawsuit.

If a broker has a listing where there is an ongoing condemnation process OR a notice has been received regarding a pending condemnation process, this fact should be disclosed to an interested buyer.

- * The TREC Farm and Ranch Contract has a requirement for disclosure under paragraph 7H Sellers Disclosures, section “(2) any pending or threatened litigation, condemnation, or special assessment affecting the property.”
- * The TREC One to Four Family Residential Contract (Resale) does not state a requirement for disclosure since condemnations are uncommon in residential transactions. However, if there is a pending or threatened “taking” on a residential property, it must be disclosed to any interested buyer.

- * Most commercial contracts contain an entire paragraph addressing what happens if a condemnation is threatened or commenced during the pendency of the contract.

Who gets the money if the settlement occurs after closing is a question that needs to be discussed and resolved before entering into a contract with a property involved in the condemnation process. If a condemnation is pending or threatened there needs to be a negotiation between the buyer and seller. The buyer might not be receiving all of the property that the buyer thought they were purchasing because the seller might not be able to convey everything the seller intended to convey. It is common for the negotiations to result in one of the following:

- * The seller receiving the condemnation award and the sales price being reduced by a similar amount.
- * The buyer receiving the condemnation award and the sales price not being reduced.
- * The buyer terminating the contract.

For more information, there is a publication from the Texas A&M School of Law titled “Law and Policy Resource Guide, A Survey of Eminent Domain Law in Texas and the Nation.”

Appendix A

TREC Rule §535.2

- (a) A broker is required to notify a sponsored sales agent in writing of the scope of the sales agent's authorized activities under the Act. Unless such scope is limited or revoked in writing, a broker is responsible for the authorized acts of the broker's sales agents, but the broker is not required to supervise the sales agents directly. If a broker permits a sponsored sales agent to conduct activities beyond the scope explicitly authorized by the broker, those are acts for which the broker is responsible.
- (b) A broker owes the highest fiduciary obligation to the principal and is obliged to convey to the principal all information known to the agent which may affect the principal's decision unless prohibited by other law.
- (c) A broker is responsible for the proper handling of trust funds placed with the broker and must comply with §535.146 of this title.
- (d) A broker is responsible for any property management activity by the broker's sponsored sales agent that requires a real estate license.
- (e) A broker may delegate to another license holder the responsibility to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of license holders sponsored by the broker. Any license holder who leads, supervises, directs, or manages a team must be delegated as a supervisor. Any such delegation must be in writing. A broker shall provide the name of each delegated supervisor to the Commission on a form or through the online process approved by the Commission within 30 days of any such delegation that has lasted or is anticipated to last more than three consecutive months. The broker shall notify the Commission in the same manner within 30 days after the delegation of a supervisor has ended. It is the responsibility of the broker associate or newly licensed broker to notify the Commission in writing when they are no longer associated with the broker or no longer act as a delegated supervisor.
- (f) Listings and other agreements for real estate brokerage services must be solicited and accepted in a broker's name.
- (g) A broker is responsible to ensure that a sponsored sales agent's advertising complies with §535.154 and §535.155 of this title.
- (h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:
 - (1) disclosures;
 - (2) commission agreements such as listing agreements, buyer representation agreements, or other written agreements relied upon to claim compensation;
 - (3) substantive communications with parties to the transaction;
 - (4) offers, contracts and related addenda;
 - (5) receipts and disbursements of compensation for services subject to the Act;
 - (6) property management contracts;
 - (7) appraisals, broker price opinions, and comparative market analyses; and
 - (8) sponsorship agreements between the broker and sponsored sales agents.
- (i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:
 - (1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities, including competence in the geographic market area where the sales agent represents clients.
 - (2) Each sponsored sales agent maintains their license in active status at all times while they are engaging in activities subject to the Act.
 - (3) Any and all compensation paid to a sponsored sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.
 - (4) Each sponsored sales agent is provided on

- a timely basis, before the effective date of the change, notice of any change to the Act, Rules, or Commission promulgated contract forms.
- (5) In addition to completing statutory minimum continuing education requirements, each sponsored sales agent receives such additional educational instruction the broker may deem necessary to obtain and maintain, on a current basis, competency in the scope of the sponsored sales agent's practice subject to the Act. At a minimum, when a sales agent performs a real estate brokerage activity for the first time, the broker must require that the sale agent receive coaching and assistance from an experienced license holder competent for that activity.
 - (6) Each sponsored sales agent complies with the Commission's advertising rules.
 - (7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146.
 - (8) Records are properly maintained pursuant to subsection (h) of this section.
 - (j) A broker or supervisor delegated under subsection (e) of this section must respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within two calendar days.
 - (k) A sponsoring broker or supervisor delegated under subsection (e) of this section shall deliver mail and other correspondence from the Commission to their sponsored sales agents within three calendar days after receipt.
 - (l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.
 - (m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored sales agent.

