



2021-2022  
**TRECCORE**  
PRINCIPAL BROKER

*Developed for*  
**Tennessee Real Estate Education Foundation**  
*in Cooperation with*  
**Tennessee REALTORS®**

*Written by*  
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CRB, CRS, CDEI, CRI, BROKER

**Instructor Manual**





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Tennessee Real Estate Education Foundation





## A Note for Instructors

Thank you for teaching the 2021-2022 TREC Principal Broker Core Course from the Tennessee Real Estate Education Foundation in cooperation with Tennessee REALTORS®. This course is an eight (8) hour Tennessee Real Estate Commission (TREC) approved continuing education course.

This *Instructor Guide* has been written to assist you in teaching your class. This guide corresponds with the *Participant Guide* handout your class attendees will use during the course. However, **the page numbers in this guide DO NOT CORRESPOND with the page numbers in the participant's course handout.** It is recommended you have a copy of the participant handout close by so you can reference the page numbers in their handout.

### Content

This course curriculum has been written in a way so the principal broker can effectively learn the material and apply it in managing their agents and real estate office. **It is very important you thoroughly read over this material prior to teaching your class so you are well prepared on the day you teach.**

The material is divided into twelve (12) instructional units. Each unit contains various class exercises and/or case studies for you to use in order to engage the class participants in understanding the topic being reviewed. Time may limit the use of all of the exercises, but it is important to utilize as many of these as you can in order to engage the class participants in understanding the topic being reviewed. Most of these activities work best when the class is divided into smaller groups so the subject matter in the exercise may be fully discussed.

### Instructor Notes in the Guide

Throughout this handout you will find **"INSTRUCTOR NOTES" highlighted in RED** that provide you with the correct answer/response to the question, exercise, or case study being covered. **Review these notes prior to class** so you will be prepared in providing the class with the correct answer/response. Some of these notes are lengthy as they provide you with detailed information in responding to the more complex subject matter found in the course.

### Classroom Time

No two instructors possess the same teaching methods. Instructors have various teaching styles and delivery. In order to effectively deliver the course content it is imperative you keep track of the time as you progress through the course. The curriculum was written so it can be presented within the eight (8) hour time frame. A proposed timed outline is included in this guide to assist you in presenting the course.

You will encounter various questions and comments from class participants as you progress through the course material. Interaction is important for any class to be successful. This adds to the classroom experience and engages the class in some great discussion and sharing of experiences. However, questions and comments sometimes can go off in a direction that is not relative to the topic being discussed. As the instructor you will need to manage the conversation(s) to ensure the class remains focused so they can learn the topics TREC requires them to know and retain as they practice real estate in Tennessee.

Again, thank you for teaching the TREC Principal Broker Core course. We wish you and your class participants all the best in your time together!

**-Tennessee Real Estate Educational Foundation (TREEF)**



## 2021-2022 TREC Principal Broker Core Course

### Recommended Instructional Time

This course is approved for eight (8) hours of continuing education by the Tennessee Real Estate Commission.

Per TREC Rule 1260-05-.03(2), “each hour of classroom instruction required by Tenn. Code Annotated § 62-13-303 shall **consist of fifty (50) minutes of actual instruction.**” As the instructor, you will manage your classroom time as you see fit. Since this is an eight (8) hour class you should allocate time for short breaks and lunch. The length of each break will be dependent on how you progress with the material. Lunch should be between thirty (30) and forty-five (45) minutes.

Component	Time Required	Instruction Content
1	5 minutes	Introduction to the Course
2	20 minutes	Unit 1 – The Role of the Principal Broker
3	35 minutes	Unit 2 – Principal Broker Supervision of Affiliate Licensees
4	40 minutes	Unit 3 – Managing Integrity and Professionalism
5	20 minutes	Unit 4 – TREC Rules for Licensing / License Recognitions
6	45 minutes	Unit 5 – TREC Law, Rules, and Regulations
7	35 minutes	Unit 6 – Errors and Omissions Insurance/Risk Reduction
8	30 minutes	Unit 7 – Agency
9	45 minutes	Unit 8 – Advertising
10	45 minutes	Unit 9 – Contracts
11	45 minutes	Unit 10 – Property Disclosures
12	20 minutes	Unit 11 – Property Management
13	20 minutes	Follow-Up Question and Answer Period
+ Lunch	30 minutes	Lunch
+ Breaks	45 minutes	3 – 10 minute breaks + 1 – 15 minute break
<b>TOTAL</b>	<b>480 minutes</b>	



# 2021-2022 TREC Principal Broker Core Course

## Course Outline

### Course Introduction

#### Unit 1 The Role of the Principal Broker

- What does it mean to be a Principal Broker in Tennessee?
- Definitions and Terminology Every Broker Should Know

#### Unit 2 Principal Broker Supervision of Affiliate Licensees

- Principal Broker Responsibilities to Agents
- Managing Affiliate Brokers
- Termination of Affiliation
- Affiliate Broker Relationship to Principal Broker
- Unlicensed Branch Office / TREC Rule on Offices
- TREC Rule on Licenses
- Advertising and Principal Broker Supervision
- Trust Money (Earnest Money)
- If Something Happens to the Principal Broker

#### Unit 3 Managing with Integrity and Professionalism

- Establishing Competency
- Understanding Office Policy
- TREC License Requirements and Association Requirements
- Agent Advertising and Selling
- Teams and Groups
- Unlicensed Activity
- Real Estate Assistants
- Professional Conduct
- Other Regulatory Compliance
- NAR Code of Ethics and the Multiple Listing Service (MLS)
- Reviewing Paperwork for Compliance
- Crucial Document Review Areas
- What is Supervision?
- Paperwork Retention and Electronic Records
- TREC Audits and Accounting of Trust Money
- What You Need to Know About TREC Audits
- Information You Must be Prepared to Provide to TREC if Audited
- Common Issues Found by TREC Auditors
- Accounting/Bookkeeping of Trust Money

#### Unit 4 TREC Rules for Licensing

- Process for Obtaining a Tennessee Real Estate License
- Documents required for an affiliate broker's license
- Real Estate Broker License Candidates
- Documents required for a Broker's License

- Expired License
- Retired License
- License Recognition
- Minimum TREC Requirements for Licensure under License Recognition

## **Unit 5 TREC Law, Rules and Regulations**

- TREC's Complaint Process
- TREC Disciplinary Actions
- 21 Ways Your Real Estate License Can Be Suspended or Revoked by TREC
- Transferring Your Real Estate License Using the TREC-1 Form (New)
- Transferring Your Real Estate License Online
- Recent Changes to State Law and TREC Rules

## **Unit 6 Risk Reduction and Errors & Omissions**

- Why Are Real Estate Agents Getting Sued or Having TREC Complaints Filed Against Them?
- Why is the Trend for Suing an Agent and Their Broker Increasing?
- The Most Frequent Claims Made Against Real Estate Licensees
- Tips to Avoid Real Estate Errors and Omissions Claims
- TREC E & O Suspension and Penalty Fees

## **Unit 7 Agency**

- Key Points About Agency in Tennessee
- Agency Law in Tennessee
- Duty Owed to All Parties
- Duty Owed to Licensee's Client

## **Unit 8 Advertising**

- TREC Rules on Advertising
- Key Facts to Know Concerning Advertising
- A Word About "Coming Soon" and Pocket Listings
- Advertising as a Team
- Signage
- Internet Advertising
- Guarantees, Claims and Offers
- Rebates, Gifts and Prizes

## **Unit 9 Contracts**

- Use of TAR Forms
- TAR Form Categories
- TREC Core Contract Skills Assessment
- Remembering Contract Basics
- Before You Write an Offer
- Important Rules of Contracts in Tennessee
- Binding the Agreement
- Contract Timelines and Performance Dates
- Notification and Termination of the Agreement
- Defaulting on the Contract

- Other Important Components of the Contract
- Purchase and Sale Agreement – Exhibits and Addenda
- Special Stipulations
- TAR Forms Resource Guide

## **Unit 10 Property Disclosures**

- Disclosing the Condition of the Property
- Tennessee Residential Property Condition Disclosure Act
- Required Property Condition Disclosures and Disclaimers
- Percolation Tests, Soil Absorption Rates and Presence of Sink Holes
- Planned Unit Developments

## **Unit 11 Property Management**

- Property Management is Not For Everyone
- The Tennessee Uniform Residential Landlord and Tenant Act
- Some Key Points on Property Management in Tennessee
- E & O Coverage and Property Management
- Principal Broker Supervision of Property Management Activities
- Common Issues and Challenges
- Sanctions Imposed by TREC for Property Management Violations

## **TREC Frequently Asked Questions for Licensees and Firms**





## Course Introduction

This eight (8) hour TREC Principal Broker Core course provides an overview and understanding of the most common issues principal brokers face in supervising affiliate brokers and real estate brokers as outlined in the Tennessee Real Estate Broker License Act of 1973 and the rules of the Tennessee Real Estate Commission (TREC.) Topics include the licensing process, representation by real estate agents (agency), agent and firm advertising, handling trust money, contracts and paperwork compliance, property management, Errors and Omissions insurance coverage, and TREC disciplinary guidelines.

### Learning Objectives:

- Understanding **TREC rules for licensing** (affiliate broker and real estate broker.)
- Knowing the most **recent changes to TREC Rules** (October 18, 2015)
- **Principal Broker Supervision**
- **Overview of agency law in Tennessee** and common issues facing brokers and agents in client representation. Review of agency agreements.
- Review of TREC rules on **agent and real estate brokerage advertising**.
- Review and understand the **principal broker's responsibility for handling trust money accounts**. How are funds received and distributed?
- Review and understand **real estate contract and disclosure compliance** in Tennessee.
- Review **TREC guidelines for Errors and Omissions Insurance**. Also, knowing common liability issues faced by principal brokers.
- Review of **property management and broker supervision**.
- Understanding of **TREC guidelines for disciplinary action** (including the "21 Ways You Can Lose Your License.")

#### 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 - The Role of the Principal Broker

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## What does it mean to be a Principal Broker in Tennessee?

The Tennessee Real Estate Broker License Act of 1973 outlines the various responsibilities for a principal broker. It also conveys the expectations the Tennessee Real Estate Commission has for the one who oversees the firm's affiliated licensees, their real estate activity, the monies held in trust for clients and customers and the assurance all real estate transactions under their supervision are conducted in a legal, ethical and professional manner.

The principal broker's role is significant in the successful operation of a real estate office. He or she must be able to be an effective manager, teacher, motivator, counselor and advisor to his/her agents. And, in Tennessee, the principal broker is supervising licensees who are independent contractors running their own businesses.

There are four (4) major management areas where a successful broker should focus their efforts:

1. **Managing the Reputation of the Firm and the Agent.** The reputation of the company and its agents are the most essential assets in real estate. If something goes wrong in a real estate transaction and the response is not handled properly the reputation of both the broker and agent is tarnished. Repairing reputations can take a tremendous amount of time and energy and, in some cases, money.
2. **Managing Motivation and Encouragement.** The broker's job necessitates keeping his/her agents motivated. Whether the market is up or down, it is the broker's job to keep the agent focused on their goals and on their business. Agents who do not have a written business plan should seek the assistance of their principal broker in order to have clear and attainable goals for their real estate practice. In addition, the broker must always be an encourager and cheerleader for the office and their agents.
3. **Educator and Trainer.** One of the most important roles any broker can fulfill is to educate their agents on the latest developments in the local market, understanding the principals of a successful real estate business (i.e. listings and sales contracts), client management, managing the "contract to close" process, etc. In addition, making sure that brand new agents are informed on the ins and outs of real estate is crucial to the success of the broker's office. A broker should have a strong and consistent training and education program that ensures their agents are working within the law and at the highest levels of professionalism and ethical behavior.
4. **Compliance.** More than anything else, a principal broker is responsible and liable for all the activities of his/her agents. He/she needs to ensure their agents are working within state licensing law, TREC rules, NAR Code of Ethics and Standards of Practice, CFPB/RESPA guidelines, etc. Agent conduct, transaction management, contract and agency paperwork and fiduciary responsibilities must be supervised in a way that always protects the consumer and their interests in a real estate transaction.

## A Broker Must be Able to Listen

The most important attribute of a manager is the ability to listen. Listen to what an agent says and listen intently. Many times, a manager wants to control a conversation and limit the amount of talking an agent does in a conversation. The issue can become more problematic when the broker does not have “all the details” of the matter that they have been asked to address. It is critical a broker listens to what the agent says – especially if the broker is called into a conflict requiring a quick resolution.

Other attributes principal brokers must bring to their position include the ability to recruit new agents, manage administrative and support personnel, office work flow, and ensuring the office is profitable for continuing operation. A real estate office cannot survive without the right person in charge overseeing the day-to-day operations as well as the work of the licensees who work there.

## Definitions and Terminology Every Broker Should Know

Reference: T.C.A. § 62-13-102

**"Acquisition agent"** means a person who by means of personal inducement, solicitation, or otherwise attempts directly to encourage any person to attend a sales presentation for a time-share program; provided, however, that "acquisition agent" shall not include any person or that person's employee who engages in any such activity solely on real property owned or leased by the person on or within the premises of a hotel, motel, private resort or lodging rental office or phone or mail solicitation business;

**"Adverse facts"** means conditions or occurrences generally recognized by competent licensees that have negative impact on the value of the real estate, significantly reduce the structural integrity of improvements to real property or present a significant health risk to occupants of the property;

**"Affiliate broker"** means any person engaged under contract by or on behalf of a licensed broker to participate in any activity included under the two definitions of “Broker” (A)(B)

**"Agency contract"** means a valid written contract authorizing a real estate licensee to act as a party's exclusive agent for the purchase, sale or lease of real estate;

**"Agency relationship"** means the relationship resulting from an agency contract

**“Branch Office”** refers to an extension of a main firm location (additional operating location.)

Two meanings for the word “Broker”:

**(A) "Broker"** means any person who, for a fee, commission, finders fee or any other valuable consideration or with the intent or expectation of receiving a fee, commission, finders fee or any other valuable consideration from another, solicits, negotiates or attempts to solicit or negotiate the listing, sale, purchase, exchange, lease or option to buy, sell, rent or exchange for any real estate or of the improvements on the real estate or any time-share interval as defined in the Tennessee Time-Share Act, compiled in title 66, chapter 32, part 1, collects rents or attempts to collect rents, auctions or offers to auction or who advertises or holds out as engaged in any of the foregoing;

**(B) "Broker"** also includes any person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a salary, fee, commission or any other valuable consideration, to sell the real estate or any part of the real estate, in lots or parcels or other disposition of the real estate. It also includes any person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby the person undertakes primarily to promote the sale of real estate either through its listing in a publication issued primarily for that purpose or for

referral of information concerning the real estate to brokers, or both;

**"Client"** means a party to a transaction with whom the broker has entered into a specific written agency agreement to provide services;

**"Customer"** means any party, other than a client in a transaction, for whom or to whom a licensee provides services;

**"Designated agent"** refers to a licensee who has been chosen by the licensee's managing broker to serve as the agent of an actual or prospective party to a transaction, to the exclusion of other licensees employed by or affiliated with the broker;

**"Dual agency"** refers to a situation in which the licensee has agreements to provide services as an agent to more than one (1) party in a specific transaction and in which the interests of the parties are adverse;

**"Employee"** refers to a salaried or hourly employee as defined by the Tennessee Department of Revenue and the Internal Revenue Service.

