

- SUBJECT:** Real estate duties, disclosure and liability regarding agency relationships
- COMMITTEE:** Licensing and Administrative Procedures — favorable, with amendment
- VOTE:** 7 ayes — Wilson, Kubiak, Dear, Goolsby, Pickett, Torres, Yarbrough
0 nays
2 absent — Brimer, D. Jones
- SENATE VOTE:** On final passage, March 8 — voice vote (Barrientos recorded nay)
- WITNESSES:** For — Ronald J. Walker and Bob Wertheimer, Texas Association of Realtors; Joe Atnip
Against — Fran Shultz; Hazel Edwards; Erle Rawlins, III; Thomas Terrell
- DIGEST:** SB 489, as amended, would amend sec. 15C of the Real Estate License Act to delete references to a representation by more than one party to a transaction, or dual agency, and instead would establish the following duties of an intermediary:
- an intermediary could not disclose to the buyer or tenant that the seller or landlord would accept a price less than the asking price unless otherwise instructed in writing;
 - an intermediary could not disclose to the seller or landlord that the buyer or tenant would pay higher than the asking price;
 - an intermediary could not disclose any information a party specifically instructs in writing not to disclose unless otherwise instructed in a separate writing or required by this act or court order and
 - an intermediary would be required to comply with this act and treat all parties honestly.

"Intermediary" would mean a broker employed to negotiate a transaction between parties subject to the obligations listed above. The intermediary would have to act fairly and could not favor one party over another.

A broker could act as an intermediary between parties if the broker obtained written consent from all parties to the transaction and the consent stated the source of any expected compensation to the broker. A written listing agreement establishing that the broker represents the seller or buyer could also establish the consent of a party to the intermediary status of the broker if the agreement set forth in conspicuous bold or underlined print the duties of an intermediary.

An intermediary broker, if given written consent to do so and by giving written notice, could appoint a licensee associated with the broker to carry out instructions of one party and appoint another licensee to carry out instructions of the other party or parties. An appointed licensee would need to comply with all of the intermediary duties, except that during negotiations an appointed licensee could provide opinions and give advice to the party for whom appointed. Appointing licensees, who would provide advice and opinions, would be a fair and impartial act under the definition of "intermediary."

These duties of a licensee would supersede in replace any duties under common law or any other law.

SB 489 would also require a real estate licensee representing a party in a transaction to disclose to another party, or another party's real estate licensee, the licensee's representation either orally or in writing at the time of first contact with either of those people.

The bill would require a licensee to give a written statement (in at least 10-point type) to a party in a real estate transaction at the first face-to-face meeting with that party, which would be any meeting at which a substantive discussion occurs with respect to specific real property. Although "buyer" could be substituted with "tenant" and "seller" with "landlord" if appropriate, the notice would have to include the following:

- a statement advising the party that the duties of a broker depend on whom the broker represents. A broker who lists property for sale or lease is the owner's agent. A broker who acts as a subagent represents the owner through the listing broker. A broker who acts as a buyer's agent represents the buyer. A broker may act as an intermediary if the parties consent in writing. A broker can assist a party in locating property, preparing a contract or lease, or obtaining financing without representing a party;
- a broker becomes the owner's agent by agreeing in writing to such an arrangement, usually through a listing agreement. A broker also becomes the owner's agent by accepting an offer of subagency from the listing broker. A listing broker or subagent can assist a buyer but must place the interests of the owner first. The buyer should not tell the owner's agent anything that the buyer does not want the owner to know;
- a broker becomes a buyer's agent by entering a written agreement stating such an arrangement. A buyer's agent can assist the owner but must place the interests of the buyer first. The owner should not tell the buyer's agent anything that the owner does not want the buyer to know;
- a broker may act as an intermediary between the parties in compliance with the Texas Real Estate License Act with the written consent of the parties. The written consent must state who will pay the broker and must set forth the obligations of the broker as intermediary. The broker must treat each party honestly and fairly. An intermediary may not disclose that the owner will accept less than the asking price unless so authorized. An intermediary may not disclose that a buyer will pay more than the asking price unless so authorized. In addition, an intermediary may not disclose any information that a party specifically instructs the broker in writing not to disclose unless authorized in writing, required by this act or by court order. A broker acting as an intermediary may appoint a licensed person to carry out instructions of one party and appoint another licensed person to carry out instructions of the other party;
- A representation agreement should clearly state the broker's obligations and the party's obligations, including payment. However, payment of a fee to a broker does not necessarily establish that the broker represents a party.