Appendix B

Sample Transaction Checklist

Document Checklist for Contracts

Property Address _____ Close Date _____

Agent Name _____ MLS # _____

***Submit the following documents within 72 hours of Earnest Money Receipt OR 24 hours out of Option. ONLY THE LATEST DOCUMENT VERSIONS WILL BE ACCEPTED.**

Form Name	Included	Form #	Agent Notes
Required Documents: (required to receive initial DA)			
MLS Printout	<input type="checkbox"/> Yes		
Tax Records - Realist or County	<input type="checkbox"/> Yes		
Fully Initialed and Signed Contract	<input type="checkbox"/> Yes	Per Property Type	
NOTE : <input type="checkbox"/> Execution Date Filled In	<input type="checkbox"/> Option Fee Receipt	<input type="checkbox"/> Earnest Money Receipt	
Wire Fraud Notification	<input type="checkbox"/> Yes	TXR 2517	
Information about Brokerage Services	<input type="checkbox"/> Yes	IABS 1-0	
Residential Buyer/Tenant Representation	<input type="checkbox"/> Yes	TXR 1501	
General Information & Notice to Buyer	<input type="checkbox"/> Yes	TXR 1506	
Inspector Information	<input type="checkbox"/> Yes	TXR 2506	
Third Party Financing Condition Addendum	<input type="checkbox"/> Yes	TREC 40-9	
Seller's Disclosure Notice - Fully Signed	<input type="checkbox"/> Yes	TREC OP-H	
Survey & T47	<input type="checkbox"/> Yes	TXR 1907	
Additional Documents: (as apply)			
Intermediary Relationship Notice	<input type="checkbox"/> Yes	TXR 1409	
Referral Form with current W9	<input type="checkbox"/> Yes	*Office Doc	
Addendum for Propane Gas Service Area	<input type="checkbox"/> Yes	TREC 47-0	
Lead Based Paint Addendum (built before 1978)	<input type="checkbox"/> Yes	TXR 1906	
Addendum for Sale of Other Property by Buyer	<input type="checkbox"/> Yes	TXR 1908	
Seller's Temporary Residential Lease	<input type="checkbox"/> Yes	TXR 1910	
Short Sale Addendum	<input type="checkbox"/> Yes	TXR 1918	
Addendum for Property Subject to Mandatory Membership in an Owner's Association	<input type="checkbox"/> Yes	TXR 1922	
Information About On-Site Sewer Facility	<input type="checkbox"/> Yes	TXR 1407	
MUD Notice - WCID Notice	<input type="checkbox"/> Yes		
Non-Realty Items Addendum to Contract	<input type="checkbox"/> Yes	TXR 1924	
Registration Between Broker & Owner	<input type="checkbox"/> Yes	TXR 2401	
Registration Agreement Between Brokers	<input type="checkbox"/> Yes	TXR 2402	
Supplemental Documents: (required at the time of document completion)			
Amendment (Repairs, Price Changes, etc.)	<input type="checkbox"/> Yes	TREC 39-8	
Buyer's Walk-Through & Acceptance Form	<input type="checkbox"/> Yes	TXR 1925	
Termination Documents - Resubmit loop			
Notice of Termination of Contract	<input type="checkbox"/> Yes	TREC 38-5	
Release of Earnest Money	<input type="checkbox"/> Yes	TXR 1904	

Not all forms will be used with every transaction, provide only what is required in your transaction.

Appendix C

Addendum for "Back Up" Contract (11-7)

	PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)	12-05-11
	ADDENDUM FOR "BACK-UP" CONTRACT	
	TO CONTRACT CONCERNING THE PROPERTY AT	

	(Address of Property)	
	<p>A. The contract to which this Addendum is attached (the Back-Up Contract) is binding upon execution by the parties, and the earnest money and any Option Fee must be paid as provided in the Back-Up Contract. The Back-Up Contract is contingent upon the termination of a previous contract (the First Contract) dated _____, 20_____, for the sale of Property. Except as provided by this Addendum, neither party is required to perform under the Back-Up Contract while it is contingent upon the termination of the First Contract.</p> <p>B. If the First Contract does not terminate on or before _____, 20_____, the Back-Up Contract terminates and the earnest money will be refunded to Buyer. Seller must notify Buyer immediately of the termination of the First Contract. For purposes of performance, the effective date of the Back-Up Contract changes to the date Buyer receives notice of termination of the First Contract (Amended Effective Date).</p> <p>C. An amendment or modification of the First Contract will not terminate the First Contract.</p> <p>D. If Buyer has the unrestricted right to terminate the Back-Up Contract, the time for giving notice of termination begins on the effective date of the Back-Up Contract, continues after the Amended Effective Date and ends upon the expiration of Buyer's unrestricted right to terminate the Back-Up Contract.</p> <p>E. For purposes of this Addendum, time is of the essence. Strict compliance with the times for performance stated herein is required.</p>	
_____	_____	
Buyer	Seller	
_____	_____	
Buyer	Seller	
	This form has been approved by the Texas Real Estate Commission for use with similarly approved or promulgated contract forms. Such approval relates to this form only. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not suitable for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 512-936-3000 (http://www.trec.texas.gov) TREC No. 11-7. This form replaces TREC No. 11-6.	
		TREC No. 11-7

