

# COMMISSIONS, COMMISSIONS, COMMISSIONS!

**TEXAS REALTORS® LEGAL WEBINAR SERIES**

**DAVID JONES, ASSOCIATE COUNSEL**



# OUTLINE

- I. INTRODUCTION
- II. REPRESENTATION AGREEMENTS
  - LISTING AGREEMENTS
  - BUYER/TENANT REPRESENTATION AGREEMENTS
- III. COOPERATIVE COMPENSATION
  - MLS COOPERATIVE COMPENSATION
  - NON-MLS COOPERATIVE COMPENSATION
- IV. COMMISSION DISPUTES

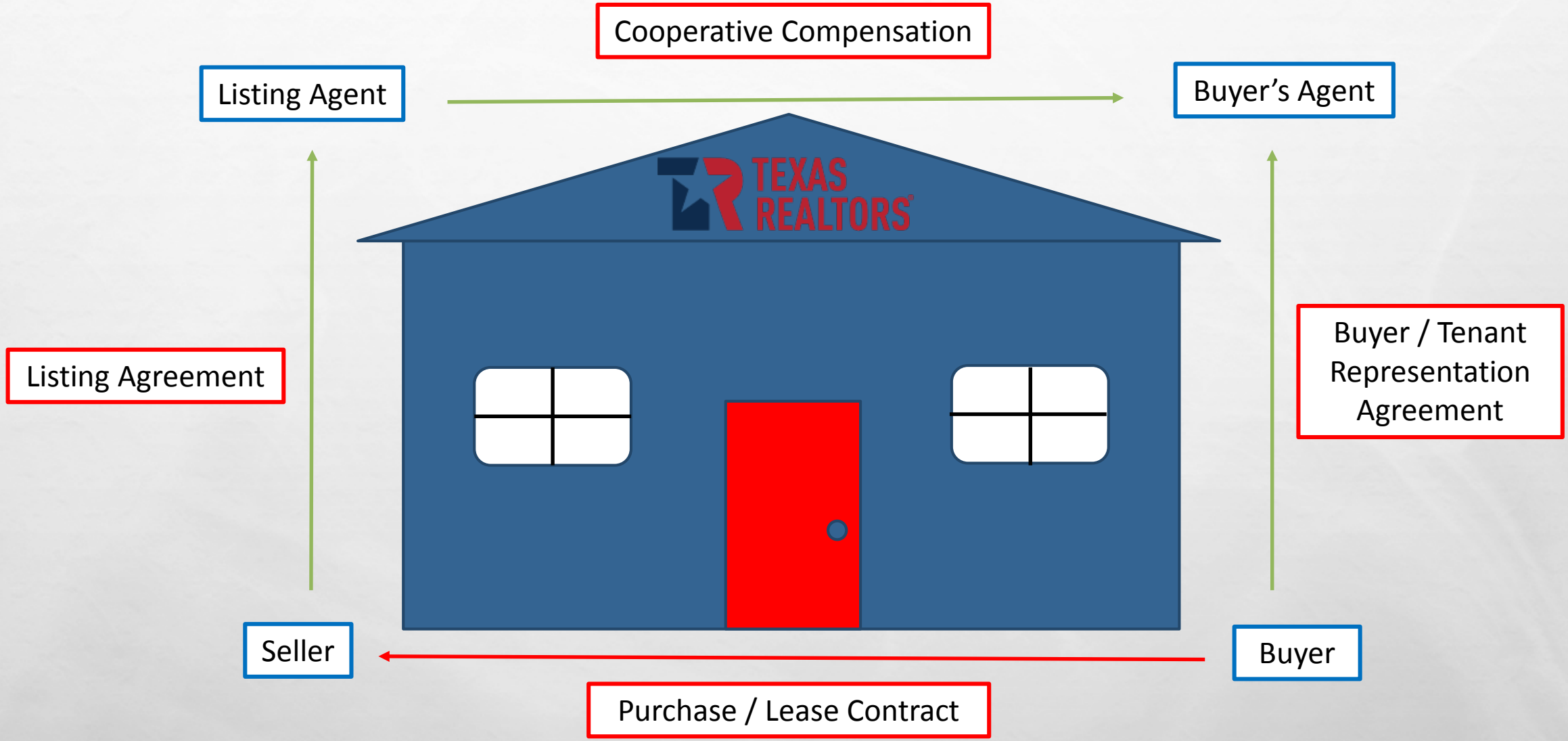


# INTRODUCTION

- Multiple agreements affect broker compensation
- Explore key concepts in each agreement
- Four types of agreements
  - Listing Agreement
  - Buyer/Tenant Representation Agreement
  - One to Four Family Residential Contract
  - Cooperative Compensation Agreement



**There are no “standard” commissions. Antitrust laws forbid brokers of different firms from joining together to fix commissions at a set price.**



Cooperative Compensation

Listing Agent

Buyer's Agent



Listing Agreement

Buyer / Tenant Representation Agreement

Seller

Buyer

Purchase / Lease Contract

# REPRESENTATION AGREEMENTS – GENERAL GUIDELINES



[This Photo](#) by Unknown Author is licensed under [CC BY-NC-ND](#)

## Representation Agreements should be in writing!


- MLS rules require written authorization from the seller
- Need a signed written agreement to enforce commission
- CoE prohibits interfering with exclusive client relationships
- CoE requires agreements be in writing, whenever possible

[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

# REPRESENTATION AGREEMENTS – GENERAL GUIDELINES

## Whose Representation Agreement is it anyways?

- TREC requires representation agreements be in the name of the broker.
- Sponsored agents should have a written agreement with broker
- *Independent Contractor Agreement (TXR 2301)*
- What happens when an Agent leaves her broker?  
Depends on the terms in the sponsorship agreement

  
**INDEPENDENT CONTRACTOR AGREEMENT FOR SALES ASSOCIATE**  
USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS®, INC. IS NOT AUTHORIZED.  
©Texas Association of REALTORS®, Inc. 2007

---

1. **PARTIES.** The parties to this agreement are:  
Broker: \_\_\_\_\_; and  
Associate: \_\_\_\_\_

2. **TERM:** This agreement commences on \_\_\_\_\_ (Commencement Date) and ends at such time as either party terminates this agreement in accordance with Paragraph 21.

