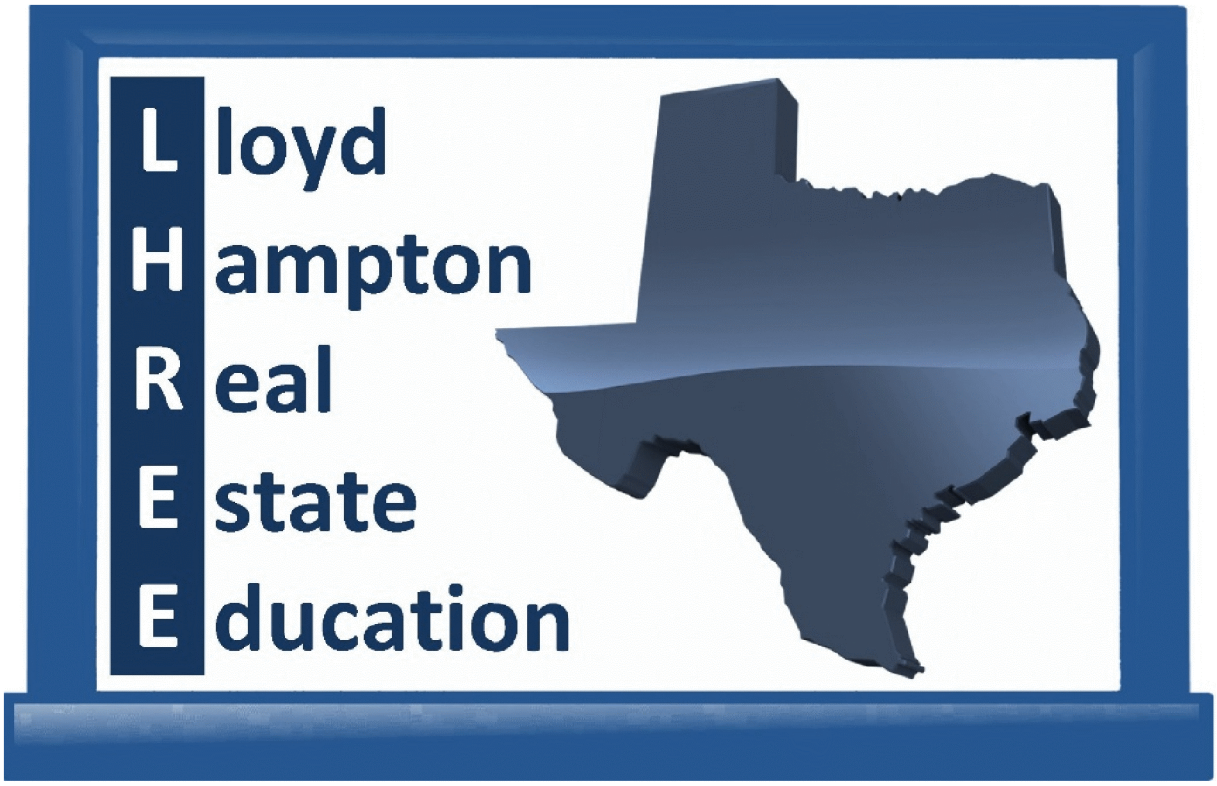

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Texas Negotiation Law

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Introduction

Negotiation is an integral part of any real estate transaction. The more a real estate agent knows about negotiation the better he or she may serve the client. There are many commonly held misperceptions held about negotiation. Texas law, including the Texas Real Estate License Act (TRELA) and the Rules of the Texas Real Estate Commission, greatly impact how these negotiations may be conducted.

This course will cover the principles of negotiation with a focus on the legal issues involved. Much of the material is very Texas specific and therefore valuable to any real estate practitioner in the state.

Upon completion you will be able to assist your clients negotiate transactions professionally and legally all the while promoting your client's interests and goals. The concepts learned here are applicable to both residential and commercial real estate.

