

Texas Real Estate Forms Manual
Third Edition

Volume 1



TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 1

A project of the
Real Estate Forms Committee
of the
State Bar of Texas



Austin 2017

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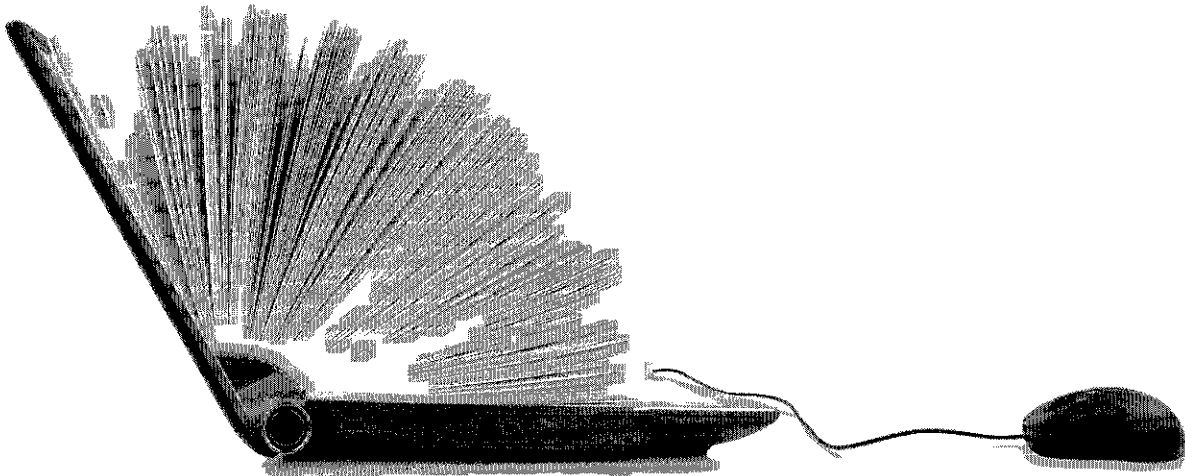
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Preface

The State Bar of Texas is proud to publish the third edition of the *Texas Real Estate Forms Manual*. Written, reviewed, and approved by Texas attorneys who contribute their time to the Real Estate Forms Committee, this manual could not have been completed without their dedication, perseverance, and hard work. Their commitment to the fostering of excellence in the practice of law is one of the hallmarks of our profession.

The members of the Committee, in their commitment to excellence, have given countless hours of their volunteer time over the years toward maintaining the manual as the most up-to-date, comprehensive, and practical publication of its kind. Committee members hail from every part of Texas and from every sort of real estate-related practice, enabling them to bring a broad range of experience and expertise to the manual. While there have been remarkable individual contributions, to attempt to single out any names would be to ignore the value of the collaborative process. Working alone and in pairs, in subcommittees, and in full meetings, the Committee has identified and responded to changes in the law and enhanced the value of the material provided to the members of the State Bar of Texas.

The original manual began as a project of the San Antonio Bar Association in 1949 to draft legal forms and sell them to lawyers. Those forms were collected into a pamphlet, then published as a manual that came to be known as the “brown book” because of the color of its cover. The brown book was both scholarly and practical, and it was widely used and highly regarded. The State Bar assumed responsibility for the project in 1970 and published the “gray book” in 1973 and the “blue book” in 1986. The “black book” carried the tradition forward in 1999, with another gray book in 2011, and now we offer a new “blue book” for the second decade of the twenty-first century.

The manual has expanded to four volumes and contains a digital download version with enhanced word-processing forms and a PDF file of the manual. A custom toolbar for Word allows users to show, hide, print, and delete all instructional material in the forms, while the PDF file includes links to primary research, assisting practitioners in both knowing the law and understanding not just how, but why, to handle a transaction in a certain way.

This expanded and updated edition of the manual stems from the passion for the law and its practice held by each member of the Real Estate Forms Committee. It would be difficult to exaggerate the contributions of this group’s members or their boundless energy, care, diligence, and amazing (sometimes painful) attention to detail. The members maintained good

PREFACE

will and a sense of humor throughout the countless hours during which this manual was developed. It has been a privilege to work with each of them.

—Denise Vargo Cheney, *Chair*
Sara Eileen Dysart, *Vice-Chair*

Summary of Contents

A detailed chapter table of contents immediately precedes the text of each chapter.

Introduction

Description of the manual and how to use it

1 Ethics and Professional Conduct

Discussion of the regulation of lawyers and law practice and accountability for professional responsibility, with emphasis on real estate practice

2 Laws Affecting Real Estate

Digest, arranged alphabetically by topic, of selected statutes and regulations that affect real estate transactions

3 Preparation, Execution, Proof, and Recording of Documents

Practice notes relating to the preparation of documents used in conveying real property and their proper execution and recording, with forms for party designations and acknowledgments, as well as a jurat and an interpreter's affidavit

4 Sales Contracts and Transaction Guide

Practice notes and a real estate sales contract form, which serves to outline typical considerations in a closing; the chapter also contains an escrow agent receipt, escrow agreement, and other supporting forms

5 Deeds, Bills of Sale, and Other Transfers

Practice notes concerning the conveyancing of real property rights and deeds and other forms, including clauses to be used in completing the forms

6 Promissory Notes

Practice notes concerning loan transactions, with a promissory note form and clauses to be used in completing the form

[chapter 7 reserved]

8 Deeds of Trust

Practice notes for the use of a deed of trust, and forms for a deed of trust and deed of trust to secure assumption, with clauses to be used in completing the forms

9 Security Agreements

Practice notes and related forms for the use of personal property as security in a real property transaction

10 Ancillary Loan Documents

Practice notes and forms for use ancillary to an original loan and for documenting subsequent transactions such as transfers or releases of liens

11 Home Equity Loan Documents

Practice notes and forms for documenting the use of homestead property to secure a home equity loan or reverse mortgage

12 Federal Consumer Disclosure Documents

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13 Residential Contracts for Deed

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16 Water Rights Conveyancing Documents

Practice notes and forms for use in conveying groundwater rights for on-site and off-site production, conveying surface water rights, and documenting the creation of liens on water rights

17 Risk Allocation: Indemnity, Waiver, and Insurance

Practice notes concerning the allocation of risk in real estate transactions, addressing the use of indemnities and waivers and the transfer of risk to third parties through the purchase of insurance

18 Residential Construction Contract Documents

Practice notes and forms for use in the construction of a new residence

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Practice notes and form for use in new commercial construction

20 Contractual Mechanic's Lien Documents

Practice notes and forms for the creation of a mechanic's lien on new residential construction

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Practice notes and forms relating to statutory mechanic's liens

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23 Restrictive Covenants and Property Owners Associations

Practice notes and forms for the creation of property owners associations

24 Condominium Documents

Practice notes and forms for the creation and conveyance of condominiums

25 Leases

Practice notes and forms for use in leasing transactions and landlord-tenant relationships

26 Miscellaneous Documents

A collection of forms for use ancillary to a real property conveyance and for documenting other transactions, including a boundary line agreement, easement agreements, listing agreements, a restrictive covenant agreement, and a special durable power of attorney

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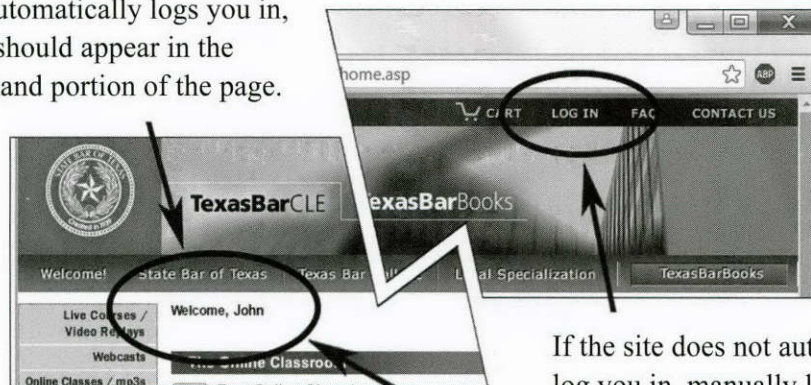
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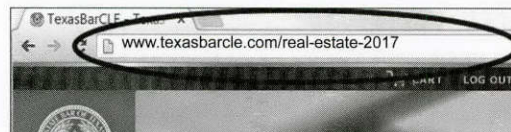
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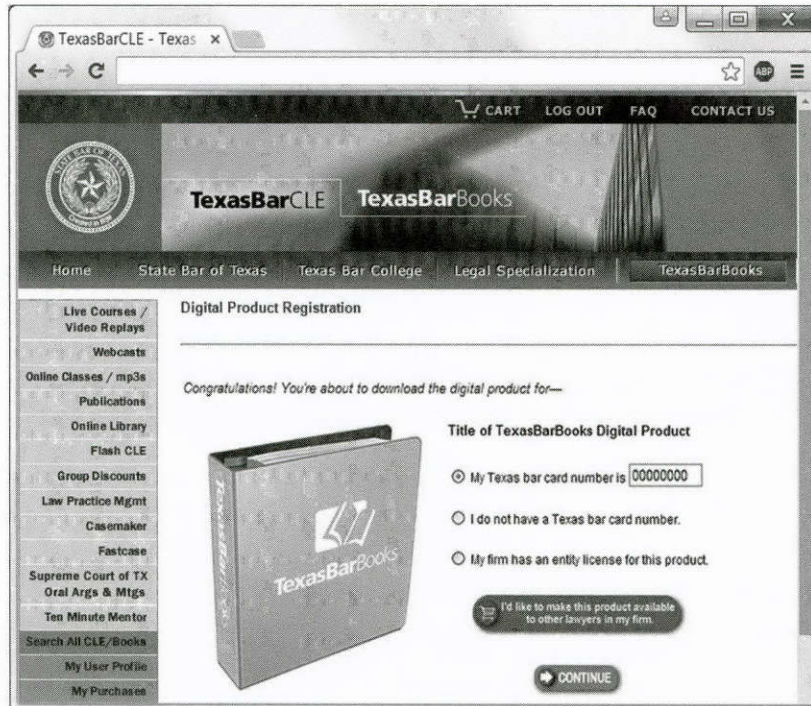


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- delete the embedded instructions entirely on forms you plan to e-mail or file electronically.

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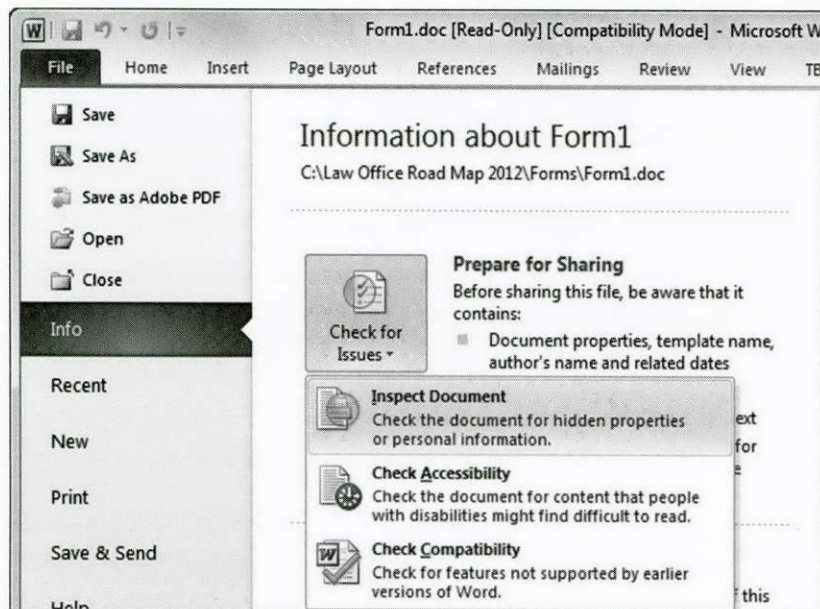
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Notes for Other Software

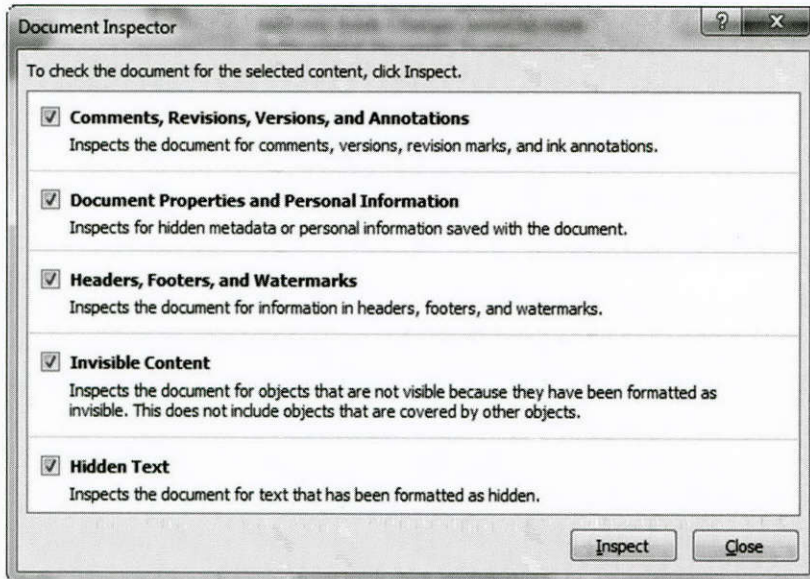
- o *Word for Macintosh*: See the section titled “Remove Metadata” in the document named “Macintosh--How to Use the Word Forms” included with the digital download.
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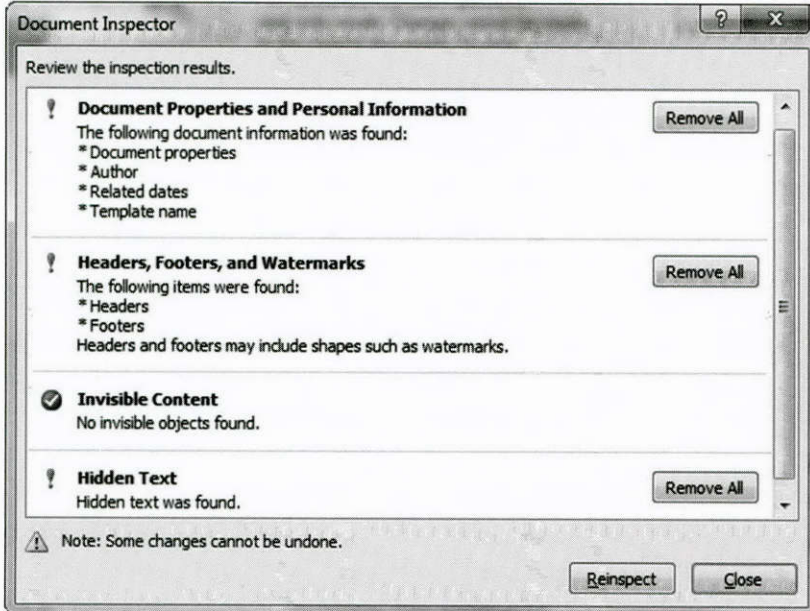
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- In the “Document Inspector” window that opens, select the categories desired by checking the appropriate boxes (be certain to check the “Hidden Text” box to ensure that any remaining red, hidden instructional text in the document will be also be detected) and click the “Inspect” button.



- In the second “Document Inspector” window that opens, review and remove any metadata found as desired.



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[Reserved]

Introduction

The *Texas Real Estate Forms Manual* is organized according to steps involved in typical real estate transactions, insofar as possible. Each chapter contains a detailed table of contents; each except chapter 26 contains practice notes concerning the topic of the chapter. With the exception of chapter 2, the forms take up the greater part of each chapter. An appendix at the end of volume 4 of the manual contains information on and a detailed bibliography about third-party opinion letters.

§ 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. They bring together the Texas Property Code sections and other basic Texas and U.S. law relating to the topic treated in the chapter. For the attorney experienced with real estate law, these notes should serve as a reminder of some of the basics; for the attorney not so experienced with the law, they should provide an orientation to the major matters with which the attorney needs to be concerned when completing a particular transaction.

Although the notes are not intended as a treatise on the subject, they contain much important information that must be understood before the forms may be used responsibly.

§ 2 Forms

The forms (except those promulgated by governmental agencies) were prepared by members of the Real Estate Forms Committee of the State Bar of Texas, and great care has gone into their preparation. The forms represent the best thinking of the practicing attorneys on the committee. Perfection, however, is hard to achieve, and each attorney using these materials must depend on his or her own expertise and knowledge of the law.

The alternative situations that occur most often are covered in the forms. There is, however, no substitute in a particular transaction for the legal mind, and there is no end to the variations

of legal problems. Thus, care should be taken to ensure that any form used fits the situation and treats the problems of that transaction.

