
2019 -2020

TREC RESIDENTIAL CORE

COURSE

Developed for the
Tennessee Real Estate Education Foundation
in cooperation with
Tennessee REALTORS®

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2019 – 2020 TREC RESIDENTIAL CORE COURSE

TENNESSEE REAL ESTATE EDUCATION FOUNDATION

2019 – 2020 TREC Residential Core Course

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Appendix

Course Introduction

Course Overview

The **2019-2020 TREC Residential Core Course** provides participants a better understanding of the rules, regulations and issues relating to practicing real estate in the state of Tennessee. It is important for the participant to know recent changes to the rules and regulations enacted by the Tennessee Real Estate Commission (TREC) as well as knowing state law and TREC's guidelines for agency, advertising, contracts and disclosures, license recognition from other states, property management and principal broker supervision. This course will include case studies on these topics as well as participatory exercises allowing students to learn practical application of the material within each section of the course.

Learning Objectives

After completing this course, participants will be able to:

1. Know and understand the most recent rule changes enacted by TREC impacting all licensees in the state.
2. Understand agency laws in Tennessee and common violations in agency relationships.
3. Identify common violations of state law and rules on advertising including Internet advertising, false, misleading or deceptive advertising, broker and agent signage, guarantees, claims, offers, and gifts and prizes.
4. Recognize the importance of Errors and Omissions Insurance and how to reduce professional liability.
5. Identify the most common legal claims filed by consumers against licensees and how to void them.
6. Know various issues with residential contracts in Tennessee and how to avoid problems that might arise before and after the binding agreement date.
7. Understand state law and TREC rules regarding property disclosures and disclaimers as well as the requirements for providing them to purchasers and property owners.
8. Recognize TREC rules for license recognition from other states.
9. Properly recognize issues arising in the practice of residential property management including escrow accounts, TREC requirements and disciplinary action for violations.
10. Know Tennessee licensing laws and/or rules concerning Principal Broker supervision including branch offices, exemptions to licensure, advertizing, and Earnest Money/Security/Trust Deposits.

A Note on References to Tennessee State Law and TREC Rules in Course Content

All references made in the content of this course regarding state law are from the Tennessee Code Annotated, Title 62, Chapter 23 (*Tennessee Real Estate Broker License Act of 1973*.)

All rules referenced are from the *Rules of Tennessee Real Estate Commission* Chapters 1260-01 – 1260-07.



UNIT 1 - TREC Law, Rule, Policy Update

TREC Rules and Regulations

- The Tennessee Real Estate Commission (TREC) was created as a result of the **Tennessee Real Estate Broker License Act of 1973**.
- TREC is one of several regulatory agencies under the Division of Regulatory Boards within the Tennessee Department of Commerce and Insurance.
- The real estate commission is empowered to take disciplinary action—including revocation of licenses and assessment of civil penalties—against license holders found guilty of violating laws governing real estate in Tennessee.



TREC is responsible for enforcing both the laws under the Broker's Act as well as the rules of the Commission.

- **The Tennessee Real Estate Broker's License Act** established a formal and structured regulatory framework for legally brokering real estate in Tennessee.
- **TREC Rules** provide more detailed guidelines for the regular activities of licensees in the state. It is your responsibility for thoroughly knowing and obeying both state law and TREC rules. Remember, having a real estate license is a privilege, not a right.

TREC's Complaint Process

1. When a consumer files a complaint against a licensee, TREC provides a copy of the complaint to the licensee (also known as the "respondent") and to the licensee's principal broker. **All complaints should be taken very seriously and reviewed very carefully by the respondent and his/her broker. The respondent has ten (10) days to respond to a complaint.** The licensee can request an extension by contacting TREC's complaint coordinator. This will permit the licensee's attorney to have additional time to assist them in responding to any complaint. The Commission does keep track of deadlines and the failure to respond to a complaint can lead to additional disciplinary action against the licensee.
2. It is important the respondent gather any and all information relating to the transaction(s) referenced in the complaint. Then, he/she should sit down with their principal broker to discuss a response. **You must respond to every allegation in the complaint, even if you think no response is required.**
3. If needed, a respondent can meet with legal counsel, however, the respondent's attorney should be with familiar with TREC rules, regulations and procedures. If the respondent is involved

in a court action the response to the Commission should include a reference to the court file, file number, court information, etc.

4. **All responses must be notarized and any and all documentation should be included in the response.** It is best to send a response via certified mail and follow-up with TREC within two (2) to three (days) to ensure receipt.
5. Specific questions concerning the complaint process should be addressed to the complaint coordinator at TREC.

Recent TREC Disciplinary Actions

Each month, the Commission reviews complaints submitted by consumers against licensees and brokers for various violations of state law and TREC rules. The Commission has increased the fines and disciplinary action for those found to be in violation of licensing rules and regulations. **Fines imposed by TREC in recent years have ranged from \$250 to several thousands of dollars and a few licensees had their license downgraded or revoked because of their actions.**

Some of the most common TREC violations include:

- | | |
|---|--|
| <ul style="list-style-type: none"> • Failure to timely complete required continuing education • Engaging in unlicensed activity • Failing to diligently exercise reasonable skill and care • Advertising violations • Failure to adequately supervise the activities of affiliates • Failure to be loyal to the interests of the client • Failure to respond to a complaint filed with the Commission • Violating the gifts and prizes rule • Making substantial and willful misrepresentation • Failing, within a reasonable time, to account for or to remit moneys belonging to others • Failure to maintain Errors and Omissions insurance • Failure to timely disburse or interplead earnest money | <ul style="list-style-type: none"> • Failure to furnish a copy of a listing, sale, lease or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution • An affiliate's acceptance of a commission from someone other than the broker with whom they are affiliated • Failure to complete and obtain a signed written disclosure agency status form • Failure to notify the Commission of conviction enumerated within chapter within 60 days of conviction • Conducting business with an expired real estate firm license • When a licensee terminates his/her affiliation with a firm, he/she shall neither take nor use any property listings secured through the firm • Unlicensed vacation lodging service • Unlicensed property management service |
|---|--|

21 Ways Your Real Estate License Can Be Suspended or Revoked by TREC

(Excerpted T.C.A. § 62-13-312)



- (1) Making any substantial and willful misrepresentation;
- (2) Making any promise of a character likely to influence, persuade or induce any person to enter into any contract or agreement when the licensee could not or did not intend to keep such promise;
- (3) Pursuing a continued and flagrant course of misrepresentation or making of false promises through affiliate brokers, other persons, or any medium of advertising, or otherwise;
- (4) Misleading or untruthful advertising, including use of the term “Realtor” by a person not authorized to do so, or using any other trade name or insignia or membership in any real estate association or organization, of which the licensee is not a member;
- (5) Failing, within a reasonable time, to account for or to remit any moneys coming into the licensee’s possession which belong to others;
- (6) Failing to preserve for three (3) years following its consummation records relating to any real estate transaction;
- (7) Acting for more than one (1) party in a transaction without the knowledge and consent in writing of all parties for whom the licensee acts;
- (8) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories thereof at the time of execution;
- (9) Using or promoting the use of any real estate listing agreement form, real estate sales contract form, or offer to purchase real estate form which fails to specify a definite termination date;
- (10) Inducing any party to a contract, sale or lease to break such contract for the purpose of substitution in lieu thereof a new contract, where such substitution is malicious or is motivated by the personal gain of the licensee;
- (11) Accepting a commission or any valuable consideration by an affiliate broker for the performance of any acts specified in this chapter, from any person, except the licensed real estate broker with whom the licensee is affiliated;
- (12) Being convicted in a court of competent jurisdiction of this or any other state, or federal court, of forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud, or any crime or any similar offense or offenses, or pleading guilty or nolo contendere to any such offense or offenses;

- (13) Violating any federal, state, or municipal law prohibiting discrimination in the sale or rental of real estate because of race, color, religion, sex or national origin;
- (14) Violating any provision of this chapter, any rule duly promulgated and adopted thereunder, or the terms of any lawful order entered by the commission;
- (15) In the case of a licensee, failing to exercise adequate supervision over the activities of any licensed affiliate brokers within the scope of this chapter;
- (16) In the case of a licensee, failing within a reasonable time to complete such administrative measures as may be required by the commission upon the transfer or termination of any affiliate broker employed by the broker;
- (17) Paying or accepting, giving or charging any undisclosed commission, rebate, compensation or profit or expenditures for a principal, or in violation of this chapter;
- (18) Failing to disclose to an owner the licensee's intention or true position if the licensee, directly or indirectly through a third party, purchases for itself or acquires or intends to acquire any interest in or any option to purchase property which has been listed with the licensee's office to sell or lease;
- (19) Engaging in the unauthorized practice of law;
- (20) Any conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent or dishonest dealing; or
- (21) Violating any provision of the Tennessee Time-Share Act, compiled in Title 66, Chapter 32, Part 1, or any rule duly promulgated thereunder.

TREC Rule Changes: 2015-2018

Periodically, TREC will revise, update or create new rules for real estate licensees and brokers to follow. Rule creation and/or revisions are a lengthy process and rely on input from state legal counsel, the state attorney general, real estate licensees as well as the general public through a detailed rulemaking process.

In October 2015 TREC made substantial changes to **TREC Rule 1260-01 Licensing** as well as new rules and amendments to current rules within **TREC Rule 1260-02 Rules of Conduct**. These changes pertain to Duplicate or Confusingly Similar Firm Names, Appearances Before the Commission for the Purpose of Obtaining a License, Military Applicants, Reinstatement of Expired License of a Broker, Affiliate Broker, Time-Share Salesperson or Acquisition Agent, Commissions Earned by Affiliated Licensees, Electronic Records, and Licensees Who Hold Themselves Out as a Team, Group, or Similar Entity Within a Firm. Amendments to rules concern Termination of Affiliation, Managing Escrow or Trustee Accounts, and Advertising.

In June 2017, the Commission revised some of the rules adopted in 2015 particularly those relating to advertising.

Termination of Affiliation (TREC Rule 1260-02-.02)

Highlights of the Rule Change

- A **completed TREC Form 1** must be submitted to the Commission to be effective.
- The **current principal broker's supervisory responsibilities end once the Commission receives the completed TREC Form 1.**
- The **licensee has ten (10) days after release** to either place his license with another broker or submit the license to TREC for retirement. The licensee cannot practice real estate until TREC receives the TREC Form 1.
- **Transfer of affiliation can be completed online on TREC's website.** The new principal broker must verify license status and the Commission must receive the TREC Form 1 within five (5) days of the online transfer. If not received, the license will be placed in "broker release" status. (*See Instructions on Transferring License Online*)
- **Licensee cannot take listings or buyer representation agreements** without written authorization by the releasing principal broker.
- **When a licensee requests their license, the principal broker must give it to the licensee immediately.** If the principal broker releases a licensee, the license must be returned to the Commission.

- TREC has a process in place when either the licensee or principal broker is unable to sign a release.
- TREC will not become involved in loans, debts, draws or commission disputes.

Transferring Your Real Estate License Using the TREC Form 1

STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE
TENNESSEE REAL ESTATE COMMISSION
900 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-1151
(615) 741-2273 or (800) 342-4031
www.tn.gov/commerce

T.R.E.C. Form 1.
REVISION 05/16
Do not write or mark in the space below.

TRANSFER, RELEASE AND CHANGE OF STATUS FORM
Check appropriate box(es) and complete all required lines of information.
Remit appropriate fee for each box checked.
Amount remitted \$ _____

☐ A. Transfer to new firm (1 thru 6) \$25.00
☐ B. Change of licensee name with **PROOF** (1,2,3, & 7) \$10.00
☐ C. Change of status to **ACTIVE** (1,3,4,6,7&8) 25.00
☐ D. Change of status to **RETIRED** (1,5,7,8) \$25.00
 (Licensee must continue to pay renewal fee when due, TCA 62-13-318)
☐ E. Change of status to **INACTIVE** (1,5,7,8) \$25.00
☐ F. Request duplicate of lost license (1, 2, 5, & 7) \$10.00

☐ G. Change or Upgrade of firm's principal broker (1,2,5,6) \$25.00
☐ H. Downgrade Principal Broker (1,2,5,7)
☐ I. Add Principal Broker to Additional Firm (1 thru 7) \$25.00
☐ J. Principal Broker **RELEASE** of affiliated licensee (1,2, & 5) NO CHARGE, Licensee will be placed in problem status, SEE additional information on page 2 of this form.

I request T.R.E.C. process as indicated above

1.	Licensee's Name	Home Phone Number	E-Mail Address	Licensee's File ID Number
2. <td>Current Firm Name <td>Firm Phone Number <td>E-Mail Address <td>Current Firm File ID Number </td></td></td></td>	Current Firm Name <td>Firm Phone Number <td>E-Mail Address <td>Current Firm File ID Number </td></td></td>	Firm Phone Number <td>E-Mail Address <td>Current Firm File ID Number </td></td>	E-Mail Address <td>Current Firm File ID Number </td>	Current Firm File ID Number
3. <td>New Firm/Licensee Name <td>New Firm Phone Number <td>E-Mail Address <td>New Firm File ID Number </td></td></td></td>	New Firm/Licensee Name <td>New Firm Phone Number <td>E-Mail Address <td>New Firm File ID Number </td></td></td>	New Firm Phone Number <td>E-Mail Address <td>New Firm File ID Number </td></td>	E-Mail Address <td>New Firm File ID Number </td>	New Firm File ID Number
4.(a)	New Firm Street Address			
	City	State	Zip Code	
4.(b)	Firm Mailing Address (P.O. Box only)			
	City	State	Zip Code	

ORIGINAL SIGNATURES ONLY PROVIDE ALL INFORMATION AND DATES

5.	Current or Releasing Principal Broker's Signature	PB License (File I.D./Number)	Date of Change or Release
6.	New Principal Broker's Signature	PB License (File I.D./Number)	Date
7.	Licensee's Signature		Date
8.	Licensee's Home Mailing Address		
	City	State	Zip Code

PLEASE READ REVERSE OF THIS FORM FOR IMPORTANT INFORMATION AND INSTRUCTIONS
 If this form does not have the information printed on the reverse, you can obtain a copy of both sides by contacting the TREC office or web site at
 www.tn.gov/commerce IN2857 (Rev. 05/2016)

TREC Form 1

The TREC Form 1 is available on TREC's website under "Forms and Downloads" in the "Licensee/Applicant Resources" section

TN Department of Commerce & Insurance

Search Commerce and Insurance

Licensing & Regulations ▾ Training & Certification ▾ Consumer Services ▾ Divisions ▾ Online Services ▾ Resources ▾ Contact ▾

Real Estate Commission

Help Desk & Questions

News and Information

Licensee/Applicant Resources

How to Get a License

Forms and Downloads

Fees

Renew a License

Change Firm Affiliation/Home Mailing Address

Is Your License Suspended

Newsletter

Forms and Downloads

Tennessee Real Estate Commission

Firms

- [Application for Firm or Branch](#) [pdf]
- [Request for Waiver of Escrow Account](#) [pdf]
- [Application for Registration of Timeshare Development](#) [pdf]
- [Vacation Lodging Service License Application](#) [pdf]
- [Application for Firm or Branch Name Change](#) [pdf]
- [Application for Non Resident Firm or Branch](#) [pdf]
- [Application for Firm or Branch Reapply](#) [pdf]

Applicants

- [Eligibility/Verification for Entitlements Act Attestation Instructions](#) [pdf]

Transferring Your Real Estate License Online

Tennessee Department of Commerce and Insurance Online Licensing System C.O.R.E. (Comprehensive Online Regulatory & Enforcement)

The Department of Commerce and Insurance provides an online portal for you to renew or transfer your license. Go to: **<https://www.core.tn.gov>** to register.

Online Licensing Services

Need Help Con

Returning User
" * " are required.
*User ID:
*Password:
[Forgot user ID?](#) [Forgot password?](#)

New User
[Register a new account](#)

You must create a new online account even if you already use e-services. Your online account is separate from your e-Services account.

Sign-up and manage your licenses
Welcome to the Online Licensing System. If you are a new user and use this system please sign up to your online account.
If you are an existing user sign-in have forgotten your user ID or password use the links in the 'Returning User' section to help you.

THIS SYSTEM IS FOR AUTHORIZED USE ONLY!

Use of this system constitutes consent to monitoring, interception, recording, reading, copying or capturing by authorized personnel of all activity. There is no right to privacy in this system. Unauthorized use of this system is prohibited and subject to criminal and civil penalties.

Accessing TREC Online with C.O.R.E

- Initiate a Real Estate License
- Renew Your License
- Retire Your License
- Change Your Address
- Reactivate Your License
- Pay fees online
- Initiate a Firm License
- Reinstatement/Reapplication

Deposits and Earnest Money (TREC Rule 1260-02-.09)

Highlights of the Rule Change

- New terms have been introduced in the new rule: **“Commingling” and “Trust Money”**:
“Commingling” is defined as the act of a licensee maintaining funds belonging to others in the same bank account that contains his or her personal or business funds.

