Agency In Tennessee

(A 4-Hour Course)

Course Manual

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Tennessee Real Estate Educational Foundation
and the
Tennessee Association of REALTORS®

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Agency in Tennessee

COURSE INTRODUCTION

This course is a guide to understanding agency. Agency relationships – how they are created and governed under Tennessee law – will be examined. Also covered will be the issues of duties and disclosures to clients, customers and other parties as required by Tennessee law and the REALTOR® Code of Ethics. Finally, this course will address the issues of how and when to change agency status, selling your own listing and the importance of following your company agency policy. A clear approach to understanding agency relationships will allow students to correct some common misconceptions that can lead to costly errors in their daily business practice.

LEARNING OBJECTIVES

By the end of this course, students will be able to:

1. Identify how agency is and is not created in Tennessee.

2. Describe the agency duties owed to clients, customers and other parties in a transaction.

3. Make the proper disclosures to all parties as required by Tennessee law and the Code of Ethics.

4. Determine when and how it's necessary to change agency status in a transaction.

5. Recognize the benefits of having a consistent agency policy used by all agents in an office.

6. Identify common myths and misconceptions about Tennessee's agency law.

Section 1:
Agency Creation and Duties

Let's Test Your Agency I.Q.

Your company's agency policy may be more restrictive than Tennessee law and/or the REALTOR Code of Ethics. ***Please, however, choose the best answer to each of the following, based solely on Tennessee law and the Code of Ethics.***

1. Buyer agency is established when:
   a. An agent shows a property.
   b. When all parties sign the Buyer Representation Agreement.
   c. When the purchaser calls the office, and the agent gives out information.
   d. A purchaser signs the Purchase and Sales Agreement.

2. Under Tennessee Agency Law, when must a licensee first disclose their agency status?
   a. At the initial appointment.
   b. After showing a minimum of three properties.
   c. Before providing any real estate services.
   d. Before preparation of an offer.

3. In a traditional "seller's agency" firm, the owner of a property is represented by
   a. The broker
   b. The affiliate that met with the owner
   c. The other affiliates with the firm, even though they've never met the owner
   d. All of the above
   e. None of the above

4. In order to be an Agent for the Seller, which of the following must be executed?
   a. Purchase Agreement
   b. Exclusive Right to Sell Listing Agreement
   c. Buyer Representation Agreement
   d. Confirmation of Agency Status

5. Which of the following situations would require a personal interest disclosure?
   a. You represent your cousin Mike in making an offer for a house on 123 Elm Street.
   b. You are working with your Father as an agent and receive an offer on his condo.
   c. You represent your stepmother in a transaction and make an offer on a warehouse on 450 Main Street.
   d. A and B only.
   e. A, B, and C.

6. A licensee may be paid by:
   a. A seller
   b. A buyer
   c. Her principal broker
   d. All of the above

7. You have been showing a buyer houses for months. You finally show the buyer his dream home, and he asks you to write an offer. You produce a Confirmation of Agency Status form indicating that you will be the designated agent for the buyer, and the buyer signs this form. Now you will be considered a:
   a. Buyer's agent
   b. Designated buyer's agent
   c. Facilitator
   d. None of the above

8. A licensee's agency status when providing real estate service is controlled by:
   a. State law.
   b. His company agency policy.
   c. The wishes of his customer/client.
   d. All of the above.

9. If you have the Confirmation of Agency form signed by all parties, you do not need any other documentation to establish agency.
   True or False

10. When writing a contract for your buyer client on a property listed by your company, it may be necessary for you to check more than one agency status on the Conformation of Agency Status.
    True or False

11. Your office practices Designated Agency. The files for each agent's listings must be maintained separately to ensure confidentiality.
    True or False

12. Licensees need a Buyer Representation Agreement prior to showing any property to a prospective buyer.
    True or False

13. Dates on a Confirmation of Agency Status form, indicating your status as an agent for the buyer or Designated Agent for the Buyer, must not be dated before the date on the representation agreement.
    True or False

14. Bill and Jane are agents with the same firm. Bill lists the Smith's property as agent for seller. Bill then has a fiduciary responsibility to the Smiths. Jane also has a fiduciary responsibility to the Smiths.
    True or False

15. A facilitator may assist but may not advise either the buyer or the seller.
    True or False

16. A licensee must become a facilitator in order to write an offer for an unrepresented buyer if he was initially a designated seller's agent.
    True or False

17. A licensee's actions on behalf of a prospective buyer may inadvertently create an agency relationship with that buyer.
    True or False

18. With a signed preauthorization from the seller to drop to a facilitator, it is necessary to discuss agency again with the seller if you do change your status during the transaction.
    True or False

19. Every office is required by law to have a company policy regarding agency.
    True or False

20. When one licensee in a firm serves as Designated Agent for the Buyer, and another licensee in the same firm is Designated Agent for the Seller, and neither of these agents is the managing broker of the firm, the managing broker of the firm is therefore a Disclosed Dual Agent.
    True or False

21. The personal interest disclosure is required for transactions involving

    _____ property, but not for transactions involving

    _____ property.

22. In Tennessee, an agency relationship with a buyer can only be created by

_____.

Learning Objectives:
Upon completion of this segment, students will be able to:

- Identify how agency is and is not created in Tennessee.
- Describe the agency duties owed to clients, customers, and other parties in a transaction.

Agency Creation:

1. True or False: The Agency Disclosure form establishes an agency relationship.

2. True or False: There's no problem with waiting to have an agency discussion until just before a purchase agreement is signed.

Agency Creation Exercise Notes:

Case Study: Briar Creek Blunder

Paul and Ann Reed had been watching the Briar Creek area for about a year. The small, well-kept neighborhood wasn't really a subdivision, just a pocket of about 50 homes all built around the same time. It was exactly the kind of neighborhood the Reeds were looking for to move out of their cramped condo and start a family. The lots were nicely sized and the homes were only about 10 years old. Also, the location was convenient to downtown, where Paul worked as an accountant for a law firm.

When the Reeds first stumbled upon Briar Creek, they contacted Wendy Walker, a Realtor® with a small company near Paul's office. Wendy said she'd keep an eye on the activity in Briar Creek and let them know when something came on the market. As soon as they found something and they decided to write an offer, she told them they'd need to sit down and sign an agency agreement and fill out some paperwork.

Although Wendy touched base with the Reeds a few times over the last year, nothing panned out. So, when a four-bedroom house in the heart of Briar Creek appeared in the MLS, Wendy called Paul and Ann immediately. She told them she'd put in a call to the listing agent and see if they could take a look the following day.

While the Reeds were still in her office, Wendy put in a call to the listing agent, Darren Carroll. "Hi, Darren, this is Wendy Walker with Turner Realty and I have some clients interested in your Briar Creek listing. I wanted to see if we could set up a time, possibly tomorrow, to take a look at it." Darren agreed to make the house available the following afternoon.

The Reeds loved the home as soon as they walked inside. It was beautifully decorated and well maintained. The downstairs had been freshly painted and the carpet upstairs was new. A newer addition in the rear of the house provided an oversized master suite with its own sitting room. Ann thought it would be perfect to have space for a small nursery just off their bedroom.

With the house very reasonably priced at $239,000, Paul and Ann wanted to put in an offer immediately. Wendy explained they needed to double-check the permitting and the square footage, due to the recent addition, especially since the MLS noted "buyer to verify square footage." Before contacting an inspector and pulling the septic permit, Wendy called Darren while the Reeds were still in her office.

"My clients are interested in putting an offer on your Briar Creek listing. We just need to double-check the square footage and the septic permit. I'll be in touch in the next few

days. Would you mind calling me if it looks like you're getting another offer and we'll speed things up?" Darren said he'd hold onto her number and let her know.

A few days later, Wendy called Darren to tell him the Reeds had an offer coming that afternoon. He told her he was sorry, that the house was already under contract. They'd received and accepted an offer the day after the Reeds viewed the property.

When Wendy called Paul and Ann, they were furious. They blamed her for losing the house. When they explained the situation to an attorney in Paul's office the following day and described the events as they had occurred, the attorney was shocked to hear they hadn't even signed an agency agreement with Wendy. The Reeds filed a complaint with the Real Estate Commission for misrepresentation and filed suit against Wendy and her broker.

Discussion:

1. What was Wendy's relationship to the Reeds?

2. Do you think Wendy's guilty of misrepresentation? Why or why not?

3. What are the complicating factors here?

4. How does Tennessee law distinguish duties owed to clients from duties owed to customers?

Final Exercise: Agency Duties

*Categorize the following as duties to clients or all/other parties as defined by Tennessee law and the Code. You may designate each by using **C** (for duties owed to Clients) or **A** (for duties owed to ALL parties).*

1. Honesty and good faith
2. Reasonable skill and care
3. Loyalty
4. Reveal adverse facts about a property
5. Confidentiality
6. Obey lawful instructions
7. Present all offers in a timely manner
8. Protect and promote interests
9. Execute agreements in writing
10. Schedule property showings
11. Answer questions to negotiate purchase agreement
12. Disclose timely and accurate information upon request
13. Present a true picture in advertising
14. Not engage in self-dealing

Section 2:
Agency Disclosures

Learning Objective:
Upon completion of this segment, students will be able to:

- Make the proper disclosures to all parties as required by Tennessee law and the Code of Ethics.