It is my sincere desire that you will take what you learn here and use it to build success for yourself, your clients, and with those you deal with in the industry every day. Be ever mindful that both sides in a transaction must be satisfied if you ever hope to get the transaction to closing.

This booklet is designed to be a companion to a PowerPoint presentation as presented in a live classroom setting.

Thank you for choosing Lloyd Hampton Real Estate Education for your continuing education. We hope you enjoy and profit from the presentation. With a dedication to quality real estate education we believe that knowledge is the vehicle and service is the goal. We wish you the best of luck in your real estate career.

Sincerely,

Lloyd Hampton CREI, CDEI

Texas Negotiation Law

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Binding Negotiation
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Part 1 – Offer

1. **When a License is Required to Negotiate**
   According to the Texas Real Estate License Act, Section 1101.002:
   In this chapter "Broker":
   (A) means a person who, in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration, performs for another person one of the following acts:
   (iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate.

2. **Non-Binding Negotiation**
   Non-binding negotiation is any communication between the parties that CANNOT result in a contract. This includes face-to-face conversations, phone conversations, and carefully crafted written communications such as letter, texts, and emails. Best practice is to make sure the other side understands that there is nothing binding. We're just talking here! Agents must understand that even oral communications must be presented to their clients unless they have written instructions to the contrary.

3. **Binding Negotiation**
   Binding negotiation is any communication between the parties that CAN result in a contract. Of course, this would have to be some form of written communication such as letters, texts, emails, and preferably, TREC forms. All these communications must be presented by the agents to the clients unless they have written instructions to the contrary.

4. **We Negotiate Contracts**
   If you ask a lot of people what real estate agents negotiate the answers often heard are that we negotiate a deal, a sale, a purchase, an agreement, or a transaction. You will also hear people say that we are negotiating the price and other terms. None of this is true! We must never lose sight of the fact that what we are negotiating is a contract! In negotiating the terms of that contract we deal with price and terms but you could have buyers and sellers reach complete agreement, but if it's not on a contract, you have nothing.

5. **Offer**
   An offer is a proposal by one party to another that if accepted, would form a contract. In other words, an offer gives the other party the power of acceptance. The power to accept and form a contract. Anything else is simply a conversation or non-binding negotiation. An offer must be made in writing and again, preferably on TREC forms.

6. **Offer vs Contract**
   Let us be very clear about the difference between an offer and a contract. An offer, as just discussed, is simply a proposal from one party to another. A contract is a legally enforceable agreement. This means that if a party violates their promises in the contract you can enforce the contract in a court of law. Agents on the street are bad about referring to offers as contracts. How often have you heard an agent say, "We already have three contracts on that property!" or "I wrote a contract last night." When what

they really mean is that they have three offers on the property or just wrote an offer on a listing? This type of imprecise language can lead someone to believe that a property is under contract when in fact it is simply under negotiation.

7. **Withdrawal of Offer**
   An offer may be withdrawn any time before a contract is formed. More on this later……..

8. **Disclosing the Presence of Multiple Offers**
   You represent the seller. You have two offers in hand and another just came in. Can you disclose to all the potential buyers that there are multiple offers? Yes. Are you required to disclose there are multiple offers? No. Who should make this decision? Your client. This can work for you or against you in a negotiation. Make your recommendation in this matter but you must let the clients decide. Only one rule here, if you disclose to any one buyer there are multiple offers, you must disclose it to all. You cannot tell some buyers there are multiple offers and not tell others.

9. **Disclosing the Content of Multiple Offers to Third Parties**
   There is some disagreement within the industry on this issue. Some say that the details of offers can be disclosed to others if you have the sellers consent. Others say no, that it violates the right of privacy of the buyers that made the offer unless you have consent from the buyers to do so. Consult your broker and legal counsel for guidance. I think that the best practice is that if there are multiple offers on the table, you should make it clear you will disclose no details as to the content of those other offers. You should not tell third parties the amount, terms, closing date, whether it is better or worse than another offer, if it's cash or financed, good, fair, poor, higher, lower, or rate it from one to ten.

