

A Reprint from *Tierra Grande*

Broker Duties

By Reid C. Wilson

A real estate broker is an agent engaged to assist in the purchase, sale, management or leasing of real property. A broker may represent the seller-landlord ("seller"), the buyer-tenant ("buyer"), or act as an intermediary, representing both the seller and the buyer, though to a limited extent.

Brokers' obligations to their principals are defined in common law (case law); statute (legislation); the Texas Real Estate Commission's (TREC) Canons of Professional Ethics and Conduct for Real Estate Licensees; and the National Association of Realtors' Code of Ethics and Standards of Practice. Brokers who violate these duties face severe penalties, including loss of license and money damages.

Only a licensed real estate broker may sue to recover a commission; a broker's agent or salesperson may not do so. Consequently, it is critical for an agent or salesperson to identify the broker in every document related to a transaction.

Most brokers work for an established brokerage firm. Many real estate professionals are not aware that, in this case, the brokerage firm must be separately licensed — that is, the firm is the broker, not the individual. Individual brokers who establish wholly owned corporations or limited liability companies must license those entities separately.

Who Does the Broker Represent?

Brokers are required to disclose who they represent in a transaction. In the absence of disclosure, courts will consider who paid (or would be obligated to pay) a broker's commission.

The seller is almost always the broker's principal. However, TREC has a history of looking to the broker's actions in a transaction to determine if a complaining party was the broker's principal rather than just following the commission trail. Brokers can safely assume they will be considered to represent the party paying their commission unless proper disclosure is made to all parties that the broker represents another party. Buyer representation, which is becoming more common, requires agreement of the principal (preferably in writing, up front) and disclosure to the seller and other brokers involved.

Intermediary status was created by statute in 1996 in recognition of certain marketplace realities. It allows a single broker to consummate a real estate deal on behalf of two principals, serving as an intermediary between the parties, provided specified disclosure is made. It also allows two agents of a brokerage firm to represent the buyer and seller in the same transaction without incurring the legal risks associated with dual agency.

When two brokers from one firm represent different parties in a transaction, the brokerage company is considered an intermediary. When an independent broker represents both parties in a transaction, the broker is an intermediary. A broker representing one party in a transaction in which the other party is unrepresented is not considered an intermediary.

Intermediary status is not the same as dual agency, in which a single broker represents both sides in a transaction. Dual agency is allowed in Texas, but because it is virtually impossible for a broker to fulfill all obligations to competing principals, it should not be undertaken.

Whether the broker is a buyer representative, a seller representative or an intermediary, prompt written disclosure to all involved parties is necessary.

Common Law Disclosure Duties

According to common law, the broker has a fiduciary duty to the principal, meaning an obligation to act with honesty and loyalty in the principal's best interest. In addition, the broker owes the principal full disclosure of information, diligence (earnest and persistent effort) and accountability.

Texas law requires the following information to be disclosed: title defects, financial ability of a proposed purchaser, who the broker represents and who will pay his or her commission, increases in value of principal's property being sold, all offers to purchase the principal's property and the broker acting in his or her own interest.

Texas law requires that if a broker knows information material to a transaction, the broker must disclose that information to his or her principal. Texas courts have been harsh on brokers withholding significant information that would have affected their principals' decisions in a transaction.

Breach of any of these duties may give the principal a cause of action for damages, the right to rescind pending contracts, the right to return property wrongfully acquired by the broker, restitution of profits made by the broker (including commissions), and, potentially, exemplary (punitive) damages.

Statutory Disclosure Duties

Deceptive Trade Practices—Consumer Protection Act

Brokers violate the Deceptive Trade Practices—Consumer Protection Act (DTPA) by failing to disclose information of which they have **actual knowledge** to their principals or by affirmative misrepresentations, regardless of whether the brokers had actual knowledge that these representations were false or incorrect. Specifically, the DTPA prohibits brokers from representing:

- goods or services as having characteristics-uses-benefits they do not;
- goods or services as being of a particular standard, quality or grade they are not;

- that an agreement confers rights, remedies or obligations it does not;
- that salespersons, representatives or agents have authority to negotiate the final terms of a transaction they do not;
- that a guarantee or warranty confers rights or remedies it does not; and
- that work or services have been performed when they have not.

The act also prohibits brokers from failing to disclose information concerning goods or services that was known at the time of the transaction, if the failure to disclose was intended to induce consumers into a transaction they would not have entered had the information been disclosed.

A party to a real estate transaction may sue the broker for violation of the DTPA. The DTPA now applies only to real estate transactions of \$500,000 and less or transactions relating to the principal's homestead. In transactions between \$100,000 and \$500,000, the DTPA can be waived if the contract is negotiated by independent legal counsel and does not involve a homestead.

