



Staying Out of Court So You Can Stay on the Court!

Tips on How to Avoid Lawsuits and TREC Complaints

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Introduction

Why Are Real Estate Agents Getting Sued or Having TREC Complaints Filed Against Them?

What We Know:

- Today's real estate market has turned into a legal battlefield.
- Even though the real estate licensee might not be the reason a lawsuit is filed, they will probably find themselves caught in the crossfire.
- The trend in agent-related lawsuits and complaints has increased dramatically since the 1990's.

Why is the trend for suing an agent increasing?

Complexity of the Real Estate Transaction

There are more and more complex real estate transactions than in the past such as property trades, assignment or transactions involving alternative financing. Whenever you have a complicated transaction, you increase the likelihood that something will go wrong and that the practitioner will end up getting sued.

Lack of Adequate Agent Training

Many real estate firms are not providing the type of training and coaching needed to ensure their real estate licensees are doing everything that can to minimize the risk of being sued or having a TREC complaint filed against them.

Everyone Seems to be "Lawyering-Up"

Society as a whole is growing more litigious. People are more willing to sue today than ever before. This trend is affecting a broad spectrum of business, not just the real estate industry. Studies have shown we are becoming a less trusting society and some question "everything and everyone."

Increasing Government Regulations for Real Estate Licensees

Federal, state, and local governments are passing more laws that are expanding the duties and obligations of real estate practitioners. From following the guideline in the Real Estate Settlement Procedures Act (RESPA) to the most recent regulations enforced by the Consumer Financial Protection Bureau (CFPB) agents are finding themselves navigating through a fairly treacherous regulatory environment. The more duties that licensees have, the greater the opportunity that they'll make a mistake somewhere along the line.

The Bottom Line: You can't prevent someone from filing a lawsuit or complaint against you. However, you can be proactive and reduce the chances of seeing one come across your desk.

Oversight of Real Estate Licensees in Tennessee

Created in 1951, The Tennessee Real Estate Commission licenses, registers and regulates real estate brokers and affiliate brokers, real estate firms, rental location agents, time-share salespersons and developments, vacation clubs and vacation lodging services. The Commission also enacts rules addressing professional conduct and standards of practice. The mission of the Tennessee Real Estate Commission is to protect the public through establishment and administration of minimum requirements for candidates and licensees, effective professional education of licensees and enforcement of professional conduct.

TREC Rules and Regulations

- The Tennessee Real Estate Commission (TREC) was created as a result of the **Tennessee Real Estate Broker License Act of 1973**.
- TREC is one of several regulatory agencies under the Division of Regulatory Boards within the Tennessee Department of Commerce and Insurance.
- The real estate commission is empowered to take disciplinary action—including revocation of licenses and assessment of civil penalties—against license holders found guilty of violating laws governing real estate in Tennessee.

TREC is responsible for enforcing both the laws under the Broker's Act as well as the rules of the Commission.

- **The Tennessee Real Estate Broker's Act** established a formal and structured regulatory framework for legally brokering real estate in Tennessee.
- **TREC Rules** provide more detailed guidelines for the regular activities of licensees in the state. It is your responsibility for thoroughly knowing and obeying both state law and TREC rules. Remember, having a real estate license is a privilege, not a right.

Recent TREC Disciplinary Actions

Each month, the Commission reviews complaints submitted by consumers against licensees and brokers for various violations of state law and TREC rules. The Commission has increased the fines and disciplinary action for those found to be in violation of licensing rules and regulations. **Fines imposed by TREC in recent years have ranged from \$1,000 to several thousand of dollars and a few licensees had their license downgraded or revoked because of their actions.**

Some of the most common TREC violations include:

- Failure to timely complete required continuing education
- Engaging in unlicensed activity
- Failing to diligently exercise reasonable skill and care