10. **Handling Multiple Offers**
    This is a situation that requires a certain amount of finesse. We must be fair to all parties. There is no one correct way to deal with multiple offers. However, you need to make clear to all parties what method will be used and any timeframes that will be imposed. You can simply go back to all the buyers with a request for "final and best offers". You can inform all the buyers that you will hold off until a certain date and time to see what other offers will come in. You can go old school and handle the offers one at a time in the order in which they were received. Probably the best way to handle multiple offers is to use the TAR form #1926, SELLER'S INVITATION TO BUYER TO SUBMIT NEW OFFER.

TEXAS ASSOCIATION OF REALTORS®

SELLER'S INVITATION TO BUYER TO SUBMIT NEW OFFER

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.
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To: _____ (Buyer)

From: _____ (Seller)

Re: The offer concerning the Property at _____

(1) Seller does not accept the above-referenced offer you submitted.

(2) You are invited to submit another offer, which Seller may more favorably consider if: _____

(3) **This communication and invitation is not a counter-offer.** The Property remains on the market. Seller may consider other offers and accept another offer.

Seller Date Seller Date

11. Full Price Offers

There is a very common myth on the street that if a buyer makes a full price offer with all the terms a seller is requesting then the seller must accept that offer. This is not true. It is well established that what we list a property for, what we put in the MLS, and what we advertise is not an offer. It is an invitation to negotiate. If an agent does procure a full price and terms offer a commission may be due since the agent did what the agent was hired to do, but that would be a separate issue. (Collecting that commission would be yet a third issue!)

12. Back-up Offers

A back-up offer is an offer made after a contract is already in place with another buyer. The second buyer is in line to purchase in case the first buyer fails to close. The Texas Real Estate Commission has a promulgated addendum to address this situation. But keep a few things in mind. The back-up buyer and seller sign the back-up offer and the addendum. The buyer pays any option fee to the seller and tenders the back-up contract and earnest money to the title company. It works best to open title on the back-up at the same title company used on the first contract. The buyer stays in back-up position as long as specified in the addendum. If the first contract does not fall out before then, the back-up contract terminates, and the earnest money is refunded to the buyer. If the parties agreed to an option period, the back-up buyer may terminate anytime while in back-up and then the agreed number of days specified in the option period when and if the first contract falls out. Let's look at the addendum.

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC) 12-05-11

EQUAL HOUSING OPPORTUNITY

ADDENDUM FOR "BACK-UP" CONTRACT

TO CONTRACT CONCERNING THE PROPERTY AT

_____

(Address of Property)

A. The contract to which this Addendum is attached (the Back-Up Contract) is binding upon execution by the parties, and the earnest money and any Option Fee must be paid as provided in the Back-Up Contract. The Back-Up Contract is contingent upon the termination of a previous contract (the First Contract) dated _____, 20_____, for the sale of Property. Except as provided by this Addendum, neither party is required to perform under the Back-Up Contract while it is contingent upon the termination of the First Contract.

B. If the First Contract does not terminate on or before _____, 20_____, the Back-Up Contract terminates and the earnest money will be refunded to Buyer. Seller must notify Buyer immediately of the termination of the First Contract. For purposes of performance, the effective date of the Back-Up Contract changes to the date Buyer receives notice of termination of the First Contract (Amended Effective Date).

C. An amendment or modification of the First Contract will not terminate the First Contract.

D. If Buyer has the unrestricted right to terminate the Back-Up Contract, the time for giving notice of termination begins on the effective date of the Back-Up Contract, continues after the Amended Effective Date and ends upon the expiration of Buyer's unrestricted right to terminate the Back-Up Contract.

E. For purposes of this Addendum, time is of the essence. Strict compliance with the times for performance stated herein is required.

