



THE LAW OFFICE OF  
CHRISTOPHER J. SULLIVAN, PLLC

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**To:** Clients and Friends  
**From:** Christopher J. Sullivan  
**Subject:** Top TREC Complaints

It's hard to know how to avoid TREC complaints and disciplinary actions unless you stay well-versed in what specific situations are the most likely to lead to TREC complaints. Many agents assume they will never get into trouble simply because they view themselves as fair and ethical agents. While most agents really are fair and ethical, the truth about TREC complaints is more complicated than that.

That truth is that the world of buying and selling real estate is incredibly technical. At the same time, an agent's career is built upon how willing they are to go above and beyond for their clients. Sometimes an agent goes too far and crosses the line into actions that put them in danger of a TREC complaint, or even a lawsuit by a disgruntled client. This is usually the result of being too focused on making the client happy at any cost or ensuring the transaction goes through after serious hiccups. This can result in allegations against the agent such as those for unauthorized practice of law.

And then again, there are times when agents don't even come close to going above and beyond. Instead, for one reason or another, they fail to respond to a client in a reasonable manner or time. Or, perhaps they make a significant mistake in showing a home or completing a contract. These situations can lead to accusations by clients and TREC of breach of fiduciary duty.

In this article, I aim to highlight several of the most common TREC complaint categories against agents. My goal is to show how these complaints and violations can be avoided, by providing examples of situations leading to common complaints as well as best practices to avoid finding yourself in those situations. We live in a litigious society, and even the best of us can learn something from the mistakes others have already made. When it comes to liability, what you don't know really can hurt you.

### *Leasing and Property Management*

Every year, one of the top categories of complaints received by TREC is leasing and property management violations. Of these, most complaints relate to improper conduct concerning property management. A common violation within this category is a broker or agent who purposefully or mistakenly commingles their own funds (including operating funds) with those from tenants and clients. This leads to inadvertent misappropriation of funds that should go to the client/landlord and either goes to another client or ends up in the agent's pocket. Furthermore, failure to properly account for money coming in and going out can cause a broker or agent to be fined by TREC and sometimes results in a lawsuit by the client for conversion (the civil version of theft).



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### *How do I avoid this?*

The Texas Operations Code §1101.652(b)(10) prohibits commingling of a license holder's money with money that belongs to another person. To avoid a violation, agents should always deposit clients' money into a trust or escrow account that is dedicated to money from properties being managed. A security deposit that is held onto for the landlord is also often deposited into an account entirely separate from the main trust account, although technically this is not a requirement. Failing to properly account for or remit money within a reasonable period of time can result in disciplinary action by TREC, as can paying an operating expense with unearned trust account funds. Always keep your books and accounting updated, and never, ever borrow from your trust account!

### *Advertising*

Another common category of TREC complaints concerns violations of advertising rules applying to license holders. Many of these have to do with misleading information or advertising that fails to include required information, such as the brokerage name. Even use of an unregistered DBA or assumed name by the agent (or the brokerage) can lead quickly to a complaint. Some agents have asked me in the past whether TREC views advertising violations differently if the advertisement is targeting commercial properties instead of residential ones. This question makes sense when you consider that most consumer protections applying to primary residence transactions don't apply to commercial transactions, where parties are assumed to be more sophisticated. However, the short answer is no. Any advertising rules in place generally apply to commercial agents and commercial properties as much as to residential.

### *How do I avoid this?*

The easiest way to avoid advertising dilemmas is to become very familiar with the TREC requirements. Refresh yourself with these requirements before you embark on any course of advertising – and remember that in today's age of social media, a casual Facebook post can be considered an advertisement! Here is a simple checklist to get you started on advertising compliance:

- If you are a sponsored agent, include your brokerage name in a clear and conspicuous manner
- Include a designation that identifies you clearly as a license-holder, such as agent, broker, or Realtor®
- Avoid any wording that could be considered deceptive or misleading (when in doubt, leave it out!)
- Make sure you have authority to publish the advertisement, which may involve seeking prior approval from your broker or firm
- If you are advertising a listing, make sure the price reflects what the seller has agreed to in advance



Of course, this isn't a comprehensive list. In addition, TREC recently adopted updated advertising rules. These rules won't be in effect until May 15, 2018, but you can familiarize yourself with them ahead of time to avoid inadvertent violations. I have a forthcoming article that will explain and analyze the changes to advertising rules, so check back here soon!

### *Breach of Fiduciary Duty*

Agents owe what are known as "fiduciary duties" to their clients. It can be hard to put succinctly into words what this means, but essentially it obliges the agent to always act in the best interest of the client, to hold their confidences, communicate fully, obey their directions concerning the transaction, perform due diligence, and account for all money or property entrusted to them.

The obligations of a fiduciary can arise either through a written contract with the client OR through actions between you and a client. Yes, this means that in the eyes of the legal system, and of TREC, you can accidentally or unknowingly become burdened with fiduciary duties. I have a forthcoming article that will detail the six fiduciary duties of an agent, namely: loyalty, confidentiality, disclosure, obedience, reasonable care and diligence, and accounting.

