

TENNESSEE REAL ESTATE COMMISSION CORE 2023-2024

CHAPTER 1: STATE LICENSE LAW AND SUPERVISION

Course Overview

We encourage our customers to visit the FAQs section for further information regarding your educational experience. They have complete step-by-step tutorials that we've designed with YOU in mind!

Please note: Upon completion of the final exam, you will need to advance to the survey page and complete the survey. Once that is done, the course will be marked as "Complete" in our system and credit may be issued.

Course Description

Welcome! This course fulfills the requirement to complete the six-hour 2023-2024 Tennessee CORE Residential course required to renew your real estate license. This course first reviews Tennessee real estate license law and the important supervisory role of the principal broker. This course also covers requirements for advertising, the creation and disclosure of agency relationships, contracts and property disclosures, and property management.

Best wishes for your success!

Course Learning Objectives

After completing this course, you should be able to:

- Recall the role of TREC and the source of the Tennessee Real Estate Broker License Act and the rules of the Tennessee Real Estate Commission.
- Identify activities that require a real estate license and individuals who are exempt from licensing requirements.
- Describe the role of a principal broker in supervising affiliated brokers, including verifying an individual has a valid license.
- Recall E&O insurance coverage requirements and penalties for noncompliance.
- Recognize the steps necessary to renew a Tennessee broker license and affiliated broker license and to reinstate an expired license.
- Identify the updated process for transferring to a new firm, changing license status from "active" to "retired," and changing license status from "retired" to "active."
- Recall rules for working as a team, obtaining advertising approval, earning commissions, and receiving commissions.
- Describe requirements for lawfully operating a real estate office and branch office in Tennessee, including the use of unlicensed persons, office signage, and telephone answering services; naming a real estate firm; notification of a principal broker's absence; handling consumer deposits and earnest money; and maintaining transactional records.
- Identify activities that may result in disciplinary action and TREC's process for investigating licensees and disciplining for noncompliance.
- Identify requirements for complying with the rules of the Tennessee Real Estate Commission related to advertising.
- Describe a licensee's duties related to lawfully promoting listed properties and presenting offers to sellers.
- Describe terms and concepts related to agency.
- Recall provisions of Tennessee law related to agency.
- Describe contract classifications, essential elements of a valid and enforceable real estate contract, and methods of contract discharge.
- Explain the process of offer and counteroffer and the methods for accepting and terminating an offer.
- Identify property disclosure requirements set forth by the Tennessee Residential Property Disclosure Act.
- Recognize situations in which a real estate licensee does and does not have a duty to disclose property conditions.
- Recall the role of a property manager and how property managers fulfill their obligations to their property owner clients.
- Identify requirements for acting as a property manager as set forth by Tennessee law and rules.

Chapter Introduction

Chapter 1 begins with a review of the role of the Tennessee Real Estate Commission (TREC or Commission) and the source of Tennessee's laws and rules that govern real estate licensing and licensee activities. Activities that require a Tennessee real estate license and the individuals who are exempt from licensing requirements will also be covered.

We will spend the majority of this chapter studying state-specific laws and rules that broker and affiliate broker licensees must adhere to if they want to maintain their Tennessee license in good standing. Specific focus will be given to the supervisory role of the principal broker; however, affiliate brokers need to know and adhere to the same laws and rules that the principal broker is responsible for enforcing through their supervisory efforts.

Key topic areas covered specific to the relationship between principal brokers and their affiliated brokers include E&O insurance coverage, license renewal and reinstatement, changing affiliation and license status, working as a team, advertising approval, and licensee commissions. Time will also be spent on key requirements governing a licensed firm, including principal office and branch office operational requirements, allowed unlicensed activities, naming restrictions, handling of consumer funds, and transactional record maintenance.

The chapter concludes with a list of activities that are likely to result in TREC disciplinary action and the process for investigating and disciplining for noncompliance.

Chapter Introduction: Key Terms

Key terms important to understanding the content presented in this chapter include:

- Affiliate Broker**—A real estate licensee who is engaged under contract to act on behalf of a broker to participate in real estate brokerage activities.
- Broker**—A real estate licensee who performs specific activities with the intent to receive compensation or other valuable consideration from another.
- Commingling**—Maintaining funds belonging to others in the same bank account that contains the licensee’s personal or business funds.
- Continuing Education (CE)**—Ongoing training that must be fulfilled to renew a real estate license. In Tennessee, the continuing education requirement is 16 hours every two years.
- Division of Regulatory Boards**—A Tennessee agency consisting of 23 professional boards, programs, and commissions that license and regulate over 200,000 professionals.
- Errors and Omissions (E&O) Insurance**—Insurance that protects real estate licensees from liability due to mistakes or negligence.
- Escrow Account**—A bank account, separate from a real estate broker’s personal and business accounts, used to hold any trust money that the broker receives in a fiduciary capacity. *Also called Trustee Account or Trust Account.*
- Expired**—The status of a license that is not renewed by the expiration date.
- Irrevocable Consent**—A consent to suit signed by nonresident licensees agreeing to allow legal action to be brought against them in the state of Tennessee.
- Principal Broker**—A licensed broker who, in addition to performing real estate brokerage activities, is the single broker responsible for the operation of the office with which the licensee is associated.
- Real Estate Education and Recovery Account**—A fund maintained by the Tennessee Real Estate Commission to reimburse an aggrieved person for damages that result when a licensee violates the Real Estate Broker License Act or the Rules of the Real Estate Commission.
- Tennessee Real Estate Broker License Act**—Title 62 Chapter 13 of the Tennessee Code Annotated, which contains the law that addresses real estate licensees.
- Tennessee Real Estate Commission**—An administrative agency that has the authority to license and regulate real estate brokers, affiliate brokers, and firms and is responsible for protecting the public; also has authority over rental location agents, time-share salespersons and developments, vacation clubs, and vacation lodging services.
- Time-Share Salesperson**—A person who sells time-share intervals in a time-share program and who works under a licensed real estate broker.
- Trust Money**—Money belonging to others received by a licensee who is acting as an agent or facilitator in a real estate transaction or any money held by a licensee who acts as the temporary custodian of funds belonging to others.

Chapter Introduction: Learning Objectives

After completing this chapter, you should be able to:

- L01: Recall the role of TREC and the source of the Tennessee Real Estate Broker License Act and the rules of the Tennessee Real Estate Commission.
- L02: Identify activities that require a real estate license and individuals who are exempt from licensing requirements.
- L03: Describe the role of a principal broker in supervising affiliated brokers, including verifying an individual has a valid license.
- L04: Recall E&O insurance coverage requirements and penalties for noncompliance.
- L05: Recognize the steps necessary to renew a Tennessee broker license and affiliated broker license and to reinstate an expired license.
- L06: Identify the updated process for transferring to a new firm, changing license status from “active” to “retired,” and changing license status from “retired” to “active.”
- L07: Recall rules for working as a team, obtaining advertising approval, earning commissions, and receiving commissions.
- L08: Describe requirements for lawfully operating a real estate office and branch office in Tennessee, including the use of unlicensed persons, office signage, and telephone answering services; naming a real estate firm; notification of a principal broker’s absence; handling consumer deposits and earnest money; and maintaining transactional records.

- L09: Identify activities that may result in disciplinary action and TREC's process for investigating licensees and disciplining for noncompliance.

Tennessee Regulatory Authorities

The **Tennessee Department of Commerce and Insurance** is responsible for making sure that professionals, like you, who serve Tennessee have the guidance, supervision, and resources needed to ensure success. The Department of Commerce and Insurance is led by its **Commissioner**, who is appointed by the Governor.

Within the Tennessee Department of Commerce and Insurance, the **Division of Regulatory Boards** consists of 23 professional boards, programs, and commissions that license and regulate over 200,000 professionals within the state of Tennessee, including the **Tennessee Real Estate Commission**. The Tennessee Real Estate Commission, also referred to as **TREC** or the **Commission**, has the authority to license and regulate **real estate brokers, affiliate brokers, and firms** and is responsible for protecting the public. According to the [Commission's website](#):

The mission of the Tennessee Real Estate Commission is to protect the public through the establishment and administration of minimum requirements for candidates and licensees, effective professional education of licensees, and enforcement of professional conduct.

Note: The **Commission** also has authority over **rental location agents, time-share salespersons and developments, vacation clubs, and vacation lodging services**.

TREC Laws and Rules

Licensees regulated by TREC must comply with state laws and rules to maintain a license in good standing.

Legislatures are the branches of government that have primary responsibility for passing laws and, as such, are the primary source of new laws in the United States. The term "**statutes**" refers to laws adopted by a legislative body. [Tennessee's statutory laws](#) are organized logically into broad **titles**. Within each title, the laws are divided into **chapters**, and chapters are further divided into sections and subsections.

The law that addresses real estate licensees, referred to as the **Tennessee Real Estate Broker License Act**, is found in:

- **Title 62** Professions, Businesses, and Trades
- **Chapter 13** Tennessee Real Estate Broker License Act of 1973

As an administrative agency, the Commission has the authority to **enact rules** addressing professional conduct and standards of practice. The [Rules of the Tennessee Real Estate Commission](#) are contained in Chapters 1260-01 through 1260-07 of the Rules and Regulations of the State of Tennessee.

TREC Membership

The Tennessee Real Estate Broker License Act includes provisions regarding the **membership of the Commission** (*Tenn. Code Ann. 62-13-201*):

The Commission consists of nine members appointed by the **Governor**, and each member must be a **resident** of Tennessee.

- **Seven members** must have been principally engaged as **licensed real estate brokers or affiliate brokers** in Tennessee for at least **five years** prior to appointment. The remaining **two members** must **not** be real estate brokers or affiliate brokers or engaged in the business of real estate finance or development.
- Each member is appointed for a **five-year term** and serves until a successor is appointed. No member may serve more than **two consecutive terms**.
- Any vacancy occurring on the Commission will be filled by the Governor for the unexpired term. The Governor may remove any member for misconduct, incompetency, or willful neglect of duty.
- Upon qualification of newly appointed members, the Commission will select a chair and vice chair from among its members (*Tenn. Code Ann. 62-13-203(a)*).



TREC Powers and Duties

Powers and duties granted to the Commission by statute include:

- **Rules and regulations.** As mentioned previously, as an administrative agency, the Commission has the authority to **enact rules and regulations**. The Commission's rules and regulations may incorporate and establish canons of ethics and minimum acceptable standards of practice for licensees (*Tenn. Code Ann. 62-13-203(a) and (b)*).
- **Discipline.** The Commission is responsible for **enforcing** the Tennessee Real Estate Broker License Act and may take action when a licensee is accused of violating the Act (*Tenn. Code Ann. 62-13-203(e)*). The disciplinary process will be discussed in more detail later.
- **Education.** The Commission has the authority to enact rules and regulations related to the **educational requirements** for real estate licensees. The Commission may conduct real estate clinics, meetings, courses, or institutes that are open to all licensees. The Commission is

also authorized to assist educational institutions in sponsoring studies, research, and programs to raise the standards of professional practice in real estate and the competence of licensees in the public interest (*Tenn. Code Ann. 62-13-106 through 108*).

Note: The Commission does **not** have the authority to **set fees or commissions** for real estate contracts or transactions. If this practice is found to be occurring as a result of action by the Commission, all members of the Commission must forfeit their licenses (*Tenn. Code Ann. 62-13-204*).

Types of TN Real Estate Licenses



Two Tennessee real estate license types governed by the TREC are:

1. **Broker.** A broker is a licensee who performs specific activities with **the intent to receive compensation** or other valuable consideration **from another**.
2. **Affiliate broker.** An affiliate broker is an individual who **acts on behalf of a broker** to participate in real estate brokerage activities. An affiliate broker may perform most of the acts of a broker. However, affiliate brokers may **not** work independently of their broker and, in fact, **can function only through the broker** with whom they are associated. Furthermore, an affiliate broker receives compensation **only** from their broker. All real estate activities must be performed with the consent of the broker.

PB Supervision: Valid License Rule



A **principal broker (PB)** is a **licensed broker** who, in addition to performing real estate brokerage activities, is the single broker responsible for the **operation of the office** with which the broker is associated.

Rule 1260-01-.19 sets forth that: Any applicant for licensure appearing before the Commission for the purpose of obtaining a license must also ensure the **presence of their principal broker** (or intended principal broker). No such appearance for the purpose of obtaining a license will be heard by the Commission without the presence of that principal broker.

Rule 1260-01-.04(1) sets forth that: No **principal broker shall permit** a broker, affiliate broker, or time-share salesperson under the principal broker's supervision **to engage in the real estate business unless** the broker, affiliate broker, or time-share salesperson has been **issued a valid license** and is covered by an errors and omissions insurance policy.

Let's review activities requiring a Tennessee real estate license, license exemptions, and requirements related to license reciprocity.

Activities Requiring a License

Unless specifically exempted, anyone who acts or claims to act in any way as a real estate broker or affiliate broker in Tennessee must first obtain the proper license from the Commission.

According to the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-102(4)*), a broker is defined as a person who, with the intent to receive **compensation or other valuable consideration from another**:

- Solicits, negotiates, or attempts to solicit or negotiate the **listing, sale, purchase, exchange, or lease** of real estate or improvements on the real estate.
- Solicits, negotiates, or attempts to solicit or negotiate the listing, sale, purchase, exchange, or lease of **time-share intervals**.
- Solicits, negotiates, or attempts to solicit or negotiate **options**.
- Collects or attempts to **collect rent**.
- Auctions or offers to **auction real estate**.

The definition of broker also includes a person who:

- **Advertises** any of the brokerage activities listed above.
- Receives compensation for **selling lots or parcels** of real estate on behalf of the owner.
- Charges an **advance fee** or collects a fee for promoting the sale of real estate by listing it or by referring the information to brokers.



Activities Requiring a License: Commercial Property



A broker or affiliate broker license allows the licensee to list, sell, exchange, or lease any type of real estate. A separate license is **not** required to handle commercial real estate.

Under the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-501*), **commercial real estate** is defined as any real estate **except**:

- Real estate containing one to four residential units.
- Real estate on which no buildings or structures are located and that is zoned for no more than one- to four-family residential units.

Commercial real estate does **not** include single-family residential units such as condominiums, townhouses, or homes in a subdivision when conveyed on a unit-by-unit basis, even though they may be a part of a larger building or parcel of real estate containing more than four residential units.

Activities Requiring a License: Selling Time-Share Intervals



A time-share salesperson is a person who **sells time-share intervals** in a time-share program and who works **under a licensed real estate broker**. A time-share salesperson shall **only participate** in time-share transactions when the licensee is affiliated with a firm that is affiliated with a registered time-share project (*Rule 1260-01-.04(5)*).

A licensed broker or affiliate broker is **entitled to sell time-share intervals** without obtaining a separate license.

Note: A **time-share interval** is a right to use, occupy, and/or possess property for a recurring block of time each year. In Tennessee, the sale of time-share intervals is governed by the **Time-Share Act**, which appears in Title 66 Chapter 32 of the Tennessee Code Annotated (66-32-101 through 66-32-139).

License Exemptions

As discussed, it is **unlawful** for any person to **engage in the activities of a broker** without first obtaining a broker or affiliate broker license, **unless exempt** from licensing requirements. The following individuals are exempt from licensing requirements under Tennessee law (*Tenn. Code Ann. 62-13-104(a)*):

- An **owner** of real estate with respect to property owned or leased by that person.
- An **attorney-in-fact** acting under a **power of attorney** from an owner or lessor.
- An **attorney at law** when performing duties of an attorney.
- An **officer of a corporation** who manages, leases, or sells **real estate owned by the corporation** and who does not earn a commission based on the value of the real estate.
- A **receiver**, who is a neutral person appointed by a judge to take charge of the property and business of a party to a lawsuit until final settlement of the case.
- A **trustee** in bankruptcy, who is a neutral person appointed by a judge to take charge of the property and business of a party to a bankruptcy action.
- An **administrator**, who is appointed by a court to handle the estate of someone who died without a will, or an **executor**, who is the person named in a will to handle the estate of the deceased.
- A **guardian**, who has legal authority and duty to care for another person's property, typically because of the other person's age or incapacity.
- A **trustee** acting under a trust agreement, deed of trust, or will to manage the assets on behalf of the beneficiary.
- A person acting under a **court order** or instrument.



License Exemptions: AG Opinion



On March 6, 2014, the Office of the Attorney General (AG) issued [Opinion No. 14-27](#) to answer three clarifying questions about license exemptions from the Real Estate Broker License Act.

The following are the three questions and the response of the Attorney General:

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

AG Opinion: No. A limited liability company must be licensed under the Act because the exemption provided by Tenn. Code Ann. § 62-13-104(a)(1)(F) is limited to “a corporation, foreign or domestic.” A limited liability company is not a corporation.

Question 2: If an individual who is a member or officer of an entity 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?

AG Opinion: No, it does not matter; the exemption does not apply. The corporate exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) expressly does not apply to a person who performs an act described in Tenn. Code Ann. § 62-13-102(4)(A) as a vocation and a person who performs such acts as their primary responsibility does so as a vocation.

Question 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)(F) but does not perform such activities as a vocation, does the exemption apply to that person if their compensation is based on a distribution of profits to the owners of the entity, where the amount of the distribution includes the money received by the entity from the sale of the property and is distributed to all owners based on a percentage of ownership in the entity or some other calculation not directly related to the sale or rental of the property?

AG Opinion: No. The corporate exemption under Tenn. Code Ann. § 62-13-104(a)(1)(F) expressly does not apply to a person who performs an act described in Tenn. Code Ann. § 62-13-102(4)(A) for compensation if the compensation is dependent upon the value of the real estate with respect to which the act is performed. If the person’s compensation is based on a distribution of the corporation’s profits that includes money from the sale of property transacted by the person, the amount of the person’s compensation is dependent upon the value of the property sold.

License Exemptions: Property Management

Property management refers to leasing and renting, or offering to lease or rent, real estate belonging to others for a fee, commission, compensation, or other valuable consideration pursuant to a property management contract. A property manager (or property management company) may deal with residential or commercial real estate and may be responsible for marketing the property, selecting tenants, negotiating leases, collecting rent, accounting for income and expenditures, coordinating maintenance, and providing reports to the property owner.

Typically, **obtaining a real estate license is a must for those engaging in property management.** Under the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-102(4)*), the following activities **require** a real estate license:

- Soliciting, negotiating, or attempting to solicit or negotiate the **lease of real estate**
- Collecting or attempting to **collect rents**

However, there are exceptions to the licensing requirements. A **resident manager** for a broker or an owner, or an **employee** of a broker, who manages an apartment building, duplex, or residential complex is **not** required to obtain a real estate license (*Tenn. Code Ann. 62-13-104(a)*). The resident manager or employee is permitted to manage only a single property, and the person’s **duties are limited to:**

- Supervision,
- Showing and leasing residential units, and
- Collecting security deposits and rents.

The resident manager or employee **may not negotiate** the amounts of security deposits or rents or negotiate any leases.



Reciprocity: License Requirements

Under the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-314*), the Commission may issue the appropriate license to the **nonresident applicant** if:

- The applicant has **qualified for the license** held in the applicant's **state of residence** by written examination; and
- The applicant **meets or exceeds** each of the qualifications for licensure **in this state**.

These same requirements apply to a **resident** candidate who was or is licensed in another state.

More specifically, an individual (**resident or nonresident**) who holds or has held a **license in another state** and who wishes to obtain a reciprocal Tennessee license must meet the following Tennessee **education, examination, and experience** requirements:



Education

- Affiliate broker applicants must provide proof of satisfactory completion of 90 hours of real estate education, including the Tennessee 30-hour course for new affiliates.
- Broker applicants must provide proof of satisfactory completion of 120 hours of real estate education, including at least 30 hours of real estate office and brokerage management.
- Education hours must be accepted for credit by the state of licensure before being considered for credit by the Tennessee Real Estate Commission.

Examination

- An applicant must pass the written licensing examination.
- An applicant who has previously passed a licensing exam administered by a national testing company may request a **waiver of the national portion of the exam** (minimum passing score of 70% for affiliate brokers and 75% for brokers). The exam must be for the same level of licensure for which the applicant is currently applying.
- The applicant must take and **pass the Tennessee portion** of the affiliate broker or broker examination.

Experience

- Broker applicants must provide proof of having an active real estate license for at least **three years**.

An applicant for a Tennessee real estate license who holds or has held a license in another state is required to submit [Worksheet A](#) and a certified license history from each state in which the applicant is or was licensed.

In addition to the aforementioned requirements, a **nonresident applicant** must file:

- **Copies of their Tennessee license** in the Office of the Tennessee Real Estate Commission and with their principal broker (*Rule 1260-01-.04(4)*).
- An **irrevocable consent** (i.e., consent to suits), which gives consent for legal actions to be taken against the applicant in the proper Tennessee court (*Tenn. Code Ann. 62-13-314(b)*). The consent requires any legal pleadings against a nonresident licensee to be filed with the Tennessee Real Estate Commission, giving the pleadings the same legal validity as though served on the licensee directly.

Note: Under irrevocable consent, a nonresident licensee cannot escape lawsuits or other legal matters simply because the licensee does not reside in the state. This requirement protects consumers by enabling the Commission to take action against licensees as if they lived in the jurisdiction.

Reciprocity: With Kentucky (Policy Update)



Recently, the Commission approved a reciprocal licensing agreement with the Kentucky Real Estate Commission. The goal of the agreement is to allow Tennessee licensees to use their education and experience when applying for licensure in Kentucky.

Over the past few years, the Kentucky Real Estate Commission has not been able to give credit for Tennessee's education and experience. Now, through the agreement, some of these requirements can be waived. A licensee must be in active status and in good standing with their original state of licensure.

Source: [Door to Door: The TREC Newsletter \(Spring 2021\) \(tn.gov\)](#)

Principal Broker Supervision: Valid License Verification

There are two state resources available for a principal broker to search and identify if a person has been issued a valid license:

1. The Department of Commerce and Insurance website at <https://verify.tn.gov/>.
2. The **Comprehensive Online Regulatory and Enforcement (CORE) System** at <https://www.tn.gov/commerce/core.html>.

In addition, principal brokers need to be aware of the qualifications and application processes for obtaining a real estate broker, affiliate broker, or time-share salesperson license. There are several resources available to review these qualifications and processes, including the *How to Get a License* page at <https://www.tn.gov/commerce/regboards/trec/licensee-applicant-resources/how-to-get-a-license.html>

Take a few minutes now to select the link above to access the *How to Get a License* page and review the license requirements for a broker, affiliate broker, and time-share salesperson license.

Check Your Understanding #1

Using your notes link or on a piece of paper, identify if each statement is “true” or “false” as it relates to Tennessee Real Estate License Law. When finished, scroll to the end of the course to see the answers.

1. The Tennessee Real Estate Broker License Act is found in Title 62 Chapter 13 of the Tennessee Code Annotated.
2. The Tennessee Real Estate Commission has the authority to set real estate commission rates.
3. An affiliate broker oversees the activities of a broker.
4. Lou's grandmother is selling her house. She asks Lou if he will help her. Lou shows his grandmother's house to a co-worker, who makes an offer that his grandmother accepts. To show her appreciation, Lou's grandmother offers her 1968 Camaro to him, which he accepts. Lou's activities do not require a real estate license.
5. A property manager must have a real estate license to lawfully solicit, negotiate, or attempt to solicit or negotiate the lease of real estate and to collect or attempt to collect rents.
6. A time-share salesperson works under a licensed real estate broker.
7. An irrevocable consent enables a nonresident licensee to escape lawsuits or other legal matters that occur in Tennessee.

Principal Broker Supervision: E&O Insurance



Recall, **no principal broker shall permit** a broker, affiliate broker, or time-share salesperson under the principal broker's supervision **to engage in the real estate business unless** the broker, affiliate broker, or time-share salesperson has been issued a valid license and is **covered by an errors and omissions insurance policy**.

Errors and omissions (E&O) insurance is professional liability insurance that protects licensees from liability for mistakes or negligence. A typical policy pays legal fees and judgments resulting from real estate activities; however, it does not cover acts arising from fraud or discrimination. In Tennessee, every real estate broker and affiliate broker must carry E&O insurance (*Tenn. Code Ann. 62-13-112(a)*).

The Real Estate Commission contracts with an insurance provider to offer a group policy available to any licensee (*Tenn. Code Ann. 62-13-112(c)*). Licensees can choose to participate in the group policy or purchase their own E&O insurance policy from a private insurer, as long as the coverage meets the minimum requirements established by the Commission, including the limits of coverage, permissible deductible, permissible exemptions, and term of the policy (*Tenn. Code Ann. 62-13-112(e); Rule 1260-01-.15(4)*).

Note: Licensees who place their license in an inactive or retired status are **not** required to carry E&O insurance until their license is activated (*Rule 1260-01-.15(1)*).

Case Study: Purpose E&O Insurance Coverage



Licensees who operate without an active E&O insurance policy in place may be at serious financial and legal risk due to issues such as not properly disclosing all known or unknown property defects. Next, read a fictional case study to better understand and appreciate the potential financial risks of operating without sufficient E&O insurance coverage.

Listing agent Ann sells a home to Mr. and Mrs. Buyers, who relied upon Ann's completed and signed disclosure forms that noted that there were not any roof leaks. Ann, in turn, had relied upon the word of both Mr. and Mrs. Sellers that there were no leaks in the roof. Partly due to both the strong opinions by Ann that there were no problems associated with the home's roof, the Buyers decided to try to save some money and not hire a professional roof inspector since both Ann and the Sellers were so adamant about the roof being in peak or "tip-top shape."

Just one month after the Buyers closed escrow on their beautiful new home, the worst rainstorm in 50 years hit their region. The rain, thunder, and lightning were relentless and quite loud and damaging to both the Buyers' home and the neighboring region. Tragically, the multiple inches of rain caused a section of the roof to collapse over the Buyers' living room. Within the Buyers' living room, their \$10,000 antique Persian floor rugs, \$25,000

Grand Piano, and their expensive sofas, tables, chairs, and wood floors were completely flooded and ruined as a direct result of the damaged roof above.

After the roof was inspected by the Buyers' Homeowner's Insurance Company, the inspectors soon discovered that there had been a pre-existing patched hole, which was almost a foot in diameter, where the bulk of the water from the thunderstorm was able to get through to the interior of the home. Upon a more formal questioning of the Sellers who had lived there for 20 years, they remembered that they had placed a patch on the roof 10 years earlier after a mild rainstorm had damaged the roof and caused a very mild leak.

The Sellers explained that as they have gotten older, their memory was not what it used to be and the roof leak and patch was an honest lapse in memory. Even the former neighbors described the Sellers as the nicest and the most compassionate, caring, and honest homeowners in the neighborhood. The Buyers believed based on their interactions with the Sellers that they were not trying to be purposely deceptive by not disclosing the previous roof leak and patch.

Unfortunately, the Buyers' homeowner's insurance company refused to pay out on their \$100,000+ in damage claims after learning that the damaged and patched roof was never disclosed by the Sellers and was also never disclosed by the Buyers to their new homeowner's insurance company. What was even more tragic for the Buyers was that they spent the bulk of their cash reserves on the down payment for the home, moving expenses, and new furniture, which was also damaged by the roof leaks and flooding.

Then, both the Buyers' insurance agent and attorney suggested that the Buyers try to go after the listing agent Ann and her principal broker for the \$100,000 in losses due to non-disclosure of the previous roof problems, regardless of whether or not they were known or unknown at the time. After the Buyers filed a lawsuit against Ann and her employing principal broker, their E&O insurance company thankfully stepped in to resolve and settle the claims for the Buyers' financial losses.

Had the E&O insurance company not been there to protect Ann and her employing broker, each of them may have been personally liable for the \$100,000 in financial losses that were related to the rainstorm and the previously undisclosed and damaged roof.

Failure to Have E&O Insurance: Suspension and Fees



To make sure that licensees comply with the E&O insurance requirement, the Real Estate Commission performs random audits (*Rule 1260-01-15(3)*).

If a licensee **fails to obtain, maintain, or renew E&O insurance** that meets or exceeds the minimum requirements established by the Commission, their license will be **suspended** (*Tenn. Code Ann. 62-13-112(j)(1)*).

- The Commission will send notification of the suspension to the licensee and the licensee's broker (*Tenn. Code Ann. 62-13-112(j)(2)*).
- While the license is suspended, the licensee may not engage in activities that require a

license (*Tenn. Code Ann. 62-13-112(j)(3)*).

- A license suspended for failure to maintain E&O insurance may be reinstated if the licensee provides proof of insurance that meets the required terms and conditions of coverage.

The licensee is **not required to pay any penalty fee** if proof of insurance is provided to the Commission **within 30 days** of suspension (*Tenn. Code Ann. 62-13-112(k)(1)*).

If the license is suspended for **more than 30 days but less than 120 days**, the licensee will be required to pay the following applicable penalty fee (*Rule 1260-01-16(1)(a)(1)*):

- **\$200** if the licensee's insurance carrier **backdates** the licensee's E&O insurance policy to indicate continuous coverage
- **\$400** if the licensee's insurance carrier does **not** backdate the licensee's E&O insurance policy to indicate continuous coverage

If the license is suspended for **more than 120 days but less than six months**, the licensee will be required to pay a penalty fee of **\$500** (*Rule 1260-01-16(1)(a)(2)*).

If the license is suspended for **more than six months but less than one year**, the licensee will be required to pay a penalty fee of \$500 plus **\$100 per month** for months six through 12 (*Rule 1260-01-16(1)(a)(3)*).

Failure to Have E&O Insurance: Revocation

If a license is suspended for **more than one year** for failure to maintain E&O insurance, the license is automatically **revoked** (*Tenn. Code Ann. 62-13-112(l)(1)*).

The Commission will send notification of the revocation to the licensee and the licensee's broker (*Tenn. Code Ann. 62-13-112(l)(2)*).

To have a license reissued, the individual must satisfy the following requirements (*Rule 1260-01-16(1)(b)*):

- Reapply for licensure and pay applicable license fees
- Pay the applicable penalty fees
- Pass all required examinations for licensure, unless the Commission waives the examination requirement
- Meet any current education requirements for licensure, unless the Commission waives the education requirements



Failure to Have E&O Insurance: PB Supervision Failure

A **principal broker** must ensure that, **at all times**, all licensees affiliated with that principal broker hold E&O insurance as required by law. A failure to do so is considered **failing to exercise adequate supervision** over the activities of licensed affiliate brokers (*Rule 1260-01-16(2)(a)*).

Failing to exercise adequate supervision is a violation of the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(15)*).

If a principal broker has an affiliated licensee whose license is suspended for failing to maintain E&O insurance, there will be **no penalty** to the principal broker if **either of the following** circumstances occurs **within 30 days** of the suspension (*Rule 1260-01-16(2)(b)*):

- The affiliated licensee has provided proof of insurance that complies with the required terms and conditions of coverage to the Commission.
- The principal broker releases the affiliated licensee.

After the aforementioned 30-day period, if the affiliated licensee has not provided proof of insurance or been released by the principal broker, the Commission is authorized to hold a **formal hearing** regarding the principal broker's failure to exercise adequate supervision. Or, as an alternative, the Commission is authorized to enter into a **consent order**, which allows the principal broker to settle the matter informally (*Rule 1260-01-16(2)(c)*).

A **consent order** is an enforceable agreement between the Commission and a licensee to take action to correct a violation. The consent order is to impose the aforementioned penalty fees required under Rule 1260-01-16(1).

Check Your Understanding #2

Using your notes link or on a piece of paper, write down the number that correctly completes each law or rule. When finished, scroll to the end of the course to see the answers.

1. The licensee is not required to pay any penalty fee if proof of insurance is provided to the Commission within ____ days of suspension (*Tenn. Code Ann. 62-13-112(k)(1)*).
2. If the license is suspended for more than ____ days but less than ____ days, the licensee will be required to pay the following applicable penalty fee (*Rule 1260-01-16(1)(a)(1)*):
 - a. \$____ if the licensee's insurance carrier backdates the licensee's E&O insurance policy to indicate continuous coverage
 - b. \$____ if the licensee's insurance carrier does not backdate the licensee's E&O insurance policy to indicate continuous coverage
3. If the license is suspended for more than ____ days but less than ____ months, the licensee will be required to pay a penalty fee of \$____ (*Rule 1260-01-16(1)(a)(2)*).
4. If the license is suspended for more than ____ months but less than ____ year, the licensee will be required to pay a penalty fee of \$____ plus \$____ per month for months six through 12 (*Rule 1260-01-16(1)(a)(3)*).
5. If a license is suspended for more than ____ year for failure to maintain E&O insurance, the license is automatically revoked (*Tenn. Code Ann. 62-13-112(l)(1)*).

Responsibility Maintain Valid License: Licensee and PB



Rule 1260-01-04(2) sets forth that each licensee is **individually responsible** for satisfying all legal requirements for **retention** of their license, including, but not limited to, paying appropriate fees; and completing real estate education.

However, to ensure they do not permit a broker, affiliate broker, or time-share salesperson under their supervision to engage in the real estate business **without a valid license**, principal brokers need to ensure employed licensees know and adhere to **license renewal requirements**.

License Renewal Requirement

Real estate **licenses expire two years** from the date the license was issued or renewed (*Tenn. Code Ann. 62-13-307(a)*).

To renew a Tennessee license, **resident and nonresident affiliate broker** and **broker** licensees must submit:

- Certification of satisfactory completion of **16 hours** of real estate education (i.e., **continuing education** or CE). The 16-hour continuing education requirement includes a six-hour mandatory Tennessee Real Estate Commission CORE course and 10 hours of elective education (*Tenn. Code Ann. 62-13-303(g)*).
- The required renewal fee.
- Any other documentation required by the Commission.



A licensee who elects **not** to participate in the E&O insurance program administered by the Real Estate Commission must submit a private carrier **certificate of coverage** as part of the license renewal (*Tenn. Code Ann. 62-13-112(g)*).

A licensee must provide all required renewal documentation and fees to the Commission **before** the license expiration date (*Tenn. Code Ann. 62-13-307(a)*).

License renewals are submitted using the state's **Comprehensive Online Regulatory and Enforcement (CORE) System**. Link the highlighted words to this website: <http://www.core.tn.gov>

Note: The continuing education requirement applies to affiliate brokers who were originally licensed on or after July 1, 1980, and brokers who were originally licensed on or after January 1, 2005 (*Rule 1260-05-12(3)*).

Failure to Renew: Reinstatement of Expired License

If a licensee fails to renew their license by the expiration date, the licensee is given a **60-day grace period**. If the licensee renews after the expiration date but within 60 days of expiration (i.e., within the grace period), the licensee must pay the **renewal fee plus \$50** per 30-day period, or a portion thereof, that the documentation or fees are late (*Rule 1260-01-21(2)(a)*).