- Advertising violations
- Failure to adequately supervise the activities of affiliates
- Failure to be loyal to the interests of the client
- Failure to respond to a complaint filed with the Commission
- Violating the gifts and prizes rule
- Making substantial and willful misrepresentation
- Failing, within a reasonable time, to account for or to remit moneys belonging to others
- Failure to maintain Errors and Omissions insurance
- Failure to timely disburse or interplead earnest money
- Failure to furnish a copy of a listing, sale, lease or other contract relevant to a real estate transaction to all signatories of the contract at the time of execution
- An affiliate's acceptance of a commission from someone other than the broker with whom they are affiliated
- Failure to complete and obtain a signed written disclosure agency status form
- Failure to notify the Commission of conviction enumerated within chapter within 60 days of conviction
- Conducting business with an expired real estate firm license
- When a licensee terminates his/her affiliation with a firm, he/she shall neither take nor use any property listings secured through the firm
- Unlicensed vacation lodging service
- Unlicensed property management service

21 Ways Your Real Estate License Can Be Suspended or Revoked by TREC

(Excerpted T.C.A. § 62-13-312)

- (1) Making any substantial and willful misrepresentation;
- (2) Making any promise of a character likely to influence, persuade or induce any person to enter into any contract or agreement when the licensee could not or did not intend to keep such promise;
- (3) Pursuing a continued and flagrant course of misrepresentation or making of false promises through affiliate brokers, other persons, or any medium of advertising, or otherwise;
- (4) Misleading or untruthful advertising, including use of the term "Realtor" by a person not authorized to do so, or using any other trade name or insignia or membership in any real estate association or organization, of which the licensee is not a member;
- (5) Failing, within a reasonable time, to account for or to remit any moneys coming into the licensee's possession which belong to others;
- (6) Failing to preserve for three (3) years following its consummation records relating to any real estate transaction;
- (7) Acting for more than one (1) party in a transaction without the knowledge and consent in writing of

all parties for whom the licensee acts;

- (8) Failing to furnish a copy of any listing, sale, lease, or other contract relevant to a real estate transaction to all signatories thereof at the time of execution;
- (9) Using or promoting the use of any real estate listing agreement form, real estate sales contract form, or offer to purchase real estate form which fails to specify a definite termination date;
- (10) Inducing any party to a contract, sale or lease to break such contract for the purpose of substitution in lieu thereof a new contract, where such substitution is malicious or is motivated by the personal gain of the licensee;
- (11) Accepting a commission or any valuable consideration by an affiliate broker for the performance of any acts specified in this chapter, from any person, except the licensed real estate broker with whom the licensee is affiliated;
- (12) Being convicted in a court of competent jurisdiction of this or any other state, or federal court, of forgery, embezzlement, obtaining money under false pretenses, bribery, larceny, extortion, conspiracy to defraud, or any crime or any similar offense or offenses, or pleading guilty or nolo contendere to any such offense or offenses;
- (13) Violating any federal, state, or municipal law prohibiting discrimination in the sale or rental of real estate because of race, color, religion, sex or national origin;
- (14) Violating any provision of this chapter, any rule duly promulgated and adopted thereunder, or the terms of any lawful order entered by the commission;
- (15) In the case of a licensee, failing to exercise adequate supervision over the activities of any licensed affiliate brokers within the scope of this chapter;
- (16) In the case of a licensee, failing within a reasonable time to complete such administrative measures as may be required by the commission upon the transfer or termination of any affiliate broker employed by the broker;
- (17) Paying or accepting, giving or charging any undisclosed commission, rebate, compensation or profit or expenditures for a principal, or in violation of this chapter;
- (18) Failing to disclose to an owner the licensee's intention or true position if the licensee, directly or indirectly through a third party, purchases for itself or acquires or intends to acquire any interest in or any option to purchase property which has been listed with the licensee's office to sell or lease;
- (19) Engaging in the unauthorized practice of law;
- (20) Any conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent or dishonest dealing; or
- (21) Violating any provision of the Tennessee Time-Share Act, compiled in Title 66, Chapter 32, Part 1, or any rule duly promulgated thereunder.