Case Study: Briar Creek Blunder (Cont.)

In groups, continue the case study from the first segment and answer the discussion questions. Go over the correct answers as a class.

Mike Morris called his clients, the Williamsons, as soon as he heard their offer on the Briar Creek house had been accepted. They'd made a full price offer, knowing the high demand for the small neighborhood. The Williamsons were thrilled and Mike told them he'd start working on the contract, scheduling an inspection and (as they requested) verifying the square footage.

Two days later, when Mike pulled the septic permit, he realized the home was only permitted for three bedrooms; the master addition the sellers had built couldn't technically be considered a bedroom. He called the listing agent Darren, who claimed he was unaware of the septic issue.

Discuss:

1. Assuming you're the listing agent Darren, what are you obligated to disclose to your clients? To others?

2. Assuming you're Mike, what disclosures are required at this point to your buyer-clients?

3. If you're Mike, what do you do now?

4. If you're Darren, what do you do now?

Disclosures as a Buyer's Agent

Review the disclosures that you are required to make when representing buyers, at different stages of your work with them.

Disclosures to buyers, when entering into an agency agreement with them:

Amount and source of compensation (_____)
Potential for disclosed dual agency or default to facilitator status (_____)
Possibility their offers may not be kept confidential (_____)
Company policies regarding cooperation (_____)
Potential for offsetting/additional compensation (_____)
Agency, agency status, potential factors necessitating a change in agency status [TREC 1260-2-36 and 62-13-405(a) and (b)]

Notes:

Disclosures to buyers, in regards to showing/making offers on property and in transactions on their behalf:

Any ownership interest in a property [Article 4 and 62-13-403(7A)]
Any interest or potential incentives/compensation from recommended affiliates or suggested independent companies offering related services [SOP 6-1 and 62-13-403(7B)] **AND** ~ RESPA prohibits receiving any "thing of value" for recommending such services from unaffiliated businesses (i.e. "kickbacks") An actual ownership interest in such a company is allowed as long as full disclosure is made to the client.
Reasonably apparent material facts related to the property [SOP 2-1 and 62-13-403(2)]
Market conditions affecting a transaction when requested and available through public record [62-13-403(5)]
Any compensation from more than one party to a transaction (Article 7)
Any potential differential resulting from a cooperative transaction (_____)

Notes:

Disclosures to other licensees or unrepresented sellers (when representing a buyer):

The nature of an inquiry about a property, including agency status, i.e. who your inquiry is on behalf of and what your relationship is to that individual (SOP 3-7)
Agency status/relationship when inquiring about unlisted property (SOP 16-11)
Agency status, relationship, and any subsequent change in status during the course of a transaction [SOP 16-10 and 62-13-405(d)]

Notes:

Disclosures as a Seller's Agent

Review the disclosures that you are required to make when representing sellers, at different stages of your work with them.

Disclosures to sellers, when entering into a listing agreement with them:

Buyers' Agents' representation of only the Buyer's interests regardless of the source of their compensation (_____)
Potential for disclosed dual agency (_____)
Company policies regarding cooperation and compensation (_____)
Upon a client's waiver of any agency duties, that they may not expect or seek assistance from any other agent in the transaction [62-13-404(3)(B)]
Agency status (original agency disclosure) [62-13-405(a) and (b)]
Any intent to purchase the property for yourself [1260-2-.11(1)]

Notes:

Disclosures to sellers, during the listing/offer/transaction period:

Any affiliation with or benefit received from other recommended real estate service providers [SOP 6-1, 62-13-403(7)(B), and RESPA]
Known material facts related to property [SOP 2-1 and 62-13-403(2)]
All offers and counter-offers on a property (SOP 1-6 and 1-7)
Market conditions affecting a transaction when requested and available through public record [62-13-403(5)]
The existence of potential dual or variable rate commission arrangements (SOP 3-4)
Any compensation received from more than one party to a transaction (_____)

Notes:

Disclosures to other licensees or unrepresented buyers (when representing a seller):

Agency status or relationship with your client [SOP 16-12 and 62-13-405(d)]
Existence and origination of unaccepted offers *with the seller's consent* (SOP 1-15)
Any ownership interest in the property [Article 4 and 62-13-403(7)(A)]
Known material facts related to property [SOP 2-1 and 62-13-403(2)]
Existence of accepted offers (SOP 3-6)
Market conditions affecting a transaction when requested and available through public record [62-13-403(5)]
Potential differential caused by any dual or variable commission arrangement (SOP 3-4)

Notes:

Section 3:
Changing Agency Status & Office Agency Policies

Learning Objectives:
Upon completion of this segment, students will be able to:

- Know when and how to change agency status in a transaction.
- Identify the benefits of a consistent office agency policy and the dangers of not having one.

Agency Status Notes:

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Changing Status Pretest:

1. True or False: To properly change status in a transaction, you must have a detailed discussion with both parties.

2. True or False: Practicing Dual Agency is illegal and unethical.

Changing Status Discussion:

Legal Reasons:

- Trying to represent both parties in a transaction can create a _____ in the duties required under Tennessee law.

- To protect yourself from_____.

- Many attorneys don't understand the concept of _____. When a client's unhappy with the outcome of a dual agency transaction, their attorney is likely to recommend _____ ___.

Ethical Reasons:

- Practicing dual agency can create a conflict in the duties owed to _____ _____ under the Code, although the practice isn't prohibited. TAR's legal counsel routinely advises against this practice and instead recommends _____ _____ _____.

- If you decide to act as a disclosed dual agent, make sure you give a _____ _____ to _____ and review how practicing this type of agency affects your ability to _____ _____ to _____.

How to properly change your status in a transaction:

- _____ must be made to inform your client of the potential for this change in status.

- When the change actually occurs, you must execute a _____ (_____ Form) and obtain consent from _____ *and the other party's* _____ for the change from agency to Facilitator status *as soon as practicable* and *before the parties* _____.

Exceptions:

- Disclosed dual agency, although discouraged by TAR's legal counsel on a regular basis, is often used as company policy, usually in _____ and _____.

- While the practice of disclosed dual agency isn't prohibited by Tennessee law, practitioners should proceed with caution and companies should consider Facilitator status as an alternative to _____ and provide the best possible service to clients and customers.

<u>Agency itself does NOT equal commission!!!</u> Practicing disclosed dual agency isn't necessary to secure both "sides" of the commission. Facilitators routinely receive the same commission associated with practicing dual agency. Also, it's possible to sell your own listing to an unrepresented buyer and still receive both sides of the commission.

Changing Status Exercise Notes:

Selling Your Own Listing Notes:

If you do not change status and represent only the seller,

- You must make certain the buyer understands that _____ is representing their interests.

- Full disclosure must include _____ notification that the purchaser is unrepresented _____ they sign an agreement of sale.

Also, could we/should we…

- Provide _____ to the purchaser and complete _____ _____ for the purchasers without representing them?

- Obtain _____ from your office to represent their interests?

- Insist on _____ obtaining representation of their choosing?

And, what is the goal? To:

- Sell the property and _____ the real estate commission expense?

OR

- To sell the property to the _____ of all parties, making sure that the property stays sold?

Consistent Office Agency Policies Notes:

Summary:

- _____ your office agency policy, AND
- _____ it!!

Section 4:
Dispelling Common Myths & Misconceptions

A GUIDE TO TENNESSEE'S AGENCY LAW

FOR REAL ESTATE LICENSEES, BROKERS, AND INSTRUCTORS

Published by
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INTRODUCTION

Why does someone obtain a real estate license? The answer really has nothing to do with the right to buy or sell real estate. Anyone with enough money or financing can do that! A real estate license is all about ***representation***. The license permits someone to represent another party in the purchase or sale of real estate, to safeguard their interests, to treat them honestly, to serve them with professionalism.

This relationship – between a real estate client and the licensed professional representing the client – is what agency is all about. To become someone's agent imposes several duties on the real estate professional, above and beyond expectations of fairness and basic competence. A consumer can and should have higher expectations of a licensed professional when that professional becomes the consumer's agent. Among other things, the consumer may give instructions to his or her agent, expecting them (as long as those instructions are legal) to be carried out faithfully.

Bill Tune – a former REALTOR, instructor, and respected Chairman of the Tennessee Real Estate Commission – used to begin discussions of agency by noting that, in Western law, the legal concept of agency has its origins in the King-messenger relationship from medieval times. **The client is King**, and the agent is the King's messenger; the messenger is to act at the direction of (and in the best interests of) the client.

