

CHAPTER 02

AGENCY

Learning Objectives

After this chapter, you will be able to

- Explain the intermediary process. Explain the difference between intermediary with appointments and intermediary without appointments.
- Describe the difference between a rebate and a referral fee and who may receive each.



Residential Rental Locators

A person must be licensed by TREC to locate apartment units for prospective tenants, if they receive compensation for the service, unless they are employees of the apartment owner or otherwise exempt. The apartment locator is subject to the same duties of fidelity, integrity and competency as any other TREC license holder.

Examples of Recent TREC Cases with Violations by Apartment Locators

In four cases originating out of the same apartment locating firm, 9 sales agents, the designated broker and the brokerage were found to have submitted fraudulent rental applications, forging documents and references, including fake jobs, fake pay stubs and fake rental

reference. Some of the agents had licenses that expired so unlicensed activity violations were added. (Four Agreed Orders were entered)

Seller Term Requirement Sheets or Seller Offer Guidelines

Have you ever received offer instructions or seen them in the MLS? Offer instructions give pertinent information such as the seller contact, the broker and agent contact, survey availability, possession opportunities, timeframes getting to the seller, and office hours.

While requiring proof of funds and a pre-approval letter IS a best practice, issues can arise when there are staunch requirements for structuring the offer. Issues can arise in the following situations:

- * Asking for a percentage amount for earnest money – when Texas does not even legally require it in a contract.
- * Requirements for option money amounts and time constraints.
- * Limiting the timelines for the buyer approval on credit worthiness in the Third Party Financing Addendum.

The concern comes when agents are dictating what should happen and what the terms should be without instruction from your client. Putting things like “*offers with missing documentation or not correctly filled out will not be presented to seller*” could put you in violation. Did your seller really instruct you to do so and are those instructions in writing. All of us want to protect our clients, but do not overstep your authority making those decisions.

There are some situations such as foreclosure, relocation, or a brokerage owner business model who will structure certain contract requirements. Being the principal does afford the opportunity to generate the rules but remember - it is not the agent’s decision.

Keep in mind also that if the term sheet you require for offers in effect makes the only variable the purchase price, you may have inadvertently created an auction situation. That would mean you would have to be licensed as an auctioneer and follow the Auctioneer Laws administered by the Texas Department of Licensing and Regulation.

Intermediary Refresher - Intermediary Means “Enter the Middle”

By law, Texas does not permit dual agency. Instead, the statute sets out a process known as intermediary if a broker is going to represent both parties to a transaction. So as an agent of the broker who is an intermediary, you are stepping into the middle of the transaction and facilitating; and if appointments are properly made, giving advice.

For clarity, what and how does intermediary happen? First, the broker must decide if they are willing to offer intermediary at their firm. The clients must also agree to the intermediary – whether with appointments or no appointments. The consumer is introduced to the concept of intermediary through the Information About Broker Services form. The statutory disclosure and preemptive consent to intermediary is usually contained in the listing agreements and buyer agreements between the clients and the broker. Once the situation presents itself [a seller and buyer who are represented by the same broker want to negotiate on a particular property], there is a secondary notice if appointments are

to be made so the parties will know who will represent whom. Note also that if consent to intermediary was not preemptively given previously, written consent to intermediary can also be obtained at the time the intermediary situation presents itself. TEXAS REALTORS® has a form, TXR 1409, Intermediary Relationship Notice, available for members to use or a broker can have an attorney draw up an appropriate notice form.

The broker has final say whether they will appoint or not. There must be at least two agents, not including the broker, in order to appoint. Sole brokers with no or one agent can only be intermediary with NO APPOINTMENTS. If appointments are made, the agents can give advice and opinions to their appointed client. Without appointments, neither the broker nor any agent can give advice or opinions.