1. Optional content

Within major sections of the text of forms, optional paragraphs or items are usually identified by boxed instructions. Additional optional clauses are collected under separate form numbers in each chapter where appropriate. Because the manual can cover only relatively common situations confronted in real estate transactions, language needed to address an atypical issue in a particular situation may not appear in the form. The user must take care to ensure both that language appearing in the form that is not appropriate for the particular transaction is eliminated and that any language needed for the particular transaction that does not appear in the form is added.

2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is appropriate for inclusion in a finished form. In contrast, Arial type is used for boxed instructions. When Arial type is used within the form itself (rather than in an instruction box), it appears in **boldface** for emphasis.

3. Bracketed material

Several types of bracketed material appear in the forms.

Choice of terms. In a bracketed statement such as “[Landlord/Tenant], the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Alternative letters or phrases may also be

indicated by the use of brackets. A frequent example that appears in the forms is “[county/counties],” indicating a choice between the singular and plural forms of the word.

Optional words. In a phrase such as “Description of the Land [and Personal Property], the user must determine whether to include the words “and Personal Property.

Substitution of terms. In a bracketed statement such as “[name of buyer], the user is to substitute the name of the buyer rather than typing the bracketed material verbatim.

Instructions for use. Material such as “[include if applicable:]” and “[describe property]” provides instructions for completing the finished form and should not be typed verbatim in the document.

Subtitles. The titles of some forms are followed by a bracketed subtitle that is not to be typed as part of the form title. In the title ‘Closing Instructions [from Borrower], for example, the bracketed words simply distinguish the form from another similarly titled form in the same chapter for ease of reference.

4. Blank lines

Signature lines appear as blank lines. Spaces for dates and times that would be filled in *after* the document is prepared also appear as blank lines. (If an actual date or time should be inserted in the form when it is prepared, “[date]” or “[time]” appears instead.) Additional signature lines may be necessary in a given form and should be added by the user.

5. Language in boxes

Language in boxes is not to be typed in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or providing cautionary reminders about use of the form language.

6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. Some forms consist only of clauses to be inserted in other forms. In these instances the clauses are numbered in sequence using the form number, followed by the number of the clause—for example, clause 5-6-2 in form 5-6. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

7. Digital download

The digital download version of the *Texas Real Estate Forms Manual* contains the entire text of the manual as a PDF file that is searchable and hyperlinked to allow for easy, rapid navigation to topics of interest. Also included are electronic versions of all State Bar of Texas–copyrighted forms from the manual as editable Word files, as well as printable or downloadable PDF files of forms available from various agencies, linked from the main PDF file for easy retrieval.

Applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Casemaker online.

Caveat: Note that the word-processing forms included in the digital download contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

For more information about the digital download including usage notes, see the material following the “How to Download This Manual” tab in volume 1 of this manual.

§ 3 Page numbers

Page numbers are consecutive for both practice notes and forms within each chapter. Practice notes begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the

form. This system is used to permit revisions within any chapter or form without renumbering the pages in the remaining chapters.

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§ 4 Corrections and updates

In drafting the manual, the members of the committee devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out to us any errors you find in the manual, as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.

[Reserved]

Chapter 1

Ethics and Professional Conduct

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Chapter 1

Ethics and Professional Conduct

§ 1.1 Introduction

The Texas Disciplinary Rules of Professional Conduct set the standard of conduct for Texas attorneys and are found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code. The rules are also available online at <https://www.legalethictexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx>.

This chapter of the manual follows the attorney-client relationship from the initial client interview to the termination of the relationship, with examples of what a real estate attorney might do to document compliance with the rules. This chapter is very general and is not intended to be a substitute for a complete study of the rules.

The documents at the end of this chapter are examples only and provide general guidance, not “forms” for all transactions.

§ 1.1:1 The Texas Lawyer’s Creed

On November 7, 1989, the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted “The Texas Lawyer’s Creed—A Mandate for Professionalism.” An attorney adhering to the Creed agrees to advise a client of the contents of the Creed when undertaking a representation (article II, paragraph 1).

Recommended paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.1:2 Notice of Grievance Process

Section 81.079 of the Texas Government Code requires attorneys to notify clients of the grievance process. Notice must be provided by making available in the attorney’s office grievance brochures prepared by the State Bar, by prominently posting a sign in the attorney’s office describing the process, by including the information in a written contract for services, or by providing the information in a bill for services. Tex. Gov’t Code § 81.079(b).

Example paragraphs for the disclosure about the Creed are found in the model engagement letters at forms 1-8, 1-9, and 1-10 in this chapter.

§ 1.2 Sources of Interpretation of Rules

Judicial decisions in Texas regarding ethical violations are referenced in the annotations to the Texas Disciplinary Rules of Professional Conduct.

The Committee on Professional Ethics of the Supreme Court of Texas issues opinions on the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These opinions are published in the *Texas Bar Journal*.

An attorney may obtain informal explanations of the rules from the State Bar. A consultation with the disciplinary counsel’s office may be not only informative but also probative of good faith should a question later arise. The telephone number of the attorney ethics line is 800-532-3947.

The Texas Center for Legal Ethics also maintains an online library, index, and text of all published opinions of the Committee on Professional Ethics; Texas cases dealing with ethics and professionalism; and a bibliography. The Center's website is at <https://www.legalethictexas.com/Home>, and its phone number is 800-204-2222, ext. 1477.

§ 1.3 Disciplinary Action

Article VIII of the Texas Disciplinary Rules of Professional Conduct (Maintaining the Integrity of the Profession) generally governs an attorney's conduct. Rule 8.04 sets out a comprehensive restatement of all forms of conduct that will subject an attorney to disciplinary action. Tex. Disciplinary Rules Prof'l Conduct R. 8.04, reprinted in Tex. Gov't Code, tit. 2, subtit. G, app. A (West 2005 & Supp. 2009) (Tex. State Bar R. art. X, § 9). It includes conduct controlled by the State Bar Act and the State Bar Rules. The rules govern attorneys who are admitted to practice in Texas or specially admitted for a particular proceeding. A licensed Texas attorney's conduct in another state may also be the subject of a Texas grievance procedure. Tex. Disciplinary Rules Prof'l Conduct R. 8.05.

The rules do not prescribe either disciplinary procedures or penalties for a violation. Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 14. Possible sanctions are found instead in the Texas Rules of Disciplinary Procedure. These rules are reproduced in the Texas Government Code in title 2, subtitle G, appendix A-1, following section 84.004 of the Government Code. The rules are also available online at <https://www.legalethictexas.com/Ethics-Resources/Rules/Texas-Rules-of-Disciplinary-Procedure.aspx>.

§ 1.4 Consulting Potential Client

§ 1.4:1 Attorney-Client Relationship

The relationship of attorney and client is one of agent and principal. *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). It is created by consent and governed by the general rules covering agency. *Bar Ass'n of Dallas v. Hexter Title & Abstract Co.*, 175 S.W.2d 108, 115 (Tex. Civ. App.—Fort Worth 1943), *aff'd*, 179 S.W.2d 946 (Tex. 1944). The fiduciary obligations and responsibilities imposed on the attorney are predicated on the existence of the attorney-client relationship. *See Shropshire v. Freeman*, 510 S.W.2d 405 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.).

The attorney-client relationship can be implied from the conduct of the parties. *Duval County Ranch Co.*, 663 S.W.2d at 633. A written contract or payment of a retainer is not necessary. For example, gratuitous services can establish an attorney-client relationship. *Prigmore v. Hardware Mutual Insurance Co. of Minnesota*, 225 S.W.2d 897, 899 (Tex. Civ. App.—Amarillo 1949, no writ). But the fact that an attorney had business dealings with someone does not establish an attorney-client relationship. *McGary v. Campbell*, 245 S.W. 106, 116 (Tex. Civ. App.—Beaumont 1922, writ dism'd w.o.j.).

The existence of an attorney-client relationship is a question of fact. *Jinks v. Moppin*, 80 S.W. 390, 393 (Tex. Civ. App. 1904, no writ).

§ 1.4:2 Areas of Concern When Consulting Potential Client

Consultation alone does not create an attorney-client relationship. Nevertheless, some duties attach during a consultation. *See* Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 12.

During a consultation, an attorney must maintain the requirements of confidentiality and must be wary to avoid current and future conflicts. A consultation and certainly an investigation may impose additional duties such as advising the potential client of the statute of limitations. *See Villarreal v. Cooper*, 673 S.W.2d 631 (Tex. App.—San Antonio 1984, no writ). At least one state has held attorneys liable for negligently investigating the claim, even though the attorney refused to take the case. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980). Further confusion may result if an attorney has a continuing or gratuitous relationship with a client. *See Bressette v. Knapp*, 159 A.2d 329 (Vt. 1960).

An attorney should consider declining bad or unwanted business as well as the unwanted client. An attorney is not ethically required to represent all who seek the attorney's advice. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.01 & cmts.

§ 1.4:3 Refusing Representation

A potential client may believe that an attorney-client relationship is created by the initial interview. If the attorney decides not to represent a person, this should be made clear. The attorney should consider sending a letter to confirm that the proposed representation will not be undertaken. Form 1-1 in this chapter is an example of a nonrepresentation letter. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) requires the potential client's documents to be returned. They may be withheld only if other law, such as a lien, permits the withholding of documents and if the client will not be prejudiced by the retention. *See* Tex. Comm. on Prof'l Ethics, Op. 395 (1979). If the documents are particularly valuable, the attorney should consider having their receipt acknowledged.

§ 1.4:4 Advising Potential Client

If the attorney declines the representation, there is a question about whether the attorney should advise the nonclient of any rights or statutes of limitation. Some attorneys, as a matter of policy, will advise the nonclient of such matters if the attorney is aware of them. Other attorneys believe that advice implies some representation of the nonclient and therefore, as a matter of policy, do not offer any advice in the nonrepresentation letter.

§ 1.5 Establishing Attorney-Client Relationship

§ 1.5:1 Disclosure of Conflicts

An attorney must disclose all potential conflicts before accepting employment and those that arise during the course of employment. Nonlitigation conflicts are addressed specifically in rule 1.06, comments 13–16. Unfortunately, these comments merely provide examples and conclude that the question is “often one of proximity and degree.” Tex. Disciplinary Rules Prof'l Conduct R. 1.06 cmt. 13. Relevant factors include the duration of the relationship and intimacy that an attorney has with a client, the duties performed, the likelihood a conflict will arise, and the likelihood of resulting prejudice.

The disclosure requirement includes all personal conflicts, conflicts with current clients, and conflicts with past clients. For examples of disclosures and waivers of specific types of conflicts of interest, see forms 1-2 through 1-7 in this chapter.

Rule 1.12(a) states that an attorney employed by an organization represents the entity. Because investors often ask real estate attorneys to form a partnership or corporation, it is a good practice to clarify that the client is the entity and not the individual investors. See forms 1-5 and 1-6 for

examples of letters pertaining to the formation of a partnership and a corporation.

In addition, rule 1.12(e) requires the attorney to inform shareholders and officers that the attorney will not represent them if their interests are adverse to the interests of the entity. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.12(e) & cmt. 4.

§ 1.5:2 Consent Required for Representation of Multiple Clients

A typical real estate transaction may involve sellers, purchasers, guarantors, lenders, title insurance companies, trustees, real estate brokers and agents, mortgage brokers, tenants, and lien claimants, as well as the attorneys. In addition, if any of the parties are corporations or partnerships, the individual officers, directors, shareholders, partners, or venturers involved may have interests that diverge from those of the business entity. An attorney who provides legal counsel for more than one of the parties faces a potential conflict of interest that should be carefully examined before the attorney undertakes representation.

In examining the potential attorney-client relationship, the attorney should carefully consider the unique facts of the transaction and the purpose of the engagement. Representation may be analyzed under two theories: the traditional multiple-representation analysis (*see* Tex. Disciplinary Rules Prof'l Conduct R. 1.06) and the intermediaries analysis (*see* Tex. Disciplinary Rules Prof'l Conduct R. 1.07).

In many transactions, the multiple clients have adverse positions to each other but, because of economic constraints, want only one attorney to represent them in the transaction. Rule 1.06(a) prohibits an attorney from representing opposing parties in the same litigation. Rule 1.06(b) also prohibits an attorney from representing a

client if the representation is substantially related and materially and directly adverse to the interest of another client of the attorney or if the attorney would be limited by other responsibilities. Notwithstanding the prohibition of rule 1.06(b), subsection (c) allows the attorney to represent multiple clients if the attorney believes each client's representation will not be materially affected and each client consents to the multiple representation after full disclosure.

Rule 1.07 may also affect the consent required for representation of multiple clients. Rule 1.07 can be read to require that an attorney obtain 'each client's written consent' whenever 'two or more parties with potentially conflicting interests' are represented by one attorney. One of the primary drafters of the rules has suggested that the literal language of rule 1.07 was in error and should be limited to situations in which an attorney mediates between clients, as illustrated by the comments to rule 1.07. *See* Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hous. L. Rev., Oct. 1990, at 122.

If the attorney concludes that multiple representation is appropriate, obtaining written consent of the clients is advised. Form 1-3 in this chapter is a model letter for such a situation. *See* also forms 1-5, 1-6, and 1-7 for letters dealing with multiple representation. Separate engagement letters for each client may be appropriate in addition to the multiple-representation consent letter.

An additional problem that may arise is the division of the legal bill between multiple clients. Any representation of multiple clients will require a tailor-made consent agreement that clarifies the billing arrangement. *See* form 1-7 for an example of a consent agreement.

Further, if multiple parties are to receive cash or some other consideration, the attorney may have a duty to make sure all parties represented concur in the way the consideration is to be divided.

See Tex. Disciplinary Rules Prof'l Conduct R. 1.08(f); *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (involves litigation but easily analogized to business settlements).

§ 1.5:3 Legal Fees

An attorney may not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a). In borderline cases the comments specify two indications of unconscionability: the attorney's overreaching with a client, especially one susceptible to such a practice, and the attorney's failing to give the client at the outset of the representation a clear explanation of how the fee will be calculated. Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 8. Rule 1.04(b) lists a number of factors that may be considered in determining the reasonableness of a fee.

An attorney may not divide a fee with another attorney who is not a member or employee of the same firm unless (1) the client consents in writing to the terms of the arrangement ahead of time, (2) the division is in proportion to the services rendered by each attorney or is with an attorney who assumes joint responsibility for the representation, and (3) the aggregate fee is not unconscionable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f).

Unless the agreement is confirmed by an arrangement conforming to paragraph (f)(2) of rule 1.04, the attorney may not collect fees or expenses in connection with the agreement except for (1) the reasonable value of legal services provided and (2) the reasonable and necessary expenses actually incurred. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g).

An attorney may share fees with an 'of counsel' attorney (Tex. Comm. on Prof'l Ethics, Op. 450 (1988)) or with a former partner or associate (Tex. Disciplinary Rules Prof'l Conduct R. 1.04(h)).

Fees paid in advance of the performance of work, as well as any of the client's other property that comes into the attorney's possession, must be held in trust by the attorney. Tex. Disciplinary Rules Prof'l Conduct R. 1.14. Attorneys must keep complete records of client account funds for at least five years after the conclusion of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a). If a client's funds either are of an amount or are held for a long enough time that the interest generated is likely to exceed the costs of setting up and maintaining an account, an individual account must be set up for the client. For a client's funds that are of a small amount or are likely to be held only for a short time, attorneys are required to maintain an interest-bearing account in which to pool the funds. Under the Interest on Lawyers' Trust Accounts (IOLTA) program, interest from these pooled accounts is paid to the Texas Equal Access to Justice Foundation, which awards grants to organizations in Texas that serve the poor in legal matters. Attorneys must submit an annual IOLTA compliance statement to the foundation. State Bar Rules art. XI (1989) (found in the Texas Government Code in title 2, subtitle G, appendix A, following section 84.004 of the Government Code). See also the Rules Governing the Operation of the Texas Equal Access to Justice Program (reproduced in the Texas Rules of Court—State (West 2011)).

§ 1.5:4 Engagement Agreements Detailing Fee Arrangements

Rule 1.04(c) states:

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated

to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c) (emphasis added). Forms 1-8, 1-9, and 1-10 in this chapter are examples of engagement letters for real estate transactions.

§ 1.5:5 Charging for Time and Expenses

As implied in rule 1.04(c), the attorney's fee basis is established by an agreement between the attorney and the client. The attorney should, however, carefully outline the fee basis to avoid a client's misunderstanding later. For example, the attorney might advise the client that there will be a fee to recover time previously spent to develop a limited partnership form or to recover unbilled or unpaid time for research incurred on another matter.

§ 1.5:6 Record Retention and Destruction

Neither the rules nor Texas case law specify if, or how long, an attorney must retain client records. To resolve the ambiguity, some attorneys adopt a record retention and destruction policy. If the existence of a policy is disclosed to the client in either the engagement letter or the closing letter, the client has the opportunity to obtain the records and the attorney has some authority to dispose of the documents. See forms 1-8, 1-9, 1-10, and 1-14 in this chapter for an optional paragraph concerning retention and destruction of records.