The legal and fiduciary nature of this relationship is too often forgotten. Some real estate licensees see themselves as salespeople, but – if they become the agent of a buyer or seller – the law sees them quite differently. The man or woman who sells you a car, a piece of jewelry, a new suit of clothes, or a vacation in the Bahamas usually has no legal relationship to you. That man or woman is a salesperson, hopefully a good one, but still a salesperson. The real estate professional, however, who becomes a consumer's agent assumes a legally-defined role and a position of trust, in service to his/her "king," the client. It's not a relationship to be treated lightly, or terminated easily.

It was my pleasure in 1994 and early 1995 to serve as staff to the Tennessee Association of REALTORS®' Presidential Advisory Group on Agency Law. PAG members included both attorneys and REALTORS®. The PAG had several goals, one of which was to eliminate the possibility of accidental or unintended agency, whereby – solely through his/her behavior or a casual statement – a licensee might unwittingly become a consumer's agent. Accidental or implied agency created excessive liability for both licensees and their brokers (and even consumers), and it opened the door to unintended and undisclosed dual agency.

Another goal was to recognize and accommodate the growing practice of buyer agency, ensuring that buyer-clients are better informed and protected. As the PAG examined agency laws as well as proposed legislation in other states, the concept of designated agency was also explored and included (in amended form) in the PAG's legislative recommendations.

I drafted what subsequently became Tennessee's agency law on behalf of, and at the direction of, this PAG. Tennessee's law was not modeled after any other state's approach to this subject. Instead, Tennessee's law "borrowed" – with changes – from multiple sources: a

legislative proposal that the Wisconsin REALTORS® Association had developed, an agency law that Ohio had passed, agency law in Colorado, and others. Parts of Tennessee's law are also unique to Tennessee.

The Tennessee Association of REALTORS® also engaged me as a lobbyist in 1995, so that I might answer any questions and participate in discussions with various legislators in order to pass this legislation. The TAR-endorsed bill passed almost unanimously in 1995 and took effect on January 1, 1996, as sections 62-13-401 through 62-13-408 of the Tennessee Code Annotated.

Tennessee's agency law has been amended twice since then, in the spring of 1996 and again in 2006. It was my privilege, on behalf of the Tennessee Association of REALTORS®, to author both of the legislative proposals that amended Tennessee's law.

Agency at its heart is not a difficult or complex concept. It's all about representing a consumer conscientiously, doing so with the consumer's understanding and written agreement, steering clear of any conflicts of interest, and ensuring that – at any time in the transaction – everybody in the transaction knows whom the licensee does and doesn't represent.

The following Guide takes you through a number of common misconceptions about agency law in Tennessee, as well as a section-by-section presentation of the law itself with a brief commentary on each section.

Several attorneys reviewed this document prior to its publication, to ensure that the agency statute and its intent are faithfully and accurately explained. We're very grateful for their suggestions and improvements.

This Guide is not intended to be a lengthy, in-depth thesis on the law. Instead, it's provided as a reference and guide for real estate licensees in Tennessee, their brokers, and their instructors. I hope it proves helpful.

– Charles "Pug" Scoville, 2009

NOTE: The term 'Licensee" is used throughout this Guide since agency law applies to all real estate licensees in Tennessee, not just REALTORS®.

Things You Should Know About Agency in Tennessee

1. An agency relationship in Tennessee is not implied or created by a licensee's actions, behavior or even his/her statements. It cannot be created accidentally.

2. A licensee is always a facilitator by default and remains a facilitator until a bilateral written agency agreement has been negotiated with a consumer and signed by both parties.

3. A licensee's delivery of a written disclosure, or confirmation of agency status, saying that he/she is an agent does not make the licensee an agent. [A unilateral disclosure is not a bilateral agreement.]

4. Tennessee's agency law supersedes what is known as the common law of agency.

5. A traditional (non-designated) agency relationship obligates everyone in the office to an agency relationship with that buyer or seller.

6. Designated agency establishes an agency relationship between only one real estate licensee in the office (to the exclusion of everyone else in the office, including the managing broker) and a buyer or seller.

7. An office policy of designated agency from the outset – in all transactions (whether in-house or not) – is a common and perfectly legitimate agency office policy in Tennessee.

8. Every change in agency status during the course of working with a consumer must be fully disclosed to the consumer at the time status is changed and should be documented, even if the consumer gave prior consent to changes of status should they occur.

9. An agency relationship is not required in order for a licensee to receive a commission; a facilitator may usually receive a commission as easily as a buyer's agent. [*The listing agent's payment of a commission to a selling agent compensates the selling agent for procuring a willing and able buyer, not for his/her agency representation of the buyer.*]

10. Every real estate office in Tennessee should have a written agency office policy.

11. Subagency is still legal in Tennessee but is rarely offered. In actual practice, a subagent generally has little or no true allegiance or loyalty to the client or client's best interests.

12. Dual agency is still legal in Tennessee (if it is fully disclosed to both parties and both parties consent to it). Disclosed dual agency, however, is rarely practiced. Most legal experts still believe that it greatly increases legal liability for both the licensee and his/her firm and the potential for complaints to the Tennessee Real Estate Commission.

Common Myths & Misconceptions About Agency in Tennessee

MYTH: An agency relationship can be "implied", created "accidentally", or created simply by a licensee's actions, statements, or behavior.

This may have been true in Tennessee prior to 1996, but it has not been true since then! Moreover, even if a licensee completes a written disclosure form – such as the commonly used "Confirmation of Agency Status" – the licensee does NOT become an agent. Agency law in Tennessee states that an agency relationship does not exist without a **bilateral, written agency agreement** between the licensee and the buyer or seller. An agency disclosure form, or confirmation of agency status, is NOT an agreement!

To represent a seller, a "bilateral, written agency agreement" would be the listing agreement: an Exclusive Right to Sell listing or an Exclusive Agency listing. [These two types of listing agreements have served as a bilateral written agreement to establish an agency relationship since 2006. Other types of listing agreements (e.g., open listings) may *also* establish an agency relationship with the seller, although these are not specified in the agency law itself.]

To represent a buyer, a "bilateral, written agency agreement" would be a Buyer Representation Agreement, a negotiated contract for agency representation.

IF a licensee simply "declares" (*to a consumer or to another licensee*) that he or she represents a buyer or is a buyer's "agent", but has not negotiated and signed a written buyer agency agreement with that buyer, then this licensee is NOT a Buyer's Agent. This licensee is still a Facilitator (or Transaction Broker) regardless of what he or she says; to represent himself or herself as a buyer's agent is **misrepresentation**! It's still misrepresentation *even if the licensee gives somebody a disclosure form that says he/she is a buyer's agent*, but the licensee hasn't negotiated an actual buyer representation agreement that the buyer has signed.

Until an actual buyer agency agreement is signed, it's appropriate for a licensee to tell others (including other companies when he/she is setting up showings, etc.) that the licensee is "working with" a buyer …but the licensee should refrain from saying that he/she represents the buyer or is a buyer's agent until this is actually true. The *intent* to get an agreement signed doesn't make a licensee someone's agent!

The law is very clear: an agency relationship can be created in only one way – through a written agency agreement with a consumer. The law states very clearly that an "agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship." The law ALSO states – very clearly – that "the disclosure of agency or facilitator status ...shall not be construed as, or be considered a substitute for, a written

agreement to establish an agency relationship between the broker and a party to a transaction...."

Without an agency relationship to either the seller or to a prospective buyer for the seller's property, a licensee is a facilitator, pure and simple, and represents nobody in the prospective transaction.

With the above myth, many people falsely believe that a licensee cannot give advice to a consumer unless the licensee represents that consumer as an agent. Nothing in Tennessee law requires facilitators to remain "on the sidelines, offering no advice." Giving advice does not create an agency relationship. As the legal definition of facilitator states: "A **facilitator may advise either or both of the parties** to a transaction but cannot be considered a representative or advocate of either party." [emphasis added]

While professional advice is always permitted, if a licensee is the sole licensee in a transaction, serving as a facilitator between an unrepresented seller and an unrepresented buyer, the licensee should be extremely careful not to promote or advocate one party's interests over the other's.

MYTH: You can be a seller's agent (the listing agent) and a facilitator for the buyer at the same time.

Wrong! A licensee can only wear one "agency hat" at a time in a given transaction. A licensee **cannot** be working as a seller's agent for a seller whose property the licensee has listed and simultaneously represent himself/herself as a facilitator to an unrepresented buyer who might like to purchase that property! At best, this practice is deceptive and an obvious effort to gain or keep everyone's trust without telling them the truth. A licensee has only **one agency status at a time** in a transaction.

If the licensee is the listing agent, for example, and a buyer approaches the licensee regarding this property, then normally the licensee would disclose to this buyer that he/she represents the seller. There is nothing in Tennessee law that prevents a seller's agent from assisting this buyer, completing an offer to purchase for the buyer (if that's what the buyer wants to do), presenting that offer, etc., while the licensee remains a seller's agent ...as long as the buyer knows that the licensee represents the seller and is going to promote the seller's best interests.

