# How Exempt Are Attorneys From the Texas Real Estate License Act?

**By Timothy H. Daniel***

The practical and ethical limitations and implications of attorney exemption from the Texas Real Estate License Act ("TRELA"), as they apply to attorneys involved in real estate transactions, are factors of which all lawyers need to be aware. This article will discuss and analyze these issues. Part I will provide background information regarding TRELA followed by the relevant interpretations of the attorney exemption from TRELA in Part II. The practical considerations involved when attorneys obtain a real estate salesperson or brokerage license will be covered in Part III, followed by an assessment of important ethical considerations for attorneys and attorney-brokers in Part IV. For purposes of this article, the reader should assume that any discussion regarding "attorneys" involves only those attorneys duly licensed to practice law in the State of Texas. In connection with this assumption, any discussions regarding "brokers" or "salespersons" shall mean duly licensed brokers and duly licensed salespersons under TRELA.

## I. TRELA – BACKGROUND INFORMATION

Since its enactment in 1939, TRELA has undergone several substantive and non-substantive changes and interpretations.[1] As with most state statutes regulating the licensure of real estate salespersons and brokers, TRELA was enacted with the purpose of eliminating or reducing fraud against the public by "unlicensed, unscrupulous, or unqualified persons" involved in real estate transactions.[2] TRELA is administered and enforced by the Texas Real Estate Commission ("TREC").[3]

In its current form, TRELA defines the term "broker" as follows:

(1) "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:

(i) sells, exchanges, purchases, or leases real estate;
(ii) offers to sell, exchange, purchase, or lease real estate;
(iii) negotiates or attempts to negotiate the listing, sale, exchange, purchase, or lease of real estate;
(iv) lists or offers, attempts, or agrees to list real estate for sale, lease, or exchange;
(v) appraises or offers, attempts, or agrees to appraise real estate;
(vi) auctions or offers, attempts, or agrees to auction real estate;
(vii) deals in options on real estate, including buying, selling, or offering to buy or sell options on real estate;
(viii) aids or offers or attempts to aid in locating or obtaining real estate for purchase or lease;
(ix) procures or assists in procuring a prospect to effect the sale, exchange, or lease of real estate; or
(x) procures or assists in procuring property to effect the sale, exchange, or lease of real estate; and

(B) includes a person who:
(i) is employed by or for an owner of real estate to sell any portion of the real estate; or
(ii) engages in the business of charging an advance fee or contracting to collect a fee under a contract that requires the person primarily to promote the sale of real estate by:
(a) listing the real estate in a publication primarily used for listing real estate; or
(b) referring information about the real estate to brokers.[4]

Unless otherwise specified in TRELA, a person who performs any of the above activities must be a licensed broker. To be eligible for a brokerage license an individual must have two or more years of active experience as a licensed salesperson in Texas coupled with at least sixty semester hours of post-secondary education in core real estate courses approved by TREC.[5] To become a licensed salesperson, an individual must be eighteen years of age, a United States citizen, a resident of the State of Texas, and must establish his honesty, trustworthiness, and integrity to the satisfaction of TREC.[6] In addition, an applicant for a salesperson license must meet the education requirements of TRELA,[7] demonstrate competency by passing the real estate licensing examination,[8] and be sponsored by a licensed broker who has notified TREC of the potential sponsorship.[9] After obtaining a salesperson or brokerage license, licensees are required to renew their license according to TREC guidelines, which, in most cases, occurs biannually.[10] In order to renew a license with TREC, licensees must meet requirements similar to those required of attorneys, including the payment of dues or renewal fees,[11] participating in annual mandatory continuing education,[12] and making relevant disclosures regarding moral fitness and character.[13] Only upon meeting these requirements may an individual engage in the activities of a broker as defined by TRELA.