Appendix D

TREC Rule §535.146 - Managing Trust Money

- (a) Definitions. In this section
 - (1) "Trust money" means client's money, earnest money, rent, unearned fees, security deposits, or any money held on behalf of another person.
 - (2) "Trust account" means an account managed by one party for the benefit of another in a banking institution authorized to do business in Texas.
- (b) Acceptance of Trust Money.
 - (1) Any trust money accepted by a broker is held in a fiduciary capacity and must be maintained in a designated trust account maintained by the broker or delivered to an escrow agent authorized in Texas in accordance with the agreement of the principals of the transaction.
 - (2) A sales agent shall not maintain a trust account. Any trust money received by a sales agent must be immediately delivered to the sales agent's sponsoring broker.
 - (3) Unless a different time to deposit trust money is expressly agreed upon in writing by the principals to the transaction, any trust money received by the broker must be deposited in a trust account or delivered to an authorized escrow agent within a reasonable time, which the Commission has determined to be not later than the close of business of the second working day after the date the broker receives the trust money.
 - (4) The broker shall not:
 - (A) commingle trust money with the broker's personal money or other non-trust money; or
 - (B) deposit or maintain trust money in a personal account or any kind of business account.
 - (5) The following is prima facie evidence of commingling trust money with the broker's own money:
 - (A) placing trust money in a broker's personal or operating account; or
 - (B) paying operating expenses or making withdrawals from a trust account for any purpose other than proper disbursement of trust money.
- (c) Trust account requirements.
 - (1) The trust account must be clearly identified as a trust account;
 - (2) The broker may, but is not required to, maintain separate trust accounts for each client or type of trust money maintained by the broker, such as earnest money deposits or security deposits received for the management of rental property.
 - (3) If trust money held by a broker is deposited in an interest bearing account:
 - (A) the money must be available for disbursement at the appropriate time; and
 - (B) unless otherwise provided for by an agreement signed by the party depositing the money with the broker, any interest earned on the money must be distributed to any parties to whom the money is disbursed.
 - (4) A broker may deposit and maintain a reasonable amount of money in the trust account to cover bank service fees, including fees charged for insufficient funds. Detailed records must be kept for any funds deposited under this exception.
 - (5) If a broker acquires ownership of trust money held in a trust account, including entitlement to compensation, such money must be removed from the trust account not later than the 30th day after the date the broker acquires ownership of the money.
 - (6) The broker must retain a documentary record of each deposit or withdrawal from the trust account and provide an accounting to each beneficiary of trust money at least monthly if there has been any activity in the account.
 - (7) A broker may only authorize another license holder to withdraw or transfer money from any trust account but the broker remains responsible and accountable for all trust money received by that broker and all deposits to or disbursements from the trust account.
 - (8) If a broker deposits trust money in the form

- of a check in a trust account and the check is dishonored by the financial institution on which it was drawn, the broker shall immediately notify all parties to the transaction in writing.
- (d) Disbursement of trust money.
- (1) A broker may only disburse money from the broker's trust account in accordance with the agreement under which the money was received.
 - (2) If any or all of the parties to a real estate transaction make a written demand for payment of trust money, the broker must pay the trust money to the party or parties entitled to the money within a reasonable time, which the Commission has determined to be not later than the 30th day after the date the demand is made.
 - (3) If by a subsequent written agreement, all parties to a real estate transaction authorize the broker maintaining trust money to disburse the trust money in a manner not in accordance with the agreement under which the money was received, the broker must pay the trust money to the party or parties entitled to the money under the subsequent written agreement within a reasonable time, which the Commission has determined to be not later than the 30th day after the date the broker receives the subsequent written agreement.
 - (4) The broker must immediately notify all parties in writing of any disbursement of trust money under subsections (d)(2) or (3).
 - (5) If the broker cannot reasonably determine to which party or parties the trust money should be paid, the broker may pay the trust money into the registry of a court and interplead the parties.
- (e) Records. A broker must maintain all documentation regarding a trust account for four years from the date the document is received or created by the broker.

Appendix E

Consumer Protection Notice Form (CN 1-2)

THE TEXAS REAL ESTATE COMMISSION (TREC) REGULATES
REAL ESTATE BROKERS AND SALES AGENTS, REAL ESTATE INSPECTORS,
HOME WARRANTY COMPANIES, EASEMENT AND RIGHT-OF-WAY AGENTS
AND TIMESHARE INTEREST PROVIDERS