“Trust money” is defined as either: money belonging to others received by a licensee who is acting as an agent or facilitator in a real estate transaction; or any money held by a licensee who acts as the temporary custodian of funds belonging to others.
- **The principal broker is responsible for ALL trust money.** This is true regardless of whether the principal broker is the owner or if someone else owns the firm.
- **Each principal broker shall maintain a separate escrow account for the purpose of holding trust money** received in their fiduciary capacity. All trust money received and held which relates to the lease of property must be held in one or more separate escrow or trustee accounts. (For security deposits, the broker CANNOT keep security deposits in the same account as rent monies.)
- **An affiliate broker shall pay over to the principal broker all trust money immediately upon receipt.**
- **The principal broker shall clearly specify in the contract the terms and conditions for disbursement,** and the name and address of the person or firm who will actually hold the trust money.
- Where the contract authorizes an individual or entity other than the principal broker to hold the trust money, the specified agent relieves the principal broker of responsibility for the trust money.
- **A principal broker may disburse trust money:** pursuant to the contract authorizing him to hold the trust money; **by a written agreement** with all parties having an interest separate from the trust contract; **at the closing; upon the rejection of an offer to purchase, sell, rent, lease, exchange or option real estate; upon filing an interpleader action; upon the order of a court.**
- Trust money shall be **disbursed in a proper manner without unreasonable delay.**
- Absent a compelling reason **earnest money shall be disbursed, interpleaded, or turned over** to an attorney to interplead the funds **within 21 days from the date of receipt of a written request.**

- **No postdated check shall be accepted for payment of trust money** unless otherwise provided in the offer. Trust Money shall be deposited into an escrow or trustee account promptly upon acceptance of the offer, unless the offer contains a statement saying otherwise. **Commingling of funds contained within firm accounts is prohibited.**
- **Interest bearing escrow accounts are neither required nor prohibited.** If used there must be a written contract between the parties expressing that such exists, the manner of disposition, and a detailed accounting shall be kept by the licensee for each separate account.

Advertising (TREC Rule 1260-02-.12)

Note: Changes to TREC Rule 1260-02-.12 will be reviewed in Unit 5 - Advertising

Commissions Earned by Affiliated Licensees (TREC Rule 1260-02-.39)

Highlights of the Rule Change

- Commissions earned while working under a principal broker can still be paid after one or more of these circumstances occur:
 - the licensee transfers to a new broker;
 - retires their license;
 - is in broker release status;
 - allows their license to expire, or
 - the death of the affiliated licensee.

These commissions can be paid directly to the agent rather than the new firm as long as the contract was signed WHILE the agent's license was affiliated with the real estate firm.

Electronic Records (TREC Rule 1260-02.40)

Highlights of the Rule Change

- Per the law real estate licensees **must preserve records relating to any real estate transaction for 3 years**. Electronic recordkeeping is allowed if:
 - all documents **must be readily accessible in an organized format** within 24 hours of any request for inspection by TREC; and
 - the **principal broker must utilize a retention schedule** and security format that ensures accessibility in a readable format.

NOTE: Tennessee REALTORS® recommends that records be kept for a minimum of seven (7) years. This is because the statute of limitations for breach of contract (default) is six (6) years. Records include the following (from TREC's website): Listings, offers (even offers that did not become contracts), contracts, closing statements, agency agreements, agency disclosure documents, property disclosure forms, correspondence and notes.

Licensees Who Hold Themselves out as a Team, Group, or Similar Entity Within a Firm (TREC Rule 1260-02-.41)

Highlights of the Rule Change

- **Licensee who hold themselves out as a team, group or similar entity must be affiliated with the same licensed firm and shall not establish a physical location for said team or group that is separate from the physical location of the firm.**
- **No compensation shall be received from anyone other than their principal broker.**
- **The principal broker shall not delegate their supervisory role to any licensees in the team or group.**
- **Designated Agents shall not represent themselves as a separate entity from the firm, nor shall they designate members as agents as this remains a responsibility of the principal broker.**

Duplicate or Confusingly Similar Firm Names (TREC Rule 1260-01-.18)

Highlights of the Rule Change

- **TREC will not issue a new firm license in a name that is the same or confusingly similar to another firm already issued. The applicant may appeal a decision not to issue first to the Executive Director, and then to the Commission.**

Appearances Before the Commission for the Purpose of Obtaining a License (TREC Rule 1260-01-.19)

Highlights of the Rule Change

- **When a licensure applicant appears before the Commission, they must also ensure the presence of their principal broker (or intended principal broker).**

Military Applicants (TREC Rule 1260-01-.20)

Highlights of the Rule Change

- **An applicant serving in the military may be issued a license upon application and payment of all fees if the Commission decides the requirements for licensure from another state are substantially equivalent to Tennessee. Or, a military applicant may obtain a temporary permit until they have completed the additional requirements necessary to become equivalent in the opinion of the**

Commission. Also, military education, training or experience shall be acceptable for equivalent qualifications as determined by the Commission.

- Any licensee who is a member of the National Guard or a reservist called to active duty whose license expires during that time shall be eligible to be renewed upon the licensee being released from active duty without payment of late fees, or penalties; or obtaining CE credits.

Reinstatement of an Expired License of a Broker, Affiliate Broker, Time-Share Salesperson or Acquisition Agent (TREC Rule 1260-01-.21)

(NOTE: TREC Rule 1260-01-.21 was amended in October 2016 by TREC and the changes became effective on January 16, 2017)

Highlights of the Rule Change

- **Expired license due to health issues or medical problems:** If a licensee fails to renew within 60 days after expiration due to personal or family health issues, **they can request a medical waiver from the Commission with a signed doctor's statement.** Also, renewal fees must be paid but late penalties are waived.
- **Expired license due to failure to comply with prerequisites to licensure:** If a licensee fails to comply with their conditions to licensure or renewal, but successfully completes same within 60 days of expiration, the penalty fee will be \$50 per 30-day period in addition to their renewal fees.
- **If a licensee fails to comply with their conditions to licensure or renewal after 60 days of expiration,** the licensee must sign a **Reinstatement Order**, complete all prerequisites or conditions, pay renewal fees, and pay \$50 penalty fees per 30-day period (if within 120 days); or if more than 120 days (but less than 1 year) they must pay \$100 per 30 days period beginning on the 121st day.
- **If a license is expired for more than 1 year,** the individual **must reapply for licensure, meet current education requirements, and pass all required exams.**

Retired Tennessee Real Estate Licenses

Highlights of the Rule Change

- T.C.A. § 62-13-318 has been amended and eliminates the requirement that all education requirements specified in § 62-13-303 must be completed as a condition to temporary retirement of a license in Section 10 of the bill. Instead, **the licensee must complete the education requirements prior to reactivation within the current license renewal period in which they**

are seeking reactivation. This change, enacted in July 2016, eliminates the need for an inactive license status, thus T.C.A. § 62-13-322 was deleted in its entirety.

Errors and Omissions Insurance / Risk Reduction

The Importance of E & O Coverage

- Practicing real estate and navigating through real estate agency agreements and sales contracts is becoming increasingly more complex. As a result, **litigation is on the rise and real estate agents and principal brokers need to be aware of how to reduce their risk so they do not find themselves embroiled in a costly and lengthy lawsuit or regulatory complaint.** One lawsuit can jeopardize a licensee's career and financial stability.
- Errors & omissions insurance is a necessity if you practice real estate in Tennessee.
- The Tennessee Real Estate Commission will not issue or renew a real estate license without the applicant/licensee having a current E & O insurance policy in place.
- Most policies, including the state's group policy through Rice Insurance Services Company, LLC, provide comprehensive protection for real estate professionals. There are limits, however, on what is covered, so it is important that an agent or broker check with their carrier to determine the specific terms and conditions of coverage.

The Most Frequent Claims Made Against Real Estate Licensees

According to Rice Insurance, the following are the ten (10) most common claims made against licensees:

1. Fraud
2. Breach of Duty
3. Breach of Contract
4. Bodily Injury / Property Damage
5. Negligence
6. Misrepresentation regarding the Condition of the Property
7. Consumer Protection Act
8. Trust / Earnest Money Dispute
9. Misrepresentation regarding Flooding or Leaks
10. Misrepresentation regarding the Value of the Property

Let's discuss a few of these in more detail....

1. Fraud

What are some examples of claims of fraud?

2. Breach of Duty

What are examples of "breach of duty" claims?

3. Breach of Contract

Can a licensee have a claim of "breach of contract" made against them? If so, explain.

4. Negligence

What examples can you provide that would be considered a claim of "negligence" against an agent?

5. Misrepresentation Regarding the Condition of the Property

How can misrepresentation of the property condition turn into a claim against an agent?

6. Misrepresentation Regarding Flooding or Leaks

Misrepresentation concerning property water intrusion has led to many lawsuits by angry clients. What are some examples of misrepresenting issues associated with flooding and water leaks?

7. Misrepresentation Regarding the Value of the Property

There are a number of scenarios where misrepresentation of property value may occur. Can you think of a few examples?

Case Study on Conflicts of Interest

Actual Case from Rice Insurance Services Co. LLC

Betty Johnson needed a new building for her law firm. Since business was booming, she began working with a real estate firm to assist in her search. After viewing several buildings, Sandra Smith, the real estate agent, showed Ms. Johnson a building that was available for \$275,000. Ms. Johnson was interested in purchasing the building but wanted to know if it could be renovated for under \$325,000.

Ms. Smith referred Ms. Johnson to a contractor, who happened to be her husband. According to Ms. Johnson, Mrs. Smith spoke with her husband and assured her the building renovations could be hers for under \$600,000. Ms. Johnson purchased the building and retained Mr. Smith to complete the renovations. Mrs. Smith brought the renovation contracts to Ms. Johnson and was present during discussions with the contractor. Unfortunately, the renovation work was not completed on time or to Ms. Johnson's satisfaction. As a result of the unsatisfactory work, Ms. Johnson decided to consult an attorney.

Discuss the case study and consider what Ms. Smith might face in court?

Tips to Avoid Real Estate Errors and Omissions Claims

While even the most diligent licensee may be the victim of a frivolous claim, diligent business practices help decrease risk. Even if these procedures do not prevent a claim, they may greatly enhance the chance of a successful defense.

1. **Resolve problems far before the closing date.** Don't wait until the last minute to address problem issues. When people are rushed to resolve matters, they are more likely to make mistakes or overlook items.

2. **Don't try to be an expert at everything.** Involve key professionals, such as attorneys, home inspectors, termite inspectors, appraisers, lenders, and surveyors when needed. Provide a list of several names or a copy of the yellow page listings but do not recommend a specific individual or firm! Keep a copy of the list you provide.
3. **It is generally a good idea to require agency disclosure on every transaction.** Be familiar with Tennessee laws regarding when a written agency disclosure is required, at what stage it must be completed, and who must be provided with signed copies. Typically, agency relationships should be disclosed as soon as possible, but in any event, prior to providing specific assistance to the client. For example, buyers should be advised if the licensee showing them the house is the seller's agent.
4. **Document conversations, recommendations, and activities in a log.** It is also often helpful to document conversations by sending a brief follow up email. Keep organized, detailed records of all real estate transactions. This is often required by state law, will assist you in recalling details, and will be helpful to an attorney if a defense is needed in the future.
5. **Brokers should have regular meetings with their firm licensees and remain informed as to their activities.** Establish consistent guidelines and make sure everyone in the firm understands and complies with them.
6. **Listing agents should have the seller complete any required property disclosure form.** This form should never be filled out by the real estate licensee. Additionally, if any issues arise while the property is listed, advise the seller to update the disclosure form accordingly.
7. **Recommend that buyers obtain a home warranty** and retain written evidence of the recommendation.
8. **Recommend that buyers obtain a home inspection.** If they decline, have them sign a form confirming this decision.
9. **Utilize state and/or association standard contract forms (i.e. TAR forms).** It is wise to address items that are outside of standard form language with the client's legal counsel, or else the real estate licensee risks the unauthorized practice of law.
10. **Be a "source of the source."** When information is obtained from a third party, it is often a good idea to disclose the source when making representations, because sometimes information from what appears to be a valid source turns out to be inaccurate. For example, if you believe a property is on city sewer based on a prior listing or a statement by the city utility office, disclose the source of your representation.

TREC E & O Suspension and Penalty Fees

- TREC has instituted comprehensive rules on Tennessee licensees maintaining Errors and Omissions insurance coverage.
- Disciplinary action and monetary fines can be imposed on licensees and principal brokers who fail to maintain E & O coverage while holding an active real estate license.

TREC Rule 1260-01-.16 Lapsed Errors and Omissions Insurance

(1) Licensees Who Fail to Maintain Errors & Omissions (E&O) Insurance

- (a) Penalty fees for Reinstatement of a Suspended License: Any licensee whose license is suspended for more than thirty (30) days pursuant to T.C.A. § 62-13-112 for failure to maintain E&O insurance must provide proof of insurance that complies with the required terms and conditions of coverage to the Commission and must pay the following applicable penalty fee in order to reinstate the license:
1. For a license suspended due to a lapse in E&O coverage for more than thirty (30) days but within one hundred twenty (120) days:
 - (i) Two Hundred Dollars (\$200.00) if the licensee's insurance carrier back-dated the licensee's E&O insurance policy to indicate continuous coverage; or
 - (ii) Four Hundred Dollars (\$400.00) if the licensee's insurance carrier did not the licensee's E&O insurance policy to indicate continuous coverage.
 2. For a licensee suspended due to a lapse in E & O coverage for more than one hundred twenty (120) days but less than six (6) months, a Five Hundred Dollar (\$500.00) penalty fee;
 3. For a license suspended due to a lapse in E&O coverage for six (6) months up to one (1) year, a Five Hundred Dollar (\$500.00) penalty fee plus a penalty fee of One Hundred Dollars (\$100.00) per month, or portion thereof, for months six (6) through twelve (12).
- (b) Conditions for Reissuance of a Revoked License: Upon revocation of a license pursuant to T.C.A. § 62-13-112 for failure to maintain E&O insurance, any individual seeking reissuance of such license shall:

1. Reapply for licensure, including payment of all fees for such application;
2. Pay the penalty fees outlined in subparagraph (a) above.
3. Pass all required examinations for licensure, unless the Commission waives such examinations; and
4. Meet any current education requirements for licensure, unless the Commission waives such education requirements.

(2) Principal Brokers of Licensees Who Fail to Maintain E&O Insurance:

- (a) A principal broker shall ensure, at all times, that all licensees affiliated with that principal broker shall hold E&O insurance as required by law. A failure to do so shall constitute failing to exercise adequate supervision over the activities of a licensed affiliated broker.
- (b) For any principal broker who has an affiliated licensee whose license is suspended pursuant to T.C.A. § 62-13-112 for failure to maintain E&O insurance, there shall be no penalty to the principal broker if either of the following two (2) circumstances occur within thirty (30) days of the affiliated licensee's suspension:
 1. The affiliated licensee has provided proof of insurance, which complies with the required terms and conditions of coverage to the Commission; or
 2. The principal broker releases that affiliated licensee whose license is suspended for failure to maintain E&O insurance.
- (c) After the aforementioned thirty (30) day period, if the affiliated licensee has neither provided the required proof of insurance nor been released by the principal broker, the Commission authorizes a formal hearing on the matter of the principal broker's failure to exercise adequate supervision over an affiliated licensee who failed to maintain E&O insurance but also authorizes that a consent order shall be sent to the principal broker, offering that principal broker the opportunity to settle the matter informally, thereby making formal hearing proceedings unnecessary, according to the following:
 1. Notwithstanding the provisions of Rule 1260-02-.32, if the principal broker's affiliated licensee reinstates his or her license, or the principal broker releases the affiliated licensee, more than thirty (30) days after suspension but within one hundred twenty (120) days after suspension, the consent order shall contain the following civil penalties:
 - (i) Two Hundred Dollars (\$200.00) if the affiliated licensee's insurance

carrier back-dated the licensee's E&O insurance policy to indicate continuous coverage; or

- (ii) Four Hundred Dollars (\$400.00) if the affiliated licensee's insurance carrier did not back-date the licensee's E&O insurance policy to indicate continuous coverage.

2. If the principal broker's affiliated licensee reinstates his or her license, or the principal broker releases the affiliated licensee, more than one hundred twenty (120) days after suspension, the consent order referenced in this subparagraph (c) above shall contain a civil penalty of one thousand dollars (\$1,000.00).
3. Where a principal broker does not accept any authorized consent order for failure to supervise an affiliated licensee's E&O insurance, the hearing shall be held before an administrative law judge sitting alone, pursuant to the Uniform Administrative Procedures Act, compiled at Title 4, Chapter 5.
4. Nothing in this rule shall be construed as limiting the Commission's authority to:
 - (i) Authorize a consent order in a different amount than listed herein;
 - (ii) Seek any other legal discipline - including revocation or suspension of a license - for a failure to supervise an affiliated licensee's E&O insurance;
 - (iii) Review an initial order under the Uniform Administrative Procedures Act; or
 - (iv) Not seek discipline against a principal broker for failure to supervise an affiliated broker's maintenance of E&O insurance if the Commission determines that such discipline is not appropriate under the facts of that matter.

UNIT 2 - License Recognition

Non-Resident Candidates (Licensing Real Estate Candidates Currently Licensed in Another State Seeking a Tennessee License)

An applicant for a Tennessee real estate license **who is currently licensed in another state** must pass the Tennessee (state law) portion of the examination for the same type of license they hold in their resident state. TREC provides additional information on their website that will assist an applicant in determining the requirements for seeking a Tennessee real estate license. Information required by the Commission include certificates showing the completion of pre-licensing education and completion of continuing education. The firm and principal broker where the applicant is affiliated must also hold an active Tennessee real estate license.

Resident Candidates Who Are or Were Licensed in Another State

An applicant for a Tennessee real estate license **who are or were licensed in another state and are now a resident of the Tennessee** may still qualify under Tennessee statute to have their real estate education, the national portion of the examination and/or their experience (if applying for a broker license) substitute for Tennessee's education, national portion of the examination and/or experience. TREC provides additional information on their website that will assist an applicant in determining the requirements for seeking a Tennessee real estate license. Information required by the Commission includes certificates showing the completion of pre-licensing education and completion of continuing education. The firm and principal broker where the applicant is affiliated must also hold an active Tennessee real estate license.