TRELA does, however, provide exemptions from the requirements of the Act. These exemptions make TRELA inapplicable to the following:

(1) attorneys licensed in any state;
(2) attorneys-in-fact authorized under a power of attorney to conduct a real estate transaction;
(3) a public official while engaged in official duties,
(4) an auctioneer licensed under Chapter 1802 while conducting the sale of real estate by auction if the auctioneer does not perform another act of a broker or salesperson;
(5) a person acting under a court order or the authority of a will or written trust instrument;
(6) a person employed by an owner in the sale of structures and land on which structures are located if the structures are erected by the owner in the course of the owner's business;
(7) an on-site manager of an apartment complex;
(8) an owner or the owner's employee who leases the owner's improved or unimproved real estate;
(9) a partnership or limited liability partnership acting as a broker or salesperson through a partner who is a licensed broker; or
(10) a transaction involving:
(a) the sale, lease, or transfer of a mineral or mining interest in real property,
(b) the sale, lease, or transfer of a cemetery lot, or
(c) the lease or management of a hotel or motel.[14]

These exemptions are not absolute, and much has been left to Texas courts in determining their breadth.

## II. THE ATTORNEY EXEMPTION UNDER TRELA

For attorneys, especially those specializing in real estate law, it is common to perform activities that fall within the definition of brokerage as an integral part of their practice.[15] Not exempting attorneys from TRELA would require many attorneys to obtain a salesperson or brokerage license in addition to their license to practice law.[16] Necessarily, most states exempt attorneys from their real estate licensure statutes.[17] Although TRELA does not contain any language limiting the attorney exemption, Texas courts, as well as the courts of other jurisdictions, have offered their own interpretations of the extent to which attorneys are exempt from real estate licensure statutes.

### A. Interpretations of Exemptions in States Other Than Texas

In *Krebs v. Jackson*,[18] the Pennsylvania Supreme Court interpreted the attorney exemption from the state's real estate licensure statute by noting, in dicta, that attorneys have the right, as an incident of their legal profession, to engage in the leasing of real estate, and they could enter into a proper agreement concerning their fees for such services.[19] The attorney in *Kribbs*, however, engaged in otherwise illegal and fraudulent behavior during the transaction, which voided the agreement and persuaded the court to deny the attorney his right to the agreed fee.[20]

The New Jersey Superior Court took issue with an attorney who claimed he was wholly exempt from the state's licensure statute in *Spirito v. New Jersey Real Estate Comm'n*.[21] The attorney wrote a letter to the commission requesting the issuance of a broker's license, claiming a right to the license by virtue of his license to practice law.[22] The commission notified the attorney that his request would be denied until he complied with the state's apprenticeship and testing requirements.[23] The court interpreted the legislative purpose behind the attorney exemption as authorizing attorneys to sell or lease real estate incidental to the normal practice of their profession.[24] The court further held that an attorney is not entitled to a real estate broker's license solely by virtue of his license to practice law.[25]

Subsequently, the New Jersey Supreme Court offered a similar interpretation.[26] The court analyzed a situation involving an attorney who was also a licensed salesperson, but not a licensed broker.[27] The attorney-salesperson represented a prospective purchaser of residential real estate, and he sought fifty percent of the listing broker's commission to be applied to the purchase price.[28] In holding that it was not *per se* unlawful for an attorney to engage in the business of a real estate broker, the court noted that such practices by an attorney who is not also a licensed broker must only be incidental to his practice of law.[29] The court held, however, that an attorney who undertakes brokerage activities pursuant to the attorney exemption, with such activities being incidental to his practice of law, may not be compensated as a broker (i.e. receive a commission).[30]

The courts of California have also held that attorneys are exempt from the state's licensure requirements so long as they are acting within the scope of their duties as attorneys.[31] Activities such as examining real property and commencing negotiations regarding the purchase or sale of real property were

held to be activities within the scope of an attorney's duties and did not require a broker's license.[32] California courts, however, have held that compensation for such services must be sought from a principal to the transaction and cannot be sought from a broker involved in the transaction.[33] The courts reasoned that such services are performed for the attorney's client, not the broker.[34]

Finally, the First Circuit Court of Appeals has considered arguments involving Massachusetts and New Hampshire real estate licensure statutes that did not exempt attorneys.[35] In *Shinberg v. Burk*, an attorney claimed he was acting as a "finder" in a real estate transaction, not as a "broker," and, therefore, did not fall within the scope of the licensure statutes.[36] The court looked to Black's Law Dictionary to define "finder," "broker," and "finder's fee," concluding that a "finder" is a "special type of broker that deals in personal property."[37] Since the transaction at issue dealt with real property, the court held that the attorney was subject to the two states' licensing requirements, and therefore not entitled to the disputed fee.[38]