YOU CAN FIND MORE INFORMATION AND
CHECK THE STATUS OF A LICENSE HOLDER AT
WWW.TREC.TEXAS.GOV

YOU CAN SEND A COMPLAINT AGAINST A LICENSE HOLDER TO TREC
A COMPLAINT FORM IS AVAILABLE ON THE TREC WEBSITE

TREC ADMINISTERS TWO RECOVERY FUNDS WHICH MAY BE USED TO
SATISFY A CIVIL COURT JUDGMENT AGAINST A BROKER, SALES AGENT,
REAL ESTATE INSPECTOR, OR EASEMENT OR RIGHT-OF-WAY AGENT,
IF CERTAIN REQUIREMENTS ARE MET

IF YOU HAVE QUESTIONS OR ISSUES ABOUT THE ACTIVITIES OF
A LICENSE HOLDER, THE COMPLAINT PROCESS OR THE
RECOVERY FUNDS, PLEASE VISIT THE WEBSITE OR CONTACT TREC AT



TEXAS REAL ESTATE COMMISSION
P.O. BOX 12188
AUSTIN, TEXAS 78711-2188
(512) 936-3000

Appendix F

Information About Brokerage Services Form (IABS 1-0)



Information About Brokerage Services

Texas law requires all real estate license holders to give the following information about brokerage services to prospective buyers, tenants, sellers and landlords.

11-2-2015



TYPES OF REAL ESTATE LICENSE HOLDERS:

- A **BROKER** is responsible for all brokerage activities, including acts performed by sales agents sponsored by the broker.
- A **SALES AGENT** must be sponsored by a broker and works with clients on behalf of the broker.

A BROKER'S MINIMUM DUTIES REQUIRED BY LAW (A client is the person or party that the broker represents):

- Put the interests of the client above all others, including the broker's own interests;
- Inform the client of any material information about the property or transaction received by the broker;
- Answer the client's questions and present any offer to or counter-offer from the client; and
- Treat all parties to a real estate transaction honestly and fairly.

A LICENSE HOLDER CAN REPRESENT A PARTY IN A REAL ESTATE TRANSACTION:

AS AGENT FOR OWNER (SELLER/LANDLORD): The broker becomes the property owner's agent through an agreement with the owner, usually in a written listing to sell or property management agreement. An owner's agent must perform the broker's minimum duties above and must inform the owner of any material information about the property or transaction known by the agent, including information disclosed to the agent or subagent by the buyer or buyer's agent.

AS AGENT FOR BUYER/TENANT: The broker becomes the buyer/tenant's agent by agreeing to represent the buyer, usually through a written representation agreement. A buyer's agent must perform the broker's minimum duties above and must inform the buyer of any material information about the property or transaction known by the agent, including information disclosed to the agent by the seller or seller's agent.

AS AGENT FOR BOTH - INTERMEDIARY: To act as an intermediary between the parties the broker must first obtain the written agreement of each party to the transaction. The written agreement must state who will pay the broker and, in conspicuous bold or underlined print, set forth the broker's obligations as an intermediary. A broker who acts as an intermediary:

- Must treat all parties to the transaction impartially and fairly;
- May, with the parties' written consent, appoint a different license holder associated with the broker to each party (owner and buyer) to communicate with, provide opinions and advice to, and carry out the instructions of each party to the transaction.
- Must not, unless specifically authorized in writing to do so by the party, disclose:
 - o that the owner will accept a price less than the written asking price;
 - o that the buyer/tenant will pay a price greater than the price submitted in a written offer; and
 - o any confidential information or any other information that a party specifically instructs the broker in writing not to disclose, unless required to do so by law.

AS SUBAGENT: A license holder acts as a subagent when aiding a buyer in a transaction without an agreement to represent the buyer. A subagent can assist the buyer but does not represent the buyer and must place the interests of the owner first.

TO AVOID DISPUTES, ALL AGREEMENTS BETWEEN YOU AND A BROKER SHOULD BE IN WRITING AND CLEARLY ESTABLISH:

- The broker's duties and responsibilities to you, and your obligations under the representation agreement.
- Who will pay the broker for services provided to you, when payment will be made and how the payment will be calculated.

LICENSE HOLDER CONTACT INFORMATION: This notice is being provided for information purposes. It does not create an obligation for you to use the broker's services. Please acknowledge receipt of this notice below and retain a copy for your records.

_____	_____	_____	_____
Licensed Broker /Broker Firm Name or Primary Assumed Business Name	License No.	Email	Phone
_____	_____	_____	_____
Designated Broker of Firm	License No.	Email	Phone
_____	_____	_____	_____
Licensed Supervisor of Sales Agent/ Associate	License No.	Email	Phone
_____	_____	_____	_____
Sales Agent/Associate's Name	License No.	Email	Phone
_____	_____	_____	_____
Buyer/Tenant/Seller/Landlord Initials		Date	

Regulated by the Texas Real Estate Commission

Information available at www.trec.texas.gov

IABS 1-0

Appendix G

TREC Rule §535.154 – Registration and Use of Alternate, Team and Assumed Business Names Used in Advertisements and TREC Rule §535.155 - Advertisements

TREC Rule §535.154 – Registration and Use of Alternate, Team and Assumed Business Names Used in Advertisements

(a) Definitions. or the purposes of this section:

- (1) “Advertisement” has the meaning assigned by §535.155.
- (2) “Alternate name” (commonly known as an alias) 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) “Associated broker” means a broker who associates with and gets paid through another broker under a relationship that is intended to be a continuous relationship, including but not limited to, an employment or ongoing independent contractor relationship.
- (4) “Assumed business name” (commonly known as a DBA or trade name) means any name used in business by a broker that meets the requirements of subsection (d), other than the name shown on the broker’s license issued by the Commission, a team name, or an alternate name.
- (5) “Team name” means a name used by a group of one or more license holders sponsored by or associated with the same broker that performs real estate activities under an exclusive collective name other than the broker’s licensed name or assumed business name.

