



Texas Real Estate Commission

Post Office Box 12188 Austin, Texas 78711-2188
1101 Camino La Costa Austin, Texas

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Wayne Thorburn
Administrator

June 8, 2004

The Honorable Greg Abbott
Attorney General of Texas
Post Office Box 12548
Austin, TX 78711-12548

Attention: Opinion Committee

Dear General Abbott:

At its meeting on June 7, 2004, the Texas Real Estate Commission (TREC) authorized me to modify the request for an opinion of your office regarding TREC's statutory authority to establish minimum service standards for a real estate broker who enters into an exclusive agency relationship to represent a party to a real estate transaction. The original request dated May 6, 2004 is Request No. 0224-GA. Please use the following questions in lieu of the questions asked in the May 6, 2004 letter.

Specifically, the Commission respectfully requests your opinion on the following questions:

1. Does TREC have the statutory authority to revise 22 TAC §535.2 as follows (underlined language would be new)?

§535.2; Broker's Responsibility

(a) A broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision. A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent.

(c) A broker is responsible for the proper handling of escrow monies placed with the broker, although the broker may authorize other persons to sign checks for the broker.

(d) In negotiating for his or her principal a broker may not refuse to provide the following services:

(1) accept and present to the principal offers and counter-offers to buy, sell, or lease the principal's property or property the principal seeks to buy or lease;

(2) assist the principal in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and

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(3) answer the principal's questions relating to offers, counter-offers, and notices.

(e) Under §1101.652(b)(22) of the Act a broker may not negotiate or attempt to negotiate the sale or lease of property with a principal with knowledge that the principal is a party to an outstanding written contract that grants exclusive agency to another broker. Under §1101.652(b)(27) of the Act, a broker may not aid, abet, or conspire with another to circumvent the Act. A broker who represents a principal under a listing contract that grants an exclusive agency to the broker may not instruct or authorize another broker who represents another party in the transaction to negotiate directly with the principal.

(f) When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.

2. If your answer to question number 1 is no, does TREC have the statutory authority to revise 22 TAC §535.2 by adding subsection (d) as follows (subsection (f) only from above)?

(d) When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.

The relevant statutory and rule provisions provide as follows:

Section 1101.151 (b). The commission may:

(1) adopt and enforce rules necessary to administer this chapter and Chapter 1102;

(2) establish standards of conduct and ethics for persons licensed under this chapter and Chapter 1102 to:

(A) fulfill the purposes of this chapter and Chapter 1102;
and

(B) ensure compliance with this chapter and Chapter 1102[.]

Section 1101.652(b). The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder, while acting as a broker or salesperson

...

22) negotiates or attempts to negotiate the sale, exchange, or lease of real

property with an owner, landlord, buyer, or tenant with knowledge that that person is a party to an outstanding written contract that grants exclusive agency to another broker in connection with the transaction;

...

(27) aids, abets, or conspires with another person to circumvent this chapter[.]

Texas Occupations Code, Chapter 1101, The Real Estate License Act.

22 TAC §535.13(a) Locating and bringing together a buyer and seller constitutes negotiation if done from within the borders of Texas.

(b) A real estate license is required for a person to solicit listings or to negotiate in Texas for listings.

Texas Administrative Code, Title 22, Chapter 535.

As context and background for the above questions, approximately 18 months ago, the Texas Association of Realtors (TAR) recommended that the commission promulgate a similar rule to require that all brokers must at a minimum provide the three services articulated in the rule described above under 22 TAC §535.2. After a lawsuit was filed challenging the rule based on, among other things, compliance with the Administrative Procedures Act, Chapter 2001, Government Code, the commission repealed the rule to take a closer look at the issue and to provide for additional public comment. Persons opposing any change to the current rule argue that the commission lacks statutory authority to enact a provision that requires a broker to provide a minimum standard of service to a client in an exclusive agency relationship. In addition, they argue in part that any rule that purports to require a service when the client has not requested such service unfairly burdens the client's right to set the terms and conditions of a personal service contract.

Proponents of the rule argue that the commission is authorized to enact the rule based on section 1101.151(b) of the Act as outlined above. Further, proponents argue that section 535.2 of the current rules of the commission require that "[a] broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent." Thus, the commission may provide further clarification of the meaning of the term "negotiate" to include the three services described above. Finally, proponents argue that because a licensee may not negotiate with a represented party under section 1101.652(b)(22), TREC rules should clarify what services the represented party may expect from their broker, and when the opposite side broker may deal directly with the represented party.

Under this variation of the rule for which the commission requests your opinion, a broker may not refuse to provide the minimum services described in the rule. In such case, while the broker is not required to provide the services in all instances, the broker may not refuse to provide the services when requested and compensated by the broker's client.

In addition, the commission requests whether subsection (f) of the rule described above is within its statutory authority to adopt to provide clarification of the apparent ambiguity in section 1101.652(b)(22) of the Act. That provision, as described above, prohibits a licensee from negotiating or attempting to negotiate a real estate transaction with a person with knowledge that the person is a party to an outstanding exclusive agency agreement with another broker in connection with the transaction. In addition, section 1101.652(b)(27) prohibits a licensee from aiding or abetting in a violation of the Act. Unlike the laws governing attorney client relationships, there are no exemptions to the statutory provisions.

In a situation where a fee-for service broker is in a limited exclusive agency relationship with a seller,

the broker may wish to instruct other agents who represent potential buyers to negotiate the transaction directly with the seller. They contend that to the extent that the seller does not want the broker to provide additional services, anything more unnecessarily obliges the seller to pay for unwanted services. However, TAR contends that instructing other brokers and agents to negotiate directly with the principal violates section 1101.652(b)(27), in light of section 1101.652(b)(22). Further, TAR contends that a minimum service standard is necessary to prevent the buyer's agents from unintentionally being perceived as and held liable for representing the seller as well.

If your answer to question number 1 is no, the commission respectfully requests your opinion as to whether the commission may promulgate subsection (f) only as described above to address the ambiguity raised in sections 1101.652(b)(22) and (27).

The names of the persons who spoke at various commission meetings on this issue may be interested in briefing the questions presented. I have attached the meeting minutes where interested parties have addressed the commission on this matter.

Sincerely,



Wayne Thorburn
Administrator

cc: Commissioners