Minimum TREC Requirements for Licensure under License Recognition

Licensee applicants active in another state desiring to obtain a Tennessee real estate license must meet the following requirements:

Affiliate Broker License

- Provide proof of a minimum of ninety (90) hours of real estate education that includes at least thirty (30) hours of real estate principles and the Tennessee thirty (30) hour Course for New Affiliates (CNA). The remaining thirty (30) hours can be approved electives. Education hours must be accepted for credit by the resident state of licensure before being considered for credit by TREC.

Real Estate Broker License

- Provide proof of satisfactory completion of one hundred twenty (120) hours of real estate education including at least thirty (30) hours of *Real Estate Office and Brokerage*

Management or equivalent. . Education hours must be accepted for credit by the resident state of licensure before being considered for credit by TREC.

- The licensee must also provide proof of having an active real estate license for at least three (3) years.
- Broker license candidates must provide proof of passing a national real estate examination since June 30, 1980 with a minimum passing score of seventy-five percent (75%) on the national or uniform section of the examination in order to be granted a waiver of the uniform section.
- All broker license candidates must pass the Tennessee law section of the Tennessee examination with a minimum passing score of seventy-five percent (75%).

Note: All license applications are subject to the approval of the Tennessee Real Estate Commission pursuant to the Tennessee Real Estate Broker License Act of 1973 and the Rules and Regulations of TREC.

Out-of-State Licensee Continuing Education Requirement for License Renewal

- Non-resident licensees are required to submit sixteen (16) hours of real estate education in order to renew their Tennessee real estate affiliate broker or real estate broker license. Out-of-state licensees must follow the same rules as Tennessee residents who hold a license.
- **Affiliate Broker Licenses**
Per T.C.A. § 62-13-303(g), “Every two (2) years, as a requisite for the re-issuance of an affiliate broker’s license originally issued on or after July 1, 1980, the affiliate broker shall furnish certification of satisfactory completion of sixteen (16) classroom hours in real estate courses at any school, college or university approved by the commission.
- **Real Estate Broker Licenses**
Per T.C.A. § 62-13-303(h), “..Beginning with the license period immediately following the license period in which the licensee completes the one hundred twenty (120) hours of education specified in this subsection (h), the licensee of a broker's license originally issued after January 1, 2005, every two (2) years shall furnish certification of satisfactory completion of sixteen (16) classroom hours in real estate courses at any school, college or university approved by the commission as a requisite for the re-issuance of the license.
- On June 14, 2017, the Commission voted to grant a waiver of the continuing education requirements in T.C.A. § 62-13-303(g) & (h) above, for non-resident licensees whose license is due for renewal

prior to September 1, 2017. Starting September 1, 2017, if a non-resident licensee does not submit satisfactory completion of sixteen (16) hours in real estate courses approved by the Commission, the licensee's real estate license will not be renewed.

UNIT 3 - Principal Broker Supervision of Affiliate Licensees

Managing Licensees

Key Points to Remember:

- **Licenses renew every two (2) years.** When the license is issued either the firm or the licensee needs to develop a reminder on their calendars or develop a process to know when the license needs to be renewed.
- **Errors and Omissions Insurance** – Licensees receive a reminder thirty (30) days prior to the licensee's renewal. Remember, proof of insurance is required by TREC for license renewal.
- **Education** – TREC requires sixteen (16) hours every two (2) years, of which six (6) hours must be the TREC Core course and ten (10) hours of elective courses. The Commission will send a reminder of education requirements six (6) months prior to expiration of license with the expiration date listed in the letter.

Principal Broker Responsibilities to Agents

The following is just a few of the responsibilities of a principal broker:

- Supervision of Affiliate Broker and Real Estate Broker licensees
- Offices
- Maintaining Good Communication
- Offers to Purchase
- Agency Agreements
- Escrow Accounts
- Personal Interest Disclosure
- Advertising Responsibilities
- Commissions Earned by Licensees
- Records (Electronic and traditional paper records)
- Principal Broker Responsibility of Teams

Managing Affiliate Brokers (TREC Rule 1260-02-.01)

- In Tennessee, in order for an affiliate broker to be engaged in any real estate activity **he or she must be under the direct supervision of a principal broker.**
- The broker must be engaged primarily in the real estate business and **must be accessible to his agents during normal working hours.**
- **The principal broker is responsible for ALL of the activities of the licensee** and, as such, must be able to ensure a licensee is practicing real estate within the regulations outlined in

the Tennessee Broker's License Act of 1973 and the Rules of the Tennessee Real Estate Commission.

- The principal broker should be competent in instructing licensees on client and transaction management, real estate contracts and disclosures, handling of trust money, resolution of disputes between clients and agents and well-versed on the latest changes taking place in the real estate industry.
- **The broker should be the one a licensee can turn to for answers** to their questions as well as advice on how to grow their real estate practice.

In Tennessee, the affiliate broker is an independent contractor – not an employee. As such, the licensee is self-employed and is compensated by the broker for their efforts in assisting a consumer in purchasing or selling a piece of real property. Even though licensees are independent contractors they are still held responsible to the principal broker for any and all activity in their business including advertising and marketing, listing and contract documents, the handling of trust money and guiding the client/customer through the entire process of a real estate transaction.

Termination of Affiliation (TREC Rule 1260-02.02)

When a licensee wishes to terminate their affiliation with a firm the principal broker shall immediately release the licensee from the firm and return the license to the licensee. If the licensee cannot be located the license can be returned to the Commission. Under TREC rules, the licensee has ten (10) days to place his license with another broker or place it in retirement status.

Affiliate Broker Relationship to Principal Broker (T.C.A. § 62-13-310)

- Whenever the contractual relationship between a broker and affiliate broker is terminated, the present broker shall immediately sign and date the change of affiliation form prescribed by the commission. The affiliate broker may act under a contract with another broker upon completion and transmittal to the commission of the form, accompanied by the fee established pursuant to § 62-13-308. The affiliate broker shall assure that the completed form and fee are promptly transmitted and that the affiliate broker's license is prominently displayed in the new broker's principal place of business.
- Licensees may not post signs on any property advertising themselves as real estate agents unless the firm's name appears on the signs in letters the same size or larger than those spelling out the name of the licensee.
- Any unlawful act or violation of this chapter by any affiliate broker may not be cause for the suspension or revocation of the license of the broker with whom the affiliate broker is affiliated.

T.C.A. § 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 the managing broker. A managing broker providing services under this chapter 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 the 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, the managing broker and any designated agent or agents in a designated agency situation.

Unlicensed Branch Office

One of the violations discussed under *Unit 5- TREC Rules, Regulations and Updates* is operating an unlicensed Branch Office.

Can you name some examples of an Unlicensed Branch Office?

- 1.
- 2.

Can you name some examples of offices that are exempt from the requirement for a branch office license?

- 1.
- 2.

TREC Rule 1260-02-.03 Offices

- (a) For purposes of T.C.A. § 62-13-309(d), a licensee is deemed to maintain a "branch" if the licensee:
 1. Advertises the office in any manner for the purpose of attracting the public;
 2. Has a mail drop at the office which is registered with and served by the United States Postal Service; or
 3. Invites or solicits telephone calls to the office (by such means as advertising or listing in a

telephone directory). *Note: No broker shall post his license at a telephone answering service.*

- (b) Model Homes and Modular Units. A model home may be utilized in a subdivision or on a commercial lot and a modular unit may be utilized in subdivisions which are under construction for purposes of soliciting business and will not be required to be licensed as a branch office as long as the model home or modular unit meets the following requirements:

1. The model home or modular unit location and/or telephone number is only advertised in conjunction with advertising the main firm office and such advertising complies with the statutes, rules and regulations of the Commission;
2. The model home or modular unit does not have a mail drop;
3. The model home or modular unit is not the sole sales office for the firm;
4. The model home or modular unit is not utilized to allow unlicensed activity by individuals in performing any of the acts requiring licensure under T.C.A. § 62-13-101, et seq.; and
5. The principal broker of the main firm office shall adequately supervise licensees operating from model homes or modular units as required by T.C.A. §62-13-312 and any rules promulgated thereunder.

Licenses (TREC Rule 1260-01-.04)

- (1) No principal broker shall permit a broker, affiliate broker or time-share salesperson under his supervision to engage in the real estate business unless the broker, affiliate broker or timeshare salesperson has been issued a valid license and is covered by an errors and omissions insurance policy.
- (2) Each licensee is individually responsible for satisfying all legal requirements for retention of his license, including, but not limited to, paying appropriate fees; and completing real estate education.
- (3) Each licensee in a firm must obtain any desired change of affiliation or status through the firm's principal broker.
- (4) All Tennessee licensees holding nonresident licenses issued in other states shall file copies of such licenses in the Office of the Tennessee Real Estate Commission and with their principal broker.
- (5) A time-share salesperson shall only participate in time-share transactions when he is affiliated with a firm which is affiliated with a registered time-share project.

Tennessee Attorney General Opinion – Exemptions to licensure

On March 6, 2014 the Office of the Attorney General issued Opinion No. 14-27 concerning questions about Exemptions from the Real Estate Broker License Act.

1. Does the exemption from licensure under the Tennessee Real Estate Broker License Act of 1973 provided to “corporation, foreign or domestic” in Tenn. Code Ann. 62-13-104(a)(1)(F) apply to a limited liability company?

2. If an individual who is a member of an entity (Corp) that qualifies for the exemption under Tenn. Code Ann. 62-13-104(a)(1)(F) has the primary responsibility of performing activities on behalf of such entity for which a license is otherwise required under Tenn. Code Ann. 62-13-102(4)(A) or (B), does it matter for purposes of the exemption whether the individual's compensation is dependent upon or directly related to the value of the real estate as to which the actions are performed?
3. If an individual performs activities for which a license is required under Tenn. Code Ann. 62-13-102(4)(A) or (B) on behalf of an entity that qualifies for the exemption under Tenn. Code Ann. 62-13-104(a)(1)(A-F) but not perform such activities as a vocation does the exemption apply to that person if his or her compensation is based on a distribution of profits to the owners of the entity from the in the entity or some other calculation not directly related to the sale or rental of the property.

Advertising and Principal Broker Supervision

(b) All advertising shall be under the direct supervision of the principal broker and shall list the firm name and the firm telephone number as listed on file with the Commission.

With regard to the size and visibility of the firm name and firm telephone number, all of the following shall apply:

1. The firm name must be the most prominent (applies to font, size, location and color) name featured within the advertising, whether it be by print or other media; and
2. The firm's telephone number shall be the same size or larger than the telephone number of any individual licensee or group of licensees.

Trust Money (Earnest Money)

TREC Rule 1260-02-.09 Managing Escrow or Trust Accounts

(1) Definitions: for purposes of this rule, the following definitions are applicable:

(a) "Commingling" is defined as the act of a licensee maintaining funds belonging to others in the same bank account that contains his or her personal or business funds.

(b) "Trust money" is defined as either of the following:

1. Money belonging to others received by a licensee who is acting as an agent or facilitator in a real estate transaction; or
2. Any money held by a licensee who acts as the temporary custodian of funds belonging to others.

(2) Each principal broker shall maintain a separate escrow or trustee account for the purpose of holding any trust money which may be received in his fiduciary capacity.

(3) An affiliated broker shall pay over to the principal broker with whom he is affiliated all trust money immediately upon receipt.

(4) Principal brokers are responsible at all times for trust money accepted by them or their affiliated brokers, in accordance with the terms of the contract.

- (5) Where a contract authorizes a principal broker to place trust money in an escrow or trustee account, the principal broker shall clearly specify in the contract:
 - (a) the terms and conditions for disbursement of the trust money; and
 - (b) the name and address of the person or firm who will actually hold the trust money.
- (6) Where a contract authorizes an individual or entity other than the principal broker to hold trust money, the principal broker will be relieved of responsibility for the trust money upon receipt of the trust money by the specified escrow agent.
- (7) A principal broker may properly disburse trust money:
 - (a) upon a reasonable interpretation of the contract which authorizes him to hold the trust money;
 - (b) upon securing a written agreement which is signed by all parties having an interest in such and is separate from the contract which authorizes him to hold the trust money;
 - (c) at the closing of the transaction;
 - (d) upon the rejection of an offer to purchase, sell, rent, lease, exchange or option real estate;
 - (e) upon the withdrawal of an offer not yet accepted to purchase, sell, rent, lease, exchange or option real estate;
 - (f) upon filing an interpleader action in a court of competent jurisdiction; or
 - (g) upon the order of a court of competent jurisdiction.
- (8) Trust money shall be disbursed in a proper manner without unreasonable delay.
- (9) Absent a demonstration of a compelling reason, earnest money shall be disbursed, interpleaded, or turned over to an attorney with instructions to interplead the funds within twenty-one (21) calendar days from the date of receipt of a written request for disbursement.
- (10) No postdated check shall be accepted for payment of trust money unless otherwise provided in the offer.
- (11) Trust money shall be deposited into an escrow or trustee account promptly upon acceptance of the offer unless the offer contains a statement such as "Trust money to be deposited by:".
- (12) In addition to the escrow or trustee account referenced in paragraph (2), all trust money received and held which relates to the lease of property must be held in one (1) or more separate escrow or trustee accounts.
- (13) Commingling of funds contained within firm accounts is expressly prohibited.
- (14) Interest-bearing escrow or trustee accounts are neither required nor prohibited by the Commission. If utilized, however, the following provisions shall be observed:
 - (a) At the time of contract execution, the licensee shall disclose to the payor that his or her deposit will be placed in an interest-bearing escrow or trustee account, and the licensee and the payor shall execute a written agreement indicating the manner of disposition of any interest earned;
 - (b) As a depositor of the trust money, the licensee does not own the trust money or interest earned thereon until properly disbursed to the licensee; and
 - (c) The licensee shall keep a detailed and accurate accounting of the precise sum of the interest earned for each separate deposit.

If Something Happens to the Principal Broker

The Commission has rules in place in the event a principal broker becomes incapacitated, leaves his/her responsibilities for an extended period of time (with a valid reason) or dies.

TREC Rule 1260-02-.38 Death or Extended Absence of Principal Broker

- (1) The Commission must be notified within ten (10) days of the death, resignation, termination, or incapacity of a principal broker. In the event of an unexplained extended absence of a principal broker, the Commission must be notified within a reasonable time period. At the time of notification, a plan must be submitted which addresses the continuation of operations without a principal broker.
- (2) The Commission may, in its discretion, based on the merits and circumstances of each case, permit a real estate firm to continue operating without a principal broker for a period of time not to exceed thirty (30) days from the date of death, resignation, termination, or incapacity of a principal broker, subject to conditions imposed by the Commission.
- (3) If, within the aforementioned thirty (30) day period, a real estate firm contacts the Commission demonstrating compliance with their initial approved plan and circumstances which require additional time to continue operating without a principal broker, the executive director shall have the authority to grant a thirty (30) day extension to the period originally allowed by the Commission. In the event that a thirty (30) day extension is granted, a new principal broker must be in place no later than the sixty-first (61st) day from the date of death, resignation, termination, or incapacity of a principal broker.

Let's Review (Optional for Instructor)

1. In Tennessee, in order for an affiliate broker to be engaged in any real estate activity he or she must be under the direct supervision of a principal broker. True or False?
2. How often do real estate licenses renew?
3. TREC requires _____ hours every _____ years, of which _____ must be in the _____ and _____ hours of elective courses.
4. The principal broker is responsible for all the activities of the licensee? True or False?
5. If a licensee wants to transfer their license to another firm how long should the licensee expect the license to be released by their current broker?
6. How many days does a licensee have to place his license with another firm?
7. Who "owns" the listings and contracts of the firm?

8. Is a principal broker considered a dual agent under designated agency?
9. Under TREC Rule 1260-02-.03 (Offices), what are the three (3) conditions a licensee when a licensee may be considered operating a “branch” office?
10. Does the Tennessee Attorney General’s opinion concerning exemptions to licensure allow an employee of a company to perform real estate activities on behalf of the company?
11. What happens if the principal broker dies?

UNIT 4– Agency

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, and 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. If a licensee is representing someone as an agent and not as a facilitator, an agent has the additional obligations contained in T.C.A. § 62-13-404.
- 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.

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.

Key Points 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 or by a licensee’s actions.
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. **Sub-agency 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 in writing 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.
- 13.

Agency Law in Tennessee

Tennessee's real estate agency law was passed in 1995 and took effect on January 1, 1996 as sections § 62-13-401 through § 62-13-408 of the Tennessee Code Annotated. The state's agency law has been amended twice – once in 1996 and again in 2006.

The following sections of the sections of the T.C.A. highlight the importance of agency and the duties agents have to the parties in a real estate transaction:

Creation (T.C.A. § 62-13-401)

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, the 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 the 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.

Limited Agency (T.C.A. § 62-13-402)

- a) If a real estate licensee is engaged as an agent, the real estate licensee serves as a limited agent retained to provide real estate services to a client. The licensee shall function as an intermediary in negotiations between the parties to a transaction unless the 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 the licensee's client the duties enumerated in § 62-13-404.
- c) Notwithstanding any 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 the licensee's client on January 1, 1996.

Duty owed to all parties (T.C.A. § 62-13-403)

A licensee who provides real estate services in a real estate transaction shall owe all parties to the 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 the 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 that the party would reasonably expect to be held in confidence, except for information that 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 the transaction only when the information is available through public records and when the 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 the 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 this chapter, without timely disclosing to the party who receives the referral the licensee's interest in the referral or the fact that a referral fee may be received.

Duty owed to licensee's client (T.C.A. § 62-13-404)

Any licensee who acts as an agent in a transaction regulated by this chapter owes to the licensee's client in that transaction the following duties, to:

- (1) **Obey all lawful instructions of the client** when the 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 the 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).

From the Tennessee REALTORS® Legal and Ethics Hotline

1. Agency Relationships When Co-listing?

QUESTION: I work with a team, and there are three of us total. We co-list everything for MLS purposes and clients are comfortable with the idea they have three agents working for them rather than one. We verbally discuss this with our clients and they are always on board, but we have no form that states this. If we get audited, is this grounds for a write up?

