

TREC Advisor

Our agency protects consumers of real estate services in Texas by ensuring qualified and ethical service providers through upholding high standards in education, licensing, and regulation. We oversee the providers of real estate brokerage, appraisal, inspection, home warranty, timeshares and right-of-way services, thereby safeguarding the public interest while facilitating economic growth and opportunity across Texas.



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Issues with Inserting Escalation or Appraisal Contingency Clauses in Paragraph 11, Special Provisions

It has come to our attention at the Commission that in a hot market some buyers' agents are drafting and adding problematic language into the contract, generally into the One to Four Family Residential Contract (Resale) Paragraph 11, Special Provisions. For example, something like this is inserted:

"Buyer will pay above appraised value" or "Buyer will pay \$1,000 more than any other offer." In some communities, agents are adding language to special provisions written by a title company or the real estate brokerage's attorney. All of these practices violate the License Act and Commission Rules. The following Q & A's explain why!

When can a license holder insert language into paragraph 11, Special Provisions that makes the purchase price vary based on either other offers or an appraisal?

Short answer: Never! Making the purchase price vary from the amount set out in the contract based on outside variables could affect the rights and remedies of one or both of the parties to the contract and is considered the unauthorized practice of law. Please note that license holders cannot draft inserts or addenda for these purposes either.

Can an attorney for a license holder or an attorney for a title company draft language for such contingencies that the license holder can then recommend their clients insert into paragraph 11, Special Provisions?

Short answer: No. License holders are prohibited from employing an attorney, directly or indirectly, to represent the interest of a party to a transaction when they are acting as an agent of their client. It creates

confusion and possible conflict as to who the attorney represents and can create additional liability for the broker if the suggested language results in a problem down the road.

Can an attorney for a party to a contract draft language for such contingencies that the party can then insert into paragraph 11, Special Provisions?

Short answer: Yes. If a party to a contract is the attorney's client, the party can then follow any advice the attorney gives the party regarding making changes to that particular contract. Keep in mind that the license holder may not recommend or make any additional changes to the contract, but simply follow the party's instructions based on the party's consultation with the party's own attorney.

Can an attorney for a license holder or an attorney for a title company draft a contract form or addendum for use by a license holder's clients?

Short answer: Only under very specific circumstances. If there is no standard contract form or addendum for that type of transaction promulgated by TREC, a licensed Texas attorney may prepare a standard contract form or addendum and authorize its use for a particular kind of transaction. Keep in mind that unless the attorney specifically authorizes the use of that form by all license holders or the general public, the license holder or title company who hired the attorney is the only one authorized by the attorney to use that form. In other words, license holders cannot legally use a contract or addendum form for their own clients that was created for another brokerage in a different transaction without express authorization from the attorney who created the form.

From the Executive Director ...

What a summer - national politics and national and international violence have dominated the news. Even in the face of these uncertainties, the Texas real estate market has continued a steady growth. That is also reflected in the continued influx of new applicants for a sales agent license and the steady renewal rates for current sales agent and broker license holders. Increased numbers result in pressure to meet service goals and processing timelines. But your team at TREC is responding well and meeting expectations. We welcome your comments on our performance at any time.

We've also had our own internal growth challenges as we work hard to upgrade our network, our database and our website. Each of these is a challenge onto itself, and we are working on all three systems in an effort to deliver better service, faster and more reliable than ever. By the end of 2016, all systems should be substantially upgraded and, after that, more incremental improvements will become the new norm. We look forward to setting a new and higher bar for serving Texas consumers and for working with our license holders. We welcome and will listen to your recommendations.

The level of professionalism required to hold a real estate license in Texas remains high, despite growing market pressures which seek to drive convenience as a service enhancement. However, far too often that convenience comes at the expense of competence, diligence or loyalty which are basic legal requirements. When considering a new option for reducing some time or effort needed for a real estate transaction, a professional must always ask if the proposed method or process is really in the best interest of the practitioner's client, or rather, is it merely to enhance convenience for the practitioner? Our fiduciary obligation requires us to always put our client's interest before our own. This simple question will often yield the clear answer.

This approach also holds true when we consider marketing ourselves - often via branding - versus focusing on our client's needs to sell or buy a property, using a range of methods to find the best

result for the client. Advertising a client's property and ourselves simultaneously presents a significant challenge – one dealt with directly in Texas law. An advertisement is misleading if it fails to identify that the person who published it is a licensed broker

or agent. A sign placed on a client's property advertising the property for sale or lease must include a clear identification of license status if the person named as a contact is a TREC license holder. Is the advertiser a principal or a legal representative of a principal? The ad must be clear. There are many simple ways to accomplish that required disclosure and we will be proposing several options when we simplify the current advertising rules.

We continue to hear that there are issues surrounding the use of the term "value". Let me be clear – the only admonition from TREC in this regard is that you must be extremely careful to ensure that you do not confuse or mislead the public or a client by being careless in using the term. You must take great care to distinguish between an "opinion of value" that is both legally and commonly understood as an appraisal, and the result of a CMA or BPO done by you that is based solely on estimated sale price. This has been the case for many years, though it has recently gained quite a bit of attention.

The Commission welcomes you to attend its meetings and comment on all of its work. The next meeting is on Monday August 15 at 10 a.m. at our HQ in Austin. Come on by; we'd love to see you!