(b) Alternate names.

- (1) Before a license holder starts using an alternate name in an advertisement, the license holder must register the name with the Commission on a form approved by the Commission.
- (2) The Commission may request supporting documentation evidencing the legal authority to use the alternate name if the last name submitted is different from the last name shown

on the license issued by the Commission.

- (3) A license holder must notify the Commission, and their sponsoring broker, not later than the 10th day after the date the license holder stops using an alternate name.

(c) Team names:

- (1) A team name may not include any terms that could mislead the public to believe that the team is offering brokerage services independent from its sponsoring broker.
- (2) A team name must end with the word “team” or “group”.
- (3) Before an associated broker or a sales agent sponsored by a broker starts using a team name in an advertisement, the broker must register the name with the Commission on a form approved by the Commission.
- (4) A broker must notify the Commission in writing not later than the 10th day after the date the associated broker or a sales agent sponsored by the broker stops using a team name.

(d) Assumed business names.

- (1) Before a broker, associated broker or a sales agent sponsored by a broker starts using an assumed business name of the broker in an advertisement, the broker must:
 - (A) register the name with the Commission on a form approved by the Commission; and
 - (B) provide written evidence of legal authority to use the assumed business name in Texas, such as registration of the name with the Secretary of State or county clerk’s office
- (2) A broker must notify the Commission in writing not later than the 10th day after the date the broker stops using an assumed business name.

TREC Rule §535.155 – Advertisements

- (a) Each advertisement must include the following in a readily noticeable location in the advertisement:
 - (1) the name of the license holder or team placing the advertisement; and

- (2) the broker's name in at least half the size of the largest contact information for any sales agent, associated broker, or team name contained in the advertisement.
- (b) For the purposes of this section:
 - (1) "Advertisement" is any form of communication by or on behalf of a license holder designed to attract the public to use real estate brokerage services 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; and
 - (B) a directional sign that may also contain only the broker's name or logo.
 - (2) Associated broker has the meaning assigned by §535.154.
 - (3) "Broker's name" means:
 - (A) the broker's name as shown on a license issued by the Commission;
 - (B) if an individual, an alternate name registered with the Commission; or
 - (C) any assumed business name that meets the requirements of §535.154.
 - (4) "Contact Information" means any information that can be used to contact a license holder featured in the advertisement, including a name, phone number, email address, website address, social media handle, scan code or other similar information.
 - (5) "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.
 - (6) "Team name" has the meaning assigned by §535.154.
- (c) For an advertisement on social media or by text, the information required by this section may be located on a separate page or on the account user profile page of the license holder, if the separate page or account user profile is
 - (1) readily accessible by a direct link from the social media or text; and
 - (2) readily noticeable on the separate page or in the account user profile
- (d) For purposes of this section and §1101.652(b)(23) of the Act, an advertisement that misleads or is

likely to deceive the public, tends to create a misleading impression, or implies that a sales agent is responsible for the operation of the broker's real estate brokerage business includes, but is not limited to, any advertisement:

- (1) that is inaccurate in any material fact or representation;
- (2) that does not comply with this section;
- (3) that identifies a sales agent as a broker
- (4) that uses a title, such as owner, president, CEO, COO, or other similar title, email or website address that implies a sales agent is responsible for the operations of a brokerage;
- (5) that contains a team name with terms that imply that the team is offering brokerage services independent from its sponsoring broker, including, but not limited to, "brokerage", "company", and "associates";
- (6) that contains the name of a sales agent that is not the name as shown on the sales agent's license issued by the Commission or an alternate name registered with the Commission;
- (7) that contains the name of a sales agent whose name is, in whole or in part, used in a broker's name and that implies that the sales agent is responsible for the operation of the brokerage;
- (8) that causes a member of the public to believe that a person not licensed to conduct real estate brokerage is engaged in real estate brokerage;
- (9) that contains the name or likeness of an unlicensed person that does not clearly disclose that the person does not hold a license;
- (10) that creates confusion regarding the permitted use of a property;
- (11) about the value of a property, unless it is based on an appraisal that is disclosed and readily available upon request by a party or it is given in compliance with §535.17;
- (12) that implies the person making the advertisement was involved in a transaction regarding a property when the person had no such role;
- (13) 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 in writing to waive disclosure;
- (14) offering a listed property that is not discontinued within 10 days after the listing agreement is no longer in effect;
- (15) about a property 10 days or more after the closing of a transaction unless the current