§ 1.6 Representation of Client

§ 1.6:1 Duty to Keep Client Informed

Rule 1.03(a) requires an attorney to keep the client reasonably informed. In addition, the attor-

ney has the duty to inform the client of relevant considerations and explain their legal significance to permit the client to make informed decisions. Tex. Disciplinary Rules Prof'l Conduct R. 1.03(b).

One way to meet these obligations is to routinely provide the client with copies of all pertinent correspondence, documents, and file memoranda; advise the client in writing of risks involved with the transaction, including the obvious; and document the business decisions made by the client.

§ 1.6:2 Confidentiality

An attorney may not knowingly reveal confidential information of a client or use such confidential information to the attorney's advantage or for the advantage of a third person. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(b). The ethical duty to preserve a client's confidence is much broader than the attorney-client evidentiary privilege. This duty applies even if there is not yet an established attorney-client relationship—for instance, when a client comes in for an initial interview. *See* Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 12. The obligation of confidentiality also continues after the termination of employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)(2).

§ 1.6:3 Business Interests with Clients

Rule 1.08(a) provides that an attorney may not enter into a business transaction with a client unless (1) the transaction and the terms on which the attorney acquires the interest in the transaction are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client, (2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction, and (3) the client *consents in writing*. Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a). Com-

ment 2 to rule 1.08 indicates that the rule does not apply to standard commercial transactions between the attorney and the client for products or services the client generally markets to others, because the attorney has no advantage in dealing with the client.

In cases in which the attorney and client are both personally involved in a business transaction, malpractice insurance claims might be denied because the policies may exclude coverage under such circumstances.

See form 1-11 in this chapter for an example of a consent agreement for doing business with a client.

§ 1.6:4 Duty to Clarify Nonrepresentation

An attorney dealing on behalf of a client with a person not represented by an attorney may not state or imply that the attorney has no interest in the outcome of the matter. If the attorney believes an unrepresented person misunderstands the attorney's role, the attorney must correct this misunderstanding. Tex. Disciplinary Rules Prof'l Conduct R. 4.03. For example, an attorney might make a written nonrepresentation disclosure to a borrower when representing a lender. See form 1-12 in this chapter for an example of a nonrepresentation disclosure letter.

§ 1.6:5 Communication with Someone Represented by Counsel

An attorney may not communicate about the subject of the representation with someone the lawyer knows to be represented by counsel. Tex. Disciplinary Rules Prof'l Conduct R. 4.02. Likewise, the rules prohibit an attorney from encouraging a client to make such a communication. *See* Tex. Disciplinary Rules Prof'l Conduct R. 4.02 cmt 2.

There are legally required exceptions to this rule, such as the sending of a foreclosure notice. *See* Tex. Prop. Code § 51.002.

§ 1.7 Issues Raised by Use of Technology

The Texas Disciplinary Rules of Professional Conduct do not specifically address issues raised by the use of technology in the practice of law. The ABA Model Rules of Professional Conduct provide some guidance on such issues, especially when there is no counterpart in the Texas rules.

§ 1.7:1 Confidentiality of Information

Rule 1.6(c) of the ABA Model Rules of Professional Conduct states: 'A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Comment 18 to this rule states, in part, that—

[t]he unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g. by making a

device or important piece of software excessively difficult to use).

§ 1.7:2 Responsibilities Regarding Nonlawyer Assistant

Rule 5.03 of the Texas Disciplinary Rules of Professional Conduct is similar to rule 5.3 of the ABA Model Rules of Professional Conduct. Comment 3 to ABA rule 5.3 recognizes that the use of nonlawyers outside the firm may include—

sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

Tex. Comm. on Prof'l Ethics, Op. 572 (2006), addresses the use of an independent contractor for copying services. *See* 69 Tex. B.J. 793–94 (2006).

§ 1.7:3 Respect for Rights of Third Parties

Rule 4.4(b) of the ABA Model Rules of Professional Conduct states: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." Comments 2 and 3 to this rule state the following:

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electroni-

cally stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electroni-

cally stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 [“Scope of Representation and Allocation of Authority Between Client and Lawyer”] and 1.4 [“Communications”].

Texas Disciplinary Rules of Professional Conduct rules 1.02 (“Scope and Objectives of Representation”) and 1.03 (“Communication”) are the comparable Texas rules referenced in comment 3 above.

§ 1.8 Terminating Attorney-Client Relationship

§ 1.8:1 Termination by Parties

A client may always terminate the attorney-client relationship. An attorney must return any unearned portion of the fee and all pertinent papers and property. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(d) cmt. 4; Tex. Comm. on Prof’l Ethics, Op. 395 (1979). However, rule 1.15(d) specifically provides that an attorney may retain papers relating to the client to the extent permitted by other law, but only if such retention will not prejudice the client in the subject matter of the representation. *See* Tex. Comm. on Prof’l Ethics Op. 411 (1984).

An attorney also may terminate the relationship; however, the attorney has a duty to minimize any adverse effects to the client. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(b), (d). It is a good practice for an attorney to send a disengagement letter to record the date of the termination of the attorney-client relationship. *See*

form 1-13 in this chapter for an example of a disengagement letter.

Tex. Disciplinary Rules Prof’l Conduct R.

1.15(a) sets out the circumstances under which the attorney must terminate the relationship with the client. An attorney must withdraw if continued representation will result in a violation of one of the Texas Disciplinary Rules of Professional Conduct or another law or if the attorney’s physical, mental, or psychological condition materially impairs the attorney’s fitness to represent the client. The attorney must also withdraw when discharged. When terminating the attorney-client relationship before completing the work for which the client contracted, the attorney should review rule 1.15 to be sure that good cause for withdrawal exists.

Withdrawal is permissible under the circumstances listed in rule 1.15(b). The rule provides that an attorney may withdraw if the client fails substantially to fulfill an obligation to the attorney, including the obligation to pay the attorney’s fee as agreed, *and* a reasonable warning has been given that the attorney will withdraw unless the obligation is fulfilled. Tex. Disciplinary Rules Prof’l Conduct R. 1.15(b)(5). *See* form 1-13 for an example of a letter terminating the attorney-client relationship because of nonpayment of fees. At least one court in dicta has stated that by accepting employment an attorney implicitly represents that the attorney will see the task through to conclusion. *See Staples v. McKnight*, 763 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied). By conditioning the commencement of work and continued performance on the payment of a fee, the attorney may avoid problems later.

§ 1.8:2 Termination Due to Other Considerations

The attorney-client relationship does not continue automatically once the purpose of the employment is completed. However, it is often

difficult to determine when a matter is completed. Again, it is a good practice to send a disengagement letter to record the date of the

completion of employment. See form 1-14 in this chapter for an example of a completion letter.

Additional Resources

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[Reserved]

Form 1-1

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case.

Letter Declining Representation

[Date]

[Name and address of potential client]

Re: [state nature of representation]

[Salutation]

First, let me thank you for contacting this firm about representing you in [state nature of representation].

After reviewing the documents I have concluded that we are not the appropriate firm to handle this matter. Please understand that in declining this representation I am not expressing any opinion about your legal remedies in this situation, nor am I suggesting that a solution is or is not available.

See section 1.4:4 in this chapter concerning advising a potential client.

Include the following if applicable.

I strongly recommend that you contact another attorney who is familiar with real estate transactions.

Continue with the following.

Again, I appreciate the confidence you have expressed in our firm, and I hope that you are able to resolve this matter in a satisfactory manner. **[Include if applicable: I am returning [describe documents] with this letter.]**

Include the following if applicable.

Please sign and return the enclosed copy of this letter to confirm that you have received the enclosures.

Continue with the following.

Sincerely yours,

[Name of attorney]

Enc.

Include lines for potential client to sign and date if copy of letter is to be returned.

Form 1-2

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:1 in this chapter concerning disclosing conflicts.

**Letter Disclosing and Requesting Waiver of Potential Conflict with
Current Client**

[Date]

[Name and address of prospective client]

Re: [describe transaction]

[Salutation]

I would like to express my appreciation for the opportunity to represent [name of corporation] in connection with [describe transaction]. However, before I can serve as your counsel, it is important that you have a clear understanding of a potential ethical conflict that could exist in this matter. If you have any questions about any matter in this letter, please give me a call.

[Describe potential conflict, e.g., Our firm has decided not to represent any clients with an adverse position to First Local Bank or a related party because we represent First Local Bank. We do not believe a borrower from First Local Bank is in an adverse position, and I assure you that we will represent your interests to the very best of our abilities. But if you should decide to sue the bank, our firm would not be able to represent you. Of course, we would not represent the bank in any matter adverse to you.]

Please give careful thought to the matter discussed in this letter and respond in the space below.

Sincerely yours,

[Name of attorney]

- I consent to the representation subject to the foregoing limitation.

- I do not consent to the representation.

[Name of prospective client]

Date:

Form 1-3

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Disclosing and Requesting Waiver of Potential Conflict for Multiple Representation of Title Company and Third Party

[Date]

[Name and address of prospective client]

Re: [describe transaction]

[Salutation]

I am pleased that you are considering employing our firm in connection with the above-referenced transaction. Although it is not common for a lawyer to represent more than one party in a transaction, dual representation is permitted by professional ethics guidelines as long as two conditions are met.

First, the lawyer must conclude, after a good-faith self-evaluation, that the lawyer can adequately represent the interests of each client. The multiple representation should not adversely affect the attorney's independent professional judgment on behalf of any client. Second, all clients must consent to the multiple representation after full disclosure is given by the lawyer.

The first condition has been satisfied because I believe that this firm can adequately represent each of you (although I hope you understand that we must reserve the right to withdraw from this dual representation if later events cause me in good faith to reach a different conclusion). This letter is intended to fulfill the second requirement mentioned above, that of

disclosure and consent. Accordingly, I will review some of the possible effects that dual representation may have on you.

Conflicts of interest. If I determine that, because of differences between the parties, I can no longer represent each of you impartially, I will inform you of the conflict, and I must then withdraw from representation. If this occurs, I will no longer be able to represent any party to the transaction. Should I determine that this law firm must withdraw from the representation, I will, if you wish, assist the parties in obtaining new counsel. You would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, I would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

Scope of employment. I am being hired solely to advise you on and document this real estate transaction. I am not responsible for and will not advise you on other transactions, nor will I give either of you any kind of tax advice with respect to this transaction. [**Include additional disclaimers appropriate to the facts.**]

Judgment calls. In all real estate closings, a seller or buyer must decide which title matters materially affect title to the property. These decisions are often routine; however, on occasion they require my exercising professional judgment in representing your sometimes competing interests. [**Describe examples of possible judgment calls appropriate to the facts.**]

Describe any specific conflicts possible in this transaction.

There are of course other potential problems that might develop. Although I assure you that I will try to act as fairly as possible in judgment-call matters, it is certainly possible that one of you may not concur with my judgment.

Confidential information. During the course of any representation a lawyer generally becomes aware of confidential information regarding the client. The confidential information

may be a potential cloud on the title that one party does not want revealed to the other party. Another possible confidential matter may be the financial capacity of a party, which bears on the likelihood of that party's performance of its obligations.

Although I assure you that I will try to act discreetly within the bounds of fair dealing, it is certainly possible that either or both of you would prefer to eliminate any possibility of having your confidential information known by an attorney who is also representing the other party. Furthermore, neither of you will be protected by the attorney-client privilege concerning any information disclosed to me or another lawyer in this firm during our representation. The general rule is that, as between commonly represented clients, the privilege does not attach. Thus, confidential information that would be protected by the attorney-client privilege if we represented only one of you can be disclosed to the other party.

Of course, I would have declined the dual representation before now if I had not already concluded that I can adequately represent both of you in this transaction; however, I also understand that you may feel differently. Therefore, I would appreciate your giving careful thought to the matters discussed in this letter. If you consent to the multiple representation, please sign in the space below and return this letter to me. You should keep a copy of this letter for your records. I will be happy to answer any questions you might have.

Sincerely yours,

[Name of attorney]

I understand this disclosure and I consent to the proposed multiple representation.

[Name of prospective client]

Date:

Send letter to each prospective client for signature.

Form 1-4

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:1 in this chapter concerning disclosing conflicts.

**Letter Disclosing and Requesting Waiver of Potential Conflict with
Former Client**

[Date]

[Name and address of former client]

Re: [describe transaction]

[Salutation]

As you are aware, this firm previously represented you in connection with [describe transaction]. This firm has recently been asked to represent [name of prospective client] in a claim against you.

Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct prohibits us from representing [name of prospective client] without your written consent. Before asking for your consent, we advise you that the claim against you [describe adverse claim and the specific prohibition of rule 1.09(a)(1)–(3)].

As this is a very serious matter and you may be compromising certain rights that you have under the Texas Disciplinary Rules of Professional Conduct, I suggest that you seek independent counsel in this matter before consenting to our representation of [name of prospective client]. Please give careful thought to the matters discussed in this letter and respond in the space below.

Sincerely yours,

[Name of attorney]

- I consent to the representation [**include if applicable:** subject to the following limitation: [describe any limitation on representation to be imposed]].
- I do not consent to the representation.

[Name of former client]

Date:

Form 1-5

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Disclosing Potential Risks and Requesting Consent of Individual Partners to Representation of Partnership

[Date]

[Names and addresses of all partners]

Re: Proposed representation of [name of partnership] (the partnership)

[Salutation]

In connection with your request that this law firm represent your partnership, I want to make the following disclosures regarding potential ethical conflicts of interest involving our proposed representation.

Our representation of clients is governed by the Texas Disciplinary Rules of Professional Conduct. A lawyer has the duty to exercise independent professional judgment on behalf of each client. If a lawyer is requested to represent multiple clients in the same matter, two requirements must be met: The lawyer must be able to fulfill this duty for each client on an impartial basis, and the lawyer must obtain the consent of each client after explaining the possible risks involved in the multiple representation.

Concerning the representation of an entity, such as a corporation, partnership, joint venture, trust, or association, rule 1.12 of the Texas Disciplinary Rules of Professional Conduct provides, in part, as follows:

A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents the lawyer shall proceed as reasonably necessary in the best interest of the organization.

Thus, as legal counsel to the entity, we will respond to the instructions of the representative authorized to act on behalf of the entity. For example, the managing partner of the partnership has the authority and power to deal with this law firm. Further, this law firm has no responsibility to verify the representative's authority and will not bear any responsibility for discovering whether the representative has committed acts of fraud, defalcation, or forgery or other criminal or civil liability actions.

If matters arise that cause any one partner to have a claim against another partner, this law firm could not represent either partner. If matters arise that cause any partner to have a claim against the partnership or that cause the partnership to have a claim against an individual partner, this law firm retains the right to require the partnership to engage other legal counsel to represent it in that claim.

Before consenting to our representation of the partnership, please be aware of the following:

1. This law firm has represented one or more of the partners in matters unrelated to the partnership. These partners, for whom unrelated legal counsel has been furnished, include **[name[s] of partner[s]]**. Each of these partners is requested to execute a form consenting to this law firm's serving as counsel to the partnership, because of potential conflicts of interest. At this time, we do not believe that our prior representation of individual partners will impair our independent professional judgment on behalf of the partnership. However, if we determine that, because of differences between the partnership and the partners, we can no longer represent the partnership impartially or if a conflict arises during our representation of the partner-

ship, we will inform you of such conflict, and we must then withdraw from representation. If this occurs, we will no longer be able to represent any party to the conflict. Should we determine that this law firm must withdraw from the representation, we will, if you wish, assist the partnership in obtaining new counsel. The partnership would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, we would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

2. Representation of any entity automatically involves potential conflicts, because entities are nothing more than the joining of individuals or other entities with differing needs for what is initially perceived to be a common objective. Each individual should understand that when there is such diversity of interests, the lawyer for the organization cannot provide legal representation for constituent individuals and that discussions between the lawyer for the organization and an individual may not be privileged insofar as that individual is concerned.

3. Before agreeing to the contents of this letter, you are advised to obtain separate legal counsel for these matters. If you consent to this law firm's representation of the partnership as contemplated by this letter, please sign in the spaces below and return one copy of this letter to me.

Sincerely yours,

[Name of attorney]

We consent to your representation of the partnership under the terms and conditions outlined above.

[Name of partner]

Date:

Repeat signature blocks as necessary.

Form 1-6

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Disclosing Potential Risks and Requesting Consent to Representation of Corporate Entity

[Date]

[Names and addresses of all shareholders]

Re: Consent to multiple representation in organizing corporation and acting as its general counsel

[Salutation]

You have requested that this law firm represent all of you as initial investors in organizing [name of corporation] (the corporation). You have also requested that this firm serve as general counsel to the corporation following the incorporation.

Our representation of clients is governed by the Texas Disciplinary Rules of Professional Conduct. A lawyer has the duty to exercise independent professional judgment on behalf of each client. If a lawyer is requested to represent multiple clients in the same matter, two requirements must be met: The lawyer must be able to fulfill this duty for each client on an impartial basis, and the lawyer must obtain the consent of each client after explaining the possible risks involved in the multiple representation. Further, if at any time during the representation it is determined that because of differences between the joint clients a lawyer can no longer represent each of them impartially, then the lawyer must withdraw from representing all the clients.