Some Tennessee firms have adopted office policies that call for their salespeople to default to facilitator status automatically if they have listed a property and an unrepresented buyer approaches them regarding their listing. The listing agreement used by these offices typically includes language by which the seller gives prior consent for their listing agent's default to facilitator status if an unrepresented buyer comes along. If a licensee's office policy dictates this kind of action, the licensee is STILL obligated to

go back to the seller at the time he/she defaults to facilitator and communicate to the seller that the licensee no longer represents him/her (confirming this subsequent disclosure in writing).

Once a licensee tells *any* party or prospective party to a transaction that the licensee is a facilitator, the licensee is saying, *"I don't represent anybody – seller or buyer – as an agent in this transaction!"*

"Facilitator" status is not a type of agency status or agency relationship; it's the *lack* of an agency relationship. At one time, some people in Tennessee believed that a licensee needed to have agency relationships with both seller and buyer before the licensee could legally default to facilitator. This is not true. With their attorney's support, the Tennessee Real Estate Commission voted 9 to 0 in December of 2005 **"that Tennessee Code Annotated §62-13-102(9)(B) does not require a written agency relationship with both parties prior to default to facilitator status."**

If a licensee has represented either a buyer or a seller and subsequently defaults to facilitator status in the transaction, this licensee is simply terminating the agency relationship with his/her client …**with the client's permission of course**.

MYTH: If you're not sure what your agency status is at the time you submit a written confirmation of agency status, then it's probably safest to check several boxes …since one of them is sure to be correct!

Wrong! Since a licensee can only wear one agency hat at a time in a transaction, then checking more than one box on a confirmation of agency status means that only one box is correct. [We're hoping, of course, that one of the boxes checked represents the licensee's true agency status.] Anything else that is checked constitutes a false statement. It may be done in ignorance – which doesn't speak well for the licensee's professionalism – but it is still a misrepresentation of facts.

Similarly, if a licensee is the only licensee in the transaction, then checking one status on the "buyer side" of the confirmation of agency status form and checking a *different* status on the "seller side" of that form is also incorrect and an indicator of misrepresentation.

MYTH: You can't sell your own listing without changing your agency status in the transaction (to facilitator).

While this restriction may be true according to some office policies (and **every licensee should be familiar with and abide by his/her office policies**), **nothing** in Tennessee law or the REALTOR Code of Ethics **requires** a change of status in this situation.

A seller's agent can assist and even advise a prospective buyer in almost every way,

throughout a transaction, to help that buyer purchase the agent's listing …as long as the seller's agent remains loyal to the seller and does not compromise or ever work against his/her seller-client's best interests. The buyer, of course, needs to be told that the seller's agent represents the seller and is bound to promote the seller's interests.

MYTH: Designated agency is intended solely for in-house transactions.

Wrong again. Before explaining why this is untrue, it's important to understand traditional (i.e., non-designated) agency. In the absence of designated agency, any agency relationship that one person in an office establishes – with either a buyer or seller – **makes every licensee in the office an agent of that buyer or seller** …even if they never have any contact with, or even know the name of that buyer or seller. Unintended dual agency and rampant conflicts of interest can therefore occur. Designated agency changes this. **With designated agency, the agency relationship exists solely between the licensee and his/her client, to the exclusion of all other licensees in his/her office.**

Designated agency was created simply to accommodate a quite proper practice that reflects the real-world operation of most real estate transactions ...in which an individual agent (and **not** usually an entire office or company) functions as the advocate for his/her client, *regardless of whether the other party in the transaction is represented by someone in another firm or someone in the same firm.*

From the earliest discussion of the designated agent status, to its implementation in law, **there was never any assumption or intent that it would only be used for in-house transactions.** That's the primary reason for the language "or by written company policy" in 62-13-406(a). It was the intent from the original crafting of the legislation that many firms would implement company policies calling for the practice of designated agency from the outset, for both buyers and sellers, regardless of whether or not the transaction ever involved an in-house showing or sale.

To illustrate why this practice has been so popular with companies:

Assume that a licensee has entered into a buyer agency agreement with a prospective buyer – ***but NOT as a designated buyer's agent***. The licensee then makes a list of ten properties to show that client, and sets up appointments to do so. Properties number 3, 5, and 8 on that list are actually listed by members of the licensee's own firm …and this means that the buyer's agent is also an agent of the seller. Conflict of interest! Therefore, before showing each of these particular properties, the licensee changes his/her agency status and notifies the buyer of the changed status, because the licensee ALSO represents the seller on those properties! Then, after showing those properties, the licensee changes status again, back to a buyer's agent, to show properties listed by other firms. The Tennessee Real Estate Commission wants to see written documentation of any change in agency status ...and this licensee may need to change agency status multiple times in a single day of property showings. This situation makes little sense, and will

frustrate both the licensee and his/her buyer-client. Members of the firm could avoid it altogether with the use of designated agency status from the outset, for both buyers and sellers.

MYTH: The managing broker remains a dual agent even if the buyer and seller are each represented by different designated agents in the broker's office.

This too is incorrect. Some other states with a designated agency provision in their laws make the managing broker of the office a dual agent in this situation. There is no national, standardized definition of designated agency. NAR, the "Internet," and other states may choose to define it in any way they wish, but their definition is neither binding nor (in this case) applicable to Tennessee.

The designated agency provision in Tennessee's law was drafted specifically to protect the managing broker and avoid any unnecessary liability for the broker or the firm. That's the reason for the following provision: "A managing broker …shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction." The law also states that there **"shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation."**

MYTH: An office-wide agency policy is unnecessary. Each licensee should just select the type of agency (or non-agency) relationship that works best for him or her.

This is extremely dangerous from a legal standpoint. The possibilities for unintended misrepresentations and conflicts of interest in this situation are almost endless. Consider just one example:

Any traditional, non-designated agency relationship with a buyer or seller actually obligates everyone in the office to represent that buyer or seller, *whether the other licensees in the office realize it or not.* Let's assume that one of the licensees in the office has negotiated a listing agreement as **a non-designated agent**. Another licensee in the office then tells a potential buyer that he/she is a facilitator in a transaction *when in fact the licensee unknowingly represents the seller whose property this buyer wants to purchase.* This is misrepresentation. [Even if it never gets to the point of a contract to purchase, misrepresentations of agency status can occur simply in showing properties when agency relationships are chosen at licensees' individual discretion.]

If each of the licensees in the office simply "does his or her own thing" in regard to agency, the managing broker and the licensees in that office are all risking legal problems and their reputations unnecessarily. **Every real estate office in Tennessee should have a**

written, clear, and consistent agency policy for the entire office, with periodic training for everyone to ensure that they understand and follow the policy.

MYTH: Licensees in Tennessee are still subject to the common law of agency.

Prior to 1996, application of the common law of agency – which embodies a set of general principles rather than specific guidance – led to both licensee confusion and even inconsistent rulings in various court cases in Tennessee. "Common law" represents the accumulation of court cases across the nation, not all of which ever agree. Since decisions in those cases have not always been consistent, clear answers to some licensee questions about agency were impossible. Tennessee's law, however, now specifies that it **"shall supersede common law to the extent common law is inconsistent with the provisions of this part."**

Instead of a very general list of fiduciary duties to clients, Tennessee's law was drafted with a more specific list of duties to all parties, as well as a few specific duties to clients. Also, in lieu of the accidental agency relationships so prevalent under common law, Tennessee's law ensures that these relationships are intentional, with all parties fully informed and protected.

A major goal in supporting enactment of Tennessee's agency law was to implement agency *by statute* so that everyone can reference one set of guidelines for most situations.

TENNESSEE'S AGENCY LAW SECTION BY SECTION

Creating an Agency Relationship

62-13-401. Creation.
A real estate licensee may provide real estate services to any party in a prospective transaction, with or without an agency relationship to one (1) or more parties to the transaction. Until such time as a licensee enters into a specific written agreement to establish an agency relationship with one (1) or more parties to a transaction, such licensee shall be considered a facilitator and shall not be considered an agent or advocate of any party to the transaction. An agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship. The negotiation and execution of either an exclusive agency listing agreement or an exclusive right to sell listing agreement with a prospective seller shall establish an agency relationship with the seller.
[Acts 1995, ch. 246, § 3; 1996, ch. 772, § 4; 2006, ch. 738, § 1.]

COMMENT: Before 1996, a real estate licensee could create an agency relationship *accidentally*, by saying or doing something that led a buyer or seller to believe that the licensee represented them. Now, to prevent an "accidental" or implied – or a relationship created without the consent of both agent and client – **Tennessee law provides that such a relationship cannot be created or implied by word or action alone, but *only by a specific written agency agreement.*** A disclosure or confirmation form alone is not an agreement.

In some states, a real estate licensee may still become an agent of a buyer simply by his/her conduct or by something that he or she says ...even accidentally. **Again, this is NOT the case in Tennessee.** An actual written agency contract between a buyer or seller and the licensee is required in order for the licensee to become that consumer's agent.

With sellers, an Exclusive Right to Sell Listing agreement or an Exclusive Agency Listing agreement automatically establishes an agency relationship with the seller. [As noted previously, other types of listing agreements such as open listings may also establish an agency relationship with the seller.]