3. **DEFINITIONS:**

A. "Brokerage services" means assistance and services to prospects that are reasonably necessary to negotiate and bring about the successful closing of transactions for the sale, purchase, or lease of real estate.

B. "Files" means any documents, instruments, contracts, written agreements, disclosures, memoranda, books, publications, records, correspondence, reports, data, lists, compilations, studies, surveys, images, and all other data, whether in written or electronic format, which are related to Broker's real estate business. The term "files"  includes  excludes Associate's prospect lists.

C. "Prospect" means: (1) a buyer, prospective buyer, seller, prospective seller, landlord, prospective landlord, tenant, or prospective tenant of real estate; or (2) a client or customer of Broker or Associate.

D. "Real estate business" means all business related to the acts of a real estate broker as defined by Section 1101.002, Occupations Code (the Real Estate License Act).

4. **BEST EFFORTS:** Associate will use Associate's best professional efforts to:  
A. solicit listings and prospects for Broker's real estate business; and  
B. provide brokerage services to prospects procured by or assigned to Associate.

5. **EXCLUSIVE ASSOCIATION:** Associate will perform the services contemplated by this agreement exclusively for Broker. Associate may not engage in the brokerage of businesses or in the management of property without Broker's knowledge and written consent.

6. **LEGAL AND ETHICAL COMPLIANCE:** When delivering brokerage services to prospects and when otherwise performing under this agreement, the parties agree to comply with all applicable laws and standards of practice, including but not limited to the Real Estate License Act, the Rules of the Texas Real Estate Commission, the Code of Ethics of the National Association of REALTORS®, the bylaws of the national, state, and applicable local associations of REALTORS®, any rules and regulations of any listing services to which the parties may subscribe, and any standards or policies Broker adopts.

7. **LICENSES AND TRADE ASSOCIATIONS:**

A. **Broker's License and Membership Status:** Broker is a licensed real estate broker in the State of Texas and is a member of the National Association of REALTORS®, Texas REALTORS®, and the following local associations of REALTORS®: \_\_\_\_\_  
Broker will maintain Broker's license and REALTOR® membership status active and in good standing at all times while this agreement is in effect.

B. **Associate's License and Membership Status:** Associate is a licensed real estate  salesperson  broker in the State of Texas and  is  will become a member of the National Association of

(TXR-2301) 8-16-07 Initialed for Identification by Associate \_\_\_\_\_ and Broker \_\_\_\_\_ Page 1 of 8

Cooperative Compensation

Listing Agent

Buyer's Agent



Listing Agreement

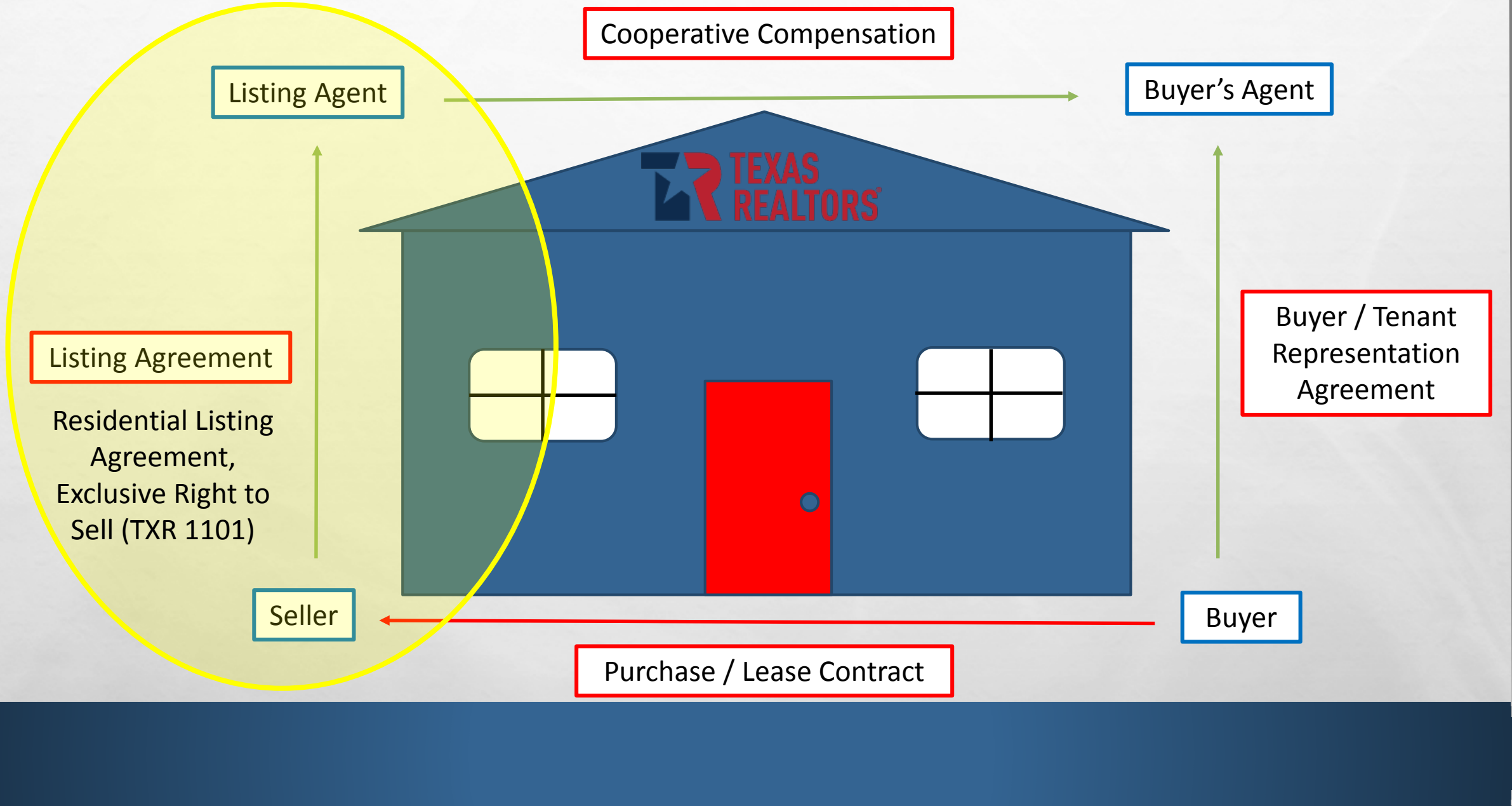
Residential Listing Agreement,  
Exclusive Right to Sell (TXR 1101)