At our initial conference, I advised each of you of your right to obtain separate legal counsel to represent you in all matters relating to the organization of the corporation. I am still recommending that course of action to you. Each of you indicated that you understood this but nevertheless wanted this firm to represent all of you. Based on the information you have provided, we have concluded that we can represent each of you impartially. In determining whether you should consent to this joint representation, however, you should carefully consider the following matters.

The first matter involves the attorney-client privilege. Although the law is not settled, we believe that any information disclosed by you to us during this representation will not be protected by the privilege in a subsequent legal proceeding asserted by or against one of you involving another of you. Moreover, we believe we cannot effectively represent each of you if information disclosed to us by one of you must be preserved in confidence. If we are to represent you, it will only be with the express understanding that each of you has waived the attorney-client privilege to the extent, but only to the extent, that the privilege might otherwise require us to withhold from your fellow shareholders information disclosed by one of you.

Second, at this time there does not appear to be any difference of opinion among you about the major issues involved in organizing the corporation. However, it may turn out that on further consultation you may have varying opinions about the corporation's capitalization or other organizational matters. There are many issues about which investors may disagree that we must explore with you. Should we determine that there are material differences on one or more of these issues that you cannot resolve amicably or that we conclude cannot be resolved on terms compatible with the best interests of each party involved, then we must at that time withdraw from the representation. If this occurs, we will, if you wish, assist each of you in obtaining new counsel. You would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, we would return any unused por-

tion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

Third, as you know, I have represented [name] in other legal matters. I do not believe that this prior representation will affect in any material manner my ability to represent each of you impartially. Nonetheless, you must understand that this prior representation may unconsciously bias me in favor of [name] in the event of any disagreement among you. Should I at any time determine that such a bias exists, then I must withdraw from the representation.

The fourth matter is that of ultimately allocating our fees and disbursements. Unless we receive joint instructions to the contrary, we will send our entire bill for fees and disbursements for organizing the corporation to [name]. You should enter into a written agreement for reimbursement of [name].

When you have reached an agreement on the subject of fee payment, we will discuss with you whether we can ethically draft the agreement concerning fee payment. If not, we will recommend independent counsel for you. However, we cannot provide advice to any of you for any claim you may have or desire to assert against another for indemnity or reimbursement of fees and disbursements billed by us for this representation.

If you are willing to consent to our joint representation based on the disclosures and conditions listed above, please sign in the spaces below and return one copy of this letter to us.

Sincerely yours,

[Name of attorney]

We consent to your joint representation of us under the terms and conditions outlined above.

[Name of shareholder]

Date:

Repeat signature blocks as necessary.

Form 1-7

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.5:2 in this chapter concerning representing multiple clients.

Letter Requesting Consent to Intermediary and Outlining Fee Agreement

[Date]

[Names and addresses]

Re: [describe transaction]

[Salutation]

You have inquired about hiring me to [describe transaction]. As you will recall, we have thoroughly discussed the risks and advantages involved in dual representation. Nevertheless, I believe that we should set out a few matters in more detail. Also, the Texas Disciplinary Rules of Professional Conduct require me to get your consent to this arrangement in writing.

As we discussed, since I will be acting as an intermediary, I will not be an advocate for either side. This role is different from the traditional one of an attorney in American society; I must remain impartial. The risks we discussed were [list risks].

Another matter we discussed involved the attorney-client privilege. Although the law is not settled, we believe that any information disclosed by you to us during this representation will not be protected by the privilege in a subsequent legal proceeding asserted by or against one of you involving the other. Moreover, I believe I cannot effectively represent both of you if information disclosed to me by one of you must be preserved in confidence. If I am to represent you, it will only be with the express understanding that each of you has waived the attorney-client privilege to the extent, but only to the extent, that the privilege might otherwise

require me to withhold from one of you information disclosed by the other.

Because I am and will continue to be neutral, you, as clients, will assume greater responsibility for this transaction than you might ordinarily if you were each represented by counsel. For example, I am being hired solely to document the agreement between you. I am not responsible for and will not advise either of you of the risks or benefits of the transaction, nor am I giving either of you any kind of tax advice with respect to this transaction. I am not giving any other legal advice or opinions such as **[include additional disclaimers appropriate to the facts]**. Each of you must be sure that the transaction is one in which you want to participate and that it is structured the way you want it.

If I determine that intermediation is no longer appropriate I will so inform you, and I must then withdraw from representation. If this occurs, I will no longer be able to represent any party to the conflict. Should I determine that this law firm must withdraw from the representation, I will, if you wish, assist each of you in obtaining new counsel. You would, of course, be responsible for payment of all accrued legal fees and any outstanding expenses. Likewise, I would return any unused portion of any advances that had been made. The need to obtain substitute counsel may involve additional legal fees and expenses.

As we have discussed, our fees are charged on an hourly basis plus expenses. My fees are \$[amount] per hour. The billing rate for my associate, [name], is \$[amount] per hour. It is my understanding, and by your signature below you are confirming, that our fees are to be divided equally between you and paid at the closing. I, of course, do not guarantee or promise that any certain result will be obtained. I make no express warranties concerning this transaction, and I disclaim any implied warranties concerning it.

If you are willing to engage me for this joint representation under the terms outlined above, please return a signed copy of this letter for our files.

Sincerely yours,

[Name of attorney]

We consent to your joint representation of us under the terms and conditions outlined above.

[Name of client]

Date:

[Name of client]

Date:

[Reserved]

Form 1-8

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Basic Engagement Agreement and Fee Agreement

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

Please read this letter carefully. It describes the terms and conditions under which we will represent you concerning the above-referenced matter. Our policy requires that each client sign a copy of this letter agreeing to the terms and conditions described below before we can engage in representation. The terms and conditions of our engagement are as follows:

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are \$[amount] per hour for [name], \$[amount] per hour for [name], and \$[amount] per hour for legal assistants. We review these hourly rates periodically and may adjust them. If such changes are necessary, you will be notified in writing [number] days before the change.

Complete disclosure about the attorney's billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm's form library, administrative over-time, etc. See sections 1.5:4 and 1.5:5 for additional information.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. Each lawyer and legal assistant records the time required to perform services, and these time

records are the basis for the bills. These bills will generally describe services performed and the expenses incurred. For large expenses, we may request the supplier to bill you directly.

3. Because of the detailed nature of our statements, our clients do not usually have any questions about them. However, if any question should arise, please call us promptly so we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. If during our representation we anticipate a significant increase in the level of our activity on your behalf—for example, trial preparation or trial—we may bill you more frequently. We will expect that such statements also will be paid promptly.

5. We require a deposit before we commence work for you. We have asked that you remit to and maintain with us during our representation a deposit of at least \$[amount]. Unless deposits are large enough or will be held long enough to earn interest in excess of the cost of an individual account, we will place these funds in a State Bar of Texas Interest on Lawyers' Trust Account, the interest on which benefits the Texas Equal Access to Justice Foundation. The deposit will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts. On the termination of our services, we will promptly refund the deposit, less any fees and expenses unpaid as of the date of our final bill.

6. Our agreement to provide legal representation in the above-referenced matter is conditioned not only on your execution of this engagement letter but also on payment of the requested deposit.

7. We retain the right to request a supplemental deposit, over and above the original deposit, in the event of an increase in our anticipated fees and expenses during our representation.

8. By your execution of this engagement letter, you agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees and expenses (including bills for expenses received from third parties) or for supplemental deposits within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

9. By signing this engagement agreement, you are agreeing that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

10. During our discussion about handling this matter, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which other parties require our involvement on your behalf. The reason we submit our clients' bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

11. In representing you, we recognize that we may be disqualified from representing any client in any matter related to our representation of you. We also recognize that we may be disqualified from representing any client in any matter in which confidential information concerning you and made available to us during our representation of you becomes material or relevant to another matter or in which use or knowledge of such information could be adverse to your interest.

Include the following if applicable.

You agree that, except as stated above, the firm will be entitled to represent the interests of any other client against you in business negotiations or other legal matters.

Continue with the following.

12. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer's Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer's Creed, and if you have any questions, we will be glad to discuss them with you.

13. You may discharge us from this representation at any time. We will be free to withdraw at any time and without cause, subject to reasonable notice under the circumstances and to approval by any court in which your matter may be pending. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

14. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning this transaction, and disclaim any implied warranties concerning it.

15. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients' right to privacy. In the course

of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

Include the following if applicable.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

We discuss the terms and conditions of our engagement so candidly because you are entitled to know and we believe a candid discussion now should avoid any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above. After we receive your signed copy of this letter and the required deposit, we will commence our representation in the matter.

Sincerely yours,

[Name of attorney]

Enc.

ACCEPTED AND AGREED TO ON _____.

[Name of client]

Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information."

Continue with the following.

The Texas Lawyer's Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

[Reserved]

Form 1-9

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

Letter Detailing Ongoing Engagement Agreement and Fee Agreement

[Date]

[Name and address of client]

Re: [describe attorney engagement]

[Salutation]

Please read this letter carefully. It describes the terms and conditions under which we will represent you on an ongoing basis. Our policy requires that each client sign a copy of this letter agreeing to the terms and conditions described below before we can engage in representation. The terms and conditions of our engagement are as follows:

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are \$[amount] per hour for [name], \$[amount] per hour for [name], and \$[amount] per hour for legal assistants. We review these hourly rates periodically and may adjust them. If such changes are necessary, you will be notified in writing [number] days before the change.

Complete disclosure about the attorney's billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm's form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. Each lawyer and legal assistant records the time required to perform services, and these time

records are the basis for the bills. These bills will generally describe services performed and the expenses incurred. For large expenses, we may request the supplier to bill you directly.

3. Because of the detailed nature of our statements, our clients do not usually have any questions about them. However, if any question should arise, please call us promptly so we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. If during our representation we anticipate a significant increase in the level of our activity on your behalf—for example, trial preparation or trial—we may bill you more frequently. We will expect that such statements also will be paid promptly.

5. We require a deposit before we commence work for you. We have asked that you remit to and maintain with us during our representation a deposit of at least \$[amount]. Unless deposits are large enough or will be held long enough to earn interest in excess of the cost of an individual account, we will place these funds in a State Bar of Texas Interest on Lawyers' Trust Account, the interest on which benefits the Texas Equal Access to Justice Foundation. The deposit will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts. On the termination of our services, we will promptly refund the deposit, less any fees and expenses unpaid as of the date of our final bill.

6. Our agreement to provide legal representation is conditioned not only on your execution of this engagement letter but also on payment of the requested deposit.

7. We retain the right to request a supplemental deposit, over and above the original deposit, during our representation.

8. By your execution of this engagement letter, you agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees

and expenses (including bills for expenses received from third parties) or for supplemental deposits within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

9. By signing this engagement agreement, you are agreeing that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

10. During our discussion about representing you, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, particularly the extent to which other parties require our involvement on your behalf. The reason we submit our clients' bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

11. In representing you, we recognize that we may be disqualified from representing any client in any matter related to our representation of you. We also recognize that we may be disqualified from representing any client in any matter in which confidential information concerning you and made available to us during our representation of you becomes material or relevant to another matter or in which use or knowledge of such information could be adverse to your interest.

Include the following if applicable.

You agree that, except as stated above, after our representation of you has terminated, the firm will be entitled to represent the interests of any other client against you in business negotiations or other legal matters.

Continue with the following.

12. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer's Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer's Creed, and if you have any questions, we will be glad to discuss them with you.

13. You may discharge us from this representation at any time. We will be free to withdraw at any time and without cause, subject to reasonable notice under the circumstances and to approval by any court in which we are your attorney of record. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

14. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning any matter in which we represent you, and disclaim any implied warranties.

15. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients' right to privacy. In the course

of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

Include the following if applicable.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

We discuss the terms and conditions of our engagement so candidly because you are entitled to know and we believe a candid discussion now should avoid any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above. After we receive your signed copy of this letter and the required deposit, we will commence our representation of you.

Sincerely yours,

[Name of attorney]

Enc.

ACCEPTED AND AGREED TO ON _____.

[Name of client]

Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: “The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar’s Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information.”

Continue with the following.

The Texas Lawyer’s Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas, I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, “My word is my bond.”

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

[Reserved]

Form 1-10

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See sections 1.5:4 and 1.5:5 in this chapter concerning the basic engagement agreement.

**Letter Detailing Basic Engagement Agreement and Fee Agreement
for Simple Matters**

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

Thank you for asking me to represent you in the above-referenced matter. I consider it a privilege to do so. Please excuse the overly formal and detailed nature of this letter—it is intended to ensure that you know and understand the terms and conditions under which this firm will represent you.

1. Our fees for legal services are based primarily on the hourly rates for each lawyer and legal assistant at the time the services are rendered. Our current rates are \$[amount] per hour for [name], \$[amount] per hour for associates or contract lawyers, and \$[amount] per hour for legal assistants.

Complete disclosure about the attorney's billing practices can avoid client misunderstandings later. For example, explain about travel time, multiple attorney conferences, research, billing for "forms" in the firm's form library, administrative overtime, etc. See sections 1.5:4 and 1.5:5 for additional information.

2. It is our policy to bill clients periodically for fees and out-of-pocket expenses. These bills will generally describe services performed and the expenses incurred. If we are

confronted with unanticipated expenses, we may request the supplier to bill you directly for any third-party expenses.

3. Our statements are reasonably detailed, and consequently our clients do not usually have any questions about them. However, if you should ever have any question or comment, please do not hesitate to call us so that we can discuss the matter. Our hourly rates do not include any interest for slow payment. Because of this and the fact that we do not include a service charge for late payments, we must insist that our clients pay their bills promptly.

4. We require a [nonrefundable] retainer [when accepting work from new clients/ before beginning work on a new matter]. Accordingly, we ask that you remit to [us/and maintain with us during our representation] a retainer of \$[amount]. [**Include as applicable:** We will place these funds in our trust account./The retainer will be applied to our final statement for fees and expenses or, at our discretion, to any past-due amounts./On the termination of our services, we will promptly refund the retainer, less any fees and expenses unpaid as of the date of our final bill.]

5. You agree that we are relieved from the responsibility of performing any further work should you fail to pay any statement for fees and expenses (including bills for expenses received from third parties) or for supplemental retainers within fifteen days of their receipt. In that event, you agree that we may move to withdraw as your counsel and that you will promptly execute any withdrawal motions to accomplish this.

6. You agree that this firm may retain papers relating to this matter to secure payment of any amount you owe us, to the extent permitted by law, but only if such retention will not prejudice your interests in the subject matter of the representation.

7. During our discussions about handling this matter, we may have provided you with certain estimates of the fees and expenses that will be required at certain stages of our representation. Such estimates are just that, and the fees and expenses required are ultimately

a function of many conditions over which we have little or no control, particularly the difficulties we encounter during negotiations with other parties. The reason we submit our clients' bills shortly after the services are rendered is so they will have a means of monitoring and controlling their expenses. If you believe the expenses are mounting too rapidly, please contact us immediately so we can assist you in evaluating how they might be curtailed. If we do not hear from you, we assume that you approve of the overall level of activity in this matter.

Include the following if applicable.

8. The Supreme Court of Texas has adopted and promulgated the Texas Lawyer's Creed. Although compliance with the Creed is voluntary, we have decided to adhere to its provisions. Please review the attached Texas Lawyer's Creed, and if you have any questions, we will be glad to discuss them with you.

Continue with the following.

9. You may discharge us from this representation at any time. We will be free to withdraw at any time, with or without cause, subject to reasonable notice under the circumstances and to approval by any court that may become involved in your matter. We will be entitled to receive compensation from you for all services rendered and all disbursements made, under the provisions of this agreement, up to the time of withdrawal. Circumstances may arise that will require us to withdraw from representation under the Texas Disciplinary Rules of Professional Conduct or other applicable professional standards. In such circumstances, as well as in the instances referred to above, we will cooperate in the transfer of the matter to other counsel of your choice.

10. As is true with all legal services, we cannot and do not guarantee the results of our representation. We make no express warranties concerning this transaction, and disclaim any implied warranties concerning it.

11. Attorneys, like other professionals who advise on personal financial matters, are required by a federal law (the Gramm-Leach-Bliley Act) to inform their clients of their policies regarding privacy of client information. Because attorneys have been and continue to be bound by professional standards of confidentiality that are even more stringent than those required by this new law, we have always protected our clients' right to privacy. In the course of representing our clients, we receive all manner of significant personal financial information from them. As a client of the firm, you are advised that all information we receive from you will be held in confidence and not released to outside persons, except as agreed to by you or as required under applicable law. We retain records relating to professional services we provide to assist our clients with their professional needs and, in some cases, to comply with professional guidelines. To guard your nonpublic personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

Include the following if applicable.