If the licensee **fails** to renew **within 60 days** of the expiration date, the licensee must sign a **Reinstatement Order**, meet all requirements for license renewal, including paying the renewal fee, and pay a **penalty fee** according to the following schedule (*Rule 1260-01-21(2)(b)*):

- If the license is expired for more than 60 days but less than 120 days, the penalty fee is \$50 per 30-day period, or a portion thereof, from the time the license expired.
- If the license is expired for more than 120 days but less than one year, in addition to the penalty fee described above, the penalty fee is \$100 per 30-day period, or a portion thereof, beginning on the 121st day.

If a license is expired for **more than one year**, the individual must **reapply for licensure**, meet current education requirements, and pass all required examinations (*Rule 1260-01-21(3)*).



Failure to Renew Due to Health Issues

If a licensee fails to renew a license within 60 days after expiration because of **personal or family health issues**, the licensee may request a medical waiver from the Commission (*Rule 1260-01-21(1)*).

To request a waiver, the licensee must:

- Provide a **signed doctor's statement** attesting to the nature and length of the illness.
- Submit a **statement explaining the lapse**, which must be signed by the person seeking reinstatement.

If the Commission grants the medical waiver request, the renewal fee must be paid and all other conditions for licensure must be met, but late penalty fees will **not** be assessed.

Note: Information submitted with the request will become public record unless otherwise prohibited by law.



Failure to Renew Due to Active Military Duty

The Commission may waive late penalty fees and continuing education requirements for a licensee who is a **member of the National Guard or Reserves** and whose license expires while **called to active duty** (*Rule 1260-01-20(3)*).

The license may be eligible for renewal for **six months** from the person's **release from active duty**.

Before renewing the license, the Commission may request **documentation** of the licensee's call to duty.



Check Your Understanding #3

Using your notes link or on a piece of paper, write down the answers to the following questions to check your understanding of license renewal requirements. When finished, scroll to the end of the course to see the answers.

1. For a licensee who elects not to participate in the E&O insurance program administered by the Real Estate Commission, what are the four items that must be submitted for license renewal?
2. For a nonresident who is licensed as a Tennessee affiliate broker or broker, how many hours of continuing education are required for license renewal?
3. If the licensee fails to renew within 60 days of the license expiration date, what steps must the licensee take to apply for reinstatement of their license?

Principal Broker Supervision: Affiliated Brokers



A primary responsibility of a principal broker is to **supervise affiliate brokers**. Failing to exercise adequate supervision over the activities of licensed affiliate brokers is a violation of the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(15)*).

According to the Rules of the Tennessee Real Estate Commission (*Rule 1260-02-.01(1)*), a licensee may not engage in any real estate activity in any office unless there is a **full-time principal broker** managing the office.

The principal broker must be engaged **primarily in the real estate business** and accessible during **normal daytime working hours** (*Rule 1260-02-.01(2)*).

Note: Most affiliate brokers in Tennessee are independent contractors instead of employees of a firm.

The same principal broker supervisory responsibilities apply to affiliate brokers that are **independent contractors** and employees of a firm.

Affiliate Broker Relationship to Broker



As set forth by Tenn. Code Ann. 62-13-310:

(a) 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.

(b) 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.

(c) 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

Principal Broker Supervision: Change Affiliation or Status (Update)

A licensee in a firm must obtain any desired change of affiliation or status through the firm's principal broker (*Rule 1260-01-.04(3)*).

The [Transfer, Release, and Change of Status Form](#) (TREC Form 1) is used to transfer, retire, or activate a license. Select the link to take a look at the **TREC Form 1**.

Notice the three actions that can be selected at the top of the form:

- Transfer to a new firm
- Change license status from "active" to "retired"
- Change license status from "retired" to "active"

Take special notice of the licensee and principal broker signatures required to transfer, retire, or activate a license.

The TREC Form 1 can be hand-delivered, faxed, mailed, e-mailed, or uploaded through the Comprehensive Online Regulatory and Enforcement (CORE) System.

The principal broker's **supervisory responsibility** for the future acts of the licensee **terminates** upon the Commission's **receipt of the release form** or **online submission**. The principal broker **must retain** a copy of the executed form or confirmation of online submission, whichever is applicable (*Rule 1260-02-.02(1)*).

Within 10 days after the date of release, the licensee must complete the required administrative measures for either **change of affiliation or retirement** (*Rule 1260-02-.02(2)*).

Rule for Online Firm Transfer Request (Update)

With regard to **firm transfer requests** that are completed through online submission, the Commission recognizes the transfer of an affiliated licensee to a new firm as having been completed at the time that said transfer request is **completed online** and the **transfer confirmation is printed** only if the following conditions are met: *(Rule 1260-02-.02(3))*

1. Before the submission of the online transfer request, the principal broker who is receiving the affiliated licensee into their firm has verified that the affiliated licensee has an active Tennessee license and current errors and omissions insurance; and
2. The online submission is complete, the submission contains an electronic signature, and payment has been received. If the electronic submission is not complete, does not have an electronic signature, or payment has not been received, then the transfer will **not** be considered by the Commission to be a valid transfer and the affiliated licensee will be placed into broker release status.



Rules for Release From a Firm (Update)



When a licensee **terminates** an affiliation with a firm, the licensee cannot take or use any property listings or buyer representation agreements secured through the firm, unless specifically authorized by the principal broker in writing *(Rule 1260-02-.02(4))*.

Upon demand by a licensee for the **release from a firm**, it shall be **promptly granted** by the principal broker and the principal broker must **return the license to the licensee**. If the licensee cannot be located, then the principal broker may return the license to the Commission *(Rule 1260-02-.02(5))*.

If the **principal broker is deceased** or **physically unable to sign** the release or refuses to sign a release, the licensee requesting termination of affiliation must submit to the Commission a notarized Affidavit for Release. *(Rule 1260-02-.02(6))*.

If the **affiliated licensee is deceased** or **physically unable to sign** a release or make an online submission or refuses to sign a release or make an online submission, the principal broker requesting termination of affiliation must submit to the Commission a completed TREC Form 1 or make an online submission *(Rule 1260-02-.02(7))*.

Retired Status: Dos and Don'ts (Update)

While a license is in a **retired status**, the licensee:

- Must **not** engage in any activities defined in § 62-13-102 until a change of affiliation is received and processed by the Commission.
- Must continue to renew the license by paying the renewal fee prior to the expiration date.
- Does not need to maintain an active E&O insurance policy.
- Is not required to complete continued education.

Source: <https://support.commerce.tn.gov/hc/en-us/articles/209618998-How-do-I-retire-my-real-estate-license->

Reactivate a Retired License: Requirements (Update)

To **reactivate a retired license**, the licensee must:

- Provide proof of a current E&O insurance policy,
- Affiliate with an active firm, and
- Complete the Transfer, Release, and Change of Status Form along with the online application at <https://www.tn.gov/commerce/core.html>

The licensee must **complete the education requirement (16 hours of CE) prior to reactivation** and must do so **within the current license renewal period** in which they are seeking reactivation. Thus, if a licensee reactivates a retired license within the same renewal period in which the license was retired, any continuing education hours obtained prior to retirement within that renewal period would count toward the 16 hours required to reactivate. Licensees can check or CORE to confirm if they require education.

Source: <https://support.commerce.tn.gov/hc/en-us/articles/115007998547-How-do-I-reactivate-my-retired-real-estate-license->



Principal Broker Supervision: Team Members



In the past, real estate licensees relied solely on their own resources to generate and sustain business activities. Today, it is not uncommon for licensees to employ a “team environment” within a brokerage firm to generate activity.

Licensees who hold themselves out as a **team, group, or similar entity** within a firm **must be affiliated** with the same licensed firm (*Rule 1260-02-.41(1)*).

The team must **not**:

- **Represent** themselves as a **separate entity** from the licensed firm with which they are affiliated (*Rule 1260-02-.41(4)*).
- Establish a **physical location** that is **separate** from the physical location of the firm (*Rule 1260-02-.41(1)*).
- **Receive compensation** for performing real estate brokerage services from **anyone other than** their principal broker (*Rule 1260-02-.41(2)*).

The principal broker may **not** delegate their supervisory responsibilities to any licensee within a team. The principal broker **remains ultimately responsible** for oversight of all licensees within the principal broker’s firm (*Rule 1260-02-.41(3)*).

Principal Broker Supervision: Advertising Approval

All advertising **must be under the direct supervision of the principal broker** and must 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 (*Rule 1260-02-.11(3)(b)*).

Principal Broker Supervision: Licensee Commissions

A real estate licensee may earn compensation for a variety of services, including, but not limited to:

- Listing property for sale or lease
- Finding a buyer or a tenant
- Negotiating the sale or lease of property
- Engaging in property management

In a typical residential sale transaction, the seller pays a commission and that commission is delivered to the listing broker at closing. The listing broker may share the commission with their affiliated licensee(s) and/or with another licensed broker. An affiliate broker may **not** receive compensation directly from a client or from a broker who is licensed at a different firm.



An **affiliate broker** may receive compensation for real estate brokerage activities only from **the broker with whom the licensee is affiliated** (*Tenn. Code Ann. 62-13-312(b)(11)*). The commissions earned by an affiliated licensee while working under a principal broker can still be paid after one or more of the following circumstances occur (*Rule 260-02-.39*):

- The affiliated licensee transfers to a new broker;
- The affiliated licensee retires their license;
- The affiliated licensee is in broker release status;
- The affiliated licensee allows their license to expire; or
- The death of the affiliated licensee.

A broker may **not** pay any **unlicensed person** for an act that requires a real estate license. According to the Tennessee Real Estate Broker License Act, it is a violation for a licensed broker to employ or compensate a person who is not a licensed broker or affiliate broker for performing real estate brokerage activities (*Tenn. Code Ann. 62-13-302(a)*).

A licensed broker **may pay** a commission to a **broker licensed in another state** if the nonresident broker does not conduct any negotiations for the transaction in Tennessee (*Tenn. Code Ann. 62-13-302(a)*).

To enforce payment for brokerage services, a person must have been **properly licensed** at the time the compensation was earned (*Tenn. Code Ann. 62-13-105*). In other words, a person may not file a lawsuit to collect a commission for providing brokerage services if the person was not licensed at the time.

Note: The Commission will **not** intervene in the settlement of debts, loans, draws, or **commission disputes** between firms, brokers, and/or affiliates (*Rule 1260-02-.02(8)*).

Check Your Understanding #4

Using your notes link or on a piece of paper, write down the answers to the following questions to review steps for changing your license status and prohibited acts for a team. When finished, scroll to the end of the course to see the answers.

1. What are three steps a licensee must take to reactivate a retired license?

2. Under Rule 1260-02-.41, what are three acts prohibited by a team?

Principal Broker Supervision: Office



Though the principal broker is the licensed broker who is the single broker responsible for the operation of the office with which the principal broker is associated, you must also know and comply with the laws and rules that govern the principal broker's **supervision of an office** to protect your clients, your broker, and yourself.

Each real estate office **must have** the following (*Tenn. Code Ann. 62-13-309(a)(1)*):

- **Real estate firm license**
- Principal broker
- Fixed location that has adequate facilities for affiliated licensees and that complies with all zoning laws and ordinances

The broker's license and the **licenses** of all affiliate brokers **must be prominently displayed** in the broker's **principal place of business** (*Tenn. Code Ann. 62-13-309(a)(2)*).

Note: A main or branch office may be located in a home if the zoning allows a real estate office at that location. The licensee must apply for a firm license and assign a principal broker.

Principal Broker Supervision: Branch Offices

If an applicant for a broker's license maintains more than one place of business in Tennessee, the applicant must apply for and obtain an **additional firm license for each branch office** (*Tenn. Code Ann. 62-13-309(d)(1)*). Each application must state the **location** of the branch office and the name of the person in charge of it (*Tenn. Code Ann. 62-13-309(d)(2)*).

A licensee is deemed to maintain a "branch" if the licensee (*Rule 1260-02-.03*):

- Advertises the office in any manner for the purpose of attracting the public;
- Has a mail drop at the office which is registered with and served by the United States Postal Service; or
- Invites or solicits telephone calls to the office (by such means as advertising or listing in a telephone directory).

Use of a post office box as a business location is prohibited. However, a post office box may be included in a business address for the purpose of receiving mail (*Rule 1260-02-.05*).

Each branch office must be under the direction and supervision of a **full-time principal broker** licensed **at that address** (*Tenn. Code Ann. 62-13-309(d)(3)*).

A principal broker may act as a principal broker **for two firms** as long as both firms are in the **same location**. The "same location" means that both firms are located at and use the same physical address (*Tenn. Code Ann. 62-13-309(g)*).

Principal Broker Supervision: Unlicensed Branch Office

If the following requirements are met, a **model home or a modular unit** in a subdivision that is under construction may be used to solicit business **without being licensed** as a branch office (*Rule 1260-02-.03(3)(b)*):

- The model home or modular unit location and/or telephone number is only advertised in conjunction with advertising for the main firm office. All advertising must comply with applicable laws and rules.
- The location does not have a mail drop.
- The location is not the sole sales office for the firm and is not used to allow unlicensed individuals to perform acts requiring licensure.
- The principal broker of the main firm office adequately supervises licensees operating from the location.

Principal Broker Supervision: Unlicensed Personnel

Running a busy real estate office requires a great deal of administrative support.

Because licensees typically prefer to spend their time interacting with clients and customers to bring about successful real estate transactions, principal brokers often employ **unlicensed personnel** to assist with administrative, clerical, or personal activities. Principal brokers must ensure that these individuals perform only those activities for which a real estate license is not required.

Let's examine some specific tasks that unlicensed personnel may and may not perform.

Unlicensed Personnel: Permitted Acts

An unlicensed real estate employee, assistant, or secretary **may**:

- 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 the 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 of 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 comparative market analysis (CMA).
- Unlock property under the direction of a licensee.
- Disclose the current sales status of a listed property.



Unlicensed Personnel: Prohibited Acts

An unlicensed real estate employee, assistant, or secretary **may not**:

- 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 individuals 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 that is dependent upon, or directly related to, a real estate transaction.



Note: The tasks listed here are also provided on the Tennessee Real Estate Commission website, under the Frequently Asked Questions. Link the highlighted words to this website: <https://support.commerce.tn.gov/hc/en-us/categories/200695848-Real-Estate-Commission>

Office Sign Requirements

Each licensed real estate firm shall conspicuously **display** on the outside of the firm's place of business a **sign** which contains the **name of the real estate firm** as registered with the Commission (*Rule 1260-02-.03(1)*).

Use of Telephone Answering Service Restrictions

A broker is prohibited from:

- Posting their license at a telephone answering service.
- Conducting the major part of their real estate by or through a telephone answering service.

The reasonable use of a telephone answering service by a broker is permitted (*Rule 1260-02-.04*).

Principal Broker Supervision: Naming Real Estate Firm

It is the applicant's responsibility to research any legal restriction regarding the use of a proposed firm name. The Commission will not attempt to determine ownership, trademark, copyright, or any other legal means to protect a name (*Rule 1260-01-18(4)*).

The Commission staff will review all applications for a firm name to determine whether the name is the same as or similar to the name of another firm licensed with the Commission (*Rule 1260-01-18(2)*).

To protect the public from confusion regarding licensed real estate firms, the Real Estate Commission has the right to refuse to issue a new firm license in a name that is the same as or confusingly similar to the name of another licensed firm (*Rule 1260-01-18(1)*).

If a name is rejected, the applicant may appeal the decision (*Rule 1260-01-18(3)*).

Notification of Principal Broker Absence or Death



The Real Estate Commission must be notified within **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 period of time (*Rule 1260-02-.38(1)*).

At the time of notification, a plan must be submitted that addresses the continued operations of the business without a principal broker (*Rule 1260-02-.38(1)*).

The Commission may permit a real estate firm to continue operating **without a principal broker** for a period of time not to exceed **30 days** (*Rule 1260-02-.38(2)*).

Under certain conditions, the Commission may grant a **30-day extension** to the original period. If an extension is granted, a new principal broker must be in place no later than the 61st day from the date of the death, resignation, termination, or incapacity of the original principal broker (*Rule 1260-02-.38(3)*).

Principal Broker Supervision: Handling of Deposits and Earnest Money



Every broker must comply with the Rules of the Real Estate Commission that set forth the requirements for having an **escrow or trustee account** to deposit funds held by brokers (most often in the form of earnest money deposits) relating to a real estate transaction.

The Rules of the Real Estate Commission use the term "**trust money**" to represent (*Rule 1260-02-.09(1)(b)*):

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

As set forth in Rule 1260-02-.09(4), **principal brokers** are responsible at all times for trust money accepted by them or by their affiliate brokers


Next, we will cover the Rules of the Real Estate Commission regarding the handling of trust money.

Escrow or Trust Account Requirements

Each principal broker must maintain a **separate escrow or trustee account** (also referred to as a **trust account**) to hold any trust money that the broker receives in a fiduciary capacity (*Tenn. Code Ann. 62-13-321; Rule 1260-02-.09(2)*).

If a broker also receives trust money related to **leased property**, the funds must be held in **one or more separate escrow accounts** (*Rule 1260-02-.09(12)*).

When applying for an original real estate firm license or renewing an existing license, the firm must provide proof of the firm's escrow account (*Tenn. Code Ann. 62-13-309(f)*).

 An escrow account holds only trust money. Commingling of funds is **prohibited** (*Rule 1260-02-.09(13)*). **Commingling** refers to maintaining funds belonging to others in the same bank account that contains the licensee's personal or business funds (*Rule 1260-02-.09(1)(a)*).

Requirements for Depositing Trust Money

(A). \$ _____ EARNEST MONEY: BUYER hereby deposits
DOLLARS as Earnest Money evidenced by: <input type="checkbox"/> cash <input type="checkbox"/> personal check <input type="checkbox"/> cashier's check <input type="checkbox"/> note (due date): _____
<input type="checkbox"/> other _____ and a receipt is hereby acknowledged. Earnest Money to be
deposited in trust account <input type="checkbox"/> upon receipt, or <input type="checkbox"/> upon acceptance by BUYER and SELLER and shall be held by: <input type="checkbox"/> Listing Broker <input type="checkbox"/> Selling Broker
<input type="checkbox"/> other _____ for the benefit of the parties hereto.
THE RESPONSIBLE BROKER SHALL BE: _____

An **affiliate broker** who receives trust money in a real estate transaction must turn the funds over to the principal broker **immediately** upon receipt (*Rule 1260-02-.09(3)*).

A contract that authorizes a principal broker to place trust money in an escrow account must clearly state the following (*Rule 1260-02-.09(5)*):

- Terms and conditions for disbursement of the trust money
- Name and address of the person or firm who will hold the trust money

A broker may **not** accept a **postdated check** for payment of trust money unless otherwise provided in the offer (*Rule 1260-02-.09(10)*).

Trust money must be deposited into an escrow account **promptly** upon acceptance of an offer unless the offer contains a statement such as “Trust money to be deposited by _____” (*Rule 1260-02-.09(11)*).

If 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 funds upon receipt of the funds by the specified escrow agent (*Rule 1260-02-.09(6)*).

Requirements for Disbursing Trust Money

The Rules of the Real Estate Commission specify the conditions under which the principal broker may **properly disburse trust money** (*Rule 1260-02-.09(7)*):

- Reasonable **interpretation of the contract** that authorizes the broker to hold the trust money
- **Written agreement** signed by all parties and separate from the contract that authorizes the broker to hold the funds
- **Closing** of the transaction
- **Rejection** of an offer to purchase, sell, rent, lease, exchange, or option real estate
- **Withdrawal** of an offer not yet accepted
- Filing an **interpleader action**
- **Court order**



Trust money must be disbursed in a proper manner **without unreasonable delay** (*Rule 1260-02-.09(8)*).

If a party submits a **written request for disbursement**, earnest money must be disbursed or interpleaded within **21 calendar days** (*Rule 1260-02-.09(9)*; *Rule 1260-02-.34*).

Note: An **interpleader action** is a court action filed by someone who is holding funds that two or more people are claiming. The holder turns the funds over to the court, and the court resolves the dispute and delivers the money to whoever is entitled to it.

Requirements for Use of Interest-Bearing Account

A broker may hold trust money in an **interest-bearing escrow account** if the following conditions are met (*Rule 1260-02-.09(14)*):

- When the contract is signed, the broker must disclose to the payor that their deposit will be placed in an interest-bearing escrow account, and the broker and the payor must agree in writing as to who will receive any interest earned.
- The broker does not own the trust money or interest earned until it has been properly disbursed to the broker.
- The broker must keep a detailed and accurate accounting of the precise sum of the interest earned for each separate deposit.



Deposited Funds Record Requirement and Examinations



According to the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-321*), a broker must maintain for at least **three years** accurate records of deposited funds showing:

- Depositor of the funds
- Date of deposit
- Date of withdrawal
- Payee of the funds
- Other pertinent information that the Real Estate Commission may require

A representative of the Division of Regulatory Boards may, at reasonable hours, examine and copy books, accounts, documents, or records that are relevant to determine whether a licensee has properly maintained and disbursed funds from an escrow account (*Tenn. Code Ann. 62-13-312(d)*).

If the broker refuses to allow access to the account records, the Division of Regulatory Boards may pursue disciplinary action. Also, the refusal is grounds for the Real Estate Commission to suspend or revoke a license (*Tenn. Code Ann. 62-13-312(d)*).

Escrow Account Waiver Conditions

The principal broker of a real estate firm that **does not engage in activities that require the acceptance of any funds** belonging to others may receive a **waiver** from the requirements to maintain an escrow account (*Tenn. Code Ann. 62-13-323(a)*).

Upon receipt of a waiver by the Real Estate Commission, the principal broker may close the real estate firm's escrow account (*Tenn. Code Ann. 62-13-323(b)*).

The principal broker of a firm operating under a waiver **may accept funds** belonging to others if the following conditions are met (*Tenn. Code Ann. 62-13-323(c)*):

- The principal broker must **open an escrow account within one business day** of accepting trust money and must deposit the funds into the newly opened escrow account on the same day.
- The principal broker must **notify the Commission within one business day** after opening a new escrow account and must provide the following information:
 - Name and address of the bank where the new escrow account was opened
 - Name of the new account
 - Account identification number of the new account
- The principal broker must acknowledge responsibility for maintaining the escrow account.

A principal broker may obtain a waiver for the same real estate firm **no more than once during each license renewal period** (*Tenn. Code Ann. 62-13-323(e)*).

Case Study: Mishandling of Consumer Funds



The improper handling of funds is one of the quickest ways to end up with a restricted or revoked real estate license. Next, read a fictional case study regarding the mishandling of consumer funds and disciplinary actions taken against the noncompliant principal broker.

Affiliate Broker Sansa works at the Winterfell Realty brokerage office operated and managed by Principal Broker Jon. Sansa is working as the listing agent for a condominium unit. Another real estate licensee, Jamie, brought in a young couple named Mr. and Mrs. Stark, who had just gotten married a few months earlier.

After weeks of Jamie showing the Starks some affordable condominiums around town that are quite favored by other first-time homebuyers, the Starks fell in love with a newer \$250,000 three-bedroom condo unit located in a neighborhood near the Starks' offices and church location. They also were quite fond of the nearby schools because they planned on having a baby in the not-so-distant future.

The Starks had recently qualified for an FHA mortgage for up to the same \$250,000 purchase price amount, which only required a 3.5% cash down payment. For this \$250,000 condo purchase price, the required 3.5% down payment was equal to \$8,750. In the purchase offer presented by licensee Jamie, the Starks had requested

that the seller pay some of their closing costs to help minimize their total out-of-pocket cash needed to buy the property.

The sellers, by way of their listing agent Sansa, accepted the Starks' full price offer of \$250,000 as long as the buyers wrote an earnest money check in the amount of 3% of the total purchase price. Because the Starks knew that they had to invest a 3.5% down payment to qualify for their FHA loan, they agreed to give the seller the full 3.5% down payment amount instead of just the requested 3% earnest money deposit.

The Starks and their advising Broker Jamie thought that it made sense to just write the full amount of 3.5% down (\$8,750) made payable to "Winterfell Realty" because they could forward the funds to the selected title insurance company for the closing that was scheduled 30 days later. In most cases, this decision to write a bigger 3.5% down payment check would seem reasonable and be fairly wise. It would also be less work for the buyers because they would not have to write two separate checks or transfer the balance of funds electronically at a later date to close.

However, Principal Broker Jon was having a very challenging financial year at his business unbeknownst to his co-workers and clients. In fact, Principal Broker Jon was one month behind in paying his office rent, which amounted to \$3,500 per month. In total, he owed his office landlord \$7,000 for last month's and this month's rent that was due.

Jon was awaiting the closing of his own sales transaction that would net him \$15,000 next week. Because Jon was almost certain that his purchase deal was on track to close on time, he took \$7,000 out of the Starks' earnest money deposit and paid his office space rent. These same funds were in Principal Broker Jon's trust account that only he had access to at the time, so he didn't think that anyone would be aware of his unethical and criminal actions.

Sadly for Principal Broker Jon, his own sales transactions fell apart the next week, and his buyers walked away from the purchase deal. So, there went Jon's expected \$15,000 future commission that he was planning to use to put back into his brokerage trust account to replace the Starks' missing \$7,000 funds.

In this fictional case study, Principal Broker Jon had never met the Starks in person or spoken with them on the phone. They were Affiliate Broker Sansa's clients and close personal friends. Once all the parties involved in this deal learned that Jon had stolen the Starks' funds, they were not able to purchase the home because the Starks did not have the required 3.5% down payment.

Later, the Starks filed a lawsuit against Affiliate Broker Sansa and Principal Broker Jon for the illegal spending of their personal funds. The Starks also filed a complaint with the Tennessee Real Estate Commission. At a later date, after investigating these unethical allegations, TREC revoked Principal Broker Jon's license, and Sansa had to find another Principal Broker where she could hang her license.

The local District Attorney's office also filed a criminal complaint against Principal Broker Jon for the following reasons.

- Fraud due to the commingling or mixing of broker and client funds in the same account
- Theft due to the conversion or illegal act of spending client funds on personal expenses

Principle Broker Supervision: Transaction Recordkeeping

Licensees must preserve records relating to any real estate transaction for a period of **three years** following its consummation (*Tenn. Code Ann. 62-13-312(b)(6)*).

Transaction 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



Electronic Recordkeeping Conditions

Real estate licensees are permitted to use **electronic record-keeping methods** if certain conditions are met:

- Documents must be readily accessible in an organized format **within 24 hours** of any request for **inspection by the Real Estate Commission** (*Rule 1260-02-.40(1)(a)*).
- The principal broker must use a system that **maintains the security, authenticity, and accuracy** of the records and ensures that the records can be accessed in a **readable format** (*Rule 1260-02-.40(1)(b)*).

Check Your Understanding #5

Using your notes link or on a piece of paper, identify if each statement is "true" or "false" as set forth in the laws and rules that govern Tennessee real estate licensees. When finished, scroll to the end of the course to see the answers.

1. Each real estate office must have a real estate firm license, principal broker, and a fixed location that has adequate facilities for affiliated licensees and that complies with all zoning laws and ordinances.
2. A broker can obtain one firm license for multiple places of business if the principal broker is the same licensee for all locations.
3. Licensees are prohibited from using a telephone answering service to conduct real estate business.
4. The Real Estate Commission must be notified within 10 days of the death, resignation, termination, or incapacity of a principal broker.
5. An affiliate broker who receives trust money in a real estate transaction must turn the funds over to the principal broker immediately upon receipt.
6. If a party submits a written request for disbursement, earnest money must be disbursed or interpleaded within 15 business days.
7. Documents maintained electronically must be readily accessible in an organized format within 24 hours of any request for inspection by the Real Estate Commission.

Grounds for Disciplinary Action



The Real Estate Commission has the authority to **deny** a license for cause or to **suspend or revoke** a license if it was **obtained by false representation or by fraudulent act or conduct** (*Tenn. Code Ann. 62-13-312(b)*).

The Commission may also suspend or revoke a license if the licensee engages in any of the 21 acts listed next:

(1) Making any substantial and willful misrepresentation (*Tenn. Code Ann. 62-13-312(b)(1)*).

Misrepresentation refers to a false or misleading statement made by words, actions, or failure to speak intended to influence someone to act or behave in a certain way.

(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 the promise (*Tenn. Code Ann. 62-13-312(b)(2)*).

(3) Pursuing a continued and flagrant course of misrepresentation or making of false promises through affiliate brokers, other persons, any medium of advertising, or otherwise (*Tenn. Code Ann. 62-13-312(b)(3)*).

An ongoing pattern of misrepresentation could certainly land a licensee in some hot water, subjecting the licensee to disciplinary action by the Commission.

(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, insignia, or membership in any real estate association or organization of which the licensee is not a member (*Tenn. Code Ann. 62-13-312(b)(4)*).

An advertisement could be misleading if a licensee uses a trademarked or copyrighted term or symbol in the ad without authorization. For example, the term **REALTOR®** is a registered trademark and refers to a member of the National Association of REALTORS® (NAR). A licensee doesn't automatically become a REALTOR® when issued a real estate license. Only those who join the NAR may use the term REALTOR®. If you're not a member, you cannot call yourself a REALTOR® in any advertisement, business card, e-mail, etc.

(5) Failing, within a reasonable time, to account for or to remit any money coming into the licensee's possession that belongs to others (*Tenn. Code Ann. 62-13-312(b)(5)*).

Money belonging to others received by a licensee who is acting as an agent or facilitator in a real estate transaction is referred to as **trust money**. Licensees who accept trust money must follow proper procedures for holding and disbursing these funds.

(6) Failing to keep records relating to any real estate transaction for three years following its consummation (*Tenn. Code Ann. 62-13-312(b)(6)*).

Recall, documents that need to be retained include:

- Listings
- Offers (even offers that did not become contracts)
- Contracts
- Closing statements
- Agency agreements
- Agency disclosure documents
- Property disclosure forms
- Correspondence
- Notes

(7) Acting for more than one party in a transaction without the knowledge and consent in writing of all parties for whom the licensee acts (*Tenn. Code Ann. 62-13-312(b)(7)*).

Dual agency requires the **informed, written consent** of both parties.

(8) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution (*Tenn. Code Ann. 62-13-312(b)(8)*).

A licensee must deliver a copy of any signed real estate transaction document to the parties immediately upon signing.

(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 that fails to specify a definite termination date (*Tenn. Code Ann. 62-13-312(b)(9)*).

For example, a listing agreement may **not** have an automatic renewal clause. Under an **automatic renewal clause**, the agreement continues for another term if it is not expressly canceled or renegotiated within a specified time.

(10) Inducing any party to a contract, sale, or lease to break the contract for the purpose of substituting a new contract, where the substitution is malicious or is motivated by the personal gain of the licensee (*Tenn. Code Ann. 62-13-312(b)(10)*).

(11) In the case of an affiliate broker, accepting compensation for performing real estate brokerage activities from any person except the broker with whom the licensee is affiliated (*Tenn. Code Ann. 62-13-312(b)(11)*).

An affiliate broker can accept compensation for brokerage activities **only from their principal broker**. To do otherwise could result in sanctions. There is a specific exception to this provision, however, if the licensee changes principal brokers and had earned a commission while affiliated with a different principal broker. In this case, the licensee can accept the earned commission from the previous broker.

(12) Being convicted 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 (*Tenn. Code Ann. 62-13-312(b)(12)*).

(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 (*Tenn. Code Ann. 62-13-312(b)(13)*).

(14) Violating any provision of the Tennessee Real Estate Broker License Act, the Rules of the Real Estate Commission, or the terms of any lawful order entered by the Commission (*Tenn. Code Ann. 62-13-312(b)(14)*).

(15) In the case of a broker, failing to exercise adequate supervision over the activities of any licensed affiliate brokers (*Tenn. Code Ann. 62-13-312(b)(15)*).

A principal broker is responsible for the acts of all affiliate brokers.

(16) Failing within a reasonable time to complete administrative measures that may be required by the Commission upon the transfer or termination of any affiliate broker employed by the broker (*Tenn. Code Ann. 62-13-312(b)(16)*).

If an affiliate broker is terminated or transfers to another principal broker, the affiliate broker and the principal broker(s) must follow the procedures established by the Commission.

(17) Paying or accepting, giving, or charging any undisclosed commission, rebate, compensation, or profit on expenditures for a principal or in violation of the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(17)*).

For example, a broker acting as a property manager for an owner may not accept any sort of compensation from other sources without the owner's knowledge. If a lawn service company representative wants to give the property manager tickets to a football game as a thank you for the business, the property manager can accept them only with the owner's knowledge.

(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 themselves or acquires or intends to acquire any interest in or any option to purchase property that has been listed with the licensee's office to sell or lease (*Tenn. Code Ann. 62-13-312(b)(18)*).

If a licensee attempts to acquire any interest in property listed with their firm, the licensee must fully disclose their position to the owner.

(19) Engaging in the unauthorized practice of law (*Tenn. Code Ann. 62-13-312(b)(19)*).

Many aspects of real estate transactions raise legal questions or have legal consequences. Real estate licensees need to remind their clients that they aren't licensed to practice law. Agents should never give legal advice or perform any acts that require a lawyer's expertise.

(20) Any conduct that constitutes improper, fraudulent, or dishonest dealing (*Tenn. Code Ann. 62-13-312(b)(20)*).

(21) Violating any provision of the Tennessee Time-Share Act or any rule promulgated under the Tennessee Time-Share Act (*Tenn. Code Ann. 62-13-312(b)(21)*).

A time-share interval is a right to use, occupy, and/or possess property for a recurring block of time. A licensee dealing in time-share intervals must comply with the Tennessee Time-Share Act and any related rules.

Staying Compliant: Do the Right Thing

You should not have been surprised by most of the violations we just discussed. In many cases, it comes down to a common-sense choice between right and wrong. Should you take advantage of a client for your personal gain? Of course, you shouldn't! Should you induce the client of another broker to break a contract and sign with you? Absolutely not! Should you refuse to show property to someone of a different race, even if directed to do so by your client? The answer is obviously not!

While some actions are clearly wrong, it can be argued that there is the occasional situation where the line between proper and improper conduct is not so clearly drawn. Understand, however, that ignorance of the law is no defense. As a licensee, you have a legal obligation to know and follow the law. It's important to remember that any improper conduct or other actions that violate the statutes and rules can result in administrative sanctions as well as possible civil and criminal consequences.

If you're ever unsure about a situation, you should **go to your principal broker** for advice. Your broker is legally responsible for supervising the real estate brokerage activities you perform on their behalf. While the law generally will not hold a principal broker primarily liable for violations by an affiliated licensee, the **broker would be liable if they had knowledge of the violation and did nothing to prevent it**. Furthermore, the Commission could decide that a principal broker who **fails to exercise adequate supervision** over their affiliated licensees is in violation of the Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(15)*).

TREC: The Disciplinary Process

The Tennessee Real Estate Commission has the statutory authority to **investigate complaints** and the **activities of real estate licensees** to ensure compliance with federal and state laws and rules. Let's review the TREC disciplinary process in a bit more detail.