**"Facilitator"** means any licensee:

(A) Who assists one (1) or more parties to a transaction who has not entered into a specific written agency agreement representing one (1) or more of the parties; or

(B) Whose specific written agency agreement provides that if the licensee or someone associated with the licensee also represents another party to the same transaction, the licensee shall be deemed to be a facilitator and not a dual agent; provided, that notice of assumption of facilitator status is provided to the execution of the contract. A facilitator may advise either or both of the parties to a transaction but cannot be considered a representative or advocate of either party. "Transaction broker" may be used synonymously with, or in lieu of, "facilitator" as used in any disclosures, forms or agreements under this chapter;

**"Firm"** refers to a Corporation, Partnership, Association or Sole Proprietor.

**"Limited agency"** means an agency relationship created for the purpose of providing real estate services in which the client's or other party's liability for the actions or statements of an agent, subagent or facilitator is limited to actions or statements initiated by specific instruction of the client or other party or those actions or statements about which the client or other party had knowledge;

**"Material"** means any statement, representation or fact relative to a transaction that would affect a reasonable person's decision to enter into an agreement and that has been identified by the person as being of significance to a particular party;

**"Party"** means any person or persons seeking to obtain or divest an interest in real estate or a business opportunity as a buyer, seller, landlord, tenant, option grantee or option grantor;

**"Person"** means and includes individuals, corporations, partnerships or associations, foreign and domestic;

**"Real estate"** means and includes leaseholds, as well as any other interest or estate in land, whether corporeal, incorporeal, freehold or nonfreehold, and whether the real estate is situated in this state or

elsewhere;

**"Referral fee"** means a commission or any other type of compensation for the referral of a potential buyer, seller, lessor or lessee of real estate.

**"Team"** refers to a group of licensees (under the broker's authority) who form a workgroup to assist each other and work as a team in all transactions

### **Let's Review** (Optional for Instructor)

1. What are the four (4) major management areas where a successful principal broker should focus their efforts?

**INSTRUCTOR NOTE:** 1. Managing the Reputation of the Firm and the Agent  
2. Managing Motivation and Encouragement  
3. Educator and Trainer  
4. Compliance

2. What attributes should principal brokers bring to their position?

**INSTRUCTOR NOTE:**  
A principal broker must be able to listen, recruit new agents, manage administrative and support personnel, office work flow, and the profitability of the office.

3. The term "Broker" has two meanings under the Tennessee Real Estate Broker License Act of 1973. What are these two terms?

**INSTRUCTOR NOTE:** Refer to definitions (A) and (B) for "Broker."

## UNIT 2 - Principal Broker Supervision of Affiliate Licensees

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### 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 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.
- 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. See TREC Rule 1260-02-.03 Offices
2. See TREC Rule 1260-02-.03 Offices

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

1. See TREC Rule 1260-02-.03 Offices
2. See TREC Rule 1260-02-.03 Offices

## 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?

**INSTRUCTOR NOTE: Since the statute does not mention LLC's, it does not apply to LLCs.**

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?

**INSTRUCTOR NOTE: As long as the person has the authority to address property matters occasionally and not as a regular part of the job, the person would be exempt. It is important to know the key to this exemption is whether the activities performed are part of their primary responsibilities, not necessarily whether their compensation is directly or indirectly related to the value of the real estate.**

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.

**INSTRUCTOR NOTE:**

1. If the person were paid a salary, then they would be exempt.

2. If the person were paid from company profits, then they would be paid based upon the transaction and would not be exempt.

## 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.

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.

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## 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)

**INSTRUCTOR NOTE:** Answers in RED.

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? **TRUE**
2. How often do real estate licenses renew? **Every two (2) years.**
3. TREC requires **16** hours every **2** years, of which **6** must be in the **TREC Core Course** and **10** hours of elective courses.
4. The principal broker is responsible for all the activities of the licensee? True or False? **TRUE**
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? **IMMEDIATELY, per TREC Rule 1260-02.02.**
6. How many days does a licensee have to place his license with another firm? **10 days**
7. Who "owns" the listings and contracts of the firm? The principal broker
8. Is a principal broker considered a dual agent under designated agency? **No. Per T.C.A. § 62-13-406 "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.**
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?
  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.**
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?

**As long as the person has the authority to address property matters occasionally and not as a**

regular part of the job, the person would be exempt.

11. What happens if the principal broker dies? TREC must be notified within ten (10) days of the death along with a plan that addresses the continuation of operations without a principal broker. Refer to TREC Rule 1260-02-.38 paragraphs.

## UNIT 3 - Managing with Integrity and Professionalism

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As a principal broker, your role is clearly defined under the Tennessee Real Estate Broker Act of 1973. However, in order to ensure your office is operating efficiently and within state law and the rules of the Tennessee Real Estate Commission there are certain areas of the broker's job that should always be at the forefront of everyday supervision.

### The Basics

As the principal broker, you should provide adequate supervision of all real estate brokers and affiliate brokers who are affiliated with your office. At a minimum, you should carry out the following:

### Establishing Competency

- The path to receiving a real estate license is well defined – completion of ninety (90) hours of pre-licensing course work prior to sitting for affiliate broker license examination.
- In pre-licensing classes, the licensee is exposed to basic real estate theory and common principles used in today's real estate practice. Unfortunately, the theory and instructor-created case studies taught in these courses doesn't prepare the licensee for the reality they will face in today's real estate market.
- **The licensee needs to be competent** in procuring listings (seller) and buyers, showing properties, effective contact writing, transaction management, closings, etc.
- **It is your responsibility to educate the new agent** in the knowledge and expertise of how to build and sustain their real estate business as well as the proper way to work with consumers through the entire transaction process. It is important you have adequate training for the new licensee so they can start out "on the right foot."
- In addition, **it might be wise to develop a mentoring program** utilizing senior agents as mentors to work with the new agent in the first year of holding a real estate license.

**In order to be an effective agent, the licensee should only focus in an area of expertise.** Their practice may be limited to selling residential properties, commercial buildings, leasing and property management, farm and land properties, etc. It is critical additional education course work in a specialized area is taken and the activities of the licensee are properly supervised as they work with clients.

### Understanding Office Policy

It is critical each principal broker establish specific policies and procedures for their agents to follow while they are affiliated with the firm. A written policy manual should be presented to the newly-hired licensee as soon as possible so he/she can understand the expectations of the broker as well as the procedures they should follow as they work with clients, submit transaction paperwork, process closings, etc. And, as policy changes occur, the broker should ensure each licensee is familiar with any and all revisions and updates.

All licensees in the firm should be aware of the firm's policies relating to:

- State law and TREC rules

- Transaction work flow
- Listing and Buyer agency agreements as well as sales contract documents
- Submission of trust money
- Agent behavior policy
- Brokerage marketing and branding guidelines (including signage)
- Commission payment policy
- Property management policy
- Use of Offices and company policy on sexual harassment, personal safety, etc.

Violations to any of the policies and procedures of the company should immediately be addressed and corrective action taken.

## TREC License Requirements and REALTOR® Association Requirements

- It is extremely important that **each licensee in the firm complies with TREC license requirements** in order to reduce liability and risk.
- The **licensee and broker should know when the licensee's real estate license is about to expire** and if the necessary continuing education requirements have been met.
- Currently, **the Commission notifies both the licensee and broker six (6) months prior to license expiration** regarding the licensee's continuing education status. Ignoring license renewal requirements can result in disciplinary action by TREC including placing the license in inactive status, suspension or revocation.
- In addition, if the licensee is a member of a REALTOR® association(s), a local Multiple Listing Board, as well as holding professional designations the dues associated with each entity should be paid in a timely manner so the licensee remains in "good standing" with the organization. (Note: REALTOR® membership requires the member to complete a REALTOR® Code of Ethics course every two (2) years.)

The broker should address these requirements with all licensees and have a process in place to constantly remind the licensees of the renewal requirements.

**If a licensee is placed inactive for not completing active license renewal requirements** TREC may initiate a complaint against the broker and licensee for failure to supervise, unlicensed activity, false advertising, etc. The licensee's local REALTOR® association may suspend membership and association privileges and initiate disciplinary action.

Key points in ensuring the licensee is in compliance with TREC's licensing requirements and the local, state, and national REALTOR® association:

- a. Active license – the license must be active in order to practice real estate in Tennessee
- b. Continuing education compliance
- c. Errors and omissions insurance compliance
- d. Professional association renewal requirements, i.e., REALTOR®, MLS, etc.
- e. Professional designations (maintenance requirements)

## Agent Advertising and Selling

TREC rules applying to advertising and other marketing generally restrict licensees from knowingly publishing real estate advertising containing any false statement or misrepresentation concerning real



estate, a trade in real estate or the provision of real estate services. The brokerage's written policies should address the following:

- Definition of advertising (as per TREC Rule 1260-02-.12)
- Forms of advertising (newspaper, internet, social media, billboards, etc.)
- Distribution methods for advertising
- General mandated rules for advertising (federal, state, province, territory, etc.)
- Brokerage approval process
- Client solicitation and consent
- Joint advertising with other agents or settlement agencies (check RESPA rules)
- Special promotions
- Self-promotion and marketing
- Teams and Groups
- Unlicensed assistants
- Personally owned property
- Responsibility of costs related to advertising

In addition to the restrictions dealing with advertising and solicitation regarding specific properties, there are some specific rules that a broker must address regarding the marketing of real estate services generally.

## Teams and Groups

TREC does not recognize teams under current Tennessee agency law. However, teams do exist within many brokerages and the principal broker must ensure there is sufficient supervision for licensees, including groups of licensees who work together as a "team" or "group." As for any other licensees or employees and others who perform duties on behalf of the brokerage, the broker is responsible for ensuring that such groups are supervised accordingly and that their conduct is such to avoid misleading the consumer (e.g. that they do not give the impression of being an incorporated company or a separate real estate brokerage). Written office policies may assist in this regard and should include specific guidelines on the following:

- Broker authorization
- Broker and team identification in advertising
- Advertising of team must meet current TREC rules on advertising
- Meet all local statutes and regulations, i.e., team leader name must be in the advertising; team leader must supervise team members, etc.
- Unlicensed persons
- Compensation

## Unlicensed Activity

A broker must be actively involved in the management of their brokerage, ensuring that the business of the brokerage is carried out competently and in accordance with state law and TREC rules. The broker must provide an adequate level of supervision for licensees, licensee assistants, employees and others who perform duties on behalf of the brokerage. The broker must take steps to deal with any conduct that may constitute a breach of TREC licensing requirements to include Code of Ethic violations, if applicable. The written office policies may assist in this regard, and should include the following information:

- Identify what activities require a license (and what does not) and develop policy for licensees, unlicensed assistants and office employees
- Must possess an active license prior to performing licensed activity
- Prohibited from splitting a fee with an unlicensed person
- Unlicensed assistants
- Report individuals who perform licensed activity without a license to TREC immediately

## For Your Information: Real Estate Assistants

**Licensed Assistant** – A person who is licensed under the managing broker, who works and exclusively assists a team, group or individual licensee also licensed under the managing broker. The broker, in conjunction with the employing licensed individual, group or team, is responsible for all acts of the assistant.

**Unlicensed Assistant** – A person who is unlicensed and exclusively assists a team, group or individual licensee and who is prohibited from performing activities that require a license. Remember, the broker, in conjunction with the employing licensed individual, group or team, is responsible for all acts of the unlicensed assistant.

## Professional Conduct

**The principal broker is responsible to TREC for all the activities performed by licensees acting on behalf of the firm.** As a result, the professional conduct of all affiliated licensees and others within the firm is the responsibility of the broker. The broker needs to make sure written policy is followed and any deviations from TREC requirements, professional association rules and company policy are properly addressed.

## Other Regulatory Compliance

The managing broker is responsible for performing the duties imposed on the brokerage and controlling the brokerage's real estate business, which includes the services and activities performed by licensees and others on behalf of the brokerage. The written office policies should reflect any applicable legislative requirements, such as:

- Do Not Call Registry Act
- Human Rights Act (*See Appendix*)
- Fair Housing Act
- Anti-Trust
- Financial Transaction Accounting Act
- Electronic Monitoring Act
- Taxation
- Real Estate Settlement and Procedures Act (RESPA), Truth in Lending Act (TILA)
- Foreign Investment in Real Property Tax Act (FIRPTA)
- Interstate Land Sales Act (ILS)
- Reporting Cash Payments of Over \$10,000 (Internal Revenue Service rule)

## NAR Code of Ethics and the Multiple Listing Service (MLS)

The responsibilities of a broker are multifaceted and should be carried out with an increasingly high level of professionalism. For this reason, the broker's knowledge and understanding of state and federal laws relating to real estate and industry standards is imperative to maintaining to the licensee's good standing with the state and professional organizations. The most important source of standards is what the real estate commission requires; however, regulatory guidelines can only set a basic or

minimum standard of legal conduct. Therefore, the National Association of REALTORS® Code of Ethics and Standards of Practiced was established in order to raise general business standards for REALTORS® to a higher level and also to provide guidelines for interaction between professional members. The written office policies should address professional ethics in general, and professional association rules specifically, as applicable.

## **Reviewing Paperwork for Compliance**

The real estate profession involves quite a bit of paperwork and it has increased – especially over the past several years. Governmental regulatory requirements, possible client complaints and professional liability insurance terms and conditions are the primary reasons the paperwork is so extensive. In order to ensure compliance in these areas it is imperative the principal broker properly manages any and all paperwork associated with listing and buyer transactions.

For all new agents, the broker should make sure training is in place regarding all contract and disclosure forms used by the firm prior to the licensee having contact with prospective clients and customers. Furthermore, ongoing education of changes to transaction documents should be available for more experienced agents.

### **Review and Approval:**

The broker must review and approve in a timely manner the following paperwork to ensure that any errors and omissions are corrected:

- Listing agreements
- Buyer representation agreements
- Offers to purchase
- Counter offers
- Amendments
- Addenda
- All disclosure statements
- Settlement statemen

## Discussion: Crucial Document Review Areas

What should a principal broker look for when reviewing **property listing paperwork**?

### INSTRUCTOR NOTE: DISCUSS EACH POINT

1. Review of the MLS Listing (correct property information, fair housing language, etc.)
2. Review of the Listing Agreement to make sure all the terms and conditions of the listing are acceptable including compensation, noting the designated agent (if applicable), exhibits/addenda, special stipulations, etc.
3. Disclosures
4. Disclaimers
5. What else?

What should a principal broker look for when reviewing **sales contract paperwork**?

### INSTRUCTOR NOTE: DISCUSS EACH POINT

1. Review the Purchase and Sale Agreement to ensure the terms and conditions of the agreement are clear. This includes property description, items to remain and not remain with the property, appraisal contingency, loan contingency, inspection contingency, closing and possession dates, binding agreement date information, exhibits and addenda, special stipulations, etc.
2. All Counter offers
3. Disclosures (including Confirmation of Agency, Property Condition, Septic, Lead-Based Paint, etc.)
4. Disclaimers
5. Compensation Agreement between Listing Broker and Selling Broker
6. Buyer Representation Agreement
7. What else?

The principal broker **prior to approving payment of the agent's commission** should review what documents?