At the end of our representation, please let us know if you need any documents from our files. We will retain documents for [five years/a limited time] and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

We believe this candid discussion should prevent any misunderstandings later. Please sign a copy of this letter in the space below, expressing your agreement to the terms and conditions set forth above.

Sincerely yours,

[Name of attorney]

Enc.

ACCEPTED AND AGREED TO ON _____.

[Name of client]

Date:

Include the following notice if notice is not otherwise provided as required by Tex. Gov't Code § 81.079. See section 1.1:2.

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar's Office of Chief Disciplinary Counsel will provide you with information about how to file a complaint. Please call 1-800-932-1900 toll-free for more information."

Include the following if applicable.

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I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Form 1-11

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.6:3 in this chapter concerning entering business transactions with clients.

Letter Requesting Client's Consent to Business Relationship with Attorney

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

You have inquired about my interest in investing in the above-referenced venture in addition to my performing the legal work for you on this project. I have given this matter considerable thought and will continue to do so. I will let you know my decision by [date].

Nevertheless, I think it is important that you consider the advisability of having me, your lawyer, as a business partner. Under rule 1.08(a) of the Texas Disciplinary Rules of Professional Conduct, a lawyer cannot enter into a business venture with a client unless (1) the transaction and terms on which the lawyer acquires an interest are fair and reasonable to the client, (2) these terms are fully disclosed to the client, (3) the client is given a reasonable opportunity to seek independent counsel, and (4) the client agrees in writing to the relationship. This rule protects the client from possible conflicts of interest that may occur if counsel is involved in the venture.

In this case the terms and conditions of the venture are well known to you because you were the one who suggested them. However, for purposes of clarity I will repeat them here. The terms are [list terms].

Although not required by our State Bar's rules of ethics, I must insist that you seek independent counsel before our entry into this venture.

Once you consult with an attorney, please put his or her name in the space I have provided and then sign and return the copy of this letter to signify your consent for me to have an interest in the venture.

Sincerely yours,

[Name of attorney]

I have consulted with _____ and have availed myself of that attorney's advice. I knowingly agree to your participation in the venture described on the terms outlined in this letter, which I believe are fair and reasonable. I am also requesting you to act as legal counsel in this transaction, with the terms of the engagement to be outlined in a separate letter agreement.

ACCEPTED:

[Name of client]

Date:

Form 1-12

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.6:4 in this chapter concerning clarifying nonrepresentation.

Nonrepresentation Letter When Representing Lender or Title Company

[Date]

[Names and addresses of buyer and seller]

Re: [describe transaction]

[Salutation]

I have represented [name of lender or title company] in the preparation of legal documents for use in closing the above-referenced transaction.

While I have acted solely on behalf of [name of lender or title company], [name], the buyer, and [name], the seller, acknowledge that the legal fees incurred in preparing the legal documents will be paid by the buyer or the seller even though I have not in any manner undertaken to assist or render legal advice to the buyer or the seller, except in the preparation of the legal documents. The buyer and the seller further acknowledge and understand that they may retain independent legal counsel to represent their individual interests in the referenced transaction.

The buyer and the seller specifically recognize that I do not have the responsibility to provide any truth-in-lending disclosures, any other truth-in-lending documents, or any other documents required by any regulations that apply to this transaction. The lender is responsible for providing those documents, and no charge may be made for providing them.

Please sign below to acknowledge that you have been advised of my representation of the [lender/title company] and that you understand that I am not your attorney.

Sincerely yours,

[Name of attorney]

Buyer:

[Name of buyer]

Date:

Seller:

[Name of seller]

Date:

Form 1-13

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. See section 1.8:1 in this chapter concerning terminating the attorney-client relationship.

Letter Terminating Attorney-Client Relationship

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

During the past [time period], it has been our pleasure to serve you as counsel in [describe transaction]. During that representation, you have paid substantial legal fees and related expenses. Unfortunately, contrary to our engagement agreement, you have not paid our statements in a timely manner for the past few months.

At this time, the outstanding and overdue fees and expenses total approximately \$[amount]. Our firm desires to continue our relationship but does not have the ability to finance your legal representation. Moreover, you expressly agreed that payment of the hourly fees and expenses in this matter would be kept current.

We now provide you the opportunity to retain other counsel without jeopardizing your position. However, if we wait several more months, it is possible that circumstances will change and this opportunity will be lost. Consequently, as of [date], we will cease to represent you.

Your new counsel may wish to discuss this file with us. That would be to your advantage both substantively and economically. We are willing to do so as long as satisfactory

arrangements are made to compensate us for the additional time and expense incurred. Also, it will be necessary to agree on a plan to pay the outstanding fees and expenses.

During our representation we have generated work that we are willing to share with your new counsel to the extent our legal obligations require us to do so in the absence of full payment of our fees and expenses.

If you wish us to continue representing you, satisfactory arrangements must be made to take care of the overdue fees and expenses, as well as the future fees and expenses.

I look forward to hearing from you and remain hopeful our representation can continue.

Sincerely yours,

[Name of attorney]

Form 1-14

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case. Client files must be maintained and preserved for a period of five years after termination of representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14.

Letter for Completion of Attorney-Client Relationship

[Date]

[Name and address of client]

Re: [describe transaction]

[Salutation]

It has been our pleasure to serve you as counsel in [describe transaction]. According to our records, we have completed this matter, and we are closing this file.

You should already have a complete set of the relevant closing documents in your possession. If not, please let us know and we will be glad to send them to you.

Describe any actions that the client may need to follow up on, such as UCC1 renewals, note extensions at maturity, etc.

Include the following if applicable.

Please let us know if you need any other documents from our files. We will retain documents for five years and then destroy them in accordance with our record-retention policy then in effect.

Continue with the following.

I look forward to the opportunity to represent you on other matters in the future.

Sincerely yours,

[Name of attorney]

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Chapter 2

Laws Affecting Real Estate

The following statutes and regulations affecting real estate are organized alphabetically by topic, with cross-references to other relevant sections where appropriate.

§ 2.1 Abandonment

The landlord's rights and obligations regarding personal property after a tenant abandons commercial leased premises are addressed in Tex. Prop. Code § 93.002(e). A landlord has a duty to mitigate damages if a tenant abandons leased premises. Tex. Prop. Code § 91.006. The general subject of unclaimed personal property and escheat is addressed in Tex. Prop. Code chs. 72–76. See also the section titled "Escheat" below.

§ 2.2 Abstracts of Judgment

The Texas Property Code sets out the procedure for obtaining an abstract of judgment from the judge or justice of the peace who rendered the judgment or from the clerk of the court.

Abstracts of judgment are recorded in the county's real property records. Tex. Prop. Code §§ 52.002–.003. See also the sections titled "Judgment Liens" and "Release of Lien by Attorney or Others" below.

For special restrictions on the filing of abstracts of judgment by inmates or their representatives, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001–.007.

§ 2.3 Acceleration of Note

Tex. Civ. Prac. & Rem. Code § 16.038 provides that if the maturity date of a note is accelerated and subsequently rescinded or waived in accordance with the requirements of section 16.038 before the limitations period expires, then the acceleration is deemed rescinded and waived,

and the note is governed by Tex. Civ. Prac. & Rem. Code § 16.035 as if no acceleration had occurred. A notice served under section 16.038 does not affect a lienholder's right to accelerate the maturity date of the debt in the future or waive past defaults. Section 16.038 does not create an exclusive method for waiver and rescission of acceleration or affect the accrual of a cause of action and the running of the related limitations period under Tex. Civ. Prac. & Rem. Code § 16.035(e) on any subsequent maturity date, accelerated or otherwise, of the note.

§ 2.4 Acknowledgments

Texas law provides one form of ordinary certificate of acknowledgment and five short-form certificates of acknowledgment. Tex. Civ. Prac. & Rem. Code §§ 121.007–.008. A notary may sign on behalf of a disabled person in certain circumstances. Tex. Gov't Code § 406.0165. There are specific requirements for proof of instruments. Tex. Civ. Prac. & Rem. Code §§ 121.005, 121.009–.011. Instruments may be recorded in Texas real property records if they contain an acknowledgment, a jurat, or a proof. Tex. Prop. Code § 12.001. On the law of acknowledgments generally, see Tex. Civ. Prac. & Rem. Code §§ 121.001–.015. Forms of acknowledgments are included in chapter 3 in this manual. See also the section titled "Notarial Seals, Out-of-State" below.

§ 2.5 Ad Valorem Taxes

Both real and personal property are subject to ad valorem taxes in Texas. Tex. Tax Code § 11.01.

Provisions for special assessments or exemptions that may apply to real property include those for a residence homestead (Tex. Tax Code §§ 11.13, 11.131, 11.135); charitable organizations improving property for low-income housing (Tex. Tax Code §§ 11.181–1826); agricultural use (Tex. Const. art. VIII, §§ 1–d, 1–d–1, Tex. Tax Code §§ 23.41–.60); timber production (Tex. Const. art. VIII, § 1–d–1, Tex. Tax Code §§ 23.59, 23.71–.79); restricted timber use land (Tex. Tax Code §§ 23.9801–.9807); open-space scenic, recreational, or park use (Tex. Const. art. VIII, § 1–d–1, Tex. Tax Code §§ 23.59, 23.81–.87); mandatory school-tax home exemption (Tex. Const. art. VIII); and surviving spouses of disabled veterans (Tex. Const. art. VIII, § 1–b). There is also a provision dealing with the separate taxation of tax parcels in condominium projects (Tex. Prop. Code § 82.005). The word *grant* or *convey* in a deed implies a covenant that the estate is free of encumbrances at the time of execution of the conveyance. Tex. Prop. Code § 5.023.

‘Encumbrance’ includes a tax, an assessment, and a lien on real property. Tex. Prop. Code § 5.024.

Owners taxed at a reduced rate under the agricultural-use amendment (Tex. Const. art. VIII, § 1–d), the open-space amendment (Tex. Const. art. VIII, § 1–d–1), or the special appraisal provisions of subchapters B–H of chapter 23 of the Tax Code should be alert to the potential tax liability that accrues if the land use changes or title is transferred and must disclose the reduced rate to a potential buyer using the statutorily prescribed form. Tex. Prop. Code § 5.010. The county appraisal district office is required to maintain a list of properties potentially subject to this type of rollback of taxes. *See* Tex. Tax Code §§ 23.51–.79. Lenders should be aware of the prohibitions against certain waivers and indemnities relating to the agricultural or open-space use exemption, described in more detail in the section titled ‘Loan Documents’ below. In certain circumstances, taxing

authorities may have the ability to waive penalties and interest on property erroneously omitted from taxation or granted improper tax exemptions. *See* Tex. Tax Code § 33.011.

Ad valorem tax liens take priority over most prior recorded liens. Tex. Tax Code §§ 32.01–.07. Certain redemption and possessory rights also apply to properties sold at tax foreclosures. *See* generally Tex. Tax Code ch. 34 and the section titled “Redemption Rights” below. A tax lien may also be transferred to a third party on payment of taxes authorized by the owner in accordance with Tex. Tax Code § 32.06. In some cases, property tax lenders will need to be licensed, are prohibited from lending to those eligible for the tax exemption for people over age sixty-five, will need to be cognizant of the regulations concerning advertising, and may be limited in selling a property tax loan in the secondary market. *See* Tex. Fin. Code ch. 351.

In counties having a population in excess of 250,000 and counties of less than 250,000 whose county commissioners opt to participate, an officer conducting a tax foreclosure sale of real property may not execute or deliver a deed to a purchaser who owes ad valorem taxes, whether on real or personal property. Tex. Tax Code § 34.015.

A tenant may contest a landlord’s ad valorem tax assessment under certain circumstances. Tex. Tax Code §§ 41.413, 42.015.

When a governmental entity acquires the right to possession of taxable property by condemnation or acquires title to taxable property, taxes for the year of conveyance are prorated to the date of the order granting possession or the date of conveyance. If taxes for the year have not yet been determined, the assessor for each taxing unit may base the proration on taxes for the prior year. The collector must accept the tax payment, and the transferor is relieved of further payment for that year. Tex. Tax Code § 26.11.

§ 2.6 Adverse Possession

Texas has adverse possession periods of three, five, ten, and twenty-five years, depending on different factors. *See* Tex. Civ. Prac. & Rem. Code §§ 16.021–.034.

§ 2.7 Affidavits of Heirship

If an ownership interest in real property is in the estate of a decedent who dies intestate, inheritance of the property may be established by an affidavit recorded in the real property records of the county in which the property is located that details the family history and heirship of the decedent and identifies the heirs-at-law under sections 201.001–.003 of the Texas Estates Code. Tex. Est. Code ch. 205. The Estates Code includes a form of affidavit of heirship. Tex. Est. Code § 203.002. *See* also the section titled ‘Wills and Estates’ below. A form of affidavit is furnished at form 26-1 in this manual. The practitioner may want to verify with a title insurance company that the affidavit will be sufficient evidence of inheritance for issuance of a title policy in the event of a future sale of the property interest.

§ 2.8 Affordable Housing Investments

The Internal Revenue Code provides for credits against federal income tax for owners of qualified low-income rental housing projects. *See* 26 U.S.C. § 42. In Texas that program is administered by the Texas Department of Housing and Community Affairs under Tex. Gov’t Code ch. 2306 and the rules found in 10 Tex. Admin. Code ch. 49. Under the National Affordable Housing Act of 1990, 42 U.S.C. §§ 12701–12898a, certain HUD funds are available for nonprofit and community development organizations to build or preserve low-income housing. Those projects must also satisfy the HUD program requirements found in 24 C.F.R. pts. 91, 92. Affordable housing constructed with fed-

eral or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514. Tex. Gov’t Code § 6711(g) provides for the allocation of housing tax credits in Fort Worth, Houston, Dallas, and San Antonio. A community land trust may be created to acquire and hold land for the benefit of developing and preserving long-term affordable housing in a municipality or county. Tex. Loc. Gov’t Code ch. 373B.

§ 2.9 Agricultural Development Districts

The creation of agricultural development districts is authorized by chapter 60 of the Agriculture Code. Tex. Agric. Code ch. 60. Districts have the power of eminent domain and may issue bonds (Tex. Agric. Code § 60.058) and levy taxes (Tex. Agric. Code ch. 60, subs. E, F). *See* also the section titled ‘Disclosures and Notices’ below.

§ 2.10 Agricultural Liens

Persons securing loans with agricultural products should be aware that the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, an agricultural lien granted under subchapter E of Texas Property Code chapter 70 has priority over certain prior liens if certain conditions are met. *See* Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act (PACA) applies may also have priority over certain previously filed UCC liens. *See* 7 U.S.C. § 499a–499s. The seller of commodities to which PACA applies may be in a position superior to all other creditors.

§ 2.11 Agricultural Use Exemption

See the sections titled ‘Ad Valorem Taxes’ above and ‘Loan Documents’ below.

§ 2.12 Aircraft Liens

Lien instruments covering aircraft should consider the aircraft registration requirements of the Federal Aviation Act of 1958 as amended (FAA), 49 U.S.C. §§ 44101–44113, and regulations found in 14 C.F.R. pt. 49. There are also provisions relating to aircraft storage, maintenance, and repair liens in Tex. Prop. Code §§ 70.301–.306.

§ 2.13 Alcoholic Beverages

There are a number of significant limitations on the transfer of and eligibility for alcoholic beverage permits under Texas law. *See* Tex. Alco. Bev. Code ch. 11. Businesses that sell alcohol are heavily regulated, and statutory control may extend to the physical structure of the business. *See, e.g.*, Tex. Alco. Bev. Code § 22.14. The Alcoholic Beverage Code also imposes location requirements applicable to the sale and consumption of alcoholic beverages. *See* Tex. Alco. Bev. Code §§ 101.75(a), 109.33.

§ 2.14 Alternative Dispute Resolution (ADR)

The Texas Alternate Methods of Dispute Resolution Act establishes alternative dispute resolution procedures, including mediation. Tex. Civ. Prac. & Rem. Code ch. 154. *See* the section titled “Arbitration” below.

§ 2.15 Americans with Disabilities Act and Related Statutes

Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12181–12189, creates minimum standards for accessibility in commercial and some types of residential buildings, including requirements relating to new construction; parking alterations; removing barriers from existing structures; installing telephone devices and other assistive listening devices for the deaf; providing auxiliary aids for

conferences, seminars, and written materials offered to the public; and ensuring equivalent services and opportunities to disabled persons. Regulations under title III of the ADA pertaining to public accommodations, commercial facilities, and private entities are promulgated under 28 C.F.R. pt. 36. Architectural guidelines can be found in 36 C.F.R. pt. 1191.

Texas also has a state architectural-barriers statute that applies to certain commercial and residential facilities. Tex. Gov’t Code ch. 469. Regulations promulgated under the statute are found at 16 Tex. Admin. Code ch. 68. The Human Resources Code permits guide trainers reasonable access to public facilities to train assistance animals and prohibits the denial of access to public facilities, commercial properties, or housing for disabled persons, including those who use assistance animals. Tex. Hum. Res. Code § 121.003. Affordable housing constructed with federal or state funds must meet specified handicapped-accessible standards. Tex. Gov’t Code § 2306.514.