The statute specifies four tenets that must be obeyed during intermediary, whether there are appointments or not:

1. the buyer cannot be told the seller would accept a price less than asking price,
2. the seller may not be told the buyer would pay more than the price submitted in a written offer,
3. no confidential information may be shared unless permitted in writing by a party, and
4. all parties must be treated impartially and fairly.

DISCUSSION

1. An agent brings in a listing to the brokerage. Later a call comes in to the brokerage from a prospect and it is passed to the brokerage’s buyer agent. The buyer agent--eager to sell the property--makes an appointment to meet the prospect. Who does the buyer agent represent?
2. An agent represents both the buyer and seller in a transaction. The agent says, “Don’t worry, I can represent you both and get this deal done. We don’t need another agent in the mix. It will go easier if it’s just me, after all I know what the seller wants.”

Since there are no appointments, there is only one agent who will facilitate the paperwork between the parties. No advice or opinions mean that the agent cannot advise the buyer. The agent says, “You tell me the terms and I will fill in the blanks.” The buyer asks, “Should we offer more?” The agent shrugs his shoulders and shakes his head because he cannot give advice or opinion. The seller asks, “Should we counter this offer?” The agent looks at the seller but can offer NO advice or opinion! What is wrong with this scenario?

Recent TREC Cases - Agency Violations

Case 1

A sales agent scheduled a showing for his client's interested buyers. Prior to the showing, the sales agent arrived and accessed the home. The sales agent was videotaped going through dresser drawers and viewing items in the drawers of bedroom furniture located in the master bedroom. The agent was also on tape going into other parts of the home for a prolonged period of time. No items were taken or damaged, but the sales agent did not have authority to access these areas while showing a home or at any time. (Agreed Order)

Case 2

A buyer's agent left the buyer and an A/C technician (doing an estimate for repairs) in the property alone (the agent did not schedule enough time for the appointment) and gave the key to the buyer and told the buyer to put the key back in the lockbox and lock up when they were done. No damage or harm, just an upset seller because she had not known about or consented to the unescorted buyer and A/C technician on her property. (Agreed Order).

Case 3

A sales agent represented a commercial tenant and entered into a representation agreement that was a custom form (Agreement). The agent was paid a commission on a commercial lease transaction after the commercial lease was finalized but after the Agreement expired and he kept the retainer fee. By the terms of the Agreement, the agent was to either be paid a commission on the lease or keep the \$2,000 retainer fee paid upfront-not both. The agent demonstrated bad faith and untrustworthiness when he kept both.

In addition, the agent failed to disclose to his client that the landlords were willing to enter into a 3-to-5 year lease instead of a 10-year lease. The agent continued to push for a 10-year lease when his client told him he was more comfortable with a shorter-term lease, and that his goal was to be the first float center in San Antonio. By continuing to push for a longer lease term and more commission on renewals and expansions, the agent placed his own interests above that of his client's interests to his client's detriment. During the delay for the extended negotiations, another float center opened up in the area first. [Final Order by Commission after the SOAH (State Office of Administrative Hearing) hearing].

Rebates and Referral Fees

What is the difference between a rebate and a referral fee? A **rebate** can be cash or anything of value and is part of a license holder's commission that the license

holder gives to a party of the transaction. A **referral fee** is something of value given by a license holder to someone for sending a prospective buyer, seller, landlord or tenant his way.

Who can receive a rebate or referral fee? A **rebate** can only be given to a party of a real estate transaction where the license holder represents one of the parties. A **referral fee** may only be given to a licensed broker or sales agent, unless the value of the gift is \$50 or less and is not cash, cash like, (i.e. a gift card) rent bonuses, or discounts. A person not licensed as a real estate broker or sales agent may receive a **referral fee** in very limited circumstances if they are engaged in the business of selling goods or services to the public and other factors are met. This exception is hardly ever used and can be found in 22 TAC §535.20(b).