### B. Interpretations of the Attorney Exemption in Texas

In *Burchfield v. Markham*,[39] an attorney advised a real estate broker that he had a client interested in purchasing a piece of property. In order to escape the provisions of TRELA, the broker agreed to split the commission with the attorney provided the attorney nominated another broker to receive his half of the commission.[40] Ultimately, the broker refused to pay the promised commission.[41] At the time of *Markham*, the 1951 version of TRELA controlled.[42] In 1951, TRELA made it unlawful for brokers to split their fees with anyone other than a salesperson or broker.[43] Because brokers were forbidden from entering into agreements with non-brokers, the Texas Supreme Court held that the agreement between the broker and the attorney was unlawful and unenforceable.[44]

Twenty years later, the Dallas Court of Appeals also refused to exempt attorneys, when it interpreted the attorney exemption to TRELA in the case of *Sherman v. Bruton*.[45] The court examined the history of TRELA to determine the legislature's intent regarding the exemption for attorneys.[46] The original exemption excluded "licensed and registered attorneys" from the definition of "real estate dealer."[47] A 1955 amendment to TRELA excluded this broad exemption, thus evidencing a legislative intent to limit the exemption to services rendered by the attorney "in the course of an attorney-client relationship."[48] The court rejected the argument that an attorney, solely by virtue of his license to practice law, is authorized to engage generally in the business of a real-estate broker.[49]

In 1986, the court in *Elin v. Neal*[50] took a different and more liberal approach to the attorney exemption. In *Elin*, an attorney sought to obtain a commission from a broker based on an oral agreement.[51] The broker refused to pay the attorney, contending that the attorney did not meet TRELA's statute of frauds requirement regarding the payment of a commission.[52] The broker further asserted that attorneys are only exempt from the licensing provisions of TRELA, not the entire act.[53] In applying the "plain meaning" rule to TRELA, the court found an absolute exemption for attorneys under TRELA and held that attorneys are exempt from TRELA for all purposes.[54] However, the court declined to overrule any previous cases interpreting the attorney exemption.

Controversy over the attorney exemption is spurred when an attorney, who is not a salesperson or broker, engages in a real estate transaction on behalf of a client, and thereafter attempts to recover a commission for his services or to enforce an agreement entered into with a salesperson or broker to split a commission. As evidenced by the Texas decisions, a salesperson or broker will typically argue that they cannot split a commission with an attorney who is not also a salesperson or broker without violating TRELA, even though they have entered into such an agreement. The attorney, however, will typically argue that he is wholly exempt from TRELA. The Texas legislature addressed such situations when it re-evaluated TRELA in 1991. In its review, the legislature retained the provisions of TRELA that forebode salespersons and brokers from sharing their fees for performing a brokerage function with anyone other than a salesperson or broker.[55] Furthermore, TREC remained authorized under this amendment to suspend or revoke an issued license or take other disciplinary action if the salesperson or broker shares such a fee in violation of TRELA.[56]

### C. Practical Implications of the Trela Exemption

The interpretations of attorney exemptions from real estate licensure statutes offered by Texas courts and courts in other jurisdictions, coupled with the current TRELA provisions, provide a framework to discuss the attorney exemption. Although attorneys are exempt from the majority of TRELA provisions, certain practical implications of performing brokerage services do exist. For example, one direct limitation on the attorney exemption is found in the Rules of TREC.[57] Under these rules, an attorney is not allowed to sponsor salespersons or serve as the designated officer or manager of a licensed corporation or limited liability company unless the attorney is also licensed as a real estate broker.[58] The primary concern for an attorney, however, as evidenced by the noted judicial decisions, involves the sharing of fees with a broker. Additionally, attorneys must remember that they are bound by the Ethical Considerations and Disciplinary Rules of the Texas Code of Professional Responsibility.[59] A discussion regarding these ethical concerns will follow in Part IV.