For current information on contractors and municipalities that are authorized to perform inspection functions, contact the Texas Department of Licensing and Regulation.

See also the section titled “Fair Housing” below for additional statutes relating to disability access for residential properties.

§ 2.16 Annexation

Annexation and disannexation of real property by municipalities are governed generally by Tex. Loc. Gov’t Code chs. 42, 43. A municipality may contract with an owner of land that is located in the municipality’s extraterritorial jurisdiction to guarantee the land’s immunity from annexation for a period not to exceed forty-five years, including renewals or extensions. Tex. Loc. Gov’t Code § 212.172.

§ 2.17 Antiquities

Chapter 191 of the Texas Natural Resources Code (the Antiquities Code) governs the location, protection, and preservation of “all sites, objects, buildings, pre-twentieth century shipwrecks, and locations of historical, archeological, educational, or scientific interest in, on, or under any of the land in the State of Texas. Tex. Nat. Res. Code § 191.002. The Antiquities Code provides landowners with certain rights. See Tex. Nat. Res. Code §§ 191.094, 191.133. There are civil and criminal penalties for violation of provisions of the statute. See Tex. Nat. Res. Code §§ 191.171–174.

§ 2.18 Appraisers

Appraisers are governed by Tex. Occ. Code ch. 1103, the Texas Appraiser Licensing and Certification Act. The Broker’s and Appraiser’s Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). See Tex. Prop. Code ch. 62. An appraiser or other person who intentionally or knowingly makes a materially false or misleading written statement in providing an appraisal of real property for compensation commits a criminal offense punishable under Tex. Penal Code § 32.32(b–1).

Creditors approved as sellers and servicers to government-sponsored enterprises Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) must represent and warrant that appraisals for all covered loans for which application is made on or after October 15, 2010, comply with certain appraiser independence requirements as defined in their respective seller and servicing guides. See Fannie Mae, Announcement SEL-2010-14 (Oct. 15, 2010), and Freddie Mac, Bulletin 2010-23 (Oct. 15, 2010).

Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may be cited by its short title as the ‘Mortgage Reform and Anti-Predatory Lending Act,’ codified extensive appraisal reform measures that supersede the Home Valuation Code of Conduct (HVCC) and the appraiser independence requirements in favor of new, uniform appraisal independence standards. Regulation Z (Truth in Lending) was amended to implement these new standards effective April 1, 2011, by adding 12 C.F.R. § 226.42 (and removing old section 226.36(b)) to establish new requirements for appraisal independence for consumer credit transactions secured by a consumer’s principal residence. See 75 Fed. Reg. 66,554 (Oct. 28, 2010). The regulations are intended to ensure that real estate appraisals used to support creditors’ underwriting decisions are based on the appraisers’ independent professional judgment, free of any influence or pressure exerted by parties to the transactions.

§ 2.19 Arbitration

Arbitration is a dispute resolution process whereby one or more arbitrators make a decision, called an award, which is binding only if the parties so agree. In Texas, arbitrations can be governed by common law, the Texas Arbitration Act (TAA), and the Federal Arbitration Act (FAA). See *L.H. Lacy v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977); Tex. Civ. Prac. & Rem. Code chs. 171–172; 9 U.S.C. §§ 1–16. Some Texas statutes prohibit arbitration under certain circumstances. For example, in a contract for the construction or repair of improvements to real property in Texas, a provision requiring arbitration of disputes in another state is voidable. Tex. Bus. & Com. Code ch. 272. Also, in a contract for the sale or lease of goods worth \$50,000 or less, a provision requiring arbitration in another state is voidable unless the provision is in bold-faced, capitalized, underlined, or otherwise conspicuous type. Tex. Bus.

& Com. Code ch. 273. When an arbitration agreement is not governed by or enforceable under the TAA, it may be governed by relevant Texas common-law arbitration rules. *L.H. Lacy*, 559 S.W.2d at 352. The FAA applies when the dispute concerns a contract evidencing a transaction involving interstate commerce. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269–70 (Tex. 1992). The FAA and TAA are not mutually exclusive and can both apply to an arbitration provision. *In re D. Wilson Construction Co.* 196 S.W.3d 774, 779–80 (Tex. 2006). If the FAA applies, however, restrictions under Texas statutes, like the ones described above, can be preempted if the TAA would not allow enforcement of an arbitration agreement that the FAA would enforce. *In re D. Wilson Construction Co.*, 196 S.W.3d at 780.

§ 2.20 Architects

The Board of Architectural Examiners governs the activities of professional architects. Tex. Occ. Code ch. 1051.

An architect's lien against real estate is addressed in Tex. Prop. Code § 53.021(c).

§ 2.21 Asbestos

See the section titled 'Environmental Laws' below.

§ 2.22 Assumed Names

The circumstances under which assumed names should be filed are addressed in the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code ch. 71. The circumstances under which an entity is considered to have fraudulently filed an assumed name and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 71.203. See also the section titled 'Fraudulent Filings' below.

A financing statement that identifies a debtor by an assumed name or trade name may not be effective to perfect a security interest against the debtor unless the name used in the financing statement is so similar to the debtor's name that a search of the records of the filing office under the debtor's name, using the filing office's standard search logic, would disclose the financing statement that used a different assumed name or trade name. Tex. Bus. & Com. Code § 9.506(c). The Texas Business and Commerce Code provides rules for the name to be used in a financing statement for different types of debtors—for example, a debtor that is a decedent's estate, a trust or a trustee, an individual, or an organization. Tex. Bus. & Com. Code § 9.503.

§ 2.23 Astronomical Observatories

See the section titled 'Outdoor Lighting' below.

§ 2.24 Automatic Teller Machines (ATMs)

Public safety requirements for the design of and layout surrounding an unmanned teller machine are found at Tex. Fin. Code ch. 59, subch. D.

§ 2.25 Bankruptcy

In addition to the federal Bankruptcy Code, title 11 of the United States Code, property subject to bankruptcy protection will also be affected by the homestead and personal property exemptions of the Texas Constitution and Property Code. Tex. Const. art. XVI, § 50; Tex. Prop. Code chs. 41, 42. Assignment for the benefit of creditors is addressed in Tex. Bus. & Com. Code §§ 23.01–.33. Texas has also adopted the Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code ch. 24. The circumstances under which a judgment lien is canceled after a bankruptcy discharge are addressed in Tex. Prop. Code §§ 52.041–.043.

§ 2.26 Beaches

See the section titled "Coastal Properties" below.

§ 2.27 Beauty Shop Leases

Lessors of premises used for beauty salons and parlors should be aware of the Texas Department of Licensing and Regulation regulations found in 16 Tex. Admin. Code § 83.114.

§ 2.28 Billboards

See the section titled "Outdoor Signs" below.

§ 2.29 Blind Trusts and Undisclosed Beneficiaries

A conveyance by a person designated as trustee is valid, even if the identity of the beneficiary has not been disclosed; the beneficiary may not set aside the conveyance of the property. Tex. Prop. Code § 101.001. A governmental entity may not purchase real property held in trust or sell real property to a trustee until the trustee submits a copy of the trust agreement and identifies the true owner of the property to the governmental entity. Tex. Gov't Code ch. 2252, subch. D.

§ 2.30 Brokers

Real estate brokers and salespersons are regulated by the Texas Real Estate Commission under the provisions of the Real Estate License Act, Tex. Occ. Code ch. 1101. The Broker's and Appraiser's Lien on Commercial Real Estate Act provides for a lien and procedures to foreclose the lien for commissions and fees due and payable on the sale or lease of commercial real estate (as defined in the Act). *See* Tex. Prop. Code ch. 62. See also the section titled "Disclosures and Notices" below.

§ 2.31 Brownfields Statute

See the section titled "Voluntary Cleanup Program" below.

§ 2.32 Building Codes

The Plumbing License Law adopts the Uniform Plumbing Code and the International Plumbing Code. *See* Tex. Occ. Code ch. 1301. The International Residential Code applies to all construction, alteration, remodeling, enlargement, and repair of residential structures inside municipalities except the installation and maintenance of electrical components. *See* Tex. Loc. Gov't Code §§ 214.212–.213. The National Electrical Code regulates all residential electrical installation and maintenance. *See* Tex. Loc. Gov't Code § 214.214. See also the section titled "Wind-storm Inspection" below.

The National Electrical Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal electrical construction code in Texas and applies to (1) all residential electrical construction applications and (2) commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.214.

The International Building Code as it existed on May 1, 2003, was adopted by the Texas legislature as the municipal commercial building code in Texas for commercial buildings in a municipality for which construction began after January 1, 2006. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.216.

The International Residential Code as it existed on May 1, 2001, was adopted by the Texas legislature as the municipal residential building code

in Texas. A municipality may establish procedures to adopt local amendments and to administer and enforce the code. Tex. Loc. Gov't Code § 214.212.

§ 2.33 Business Organizations Code

Corporations, partnerships, limited partnerships, limited liability companies, registered limited liability partnerships, nonprofit corporations, and cooperative associations organized or qualified to do business in Texas on or after January 1, 2006, must comply with the Texas Business Organizations Code. Entities organized or qualified to do business before January 1, 2006, had the option to be governed by the Code on or after January 1, 2006. Effective January 1, 2010, all entities organized or qualified to do business in Texas must comply with the Code. *See generally* Tex. Bus. Orgs. Code ch. 402.

§ 2.34 Camping Resorts

The Texas Membership Camping Resort Act is found at Tex. Prop. Code ch. 222. See also the section titled “Landowner Liability” below.

§ 2.35 Cash Proceeds

Those who receive in connection with their trade or business more than \$10,000 in cash in a transaction or in several related transactions must report to the Internal Revenue Service the amount of currency received; the payor’s name, address, and tax identification number; the date and nature of the transaction; and other information as the United States Secretary of the Treasury may prescribe. 26 U.S.C. § 6050I(a), (b); 26 C.F.R. § 1.6050I-1.

§ 2.36 Cemeteries

The location and operation of cemeteries are regulated by Tex. Health & Safety Code §§ 711.001–.062. The platting of cemetery

lands, mausoleums, crematories, and columbariums is governed by Tex. Health & Safety Code § 711.034.

§ 2.37 Certificates of Convenience and Necessity

See the sections titled “Sewer Service,” “Telecommunications,” and “Water Service” below.

§ 2.38 Certification of Trust

A person other than a beneficiary is not required to inquire into the extent of the trustee’s powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. Tex. Prop. Code § 114.081(b). Tex. Prop. Code § 114.086 describes the contents of such a certification and describes the instances in which a party may rely on the representations about the power of the trustee to take actions on behalf of the trust described in the certification. See section 10.15 in this manual.

§ 2.39 Certified Mail

See the section titled “Registered Mail” below.

§ 2.40 Child Support Liens

A lien for all child support due and owing, including any accrued interest, attaches by operation of law to all nonhomestead property of an obligor. Tex. Fam. Code § 157.312. A child support lien against real property is perfected by filing or delivering an abstract of judgment or a child support lien notice as provided by Tex. Fam. Code § 157.314. Tex. Fam. Code § 157.316. The lien is subject to the general requirements addressed in Tex. Fam. Code §§ 157.311–.331. Foreclosure is governed by Tex. Fam. Code § 157.323. Tex. Fam. Code § 157.318 sets out the provisions regarding duration and effect of child support liens.

§ 2.41 Choice of Law

Choice-of-law provisions in contracts of \$1 million or more are enforceable under certain conditions. Tex. Bus. & Com. Code ch. 271. Tex. Bus. & Com. Code ch. 272 restricts the enforceability of choice-of-law provisions in contracts for the construction or repair of improvements to real property. For other types of contracts of \$50,000 or less, a conspicuous legend informing the parties of the choice-of-law provision must be in the contract (if another state's laws are chosen). Tex. Bus. & Com. Code ch. 273. Choice-of-law provisions for contracts made solely over the Internet are governed by Tex. Bus. & Com. Code ch. 274.

§ 2.42 Coastal Properties

Two types of notices relating to coastal properties are required for real property transactions in the vicinity of coastal waters. First, persons entering into an executory contract to convey an interest in property located seaward of the Gulf Intracoastal Waterway must make the disclosure required by Tex. Nat. Res. Code § 61.025, either in the contract itself or in a notice delivered not less than ten days before the closing of the sale. With some exceptions, the notice must be provided to the purchaser or transferee in all conveyancing transactions, including nonjudicial foreclosure sales. *See* Tex. Att'y Gen. Op. No. JM-834 (1987). Second, if real property adjoins and abuts the tidally influenced waters of the state, the notice prescribed in Tex. Nat. Res. Code § 33.135 must be given in all written executory contracts. The statutory disclosure form prescribed by section 5.008(b) of the Texas Property Code also includes language regarding such coastal properties.

Chapter 61 of the Natural Resources Code (Texas Open Beaches Act) declares the public policy of the state is that the public has free and unrestricted right of ingress and egress to and from state-owned beaches bordering on the sea-

ward shore of the Gulf of Mexico and the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico, to which the public has acquired a right of use or easement to or over by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law. Chapter 61 contains provisions under which the commissioner of the General Land Office can (1) impose administrative penalties on persons constructing, maintaining, controlling, owning, or possessing improvements on public beaches; (2) order those improvements removed at the expense of the person constructing, maintaining, controlling, owning, or possessing them; (3) notify the State Board of Insurance that the improvements are not insurable; and (4) make determinations concerning the line of vegetation, including the ability to suspend a determination on the line of vegetation for up to three years. There are several provisions regarding public access to beaches, coastal erosion duties, erosion responses, and posting of private access in Tex. Nat. Res. Code chs. 33, 61.

See also the section titled "Windstorm Inspection" below.

The Texas Constitution was amended in 2009 to further protect the right of the public to access and use public beaches. Tex. Const. art. I, § 33, defines 'public beach' and grants to the public a permanent easement and the unrestricted right to use, and a right of ingress to and egress from, a public beach. Section 33 further authorizes the legislature to enact laws to protect the public's right to access and use a public beach and to protect the public beach easement from interference and encroachments, but it does not create a private right of enforcement. However, Texas law does not recognize the concept of a 'rolling' public easement onto privately owned beachfront property, which would have the effect of allowing the public use easement to

migrate onto previously unencumbered private property.

Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property.

Severance v. Patterson, 370 S.W.3d 705, 724–25 (Tex. 2012).

§ 2.43 Colonias

Colonias are housing developments in low-income regions, typically near the border between Texas and Mexico. The Texas Local Government Code contains subdivision platting requirements in counties located (1) within fifty miles of the international border regardless of the population of any city within the county or (2) within one hundred miles of the international border if a city located within the county has a population of more than 250,000. Tex. Loc. Gov't Code §§ 232.021–.043. See also Tex. Loc. Gov't Code §§ 232.071–.080 for alternate subdivision platting requirements applicable to certain other economically distressed areas. The Property Code contains restrictions on executory contracts (contracts for deed), a form of real estate transaction widely used in colonias. See Tex. Prop. Code §§ 5.061–.080. Colonia self-help centers are authorized in certain counties under Tex. Gov't Code §§ 2306.581–.590. See also the section titled 'Contracts for Deed' below.

§ 2.44 Community Homes; Group Homes

The Community Homes for Disabled Persons Location Act, Tex. Hum. Res. Code §§ 123.001–.010, restricts in some circumstances the enforceability of restrictive covenants and zoning excluding such homes and provides for registration, licensing, and other regulation of such facilities.

§ 2.45 Community Property with Right of Survivorship

Spouses may create a right of survivorship in community property by executing a written agreement. Tex. Est. Code §§ 111.001–.002. The Estates Code also addresses the rights of personal representatives, purchasers, and creditors in this type of property.

§ 2.46 Condemnation and Eminent Domain

Condemnation is the right to take private property for public use; property may not be taken, damaged, or destroyed for or applied to public use without just and adequate compensation and due process. See U.S. Const. amends. V, XIV, § 1, Tex. Const. art. I, §§ 17, 19. Condemnation actions are governed by chapter 21 of the Texas Property Code. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner's bill of rights statement provided by Tex. Gov't Code § 402.031. The landowner's bill of rights provides that the property owner has a right to (1) notice of the proposed acquisition of the owner's property; (2) a bona fide good-faith effort to negotiate by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under chapter 21 of the Texas Property Code, including a hearing on the assessment of damages; and (5) an appeal of a

judgment in a condemnation proceeding, including an appeal of an assessment of damages. The attorney general will prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under chapter 21 of the Texas Property Code. A copy of the Texas Landowner's Bill of Rights can be found at https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf.