### INSTRUCTOR NOTE: DISCUSS EACH POINT

1. Settlement Statement
2. Final Property Condition Disclosure
3. Check from the Title Company/Closing Attorney
4. Outstanding paperwork in order to make the file complete
5. What else?

## What is Supervision?

The Rules of the Tennessee Real Estate Commission state a principal broker shall exercise reasonable supervision over the activities of his or her affiliate licensees. This supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

- Transactions requiring a real estate license.
- Documents which may have material effect upon the rights or obligations of a party to the transaction.
- Filing, storage and maintenance of such records.
- The handling of trust monies.
- Advertising of any service for which a license is required.
- Familiarizing affiliate licensees with the requirements of federal and state laws relating to the prohibition of discrimination.
- Regular and consistent reports of licensed activities of affiliate licensees.

A strong and reliable system for monitoring compliance of policies, rules and procedures should be clearly in place to support the principal broker. Even though some services may be delegated to others in the firm from time to time, **the broker should NEVER relinquish overall responsibility for supervision of the acts of affiliate broker and real estate broker licensees that are licensed under his or her license.**

## Paperwork Retention and Electronic Records

Per TREC rules, a licensed principal broker must retain for three (3) years copies of all listings, contracts, rejected/expired offers to purchase, escrow deposit receipts, cancelled checks, trust account records and other documents executed by him or her or obtained by him or her in connection with any transaction which a broker's license is required. The retention period should run from the date of closing of the transaction or from the date of the listing if the transaction is not consummated. After reasonable notice, the books, accounts and records shall be made available to a TREC auditor for audit, examination, and inspection.

### TREC Rule 1260-02-.40

(1) Pursuant to T.C.A. § 62-13-312(b)(6), real estate licensees must preserve records relating to any real estate transaction for three (3) years following the consummation of said real estate transaction. Real estate licensees may utilize electronic recordkeeping methods to comply with this requirement, provided that the following conditions are met:

(a) All documents required to be retained must be readily accessible in an organized format providing ease in document identification within twenty-four (24) hours of any request for inspection by representatives of the Commission.

(b) In order to ensure proper document retention, the principal broker of all real estate firms that use electronic recordkeeping methods must develop and utilize a retention schedule that safeguards the security, authenticity, and accuracy of the records for the entire required retention period and that also provides for the use of technology and hardware that ensures the accessibility of records in a readable format.

## TREC Audits and Accounting of Trust Money

The Tennessee Real Estate Commission has established an ongoing program of examining broker's trustee/escrow records per the guidelines specified in the Broker's Act:

### T.C.A. § 62-13-312(d)

(d) The director of the division of regulatory boards or the director's duly authorized representatives may, at all reasonable hours, examine and copy books, accounts, documents or records that are relevant to a determination of whether a licensee has properly maintained and disbursed funds from escrow or trustee accounts required under this part. In case of refusal to permit the access accorded by this subsection (d), the director or the director's authorized representatives may pursue the remedies provided by § 4-5-311(b) for disobedience to any lawful agency requirement for information. Refusal shall also constitute grounds for the commission to suspend or revoke a license.

### What You Need to Know About TREC Audits

- Audits are randomly selected from the TREC database of real estate brokerage firms for review.
- If the principal broker receives a mail-in audit letter then they have thirty (30) days to respond and provide the requested documents.
- As necessary, audited licensees will be made aware of deficiencies in trust fund handling and record keeping.

### Information You Must be Prepared to Provide to TREC if Audited

- Bank statements
- Copies of bank reconciliations
- List of individual ledger balances or individual tenant security deposits (if applicable)
- List of Earnest Money amounts held, disbursed and interpleaded
- Closing or Settlement Statements
- Copies of Purchase and Sale Agreements for selected transactions
- Release of Earnest Money Disbursement forms
- Lease Agreements for selected leases
- Copies of the journal or check registers, including a record of daily balances
- List of outstanding checks and deposits by month
- List of all current licensees affiliated with the firm

### Common Issues Found by TREC Auditors

- Days of delay in depositing/disbursing Earnest Money
- Depositing/Disbursing Earnest Money funds far in advance of the binding agreement date of the contract/contract closing date
- Comingling funds
- Misuse of funds (paying bills, payroll, personal expenses, etc.)

## Accounting/Bookkeeping of Trust Money

It is important a principal broker maintain good accounting of a consumer's funds deposited in an escrow/trust account. The following table provides the required documentation for activities associated with trust/earnest money:

Activity	Required Documents
Receiving Trust Monies	<ul style="list-style-type: none"> <li>• Purchase and Sale Agreement</li> <li>• Collection Receipts</li> </ul>
Depositing Trust Monies	<ul style="list-style-type: none"> <li>• Bank Deposit slips</li> </ul>
Disbursing Trust Monies	<ul style="list-style-type: none"> <li>• Checks issued</li> <li>• Supporting documentation for the checks such as invoices, escrow statements, billings, receipts, etc.</li> </ul>

## Suggested Procedures for Accurate Accounting of Escrow Account Funds

1. Record transactions daily in the trust/escrow bank account.
2. On a consistent basis use the same specific source documents as a basis for recording trust receipts and disbursements.
3. Calculate the account balances on all applicable records at the time entries are made.
4. Reconcile the records monthly to ascertain that transactions are properly recorded on both the bank account record and the applicable subsidiary account records (i.e. any account that flows in the general ledger.)
5. If more than one trust/escrow account bank account is maintained, keep a different set of records for each account.

## Let's Review (Optional for Instructor)

### INSTRUCTOR NOTE: Answers in RED

1. Can a licensee practice residential real estate and commercial real estate at the same time?  
**Yes. However, in order to be an effective agent, the licensee should only focus in an area of expertise.**
2. It is critical each principal broker establish specific policies and procedures for their agents to follow while they are affiliated with the firm. True or False? **TRUE**
3. When should a licensee receive a copy of the office policies? **As soon as possible after they are hired.**
4. Who is responsible for knowing when a licensee's real estate license is going to expire?  
**Both the principal broker and the licensee.**
5. What happens if a licensee does not renew their license in a timely manner? **TREC may initiate a complaint against the broker and licensee for failure to supervise, unlicensed activity, false advertising, etc.**

6. TREC now recognizes teams? True or False? **FALSE. TREC does not recognize teams under current Tennessee agency law.**
7. Can an unlicensed assistant host an open house? **NO.**
8. How long does TREC require a licensee retain all of their transaction paperwork? **3 years.**
9. The principal broker has forty-five (45) days to respond to a request for information from a TREC auditor. True or False? **FALSE, they have 30 days to respond and provide the requested documents.**
10. Can trust money/earnest money be kept in the firm's operating account even though separate documentation is available from the broker to denote the amount and date of deposit? **NO. TREC does not allow any commingling of funds. Trust money must be kept separate from other firm \ monies.**



**INSTRUCTOR NOTE:** Review this information with the class. Additional information is available on TREC's

## UNIT 4 – TREC Rules for Licensing

The Tennessee Real Estate Commission has specific guidelines for obtaining either an Affiliate Broker or Real Estate Broker license. Prior to a license being issued by TREC the applicant must obtain a passing score on the respective licensing examination as well as meeting other application requirements.

### Process for Obtaining a Tennessee Real Estate License (T.C.A. 62-13-303)

#### Affiliate Broker License Candidates

- **Affiliate broker candidates must complete sixty (60) hours of real estate education** in real estate principles/fundamentals before they take the examination.
- Proof that the prescribed pre-license education has been completed will be forwarded by the school where the education was completed to PSI. **An applicant may not register for the examination until the school has provided that information to PSI Examination Services (PSI).** The school will also provide a certificate or letter of course completion that must be submitted to TREC with the application for licensure.
- **Affiliate brokers licensed after 12/31/04 must have completed the 30-hour "Course for New Affiliates"** prior to their license being issued and a letter or certificate of completion of the "Course for New Affiliates" must also be submitted with the license 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 or GED
- Proof of completion of pre-license education
- Proof of errors and omissions insurance policy
- Payment of all fees due. (\$110.00)
- Eligibility Verification

In addition to the application documentation an applicant for an Affiliate Broker License must also have:

- Satisfactory proof that the applicant is at least eighteen (18) years of age; and
- Residency in Tennessee for at least forty-five (45) days.
- A sworn statement by the broker with whom the applicant desires to be affiliated certifying that, in the broker's opinion, the applicant is honest and trustworthy and that the broker will actively supervise and train the applicant during the period the license remains in effect. *(Included in the license application)*

#### *Post-Licensing Continuing Education Requirement for Affiliate Brokers*

Every two (2) years, as a requisite for the reissuance 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 License Candidates**

To be eligible for the examination, broker candidates must have held an **ACTIVE** license that meets one of these criteria:

- Twenty-four (24) months actively licensed, if licensed as an affiliate broker on or before May 12, 1988
- Thirty-six (36) months actively licensed, if licensed as an affiliate broker after May 12, 1988
- Twenty-four (24) months actively licensed, if the candidate has a baccalaureate degree with a major in real estate.

In addition to experience, broker candidates must have successfully completed one hundred twenty (120) classroom hours of approved real estate education, thirty (30) hours of which must be an "Office/Broker Management" course taken at a school approved by the Tennessee Real Estate Commission.

Broker candidates must submit the completed *Broker Examination Application* to the Tennessee Real Estate Commission. Commission approval is necessary before the broker candidate may make an examination appointment. After completing a review of education and experience documentation, the Tennessee Real Estate Commission will inform candidates of eligibility for examination. The approval process takes approximately four (4) weeks to complete. Candidates may make an examination reservation after they have been approved.

### **Documents required for a Real Estate 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. (\$110.00)
- Eligibility Verification

### *Post-Licensing Continuing Education Requirement for Brokers*

**Brokers licensed after January 1, 2001 must complete one hundred-twenty (120) additional hours of Commission approved education before the third anniversary of their broker license.** Failure to comply with the post-broker education requirement will result in non-issuance of a license renewal.

Brokers licensed after January 1, 2005 must complete sixteen (16) hours of Commission approved education after completing the 120- hour post license requirement in order to renew the license.

### **Expired License**

In October 2015 the Commission enacted new rules regarding expired licenses due to health issues and failure to maintain continuing education. [See TREC Rule Changes – October 2015; Section "J" *Reinstatement of an Expired License of a Broker, Affiliate Broker, Time-Share Salesperson or Acquisition Agent* for specific information on the procedures for expired licenses.]

Licensees that have been expired more than 1 (one) year **MUST** retest and reapply to current requirements.

## Retired License

Recently, the Tennessee state legislature amended T.C.A. § 62-13-318 by eliminating 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 eliminates the need for an inactive license status, thus T.C.A. § 62-13-322 was deleted in its entirety. This law became effective July 1, 2016.

## 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 5 - TREC Rules and Regulations

- The Tennessee Real Estate Commission (TREC) was created in 1951 with limited governing oversight. Its current regulatory authority was established with the passage of the **Tennessee Real Estate Broker License Act of 1973**. In addition to the laws outlined in the Broker's Act, the Commission adopted specific rules and regulations for licensees to follow to protect the consumer when selling or purchasing real estate.
- 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.



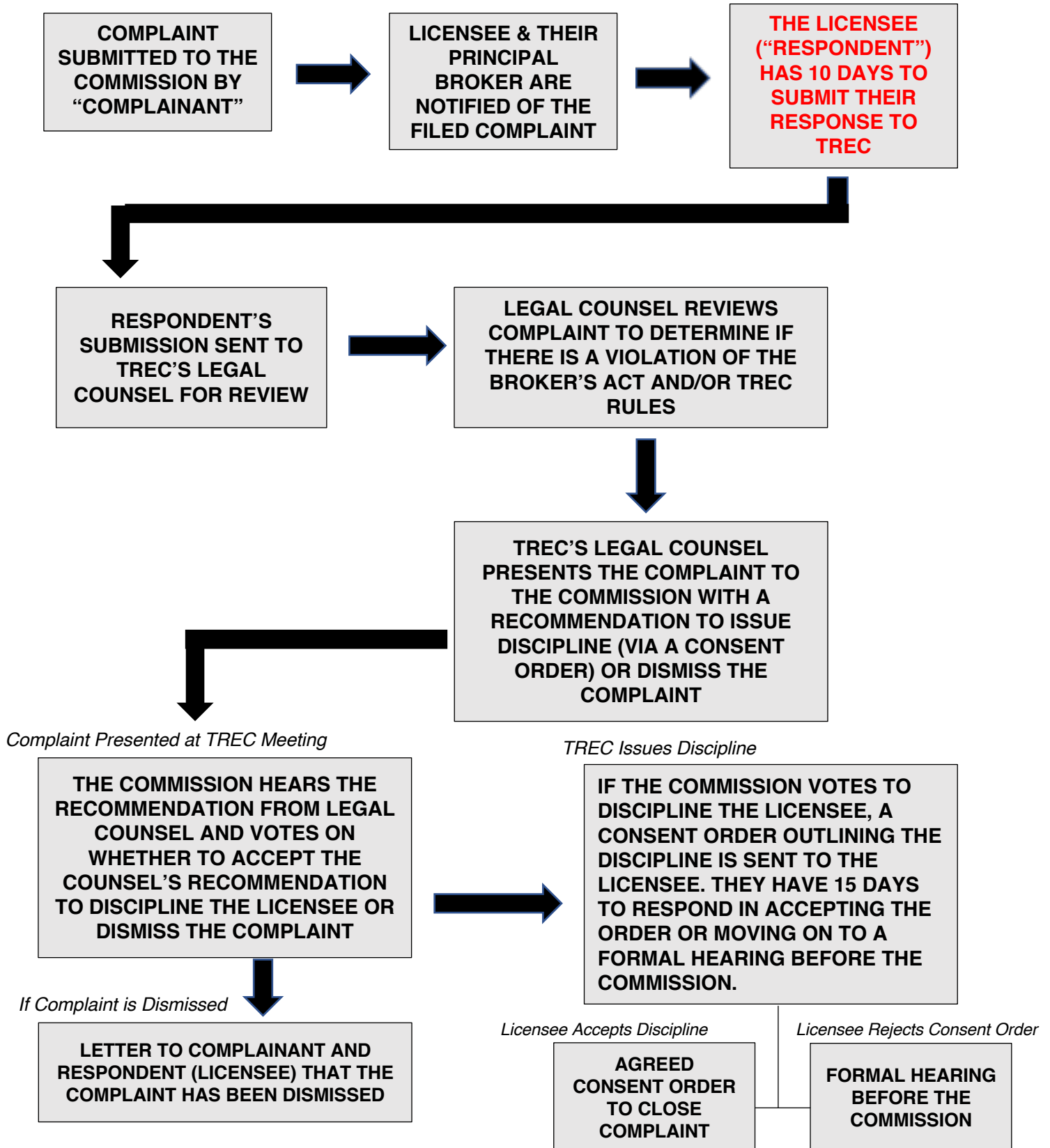
TREC is responsible for enforcing both the laws under the Broker's Act as well as the rules of the Commission.

- **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 the Broker's Act, 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.

**COMPLAINT PROCESS AT TREC**



## 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. A few licensees had their license downgraded or revoked because of their actions.**

Every month, the Department of Commerce and Insurance publishes all disciplinary actions taken by the department's regulatory boards via the department's *Disciplinary Action Report*. TREC disciplinary actions are included in the list of licensees who received consent orders with monetary fines, additional continuing education requirements, or both. Results from formal hearings are also included in the report. In addition, names of real estate licensees suspended or revoked are included in the department's disciplinary action report.