_____ _____

Buyer Seller

13. Deadlines in an Offer

Agents and their clients sometimes try to put a deadline for a response to an offer. Something like "Must have a response by 5:00 tomorrow." OK. Then do this in the proper manner and in the proper place. The proper place is not Special Provisions of the contract form. Remember that Special Provisions does not exist until you have a contract. Furthermore, by putting the deadline in Special Provisions you are asking the other side to agree to the deadline. A deadline is a unilateral action that does not need the other party's agreement. So, let's notify the other side of a deadline in a cover letter or email. Let's also word the deadline correctly. "Must have a response by 5:00 tomorrow" can be responded to by "I really like your hair." Typically, what the other side is looking for is a specific response. A yes, no, or counter. So, something like "This offer expires on May 14th, 2019 at 2:15 pm" will suffice.

14. Presenting Offers

Which offers must be presented? All of them. Every single one. No matter how bad. No matter how messed up. No matter how low. No matter how incomplete. No matter if the seller has already turned down better offers. Wrong form, wrong language, on a napkin, in pencil, does not matter. This also includes the infamous "insulting" offers. The only time real estate agents can refuse to present an offer to their clients is when the clients have issued written instructions not to present. Let's look at what the License Act has to say on this issue:

TRELA Sec. 1101.557(b) A broker must inform the party if the broker receives material information related to a transaction, including the receipt of an offer by the broker and shall, at a minimum, answer the party's questions and present any offer to or from the party.

15. Responding to an Offer

There are seven ways one may respond to an offer.

a. Yes! Remember that any other response carries risk. They may walk.
b. No! Can be useful but may simply end the negotiation.
c. Reaffirmation. Just keep repeating your last response.
d. Vagueness. "You'll have to do better than this."
e. Silence. They either go away or improve their offer.
f. Negotiate. Still talking but without a counter-offer.
g. Counter-offer. Remember you are granting the power of acceptance.

Part 2 – Acceptance

1. **Elements of a Contract**

   To have a contract there are eight elements that must be met. If any of these elements are missing, then a contract has not been formed. Try using Coca-Cola to remember them!

   Competent parties
   Offer
   Consideration
   Acceptance
   Contractual Intent
   Objective is Legal
   Legal Description
   Agreement in Writing and Signed

2. **Statute of Frauds**

Here is the part of Texas law that requires contracts for the sale of real estate to be in writing. There is no such thing as an oral contract for the sale of real estate! What we say in a phone conversation or face-to-face has no binding effect in our negotiations. Although we may negotiate orally, such negotiations often lead to misunderstandings and disputes. Oral contracts are common outside of real estate but almost unheard of within our industry. All negotiations should be in writing to avoid such problems or at least make clear to all involved that this is simply a discussion! Below is the actual statute:

Texas Business and Commerce Code §26.01 Agreement Must Be In Writing.
(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
(1) in writing; and
(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
(b) Subsection (a) of this section applies to:
(4) a contract for the sale of real estate;
(5) a lease of real estate for a term longer than one year.

3. **Partial Acceptance**

   There is no such thing as partial acceptance. You either have a contract with full agreement, or you don't. From a conversational standpoint we often say, "We have accepted this, this, and this, but we still need to talk about that, and that." This is still a negotiation. You cannot lock people into some terms but not have full agreement on others.

4. **Agreement vs Contract**

   Lawyers have a saying: "All contracts are agreements but not all agreements are contracts!" An agreement is an understanding between the parties, but it is not a contract. We should make this distinction clear to all the parties and agents involved. Say something like "It sounds as if we may have an agreement so let's do the TREC forms to turn that agreement into a contract." A contract is a legally enforceable agreement. That means that if one party breaks a promise the other party may enforce the contract through a court of law. It is more than an agreement or understanding.

5. **Offer to Contract**

Probably the single most important question in real estate is "When does an offer become a contract?" The wording is critical. Please read this carefully.

An offer becomes a contract when the last party has signed, and the other side has been notified.