ANSWER: If you are co-listing a piece of property and you practice designated agency, then ALL three agents must be appointed as designated agents. This can be done on the listing agreement; it definitely needs to be confirmed in writing and must conform to your company's agency policy. ALSO, be very careful that you understand that what one of you knows, all of you know.

2. Terminating a Buyer Agency Agreement?

QUESTION: Can a buyer's agency agreement be terminated after there is a binding contract?

ANSWER: Yes. A buyer representation agreement can be terminated at any time with the approval of both parties and in writing.

A buyer's rep agreement is a written contract that establishes an agency relationship between a buyer and a real estate company. In order to terminate this contract, it requires a termination and release in writing and signed by all parties to the buying agreement (unless the agreement allows for one side to terminate without the approval of the other. TAR's forms do not so provide). It should terminate the contract and release both sides from the obligations under the original buyer's rep agreement. Until this is completed, the buyer's representation agreement will continue in place until its natural termination.

If you have a buyer who wishes to terminate their buyer's representation agreement with you, your principal broker must decide whether you wish to hold them to that contract or not. This is completely up to the broker as to whether they want to release them from the representation agreement. TAR provides a form for you to use if you wish to agree to terminate the buyer's representation agreement — form RF151.

Case Study 1 – Two Buyers Who Want the Same Property

Buyer Agent John Patterson has signed a Buyer Representation Agreement with two (2) different buyers – Buyer Jason and Buyer Betsy. Jason signed his agreement three weeks ago and Betsy signed her agreement with John about two weeks ago. Both buyers really like John as he is easy to work with and very professional.

On Wednesday morning, John showed a home located at 1450 Volunteer Drive that just came on the market to Buyer Jason. Jason really liked the home as he felt it met most of his needs. However, he needed to a little bit of time to think about it. After showing the house to Jason, John received a phone call from Betsy asking to see the same property. That afternoon, John showed Buyer Betsy the house. Right before he showed the house to Betsy he received a text message from Jason indicating he was ready to make an offer on the property and wanted to know when they could get together. John responded to Jason with “Great!” After viewing the home, Betsy said it’s exactly what she was looking for and wanted to make an offer before it got away.

John found himself in an awkward and perplexing spot with his two buyer clients. He called his broker to see how to best handle writing offers for two separate clients on the same home. He asked his broker if he needed to inform each buyer that he was representing another buyer interested in putting an offer on the same home.

How do you think John and his broker should handle this situation?

Case Study 2 – Agent *and* Facilitator at the Same Time?

Seller Agent Wayne listed a three-bedroom, two-bath home in a very popular neighborhood on Thursday afternoon for Seller Bill and Seller Sally. On the following Sunday, Wayne hosted an open house from 2:00 – 4:00 pm. Buyer Kyle and Buyer Joan attended the open house. Wayne asked them if they were working with an agent. They said they were not. After looking at the house they told him they were ready to write an offer. He asked them if they wanted an agent to represent them as he could refer another REALTOR® to assist them with the offer. They said they did not need representation as they had bought and sold many houses on their own. He asked them to meet him at his office after the Open House so he could put together the paperwork for their offer. When he completed the “Confirmation of Agency” he noted on it he was the “Designated Agent for the Seller” and “Facilitator” for the buyers.

Can Wayne be the “Designated Listing Agent for the Sellers” and a “Facilitator/Transaction Broker” for the Buyers at the same time?

Let's Review

1. An agency relationship in Tennessee cannot be implied by an agent's actions or behavior, but only created by what means?
2. If an agent has not established a written agency relationship with a client, what is the agent's status in the transaction?
3. In a traditional agency relationship, who is the client's agent?
4. If the client has signed a Designated Agency agreement with the broker, who represents the client?
5. Is Dual Agency still legal in Tennessee?
6. What is your relationship with a buyer prior to signing a Buyer Representation Agreement?
7. You have a signed Designated Listing Agreement with a seller noting you as the Designated Agent. An unrepresented buyer contacts you to see the property. They view the property and decide to make an offer.
 - a. Do you have to change your agency status?
 - b. Can you receive commission for "both sides"?
 - c. In the listing agreement, via the Special Stipulations section, it states the seller will allow you to default to a facilitator. If you elect to do so, do you need to notify the seller?
8. If you sell your own listing to a buyer who does not have an agent (unrepresented) do you automatically become a Facilitator? .
9. Can you allow an unrepresented buyer think they are represented by you as long as you have not told them directly?
10. If your firm practices traditional agency and you take a buyer client to see a property listed by another agent in your office, does this create a conflict?
11. For in-house transactions, is Designated Agency the only agency relationship utilized?

12. If the firm practices designated agency, do all files need to be in a centralized location for everyone to access?
13. You are an agent who is part of a team. Is the team leader the only one who needs to sign the buyer representation agreement or listing agreement?
14. Can a “Confirmation of Agency” disclosure be used as an agency agreement with a buyer or seller?
15. If two licensees in the same firm represent a buyer and a seller as designated agents for their respective clients, what is the status of the principal broker?
16. If a prospective buyer attends your Open House should they tell you they are working with an agent or are you obligated to ask them?
17. If you discover an adverse fact with the property you are listing, are you only required to disclose this to your seller client?
18. Your brother is a home inspector and you have referred him to your buyer clients who just contracted on a home. Do you see a problem with this referral?

UNIT 5 - Advertising

Understanding TREC Rules on Advertising:

- The **primary mission of the Tennessee Real Estate Commission (TREC) is to protect the consumer** by ensuring real estate licensees in the state are practicing in an honest, ethical and professional manner. Part of this protection includes the oversight of advertising by a licensee and his/her principal broker.
- All advertising by a licensee in Tennessee should conform to TREC rules and policies. **Since all advertising is under the supervision of the principal broker, he/she is responsible for approving your advertising and marketing materials.**
- It is imperative that every licensee in the state complies with TREC rules and state law on advertising, no matter the medium. Since the implementation of the October 2015 rule changes, the Commission has increased the review of licensee and firm advertising to ensure it complies with the new rules.
- **Failure to follow these rules will result in disciplinary action against you and your broker** including citations and consent orders with substantial fines and the possibility of license suspension, downgrading or revocation.

TREC Rules on Advertising (TREC Rule 1260-02-.12)

In the past, one of the challenges for licensees and their brokers was to determine how to meet the Commission's rules on advertising on various marketing and promotional materials including signs, flyers, TV and Radio ads, websites, branded giveaways, as well as agent-sponsored charitable and community events. The recent rule changes clarified what is considered advertising and what is not.

What Constitutes Advertising?

Summary of What IS and What IS NOT considered advertising under TREC Rules

ADVERTISING	NOT ADVERTISING
Print Advertising (Newspapers, Magazines, etc.)	Promotional Material
Radio Advertising	Hats
Television Advertising	Pens
Signs (All Kinds)	Business Cards
Flyers	T-shirts and Clothing
Letterhead	Notepads
E-mail Signatures	Name Tags
Websites	Sponsorship of Charitable & Community Events
Social Media (Facebook, Twitter, LinkedIn, etc.)	
Video or Audio Recordings (includes Podcasting, YouTube, Vines, etc.)	

Key Facts to Know Concerning TREC's Rules on Advertising:

Principal Broker Supervisory Responsibility

The firm's principal broker is responsible for all activities of their licensees and this includes advertising. If you have any questions on whether or not your marketing/advertising materials meet TREC rules contact your principal broker or TREC directly. *Remember, the Commission does not accept lack of knowledge as an excuse for not following state law and TREC rules.*

Size of Names and Telephone Numbers in Advertising

The Commission has clarified the rule concerning the size of names and telephone numbers in advertising. TREC Rule 1260-02-.12(3)(b) is specific on the size. The rule states **“the firm name must appear in letters the same size or larger than those spelling out the name of a licensee or the name of any team, group or similar entity.”** This rule applies to all advertising whether it be print or digital media.

Licensee Name in Advertising

Any advertising, which refers to an individual licensee, must list that individual licensee's name as licensed with the Commission. However, TREC has provided additional clarification to this rule [TREC Rule 1260-02-.12(3)(c)] by stating **nicknames currently registered with the Commission can be used in all forms of advertising.** Also, middle initials, middle names and suffixes included in a licensee's name as registered with TREC do not have to be used when advertising.

Deceptive and Misleading Advertising

A licensee cannot advertise in way that would mislead or deceive the public. By doing so, a licensee will most definitely put their real estate license at risk. Examples of false, misleading or deceptive advertising include:

- Using a franchise name without including the name of the firm.
- Advertising as a team using similar names as a licensed real estate firm (i.e. using the terms “Real Estate”, “Real Estate Brokerage”, “Realty”, “Company”, “LLC”, “Corp.”, “Inc.”, “Associates”, or any other similar terms which would lead the public to believe that those licensees are offering real estate brokerage services independent of the firm and principal broker.)
- Any webpage that contains a link to an unlicensed entity's website where said entity is engaged or appears to be engaged in activities which require licensure by the Commission.
- Not including the name of the firm or firm's telephone number in the advertising.
- Agent websites that do not have their firm's name and telephone number clearly appearing on each page of the site.

- Incorrect listing data on websites as well as the acknowledgement that the agent's broker may not be the listing broker for the property. In other words, the listing should have a disclaimer stating, "not all listings shown/displayed are listings of the firm/broker."

Discussion: False and Deceptive Advertising

Provide examples in the following categories of advertising that could be considered misleading:

Radio and Television Advertising

Craigslist

Ad Offers & Guarantees

Signage

Social Media

Vehicle Advertising (Car Wraps)

Truth in Lending (Regulation Z)

Others

A Word About “Coming Soon” and “Pocket Listings”

Key Points

- Misrepresentation – is property legitimately coming on market or ploy to build buzz about the property. TREC will bring disciplinary action against a licensee if there is any misrepresentation.
- Signage – signed written authorization from property owner allowing a sign to be put on property. (Ref. TREC Rule 1260-02-.12(2)(c))
- Seller understands minimal options for exposure of property even with the Internet, as not all sites will pick up the listing. As a result, the seller may not get the best price possible.

From the Tennessee REALTORS® Legal & Ethics Hotline

Underprice to Draw More Offers?

QUESTION: Should I market my property at a price below market value in hopes of getting multiple offers and starting a bidding war?

ANSWER: This practice is not recommended. Several provisions of the Code of Ethics and Broker’s Act could be interpreted to prohibit this. First, Article 12 of the Code of Ethics states: *“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 presentations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional.”*

The local board could view underpricing as encouraging a seller to be untruthful in setting a list price that they know full well they would not take.

Second, the Broker’s Act would likely not permit this. Tenn. Code Ann. § 62-13-312(b)(1, 3, 4) states that an agent can be disciplined for:

- (1) Making any substantial and willful misrepresentation;
- (2) Pursuing a continued and flagrant course of misrepresentation or making of false promises through affiliate brokers, other persons, any medium of advertising or otherwise;
- (3) Misleading or untruthful advertising, including use of the term “REALTOR®” by a person not authorized to do so, or using any other trade name, insignia or membership in any real estate association or organization of which the licensee is not a member.

Advertising as a Team

- **Real estate teams** have become more and more popular in Tennessee.
- Teams offer agents the **opportunity to work under an experienced team leader(s)** who can provide the guidance and direction needed to be successful in marketing and selling properties.
- They also **provide both new and experienced agents training and support in focusing on a particular segment of their real estate business** such as working with buyers or marketing properties for sale.
- However, advertising as a team can be somewhat challenging not only for the team members, but also for the principal broker. Clearly seeing how the team operates within a brokerage and under a managing broker has become problematic for TREC.



Over the past several years, the Commission has received multiple complaints from consumers who felt they were misled by a team advertising themselves as a “stand alone” entity and not affiliated with a broker. **Many times, the client is unaware the team is part of a real estate firm and there is a principal broker who has responsibility over the team and their activities.**

Under the new rules, TREC is very specific about how a team should identify itself in all advertising in order not to mislead the consumer. Terms such as

“Real Estate,”	“LLC,”
“Real Estate Brokerage,”	“Corp.,”
“Realty,”	“Inc.,”
“Company,”	“Associates”
“Corporation,”	

cannot be used within a team name.

The rule also says the use of other similar terms that would lead the public to believe that those **licensees are offering real estate brokerage services independent of the firm and principal broker is prohibited.**

For example, if “The John Smith Real Estate Team” licensed with Hilltop Realty noted the team name as the most prominent one in their advertising they would be in violation of TREC rules. Furthermore, usage of “Real Estate” within the team name is prohibited. The firm name must be the most prominent one in all advertising allowing the consumer to see the team is part of the firm and not appearing as a separate entity apart from the firm.

Signage

Real estate signage is one of the most widely used forms of advertising for real estate agents. Various signage used by agents includes “For Sale” and “Open House” yard signs, billboards, bus bench advertising and public wall placards. How the firm and licensee name should appear on the sign has always been addressed under TREC rules and state law but was revised in TREC’s rules on how names should be displayed in all advertising, including signs.

In 2013, Tennessee’s real estate law (specifically T.C.A. § 62-13-310(b)) had been interpreted by the Commission to mean that a licensee’s name on a sign or billboard could not be any larger than the smallest font in the firm name as licensed with TREC. However, in the October 2015 rule changes **the firm name must appear in letters the same size or larger than those spelling out the name of the licensee or the name of any team, group or similar entity.**

Signs on Properties

TREC Rule 1260-02-.12(3)(d)(e)

- Any sign promoting the sale of a property (i.e. “For Sale”, “Coming Soon”, etc.) **cannot be placed on a property without the written authorization of the property owner.** Notice the word “written.” Licensees should be cautioned to not place any signage prior to the written permission from the property owner. The TAR Residential Exclusive Right to Sell Listing Agreements (RF101 and RF102) and the Land/Lot Exclusive Right to Sell Listing Agreements (RF131 and RF132) authorizes the Broker to place a sign and lock box on the property.
- TREC rules also state that no licensee shall advertise property listed by another licensee without *written* authorization from the property owner. Written authorization must be evidenced by a statement on the listing agreement or any other written statement signed by the owner.

Would these “For Sale” signs meet TREC rules?





Internet Advertising

TREC says in addition to all other advertising guidelines specified in their rules, the following requirements shall also be applicable to Internet advertising, **including, but not limited to, social media**:

- The firm name and firm telephone number listed on file with the Commission must **conspicuously appear** on each page of the website.
- Each page of a website which displays listings from an outside database of available properties must include a statement that some or all of the listings may not belong to the firm whose website is being visited.
- **Listing information must be kept current and accurate.** This requirement shall apply to "First Generation" advertising as it is placed by the licensee and does not refer to such advertising that may be syndicated or aggregated advertising of the original by third parties outside of the licensee's control and ability to monitor.

Guarantees, Claims and Offers..."It's Too Good to Be True!"

TREC Rule 1260-02-.12(5)

Unsubstantiated selling claims and misleading statements or inferences are strictly prohibited by TREC. TREC Rule 1260-02-.12(6)(b) says "any offer, guaranty, warranty or the like, made to induce an individual to enter into an agency relationship or contract, must be made in writing and must disclose all pertinent details on the face of such offer or advertisement." **The consumer**

needs to clearly understand the terms and conditions that must be met in order to receive the guarantee, claim or offer made by the licensee.

Take note...TREC will discipline any licensee who violates this rule as this is a serious violation impacting consumers. Historically, the Commission has levied large civil penalties as well as suspending, downgrading and revoking a real estate license as a result of a listing agent or buyer's representative attempting to persuade a consumer to do business with them by offering a guarantee, claim or offer that "sounds too good to be true." Any special offer or guarantee must clearly explain the details in the advertisement (or offer) so the consumer knows exactly what the terms and conditions that must be met to receive the offer or guarantee.

Rebates, Gifts and Prizes

Cash / Rebates.... "If it is cash – dash!"

- Cash rebates/refunds by a real estate licensee are strictly prohibited in Tennessee. Per T.C.A. § 62-13-302(b) *"A real estate licensee shall not give or pay cash rebates, cash gifts or cash prizes in conjunction with any real estate transaction. As part of the Tennessee real estate commission's general rulemaking authority the commission may regulate the practices of real estate licensees regarding gifts, prizes or rebates that are not otherwise prohibited by law."*
- In other words, **you cannot give some of your compensation to a buyer or seller as a refund or rebate.**
- **You cannot pay for your client's closing costs;** however, you can reduce your commission allowing the client to make concessions in the transaction such as lowering the purchase price, increasing seller paid closing costs for the buyer, etc.

Inducement for Business

A licensee can give a non-licensee a gift in order to induce them in doing business with them. This gift, however, must be an inducement for THEM to do business with you...not their friends, family, etc. which would make it a referral fee.

TREC Rule 1260-02-.33 - Gifts and Prizes

- (1) A licensee may offer a gift, prize, or other valuable consideration as an inducement to the purchase, listing, or lease of real estate only if the offer is made:
 - (a) Under the sponsorship and with the approval of the firm with whom the licensee is affiliated; and

(b) In writing, signed by the licensee, with disclosure of all pertinent details, including but not limited to:

1. accurate specifications of the gift, prize, or other valuable consideration offered;
2. fair market value;
3. the time and place of delivery; and
4. any requirements which must be satisfied by the prospective purchaser or lessor.

Pursuant to this rule, **any gift offered CANNOT take the form of cash**. Gift cards may be given, but they cannot be convertible to cash. In addition, you cannot pay closing costs for your client. Please consult with your principal broker prior to offering any gift or prize.

From the Tennessee REALTORS® Legal & Ethics Hotline

A Rebate to the Buyer?