With buyers, an Exclusive or Non-Exclusive Representation agreement must be signed by both the licensee and the buyer in order for an agency relationship to be established. If a licensee signs a disclosure form – such as a Confirmation of Agency Status – indicating that he/she is a buyer's agent, BUT the licensee has not yet negotiated a buyer representation agreement with the buyer, ***then the licensee has just misrepresented his/her status*** ...in violation of both Tennessee license law and the REALTOR® Code of Ethics.

The licensee's commission may also be better protected when working with a buyer under an actual buyer agency agreement that spells out the commission arrangements.

If NO Agency Agreement Is Signed…

> 62-13-102 (9) "Facilitator" means any licensee:
> (A) Who assists one (1) or more parties to a transaction who has not entered into a specific written agency agreement representing one (1) or more of the parties; or
> (B) Whose specific written agency agreement provides that if the licensee or someone associated with the licensee also represents another party to the same transaction, such licensee shall be deemed to be a facilitator and not a dual agent; provided, that notice of assumption of facilitator status is provided to the buyer and seller immediately upon such assumption of facilitator status, to be confirmed in writing prior to execution of the contract. A facilitator may advise either or both of the parties to a transaction but cannot be considered a representative or advocate of either party. "Transaction broker" may be used synonymously with, or in lieu of, "facilitator" as used in any disclosures, forms or agreements under this chapter;...

COMMENT: "Facilitator" is every licensee's status *by default,* in the absence of any written bilateral agency agreement between the licensee and a consumer. "Facilitator" or "transaction broker" is the status for any licensee acting as neither agent of the buyer nor agent of the seller in a transaction. Simply put, **a Facilitator is a non-agent.**

This facilitator status doesn't obligate or bind the licensee to represent either party. Remember, however, that a licensee's statement that he/she is a facilitator means that *the licensee has no agency relationship with EITHER party in the transaction*. [One cannot be an agent for the seller, for example, while simultaneously telling the buyer that he/she is a facilitator!]

The Nature of the Agency Relationship

62-13-402. Limited agency.

(a) If a real estate licensee is engaged as an agent, such real estate licensee serves as a limited agent retained to provide real estate services to a client. Such licensee shall function as an intermediary in negotiations between the parties to a transaction unless such parties negotiate directly.

(b) A real estate licensee shall owe all parties to a transaction the duties enumerated in § 62-13-403. A licensee shall owe to such licensee's client the duties enumerated in § 62-13-404.

(c) Notwithstanding any provision of law to the contrary, the duties enumerated in §§ 62-13-403 and 62-13-404 shall supersede any fiduciary or common law duties owed by a licensee to such licensee's client on January 1, 1996.

[Acts 1995, ch. 246, § 4.]

COMMENT: There are really two purposes behind this section. First, it defines the agency relationship in real estate transactions as a "limited agency." It's not a boundless authorization for the real estate licensee to operate on behalf of a consumer, as a power of attorney might be.

The second purpose of this section is to emphasize that the duties to consumers and clients in Tennessee's agency law take precedence over the more general list of duties that have been taught for several decades as part of the "common law" of agency.

A Licensee's Duties To ALL Consumers (*with or without an agency relationship)*

62-13-403. Duty owed to all parties.
A licensee who provides real estate services in a real estate transaction shall owe all parties to such transaction the following duties, except as provided otherwise by § 62-13-405, in addition to other duties specifically set forth in this chapter or the rules of the commission:

(1) Diligently exercise reasonable skill and care in providing services to all parties to the transaction;

(2) Disclose to each party to the transaction any adverse facts of which licensee has actual notice or knowledge;

(3) Maintain for each party to a transaction the confidentiality of any information obtained by a licensee prior to disclosure to all parties of a written agency or subagency agreement entered into by the licensee to represent either or both of the parties in a transaction. This duty of confidentiality extends to any information which the party would reasonably expect to be held in confidence, except for information which the party has authorized for disclosure, information required to be disclosed under this part, and information otherwise required to be disclosed pursuant to this chapter. This duty survives both the subsequent establishment of an agency relationship and the closing of the transaction;

(4) Provide services to each party to the transaction with honesty and good faith;

(5) Disclose to each party to the transaction timely and accurate information regarding market conditions that might affect such transaction only when such information is available through public records and when such information is requested by a party.

(6) Timely account for trust fund deposits and all other property received from any party to the transaction; and

(7)(A) Not engage in self-dealing nor act on behalf of licensee's immediate family, or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of such interest and the timely written consent of all parties to the transaction; and

(B) Not recommend to any party to the transaction the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees to provide real estate services under the Tennessee Real Estate Broker License Act of 1973, without timely disclosing to the party who receives the referral, the licensee's interest in such referral or the fact that a referral fee may be received.

[Acts 1995, ch. 246, § 5; 1996, ch. 772, §§ 5, 6.]

COMMENT: To clarify every licensee's responsibilities in a transaction, Tennessee law provides a clear list of duties by every licensee to any consumer with whom they are working …*regardless of* any agency relationships. Tennessee's agency law supersedes the "common law

of agency." Rather than dealing with a list of (non-real-estate-specific) "fiduciary duties" that changes dramatically whenever an agency relationship is created or changed, both licensees and consumers can now look to one clear set of real-estate-specific guidelines.

The "adverse facts" that must be disclosed to all consumers are defined in Tennessee law as "conditions or occurrences generally recognized by competent licensees that have negative impact on the value of the real estate, significantly reduce the structural integrity of improvements to real property or present a significant health risk to occupants of the property."

Confidentiality is another important aspect of Tennessee agency law. The list of duties to all consumers in Tennessee law includes every licensee's duty to **safeguard any confidential information from a consumer with whom the licensee is working, *conveyed prior to that licensee's disclosure of an agency relationship*** …to create a healthy "balance" between the client's right to know and a customer's expectations that a confidential information will be kept confidential.

The law strikes a fair balance between the client's right to be fully informed of everything by his/her agent and the consumer's expectation (being less informed about agency law) that confidential information that has been shared with that licensee – even if that licensee subsequently discloses that he or she is the agent of the other party in a transaction – will be kept confidential. Anything of a sensitive nature that a consumer tells or reveals to a licensee, prior to the licensee telling that consumer that the licensee is someone else's agent, must still be held in confidence!

A Licensee's Duties To His/Her Client (*once an agency relationship has been established*)

62-13-404. Duty owed to licensee's client.
Any licensee who acts as an agent in a transaction regulated by the Tennessee Real Estate Broker License Act of 1973 owes to such licensee's client in that transaction the following duties, to:

(1) Obey all lawful instructions of the client when such instructions are within the scope of the agency agreement between licensee and licensee's client;

(2) Be loyal to the interests of the client. A licensee must place the interests of the client before all others in negotiation of a transaction and in other activities, except where such loyalty duty would violate licensee's duties to a customer under § 62-13-402 or a licensee's duties to another client in a dual agency; and

(3) (A) Unless the following duties are specifically and individually waived, in writing by a client, a licensee shall assist the client by:

(i) Scheduling all property showings on behalf of the client;

(ii) Receiving all offers and counter offers and forwarding them promptly to the client;

(iii) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the licensee's expertise; and

(iv) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.

(B) Upon waiver of any of the duties in subdivision (3)(A), a consumer shall be advised in writing by the consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of the duties in subdivision (3)(A).

[Acts 1995, ch. 246, § 6; 1996, ch. 772, § 7; 2006, ch. 738, § 2.]

COMMENT: A somewhat shorter list of duties to *clients* is prescribed if an agency relationship has been established. Understand, however, that the duties to all consumers *take precedence over* the duties to one's client, if a conflict exists between the two.

Section 62-13-404 was amended in 2006 to include items (3)(A) and (3)(B) because of the need to specify what real estate services a consumer should reasonably expect from the licensee with whom they are working.

Disclosing Agency (or Facilitator) Status

62-13-405. Written disclosure.

(a) If a licensee personally assists a prospective buyer or seller in the purchase or sale of a property, and such buyer or seller is not represented by this or any other licensee, the licensee shall verbally disclose to such buyer or seller the licensee's facilitator, agent, subagent or designated agent status in the transaction before any real estate services are provided. Known adverse facts about a property must also be disclosed under the Tennessee Residential Property Disclosure Act, title 66, chapter 5, part 2, but licensees shall not be obligated to discover or disclose latent defects in a property or to advise on matters outside the scope of their real estate license.

(b) The disclosure of agency status pursuant to subsection (a) must be confirmed in writing with an unrepresented buyer prior to the preparation of an offer to purchase. The disclosure of agency status must be confirmed in writing with an unrepresented seller prior to execution of a listing agreement or presentation of an offer to purchase, whichever comes first. Following delivery of the written disclosure, the licensee shall obtain a signed receipt for such disclosure from the party to whom it was provided. The signed receipt shall contain a statement acknowledging that the buyer or seller, as applicable, was informed that any complaints alleging a violation or violations of § 62-13-312 must be filed within the applicable statute of limitations for the violation set out in § 62-13-313(e). The acknowledgment shall also include the address and telephone number of the commission.