In the typical residential real estate transaction,[60] a seller approaches a salesperson or broker (the "listing agent") who then agrees to list the property for sale for a standard commission of six percent. If the subsequent purchaser is represented by a salesperson or broker (the "buyer's agent"), the listing agent will typically agree to split the six percent commission with the buyer's agent. If the subsequent purchaser is represented by an attorney who is not also a licensed salesperson or broker, the listing agent is precluded from splitting his commission with the attorney. Instead, the attorney must seek direct compensation for his services from either the seller or the purchaser. In seeking compensation for his services, an attorney could request the listing agent to reduce his fee agreement with the seller. This would allow the attorney's fee to be paid by the seller or would allow the seller to reduce the purchase price in an amount equal to the proposed reduction. However, an agreement to reduce the listing agent's commission would be a matter of a private agreement between the seller and the listing agent.[61] It should be noted that attorneys must not insist that a broker lower his fees in this situation, since such insistence could be construed as interference with the contract between the seller and the listing agent.[62] Furthermore, while the listing agent is not required to forego his right to compensation under a listing agreement, doing so might be appropriate when balancing his right to a fee against the

best interest of his client.[63] It should also be noted that for any agreement in which an attorney, salesperson, or broker is to be paid a commission to be enforceable, such agreement must be in writing.[64] Although at least two Texas courts have offered what appear to be conflicting opinions regarding this requirement for attorneys,[65] an attorney should strongly consider putting a commission agreement in writing in order to forego any potential litigation on the issue. Additional considerations have arisen in the context of the listing agent sharing his fee with a purchaser who is either unrepresented or who is represented by an attorney. Such an agreement could allow a purchaser who is represented by an attorney to pay his own attorney's fees without the attorney having to request the listing agent to reduce his commission with the seller.

The law governing the sharing of fees with a principal to a real estate transaction is much more relaxed. In *McCall v. Johns*,[66] a broker entered into an oral agreement with an attorney-purchaser promising to share his commission in the form of a reduction in the purchase price.[67] Later, the broker refused to pay, arguing that TRELA prohibited him from doing so.[68] The attorney contended that, as an attorney, he was exempt under the terms of TRELA, and thus entitled to his share of the commission.[69] The court disagreed with the attorney's reasoning, even though an attorney who rendered brokerage services was exempt and needed no license under the provisions of TRELA.[70] The court, however, ruled in favor of the attorney. The court reasoned that in this case, the attorney was acting for himself and not providing real estate services.[71] The court held that the agreement between the attorney-purchaser and the broker was valid and enforceable, not because the attorney was exempt from TRELA, but because a broker is allowed to advance the interests of the principal in a real estate transaction.[72] It follows that a broker or salesperson may share his fee with the principal to a transaction, whether that principal is an attorney, teacher, or an accountant. For the principal who is a seller in this situation, a salesperson or broker could certainly avoid the prohibitions contained in TRELA.[73] However, for the principal who is a buyer in this situation, the salesperson or broker should consider sharing the fee only with full disclosure to all parties involved in the transaction.[74] Such fee sharing could affect the lender's loan-to-value ratio or possibly violate the lender's underwriting guidelines.[75] By making full disclosure, the broker can ensure that he has obtained the lender's permission for sharing his fee with a principal to the transaction. Additionally, a principal receiving such a fee should be provided with a 1099 form reporting the income to the Internal Revenue Service.[76]

## III. BECOMING AN ATTORNEY-BROKER

As a practical matter, attorneys could avoid many of the controversies posed by the TRELA exemption by becoming licensed brokers. Even though licensing statutes vary from state to state, no state forbids lawyers from practicing both as attorneys and brokers.[77]

For attorneys, becoming a licensed broker should not prove too difficult. Many law school courses will meet the minimum educational requirements of TREC, and by becoming licensed to practice law in the State of Texas, attorneys have already demonstrated the requisite moral fitness and character required of applicants. For the attorney who has complied with these requirements to the satisfaction of TREC, the remaining tasks for salesperson licensure include passing the licensing examination and finding a sponsoring broker. Assuming that the attorney-salesperson adheres to the minimum requirements for licensure renewal, he will typically become eligible for his brokerage license after two years of experience as a salesperson.

## IV. ETHICAL CONSIDERATIONS FOR THE ATTORNEY AND THE ATTORNEY-BROKER

Although becoming an attorney-broker is a relatively simple procedure, there are important ethical, statutory, and regulatory concerns attorney-brokers should consider.[78] These concerns require a substantial awareness of potential conflicts of interest, confidentiality, and the collection of unconscionable or unreasonable fees. One should also note that the ethical considerations discussed in this section are equally applicable to all attorneys, regardless of their additional status as salesperson or broker.