- status of the property is included in the advertisement;
- (16) that offers to rebate a portion of a license holder's compensation to a party if the advertisement does not disclose that payment of the rebate is subject to the consent of the party the license holder represents in the transaction;
 - (17) that offers to rebate a portion of a license holder's commission contingent upon a party's use of a specified service provider, or subject to approval by a third party such as a lender, unless the advertisement also contains a disclosure that payment of the rebate is subject to restrictions;
 - (18) that offers 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, if the advertisement does not contain a disclosure that the license holder may receive compensation from the service provider;
 - (19) that ranks the license holder or another service provider unless the ranking is based on objective criteria disclosed in the advertisement; or
 - (20) that states or implies that the license holder teaches or offers 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.

Appendix H

Who's On Deck? Broker Succession Planning



Brokerage

A broker's business can be interrupted when the broker suddenly dies or becomes incapacitated. The best way to avoid this is to have a succession plan in place ahead of time.

Different factors must be considered for business entity brokers and individual brokers, but both are far better off with a plan than without one.



WHO'S ON DECK?

BROKER SUCCESSION PLANNING

BY KERRI LEWIS

It happens—an unexpected illness, car wreck, or license revocation or suspension of a business entity designated broker or an individual broker. When these occur, what happens to the brokerage business and sponsored agents will depend on swift action being taken.

Having a succession plan in place before the unexpected occurs is the best way to minimize disruptions in business operations. Different laws and issues come into play when creating a succession plan for business entities and individual brokers.

Interplay Between Laws

When the broker in charge of a brokerage becomes incapacitated, dies, or is otherwise ineligible to act as a broker, whether it is a designated broker or an individual broker, at least two of the following areas of law kick in.

- **Texas Real Estate Commission (TREC).** Under the Texas Real Estate License Act (TRELA), for a business entity to act as a broker (i.e., sponsor agents, collect commissions, take listings, etc.), its designated broker must be an active licensed broker in good standing [TRELA 1101.355]. TREC rules specify that if the designated broker of a business entity dies, is suspended, or has his license revoked or otherwise inactivated (including expiration of his license), the licenses of the entity broker and all sales agents sponsored by the entity broker immediately become inactive. Likewise, an individual broker's death immediately causes all of her sponsored sales agents to become inactive [TREC Rule 535.121]. Although TREC works with brokerages in these situations to expedite the approval of a new designated broker or transfer sponsorship of an individual broker's sales agents to a new broker, technically, under the law, there is no grace period. Therefore, quick action is critical. If the brokerage does not have a succession plan in place, business will undoubtedly be interrupted.
- **Business entity structure and management.** The laws related to business entity formation and management are applicable only to business entity brokers. Those laws set out the structure for ownership and management of the entity. However, each business entity's management authority for appointing the designated broker will most likely be contained in the entity's management documents,

like bylaws for corporations, operating agreements for LLCs, or partnership agree-

ments for partnerships. Understanding the ownership structure and who has authority to appoint a new designated broker is important when applying to TREC to change the designated broker. Having the wrong person sign the TREC change form or improper entity authorization documentation will cause delays, and, as previously noted, longer inactivation of sales agents and possible loss of listings and clients.

- **Estate and probate.** Taking a dead broker's estate through probate or getting authority to act on behalf of an incapacitated broker takes time in the best of circumstances. The spouse or other heirs of the broker will be dealing with their grief and any arrangements that must be made. Their first priority will not be upcoming closings or sales agents' license status. While an executor will be appointed and an heir will eventually inherit ownership of business assets, it is likely that neither of them will be a broker who could take over the business in compliance with TREC requirements.

Timing for implementation of estate and probate laws should influence an individual broker's succession plan, but it may also be relevant for a business entity. A business entity could be impacted if the deceased or incapacitated designated broker is also the sole owner of the entity or a person whose authority is needed to appoint a new designated broker. A plan that can be put into action right away, before the probate process is complete, helps maximize the amount of commissions realized by an individual broker as the business is wrapped up or maintains continuity of business for an entity broker. It also benefits the sales agents and heirs left behind.

Brokerage Ownership, Appointment Authority

One of the key advantages of being a business entity broker is that the entity can exist perpetually, changing owners and designated brokers over time. In other words, the brokerage can continue to operate for generations.