Duties Owed to All Parties in a Transaction (Customers and Clients)

T.C.A. § 62-13-403

Pursuant to the Tennessee Real Estate Broker License Act, every Real Estate Licensee owes the following duties to every Buyer and Seller, Tenant and Landlord (collectively “Buyers” and “Sellers”):

1. To diligently exercise reasonable skill and care in providing services to all parties to the transaction;
2. To disclose to each party to the transaction any Adverse Facts of which Licensee has actual notice or knowledge;
3. To maintain for each party in a transaction the confidentiality of any information obtained by a Licensee prior to disclosure to all parties of a written agency agreement entered into by the Licensee to represent either or both parties in the transaction. This duty of confidentiality extends to any information which the party would reasonably expect to be held in confidence, except for any information required by law to be disclosed. This duty survives both the subsequent establishment of an agency relationship and the closing of the transaction;
4. To provide services to each party to the transaction with honesty and good faith;
5. To disclose to each party to the transaction timely and accurate information regarding market conditions that might affect such transaction only when such information is available through public records and when such information is requested by a party;
6. To give timely account for earnest money deposits and all other property received from any party to a transaction; and
7. A) To refrain from engaging in self-dealing or acting on behalf of Licensee’s immediate family, or on behalf of any other individual, organization or business entity in which Licensee has a personal interest without prior disclosure of such personal interest and the timely written consent of all parties to the transaction; and

B) To refrain from recommending to any party to the transaction the use of services of another individual, organization or business entity in which the Licensee has an interest or from whom the Licensee may receive a referral fee or other compensation for the referral, other than referrals to other Licensees to provide real estate services, without timely disclosure to the party who receives the referral, the Licensee’s interest in such a referral or the fact that a referral fee may be received.

In addition to the duties owed all parties in a transaction, the licensee has the following duties to his/her client if the licensee has become an Agent or Designated Agent in a transaction:

Duties Owed to Clients

T.C.A. § 62-13-404

8. Obey all lawful instructions of the client when such instructions are within the scope of the agency agreement between the Licensee and Licensee's client;
9. Be loyal to the interests of the client. Licensee must place the interests of the client before all others in negotiation of a transaction and in other activities, except where such loyalty/duty would violate Licensee's duties to a customer in the transaction; and
10. Unless the following duties are specifically and individually waived in writing by a client, Licensee shall assist the client by:
 - A) Scheduling all property showings on behalf of the client;
 - B) Receiving all offers and counter offers and forwarding them promptly to the client;
 - C) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the Licensee's expertise; and
 - D) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.

Upon waiver of any of the above duties contained in 10. above, a consumer must be advised in writing by such consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of said duties.

Other Considerations

Adverse Facts

"Adverse Facts" means conditions or occurrences generally recognized by competent licensees that have a negative impact on the value of the real estate, significantly reduce the structural integrity of improvements to real property or present a significant health risk to occupants of the property.

Examples of Adverse Facts:

Confidentiality

By law, every licensee is obligated to protect some information as confidential. This includes any information revealed by a consumer which may be helpful to the other party IF it was revealed by the consumer BEFORE the Licensee disclosed an agency relationship with that other party. AFTER the Licensee discloses that he/she has an agency relationship with another party, any such information which the consumer THEN reveals must be passed on by the Licensee to that other party.

What are some examples of confidentiality in a real estate transaction?