Brokers also may be liable for "an unconscionable action or course of action."

Real Estate Fraud Act

The Real Estate Fraud Act provides similar protections to those found in the DTPA but applies to all real estate transactions, regardless of dollar amount. Plaintiffs may recover actual and exemplary damages as well as legal fees and costs. Real estate fraud is the false representation of a past or existing material fact, made to induce a person to enter into a contract, and relied on. Real estate fraud also can be a false promise to do an act that is material, not intended to be fulfilled, made to induce a person to enter into a contract and relied on.

If a broker benefits from a fraud committed by another, that broker is liable only if he or she was actually aware of the fraud and failed to disclose it to the principal.

Texas Real Estate License Act and TREC Rules

The Texas Real Estate License Act mandates suspension or revocation of license and civil or criminal liability if a broker fails to:

- disclose to a potential purchaser any latent structural defect **or any other defect known to the broker**. Latent structural defects are those that a reasonable and prudent purchaser would consider significant in making the decision to purchase.
- disclose to all parties what party he or she represents.
- disclose to all parties that he or she (the broker) is receiving compensation from more than one party.
- disclose a definite termination date in a listing agreement.
- disclose to principal(s) their acceptance, receipt or charge of an undisclosed commission, rebate or direct profit on expendi-

The broker is obligated to act with honesty and loyalty in the principal's best interest.

tures made for the principal(s).

- disclose that he or she is a principal in a transaction.
- provide copies of any document in a real estate transaction to the person who signed that document.
- advise a purchaser in writing before closing a transaction that the purchaser should have an attorney review title or obtain a title policy.

The act also requires a broker to:

- make oral or written disclosure of who the broker represents at the time of first contact with another party to the transaction (or that party's broker).
- make the written broker disclosure statement at the first face-to-face meeting with another party to the transaction unless that party is represented by a broker. "Face-to-face meeting" is considered more than a casual interaction and requires "substantive discussion" of the transaction. Open houses are excluded, and disclosure is not required after a contract has been signed.

- correct any third-party misrepresentation and disclose any material fact of which they have knowledge to their principal.
- advise the purchaser to have an attorney review title or obtain title insurance. Failure to do so prevents collection of a commission on the transaction.

TREC rules mandate the same high standards for brokers as are described in the common law and statutes. That is, brokers owe their clients the highest fiduciary obligation, must convey to clients all information that might affect decisions related to transactions and must put clients' best interests ahead of their own when negotiating transactions. TREC rules also prohibit brokers from undertaking a service or handling a transaction for which they lack needed knowledge or expertise.

Brokers violating these rules may face suspension or termination of their licenses and administrative fines of up to \$1,000.

Intermediary Disclosure

Intermediaries may not disclose the following:

- that the seller will accept a price less than the asking price, unless authorized in writing to do so by the seller;
- that the buyer will pay a price greater than the price submitted in a written offer, unless authorized in writing to do so by the buyer; or
- confidential information or any information that a party specifically instructs the broker not to disclose, unless authorized in writing to disclose the information, or required to do so by the Texas Real Estate License Act or a court order or if the information materially relates to the condition of the property.

The intermediary has a duty to treat all parties honestly and may not favor one party over the other or provide advice or opinions. If the intermediary's principal desires advice or opinions, the intermediary must refer the principal to another professional, such as an attorney, accountant or lender. Intermediaries may provide factual information in response to questions.

When intermediary status is approved by the parties after disclosure, the broker may designate employees to represent the respective parties and carry out their instructions, provided the parties

are given written notice of those appointments. The appointed employees must comply with nondisclosure requirements but may provide opinions and advice to the party to whom they are appointed and are not subject to the statutory intermediary's duty to not favor one party over the other.

NAR Code of Ethics and Standards of Practice

The National Association of Realtors'® Code of Ethics and Standards of Practice requires Realtors to disclose:

- all offers and counteroffers until a deal is consummated unless they get a written waiver;
- all pertinent facts relating to a property or transaction;
- when entering into contracts to represent parties, the potential to act as an intermediary or as a dual agent;
- when legal counsel is necessary (Realtors® may not engage in the unauthorized practice of law);
- the existence of dual or variable rate commission arrangements;
- their ownership or interest in property, in writing, when selling that property; and
- any benefits or fees, other than real estate referral fees, they might receive when recommending real estate products or services.

All information relating to the negotiations, property and parties involved in a real estate transaction should be disclosed to

the principal, unless it is inconsequential. Written disclosure is best because it provides documentary evidence of disclosure. Brokers should create and retain records of significant verbal disclosures. Complete files of transactions should be kept for at least four years after a transaction has been closed. ♣

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