Some of the statutes authorizing condemnation are Tex. Transp. Code § 22.011 (airports and airspace), §§ 224.001–.008, 280.001, 314.011–.013 (highways and streets); Tex. Loc. Gov't Code §§ 251.001–.002 (public works or public use), §§ 331.001, 331.003 (parks and playgrounds), §§ 552.011, 552.013 (waterworks), § 571.004 (seawalls, levees, floodways, and the like); Tex. Nat. Res. Code § 111.019 (pipelines); Tex. Health & Safety Code § 711.033 (cemetery organizations); Tex. Educ. Code § 11.155 (school districts); Tex. Util. Code § 181.004 (utilities); Tex. Water Code § 49.222 (drainage districts); Tex. Gov't Code § 411.004 (providing eminent domain authority to counties for drainage); and Tex. Water Code ch. 54 (municipal utility districts (“MUDs”)).

See also the sections titled “Landowner's Bill of Rights” and “Private Property Rights” below.

The comptroller is required to create an eminent domain database including the name, address, and representative of each entity authorized by the state to exercise the power of eminent domain. Tex. Gov't Code ch. 2206, subch. D (eff. September 1, 2015). The database must identify the scope of eminent domain granted to the entity, the entity's website address, and whether the entity exercised its eminent domain authority in the past year. Entities with the power of eminent domain are required to submit an annual report to the comptroller to update the database, including whether or not the entity

exercised its eminent domain authority in the past year. Failure to file a report may result in a civil penalty.

§ 2.47 Condominiums

A condominium is a form of real property ownership in which portions of the real property are designated for separate ownership and the remainder is designated for common ownership solely by the separate owners. A condominium exists only if one or more of the common elements are directly owned in undivided interests by the unit owners. If an entity separate from the unit owners (e.g., an incorporated property owners association) owns all the common elements, the real property is not a condominium, even if the separate entity is owned by all the unit owners. Tex. Prop. Code § 82.003(a)(8).

The Texas Uniform Condominium Act (TUCA), Tex. Prop. Code ch. 82, governs the creation, operation, alteration, termination, and management of TUCA condominium projects created on or after January 1, 1994, but certain provisions of TUCA apply to those created before that date. Condominium projects created before January 1, 1994, are governed by portions of Tex. Prop. Code ch. 81 (the prior Condominium Act) and portions of TUCA, unless the owners of the project amend their declaration and submit it exclusively to the provisions of TUCA. *See* Tex. Prop. Code § 82.002. Tax certificates, receipts, or other statements evidencing payment of taxes or that taxes have not yet been calculated must be attached to a plat, replat, or amended plat or replat of a condominium before recording in accordance with Tex. Prop. Code § 82.051(g). The separate taxation of individual units of a condominium is addressed in Tex. Prop. Code § 82.005 and Tex. Tax Code § 25.09. Certain disclosures are required in a contract for sale of a condominium. Tex. Prop. Code §§ 82.156–157. *See* chapter 24 in this manual.

§ 2.48 Confessions of Judgment

Confession-of-judgment provisions in contracts executed before a lawsuit is brought are not enforceable. Tex. Civ. Prac. & Rem. Code § 30.001.

§ 2.49 Confidentiality Notice

See the section titled 'Disclosures and Notices' below.

§ 2.50 Conspicuous Text

Several statutes require that certain notices and contractual provisions be set apart from and made more conspicuous than the surrounding text, either by using bold-faced type or some other method. A partial list of these provisions includes—

1. choice-of-law provisions designating another state and agreements to litigate or arbitrate in another state in contracts concerning goods valued at \$50,000 or less (Tex. Bus. & Com. Code ch. 273);
2. Deceptive Trade Practices Act waivers (Tex. Bus. & Com. Code § 17.42);
3. the statutory statute-of-frauds notice for loans greater than \$50,000 (Tex. Bus. & Com. Code § 26.02);
4. notices of cancellation for certain types of credit services agreements (Tex. Fin. Code § 393.202);
5. disclosures required in rental-purchase agreements (Tex. Bus. & Com. Code § 92.051(d));
6. certain language in homestead improvement contracts (Tex. Prop. Code § 41.007);
7. certain language in homestead lien affidavits (Tex. Prop. Code § 53.254);

8. certain notices relating to contracts for deed (Tex. Prop. Code §§ 5.062, 5.066, 5.074);
9. certain agreements between landlords and residential tenants concerning repairs (Tex. Prop. Code § 92.006);
10. certain notices in residential leases concerning the landlord's obligations to install safety devices (Tex. Prop. Code § 92.164);
11. certain notices in residential leases concerning the disabling of smoke alarms by tenants (Tex. Prop. Code § 92.2611);
12. various provisions in retail installment contracts (Tex. Fin. Code §§ 345.052, 345.081, 345.304);
13. home solicitation transaction cancellation notices (Tex. Bus. & Com. Code §§ 601.052-.053);
14. the business opportunity contract disclosure statement (Tex. Bus. & Com. Code § 51.151) (note that "business opportunity" does not include real estate syndications and certain other transactions (Tex. Bus. & Com. Code § 51.003(b)));
15. certain provisions of residential service contracts (Tex. Occ. Code § 1303.254);
16. liability for rollback taxes (Tex. Prop. Code § 5.010(a)); and
17. the confidentiality notice required by the Property Code (Tex. Prop. Code § 11.008).

§ 2.51 Construction Accounts

Construction accounts are governed by Tex. Prop. Code ch. 162.

§ 2.52 Construction Contracts

Payment to contractors, subcontractors, and materialmen must be made within certain prescribed time periods. Tex. Prop. Code § 28.002. Waivers of this provision are generally void. Tex. Prop. Code § 28.006. Certain restrictions on indemnity agreements entered into with contractors are contained in Tex. Civ. Prac. & Rem. Code ch. 130. Restrictions on choice-of-law provisions and agreements to litigate or arbitrate in another state in some types of construction contracts are contained in Tex. Bus. & Com. Code ch. 272. Disclosures concerning home insulation are required of sellers of new homes by 16 C.F.R. § 460.16. Contractors are required to give owners a disclosure statement for residential construction contracts. Tex. Prop. Code § 53.255. See also the sections titled "Consumer Laws," "Homesteads," and "Mechanic's Liens" below.

§ 2.53 Construction Payment Bond Claims

A surety company that has issued a construction payment bond is subject to requirements governing the claims process. See Tex. Ins. Code §§ 3503.051–.057.

§ 2.54 Consumer Laws

Many of the laws designed to protect consumers apply to real estate transactions, including—

1. the Deceptive Trade Practices–Consumer Protection Act (DTPA), Tex. Bus. & Com. Code §§ 17.41–.63 (including special provisions in section 17.42 limiting waivers of DTPA rights);
2. the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (applies to consumer products used for personal, family, or household purposes, including property intended to be attached to or installed in real property);
3. the Home Solicitation Transactions Act, Tex. Bus. & Com. Code ch. 601 (gives consumers the right to cancel a transaction involving real property);
4. the Real Estate License Act, Tex. Occ. Code ch. 1102 (requires the licensing of persons who inspect real property);
5. the Residential Service Company Act, Tex. Occ. Code ch. 1303 (regulates persons who sell residential service or maintenance contracts);
6. the Manufactured Housing Standards Act, Tex. Occ. Code ch. 1201 (requires the licensing of persons who install manufactured housing), Tex. Occ. Code ch. 1202 (regulates 'industrialized housing' or modular homes);
7. the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its accompanying Regulation Z, 12 C.F.R. pt. 226 (requires certain consumer disclosures by creditors of the costs and terms of consumer credit and provides certain remedies for consumers, including the right of rescission of certain credit transactions secured by a lien on the consumer's principal dwelling); see also the section titled "Truth in Lending" below; and
8. the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and its accompanying Regulation X, 24 C.F.R. pt. 3500 (requires certain consumer disclosures for mortgage loan transactions secured by a lien on one-to-four family residential real property that otherwise meet the definition of a 'federally related mortgage loan' set out in 24 C.F.R. § 3500.2 and also prohibits unlawful kickbacks, referral fees, and unearned fees in connection

with federally related mortgage loans). See also the section titled 'Real Estate Settlement Procedures Act (RESPA)' below.

§ 2.55 Contracts for Deed

The requirements for creating an enforceable residential contract for deed, the notice requirements to enforce a default, and numerous requirements imposed on sellers under such a contract are found in subchapter D of chapter 5 of the Texas Property Code. Tex. Prop. Code §§ 5.061-.080. See the section titled 'Deceptive Trade Practices—Consumer Protection Act (DTPA)' below regarding DTPA actions for failure to deliver required disclosures.

Subchapter D applies to all contracts for deed statewide if the property is used or to be used as the buyer's residence or as the residence of a person related to the buyer within the second degree by consanguinity or affinity. A residential lease with option to purchase the leased property is deemed a contract for deed with respect to certain of the provisions of subchapter D, although lease/purchase options of less than three years are subject to fewer provisions of subchapter D. Tex. Prop. Code § 5.062(a), (f).

A complete review of subchapter D is recommended before documenting a residential contract for deed. Breaches of certain requirements of subchapter D are violations of the Texas Deceptive Trade Practices—Consumer Protection Act. See Tex. Prop. Code §§ 5.069, 5.070, 5.072, 5.078, 5.085.

The attorney who prepares the contract for deed, if deemed the person responsible for closing, may be required to satisfy Internal Revenue Service Form 1099-S reporting requirements. 26 U.S.C. § 6045(e). See chapter 4 in this manual for additional considerations in reviewing a contract for deed transaction. The practitioner should also carefully consider the applicability

to the contract for deed transaction of the many disclosures required elsewhere in chapter 5 of the Property Code. See exhibit D to form 4-1 in this manual.

If chapter 601 of the Texas Business and Commerce Code (relating to the right of consumers to cancel certain transactions) applies to the contract for deed transaction, the seller must provide the buyer with the notice of right of rescission prescribed in section 601.052(a) and (b) and the form of cancellation notice prescribed in section 601.053(c), and the buyer may cancel the contract not later than midnight of the third business day after the buyer signs the contract for deed. Tex. Bus. & Com. Code §§ 601.051, 601.052(a), (b), 601.053. See forms 4-4 and 4-15. The attorney who prepares the contract for deed should also determine whether the contract for deed transaction is subject to the federal Truth in Lending Act and its accompanying Regulation Z. See chapter 12 in this manual.

Contracts for deed transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.56 Copyrights

The U.S. copyright laws extend to visual arts and architectural works and prohibit modification or destruction of visual arts in certain circumstances. See 17 U.S.C. §§ 102, 106A. Owners of buildings may alter or destroy a building embodying an architectural work. 17 U.S.C. § 120(b).

§ 2.57 Corporations

Corporations may buy, sell, and otherwise deal with real property. Tex. Bus. Orgs. Code § 2.101. They are prohibited, however, from engaging in specified combinations of businesses: owning land and raising cattle and oper-

ating stockyards and packing meat; and operating both a petroleum-producing business and an oil pipeline business in the state. Tex. Bus. Orgs. Code § 2.007. A corporation cannot be organized to operate a bank, trust company, savings association, insurance company, cemetery company (except as authorized by the Health and Safety Code), or abstract or title company. Tex. Bus. Orgs. Code § 2.003.

Unless otherwise provided in the governing documents, the governing entity may authorize by resolution a disposition of property without the approval of the members or owners of the entity. Tex. Bus. Orgs. Code § 10.252. If a corporation conveys land under authority of its governing documents, the deed must be signed by an officer or attorney-in-fact. Tex. Bus. Orgs. Code § 10.253. A corporation may convey or mortgage its property for any lawful purpose, except if prohibited by law or by the corporation's charter or bylaws. No corporate seal is required for a valid deed. Tex. Bus. Orgs. Code § 10.251.

Condominium owners associations for condominium regimes formed after December 31, 1993—and those formed before January 1, 1994, that opt to be governed exclusively by Texas Property Code chapter 82 under section 82.002(a)(1)—must be formed as for-profit or nonprofit corporations. Tex. Prop. Code § 82.101.

See also the sections titled "Business Organizations Code" above and "Foreign Entities," "Limited Liability Companies," "Nonprofit Corporations," and "Partnerships" below.

§ 2.58 Covenants Not to Compete

Covenants not to compete are governed by the provisions of Tex. Bus. & Com. Code § 15.50.

§ 2.59 Criminal Record Checks of Employees

Criminal record checks of employees of residential dwelling projects are permitted under the provisions of Tex. Health & Safety Code ch. 765.

§ 2.60 Deceptive Trade Practices—Consumer Protection Act (DTPA)

The Texas Deceptive Trade Practices—Consumer Protection Act (Tex. Bus. & Com. Code §§ 17.41–.63) applies to certain types of real estate transactions. Waivers of the Act's protection are permitted only if in compliance with Tex. Bus. & Com. Code § 17.42. See also the section titled "Residential Construction Liability" below. A violation of the provisions of the Texas Property Code pertaining to home improvement contracts may be brought as a DTPA action (Tex. Prop. Code § 41.007), as may a seller's failure to deliver a property disclosure statement before execution of some contracts for deed to convey residential property (Tex. Prop. Code § 5.069(d)). See also Tex. Prop. Code § 221.071 for a DTPA action under the Texas Timeshare Act (Tex. Prop. Code ch. 221).

§ 2.61 Deeds

The legal requirements for deeds are addressed in Tex. Prop. Code §§ 5.021–.023. See also chapter 5 in this manual.

Deeds transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Instruments that correct a conveyance of real property should comply with Tex. Prop. Code §§ 5.027–.030. Whether the change to the instrument is material or nonmaterial will dic-

tate the process needed to make the correction. See section 5.8 in this manual.

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. *See* Tex. Est. Code ch. 114. See section 5.12 in this manual.

§ 2.62 Deeds of Trust

Foreclosure of liens is addressed in Tex. Prop. Code ch. 51. See also the separate discussion under "Foreclosure" below.

Deeds of trust transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.63 Deficiency Litigation after Foreclosure

A suit for a deficiency following a foreclosure sale conducted under Tex. Prop. Code § 51.002 must be brought within two years and is governed by Tex. Prop. Code §§ 51.003–.005. See also the section titled "Foreclosure" below.

§ 2.64 Disclaimer of Interest in Decedent's Estate

A person desiring to disclaim an interest in a decedent's estate must comply with Tex. Est. Code ch. 122. A person disclaiming an interest in a decedent's property after January 1, 2014, is required to disclose any child support owed. Tex. Est. Code § 122.051. A disclaimer made by a beneficiary who is a child support obligor may not be effective to disclaim his interest in the estate. *See* Tex. Est. Code § 122.107.

§ 2.65 Disclosure of Interested Parties When Contracting with Governmental Entities

A governmental entity or state agency may not enter into a contract with a business entity if the contract requires a vote by the governing body of the governmental entity or state agency or the contract has a value of at least \$1 million unless the business entity submits a disclosure of interested parties to the governmental entity or state agency at the time the business entity submits the signed contract to the governmental entity or state agency. Tex. Gov. Code § 2252.908. The disclosure of interested parties must be submitted on an electronic form prescribed by the Texas Ethics Commission. *See* 1 Tex. Admin. Code ch. 46. The required Form 1295 and filing instructions can be found on the Texas Ethics Commission website at https://www.ethics.state.tx.us/whatsnew/FAQ_Form1295.html. See also the section titled 'Sale of Trust Property to Governmental Entities' below.

§ 2.66 Disclosures and Notices

Numerous statutory disclosure and notice requirements affect real estate transactions.