QUESTION: An out-of-state company wants to partner with our agents for referrals. The commission would be split 70/30, with 15% of the 30% going to the company being given to the buyer. Is this legal?

ANSWER: NO, this is not permitted under Tennessee law. The statute states: “A real estate licensee shall not give or pay cash rebates, cash gifts or cash prizes in conjunction with any real estate transaction. As part of the Tennessee Real Estate Commission’s general rulemaking authority the commission may regulate the practices of real estate licensees in regard to gifts, prizes or rebates that are not otherwise prohibited by law.” — Tenn. Code Ann. 62-13-302(b).

Therefore, the 15% could NOT be remitted back to the buyer.

For Discussion - Advertising Misrepresentation

Broker Bob Arnold recently placed a full-page advertisement in the local newspaper containing the following statement in large letters: **“List with me and, if I can’t sell your home in 90 days...I will buy it!”** In addition to this headline, the ad contained multiple pictures of properties Bob sold over the past year, a couple of testimonials from his clients, his real estate firm name and telephone number as well as her picture and contact information. There was no additional information concerning the 90-day “buyout” claim.

Would TREC have an issue with Bob’s claim in her advertising? If so, discuss the reasons a complaint could be filed against him?



Let’s Review

1. You and your assistant are preparing in-house brochures and box flyers for a new listing. Do these materials need to be reviewed by your principal broker?
2. Under the TREC advertising rules what must be most prominent and visible in all advertising?
3. A new team has just been formed at your firm and you have been asked to join them. The team leader says the name of the new team will be “James Smith Real Estate Associates.” Is this name compliant with TREC rules on teams?
4. You are visiting with a sign company in order to have a new “For Sale” yard sign produced. They ask you for specifics on how the sign should look. Under TREC rules, what information will the sign company need in order to provide you a sign that is TREC compliant?
5. According to TREC, what must appear on each page of your website?

6. You want to create a new marketing plan for the listing side of your business. After thinking about it for a few days, you decide to offer a new program for listing clients with the following tag line: “If I don’t sell your home in 90 days I will buy it!” What will you need to do in order to make this offer legal under TREC rules?
7. This Sunday, you are holding an open house at one of your listings. You decide to hold a door prize consisting of a \$50 Visa gift card for the first drawing and a \$75 MasterCard gift card for the second drawing. Can you offer these gift cards as a prize?
8. What four (4) requirements must be met under TREC’s Gifts and Prizes rule?

UNIT 6 - Contracts

A Note About the Authorized Use of Tennessee REALTOR® Forms

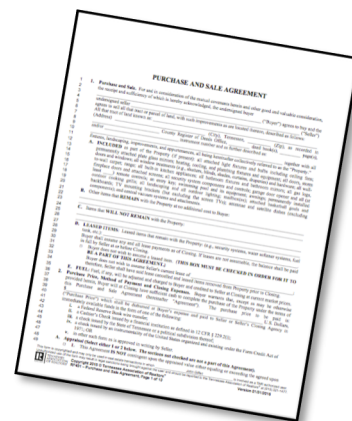
In an effort to protect the unauthorized use of any its form, Tennessee REALTORS® monitors and strictly enforces the copyright protection on all residential and commercial forms found on TAR's website or in Transaction Desk. All Tennessee REALTORS® forms must be generated by an authorized user from the "Forms on the Fly" section of the association's website or the Transaction Desk portal. (Also, several third-party providers have license agreements with Tennessee REALTORS® in order for the forms to be used in their electronic document systems.) Every form contains a "digital identifier" at the bottom of each page noting the authorized user's name. This identifier cannot be filled in by hand. Unauthorized use of any of the Tennessee REALTORS® forms may result in legal sanctions brought against the user by Tennessee REALTORS®.

Tennessee REALTORS® Form Categories

There are two (2) separate sets of forms provided by Tennessee REALTORS® for its members to use – residential and commercial. The **residential forms** will begin with the letters "RF" and the **commercial forms** will begin with the letters "CF."

Form Series

- **100 Series.** This series includes the agency forms and agreements between a real estate firm and its clients/customers such as listing agreements, buyer's representation agreements, terminate of agency agreements, and agreements to show property.
- **200 Series.** This includes disclosures made by the client/customer. Documents in this series include property condition disclosure forms, impact fees/adequate facilities tax disclosures, lead based paint disclosures, etc.
- **300 Series.** This series includes disclosures from the real estate firm to clients and customers. Documents in this series include confirmation of agency status, disclaimer notices, personal interest disclosures, referral for services, etc.
- **400 Series.** This series contains contracts between parties in a real estate transaction. Documents in this series include the purchase and sale agreements, lease agreements, confidentiality agreements, trust money disbursement and release agreements, etc.



- **500 Series.** This series includes exhibits to contracts.
- **600 Series.** This series contains addenda, amendments, counter offers, notifications, etc. This includes back up agreements, right to continue to market property forms, FHA/VA addenda, counter offers, amendments, repair/replacement forms, final inspection documents, notifications, multiple offer disclosures, etc.
- **700 Series.** This series is comprised of miscellaneous documents. It includes things such as referral agreements, compensation agreements, interpleader documents, information sheets, etc.

Before You Write an Offer

The following are suggestions of items you and your client should have prior to writing an offer to purchase:

1. Agency determined and proper paperwork completed – Tennessee REALTORS® form RF 302 – Confirmation of Agency Status disclosure form and possibly RF 302 – Working with a Real Estate Professional.
2. TN Residential Property Disclosure (RF 201), Disclaimer (RF 204) or Exemption (RF 203)
3. Lead Based Paint disclosure (RF 209), if applicable
4. Disclaimer Notice (RF 304)
5. Good Faith Estimate from buyers lender
6. Vendor lists (RF 711)
7. If any known percolation tests, soil absorption rates, or if property contains Exterior Injection Well, you may use Tennessee REALTORS® form (RF 205). You may also want to use RF 205 if the property is located in a PUD or if the seller has knowledge that a single-family residence on the property has been moved from one foundation to another.

REMEMBER THESE TWO IMPORTANT RULES OF CONTRACTS IN TENNESSEE:

TREC Rule Concerning Offers

TREC RULE 1260-02-.08 OFFERS TO PURCHASE. A broker or affiliate broker promptly **shall tender every written offer to purchase or sell obtained on a property until a contract is signed by all parties.** Upon obtaining a proper acceptance of an offer to purchase, or any counteroffer, a broker or affiliate broker promptly shall **deliver true executed copies of same, signed by the seller, to both the purchaser and the seller.** Brokers and affiliate brokers shall make certain that all of the terms and conditions of the real estate transaction are included in the contract to purchase. **In the event an offer is rejected, the broker or affiliate broker shall request the seller to note the rejection on the offer and return the same to the offeror or the offeror's agent.**

NOTE: The NAR Code of Ethics and Standards of Practice provides additional requirements for handling

offers. Standard of Practice 1-7 requires that listing brokers “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”, but does not require them to continue to market the property after an offer has been accepted. Standards of Practice 1-8 concerns buyer’s/tenant’s agents and states that they are required to “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.”

Statute of Frauds

Contracts for the sale of real estate must be in writing and signed by all parties to be enforceable in the state of Tennessee. This is due to the “statute of frauds,” which in Tennessee holds that, **in order to be enforceable, the promise or agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.** Tennessee courts have generally held that an oral contract for the sale of real estate is not enforceable, even though the parties may have “partially” performed on the contract.

Important Terminology in the Contract Impacting Performance

Definition of Days

- All days are in the Tennessee REALTORS® Purchase and Sale Agreement (RF401) are *calendar days* **NOT** *business days*.
- The “start” / “commencement” date is the day following the Binding Agreement Date.
- **IMPORTANT:** The ONLY “drop dead” performance dates in this Agreement are the **Closing Date, Day of Possession, Completion of Repair Deadline** and **Offer Expiration Date**. These performance dates are actual CALENDAR DAYS which means if the date falls on a Saturday, Sunday or holiday, then it will occur on that day rather than rolling to the next business day.
- Be very careful when selecting these dates and CONSULT YOUR CALENDAR first. Holidays are defined by federal law (5 U.S.C. § 6103.) These are: New Year’s Day (January 1), Martin Luther King, Jr. Day (3rd Monday in January), Washington’s Birthday (3rd Monday in February), Memorial Day (last Monday in May), Independence Day (July 4th), Labor Day (1st Monday in September), Columbus Day (2nd Monday in October), Veteran’s Day (November 11th), Thanksgiving Day (4th Thursday in November) and Christmas Day (December 25th)

Lines 411-418: *“the term day(s) used throughout this Agreement shall be deemed to be calendar day(s) ending at 11:59 p.m. local time unless otherwise specified in this Agreement. Local time shall be determined by the location of the Property. **In the event a performance deadline**, other than the Closing Date, Date of Possession, Completion of Repair Deadline (Repair/Replacement Amendment), and Offer Expiration date, occurs on a Saturday, Sunday or legal holiday, the performance deadline shall be extended to the next following business day. Holidays as used herein are those days’ deemed federal holidays pursuant to 5 U.S.C. 6103. In*

calculating any time period under this Agreement, the commencement date shall be the day following the initial date (e.g. Binding Agreement Date).” (Slight paraphrasing for spacing purposes only.)

Time is of the Essence

- A contract clause that emphasizes punctual performance is an essential requirement of the contract. Thus, if any party to the contract does not perform within the specified time period (the drop-dead date), that party is in default, provided the non-defaulting party has made a valid notice of demand of performance.
- If no demand is made, then the clause may be waived. The clause may also be waived by the subsequent acts of the parties such as accepting tardy payments or signing escrow instructions that allow for extensions of time in which to perform. However, if the contract terminates by its language, consult with an attorney if the parties want to “revive” a dead contract or execute a new one.

Binding Agreement Date / Acknowledgement of Receipt

The Tennessee REALTORS® Purchase and Sale Agreement (RF401) defines when the Binding Agreement Date will be:

“_____ hereby acknowledges receipt of final accepted offer on _____ at _____ o'clock ☐ am / ☐ pm, and this shall be referred to as the Binding Agreement Date for purposes of establishing performance deadlines as set forth in the Agreement.”

- The Binding Agreement Date is an **EXTREMELY CRITICAL DATE**. It is very important that this is completed because **it marks the time and date the contract went into effect**.
- This time and date “starts the clock” on the time deadlines in the Purchase and Sale Agreement. (e.g. Inspection deadlines, etc.) Note that it is referred to throughout the contract.

The agent who receives the finally executed contract from the agent representing the last signor of the contract is the one who completes this section. If this is not done, it creates havoc for trying to establish deadlines. It could even mean that a court could void the contract. **FILL THIS IN!** **INSTRUCTOR NOTE:** Discuss in further detail.

Preprinted Deadlines

- **Preprinted deadlines are just as important as those you write in the Agreement!**
- If it's in the contract, it must be done by the date specified.

- Failing to meet deadlines may constitute a breach. An agent that allows a deadline to pass unnoticed may have a complaint filed against them with TREC and/or the local REALTOR® board as well as possibly facing a lawsuit.
- It is imperative to discuss the pre-printed deadlines in the Tennessee REALTORS® Purchase and Sale Agreement (RF401) with buyer clients BEFORE submitting an offer.
- If, for any reason, they will be unable to meet a required pre-printed deadline, this should be noted clearly BEFORE an offer is made or counteroffer is submitted. For seller clients, you must discuss pre-printed deadlines and filled in dates.
- If for any reason, they will be unable to meet a required date or deadline, this should be noted clearly in a counteroffer.

Failure to meet a contractual deadline may result in a breach of contract, forfeiture of trust money, unenforceable performance and, in some cases, liability for civil damages. When a preprinted deadline needs to be changed, you should first check to see if the issue is addressed by another Tennessee REALTORS® form. If not, the EXACT verbiage should be copied with only the number of days for performance changed. By altering the verbiage within the attorney approved Purchase and Sale Agreement (RF401), you could end up making the party's performance unenforceable.

The Tennessee REALTORS® Purchase and Sale Agreement (RF401) contains several performance requirements with time limits associated with them. Can you name some of them?

Notification and Termination of the Agreement

- A party to a contract may elect to **terminate the agreement** due to various reasons. Some of these include the inability to remove the contingencies noted in the agreement or non-performance on the part of either the Buyer or the Seller.
- The Tennessee REALTORS® **Notification form** (RF656) form serves as a notification form for all notices required in the Purchase and Sale Agreement (RF401). This form assists licensees in creating a paper trail of their compliance.
- If **trust money (earnest money) has been paid by the buyer**, the holder of the money must decide if, when and how the money is to be distributed. The Tennessee REALTORS® Earnest Money/Trust Money Disbursement and Mutual Release of Purchase and Sale Agreement” form (RF 481) should be used to distribute the funds and release the buyer, seller and all licensees from all obligations agreed upon in a purchase and sales agreement previously agreed upon. Keep in mind that if either party wants to pursue legal action, they **SHOULD NOT** complete this form. The parties waive all rights to sue if they use this form!

Defaulting on the Contract

If either party to the contract fails to perform as outlined in the terms and conditions of the agreement, the terminating party may have the right to pursue any and all legal rights and remedies against the defaulting party following termination.

- **If a Buyer fails to perform**, there are consequences – trust money is forfeited as damages to the Seller and are applied as a credit against Seller’s damages. The Seller may sue the Buyer for damages or specific performance.
- **If a Seller fails to perform**, there are consequences – the Buyer’s trust money is returned to them and the Buyer may sue the Seller for damages or specific performance.

Possible Causes for Default:

- Failure to close within the timeframe specified in the contract.
- Ignoring the terms and conditions of the contract.
- Failure to perform in “good faith.”
- Terminating the agreement without cause
 - Buyer decides they don’t want to purchase the property.
 - Seller decides they don’t want to sell the property.

For Discussion: Performance Deadlines

Discuss how to handle the following scenarios:

1. In the offer to the Seller, the Buyer puts 12:00 noon on Thursday as the time limit for the Seller to respond. The Seller is driving back home from vacation on Wednesday evening and requests additional time to review the offer. The Seller would like to extend the time limit of the offer. How should this be handled?
2. After extending the time limit of the offer the Seller counters the Buyer’s offer. The Buyer reviews the Seller’s counter offer and makes one minor change that does not impact the price or closing date. The listing agent sends the counter offer to the Buyer’s agent, and he, in turn, submits it to his Buyer for his review. The Buyer is in full agreement with the terms and conditions of the Seller’s counter offer and accept it. They have a deal! The signed counter offer noting acceptance is returned to the listing agent. Who binds the contract?
3. The Purchase and Sale Agreement states that the Buyer will pay to the listing broker the Earnest Money/Trust Money in the amount of \$3,000 within three (3) days of the Binding Agreement Date. The end of the third day has arrived and the listing agent or the listing broker has not yet receive the money. What should happen in this situation?

4. The Buyer is applying for a conventional loan to purchase the Seller's home. Three (3) days after the Binding Agreement Date the Seller has still not received Notification that the Buyer has made loan application and paid for the credit report. What does the Seller need to do?
5. 14 days after Binding Agreement Date, the Seller has not received Notification that the Buyer has signed *Intent to Proceed* with lender and/or evidence of Hazard Insurance. What should the Seller do?
6. The Buyer has all inspections completed within the time frame specified in the contract. They send a RF654 Repair/Replacement Proposal to the Seller listing the items they would like the Seller to repair. This begins the Resolution period of 3 days. The Seller is not in agreement with the buyer's list of repairs and sends back another RF654 detailing what he is willing to do. The Buyer is disappointed but wants to continue negotiating. At the end of the third day there is no resolution. What happens now?

Other Important Components of the Contract

Loan Obligations

- The loan obligations paragraph in the TAR Purchase and Sale Agreement (RF401) is one that sometimes is overlooked by the parties in the contract.
- This paragraph contains performance time frames related to the loan the buyer would be receiving in order to purchase the property.
- The buyer is required to make application for a loan, pay for an appraisal and provide the lender information to the buyer.
- In addition, the buyer has obligations to obtain homeowners insurance, pay for an appraisal, cooperate with the lender on any requests for documentation, and confirm that the purchase is not contingent on the lease or sale of any property. The buyer must also communicate this to the seller in writing. The Notification form is designed to do this. Many agents still do not use the Notification form and fail to have their buyer clients/customers give the proper notice to the seller of these deadlines. This places their client/customer in default that can result in lawsuits.
- And, they must work in good faith to ensure these obligations are satisfied.

Financing Contingency Waived

- The box on line 86 of the TAR RF401 Purchase and Sale Agreement should only be checked if the buyer is not purchasing the property conditioned upon his ability to secure a loan. A

loan may be obtained, but the Agreement is not contingent upon the loan. This is typically known as an “ALL CASH” transaction.

- The buyer cannot use “failure to obtain financing/loan” to get the Trust Money/Earnest Money refunded. **There are NO financial contingencies.** Per the Agreement, the buyer has only five (5) days to provide proof they have the funds to close the transaction. The buyer should obtain Certified/notarized documentation confirming they have the money from the funds source in order to satisfy this performance requirement.

Inspection Contingency

- Buyers have the right to inspect the property they are purchasing.
- The word “Inspections” in the contract includes ALL inspections and reports related to the condition of the property. This would include wood destroying insects, swimming pool, structural inspections, etc. The buyer is responsible for any and all costs associated with inspections.
- All inspections should focus on the structural or system integrity of the property and not cosmetic issues. A buyer cannot terminate a contract if they don’t like the color of the paint in the living room or the wallpaper in the kitchen.

What are the three (3) options the buyer has after completing their inspections?