TREC: Time Periods for Filing Complaint

A complaint must be filed with the Commission within the longer of the following time periods:

- **Two years** from the date the alleged violation occurred or the date the complainant became aware of the violation (*Tenn. Code Ann. 62-13-313(e)(1)*)
- The applicable statute of limitations if the violation is also a criminal offense (*Tenn. Code Ann. 62-13-313(e)(2)*)
- **10 days** after a successful criminal prosecution becomes final, if the violation is also a criminal offense and the time required for prosecution exceeds the time limits specified above (*Tenn. Code Ann. 62-13-313(e)(3)*)



TREC: Handling of Complaints



The Commission **may** initiate an investigation on its own initiative in the absence of a written complaint. However, upon **receipt of a written complaint**, the Commission **must** investigate to establish the facts and, if warranted, hold a hearing for reprimand or the suspension or revocation of a license (*Tenn. Code Ann. 62-13-312(a)*).

The Commission must **notify the accused licensee in writing** and provide a copy of the complaint (*Tenn. Code Ann. 62-13-313(a)(1)*).

The licensee has **10 days to respond** to the complaint, and the Commission will forward a copy of the response to the complainant (*Tenn. Code Ann. 62-13-313(a)(2)*).

TREC: Options for Handling Investigation Findings

After an investigation, the facts are presented to the Commission for a vote:

- If the Commission determines that there may be **probable cause for discipline**, the Commission may give the licensee an option to **settle with a consent order**. If the matter is not settled with a consent order, a **hearing** will be scheduled (*Tenn. Code Ann. 62-13-313(a)(3)*).
- If the Commission determines that there is **no reasonable cause** to believe that the licensee has engaged in a violation, the Commission **may dismiss** the matter. A copy of the order will be furnished to the complainant, the licensee, and any other individuals that the Commission deems proper (*Tenn. Code Ann. 62-13-313(a)(4)*).

Any hearing conducted by the Commission must follow procedures established by the Uniform Administrative Procedures Act—Tennessee Code Annotated Title 4 Chapter 5 (*Tenn. Code Ann. 62-13-111*).

A **majority vote** of the Commission is required to **revoke or suspend** a license (*Tenn. Code Ann. 62-13-313(c)*).

If the matter that is the subject of the complaint has been filed or is pending in any Tennessee court, the Commission may withhold its decision until the court action has been concluded (*Tenn. Code Ann. 62-13-313(d)*).

The Commission may petition a court to enjoin (prohibit) a person (licensed or unlicensed) from continuing a violation of the Real Estate Broker License Act (*Tenn. Code Ann. 62-13-109*).

Note: In addition to, or in lieu of, any other disciplinary action against a broker, the Commission may **order the broker's license to be downgraded to affiliate broker** status (*Tenn. Code Ann. 62-13-312(c)*).

License Revocation by Court

If a person or entity **suffers damages** due to the gross negligence, incompetency, fraud, dishonesty, or misconduct of a licensee and the injured party files a claim in court, the court has the **power to revoke the licensee's license** (*Tenn. Code Ann. 62-13-311*).

The license may not be reissued unless six members of the Real Estate Commission vote in favor of the reissuance.

Consequences of Guilty Plea or Conviction

If a licensee **pleads guilty to or is convicted of a violation** of the Tennessee Real Estate Broker License Act, the licensee must notify the Commission **within 60 days** (*Tenn. Code Ann. 62-13-312(f)*).

The license will be **automatically revoked** 60 days after the conviction unless, during that 60-day period, the licensee submits a written request to the Commission for a hearing.

Following the hearing, the Commission **may impose any sanction** permitted under the Real Estate Broker License Act.

Consequence of Unlicensed Activity Violation

It is unlawful for any person or entity to act as a real estate broker or affiliate broker without first obtaining the proper real estate license (*Tenn. Code Ann. 62-13-301*).

Committing a single real estate brokerage act without a license is considered a violation (*Tenn. Code Ann. 62-13-103(b)*).

Any **person** acting as a broker or affiliate broker without first obtaining a license commits a **Class B misdemeanor** (*Tenn. Code Ann. 62-13-110(a)(1)*). If the person has received any compensation for the unlicensed activity, the person will be liable for a penalty of **no less than the amount received and no more than three times that amount**, as determined by the court (*Tenn. Code Ann. 62-13-110(b)*).

A **corporation** that performs real estate brokerage acts without a license is ineligible to obtain a license for a period of **one year** from the date of conviction of the offense (*Tenn. Code Ann. 62-13-110(a)(2)*).

Real Estate Education and Recovery Account

The **Real Estate Education and Recovery Account** provides a means of compensating individuals for damages resulting from any violation of the Real Estate Broker License Act or the Rules of the Real Estate Commission committed by a broker, affiliate broker, or time-share salesperson (*Tenn. Code Ann. 62-13-208(d)*).

The Real Estate Commission must maintain a **minimum balance of \$500,000** in the Real Estate Education and Recovery Account (*Tenn. Code Ann. 62-13-208(a)*).

When an individual applies for an original license as a broker, affiliate broker, or time-share salesperson, the applicant pays, in addition to the original license fee, a fee established by the Commission for deposit into the account. If the Commission refuses to issue the license, the fee is returned to the applicant (*Tenn. Code Ann. 62-13-208(c)(1)*).

Also, as a condition for renewal of a license, the Commission may assess a fee, in addition to the renewal fee, not to exceed \$30 to ensure that the required minimum balance is maintained in the account (*Tenn. Code Ann. 62-13-208(c)(2)*).

If at any time, the money on deposit in the Real Estate Education and Recovery Account is insufficient to satisfy any duly authorized claim, the Commission must satisfy the unpaid claims plus interest when sufficient money has been deposited in the account (*Tenn. Code Ann. 62-13-208(i)*). The claims must be paid in the order in which they were originally filed.

Before requesting payment from the account, the aggrieved person must have:

- Notified the Commission before filing a legal action that could result in collection from the account (*Tenn. Code Ann. 62-13-208(e)*).
- Obtained a valid judgment from the court that has gone unpaid for 60 days (*Tenn. Code Ann. 62-13-208(f)*).
- Pursued all other remedies to collect the amount, including attachment and garnishment (*Tenn. Code Ann. 62-13-208(f)*).

The aggrieved person may recover compensatory damages, not including interest and costs, resulting from the violation (*Tenn. Code Ann. 62-13-208(d)*). **Compensatory damages** are damages to **repay the actual loss suffered**. Compensatory damages are also called **actual damages**.

The **maximum payout amounts** from the Real Estate Education and Recovery Account are as follows:

- **\$15,000 per transaction** regardless of the number of persons aggrieved or parcels of real estate involved in the transaction (*Tenn. Code Ann. 62-13-208(d)(1)*)
- **\$30,000 in total per licensee** (*Tenn. Code Ann. 62-13-208(d)(2)*)

When a claim is paid out of the Real Estate Education and Recovery Account, the license of the licensee against whom the claim was made may be suspended or revoked. If the license is revoked, the person may not apply for a new license until the licensee has reimbursed the full amount paid from the account plus interest (*Tenn. Code Ann. 62-13-208(g)*).

The Real Estate Commission is authorized to use earnings on the account to cover expenses associated with the following activities:

- Training Commission members and staff to enable them to advise licensees on pertinent subjects (*Rule 1260-01-.11(1)(b)*)
- Preparing and disseminating information for the benefit of licensees (*Rule 1260-01-.11(1)(b)*)
- Holding seminars concerning regulatory matters and business practices affecting licensees (*Rule 1260-01-.11(2)(a)*)
- Monitoring and evaluating approved post-licensing courses to ensure they are structured and conducted to provide maximum benefit to licensees (*Rule 1260-01-.11(2)(b)*)
- Publishing and distributing a newsletter containing information of interest to licensees (*Rule 1260-01-.11(2)(c)*)

The Commission may not expend funds for these purposes if the expenditure would reduce the balance in the account to less than \$500,000 (*Tenn. Code Ann. 62-13-208(l)*).

CHAPTER 2: ADVERTISING COMPLIANCE

Chapter Introduction

Recall from Chapter 1 that the Tennessee Real Estate Commission has the authority to suspend or revoke a license if the licensee engages in one or more of the following acts:

- **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** (*Tenn. Code Ann. 62-13-312(b)(4)*)

- **Making any substantial and willful misrepresentation** (*Tenn. Code Ann. 62-13-312(b)(1)*)
- **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 the promise** (*Tenn. Code Ann. 62-13-312(b)(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** (*Tenn. Code Ann. 62-13-312(b)(3)*)
- **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** (*Tenn. Code Ann. 62-13-312(b)(13)*)

Chapter 2 covers the **Rules of the Tennessee Real Estate Commission** specific to real estate **advertising** and also provides guidance to ensure licensees do not commit the aforementioned prohibited acts in violation of federal and state laws.

Chapter Introduction: Key Terms

Key terms important to understanding the content presented in this chapter include:

Advertising—The placement of public announcements in any medium with the intention of promoting or enticing a consumer into purchasing goods or engaging the services of someone.

Blind Advertisement—A real estate advertisement by a licensee that does not include the real estate firm's name.

Cooperative Advertising—A joint advertising effort in which costs are shared among members of a group.

Counteroffer—A response to an offer to enter into a contract, changing some of the terms of the original offer; a counteroffer is a rejection of the original offer (not a form of acceptance) and does not create a binding contract unless the new counteroffer is accepted by the original offeror.

Franchise—A type of license that allows a party (the franchisee) to have access to the proprietary trademarks and knowledge of a business (the franchiser or franchisor) and to operate under the business's name.

Multiple Listing Service (MLS)—A listing service whereby member brokers agree to share listings and commissions on properties sold jointly; the MLS generally consists of an online database that is updated regularly to include new listings.

Offer—The first step in forming a contract when one person proposes a contract to another.

Social Media—Internet-based applications or platforms that allow the public to create and share content and information.

True Picture—The mandate to present accurate words and images that do not misrepresent a property or mislead a consumer in all advertising, marketing, and other representations.

Chapter Introduction: Learning Objectives

After completing this chapter, you should be able to:

- LO10: Identify requirements for complying with the rules of the Tennessee Real Estate Commission related to advertising.
- LO11: Describe a licensee's duties related to lawfully promoting listed properties and presenting offers to sellers.

TREC Rules Related to Advertising



To protect the public, the Tennessee Real Estate Commission has enacted rules that address advertising by real estate licensees. In this chapter, we will present **specific provisions** of the **Rules of the Real Estate Commission** related to advertising property and services.

As set forth in Rule 1260-02-.12(1):

All advertising, regardless of its nature and the medium in which it appears, which promotes either a licensee or the sale or lease of real property, shall conform to the requirements of this rule. The term “advertising,” for purposes of this rule, in addition to traditional print, radio, and television advertising, also includes, but is not limited to, sources of communication available to the public such as signs, flyers, letterheads, e-mail signatures, websites, social media communications, and video or audio recordings transmitted through internet or broadcast streaming. Advertising does not include promotional materials that advertise a licensee such as hats, pens, notepads, T-shirts, name tags, business cards, and the sponsorship of charitable and community events.

TREC Rules: Advertising General Principles

The following are general principles set forth in Rule 1260-02-.12(3)(a)(b)(c)(d)(e):

- No licensee shall advertise to sell, purchase, exchange, rent, or lease property in a manner indicating that the licensee is **not engaged in the real estate business**.
- 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.
- Any advertising which refers to an individual licensee must list that **individual licensee's name as licensed** with the Commission.
- No licensee shall **post a sign** in any **location advertising property** for sale, purchase, exchange, rent, or lease, **without written authorization from the owner** of the advertised property or the owner's agent.
- 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.



Note: Written authorization to advertise is typically provided in a signed listing agreement.



As set forth in Rule 1260-02-.12(3)(j):

No licensee shall advertise in a false, misleading, or deceptive manner. False, misleading, and/or deceptive advertising includes, but is not limited to, the following (Rule 1260-02-.12(3)(f)):

1. Any licensee advertising that includes only the franchise name without including the firm name;
2. Licensees who hold themselves out as a team, group, or similar entity within a firm who advertise themselves utilizing terms such as "Real Estate," "Real Estate Brokerage," "Realty," "Company," "Corporation," "LLC," "Corp.," "Inc.," "Associates," or other similar terms that may lead the public to believe that those licensees are offering real estate brokerage services independent of the firm and principal broker; or
3. Any webpage that contains a link to an unlicensed entity's website where said entity is engaged or appears to be engaged in activities that require licensure by the Commission.

For purposes of Rule 1260-02-.12(3), the term "firm name" means either of the following: (a) The entire name of the real estate firm as licensed with the Commission or (b) The D/B/A name, if applicable, of the real estate firm as licensed with the Commission *Rule 1260-02-.12(2)*.

Note: A D/B/A (doing business as) name is the operating name of a company, also known as an assumed or fictitious name.

TREC Rules: Advertising Franchise and Cooperative

Rule 1260-02-.12(4)(a)(b) set forth that:

- Any licensee **using a franchise trade name or advertising as a member of a cooperative group** shall clearly and unmistakably indicate in the advertisement the licensee's name, firm name, and firm telephone number as registered with the Tennessee Real Estate Commission and adjacent to any specific properties advertised for sale or lease in any media.
- Any licensee using a **franchise trade name on business cards, contracts, or other documents** relating to real estate transactions shall clearly and unmistakably indicate the licensee's name, firm name, and firm telephone number as registered with the Commission.



Note: A **franchise** is a type of license that allows a party (the franchisee) to have access to the proprietary trademarks and knowledge of a business (the franchiser or franchisor) and to operate under the business's name. The franchisee usually pays the franchiser start-up and annual licensing fees. **Cooperative advertising** is a joint advertising effort in which costs are shared among members of a group.

TREC Rules: Internet Advertising



In addition to all other advertising guidelines within this rule, the following requirements shall also apply with respect to **Internet advertising** by licensees (*Rule 1260-02-.12(5)(a)(b)(c)*):

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

TREC Rules: Social Media Advertising



For the purpose of this rule, “**social media**” means Internet-based applications or platforms that allow the public to create and share content and information. Examples include, but are not limited to: Facebook, Twitter, Instagram, and LinkedIn (*Rule 1260-02-.12(6)(a)*).

With regards to **social media** advertising by licensees, the **firm name and firm telephone number** listed on file with the Commission must be **no more than one click away from the viewable page** (*Rule 1260-02-.12(6)(b)*).

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 (*Rule 1260-02-.12(6)(c)*).

TREC Rules: Advertising Guarantees, Claims, and Offers

Unsubstantiated selling claims and misleading statements or inferences are **strictly prohibited** (*Rule 1260-02-.12(7)(a)*).

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 (*Rule 1260-02-.12(7)(b)*).



TREC Rules: Offering Gifts and Prizes



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 (*Rule 1260-02-.33(1)(a)(b)*) :

- **Under the sponsorship** and with the **approval of the firm** with whom the licensee is affiliated; and
- **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.

TREC Rules: Office Signs and Team Representation

Recall,

- Each licensed real estate firm shall conspicuously **display on the outside of the firm’s place of business a sign** which contains the **name** of the real estate firm as registered with the Commission (*Rule 1260-02-.03(1)*).
- No licensees who **hold themselves** out as a team, group, or similar entity within a firm shall represent themselves as a **separate entity** from the licensed firm (*Rule 1260-02-.41(4)*).

Check Your Understanding #1

Using your notes link or on a piece of paper, identify the correct answer to each question. When finished, scroll to the end of the course to see the answers.

1. Which forms of promotion are included in the definition of “advertising” under the Rules of the Tennessee Real Estate Commission? *Select all correct responses.*
 - A. business cards
 - B. radio and television advertising
 - C. signs
 - D. websites and social media communications
2. Licensees operating as a team may advertise themselves using the term
 - A. associates.
 - B. company.
 - C. realty.
 - D. team.

3. Before posting a sign on a property advertising it for sale, a licensee must have
 - A. an agency relationship with the owner.
 - B. a listing agreement with the owner.
 - C. written authorization from the owner.
 - D. written or oral authorization from the owner.
4. When a licensee uses social media to advertise a listing, the firm name and firm telephone number
 - A. is not required.
 - B. must appear on the viewable page.
 - C. must be no more than one click away from the viewable page.
 - D. must be no more than two clicks away from the viewable page.
5. If a licensee advertises real estate services or property listings, the advertisement must include the
 - A. firm name and firm telephone number.
 - B. licensee's license number.
 - C. licensee's telephone number.
 - D. name of the principal broker.

Case Study: Exchange for Referral



Read the case study. Be prepared to answer a question about the case study on the next screen.

A former client, Hank, visits Tennessee broker Becky and requests a personal check for \$200 from Becky in exchange for Hank's referral of his neighbor named Mr. Owner. Hank wants the check handed to him within one day of Mr. Owner's signing the listing agent with Becky's office. Hank wants to use the \$200 to go on a short weekend vacation with his wife and the \$200 will cover the hotel expenses for the weekend.

Becky then gets a signed listing agreement from Mr. Owner a few days later. Hank, in turn, is quite happy to hear the good news about his neighbor's listing with Becky. Hank then learns that the hotel he wishes to visit offers gift cards for clients who wish to use their hotel franchise chain. Partly due to concerns about tax obligations, Hank asks Ms. Becky to give him a gift card for \$200 (instead of a check) for the franchised national hotel chain he is staying out.

Check Your Understanding #2

Using your notes link or on a piece of paper, identify the correct answer to the case study question. When finished, scroll to the end of the course to see the answers.

In this scenario, which of the following may Tennessee broker Becky legally do as it relates to a check, gift card, or other options for Mr. Hank's referral?

- A. Give Hank a \$200 personal or cashier's check.
- B. Refuse to give Hank any money whatsoever due to TREC licensing and advertising laws.
- C. Provide Hank with a \$200 gift card for the national hotel chain where Hank is planning to stay with his wife.
- D. Offer to provide a discount or slightly reduced commission to Hank on the potential real estate commission in regard to any future listings with Hank personally, or provide a gift card to Mr. Owner as a show of thanks to these neighborly friends.

Promoting the Property

Most licensees and homeowners can probably agree that advertising is an extremely important part of any marketing plan—generally speaking, the more exposure, the better. Let's review a licensee's duties related to **promoting listed properties** and **presenting offers** to sellers in a manner that complies with **fair housing laws**.

One of the primary obligations of a listing broker in fulfilling the terms of the listing agreement is to promote the property. Your methods for doing this are **negotiable with the client** and should be included in the listing agreement. For example, you might:

- Place yard signs
- List the property in the multiple listing service
- Hold open houses
- Contract with cooperating brokers
- Advertise in local media



- List the property on websites

Remember that you're not only marketing the property to potential buyers but to **other brokers** who might have a ready, willing, and able buyer.

Permission to Promote



You may **not** advertise a property or solicit for prospective buyers or tenants without the **express written consent** of the owner of the property.

You may wonder why an owner would refuse to provide consent and skip the benefits of advertising.

Perhaps a couple is going through a divorce and they don't want their neighbors to know about it yet. A "For Sale" sign in the front yard can certainly lead to a lot of questions.

Perhaps the property is in a neighborhood with very strict regulations that prohibit yard signs.

There are many reasons why property owners may choose to limit the promotion of their property. You need to discuss this with your clients and **get their permission in writing** in the listing agreement before you do any solicitation.

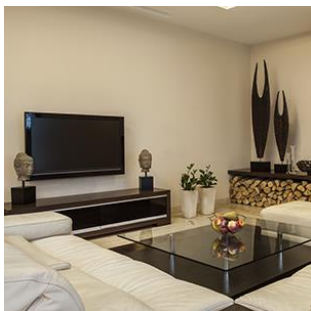
Marketing Strategy



Although most listing agreements authorize the broker to undertake various marketing activities, it is important that you review with the sellers exactly what **marketing activities you intend to use on their behalf**. Take the time to review each activity and judge its effectiveness for that specific property. For example, a successful **marketing strategy** might involve any number of the following activities:

- Taking photos of the property, both interior and exterior
- Preparing details about the property for inclusion in the multiple listing service
- Updating appropriate websites
- Preparing signs
- Disseminating the listing information to cooperating brokers
- Disseminating the listing information to current and past buyer clients and customers
- Preparing marketing packages for prospective buyers
- Designing and writing classified or other ads; determining content, size, placement, etc.
- Scheduling and overseeing ad placement
- Designing and proofing secondary marketing materials, such as brochures, flyers, postcards, etc.
- Following up on inquiries resulting from ads or signs
- Summarizing comments and reactions from prospective buyers
- Planning a review of marketing strategies and re-framing the strategy, if necessary

Using Photographs



When **selecting photographs** for inclusion in marketing materials, ask these questions:

- Do interior photographs show expensive electronic equipment, appliances, furnishings, or artwork?
- Do exterior photographs show vulnerable areas of the property where someone could hide or gain access to the home without being seen?
- Do photographs reveal the location of—or absence of—security keypads, locks, or surveillance cameras?

Also, consider the fact that photographs of vacant rooms indicate that the property is likely to be unoccupied and, therefore, at greater risk for a break-in. It might be wise to stage the property with some furniture and accessories before taking photographs, even if the property is left vacant for showings.


Open Houses

Holding an **open house** is one of the most widely recognized marketing tools to get buyers into a property. Some agents love them; some agents hate them.

While it is a way to get prospects through the door, some people who attend open houses are not at all interested in purchasing a property. They come to open houses for entertainment, to look for decorating ideas, or to evaluate their neighbors' property.

Multiple Listing Service

6042978	DOM: 110	Change Type	DOM	Price	Change Details	When Changed	Eff. Date
Prop. Type: COM		Price Decrease	61	\$329,900	\$344,900->\$329,900	09/21/19 @ 04:10 PM	09/21/19
13923 Sherman White Road		New Listing		\$344,900	->A	07/23/19 @ 04:46 PM	07/22/19



A **multiple listing service (MLS)** is a service whereby member brokers agree to share listings. It is a local or regional joint venture of real estate brokers typically affiliated with a local association of REALTORS®.

The MLS combines the members' listings into a single database that is used to provide information about homes available for sale in a geographic area. Sharing this information benefits:

- Listing brokers because it allows them to market their listings to potential buyers.
- Brokers representing buyers because they can search the MLS to find homes in the area that match their buyers' criteria.

In most cases, an MLS requires that a member broker enter a listing into the database within a short time after accepting the listing. The length of time can vary, but it is commonly between 24 and 72 hours. Because brokers are expected to keep their information in the MLS current, the MLS is relied on and expected to provide real-time information. The information commonly required includes:

- A description of the property,
- The asking price, the commission that will be paid to a cooperating broker, and
- The name of the listing broker.

In addition to current listings, an MLS includes a database of homes sold through its service. This is typically the source brokers use for providing comparables (i.e., comps) to their clients.

Cooperating Through an MLS

6034957	DOM: 182	Change Type	DOM	Price	Change Details	When Changed	Eff. Date
Prop. Type: COM		Expired	182	\$344,900	A->X	07/20/19 @ 12:09 AM	07/19/19
13923 Sherman White Road		Price Decrease	165	\$344,900	\$350,000->\$344,900	07/02/19 @ 05:07 PM	07/02/19
		New Listing		\$350,000	->A	01/21/19 @ 03:59 PM	01/18/19



When you post a listing with your local MLS, you are essentially cooperating with other brokers to sell the house. Because you must have your client's consent to advertise their property, you **must have your client's consent** to post the listing in the MLS and to cooperate with other brokers.

When a property is listed in an MLS, **listing brokers can pay cooperating brokers whatever the listing broker wants to pay**. They can offer as much as they want, or they can even offer nothing. The MLS cannot dictate what one broker pays another broker, and it is illegal for an association of real estate brokers to dictate how much must be paid. Although listing brokers do not have to offer a commission if they choose not to, they do **have to indicate in the MLS that they are not offering compensation** to cooperating brokers.

If you are doing business in a geographic area where you don't normally do business, keep in mind that the amount offered to cooperating brokers is **only** for those brokers who are **members of that MLS**. Members of that MLS are **not** required to pay nonmembers what they pay other members.

It's not difficult to see how this system of brokers setting commissions and other aspects of an MLS could result in disputes between listing and cooperating brokers. The MLS does include a mechanism for arbitration for these situations when they arise.

Legal Obligation Related to Advertising

In your zest for finding potential home sellers—and buyers for those listings you win—don't neglect your **legal obligations** related to advertising. For example, you should recall that **affiliated** licensees cannot advertise solely under their own names. Any advertising of property or services must be placed under the **direct supervision** of a principal or managing broker and must include the broker's **business name**. Otherwise, the ad could be considered an illegal **blind advertisement** (i.e., a blind ad).

Remember also that deceptive and misleading practices are prohibited by both state and federal law. Ads should present a **true picture** of the property or services and should not include—or omit—any information that could mislead a reasonable consumer.

Legal Obligations Related to Advertising: Fair Housing

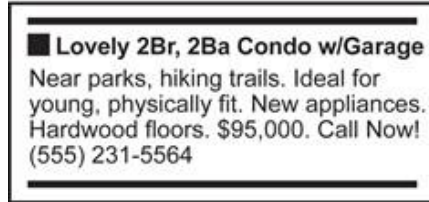


The federal Fair Housing Act **restricts** the publication of any real estate **advertising that indicates a limitation, preference, or intent to discriminate based on race or other protected class**. Specifically, Section 804(c) of the Fair Housing Act states that it is:

... unlawful to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. However, the prohibitions of the Act regarding familial status do not apply with respect to housing for older persons...

Restricted Word, Phrases, and Symbols

Example: Ad using *inappropriate* words or phrases:



Example: Ad using appropriate words or phrases:



Words can carry great power, and the misuse of words, even if unintentional, can create problems. Here are some federal fair housing advertising guidelines you should follow:

- **Avoid phrases** used in residential real estate advertising **that could convey discriminatory preferences or limitations**.
- When including photographs of people in an ad, strive to **show both men and women of all races and ages** to not imply that the property is intended to include or exclude any particular group.
- **Do not use symbols or logotypes that imply or suggest** race, color, religion, national origin, sex, handicap, or familial status.

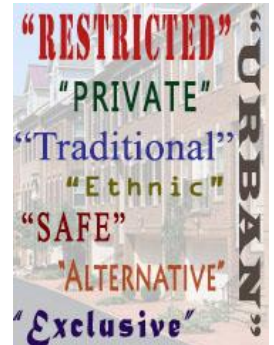
Use of Community Descriptions

Certain words or phrases that describe a community have come under scrutiny because some people may consider them to be a code. **Words implying that certain protected classes are to be avoided**, such as:

- Restricted
- Exclusive
- Private
- Traditional
- Board approval

Additionally, do not use words implying that a community is **primarily intended for one or more protected classes**, such as:

- Integrated
- Urban



Property Descriptions

There are other phrases that some feel can be discriminatory, such as "master bedroom." This could be offensive to some people based on race or gender issues. Although the Department of Housing and Urban Development (HUD) has determined that the phrase "master bedroom" is simply a description of the property—a bedroom with its own separate bathroom—you'll find that many real estate licensees prefer to use the term "owner's suite" or something similar instead, just as a precaution.

Similarly, according to HUD, the use of "family room" does not imply anything related to familial status. Nor does "walk-in closet" discriminate against someone in a wheelchair, any more than "great views of the lake" discriminates against someone who is blind or "jogging trails nearby" discriminates against someone who cannot walk.

The key is that these are **physical descriptions of the property that is being advertised**.

Always pay close attention to the words you use to describe listings.

Use of Human Models

Human models used in photographs, drawings, or other graphic techniques:

- **May not be used to indicate exclusiveness** because of race, color, religion, national origin, sex, handicap, or familial status.

- Should be clearly definable as reasonably **representing majority and minority groups** in the metropolitan area, both sexes, and, when appropriate, families with children.
- Should portray persons in an equal social setting and **indicate** to the general public that the **housing is open to all** without regard to race, color, religion, national origin, sex, handicap, or familial status.

Use of Maps, Symbols, or Landmarks

Here are some guidelines with regard to the use of **maps, symbols, or landmarks**:

- Be sensitive in the use of maps or symbols that could imply a discriminatory preference, limitation, or exclusion.
- Do not make references to real estate locations in relation to significant landmarks or neighborhoods based on race or national origin.
- Do not use names of facilities that cater to a particular race, national origin, or religious group, or that are used exclusively by one sex.



Examples for Comparison

Consider these comparisons:

- “Traditional Italian neighborhood” will violate fair housing advertising guidelines but “desirable neighborhood” will not.
- “Perfect for young singles” will violate fair housing guidelines but “cozy two-bedroom” will not.
- “Exclusive community” will violate fair housing guidelines but “gated community” will not.

Check Your Understanding #3

Using your notes link or on a piece of paper, write the correct answer to the following questions. When finished, scroll to the end of the course to see the answers.

1. Does a listing broker need to obtain the client’s consent before posting the client’s listing in the MLS?
2. What are some words that are not to be used in advertising because they imply certain protected classes will not be welcome?
3. Does using the words “cozy two-bedroom” violate fair housing advertising guidelines?
4. Does using the words “traditional Italian neighborhood” violate fair housing advertising guidelines?

Presenting Offers from Buyers

You’ve listed the house, you’ve marketed the house, and now there’s a potential buyer who is making an offer. The first thing sellers are likely to ask when an agent calls to tell them there’s an offer is, “How much?” Presenting an offer over the telephone is not the best strategy if it can be avoided. It’s best to **meet with the sellers to present the offer to them face-to-face** so that you may:

- Explain the terms of the offer, including any contingencies related to the buyer’s financial qualifications.
- Identify anything in the offer that could be problematic so that you continue to protect the sellers’ best interest by offering alternatives.
- Discuss settlement costs.
- Ask the sellers to sign the offer if it’s acceptable to them.
- Explain the next steps to the sellers, including what it means to present a counteroffer.



Disclosure of All Offers

Remember that one of your **fiduciary obligations is disclosure**. An agent has an **obligation to disclose all offers**.

If you’re lucky, your seller may have to decide from among several offers.

Seller’s Decision

Even if an offer seems unacceptable, the agent must present it to the principal. The principal, not the agent, decides if an offer is acceptable. The agent must present an offer to the principal, even if its acceptance means a smaller commission because the agent's first loyalty is to the principal.

Of course, if the sellers explicitly told their agent not to present any offers that are less than a certain base amount, the agent could legitimately not present a buyer's offer. In such a case, however, the listing broker should have the seller client put this direction **in writing as evidence of the authority granted to the listing broker** to avoid potential complications with prospective buyers who submit offers below the indicated base.

What happens if an offer comes in after a seller has accepted a previous offer? Does that fiduciary obligation to present all offers end once an offer is accepted? No, it does not, which is why your listing agreement should contain a clause that releases you from the legal requirement to present all offers under certain circumstances.

Contract Interference

The concept of **tortious interference** means that you **cannot interfere** with an existing contract.

That concept applies to a broker who tries to talk a seller out of a current listing agreement with another broker. It also means that you cannot induce a seller client to abandon a signed contract with a buyer if a better offer comes along.

Maintaining Communication



When you list a property, your clients will expect to hear from you regularly, whether there is anything new to report or not.

You should **regularly update clients** on the market activity of their home as well as information on competing homes. Keep them informed regarding any broker open house you host and the remarks or suggestions from other agents. If you host any public open houses, give them feedback on what, if anything, the customers had to say. Stay in touch with any agents who show the property, ask for feedback from their buyers, and relate this information to your clients.

There's an adage in business: If you don't take care of your clients, someone else will. Maintaining regularly scheduled communication with your clients is part of your statutory obligation of reasonable care. Plan to contact your clients at least once a week, at a day and time that is convenient for them. Schedule that in advance, and do not neglect it, even if

you have nothing to report.

Update Your Listings

Another example of reasonable care that you owe to a seller client is making sure that you update all listing information for your client's property, as in the MLS.

If the client lowers the asking price, make sure all of your advertising materials reflect that. If the property has been on the market for a while, make sure that you update the photos in the MLS and on any websites. It certainly does not present a home in the best light if the photo in the MLS shows the home with snow on the ground and it's now August. Not only does that indicate that the home has been on the market for a long time, but it is a clear indication of the agent's lack of reasonable care.

Electronic Communication

Technology can be both a blessing and a curse. Cell phones and text messaging, e-mail, Twitter, and instant messaging—all of these tools can make communicating with coworkers and customers faster and easier. However, we know, too, that technology can intrude into our personal space.

As a professional, you expend a great deal of energy nurturing relationships with your clients, and the last thing you want to do is jeopardize that relationship by annoying them. Establish with your sellers up front what level and means of communication they prefer.

Keeping Records



It's very important to keep good records of your communications with your clients. A log of all activities should be kept from the time the relationship begins. For example, you should record:

- Conversations that take place over the phone.
- Copies of e-mails.
- Records of appointments or cancellation of appointments.
- Information provided regarding lenders, inspectors, and other professionals.

Good records illustrate the natural flow of events that lead to a real estate transaction. If there's ever a dispute, an agent with reliable records is better protected. A lack of detailed records may imply that the relationship was not maintained and perhaps statutory obligations were breached.

Remember, the license law also requires principal or managing brokers to maintain copies of all transaction records. Regardless, you should make a habit of maintaining comprehensive records of your dealings with clients and customers.

Check Your Understanding #4

Using your notes link or on a piece of paper, identify if the statement is “true” or “false.” When finished, scroll to the end of the course to see the answers.

1. Fiona is a seller’s agent for Jeremiah, whose house is listed at \$320,000. Lawrence came to an open house and really liked the property, but he thought it was significantly overpriced. He contacted Fiona with an offer of \$190,000. Fiona knows that Jeremiah will never accept such an insulting offer so she is NOT required to tell him about it.
2. Inducing a party to break an existing contract is referred to as tortious obstruction.

CHAPTER 3: AGENCY RELATIONSHIPS AND DUTIES

Chapter Overview

The topic of agency is one of the most important and challenging aspects of the real estate profession because it affects all dealings with the public.

In this chapter, we will review general agency concepts, including how agency relationships are created and the obligations that come with those relationships. After discussing agency in general terms, we will identify the types of agency relationships that exist between real estate licensees and their clients—specifically buyers and sellers. We will also examine the provisions of Tennessee law related to agency. We will wrap up the chapter by presenting some situations that create conflicts of interest in agency relationships.

Chapter Overview: Key Terms

Key terms important to understanding the content presented in this chapter include:

Accounting—In an agency relationship, the agent’s fiduciary duty to the principal to strictly account for all monies received.

Adverse Facts—Conditions or occurrences that have a negative impact on the value of real estate, significantly reduce the structural integrity of improvements to real property, or present a significant health risk to occupants of the property.

Agency—A relationship of trust created when one person (the principal) gives another person (the agent) the right to represent the principal in dealings with third parties.

Agency Coupled with an Interest—A situation in which the agent has a personal interest in the subject of the agency, as when one co-owner has been authorized by the others to sell their property.

Agent—A licensed broker who represents another (the principal) in a real estate transaction; a person authorized to represent the principal in dealings with third parties (clients or customers).

Breach—Violation of an obligation, duty, or law.

Breach of Contract—An unexcused failure to perform according to the terms of a contract.

Buyer’s Agent—A licensee representing the interests of the buyer of a property.

Client—A person being represented by a licensee. Also called **Principal**.