(c) The disclosure of agency or facilitator status, as provided in subdivision (a), shall not be construed as, or be considered a substitute for, a written agreement to establish an agency relationship between the broker and a party to a transaction as referenced in § 62-13-406.

(d) Upon initial contact with any other licensee involved in the same prospective transaction, the licensee shall immediately disclose such licensee's role in the transaction, including any agency relationship, to this other licensee. If the licensee's role changes at any subsequent date, such licensee shall immediately notify any other licensees and any parties to the transaction relative to such change in status.

(e) Real estate transactions involving the transfer or lease of commercial properties, the transfer of property by public auction, the transfer of residential properties of more than four (4) units, or the lease or rental of residential properties shall not be subject to the disclosure requirements of §§ 62-13-403, 62-13-404 and this section. [Acts 1995, ch. 246, § 7; 1996, ch. 772, §§ 8-11; 2006, ch. 776, § 3.]

COMMENT: Many licensees assume that, because the disclosure doesn't have to be confirmed until the time of contract, that the disclosure can be safely delayed until then. This is incorrect!

In Tennessee, BEFORE providing any real estate brokerage services to a consumer (e.g., showing property), every licensee must disclose his/her agency or facilitator status in the transaction to that consumer.

This first disclosure of agency status before any services are provided can be either verbal or written ***...but it MUST be made prior to providing any real estate services! It must then be confirmed in writing prior to preparation of an offer.*** This early disclosure is much more in keeping with the REALTOR® Code of Ethics requirement, and it should reduce the number of arbitrations and procuring cause disputes that result from late disclosures.

Note also that the disclosure of agency status does not simply refer to the disclosures that licensees make to consumers. The law also requires disclosure of agency status to other licensees in the same prospective transaction.

This section of agency law also requires prompt disclosure of any and every change in agency status. The Tennessee Real Estate Commission has also said that **any such change in status must be documented when it occurs**, so that a Commission auditor can verify that in fact the change was disclosed.

Designated Agency

62-13-406. Designated broker – Managing broker.

(a) A licensee entering into a written agreement to represent any party in the buying, selling, exchanging, renting or leasing of real estate may be appointed as the designated and individual agent of this party by the licensee's managing broker, to the exclusion of all other licensees employed by or affiliated with such managing broker. A managing broker providing services under the provisions of the Tennessee Real Estate Broker License Act of 1973 shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction.

(b) The use of a designated agency does not abolish or diminish the managing broker's contractual rights to any listing or advertising agreement between the firm and a property owner, nor does this section lessen the managing broker's responsibilities to ensure that all licensees affiliated with or employed by such broker conduct business in accordance with appropriate laws, rules and regulations.

(c) There shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation. [Acts 1995, ch. 246, § 8.]

COMMENT: With "designated agency" a managing broker may designate – by written office policy or by specific instruction – an individual licensee to be the individual agent of a seller or buyer client, to the exclusion of all other licensees in the same firm …to preserve the consumer's right to an agent/advocate even with in-house sales.

This feature of the agency law is, for many, one of its most positive benefits. Much of the industry has never fully understood the fact that, under the common law of agency, the office (not the individual) is considered the agent, making ALL licensees in that office agents of any buyer-client or seller-client of anybody in the office! Dual agency is therefore created and has to be disclosed to all parties even when a transaction involves two different licensees with the same firm.

A firm's use of designated agency can greatly reduce occurrences of dual agency, disclosed or undisclosed. **Use of this option, nevertheless, should probably be accompanied by an office policy that prescribes, for example, what kinds of information may or may not be shared among sales associates.**

Limitations on Consumer Liability

> **62-13-407. Liability.**
> A client or other party to whom a real estate licensee provides services as an agent, subagent or facilitator shall not be liable for damages for the misrepresentations of the licensee arising out of such licensee's services unless the client or party knew, or had reason to know, of the misrepresentation. This section shall not limit the liability of a licensee's managing broker for the misrepresentations of the managing broker's licensees.
> [Acts 1995, ch. 246, § 9; 1996, ch. 772, § 12.]

COMMENT: A client's liability for his/her agent is limited to those statements or actions (by the agent) for which the client/consumer may be directly responsible as well as any misrepresentations by an agent that the client knew about but did not correct.

This provision removes most of the drawbacks of an agency relationship for the consumer entering into an agency agreement with a licensee. A consumer does not have to accept unlimited liability or greater exposure if they become a real estate licensee's client. This provision may also "control" a broker's liability for the unintended actions or statements of any subagents, if subagency is even offered.

Tennessee Law versus Common Law

> **62-13-408. Application.**
> This part shall supersede common law to the extent common law is inconsistent with the provisions of this part.
> [Acts 1995, ch. 246, § 10.]

COMMENT: Expanding upon the same idea in section 62-13-402(c), this conclusion of the agency law underscores the point that Tennessee law supersedes the common law of agency, taking precedence over common law if a conflict exists between this legislation and common law (especially since "common law" has not always been consistent when applied to real estate relationships).

Appendix

Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS®

Effective January 1, 2010

Where the word REALTORS® is used in this Code and Preamble, it shall be deemed to include REALTOR-ASSOCIATE®s.

While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Preamble

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. REALTORS® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which REALTORS® should dedicate themselves, and for which they should be diligent in preparing themselves. REALTORS®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow REALTORS® a common responsibility for its integrity and honor.

In recognition and appreciation of their obligations to clients, customers, the public, and each other, REALTORS® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. REALTORS® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of REALTORS®. *(Amended 1/00)*

Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, REALTORS® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where REALTORS® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain. The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of this obligation, REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever ye would that others should do to you, do ye even so to them."

Accepting this standard as their own, REALTORS® pledge to observe its spirit in all of their activities whether conducted personally, through associates or others, or via technological means, and to conduct their business in accordance with the tenets set forth below. *(Amended 1/07)*

Duties to Clients and Customers

Article 1

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. *(Amended 1/01)*

• Standard of Practice 1-1

REALTORS®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics. *(Amended 1/93)*

• Standard of Practice 1-2

The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.

The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities.

As used in this Code of Ethics, "client" means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®'s firm has an agency or legally recognized non-agency relationship; "customer" means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®'s firm; "prospect" means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or REALTOR®'s firm; "agent" means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and "broker" means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. *(Adopted 1/95, Amended 1/07)*

• Standard of Practice 1-3

REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

• Standard of Practice 1-4

REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits
that might be realized through use of the REALTOR®'s services.
(Amended 1/93)

• Standard of Practice 1-5

REALTORS® may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties. *(Adopted 1/93)*

• Standard of Practice 1-6

REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.
(Adopted 1/93, Amended 1/95)

• Standard of Practice 1-7

When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. *(Amended 1/93)*

• Standard of Practice 1-8

REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated. *(Adopted 1/93, Amended 1/99)*

• Standard of Practice 1-9

The obligation of REALTORS® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. REALTORS® shall not knowingly, during or following the termination of professional relationships with their clients:

1) reveal confidential information of clients; or

2) use confidential information of clients to the disadvantage of clients; or

3) use confidential information of clients for the REALTOR®'s advantage or the advantage of third parties unless:

   a) clients consent after full disclosure; or

   b) REALTORS® are required by court order; or

c) it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or

d) it is necessary to defend a REALTOR® or the REALTOR®'s employees or associates against an accusation of wrongful conduct.

Information concerning latent material defects is not considered confidential information under this Code of Ethics. *(Adopted 1/93, Amended 1/01)*

• Standard of Practice 1-10

REALTORS® shall, consistent with the terms and conditions of their real estate licensure and their property management agreement, competently manage the property of clients with due regard for the rights, safety and health of tenants and others lawfully on the premises. *(Adopted 1/95, Amended 1/00)*

• Standard of Practice 1-11

REALTORS® who are employed to maintain or manage a client's property shall exercise due diligence and make reasonable efforts to protect it against reasonably foreseeable contingencies and losses. *(Adopted 1/95)*

• Standard of Practice 1-12

When entering into listing contracts, REALTORS® must advise sellers/ landlords of:

1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;

2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and

3) any potential for listing brokers to act as disclosed dual agents, e.g., buyer/tenant agents. *(Adopted 1/93, Renumbered 1/98, Amended 1/03)*

• Standard of Practice 1-13

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

1) the REALTOR®'s company policies regarding cooperation;

2) the amount of compensation to be paid by the client;

3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;

4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc., and

5) the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. *(Adopted 1/93, Renumbered 1/98, Amended 1/06)*

• Standard of Practice 1-14

Fees for preparing appraisals or other valuations shall not be contingent upon the amount of the appraisal or valuation. *(Adopted 1/02)*

• Standard of Practice 1-15

REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. *(Adopted 1/03, Amended 1/09)*

Article 2

REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law. *(Amended 1/00)*

• Standard of Practice 2-1

REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines. *(Amended 1/96)*

• Standard of Practice 2-2

(Renumbered as Standard of Practice 1-12 1/98)

• Standard of Practice 2-3

(Renumbered as Standard of Practice 1-13 1/98)

• Standard of Practice 2-4

REALTORS® shall not be parties to the naming of a false consideration in any document, unless it be the naming of an obviously nominal consideration.