Inspection Contingency Resolution Period

If the buyer chooses #3, the parties enter the “resolution period” and the Tennessee REALTORS® Repair/Replacement Proposal form (RF654) should be used for negotiating the items the buyer wants repaired and/or replaced. This form is signed only by the party making the proposal and does not go to the lender unless the lender requests it. Once the buyer and seller agree on what items will be repaired and/or replaced, then the final agreement will be submitted on TAR RF655 Repair/Replacement Amendment with both parties’ signatures. It then becomes an amendment to the Purchase and Sale Agreement and must be submitted to the lender.

Remember to watch the performance dates associated with the resolution period. If a written resolution cannot be reached within this time frame, the contract is terminated and the buyer is entitled to a full refund of their Trust Money/Earnest Money

From the Tennessee REALTORS® Legal & Ethics Hotline

Possession of the Property?

QUESTION: I represent a seller on a transaction. The closing date is today. I was under the impression that the seller had until 11:59 pm on the date of closing to vacate the premises. The buyer's agent is under the impression that the seller should be out of the house when they sit down at closing. Which one is correct?

ANSWER: As always, the Tennessee REALTORS® Legal Hotline cannot interpret any executed contract. If your clients have questions concerning their legal rights and obligations under their contract, they should speak with their own legal counsel.

However, the Tennessee REALTORS® contract states that possession is given “with delivery of warranty deed and payment of purchase price”. This may or may not be at the time of closing. But it also does NOT mean that the sellers have until 11:59 on the day of closing to convey possession. The sellers should be prepared to convey possession when they go to closing or other arrangements should be made concerning the conveyance of possession. (INSTRUCTOR NOTE: This should be done via a Temporary Occupancy Agreement even if it is a day other than closing (See Tennessee REALTORS® forms RF 626 and RF 627) These protect the buyers, sellers and agents.

Tennessee REALTORS® Purchase and Sale Agreement RF401 - Exhibits and Addenda

Recommended Documents to Include with the Purchase and Sale Agreement

The Tennessee REALTORS® attorneys have recommended NOT attaching any document to the Purchase and Sale Agreement unless the documents specifically state they are *exhibits, amendments, or addenda* to the agreement (ex. VA/FHA Addendum, standard addendums, occupancy agreements, etc.) By attaching documents that are not part of the agreement the statute of limitations increases and any information contained in the documents will make them a part of the contract.

Many of the requirements of the Tennessee Real Estate Broker License Act of 1973 (such as disclosure of agency, compensation agreements, etc.) only have a statute of limitations of one year. (Agency forms should not be listed as part of the agreement. They are not a part of the agreement between the seller and buyer.) However, real estate contracts have a statute of limitations of six years. Therefore, by attaching documents that deal with issues required by the Broker's Act, you are potentially increasing the time in which you could be sued by SIX times. This is also true of the Property Condition Disclosure Form. It generally has a statute of limitations of one year. If attached to the Purchase and Sale Agreement it increases the seller's liability from one year to six years.¹

Also, never attach the MLS information printout as part of the contract as the information noted on it could become part of the contract. As we all know, information in the MLS is "deemed accurate but not guaranteed."

RECOMMENDED Exhibits/Addenda

- VA/FHA Addendum
- Seller's Right to Continue to Market Property
- Temporary Occupancy Agreements
- "Get a Home Inspection and Property Survey"
- Water Supply and Waste Disposal Notification
- Assumption Agreement Addendum
- Lead Based Paint Disclosure

NOT RECOMMENDED Exhibits/Addenda

- Property Condition Disclosure or Exemption
- Confirmation of Agency
- Septic Disclosure
- Compensation Agreement
- RESPA Disclosure
- Disclaimer

Class Exercise

Students will work in groups on the following situations, using the Tennessee REALTORS® Purchase and Sale Agreement (RF401) and other related forms, if applicable.

Scenario 1:

The buyer is making an offer contingent on inspections. They are willing to pay for the inspection, which they expect to have completed within 10 days. If repairs are needed, they are willing to negotiate with the seller. How would you address this in the offer?

Scenario 2:

The buyers obtain an inspection report identifying needed replacement of the HVAC system, estimated at \$5,000. They want the seller to replace the system before they will proceed with the transaction. How would you proceed if you represent the buyer?

Scenario 3:

You represent the seller. The buyer requests repairs to the roof, estimated at \$1,750. The seller is willing to pay no more than \$500 towards the needed repairs. How would you proceed?

Special Stipulations

- A real estate sales contract contains numerous stipulations and clauses that expand the agreement between the seller and the buyer into concerns that go beyond the financial negotiations and the various contingency agreements.
- In the Tennessee REALTORS® Purchase and Sale Agreement (RF401) many stipulations are addressed throughout the Agreement. However, there are usually “special stipulations” that either the buyer or seller would like to include in the Agreement not addressed in the “boilerplate” language of the Purchase and Sale Agreement.
- Some example of “special stips” range from making the contract contingent on the sale of a home to requiring the property be clean at the time of the final inspection (final walk-through.)
- Whatever the stipulation is, it is important to keep the language simple and understandable. Remember that your Tennessee real estate license does not allow you to practice law and draft language that is not congruent with other parts of the contract or the integrity of the transaction.
- Be careful with the stipulation you insert and how it may impact the parties if they agree to it.

Seek the advice of your principal broker or closing attorney for assistance in drafting the correct wording for the special stipulation(s) you would like to add to the agreement.

Points to Remember

- The preprinted portions of the Purchase and Sale Agreement (RF401) have been approved by the Tennessee REALTORS® forms committee and Tennessee REALTORS® attorneys.
- Handwritten provisions prevail! **When you write something in the special stipulations section, it should be consistent with the rest of the Tennessee REALTORS® Purchase and Sale Agreement (RF401).** Whenever possible, use the same verbiage included in the preprinted portion, referencing the specific line number(s), only changing what is absolutely necessary!
- Before writing something into the special stipulations section, you should **FIRST check to make sure the issue is not addressed by another Tennessee REALTORS® form.**
- **NEVER include phrases such as TBD, actual costs, negotiable, etc.** Always be as specific as possible, especially when it comes to dates, amounts and actions required of either party. If you do not, then the contract may not be enforceable.
- The **Special Stipulations Library (RF707)** exists to assist you in addressing items in this section.
- If you're using the special stipulations section to write in a contingency, there is likely another more appropriate TAR form.
- The special stipulations section can be appropriately used to make simple changes to a preprinted item, such as a required deadline, if the line number is referenced and exact verbiage reprinted, with only the number of days changed.
- **The special stipulations section should NEVER be used to write a new contract.** If you do not have enough room in the special stipulations section use **Form RF621 – Addendum.**

Class Exercise

Class participants should divide into groups to address the following situations. In your groups, decide whether the item should be addressed in the special stipulations section and, if so, how. If the item should NOT be addressed in this section, identify how an alternative form or section of the Purchase and Sale Agreement (RF401) would address it. Choose a representative, who should be prepared to share the group's answers with the entire class.

1. The contract is contingent on the sale of the buyer's home in Indiana.
2. The buyer wants all the carpets in the home cleaned by ABC Carpet Cleaners prior to closing
3. The buyer is purchasing a foreclosed home from Bank of America. The bank, which is the seller, has agreed to allow the buyer to fix loose tile in the hallway bathroom.
4. The buyer would like the home inspected for Radon gas.
5. The buyer is requesting the home be professionally cleaned prior to the final inspection.

Counter Offers

- Any change to the original offer made on any of the TAR Purchase and Sale Agreements (e.g. Purchase and Sale, New Construction, Lot / Land, etc.) constitutes a counter offer. Use TAR Form RF651 Counter Offer to counter the original offer.
- **VERY IMPORTANT NOTE: Unless specifically addressed in the counter offer, all other terms and conditions of the Original Purchase and Sale Agreement will remain the same.** However, the terms and conditions of all other previous counter offers are *NOT* included in this counter offer *unless* they are **RESTATED** in this counter offer.

Case Study – Counter Offers

Buyer's agent, Drake, sent an offer from Buyer Joe to Seller's Agent Ellen to present to Seller Clay who is selling the property located at 1780 Hillside Drive. In the original offer, the Seller is to pay all of the buyer's closing expenses – approximately \$6,000 toward closing costs and pre-paid items. At 9:00 a.m. the next day, Drake receives the Seller's counter offer from Ellen. The counter offer states "Sales price to be \$235,000 with no credit toward buyer's closing costs."

Drake calls Joe and, after careful discussion and consideration, uses the TAR Form RF651 Counter Offer to counter with the following: "Sales price to be \$233,500." There is no mention of the closing costs. Drake emails the last counter over to Ellen at 12 noon.

When Ellen shows the counter to the seller, he approves the sales price, checks the "Accepted" box and signs it. Ellen then sends the signed counter to Drake and he binds the contract.

When Ellen and Clay reviewed the Seller Disclosure and Settlement Statements before closing Clay noticed the he was paying for the buyer's closing costs- \$6,000. He asked Ellen why he was paying for the buyer's closing costs?

Is the Seller responsible for paying the Buyer's closing costs of \$6,000?

Refer to the *"Tennessee REALTORS® Forms Resource Guide"* for the correct form to use in a transaction.

A Final Word on Contracts....

Your Tennessee real estate license does not allow you to practice law. This is one of the twenty-one (21) ways you can lose your license as noted in the Tennessee Real Estate Broker License Act of 1973 among other unpleasant things. In the event your client is impacted by a breach to the contract by the other party, advise your client to seek the advice of a competent attorney who can assist them.

Class Exercise (Optional)

After reviewing the Tennessee REALTORS® Purchase and Sale Agreement (RF401), students will divide into groups. Using the following set of circumstances, each group will fill out the Tennessee REALTORS® Purchase and Sale Agreement (RF401) AND reference any other additional forms if needed. A representative from each group will be asked to present a portion of the offer, as they would assist the buyer in filling it out.

You have been showing property to Jim and Patty Smith for almost three months. Today, they found their “dream” home and have decided to purchase Doris Jones 30-year-old home at 3450 Golf Course Lane. The home is a four bedroom, two and one-half bath brick home in Small Village, TN. They are willing to offer \$205,000 for the property, assuming they successfully close on their current home at 550 East River St. in Mid-City, TN., upon which they have a contract scheduled to close in three weeks. They would like to purchase the home using the VA entitlement that was earned by Mr. Smith while serving in the U.S. Army. They would like to put down as little as possible and prefer to have the current owner pay for all their costs from the lender.

They need a response by tomorrow afternoon, as they like a house at 2098 Tennis Court Way equally as well and want to make sure they are able to secure one of these two homes. Although, they are particularly interested in the storage shed Ms. Jones has in her backyard, as well as the hot tub on the deck.

The Smiths are unfamiliar with the typical arrangements that agents make for clients for appraisals, inspections, etc. and are leaving those things up to your judgment. However, they very much want to have possession at time of closing and would like to close in forty-five days.

The name of your company is Acme Realty. You suggest – and your client agrees – to offer 1% of the offered price as trust money, with your firm holding it in an escrow account.

Tennessee REALTORS® Forms Resource Guide

Tennessee REALTORS® FORM	PURPOSE
RF 302– Confirmation of Agency Status	To confirm the required agency disclosures have been made – this is NOT the same as an agency agreement!
RF303– Notification of Change in Status or Agency Relationship	To confirm a change in agency status
RF 143 & RF144– Buyer Representation Agreement (Non-Exclusive)	As a non-exclusive agency agreement for buyer agency
RF141 & RF142– Buyer Representation Agreement (Exclusive)	As an exclusive agency agreement for buyer agency
RF654– Repair/Replacement Proposal	When the sale is contingent on the buyer completing inspections during the inspections period this form is to be used as a worksheet to negotiate the repairs
RF655– Repair/Replacement Amendment	When the parties agree on repairs, those repairs are listed on this amendment.
RF657– Closing Date/Possession Amendment	To make a change to the closing date and/or possession date specified in the RF401
RF651– Counter Offer	To submit a counter offer – this form should ALWAYS be used instead of scratching out portions of the original offer!
RF401 – Purchase and Sale Agreement	As the standard offer to purchase for residential properties
RF304– Disclaimer	Notice By licensees to notify parties they are NOT experts on property condition/inspection issues
RF209– Lead-Based Paint Disclosure	To fulfill statutory requirements for lead-based paint disclosures
RF201– Tennessee Residential Property Condition Disclosure	By the seller to disclose material facts about a property
RF202– Tennessee Residential Property Condition Disclosure Update	To update the property condition disclosure
RF706– Interpleader	When a broker must interplead trust money dispute

RF161– Agreement to Show Property	To obtain a seller’s written consent to market and show their property
RF656– Notification	To adhere to requirements for notice for certain items within the RF401
RF658– Buyer Authorization to Make Repairs and Improvements Prior to Closing	When the buyer wants to obtain the seller’s consent to have access to the property prior to closing for the purpose of completing repairs
RF481– Mutual Release of Purchase and Sale Agreement and Disbursement of Earnest Money/Trust Money	To establish how trust money will be dispersed
RF707– Special Stipulations Language	To provide examples of appropriate language to use in the special stipulations sections for common issues
RF623– Sellers’ Right to Continue to Market Property	Enables seller to give buyer XX hours to remove certain contingencies in the event an acceptable offer is received
RF624– Sellers’ Notice to Buyer of Receipt of Acceptable Offer	Form to give notice of acceptable offer and removal (or non-removal) of contingencies
RF711– Vendor List	When the licensee recommends vendors such as inspectors, lenders, etc.
RF660– Buyers Final Inspection	To properly document Buyer’s final inspection
RF203– Tennessee Residential Property Condition Exemption	When a property or transaction is exempt from statutory disclosure requirements
RF204– Tennessee Residential Property Condition Disclaimer Statement	When the buyer waives their right to receive the Property Condition Disclosure form
RF621– Addendum “__” to the Purchase and Sale Agreement	Blank, as stated.
RF625– FHA/VA Loan Addendum	When the buyer is getting a FHA or VA loan
RF714– Water Supply and Waste Disposal Notification	When a property is served by a well, septic or other water or waste system
RF708– Timeline Compliance Checklist for P&S Agreement	As a worksheet to keep up with timelines and deadlines within the RF401
RF205– Tennessee Residential Property Condition Disclosure (For Exempt	When the property is served by an exterior injection well or when soil absorption rates or

Properties and Property Residential Disclosures)	percolation tests have been performed. Also includes disclosure for PUD's, sinkholes, house moved from one foundation to another.
RF101– Exclusive Right to Sell Listing Agreement (Designated Agency)	As an exclusive right to sell listing agreement for designated seller agency
RF102– Exclusive Right to Sell Listing Agreement (Seller Agency)	As an exclusive right to sell listing agreement for traditional seller agency

UNIT 7 - Disclosures

Disclosing the Condition of the Property

- When a homeowner elects to sell their home, under state law, they must disclose the condition of the property to any prospective buyer.
- Under the Tennessee Residential Property Condition Disclosure Act, the Property Condition Disclosure, Exemption and Disclaimer provide the buyer with information concerning the property and its condition, if known by the seller.
- The buyer prior to reaching a binding agreement on the purchase of the property should carefully review any of these disclosures/disclaimers.
- In addition, licensees are responsible for ensuring the buyer clearly understands these disclosure forms and be able to answer any questions the client may have concerning them. The licensee, however, should never complete any of these forms for their client. **It is imperative that only the seller FULLY COMPLETES any disclosure/disclaimer on the property condition. Additionally, the licensee should never advise what should be disclosed and what should not be disclosed. These are legal questions and answering them in the practice of law. If a seller has a question concerning what should be disclosed, he should speak with his/her own attorney.**

Tennessee Residential Property Condition Disclosure Act

T.C.A. § 66-5-201; 202; 212; 213

- The Tennessee Residential Property Disclosure Act, enacted in 1994, states that anyone transferring title to residential real property must provide information about the condition of the property.
- The required disclosure is for properties consisting of not less than one (1) nor more than four (4) dwelling units, including site-built and non-site-built homes.
- This law states a real estate licensee does not have to be involved in the transaction in order for the seller to disclose the condition of the property.

- The disclosure made by the seller **SHOULD NOT** be considered a warranty of any kind and should not be used as a substitute for any and all inspections by the buyer.

Required Property Condition Disclosures and Disclaimers

There are three Tennessee REALTORS® forms that deal with the Tennessee Residential Property Disclosure Act. One of these three forms should be completed in every transaction involving residential property. ALL of these should be completed by the SELLER and disclosed to potential buyers. They are:

- **Form RF 201 (Tennessee Residential Property Condition Disclosure form),**
- **Form RF 203 (Tennessee Residential Exemption Notification form), and**
- **Form RF 204 (Tennessee Residential Property Disclaimer form).**

Form RF 201 (Tennessee Residential Property Condition Disclosure form)

- This form is the one most commonly used by licensees for their sellers to complete. This is the one that is given to the seller where he discloses information about the property.

Form RF 203 (Tennessee Residential Exemption Notification form)

- The “Exemption” form concerns those exemptions that the statute has provided for, when a disclosure is not required. These include things such as: the seller has not lived on property at any time in the last three years, some bankruptcies, foreclosure sales, auctions, etc. (please see the form for a complete list).
- In these instances, no form is required, but we recommend using the RF 203 so that your file has documentation in it clarifying that the seller is exempt.
- **Note: Remember, if the seller or licensee is aware of any adverse fact concerning the property it must be disclosed even if an Exemption form is used.**

Form RF 204 (Tennessee Residential Property Disclaimer form)

- The Disclaimer form is RF 204. This is the form that you use when the seller wants to sell the property “as is”. The seller is stating that he is not going to make repairs and is not disclosing anything.