Seller

Buyer / Tenant Representation Agreement

Buyer

Purchase / Lease Contract



# LISTING AGREEMENT



- Listing broker markets the property, and seller pays broker if the property sells
- Percentage of the sales price or a definite fee
- Seller is agreeing to pay the listing broker
- Commission must be “earned” and “payable”



# LISTING AGREEMENT

- Listing Broker's commission is "earned" when:
  - Seller agrees to sell,
  - A ready, willing, and able buyer is procured, or
  - Seller breaches the listing agreement.
- Listing Broker's commission is "payable" when:
  - Transaction has closed and funded
  - Seller refuses to sell the property
  - Seller breaches the listing agreement

## 5. BROKER COMPENSATION:

A. When earned and payable, Seller will pay Broker:

(1) \_\_\_\_\_ % of the sales price.

(2) \_\_\_\_\_.

B. Earned: Broker's compensation is earned when any one of the following occurs during this Listing:

- (1) Seller sells, exchanges, options, agrees to sell, agrees to exchange, or agrees to option the Property to anyone at any price on any terms;
- (2) Broker individually or in cooperation with another broker procures a buyer ready, willing, and able to buy the Property at the Listing Price or at any other price acceptable to Seller; or
- (3) Seller breaches this Listing.

C. Payable: Once earned, Broker's compensation is payable either during this Listing or after it ends at the earlier of:

- (1) the closing and funding of any sale or exchange of all or part of the Property;
- (2) Seller's refusal to sell the Property after Broker's compensation has been earned;
- (3) Seller's breach of this Listing; or
- (4) at such time as otherwise set forth in this Listing.

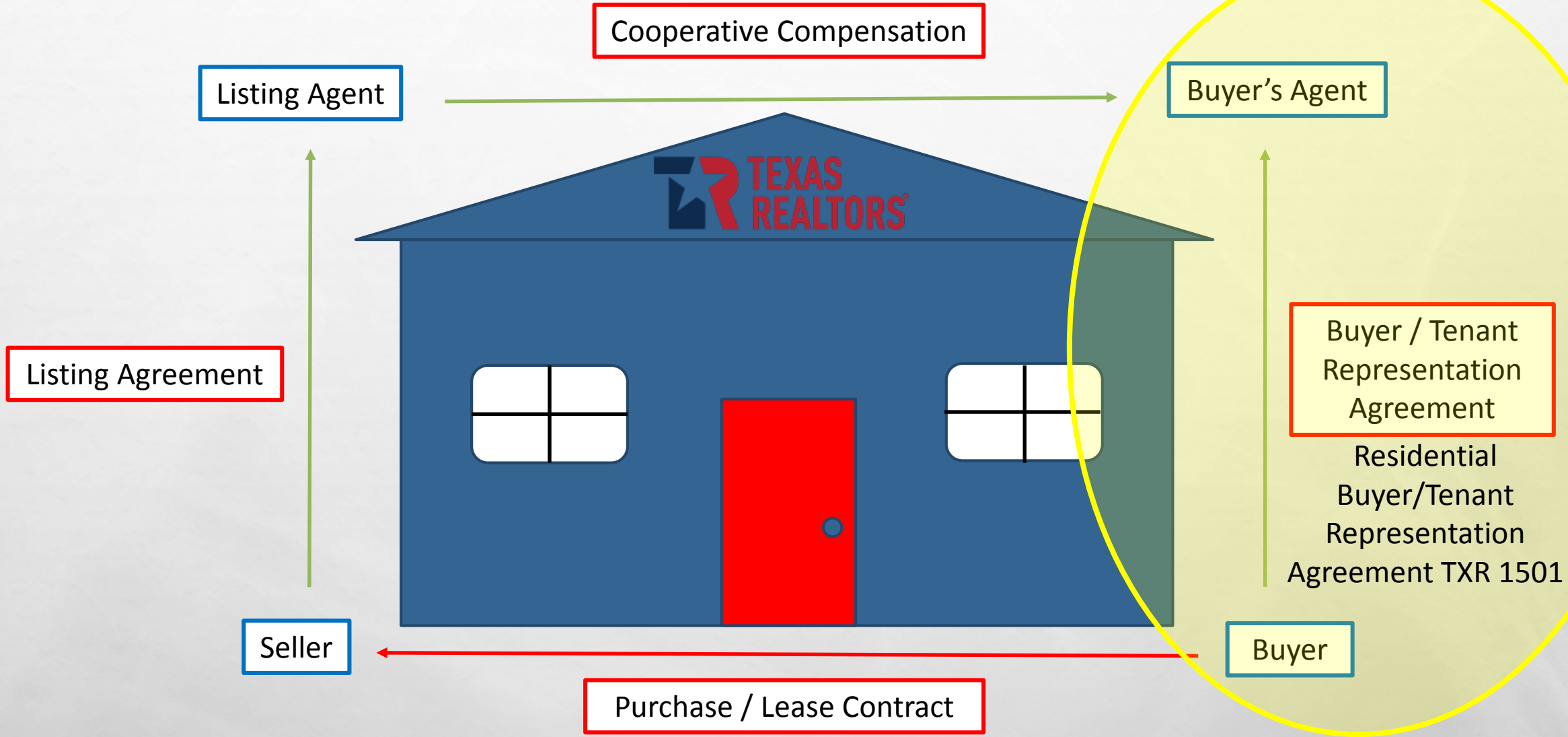
Broker's compensation is not payable if a sale of the Property does not close or fund as a result of: (i) Seller's failure, without fault of Seller, to deliver to a buyer a deed or a title policy as required by the contract to sell; (ii) loss of ownership due to foreclosure or other legal proceeding; or (iii) Seller's failure to restore the Property, as a result of a casualty loss, to its previous condition by the closing date set forth in a contract for the sale of the Property.