Confidential Information—Information that, if known, could harm a consumer’s negotiating position and that the consumer has not consented to disclose.

Confidentiality—The protection of the client’s confidential information; this duty lasts even after the agency relationship has terminated.

Consumer—A person or entity seeking or receiving licensed activities.

Cooperating Agent—An agent who works with a listing agent to sell property in a real estate transaction; the selling agent who found a buyer for the listed property. The cooperating agent could be a buyer’s agent, a subagent of the seller, or a licensee who has no agency relationship with either the buyer or the seller. Also called **Cooperating Broker**.

Customer—A party to a transaction with whom a real estate licensee does not have a fiduciary duty or relationship, but with whom a licensee must be honest and fair.

Designated Agency—A contractual relationship between a broker and a client in which the broker appoints specific agents to advocate separately for the buyer client and the seller client in negotiating an in-house transaction.

Designated Agent—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.

Disclosure—A real estate licensee’s fiduciary obligation to reveal certain material facts or defects.

Dual Agency—An agency relationship in which a licensee represents both the buyer and the seller (or both the landlord and the tenant) in the same transaction; usually requires informed, written consent from both parties.

Dual Agent—A licensee who represents both the buyer and the seller (or both the landlord and the tenant) in a single real estate transaction.

Dual Capacity—A situation in which a person or firm acts as both an agent and a principal in the same transaction.

Estoppel—A legal doctrine that prevents a person from asserting rights or facts that are inconsistent with their earlier actions or statements, when they failed to object (or attempt to “stop”) another person’s actions.

Express Agency—An agency relationship based on an expressed agreement, either written or oral.

Fiduciary—A person in a position of trust, held by law to high standards of good faith and loyalty.

General Agent—A person authorized to handle a principal’s affairs in one area or specified areas.

Gratuitous Agency—An agency relationship where a real estate licensee is not compensated for their services but still owes the principal all statutory obligations due to every client.

Implied Agency—An agency relationship created through the behavior (actions or words) of one or both parties.

In-House Transaction—A situation in which a single brokerage represents both the buyer and the seller in the same real estate transaction.

Limited Agency—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 of an agent, subagent, or facilitator is limited to actions initiated by specific instruction of the client or other party or those actions about which the client or other party had knowledge.

Loyalty—A fiduciary duty that requires a real estate licensee to put the principal’s interests above all others’ interests, including their own.

Ministerial Acts—Acts that a licensee may perform for a customer that are informative or clerical in nature and do not rise to the level of active agency representation.

Non-Agency—A situation in which a licensee performs administrative tasks for a consumer but there is no agency relationship.

Obedience—A fiduciary duty that requires a licensee to follow the (legal) instructions of the principal, obey the parameters of the agency relationship, and not stray beyond the scope of authority.

Power of Attorney—An instrument authorizing one person (called an attorney-in-fact) to act as another’s agent, to the extent stated in the instrument.

Renunciation—When someone who has been granted something or has accepted something later gives it up or rejects it, as when a broker withdraws from an agency relationship with a client.

Revocation—When someone who granted or offered something withdraws it; as when a principal withdraws the authority granted to an agent or an offeror withdraws the offer.

Seller’s Agent—A licensee representing the interests of the seller of a property. Also called **Listing Agent**.

Selling Agent—The licensee who secures a buyer for a property.

Special Agent—An agent with limited authority to do a specific thing or conduct a specific transaction.

Subagent—An agent of an agent; a person to whom an agent has delegated authority so that the subagent can assist in carrying out the principal’s orders.

Transactional Brokerage—A brokerage relationship in which a licensee provides only administrative services to buyers and sellers to assist in a transaction, remaining neutral and having no fiduciary responsibility toward either party. Also called **Non-Agency**.

Undisclosed Dual Agency—A situation in which one licensee represents both the buyer and the seller in a single transaction without the informed consent of both parties; very often may be practiced unintentionally, possibly by implying to one party that she is represented when, in fact, there is no agency agreement.

Universal Agent—An agent authorized to do everything that can be lawfully delegated to a representative.

Vicarious Liability—Liability that is created because of the relationship between someone and the actions of the person who is actually liable, such as a broker who has vicarious liability for the actions of affiliated licensees even though the broker may have done nothing wrong.

Chapter Overview: Learning Objectives

Upon the completion of this chapter, you will learn how to:

- L012: Describe terms and concepts related to agency.
- L013: Recall provisions of Tennessee law related to agency.

The Agency Relationship



Agency is a **relationship of trust** created when one party to a transaction gives another party the right to **represent them in dealings with third parties**. This is a consensual relationship that both parties enter into willingly. Agency relationships are **created** when buyers, sellers, tenants, or landlords hire real estate licensees to represent them in real estate sales and lease transactions.

An **agent** is a person authorized by another person (principal/client) to act on their behalf. In a real estate transaction, brokers are the ones authorized and who owe duties to their principal/client.

A **principal** is one of the main parties to a transaction—either the seller or the buyer (or landlord or tenant). In an agency relationship, the principal, also called the **client**, is the person who hires the broker and for whom the broker and the broker’s associates work.

Because the primary relationship in a real estate transaction is between the broker and client, the **customer** is often considered a **third party** in the transaction. As a real estate agent, you work “with” a customer and you work “for” a client.



Caution: Real estate licensees must take great care not to use the terms **client** and **customer** out of context or improperly, as it may imply a relationship not yet established.

Agent Types and Authority

The scope of authority determines the classification of an agent:

- **Universal.** A universal agent is authorized to do anything and everything that can be lawfully delegated to a representative. For example, a universal agency may be created through the granting of a **power of attorney**. Real estate licensees are rarely considered to be universal agents.
- **General.** A general agent is authorized to represent the principal in a **broad range of matters** as specified, usually as part of a long-term relationship. A **property manager** is a prime example of a general agent. Another example would be the relationship between a principal broker and affiliated licensees. The broker gives general authority to affiliated licensees to conduct real estate business.
- **Special.** A special agent has limited authority to perform a specific task or conduct a specific transaction. This is generally a short-term relationship. For example, when a client contracts with a real estate broker to sell a house, the broker is considered a special agent. A special agent may also be called a **limited agent**.

Sources of Agency Law

The duties an agent owes to the client and third parties are imposed by law. Let’s review **two important sources of law**:

- **Common law**, which refers to law based on long-established customs that the United States inherited from England and to law derived from court decisions (sometimes called case law)
- **Statutory law**, which refers to the body of law (i.e., statutes) adopted by a legislative body

Prior to the enactment of statutes that specifically address agency relationships in real estate transactions, the **common law** of agency applied. However, there are some problems with relying on the common law of agency:

- Common law provides **general principles** of agency rather than specific guidance related to real estate practice.
- Common law is based on **rulings of the courts** and these rulings are **not always consistent**.

Because of these issues, many states have **adopted legislation** to clarify a licensee’s role and responsibilities in a real estate transaction. Specifically, **Tennessee’s agency law** appears in the Tennessee Real Estate Broker License Act: Tennessee Code Annotated, Title 62, Chapter 13, Part 4 Representation by Agents (62-13-401 through 62-13-408).

Actual Authority

Real estate **agents** can never exceed the scope of authority given to them by a client. The authority should be clearly **articulated in a written agreement** (express agency) between the agent and the client, whether a buyer, a seller, a tenant, or a landlord.

Actual authority is power or permission that a principal intentionally gives an agent, expressly or by implication.

- **Express authority** is power or permission that the principal communicates to the agent for a specific act or outcome. As an example, express authority in an agency relationship for a real estate transaction is granted when a broker and seller **sign a listing agreement**.
- **Incidental authority** is the authority to do everything reasonably necessary to carry out the principal’s express orders. For example, a seller gives a real estate agent express authority to find a buyer for the property. This is understood to give the agent incidental authority to tell people about the house being on the market. One cannot have incidental authority without first having express authority.
- **Implied authority** results when a party’s actions, not expressed words, communicate authority to act on someone’s behalf.

Agency Creation Under Common Law



Express agency refers to an agency relationship that is established by a **written or oral agreement** between the principal and the agent. An agency relationship is typically established by a **written agreement**, which is a **legal contract**, such as a listing agreement between a broker and a seller or a buyer agency agreement between a broker and a buyer.

Although **most agency relationships are established by written agreement**, under common law, there are other ways an agency relationship may be created. For example:

- Implied agency
- Apparent or ostensible agency
- Agency by ratification

We'll look briefly at each of these, along with some other **common law terms** related to agency creation.

Implied Agency Creation



Under common law, the creation of an agency relationship may be **implied** by the words and actions of either party and does not depend on the existence of a written contract. For example, buyer Brenda calls a brokerage and asks if someone will show her a house the company has listed. The broker shows Brenda the house and two others as well. Buyer Brenda could assume from the broker's actions that she is being represented by the brokerage.

Implied agreements are difficult to enforce and often lead to confusion and misunderstanding between the parties.

Licensees should take great care with their behavior, especially the words they speak and the way statements are made. When **no relationship exists or is intended**, a real estate licensee should be cautious of using the following phrases to avoid implied agency:

- My seller...
- My buyer...
- I have a property...
- I have a buyer...
- I am working for you (or another unrelated party).
- I will work hard for you.
- I will do my best to see that you (get the best deal, fulfill your goals, etc.).
- I am on your side.

Apparent Agency Creation



Apparent agency is created when someone who has not been authorized to represent another acts as if they are that person's agent. Apparent agency can also occur when an agent acts beyond the scope of their authority, giving a third party the impression that the acts are authorized. This is also called **ostensible agency**.

For example, licensee Louise has been showing property owner Otto's vacant lot to prospective buyers, even though Louise and Otto do not have an agency agreement. As a matter of fact, Otto is unaware that Louise has been showing the lot. Louise leads buyers to believe that she represents Otto. Louise's actions have, therefore, created an apparent agency between her and Otto. In most states, this would be a clear violation of license law, rules, or regulations.

Agency Creation by Ratification



Agency by ratification is the **later confirmation or approval** of an act that was not authorized when it was performed. In this way, an agency relationship can arise "after the fact," even without a specific agreement. If the other person later approves of these actions or accepts the benefit of the actions, the person is said to have ratified them. If an agency relationship is created by ratification, the principal can be held liable for the agent's acts just as if they had been authorized in advance.

Returning to the scenario involving licensee Louise, let's say that Otto is aware that Louise has been showing his property and does nothing to stop Louise. This creates an agency by ratification. What if Louise discriminated against a prospective buyer on the basis of race, telling the buyer that the owner did not want to sell to a minority? Because an agency relationship was later created by ratification, Otto could be held liable for Louise's actions. This is a concept known as **vicarious liability**.

Legal Term: Vicarious Liability

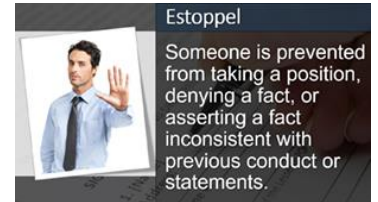
Vicarious liability is the legal concept that a principal can be held responsible for wrongful acts of their agent performed within the scope of the agency relationship, even though the principal did nothing wrong.

A universal application of vicarious liability relates to the activities of a real estate brokerage firm and its affiliated licensees. Remember that **affiliated brokers are agents of their employing broker** and are acting on their broker's behalf. This generally means that an **employing broker is liable** for an affiliated broker's actions related to the authority given to them through their agency relationship.

Legal Term: Doctrine of Estoppel

Because one may **appear to be the agent of another**, even though no agency relationship has been agreed to, third parties may be misled. There is a **duty** upon a would-be principal to **inform these known third parties that an agency relationship does not exist**. If these parties are not so informed, the principal may be held liable for the acts of the agent, just as though there had been an agreement, under the **doctrine of estoppel**.

Estoppel is a legal doctrine preventing a person from asserting rights or facts inconsistent with earlier actions or statements when the person failed to object (or attempt to "stop") another person's actions. Estoppel makes it legally impossible for the principal to deny the agency. The principal cannot sit back and do nothing. By accepting the rewards of the relationship, the principal must also assume the responsibilities, even though there was no formal agreement.



Legal Term: Agency Coupled with Interest



Agency coupled with an interest occurs when the agent holds an ownership interest in the property being sold.

For example, broker Bob and developer Dawn become business partners in a subdivision project. Broker Bob puts up \$2 million for the project and has an agency contract giving him the exclusive right to list the finished homes. Broker Bob gets a commission on the sale of each home, as specified in the listing agreement, as well as a split of the profits, as specified in the partnership agreement.

Because broker Bob made a financial investment in the project, his partner, developer Dawn, **cannot** terminate the agency relationship. Also, an agency coupled with an interest is **not** terminated by the death, incompetence, or bankruptcy of the principal.

Legal Term: Gratuitous Agency



The payment of compensation does **not** create an agency relationship, nor does the absence of compensation mean that no agency relationship exists.

Agents may choose to offer their services free of charge—for example, licensee Lisa lists her mother's home for sale and does not accept a commission for her services. A situation such as this is referred to as **gratuitous agency**. Although compensation is not part of the agreement, the agent is **not released** from their statutory obligations to their client.

Check Your Understanding #1

Using your notes link or on a piece of paper, answer each question about the fundamentals of agency relationship creation under common law. When finished, scroll to the end of the course to see the answers.

1. Who authorizes the creation of the agency between a client and an agent?
2. Felicia is a buyer's agent for Kevin. She sees a "For Sale By Owner" sign in front of Ron's house that indicates a 3% commission would be paid to any broker who procures a buyer. If Kevin makes an offer on that FSBO house through Felicia, is seller Ron's relationship with Felicia that of a client or customer?
3. Buyer Todd signs a contract with XYZ Real Estate to represent him in his search for the perfect house. He intends for the seller to compensate XYZ. What type of agency situation does this represent?
4. A real estate licensee has assisted an investor with the purchase of a number of commercial properties. The investor will be out of the country for part of the year and asks the licensee to manage all aspects of those properties during that time, including advertising and leasing. The real estate licensee will be what type of agent?

Tennessee Agency Law: Creating an Agency



Now let's apply what we know about agency creation in understating the types of agency relationships allowed under the Tennessee Real Estate Broker License Act and the Rules of the Tennessee Real Estate Commission.

One of the main reasons Tennessee's agency law was enacted was to **eliminate accidental or unintended agency** that could occur under common law.

Under Tennessee law, an agency or subagency relationship **may not be assumed, implied, or created without a written bilateral agreement** that establishes the terms and conditions of the relationship (*Tenn. Code Ann. 62-13-401*).

Note: Recall, in some states, a real estate licensee may become an agent as a result of the agent's words or actions (i.e., implied agency). This is **not** true in Tennessee.

Tennessee Agency Law: Seller's Agency



An agency relationship with the **seller** is established by negotiating and executing an **exclusive agency listing agreement**, an **exclusive right-to-sell listing agreement**, or another type of listing agreement such as an open listing (*Tenn. Code Ann. 62-13-401*).

Note: No broker or affiliate broker shall accept or enter a listing based on a "net price" (*Rule 1260-02-.07*).

Tennessee Agency Law: Buyer's Agency



An agency relationship with the **buyer** is established with an exclusive or nonexclusive representation agreement. An **exclusive buyer representation agreement** is an agreement in which a licensee is engaged to represent a buyer in the purchase of a property to the exclusion of all other licensees.

According to the Rules of the Tennessee Real Estate Commission (*Rule 1260-02-.36*), when entering into an exclusive buyer representation agreement, a licensee must **advise the buyer and confirm in writing**:

- That the buyer should make all arrangements to view or inspect a property through the licensee and should not directly contact other licensees.
- That the buyer should immediately inform any other licensee the buyer may come into contact with (e.g., at an open house) that the buyer is represented by the licensee.
- Whether the buyer will owe a commission in the event the buyer purchases a property through another licensee or directly from an owner without the assistance of the licensee.

Tennessee Agency Law: Role of Facilitator



According to Tennessee law, a real estate licensee may provide real estate services to any party in a prospective transaction **with or without an agency relationship** with one or more parties to the transaction (*Tenn. Code Ann. 62-13-401*).

Until a licensee enters into a specific written agreement establishing an agency relationship with one or more parties to a transaction, the licensee is considered a **facilitator** and is not considered an agent or advocate of any party to the transaction (*Tenn. Code Ann. 62-13-401*). That is, in the absence of a written agency agreement, a licensee is a **facilitator by default**. The licensee remains a facilitator unless or until a written bilateral agency agreement has been negotiated and signed.

A facilitator is neither an agent of the seller nor an agent of the buyer.

A facilitator **may advise** either or both of the parties to a transaction but **cannot** be considered a representative or **advocate** of either party. A facilitator may also be referred to as a **transaction broker** (*Tenn. Code Ann. 62-13-102(9)*).

Note: A facilitator has **no agency relationship with either party**. A licensee cannot be a seller's agent and a facilitator for the buyer; conversely, a licensee cannot be a buyer's agent and a facilitator for the seller. A facilitator is a **non-agent**.

Tennessee Agency Law: Serve as Limited Agent

In Tennessee, if a real estate licensee is engaged as an agent, the licensee serves as a **limited agent** (*Tenn. Code Ann. 62-13-402(a)*). In other words, the scope of the agent's authority is limited. The licensee is retained to provide real estate services to the client and functions as an intermediary in negotiations between the parties unless the parties negotiate directly.

Limited agency also limits the client's liability.

Under common law, a client is liable for the actions of the agent. Under Tennessee law (*Tenn. Code Ann. 62-13-102(10)*), in a limited agency relationship, the client's or other party's liability for the actions of an agent, subagent, or facilitator is **limited to actions or statements**:

- Initiated by specific **instruction of the client** or other party, or
- About which the client or other party **had knowledge**.

For example, if a licensee engages in misrepresentation, the client is not liable for damages unless the client knew or had reason to know of the misrepresentation.

This provision of the law does **not** limit the liability of a broker for any misrepresentation made by the broker's affiliated licensees (*Tenn. Code Ann. 62-13-407*).

Check Your Understanding #2

Using your notes link or on a piece of paper, fill in the blank to complete the statement in accordance with the Tennessee Real Estate Broker License Act and the Rules of the Tennessee Real Estate Commission. When finished, scroll to the end of the course to see the answers.

1. Under Tennessee law, an agency or subagency relationship _____ be assumed, implied, or created without a written bilateral agreement that establishes the terms and conditions of the relationship (*Tenn. Code Ann. 62-13-401*).
 - A. may
 - B. may not

2. An agency relationship with the ____ is established by negotiating and executing an exclusive agency listing agreement, an exclusive right-to-sell listing agreement, or another type of listing agreement such as an open listing (*Tenn. Code Ann. 62-13-401*).
 - A. buyer
 - B. seller

3. A real estate licensee ____ provide real estate services to any party in a prospective transaction without an agency relationship with one or more parties to the transaction (*Tenn. Code Ann. 62-13-401*).
 - A. may
 - B. may not

4. Until a licensee enters into a specific written agreement establishing an agency relationship with one or more parties to a transaction, the licensee is considered a(n) _____. (*Tenn. Code Ann. 62-13-401*).
 - A. facilitator
 - B. implied agent

Common Law Fiduciary Duties

FIDUCIARY DUTIES



- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE

Regardless of how an agency relationship is created, an **agent must always act in the best interests of the principal**. Therefore, an agency relationship imposes certain duties, obligations, and high standards of good faith and loyalty on the agent, as the representative of the principal.

The term **fiduciary** describes a **relationship** of trust and confidence. It also describes a **person** who is responsible for the money and/or property of another. **Common law** defines these **basic fiduciary duties** that an agent owes a **client** in an agency relationship:

- Obedience
- Loyalty

- Disclosure
- Confidentiality
- Accounting
- Reasonable care

Note: Use the acronym **OLD CAR** to remember an agent's common law fiduciary duties to the client.

Fiduciary Duties: Obedience

FIDUCIARY DUTIES



- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE

When acting in an agency relationship, the **duty of obedience** requires you to **follow the legal directions** of your principal, obey the restrictions of the agency relationship, and **not stray beyond the scope of your authority**. If you don't follow this duty, you could be held liable to the principal for losses sustained plus other damages.

For example: Seller Ben wants to list his home for \$400,000, even though Ben's agent Anna tells him it won't sell for more than \$300,000. *If Anna wants to keep Ben as her client, must she list his house for \$400,000 even if she knows that it will limit prospective buyers and will, therefore, take longer to sell?* The correct answer is "yes." Agent Anna has a duty to obey the legal directions of her client Ben, even if she feels it is not in his best interests. However, Anna also has the right to refuse the listing. Often, accepting an overpriced listing is not helpful to the agent or the seller.

If the client is asking an agent to do something unlawful, the duty of obedience is no longer in effect. An example of an unlawful request from a principal would be if a seller asked the agent not to tell potential buyers of a known defect in the property. In this case, the agent would not have to obey the client. A licensee can respond to an unlawful request with a reply such as, "I cannot (fulfill your request) as it is a violation of real estate law for me to do so."

Fiduciary Duties: Loyalty

FIDUCIARY DUTIES



- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE

The duty of **loyalty** holds that an agent must put their principal's interests above all others, including the agent's own.

Let's say that agent Candace, who represents seller Sherman, convinces him to accept a low offer because their listing agreement is about to expire and Sherman had indicated that he would not extend the listing period. *Has Candace violated the duty of loyalty?* The correct answer is "yes." Agent Candace has violated the duty of loyalty. Her motivation was not to get the best deal for her client but to ensure that he accepted an offer to preserve her opportunity to earn a commission.

Fiduciary Duties: Disclosure

FIDUCIARY DUTIES



- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE

An agent must make a complete disclosure of any **material fact or defect**, which is anything that could affect someone's decision regarding the transaction if it were known. When considering disclosure obligations, one usually thinks about property-specific issues. But the duty to disclose material facts is much broader than that. For example, agents have a duty to disclose:

- Any relationship they may have with other parties to a transaction.
- **All offers to purchase** to seller clients, even if the offer(s) seems unacceptable. If a seller chooses to waive that duty, they should do so in writing.
- The property's **true value** based on an educated analysis. An agent should also point out

things that they may know about the property that could affect its value.

Fiduciary Duties: Confidentiality

FIDUCIARY DUTIES



- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE

All information the principal gives to the agent or that the agent gains from other sources must be kept **confidential**. An agent must never reveal confidential information to others or take advantage of it for personal benefit.

Without the principal's written permission, therefore, an agent **cannot disclose** to third parties confidential information or information that hurts the principal's **bargaining position**. For example, the fact that the seller is forced to sell due to loss of a job, poor health, or pending divorce, or that the seller will accept less than the listing price, cannot be disclosed without authorization.

The only instance in which confidential information can, and must, be relinquished is in the case of a **court order**. Licensees must comply with a court order but may release confidential information

only to the court or to the party or parties named in the order.

Caution: The duty of confidentiality remains forever, even after the agency relationship ends!



Reasonable Care and Skill

FIDUCIARY DUTIES

- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE



Agents must always use **reasonable care and skill** when acting on behalf of a principal. This duty requires agents to:

- Protect the principal from foreseeable harm.
- Act according to the high standards set by their profession.
- Perform their duties as promised.
- Real estate agents must be skillful and exercise care in many areas, such as:
- Contract preparation, including the ability to fully understand and explain in simple terms

the purpose and effect of contracts.

- Making a best effort to sell or find a property.
- Advising on prices and market conditions.
- Diligently meeting deadlines by being organized and keeping the lines of communication open.
- Discovering and disclosing material facts about the property, neighborhood, and parties to a contract.

A form filled out incorrectly, a missed deadline, or a misunderstood law could cause serious problems. If a principal is harmed due to a licensee's incompetence or carelessness, it is a **breach of the agent's duty**, and the licensee can be held liable for **negligence**.



Caution: A real estate transaction can raise many legal questions. Unless you are also licensed to practice law, you should never give legal advice or perform any acts that require a lawyer's expertise.

Duties to Customers and Others



Now that we've covered the duties an agent has to clients, let's move on and discuss the duties owed to third parties. Under common law (and as we'll soon see, under statutory law as well), an agent also has duties to **third parties** (e.g., customers). Although a **customer is not represented** by the agent, the customer is entitled to the following:

- Adherence to law
- Honesty and integrity
- Disclosure of known material facts
- Accounting for money

In a real estate transaction, **honesty** could be defined as disclosing information that one is obligated to disclose and avoiding misrepresentation or fraud. However, being honest with a customer does **not** require disclosing information deemed confidential in the agent-client relationship without the client's consent. Examples of confidential information might be the seller's motivation

to sell and the amount below the asking price the seller would be willing to accept. A reply such as "I cannot disclose that information without my seller's consent" is an honest response.

Honesty **does** require a licensee to **disclose material facts** to a customer in a timely manner. For instance, if a licensee representing a seller knows the paneling in the basement is covering up structural damage to the foundation, this is a material fact that must be disclosed to a buyer customer. Disclosure of known material facts is a duty a licensee owes to both the client and the customer.

The Principal's Duties to Agent



You may be happy to hear that the **principal owes you certain duties** as well. Beyond honesty and fairness, your clients owe you:

- **Compensation.** The principal is expected to pay the agreed-upon compensation when you perform the tasks under the terms of a signed agency agreement.
- **Performance.** The principal is expected to carry out the tasks associated with the transaction, such as providing truthful information, bargaining in good faith, and meeting deadlines.
- **Indemnification.** The principal is expected to not hold you responsible for things the principal does not disclose.

Check Your Understanding #3

Using your notes link or on a piece of paper, identify the common law fiduciary duty described. When finished, scroll to the end of the course to see the answers.

1. Duty to share material facts
2. Duty to place client's interests above own

3. Duty to protect finances
4. Duty to follow legal instructions
5. Duty to protect private information
6. Duty to perform at a high level of competence

Tennessee Agency Law: Statutory Duties

We just reviewed the duties an agent has under **common law**. However, because a licensee is considered a **limited agent** under Tennessee law, the licensee does **not** owe clients or customers the general list of duties under common law. Rather, the **licensee's duties are limited to the obligations specified by statutory law**.

Tennessee law mandates the specific duties that a real estate licensee owes to **all parties** to a transaction and the duties that the licensee owes to a **client**.

These duties are described next.

Note: The statutory duties supersede any fiduciary or common law duties owed to a client (*Tenn. Code Ann. 62-13-402(c)*).

Tennessee Agency Law: Duties Owed to All Parties

A licensee who provides real estate services owes **all parties** to the transaction the following duties (*Tenn. Code Ann. 62-13-403*). Licensees must:

- Diligently exercise **reasonable skill and care** in providing services to all parties.
- **Disclose** to each party any adverse facts of which the licensee has actual notice or knowledge. The Real Estate Broker License Act defines **adverse facts** as conditions that have a negative impact on the value of the real estate, significantly reduce the structural integrity of improvements to the property, or present a significant health risk to occupants of the property (*Tenn. Code Ann. 62-13-102(2)*).
- Maintain the **confidentiality** of any information obtained by the licensee prior to that licensee's disclosure of an agency relationship. This duty covers information that the party would reasonably expect to be held in confidence, except for information that the party has authorized for disclosure and information required to be disclosed by law. (This duty will be described in more detail shortly.)
- Provide services with **honesty and good faith**.
- **Disclose** to each party 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.
- Timely account for **trust fund deposits** and all other property received from any party to the transaction.
- Not engage in **self-dealing** nor act on behalf of the licensee's immediate family or on behalf of any other party in which the licensee has a personal interest **without prior disclosure** of the interest and the timely written consent of all parties. (This duty will also be described in more detail shortly.)
- **Not recommend** the use of services of another individual or entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation without timely disclosing the licensee's interest or potential for compensation.

Duties Owed to All Parties: Confidentiality



Under common law, an agent owes the duty of confidentiality to the client but not to third parties. However, under Tennessee law, a licensee is obligated to **safeguard certain confidential information** obtained from a **customer**.

The licensee must maintain the confidentiality of any **information obtained prior to disclosing to the customer the licensee's agency relationship status** (*Tenn. Code Ann. 62-13-403(3)*).

This provision of the law protects sensitive information that a customer may reveal to a licensee before that licensee tells the customer that they are someone else's agent. If the licensee later discloses that they are an agent of another party to the transaction, information disclosed previously must be kept confidential.

The purpose of this provision is to balance the client's right to be informed of everything the agent knows with the customer's expectation that information will be kept confidential. Customers are often not knowledgeable about agency law and may say things that put them at a disadvantage in the transaction.

This duty of confidentiality survives both the subsequent establishment of an agency relationship and the closing of the transaction.

Duties Owed to All Parties: Self-Dealing Disclosure



All licensees must disclose their **license status when buying or selling property for themselves** (*Rule 1260-02-.11(2)*).

If a licensee attempts to buy property listed with their firm, they must fully disclose their position to **the owner** and to **any buyer client or buyer customer** who is interested in the same property. A licensee must make the same full disclosure of personal interest if they attempt to buy property from any seller who previously approached the licensee's company with regard to listing the property (*Rule 1260-02-.11(1)*).

After acquiring the property, the licensee must make a full disclosure of their position to any prospective buyers who submitted offers to buy the property (*Rule 1260-02-.11(1)*).

Duties Owed to the Licensee's Client

Any licensee who acts as an agent owes the **client** the following duties (*Tenn. Code Ann. 62-13-404*). Licensees must:

- **Obey** all lawful instructions of the client when the instructions are within the scope of the agency agreement.
- Be **loyal** to the interests of the client. A licensee must place the interests of the client before all others, except when the loyalty duty would violate the licensee's duties to a customer or the licensee's duties to another client in a dual agency. The duties owed to all parties take precedence over the duties to a client if a conflict exists between the two.
- Unless the following duties are specifically waived in writing by a client, **assist the client** by:
 - Scheduling all property showings on behalf of the client.
 - Receiving all offers and counteroffers and forwarding them promptly to the client.
 - Answering any questions that the client may have, within the scope of the licensee's expertise, during the negotiation of a purchase agreement.
 - 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.



Upon waiver of the duties listed above, the client's agent must advise the client in writing that the client may not expect or seek assistance from any other licensees for the performance of these duties.

Check Your Understanding #4

Using your notes link or on a piece of paper, identify if each statement is "true" or "false." When finished, scroll to the end of the course to see the answers.

1. Licensee Lisa is on a listing appointment with a prospective seller client. The seller tells her that they intend to cover the mold in the basement with paneling, but they do not want her to say anything about it. If Lisa takes the listing, she is obligated to obey her client's directions.
2. You represent a buyer who has an offer accepted on another brokerage's listing. Your client is trying to qualify for a loan. Numerous lenders have refused to approve the loan because of the buyer's financial status. It appears that the buyer will not be able to get a loan but is still trying with another lender. The closing date is approaching. Because of the duty of confidentiality owed to your buyer client, you are NOT required to disclose the buyer's inability to get financing to the seller.
3. Potential seller Sam comes into broker Ruby's office and states that he just lost his job and needs to sell his home. Ruby discloses to the seller that she is the agent for a buyer who might be interested in the seller's home. In compliance with Tennessee law, Ruby cannot disclose customer Sam's financial position to her buyer client.

Termination of Agency Relationships



An agency relationship between a principal and an agent can terminate by:

- Accomplishment of purpose
- Expiration
- Operation of law
- Mutual agreement
- Renunciation by the agent
- Revocation by the principal

We'll explain each of these termination methods next. And as you'll see, sometimes the termination of an agency results in a **breach** of the agency agreement that could have legal or financial consequences.

Termination by Accomplishment of Purpose

The most common (and satisfactory) way an agency relationship terminates is when the **purpose of the agency has been accomplished**.

For example:

- The agency relationship between a seller and a real estate broker ends when a buyer is found and the sale closes.
- The agency relationship between a buyer and a real estate broker ends when the buyer finds and closes on their property.



Termination by Expiration

A less satisfactory way of terminating an agency agreement is if the **term of the agreement expires** without a successful conclusion. If a brokerage agreement specifies that the agency is for a limited term, either a certain period of time or a specific expiration date, the agency relationship ends automatically when the term expires.

Exclusive brokerage agreements **must include an expiration date** to ensure that the agency relationship is concluded, either through the accomplishment of purpose or expiration.

Termination by Operation of Law



An agency relationship ends automatically, as a **matter of law**, if certain events occur:

- The broker or the client **dies** or **becomes incapacitated**.
- The broker or the client **declares bankruptcy**.
- The **property** that is the subject of the agency is **destroyed or condemned**.
- The broker **loses** their **license**.

Note: If an affiliated licensee dies or loses their license, the agency relationship with the broker remains intact.

Termination by Mutual Agreement

An agency is a consensual relationship, meaning it is based on the consent of both parties. If **both** the principal and the agent desire to end the agency, they can agree to terminate it at any point. When an agency is terminated by **mutual consent**, neither party is liable to the other for breach of contract.

This is considered the best way to terminate an agency (outside of accomplishment of purpose) because it is mutually voluntary.

Termination by Renunciation by Agent



Renunciation occurs when someone who has been granted something or has accepted something **later gives it up or rejects it**.

With an open-ended agreement that has no specific termination date, a party may renounce the contract at any time with no further obligation. However, if there is a termination date, such as with a typical real estate listing agreement, the renunciation may be a **breach of contract**, making one party liable to the other party for damages.

For example: Buyer Bill signs a 30-day agency agreement with broker Lynn. He provides a specific price range, location, and list of features. Lynn finds two dozen homes that meet his exact requirements and spends the first week showing them. Bill is not interested in making an offer on any. After two weeks of showing houses, Lynn decides that Bill is not serious about buying a home. She tells him that she is done—Lynn has renounced the agency relationship. While she may be justified, Bill could try to hold her liable.

Termination by Revocation by Principal



Revocation occurs when someone who granted or offered something **withdraws it**. Because the relationship between a principal and an agent is a personal one, the principal may revoke the grant of agency authority at any time. In effect, the principal is firing the agent.

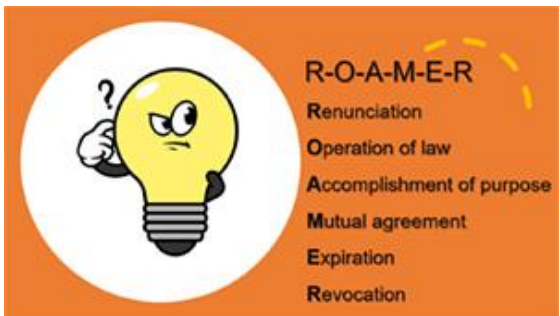
If the agent breached their duty to the principal or did not perform according to the terms of the contract, the principal usually can revoke the agency relationship without liability. Another reason may be abandonment by the agent.

Consider this scenario. Broker Pam has a 60-day listing agreement with seller Vic. Two weeks after Vic signed the listing agreement, Pam still had not placed a For Sale sign in his yard or submitted his property to the multiple listing service. Several calls to Pam have gone unanswered. It appears that Pam has **abandoned** the agency relationship. Therefore, Vic likely can revoke the agency without owing her a commission.

If the revocation is **without** good reason, however, the principal may be liable for **breach of contract** and may be required to pay a commission or reimburse the agent for other damages caused by the breach.