• Standard of Practice 2-5

Factors defined as "non-material" by law or regulation or which are expressly referenced in law or regulation as not being subject to disclosure are considered not "pertinent" for purposes of Article 2. *(Adopted 1/93)*

Article 3

REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. *(Amended 1/95)*

• Standard of Practice 3-1

REALTORS®, acting as exclusive agents or brokers of sellers/landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms

of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation. *(Amended 1/99)*

- **Standard of Practice 3-2**

To be effective, any change in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time that REALTOR® submits an offer to purchase/lease the property. *(Amended 1/10)*

- **Standard of Practice 3-3**

Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation. *(Adopted 1/94)*

- **Standard of Practice 3-4**

REALTORS®, acting as listing brokers, have an affirmative obligation to disclose the existence of dual or variable rate commission arrangements (i.e., listings where one amount of commission is payable if the listing broker's firm is the procuring cause of sale/lease and a different amount of commission is payable if the sale/lease results through the efforts of the seller/landlord or a cooperating broker). The listing broker shall, as soon as practical, disclose the existence of such arrangements to potential cooperating brokers and shall, in response to inquiries from cooperating brokers, disclose the differential that would result in a cooperative transaction or in a sale/lease that results through the efforts of the seller/landlord. If the cooperating broker is a buyer/tenant representative, the buyer/ tenant representative must disclose such information to their client before the client makes an offer to purchase or lease. *(Amended 1/02)*

- **Standard of Practice 3-5**

It is the obligation of subagents to promptly disclose all pertinent facts to the principal's agent prior to as well as after a purchase or lease agreement is executed. *(Amended 1/93)*

- **Standard of Practice 3-6**

REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. *(Adopted 5/86, Amended 1/04)*

- **Standard of Practice 3-7**

When seeking information from another REALTOR® concerning property under a management or listing agreement, REALTORS® shall disclose their REALTOR® status and whether their interest is personal or on behalf of a client and, if on behalf of a client, their representational status. *(Amended 1/95)*

- **Standard of Practice 3-8**

REALTORS® shall not misrepresent the availability of access to show or inspect a listed property. *(Amended 11/87)*

- **Standard of Practice 3-9**

REALTORS® shall not provide access to listed property on terms other than those established by the owner or the listing broker. *(Adopted 1/10)*

Article 4

REALTORS® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent or broker. In selling property they own, or in which they have any interest, REALTORS® shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative. ***(Amended 1/00)***

• Standard of Practice 4-1

For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by REALTORS® prior to the signing of any contract. *(Adopted 2/86)*

Article 5

REALTORS® shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

Article 6

REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client's knowledge and consent.

When recommending real estate products or services (e.g., homeowner's insurance, warranty programs, mortgage financing, title insurance, etc.), REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the REALTOR® or REALTOR®'s firm may receive as a direct result of such recommendation. (Amended 1/99)

• Standard of Practice 6-1

REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. *(Amended 5/88)*

Article 7

In a transaction, REALTORS® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the REALTOR®'s client or clients. ***(Amended 1/93)***

Article 8

REALTORS® shall keep in a special account in an appropriate financial institution, separated from their own funds, monies coming into their possession in trust for other persons, such as escrows, trust funds, clients' monies, and other like items.

Article 9

REALTORS®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and

commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. ***(Amended 1/04)***

• Standard of Practice 9-1

For the protection of all parties, REALTORS® shall use reasonable care to ensure that documents pertaining to the purchase, sale, or lease of real estate are kept current through the use of written extensions or amendments. *(Amended 1/93)*

• Standard of Practice 9-2

When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party. *(Adopted 1/07)*

Duties to the Public

Article 10

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, or national origin. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, or national origin. ***(Amended 1/90)***

REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, or national origin.
(Amended 1/00)

• Standard of Practice 10-1

When involved in the sale or lease of a residence, REALTORS® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood nor shall they engage in any activity which may result in panic selling, however, REALTORS® may provide other demographic information. *(Adopted 1/94, Amended 1/06)*

• Standard of Practice 10-2

When not involved in the sale or lease of a residence, REALTORS® may provide demographic information related to a property, transaction or professional assignment to a party if such demographic information is (a) deemed by the REALTOR® to be needed to assist with or complete, in a manner consistent with Article 10, a real estate transaction or professional assignment and (b) is obtained or derived from a recognized, reliable, independent, and impartial source. The source of such information and any additions, deletions, modifications, interpretations, or other changes shall be disclosed in reasonable detail. *(Adopted 1/05, Renumbered 1/06)*

• Standard of Practice 10-3

REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based

on race, color, religion, sex, handicap, familial status, or national origin. *(Adopted 1/94, Renumbered 1/05 and 1/06)*

• Standard of Practice 10-4

As used in Article 10 "real estate employment practices" relates to employees and independent contractors providing real estate-related services and the administrative and clerical staff directly supporting those individuals. *(Adopted 1/00, Renumbered 1/05 and 1/06)*

Article 11

The services which REALTORS® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage; specifically, residential real estate brokerage, real property management, commercial and industrial real estate brokerage, land brokerage, real estate appraisal, real estate counseling, real estate syndication, real estate auction, and international real estate.

REALTORS® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth. ***(Amended 1/10)***

• Standard of Practice 11-1

When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

1) identification of the subject property

2) date prepared

3) defined value or price

4) limiting conditions, including statements of purpose(s) and intended user(s)

5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants

6) basis for the opinion, including applicable market data

7) if the opinion is not an appraisal, a statement to that effect *(Amended 1/10)*

• Standard of Practice 11-2

The obligations of the Code of Ethics in respect of real estate disciplines other than appraisal shall be interpreted and applied in accordance with the standards of competence and practice which clients and the public reasonably require to protect their rights and interests considering the complexity of the transaction, the availability of expert assistance, and, where the REALTOR® is an agent or subagent, the obligations of a fiduciary. *(Adopted 1/95)*

• Standard of Practice 11-3

When REALTORS® provide consultive services to clients which involve advice or counsel for a fee (not a commission), such advice shall be rendered in an objective manner and the fee shall not be contingent on the substance of the advice or counsel given. If brokerage or transaction services are to be provided in addition to consultive services, a separate compensation may be paid with prior agreement between the client and REALTOR®. *(Adopted 1/96)*

• Standard of Practice 11-4

The competency required by Article 11 relates to services contracted for between REALTORS® and their clients or customers; the duties expressly imposed by the Code of Ethics; and the duties imposed by law or regulation. *(Adopted 1/02)*

Article 12

REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. *(Amended 1/08)*

• Standard of Practice 12-1

REALTORS® may use the term "free" and similar terms in their advertising and in other representations provided that all terms governing availability of the offered product or service are clearly disclosed at the same time. *(Amended 1/97)*

• Standard of Practice 12-2

REALTORS® may represent their services as "free" or without cost
even if they expect to receive compensation from a source other than their client provided that the potential for the REALTOR® to obtain a benefit from a third party is clearly disclosed at the same time. *(Amended 1/97)*

• Standard of Practice 12-3

The offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the REALTOR® making the offer. However, REALTORS® must exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or otherwise benefiting from the REALTOR®'s offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. The offering of any inducements to do business is subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. *(Amended 1/95)*

• Standard of Practice 12-4

REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord. *(Amended 1/93)*

• Standard of Practice 12-5

REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner. *(Adopted 11/86, Amended 1/10)*

• Standard of Practice 12-6

REALTORS®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as REALTORS® or real estate licensees. *(Amended 1/93)*

• Standard of Practice 12-7

Only REALTORS® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have "sold" the property. Prior to closing, a cooperating broker may post a "sold" sign only with the consent of the listing broker. *(Amended 1/96)*

• Standard of Practice 12-8

The obligation to present a true picture in representations to the public includes information presented, provided, or displayed on REALTORS®' websites. REALTORS® shall use reasonable efforts to ensure that information on their websites is current. When it becomes apparent that information on a REALTOR®'s website is no longer current or accurate, REALTORS® shall promptly take corrective action. *(Adopted 1/07)*

• Standard of Practice 12-9

REALTOR® firm websites shall disclose the firm's name and state(s) of licensure in a reasonable and readily apparent manner.