# LISTING AGREEMENT



## The Protection Period

- Prospective buyers whose attention was called to the property during listing
- Seller agrees to sell to a prospect during the protection period
- Broker entitled to commission upon closing
- Doesn't apply if the seller enters new exclusive listing agreement



# BUYER/TENANT REPRESENTATION AGREEMENT

- Help buyer find property, buyer pays if they buy
- Buyer is agreeing to pay the broker
- Broker tries to get paid from the seller/listing broker
- Buyer is still contractually obligated to pay broker



# BUYER/TENANT REPRESENTATION AGREEMENT

## 11. BROKER'S FEES:

- A. Commission: The parties agree that Broker will receive a commission calculated as follows: (1) \_\_\_% of the gross sales price if Client agrees to purchase property in the market area; and (2) if Client agrees to lease property in the market area a fee equal to (check only one box):  \_\_\_% of one month's rent or  \_\_\_% of all rents to be paid over the term of the lease.
- B. Source of Commission Payment: Broker will seek to obtain payment of the commission specified in Paragraph 11A first from the seller, landlord, or their agents. **If such persons refuse or fail to pay Broker the amount specified, Client will pay Broker the amount specified less any amounts Broker receives from such persons.**
- C. Earned and Payable: A person is not obligated to pay Broker a commission until such time as Broker's commission is *earned and payable*. Broker's commission is *earned* when: (1) Client enters into a contract to buy or lease property in the market area; or (2) Client breaches this agreement. Broker's commission is *payable*, either during the term of this agreement or after it ends, upon the earlier of: (1) the closing of the transaction to acquire the property; (2) Client's breach of a contract to buy or lease a property in the market area; or (3) Client's breach of this agreement. If Client acquires more than one property under this agreement, Broker's commissions for each property acquired are earned as each property is acquired and are payable at the closing of each acquisition.

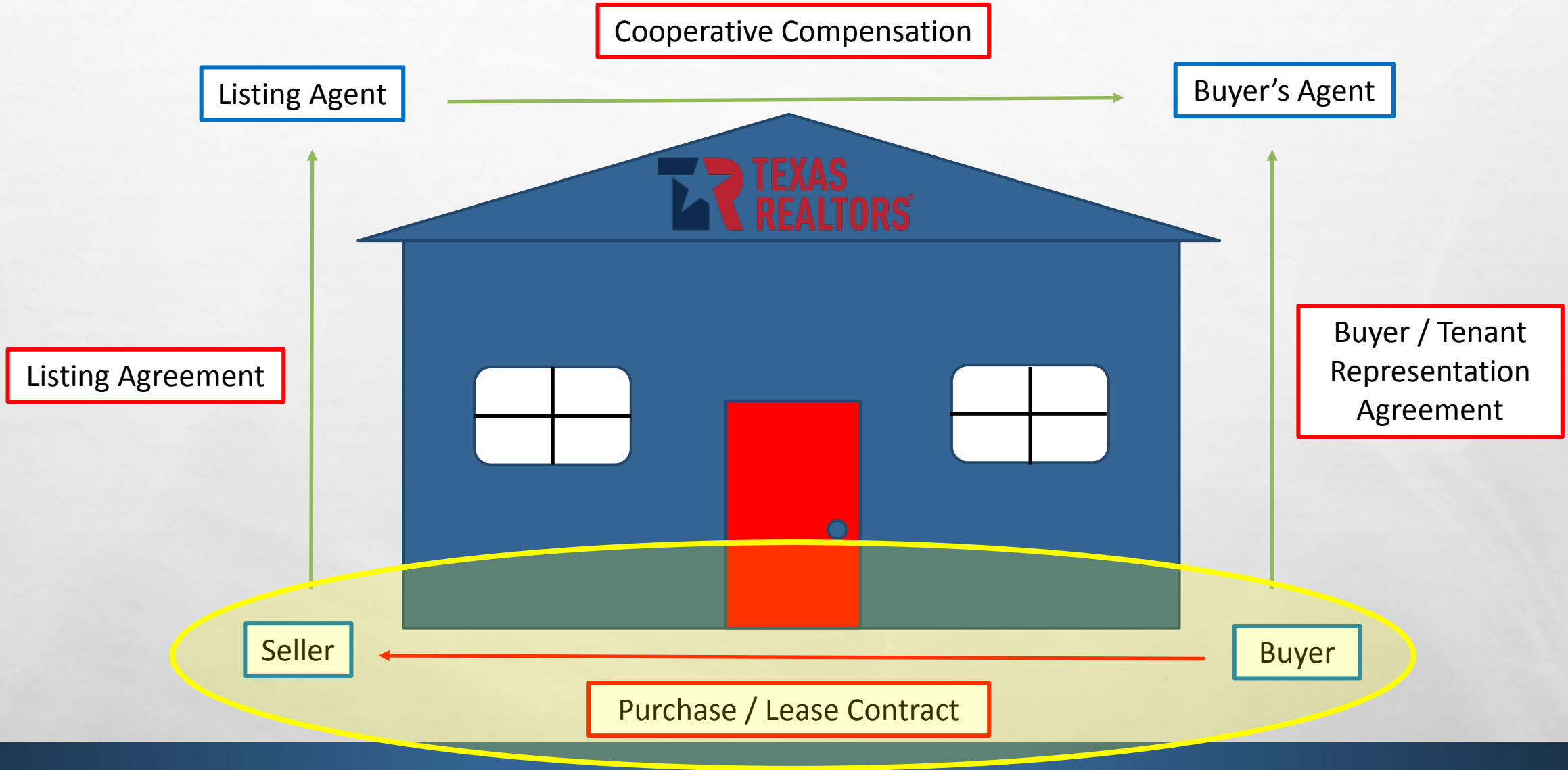
- Commission is “earned” when:
  - Buyer/Tenant enters into a contract to buy or lease, or
  - Buyer/Tenant breaches the representation agreement.
- Commission is “payable” when:
  - Transaction closes
  - Buyer/Tenant breaches the sales or lease contract, or
  - Buyer/Tenant breaches the representation agreement.