Note: Even if the circumstances seem clear, when agency is terminated by renunciation or revocation, there's a possibility that the issue could end up in court.

Remember Termination Methods: ROAMER



This might help you recall the different ways an agency relationship may be **terminated**. Remember **ROAMER**:

R=Renunciation

O=Operation of law

A=Accomplishment of purpose

M=Mutual agreement

E=Expiration

R=Revocation

Check Your Understanding #5

Using your notes link or on a piece of paper, identify the method of termination described. When finished, scroll to the end of the course to see the answers.

1. The listing agent abandons the seller before the listing period ends.
2. The listing broker does not find a buyer before the listing period ends.
3. The listing broker sells the house.
4. A seller fires their agent before the listing period ends.
5. The broker declares bankruptcy.

Forms of Agency Relationships: Single Agency



As you know, the agency relationship with real estate clients can take a variety of forms under **common law**.

The most basic form of agency is when **one agent** represents just **one party** in a specific transaction, such as when broker Dan represents seller Donna in the sale of her home. You may see this referred to as "**single agency**" or "**principal agency**." This simple relationship leaves little room for confusion about who represents whom.

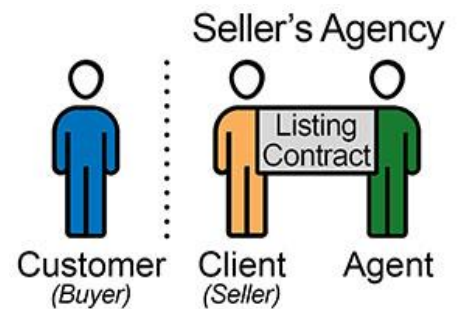
In the past, this so-called "traditional agency" was reserved for the seller and buyers were left to fend for themselves. Even when a buyer contacted a broker to assist with finding a home, the buyer's interests were likely not represented. This fact may not have been clear to buyers, who probably assumed that the broker or licensee they contacted represented them. As you know, in today's real estate market, most brokers will take on seller clients and buyer clients.

Forms of Agency Relationships: Seller's Agent

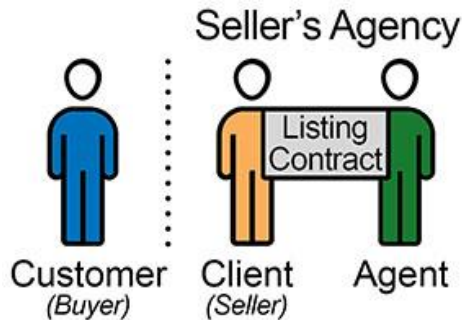
An **agency relationship between a seller and a broker** in a real estate transaction is usually created with a contract referred to as a **listing agreement**. A listing agreement is a written agency employment contract between a seller and a real estate broker stipulating that the broker will be paid a commission for finding a ready, willing, and able buyer for a seller's property.

The role of a **seller's agent** is fairly clear. When representing only the seller in a transaction, the agent **owes all loyalties to that seller client**. The agent will work to obtain the best possible terms and conditions for the seller of the property.

Note: Don't confuse **seller's agent** with **selling agent**. A seller's agent has a listing agreement to represent a seller. A selling agent finds a buyer in a real estate transaction. A selling agent may be a buyer's agent, a subagent of the seller, or a licensee who has no agency relationship with either the buyer or the seller.



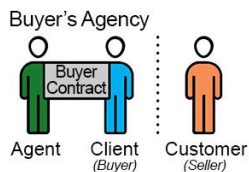
Seller's Agent Duties



In addition to the basic fiduciary duties and any statutory duties, a **licensee representing a seller in a seller's agency relationship** should:

- Seek a purchase offer at a price and with terms acceptable to the seller. Unless the seller so directs, the licensee is generally not obligated to seek additional offers if the property is under contract.
 - Accept delivery of and present all purchase offers to the seller in a timely manner, even if the property is under contract.
 - Within the scope of knowledge required for licensure, answer the seller's questions and provide information to the seller regarding any offers or counteroffers.
 - Assist the seller in developing, communicating, and presenting offers or counteroffers.
- Within the scope of knowledge required for licensure, answer the seller's questions regarding the steps the seller must take to fulfill the terms of any contract.
 - Disclose material facts.

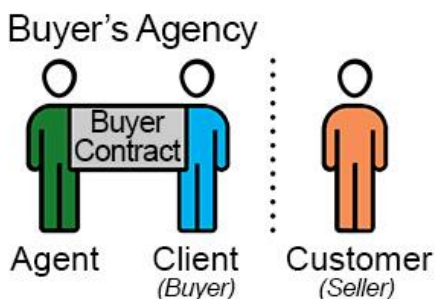
Forms of Agency Relationships: Buyer's Agent



When a **buyer contracts with a broker** to assist in the purchase of real property, the buyer is the principal.

An agency relationship between a buyer and a broker in a real estate transaction can be created with a contract such as a **buyer agency agreement**. This is a written agency contract between a buyer and a real estate broker stipulating that the broker will be paid a commission when the buyer purchases real property.

Buyer's Agent Duties



A buyer's agent owes **all fiduciary and statutory duties to the buyer** in a real estate transaction. Additionally, when **representing a buyer in a buyer agency relationship**, a licensee should:

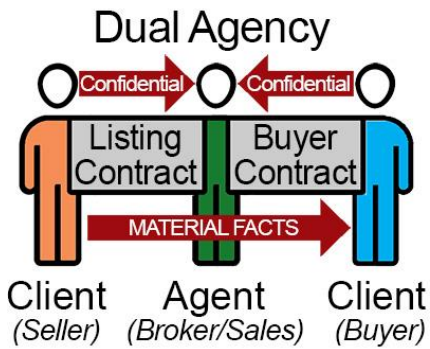
- Seek a property at a price and with purchase terms acceptable to the buyer.
 - Within the scope of knowledge required for licensure, answer the buyer's questions and provide information to the buyer regarding any offers or counteroffers.
 - Assist the buyer in developing, communicating, and presenting offers or counteroffers.
 - Present any offer to purchase to the seller or the seller's agent in a timely manner, even if the property is subject to a contract of sale or lease, and accept delivery of and present any counteroffers to the buyer in a timely manner.
- Within the scope of knowledge required for licensure, answer the buyer's questions regarding the steps the buyer must take to fulfill the terms of any contract.
 - Disclose material facts.

Representing Multiple Buyers

There may be instances where one licensee represents **multiple buyers** simultaneously. In most states, a licensee representing a buyer client does **not** breach a duty or obligation to the client by showing properties in which the client is interested to other prospective buyers.

A licensee should, however, **advise all the parties of the situation**, preferably in writing, as it could be considered a conflict of interest. Once disclosure is made, clients can make an informed decision about whether or not they want to continue with the licensee or work with someone else.

Forms of Agency Relationships: Dual Agency



So far, we've been looking at agency relationships where one broker represents only one party to the real estate transaction. When possible, brokers like to keep transactions within the brokerage, called "**in-house**" transactions. An in-house transaction occurs when a brokerage licensee procures a buyer for one of the broker's listed properties. Although it benefits the broker financially, because it's not necessary to split the commission with another brokerage, this situation can create risk and liability.

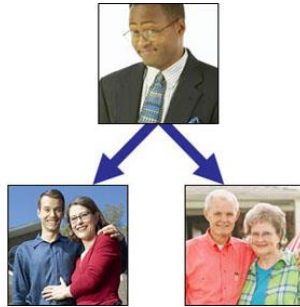
When both the seller and buyer are clients of the same brokerage, a **dual agency** situation may exist.

Dual agency occurs when one licensee **represents both a buyer and seller in the same transaction**. For example, Paul, a licensee for broker Dan, is working with buyer client Maggie. A week later, Paul brings in a listing to sell Sam's home. Paul realizes that Sam's house meets all of Maggie's requirements. If he shows Sam's house to Maggie and she decides to make an offer, Paul becomes a dual agent. He would technically owe the same fiduciary duties to both buyer Maggie and seller Sam.

An in-house transaction can create a dual agency. For example, Jane is another licensee in Dan's brokerage. She is working with buyer client Sophie, who is interested in purchasing Sam's house. Remember that the agreements that the buyer and seller have with Dan's brokerage are really with Dan, the employing broker. As the broker, he could, therefore, be considered a dual agent in this transaction, depending on the agency laws in his state.

Note: The options for handling in-house transactions in Tennessee will be covered shortly.

Limitations on Dual Agency



While dual agency is legal in most states, a dual agent must not do anything that harms either party. As you can imagine, it is difficult, if not impossible, to adequately represent these two opposing interests. A dual agent owes fiduciary duties to both buyer and seller but must remain **neutral** at all times.

How can an agent do that? The seller is looking for the highest price while the buyer is looking for the lowest price.

For example, Paul's buyer Maggie asks whether the seller will take \$200,000. Even if he knows the answer is yes, Paul's best response would be something along the lines of "As a dual agent, I cannot answer that question for you. Nor would I tell the seller that you're willing to go up to \$210,000. Why don't you make the highest offer you can live with; I'll present it and see what happens." To do otherwise would be to risk disclosing confidential information from the seller client.

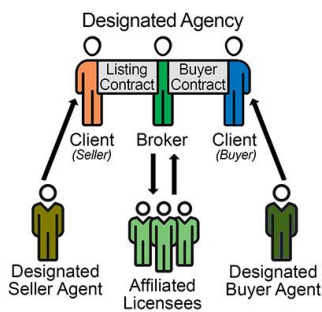


Therefore, dual agents cannot provide **undivided loyalty** to their clients, nor can they advise them on points of negotiation. Dual agents can provide facts but not insight or counsel on how to respond to an offer or counteroffer.

Dual agents must be careful not to disclose confidential information from one party to the other party, especially regarding price or any other matter that may adversely affect one of the parties. However, dual agents are **obligated to disclose material facts and defects**.

Critics of dual agency rightly point out that there is an inherent **conflict of interest** in the arrangement. Because this type of relationship might not be acceptable to one or both parties, in most states, dual agency requires the **informed, written consent of both clients**.

Forms of Agency Relationships: Designated Agency



Designated agency came about as a way to deal with complicated situations that might arise during a real estate transaction. As you've seen, when licensees within a single brokerage represent both parties to a real estate transaction, clients might argue that their negotiating ability is weakened.

When a brokerage secures both the seller client and the buyer client in an in-house transaction, many states allow an employing broker to **appoint specific designated agents to advocate separately** for the buyer client and the seller client in negotiating the transaction.

A positive consequence of the designated agent function is the ability to establish—within a single brokerage—individual representation of both buyer and seller interests. Designated agency is an effective way to eliminate the issues inherent in dual agency.

Cooperative Transactions

While in-house transactions are preferred, listing brokers commonly extend offers to outside brokerages to sell listed property to outside buyers through the **multiple listing service (MLS)**. As you recall, an MLS is a service through which member brokers share listings. The MLS exposes listings to a broader market of prospective buyers.

When a broker submits a property listing to the MLS, the act constitutes a unilateral blanket **offer of cooperation**—an open invitation to other brokers to sell property listed by another broker.

Subagency



Under **common law**, a **subagent** is anyone given authority by an agent to assist in carrying out the principal's orders.

An offer of cooperation through a multiple listing service **does not create a subagency relationship** among the brokers who are members of the MLS. One reason for this goes back to the concept of **vicarious liability**. If an MLS listing created a true subagency relationship, then legally, the listing broker would have vicarious liability for the actions of every other member of the MLS. Even more alarming, the client could arguably be liable for the actions of any subagent.

Consequently, subagency as a business relationship between brokerages is now relatively **uncommon**.

Non-Agency

Sometimes, a licensee may work with a buyer or seller (or landlord or tenant) who rejects agency representation. In this case, the licensee is simply assisting in the transaction in a neutral capacity without providing the fiduciary duties an agent owes to a client. This situation may be referred to as **non-agency or transactional brokerage**, and the licensee may be referred to as a non-agent, transaction broker, or **facilitator**, among other names. Non-agency does not prevent a licensee from performing **ministerial acts**. Ministerial acts are tasks that a licensee may perform for a customer that are informative or clerical in nature and do not rise to the level of active agency representation. Such acts may include:

- Responding to inquiries as to the pricing of brokerage services or the price or location of property
- Completing business or factual information on an offer to purchase
- Making a referral to another broker or service provider

Check Your Understanding #6

Using your notes link or on a piece of paper, identify if each statement is “true” or “false” under common law. When finished, scroll to the end of the course to see the answers.

1. Joanne is a seller's agent for Felix, whose house is listed at \$420,000. Curtis came to an open house and really liked the property but he thought it was significantly overpriced. He contacted Joanne with an offer of \$290,000. Joanne knows that Felix will never accept such an insulting offer and so she is NOT required to tell him about it.
2. You are a buyer's agent for Jeanine. She has rejected all 14 homes you've shown her. Home 15 seems perfect but she wants to think about it. An hour later, Colt comes into your office, interested in Home 15. You must wait for Jeanine's decision before showing him the home because she is a client and he is just a customer.
3. When acting as a dual agent, a licensee may only provide each client with the facts without any interpretation or counsel on how to respond to an offer or counteroffer.

- Licensee Deanne sees a listing for Domenic’s house in the MLS. She shows the house to Gracie, a buyer client. Gracie makes an offer, which Deanne delivers to listing broker Benjamin. When Deanne accepted the offer of cooperation from broker Benjamin, seller Domenic became Deanne’s client.

Tennessee Agency Law: Two Agency Models Recognized



As set forth **under the Tennessee Real Estate Broker License Act**, two agency models are recognized in Tennessee:

- Traditional (non-designated) agency
- Designated agency

These models are described next.

Note: When reviewing Tennessee Agency Law, you will see the term “managing broker” rather than “principal broker.” Managing broker is used here because that term appears throughout the section of the Tennessee Real Estate Broker License Act that addresses agency relationships (*Tenn. Code Ann. 62-13-401*

through 408).

Tennessee Agency Law: Traditional Agency Model

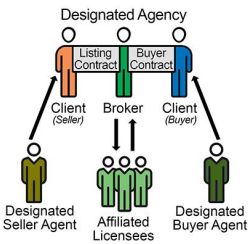


Remember that an agency relationship is technically between the client and the brokerage.

In a **traditional agency model**, an agency agreement with a buyer or a seller creates the **same agency relationship** between the client and everyone at the brokerage, including the managing broker and **all affiliated licensees** regardless of which specific licensee might be working with the client directly.

This means that a licensee in the office may represent a client even if the licensee has never met and/or does not know the name of that client.

Tennessee Agency Law: Designated Agency Model



Tennessee’s agency law allows a managing broker to **appoint a designated agent** to represent a party in a real estate transaction, to the exclusion of all other licensees employed by or affiliated with the managing broker (*Tenn. Code Ann. 62-13-406(a)*).

Designated agency establishes an agency relationship **between only one licensee and the client**. When a designated agent is named, other affiliated licensees do **not** have an agency relationship with the client.

Designated agency was created to reflect standard practice in most real estate transactions—an **individual agent** (not the entire company) acts as an advocate for the client.

Designated Agency: Appointing Designated Agent



There are two ways a managing broker may designate a licensee to be the individual or designated agent of a buyer or seller client:

- **By written office policy.** A brokerage firm may have an office policy of designated agency from the outset for buyers and sellers.
- **By specific appointment.** A managing broker may appoint a licensee to act as a designated agent by specific instruction or appointment (i.e., on a case-by-case basis).

If licensees within the firm operate in a team environment, members of the team may **not** appoint designated agents within the team. This remains the responsibility of the **broker** (*Rule 1260-02-.41(5)*).

Note: The managing broker, not the licensees, determines the acceptable agency model to be practiced at the firm. Every real estate brokerage firm should have a written agency policy for the entire office and all licensees should be familiar with and abide by their office policies.

Tennessee Agency Law: In-House Transactions

As you recall, an “**in-house**” transaction occurs when a brokerage licensee procures a buyer for one of the **brokerage’s listed properties**.

Because Tennessee law allows for designated agency, there are several options for handling in-house transactions:

- Dual agency (non-designated agency)
- Designated agency
- Facilitator status

In-House Transaction with Dual Agency

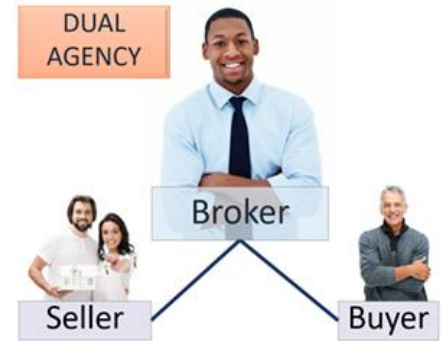
Dual agency is defined as a situation in which a licensee has agreements to provide services as an agent to more than one party in a specific transaction and in which the interests of the parties are adverse (*Tenn. Code Ann. 62-13-102(8)*).

As mentioned earlier, in a **traditional agency model**, an agency agreement with a buyer or a seller creates the **same agency relationship** between the client and everyone at the brokerage.

When property is listed, all licensees of the brokerage represent the seller. Likewise, when a buyer is represented, all licensees of that brokerage represent that buyer. Therefore, when a represented buyer wishes to purchase a property listed with the same brokerage, **all** licensees of the brokerage act as **dual agents**. This is true whether one licensee is representing both parties or two separate licensees are involved.

Dual agency requires the **informed, written consent** of both parties.

Note: Dual agency is legal in Tennessee but rarely practiced.



In-House Transaction with Designated Agency



Recall, **designated agency** came about, in part, as a way to deal with some of the complications associated with dual agency for in-house transactions. When licensees within a single brokerage represent both parties to a real estate transaction, clients might argue that their negotiating ability is weakened.

Tennessee, therefore, allows a managing broker to **designate one licensee** to represent a buyer in a transaction, to the exclusion of all other licensees, and **another licensee** to represent the seller in the same transaction, to the exclusion of all other licensees.

Under Tennessee law, the managing broker is **not** considered a dual agent (unless an individual licensee appointed as a designated agent also represents the interests of another party to the same transaction) (*Tenn. Code Ann. 62-13-406(a)*).

Note: The use of designated agency does not lessen the managing broker's responsibilities to ensure that all affiliated licensees conduct business in accordance with appropriate laws, rules, and regulations (*Tenn. Code Ann. 62-13-406(b)*).

In-House Transaction with Facilitator Status

A real estate firm may adopt a policy that calls for an affiliate broker to default to **facilitator status** automatically if the affiliate broker has a listing and an unrepresented buyer expresses interest in the property.

In this situation, the listing agreement may include a provision in which the seller provides consent to facilitator status if an unrepresented buyer enters the picture. However, the licensee must immediately inform the seller that they no longer represent the seller and the change in status must be confirmed in writing.

Case Study: Tennessee Court Decision



Let's look at a Tennessee court decision case that involves agency designation. Be prepared to answer a question about the case study information presented.

White v. Miller, 2017 Tenn. App.

Court of Appeals of Tennessee

Seller White entered into an agreement, the Exclusive Right to Sell Listing Agreement (Designated Agency), for the sale of her home. Miller, a licensed real estate agent affiliated with Managing Broker Parks, was appointed by Parks as "designated agent" for the seller.

The listing agreement defined "Designated Agent for the Seller" as:

The individual licensee that has been assigned by his/her Managing Broker and is working as an agent for the Seller or Property Owner in this consumer's prospective transaction, to the exclusion of all other licensees in his/her company.

Even if someone else in the licensee's company represents a possible Buyer for this Seller's Property, the Designated Agent for the Seller will continue to work as an advocate for the best interests of the Seller or Property Owner. An agency relationship of this type cannot, by law, be established without a written agency agreement.

The Nguyens contacted seller White directly about purchasing the property. White referred the Nguyens to Miller, who negotiated with the Nguyens on White's behalf, presenting White with the Nguyens' offer to purchase the property for \$900,000.

In the course of those negotiations, Miller, on behalf of Parks, entered into an Exclusive Right to Sell Listing Agreement with the Nguyens for the sale of their townhouse. Miller signed the agreement as "Broker or Licensee Authorized by Broker," with Parks listed as the "Broker/Firm." White and the Nguyens subsequently entered into a Purchase and Sale Agreement whereby the Nguyens agreed to purchase White's property for \$900,000, and White agreed to accept the Nguyens' townhouse for \$155,000, to be applied as a credit toward the purchase price of White's home.

Subsequently, White filed suit against Miller and Parks alleging that, in addition to acting as her agent, Miller acted as an undisclosed agent for the Nguyens without White's consent.

The trial court granted White's summary judgment on her claim for dual agency. The court concluded that Miller and Parks acted as a dual agent for White and the Nguyens, which was an unlawful act, the remedy for which was the forfeiture of the commission.

On appeal, Miller and Parks contended that the court erred in granting judgment to White on her claim of undisclosed dual agency.

Tennessee Code Annotated, Section 62-13-102(8) states:

"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.

White's listing agreement identified Parks as "Broker" and White as "Owner/Seller"; Miller signed the agreement as "Broker or Licensee Authorized by Broker." In Section D1 of the agreement, Miller was named "to be the Designated Agent to the Seller in this transaction." In accordance with the requirements for establishing an agency relationship set forth in Tennessee Code Annotated Section 62-13-401, the listing agreement expressly designated Miller as agent and set forth the terms of the agency relationship.

Similarly, the Nguyens' listing agreement listed Parks as "Broker" and the Nguyens as "Owner/Seller." Miller signed the agreement as "Broker or Licensee Authorized by Broker." Unlike White's listing agreement, however, Section D1 did **not** designate Miller as agent.

In the absence of a designation of Miller as agent in the agreement or any other pertinent provision in the agreement, he could **not** be deemed the agent for the Nguyens.

Tennessee Code Annotated, Section 62-13-406(a) states:

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 the interests of any other party to the same transaction.

As applied to the facts of this case, under the Tennessee statute, Parks could not be considered a dual agent because Miller is the designated agent only for White with respect to the sale of her home; he is not the designated agent for the Nguyens with respect to the sale of their townhouse.

On appeal, the court reversed the grant of summary judgment to White regarding the claim of undisclosed agency and granted judgment to Miller and Parks.

Check Your Understanding #7

Using your notes link or on a piece of paper, identify the correct answer to the case study question. When finished, scroll to the end of the course to see the answers.

1. In the case of *White v. Miller*, the appellate court determined that
 - A. both Miller and Parks acted as undisclosed dual agents.
 - B. neither Miller nor Parks acted as an undisclosed dual agent.
 - C. only Miller acted as an undisclosed dual agent.
 - D. only Parks acted as an undisclosed dual agent.

Agency Disclosure

For most people, the purchase or sale of a home is one of the most important financial decisions of their lives. Unfortunately, most people are not informed and not prepared to deal with the legal and financial details involved in such a transaction. Because of this, it's critical that individuals who have superior knowledge and ability in the field of real estate not take advantage of consumers.

While the different types of agency relationships might be clear to you now, you can probably imagine how confusing agency representation might be to the average consumer. To help address this confusion, all states, including Tennessee, require licensees to **disclose the nature of the agency relationship** into which a potential client is entering. This disclosure allows consumers to have full knowledge of the duties owed to them, and it also allows consumers to choose what sort of agency relationship is acceptable to them.

Tennessee Agency Law: Relationship Disclosures

Under Tennessee law, licensees have an obligation to disclose their **role in a transaction to all parties** involved, including:

- Any unrepresented buyer or seller
- Any other licensees involved in the transaction

Let's take a look at the licensee's specific duty of disclosure under Tennessee law.

Tennessee Agency Law: Disclosure to Unrepresented



If a licensee personally assists a prospective **buyer or seller who is not represented** by any licensee, the licensee must **disclose their status** as facilitator, agent, subagent, or designated agent in the transaction **before any real estate services are provided** (*Tenn. Code Ann. 62-13-405(a)*). This **initial disclosure can be oral or written**, but it must be made before providing any real estate services (e.g., showing property).

This disclosure must be **confirmed in writing**, and the written disclosure must be delivered (*Tenn. Code Ann. 62-13-405(b)*):

- In a transaction involving an unrepresented buyer, **prior to preparing an offer** to purchase.
- In a transaction involving an unrepresented seller, **prior to executing a listing agreement or presenting an offer** to purchase, whichever comes first.

Following delivery of the written disclosure, the licensee must obtain a signed receipt for the disclosure from the party to whom it was provided. The **signed receipt** must include:

- A statement acknowledging that the buyer or seller (as applicable) was informed that any complaints alleging a violation of the license law must be filed within the applicable statute of limitations for the violation, and
- The address and telephone number of the Tennessee Real Estate Commission.

Note: The disclosure of agency status does **not** create an agency relationship (*Tenn. Code Ann. 62-13-405(c)*). A written bilateral agreement (such as a listing or buyer representation agreement) is required to establish an agency relationship between the broker and a party to a transaction. A unilateral disclosure is not a substitute for a bilateral agreement.

Tennessee Agency Law: Disclosure to Other Licensees

Upon **initial contact with any other licensee** involved in the same prospective transaction, the licensee must immediately disclose their role in the transaction (*Tenn. Code Ann. 62-13-405(d)*).

If the **licensee's role changes** at any subsequent date, the licensee must **immediately** notify all parties to the transaction of the change in status. The licensee needs to maintain written documentation of any change in agency status.

Tennessee Agency Law: Disclosure Exemptions

The following transactions are **not** subject to **agency disclosure requirements** (*Tenn. Code Ann. 62-13-405(e)*):

- Transfer or lease of commercial properties
- Transfer of property by public auction
- Transfer of residential properties of more than four units
- Lease or rental of residential properties

Agent Disclosures to Avoid Conflicts of Interest



Often, real estate licensees find themselves in the position of being a **party to the transaction** or otherwise having some form of interest in the property being conveyed. Licensees need to **disclose in writing any interest** they may have in the subject property.

It is not automatically improper for an agent to buy property from the principal, but the agent must inform the seller that the **agent is the buyer**. The agent must also inform the seller if the **buyer is a**:

- **Relative or close friend of the agent**, or
- **Business entity** in which the agent **has an interest**.

Why should it matter? Disclosure alerts clients and customers to possible **conflicts of interest** so they may choose to find another agent. Let's discuss in a bit more detail conflicts of interest that need to be disclosed and strategies for avoiding questionable conflicts of interest.

Conflicts of Interest: Party to Transaction



One example of this situation is when a licensee has their own home for sale and their buyer client is interested in buying it. A similar example is when a listing agent decides they want to purchase their seller client's property.

In each of these situations, the licensee is **acting as both** an agent and a principal in the transaction. This type of situation is sometimes referred to as dual capacity. **Dual capacity** occurs when a person or firm acts as both an agent and a principal in the same transaction.

A licensee must disclose **in writing** any interest the licensee may have in the property being conveyed. While disclosure of such interest or ownership must be made to comply with state laws and rules, the issue that licensees need to be concerned about is their relationship to the other parties in the transaction and how that might conflict with their agency obligations.

If a dispute arises in a transaction involving a licensee acting in a dual capacity, the licensee will be hard-pressed to convince anyone—especially a judge, administrative hearing officer, or commissioner—that they represented the party across the table to the same degree that they represented themselves.



One cannot deny any knowledge that has been gained about the other party's motivations. Consequently, a licensee who is a buying or selling party in a dual capacity will **always** have an advantage over the other party.

Caution: Licensees should avoid acting as an agent in a transaction in which they have an interest in the property being conveyed.

Conflicts of Interest: Relatives or Close Relationships



Agency conflicts can also arise in transactions involving a party related to the real estate licensee. A licensee involved in a transaction in which one of the parties is a **relative**, a close friend, etc. should avoid a dual agency role.

While Tennessee laws and rules allow for **disclosed dual agency**, commissioners, hearing officers, and judges may find it difficult to believe that licensees could represent an unknown party to the same degree and exercise the same level of loyalty as they do a person with whom they have a close relationship.

A licensee who is related to one party may not, in actuality, favor that person over the other party. However, a good attorney could certainly make a strong argument that the party to whom the real estate licensee is related has an advantage over the other party.

Handling Conflicts of Interest: Best Practices

Some licensees who find themselves in a transaction in which they have an interest in the property being conveyed, or in which they are somehow related to one of the parties, choose to practice disclosed dual agency. However, a better approach would be for licensees to act as a single agent or to extract themselves completely from the transaction.

Licensees should consult their broker to determine how to handle such situations.

Check Your Understanding #8

Using your notes link or on a piece of paper, identify if the correct answer to each question is “yes” or “no” and provide an explanation for your answer. When finished, scroll to the end of the course to see the answers.

1. At an open house, buyer Linh decides to sign a buyer agency agreement with your firm and with you as her representative. She wants to put in an offer on your listing. Are you now a dual agent?
2. Julie hires broker Ethan to list her house for sale. Tessa, a licensee at Ethan's agency, is interested in buying the house for her mother. Should Ethan disclose his coworker's status to Julie?
3. Juanita, a small business owner, is moving out of state and needs to sell her home as well as her retail property. Broker Trevor tells seller Juanita that he will take a lower commission on the sale of her house if she lists her commercial property with him, too. Do you think Trevor must disclose his arrangement to the buyer of Juanita's house?

Legal Consequences for Failing to Fulfill Duties

Any real estate licensee who is found to have breached an agency relationship can be disciplined or judged by a regulatory agency, a court of law, or both.

A licensee's failure to fulfill duties to clients and customers can result in compensatory or monetary damages to the principal, repayment or loss of any commissions received, as well as the complete rescission of the real estate transaction by a court of law.

If the court takes such action, it is very likely that the state **regulatory agency**, in this case, TREC, will **initiate its own disciplinary actions**.



Caution: As you know, many aspects of real estate transactions raise legal questions or have legal consequences. Real estate licensees need to remind their clients that they are not licensed to practice law. Licensees should **never** give legal advice or perform any acts that require a lawyer's expertise.



TREC Disciplinary Actions

Sanctions by TREC or any regulatory agency may include:

- Letter of reprimand
- Suspension of license
- Revocation of license
- Other special conditions or restrictions of licensure
- Fines or monetary penalties
- Educational requirements
- Examination requirements
- Restitution of actual damages to injured party



Final Thoughts

You will have a less stressful and more successful career by constantly being aware of agency relationships and practicing in a manner that fulfills your fiduciary and statutory duties to your clients and customers. A strong understanding of agency must be accompanied by knowledge of the legal requirements of the jurisdictions in which you practice.

You must disclose to clients and customers the types of agency relationships that are available. Failure to disclose agency representation can bring legal repercussions to not only you but to your employing broker and clients as well. Transparency is imperative. All parties need to understand who represents whom in the real estate transaction.

With a complete understanding and fulfillment of your agent responsibilities, you will, hopefully, avoid ever having to appear in a court or hearing room, trying to prove that you did what was expected of you as an agent, while a party to one of your transactions is claiming otherwise.

CHAPTER 4: CONTRACT COMPLIANCE

Chapter Overview

As a real estate professional, you'll be responsible for the appropriate handling of real estate contracts. Many disputes and lawsuits in real estate can be tied back to contracts, so contract fundamentals are vital for you to know. In contract formation, the basic concepts and requirements are the same whether we're talking about a listing agreement, a purchase agreement, or any other type of agreement. In fact, agreement is simply another word for contract. A properly formed contract can protect you and your clients in the event of a lawsuit, but to be enforceable in a court of law, the contract must be formed using some basic rules.

Chapter Overview: Key Terms

Key terms important to understanding the content presented in this chapter include:

Acceptance—When a party agrees to the terms of an offer to enter into a contract.

Addendum—A document that may be attached to and made part of a contract prior to signing to include provisions that are not in the standard contract (must be signed by the parties to be made part of the contract).

Amendment—A change in the terms, conditions, or provisions of a contractual agreement previously entered into by the parties involved (must be signed by the parties to become part of the contract).

Backup Offer—An offer made after another offer has been accepted that is contingent on the failure of the first contract.

Bilateral Contract—A contract in which both parties make a binding promise to the other.

Breach—Violation of an obligation, duty, or law.

Bump Clause—A clause in a purchase agreement that allows the seller to keep the property on the market while a buyer waits out a contingency to sell their property.

Consideration—Something that is given to induce another to enter into a contract, such as money, services, goods, or promises.

Contemporaneous Offers—Competing offers submitted by the same buyer agent on the same property that the owner will consider at the same time; this requires disclosure to the buyer clients.

Contingency—A provision in a contract that makes the parties' rights and obligations depend on the occurrence (or non-occurrence) of a specified event. Also called **Condition**.

Contract—An agreement between two or more parties to do, or not do, something; a legally enforceable promise, with the law providing remedies for breach.

Contractual Capacity—The legal ability to enter into a contract.

Counteroffer—A response to an offer to enter into a contract, changing some of the terms of the original offer; it is a rejection of the original offer (not a form of acceptance).

Enforceable Contract—A contract that would be upheld by the courts; the requirements are capacity, mutual consent, lawful objective, consideration, and for some contracts, in writing.

Executed Contract—A contract in which both parties have fully performed their contractual obligations.

Executory Contract—A contract in which one or both parties have not yet performed their contractual obligations.

Express Contract—An agreement that's been expressed in words, either spoken or written.

Implied Contract—An agreement that hasn't been put into words but is implied by the actions of the parties.

Lawful and Possible Objective—The requirement that a contract's terms not be illegal or impossible.

Meeting of the Minds—When all parties involved agree to the terms of a contract, achieved through offer and acceptance. Also called **Mutual Agreement, Mutual Consent**.

Offer—The first step in forming a contract when one party proposes price and terms to another party; requires intent to contract and definite terms.

Purchase Agreement—A contract in which a seller promises to convey title to real property to a buyer in exchange for the purchase price. Also called **Purchase and Sale Agreement, Purchase Contract, Sales Contract, Earnest Money Agreement**.

Rejection—An irreversible refusal of an offer by an offeree

Revocation—The termination of an offer by the offeror by withdrawing the offer before it's accepted.

Severable—The concept that one part or provision of a contract can be held unenforceable without making the entire contract unenforceable.

Statute of Frauds—A state law that requires certain types of contracts to be in writing and signed to be enforceable.

Time is of the Essence Clause—A clause in a contract that makes failure to meet a stated deadline a material breach of the contract.

Unenforceable Contract—A contract that a court would refuse to enforce; often an oral contract or a vaguely worded contract.

Unilateral Contract—A contract in which only one party makes a binding promise to another party.

Valid Contract—A contract that meets all of the legal requirements for contract formation.

Void Contract—A contract that isn't enforceable because it lacks one or more of the requirements for contract formation or is otherwise defective.

Voidable Contract—A contract that one of the parties can end without liability because of a lack of legal capacity or other factor such as fraud or duress.

Chapter Overview: Learning Objectives

Upon the completion of this chapter, you will learn how to:

- LO14: Describe contract classifications, essential elements of a valid and enforceable real estate contract, and methods of contract discharge.
- LO15: Explain the process of offer and counteroffer and the methods for accepting and terminating an offer.