- However, in these circumstances, the buyer **MUST** agree to this disclaimer. If not, then the Condition Disclosure form must be completed if the sale is to proceed.
- If the buyer agrees to accept the Disclaimer, the seller is not obligated to present the disclosure statement (and the buyer does not have to sign it).
- In certain situations (such as someone has a power of attorney for the seller), you can explain that the seller is not able to provide an adequate disclosure form (get the seller's permission or the person holding the power of attorney before stating this to the buyer). This may make them more agreeable to accept the Disclaimer, especially if they understand that they can make whatever inspections they wish and can terminate the contract if they are not happy with the outcome of the inspections.

Percolation Tests, Soil Absorption Rates and Presence of Sink Holes

Under Tennessee law, sellers must also disclose “the presence of any known exterior [water] well”; the results of any known “percolation test or soil absorption rate performed on the property”; the existence of a “sinkhole” on the property; and any known “groundwater erosion causing a surface subsidence of soil, sediment, or rock.” Obviously, these potentially hazardous environmental conditions would be of interest to a potential buyer.

T.C.A. § 66-5-212. Disclosure of known percolation tests or soil absorption rates -- Disclosure of foundation move -- Disclosure of presence of sinkhole.

- (a) In addition to any other disclosure required by this part, the seller shall, prior to entering into a contract with a buyer, disclose in the contract itself or in writing, including acknowledgement of receipt, the presence of any known exterior injection well and the results of any known percolation test or soil absorption rate performed on the property that is determined or accepted by the department of environment and conservation.
- (b) Prior to entering into a contract with a buyer on or after May 20, 2009, the seller shall, where such information is known to the seller, also disclose in the same manner whether any single family residence located on the property has been moved from an existing foundation to another foundation.
- (c) (1) In addition to any other disclosure required by this part, the seller shall, prior to entering into a contract with a buyer, disclose in the contract or in writing, including acknowledgment of receipt, the presence of a known sinkhole on the property.
 - (2) For purposes of this section, "sinkhole":
 - (i) Means a subterranean void created by the dissolution of limestone or dolostone strata

resulting from groundwater erosion, causing a surface subsidence of soil, sediment, or rock; and

(ii) Is indicated through the contour lines on the property's recorded plat map.

Planned Unit Developments

The Planned Unit Development, or PUD, is a type of residential development where the homes are usually grouped together on lots that are smaller than typical and where there are large and open park-like areas within the development. Under state law, a seller must disclose whether or not the property is in a PUD. This information is noted on the Tennessee Residential Property Condition Disclosure (RF201), the Tennessee Residential Exemption form (RF203) and the Tennessee Residential Property Disclaimer form (RF204) and should be completed by the seller.

T.C.A. § 66-5-213. Disclosure requirement where property is located in a planned unit development.

(a) As used in this section, unless the context otherwise requires:

- (1) "Bylaws" mean guidelines for the operation of a homeowner's association that define the duties of the various offices of the board of directors, the terms of the directors, the membership's voting rights, required meetings and notices of meetings and the principal office of the association, as well as other specific items that are necessary to run the homeowner's association as a business;
- (2) "Planned unit development (PUD)" means an area of land, controlled by one (1) or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational or industrial uses, or any combination of these, the plan for which does not correspond in lot size, bulk or type of use, density, lot coverage, open space or other restrictions to the existing land use regulations; and
- (3) "Restrictive covenant" means any written provision that places limitations or conditions on some aspect of use of the property, such as size, location or height of structures, materials to be used in structure exterior, activities carried out on the property or restrictions on future subdivision or land development.

A Note About Property Condition Disclosures and the Role of the Licensee

It goes without saying that licensees should never complete the Property Condition Disclosure, Disclaimer Exemption form for a seller. Property disclosure forms should only be completed by the owner of the property and no one else. However, a licensee should always take the time to review these forms with a seller before they complete them. A licensee should go over each section of the form(s) with the seller and answer any and all questions they have about it. **A licensee should not tell them how to answer or what to note on the document.** These forms are seller disclosures and should only be completed by the property owners(s).

From the Tennessee REALTORS® Legal & Ethics Hotline

Misrepresenting the Property Condition

QUESTION: It is apparent that the seller made several misrepresentations on the Tennessee Residential Property Condition Disclosure form. What recourse does the purchaser have after discovering the actual condition of the property?

ANSWER: There are penalties for a seller blatantly lying on the form. The buyer has several different remedies available to him under the Tennessee Residential Property Condition Disclosure Act. Tenn. Code Ann. 66-5-208(a) states:

“The purchaser’s remedies for an owner’s misrepresentation on a residential property disclosure statement shall be either:

- (1) An action for actual damages suffered as a result of defects existing in the property as of the date of execution of the real estate purchase contract; provided, that the owner has actually presented to a purchaser the disclosure statement required by this part, and of which the purchaser was not aware at the earlier of closing or occupancy by the purchaser, in the event of a sale, or occupancy in the event of a lease with the option to purchase. Any action brought under this subsection (a) shall be commenced within one (1) year from the date the purchaser received the disclosure statement or the date of closing, or occupancy if a lease situation, whichever occurs first;
- (2) In the event of a misrepresentation in any residential property disclosure statement required by this part, termination of the contract prior to closing, subject to the provisions of 66-5-204; or
- (3) Such other remedies at law or equity otherwise available against owner in the event of an owner’s intentional or willful representation of the condition of the subject property.”

There may be additional claims such as violation of the Tennessee Consumer Protection Act and/or fraud. The buyer should speak with his own attorney if he has questions concerning his legal rights.

Pursuant to Tenn. Code Ann. 62-13-403(2), a real estate agent is required to “[d]isclose to each party to the transaction any adverse facts of which the licensee has actual notice or knowledge.” Tennessee law defines an adverse fact as “conditions or occurrences generally recognized by competent licensees that have a 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.” — Tenn. Code Ann. 62-13-102(2).

Therefore, if an agent has actual knowledge of an adverse fact, he must disclose it. If the agent finds something in that report which constitutes an adverse fact, he must disclose it.

Case Study for Updating the Property Condition Disclosure

The following case study is from an actual claim filed with Rice Insurance Services Company, LLC. The class is to divide up in groups and review the case study.

Case Facts

Broker Bill Jones listed a home for sale for a young couple who wanted to find a larger home for their growing family. At the time Broker Jones listed the property, he had the couple fill out a property disclosure form. While several people expressed interest in the home, there were no offers for more than a year. During that time, there was an unusually severe rainstorm, which led to a leak in the roof and stains on the ceiling. Broker Jones and the couple discussed the leak and stains and that they were repaired by licensed contractors. Sometime later, a person moving into the area from out of state made an offer on the property and the contract was finalized. Prior to the closing, the buyer received the original seller disclosure form and obtained an inspection. The inspector did not go on the roof but looked at it through binoculars and indicated it appeared within its useful life.

Several months after closing, there was another rainstorm and another roof leak. The buyer called a roofing company, who told the buyer a patch on the roof suggested a leak was recently repaired. Further, the roofer informed the buyer that the roof was nearing the end of its useful life and would likely leak again if not replaced in the near future. The buyer paid \$17,500 to replace the roof.

The buyer made a claim against the sellers and Broker Jones, alleging the sellers should have updated their disclosure form to disclose the leak that occurred while the property was listed. The buyer's position was that if he had been aware of a recent roof leak, he would have had a roof inspection, rather than relying on the general inspection. The sellers also filed a claim against Broker Jones alleging that he should have advised them to update the disclosure form or otherwise disclose the repair to the buyer.

What should Broker Jones have done in this this situation to possibly avoid problems?

Class Exercise: Proper Disclosures

For the following items, identify which form(s) should be used to make the disclosure.

Issue	Form
1. Lead-based paint was found and removed from the basement of the seller's home.	<i>RF209 (LBP Disc), RF201 (Prop Cond Disc)</i>
2. The seller knows the roof has a minor leak.	<i>RF201 (Prop Cond Disc)</i>
3. The buyer has agreed to waive their right to the seller's property disclosure	<i>RF204 (Prop Cond Disclaimer)</i>
4. The seller added a room to the rear of the house without a permit.	<i>RF201 (Prop Cond Disc)</i>
5. The home has four bedrooms but the seller admits the septic permit only allows for three.	<i>RF201 (Prop Cond Disc)</i>
6. During periods of heavy rain, the backyard tends to have a great deal of standing water.	<i>RF201 (Prop Cond Disc)</i>
7. The home was previously treated for radon.	<i>RF201 (Prop Cond Disc)</i>
8. The seller just replaced the refrigerator, which is included in the sale.	<i>RF656 (Notification), RF401</i>
9. The seller's home was previously treated twice for termite damage.	<i>RF201 (Prop Cond Disc)</i>
10. A neighbor's fence encroaches two feet onto the left side of the seller's property but they have refused to move it.	<i>RF201 (Prop Cond Disc)</i>
11. The buyer is considering waiving their right to an inspection.	<i>RF656 Notification RF204 (Disclaimer Notice), RF712 Get A Home Inspection and Property Survey</i>
12. The seller's property contains an exterior injection well, which is in working order.	<i>RF201, 203 and/or 204 (Ext Inj Well Disc)</i>
13. During the contract period, the seller discovers a significant amount of water damage in the rear wall of an upstairs closet.	<i>RF201 (Prop Cond Disc)</i>
14. The developer of a vacant lot of land now listed for sale has paid a \$400 impact fee to the city with the installation of utilities.	<i>RF207 (Impact Fee Disc)</i>
15. The seller has never occupied the property.	<i>RF203 Prop. Cond. Exempt</i>
16. The seller's property contains a large storage shed they are planning on having moved to their new home.	<i>RF653 Amendment to the Purchase Agreement; RF401 Purchase and Sale Agreement</i>

Case Study: Buyer Representative and Disclosure

The following case study is from an actual claim filed with Rice Insurance Services Company, LLC. The class is to divide in groups and review the case study.

Case Facts

Broker Joan Smith represented a first-time homebuyer who was happy to find a newer home in a desirable area of town. The buyer made an offer on the property, which was accepted. During the due diligence period, the buyer received the seller's disclosure statement, which disclosed minor cracks in the kitchen wall that had been repaired. The buyer also had the property inspected and reviewed the inspection report.

Approximately two years after closing, the buyer noticed minor cracks in the kitchen walls and the tiled kitchen floor. A few months later, the floor began to buckle. The buyer had a contractor look at the issue, and he recommended the buyer contact a structural engineer. The structural engineer determined the foundation was not sufficient given the type of soil and recommended adding piers to the foundation at a cost of \$82,000.

The buyer sued Broker Smith, the seller, and the seller's broker. The seller testified she only lived in the property for a short time and did not realize there were structural problems. She said that the cracks in the kitchen wall were there when she purchased the property, and she had them spackled and covered when she painted the kitchen. The seller reminded the buyer that she had disclosed the cracks and repair on the disclosure statement.

The buyer turned his attention to Broker Smith, claiming he trusted Broker Smith to protect him in this transaction and she should have told the buyer that he should investigate the cause of the minor cracks. Broker Smith said that she did not review the disclosure form, and even if she had, she would be unlikely to comment on specific responses. Further, Broker Smith is not a contractor and not held to be an expert that field. However, the buyer argued that it is fairly common knowledge among people who work with homes that wall cracks may suggest a structural problem. The buyer also argued he was not familiar with real estate or construction, so he did not realize cracks may indicate structural problems.

UNIT 8 - Property Management

Introduction

- If you are going to engage in property management (i.e. you are going to lease, list or manage **real estate**, or promote the rental of **real estate**, **you will need a broker's license**. [Ref. T.C.A. § 62-13-102(4)] The Broker's Act defines "Broker" under this rule as *"any person for a fee, commission, finder's fee or any other valuable consideration from another who solicits, negotiates, or attempts to solicit or negotiate the listing, sale, purchase, exchange, lease or option to buy, sell, rent or exchange any real estate...collects rents or attempts to collect rents."*
- Many firms in Tennessee have created property management divisions within their companies to address the growing number of property owners who want to lease their properties and manage the income and expenses associated with the rental. However, property management can be challenging for those who do not practice it on a regular basis.



Property Management is Not for Everyone

Before providing property management services, you must be aware of what lies ahead for you.

- **Property management is considerably different from residential real estate transactions.** Overseeing properties on a regular basis requires a considerable amount of time and effort.
- A couple of questions you must ask yourself before entering property management are: Is this something I want to do on a part-time or full-time basis? Is the return on investment worth my time, energy and financial resources? Maybe yes, maybe no. It really depends on you and the goals you established for this component of your business.
- Many times, the owner of the property is relying on you, the property manager, to ensure his investment is protected and is properly overseen to ensure costs are kept within budget, the tenants are paying their bills, maintenance items are resolved quickly, etc.
- Prior to adding property management to your business mix and revenue stream you must first consult your principal broker and you must be aware of the Tennessee Landlord & Tenant laws and IF the county where the property is located is obligated to these rules.
- In addition, taking several courses and seminars on property management should be a top priority if you plan on becoming a property manager. Courses are offered through real estate

schools, local REALTOR® associations or professional associations such as The Institute of Real Estate Management, an affiliate of the National Association of REALTORS® (<http://www.irem.org>)

- You should also consult with your E & O provider to ensure that you have the proper insurance coverage for property management or whether an additional rider will be required.

The Tennessee Uniform Residential Landlord and Tenant Act

There are specific laws concerning property management including the Tennessee Uniform Residential Landlord and Tenant Act, Title 66, Chapter 28. This statute only applies in the following counties with a population of more than 75,000:

Anderson, Blount, Bradley, Davidson, Hamilton, Knox, Madison, Maury, Montgomery, Rutherford, Sevier, Shelby, Sullivan, Sumner, Washington, Williamson and Wilson.

This act provides specific information on the rights of both the landlord and the tenant, required disclosures, handling of security deposits, late fees, legal procedures for lease termination and tenant eviction, etc. It is important anyone who engages in property management familiarizes themselves with this law and how it might impact the manner in which they manage properties.

The law applies only to counties with a population of at least 75,000.

Some Key Points on Property Management in Tennessee

Management Agreements

- It is imperative a property manager and owner establish a *Management Agreement*.
- **This agreement creates the general agency relationship between the owner and the property manager and defines the duties and responsibilities of each party.**
- The agreement should cover all the duties and responsibilities of the property manager and the owner including who is responsible for handling setting up and paying for any repairs as needed.

Escrow Accounts and the Proper Handling of Security Deposits

TREC requires each broker to maintain a separate escrow account for the purpose of holding any funds which may be received in this fiduciary capacity as deposits, earnest money, or the like.

Rental deposits must be held in a separate account. [Ref. TREC Rule 1260-02-.09(2)]

- The Tennessee Uniform Residential Landlord and Tenant Act specifies how security deposits are handled when received by the property manager as well as distribution upon vacating the property:

All landlords of residential property requiring security deposits prior to occupancy are required to deposit all tenants' security deposits in an account used only for that purpose, in any bank or other lending institution subject to regulation by the state of Tennessee or any agency of the United States government.

- The act also is specific as to the process followed prior to vacating the property including timeframes, rights of the parties, written documentation for recovery of damages and a security deposit statement. (Many agents turn over security deposits to owners directly who do not perform proper move outs, or the agent does not, which leads to litigation of security deposits.)
- If a property is located in a county **not** subject to the Landlord and Tenant Act, TREC requires a separate account for security deposits. TREC Rule 1260-2-.09 (12) states, “*In addition to the escrow or trustee account referenced in paragraph (2), all trust money received and held which relates to the lease of property must be held in one (1) or more separate escrow or trustee accounts.*” Therefore, this would need to be in a separate account from any earnest money or rent money.

From the Tennessee REALTORS® Legal & Ethics Hotline

QUESTION: I’m the managing broker and I have agents who want to do property management. I want no part of this activity. Is there a way they can have their own escrow account for this that will not involve our firm financially other than insurance is concerned?

ANSWER: NO. **The agents cannot have their own escrow account.** Under the Broker’s Act, the Broker is responsible for any funds that come into the company which belong to third parties and is ultimately responsible for ensuring that they are deposited into the escrow account. Brokers are responsible for opening the escrow accounts.

Common Exemptions from Licensure for Persons Working in Licensed Property Management (Ref. T.C.A. 62-13-104)

A person working in licensed property management can:

1. Collect rent payments
2. Order maintenance requests of tenants
3. Show apartments
4. Procure standardized leases (cannot negotiate)

62-13-104(E) “A resident manager for a broker or owner, or employee of a broker, who manages an apartment building, duplex or residential complex where the person’s duties are limited to supervision, exhibition of residential units, leasing or collection of security deposits and rentals from the property. The resident manager or employee shall not negotiate the amounts of security deposits or rentals and shall not negotiate any leases on behalf of the broker.”

Also....

- You may manage without a license **if you own the properties solely as the individual.**
- If an officer of a Corporation (that is not in the rental business) has been granted permission as noted in Board of Directors meeting minutes to dispose of real estate this rule will not apply. (Note: This exemption will not apply if the officer is receiving additional compensation directly related to the value of the real estate being disposed [i.e. a commission.]

E & O Coverage and Property Management

Many E & O carriers do not provide coverage for property management in their standard E & O policies. If you are involved in property management in any way you will need to have adequate protection from your insurance company. Contact your carrier for additional information on how to add a property management rider to your current policy.

Principal Broker Supervision of Property Management Activities

- Under the Broker’s Act T.C.A. § 62-13-312(15) it states a principal broker may be disciplined by the Commission for “failing to exercise adequate supervision over the activities of any licensed affiliate brokers within the scope of this chapter.” **Brokers are responsible for ALL activities their affiliates are engaged in – including property management.**
- Brokers need to be aware of the management agreements signed between their licensees and property owners.