# BUYER/TENANT REPRESENTATION AGREEMENT

## Protection Period

- Buyer agrees to acquire a property previously identified during the protection period.
- There must be a successful closing.
- Doesn't apply if the buyer was under new representation agreement





# PURCHASE CONTRACT

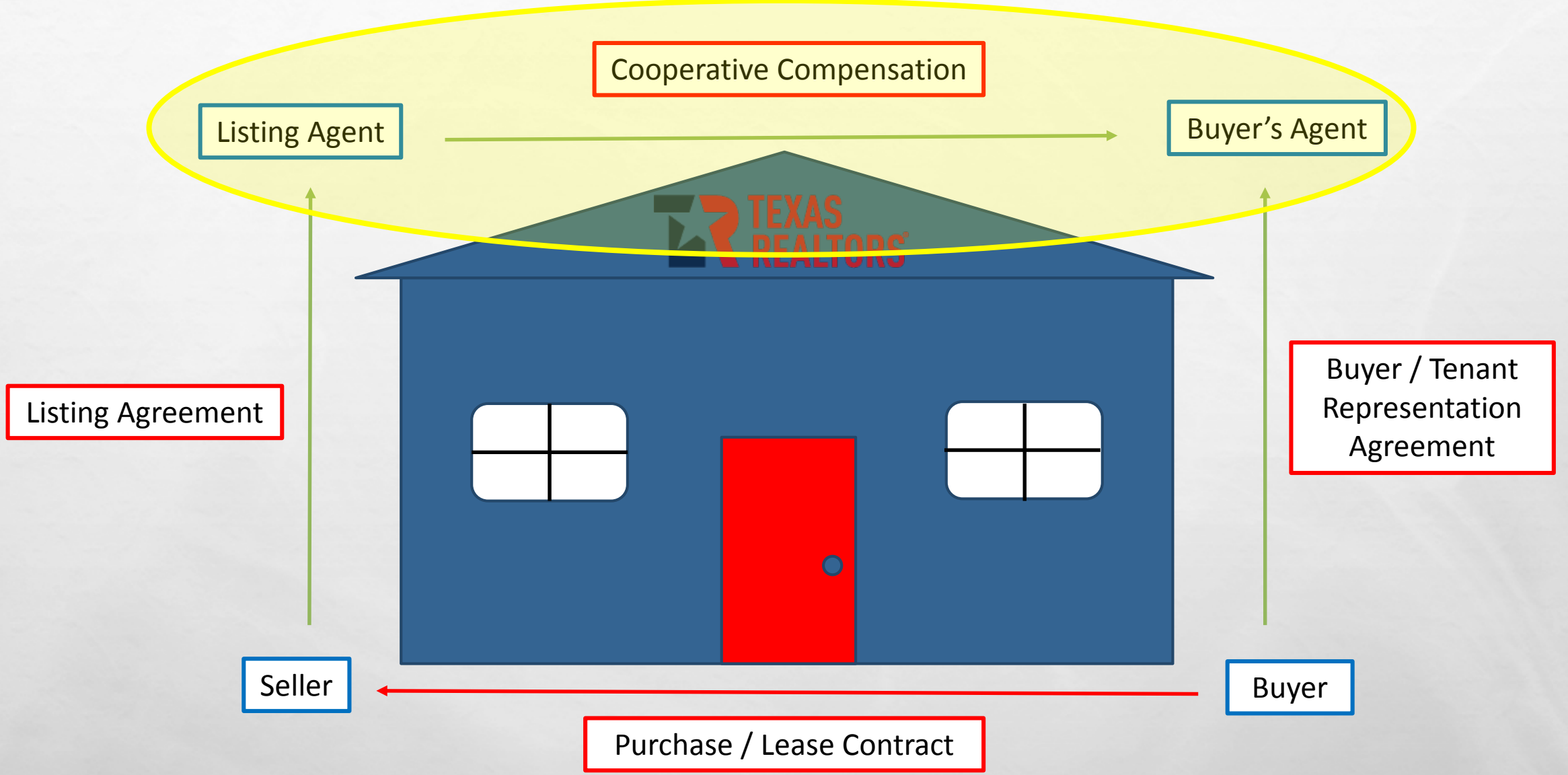
## One to Four Family Residential Contract (Resale) (TXR 1601)

- No broker compensation
- Use separate agreement for cooperative compensation
- But what about page 9 (Broker Information page)?

Listing Broker has agreed to pay Other Broker \_\_\_\_\_ of the total sales price when the Listing Broker's fee is received. Escrow agent is authorized and directed to pay Other Broker from Listing Broker's fee at closing.