Douglas E. Oldmixon

Texas Real Estate Commission Wins Education Award

The Texas Real Estate Commission (TREC) is pleased to announce it has received a 2016 Education Award by the Association of Real Estate License Law Officials (ARELLO) for the agency's "Broker Responsibility" course. ARELLO is an international organization of real estate licensing agencies and individuals involved with regulation of the real estate industry.

The "Broker Responsibility" course is a mandatory continuing education course required for brokers and agents with supervisory responsibilities. Since 2011, the Real Estate Center at Texas A&M, TREC staff and a committee of volunteer brokers has worked closely to improve the course every two years. The purpose of this course is to address the management, operation and supervision of a real estate brokerage firm in Texas. The course provides an understanding and working knowledge of the laws of agency, planning and organization of business entities, requirements for written policies and procedures, records retention and control, advertising, recruitment and training of agents, and

the anatomy of a complaint filed with TREC. The most recent improvements included scenario-based discussions of requirements and best practices.

The ARELLO Education award is a great honor. TREC was also recognized by ARELLO in 2012 when the course was first introduced. A sincere thank you goes to all who worked so hard on the update of this course. The award will be presented at the 2016 ARELLO Annual Conference in Vancouver, BC in September.

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TREC Enforcement Actions

The Texas Real Estate Commission has published enforcement actions. To read the full report and get access to all of the enforcement actions taken by the Commission, please go to the TREC website and click on, "Complaints, Consumer Info" and then [click "Disciplinary Actions"](#).

IMPORTANT DATES TO REMEMBER

TREC Commission Meeting—August 15

Check the [TREC website](#) regularly for postings of all of our upcoming meetings.

Rule Actions Taken at the May Commission Meeting

The following amendments or new rules were proposed at the May 2, 2016, meeting of the Commission and are up for adoption at the August 15, 2016, meeting. You can see the full text of these rules on the "Proposed Rules" section of the TREC Website. The following amendments or new rules were proposed at the Commission meeting on May 13, 2016, and are up for adoption at the August 19, 2016, Commission meeting. You may review the full text of these actions on the Rules and Laws section of the TREC website. The deadline for submitting written comments has passed, but you may still submit comments in person at the Commission meeting on August 15, 2016.

§535.53, Requirements for Licensure. The proposed amendments clarify that to maintain an active license a business entity must be qualified to transact business in Texas at all times and that the business entity must notify TREC when it is no longer qualified to transact business in Texas. In addition, the amendments more fully set out the scope of required errors and omissions insurance coverage.

§535.55, Education and Sponsorship Requirements for a Sales Agent License. The proposed amendments align the rule with statutory changes in SB 699, enacted by the 84th Legislature regarding the number of hours required for continuing education and changing term "salesperson" to "sales agent."

§535.64, Content Requirements for Qualifying Real Estate Courses. The proposed amendments require certain topics to provide consistency and better quality in Real Estate Marketing qualifying courses and are recommended by the Commission's Education Standards Advisory Committee.

§535.65, Responsibilities and Operations of Providers of Qualifying Courses. The proposed amendments remove the requirement for education completion certificates to include the registration date since that information is not necessary for the Commission to calculate compliance with statutory timeframes for course completion.

§535.72, Approval of Non-elective Continuing Education Courses. The proposed amendments clarify that classroom students must take the promulgated final examination independently prior to the instructor reviewing the correct answers.

§535.83, Association of Designated Broker on Claim. The new section is proposed to clarify which designated broker is to be associated with a licensed business entity when a Real Estate Recovery Trust Account claim is filed or paid on behalf of that licensed business entity.

§535.123, Inactive Broker Status. The proposed amendments clarify that a licensed business entity becomes inactive when it is no longer qualified to transact business in Texas or its designated broker's license is suspended, including probated suspension.

§535.191, Schedule of Administrative Penalties. The proposed amendments lower the administrative penalty for bad check violations and include a penalty for violations of 22 TAC §535.53.

§535.227, Standards of Practice: General Provisions; §535.228, Standards of Practice: Minimum Inspection Requirements for Structural Systems; §535.229, Standards of Practice: Minimum Inspection Requirements for Electrical Systems; §535.230, Standards of Practice: Minimum Inspection Requirements for Heating, Ventilation, and Air Conditioning Systems; §535.231, Standards of Practice: Minimum Inspection Requirements for Plumbing Systems; §535.232, Standards of Practice, Minimum Inspection Requirements for Appliances; and §535.233, Standards of Practice: Minimum Inspection Requirements for Optional Systems. The proposed amendments restructure and renumber these sections to streamline wording and remove redundant language to provide clarity and consistency throughout the inspector SOP's.

TREC Employee Update



Sarah Havis

Education and Licensing Services

Sarah Havis began employment with TREC in June. She was born in Dallas and was raised in Austin. She has two daughters and one granddaughter. They are Heather (23), Madison (11), and Kylie (5 months). Sarah loves to spend time with her family. She worked for the Texas Department of State Health Services for fourteen and a half years and is very excited about her new opportunities working at TREC.

Congratulations to our TOP Performer!



Maury James

Reception and Communication Services

Maury is both dependable and ambitious. She looks for opportunities to contribute and doesn't just wait for someone else to open the door. She makes the most of the chances that are given to her and is not fearful of assuming any assigned task. Her responsibilities are always done thoroughly and on time. She uses logic and innovation to solve difficult problems with effective solutions. Overall, she makes a substantial contribution to our team and to our success. Wow – that is quite a list of exceptional attributes! Maury - thank you for all you do for our agency.