Deceptive and Misleading Advertising

A licensee cannot advertise in way that would mislead or deceive the public. By doing so, a licensee will most definitely put their real estate license at risk. Examples of false, misleading or deceptive advertising include:

- Advertising as a team using similar names as a licensed real estate firm (i.e. using the terms “Real Estate”, “Real Estate Brokerage”, “Realty”, “Company”, “LLC”, “Corp.”, “Inc.”, “Associates”, or any other similar terms which would lead the public to believe that those licensees are offering real estate brokerage services independent of the firm and principal broker.)
- Any webpage that contains a link to an unlicensed entity’s website where said entity is engaged or appears to be engaged in activities which require licensure by the Commission.
- Not including the name of the firm or firm’s telephone number in the advertising.
- Agent websites that do not have their firm’s name and telephone number clearly appearing on each page of the site.
- Incorrect listing data on websites as well as the acknowledgement that the agent’s broker may not be the listing broker for the property. In other words, the listing should have a disclaimer stating, “not all listings shown/displayed are listings of the firm/broker.”

What type of advertising could be considered deceptive and misleading?

Guarantees, Claims and Offers...”It’s Too Good to Be True!”

TREC Rule 1260-02-.12(5)

Unsubstantiated selling claims and misleading statements or inferences are strictly prohibited by TREC. TREC Rule 1260-02-.12(6)(b) says “any offer, guaranty, warranty or the like, made to induce an individual to enter into an agency relationship or contract, must be made in writing and must disclose all pertinent details on the face of such offer or advertisement.” **The consumer needs to clearly understand the terms and conditions that must be met in order to receive the guarantee, claim or offer made by the licensee.**

Take note...TREC will discipline any licensee who violates this rule as this is a serious violation impacting consumers. Historically, the Commission has levied large civil penalties as well as suspending, downgrading and revoking a real estate license as a result of a listing agent or buyer’s representative attempting to persuade a consumer to do business with them by offering a guarantee, claim or offer that “sounds too good to be true.” Any special offer or guarantee must *clearly explain* the details in the advertisement (or offer) so the *consumer knows exactly* what the terms and conditions that must be met to receive the offer or guarantee.

For Discussion - Advertising Misrepresentation

Affiliate Broker Jane Smith recently placed a full-page advertisement in the local newspaper containing the following statement in large letters: “List with me and, if I can’t sell your home in 120 days...I will buy it!” In addition to this headline, the ad contained multiple pictures of properties Jane sold over the last 6 months, a couple of testimonials from her clients, her real estate firm name and telephone number as well as her picture and contact information. There was no additional information concerning the 120-day “buyout” claim.

Would TREC have an issue with Jane’s claim in her advertising? If so, discuss the reasons a complaint could be filed against her.

Personal Interest

Many times a real estate licensee will have a personal interest in a real estate transaction. This could range from purchasing or selling a property for himself or herself or a close family member. In addition, any ownership in a service provider or vendor who might assist a client or customer must be disclosed in writing.

Section 62-13-403(7)(A) of the Tennessee Real Estate Broker Licensing Act, a licensee shall: *Not engage in self-dealing nor act on behalf of a licensee's immediate family, or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of such interest and the timely written consent of all parties to the transaction.*

Tennessee real estate licensee must disclose the following related to personal interest:

- The licensee is the seller/owner of this property.
- An immediate family member of the licensee is the seller of the property.
- Any other individual, organization or business entity in which the licensee has a personal interest is the seller of the property.
- The licensee is a prospective buyer of the property.
- An immediate family member of the licensee is the prospective buyer of the property.
- Any other individual, organization or business entity in which the licensee has a personal interest is a prospective buyer of the property.
- Any other personal interest (ownership interest in a service provider, contractor, vendor, etc.)

National Association of REALTORS® Code of Ethics and Personal Interest

Article 4

REALTORS® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent or broker. In selling property they own, or in which they have any interest, REALTORS® shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative. (Amended 1/00)

Standard of Practice 4-1

For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by REALTORS® prior to the signing of any contract. (Adopted 2/86)

Standard of Practice 6-1

REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. (Amended 5/88)

Electronic Signatures

Digital Signatures / E-Signatures

- Tennessee treats digital signatures and writings the same as if written on paper.
- Electronic signatures must be authenticated.
- Each signature must contain a certification with a form of authorization, usually a certificate number.