There are a couple of issues to be clarified. First is that an initial is a signature. So, when we say, "the last party has signed" that is to say that the last party has put the last initial to the last little change. This does not include the initials at the bottom of the pages on a TREC promulgated contract form. Those initials are for identification, not agreement. Second is that the other side has been notified of the final signature. So, if your client is the last to sign, you still do not have a contract until you notify the other side. Texas courts have been clear that "oral notification of written acceptance is adequate." They are not saying oral *acceptance* but rather oral *notification* of written acceptance. They are also making clear that oral notification is adequate, not perfect. Delivering the signed contract back to the other side is the best practice but not required. An offer may be withdrawn until notification of written acceptance is given.

6. **The Implied Agency Rule**

Now just who do we give notification to? That brings up the implied agency rule. The notification may be to the other principal or the "agent" of the principal. "Agent" as used here may be the other real estate agent or some other form of communication used. Let us assume for a moment that there are no real estate agents involved. This is just between the buyer and seller. Then it would depend on the type of communication used. If the buyer faxed an offer to the seller and the seller signed and faxed it back then they have a contract when the seller transmitted the fax, even if it was not received back by the buyer. Because they both used the same form of communication (fax) it was binding when the seller hit send. In this case the fax is the "implied agent of the offer." It would work the same for snailmail or email using electronic signatures. For the implied agency rule to work both parties must be using the same method of communication. If they are not using the same method of communication, then there must be "actual notice". This means the other party must personally receive the notification of the written acceptance. If the buyer faxes over the offer and the seller signs and leaves a voicemail notifying the buyer of acceptance there is no contract until the buyer actually hears the voice mail. Now let's insert real estate agents into the picture. If the seller and buyer both have agents, then all one agent must do is notify the other agent of the final written acceptance. So, you represent the buyer and I represent the seller. You send me an offer (does not really matter how) and then my seller signs it. All I must do is notify you it has been accepted. Then we have a contract. Even if you have not yet notified your buyer. In this case we are the "implied agents"!

7. **Decision Makers**

Remember that the principals make the decisions here. The principals include the buyers, sellers, landlords, and tenants. Not sales agents and not the brokers. Agents often make decisions for their clients out of arrogance or ignorance. Agents should make recommendations to their clients, but it is up to the parties to decide what they will, or will not do. The agents do not have to agree, or like it, or think it wise. It is the principals' money, property, and lives we are dealing with here. Let's put them in control.

8. Text and Email Negotiation

The real estate industry is facing new questions and new challenges in the twenty-first century. We have so many ways to communicate such as phone, fax, email, and text. While these different methods of communication are fast and convenient they can cause problems in negotiating real estate transactions. In the "old days" before fax machines, the internet, or smart phones we often had the initial offer come to us in writing on a TREC form. Although technically we should then have gone back and forth in writing, we didn't. We would handle things over the phone and once we had an "understanding" then we would finish the paperwork. It was known by all that until that contract form was signed by everyone, there was nothing binding. The problem caused by text and emails is that those communications are in writing which is a whole different thing. An argument can and has been successfully made that, under the proper conditions, a series of emails or texts may create a contract. Let's look at what the Texas Real Estate License Act and the Rules of the Texas Real Estate Commission has to say about these issues and identify our best practices moving forward. The Texas Real Estate License Act which states:

§1101.652 – GROUNDS FOR SUSPENSION/REVOCATION OF LICENSE
(a) The commission may suspend or revoke a license issued under this chapter or take other disciplinary action authorized by this chapter if the license holder fails to use a contract form required by the commission.

So, trying to form a contract based on texts or emails is a failure to use the forms required by law. The texts or emails will never have all the detail necessary to cover all the issues that need to be addressed for the benefit of the buyers and sellers. The best practice is to have discussions by email but do not attempt to form a contract based on them. Claiming that a contract was formed by emails could also be considered the unauthorized practice of law.

Now let's turn our attention to the Rules of the Texas Real Estate Commission:
TREC RULES §537.11 – USE OF STANDARD CONTRACT FORMS
(a) When negotiating contracts binding the sale, exchange, option, lease or rental of any interest in real property, a real estate licensee shall use only those contract forms promulgated by the Texas Real Estate Commission for that kind of transaction.
(d) A license holder may not undertake to draw or prepare documents fixing and defining the legal rights of the principals to a real estate transaction.
(e) In negotiating real estate transactions, a license holder may prepare forms using only forms that have been approved and promulgated by the Commission.