### A. Conflicts of Interest

The most common type of conflict of interest in the real estate context arises when the attorney-broker represents more than one party to a transaction. Generally speaking, a lawyer may represent multiple parties in a particular matter if: "(1) the lawyer believes that such representation will not adversely affect [his] ability to exercise independent professional judgment as to the interests of each client; and (2) if all clients consent to the representation [preferably in writing] after full disclosure of the potential conflicts."[79]

**Attorneys could avoid many of the controversies posed by the TRELA exemption by becoming licensed brokers. No state forbids lawyers from practicing both as attorneys and brokers.**

This typical conflict of interest was examined in *Dillard v. Broyles*,[80] where an attorney represented both the seller and buyer in a residential real estate transaction and was named as trustee in the deed of trust. After defaulting on the note, the attorney commenced foreclosure proceedings and sold the property pursuant to his authority under the deed of trust.[81] The purchaser sought to set aside the foreclosure sale alleging fraud on the part of the attorney.[82] The Court of Appeals held that the attorney had not acted improperly or unethically because he had disclosed the conflict and obtained the parties' consent to proceed.[83] Although the attorney in *Dillard* was exonerated by the court, disciplinary actions in cases of this sort can range from reprimands to indefinite suspensions of attorneys who fail to adequately disclose potential conflicts of interest.[84] Such problems can be avoided in most scenarios if the attorney either declines representation or provides his clients with full disclosure and obtains the clients' informed consent. With respect to such waivers, however, the New Jersey Superior Court has held that the representation of a purchaser and a seller in connection with a real estate transaction "is so fraught with obvious situations where a conflict may arise

that [the] attorney shall not undertake to represent both parties…."[85] The court further held that "consent to continued representation is immaterial."[86]

### B. Confidentiality Conserns

Akin to the potential for a conflict of interest are issues relating to the confidentiality of client information or secrets. This situation is likely to arise when an attorney-broker is representing either the purchaser or seller in a real estate transaction. An attorney's fiduciary duty will usually extend only to his client (i.e., the purchaser or the seller), though TRELA requires brokers to disclose some information to both parties.[87] The attorney-broker could become caught between two conflicting positions. If the attorney-broker maintains confidentiality, he could place his brokerage license in jeopardy or harm his client. However, if the attorney-broker does not maintain confidentiality, he could place his license to practice law in jeopardy if he harms his client. An attorney-broker could avoid this situation by advising his client of the potential conflict before undertaking representation.[88] An attorney could also ask the client to waive, preferably in writing, the duty of confidentiality concerning information the attorney-broker might be required to disclose to the other parties to the transaction.[89]

An additional problem tends to arise when the other party to such transactions is not represented by an attorney. In this situation, it is preferable not to give advice to the unrepresented party other than to obtain counsel.[90]

### C. Unconscionable or Unreasonable Fees

A third matter with which the attorney-broker should be concerned is the method in which the attorney-broker is to be compensated for his services. If the attorney-broker is to be paid a commission, there is a possibility of having his fee adjudged unconscionable or unreasonable in violation of the Texas Disciplinary Rules of Professional Conduct.[91] Under Rule 1.04(a), "[a] fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."[92] Although no Texas court has ruled that an attorney receiving a commission as his fee is unreasonable or unconscionable *per se*, Rule 1.04(b) sets forth the factors that may be considered in determining the reasonableness of a fee as follows:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on the results obtained or uncertainty of collection before the legal services have been rendered.[93]

Rule 1.04(b) also provides that other factors may be considered to determine the reasonableness of a fee.[94]

The most important factors to be considered by the attorney or the attorney-broker seeking a commission as his fee include the sophistication of the parties, the complexity of the transaction, and the difference between the commission and a possible fixed or hourly fee. For the simple residential transaction requiring an attorney only to fill in the blanks of a form contract, a commission would likely be much higher than a fixed or hourly fee. However, for a more complex transaction involving substantial supplemental matters, a commission could conceivably amount to much less than a fixed or hourly fee. Generally speaking, a split commission will be much more than an attorney's fixed or hourly fee, especially in "high dollar" real estate transactions. Therefore, attorneys who represent clients involved in "high dollar" real estate transactions find that being compensated based on a commission to be much more desirous. Such a situation could place the attorney in a position of conflict with his client – that is, does closing the transaction in order to be paid a commission become more important than giving sound legal advice to his client? Attorneys in such a situation must, therefore, be able to substitute what could easily be classified as selfish motives for and in favor of the best interests of their client. This is not to say that attorneys should avoid the possibility of being paid a commission from a real estate transaction at all costs. Such arrangements could be much more preferable to clients. Regardless, the attorney and the attorney-broker must consider all factors and consequences in order to form a reasonable belief that receiving a commission is reasonable, while noting that such reasonable belief will always be open to potential criticism or interpretation. Arguably, if such an agreement could be held enforceable, an attorney-broker could avoid such circumstances by providing adequate disclosure to his client that he is representing his client solely as a salesperson or broker, and not his attorney.