- Separate agreement between brokers controls if conflict
- Some contracts have provisions for broker compensation
  - The *Farm and Ranch Contract* (1701) and Texas REALTORS® Commercial contracts





Cooperative Compensation

Listing Agent

Buyer's Agent



Listing Agreement

Buyer / Tenant Representation Agreement

Seller

Buyer

Purchase / Lease Contract

# COOPERATIVE COMPENSATION

- Compensation listing broker pays the cooperating broker
- Commissions offered on MLS listing
- Other written agreement
  - Texas REALTORS® Commission Registration Agreements.



This Photo by Unknown Author is licensed under CC BY-SA

# COOPERATIVE COMPENSATION



**Detached Single**  
 Status: **PCHG**  
 Area: **962**  
 Address: **132 Main Hill Dr, Anytown, Illinois 60996**  
 Directions: **I-55, Exit 115 to Main, West to Burg Dr, N to Heritage Dr, W on Concord Place**

Sold by:  
 Closed:  
 Off Market:  
 Year Built: **1997**  
 Dimensions: **IRREGULAR**  
 Ownership: **Fee Simple**  
 Corp Limits: **Bourbonnais**  
 Coordinates:  
 Rooms: **8**  
 Bedrooms: **3**  
 Basement: **None**

MLS #: **000000000**  
 List Date: **04/29/2016**  
 List Dt Rec: **04/29/2016**  
 List Before: **78: Yes**  
 Contract:  
 Financing:  
 Subdivision: **Heritage**  
 Township: **Bourbonnais**  
 Bathrooms: **1 / 1**  
 (Full/Bath):  
 Master Bath: **None**  
 Bsmtnt. Bath: **No**

List Price: **\$129,000**  
 Orig List Price: **\$135,000**  
 Sold Price:  
 Lst. Mkt. Time: **5**  
 Points:  
 Contingency:  
 Curr. Leased: **No**  
 Zoning Type: **Single Family**  
 Model:  
 County: **Kankakee**  
 # Fireplaces: **1**  
 Parking: **Garage**  
 # Spaces: **Gar:2.5**  
 Parking Incl.  
 In Price:

Remarks: **MLS #000000000. WELL MAINTAINED RANCH IN COLLEGE TOWN OF BOURBONNAIS. 3BD/1.5BA, ATTACHED 2.5 CAR GARAGE W/HANDCRAFTED CUSTOM SHELVING. BEAUTIFUL CORNER LOT W/MATURE TREES, PROF LANDSCAPED, DIGITAL IRRIGATION SYS, LGE OVERSIZED STORAGE SHED. TRIPLE WIDE DRIVEWAY W/PLENTY OF ROOM FOR A CAMPER/BOAT. FRESHLY SEALCOATED DRIVEWAY '15, NEW FURNACE/AC '08, NEW FENCED-IN DECK '12, NEW ARCHITECTURAL SHINGLED ROOF '11, NEW HOT WATER HEATER '05, '13 NEW MAYTAG DISHWASHER W/10 YR PARTS WARRANTY, UPGRADED 4" OVERSIZED GUTTERS & DOWNSPOUTS. GAS FP IN FAM RM. NEW KITCHEN CABINETS W/SOFT CLOSE DR'S & NEW COUNTERTOPS '15; HARDWOOD FLOORS IN DINING RM LEADING TO FENCED PRIVACY DECK. NEW CARPETING THRUOUT & FRESHLY PAINTED BEDRMS. LIFETIME WARRANTY ON INSULATED GGE OVERHEAD DR. PULL DOWN STAIRS TO GARAGE ATTIC. NEW STEEL EXIT DOOR TO GGE. DEADBOLT LOCKS ON ALL EXIT DR'S. ANDERSON WINDOWS, SCREENS/STORMS. QUIET NEIGHBORHOOD NEAR SCHOOLS, SHOPPING & MUCH MORE! QUICK SALE. MOTIVATED SELLERS!**

School Data	Assessments	Tax	Miscellaneous
Elementary: (53) Junior High: (53) High School: (207) Other:	Amount: \$0 Frequency: Not Applicable Special Assessments: No Special Service Area: No Master Association: No	Amount: \$3,700 PIN: 100200100 (Map) Mult PINs: No Tax Year: 2014 Tax Exmp: Homeowner	Waterfront: No Apxx SF: 1800 SF Source: Landlord/Tenant/Seller Acreage: 0.33

Room Name	Size	Level	Flooring	Win Trmt	Room Name	Size	Level	Flooring	Win Trmt
Living Room	20X11	Main Level	Carpet	Blinds	Master Bedroom	13X11	Main Level	Carpet	Blinds
Dining Room	12X09	Main Level	Hardwood	Curtains/Drapes	2nd Bedroom	11X07	Main Level	Carpet	Curtains/Drapes
Kitchen	10X12	Main Level	Vinyl	None	3rd Bedroom	10X10	Main Level	Carpet	Blinds, Curtains/Drapes
Family Room	16X13	Main Level	Carpet	Curtains/Drapes	4th Bedroom		Not Applicable		
Laundry Room	11X07	Main Level	Carpet	None	Attic	15X08	Attic	Other	
Other	11X07	Main Level	Carpet	None					

Interior Property Features: **Hardwood Floors, 1st Floor Bedroom, 1st Floor Laundry, 1st Floor Full Bath**  
 Exterior Property Features: **Deck, Patio, Storage Shed, Storms/Screens, Breezeway**  
 Age: **31-40 Years**, Recent Rehab  
 Type: **1 Story**  
 Style: **Ranch**  
 Exterior: **Vinyl Siding, Brick**  
 Air Cond: **Central Air**  
 Heating: **Gas, Forced Air**  
 Kitchen: **Eating Area-Table Space, Island**  
 Appliances: **Oven/Range, Dishwasher, Refrigerator, Washer, Dryer**  
 Dining: **Separate**  
 Attic: **Pull Down Stair**  
 Basement Details: **None**  
 Bath: **Ann**  
 Fireplace Details: **Wood Burning, Gas Logs**  
 Fireplace Location: **Family Room**  
 Electricity: **Circuit Breakers, 100 Amp Service**  
 Equipment: **Sump Pump, Sprinkler-Lawn**