It can be easily argued that forming a contract by email is failing to use the forms we are required to use. We can discuss issues by email but let's make it clear that these emails are for discussion purposes only.

So, let's set some standards as to how we handle negotiations for our clients.

i. Keep all texts and emails concerning the negotiation.
   Most agents do not keep the all the relevant texts and emails as they should.
ii. Copy clients on relevant negotiating texts and emails.

Under §535.2 of TREC Rules it states that "A broker owes the highest fiduciary obligation to the principal and is obliged to convey to the principal all information known to the agent which may affect the principal's decision". These emails clearly fall into this category.

iii. Be accurate, not brief.
In social communications being brief is the standard and with texts and tweets that is fine. But we are negotiating some of the largest financial transactions our clients will ever have. We owe them the duty of clarity, not brevity. Take the time and use as many words as needed to be clearly understood.

iv. Don't use the word "deal", use the word "contract".
"Deal" is a fuzzy word. Agents often want to jump the gun and say, "We have a deal!" before they have a contract. Lose the word "deal". If you had the paperwork in your possession but were missing one initial to one little change you would never say you had a contract. When the other side says you have a deal, make them be specific. Ask "Are you saying we have a contract? That everyone has signed, and all changes have been initialed?" If not, then there is no contract.

v. Have a disclaimer at the bottom of each email.
To that end, let's add the following statement to each and every email we send to buyers, sellers, and other agents when negotiating a transaction.
"My statements in this e-mail do not create an agreement for my clients. My typed name in this e-mail is not my electronic signature nor is it the electronic signature of any of my clients. I do not have the authority to bind my clients to a contract."
By having the statement suggested above at the bottom of each email, especially if both agents have it at the bottom of each email, it will be difficult for a court to rule a contract was formed using those emails.

vi. Don't make definitive statements in your emails.
Always use a qualifier. My client said they ***might*** be willing to accept that. My buyer ***may*** agree to that change. In this manner there should be no confusion. We are simply talking here. All this back and forth by email is for discussion, but no contract exists until it has been put onto TREC forms, the last party has signed, and the other side has been notified of this fact.

9. Four Corners Doctrine

The meaning of a written contract is represented solely by its textual content. Contracts are interpreted from the text of the agreement itself without relying upon other sources, so the parties' intentions must be discerned from the four corners of the document and extrinsic evidence is not considered. What was discussed, or agreed to, or in the MLS has no relevance once the contract is signed.

10. Parole Evidence Rule

A substantive common law rule in contract cases that prevents a party to a written contract from presenting extrinsic evidence that contradicts or adds to the written terms of the contract that appears to be whole. Basically, you can't use oral testimony to contradict the terms of a signed contract. Again, it does not matter what you said, what was discussed, or what was "understood". If it's not in the contract, it doesn't exist.

11. Effective Date

Then the question is just when is the effective date of this new contract? The TREC promulgated forms specifies that the effective date is the date of "final acceptance" and we now know that that is when the last party has signed and the other side has been notified! The agents in the transaction are charged with the duty of inserting the proper date. If we don't, we still have a contract, but this omission may certainly cause problems. The parties are allowed to agree to some other effective date.

12. The Steps of Negotiation

1. Find out what the other side wants.
2. Gather more information.
3. Reach for compromise.
4. Execute the contract.

13. Intermediary Negotiation

When the firm is representing both parties in a transaction then certain limits are imposed by Texas law on those negotiations. There are two scenarios that appear here. One is where the broker appoints sales agents to give the parties advice and opinions during negotiations and the other is where the broker does not make the appointments and the sales agents are not allowed to give advice and opinions. For the agents to be able to give advice and opinions there must be two sales agents with one appointed in writing to the seller and another agent appointed to the buyer. In any other intermediary situation, the agent or agents cannot give advice and opinions during the negotiation. Whether or not appointments are made the Texas Real Estate License Act imposes the following restrictions:

Sec. 1101.651. CERTAIN PRACTICES PROHIBITED.