Kevin.Walters@tn.gov  
615-253-8941

**DISCIPLINARY ACTION REPORT**

Category	Licensee Name	Location	Violation	Penalty	Date
Funeral Directors & Embalmers			NO ACTION TAKEN		
Geologists			NO ACTION TAKEN		
Home Inspectors			NO ACTION TAKEN		
Land Surveyors			NO ACTION TAKEN		
Locksmiths	Downtown Nashville Nissan	Nashville, TN	Issuing more temporary tags than allowed	\$2,000 civil penalty	5/15/2020
Motor Vehicle	Greenway Kia Hickory Hollow	Antioch, TN	Issuing more temporary tags than allowed	\$1,000 civil penalty	5/19/2020
Motor Vehicle	Sunrise Auto Sales	Knoxville, TN	Failure to maintain county business license	\$250 civil penalty	5/21/2020
Motor Vehicle	Budget Auto Sales of Memphis, Inc.	Memphis, TN	Unlicensed activity	\$500 civil penalty	5/27/2020
Motor Vehicle	Golden Auto Sales	Knoxville, TN	Failure to maintain temp tag log	\$1,500 civil penalty	5/28/2020
Motor Vehicle	Auto Car Inc.	Nashville, TN	Engaging in false, fraudulent, or deceptive practice(s)	\$10,000 civil penalty	5/28/2020
Motor Vehicle	Autos and More, Inc.	Knoxville, TN	Engaging in false, fraudulent, or deceptive practice(s)	\$1,000 civil penalty	5/28/2020
Motor Vehicle	United Auto Sales	Manchester, TN	Issuing more temporary tags than allowed	\$250 civil penalty	
Private Investigations & Polygraph			NO ACTION TAKEN		
Private Probation Service			NO ACTION TAKEN		
Private Protective Services			NO ACTION TAKEN		
Real Estate Appraisers	Kristie Trentham	Maryville, TN	Advertising violations	\$500 civil penalty	5/12/2020
Real Estate Commission	Ian Pete Galyon	Chattanooga, TN	Advertising violations	\$500 civil penalty	5/12/2020
Real Estate Commission	Justin Tate	Hixson, TN	Advertising violations	\$250 civil penalty	5/12/2020
Real Estate Commission	Janet Naseif Ibrahim	Nashville, TN	Advertising violations	\$500 civil penalty	5/12/2020
Real Estate Commission	Christopher Bawgus	Johnson City, TN	Failure to exercise reasonable skill and care	\$1,000 civil penalty	5/12/2020
Real Estate Commission	Edward Phillip Huletz	Tacoma, WA	Continued and flagrant misrepresentation or fraud	\$1,000 civil penalty plus four hours of continuing education in contracts and license downgraded to Affiliate Broker status	5/12/2020
Real Estate Commission	Holly Vaazi	Brentwood, TN	Advertising violations	\$500 civil penalty	5/15/2020
Real Estate Commission	Tina Ledford	Cleveland, TN	Failure to supervise	\$400 civil penalty	5/18/2020
Real Estate Commission	Margaret Christmas	Mason, TN	Failure to provide copies of lease agreements	\$4,000 civil penalty	5/21/2020
Real Estate Commission	Erika Lawson Cooke	Cleveland, TN	Failure to exercise reasonable skill and care	\$500 civil penalty plus four hours of continuing education in contracts.	5/26/2020
Real Estate Commission	Jackson Mountain Homes, Inc.	Gatlinburg, TN	Failure to respond to a complaint	\$1,000 civil penalty	5/26/2020
Real Estate Commission	Christopher Dane Bradshaw	Chattanooga, TN	Unlicensed activity	\$1,000 civil penalty plus four hours of continuing education in contracts	5/28/2020
Real Estate Commission	Kimberly Kim Cargill-Wax	Caryville, TN	Failure to exercise reasonable skill and care	\$1,000 civil penalty plus four hours of continuing education in contracts	5/29/2020

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

(Excerpted T.C.A. § 62-13-312)

The Broker's Act contains twenty-one (21) ways a real estate licensee in Tennessee can have their license suspended or permanently revoked. This particular section of the state statute is the most referenced section of the Act when TREC's legal counsel presents a complaint to the Commission for consideration.

- (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.


### Recent TREC Disciplinary Action

- 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
- 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

## Transferring Your Real Estate License Using the TREC-1 Form (New)

If you have seen the new **Transfer, Release, and Change of Status Form (TREC 1)**, for individuals, or the TREC 2, for firms, you know that it has a slightly different look. The Commission’s goal was to simplify the form and get rid of many of the transactions that no longer require a fee.

There are also questions now associated with transaction to act as a reminder of the requirements prior to proceeding with the change. TREC removed the broker release option on both forms. This is because this transaction can now be done online through the Principal Broker’s **core.tn.gov** account. This allows the broker to maintain a summary of the transaction. It also avoids the issues TREC was having with these applications getting lost in the mail. Since there is no money associated, it is difficult for the Commission staff to track. However, through core.tn.gov the principal broker can track the application and TREC can as well.



Tennessee Real Estate Commission  
**TRANSFER, RELEASE, AND CHANGE OF STATUS FORM**  
*Please complete the form in its entirety. If a section is not applicable, please mark as not applicable.*

Check the appropriate box below:	Action	Transaction	Fee	Questions	Answer (Yes/No)
<input type="checkbox"/>	Transfer to new firm	8080	\$25	Have both your releasing Broker and your new Broker signed your TRANSFER?	<input type="checkbox"/>
<input type="checkbox"/>	Change of status from RETIRED TO ACTIVE	8000	\$25	If you were in retirement status for more than one renewal cycle, have you completed all necessary education?	<input type="checkbox"/>
<input type="checkbox"/>	Change of status from ACTIVE to RETIRED	6070	\$25	Do you understand to stay in retired status you must continue to pay your license renewal fee?	<input type="checkbox"/>

Licensee Information

Name: \_\_\_\_\_ License Number: \_\_\_\_\_  
 Email: \_\_\_\_\_ Signature: \_\_\_\_\_

Releasing Firm Information  
*If you are retiring or transferring your license, please ensure this section is completed.*

Firm Name: \_\_\_\_\_ Firm License Number: \_\_\_\_\_  
 PB Name: \_\_\_\_\_ PB License number: \_\_\_\_\_  
 PB Signature: \_\_\_\_\_

New Firm Information  
*If you are reactivating or transferring your license, please ensure this section is completed.*

Firm Name: \_\_\_\_\_ Firm License Number: \_\_\_\_\_  
 PB Name: \_\_\_\_\_ PB License number: \_\_\_\_\_  
 PB Signature: \_\_\_\_\_

Notes: \_\_\_\_\_  
 \_\_\_\_\_

Davy Crocket Tower, 500 James Robertson Parkway, Nashville, TN 37243, www.core.tn.gov

IN-1989
RDA 10222

Revised TREC-1 Form

**NOTE: Forms can be downloaded on TREC’s website at:**  
<https://www.tn.gov/commerce/regboards/trec/licensee-applicant-resources/forms-and-downloads.html>

## Transferring Your Real Estate License Online

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.

### The CORE System

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

### 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
- Print Your License
- Reinstatement/Reapplication

**LICENSE PRINTING:** You no longer need to wait for your new license in the mail. Available now through CORE, TREC's licensing system, you can print your license at home at your convenience. This new function allows you to obtain a new or renewed license once your application is approved. You can access this feature through your CORE licensing account under your quick start menu. You will obtain a PDF version of your license, ready to be printed. This can act as your official license.

## Recent Changes to State Law and TREC Rules

**INSTRUCTOR NOTE: THESE RULES ARE THE LATEST SINCE THE LAST TREC CORE REVISIONS.**

### Low Income Fee Waiver

(Ref. T.C.A. § 62-76-105)

This new law requires all regulatory boards under the Tennessee Department of Commerce and Insurance, including the Tennessee Real Estate Commission (TREC), to waive initial licensing fees for applicants who demonstrate enrollment in TANF (temporary assistance for needy families), Medicaid, SNAP (supplemental nutrition assistance program), or other federal or state public assistance programs determined to qualify by the TDCI Commissioner. This fee waiver applies to applicants for initial individual licenses, and initial entity licenses where the owner-applicant qualifies for the fee waiver.

### Principal Broker Complaints for Failure to Supervise

TREC no longer automatically opens a corresponding complaint against Principal Brokers when a complaint is filed against an affiliated licensee effective May 1, 2018. Whenever a complaint is filed against a Principal Broker's affiliated licensee, the Principal Broker will receive notification of the complaint and then have the opportunity to respond and provide any information deemed necessary. Although an automatic complaint will not be opened against the Principal Broker, upon review of the complaint filed against the affiliated licensee, the Commission retains the discretion to open a complaint for failure to supervise against the Principal Broker under T.C.A. § 62-13-312(b)(15).

### Fee Reduction Changes

TREC approved proposed rules that eliminate and reduce certain licensing fees. Specifically, the new rules reduce the original license fee from \$100.00 to \$90.00 and the renewal license fee from \$80.00 to \$75.00. In addition, the rules eliminate fees for change of firm address, name change, duplicate licenses, commission manual, certified copy fees, printouts of licensee information, and printout of licensee information fees. Also, the initial \$10.00 fee that is deposited into the real estate commission education and recovery account is reduced to \$1.00. Furthermore, the rules revise the language for the handling of bad checks to comport with state law. Lastly, the rules reduce all educational course application fees by at least half.

### Fresh Start Act

(Ref. T.C.A. § 62-76-104 and § 63-1-120)

The Fresh Start Act requires that certain state departments, boards, commissions, or agencies, including TREC, not deny an application for a license, certificate, or registration or refuse to renew a license due to a prior criminal conviction unless the conviction directly relates to the applicable profession.

This Act sets out notification requirements for the agencies that intend to use a conviction as the basis for a denial of licensure, factors that must be considered in determining whether to deny or refuse to renew the license on the basis of a criminal conviction, sets out that certain crimes create a rebuttable presumption of being related to a profession, provides information that must be contained in the notice of determination by the agency, and provides that a decision under the Act may be appealed to Davidson County Chancery Court within thirty (30) business days of receipt of the notice of a denial or refusal to renew. A potential applicant may also request a pre-

application determination from the agency as to if a conviction will prevent the person from becoming licensed.

In addition, certain disciplinary actions regarding rental location agents by the Tennessee Real Estate Commission are subject to the factors and appeal process as set out in the Fresh Start Act and may also only be taken if the Tennessee Real Estate Commission determines that the criminal conviction directly relates to the applicable profession.

Note: *TREC is considering new rules related to the Fresh Start Act; however, as of September 1, 2020, they have not been enacted.*



**INSTRUCTOR NOTE:** Spend time on this unit as more and more lawsuits and regulatory complaints are being filed against licensees and their broker.

## **UNIT 6 – Risk Reduction and Errors & Omissions**

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### **Why Are Real Estate Agents Getting Sued or Having TREC Complaints Filed Against Them?**

#### **What We Know:**

- Today's real estate market has turned into a legal battlefield.
- Even though the real estate licensee might not be the reason a lawsuit is filed, they will probably find themselves caught in the crossfire.
- The trend in agent-related lawsuits and complaints has increased dramatically since the 1990's.

*Why is the trend for suing an agent and their broker increasing?*

#### **Complexity of the Real Estate Transaction**

There are more and more complex real estate transactions than in the past such as property trades, assignment or transactions involving alternative financing. Whenever you have a complicated transaction, you increase the likelihood that something will go wrong and that the practitioner will end up getting sued.

#### **Lack of Adequate Agent Training**

Many real estate firms are not providing the type of training and coaching needed to ensure their real estate licensees are doing everything that can to minimize the risk of being sued or having a TREC complaint filed against them.

#### **Everyone Seems to be “Lawyering-Up”**

Society as a whole is growing more litigious. People are more willing to file a lawsuit against a licensee and/or brokerage today than ever before. This trend is affecting a broad spectrum of business, not just the real estate industry. Studies have shown we are becoming a less trusting society and some people question “everything and everyone.”

#### **Increasing Government Regulations for Real Estate Licensees**

Federal, state, and local governments are passing more laws that are expanding the duties and obligations of real estate practitioners. From following the guidelines in the Real Estate Settlement Procedures Act (RESPA) to the most recent regulations enforced by the Consumer Financial Protection Bureau (CFPB) agents are finding themselves navigating through a fairly treacherous regulatory environment. The more duties that licensees have, the greater the opportunity that they'll make a mistake somewhere along the line.

***The Bottom Line: You can't prevent someone from filing a lawsuit or complaint against you. However, you can be proactive and reduce the chances of seeing one come across your desk.***

## 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?

**INSTRUCTOR NOTE:** Fraud claims are the most common cause of action Rice sees from claimants and plaintiffs. Generally speaking, *fraud contains an element of intent*. In other words, for a plaintiff to succeed on a fraud claim, the plaintiff must convince the judge or jury that there was an intentional act of the defendant that was designed to cause harm to the plaintiff. The "intentional act" complained of may be an affirmative statement by the real estate agent, or it could be the purposeful withholding of a material fact about which the real estate agent has knowledge.

Claimed injuries are specific to each and every situation and therefore vary from lawsuit to lawsuit, but can include diminution of value of the subject property, cost to repair the defect, replace costs, lost profits, closing costs, physical and emotional distress, loss of consortium, and the plaintiffs' attorney's fees associated with the litigation.

Some frequent examples of fraud claims include:



*“My real estate agent knew there was a discrepancy regarding the square footage of the home, and he purposefully did not disclose the discrepancy to us, the buyers.”*

*“The listing agent had actual knowledge the well on the property did not produce the amount of water that she represented on the MLS.”*

*“Even though the real estate agent knew there were problems jeopardizing the future of the development that we, the buyers, invested in, he purposefully withheld that information from us.”*

Damages may include not only the plaintiff’s actual damages, but also punitive damages, which are meant to be a punishment to the defendant or an example to the public to deter others from acting in such a way in the future. **As a matter of public policy, damages awarded for acts of fraud are not insurable. Therefore, insurance carriers will not pay a judgment based on fraud. Because the defendant will be personally responsible for those amounts, fraud claims can be very dangerous.**

## 2. Breach of Duty

What are examples of “breach of duty” claims?

**INSTRUCTOR NOTE:** As you know, real estate agents have a duty to act in the best interests of his/her clients. Failure to do so may result in a claim alleging breach of fiduciary duty. A fiduciary obligation is one that involves a special trust, confidence, and reliance on the fiduciary to exercise his discretion or expertise in acting for the client. When a fiduciary relationship exists, the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for his/her own benefit in relation to the subject matter. The client is entitled to the best efforts of the fiduciary, who must exercise all of the skill, care and diligence at his/her disposal when acting on behalf of the client. A person acting in a fiduciary capacity is held to a high standard of honesty and full disclosure in regard to the client and must not obtain a personal benefit at the expense of the client. The basis for a breach of duty claim may derive from a negligent or intentional act.