Some details to consider: If the **rebate** is provided to someone other than the license holder's client, the client and sponsoring broker must first provide written consent. A license holder may not receive a **rebate** from a person other than their client without first disclosing to their client that the license holder intends to receive the payment. The license holder's client must consent prior to receiving the payment. However, this does not include **referral fees** between license holders. A **rebate** to a buyer from a license holder may be subject to restrictions by the buyer's lender. The buyer should notify and obtain the consent of the buyer's lender to address any impact the rebate may have on the determination regarding the buyer's credit worthiness.

DISCUSSION

1. Can our team set up a "VIP" club for people who refer someone to the team more than 3 times a year? If they are in our "VIP" club, we will send them a box of goodies every month.
2. Can a license holder offer to enter an unlicensed person in a drawing to win a cruise for referring a potential lessee or buyer?
3. Is a locator permitted to rebate a portion of the locator's fee to the tenant?

A Business Proposal to Raise Funds for Local Booster Clubs

XYZ Realty, LLC. would like to enter into a verbal or written (if necessary) agreement with your high school band booster club under which XYZ Realty would make a donation to the band booster club each time a booster club member refers someone to XYZ Realty that ends up using XYZ's brokerage services to buy or sell their personal real estate.

All sales, listings, and/or referrals by booster club members that result in a purchase or a sale will generate a donation to the booster non-profit organization of 20% of the commission earned by XYZ Realty in the first year of the agreement. A 15% of the commission in year two, and 10% of the commission in years three and beyond will be donated, until the promotion is terminated by either party.

Example of a Sale for Booster Club Member

XYZ Realty, LLC sells a house for \$500,000. The commission paid by the seller is 3% to the buyer's agent and 3% to the listing agent for a 6.0% total commission. The total commission of 6% is \$30,000. XYZ's portion of the commission is \$15,000. XYZ Realty would make a donation of 20% of the \$15,000 commission to the booster club which would be \$3,000. The donation from XYZ Realty to the booster club would be paid on the first of each month following the closing. The annual donation target would be \$45,000/year.

To avoid conflicts, XYZ Realty, LLC requests that donated funds do not support student scholarships. The booster club may spend the donations any other way they see fit.

The booster club will recognize XYZ Realty at any banquets, football games and all other events when possible to promote the new fundraising concept.

The booster club can terminate this agreement at any time if not satisfied with our services.

Sincerely,
XYZ Realty

DISCUSSION

1. Is this arrangement permissible under TREC Rules? Why or why not?
2. Are there other ways to accomplish what XYZ is trying to do?

Recent TREC Cases - Rebate Violations

Case 1

A buyer banked at a credit union that had an association with a broker. Together they had a lending program that if the buyer met certain criteria (such as obtaining the home loan from that credit union), the broker would rebate 20% of broker's commission to the buyer at closing. The buyer chose to use the broker associated with his credit union. The sales agent told the buyer he was eligible for a rebate but did not write the conditions for the rebate into the buyer representation agreement OR anywhere else.

During the transaction, the buyer decided to change his lender to Wells Fargo, not knowing that he would 'lose' the rebate. Wells Fargo found out about the rebate promise shortly before closing and refused to permit the buyer to receive the rebate. (Agreed Orders for brokerage and agent, Advisory Letter for the designated broker)

Case 2

The buyer agreed to use a broker for the purchase of a new home after the broker told the buyer he would rebate \$11,000 of the \$13,000 of his commission to the buyer. As closing approached, the buyer asked the broker how he would get the rebate. The broker didn't give the buyer a firm answer.

At closing, the entire commission was listed on the HUD-1 Closing Statement as payable to the broker. After closing, buyer demanded his rebate and after months of evasion, the broker refused to pay stating that the lender was not informed of the rebate and it should have been listed on the Closing Statement. Therefore, it was against federal law for the broker to pay the rebate. (Agreed Order for making a false promise of rebate, failing to disclose conditions of rebate and not making any effort to notify lender or title company of rebate in advance of closing is not outweighed by federal law after the fact.)