A successful succession plan for a business entity must start with a good understanding of the entity ownership structure and appointment authority. In particular, a business entity owner must know who the governing body for

Succession-Planning Pointers

For Business Entities

- Check the entity's governing documents to see who has authority to appoint a new designated broker.
- If it is the same person as the designated broker, contact an attorney to amend the governing documents to add another person to the ownership and/or governance of the entity.
- If it requires unanimous consent of all of the directors, members, or partners, and the designated broker is one of those parties, contact an attorney to amend the governing documents to allow the remaining directors, members, or partners to appoint a new designated broker.
- Identify a successor designated broker either from within the brokerage or outside. Let that person know the plan, and get his agreement to step up when needed.
- Identify the documents needed to change the designated broker at TREC. These will include:
 - a Change of Designated Broker form, signed by the appropriate governing person/people;
 - an authorization document from the entity appointing the new designated broker, signed by the appropriate governing person/people; and
 - either documentation that the new designated broker owns 10 percent or more of the entity or proof of errors and omissions insurance in the amount of at least \$1 million per occurrence.
- Create a written succession plan detailing the name of the designated broker who will be on deck and the documents that will be required to make that happen. Have the governing body sign off on it.
- Keep the plan in a place known to the governing body.

For Individual Brokers

- If the brokerage is intended to continue after the individual broker becomes incapacitated or dies, restructure as a business entity immediately.
- If the individual broker's business assets and name have value and the broker can identify a willing future buyer (business entity or individual), contact an attorney to negotiate and write up a conditional sales contract that is triggered by certain events (retirement can be one of them).
- Alternatively, find another individual broker who may be in the same situation and suggest a reciprocal agreement to step in and finish up pending transactions. The terms of this agreement should be clear and preferably in writing, especially if there is some compensation involved. Depending on how detailed this agreement is, the services of an attorney might be useful.
- Let sales agents and family members know what plan will be followed if something unexpected were to happen.

the entity is and who has been granted the authority to appoint the designated broker under the entity's governing document. Keep in mind that the designated broker must be an officer of a corporation, a manager or member of an LLC, or a general partner of a partnership. Many governing documents refer to officers, managers, members, or partners, not specifically to a "designated broker." In some cases, the designated broker is also a director or owner of the entity. If the designated broker is the only owner, the only person authorized to appoint a new designated broker, or is part of a group that requires unanimous consent to appoint a new designated broker, the business can be at high risk of major business interruption or even dissolution. In these situations, governing documents will need to be amended before a succession plan can be viable.

Business Finality of Individual Broker

Unlike a business entity broker, an individual broker's business ends when the broker dies or otherwise becomes incapacitated or inactive. Not only do the sales agents become inactive immediately, those agents must find a new sponsoring broker. Any listing the individual broker had pending automatically terminates. While the estate of a deceased broker may collect commissions on transactions where the commission had been fully earned, many clients will have to find another broker to complete their transactions.

A "succession plan" for an expected departure of an individual broker, such as retirement, is really just a sale of the broker's business assets and marketability of the broker's established name. A plan for the unexpected termination of the brokerage can take two forms. Both involve making an arrangement with another broker. One plan is to have a conditional sales contract for the business assets and established name that is triggered by certain events. It could be based on a prenegotiated amount or formula. Another is more of a "I'll scratch your back if you'll scratch mine" type of arrangement. This is where two individual brokers agree to step in for the other in the case of an unexpected tragedy and help finish pending business, usually for little or no commission.

The goal of either plan is to let sales agents and clients have an immediate broker to go to for sponsorship or completion of a transaction and allow any commissions earned by the broker to date to be paid to the broker's estate. Keep in mind that because there is no continuation of the individual broker's license, sales agents would have to agree to be sponsored by the other broker. Likewise, clients would have to agree and sign a new listing agreement with the other broker.

Nothing in this article should be construed as legal advice for a particular situation. For specific advice, consult an attorney.

Editor's note: This article includes information about business entity brokerages. For a comparison of different types of business entities, use the QR code to read Lewis' "Covering Your Assets: Business Entities Limit Personal Liability." ➔



Lewis (kerrilewis13@gmail.com) is a member of the State Bar of Texas and former general counsel for TREC.

Appendix I

TREC Enforcement Questionnaire

This is the enforcement questionnaire that a sponsoring (or designated) broker receives from TREC when a complaint is filed

TREC Broker Questionnaire

1. Have you reviewed the issues indicated in the complaint with the sales agent?
2. What is your opinion about the actions of the sales agent related to the allegations in the complaint?
3. Did you try to resolve issues with the complainant?
4. How long have you sponsored the sales agent?
5. How many agents do you currently sponsor?
6. What kind of supervision do you provide to your sales agents?
7. Are you aware of Section 535.2 of the Rules, related to broker responsibilities? Do you feel that you are in compliance?
8. Have you notified the sales agent in writing of authorized activities (e.g., independent contractor agreement, written notice signed by sales agent) in accordance with Section 535.2 (a) of the Rules?
9. Provide a copy of your written notice of the agent's scope of authorized activities or Independent Contractor Agreement.
10. Provide a list containing the complete website addresses of ALL your "business websites". Each website should have a completed Information About Brokerage Services form and Consumer Protection Notice on the "...homepage of the business website and sponsored sales agent....." in 10 point font, per 531.18 (b)(1)(2). If you are not in compliance, you have 30 days from today's date to become compliant.
11. Provide a copy of the Index pages of your brokerage's Policies and Procedures Manual.
12. What are your policies for reviewing contracts and maintaining files for real estate transactions?
13. What is the process/procedure for reviewing a sales agent's advertising?
14. Do you review and update your written policies and procedures?
15. How are sales agents notified of changes?
16. Do you periodically review the policies and procedures with sales agents?
17. How do you ensure that sales agents are in compliance with the policies and procedures?
18. Do you provide training? Is the training required?
19. How do you keep track of who attends training?