Some examples of breach of duty claims include:

*“My real estate agent breached her duty by failing to verify the lot I contracted to purchase was the same lot she showed me.”*

*“The listing agent failed to disclose the propensity of the road in front of the subject property to flood and therefore breached his duty to me, the buyer.”*

*“My real estate agent breached her duty by purposefully not disclosing the seller’s dispute with the neighboring property owner over the water rights.”*

### 3. Breach of Contract

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

**INSTRUCTOR NOTE:** Rice regularly encounters lawsuits wherein one party, usually the plaintiff, asserts a breach of contract claim against the insured real estate agent. Breach of contract is a cause of action based upon an allegation that one or more parties failed to perform under the terms of a contract. If a Court finds a breach occurred, it will award damages in such an event. Note that plaintiffs will sometimes claim breach of the real estate contract; however, a breach of contract claim should not exist against the real estate agent in this circumstance, unless the agent was party to the real estate contract itself. This is distinguishable from allegations that the real estate agent breached his/her legal duties which arose out of the buying or listing agreement. It is for this reason that we typically see breach of contract claims in conjunction with other causes of action, such as breach of duty, negligence, fraud, etc.

### 4. Negligence

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

**INSTRUCTOR NOTE:** Generally speaking, negligence is a cause of action alleging the failure to exercise due care toward others which a reasonable or prudent person would do in the circumstances. The plaintiff must show the defendant had a duty to the plaintiff; the defendant’s act or inaction breached that duty; the defendant’s act or inaction was the cause of the plaintiff’s harm; and the plaintiff must have suffered a discernable injury. Acts of negligence are set apart from intentional torts such as fraud since negligence claims lack an element of intent. For example, a plaintiff does not have to prove the defendant purposefully concealed a property defect, but rather that the defendant knew or should have known about the complained of defect and failed to disclose it. Typically, most plaintiffs will plead fraud and negligence in the alternative, which means that in the event the plaintiffs fail to prove fraud, the defendant can still be found to have acted negligently.

Some examples of negligence claims include:

“Our agent failed to transmit written notice to the listing agent before the deadline that we were opting out of the purchase and sale agreement per the inspection contingency in the contract.”

“Our real estate agent should have known that even though the property was advertised as a 4-bedroom house, the septic system was only approved for a 2-bedroom house.”

“The real estate agent should have known there was termite damage to the house and disclosed it to us, the buyers.”

Normally, plaintiffs are not entitled to punitive damages in a negligence claim, but rather are limited to the actual damages suffered, which may or may not include the costs of the litigation.

## 5. Misrepresentation Regarding the Condition of the Property

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

**INSTRUCTOR NOTE:** When plaintiffs allege the misrepresentation of numerous issues concerning the subject property, which happens frequently, Rice classifies the claim under this general heading. Oftentimes a claim or lawsuit based primarily on the misrepresentation or nondisclosure of one issue will also contain several incidental allegations. On the other hand, some lawsuits or claims may simply contain a laundry list of unrelated problems the plaintiff claims were misrepresented or undisclosed. Examples may include misrepresentation concerning water intrusion, foundation defects, age of the home, type of flooring, condition of the roof, nature of the drywall, synthetic stucco, presence of mold, etc.

## 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?

**INSTRUCTOR NOTE:** Rice sees many claims regarding the failure to disclose or the misrepresentation of flooding or leaks in a subject property. These claims will likely include incidental allegations and/or claimed damages, such as damage to personal property, structural defects, difference in value of the subject property, and repair costs.

Some examples of claims in this area include:

“The seller told the real estate agent that the basement floods, but the real estate agent told the sellers not to disclose it.” (In this situation, we would typically see a complaint filed by the buyers based in negligence, fraud, and the applicable consumer protection statute, followed by a cross-claim from the sellers.)

“The real estate agent should have known of the house’s propensity to flood because of the water stains on the basement walls.”

“The real estate agent told us the water was wind driven and came in through the roof during a hurricane, when in actuality the house has a propensity to flood during lesser storms.”

Additional Note: Article 2 of the NAR Code of Ethics

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

## 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?

**INSTRUCTOR NOTE:** Claims alleging the misrepresentation of the value of the property may occur in a number of scenarios. For example, the buyer of a home or the mortgage lender may allege the appraisal overvalued the subject property. In addition to appraisals, plaintiffs may allege misrepresentation concerning broker price opinions (BPOs), which provide a fair market value estimate of the subject property. (Note that some jurisdictions place limits on BPOs done by licensed real agents.) In contrast, a seller may allege his or her real estate agent undervalued the subject property and listed it for too little.

Additional note: NAR Code of Ethics Standard of Practice 1-3 states: “Realtors®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.”

### Case Study on Conflicts of Interest

*Actual Case from Rice Insurance Services Co. LLC*

Dr. Jim Smith needed a new building for her medical practice. Since business was booming, he began working with a real estate firm to assist in his search. After viewing several buildings, Kyle Jones, the real estate agent, showed Dr. Smith a building that was available for \$300,000. Dr. Smith was interested in purchasing the building but wanted to know if it could be renovated for under \$325,000.

Kyle referred Dr. Smith to a contractor, who happened to be his father. According to Kyle, Dr. Smith spoke with his father and assured him the building renovations could be his for under \$325,000. Dr. Smith purchased the building and retained Kyle’s dad to complete the renovations. Kyle brought the renovation contracts to Dr. Smith and was present during discussions with the contractor. Unfortunately, the renovation work was not completed on time or to Dr. Smith’s satisfaction. As a result of the unsatisfactory work, Dr. Smith decided to consult an attorney.

**Discuss the case study and consider what Kyle Jones 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. Tennessee REALTOR® 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 backdated 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 7 – Agency

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**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.

**INSTRUCTOR NOTE:** Prior to the creation of Tennessee's agency law in 1996 implied agency was fairly common. An agent could accidentally say or do something that led a buyer or seller to believe that licensee represented them. However, after agency law was enacted an agency relationship can only be established by a bilateral, written agency agreement between the licensee and the buyer or seller. Remember, the commonly used form "Confirmation of Agency" does not create agency. This form only communicates, or discloses, the agency status of the licensee(s) in the transaction.

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.

**INSTRUCTOR NOTE:** A Facilitator is a "non-agent." Without an agency relationship to either the seller or to a prospective buyer for the seller's property, a licensee is a facilitator, pure and simple, and represents nobody in the prospective transaction.

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.]

**INSTRUCTOR NOTE:** Again, the Confirmation of Agency DOES NOT CREATE agency!

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

**INSTRUCTOR NOTE:** The common law of agency is an area of law dealing with a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person, called the agent, that is authorized to act on behalf of another (called the principal) to create legal relations with a third party. Under T.C.A. § 62-13-408, Tennessee's agency law takes precedence over common law if a conflict exists between state law and common law – especially since "common law" has not always been consistent when applied to real estate relationships.

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

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

Any traditional, non-designated agency relationship with a buyer or seller actually obligates everyone in the office to represent that buyer or seller, whether the other licensees in the office realize it or not. Let's assume that one of the licensees in the office has negotiated a listing agreement as a non-designated agent. Another licensee in the office then tells a potential buyer

that he/she is a facilitator in a transaction when in fact the licensee unknowingly represents the seller whose property this buyer wants to purchase. This is misrepresentation. [Even if it never gets to the point of a contract to purchase, misrepresentations of agency status can occur simply in showing properties when agency relationships are chosen at licensees' individual discretion.]

If each of the licensees in the office simply “does his or her own thing” in regard to agency, the managing broker and the licensees in that office are all risking legal problems and their reputations unnecessarily.

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.**

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

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

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.

**INSTRUCTOR NOTE:** A firm’s use of designated agency can greatly reduce occurrences of dual agency, disclosed or undisclosed. Use of designated agency, nevertheless, should probably be accompanied by an office policy that prescribes, for example, what kinds of information may or may not be shared among sales associates. **Every real estate office in Tennessee should have a written, clear, and consistent agency policy for the entire office, with periodic training for everyone to ensure that they understand and follow the policy.**

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.

**INSTRUCTOR NOTE:** Use the following TAR Hotline response to a question concerning changing agency status to clarify this point:

*QUESTION: If you are the listing agent, and you revert to a facilitator, I understand that you must fill out the Change of Agency form and the Working with a Real Estate Professional form for an unrepresented party for both sides. Do you still fill out a NEW Confirmation of Agency Status in addition to that?*

**ANSWER:** If you are a listing agent and default to a facilitator, you will need to complete the RF303 (the Notification of Change in Agency Status form) for the seller. Then, assuming you are defaulting because you are also working with an unrepresented buyer, you will need to provide the Buyer a copy of RF302, the Working with a Real Estate Professional information sheet. Then you will need to complete a Confirmation of Agency Status form RF301 for the buyer.

Keep in mind that any “default” or reversion to Facilitator status means that — from that moment on — you don’t represent EITHER the seller OR the buyer in this transaction and both of them need to be advised in writing of this fact, so that nobody is operating under the impression that you still represent one party or the other. [This notice in writing applies regardless of whether or not either party has given prior permission for this kind of default to occur.] (Ref. T.C.A. § 62-13-405(d)).

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.]

**INSTRUCTOR COMMENT:** There has been a tendency in recent years for listing agents who change their agency status to “Facilitators/Transaction Broker” to reduce their commission. Remember, the compensation to the listing broker is agreed to by the seller and the broker/ designated listing agent in the listing agreement. Some consumers believe a broker should take less compensation if an unrepresented party is involved in the transaction. Unfortunately, unrepresented parties usually require additional work for the listing agent as he/she will be the one who will have to provide access to the property, manage the paperwork, meet the inspectors and appraisers, work with the title companies, etc. Listing agents should be cautious when reducing commission just because the buyer is unrepresented.

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

**INSTRUCTOR COMMENT:** Previously noted.

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.

**INSTRUCTOR COMMENT:** It is extremely difficult to practice disclosed Dual agency as most agents find they cannot serve “two masters.” Most real estate firms in Tennessee have discontinued the practice of Dual agency.

**FINAL NOTE: Always remember “who brought you to the dance” before considering changing your agency relationship.**

## 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 state statute 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.

**INSTRUCTOR NOTE:** There are really two purposes behind this section of the Broker’s Act. First, it defines the agency relationship in real estate transactions as a “limited agency.” It’s not a boundless authorization for the real estate licensee to operate on behalf of a consumer, as a power of attorney might be. The second purpose of this section is to emphasize that the duties to consumers and clients in Tennessee’s agency law take precedence over the more general list of duties that have been taught for several decades as part of the “common law” of agency.

## 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.

**INSTRUCTOR NOTE:** To clarify every licensee's responsibilities in a transaction, Tennessee law provides a clear list of duties by every licensee to any consumer with whom they are working...regardless of any agency relationships. Tennessee's agency law supersedes the "common law of agency." Rather than dealing with a list of (non-real-estate-specific) "fiduciary duties" that changes dramatically whenever an agency relationship is created or



changed, both licensees and consumers can now look to one clear set of real-estate-specific guidelines.

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

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

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

### **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).

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

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

**INSTRUCTOR NOTE:** This was addressed in a question to the TAR Legal Hotline. The TAR attorney provided the following answer:

Having two buyers which both present offers on the same property can be a VERY dangerous proposition for an agent. It is permitted, as long as both buyers sign a statement which states that they understand that you are working with both buyers and that they are both submitting offers on the same property. **However, this opens you up to the real possibility that one of them could claim inappropriate behavior on your part**, especially if one of these buyers is successful (and the other, obviously, is not); hint: TREC COMPLAINT. Therefore, if both buyers want to make an offer, we would recommend that you have another agent in your office work with one of the buyers while you work with the other.

## 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. Tennessee REALTORS® 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. Tennessee REALTORS® 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 Billy Anderson signed a Buyer Representation Agreement with two (2) different buyers – Buyer Will and Buyer Margaret. Will signed his agreement three weeks ago and Margaret signed her agreement with Billy about two weeks ago. Both buyers really like Billy as he is easy to work with and very professional.

On Wednesday morning, Billy showed a home located at 9839 Tulip Poplar Drive that just came on the market to Buyer Will. Will really liked the home as he felt it met most of his needs. However, he needed a little bit of time to think about it. After showing the house to Will, Billy received a phone call from Margaret asking to see the same property. That afternoon, Will showed Buyer Margaret the house. Right before he showed the house to Margaret he received a text message from Will indicating he was ready to make an offer on the property and wanted to know when they could get together. Billy responded to Will with “Great!” After viewing the home, Margaret said it’s exactly what she was looking for and wanted to make an offer before it got away.

Billy 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 Billy and his broker should handle this situation?**

**INSTRUCTOR NOTE:** This was addressed in a question to the Tennessee REALTORS® Legal Hotline. The Tennessee REALTORS® attorney provided the following answer:

Having two buyers which both present offers on the same property can be a VERY dangerous proposition for an agent. It is permitted, as long as both buyers sign a statement that states that they understand that you are working with both buyers and that they are both submitting offers on the same property. **However, this opens you up to the real possibility that one of them could claim inappropriate behavior on your part**, especially if one of these buyers is successful (and the other, obviously, is not); hint: TREC COMPLAINT. Therefore, if both buyers want to make an offer, we would recommend that you have another agent in your office work with one of the buyers while you work with the other.

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

Seller Agent Keith listed a three-bedroom, two-bath home in a very popular neighborhood on Thursday afternoon for Seller Jim and Seller Mary. On the following Sunday, Keith hosted an open house from 2:00 – 4:00 pm. Buyer Kyle and Buyer Barb attended the open house. Keith 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 Keith be the “Designated Listing Agent for the Sellers” and a “Facilitator/Transaction Broker” for the Buyers at the same time?**

**INSTRUCTOR NOTE:** In Tennessee, you cannot represent one side of the transaction as an agent *and* the other side a facilitator. You can work with both sides as a facilitator, but cannot represent one side as an agent and then act as a facilitator for the other. The other side to the transaction would simply be unrepresented. You can work with a buyer as a facilitator, i.e., no buyer’s representation agreement is in place. But bear in mind that buyer’s representation agreements protect both the buyer and the real estate firm. By having a buyer’s representation agreement, the buyer is owed a higher level of service. If an agent represents a party, they owe the duties contained in TCA § 62-13-404. The firm is protected if a buyer decides to “cut out the agent” at the last minute. Buyer’s representation agreements generally require that the firm be paid no matter who assists the buyer in finding the home, and even if they have no assistance. It additionally requires that if there is no offer of compensation, or less than what is agreed to in the buyer’s representation agreement, the buyer must pay the difference. As principal broker, you can create office policy and require that buyer’s representation agreements be used in all transactions. [Source: Tennessee REALTORS® Legal Hotline]

## Let's Review

### INSTRUCTOR NOTE: Answers in RED.

1. An agency relationship in Tennessee cannot be implied by an agent's actions or behavior, but only created by what means? **A bilateral signed written agreement.**
2. If an agent has not established a written agency relationship with a client, what is the agent's status in the transaction? **Facilitator**
3. In a traditional agency relationship, who is the client's agent? **All licensees in the company.**
4. If the client has signed a Designated Agency agreement with the broker, who represents the client? **The designated agent assigned by the broker through the listing agreement.**
5. Is Dual Agency still legal in Tennessee? **Yes, but it must be disclosed in writing.**
6. What is your relationship with a buyer prior to signing a Buyer Representation Agreement? **You are a Facilitator.**
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? **No, the buyers are unrepresented.**
  - b. Can you receive commission for "both sides"? **Yes.**
  - 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? **Yes. This can be accomplished by utilizing TAR Form 303 "Notification of Change in Agency Status."**
8. If you sell your own listing to a buyer who does not have an agent (unrepresented) do you automatically become a Facilitator? **No. You can only become a Facilitator if your seller client approves you changing your agency status.**
9. Can you allow an unrepresented buyer think they are represented by you as long as you have not told them directly? **No, unrepresented buyers should be clearly told you do not represent them and you should confirm this in writing prior to the preparation of an offer to purchase. (Ref. TCA § 62-13-405.)**
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? **Yes. In this situation you would represent both the buyer and the seller, likely without either party's knowledge.**