Key Point:

Make sure a client understands the terms of the documents he or she is signing. Sometimes small problems can escalate in a real estate deal and many of these problems could be avoided if the parties were more careful in drafting the real estate offer.

DIGITAL SIGNATURE DISCLOSURE

Dear Client:

As we work together on your real estate transaction, you may receive one or more emails inviting you to review and sign electronic documents from our digital document signing system. The use of digital signatures allow us to process transaction documents more quickly and efficiently – especially when we need to meet a particular deadline/performance date in the transaction. In addition, the digital signing process allows you to receive a complete, fully executed set of documents for your files.

We utilize the most secure and technologically advanced digital signing service available in the real estate industry. Our service meets all federal and state regulatory compliance guidelines for digital signatures and is recognized as a “true signature” of the person participating in the signing process. Once you sign a document (or documents) digitally, it will be treated as an original signature and have the same enforceability as if you had signed it in person with a pen.

The Digital Signing Process

When we want you to sign a document digitally, you will receive an email informing you we need your signature(s). **Any and all documents we send you will need your immediate attention and signature.** The digital document signing system will automatically prompt you on how to establish a password and "electronically" sign the documents. Please follow the instructions on the screen in order to complete the signing.

VERY IMPORTANT:

PLEASE READ ANY AND ALL DOCUMENTS PRIOR TO DIGITALLY SIGNING!

When you login to the signing process you will notice the system will prompt you to begin the signing. The system is designed to take you directly to the signing/initialing area(s) once you begin. **It is extremely important you scroll through and read the document prior to signing/initialing so you understand its content and any terms and conditions you might be legally held to by the other signatory party.**

REMEMBER, BY DIGITALLY SIGNING THE DOCUMENT(S) SENT TO YOUR EMAIL, YOU ARE CERTIFYING THAT YOU HAVE THOROUGHLY READ AND ACCEPT THE TERMS AND CONDITIONS CONTAINED WITHIN THE DOCUMENT AND ACKNOWLEDGE ITS RECEIPT.

Once all the necessary signatures have been received by the system a final fully executed document will be available for your records via a PDF document.

Please do not hesitate to contact me if you have any questions concerning the digital signing process.

ACKNOWLEDGEMENT OF THIS DISCLOSURE

By signing below, you are acknowledging you have read this disclosure and understand the importance of the digital signing process and the need to thoroughly understand what you are digitally signing.

Client

Date

Client

Date

The Most Frequent Claims Made Against Real Estate Licensees

According to Rice Insurance, the following are the ten (10) most common claims made against licensees:

1. Fraud
2. Breach of Duty
3. Breach of Contract
4. Bodily Injury / Property Damage
5. Negligence
6. Misrepresentation regarding the Condition of the Property
7. Consumer Protection Act
8. Trust / Earnest Money Dispute
9. Misrepresentation regarding Flooding or Leaks
10. Misrepresentation regarding the Value of the Property.

Let's discuss a few of these in more detail....

1. Fraud

What are some examples of claims of fraud?

2. Breach of Duty

What are examples of "breach of duty" claims?

3. Breach of Contract

Can a licensee have a claim of “breach of contract” made against them? If so, explain.

4. Negligence

What examples can you provide that would be considered a claim of “negligence” against an agent?

5. Misrepresentation Regarding the Condition of the Property

How can misrepresentation of the property condition turn into a claim against an agent?

6. Misrepresentation Regarding Flooding or Leaks

Misrepresentation concerning property water intrusion has led to many lawsuits by angry clients. What are some examples of misrepresenting issues associated with flooding and water leaks?

7. Misrepresentation Regarding the Value of the Property

There are a number of scenarios where misrepresentation of property value may occur. Can you think of a few examples?

How to Avoid Real Estate Errors and Omissions Claims

While even the most diligent licensee may be the victim of a frivolous claim, diligent business practices help decrease risk. Even if these procedures do not prevent a claim, they may greatly enhance the chance of a successful defense.

