

# CHAPTER 05

## UNAUTHORIZED PRACTICE OF LAW

### Learning Objectives

After this chapter, you will be able to

- Explain when a license holder must use a TREC promulgated form.
- Identify what license holders can and cannot do concerning unauthorized practice of law.
- Give examples of statements intended for paragraph 11 (Special Provisions) that could constitute unauthorized practice of law.



Under Sec. 1101.654 of the Texas Occupations Code, a license holder can be suspended or a license revoked for the unauthorized practice of law. The statute describes the practice of law as drafting “an instrument that transfers or otherwise affects an interest in real property,” or advising someone regarding “the validity or legal sufficiency of an instrument or the validity of title to real property.” The statute goes on to state that it is not considered the unauthorized practice of law for a license holder to complete a contract form:

- (1) adopted by the commission for the type of transaction for which the form is used;
- (2) prepared by an attorney licensed in this state and approved by the attorney for the type of transaction for which the form is used; or

- (3) prepared by the property owner or by an attorney and required by the property owner.”

The underlined language is fairly broad, so the Commission set out some additional detail in TREC Rule §537.11. Subsection (a) sets out the requirement that the license holder use forms adopted by the Commission if there is one for that type of transaction. Effective May 2018, it specifically details what must be included in a form prepared by an attorney or trade association in order for a license holder to use that form with a client. Subsections (b)-(e) provides more guidance on what is or is not the practice of law.

### **§537.11 - Use of Standard Contract Forms**

- (b) A license holder may not:
  - (1) practice law;

- (2) directly or indirectly offer, give or attempt to give legal advice;
  - (3) give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate;
  - (4) give opinions concerning the status or validity of title to real estate;
  - (5) draft language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses;
  - (6) add factual statements or business details to a form approved by the Commission if the Commission has approved a form or addendum for mandatory use for that purpose;
  - (7) attempt to prevent or in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer; or
  - (8) employ or pay for the services of a lawyer, directly or indirectly, to represent a principal to a real estate transaction in which the license holder is acting as an agent.
- (c) This section does not limit a license holder's fiduciary obligation to disclose to the license holder's principals all pertinent facts that are within the knowledge of the license holder, including such facts which might affect the status of or title to real estate.
- (d) It is not the practice of law for a license holder to fill in the blanks in a contract form authorized for use by this section. A license holder shall only add factual statements and business details or shall strike text as directed in writing by the principals.
- (e) This section does not prevent the license holder from explaining to the principals the meaning of the alternative choices, factual statements and business details contained in an instrument so long as the license holder does not offer or give legal advice.

Still not enough clarity? Here are some pointers recycled from last year's Broker Responsibility Course with some extra notes added.

### What License Holders Can Do:

- \* Disclose all relevant facts that you know, including such facts that might affect the status of or title to real estate; *[the fact that an owner recently died and that could affect title should be disclosed, but not your opinion as to how that will affect the title]*
- \* Fill in the blanks in a contract form authorized for use by license holders under TREC Rules §537.11;
- \* Add factual statements and business details or

shall strike text as directed in writing by the principals on a contract form approved by the Commission; *[this does not include dictating to your client what to write – be sure to retain a copy of the email or other writing the buyer/seller gave to you regarding alterations to the contract form]*

- \* Explain the meaning of the alternative choices, factual statements and business details contained in an instrument to your client *[be specific but if you start talking about “what if”, “but” or “when”, you could be crossing the line into giving legal advice or opinions. Also, do not explain forms that are not promulgated by TREC, this includes Builder contracts and REO and relocation addenda].*

### What License Holders Cannot Do:

- \* Directly or indirectly give or attempt to give legal advice; *["Well if it were me, I would..." could mean you are indirectly attempting to give legal advice.]*
- \* Give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate; *["This isn't worth the paper it is written on. It's not enforceable."]*
- \* Give opinions concerning the status or validity of title to real estate; *[That's why you have title companies and attorneys]*
- \* Draft language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses; *[There are many different approved addenda that deal with contingency situations so you don't have to get in this situation]*
- \* Add factual statements or business details to an approved contract form if the Commission has approved a separate addendum for that purpose *[Use the addenda and stay out of trouble].*

### Unauthorized Practice of Law Pop Quiz

Ultimately, a judge (SOAH and civil) will decide whether some action or writing was the unauthorized practice of law. In the meantime, let's take a pop quiz and see if you can identify it when you see it (and hopefully before you write it in Special Provisions)! By the way, these are all actual provisions license holders have put in Special Provisions.

## Unauthorized Practice of Law examples from recent TREC Cases:

### Case 1

Sales agent created a lease purchase document by starting with a lease agreement and then writing her “contract terms” into paragraph 26 of the lease. (Agreed Orders for both the agent and the designated broker.)

### Case 2

Sales Agent #1, Bob, represented Seller. When a buyer expressed interest in purchasing Seller’s property for \$150,000, Sales Agent 1 contacted another agent in his brokerage, Sales Agent #2, John, and offered him \$500 if he would put his name in a contract as Buyer’s agent. Bob prepared the contract documents, and without consulting with his broker, prepared a notice of intermediary appointment, appointing himself as seller’s agent and Sales Agent #2, John, as Buyer’s agent. He also prepared an addendum that stated in part: *Seller agrees to refund for requested upgrades and repairs the amount of 70% over appraisal of 155,000. Should the property not appraise above \$150,000.00 there will be no seller contributions and no refund of any amounts. This agreement is outside of closing and done as a security for all parties involved.* Appraisal came in at \$135,000, Seller was furious and felt Sales Agent #1, Bob, favored the buyer. (Agreed orders for both agents and the broker.)

### Case 3

Broker wrote her own “As-Is Clause” for a deal on her own letterhead. (Advisory Letter)

### Case 4

A brokerage company was the owner/seller and had prepared their own addendum that they required for their sale transactions that dovetailed with the provisions of the standard 1-4 family resale contract form. Another license holder complained that the form did not address the lengthy list of “prepared by an attorney” requirements of 537.11(a)(4). However, since the brokerage company was the owner of the property, they fit under the exception in 537.11(a)(3) – a form or addenda prepared by a property owner or prepared by a lawyer and required by a property owner. (No violation)