

## Termination of Agency: TREC Rules, Code of Ethics, MLS Rules & Best Practices by Gordon Gorychka, REALTOR® and MCE Instructor

In marketing properties, occasionally a seller will request that his/her listing be terminated before the expiration of the listing. While this scenario is infrequent, it does require immediate action by the listing broker. Obviously, the first question to ask would be 'why does the seller want to terminate?' It could very well be because the seller's plans have changed. However, it could be because the seller is dissatisfied with the listing broker's efforts and wants to make a marketing change. What are the current broker's obligations and options when a seller wants to terminate a listing? Similarly related to the last question, what are the obligations and options of the subsequent broker who has been asked to list the seller's property?

The TREC Enforcement Division was asked specific questions regarding the above scenario as it relates to the materials taught in the 2007 and 2010 **Texas Real Estate Commission (TREC) Ethics MCE** course. The following paragraphs outline TREC's recommendations, as well as some applicable references to NAR's Code of Ethics, ACTRIS Rules, comments regarding Best Practices and a concluding comment from Loretta DeHay, Assistant Administrator and General Counsel at the Texas Real Estate Commission.

The following is a copy of page 14 from the 2010 **TREC Ethics MCE** manual:

### **Conflicts Arising in Early Termination of Agency**

#### **Representation:**

*The agency relationship is a highly personal relationship. It requires continuing consent of the principal and the agent. Agency may be terminated at any time by either party; however, an early termination without cause may expose the terminating party to liability under the agency agreement. If an agent continues to offer the property for sale without the consent of the principal, it constitutes a violation of the Real Estate License Act. Upon receipt of a notice of termination from a principal, the agent should cease acting as the principal's agent. A listing agent should cease all advertising. For example, remove signs, remove MLS listing, remove information from web site, etc.*

#### **Representing a Party Who Is Subject to a Prior Agency Relationship:**

*If a principal approaches a licensee and informs the licensee that the principal is subject to an existing exclusive agency relationship with another broker, the licensee should not provide any services until confirmation that the prior agency relationship has been terminated. The licensee should not interfere with an existing exclusive agency relationship under any circumstances. For example, the licensee should not suggest to the principal how the existing agency relationship should be terminated.*

#### **Compensation and Release of Contractual Obligation:**

*Upon early termination of an agency relationship, a broker might be due compensation. At the time of termination, the broker and principal should resolve the amount of compensation, if any, that might be due pursuant to their contractual obligations (listing or buyer representation agreement). However, the broker may not take actions that, in effect, prohibit the principal from engaging the services of another broker or otherwise buying, selling, or leasing the property upon termination of the relationship.*

Below, find an expanded explanation from TREC's Enforcement Division.

The topic above refers to agency, not directly to marketing. If a client terminated their agency relationship with a broker, the agency relationship is ended. Therefore, a broker cannot continue to list the property in MLS, advertise it for sale, or otherwise "market" the property because there is no consent of the owner for the broker to offer to sell real property as required under §1101.652(b)(19) of the Real Estate License Act ("Act").

The topic above notes, a seller or broker who terminates a listing agreement early without just cause may have some civil liability to the other party. **That is a private legal matter and outside the jurisdiction of the Commission.**

*(Complete answer continues on next page)*

A broker must comply with §1101.652(b)(22) of the Act, conduct their real estate brokerage services competently and as a fiduciary, and avoid exposing a seller to possibly owing a commission to two different listing brokers. Therefore, a new broker must be certain a seller is no longer a party to a written contract that grants exclusive agency to another broker before a new broker enters into a new listing agreement with a seller. **Acting prudently, a new broker will obtain written confirmation of the termination of the first listing agreement.**

I hope this information is helpful.

Sharon S. Harris  
Staff Attorney  
Texas Real Estate Commission

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The National Association of REALTORS® **Code of Ethics** addresses pertinent points relating to Agency as follows.

Article 1: REALTORS® pledge themselves to protect and promote the interests of their client.

Article 9: All agreements related to real estate transactions shall be in writing in clear and understandable language.

Standard of Practice 9-2: REALTORS® shall make reasonable efforts to explain the specific terms of the contractual relationship being established.