- All firms should have written policies concerning the expectations the broker has with his affiliates who are engaged in property management.
- Agency agreements should be written in a way that provides protection between the agent and the landlord. In these agreements, it should (1) be clear as to who is responsible for collecting the rental deposits, negotiate tenant rental and lease agreements, check applicant or tenant references, including credit reference; (2) who will physically maintain the condition of the property; conduct tenant relations; collect rent and other payments; (3) conduct tenant policies; supervise on-site manager, and discuss financial matters relating to management of the real estate with owners.
- Brokers also need to ensure their licensees who are engaged in property management are within TREC rules on agency and fiduciary responsibilities, advertising, lease contracts and disclosures as well as fair housing guidelines.
- A written company policy on property management should be in place and should clearly outline the expectations of the broker for any agent who manages properties.

Area of Emphasis for Property Management – Reconciliation & Tenant Ledger

Reconciliation

- Firms should complete a monthly reconciliation that shows the internal bank account record agrees with the actual bank statement balance.
- Any discrepancies should be explained and the records should be corrected to reflect the correct bank balance.

Tenant Ledger

- Firms should maintain individual tenant ledgers that show the chronological sequence of transactions that have taken place over the course of the year.

Common Issues and Challenges...

1. People not knowing if the Landlord & Tenant Act applies to their area.
2. The Property Manager not generating monthly reports showing income and expenses for each property.
3. Owners who can't afford or are unwilling to maintain their property.

4. Owners who want to screen tenants with the agent.
5. The worst thing from a legal standpoint is eviction of a tenant.

Sanctions Imposed by TREC for Property Management Violations

- In 2015, approximately thirteen-percent (13%) of the total number of complaints received by the Tennessee Real Estate Commission were associated with property management.
- Many of these complaints are from consumers who feel the property management company and/or their representative(s) have not conducted themselves under in a legal, professional and/or ethical manner.
- Many of the complaints reviewed by the Commissioners involve unlicensed activity. In Tennessee, you **MUST** have a real estate license if you are engaging in property management activities that involve the consumer.

Be aware that TREC is serious about violations of the Broker's Act and TREC rules when it comes to property management. Recent disciplinary action by the Commission confirms this fact. With the increase in rental activity over the past couple of years more and more scrutiny by TREC of how licensees and their brokers are overseeing property management.

Civil penalties and other administrative enforcement actions recently imposed by the Commission include:

- Activity requiring a Tennessee real estate license (T.C.A. § 62-13-102(4) and (TREC Rule 1260-02-.32)]
- Mismanagement of tenants' rental monies, separate escrow accounts and security deposits (TREC Rule 1260-02-.09)
- Misrepresentation
- Advertising violations

Appendix

Tennessee Real Estate Commission (TREC) Frequently Asked Questions

Firm FAQ's

How should Deposits and Earnest Money be handled?

Brokers are responsible at all times for deposits and earnest money accepted by them or their affiliate brokers, in accordance with the terms of the contract. The broker shall maintain for a period of at least (3) years accurate records of the account showing:

- (1) The depositor of the funds;
- (2) The date of deposit;
- (3) The date of withdrawal;
- (4) The payee of the funds; and
- (5) Other pertinent information that the commission may require.

(See: TCA § 62-13-321)

Rental deposits must be held in a separate account.

Funds should be disbursed or interplead within twenty-one (21) calendar days from the date of receipt of a written request for disbursement of earnest money. (See: TCA § 1260-02-.09)

What documents must a principal broker maintain as a part of the firm's records?

Firms are required to keep records of all real estate transactions for a period of three years. These files must contain, at a minimum, the following:

- Listings
- Offers (Even offers that did not become contracts)
- Contracts
- Closing Statements
- Agency Agreements
- Agency Disclosure Documents
- Property Disclosure Forms
- Correspondence
- Notes

NOTE: Tennessee REALTORS® recommends that records be kept for a minimum of seven (7) years. This is because the statute of limitations for breach of contract (default) is six (6) years. Records include the following (from TREC's website): Listings, offers (even offers that did not become contracts), contracts, closing statements, agency agreements, agency disclosure documents, property disclosure forms, correspondence and notes.

What information must appear in all advertising?

Rule 1260-2-.12 ADVERTISING, provides the minimum information that must appear in all advertising including Internet advertising. The firm name and firm phone number must appear in all advertising as well as every page of a website.

May a Principal Broker act as a Principal Broker for two (2) firms?

YES. T. C. A. § 62-13-309(g) A principal broker may act as a principal broker for two (2) firms as long as both firms are in the same location. As used in this subsection (g), “the same location” means that both firms are located at and use the same physical address.

Does TREC allow home offices?

A licensee may have the main office or branch office of a firm in his home if the zoning allows a real estate office at that location. The office must have a firm license and Principal Broker

How do I make changes to my firm’s name?

In order to change your firm name, you will need to complete a TREC-1 form for the firm and for each affiliated licensee in the firm. You will need to remit the fees as set forth in the TREC 1 form for the firm and for each affiliated licensee. You will also need to send documentation from the Secretary of State verifying the firm name change.

Education FAQ’s***What is the TREC Core Course?***

The TREC Core Course is a specific six (6) hour course designated by the Commission which is required to be taken by licensees who must complete the 16 hour continuing education requirement. Licensees should remember that a failure to complete the TREC Core Course will prevent renewal of the license even if the licensee completes a total of 16 hours of education. (The Commission could increase the number of hours in the required Core Course)

I want to take an education course in another state for a designation I am working on. Will I automatically get credit because it was given by the national association?

No, all courses must be pre-approved by the Commission. You are responsible for ensuring that the courses you complete are approved by the Commission. The sponsor must apply for course approval prior to the course being given. TREC does not give retroactive credit.

Where can I check my Education Credits on file with TREC?

Please visit, <http://verify.tn.gov>.

When are Continuing Education (CE) Classes Due?

Successful completion of 16 hours of CE (10 elective and 6 mandatory TREC CORE) is a condition precedent to renewal and must be completed on or before the expiration date of the license. All CE must be loaded into the TREC System by the sponsor. By Rule, the sponsors have 10 business days to upload the CE attendance rosters.

Do you recommend any continuing education/coursework classes and companies?

Tennessee Real Estate Commission (TREC) does not recommend schools, classes or instructors. All classes and instructions listed on the TREC website under approved schools and courses have been approved by the Commission for CE credit. A Complete Listing of Schools/Courses can be found under Education within the TREC website (<http://www.tn.gov/commerce/topic/rec-education>). Under Education, you will also find the link for application packets and the TREC Instructor Training manual.

I have finished my Continuing Education (CE), who do I send my certificates to?

The CE provider is responsible for sending the certificates. They have up to 10 working days to send the Tennessee Real Estate Commission (TREC) the certificates. As soon as we receive the certificates the information will be posted to our website. You can verify your continued education at <http://verify.tn.gov/>.

What are my education requirements (Affiliate Brokers/Brokers/Timeshare Sales Person)?**Affiliate Brokers:**

Pre-license: 60 Classroom Principles Course and 30 Hour Course for New Affiliates.
Continuing Education: 16 hours total. The “TREC Core” course is a MANDATORY course.

Brokers:

Pre-license: 120 hours including the 30 classroom hour “Office and Brokerage Management” course.
Post-license: 120 hours during the first 3 years of licensure.
Continuing Education:

Brokers licensed as Brokers after January 1, 2005, must complete continuing education requirements after completing post-license education, including the TREC Core course.

Timeshare Salespersons:

Pre-license: 30 hours of classroom training
Post-license: None
Continuing Education: None

Unlicensed Activity FAQ's***What activities require a license?***

Any person who performs or offers, attempts or agrees to perform any single act defined in TCA § 62-13-102, is required to be licensed.

What may an unlicensed employee, assistant or secretary do?

- Answer the phone, forward calls and give information contained only on the listing agreement as limited by the broker.

- Fill out and submit listings and changes to any multiple-listing-service.
- Follow up on loan commitments after a contract has been negotiated and generally secure status reports on the loan progress.
- Assemble documents for closing.
- Secure public information from courthouses, utility districts, etc.
- Have keys made for listings.
- Place ads that have been approved by the Principal Broker.
- Receive, record and deposit earnest money, security deposits and advance rents under the direct supervision of the Principal Broker.
- Type contract forms for approval by licensee and Principal Broker.
- Monitor licenses and personnel files.
- Calculate, print or distribute commission checks.
- Place signs on property.
- Order repairs as directed by the licensee.
- Prepare for distribution fliers and promotional information that have been approved by the Principal Broker.
- Deliver documents and pick up keys.
- Place routine telephone calls on late rent payments.
- Gather information for a comparative market analysis (CMA).
- Unlock property under the direction of a licensee.
- Disclose the current sales status of a listed property.

What can't an unlicensed employee, assistant or secretary do?

- Make cold calls by telephone or in person to potential clients.
- Show properties for sale and/or lease to prospective purchasers.

- Host open houses, home show booths or fairs.
- Discuss or explain listings, offers, contracts, or other similar matters with persons outside the firm.
- Negotiate any terms of a real estate transaction.
- Negotiate or agree to any commission split or referral fee on behalf of a licensee.
- Be paid any compensation which is dependent upon, or directly related to, a real estate transaction

May I pay an unlicensed assistant?

Unlicensed assistants can be paid by the licensee for all clerical and secretarial activities conducted on behalf of the licensee. An unlicensed assistant cannot be compensated for the performance of duties that require a license. (See: TCA § 62-13-301)

Special Note from Author: Furthermore, unlicensed assistants should be paid on a regular basis – such as weekly, bi-monthly, etc. They should NOT be paid per transaction as that creates the impression that they are being paid a commission.

I have a licensed assistant. How can I pay them for activities that require a license?

A person engaged in activities that require a license must have a valid active license and be affiliated with a licensed real estate firm. Compensation received for activities that require a license must be paid by the licensed real estate firm where the assistant is affiliated.

Can I sell real property at auction using my real estate license and my auction firm license?

No, you can only sell real property through the licensed real estate firm where you are affiliated. Your licensed auction firm could sell real property only if it obtained a real estate firm license. A real estate firm must have a principal broker. You would then need to transfer your license to the new real estate firm in order to be able to act as a real estate agent for the auction company.

I am licensed in another state. Can I visit Tennessee to list or sell real estate and “partner” or “cooperate” with a Tennessee licensee in order to avoid obtaining a Tennessee real estate license?

No. A real estate licensee from another state or jurisdiction cannot “cooperate” or “partner” with a Tennessee licensee in order to conduct business that requires a real estate license in this state without obtaining a license issued by the Tennessee Real Estate Commission (TREC). A licensed Tennessee broker may pay a commission to a licensed broker of another state provided such non-resident broker does not conduct in this state any of the negotiations for which a commission is paid. (See: TCA § 62-13- 302)

A lawyer has contacted me and wants to send a referral and receive a referral fee from my firm. Can I pay him a referral fee?

No. A lawyer can only receive a referral fee or commission if they are properly licensed as a real estate broker or affiliate and the compensation is paid to them by the licensed real estate firm where they are affiliated.

Licensee FAQ

After I pass the required licensing examination, how long do I have to apply for my license?

Once you have passed the exam, you have 6 months to apply for your license. You must send everything to the Commission in one package within 6 months of passing the exam. All required deadlines must be met. (See: TCA 62-13-304)

Are attorneys exempt from pre-license requirements?

No, attorneys must complete the same requirements as all other applicants. If the attorney completed certain classes these hours may be used to fulfill their education requirements for the initial affiliate license. The applicant will need to obtain a transcript from law school to provide to the Commission.

How often do I need to renew my license?

Every two (2) years the affiliate broker shall provide certification of satisfactory completion of sixteen (16) classroom hours in real estate courses at any school, college or university approved by the commission. All documentation and fees that are a prerequisite to the renewal of a license or registration shall be delivered to the commission prior to the expiration date of the license. (See: TCA 62-13-303 and TCA 62-13-307)

How do I change my firm affiliation?

In order to change your firm affiliation your new principal broker will need to create an account with <https://apps.tn.gov/ciupdates/>. Once he or she has created an account your new principal broker will be able to change your firm affiliation by completing the form as directed and submitting the fee by credit card. The confirmation of payment generated upon completion of the form must be retained to confirm that the transaction has been successfully completed. You may also complete and send in a TREC 1 form with the required fee to TREC.

What are the requirements for licensure if actively licensed and residing in another state?

You will need to complete and submit a "Worksheet A" form so that we can evaluate your education and your examination history.

You will need to submit a certified license history from each state in which you have previously been licensed.

After the above items are sent, the Tennessee Real Estate Commission will review your application and a staff member will contact you with the next steps.

(See: TCA 62-13-302)

How do I obtain a new Affiliate Broker License?

In order to apply for a Real Estate Affiliate Broker license, you will need to complete the following:

Affiliate broker candidates must complete sixty (60) hours of real estate education in real estate principles/fundamentals before they take the examination and an additional approved 30 hour course for new affiliates prior to a license being approved and issued.

Proof that the education described above has been completed will be forwarded by the school where the education was completed to a PSI examination center.

You may not register for the examination until the school has provided that information to PSI. The school will also provide you a certificate or letter of course completion that you must submit to Tennessee Real Estate Commission (TREC) with your application for a license.

A letter or certificate of completion of the "Course for New Affiliates" must also be submitted with the license application.

All applicants must be fingerprinted in accordance with the instructions set forth on the TREC site.

(See: TCA §62-13-303)

What could keep me from obtaining a Tennessee Real Estate License?

The Commission very carefully examines all applications. Applicants who have been convicted of, pled nolo contendere to, pled guilty to or been granted first offender treatment upon being charged with any criminal offense other than a traffic violation or applicants who have held professional licenses which have been disciplined are thoroughly scrutinized. If you have a history of any of the above, you may seek a preliminary decision from the Commission prior to spending time and money taking the pre-licensing course and the examination by completing the "Application for Decision Regarding Prior Criminal Conviction (s) and/or Disciplinary Sanction(s)" and submitting it to Tennessee Real Estate Commission (TREC) with required backup documentation. (See: TCA 62-13-303)

What do I need to send the Commission along with my application?

Documents required for an affiliate broker's license:

- Application with picture - this is obtained at the testing center upon successful completion of the examination
- Proof of High School Graduation
- Proof of completion of pre-license education
- Proof of errors and omissions insurance policy
- Payment of all fees due.

- Documents required for a broker's license:
- Application with picture - this is obtained at the testing center upon successful completion of the Tennessee Broker's examination.
- Proof of errors and omissions insurance policy.
- Payment of all fees due.

(See: TCA §62-13-303)

How do I retire my license?

If you wish to stop practicing real estate for any reason, but do not want to give up your real estate license, you may place your license in retirement. In order to retire your license you must complete a TREC Form 1 and submit it to TREC along with any fees. While in retirement, you cannot participate in any real estate transactions; however, you may receive commissions from transactions completed prior to retirement.

YOU MUST CONTINUE TO RENEW YOUR LICENSE AND PAY THE RENEWAL FEE.
(See: Rule 1260-02-02)

How do I request a license certification?

The Certification Request form must be completed in its entirety and mailed to TREC with the appropriate fee.

How do I make changes to my name?

In order to change your name, you will need to complete a TREC 1 form and submit that, along with the required documentation (for example: marriage license, court order, SS card, or government issued id) that evidences the name change and the required fee to TREC.

When I Transfer to A New Firm, What Happens To My License?

Upon transferring to a new firm, you are responsible for taking your physical wall license from your previous firm to the new firm you will be working with. If your license is sent in with the TREC 1 form to transfer, you will be responsible for submitting a new TREC 1 form to request a duplicate license and a \$10.00 fee will incur.

Source: This information was obtained from the TREC website.

ABOUT THE AUTHOR

John Giffen, ABR, CRB, CRS, CDEI, GRI, SRES, SFR, e-PRO, CRESC, BROKER

John Giffen is an award-winning real estate broker, manager, agent, author, and real estate educator. He is currently Director of Broker Operations for Benchmark Realty, LLC in Franklin, Tennessee. He served as the principal broker for Benchmark for many years as well as for ERA and Real Living franchise companies in the Nashville area. John is a licensed real estate broker and holds numerous industry designations and certifications including the Certified Real Estate Brokerage Manager (CRB) and Certified Residential Specialist (CRS) designations from the National Association of REALTORS® and the GRI (Graduate, REALTOR® Institute) designation from the Tennessee REALTORS®. He also earned the Certified Distance Education Instructor (CDEI) designation from the International Distance Education Certification Center affiliated with the Association of Real Estate License Law Officials (ARELLO.). John received his Bachelor of Science in Business Administration from Lambuth University, now the University of Memphis at Lambuth, and has completed graduate coursework in management and marketing studies.

As a real estate educator and proponent of professional development, he is a Tennessee Real Estate Commission (TREC) approved course instructor as well as the author of several TREC approved continuing education courses on real estate contracts, agency, licensing issues, buyer representation, property marketing, real estate ethics, and transaction behavior. He works closely with the Tennessee REALTORS® and other TREC approved real estate providers in developing new courses for license renewal. He has also been called on by PSI Services, TREC's approved testing vendor, to be a Subject Matter Expert. He founded Real Estate Learning Systems, LLC (RELS), a professional development and training company offering continuing education classes, training and reference materials for REALTORS® and professional curriculum design services for REALTOR® associations as well as private real estate education course providers.

He is a member of the National Association of REALTORS®, Tennessee REALTORS®, Greater Nashville REALTORS® and the Williamson County Association of REALTORS®. He has served on the Board of Directors of the Williamson County Association of REALTORS® and various committees at TAR, GNAR and WCAR. He was selected as the *2014 REALTOR® OF THE YEAR* by the Williamson County Association of REALTORS®. He has membership in numerous real estate industry organizations including the Council of Real Estate Brokerage Managers, the Council of Residential Specialists and the Real Estate Educators Association (REAA).

His latest book *"Do You Have a Minute? An Award-Winning Real Estate Managing Broker Reveals Keys for Industry Success"* is available on Amazon.com in multiple formats as well as select bookstores.

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