(d) A broker and any broker or sales agent appointed under Section 1101.560 who acts as an intermediary under Subchapter L may not:

(1) disclose to the buyer or tenant that the seller or landlord will accept a price less than the asking price, unless otherwise instructed in a separate writing by the seller or landlord;

(2) disclose to the seller or landlord that the buyer or tenant will pay a price greater than the price submitted in a written offer to the seller or landlord, unless otherwise instructed in a separate writing by the buyer or tenant;

(3) disclose any confidential information or any information a party specifically instructs the broker or sales agent in writing not to disclose, unless:

(A) the broker or sales agent is otherwise instructed in a separate writing by the respective party;

(B) the broker or sales agent is required to disclose the information by this chapter or a court order; or

(C) the information materially relates to the condition of the property.

14. Residential vs Commercial Negotiation

There are a couple of important differences here. First, in residential real estate we have TREC promulgated forms we use in the negotiation but in commercial there are no contract forms issued by TREC. However, the Texas Association of Realtors® has many commercial forms that may be used by members of that Association. Second is that residential negotiations are often 80% emotion and 20% logic whereas in commercial it is often 80% logic and 20% emotion. Buying or selling a home to the buyers and sellers (other than investors) can be a very emotional experience. But in commercial it's all about the numbers.

15. Negotiating with Out-of-State Brokers

Can we negotiate a contract with an out-of-state broker or agent? In a word, no. We are allowed to pay them a referral fee or commission as long as they are not involved in the negotiation between the buyers and sellers. This is something that has changed over the years, Currently, here is what the Texas Real Estate License act has to say:

Sec. 1101.651. CERTAIN PRACTICES PROHIBITED.

(a) A licensed broker may not pay a commission to or otherwise compensate a person directly or indirectly for performing an act of a broker unless the person is:

(1) a license holder; or

(2) a real estate broker licensed in another state who does not conduct in this state any of the negotiations for which the commission or other compensation is paid.

But then the Rules of the Texas Real Estate Commission further clarifies:

Texas Real Estate Commission Rules Section 535.4 License Required

The Act applies to any person acting as a real estate broker or sales agent while physically within Texas, regardless of the location of the real estate involved or the residence of the person's customers or clients.

For the purposes of the Act, a person conducting brokerage business from another state by mail, telephone, the Internet, email, or other medium is acting within Texas if the real property concerned is located wholly or partly in Texas.

16. The Myths of Negotiation

Myth #1: Oral agreements for the sale of real estate are binding.
Fact: Statute of Frauds tells us no.

Myth #2: An offer becomes a binding contract when the last party signs.
Fact: Notification of written acceptance must be communicated to the other side!

Myth #3: Delivery of the signed contract is the only method of giving notification.
Fact: Oral notification of written acceptance is adequate.

Myth #4: Offers must be presented & negotiated one at time in the order received.
Fact: You must present all offers unless the client has instructed otherwise in writing.

Myth #5: You must negotiate only one offer at a time.
Fact: You may negotiate as many offers simultaneously as the client chooses.

Myth #6: Sellers must accept an offer that is full price with matching terms.
Fact: Seller may counter any offer, including one at full price.

Myth #7: During a negotiation you cannot open negotiation with another party.
Fact: Until there is notification of written acceptance the seller may negotiate and accept other offers.

Myth #8: Partial acceptance is binding for that part of the offer.
Fact: If it's not a total acceptance then it's a counter-offer.

Myth #9: The agent must disclose the presence of other offers to other buyers.
Fact: You may disclose the presence of other offers, but it is not required.

Myth #10: You should disclose the details of offers to other buyers or their agents.
Fact: You cannot disclose the details of any rejected offers, nor of any in negotiation, without permission from the offeror.