All questions about duties and responsibilities should be resolved before proceeding.

The preceding disclosure would not be required if the proposed transaction was a residential lease for not more than one year or if the licensee was meeting with a party already represented by another licensee.

The bill would also amend sec. 15A of the Real Estate License Act and supersede common law so that:

- a party would not be liable for a misrepresentation or concealment of material fact made by a licensee unless the party knew of the falsity and failed to disclose that knowledge;
- a licensee would not be liable for a misrepresentation or a concealment of material fact made by a party unless the licensee knew of the falsity and failed to disclose that knowledge; and
- a party or a licensee would not be liable for a misrepresentation or a concealment of a material fact made by a subagent unless the party or licensee knew of the falsity and failed to disclose that knowledge.

The bill would apply to sale or lease transactions negotiated and effective on or after January 1, 1996, but would not affect binding agreements negotiated and effective, but not closed, prior to January 1, 1996.

**SUPPORTERS
SAY:**

SB 489 would appropriately eliminate the practice of "dual agency" and in its place establish "intermediaries," while allowing an intermediary broker to appoint a licensee who could render opinions. It would also establish appropriate written notice and liability regarding agency relationships.

First, SB 489 would eliminate the practice of dual agency. Responsibilities of dual agency were established in SB 314 enacted by the 73rd Legislature last session, which allows a real estate licensee to represent both a buyer and a seller with proper consent. However, the term dual agency implies that the licensee is actually representing both parties. This is not the case because a licensee in that situation is limited by statute with regard to information that can be provided to both parties.

For instance, a dual agent could not tell a buyer that the owner was moving to Alaska in two weeks and would accept less than the asking price. For this reason, "dual agent" is a misnomer. Instead, the broker is really acting as an intermediary. SB 489 would clarify that role. This clarification is important because the intermediary situation arises frequently when a buyer represented by a broker displays interest in a house listed by that broker. A buyer could become confused by the term "dual agent" and think that the broker was really representing the buyer, with all that the term "represent" connotes.

Under the concept of dual agency, brokers are having a difficult time dealing with a buyer who is represented by the broker but wants to negotiate for property listed with the broker. Even if the broker appoints a real estate agent for each of the parties, the owner of the listed property and the buyer, the agents would still be considered dual agents who could not give all of the advice generally sought from a representative. This bill would allow an intermediary broker to appoint an agent to the seller and an agent to the owner who could give opinions and render advice in accordance with the interests of the respective parties as long as they treat all parties honestly and do not disclose confidential information.

These types of arrangements are common in the business world. For example, one stock broker in a brokerage office might work with a buyer purchasing an investment from a seller of the investment that works with the same firm.

The bill would also clarify notice requirements with regard to agency relationships. The notice now promulgated by the Texas Real Estate Commission (TREC) appears in a contractual format forbidding to consumers. In addition, a recent survey revealed that 26 percent of consumers did not understand the purpose of the form, and 44 percent of consumers found it difficult or somewhat difficult to read. SB 489 would allow the licensee to provide the notice in a brochure or other format that the licensee decides would be effective, so long as it was in 10-point type.

The bill would also require that written notice of agency be given at a face-to-face meeting with a party, but would not have to be given if the parties had already signed a contract to sell, buy, rent or lease the property. The

current agency disclosure rule unnecessarily requires that the form be given to parties that have already received the notice. For instance, a listing agent must give the notice to the seller, but if the buyer's agent meets the seller, the buyer must give that same form to the seller. SB 489 would streamline the process so that the parties would only receive one copy of the notice.

In addition, it has been difficult to determine what level of "face-to-face meeting" triggers the requirement that the licensee provide the notice. It appears now that under TREC rules even a casual meeting mentioning the property in passing would trigger the notice requirement. SB 489 would define the face-to-face meeting to be a meeting at which a substantive discussion occurs with respect to specific real property. However, the bill would still require that real estate licensees disclose who they represent at the time of first contact with another party to the transaction or with another real estate licensee representing another party.