Additional Rooms: **Attic, Other**  
 Garage Ownership: **Owned**  
 Garage On Site: **Yes**  
 Garage Type: **Attached**  
 Garage Details: **Garage Door Opener(s), Transmitter(s)**  
 Parking Ownership:  
 Parking On Site:  
 Parking Details:  
 Driveway: **Asphalt, Side Drive**  
 Foundation: **Concrete**  
 Exst Bas/Fnd:  
 Disability Access: **No**  
 Disability Details:  
 Exposure:  
 Lot Size: **.25-.49 Acre**  
 Lot Desc: **Corner, Irregular, Landscaped**  
 Professionally:

Roof: **Asphalt/Glass (Shingles)**  
 Sewer: **Sewer-Public**  
 Water: **Well-Community**  
 Const Opt:  
 General Info: **School Bus Service, Commuter Bus, Interstate Access**  
 Amenities: **Park/Playground, Sidewalks, Street Lights, Street Paved**  
 Asst Incl: **None**  
 HERS Index Score:  
 Green Disc:  
 Green Rating Source:  
 Green Feats:  
 Sale Terms: **Conventional, FHA, Cash Only**  
 Possession: **Closing**  
 Occ Date:

Agent Remarks: **For Showings or Questions call Seller at 815-000-0000. Please remove shoes prior to entering home. All offers to Listing Office via email support@afatfee.com or fax 630-299-5001. We do not hold earnest money.**

Internet Listing: **Yes**  
 VOW A/R: **Yes**  
 Listing Type: **Exclusive Agency**  
 Coop Comp: **2.5% - \$275 (on Net SP)**  
 Showing Inst: **For Showings or Questions call Seller at 815-000-0000**

Remarks on Internet?: **Yes**  
 VOW Comments/Reviews: **Yes**  
 Holds Earned Money: **No**  
 Add. Sales Info: **None**  
 Cont. to Show?:

Addr on Internet?: **Yes**  
 Agent Notices:  
 Lock Box: **None**  
 Special Comp Info: **None**  
 Expiration Date:

## Multiple Listing Service

- MLS rules and policies create binding agreements between brokers
- Percentage of the gross sales price or as a definite fee
- Compensation is being offered and paid by the listing broker, *not* by the seller.

# Broker to Broker transaction

# COOPERATIVE COMPENSATION

## Multiple Listing Service

Blanket unilateral offer to compensate the cooperating broker

- Unilateral Offer can only be accepted by performance
- *Performance* means being the “procuring cause” of the sale
- Offer (MLS Compensation) + Acceptance (procuring cause) = Binding Agreement

# COOPERATIVE COMPENSATION

## Multiple Listing Service

### Procuring Cause

**“The uninterrupted series of causal events which results in the successful transaction.”**

# COOPERATIVE COMPENSATION

## Multiple Listing Service

### Procuring Cause factors

- Who first introduced the buyer to the property, and how was the introduction made?
- Was the series of events starting with the original introduction of the buyer to the property and ending with the sale hindered or interrupted in any way?
- If there was an interruption or break in the original series of events, how was it caused and by whom?
- Did the action or inaction of the original broker cause the buyer or tenant to seek the services of a second broker?
- Did the second broker unnecessarily intervene or intrude into an existing relationship between the buyer or tenant and the original broker?

<https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/procuring-cause-arbitration-worksheet>

# COOPERATIVE COMPENSATION

## Multiple Listing Service

### Procuring Cause v. Agency



- Listing broker only obligated to pay the procuring cause broker, not necessarily the broker that has a buyer rep.
- Agency relationships do not automatically determine procuring cause

# COOPERATIVE COMPENSATION

## Multiple Listing Service


- Offer to compensate is unconditional.
- Listing broker is not permitted to state:
  - “3% buyer’s agent commission only with a full price offer”
  - “buyer’s agent must accompany buyer on first showing to receive commission”
  - “commission equal to one month’s rent only with 12-month lease.”
- Sellers trying to set conditions





# COOPERATIVE COMPENSATION

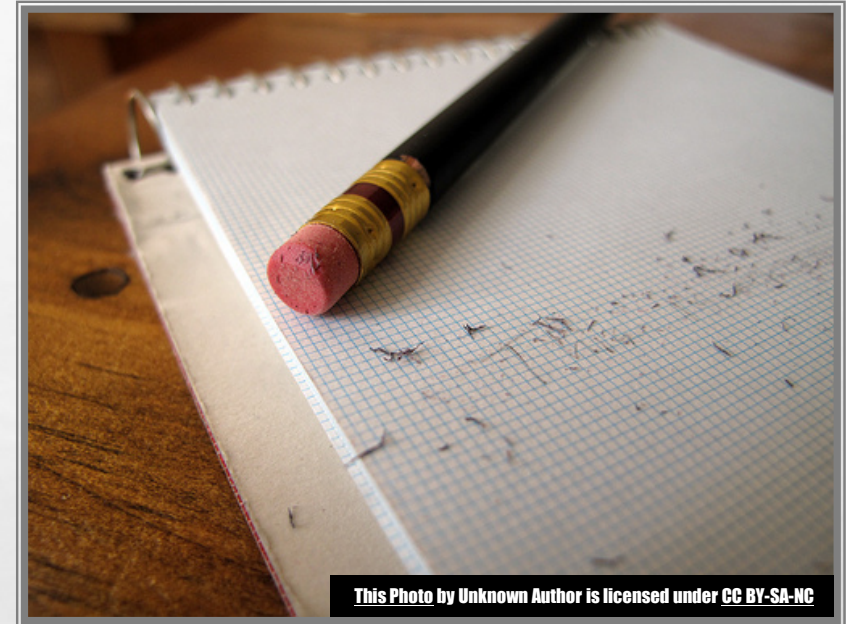
## Multiple Listing Service

- **Bonuses** are part of the blanket unilateral offer of compensation.
- What's the difference? Condition or Not a Condition
  - "\$2,000 bonus if property closes within 30 days." ❌
  - "\$2,000 bonus if offer received within 30 days." ✅
-  Home Builders – Take care when signing a listing agreement!