11. For in-house transactions, is Designated Agency the only agency relationship utilized? **No.** Designated Agency is and can be used as office policy for all agency relationships within a company. Furthermore, traditional agency can be used for in-house transactions, but it requires that the agent either notify either party in writing that there is a dual agency situation (and obtain their consent) OR both parties would default to a facilitator position with confirmation in writing.
12. If the firm practices designated agency, do all files need to be in a centralized location for everyone to access? **No.** If the company practices Designated Agency each licensee's files must be kept in a secured location so only the broker and the designated agent have access to that file. Why? Because it protects the confidentiality of the client, and, if two agents in the same office (as Designated Agents – one for the buyer, the other for the seller) are involved in the same transaction they could find themselves negotiating with each other on behalf their client. Also, if the principal broker is actively selling real estate (i.e. actively working with sellers and buyers) the broker may wish to appoint an office manager or administrative person to review paperwork and ensure that each licensee is documenting all actions appropriately.
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? **No – if one team member is a designated agent for a client, then the entire team should be the designated agent for that client.** Therefore, all members must be listed on the listing agreement or buyer's representation agreement. In addition, anything that one team member knows, all team members are assumed to know (i.e. adverse facts.) If the team represents the buyer and the seller in a transaction, then they ALL would need to default to Facilitator, or disclosed Dual Agency, depending on the company (not team) policy.
14. Can a "Confirmation of Agency" disclosure be used as an agency agreement with a buyer or seller? **No.** An agency relationship is established through a bi-lateral, written and signed agreement. A disclosure confirming agency status is just that...a disclosure used to communicate agency status.
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? **The principal broker does not have an agency status with either client and would, for practical purposes, he/she would be a Facilitator.**
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? **Yes.** Per the Code of Ethics, Standards of Practice 16-9: *"REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service."* You ask any interested buyer if they are working with another real estate agent regardless of whether the interaction occurs at an open house or some other location.
17. If you discover an adverse fact with the property you are listing, are you only required to disclose this to your seller client? **False.** Pursuant to T.C.A. § 62-13-403, you are required to disclose the existence of any adverse fact that is not disclosed by the seller

to both the seller and any interested buyer. You should do this in writing which is signed off on by the party to whom the information is disclosed.

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? Yes. Per § 62-13-403(7)(B) one of the duties owed to all parties is to not recommend the services of a person, organization or a 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.



## UNIT 8 – 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 rule changes in 2015 and 2017 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.*

### **Firm Telephone Number and Size of Licensee and Firm Names in Advertising**

TREC Rule 1260-02-.12(3)(b) states **"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."** This rule is also specific on the size of a licensee and firm name on advertising. The rule states **"the firm name must be 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."** The size of the firm's telephone number is no longer applicable per the rule changes in 2015 and 2017. Remember, this rule applies to all advertising whether it be print or digital media.

**INSTRUCTOR NOTE:** Remind the class that TREC revised the rule concerning the size of names in advertising. Originally, the rule passed in October 2015 user the terminology "most prominent." After reviewing the rule and determining the wording was too ambiguous, the Commission changed the rule in 2017 to what is noted above.

### **Licensee Name in Advertising Must Be the Name Registered with TREC**

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.)



## Discussion: False and Deceptive Advertising

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

### Radio and Television Advertising

**INSTRUCTOR NOTE:** Radio and television commercials from real estate licensees that do not include their firm names, numbers and, if applicable, franchise information would be considered misleading.

### Craigslist and Other Internet Marketing / “For Sale” Sites

**INSTRUCTOR NOTE:** Craigslist has a reputation of not having reliable information and is full of errors. Also, scammers are known for manipulating listing information and posting false advertising for rentals, investment properties, VRBO’s, etc. Firm name and telephone numbers are always missing.

[Standard of Practice 12-10: (2) manipulating (e.g. presenting content developed by others) listing and other content in any way that produces a deceptive or misleading result (4) presenting content developed by others without either attribution or without permission, or (5) to otherwise mislead consumers.]

### Ad Offers & Guarantees

**INSTRUCTOR NOTE:** Examples: (1) Advertisements that state “I can sell your house in 90 days or I will buy it for cash” –without the proper disclaimers on the face of the advertisements. (2) “I am the top selling agent in the state of Tennessee”; (3) “I have sold over \$15 Million in real estate” when it was actually the team. (4) A customer service guarantee that stated the client either was satisfied or “I will give them their money back.” Refer back to Gifts & Prizes TREC Rule 1260-02-.33

### Signage

**INSTRUCTOR NOTE:** Real estate yard signs that only contain the licensee’s information and not that of the firm. Pointer signs that only have the firm name, but not the firm telephone number. Also, third-party signs (i.e. mortgage lenders, veterans benefit home buying programs, etc) that advertise the agent and the third-party – and not the brokerage - may not conform to TREC rules. In addition, any shared signage with a settlement agency under current RESPA/CFPB guidelines may be a violation of RESPA/CFPB. Bus benches and Billboards are often found to be in violation of TREC rules because of the lack of information found on them such as brokerage name and phone number and disclaimers concerning offers or prizes.

### Social Media (Facebook, Instagram, LinkedIn, YouTube, etc.)

**INSTRUCTOR NOTE:** TREC rules do not specifically lay out guidelines about social media advertising outside of the fact advertising on social media must conform to the same guidelines as all other advertising, including Internet advertising. The Code of Ethics in Article 12, Standard of Practice 12-5 states Realtors® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services that Realtor®’s firm in a reasonable

and readily apparent manner. This Standard of Practice acknowledges that disclosing the name of the firm may not be practical in electronic displays of limited information (e.g., “thumbnails”, text messages, “tweets”, etc.). Such displays are exempt from the disclosure requirement established in this Standard of Practice, but only when linked to a display that includes all required disclosures. (*Adopted 11/86, Amended 1/11*). Take note that this is NOT specifically stated in the TREC Rules, so it is unclear as to whether the link would be sufficient for TREC.

### Vehicle Advertising (Car Wraps)

**INSTRUCTOR NOTE:** Vinyl on cars or car wraps without the required information is a violation of TREC rules.

### Truth in Lending (Regulation Z)

**INSTRUCTOR NOTE:** “New construction” properties in developments advertising specific interest rates for loans without disclosing, as required, an annual percentage rate (APR) or the required Truth in Lending (Regulation Z ) details...

### Others

**INSTRUCTOR NOTE:** Ask the class participants to give examples and discuss.

## 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.



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.**

TREC rules make it very specific about how a team should identify itself in all advertising in order not to mislead the consumer. Terms such as “**Real Estate,**” “**Real Estate Brokerage,**” “**Realty,**” “**Company,**” “**Corporation,**” “**LLC,**” “**Corp.,**” “**Inc.,**” and “**Associates**” *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

(Ref. 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. **INSTRUCTOR NOTE:** It needs to be obvious to the consumer who the firm the licensee is affiliated with and the phone number of the firm. This information can no longer be hidden in a corner of a web page but should be seen upon landing on any page of an agent's website. Placing this information in the header of each page is one possible way to satisfy this rule.
- 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. **INSTRUCTOR NOTE:** Most IDX (Internet Data Exchange) portals provide a notice stating the properties appearing on the site may not be listed by the broker; however, it is the responsibility of the licensee and their broker to make sure this notification is clearly made to the site's visitors.
- **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. **INSTRUCTOR NOTE:** "First Generation" means the licensee created the content.

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

(Ref. 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/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 Harold Smith 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 Harold’s claim in her advertising? If so, discuss the reasons a complaint could be filed against him?**

**INSTRUCTOR NOTE: YES.** Also, Article 12 of the NAR Code of Ethics addresses misrepresentation by REALTORS®. And, refer to the Gifts and Prizes TREC Rule (1260-02-.33) for a list of the requirements for advertising the offer.





## Let's Review

**INSTRUCTOR NOTE: Answers in RED.**

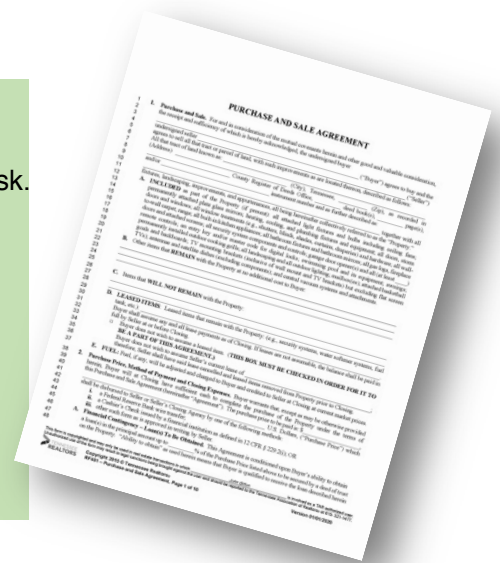
1. You and your assistant are preparing in-house brochures and box flyers for a new listing. Do these materials need to be reviewed by your principal broker? **Yes, all advertising materials, no matter the medium, must be reviewed and approved by the principal broker.**
2. Under the TREC advertising rules what must be most prominent and visible in all advertising? **The firm name must be the most prominent name in all advertising. The firm telephone number must be the same size or larger than the agent's telephone number.**
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? **No. The word "Associates" and "Real Estate" are two of the words that cannot be used in a team name. (Ref. TREC Rule 1260-02-.13(f)(2))**
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? **The firm name must be the most prominent name featured on the sign and the firm's telephone number must be the same size or larger than the number of the licensee. Also, if the licensee using a franchise trade name or as a member of a cooperative group shall unmistakably indicate on the sign the licensee name, firm name and firm telephone number listed with TREC. Also, the verbiage "Each (Franchise Trade Name or Cooperative Group) is Independently Owned and Operated" must be clearly noted on the signage.**
5. According to TREC, what must appear on each page of your website? **The firm name and firm telephone number listed on file with the Commission must conspicuously appear on each page of the 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? **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." Also, TREC Rule 1260-02.33(1)(b), the Gifts and Prizes Rule, must be followed. This means you must list the following: 1. Accurate specifications of the gift or prize, or other valuable consideration; 2. Fair market value; 3. Time and place of delivery; and 4. Any requirements that must be met in order to receive the gift.**
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? **No. A gift offered CANNOT take the form of cash. Both of these prizes are convertible to cash.**
8. What four (4) requirements must be met under TREC's Gifts and Prizes rule?
  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.**



## UNIT 9 – Contracts

### A Note About the Authorized Use of Tennessee REALTORS® 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.

## TREC Core Contract Skills Assessment

The following questions will test your knowledge of managing the offer to purchase and contract process utilizing the Tennessee REALTORS® RF401 Purchase and Sale Agreement and other forms in the Tennessee REALTORS® forms inventory. Choose the best answer for each question.

- 1. When should you review and explain the Tennessee REALTORS® Purchase and Sale Agreement (RF401) with buyers?**
  - a. After the offer is submitted
  - b. Before they make an offer - **Correct Answer**
  - c. When the offer is accepted
  
- 2. When should you review and explain the Tennessee REALTORS® Purchase and Sale Agreement (RF401) to sellers?**
  - a. Before they receive an offer
  - b. When they receive an offer - **Correct Answer**
  - c. After they accept an offer
  
- 3. Which of the following statements is TRUE?**
  - a. It's most important to be familiar with the Tennessee REALTORS® Purchase and Sale Agreement (RF401) form because you can address every issue by altering the boilerplate language.
  - b. Most Tennessee REALTOR® forms are rarely used.
  - c. It's important to be familiar with the function of all Tennessee REALTORS® forms so you understand how they work together to address different issues. - **Correct Answer**
  
- 4. Which of the following is NOT an example of ambiguous language?**
  - a. Seller to provide Buyer with \$500 credit
  - b. Seller will provide Buyer with \$500 credit at closing towards Buyer's closing costs - **Correct Answer**
  - c. Portion of closing costs to be paid by Seller
  - d. Buyer to take possession as determined prior to closing
  
- 5. Which of the following is the most acceptable method of delivering an offer?**
  - a. In person
  - b. By fax
  - c. By email
  - d. All of the above equally acceptable, with proper documentation - **Correct Answer**

- 6. Which of the following statements is TRUE?**
- a. The Buyer always gets to select the Title Company
  - b. The Seller always gets to select the Title Company
  - c. In situations where the sale is being funded by a federally insured loan, the Buyer gets to choose the Title Company if the Buyer is paying for the title insurance policy - **Correct Answer**
  - d. In situations where the property is being funded by a federally insured loan, the Seller gets to choose the Title Company if the Buyer is paying for the title insurance policy
- 7. Which of the following inspections is NOT legally permissible and not permitted under the Inspection Section?**
- a. Home inspection performed by a licensed home inspector
  - b. Home inspection performed by a licensed contractor - **Correct Answer**
  - c. Home inspection performed by Buyer
- 8. One primary function of the Tennessee REALTORS® Purchase and Sale Agreement (RF401) is to**
- a. Reduce risk and liability for REALTORS® and brokers - **Correct Answer**
  - b. Confuse REALTORS® and brokers
  - c. Address every possible situation that might arise during a transaction
- 9. The Tennessee REALTORS® Counter Offer Form (F8) states, “all terms and conditions proposed in previous counter offers, if any, are not included in this counter offer unless restated herein.”**
- a. True - **Correct Answer**
  - b. False
- 10. Per the Tennessee REALTORS® Purchase and Sale Agreement (RF401), when a Buyer is terminating the contract due to Home Inspection OR financial contingency, both Buyer and Seller must sign the Trust Money Disbursement and Release form?**
- a. True
  - b. False - **Correct Answer**
- 11. When Trust Money is either not received by the Holder or not honored for any reason, the holder does not have to notify Buyer and Seller of the Buyer’s failure to deposit the money agreed to in the RF401 Purchase and Sale Agreement.**
- a. True
  - b. False - **Correct Answer**

## Remembering Contract Basics

### What is a Contract?

A contract is a **legally binding agreement** between two or more people. This means that there are **promises** to pay money, transfer property or to do or not do something exchanged between the parties.

### What Makes a Contract Legal?

#### 1. It Must Have a Legal Purpose

Parties cannot execute a contract to do an illegal act. The purpose of the contract must conform to the law. A contract between parties that involves fraud upon another would be void.

#### 2. Legally Competent Parties

The parties to a contract must all be legally competent to enter into an agreement. This includes being of legal age and of sound body and mind at the time of entering in to a contract. In Tennessee, the legal age for signing contracts is 18 years old.

#### 3. Agreement by Offer and Acceptance

In real estate this is illustrated by an offer to purchase a property by a buyer and the acceptance of that offer by the owner/seller.

#### 4. Consideration

Consideration is anything of legal value offered and exchanged in the contract. This could be money, services or other valuable goods.

#### 5. Consent

This element requires the parties to the contract have consented willingly and knowingly to the terms of the contract. There cannot be fraud, misrepresentation, or undue duress on any party to the contract.