1. **Resolve problems far before the closing date.** Don't wait until the last minute to address problem issues. When people are rushed to resolve matters, they are more likely to make mistakes or overlook items.

2. **Don't try to be an expert at everything.** Involve key professionals, such as attorneys, home inspectors, termite inspectors, appraisers, lenders, and surveyors when needed. Provide a list of several names or a copy of the yellow page listings but do not recommend a specific individual or firm! Keep a copy of the list you provide.

3. **It is generally a good idea to require agency disclosure on every transaction.** Be familiar with Tennessee laws regarding when a written agency disclosure is required, at what stage it must be completed, and who must be provided with signed copies. Typically, agency relationships should be disclosed as soon as possible, but in any event, prior to providing specific assistance to the client. For example, buyers should be advised if the licensee showing them the house is the seller's agent.

4. **Document conversations, recommendations, and activities in a log.** It is also often helpful to document conversations by sending a brief follow up email. Keep organized, detailed records of all real estate transactions. This is often required by state law, will assist you in recalling details, and will be helpful to an attorney if a defense is needed in the future.

5. **Brokers should have regular meetings with their firm licensees and remain informed as to their activities.** Establish consistent guidelines and make sure everyone in the firm understands and complies with them.

6. **Listing agents should have the seller complete any required property disclosure form.** This form should never be filled out by the real estate licensee. Additionally, if any issues arise while the property is listed, advise the seller to update the disclosure form accordingly.

7. **Recommend that buyers obtain a home warranty** and retain written evidence of the recommendation.

8. **Recommend that buyers obtain a home inspection.** If they decline, have them sign a form confirming this decision.

9. **Utilize state and/or association standard contract forms (i.e. TAR forms).** It is wise to address items that are outside of standard form language with the client's legal counsel, or else the real estate licensee risks the unauthorized practice of law.

10. **Be a "source of the source."** When information is obtained from a third party, it is often a good idea to disclose the source when making representations, because sometimes information from what appears to be a valid source turns out to be inaccurate. For example, if you believe a property is on city sewer based on a prior listing or a statement by the city utility office, disclose the source of your representation.

Notes

About the Author

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John Giffen is an award-winning real estate broker, manager, author and real estate educator. He is Director, Broker Services for Benchmark Realty, LLC in Franklin, Tennessee. He previously served as the principal broker for Benchmark for several years. He holds numerous industry designations and certifications including the Certified Real Estate Brokerage Manager (CRB) and Certified Residential Specialist (CRS) designations from the National Association of REALTORS® and the GRI (Graduate, REALTOR® Institute) designation from the Tennessee REALTORS®. He has also earned the Certified Distance Education Instructor (CDEI) designation from the International Distance Education Certification Center affiliated with the Association of Real Estate License Law Officials (ARELLO.)

John is a Tennessee Real Estate Commission (TREC) approved course instructor as well as the author of several TREC approved continuing education courses on real estate contracts, agency, licensing, buyer representation, property marketing, real estate ethics, and transaction behavior. He works closely with Tennessee REALTORS® and other TREC approved real estate education providers in developing new courses for license renewal. He is the author of the current Tennessee REALTORS® TREC Residential, Commercial and Principal Broker Core courses.

In 2014, John was named "REALTOR® of the Year" by the Williamson County Association of REALTORS®. He is a multi-million-dollar sales producer and received numerous awards for his sales production over the years.

About the Company

Real Estate Learning Systems, LLC (RELS) is a professional development and training company based in Franklin, Tennessee. RELS provides in classroom and online continuing education classes in order for real estate agents to renew their Tennessee real estate license and meet professional standards requirements of the National Association of REALTORS®. In addition, the company offers consulting services for real estate brokers, REALTOR® associations and online continuing education providers as well as comprehensive curriculum design and development that meets state regulatory compliance requirements.



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