Standard of Practice 12-4: REALTORS® shall not offer for sale/lease or advertise property without authority.

Article 16: REALTORS® shall not engage in any practice or take any action inconsistent with the exclusive representation agreements that other Realtors® have with their clients.

Standard of Practice 16-4: REALTORS® shall not solicit a listing which is currently listed exclusively with another broker.

Standard of Practice 16-6: When REALTORS® are contacted by the client of another REALTORS® regarding the creation of an exclusive relationship, and REALTORS® have not initiated such discussions, they may discuss the terms of a future listing..... Or enter into an agreement that becomes effective upon expiration of the existing agreement.

Standard of Practice 16-9: REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of service.

Standard of Practice 16-20: REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm.

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**ACTRIS** addresses similar points in their **MLS Rules**:

Article I: Listing Procedures

Section 1.9: Listings of properties may be withdrawn from the MLS by the MLS Participant before the expiration date of the listing agreement, provided notice is filed with ACTRIS, including a copy of the agreement between the seller and the listing Participant or Subscriber which authorizes the withdrawal.

Section 1.10: Sellers do not have the unilateral right to require MLS to withdraw a listing without the listing Participant or Subscriber's concurrence. However, when a seller(s) can document that his or her exclusive relationship with the listing Participant or Subscriber has been terminated, ACTRIS may remove the listing at the request of the seller.

#### Article IV: Prohibitions

Section 4.5: Participants shall not solicit a listing on property filed with ACTRIS unless such solicitation is consistent with Article 16 of the REALTORS® Code of Ethics, its Standards of Practice, and its Case Interpretations. This Section 4.5 is to be construed in a manner consistent with Article 16 of the Code of Ethics and particularly Standard of Practice 16-4, and is intended to encourage sellers to permit their properties to be filed with the MLS by protecting them from being solicited, prior to expiration of the listing, by Participants and salespersons seeking the listing upon its expiration.

Section 4.5 is also intended to encourage Participants to participate in the MLS by assuring them that other Participants will not attempt to persuade the seller to breach the listing agreement or to interfere with their attempts to market the property.

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Finally, **Best Practices** might suggest the following to all parties.

As a **new** Listing Broker:

1. Confirm via MLS search that the property is not currently listed with another broker.
2. Ask the seller at first meeting if they have engaged any broker in the sale of the property being considered.
3. Ask for written confirmation that any exclusive representation is no longer valid, if the seller informs the broker of a prior listing.
4. If termination of listing prior to expiration of the listing is of concern, consider consulting an attorney to prepare an addendum that addresses the issue. Additionally, Paragraph 5.E (3) of the ACTRIS agreement and Paragraph 5.D (3) of the TAR agreement provide space under the topic Reimbursable Expenses to minimally address early termination and state a fee.
5. Explain the obligations and duties of the listing agreement.

As a **subsequent** Listing Broker:

1. If approached by a seller who inquires about your services, first confirm whether the property is currently listed with another broker via MLS search and also question seller.
2. If either method determines seller is engaged with another broker, subsequent listing services can begin upon expiration of the current listing or termination of same.
3. The subsequent broker may NOT instruct seller on how to terminate.
4. Prior to actively marketing the property in the situation previously described, the subsequent broker should ask for written confirmation of expiration or termination of listing. A current copy of the listing showing the expiration date or a listing printout showing the status as "W" would be confirmations.
5. Items 4 and 5 from the previous section.

Finally, a concluding comment from Loretta DeHay, General Council Texas Real Estate Commission.

I cannot give you legal advice on how to interpret the terms of a listing agreement as TREC does not promulgate listing contracts. You should talk to a private attorney to determine how best to preserve your rights under a listing agreement while complying with TREC laws and rules. Although a seller might wish to terminate a listing early, you may still have rights under the listing agreement for compensation under certain circumstances. I cannot counsel you what to do as each contract is different and each has its own set of circumstances. **Although you may wish to exercise your rights under the listing agreement, you should not do anything that interferes with the clients' ability to sell their property.**

I hope this information is helpful to you.

Loretta DeHay  
Assistant Administrator and General Counsel Texas Real Estate Commission