### Who Can Sign a Contract?

**All owners of real estate** should sign the contract of sale. If a husband puts his name only on a Purchase and Sale Agreement when both he and his wife own the property, then the buyer cannot force the wife to transfer the property in the absence of her written agreement.

If a party to the agreement cannot sign one or both of the parties can assign a **Power of Attorney** to someone who can sign in their absence. (*NOTE: Powers of Attorney should be NOTARIZED and a copy should be made available from your client to you and your broker for your file(s).*)

### 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.

### *TREC Rule Concerning Offers*

## **REMEMBER THESE TWO IMPORTANT RULES OF CONTRACTS IN TENNESSEE:**

**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.**

### **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.

## **A Few Words On Multiple Offers**

### *Key Points on Multiple Offers*

- Standard of Practice of the REALTOR® Code of Ethics states that **the existence of offers should only be disclosed with the seller's consent.**
- The **seller alone determines** whether one or more of the prospective buyers will be informed that there are multiple offers.
- Sellers who elect to disclose multiple offers risk that a buyer will walk away from a possible “bidding war.”
- Alternatively, **sellers may elect to leverage the existence** of multiple offers to get the best price and terms.

## Binding the Agreement

The Purchase and Sale Agreement becomes binding once the receipt of acceptance has been made and the receiving broker/agent signs the “Acknowledgement of Receipt” (binding) information on the last page of the Agreement. This can be done on the original Purchase and Sale Agreement or on the final Counter Offer form.

*An Example of the Binding Process of the Purchase and Sale Agreement*

1. The **Buyer makes an offer**. (Selling Agent submits the offer to the Listing Agent.)
2. The **Seller counters the offer**. (The Listing Agent submits the Counter Offer to the Selling Agent.)
3. The **Buyer accepts the counter offer**. (The Selling Agent submits the accepted Counter Offer to the Listing Agent.)
4. The **Listing Agent binds the offer**. The last party to receive the acceptance of the offer/counter offer is the one who binds the agreement.

## Contract Timelines and Performance Dates

**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?**

### INSTRUCTOR NOTE:

*Some Examples:*

- Time Limit of Offer
- Appraisal
- Financial Contingency/Loan Obligations - Credit Report, Hazard Insurance, Intent to Proceed, Appraisal paid & ordered,
- Financial Contingency Waived - Funds to Close (transferring funds, gifts funds, liquidating assets, etc.)
- Earnest Money/Trust Money
- Inspection Contingency
- Response to Inspection Contingency: Repair or Replacement Resolution
- Closing and Possession Dates
- Property Condition Disclosure
- Title and Conveyance
- Final Inspection
- Flood Issues
- Survey Issues
- Restrictions
- Title Issues
- Closing Issues

**INSTRUCTOR NOTE:** Review the various performance dates noted in the Tennessee REALTORS® Purchase and Sale Agreement (RF401) and discuss a couple of them in further detail.

Also, reference Tennessee REALTORS® Form RF708 Purchase and Sale Agreement Timeline Checklist as a good way to stay on top of performance dates.



## 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 (3<sup>rd</sup> Monday in January), Washington's Birthday (3<sup>rd</sup> Monday in February), Memorial Day (last Monday in May), Independence Day (July 4<sup>th</sup>), Labor Day (1<sup>st</sup> Monday in September), Columbus Day (2<sup>nd</sup> Monday in October), Veteran's Day (November 11<sup>th</sup>), Thanksgiving Day (4<sup>th</sup> Thursday in November) and Christmas Day (December 25<sup>th</sup>)

From the RF401 Purchase and Sale Agreement: "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.

## Loan Obligations

- The loan obligations paragraph in the Tennessee REALTORS® RF401 Purchase and Sale Agreement 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 and pay for a credit report.
- 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 (RF656)** 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 136 of the Tennessee REALTORS® 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.

## Inspecting the Property

- **Buyers have the right to inspect the property they are purchasing.** It is important to discuss inspections and all that is involved in having the property inspected. Stress the importance of the timelines associated with the inspection period and the resolution period.
- **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.
- **The termite inspection is included** and if the buyer waives the inspections, they could “except” the termite inspection or any other specific inspection to add it back in by inserting the “exception” in the Special Stipulations paragraph.

**INSTRUCTOR NOTE:** It is important to discuss Inspections and all that is involved in having the property inspected. Stress the importance of the timelines associated with the inspection period and the resolution period.

## A Note About Home Inspections in Tennessee

State law [T.C.A §62-6-302(3a)] defines a home inspection as a “visual analysis for the purpose of providing a professional opinion of the condition of a residential building, ancillary building, any reasonably accessible installed components, and the operation of the building systems, including any controls normally operated by the owner of the building, for the following components:

- |                          |   |
|--------------------------|---|
| • Heating systems;       | • Foundations;  |
| • Cooling systems;       | • Roof covering;  |
| • Electrical systems;    | • Exterior and Interior components;                             |
| • Plumbing systems;      | • Any other site aspects that affect the residential dwelling.” |
| • Structural components; |   |

Therefore, if the Buyer is receiving an inspection that covers ALL of the above mentioned components, **then it must be performed by a licensed home inspector.** A Buyer is permitted to get an inspection of individual systems without using a licensed home inspector. However, the person performing the limited inspection must meet state requirements for licensure and/or experience. (i.e. a licensed electrician to inspect the electrical, a licensed plumber to inspect the plumbing, an experienced roofer to inspect the roof, etc.) Additionally, the buyer is permitted to conduct the inspection himself/herself. If the seller will not accept this, it should be negotiated in the contract.

## Septic and Well Inspections

The buyer may ask the seller to provide a septic letter at Seller's expense. Pursuant to TREC Rule 1260-02-.37: "A licensee preparing an offer to buy shall provide in the offer and make the buyer aware that, for a fee, a septic system inspection letter is available through the Tennessee Department of Environment and Conservation, Division of Ground Water Protection."

The buyer may ask Seller to provide a well test at Seller's expense. Address this in Special Stipulations. The seller may already have had the well tested and have the results on file. You can ask the seller's representative.

## Costs associated with Inspections and Repairs

**All inspections are performed at the buyer's expense** unless otherwise specified in the Special Stipulations section of the Purchase and Sale Agreement. The termite inspection costs are the responsibility of the Buyer unless the Buyer is receiving a VA loan. Government regulations within VA loan requirements will not allow the Buyer to pay for a termite inspection. (See Tennessee REALTORS® RF625 VA/FHA Addendum that addresses this issue.) The form states that the Buyer will order the inspection BUT the Seller will be responsible for paying for it. Buyers and Sellers should negotiate any needed repair costs, in good faith, using the RF654 Repair/Replacement Proposal or the RF655 Repair/Replacement Amendment.

## Home Inspectors

Home Inspectors in Tennessee are licensed and regulated by the Home Inspector Licensing Program of the Tennessee Department of Commerce & Insurance. Tenn. Code Ann. §62-6-301(5) defines a home inspector as "any person who is licensed under this part as a home inspector and who engages in the business of performing home inspections and writing home inspection reports." Clients and customers should be encouraged to use a licensed home inspector. Although buyers may inspect the property themselves, this may not carry the same weight in the eyes of the seller as a report from a licensed home inspector.

**INSTRUCTOR NOTE:** Carefully review the options provided to the buyer after they have had the property inspected. Discuss the importance of not providing a full copy of the inspection report (recommended by Tennessee REALTORS® attorneys.)

## Inspection Contingency in the Purchase and Sale Agreement

The RF401 Purchase and Sale Agreement provides a buyer with an opportunity to make the offer/contract contingent upon a formal inspection of the property prior to closing on the transaction. Any and all inspections should be completed during the inspection period as noted in Section 7, Paragraph D in RF401 Purchase and Sale Agreement.

### *Reporting Inspection Results to the Seller*

Once all inspections are completed the buyer has three (3) options in how they report the results to the seller:

1. They can provide a list of written specified objections and immediately **TERMINATE the Agreement**. **NOTE: DO NOT PROVIDE A FULL COPY OF THE REPORT!!! This is no longer a requirement. Agents SHOULD NOT automatically send the home inspection report with the list of repairs or termination notice. The Seller can request a copy (be careful as it can create an obligation on**

**the part of the listing agent if adverse facts are revealed in this report.), but the buyer is not required to disclose it.**

2. They can **accept the property in its present “AS IS” condition** with any and all faults and no expressed warranties

OR

3. **Furnish the seller with a list of items they would like repaired and/or replaced** prior to closing.

#### *Inspection Contingency Resolution Period*

If the buyer chooses #3, the parties enter the “resolution period” and the RF654 Repair/Replacement Proposal form 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 Tennessee REALTORS® 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.

**INSTRUCTOR NOTE: Explain the importance of watching the performance date of the inspection resolution period. Explain to them the consequences of not following the specified dates noted in the Purchase and Sale Agreement.**

## **A Note About “As Is” Properties**

### Buyers

When purchasing properties offered “as is,” buyers are still entitled to make any and all desired inspections – they can and should do so!

- Buyers may still attempt to negotiate any needed repairs.
- Buyers may cancel the contract based on any items disapproved in the inspection report or any defects disclosed by the seller.
- Purchasing a property “as is” does not limit a buyer’s options under the RF401 Purchase and Sale Agreement although, in practice, an “as is” Seller will be less likely to complete or negotiate needed repairs.

### Sellers

- In practice, Sellers may offer a property “as is” because they don’t wish to make any repairs or because they are unaware of what problems may exist.
- Sellers offering a property “as is” are still required to fully disclose any property defects of which they have knowledge via the RF201 Tennessee Residential Property Condition Disclosure, unless exempt. It is especially important that Sellers answer honestly when a buyer inquires about a specific issue, i.e. plumbing or wiring.

**Offering a property “as is” does not obligate buyers to *accept* the property “as is” until they’ve completed all desired evaluations and inspections.** In the event a Seller offers a property “as is” and a Buyer agrees to waive their statutory right to a Tennessee Residential Property Condition Disclosure, an RF204 Tennessee Residential Property Condition Disclaimer form may be used. The **ONLY** time this form may be used is when the Buyer of property agrees to waive their statutory rights to a Residential Property Condition Disclosure.

## Lender Requirements

It is important to familiarize yourself with lender requirements in your area related to appraisals and inspections. Know what lenders expect to receive before they order the required items for the loan obligations.

- If a lender needs the appraisal and/or inspection report before ordering loan documents, the deadlines you fill in at the direction of the Buyer, included in the RF401 Purchase and Sale Agreement should allow for this to happen to avoid putting the buyer at risk for breach. The parties may also wish to include in the special stipulations that the appraisal and/or inspection report must be obtained on or before a specific date.
- Buyers should be advised to stay in regular contact with the Lender to ensure their obligations are fulfilled. Lenders should be made aware of the contractual deadlines for the loan obligation. Using the RF708 Timeline Compliance Checklist for Purchase and Sale Agreement is a tool you can utilize to make sure everyone involved in the transaction is aware of the deadlines contained in the contract between the Buyer and Seller.

## Binding Agreement Date

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

*Lines 504-506: Acknowledgement of Receipt. \_\_\_\_\_ hereby acknowledges receipt of the 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 this 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 counter offer 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.

## 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!

**INSTRUCTOR NOTE:** There are certain contingencies wherein the buyer is permitted to terminate the contract and receive a return of the Trust Money. The terms of the contract clearly specifies this action. The Buyer does NOT need the approval of the seller to do so. Therefore, the Notification is adequate to convey that the buyer is exercising his contingency and terminating the contract. It also contains language that requests return of the Trust Money pursuant to the terms of the contract.

The “**Earnest Money/Trust Money Disbursement and Mutual Release of Purchase and Sale Agreement**” form (RF 481) is not technically required in that situation since the contract states that the buyer has the right to terminate and if he does so, he is entitled to the Trust money. However, some brokers want a document in which both parties agree to the distribution of the funds. This is because they may not be comfortable in making a reasonable interpretation of the contract, which would be done in the event that the Trust Money is returned without the signature of RF 481.

*Waiver of seeking legal action against parties and brokers:*

The Trust Money Disbursement and Mutual Release of Purchase and Sale Agreement Form can also be used as a way to release any liability or claims the parties may have against each other or the brokers. This option requires the signature of BOTH the buyer and the seller. Please bear in mind that this form states that



both sides are **giving up their right to file a lawsuit on the contract**. If the parties want to reserve the right to file a lawsuit but are in agreement to the distribution of the Trust Money, then I would recommend having an attorney assist you in drafting an agreement for the release of the funds.

## 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.

**INSTRUCTOR NOTE:** Stress to the class there are certain communications that are required under the terms and conditions of the contract. Many agents are still not using the Notification Form (RF 656) (or giving the appropriate notices) that puts their clients in default. This can result in lawsuits against the clients and in turn against the agents.

### *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.

## Exhibits and Addenda

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.

For instance, misrepresentation on the property condition disclosure generally only has a statute of limitations of one year. However, real estate contracts have a statute of limitations of six years. Therefore, by attaching unnecessary documents, you are potentially increasing the time in which you or your client could be sued by SIX times.

This is also true of documents required by the Broker’s Act. There is a two year statute of limitations on TREC complaints against licensees. However, if you attach an agency document or other form required by the Broker’s Act to the Purchase and Sale Agreement, you are opening yourself up to a lawsuit in a Court of Law, even though the timeline for a TREC complaint has passed. (Agency forms should not be listed as part of the agreement. They are not a part of the agreement between the seller and buyer.)

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.”

The following are examples of what to attach and what not to attach to the RF401 Purchase and Sale Agreement:

### **Recommended Exhibits/Addenda:**

- VA/FHA Addendum
- Buyer’s First Right of Refusal Addendum (Seller’s Right to Continue to Market Property)
- Temporary Occupancy Agreements
- Assumption Agreement Addendum
- Lead Based Paint Disclosure

### **NON-Recommended Exhibits/Addenda:**

- Property Condition Disclosure, Disclaimer or Exemption
- Confirmation of Agency
- Subsurface Sewage Disposal System Permit Disclosure
- Compensation Agreement
- Referral for Service Disclosure

### **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 RF401 Purchase and Sale Agreement 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 may be, 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/title 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 RF401 Purchase and Sale Agreement 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 RF401 Purchase and Sale Agreement.** 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 Tennessee REALTORS® 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 space in the special stipulations section use **Form RF621 – Blank Addendum.**

## COURSE EXERCISE #1: Performance Dates/Timelines

*In the following exercise, there are several examples of how performance dates/timelines impact the parties in a real estate transaction utilizing the RF401 Purchase and Sale Agreement. Review each one carefully and provide the best way to handle each scenario.*

1. In the offer to purchase the home owned by Tom Smith (Seller), Jane Wilson (Buyer) puts 6:00 p.m. on Friday as the time limit for the Seller to respond. The Seller is driving back home from the beach on Thursday evening and requests additional time to review the offer. He would like to extend the time limit of the offer. How should this be handled?

**INSTRUCTOR NOTE:** An Addendum should be created to extend the time limit of the offer. An addendum is used BEFORE a contract is completed. For example, form RF625 (VA/FHA Loan Addendum) is generally presented with the offer. An amendment is used AFTER a contract has been formed and is used to change the terms.

If the offer has not yet been accepted, rejected, or countered, you could use an addendum to extend the time period of the offer. It would only need to be signed by the buyer (offeror) unless or until the seller agrees to accept the offer.