Contract Validity Classification

Contract Validity

- Valid
- Void
- Voidable
- Unenforceable



A **contract** is simply an agreement between two or more parties to do, or not to do, something. Contracts are **legally enforceable promises**, with the law providing remedies in the event of a breach. A contract can be classified as any one of the following:

1. **Valid.** A valid contract is a binding agreement that **meets all of the legal requirements** for contract formation. If one party doesn't fulfill their side of the bargain, the other party can sue to have the contract enforced or pursue other legal remedies. A contract that is **not valid** may be considered void or voidable. These conditions can prevent a party from being able to enforce a contract, but there are important legal distinctions between them.

2. **Void.** A void contract **lacks one or more of the requirements** for contract formation or is otherwise defective. For instance, a purchase agreement that does not include

the signatures of all legal owners is void. Similarly, a contract to perform an illegal act is void. Technically, a void contract is **not** a contract at all. Neither party may enforce it in court. For example: Jerome sold 456 Oak Street to Haley. However, Jerome did not own 456 Oak Street. The contract is void because it does not contain the signature of the legal owner.

Contract Validity

- Valid
- Void
- Voidable
- Unenforceable



3. **Voidable.** A voidable contract seems to be valid and enforceable, but it **has some defect or contingency that gives one of the parties the power to cancel it without liability**. A contract formed as a result of misrepresentation of a material fact, fraud, undue influence, or duress is **voidable by the damaged party**. It is not void. A contract entered into by a **minor** or someone who **lacks the legal capacity** to sign the contract is voidable by that party. Such a contract is, however, binding to the other party of the contract. For example, a sales contract signed by a minor is voidable by the minor if the minor chooses to dissolve the contract. The other party is bound to the contract if the minor chooses to remain in the contract. A contract that is not dissolved is considered to be valid.

4. **Unenforceable.** An unenforceable contract may be valid between the parties but one that a **court would refuse to enforce**. The two parties may proceed with their agreement if they would like to, but if there is a dispute, a **court will not enforce** the contract against either party. For example, a vaguely worded contract whose intent cannot be established would be unenforceable. Such a contract may also be known as an **illusory**. This can also describe a contract that **does not comply with the requirement that it must be in writing**. A real estate purchase agreement, for instance, cannot be enforced if it is not in writing.

Check Your Understanding #1

Using your notes link or on a piece of paper, identify if the contract described is valid, void, voidable, or unenforceable. When finished, scroll to the end of the course to see the answers.

1. Binding, legally sufficient
2. Lacks requirements for contract formation
3. A court would refuse to uphold
4. One party can end without liability

Valid and Enforceable Contract Elements



A **valid and enforceable contract** will be enforced by a **court** if one of the parties **fails to comply** with the agreement.

For a contract to be legally binding and enforceable in court, it must have these essential elements:

- **Mutual agreement.** There must be offer and acceptance.
- **Contractual capacity.** The parties must be of legal age and mentally competent.
- **Lawful and possible objective.** The contract cannot be to commit an illegal act.
- The parties must exchange something of value.

A contract that lacks one or more of the essential elements for contract formation is generally **void**.

Contract Elements: Mutual Agreement



Before any contract can be formed, each party must consent to its terms. This is called **mutual agreement**. A mutual agreement usually involves **an offer and an acceptance**. In general terms, an offer is one party, the offeror, proposing something to another party, the offeree. Acceptance of the terms of the offer indicates a **meeting of the minds**.

When an offer is accepted, a contract is formed, and both parties are legally bound. Neither can back out without legal excuse unless the other is also willing to end the contract. If they do both agree to end the contract, this is called a **mutual agreement to terminate**.

Mutual agreement assumes that both parties are acting **free of any negative influences**. A contract formed as a result of innocent misrepresentation or mistake, fraud, undue influence, menace, or duress is **voidable** by the damaged party.

For example: Homer offers to buy Mr. Burns' property for \$250,000 if Mr. Burns will throw in a year's supply of donuts. Mr. Burns agrees to Homer's offer but removes the donut clause. The parties do not have mutual agreement. No contract has been formed.

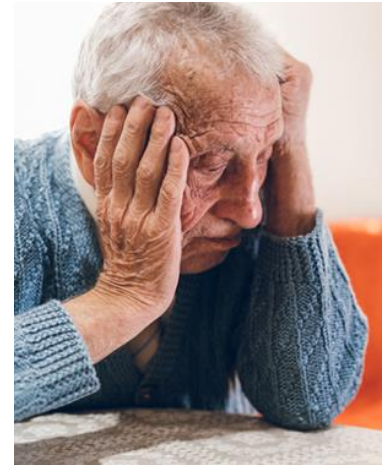
Contract Elements: Contractual Capacity

Contractual capacity is the legal ability to enter a contract. For a contract to be valid, each party must be **legally competent**:

1. **Legal Age.** Legal **age** of the majority is 18 years old in almost all states, including Tennessee. Note that when an adult enters into a contract with a minor, the contract is voidable by the minor only. Even if the minor pretended to be over 18, the minor can disaffirm the contract at any time before turning 18 or within a reasonable time thereafter. The minor also has the option to enforce the contract and require the adult to perform. The adult does not have the power to disaffirm the contract. A parent or legal guardian can, of course, form a valid and enforceable contract by signing on behalf of a minor.
2. **Mentally Competent** (such as sober, mentally sane, etc.). If a person has been declared incompetent by a court because of mental illness, intellectual or mental disability, or senility, any contract they enter into is considered void and unenforceable by either party. To be enforceable, the contract would have to be signed by the incompetent person's court-appointed guardian or someone who has been granted power of attorney. Only a court can pass judgment on an issue of incompetence. It does not fall to a real estate licensee to make that determination. Fortunately, this issue doesn't arise very often!

Even if a person has not been declared by a court to be legally incompetent, if it can be proven they were not of sound mind when the contract was signed (for example, under the influence of drugs or alcohol), the contract may still be voidable by that person if they take action to rescind the contract within a reasonable time after regaining competency. However, a court may rule in different ways, depending on the circumstances in each case. The contract may be voidable by the incompetent person but if the other party acted in good faith without notice of the incompetency, a court might decide to enforce the contract.

To have contractual capacity also means that the party must have **proper authorization**, such as someone who is designated to sign a contract on behalf of a corporation or other entity, or an individual who has been given a power of attorney to sign on someone's behalf. For example: Potential client Clint reaches out to a broker about selling his property, and they sign a listing agreement. While performing due diligence, the broker discovers that the property is owned by Clint's mom. When asked about it, Clint says that he handles all of his mother's affairs, but he has no power of attorney. The listing agreement is void.



Contract Elements: Lawful Objective



Lawful objective or **legal purpose** means the purpose or objective of a contract must be lawful at the time the contract is made. When one person promises to pay someone for committing an illegal act, the contract is **void**. A court may also refuse to enforce an otherwise legal contract if its objective violates public policy.

A contract must also be possible. It's fully possible to have a lawful objective but an impossible one as well. For example, Ted may agree to build a 10,000-foot-high skyscraper for Tina. While it may be lawful for Ted to do so, it's a physical impossibility, so the contract is void.

Many contracts have more than one purpose and are often **severable**, or "sliced and diced". **One part or provision of a contract can be held unenforceable without making the entire contract unenforceable**. The unenforceable part is severed, or cut, from the agreement, but the rest is enforced.

Contract Elements: Consideration

A contract can't be one-way; each party must give something to the other. **Consideration** refers to something given to induce another to enter into a contract, such as a promise of money, services, or goods.

Most contracts are based on **valuable consideration**, which is something that has monetary value. **Adequate consideration** is comparable in value to the consideration the other party to the contract is giving. **Forbearance**, or forgiving a debt or obligation, or giving up an interest or a right, qualifies as valuable consideration. Gifts, such as real property based solely on love and affection are considered **good consideration**.

Both valuable consideration and good consideration **meet the legal requirement** that consideration is present to make a contract **valid**. However, contracts based on good consideration are usually **not enforceable**. For example:



- An **earnest money** deposit given with an offer to purchase real property is **not** contractual consideration. It is simply an inducement to accept the buyer's offer and a means of showing that the buyer is serious and able to follow through with financing.
- The buyer's offer is a **promise to pay** a certain price for the property and the promise to pay the **purchase price is consideration**.

Consideration is NOT a promise to do something you're already legally obligated to do. Nor is it a promise **not** to do something the law doesn't allow you to do.

Real Estate Contract Element: In Writing

Additionally, for most real estate contracts, there is a fifth essential element. They must be **in writing** and must be **signed** to be enforceable.

The **Tennessee Statute of Frauds** (*Tenn. Code Ann. § 29-2-101*) requires a contract that is intended to transfer an interest in real property to **be in writing** and **signed by all parties** to be enforceable.

Tenn. Code Ann. § 29-2-101 sets forth:

(a) No action shall be brought:

- To charge any executor or administrator upon any special promise to answer any debt or damages out of such person's own estate;
- To charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;
- To charge any person upon any agreement made upon consideration of marriage;
- Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than **one year**;
or
- Upon any agreement or contract which is not to be performed within the space of one (1) year from the making of the agreement or contract;

unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be **in writing** and **signed by the party** to be charged therewith, or some other person lawfully authorized by such party. In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.



Caution: An unsigned or unwritten contract is not necessarily invalid, but it would not be enforceable by the courts in the event of a dispute.

Check Your Understanding #2

Using your notes link or on a piece of paper, answer the questions to demonstrate your understanding of the essential elements of a valid and enforceable contract. When finished, scroll to the end of the course to see the answers.

1. What are the four essential elements of a valid and enforceable contract and the one required element of a real estate contract?
2. Rick signs a piece of paper promising to paint Connie's house. Is this a valid contract? Why or why not?
3. Julie, age 17, is selling the house that she inherited from her grandparents. John has agreed to buy the property and both have signed a purchase agreement. What is the status of this contract?
4. Jeff and Cam are out at a bar drinking. During the evening, Jeff writes a note on a cocktail napkin agreeing to sell his car to Cam for \$500. After they both sign it, Jeff pockets the money and hands the keys over. The next day, Jeff has no idea where his car is and how he came to have \$500 in his wallet. Was this a valid contract? Why or why not?

Purchase Agreement: Contract Requirements



As you know, **purchase agreements** are contracts in which a seller promises to sell property, or **convey title**, to a buyer in exchange for the **purchase price**. A purchase agreement may also be called a purchase and sale agreement, purchase contract, offer to purchase and contract, sales contract, residential resale contract, earnest money agreement, or other similar terms. By whatever name is used, it is the written agreement **between the buyer and seller**, and the final product of negotiations between them.

A purchase agreement must contain all of the requirements for a valid and enforceable contract:

- **Meeting of the Minds.** When all parties involved agree to the terms of a contract, achieved through offer and acceptance.
- **Contractual Capacity.** The legal ability to enter into a contract.
- **Lawful and Possible Objective.** The requirement that a contract's terms not be illegal or impossible.
- **Consideration.** Something that is given to induce another to enter into a contract, such as money, services, goods, or promises.

Purchase Agreement: Purpose

(A). \$ _____ EARNEST MONEY: BUYER hereby deposits DOLLARS as Earnest Money evidenced by: <input type="checkbox"/> cash <input type="checkbox"/> personal check <input type="checkbox"/> cashier's check <input type="checkbox"/> note (due date): _____ <input type="checkbox"/> other _____ and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account <input type="checkbox"/> upon receipt, or <input type="checkbox"/> upon acceptance by BUYER and SELLER and shall be held by: <input type="checkbox"/> Listing Broker <input type="checkbox"/> Selling Broker <input type="checkbox"/> other _____ for the benefit of the parties hereto. THE RESPONSIBLE BROKER SHALL BE: _____

A purchase agreement can serve a variety of purposes:

- It is the buyer's initial **offer** and any subsequent counteroffers. The buyer's signature turns a purchase agreement into an **offer**; the seller's signature turns it into a **binding contract**.
- It is the **receipt** for any **earnest money** deposit.
- It documents the **terms** of sale, such as purchase price and closing date.
- It establishes the **conditions and contingencies** that must be met prior to closing.
- It **communicates** the details of the transaction to the mortgage lender, title company, and any other party to the transaction.

Purchase Agreement: Contract Formation



There are a wide variety of forms that may be used for both purchase and sale agreements in Tennessee. Generally, your role in contract formation will be limited to filling in the blanks of the pre-printed purchase agreement form appropriately.

As a real estate licensee, you should **not draft additional clauses** to a prepared contract. If buyers or sellers want to insert any specialized language into the standardized form, consult your employing broker. It may also be necessary to refer them to their attorney. In fact, you should always encourage buyers and sellers to consult an attorney before entering into any contract.

It's fine to change provisions in an offer and introduce new terms when making an offer or counteroffer at the direction of the buyer or seller. Once there is mutual agreement, however, a purchase agreement can be modified only with an amendment that is signed by all parties. **Once signed**, it becomes part of the **binding contract**.

Purchase Agreement: Types



The **most common purchase agreement is for a residential resale**; in other words, the sale of an existing home. However, different standardized purchase agreements may be available for other situations, such as newly constructed homes or vacant land.

New Construction. Developers often use different contracts, one for a home that has been built and one for property where construction is not completed or perhaps not even started. Construction contracts would include provisions related to completion dates, extensions, payment schedules, and substitution and change allowances. In either case, a new home contract likely includes standard **builder warranties** that would not appear in a residential resale contract. However, keep in mind that builder contracts tend to favor, you guessed it, the builder. Therefore, familiarize yourself with the form, ask your broker if you have any questions or concerns, and make sure your client knows what they're signing. Again, suggest an attorney review the completed form before making an offer.

Vacant Land. A contract for the sale of land or acreage is similar to a residential resale contract but it will likely be in a different form. The contract usually includes an addendum that addresses land use issues, such as surveys, known easements, zoning, flooding, soil composition, utility services, and wetlands or other environmental concerns. Before handling a vacant land purchase, consult with your broker. This is a specialized type of property sale, and it requires specialized expertise.

Purchase Agreement: Essential Elements

A valid and enforceable purchase agreement must contain these **essential elements**:

Parties to the contract	Names of the buyers and sellers
Description of the property	Street address and a complete legal description
Purchase price and method of payment	For example, any down payment and all financing details, such as "Buyer is pre-approved for conventional financing with an 80% loan-to-value ratio and a purchase price of \$325,000.;" if the seller is financing the sale, those details are specified
Interest being conveyed with the sale	For example, the entire bundle of rights or the bundle less subsurface mineral rights
Terms of the sale	Specified clearly, including an identification of any items belonging to the seller to be included or excluded from the sale
Critical dates	Deadlines for clearing contingencies, closing or possession, etc.; many contracts include a "time is of the essence" clause that could void the contract as soon as an indicated deadline passes

Typically, purchase agreements also describe the **process for closing** the transaction and name the person who will act as the **closing agent**.

Purchase Agreement: Contingency Clauses



A **contingency** is a way for your client or any party of a contract to get out of the contract due to some circumstance or condition. If the condition is not met, the other party can withdraw **without liability for breach of contract**. Contingencies are important in residential purchase contracts because they limit a buyer's or seller's responsibility to fulfill the agreement and close the deal.

Recall that the party who **benefits** from or is being protected by a condition or contingency in a contract can **waive** it; but, if a condition is included for the benefit of both parties then neither can waive it without the other's consent. Contingencies may also be known as **escape clauses** or **kick-out clauses**.

Common Financing Contingency Clauses

There are many common contingencies related to financing, for example:

- **Financing Clause.** A contingency that the buyer can obtain financing upon agreeable terms, including the amount borrowed, the type of mortgage or deed of trust, the maximum interest rate, the minimum term, etc.
- **FHA or VA Loan Clause.** A contingency that the buyer can obtain an FHA-insured or VA-guaranteed loan commitment. Note that this contingency is included as part of an **addendum** to the purchase agreement.
- **Loan Assumption Clause.** A contingency that the buyer can assume the seller's loan.
- **Seller Financing Clause.** A contingency that the buyer can obtain financing from the seller.
- **Land Contract Clause.** A contingency that the seller grants a land contract to the buyer.
- **Sale of Buyer's Home Clause.** A contingency that the buyer can sell another home before the buyer is bound to purchase another.



A seller will likely not be enthusiastic about having to wait for a prospective buyer to fulfill the Sales of Buyer's Home Clause. Most such contingencies include a **bump clause**, which allows the seller to **keep the property on the market** during that period. If the seller receives another offer before the buyer's current home is sold, the seller can invoke the bump clause to either:

- Demand that the buyer waives the contingency and proceed with the sale, which may involve getting a swing loan until the buyer's current house is sold.
- End the transaction so the seller can accept the second offer.

Appraisal Contingencies

Buyers may want to make their offer contingent on the home **appraising** at, or above, the purchase price. Because the appraiser is hired by the lender and is independent of the actual transaction, this is another financing-related contingency that is considered reasonable. If the buyer is reliant on financing, the lender will only make the loan based on the lower of the sale price or appraised value. In this case, if the appraised value is lower than the sale price, the parties have four options:



1. The buyer can terminate based on the appraisal contingency.
2. The buyer can make up the difference between the sale price and appraised value by increasing the down payment.
3. The seller can reduce the sale price to match the appraisal amount.
4. The parties can negotiate a partial sale price drop, along with a partial increase in the buyer's down payment to cover the appraisal gap.

For example: Morris and Chelsea are buying Dan's home for \$425,000 and financing the purchase. When the property is appraised, however, the appraised value is only \$410,000, a difference of \$15,000. Morris and Chelsea don't want to terminate, so they could increase their down payment by \$15,000, or they can ask Dan to reduce the sale price to \$410,000, or they can increase their down payment by \$7,500 and Dan can reduce the sale price by \$7,500. In any case, the parties must find a way to close the appraisal gap so that Morris and Chelsea's financing will go through.

Other Common Contingency Clauses

Other common contingencies may include:

- **Condominium Review Clause.** Allows review and acceptance of the condominium association documents.
- **Inspection Clause.** Relates to systems such as electrical, plumbing, roofing, drainage, heating, air conditioning, etc., and specifies they are in adequate supply and working properly.
- **Walk-Through Clause.** Allows the buyer the opportunity to walk through the home and accept (or not) the condition and, therefore, the purchase contract.
- **Absent Party Clause.** Allows the party to accept an offer by telephone or other non-signatory method, and later sign within a fixed timeframe.
- **Wood Infestation Clause.** Gives the buyer the opportunity to have the property inspected for termites and provides options if there are problems.
- **Certificate of Occupancy Clause.** Puts the seller on notice that if the municipality requires a certificate of occupancy, the seller must provide it.
- **Approval of Another Clause.** Allows the buyer to rescind the offer if another named person does not approve, for example, an out-of-town spouse who has not yet seen the property.



Failure to Satisfy Contingency



When a contingency written into the purchase agreement cannot be met, the typical course of action is to provide some sort of **notice of inability to satisfy the contingency**. Such a notice would:

- Provide the reason for not clearing the contingency.
- Declare the purchase agreement to be void.
- Reiterate the provisions in the purchase agreement related to the disbursement of any earnest money deposit.

For example: Martin and Everett are buying Jeannie's home, but the loan they had counted on using for financing is no longer offered due to a federal rule. Martin and Everett's agent prepares a notice of termination citing the financing contingency and type of loan specified in the purchase agreement, and the fact that the loan is no longer available. Because they made a good faith effort to obtain financing and their financing fell through due to no fault of their own, it's likely Martin and Everett can use the financing contingency to terminate and get a refund of their earnest money.

Purchase Agreement: Contract Addendum

Generally, conditions related to the performance of the contract are written into the contract itself, but sometimes they are found in an **addendum**. Addenda may be attached to and made part of a contract **before the contract is signed** to cover provisions that are not in the standard contract.

Earlier, we mentioned an **FHA/VA financing addendum** to a residential real estate purchase agreement. Another example is a short sale addendum. With a short sale, the seller's lender agrees to accept less than what the seller currently owes, usually as a strategy to avoid foreclosure. Because of the complexity of a short sale, an addendum is usually included to address the unique conditions and extra time that may be needed with a short sale.

Purchase Agreements: Closing and Possession Dates



One last essential component of a purchase agreement is the setting of **closing and possession dates**.

The parties should **be realistic** in setting a closing date. They need to leave adequate time to clear various financial hurdles and contingencies, such as finalizing a mortgage loan and allowing time for inspections and possible repairs if the inspections reveal significant but correctable problems.

If a closing date is fast approaching and it appears that a delay might occur that would **prevent a contingency from being fulfilled**, the parties can agree to extend the closing date by signing a **written extension agreement** that amends the original agreement.

In most transactions, the **closing date** and the **possession date** are the same day. The buyer takes possession of the property on the same day that the transaction closes. However, the parties might agree on a different possession date. For instance, the buyer wants to take possession early to begin repairs or

the seller needs additional time to move into a new residence. The parties may execute a separate **rental agreement** that covers the period between closing and possession.

Purchase Agreements: Time is of The Essence



Caution! Pay attention to deadlines written in the purchase agreement. They're important! Because the closing date is unchangeable without mutual agreement and because many activities must be completed prior to closing, purchase agreements will often include the phrase "**time is of the essence**." The purpose of this clause is to put the parties on notice that **timely performance** is an essential part of the contract. When there is a "time is of the essence" clause in the contract, failure to meet the deadline is a **material breach** and the contract is void.

When a contract does **not** provide a time is of the essence clause, the parties are generally allowed a **reasonable time** to perform, even if a specified deadline has passed. However, the contract could be voidable by the party who has been meeting the deadlines stated in the contract.



Purchase Agreements: Required Signatures



There is a saying in real estate, "It takes one to buy, and two to sell." This means that, while one spouse may commit the other spouse to buy a property, all parties with an ownership interest in the property must sign as sellers. So, in most states, including Tennessee, if the seller is married, **both spouses must sign an offer**, even if only one spouse is the owner of record.

Additionally:

- If the property is held by several family members, every person on the title must sign the offer to purchase unless one is given power of attorney to sign for the others.
- If the seller or the buyer is a legal entity, such as a corporation, the authorized legal representative must sign.

The buyer's signature turns a purchase agreement into an **offer**; the seller's signature turns it into

a **binding contract**.

Licensees are required to provide the parties with a copy of signed purchase agreements at the time they are signed.

Contract Offer and Acceptance: Set Review Dates



When the market is competitive, property sellers may be inclined to **set a specific date to review offers**. It is important to understand and explain to your buyer and seller clients that setting a specific offer review date does **not** contractually obligate the seller to only review offers on that date because the buyer and seller, at this point, have not signed a contractual agreement. Additionally, if the seller sets an offer review date of March 4 but receives an exceptionally good offer on March 2, they can review and accept the offer received on March 2; so, a buyer's agent must **not** assume that they can wait until the set offer review date to submit an offer.

From a buyer's perspective, when submitting an offer, an expiration date on the offer can be set prior to the seller's set offer review date. For example, it's Monday, March 1 and the buyer-client wants to hear a response to an offer by Tuesday, March 2. The seller's set review date is Thursday, March 4, so the seller can choose to review the offer by the requested date or wait to review the offer on Thursday.

Contract Offer and Acceptance



For a contract to be a binding obligation, **all parties must consent** to its terms. This **mutual agreement**, sometimes referred to as a “meeting of the minds,” is achieved through **offer** and **acceptance**.

An **offer** occurs when one party (the **offeror**) proposes a contract to another party (the **offeree**). An offer must meet some basic requirements:

- **Intent to Contract.** The explicit words and actions of the person making the offer (the offeror) must reasonably indicate the intention of forming a contract. The intent requirement is concerned with **objective intent** (what the offeror says and does) rather than **subjective intent** (what the offeror is actually thinking). If a person says or does something that a reasonable person could interpret as a serious expression of the intention to make a contract, that may be a legally binding offer—even if the person was just kidding.

- **Definite Terms.** The offer must also have definite terms. An offer is not binding if it is too vague. The offer should state at least such basic items as the subject matter, the time for performance, and the price. In some cases, a court will fill in the blanks with a reasonable time or a reasonable price, but if too many terms are left unspecified, no contract is formed.

- **Communication.** The offer must be clearly communicated to the offeree.

TREC Rule: Offers to Purchase

Rule 1260-02-.08 sets forth:

- 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 of the offer and return the same to the offeror or the offeror’s agent.



Note: It is desirable for the supervising brokers of the selling licensee and listing licensee to review and sign each real estate contract **before** it is submitted to the seller, although that is not always possible. However, such supervising brokers must review and sign the real estate contract **as soon as possible** after it is received, and, in all cases, **prior to closing**.

Presenting Multiple Offers



When multiple offers are received, the listing agent should discuss the terms and conditions of each offer to help the seller make an informed decision. In a multiple-offer situation, the seller may:

- Accept one offer and reject all other offers.
- Accept one offer and consider another offer as a backup contract.
- Suggest revisions to one offer, known as a counteroffer, and reject all other offers.
- Reject all offers completely.

Understand, the fact that there are multiple offers is **not** considered a material fact that the listing agent must disclose to buyers but may disclose this fact with **permission from the seller**.

Backup Offers



What happens if an offer comes in **after a seller has accepted** a previous offer? Does the obligation to present all offers end once an offer is accepted? No, it does not. Licensees are required to submit all offers until the transaction closes.

However, a buyer, knowing that an offer has been accepted, might be enthusiastic enough about a property that they want to make a **backup offer**. Backup offers should be made **contingent on the failure of the first contract**. The concept of **tortious interference** means that you **cannot interfere with an existing contract**. In other words, you cannot induce a seller client to renounce a signed contract if a better offer comes along.

Let’s say that you present your seller client with an offer that they accept. The next day, another offer comes in that is much better than the first offer, and your client asks you how they can back out of that first offer. What should you do? **This is when you refer your client to their attorney**. If they back out, not only might the **first buyer sue them for breach of contract**, but the **broker for that**

first buyer is entitled to a commission for bringing the seller a ready, willing, and able buyer at terms with which the seller agreed. If the seller were to accept the better offer, they could be obligated to pay the full commission to two buyer's brokers.

Similarly, buyers who make a backup offer must understand that they are obligated to perform if the primary contract falls through unless they retract their offer **before** moving into the first position. Buyers, therefore, should be very cautious about signing offers for any other property when they are in the backup position.

Contemporaneous Offers

Contemporaneous offers are offers from two or more buyer clients, **represented by the same licensee**, to purchase the **same property** when those offers will be considered by the seller at the same time. Buyer's agents should **disclose the existence of contemporaneous offers** to their clients in writing. Disclosure allows a buyer client to seek representation from a different licensee if desired.

Why disclose contemporaneous offers? If you have one buyer client who offers \$190,000 and another buyer client who offers \$200,000 on the same property, and your commission is based on a percentage of the selling price, do you potentially have a conflict of interest? Could you say beyond a shadow of a doubt that you are advocating equally for both of your buyer clients? Think about the agency obligations at risk when handling contemporaneous offers.

Acceptance of Offer

Acceptance is part of the mutual consent needed to reach a "meeting of the minds." When an offer is accepted, the offeree **agrees to the terms** of the offer and a **contract** is formed. At this point, the parties are **legally bound**; neither can back out unless the other is willing to end the contract. Note these key requirements of acceptance:

1. **Acceptance can be made only by the offeree.** Acceptance can be made only by the offeree may sound like an obvious requirement; however, it is also an important consideration.
2. **It must be clearly communicated to the offeror.** One party may have decided to accept an offer, but until that party communicates directly that the offer has been accepted, the offer can be revoked.
3. **It must be made in the manner specified.** Many offers specify a certain manner of acceptance (e.g., "in writing," "via fax," or "by delivering a cashier's check"). The offeree's acceptance is not effective unless the instructions in the offer are followed. If the offer states acceptance must be in writing, but the offeree calls and accepts over the phone, it does not create a binding contract; the offeror can still revoke the offer. When an offer does not specify how it is to be accepted, any reasonable method of acceptance effectively binds the offeror and prevents revocation. This rule applies to all contracts—even those required by law to be in writing and signed, such as real estate purchase agreements. The **offeror is bound by an oral acceptance** even if the contract is required to be in writing, but only a written, signed acceptance is binding on the offeree.
4. **It must not vary the terms of the offer or otherwise impose conditions.** To create a contract, the offeree must accept **exactly** those terms offered. The offeree cannot modify them or add new terms. If an offeree makes material changes to the offer, the response is not an acceptance, it is a **counteroffer**.



Termination of Offers

Termination of Offers

- Revocation
- Rejection
- Death or incapacity
- Destruction of property



To create a binding contract, **an offer must be accepted before it terminates**. Offers should state that they will **expire at a certain time**, for example: "by 10 p.m. on March 31". When an offer does not specify an expiration date, it's not good forever. It generally expires after a "reasonable" time, which if it came down to it, would be up to the courts to decide—a very good reason for having a deadline.

Even when an offer has an expiration date, a client's offer may be terminated sooner by other means, including:

1. **Revocation.** An offer is terminated if the **offeror revokes or withdraws it before the offeree accepts it**. At the point that the offer has been revoked, the offeree has lost the chance to accept it. This is true even if the offer stated that it was irrevocable or that it wouldn't expire until a particular date. It's a different matter if an offeree pays the offeror a sum of money to keep the offer open. Then the offer can't be revoked during the specified period.
2. **Rejection.** An offer is also terminated when it's **rejected by the offeree**. If I reject your offer on Monday, I can't change my mind and call back on Tuesday to accept it. If you're still interested in the deal, we can start the process of offer and acceptance over again, but your original offer was terminated by my rejection. If you've lost interest, I can no longer hold you to your offer.
3. **Death or incapacity.** The **death or incapacity of one of the parties** makes it impossible to form a contract. This would also terminate an offer before a stated expiration date. For instance, suppose an offer made on March 1 states that it will expire on March 31. If the offeror dies on March 23 before the offer has been accepted, the offer terminates on that date; it doesn't continue until March 31. The offeree cannot create a contract by accepting the contract on March 24.
4. **Destruction of the property.** An offer terminates if the **improvements that are the subject of the offer** are destroyed by fire or natural disaster.

Counteroffer



In a perfect world, the seller will accept the offer and the transaction can move forward. It's more typical, as you can imagine, for the seller to **reject** the original offer and make a counteroffer. A **counteroffer** represents a change to some of the terms of the original offer and is, therefore, a **rejection and a new offer**. The original offeror has become the **offeree** (sometimes called a counterofferee), and the original offeree is now the **offeror** (sometimes called a counterofferor). A binding contract is not created unless the counteroffer is accepted.

If a counteroffer is rejected, it is too late to go back and accept the original offer. The counterofferor can start again with a new offer identical to the original one, but if the original offeror has had a change of heart, they can no longer be held to the original offer.

This process of negotiation will continue until both the buyer and the seller agree to the terms in the sales contract—known as a **meeting of the minds**—and all contingencies or clauses are satisfied.

Note that when presented with multiple offers, a seller should counter them one at a time. Making multiple counteroffers could result in multiple acceptances, which could have serious legal consequences.

TN Contract Law: Prohibited Acts



Recall from Chapter 1, the Commission may suspend or revoke a license for the following prohibited acts related to contracts:

- Making any substantial and willful misrepresentation (*Tenn. Code Ann. 62-13-312(b)(1)*).
- 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 the promise (*Tenn. Code Ann. 62-13-312(b)(2)*).
- Acting for more than one party in a transaction without the knowledge and consent in writing of all parties for whom the licensee acts (*Tenn. Code Ann. 62-13-312(b)(7)*).
- Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution (*Tenn. Code Ann. 62-13-312(b)(8)*).
- Using or promoting the use of any real estate listing agreement form, real estate sales contract form, or offer to purchase real estate form that fails to specify a definite termination date (*Tenn. Code Ann.*

62-13-312(b)(9)).

- Inducing any party to a contract, sale, or lease to break the contract for the purpose of substituting a new contract, where the substitution is malicious or is motivated by the personal gain of the licensee (*Tenn. Code Ann. 62-13-312(b)(10)*).

Legal vs. Equitable Title



Once a valid purchase agreement is signed by both parties, it conveys **equitable title** to the buyer. This is a limited ownership interest in property which means the buyer has the right to acquire legal title. **Legal title**, the actual lawful ownership of real property, is conveyed to the buyer at closing upon full performance of all terms in the purchase agreement.

When property is sold via a land contract, rather than a purchase agreement, legal title is not passed to the buyer until all, or a specified portion of, payments have been made.

TN Contract Law: Record Retention

Licensees must keep records relating to any real estate transaction for three years following its consummation (*Tenn. Code Ann. 62-13-312(b)(6)*), including the following documents:

- Listings
- Offers (even offers that did not become contracts)
- Contracts
- Closing statements
- Agency agreements
- Agency disclosure documents
- Property disclosure forms
- Correspondence



Check Your Understanding #3

Using your notes link or on a piece of paper, identify if each statement is “true” or “false”. When finished, scroll to the end of the course to see the answers.

1. Angie hires a real estate agent to list her house. Joe hires a real estate agent to find a house. His agent takes him through Angie’s property. Joe likes it, and together they draw up an offer. Joe signs it and his agent presents it to Angie’s agent. Angie is in complete agreement with the terms of the offer. She signs it and hands it back to her agent. This is a valid, enforceable contract.
2. Blake, the seller, signs the purchase agreement from the prospective buyer Emily, and hands it back to his agent. Emily can withdraw her offer at this point without liability.
3. Sara’s house is on the market for \$280,000. Devin offers to buy it for \$270,000. Sara is eager to sell but wants to get at least \$275,000. She crosses out the offer price of \$270,000 and writes in \$275,000, initials and dates it, then returns it to Devin. This is an example of a counteroffer.

Discharge of a Contract



Discharge of contract means the contract has been canceled or terminated. This isn’t always a bad thing—in most cases, contracts discharge naturally when all of their terms have been met. Sometimes, a contract is discharged before that can happen, however. There are several methods for your clients and other parties to discharge a valid, enforceable contract:

- **Full Performance.** Ideally, a contract is discharged, that is, terminated, by full performance, which happens when each party to the contract has met all of their contractual obligations. For example, at the closing of a sales transaction, all contingencies have been met, the buyer has provided the agreed-upon purchase price, and the seller has granted the buyer a deed to the property. When a contract is discharged due to full performance, it is said to be executed.
- **Assignment.** It’s also possible for one party to a contract to withdraw from their obligations without terminating the contract. This can be done through an assignment or novation. In an **assignment**, one of the parties, the assignor, **transfers** their rights, benefits, and duties under a contract to another person, the assignee. Assignment transfers the assignor’s interest but not their liability under the contract. Contracts are generally assignable unless their terms explicitly state otherwise. However, a contract for personal services, such as a listing agreement, can’t be assigned without the consent of the other party. For example: Barb is renting a house and since she’ll be out of the country for six months, she assigns the lease to Nancy. Nancy, as the second tenant, and assignor Barb, as the original tenant, share legal responsibility for paying rent. Nancy has primary liability but Barb remains secondarily liable. If Nancy doesn’t pay, the property owner may be able to sue both.
- **Novation.** Novation is the **substitution** of a new obligation for an existing one, with the intent to extinguish the original contract. A novation may also involve the substitution of a new party for an original party. Novation **relieves the withdrawing party of liability**. To help you remember, the word “novation” has the same root as “novel” meaning “new.” For example, Brad enters into a contract with Charlie to buy Charlie’s house for \$500,000. Brad then enters into a separate contract with Charlie and Deloris for Deloris to buy Charlie’s house and to discharge Brad’s duties to Charlie. This new contract is called a novation.