## V. CONCLUSION

Despite changes in the TRELA and somewhat liberal court decisions, it appears that several problems and concerns still exist for real estate attorneys operating under the attorney exemption to TRELA. Nonetheless, most of these problems can be solved and the concerns alleviated provided attorneys take appropriate steps. Many of the pitfalls associated with the attorney exemption to TRELA can be overcome by becoming a licensed salesperson or broker. Remembering to look only to the principals to the transaction for the payment of fees, or negotiating a reduced sales price in exchange for a broker's commission reduction, are two essential steps an attorney can take to avoid the fee sharing controversy. However, attorney-brokers will continue to face certain ethical, statutory, and regulatory considerations. By declining representation or disclosing any potential conflicts of interest and obtaining a client's informed consent, many disciplinary actions can easily be avoided. Likewise, when an attorney-broker feels compelled to breach his client's confidentiality, obtaining a waiver from the client will be necessary. Finally, an attorney or attorney-broker must remain cautious of collecting a commission from the proceeds if such payment could be considered unconscionable or unreasonable. By evaluating the complexity of the transaction and the sophistication of his client, an attorney will be better able to determine what form of fee agreement is appropriate. With caution, communication, and careful assessment, a real estate lawyer can establish a lucrative career by performing brokerage services as either an attorney or as an attorney-broker.