2. After extending the time limit of the offer, Mr. Smith (Seller) counters the offer submitted by Ms. Wilson (Buyer). Ms. Wilson reviews Mr. Smith's counter offer and makes one minor change that does not impact the price or closing date. The listing agent, Bill Taylor, sends the counter offer to Carolyn Jones, the buyer's agent. She, in turn, submits it to her buyer for her 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, Mr. Taylor. Who binds the contract?

**INSTRUCTOR NOTE:** The listing agent binds the contract. The agent who receives the final executed contract from the agent representing the last signor of the Purchase and Sale Agreement is the one who completes this section.

The Binding Agreement Date is the date and time at which both Buyer and Seller have reached an agreement on the terms of the sale of real property. This date and time shall be that point at which the last offeror, or licensee of the offeror, received notice of the offeree's acceptance.

### **Example:**

Buyer made an offer to Seller on January 1<sup>st</sup> at noon. Seller countered the offer to Buyer on January 3<sup>rd</sup> at noon. Buyer accepted Seller's Counter on January 4<sup>th</sup> at noon. Seller's Agent received notice (i.e., the signed contract) from the Buyer on January 4<sup>th</sup> at 2:00 p.m. **The Binding Agreement Date would be January 4<sup>th</sup> at 2:00 p.m.** and would be inserted by the Sellers Agent in the above scenario since he is the one receiving the notice that his client's counter was accepted. A copy of the agreement with the BAD should then be sent to the other party.

**The only time the Binding Agreement Date will be filled in on the Purchase and Sale Agreement is when the initial offer is accepted by the Seller with no counters. It will be filled out by the Buyer's Representative/Buyer after receiving acceptance notification from the Seller.**

**NOTE: If you have used the Counter Offer and both parties have agreed to all of its terms, there is no need to come back to the Purchase and Sale Agreement to fill in the Binding Agreement Date. The Counter Offer NOW contains a BINDING AGREEMENT DATE.**

3. The Purchase and Sale Agreement states that the buyer, Ms. Wilson (buyer), will pay to the listing broker the Earnest Money/Trust Money in the amount of \$5,000 within three (3) days of the Binding Agreement Date. The end of the third day has arrived and the listing agent, Bill Taylor, or the listing broker has not yet received the money. What should happen in this situation?

**INSTRUCTOR NOTE: Per Lines 158 – 166 of RF 401:** In the event Earnest Money/Trust Money is not timely received by Holder or Earnest Money/Trust Money check or other instrument is not honored for any reason by the bank upon which it is drawn, Holder shall promptly notify Buyer and Seller of the Buyer's failure to deposit the agreed upon Earnest Money/Trust Money. Buyer shall then have one (1) day to deliver Earnest Money/Trust Money in immediately available funds to the Holder. In the event Buyer does not deliver such funds, Buyer is in default and Seller shall have the right to terminate this Agreement by delivering to Buyer or Buyer's representative written notice via the Notification form or equivalent written notice. (NOTE: Immediately available funds means Cashier/Certified Bank check NOT a personal check!) Check #15 on the Notification form.

Also, talk about how to handle a "bounced" check. Check #14 on the Notification form.

4. Ms. Wilson, the buyer, is applying for a conventional loan to purchase the Seller's home. Bill Taylor, the listing agent, received a pre-approval letter from Acme Bank with the offer. However, three (3) days after the Binding Agreement Date the seller, Mr. Smith, has still not received Notification that the Buyer has made loan application with Acme and paid for the credit report. What does the seller need to do?

**INSTRUCTOR NOTE:** The Seller may make written demand for compliance via Notification form (or equivalent written notice) and the Buyer has 2 days to comply or the Buyer is in default. Check #6 on the Notification form. Just make sure the seller wants to pull the trigger. If the buyer does not respond in 2 days, the contract is terminated and is void.

5. 14 days after Binding Agreement Date, Mr. Smith, the seller, or his agent, Bill Taylor, have not received notification that the Buyer has signed *Intent to Proceed* with lender and/or evidence of hazard insurance. What should the Seller do?

**INSTRUCTOR NOTE:** Seller may make written demand for compliance via Notification form (or equivalent written notice) and Buyer has 2 days to comply or Buyer is in default. **[Discuss Paragraph 12 – Default paragraph.]** Check #8 on the Notification form. Just make sure the seller wants to pull the trigger. If the buyer does not respond in 2 days, the contract is terminated and is void.

6. Ms. Wilson, the Buyer, has all inspections completed within the time frame specified in the contract. Her agent, Carolyn Jones, sends an RF654 Repair/Replacement Proposal to the listing agent, Bill Taylor, noting the items they would like the seller to repair. The Purchase and Sale Agreement states a 3-day resolution period. Mr. Smith, 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?

**INSTRUCTOR NOTE: The contract is terminated if the parties cannot reach resolution.** Per lines 298-302 in the RF401 Purchase and Sale Agreement:

*“In the event Seller and Buyer do not reach a mutual written resolution during such Resolution period or a mutually agreeable extension thereof as evidenced in an Amendment to this Agreement signed by both parties within said period of time, this Agreement is hereby terminated. If terminated, the Buyer is entitled to a refund of the Earnest Money/Trust Money.”*

**IT IS IMPORTANT TO WATCH THE INSPECTION RESOLUTION DATE!** In order not to have a terminated contract the parties should consider extending the resolution period in order to reach an amicable solution to the repair/replacement request(s). This can be done via the Amendment form (RF 653).

7. The contract for the purchase of the seller’s home was contingent on the appraised value equaling or exceeding the purchase price of \$325,000. The appraisal for the property was submitted to Jane Wilson, the buyer, via email on Tuesday afternoon by her lender. The appraiser valued the property at \$315,000. Ms. Wilson told Carolyn Jones, her agent, she needed to think about how she wanted to respond. If the buyer decides to terminate the agreement, when does she need to notify the seller? What happens if she notifies the seller of her intention four days later on Saturday? What needs to happen if the buyer still wants the home even though it appraised for \$10,000 less than the purchase price?

**INSTRUCTOR NOTE:** The contingency section of the RF401 Purchase and Sale Agreement provides the buyer with 3 days to either waive the appraisal contingency via the RF656 Notification form or equivalent written notice or terminate the agreement by giving notice to the seller via the Notification form or equivalent written notice. Upon timely termination, the buyer is entitled to a refund of Trust/Earnest money.

In this particular scenario, the buyer would need to notify the seller by 11:59 p.m. on Friday to stay within the performance timeline noted in the appraisal section of the RF401 Purchase and Sale Agreement. If the buyer notifies the seller on Saturday, one day past the required notification time period, the appraisal contingency is deemed satisfied. From this point on, the buyer cannot use the appraisal as a basis for loan denial or termination of the contract.

If the buyer still wants the home at the appraised price, the parties will need to amend the contract to (1) noting the original purchase price in the contract remains the same and the buyer will make up the \$10,000 shortfall (lender approval will probably be necessary) OR (2) renegotiate the purchase price to the appraised value or at a price agreeable to both parties (lender approval will probably be required for this latter option.)

## COURSE EXERCISE #2: Inspections and Repairs

*In the following examples, there are five scenarios related to property inspections and the inspection contingency contained in the RF401 Purchase and Sale Agreement. Read each one carefully and decide how you would handle the particular situation.*

### Scenario 1:

The buyer, John Taylor, is making an offer on the home owned by Betty Anderson, the seller. The offer is contingent on inspections. John is willing to pay for any and all inspections, which he expects to have completed within 10 days. If repairs are needed, John is willing to negotiate with the seller. How would you address this in the offer?

**INSTRUCTOR NOTE:** Demonstrate the correct blanks to be filled in on the RF401 Purchase and Sale Agreement.

### Scenario 2:

Drew and Carolyn Carson, the buyers, completed their inspection on a home they are purchasing. They obtained an inspection report identifying needed replacement of the HVAC system, estimated at \$4,000. They want the seller to replace the system before they continue with the transaction. How would you proceed if you represent the buyers?

**INSTRUCTOR NOTE:** You should use the RF654 Repair/Replacement Proposal. List the item that the buyer is requesting be repaired or replace in the designated area. You should not provide a copy of the inspection report with the list of repairs. You are only required to provide a copy of the home inspection report upon request from the seller. Remember the Home Inspection Report belongs to the Buyer and is Copyright by the Home Inspector. You cannot violate Copyright laws by disseminating the report "at will". If you represent the seller, discuss with him/her the double-edged sword of receiving a copy of the report – if there are adverse facts contained within that report, the seller and the seller's agent has a duty to disclose them by law to any subsequent buyers in the event that the contract falls through. One possible solution if your seller wants proof of the need for the requested repair is to ask for *only that portion* of the inspection report to be sent directly from the Home Inspector to the seller. If the Seller does not agree to any items requested, then the Seller uses a new Repair/Replacement Proposal and lists all items that the seller will accept. Repair/Replacement Proposals are used as "worksheets" and will travel back and forth between Buyer and Seller until an agreement is reached. Keep in mind that the parties must reach an agreement concerning repairs by the end of the Resolution Period contained in paragraph 7 D(3)a. Otherwise, the Resolution Period must be extended or the contract will terminate. To extend the Resolution Period, an amendment to the contract concerning the Resolution Period will have to be made using the RF653– Amendment to the Purchase and Sale Agreement, PRIOR to the end of the Resolution Period. Once repairs are agreed to, those repairs will then be transferred to the Repair/Replacement Amendment RF655 and signed by all parties and must be completed within so many days prior to closing, according to the Repair/Replacement Amendment.

**Scenario 3:**

You represent the seller, Tony Cleaver. The buyer requests repairs to the roof, estimated at \$3,000. The seller, Betsy Andrews, is willing to pay no more than \$500 towards the needed repairs. How would you proceed?

**INSTRUCTOR NOTE:** The Seller can request to see a copy of the entire inspection report and/or just the portion that concerns the roof issues. Have the Home Inspector send directly to the Seller. However, if the Seller receives the entire report, anything discovered in the home inspection report would have to be disclosed under the law. IF the Seller's agent reads the report and the Seller does not see the report, then the Seller's Agent would be required to disclose to other prospective buyers. Both sides will use the Repair/Replacement Proposal form until an agreement is reached. The parties then have until the end of the Resolution Period to reach an agreement on repairs. At that time, the agreed repairs are to be entered on the Repair/Replacement Amendment and all parties sign. If the parties can't agree by the end of the Resolution Period, it can be extended, *PRIOR to the end of the Resolution Period* by using an Amendment to the *Purchase and Sale Agreement*. If the parties cannot reach an agreement by... the end of the Resolution Period (and/or any extensions), then the contract will terminate and Buyer is entitled to refund of the Trust Money. **REMEMBER:** If you read a home inspection report and the Seller does not then YOU must disclose any adverse facts to other prospective buyers.

**Scenario 4:**

You represent the Buyers, Artie and Julie Brown, who want to submit an offer on a home built almost two years ago. They want to close quickly and an existing home warranty is transferrable. They opt not to perform any inspections but notice water damage on an upstairs ceiling and two cracked panes in the living room bay window during a walkthrough after the contract is accepted. What are the Buyer's options?

**INSTRUCTOR NOTE:** If the Buyers waived their inspections, then it will depend upon when the damage occurred. If it occurred *before* the Binding Agreement Date, then it is likely that the sellers will not have to make repairs. If it occurred *after* the Binding Agreement Date, then it is likely that they will have to make the repairs. (See *Paragraph 9*). The Buyers can still request needed repairs using the Repair/Replacement Proposal form but may have waived their right to a refund of the Trust Money if they decide to cancel the contract. You should assist the buyer in finding out whether the problem will be covered by the warranty and, if not, assist them in making an informed decision whether to proceed.

**Scenario 5:**

You represent the Buyer, Tom Gray, who is under contract on a home in an older section of town. During the home inspection, the home inspector discovered several hairline cracks in the exterior brick and also inside the home. The inspector recommended Tom call a licensed structural engineer to inspect the cracks to determine if there were any major structural issues with the home. The structural engineer cannot inspect the property for another 5 days due to his work schedule. The inspection period ends two days from now. How would you address this situation?

**INSTRUCTOR NOTE:** The inspection period will need to be extended in order to have the structural inspection. The RF653 Amendment to the Purchase and Sale Agreement needs to be submitted to the seller by the buyer asking for an extension to the inspection period.

Explain to the class the importance of communication between the buyer's agent and the listing agent to ensure the extension of the inspection period is handled properly with all parties so it does not impact the transaction's closing.

## Tennessee REALTORS® Forms Resource Guide

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



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

<b>RF205– Tennessee Residential Property Condition Disclosure (For Exempt Properties and Property Residential Disclosures)</b>	When the property is served by an exterior injection well or when soil absorption rates or percolation tests have been performed. Also includes disclosure for PUD's, sinkholes, house moved from one foundation to another.
<b>RF101– Exclusive Right to Sell Listing Agreement (Designated Agency)</b>	As an exclusive right to sell listing agreement for designated seller agency
<b>RF102– Exclusive Right to Sell Listing Agreement (Seller Agency)</b>	As an exclusive right to sell listing agreement for traditional seller agency

**INSTRUCTOR NOTE:** Carefully review this unit with the class participants. Have the RF201, RF203, and RF204 available for review.

## UNIT 10 – Property 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 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?**

## Course 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.



**INSTRUCTOR NOTE:** Carefully review this unit with the class participants.

## UNIT 11 – 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 in Property Management in Tennessee

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





## 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. Refer to TREC Rule 1260-02-.03.

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

Firm and Branch name changes may be completed online at [core.tn.gov](http://core.tn.gov) or by mailing in a [Firm or Branch Name Change Application](#). Escrow Account information must be submitted with the name change application, even if it was submitted with the original firm application. If your firm is a Corporation (INC) or Limited Liability Company (LLC), you will need to submit a copy of your Letter of Good Standing from the Secretary of State (SOS) listed under your new name. There is NO fee charged for a Firm Name Change application.

## **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. Please note- there is a 60 day grace period from the expiration date to receive Education Hours. You will accrue a late fee if you do not pay your renewal fee on

time. Always pay your renewal fee even if you are missing education hrs. this will allow you 60 days GRACE to complete education without fee.

***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. Renewal fee of \$75 is due prior to the expiry date. After expiry date agent will have 60 days GRACE, however the agent will accrue \$50 per 30 days. You can renew your license on CORE.

***How do I do I change my firm affiliation?***

In order to change your firm affiliation your new principal broker will need to create an account on CORE. 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.
- Fingerprinting done prior to application submission
- 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 M. GIFFEN ABR, CRB, CRS, CDEI, GRI, SRES, SFR, e-PRO, CRESC, BROKER**

**John Giffen** is an award-winning real estate broker, manager, coach, multi-million dollar REALTOR® author, and real estate educator. He is Director of Broker Operations for Benchmark Realty, LLC in Franklin, Tennessee - one of the fastest-growing independent real estate companies in North America. He oversees the brokerage operations for over 1,250 Benchmark affiliate and real estate broker licensees. In 2014, John was named "*REALTOR® of the Year*" by the Williamson County Association of REALTORS®. He is recognized as a subject matter expert by law firms representing real estate licensees and principal brokers in litigation and regulatory complaints as well as TREC approved education course providers and PSI, the testing company for Tennessee state real estate licensure.