So, if full performance, that is completing all terms of the contract, is the ideal way to discharge or terminate a contract, let’s look at the less wonderful ways a contract may be terminated by your client or other parties.

Rescission. Sometimes, both parties may **mutually agree** to terminate all contract obligations. The parties sign an agreement that returns them, as much as possible, to their original positions. Because forming a contract involves consideration (in other words, a promise for a promise), returning to one’s original position means the parties are let off the hook for those promises. The return of consideration is known as **restitution**.

Cancellation. The parties can also mutually agree to terminate any remaining terms in their contract without affecting any prior terms they’ve already fulfilled. For example, the parties may agree to cancel, and that the buyer’s earnest money deposit will not be returned. This could happen if the buyer changes their mind, allowing the seller to retain the earnest money deposit as liquidated damages.

Partial Performance. The original obligations may be extinguished if both parties agree to accept something less than the full terms of the original contract, referred to as partial performance. This may also be called **accord and satisfaction**. For example: Marsha is buying Greg’s property. She originally agreed to give Greg seven days grace period to remain in the house after closing. Greg found he no longer needed all seven days, and they agreed in writing for Marsha to possess the property earlier than planned.

Abandonment. Another way in which a contract may be discharged is by abandonment, where one party goes AWOL on what was otherwise a legally binding contract. For example: Frank makes an offer to buy Cynthia’s house and Cynthia accepts. She communicates her acceptance to Frank. They have formed a binding contract. Frank then decides he doesn’t want to buy Cynthia’s house. All of the contingency deadlines have passed so he has no recourse. He just doesn’t bother showing up at closing. Did Frank get out of that contract? Sure. Does Cynthia have legal action against him? Absolutely, but she can’t force Frank to buy her house. So, he’s managed to get out of the contract through abandonment but will likely end up in court.

Impossibility to Perform. Contracts can also terminate when the performance of a contractual obligation becomes illegal or impossible because of a change in the law after the contract was created. This may be referred to as an **impossibility of performance**. Or, although rare, the property could have been **destroyed by fire or other disaster** between signing the purchase agreement and the closing date. Because at this point, the buyer has

only equitable title, which is the right to acquire legal title but not the legal title itself, the seller bears the risk of loss in such a case. The buyer would not be required to go through with the transaction. Alternatively, the buyer may opt to claim any insurance proceeds for real property damage or renegotiate the terms of the contract. Such provisions would need to be negotiated and committed to writing.

Breach of Contract



While both parties may enter into a contract willingly and with every intention to move forward, life happens. Delays, financing problems, and other unexpected events can pop up and prevent a contract from being fully executed.

Recall, a **breach of contract** occurs when one party to a contract fails to perform their obligations under the contract with **no legal cause**. For example, depending on the specifics of the contract, a breach can occur when a party:

- Fails to perform the duties of the contract by an indicated deadline.
- Does not perform according to the terms of the agreement.
- Refuses to perform or abandons the contract.

When a breach is significant, or **material**, the non-breaching party may be excused from further obligation to perform and/or may be able to seek remedy in court.

Materials Vs. Substantial Performance

It's not always easy to determine whether a material breach has occurred.

For example: Amy hires Curtis to renovate her kitchen. Curtis does all the things he promised to do in the contract, but Amy feels they were not done well, so she refuses to pay. Or, Curtis does nearly everything promised, but some details are not finished, and he takes longer to complete the work than agreed. (That never happens in remodels, does it?!) In these cases, there is room for argument about whether a material breach occurred. Amy's obligation to pay Curtis may depend on whether there has been substantial performance or a material breach.

Substantial Performance. One party does not perform all contractual obligations but does enough so that the other party is required to fulfill their obligation. In our example, if Curtis has not fulfilled every detail of the contract but has carried out its main objective (renovating the kitchen), then it may be treated as substantial performance. Although Amy may try to sue for damages because of the unfulfilled details, she is required to perform her obligation, which is to pay Curtis as agreed.

Material Breach. A breach is material when it's important enough to excuse the non-breaching party from performing their contractual obligations. So, if Curtis removes the cabinets and never finishes the job, Amy may be excused from having to pay Curtis, and she may also be able to sue Curtis for the damages to her kitchen.

Remedies for Breach



If one party to a contract performs badly or refuses to perform, the injured party could choose to take **legal action to mitigate** the losses resulting from the breach. In a **breach of contract lawsuit**, the court will interpret the parties' intentions by relying on the terms within the written document. This is sometimes referred to as the **four-corners rule**, meaning only what is contained within the four corners of a written document can be used to determine the outcome.

The main remedies for breach of contract are:

- **Accept Liquidated Damages.** The parties agree in advance to an amount that will serve as full compensation in the event of a breach.
- **Lawsuit for Damages.** The injured party can sue for damages. A suit for damages typically involves a request to the court to be financially compensated for harm suffered.
- **Lawsuit for Specific Performance.** The party not in breach asks the court to require the other party to perform as agreed in the contract.
- **Lawsuit for Rescission.** The party not in breach can bring a suit in court to cancel the contract and ask the court to put the parties back in their original positions.

Sometimes the parties may agree to some sort of alternative dispute resolution, such as an **arbitration hearing**, to avoid the costs of a court action.

Check Your Understanding #4

Using your notes link or on a piece of paper, match each definition with one of these terms: Assignment, novation, recession, and substantial performance. When finished, scroll to the end of the course to see the answers.

1. Promisor doesn't perform all of their contractual obligations but does enough so that the promisee must fulfill their part of the deal
2. Termination of a contract where each party returns what was acquired

3. Rights under a contract are transferred to another party, with the original party secondarily liable
4. New party is substituted in a contract without liability to the old party

CHAPTER 5: TENNESSEE PROPERTY DISCLOSURE LAW

Chapter Overview

Recall, a licensee who provides real estate services owes **all parties** to the transaction the following duties (*Tenn. Code Ann. 62-13-403*). Licensees must:

- **Disclose** to each party any **adverse facts** of which the licensee has actual notice or knowledge.
- **Disclose** to each party 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.
- **Not engage in self-dealing** nor act on behalf of the licensee's immediate family or on behalf of any other party in which the licensee has a personal interest **without prior disclosure** of the interest and the timely written consent of all parties.

In Chapter 3, we covered requirements specific to agency relationship disclosures. In this chapter, we will focus on **property disclosure obligations** of Tennessee real estate licensees.

Chapter Overview: Key Terms

Key terms important to understanding the content presented in this chapter include:

Actual Damages—An award to compensate the plaintiff for actual losses caused by the defendant's act or failure to act.

Adequate Facilities Tax—A privilege tax (a tax on the privilege of carrying on a business) imposed by a county or city for engaging in the act of development.

Adverse Facts—Conditions or occurrences generally recognized by competent licensees that have a negative impact on the value of real estate, significantly reduce the structural integrity of improvements to real property, or present a significant health risk to occupants of the property.

As Is—Buyer accepts the property in its present condition.

Impact Fee—A charge imposed by a county or municipal government to regulate new development on real property.

Percolation Test—A test to determine the ability of soil to absorb and drain water to assess the feasibility of a septic system or injection well for sewage treatment.

Residential Property Disclaimer Statement—A statement indicating that the owner (seller) makes no representations or warranties as to the condition of the real property and that the buyer will be receiving the real property "as is."

Residential Property Disclosure Statement—A form completed by an owner (seller) regarding the condition of the property, including any material defects known to the owner.

Stigmatized Property—A property that may be considered undesirable because of a past event, such as a crime or death.

Chapter Overview: Learning Objectives

Upon the completion of this chapter, you will learn how to:

- L016: Identify property disclosure requirements set forth by the Tennessee Residential Property Disclosure Act.
- L017: Recognize situations in which a real estate licensee does and does not have a duty to disclose property conditions.

Disclosure of Adverse Facts

Disclosure of **adverse facts** about a property is one of the duties a licensee owes to clients and customers (*Tenn. Code Ann. 62-13-403*).

Under the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-102(2)*), **adverse facts** are defined as conditions or occurrences generally recognized by competent licensees that:

- Have a **negative impact on the value** of real estate, or
- Significantly **reduce the structural integrity** of improvements to real property, or
- Present a **significant health risk** to occupants of the property.

Note: Known adverse facts must be disclosed; however, licensees are **not** obligated to discover latent defects in a property or to advise on matters outside the scope of their real estate license (*Tenn. Code Ann. 62-13-405(a)*).

The Seller's Duty to Disclosure

DISCLOSURE



Tennessee, like many states, has determined that **sellers** owe buyers some degree of disclosure about adverse conditions and characteristics of the property they wish to purchase.

Residential property disclosure obligations are found in the Tennessee Code Annotated, Title 66, Chapter 5, Part 2 (66-5-201 through 66-5-213), also referred to as the **Tennessee Residential Property Disclosure Act**.

Transactions Covered by the Act

The Tennessee Residential Property Disclosure Act applies to **transfers of residential real property consisting of one to four dwelling units** by sale, exchange, installment land sales contract, or lease with option to buy (*Tenn. Code Ann. 66-5-201*).

The law applies **whether or not a real estate licensee is involved** with the transaction.

Exempt Property Transfers

Some transfers of residential property are specifically **exempt** from the residential property disclosure requirements set forth in the Tennessee Residential Property Disclosure Act (*Tenn. Code Ann. 66-5-209*), including the transfer of real property:

- Pursuant to a court order;
- Under a deed of trust resulting from default, a foreclosure sale, or a deed in lieu of foreclosure;
- Involving a decedent's estate, guardianship, conservatorship, or trust;
- From a debtor under a chapter 7 or chapter 13 bankruptcy to a creditor or third party by a deed in lieu of foreclosure or quitclaim deed;
- Between co-owners when ownership is by a tenancy by the entirety, joint tenancy, or tenancy in common;
- Between spouses or lineal relatives (e.g., children, grandchildren, parents, grandparents);
- Between spouses resulting from a divorce or property settlement;
- To or from a government entity or housing authority;
- At a tax sale;
- At a public auction;
- On which the owner has not resided for the previous three years; or
- Involving the first sale of a dwelling (i.e., new construction) if the builder offers a written warranty.



Seller Disclosure or Disclosure Requirement

For transfers of residential real property covered under the Tennessee Residential Property Disclosure Act, the **owner of the property (seller) must provide the buyer with** one of the following:

- Residential property **disclosure** statement
- Residential property **disclaimer** statement

Each of these statements is described next.

Disclosure Statement

In most residential transactions, the seller provides the buyer with a completed [Tennessee Residential Property Condition Disclosure](#) form to share property conditions, including any material defects known to the seller. Select the link to review the content of a sample Tennessee Residential Property Condition Disclosure form.

The residential property disclosure statement used by a seller does **not** have to be the form used in this course; however, the form used **must include all items and acknowledgment provisions** contained in this sample disclosure form (*Tenn. Code Ann. 66-5-210*).

The disclosure statement is completed by the **seller**. The representations contained in the disclosure are those of the seller and are **not** the representations of any real estate licensee.

The form must include a notice to buyers and sellers that they **may wish to obtain professional advice and/or inspections** of the property. However, the seller is **not** required to undertake any independent investigation or inspection of the property to make the required disclosures (*Tenn. Code Ann. 66-5-202(1)*).

Note: The disclosure statement is **not** a warranty of any kind by a seller and is not a substitute for inspections either by the buyer or by a professional home inspector.

Disclaimer Statement

As an alternative to the residential property disclosure statement, a seller can provide a residential property **disclaimer statement** stating the following (*Tenn. Code Ann. 66-5-202(2)*):

- The seller makes **no representations or warranties as to the condition** of the real property.
- The buyer will be receiving the real property **“as is”** (i.e., with any existing defects).

The seller may provide a disclaimer statement **only if** the buyer **waives the right** to receive the disclosure statement.

Delivery of Disclosure or Disclaimer Statement



The residential property disclosure statement or residential property disclaimer statement must be provided to the buyer **prior to acceptance of a real estate purchase contract** (*Tenn. Code Ann. 66-5-203(a)*).

The disclosure or disclaimer statement may be:

- Included in the real estate purchase contract;
- An addendum to the contract; or
- A separate document.

Note: For purpose of the Tennessee Residential Property Disclosure Act, **real estate purchase contract** means a contract for the sale, exchange, or lease with option to buy, and **acceptance** means the full execution of a real estate purchase contract by all parties (*Tenn. Code Ann. 66-5-203(a)*).

Reliability of Expert Opinions Allowed



When completing property disclosure statements, sellers **may rely** on reports or opinions delivered by **experts**, including the following (*Tenn. Code Ann. 66-5-204(c)*):

- Licensed engineers
- Land surveyors
- Geologists
- Wood-destroying insect control experts
- Contractors
- Other home inspection experts

Liability of Errors, Inaccuracies, or Omissions



transmitting it.

According to the Tennessee Residential Property Disclosure Act (*Tenn. Code Ann. 66-5-204(a)*), a seller is **not liable for any error, inaccuracy, or omission** of any information delivered to the buyer if:

- The **seller had no knowledge** of the error, inaccuracy, or omission; or
- The information was **provided by a public agency or by one of the experts** listed above; or
- The seller reasonably **believed the information to be correct**; and
- The seller was **not grossly negligent** in obtaining the information from a third party and

Changed Circumstance



The seller must:

- **Inform** the buyer **at or before closing of any material changes** in the physical condition of the property that have occurred since the initial disclosure, or
- **Certify** to the buyer at closing that the condition of the property is **substantially the same** as it was when the disclosure form was provided (*Tenn. Code Ann. 66-5-205*).

Duties of Real Estate Licensees

A seller's agent (listing broker) **must inform the seller of their rights and responsibilities** under the Tennessee Residential Property Disclosure Act (*Tenn. Code Ann. 66-5-206*).

Similarly, a buyer's agent **must inform the buyer of their rights and responsibilities** under the law. If a buyer is **not** represented by a licensee, this obligation to inform the buyer **falls to the seller's agent**.

If a licensee performs these duties, the licensee is **not** liable to any party for a violation of the law or for failure to disclose information related to the condition of the property.

However, a licensee may be subject to **legal action** for:

- Intentionally **misrepresenting or defrauding** a buyer.
- **Failing** to disclose **known adverse facts**.

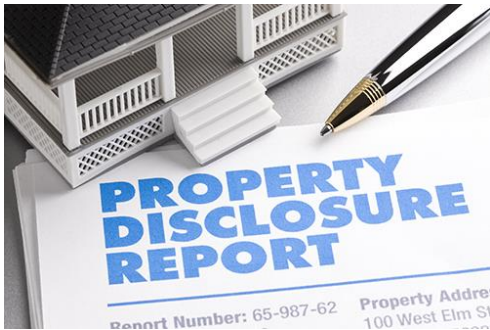
Licensees Not Responsible for Third-Party Info

No action can be taken against a real estate licensee for the information contained in any reports or opinions prepared by any of the following experts (*Tenn. Code Ann. 66-5-208(d)*):



- Engineers
- Land surveyors
- Geologists
- Wood-destroying insect control experts
- Termite inspectors
- Mortgage brokers
- Home inspectors
- Other home inspection experts

Additional Seller Disclosures



In addition to the disclosures already discussed, sellers **have disclosure obligations** related to the following:

- **Impact fees and adequate facilities taxes** (*Tenn. Code Ann. 66-5-211*). Sellers involved in the first sale of a dwelling must disclose the amount of any impact fees or adequate facilities taxes. An **impact fee** is a charge imposed by a county or municipal government to regulate new development on real property. The amount is related to the costs resulting from the development, and the revenues are invested in the area of the development. An **adequate facilities tax** is a privilege tax (a tax on the privilege of carrying on a business) imposed by a county or city for engaging in the act of development.

• **Percolation tests or soil absorption rates** (*Tenn. Code Ann. 66-5-212(a)*). Sellers must disclose the presence of any known exterior injection well and the results of any known percolation test or soil absorption rate performed on the property. A percolation test determines the ability of the soil to absorb and drain water to assess the feasibility of a septic system or injection well for sewage treatment.

- **Foundation moves** (*Tenn. Code Ann. 66-5-212(b)*). Sellers must disclose if they know that the residence has ever been moved from an existing foundation to another foundation.
- **Sinkholes** (*Tenn. Code Ann. 66-5-212(c)*). Sellers must disclose the presence of sinkholes on the property.
- **Planned unit developments (PUDs)** (*Tenn. Code Ann. 66-5-213*). Sellers must disclose if the property is located within a planned unit development and must provide buyers with a copy of the development's restrictive covenants, homeowner bylaws, and master deed.

What Conditions Do Not Require Disclosure?



Now that you've learned about information that must be disclosed, let's quickly look at some conditions that **neither a seller nor a licensee is required to disclose**.

A property owner or a licensee will not face disciplinary action for failing to disclose to a buyer of real property the following circumstances (*Tenn. Code Ann. 66-5-207*):

- **HIV or other disease** A licensee is **prohibited** from disclosing that an occupant or former occupant has or is suspected of having a **disability** as defined by the federal Fair Housing Act. For example, telling a potential buyer that the seller has acquired immunodeficiency syndrome (AIDS) constitutes **unlawful discrimination** under federal law and would **not** be allowed. According to Tennessee law, an owner or licensee will **not** be subject to legal action for **not disclosing** that an occupant was infected with human immunodeficiency virus (HIV) or other diseases that, based on medical evidence, is highly unlikely to be transmitted through the occupancy of a dwelling place.
- **Stigmatized property**. Under Tennessee law, an owner or licensee is **not** required to disclose that a property was the site of a homicide, felony, suicide, or other occurrence that did not affect the physical structure of the real property, its physical environment, or the improvements located on the property.

Note: Under Tennessee law, a property owner or licensee is not obligated to disclose a "stigmatized" property condition; however, they are NOT legally prevented from disclosing the condition.

Remedies for Misrepresentation or Nondisclosure

The **buyer's remedies** for a seller's misrepresentation on a residential property disclosure statement include (*Tenn. Code Ann. 66-5-208(a)*):

- **Actual damages** suffered as a result of defects. An action for damages must be initiated **within one year** of receiving the disclosure statement or of closing, whichever occurred first.
- **Termination** of the contract prior to closing.
- **Other remedies** available if the seller intentionally or willfully misrepresented the condition of the property.



No action can be taken against a **seller** for failing to provide a disclosure or disclaimer statement; **however**, such owner would be subject to any other cause of action available in law or equity against an owner for misrepresentation or failure to disclose material facts regarding the subject property that exists on July 1, 1994 (*Tenn. Code Ann. 66-5-208(b)*).

No action can be taken against a **closing agent or closing attorney** for the seller's failure to provide the disclosure or disclaimer statement or for any misrepresentations made by the seller on the form provided to the buyer (*Tenn. Code Ann. 66-5-208(c)*).

Check Your Understanding #1

Using your notes link or on a piece of paper, identify if each statement is "true" or "false." When finished, scroll to the end of the course to see the answers.

1. The disclosure or disclaimer statement may be included in the real estate purchase contract, an addendum to the contract, or a separate document.
2. A disclosure or disclaimer statement is not required if the owner has not resided at the property for the previous three years.
3. The disclosure or disclaimer statement must be provided to the buyer no later than closing.
4. The disclosure statement is completed by the seller.
5. If a buyer waives the right to receive a residential property disclosure statement, the seller may provide a disclaimer statement stating that the seller makes no representations or warranties as to the condition of the property.
6. Residential property disclosure statements are only used in transactions that involve the services of a real estate licensee.
7. If a buyer of a single-family home is not represented by a real estate licensee, the seller's agent must inform the buyer of her rights and responsibilities under the law.
8. Licensee Claire has a listing to sell Beau's single-family home. If Claire knows that the home was the site of a murder, she is obligated to disclose this fact to potential buyers.
9. If seller Ashlyn misrepresents the condition of the property on the residential property disclosure statement and buyer Roderick incurs costs as a result of an undisclosed defect, Roderick may be entitled to actual damages.

Case Study: Duty to Disclose

Next, read a case study based on an actual case reviewed by the Court of Appeals of Tennessee:

Case Introduction



After purchasing a home, the plaintiffs sued the sellers' real estate licensee under the Tennessee Residential Property Disclosure Act for failing to disclose that work was done on the foundation of the home prior to the purchase. The trial court granted summary judgment to the real estate licensee, finding that she had no knowledge of adverse facts as defined by the Tennessee Residential Property Disclosure Act. The plaintiffs appeal. We affirm.

Facts & Procedural History

Jamie and Charlene Smith purchased a house and lot in Lexington, Tennessee, in December 2018. In November 2019, the Smiths filed this lawsuit against the sellers, a relocation company involved with the sale, and the sellers' real estate licensee, Linda Compton. The Smiths alleged that the defendants had failed to disclose to them the existence of "foundation and structural defects" in the home and "repair attempts" that took place prior to the sale. They claimed that as a result of either the defects themselves or "the shifting in the foundation, which occurred during the repair work," they were "experiencing problems, including but not limited to loose grout in the tile floors and showers, cracks in the walls, uneven hardwood flooring, loose exterior siding and brick, and plumbing problems." The Smiths alleged that Ms. Compton had violated the Tennessee Residential

Property Disclosure Act, Tenn. Code Ann. § 66-5-201 et seq., by failing to disclose her knowledge of the defects. Ms. Compton filed an answer, and written discovery ensued.

In September 2020, Ms. Compton filed a motion for summary judgment, along with her own affidavit, in which she stated, "I had no knowledge of any defects in the property or of any adverse information concerning the structural integrity of the property." Ms. Compton further stated that the Smiths had personally viewed the property prior to closing and hired a home inspector to perform an inspection for them and that the Smiths' home inspector found no problems with the foundation. Ms. Compton filed the home inspector's report from November 2018, which classified the foundation as "acceptable," the most favorable rating available on the report. Finally, Ms. Compton submitted a report from an engineer who had examined the home for any structural deficiencies in May 2018, approximately six months prior to the Smiths' purchase of the home, which stated that the house was structurally sound. Based upon this evidence, Ms. Compton argued in her motion for summary judgment that she had negated an essential element of each claim asserted by the Smiths, i.e., that she had knowledge of any alleged defect. Alternatively, Ms. Compton argued that the Smiths' complaint was barred by an "as is" clause in the contract they signed.

After the parties' depositions were taken, the Smiths filed a response to the motion for summary judgment, arguing that Ms. Compton did in fact have knowledge of structural defects and repairs at the property prior to the sale. The Smiths submitted a report from a structural inspection completed in November 2017, approximately one year prior to their purchase of the property, in which numerous structural issues were identified and repairs were recommended. These repairs included the installation of an "LVL" beneath one wall due to an overloaded joist; the replacement of wood pier shims with metal shims; the installation of intermediate support piers where some girders were over-spanned; the replacement of dry-stacked masonry block piers with rebuilt mortared joints; the installation of reinforcement where the I joist had been notched to accommodate piping and ductwork; and securing the framing to the foundation with anchor bolts. Two follow-up structural inspections were conducted in January and February of 2018. Ms. Compton was the listing agent for the property throughout this period of time and the person who completed the recommended repairs (the original builder of the house) also happened to be Ms. Compton's live-in boyfriend. During her deposition, Ms. Compton testified that she knew that a structural inspection was performed at the house and that some additional work on the foundation was necessary in response thereto. However, she testified that she never saw the actual reports from the inspections or knew the extent of the work performed. Ms. Compton characterized the work simply as "code upgrades" rather than repairs. She testified that, in any event, it was her understanding that all of the recommended work had been completed by at least May of 2018 and that the house was in compliance with the applicable codes thereafter. Ms. Compton admitted that she did not inform the Smiths or their real estate licensee about the "upgrades." The Smiths argued that this deposition testimony created a genuine issue of material fact regarding whether Ms. Compton had knowledge of adverse facts that should have been disclosed to them prior to the sale.

Following a hearing, the trial court **entered summary judgment** in favor of Ms. Compton, finding that she had demonstrated as a matter of law that she "had no adverse knowledge of material facts affecting the structural integrity of the property," and therefore, there was no genuine issue of material fact with regard to the claims against her. This order was made final pursuant to Rule 54.02. The Smiths timely filed a notice of appeal.

The Plaintiffs Appeal

On appeal, the Smiths basically assert that the trial court erred in granting summary judgment to Ms. Compton because a genuine issue of material fact exists regarding their claim that she had knowledge of adverse facts. In response, Ms. Compton contends that summary judgment was proper either because she established a lack of knowledge of adverse facts or because of the "as is" clause in the contract signed by the Smiths.

Circuit Court Decision Affirmed

We note that the Smiths argue on appeal that "[w]hether the house was structurally sound at the time of closing is irrelevant. Rather, the problem is that the structural repairs that were made to the home, which required significant manipulation of the foundation of the home, eventually resulted in structural defects, which may not have been observable or even in existence at the time of closing." The problem with this argument is that there is no evidence in the record to support it. Ms. Compton submitted numerous reports regarding the structural integrity of the home in support of her motion for summary judgment. We cannot simply assume, based upon the assertions in the Smiths' brief on appeal, that the structural integrity of the home was significantly reduced by the repairs when the evidence in the record demonstrates that it was not. There is simply no evidence in the record from which we can make this assumption. The decision of the circuit court is hereby affirmed.

Check Your Understanding #2

Using your notes link or on a piece of paper, answer the following questions about the case study you just read. When finished, scroll to the end of the course to see the answers.

1. In this case, the Smiths alleged that Ms. Compton had violated the Tennessee Residential Property Disclosure Act, Tenn. Code Ann. § 66-5-201 et seq., by failing to do what?

2. What was Ms. Compton’s response to the allegation of the Smiths?
3. What was the decision of the circuit court and the court of appeals of Tennessee in terms of the allegations brought against Ms. Compton by the Smiths?

CHAPTER 6: PROPERTY MANAGEMENT FUNDAMENTALS

Chapter Overview

Property management refers to leasing or renting, or offering to lease or rent, real estate belonging to others for a fee, commission, compensation, or other valuable consideration pursuant to a property management contract.

A **property manager** (or property management company) may deal with residential or commercial real estate and may be responsible for marketing the property, selecting tenants, negotiating leases, collecting rent, accounting for income and expenditures, coordinating maintenance, and providing reports to the property owner.

In this chapter, we will review the fundamentals of property management and the requirements for acting as a property manager under TREC.

Chapter Overview: Key Terms

Key terms important to understanding the content presented in this chapter include:

General Agent—An agent authorized to handle any and all of the principal’s affairs in a specified job or business area, for example, a real estate broker who is a property manager.

Gross Lease—A lease for which the tenant pays a fixed amount to the property owner and the property owner is responsible for paying all expenses.

Mixed-Use Property—A development that combines residential, retail, and/or office space.

Property Management Agreement—A written agreement that creates an agency relationship between the property owner and the property manager.

Property Management—Managing the leasing or renting, or offering to lease or rent, real property of others for a fee, commission, compensation, or other valuable consideration under the terms of a property management agreement.

Property Manager—A person hired by a real property owner to administer, market, and maintain property.

Risk Management—The process of identifying potential hazards and threats and then implementing procedures necessary to minimize their impact.

Chapter Overview: Learning Objectives

Upon the completion of this chapter, you will learn how to:

- LO18: Recall the role of a property manager and how property managers fulfill their obligations to their property owner clients.
- LO19: Identify requirements for acting as a property manager as set forth by Tennessee law and rules.

Property Manager Agent Duties to All Parties



A property manager has an agency relationship with the **property owner or landlord**. The property **owner is the principal or client**. As an agent, a property manager owes the property owner the statutory duties owed to all parties (*Tenn. Code Ann. 62-13-403*):

- Diligently exercise **reasonable skill and care** in providing services to all parties.
 - **Disclose** to each party any adverse facts of which the licensee has actual notice or knowledge.
 - Maintain the **confidentiality** of any information obtained by the licensee prior to that licensee’s disclosure of an agency relationship. This duty covers information that the party would reasonably expect to be held in confidence, except for information that the party has authorized for disclosure and information required to be disclosed by law.
 - Provide services with **honesty and good faith**.
- **Disclose** to each party 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.
 - Timely account for **trust fund deposits** and all other property received from any party to the transaction.
 - Not engage in **self-dealing** nor act on behalf of the licensee’s immediate family or on behalf of any other party in which the licensee has a personal interest **without prior disclosure** of the interest and the timely written consent of all parties.

- **Not recommend** the use of services of another individual or entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation without timely disclosing the licensee's interest or potential for compensation.

Property Manager Agent Duties to Client

Additionally, as an agent, a property manager owes the property owner the statutory duties owed to clients (*Tenn. Code Ann. 62-13-404*):

- **Obey** all lawful instructions of the client when the instructions are within the scope of the agency agreement.
- Be **loyal** to the interests of the client. A licensee must place the interests of the client before all others, except when the loyalty duty would violate the licensee's duties to a customer or the licensee's duties to another client in a dual agency. The duties owed to all parties take precedence over the duties to a client if a conflict exists between the two.
- Unless the following duties are specifically waived in writing by a client, **assist the client** by:
 - Scheduling all property showings on behalf of the client.
 - Receiving all offers and counteroffers and forwarding them promptly to the client.
 - Answering any questions that the client may have, within the scope of the licensee's expertise, during the negotiation of a purchase agreement.
 - 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.



Upon waiver of the duties listed above, the client's agent must advise the client in writing that the client may not expect or seek assistance from any other licensees for the performance of these duties.

Property Manager: General Agent



In the agency relationship between the property manager and owner, a property manager is usually considered a **general agent** of the property owner, who grants the property manager the authority to handle a variety of the principal's affairs in one area or specified areas on a continuing basis.

The primary goals of a property manager as a general agent are to:

- **Protect the owner's investment**, and
- **Maximize the owner's return** on that investment.

Property Manager Agency Creation



The agency relationship between a property owner and a **licensed real estate brokerage or property management company** is created with a **property management agreement**, also called a management agreement or a property management employee contract. This agreement is a personal services contract that specifies the authority, duties, and responsibilities of the property manager related to oversight of the property, as well as the owner's obligations regarding compensation. The management agreement should be **in writing** and **signed by both parties**.

Property Management Agreement Contents

A written property management agreement should include:

1. **Description of the property.** A property management agreement must include the **exact address** of the property to be managed and sometimes a full **legal description** as well. It is also important to define the perimeters of the property, including any ancillary buildings, structures, or other amenities. For example, is the property manager responsible for the landscaping? How about the pool or clubhouse? If not, those exclusions must be written into the agreement.
2. **Term of the agreement, including how and when it is terminated.** Property management agreements must provide definitive starting and expiration dates. The timeframe of a property management agreement is negotiated between the property manager and owner. One year is a common term for a new relationship. If both parties are satisfied with the relationship after one year, a longer term can be negotiated when the contract is renewed. Additionally a property management agreement might contain an automatic renewal clause.



Details about the termination of the owner-property manager relationship should also be spelled out. For example, upon termination, how will the property manager be compensated for negotiated leases and contracts not yet executed? And how should the property manager deliver any funds held in trust?



3. **Management fee, including how and when it's earned.** The property management agreement must specify the terms of **compensation**. Since many factors can affect the profitability of a property, there is no standard way to compute management fees. Much depends on the level of services being offered by the property manager. Property managers should determine both the direct and indirect costs associated with their job. They can use this information when negotiating their management fee with the property owner.

Of course, just as rents are dictated by the market, so too are property management fees. Compensation may be a **fixed (flat) fee** or a **percentage of the gross rents** collected, which is more common. Property managers who also act as leasing agents often receive additional compensation for the renewal of leases and for supervising major repairs or alterations.

The important point here is that management fees are **negotiated** between the owner and the property manager.

4. **Scope of the property manager's duties.** A critical component of the management agreement is the detailed description of the property manager's day-to-day duties. It should specify their authority related to:
 - Selecting tenants
 - Signing leases
 - Setting and collecting rents
 - Handling security deposits
 - Initiating eviction procedures as necessary
 - Hiring staff and outside vendors
 - Managing and ordering repairs
 - Paying expenses related to the operation and maintenance of the building
 - Reporting requirements

Any **limitations** to the property manager's authority must also be indicated in the management agreement. For example, some owners may limit the property manager's signing of leases to those of a specific timeframe or amount, or they may authorize the property manager to make repairs only up to a certain amount without prior approval.

Note: Whenever the duties and powers of a property manager change, the property management agreement must be **amended**. It's not sufficient to get oral or even written permission from the owner.

5. **Obligation of the owner.** A property owner's responsibilities vary and should also be listed in the property management agreement. For example, this could include information on who oversees payroll and insurance, as well as providing direction on any monthly, quarterly, and yearly payments.



The owner should also be responsible for providing any documentation, records, and disclosures the property management company requires to perform their authorized duties.

6. **Required reports and accounting.** Two of a property manager's primary duties are protecting the owner's investment and securing the highest possible return for a given property. A property manager must be able to document all the factors that impact the owner's bottom line by preparing a variety of reports, such as:
 - A management proposal that describes the strategy for meeting the owner's financial and operational goals
 - Monthly or quarterly income statements
 - An annual operating budget that projects income and expenses
 - A long-term stabilized budget forecasting market trends and potential growth

The property management agreement should clearly explain when each report must be distributed and to whom.

Types of Properties Managed: Residential

A property manager may choose to specialize in a variety of property types. Let's do a quick review of property types starting with residential properties. **Residential properties** include:

- Single-family homes
- Apartments
- Condominiums and cooperatives (co-ops)
- Mobile home parks
- Retirement communities, assisted living facilities, and nursing homes



Whether it is a single-family home or a large apartment complex, competitive rental rates and marketing are keys to successfully leasing residential property. Property managers must be well-versed in federal, state, and local fair housing laws to ensure equal access to all prospective tenants.

Types of Properties Managed: Office

Office properties can range from small stand-alone buildings to high-rise complexes. While some tenants may be able to use the space as is, it's common for tenants to have specific requirements. Owners then will include a **build-to-suit** provision, agreeing to allow a specific dollar amount per square foot—known as a **tenant improvement allowance**—for reconfiguring the space in exchange for a lease commitment.

Most office leases are **full-service** or **gross leases**, meaning the tenant pays a fixed rent that includes a pro-rated share of the operating costs for the building, known as **common area maintenance** or CAM charges.

Lease terms for office buildings are typically from one to 10 years, although in some markets, major tenants may sign leases for as long as 40 years. Tenants may also negotiate options, known as **accordion clauses** that give them the flexibility to expand and contract the amount of space they occupy.

Medical offices usually require specialized cleaning and biohazard waste disposal services, as well as the technology needed to accommodate medical equipment that could generate harmful radiation.

Types of Properties Managed: Retail



Retail properties have more variation than other types of commercial property. They include everything from small strip malls to sprawling shopping centers with a variety of retail clients, including restaurants. Among the important considerations with retail space are parking, signage, and the tenant mix.