The bill would also clarify that a seller would not be liable for the misrepresentation of a real estate licensee if the seller did not know about the misrepresentation. Although this seems like the only fair way to handle such situations, certain case law suggests a different result. Thus, the bill would address this situation and provide that its determination would control over case law.

**OPPONENTS
SAY:**

SB 489 would protect the interests of brokers who would like to reap the benefits of inappropriately representing both sellers and buyers in real estate transactions. Consumer buyers and sellers, meanwhile, could suffer great harm.

A broker could become an intermediary who would not be able to give advice or opinions. Buyers and sellers generally expect that a real estate broker represents their interests. This bill would require that written notice be given about the intermediary's duties, but the written notice would only state that the intermediary would need to treat both parties honestly and fairly. However, the definition of intermediary states that an intermediary could not favor one party over the other. This complete lack of representation for either party would not be clearly reflected in the written notice.

In addition, a broker would be able to shift from complete representation of a seller who lists a property with that broker, to an intermediary for the seller if a buyer the broker also represents shows interest in the property. The seller would likely not be able to understand that at some given point the broker could not fully represent the seller. Moreover, it is reasonable to assume that the broker would have very little interest in fully disclosing the lack of representation allowed to be given as an intermediary. If full disclosure were given, neither the seller nor the buyer would likely consent to the intermediary arrangement.

In fact, a broker who represents and has listed a seller's property should be required to tell potential buyers represented by the broker to find another agent to represent them with regard to that seller's property. This would be the only way to ethically handle the situation. Given similar representation situations for attorneys, that would be the required action. A real estate agent performs a similar role in that the agent represents people on a subject that they usually know very little about, and they place a great deal of trust in the agent's opinion. In the intermediary situation, there would always be an inappropriate level of conflict-of-interest hovering over the transaction.

By allowing the broker to remain an intermediary while appointing licensees who could give advice and opinions would not solve the conflict-of-interest problem. The licensees would be working for the broker who in essence would have a financial interest in both the seller and the buyer's decisions. In a law firm, two lawyers in the same firm could not represent both plaintiff and defendant, respectively, because of the obvious conflict of interest problem, yet this bill would allow a similar situation.

Brokers want this arrangement only because they realized the liability they were incurring in trying to represent both parties through dual agency. In effect, the bill would allow them to keep the commissions from both seller and buyer through their licensees' representation while incurring no responsibility for the conflict that arises from that situation, since they could safely hide behind the intermediary role.

The bill would also strip regulatory power from the TREC. While the TREC now promulgates the rules regarding agency disclosure notice, this

bill proposes governing the notice by statute. This would tie the hands of the TREC to modify the means of notification. It would be folly to strip the TREC of its regulatory powers, given the expertise the TREC has amassed in this area.

Furthermore, on the liability issues regarding agency, the bill would do away with 150 years of Texas case law. The bill would absolve parties from liability for misrepresentation by their real estate licensee unless they knew of the misrepresentation and said nothing. Along the same lines, the real estate licensee would be absolved from liability for a misrepresentation by the seller or buyer unless the licensee knew of the misrepresentation and said nothing.

Contrary to the bill, Texas case law dictates that a principal is liable for the torts of its agent committed while the agent was acting within the scope of his actual or apparent authority even if the act was not authorized by the principal. It would be imprudent to change a long-standing principle that encourages a principal to monitor the actions of the agent and vice versa, for the benefit of the ultimate consumer.

**OTHER
OPPONENTS
SAY:**

The bill would remove references to dual agency, but it is not clear whether dual agency would be prohibited or would just be governed by common law after passage of this bill. Left unaddressed, the continued practice of dual agency could lead to an increase in litigation.

NOTES:

The committee amendment would delete a provision stating that an agent could not represent both an owner and a buyer in the same transaction. In addition, the amendment would clarify that an intermediary could carry out instructions "of" rather than "for" a party, so as not to indicate representation of the party. The amendment would also clarify the effective date of the bill if the contract had been executed but the deal had not closed.