### *How do I avoid this?*

In my upcoming article on fiduciary duties I will go into detail on the six duties and how to avoid their breach. For now, here is a snapshot of each duty and a common example of its breach.

- Loyalty – the duty of loyalty requires that you always act in the best interest of your client. This supersedes the ability to act in even your own best interest. For example, if you were to purchase a client's home yourself for the purpose of turning around and selling to a third-party willing to pay a higher asking price, this would quite plainly violate the duty of loyalty.
- Confidentiality – the duty of confidentiality requires you to keep confidential any information that would weaken a client's negotiation with the other party to the transaction. An example of breach of this duty would be a buyer's agent disclosing to the seller's agent that the buyer is willing to pay significantly more than their initial offer.
- Disclosure – the duty of disclosure obliges an agent to disclose to the client all information pertinent to the property and transaction. A violation of this duty would be an agent who fails to disclose an offer to a seller, even if the offer was significantly below listing price.
- Obedience – the duty of obedience imparts a duty upon the agent to follow all lawful instructions given to them by the client. For instance, if the client were to instruct an agent not to show a home during a weekend when the client will be out of town, and the agent shows the home anyway, these actions would be a breach of the duty of obedience.



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- Reasonable care and diligence – the duty of reasonable care and diligence requires that the agent sustain a standard of care that is reasonable under the circumstances whenever they are performing functions in furtherance of their representation of the client. Be aware that the standard of care that is normally applied takes into account the average license holder’s specialized knowledge and skills. An example of a breach might be a buyer’s agent who sees extensive and obvious cracks along the walls of a home that clearly indicate foundation damage, yet does not recognize the problem or say anything to the client.
- Accounting – the duty of accounting obliges an agent to safeguard money and property that belongs to the client. An agent who is entrusted with an original deed and misplaces it has violated the duty of accounting, as would a property manager who “borrows” from their client’s trust account.

### *Improper Referrals and Referral Fees*

In most cases, there needs to be a referral agreement between brokers in order for one agent to refer to another. Although not a technical or legal requirement, you are advised to get this in writing every time to avoid ambiguities, misunderstandings, and claims of improper referrals. Your broker can sign this agreement, or you can sign it yourself – but only with your broker’s permission! If you refer to someone else, you are under a duty to the client to make sure that the other agent has the proper experience to serve the client’s interests. Not doing so can be a violation of your fiduciary duty or constitute negligence, making the referral an improper one.

In addition, referral fees often trip up unwary agents. Referral fees to unlicensed persons are generally disallowed under current rules. However, there is an exception that allows you to give an unlicensed person a gift of merchandise valued at \$50 or less, without risking a TREC violation. These gifts are considered nominal as long as they are not paid in cash and do not exceed the \$50 limit.

### *How do I avoid this?*

Generally, the most-cited danger in this category is an accusation that an agent has exceeded the \$50 nominal gift limit, given cash or cash equivalent (such as a gift card), or otherwise participated in an illegal kickback scheme. Another variation on an improper referral complaint is an agent not disclosing to their client that they are paying a referral fee. For example, relocation companies can charge referral fees that sometimes approach 50%. However, they cannot demand that the agent refrain from disclosing this to the agent’s client, which is a request that is sometimes made. Remember, your fiduciary duties require you to disclose to the client all information that is pertinent to the transaction.



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### *Unauthorized Practice of Law (UPL)*

TREC has cracked down in recent years on activities it considers the unauthorized practice of law by agents. Unfortunately, many of these activities have been so casually practiced by brokers and agents, and for so long, that it can be difficult to know what an agent can and cannot safely do. For instance, agents can prepare purchase and sale contracts using preprinted forms such as the ones available from TREC and TAR. All agents know that if they drafted a contract from scratch, that would be considered the unauthorized practice of law. Most agents also know that if they write in special provisions to TREC and TAR contracts, that is ALSO considered the unauthorized practice of law.

However, many agents believe that having an attorney do that for the client will be cost-prohibitive. Others are worried that bringing in an attorney for that purpose will make the client doubtful of whether the agent is qualified or competent to handle the transaction. Still others simply do not know any real estate attorneys willing to do this quickly and for a nominal fee. (For the record, the Law Office of Christopher J. Sullivan routinely provides this service free or low-cost whenever we have cultivated a relationship with an agent.)

### *How do I avoid this?*

Unauthorized practice of law is no joke, and is best held back by a 10-foot pole. The easiest way to routinely avoid this is to establish a relationship with a knowledgeable and reliable (and cost-effective!) real estate attorney. Having an attorney draft special provisions, as well as give limited legal advice or opinions to clients, removes you safely from claims of unauthorized practice of law. In addition, having an attorney you trust in your back pocket looks good to clients, who know they are going to get excellent service from you that is backed by all the resources you have at your disposal.

Sincerely,

*Christopher J. Sullivan*

Christopher J. Sullivan  
Managing Member