Property owners who lease retail space have a vested interest in the success of a retail tenant, not only to avoid vacancies but because rent is generally calculated based on square footage as well as a **percentage of the business's gross sales**.

Types of Properties Managed: Industrial



Industrial property includes manufacturing facilities and warehouses. Because of the heavy equipment, traffic patterns geared for trucks and other specialized vehicles, and storage needs, industrial tenants are generally long-term, and the space they occupy is usually built or altered specifically for their use. They are often clustered together in industrial parks, which are frequently located near major transportation hubs.

Triple net leases are common for industrial commercial space where single tenants lease entire buildings, meaning the tenant takes responsibility for all ownership expenses including taxes, insurance, and maintenance. Lease terms for warehouses and other general-purpose industrial properties can be as long as several decades for single-tenant facilities.

Types of Properties Managed: Special Purpose



Special-purpose properties that may require the services of a property manager include:

- Hotels, motels, or resorts
- Theaters and sports facilities
- Schools
- Places of worship
- Cemeteries

It's also very common to see **mixed-use properties** that combine residential, retail, and/or office space.

Property Manager Responsibilities



In real estate property management, a property manager has four major areas of responsibility, regardless of the type of property they manage.

1. **Financial.** Property managers must perform regular financial reporting to the owner. They must also understand financial statements, profit and loss, income taxes, and budgeting. Appropriate rental rates are set from this information, balanced by what rent the current market will support.
2. **Tenant Relationships.** Property managers must negotiate leases, respond to tenant requests, monitor their compliance with their leases, and collect rent. A property manager may be required to initiate eviction proceedings for tenants who fail to pay rent or otherwise breach the terms of their lease.
3. **Facility Management.** This includes physical management of the structures and outdoor areas. A property manager must also develop and maintain a plan for the maintenance and rehabilitation of the property to increase its value while producing the **greatest amount of rental income** for as long a period as possible.
4. **Administration and Risk Management.** Property managers must account for security deposits and rent payments, keeping meticulous records. They must protect the property owner by obtaining appropriate insurance on the property.

Check Your Understanding #1

Using your notes link or on a piece of paper, identify if each statement is “true” or “false” as it relates to property management agency relationships. When finished, scroll to the end of the course to see the answers.

1. In a property management relationship, the principal is the owner.
2. A property manager is considered a universal agent of the property owner since they have broad authority to do anything in the name of the property owner necessary to manage the property.
3. A property management agreement creates an agency agreement between an owner and an individual property manager.
4. A retail property is most likely to have a triple-net lease.

Property Manager: TREC License Requirement

In Tennessee, **broker** means any person who, for a fee, commission, finder’s fee, or any other valuable consideration or with the intent or expectation of receiving a fee, commission, finder’s 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; (*Tenn. Code Ann. 62-13-102(4)*).

Based on this definition, to legally act as a property manager in Tennessee, persons or entities must obtain a real estate license. More specifically, under the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-102(4)*), the following property management activities **require** a real estate license:

- Soliciting, negotiating, or attempting to solicit or negotiate the **lease of real estate**
- Collecting or attempting to **collect rents**

Property Manager: TREC License Exceptions



There are exceptions to the TREC property manager license requirement. A **resident manager** for a broker or an **owner**, or an **employee** of a broker, who manages an apartment building, duplex, or residential complex is **not** required to obtain a real estate license (*Tenn. Code Ann. 62-13-104(a)*). The resident manager, owner, or employee is permitted to manage only a **single property** and the person's **duties are limited to**:

- Supervision,
- Showing and leasing residential units, and
- Collecting security deposits and rents.

The resident manager or employee **may not negotiate** the amounts of security deposits or rents or negotiate any leases.

Principal Broker: Supervision of Licensees

A primary responsibility of a principal broker is to **supervise affiliate brokers**. This supervisory responsibility applies to affiliate broker licensees engaged in property management services. Failing to exercise adequate supervision over the activities of any licensed affiliate brokers is a violation of the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(15)*).

Principal Broker: Approval Required



Although a real estate license makes a person legally eligible to provide property management services, only an employing broker of an affiliated broker licensee can give a licensee permission to act as a property manager.

For example: Jimena is a real estate licensee who works for Better Brokers, LLC. Better Brokers provides property management services as part of its business model. When Jimena signs a property management agreement to manage property for Rudy, she does so only with the permission of her broker and in the name of Better Brokers, LLC. Although she will perform the property management services for Rudy as specified in their agreement, Jimena's broker will supervise her activities.

A real estate brokerage that does choose to engage in property management services could be **organized in a number of ways**, for example:

- An individual licensed real estate broker who manages one or more properties for a single client
- A commercial real estate brokerage firm with a sales division and a property management division that assigns associated licensees to act as property managers for its clients
- A property management company staffed with licensed and unlicensed individuals who have the expertise necessary to manage and maintain multiple investment properties
- A traditional residential sales brokerage that also offers property management services

TREC Requirement: Property Manager Compensation

The same TREC laws and rules that apply to affiliate broker compensation, apply to affiliate brokers acting as property managers:

- An **affiliate broker** may receive compensation for real estate brokerage activities only from **the broker with whom the licensee is affiliated** (*Tenn. Code Ann. 62-13-312(b)(11)*).
- The commissions earned by an affiliated licensee while working under a principal broker can still be paid after one or more of the following circumstances occur (*Rule 260-02-39*):
 - The affiliated licensee transfers to a new broker;
 - The affiliated licensee retires their license;
 - The affiliated licensee is in broker release status;
 - The affiliated licensee allows their license to expire; or
 - The death of the affiliated licensee.

Additionally, the Commission may also suspend or revoke a license if the licensee pays or accepts, gives, or charges any undisclosed commission, rebate, compensation, or profit on expenditures for a principal or in violation of the Tennessee Real Estate Broker License Act (*Tenn. Code Ann. 62-13-312(b)(17)*).

For example, a broker acting as a property manager for an owner may not accept any sort of compensation from other sources without the owner's knowledge. If a lawn service company representative wants to give the property manager tickets to a football game as a thank you for the business, the property manager can accept them only with the owner's knowledge.

TREC Requirement: Escrow Account Set-up

Each principal broker must maintain a **separate escrow or trustee account** (also referred to as a **trust account**) to hold any trust money that the broker receives in a fiduciary capacity (*Tenn. Code Ann. 62-13-321; Rule 1260-02-.09(2)*). If a broker receives trust money related to **leased property**, the funds must be held in **one or more separate escrow accounts** (*Rule 1260-02-.09(12)*). When applying for an original real estate firm license or renewing an existing license, the firm must provide proof of the firm's escrow account (*Tenn. Code Ann. 62-13-309(f)*). Caution: An escrow account holds only trust money. Commingling of funds is **prohibited** (*Rule 1260-02-.09(13)*). **Commingling** refers to maintaining funds belonging to others in the same bank account that contains the licensee's personal or business funds (*Rule 1260-02-.09(1)(a)*).

TN Uniform Residential Landlord and Tenant Act



When acting as a property manager in counties with a population of more than 75,000, property managers must adhere to the requirements set forth in the **Tennessee Uniform Residential Landlord and Tenant Act (URLTA)** (*Tenn. Code Ann. 66-28*). This act outlines the rights of both the landlord and the tenant and the requirements for the property management agreement, handling of security deposits, and other legal procedures.

If you are acting as a property manager in a county with a population of more than 75,000, in addition to the laws and rules that apply to TREC licensees, you will want to familiarize yourself with the provisions of the Tennessee Uniform Residential Landlord and Tenant (URLT) Act.

TN URLTA: Handling Security Deposits



For instance, much like the TREC requirements, the Tennessee Uniform Residential Landlord and Tenant Act sets forth the following requirements for handling security deposits (*Tenn. Code Ann. 66-28-301*):

(a) 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 or any agency of the United States government.

(b) Except as otherwise provided in subdivision (b)(2)(B), the tenant shall have the **right to inspect the premises to determine the tenant's liability for physical damages** that are the basis for any charge against the security deposit. An inspection of the premises to determine the tenant's liability for physical damages that are the basis for any charge against the security deposit and the landlord's

estimated costs to repair such damage shall be conducted as follows:

(1)(A) Upon request by the landlord for a tenant to vacate or within **five days** after receipt by the landlord of written notice of the tenant's intent to vacate, the landlord may provide notice to the tenant of the **tenant's right to be present at the inspection** of the premises. Such notice may advise the tenant that the tenant may request a time of inspection to be set by the landlord during normal working hours. The landlord may require the inspection to be after the tenant has completely vacated the premises and is ready to surrender possession and return all means of access to the entire premises; provided, that the inspection shall be **either on the day the tenant completely vacates the premises or within four calendar days of the tenant vacating the premises**. If the landlord provides written notice of the tenant's right to be present at the landlord's inspection and the tenant schedules an inspection but fails to attend such inspection, the tenant waives the right to contest any damages found by the landlord as a result of such inspection by the landlord; provided, that notice of the tenant's waiver upon such circumstances is set out in the rental agreement;

(B) If a tenant requests a mutual inspection as provided in subdivision (b)(1)(A), the landlord and tenant shall then inspect the premises and compile a comprehensive listing of any presently ascertainable damage to the unit that is the basis for any charge against the security deposit and the estimated dollar cost of repairing the damage. The landlord and tenant shall sign the listing. Except as provided in subsection (g), the signatures of the landlord and the tenant on the listing shall be conclusive evidence of the accuracy of the listing. If the tenant refuses to sign the listing, the tenant shall state specifically in writing the items on the list to which the tenant dissents.

See Title 63, Chapter 28 to review provisions of the Tennessee Uniform Residential Landlord and Tenant Act in more detail. <https://www.tn.gov/commerce/regboards/trec/rules-and-laws/laws.html>

Sanctions for Noncompliance

TREC holds property manager licensees to the same standards of compliance as other real estate licensees. As covered in Chapter 1, the Commission may suspend or revoke a license if the licensee engages in any of the prohibited acts outlined in Tenn. Code Ann. 62-13-312. Next, read about a case where sanctions were imposed on a Tennessee-licensed broker acting as a property manager.

Case Study: Sanctions Imposed on Property Manager

The Complainant is a Tennessee resident and the Respondent is a Tennessee-licensed Principal Broker. The Complainant alleges the Respondent held a Principal Broker's license, which was revoked on November 7, 2012. The Complainant owns a four-plex rental property in Tennessee and the Respondent agreed to handle the rental and property management of the four-plex for the Complainant and would function as the rental manager. The Respondent was responsible for handling the rental of the units, tenant issues, collection of rents, and forwarding the net rent payments after deducting fees and charges.

The Complainant entered into a written agreement with the Respondent. In the fall of 2019, the Respondent gave notice to the Complainant indicating the Respondent could no longer manage the property effective December 31, 2019. From October 2019 to the end of the year, the Respondent stopped sending the Respondent any net rental proceeds and continued to collect rent from the tenants. In January 2020, the Complainant could not get in



touch with the Respondent and her telephone numbers were disconnected. The Complainant has a new property manager and has not been able to contact the Respondent and has not received any monies.

Recommendation: Authorize a formal hearing and assess a civil penalty in the amount of \$2,000 for the following violations: Tenn. Code Ann. § 62-13-312(5) for failing within a reasonable time to account for or to remit any money coming into the licensee's possession, for the unlicensed practice of real estate pursuant to Tenn. Code Ann. § 62-13-301

Commission Decision: The Commission elected to defer this matter for 60 days and to send it for investigation and present it at the December meeting.

New Information: This matter was sent for investigation and the Respondent has been arrested and charged with theft forgery and theft embezzlement and was released on a \$20,000 bail bond. There is no information available on possible trial dates.

Recommendation: Authorize a formal hearing and assess a civil penalty in the amount of \$2,000 for the following violations: Tenn. Code Ann. § 62-13-312(5) for failing within a reasonable time to account for or to remit any money coming into the licensee's possession, for the unlicensed practice of real estate pursuant to Tenn. Code Ann. § 62-13-301.

New Commission Decision: The Commission elected to authorize a formal hearing and assess a civil penalty in the amount of \$1000 for unlicensed activity.

New Information: A TDCI investigator was unable to find the Respondent in the city/county where she was previously located. This will make adequate service of process for a formal hearing difficult. The Respondent's license is still in a revoked status from 2013. Counsel recommends closing the complaint and noting the complaint information in CORE in the event a new application is ever received.

Check Your Understanding Chapter 1, #1 Answers

1. The Tennessee Real Estate Broker License Act is found in Title 62 Chapter 13 of the Tennessee Code Annotated.
True
2. The Tennessee Real Estate Commission has the authority to set real estate commission rates.
False
3. An affiliate broker oversees the activities of a broker.
False
4. Lou's grandmother is selling her house. She asks Lou if he will help her. Lou shows his grandmother's house to a co-worker, who makes an offer that his grandmother accepts. To show her appreciation, Lou's grandmother offers her 1968 Camaro to him, which he accepts. Lou's activities do not require a real estate license.
False
5. A property manager must have a real estate license to lawfully solicit, negotiate, or attempt to solicit or negotiate the lease of real estate and to collect or attempt to collect rents.
True
6. A time-share salesperson works under a licensed real estate broker.
True
7. An irrevocable consent enables a nonresident licensee to escape lawsuits or other legal matters that occur in Tennessee.
False

Check Your Understanding Chapter 1, #2 Answers

1. The licensee is not required to pay any penalty fee if proof of insurance is provided to the Commission within **30** days of suspension (*Tenn. Code Ann. 62-13-112(k)(1)*).
2. If the license is suspended for more than **30** days but less than **120** days, the licensee will be required to pay the following applicable penalty fee (*Rule 1260-01-.16(1)(a)(1)*):
 - a. **\$200** if the licensee's insurance carrier backdates the licensee's E&O insurance policy to indicate continuous coverage
 - b. **\$400** if the licensee's insurance carrier does not backdate the licensee's E&O insurance policy to indicate continuous coverage
3. If the license is suspended for more than **120** days but less than **6** months, the licensee will be required to pay a penalty fee of **\$500** (*Rule 1260-01-.16(1)(a)(2)*).
4. If the license is suspended for more than **6** months but less than **1** year, the licensee will be required to pay a penalty fee of **\$500** plus **\$100** per month for months six through 12 (*Rule 1260-01-.16(1)(a)(3)*).
5. If a license is suspended for more than **1** year for failure to maintain E&O insurance, the license is automatically revoked (*Tenn. Code Ann. 62-13-112(l)(1)*).

Check Your Understanding Chapter 1, #3 Answers

1. For a licensee who elects not to participate in the E&O insurance program administered by the Real Estate Commission, what are the four items that must be submitted for license renewal?
 - **Certification of satisfactory completion of 16 hours of real estate CE, including a six-hour mandatory Tennessee Real Estate Commission CORE course and 10 hours of elective education**
 - **Renewal fee**
 - **Any other documentation required by the Commission**
 - **A private carrier certificate of E&O coverage**
2. For a nonresident who is licensed as a Tennessee affiliate broker or broker, how many hours of continuing education are required for license renewal?

16 hours; the CE requirements are the same for resident and nonresident licensees
3. If the licensee fails to renew within 60 days of the license expiration date, what steps must the licensee take to apply for reinstatement of their license?

If the licensee fails to renew within 60 days of the expiration date, the licensee must sign a Reinstatement Order, meet all requirements for license renewal, including paying the renewal fee, and pay a required penalty fee.

Check Your Understanding Chapter 1, #4 Answers

1. What are three steps a licensee must take to reactivate a retired license?
 - **Provide proof of a current E&O insurance policy,**
 - **Affiliate with an active firm, and**
 - **Complete the Transfer, Release, and Change of Status Form along with the online application at core.tn.gov.**
2. Under Rule 1260-02-.41, what are three acts prohibited by a team?

The team must not:

 - **Represent themselves as a separate entity from the licensed firm with which they are affiliated.**
 - **Establish a physical location that is separate from the physical location of the firm.**
 - **Receive compensation for performing real estate brokerage services from anyone other than their principal broker.**

Check Your Understanding Chapter 1, #5 Answers

1. Each real estate office must have a real estate firm license, principal broker, and a fixed location that has adequate facilities for affiliated licensees and that complies with all zoning laws and ordinances.

True
2. A broker can obtain one firm license for multiple places of business if the principal broker is the same licensee for all locations.

False
3. Licensees are prohibited from using a telephone answering service to conduct real estate business.

False
4. The Real Estate Commission must be notified within 10 days of the death, resignation, termination, or incapacity of a principal broker.

True
5. An affiliate broker who receives trust money in a real estate transaction must turn the funds over to the principal broker immediately upon receipt.

True

6. If a party submits a written request for disbursement, earnest money must be disbursed or interpleaded within 15 business days.

False

7. Documents maintained electronically must be readily accessible in an organized format within 24 hours of any request for inspection by the Real Estate Commission.

True

Check Your Understanding Chapter 2, #1 Answers

1. Which forms of promotion are included in the definition of “advertising” under the Rules of the Tennessee Real Estate Commission? *Select all correct responses.*
- A. business cards
 - B. **radio and television advertising**
 - C. **signs**
 - D. **websites and social media communications**

The answer is B, C, and D. Under the Rules of the Real Estate Commission, the term “advertising” includes, but is not limited to, the following: Traditional print, radio, and television advertising; signs, flyers, and letterheads; and e-mail signatures, websites, social media communications, and video or audio recordings transmitted through Internet or broadcast streaming. Advertising does not include promotional materials that advertise a licensee such as hats, pens, notepads, T-shirts, name tags, business cards, and the sponsorship of charitable and community events.

2. Licensees operating as a team may advertise themselves using the term
- A. associates.
 - B. company.
 - C. realty.
 - D. **team.**

The answer is D. It is considered false, misleading, and/or deceptive advertising if licensees advertise themselves as a team or group using terms such as “Real Estate,” “Real Estate Brokerage,” “Realty,” “Company,” “Corporation,” “LLC,” “Corp.,” “Inc.,” “Associates,” or other similar terms. These terms could lead the public to believe that the licensees are offering real estate brokerage services independent of a firm and principal broker.

3. Before posting a sign on a property advertising it for sale, a licensee must have
- A. an agency relationship with the owner.
 - B. a listing agreement with the owner.
 - C. **written authorization from the owner.**
 - D. written or oral authorization from the owner.

The answer is C. Before posting a sign in any location advertising property for sale, purchase, exchange, rent, or lease, a licensee must obtain written authorization from the owner.

4. When a licensee uses social media to advertise a listing, the firm name and firm telephone number
- A. is not required.
 - B. must appear on the viewable page.
 - C. **must be no more than one click away from the viewable page.**
 - D. must be no more than two clicks away from the viewable page.

The answer is C. When a licensee uses social media to advertise, the firm name and firm telephone number must be no more than one click away from the viewable page.

5. If a licensee advertises real estate services or property listings, the advertisement must include the
- A. **firm name and firm telephone number.**
 - B. licensee’s license number.
 - C. licensee’s telephone number.
 - D. name of the principal broker.

The answer is A. All advertising must be under the direct supervision of the principal broker and must include the firm name and firm telephone number as listed on file with the Real Estate Commission.

Check Your Understanding Chapter 2, #2 Answers

In this scenario, which of the following may Tennessee broker Becky legally do as it relates to a check, gift card, or other options for Mr. Hank's referral?

- A. Give Hank a \$200 personal or cashier's check.
- B. Refuse to give Hank any money whatsoever due to TREC licensing and advertising laws.
- C. Provide Hank with a \$200 gift card for the national hotel chain where Hank is planning to stay with his wife.
- D. **Offer to provide a discount or slightly reduced commission to Hank on the potential real estate commission in regard to any future listings with Hank personally, or provide a gift card to Mr. Owner as a show of thanks to these neighborly friends.**

The correct answer is D. It is illegal for a licensee to pay a referral fee to someone unlicensed who refers new clients to the licensee. A licensee can provide a gift card directly to clients who list their home with the licensee at a later date though.

Check Your Understanding Chapter 2, #3 Answers

1. Does a listing broker need to obtain the client's consent before posting the client's listing in the MLS?

Because a licensee must have the client's consent to advertise their property, the licensee must have the client's consent to post the listing in the MLS and to cooperate with other brokers.

2. What are some words that are not to be used in advertising because they imply certain protected classes will not be welcome?

Words that imply certain protected classes that are to be avoided include restricted, exclusive, private, traditional, and board approval.

3. Does using the words "cozy two-bedroom" violate fair housing advertising guidelines?

These words describe a property feature and are not a violation of fair housing laws.

4. Does using the words "traditional Italian neighborhood" violate fair housing advertising guidelines?

Licensees must not use names of facilities that cater to a particular race, national origin, or religious group, or that are used exclusively by one sex.

Check Your Understanding Chapter 2, #4 Answers

1. Fiona is a seller's agent for Jeremiah, whose house is listed at \$320,000. Lawrence came to an open house and really liked the property, but he thought it was significantly overpriced. He contacted Fiona with an offer of \$190,000. Fiona knows that Jeremiah will never accept such an insulting offer so she is NOT required to tell him about it.

A seller's agent has an obligation to promptly disclose all offers to the client, even if an offer seems unacceptable to the agent.

2. Inducing a party to break an existing contract is referred to as tortious obstruction.

The concept of tortious interference means that you cannot interfere with an existing contract.

Check Your Understanding Chapter 3, #1 Answers

1. Who authorizes the creation of the agency between a client and an agent?

It is the client, also known as the principal, who authorizes an agency relationship.

2. Felicia is a buyer's agent for Kevin. She sees a "For Sale By Owner" sign in front of Ron's house that indicates a 3% commission would be paid to any broker who procures a buyer. If Kevin makes an offer on that FSBO house through Felicia, is seller Ron's relationship with Felicia that of a client or customer?

In this scenario, agent Felicia represents buyer Kevin. He is her principal. Ron, the seller, is the third party in the transaction, and he is unrepresented. As the seller, Ron is Felicia's customer. The payment of commission does not create an agency relationship.

3. Buyer Todd signs a contract with XYZ Real Estate to represent him in his search for the perfect house. He intends for the seller to compensate XYZ. What type of agency situation does this represent?

The written contract between Todd and XYZ makes this an express agency.

4. A real estate licensee has assisted an investor with the purchase of a number of commercial properties. The investor will be out of the country for part of the year and asks the licensee to manage all aspects of those properties during that time, including advertising and leasing. The real estate licensee will be what type of agent?

A real estate licensee acting as a property manager is typically a general agent. A property owner often authorizes a property manager to handle all of the day-to-day business associated with the property on an ongoing basis, such as hiring and entering into contracts.

Check Your Understanding Chapter 3, #2 Answers

1. Under Tennessee law, an agency or subagency relationship _____ be assumed, implied, or created without a written bilateral agreement that establishes the terms and conditions of the relationship (*Tenn. Code Ann. 62-13-401*).

may not

2. An agency relationship with the ____ is established by negotiating and executing an exclusive agency listing agreement, an exclusive right-to-sell listing agreement, or another type of listing agreement such as an open listing (*Tenn. Code Ann. 62-13-401*).

seller

3. A real estate licensee ____ provide real estate services to any party in a prospective transaction without an agency relationship with one or more parties to the transaction (*Tenn. Code Ann. 62-13-401*).

may

4. Until a licensee enters into a specific written agreement establishing an agency relationship with one or more parties to a transaction, the licensee is considered a(n) _____. (*Tenn. Code Ann. 62-13-401*).

facilitator

Check Your Understanding Chapter 3, #3 Answers

1. Duty to share material facts

Disclosure

2. Duty to place client's interests above own

Loyalty

3. Duty to protect finances

Accounting

4. Duty to follow legal instructions

Obedience

5. Duty to protect private information

Confidentiality

6. Duty to perform at a high level of competence

Reasonable Care and Skill

Check Your Understanding Chapter 3, #4 Answers

1. Licensee Lisa is on a listing appointment with a prospective seller client. The seller tells her that they intend to cover the mold in the basement with paneling, but they do not want her to say anything about it. If Lisa takes the listing, she is obligated to obey her client's directions.

The seller is asking Lisa to violate her duty to disclose material facts. She must tell the seller that she cannot conceal that information and let the seller decide whether or not they want to sign the listing agreement under those conditions.

2. You represent a buyer who has an offer accepted on another brokerage's listing. Your client is trying to qualify for a loan. Numerous lenders have refused to approve the loan because of the buyer's financial status. It appears that the buyer will not be able to get a loan but is still trying with another lender. The closing date is approaching. Because of the duty of confidentiality owed to your buyer client, you are NOT required to disclose the buyer's inability to get financing to the seller.

The buyer's inability to get a loan could derail the transaction and would be considered a material fact that a buyer's agent must disclose. Therefore, this is not confidential information.

3. Potential seller Sam comes into broker Ruby's office and states that he just lost his job and needs to sell his home. Ruby discloses to the seller that she is the agent for a buyer who might be interested in the seller's home. In compliance with Tennessee law, Ruby cannot disclose customer Sam's financial position to her buyer client.

Broker Ruby must maintain the confidentiality of any information obtained prior to disclosing to seller Sam her agency relationship status. This protects sensitive information that a customer may reveal to a licensee before that licensee tells the customer that they are someone else's agent.

Check Your Understanding Chapter 3, #5 Answers

1. The listing agent abandons the seller before the listing period ends.

Renunciation

2. The listing broker does not find a buyer before the listing period ends.

Expiration

3. The listing broker sells the house.

Accomplishment of Purpose

4. A seller fires their agent before the listing period ends.

Revocation

5. The broker declares bankruptcy.

Operation of Law

Check Your Understanding Chapter 3, #6 Answers

1. Joanne is a seller's agent for Felix, whose house is listed at \$420,000. Curtis came to an open house and really liked the property but he thought it was significantly overpriced. He contacted Joanne with an offer of \$290,000. Joanne knows that Felix will never accept such an insulting offer and so she is NOT required to tell him about it.

A licensee representing a seller has an obligation to promptly disclose all offers to the client, even if an offer seems unacceptable to the licensee.

2. You are a buyer's agent for Jeanine. She has rejected all 14 homes you've shown her. Home 15 seems perfect but she wants to think about it. An hour later, Colt comes into your office, interested in Home 15. You must wait for Jeanine's decision before showing him the home because she is a client and he is just a customer.

A licensee representing a buyer client does NOT breach a duty by showing properties in which the client is interested to other prospective buyers or tenants.

3. When acting as a dual agent, licensee Rachel may only provide each client with the facts without any interpretation or counsel on how to respond to an offer or counteroffer.

A dual agent cannot provide undivided loyalty to her clients and cannot advise them on points of negotiation. A dual agent can provide facts but not insight or counsel on how to respond to an offer or counteroffer.

4. Licensee Deanne sees a listing for Domenic's house in the MLS. She shows the house to Gracie, a buyer client. Gracie makes an offer, which Deanne delivers to listing broker Benjamin. When Deanne accepted the offer of cooperation from broker Benjamin, seller Domenic became Deanne's client.

Domenic is Deanne's customer, not her client. The listing in the MLS does not create an agency relationship.

Check Your Understanding Chapter 3, #7 Answers

1. In the case of *White v. Miller*, the appellate court determined that

B: neither Miller nor Parks acted as an undisclosed dual agent. As applied to the facts of this case, under the Tennessee statute, Parks could not be considered a dual agent because Miller was the designated agent only for White with respect to the sale of her home; he was

not the designated agent for the Nguyens with respect to the sale of their townhouse. In the absence of a designation of Miller as agent in the agreement or any other pertinent provision in the agreement, he could not be deemed the agent for the Nguyens.

Check Your Understanding Chapter 3, #8 Answers

1. At an open house, buyer Linh decides to sign a buyer agency agreement with your firm and with you as her representative. She wants to put in an offer on your listing. Are you now a dual agent?

You now represent both the buyer and the seller in the same transaction, which makes you a dual agent.

2. Julie hires broker Ethan to list her house for sale. Tessa, a licensee at Ethan's agency, is interested in buying the house for her mother. Should Ethan disclose his coworker's status to Julie?

To avoid a potential conflict of interest, Ethan should disclose.

3. Juanita, a small business owner, is moving out of state and needs to sell her home as well as her retail property. Broker Trevor tells seller Juanita that he will take a lower commission on the sale of her house if she lists her commercial property with him, too. Do you think Trevor must disclose his arrangement to the buyer of Juanita's house?

Trevor's arrangement with Juanita does not meet the disclosure obligations we just discussed. He has a fiduciary relationship with Juanita, and their relationship in a separate commercial real estate transaction does not affect the sale of Juanita's home and should be irrelevant to the buyer.

Check Your Understanding Chapter 4, #1 Answers

1. Binding, legally sufficient

Valid

2. Lacks requirements for contract formation

Void

3. A court would refuse to uphold

Unenforceable

4. One party can end without liability

Voidable

Check Your Understanding Chapter 4, #2 Answers

1. What are the four essential elements of a valid and enforceable contract and two additional required elements of a real estate contract?

The four essential elements for a valid and enforceable contract are mutual agreement, contractual capacity, lawful and possible objective, and consideration. Real estate contracts must also be in writing and signed by all parties involved in the contract to be valid and enforceable.

2. Rick signs a piece of paper promising to paint Connie's house. Is this a valid contract? Why or why not?

No. This situation lacks mutual agreement and consideration, which are required to form a valid contract. If Connie does not agree to Rick's offer and offers something in return for Rick's promise to paint the house, this is not a contract.

3. Julie, age 17, is selling the house that she inherited from her grandparents. John has agreed to buy the property and both have signed a purchase agreement. What is the status of this contract?

Voidable by Julie because Julie is not of legal age; however, John cannot back out of the contract.

4. Jeff and Cam are out at a bar drinking. During the evening, Jeff writes a note on a cocktail napkin agreeing to sell his car to Cam for \$500. After they both sign it, Jeff pockets the money and hands the keys over. The next day, Jeff has no idea where his car is and how he came to have \$500 in his wallet. Was this a valid contract? Why or why not?

If he was intoxicated, Jeff lacked the contractual capacity to enter into a valid contract. Under other circumstances, a contract written on a napkin could be valid.

Check Your Understanding #3 Answers

1. Angie hires a real estate agent to list her house. Joe hires a real estate agent to find a house. His agent takes him through Angie's property. Joe likes it and together they draw up an offer. Joe signs it and his agent presents it to Angie's agent. Angie is in complete agreement with the terms of the offer. She signs it and hands it back to her agent. This is a valid, enforceable contract.

False. It's not a valid contract yet. There has been a meeting of the minds but the acceptance must be clearly communicated back to the person who made the offer, the offeror Joe.

2. Blake, the seller, signs the purchase agreement from the prospective buyer Emily, and hands it back to his agent. Emily can withdraw her offer at this point without liability.

True. As the offeror, Emily has the right to withdraw her offer at any time without liability, up until there's been communication back to her or her agent saying that her offer has been accepted. Have you heard the term "signed, sealed, and delivered"? Blake signed the agreement and sealed it. What's preventing it from being a contract? There's been no delivery back to Emily of Blake's acceptance.

3. Sara's house is on the market for \$280,000. Devin offers to buy it for \$270,000. Sara is eager to sell but wants to get at least \$275,000. She crosses out the offer price of \$270,000 and writes in \$275,000, initials and dates it, then returns it to Devin. This is an example of a counteroffer.

True. When someone makes a counteroffer, it's essentially a rejection of the first offer and a new offer is made. And best practice is that counteroffers should be prepared on separate paperwork, not by crossing out the price and writing in a new one.

Check Your Understanding Chapter 4, #4 Answers

1. Promisor doesn't perform all of their contractual obligations but does enough so that the promisee must fulfill their part of the deal

Substantial Performance

2. Termination of a contract where each party returns what was acquired

Rescission

3. Rights under a contract are transferred to another party, with the original party secondarily liable

Assignment

4. New party is substituted in a contract without liability to the old party

Novation

Check Your Understanding Chapter 5, #1 Answers

1. The disclosure or disclaimer statement may be included in the real estate purchase contract, an addendum to the contract, or a separate document.

True

2. A disclosure or disclaimer statement is not required if the owner has not resided at the property for the previous three years.

True

3. The disclosure or disclaimer statement must be provided to the buyer no later than closing.

The disclosure or disclaimer statement must be provided to the buyer prior to acceptance of a real estate purchase contract.

4. The disclosure statement is completed by the seller.

True

5. If a buyer waives the right to receive a residential property disclosure statement, the seller may provide a disclaimer statement stating that the seller makes no representations or warranties as to the condition of the property.

True

6. Residential property disclosure statements are only used in transactions that involve the services of a real estate licensee.

The Tennessee Residential Property Disclosure Act applies whether or not a real estate licensee is involved with the transaction.

7. If a buyer of a single-family home is not represented by a real estate licensee, the seller's agent must inform the buyer of her rights and responsibilities under the law.

True

8. Licensee Claire has a listing to sell Beau's single-family home. If Claire knows that the home was the site of a murder, she is obligated to disclose this fact to potential buyers.

Under Tennessee law, an owner or licensee is not required to disclose that a property was the site of a homicide, felony, suicide, or other occurrence that did not affect the physical structure of the property, its physical environment, or the improvements located on the property.

9. If seller Ashlyn misrepresents the condition of the property on the residential property disclosure statement and buyer Roderick incurs costs as a result of an undisclosed defect, Roderick may be entitled to actual damages.

True

Check Your Understanding Chapter 5, #2 Answers

1. In this case, the Smiths alleged that Ms. Compton had violated the Tennessee Residential Property Disclosure Act, Tenn. Code Ann. § 66-5-201 et seq., by failing to do what?

The Smiths alleged that Ms. Compton failed to disclose her knowledge of property defects.

2. What was Ms. Compton's response to the allegation of the Smiths?

Compton said she had no knowledge of any defects in the property or of any adverse information concerning the structural integrity of the property. Alternatively, Ms. Compton argued that the Smiths' complaint was barred by an "as is" clause in the contract they signed.

3. What was the decision of the circuit court and the court of appeals of Tennessee in terms of the allegations brought against Ms. Compton by the Smiths?

The trial court granted summary judgment to Ms. Compton, finding that she had no knowledge of adverse facts as defined by the Tennessee Residential Property Disclosure Act. The court of appeals affirmed the decision of the circuit court.

Check Your Understanding Chapter 6, #1 Answers

1. In a property management relationship, the principal is the owner.

True

2. A property manager is considered a universal agent of the property owner since they have broad authority to do anything in the name of the property owner necessary to manage the property.

Although a property manager usually has the authority to perform a broad range of duties, they are more likely to be considered a general agent of the property owner.

3. A property management agreement creates an agency agreement between an owner and an individual property manager.

The property management agreement creates an agency relationship between the property owner and the licensed brokerage that employs the property manager. A property manager executes the property management agreement on behalf of their employing broker.

4. A retail property is most likely to have a triple-net lease.

It's more likely that a retail property has a percentage lease, where the property owner shares in the success of the tenant by collecting an agreed-upon percentage of the tenant's gross sales over a certain amount.