# COOPERATIVE COMPENSATION

## Modifying the MLS compensation

- Listing broker sets the amount of compensation
- Can only unilaterally be changed before an offer to purchase
- After an offer, listing broker and cooperating broker must agree
- Agreement to change the MLS commission must be mutual and voluntary.

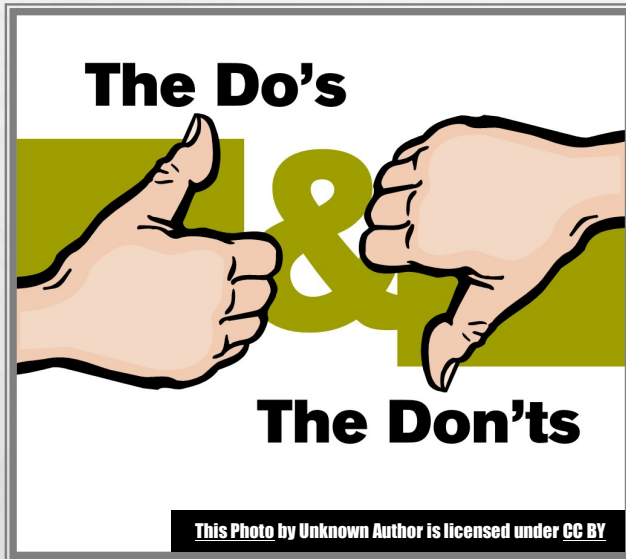


**MLS is prohibited from setting rates of compensation!**

# COOPERATIVE COMPENSATION

## Modifying the MLS compensation

- Listing brokers – Don't reduce the commission because you feel the cooperating broker has not done their fair share of the work.
- Cooperating brokers – Don't dictate how much the listing broker must pay you, even if your buyer's representation agreement has a different amount than what's offered on the MLS.
- Cooperating broker – Don't coerce the listing broker into changing the MLS commission by using the terms of an offer, or refusing to submit an offer, as leverage.



# COOPERATIVE COMPENSATION

## Separate Written Agreements

- Not listed in an MLS
- Cooperating broker not participant of MLS where property is listed
- Commercial Transactions



This Photo by Unknown Author is licensed under [CC BY-SA-NC](#)

# COOPERATIVE COMPENSATION

## Texas REALTORS® Commission Registration Agreements

- Registration Agreement Between Broker and Owner (TXR 2401) A versatile form that can be used when the broker represents either the owner or the buyer. Especially useful in a for-sale-by-owner transaction. (Commercial version available)
- Registration Agreement Between Brokers (TXR 2402) Used when the property is not listed in the MLS or the cooperating broker is not a participant of the MLS in which the property is listed. (Commercial version available)
- Agreement Between Brokers for Residential Lease (TXR 2002) Used when the property for lease is not listed in the MLS or if the cooperating broker is not a participant of the MLS in which the property is listed.

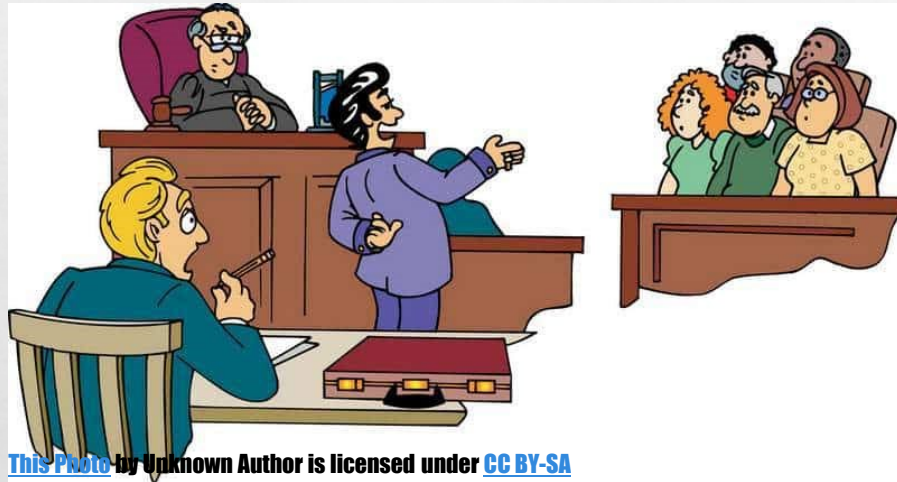
# COMMISSION DISPUTES

- Remember your Fiduciary Duty!
- Texas REALTORS® offers ombudsman, mediation, and arbitration
- Mandatory Arbitration - Disputes between REALTORS® with different firms
- Voluntary Arbitration - Disputes with a non-REALTOR®, between REALTORS® in the same firm, or between a broker and a sponsored agent,



# COMMISSION DISPUTES

## Arbitration Hearings



This Photo by Unknown Author is licensed under [CC BY-SA](#)

- Main issue is usually Procuring Cause
- The cost to request arbitration is \$400 per side.
- The burden of proof is on the complainant
- Standard of proof is a preponderance of the evidence
- Must be filed within 180 days after the closing of the transaction, or 180 days after know of dispute.

**THANK YOU**

**LEGAL HOTLINE 800-873-9155**

**TEXAS REALTORS® LEGAL WEBINAR SERIES**

**DAVID JONES, ASSOCIATE COUNSEL**