Websites of REALTORS® and non-member licensees affiliated with a REALTOR® firm shall disclose the firm's name and that REALTOR®'s or non-member licensee's state(s) of licensure in a reasonable and readily apparent manner. *(Adopted 1/07)*

• Standard of Practice 12-10

REALTORS®' obligation to present a true picture in their advertising and representations to the public includes the URLs and domain names they use, and prohibits REALTORS® from:

1) engaging in deceptive or unauthorized framing of real estate brokerage websites;

2) manipulating (e.g., presenting content developed by others) listing content in any way that produces a deceptive or misleading result; or

3) deceptively using metatags, keywords or other devices/ methods to direct, drive, or divert Internet traffic, or to otherwise mislead consumers. *(Adopted 1/07)*

• Standard of Practice 12-11

REALTORS® intending to share or sell consumer information gathered via the Internet shall disclose that possibility in a reasonable and readily apparent manner. *(Adopted 1/07)*

• Standard of Practice 12-12

REALTORS® shall not:

1) use URLs or domain names that present less than a true picture,
or
2) register URLs or domain names which, if used, would present less than a true picture.
(Adopted 1/08)

• Standard of Practice 12-13

The obligation to present a true picture in advertising, marketing, and representations allows REALTORS® to use and display only professional designations, certifications, and other credentials to which they are legitimately entitled. *(Adopted 1/08)*

Article 13

REALTORS® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

Article 14

If charged with unethical practice or asked to present evidence or to cooperate in any other way, in any professional standards proceeding or investigation, REALTORS® shall place all pertinent facts before the proper tribunals of the Member Board or affiliated institute, society, or council in which membership is held and shall take no action to disrupt or obstruct such processes. *(Amended 1/99)*

• Standard of Practice 14-1

REALTORS® shall not be subject to disciplinary proceedings in more than one Board of REALTORS® or affiliated institute, society, or council in which they hold membership with respect to alleged violations of the Code of Ethics relating to the same transaction or event. *(Amended 1/95)*

• Standard of Practice 14-2

REALTORS® shall not make any unauthorized disclosure or dissemination of the allegations, findings, or decision developed in connection with an ethics hearing or appeal or in connection with an arbitration hearing or procedural review. *(Amended 1/92)*

• Standard of Practice 14-3

REALTORS® shall not obstruct the Board's investigative or professional standards proceedings by instituting or threatening to institute actions for libel, slander, or defamation against any party to a professional standards proceeding or their witnesses based on the filing of an arbitration request, an ethics complaint, or testimony given before any tribunal. *(Adopted 11/87, Amended 1/99)*

• Standard of Practice 14-4

REALTORS® shall not intentionally impede the Board's investigative or disciplinary proceedings by filing multiple ethics complaints based on the same event or transaction. *(Adopted 11/88)*

Duties to REALTORS®

Article 15

REALTORS® shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices. *(Amended 1/92)*

• Standard of Practice 15-1

REALTORS® shall not knowingly or recklessly file false or unfounded ethics complaints. *(Adopted 1/00)*

• Standard of Practice 15-2

The obligation to refrain from making false or misleading statements about competitors, competitors' businesses, and competitors' business practices includes the duty to not knowingly or recklessly publish, repeat, retransmit, or republish false or misleading statements made by others. This duty applies whether false or misleading statements are repeated in person, in writing, by technological means (e.g., the Internet), or by any other means. *(Adopted 1/07, Amended 1/10)*

• Standard of Practice 15-3

The obligation to refrain from making false or misleading statements about competitors, competitors' businesses, and competitors' business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading. *(Adopted 1/10)*

Article 16

REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients. *(Amended 1/04)*

• Standard of Practice 16-1

Article 16 is not intended to prohibit aggressive or innovative business practices which are otherwise ethical and does not prohibit disagreements with other REALTORS® involving commission, fees, compensation or other forms of payment or expenses. *(Adopted 1/93, Amended 1/95)*

• Standard of Practice 16-2

Article 16 does not preclude REALTORS® from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another REALTOR®. A general telephone canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed "general" for purposes of this standard. *(Amended 1/04)*

Article 16 is intended to recognize as unethical two basic types of solicitations:

First, telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another REALTOR®; and

Second, mail or other forms of written solicitations of prospects whose properties are exclusively listed with another REALTOR® when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, "for sale" or "for rent" signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other REALTORS® under offers of subagency or cooperation. *(Amended 1/04)*

• Standard of Practice 16-3

Article 16 does not preclude REALTORS® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements. However, information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other REALTORS® to whom such offers to provide services may be made. *(Amended 1/04)*

• Standard of Practice 16-4

REALTORS® shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the REALTOR®, refuses to disclose the expiration date and nature of such listing; i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the REALTOR® may contact the owner to secure such information and may discuss the terms upon which the REALTOR® might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing. *(Amended 1/94)*

• Standard of Practice 16-5

REALTORS® shall not solicit buyer/tenant agreements from buyers/ tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a REALTOR®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the REALTOR® may contact the buyer/tenant to secure such information and may discuss the terms upon which the REALTOR® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement. *(Adopted 1/94, Amended 1/98)*

• Standard of Practice 16-6

When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement. *(Amended 1/98)*

• Standard of Practice 16-7

The fact that a prospect has retained a REALTOR® as an exclusive representative or exclusive broker in one or more past transactions does not preclude other REALTORS® from seeking such prospect's future business. *(Amended 1/04)*

• Standard of Practice 16-8

The fact that an exclusive agreement has been entered into with a REALTOR® shall not preclude or inhibit any other REALTOR® from entering into a similar agreement after the expiration of the prior agreement. *(Amended 1/98)*

• Standard of Practice 16-9

REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. *(Amended 1/04)*

• Standard of Practice 16-10

REALTORS®, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord's representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's representative or broker not later than execution of a purchase agreement or lease. *(Amended 1/04)*

• Standard of Practice 16-11

On unlisted property, REALTORS® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. *(Amended 1/04)*

REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact. *(Amended 1/98)*

• Standard of Practice 16-12

REALTORS®, acting as representatives or brokers of sellers/ landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement. *(Amended 1/04)*

• Standard of Practice 16-13

All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects. *(Adopted 1/93, Amended 1/04)*

• Standard of Practice 16-14

REALTORS® are free to enter into contractual relationships or to negotiate with sellers/landlords, buyers/tenants or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent. *(Amended 1/98)*

• Standard of Practice 16-15

In cooperative transactions REALTORS® shall compensate cooperating REALTORS® (principal brokers) and shall not compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with other REALTORS® without the prior express knowledge and consent of the cooperating broker.

• Standard of Practice 16-16

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation. *(Amended 1/04)*

• Standard of Practice 16-17

REALTORS®, acting as subagents or as buyer/tenant representatives or brokers, shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker. *(Amended 1/04)*

• Standard of Practice 16-18

REALTORS® shall not use information obtained from listing brokers through offers to cooperate made through multiple listing services or through other offers of cooperation to refer listing brokers' clients to other brokers or to create buyer/tenant relationships with listing brokers' clients, unless such use is authorized by listing brokers. *(Amended 1/02)*

• Standard of Practice 16-19

Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on property without consent of the seller/landlord. *(Amended 1/93)*

• Standard of Practice 16-20

REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. *(Adopted 1/98, Amended 1/10)*

Article 17

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award. ***(Amended 1/01)***

• Standard of Practice 17-1

The filing of litigation and refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate. *(Adopted 2/86)*

• Standard of Practice 17-2

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board
in writing that they choose not to arbitrate before the Board. *(Amended 1/93)*

• Standard of Practice 17-3

REALTORS®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other REALTORS® absent a specific written agreement to the contrary. *(Adopted 1/96)*

• Standard of Practice 17-4

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97, Amended 1/07)*

2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the seller or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision

of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97, Amended 1/07)*

3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97)*

4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. *(Adopted 1/97)*

5) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, claims to be the procuring cause of sale or lease. In such cases arbitration shall be between the listing broker and the buyer or tenant representative and the amount in dispute is limited to the amount of the reduction of commission to which the listing broker agreed. *(Adopted 1/05)*

• Standard of Practice 17-5

The obligation to arbitrate established in Article 17 includes disputes between REALTORS® (principals) in different states in instances where, absent an established inter-association arbitration agreement, the REALTOR® (principal) requesting arbitration agrees to submit to the jurisdiction of, travel to, participate in, and be bound by any resulting award rendered in arbitration conducted by the respondent(s) REALTOR®'s association, in instances where the respondent(s) REALTOR®'s association determines that an arbitrable issue exists. *(Adopted 1/07)*

The* Code of Ethics *was adopted in 1913. Amended at the Annual Convention in 1924, 1928, 1950, 1951, 1952, 1955, 1956, 1961, 1962, 1974, 1982, 1986, 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009.

Explanatory Notes

The reader should be aware of the following policies which have been approved by the Board of Directors of the National Association:

In filing a charge of an alleged violation of the Code of Ethics by a REALTOR®, the charge must read as an alleged violation of one or more Articles of the Code. Standards of Practice may be cited in support of the charge.

The Standards of Practice serve to clarify the ethical obligations imposed by the various Articles and supplement, and do not substitute for, the Case Interpretations in Interpretations of the Code of Ethics.

Modifications to existing Standards of Practice and additional new Standards of Practice are approved from time to time. Readers are cautioned to ensure that the most recent publications are utilized.