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1. TRELA was originally enacted under 1939 Tex. Gen. Laws ch. 1. TRELA was subsequently amended and ultimately re-codified as TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon 1999). TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon 1999) underwent a non-substantive revision and was repealed by Acts 2001, 77th Leg., and replaced with Chapter 1101 of the Texas Occupations Code with an effective date of June 1, 2003.
2. *See, e.g.,* Henry S. Miller v. Treo Enterp., 585 S.W.2d 674 (Tex. 1979) (citing Hall v. Hard, 335 S.W.2d 584, 589 (1960); Gregory v. Roedenbeck, 174 S.W.2d 585, 586-87 (1943); Justice v. Willard, 538 S.W.2d 651, 653 (Tex.Civ.App.–Amarillo 1976).
3. TEX. OCC. CODE ANN. § 1101.151 (Vernon 2003).
4. *Id.* § 1101.002(1).
5. *Id.* § 1101.356.
6. *Id.* § 1101.354(1)-(2).
7. *Id.* § 1101.358.
8. *Id.* § 1101.401.
9. *Id.* § 1101.363(b).
10. *Id.* §§ 1101.451-1101.457.
11. *Id.* § 1101.152(a)(2), (a)(4).
12. *Id.* §§ 1101.454, 1101.455(b).
13. *Id.* § 1101.452.
14. *Id.* § 1101.005.
15. CHARLES J. JACOBUS, TEXAS REAL ESTATE LAW, at 121 (8th ed. 1999).
16. *Id.*
17. *See* Jean A. Mortland, *Attorneys as Real Estate Brokers: Ethical Considerations*, 25 REAL PROP. PROB. & TR. J. 755 (1991) (listing Iowa and New York as states that allow attorneys to engage in full brokerage services without licensure; Massachusetts, Pennsylvania, Rhode Island, and South Dakota as states that grant a broker's license to attorneys without examination; New Jersey and West Virginia as states that require a broker's license to engage in full brokerage services; Florida, Hawaii, Louisiana, Montana, and Wisconsin as states that require a broker's license with no exemption of services rendered by an attorney; and the remainder of the states, including Texas, as states that require a broker's license but make an exception for services rendered by an attorney in performing legal services).
18. Kribbs v. Jackson, 129 A.2d 490 (Pa. 1957).
19. *Id.* at 495.
20. *Id.* at 497-98.
21. Spirito v. New Jersey Real Estate Comm'n, 434 A.2d 623 (N.J. Super. 1981).
22. *Id.*
23. *Id.*
24. *Id.* at 628.
25. *Id.*
26. *In re* Roth, 577 A.2d 490, 491-492 (N.J. 1990).
27. *Id.*
28. *Id.*
29. *Id.* at 493-94.
30. *Id.* at 495.
31. CAL. BUS. & PROF. CODE § 10133 (West 2004).
32. *See* Provisor v. Haas Realty, Inc., 256 Cal.App.2d 850, 854-55 (1967).
33. *Id.*
34. *See Id.*; *See also* Estate of Prieto, 243 Cal.App.2d 79 (1966).
35. Shinberg v. Bruk, 875 F.2d 973, 975 (1st Cir. 1989).
36. *Id.* at 974.
37. *Id.* at 977.
38. *Id.* at 979.
39. Burchfield v. Markham, 294 S.W.2d 795 ( 1956).
40. *Id.* at 796.
41. *Id.*
42. *Id.*
43. *Id.* at 797.
44. *Id.* at 798.
45. Sherman v. Bruton, 497 S.W.2d 316 (Tex.App.–Dallas 1973).
46. *Id.* at 321-22.
47. *Id.* at 321 (citing 1939 Tex. Gen. Laws ch. 1 § 2(a)(1)).
48. *Id.* at 322.
49. *Id.*
50. Elin v. Neal, 720 S.W.2d 224 (Tex.App.–Houston [14th Dist.] 1986).
51. *Id.*
52. *Id.* at 224-225.
53. *Id.*
54. *Id.* at 226.
55. TEX. OCC. CODE ANN. § 1101.651.
56. *Id.* § 1101.652(b)(11).
57. 22 TAC §§ 531.1-535.403.
58. *Id.* § 535.31.
59. TEX. DISCIPLINARY R. PROF'L CONDUCT, *reprinted* in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).
60. The reader should note that the same principles and considerations are present during a commercial real estate transaction, only on a grander level. Therefore, an analysis of the typical commercial real estate transaction would be superfluous.
61. Ron Walker and Dennis R. Schmidt, *Can brokers share their fees with an attorney?*, TEXAS REALTOR, November 1995, available at http://www.trec.state.tx.us/pdf/articles/other/TAR_001.pdf.
62. *Id.*
63. *Id.*
64. TEX. OCC. CODE, *supra* note 3, § 1101.806.
65. *See* Sherman v. Bruton, *supra* n.45; *but see* Elin v. Neal, *supra* n.50, at 227.
66. McCall v. Johns, 294 S.W.2d 869 (Tex. Civ. App.–San Antonio 1956).
67. *Id.*
68. *Id.* at 869-70.
69. *Id.*
70. *Id.* at 871.
71. *Id.*
72. *Id.*
73. *See* Walker and Schmidt, *supra* n.61.
74. *Id.*
75. *Id.*
76. *See* JACOBUS, *supra* n.15.
77. *See* Mortland, *supra* n.17, at 755.
78. For simplicity, the attorney who is licensed either as a salesperson or a broker will be referred to as an attorney-broker throughout the remainder of this section.
79. Jeb C. Sanford, *Ethical, Statutory, and Regulatory Conflicts of Interest in Real Estate Transactions*, 17 ST. MARY'S L. J. 79, 83 (1985) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 5, 9 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9, 1.13 (1983)).
80. Dillard v. Broyles, 633 S.W.2d 636 (Tex.App.–Corpus Christi 1982).
81. *Id.*
82. *Id.*
83. *Id.* at 643.
84. *See* Sanford, *supra* n.79, at 86.
85. Baldasarre v. Butler, 604 A.2d 112, 120 (N.J. 1992) (emphasis omitted).
86. *Id.* (citing to NEW JERSEY RULES OF COURT, APPENDIX TO PART I, RULES OF PROFESSIONAL CONDUCT, Rule 1.7).
87. *See generally* TEX. OCC. CODE, *supra* note 3, §§ 1101.556, 1101.558, 1101.559.
88. *See* Mortland, *supra* n.17, at 762.
89. *Id.*
90. MODEL RULES OF PROFESSIONAL CONDUCT RULE 4.3 and commentary.
91. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a) (forbidding attorneys from charging or collecting unconscionable or illegal fees).
92. *Id.*
93. *Id.* 1.04(b).
94. *Id.*