Appendix J

Broker Emergency Plan Example

The following emergency plan was written with a storm event in mind, modifications should be made for the broker's circumstances and to cover other emergencies.

1. As soon as possible, begin to contact your current buyers and sellers to ascertain what their condition is and if you have current listings, the status of the listing.
2. Any escrow checks should be processed IMMEDIATELY and receipts obtained.
3. Telephone service in the affected area may be non-existent. Therefore, every associate is encouraged to set up an emergency telephone number for their customers to call to contact them after the disaster has passed. Social media is also a great way to contact associates and consumers.
4. Each associate is encouraged to take their computer with them when they evacuate the area, time permitting. At least take a backup of your data.
5. Associates are advised that the office insurance does NOT cover personal computers that are located within the office. Such computers and other personal equipment should be covered under the individual's homeowners insurance plan; check to make sure you have this coverage BEFORE it is needed. Not all homeowners insurance policies cover electronic equipment; you may need a separate rider on your policy.
6. Protect your files to the best of your ability.
7. Time permitting, associates shall arrange to pick up yard signs or have the owners secure the yard signs before an approaching storm hits.
8. Associates shall advise the purchasers of real estate that flood insurance, required or not, goes into effect immediately upon closing PROVIDED there is a mortgage on the property. On all cash sales, purchasers must wait 30 days before the policy take effect. It might be the purchaser's best interest to obtain a mortgage to have the insurance take immediate effect upon closing and then they can pay off the mortgage but not until the policy take effect.
9. Associates, for their own protection, are encouraged to purchase a legal size brief case or record case and to permanently store important personal papers in this case and keep it in a location where it can be retrieved at a moment's notice and taken with the associate in the event they must evacuate their home. Insurance papers, home inventories, birth certificates, social security papers, retirement accounts, etc., should be kept in this case. Do not wait until you have to leave before you begin looking for these papers. It is further recommended that associates photocopy their important papers, secure them in a box and have a family member that resides in another part of the country keep them. Safe deposits boxes are not weather proof and if you maintain a safe deposit box in the immediate area, it too may be lost and so would all your important papers (maybe a good idea to consider keeping these documents in zip-lock bags).
10. If you have to evacuate, have a "quick run" bag prepared with all your prescription medications, a toothbrush, tooth paste, soap, toilet paper, change of clothes, closed toed walking shoes (you may be on foot through debris) important papers, flashlight, clean water, snacks.
11. Most business owners are understanding when it comes to disasters. As such, do not hesitate to contact a local business in the area you are temporarily residing and ask if you can use their computer to make contact. Many truck stops now have wireless internet service where you can pay-as-you-go or sign up for a month's service on your credit card. Usually coffee shops have wireless internet that they do not charge to use.
12. In the case of a direct hit or close hit hurricane you can be almost assured that the power will go off. The office refrigerator WILL be cleaned out by the office staff upon making the determination that the area is to be evacuated. Once emptied, turn the refrigerator off and prop open the door. (Associates, you may want to consider unloading your refrigerators and freezers and turn them off. Experience has shown that these items may survive the storm but be unusable due to the stench of decaying food upon your return. This could be an excellent recommendation to share with your Sphere of Influence.

13. The office, time permitting, is to process any pending deposits IMMEDIATELY and obtain receipts. If not these checks should be taken with them when evacuating.
14. The broker, time permitting, WILL take all bank account information, lease agreements for office and/or equipment and insurance policies with them when they evacuate.
15. Any staff, time permitting, WILL take their respective computer with them when evacuating.
16. Time permitting all office computers, faxes, etc. shall be turned off and unplugged to avoid any electrical type problems once power is restored. Computers shall NOT be left on the floor but instead raised to at least desk top height and if practicable, covered with a plastic garbage bag. File cabinets should also be covered with waterproof tarps if possible.
17. The (broker) shall be responsible for taking digital photographs of all office spaces and equipment. These photos shall be stored electronically on the broker's computer and a copy sent via email to the <another person>. <Title or person> shall maintain a complete inventory of all office equipment. Major items shall be recorded by make and serial numbers.
18. Gathering information on everyone in the office is a daunting task following a disaster of any magnitude. It is imperative that the broker/owner/office have a plan for identifying individual associate needs. Get help track down all associates and insure that if they need help, they get help.
19. Once you have determined that everyone is safe, as soon as possible set up some sort of digital means of staying in touch with your associates and your clients.

Consider the time, effort and money in recovering from a disaster. This information could prove to be very useful for your customers as well and would make a very good reason to contact your database.

Learn more by visiting <http://www.disasterassistance.gov/>



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