1. A seller of residential real property comprising not more than one dwelling unit must give the purchaser of the property a signed, written notice, substantially in statutory form, concerning the condition of the property, including known defects or malfunctions of building structural components and building materials; working condition of various systems, appliances, smoke detectors, and other enumerated items; and the existence of various undesirable conditions such as termite damage, lead-based paint, radon gas, and a single blockable main drain in a swimming pool or hot tub. The notice must be delivered on or

- before the effective date of any executory sales contract binding the purchaser and, if the seller fails to provide the notice by the effective date, the purchaser may rescind the contract for any reason within seven days after receiving the notice. Tex. Prop. Code § 5.008. See form 4-21 in this manual.
2. Real estate brokers have a number of disclosure obligations, including the nature of their principal-agent relationship, as well as any applicable intermediary status, to prospective buyers, sellers, landlords, and tenants; knowledge of latent defects; the advisability of obtaining a title policy; as well as nondisclosure requirements. Tex. Occ. Code §§ 1101.555–.559, 1101.651–.652; 22 Tex. Admin. Code chs. 535, 537.
 3. A seller is obligated to make certain disclosures if the property is located in a water or utility district. Tex. Water Code §§ 49.452, 54.016(h)(4)(A). See form 4-18.
 4. Sellers in certain municipalities must disclose the presence of restrictive covenants affecting the property. Tex. Loc. Gov't Code §§ 212.151–.157 (Enforcement of Land Use Restrictions Contained in Plats and Other Instruments). See form 4-11.
 5. The presence of underground storage tanks must be disclosed to purchasers in accordance with 30 Tex. Admin. Code § 334.9. See form 4-10.
 6. There are disclosure requirements in the Texas Timeshare Act, Tex. Prop. Code §§ 221.031–.036.
 7. The Texas Membership Camping Resort Act has disclosure requirements. See Tex. Prop. Code § 222.006.
 8. There are disclosures required by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–1720, and 24 C.F.R. pts. 1710–1720.
 9. Disclosures concerning home insulation are required by 16 C.F.R. § 460.16. See form 4-6.
 10. Disclosures concerning asbestos are required by 29 C.F.R. §§ 1910.1001 and 1926.1101. See the appropriate forms in chapters 25 and 26. See also form 4-8.
 11. A seller of vacant land must include in the contract a certain bold-faced notice about potential rollback taxes. A number of exemptions apply, including an exemption if a separate paragraph in the contract addresses rollback tax liability. Tex. Prop. Code § 5.010. See form 4-14.
 12. A seller of unimproved residential property must provide the buyer with a written disclosure of certain subsurface conditions, such as pipelines, in certain circumstances. This notice is not required if the seller is obligated under the contract to furnish a title insurance commitment and if the buyer is entitled to terminate if objections to the commitment are not cured before closing. Tex. Prop. Code § 5.013.
 13. A seller of a single-family residence must give notice to a prospective buyer if the residence is subject to membership in a property owners association, restrictive covenants have been recorded, and an assessment lien may be foreclosed for failure to pay assessments. Tex. Prop. Code § 5.012. See form 23-9.
 14. A seller must disclose that the land may be included in the extraterritorial

- jurisdiction of a municipality and thereby subject to annexation. Tex. Prop. Code § 5.011. See form 4-15.
15. Contractors are required to give the owner a disclosure statement before the owner executes a residential construction contract. Tex. Prop. Code § 53.255. See form 18-1.
 16. Residential mortgage loan originators have certain disclosure obligations to residential mortgage loan applicants, including the nature of the relationship between the residential mortgage loan originator and the applicant, the duties the residential mortgage loan originator has to the applicant, and how the residential mortgage loan originator will be compensated, as well as the terms under which an interest rate lock-in fee will be refundable. Tex. Fin. Code §§ 156.004, 156.304. The Savings and Mortgage Lending Commissioner by rule has promulgated a standard form entitled "Residential Mortgage Loan Originator Disclosure." 7 Tex. Admin. Code § 80.9.
 17. A seller of unimproved real property located outside a municipality's jurisdiction must provide a statutory notice to a purchaser that the extension of water or sewer services may require additional expense and delay to obtain. Tex. Water Code § 13.257. See form 4-16.
 18. Sellers of real property within an agricultural development district must give the purchaser written notice to that effect. Tex. Agric. Code § 60.063. The district must file a copy of the form for notice required by section 60.063 with the county clerk in each county in which all or part of the district is located. Tex. Agric. Code § 60.0631. The statute charges each agricultural district with the responsibility to prepare its own form.
 19. Disclosures concerning home loans and high-cost home loans (loans with an interest rate of 12 percent or greater per year), including disclosures regarding individual or group credit life or disability insurance, are required by chapter 343 of the Finance Code. Tex. Fin. Code ch. 343. See also section 10.14 in this manual.
 20. Texas Property Code section 11.008 provides that an instrument executed after September 1, 2005, transferring an interest in real property to or from an individual must include a statutorily described notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters. Tex. Prop. Code § 11.008. The notice advises natural persons that Social Security numbers or driver's license numbers may be removed from the document before recording. The statute defines an "instrument" for purposes of this section as "a deed or deed of trust." See Tex. Prop. Code § 11.008(a). These terms are not defined.

The validity of an instrument as between the parties to the instrument and the notice provided by the instrument is not affected by a party's failure to include the notice required under section 11.008.

The county clerk may not under any circumstance reject an instrument presented for recording solely because the instrument fails to comply with this section. Tex. Prop. Code § 11.008(e).
 21. A seller of residential property that is located in a public improvement district established under chapter 372 of

the Local Government Code and that consists of not more than one dwelling unit must give notice to the purchaser that it will be obligated to pay assessments for an improvement project. The notice must be given before the effective date of the executory contract and must be substantially similar to the prescribed notice. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. Tex. Prop. Code § 5.014. See form 4-5.

22. If all or part of a subdivision for which a plat is required under chapter 232 of the Local Government Code is located within a future transportation corridor identified in an agreement between the Texas Department of Transportation and a county under section 201.619 of the Transportation Code, each purchase contract or lease between the subdivider and a purchaser or lessee of land in the subdivision must contain a conspicuous statement that the land is located within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to the future transportation corridor. Tex. Loc. Gov't Code § 232.0033. See form 4-19.
23. With a number of exceptions, a seller of property that will be conveyed subject to a lien must make required disclosures to the prospective purchaser at least seven days before the earlier of the effective date of the conveyance or the execution of the contract for the conveyance. The failure to give the notice does not invalidate a conveyance, but the purchaser may pursue other remedies available unless the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred. Among the excepted transactions for which the disclosure is not required are those in which the purchaser obtains a title policy and those in which the seller has sold, or the purchaser has purchased, interests in real property four or more times during the preceding twelve months. Tex. Prop. Code § 5.016.
24. A person registered under the Residential Mortgage Loan Servicer Registration Act (Tex. Fin. Code ch. 158) and acting as a servicer of loans secured by a lien on residential real estate located in Texas must provide a statutory notice informing the borrower of each such residential mortgage loan that complaints about servicing of the loan should be sent to the Department of Savings and Mortgage Lending. Tex. Fin. Code § 158.101.
25. A person who sells property for which a certificate of mold remediation has been issued pursuant to section 1958.154 of the Texas Occupations Code must deliver to the purchaser copies of each certificate of mold remediation issued for the property with the preceding five years. Tex. Occ. Code § 1958.154.
26. A seller of commercial or residential property adjoining an impoundment of water, including a reservoir or lake constructed and maintained under

chapter 11 of the Texas Water Code that has storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, must give to the purchaser notice of fluctuations for various reasons, including an entity lawfully exercising its right to the water stored in the impoundment or drought or flood conditions. Tex. Prop. Code § 5.019. See form 4-27.

Other situations may require disclosures. See the sections titled 'Ad Valorem Taxes,' 'Choice of Law,' 'Coastal Properties,' 'Condominiums,' 'Conspicuous Text,' and "Contracts for Deed" above and 'Flood Insurance,' 'Foreign Ownership of Real Property,' "FTC Anti-Holder-in-Due-Course Rule," 'Home Equity Lending,' 'Home Improvement Contracts,' "Interstate Land Sales Full Disclosure Act," 'Landfills,' "Lead-Based Paint Disclosures," 'Mortgage Loan Originators,' 'Securities Acts,' "Truth in Lending," and 'Utility District Disclosures' below.

§ 2.67 Discrimination

A restriction in a deed or other instrument affecting real property that prohibits the use, sale, lease, or transfer on account of race, color, religion, or national origin is void and unenforceable. Tex. Prop. Code § 5.026. Municipalities may also adopt fair housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov't Code § 214.903. The Texas Workforce Commission civil rights division has the authority to hear certain types of discrimination complaints. Tex. Lab. Code ch. 301. See also the sections titled "Americans with Disabilities Act and Related Statutes" above and "Equal Credit Opportunity" and "Fair Housing" below.

Cities and counties may not prohibit housing discrimination against a person "because the person's lawful source of income to pay rent

includes funding from a federal housing assistance program," but ordinances or regulations protecting veterans from discrimination may not be invalidated by cities or counties. Tex. Loc. Gov't Code § 250.007.

§ 2.68 Divorce

See the section titled "Family Law" below.

§ 2.69 Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) is sweeping financial reform legislation intended in pertinent part to 'protect consumers from abusive financial services practices' thought by Congress to have significantly contributed to the 2007-2009 national financial crisis. The Act, comprising some sixteen titles, was signed into law on July 21, 2010.

The full text of the Act may be accessed at <https://legcounsel.house.gov/Comps/Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act.pdf>. Titles IX, X, and XIV of the Act are particularly pertinent to residential real estate finance transactions.

Title IX, subtitle D, requires any 'securitizer' of an asset-backed security, such as a mortgage-backed security or a collateralized mortgage obligation, to retain an economic interest in a portion of the credit risk that the securitizer sells or transfers to a third party through the issuance of an asset-backed security, unless all the assets that collateralize the asset-backed security are 'qualified residential mortgages' that meet certain definitional standards. Title IX becomes effective with respect to securitizers and originators of asset-backed securities backed by residential mortgages one year after the date on

which final regulations under the title are adopted and published in the Federal Register.

Title X, which may be cited by its short title as the Consumer Financial Protection Act of 2010, establishes within the Federal Reserve System an independent bureau to be known as the Bureau of Consumer Financial Protection (the ‘Bureau’), which shall regulate the offering and provision of all consumer financial products and services under federal consumer financial laws. The Bureau is empowered and has the exclusive authority to implement, interpret, and enforce the Real Estate Settlement Procedures Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act, S.A.F.E. Mortgage Licensing Act, and other enumerated federal statutes that currently regulate some aspect of consumer loan origination and servicing activities. The director of the Bureau, appointed by the President with the advice and consent of the Senate, has the authority to prescribe rules and issue orders and guidance as may be ‘necessary or appropriate’ to enable the Bureau to administer and ‘carry out the purposes and objectives’ of the federal consumer financial laws and to “prevent evasions” of such laws. The Bureau has unprecedented enforcement powers to grant relief for any violation of consumer financial law, including imposing civil money penalties for any violation of a law, rule, or final order imposed on a covered person in amounts ranging from \$5,000 to \$1 million for each day in which such a violation continues. The Bureau assumed all ‘consumer financial protection functions’ formerly delegated to other federal agencies on the designated transfer date of July 21, 2011.

Title XIV, which may be cited as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive amendments to the Truth in Lending Act, Real Estate Settlement Procedures Act, and the Equal Credit Opportunity Act reforming residential mortgage origination,

underwriting, appraisal, and servicing practices. See the discussion in chapter 12 in this manual.

§ 2.70 Dry Cleaners

Chapter 374 of the Health and Safety Code regulates performance standards for both existing and new dry cleaning facilities. Tex. Health & Safety Code ch. 374.

§ 2.71 Due-on-Sale Clauses

Due-on-sale provisions are addressed in the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1701j-3, and the regulations promulgated thereunder at 12 C.F.R. § 34.5, including preemption of certain conflicting state laws.

§ 2.72 Durable Powers of Attorney

Durable powers of attorney are governed by Tex. Est. Code chs. 751–752. Unless a time limitation is specifically stated in the instrument creating it, the passage of time does not cause a durable power of attorney to lapse. Tex. Est. Code § 751.004. The durable power of attorney between spouses terminates on divorce or annulment except in certain situations. Tex. Est. Code § 751.053. A court’s appointment of a permanent guardian for the principal’s estate terminates the durable power of attorney on the guardian’s qualification. A court may suspend the powers of an agent under a durable power of attorney during the term of a temporary guardianship. Tex. Est. Code § 751.052.

A durable power of attorney must be in writing, be signed by a principal who is an adult, be acknowledged, and contain the following phrase or words of similar import: ‘This power of attorney is not affected by subsequent disability or incapacity of the principal. Tex. Est. Code § 751.002. The attorney-in-fact or agent has a fiduciary duty to the principal to timely inform the principal of all actions taken, account for his

actions, maintain appropriate records, and provide an accounting on demand by the principal. Tex. Est. Code § 751.101.

Durable powers of attorney used in real estate transactions must be recorded in the county or counties in which the real property is located not later than thirty days after the instrument signed by the agent is recorded. *See* Tex. Est. Code § 751.151. Several other important requirements for such powers of attorney are addressed in the statute. Tex. Est. Code § 751.051 sets forth a statutory form of durable power of attorney. When using the statutory form, the principal will need to initial each specific power to be granted or initial the line to grant all powers. A form of durable power of attorney for use in real estate transactions incorporating the statutory requirements is included in chapter 26 in this manual.

§ 2.73 Easements, Pipeline

Unless expressly provided otherwise, pipeline easements created by grant or power of eminent domain for the benefit of a single common carrier pipeline for which the power of eminent domain is available are presumed to create an easement in favor of the common carrier pipeline that extends a width of fifty feet as to each pipeline laid under the easement before January 1, 1994. Tex. Nat. Res. Code § 111.0194. The presumption is rebuttable. Persons who acquire pipeline easements and rights-of-way for others must be registered, licensed, or exempt from licensing by the Real Estate License Act. A notice promulgated by the Texas Real Estate Commission must be delivered to the grantor of the easement before the easement is granted. Tex. Occ. Code § 1101.653.

§ 2.74 Economically Distressed Counties

See the section titled 'Colonias' above.

§ 2.75 Economic Development

The Texas Economic Development Act provides certain ad valorem tax benefits to encourage economic development. Tex. Tax Code ch. 313.

§ 2.76 Elderly Housing

See the section titled 'Fair Housing' below.

§ 2.77 Electronic Commerce

Texas has adopted the Uniform Electronic Transactions Act, which is intended to facilitate electronic commerce. Tex. Bus. & Com. Code ch. 322. The Uniform Electronic Transactions Act does not apply to transactions that are otherwise covered by the laws governing the execution of wills and testamentary trusts or by the Uniform Commercial Code. Tex. Bus. & Com. Code § 322.003(b). Electronic funds transfers are governed by chapter 4A of the Uniform Commercial Code. Tex. Bus. & Com. Code ch. 4A.

§ 2.78 Electronic Filing of Documents

Statutes authorizing and otherwise relating to the electronic filing of documents in the public records include Tex. Loc. Gov't Code § 191.009 and ch. 195. Chapter 9 of the Texas Business and Commerce Code, while no longer explicitly authorizing electronic filing, is clearly written to accommodate it. For example, in most places the revision refers to "authenticating" rather than "signing" a record. The revised Code also provides that "communication of a record to a filing office constitutes filing. Tex. Bus. & Com. Code § 9.516(a). Filing by means other than in writing is contemplated by Tex. Bus. & Com. Code § 9.525(a)(3); *see also* Tex. Bus. & Com. Code § 9.526(b).

Texas has also adopted the Uniform Real Property Electronic Recording Act. Tex. Prop. Code

§§ 15.001–.008. Under the Act, a ‘document’ includes information stored in an electronic or other medium that is retrievable in perceivable form. Tex. Prop. Code § 15.002(1). A document received by a county clerk in electronic form is eligible to be recorded in the real property records. If another law requires as a condition of recording that a document be on paper or other tangible medium, the requirement is satisfied by an electronic document that complies with the Act. Tex. Prop. Code § 15.004. An electronic signature is an electronic sound, symbol, or process attached to or logically associated with a document executed or adopted by a person with the intent to sign the document. Tex. Prop. Code § 15.002(4). An acknowledgment may be similarly satisfied by an electronic signature. Tex. Prop. Code § 15.004. Licensed attorneys, lending institutions, title insurance companies, and state agencies may record electronically. County clerks are authorized (but not required) to implement the Act. Tex. Prop. Code § 15.005. The Act also amends provisions of the Local Government Code pertaining to electronic recording and directs the Texas State Library and Archives Commission to adopt rules to promote uniformity within the state and among other states that adopt similar laws. Tex. Prop. Code § 15.006.

The Electronic Government Task Force has launched an Internet portal to provide access to electronic government services in Texas. It is found at <https://www.texas.gov>: it provides forms and applications from various agencies and access to filing and payment of sales tax. Authority for oversight by the TexasOnline Authority is provided in Tex. Gov’t Code ch. 2054.

§ 2.79 Eminent Domain

See the section titled ‘Condemnation and Eminent Domain’ above.

§ 2.80 Endangered Species Act

The Endangered Species Act can be found at 16 U.S.C. §§ 1531–1544. The provisions of the statute may limit the development of real property in areas that include the habitats of endangered species.

§ 2.81 Engineer’s Liens against Real Estate

An engineer’s lien against real estate is addressed in Tex. Prop. Code § 53.021(c).

§ 2.82 Environmental Laws

Numerous federal and state environmental statutes affect real estate transactions. Among the most important federal laws are—

1. the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601–9675, relating primarily to liability for cleanup of inactive hazardous waste sites (see also the sections titled ‘Hazardous Waste Liens’ and ‘Landowner Liability’ below);
2. the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984 and the Land Disposal Program Flexibility Act of 1996, 42 U.S.C. §§ 6901–6992k, relating primarily to active waste treatment, storage, or disposal facilities, including underground storage tanks (see also the section titled ‘Underground and Aboveground Storage Tanks’ below);
3. the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. §§ 1251–1387, governing, among other things, the regulation

- of wetlands, stormwater, and point-source water pollution (see also the sections titled “Stormwater Permits” and “Wetlands’ below);
4. the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q, requiring permits for many types of operations, regulating certain asbestos materials and emissions, and prohibiting certain types of chemicals, such as chlorofluorocarbons (CFCs), that deplete the ozone layer. The regulations dealing with CFCs are in 40 C.F.R. pt. 82. Related regulations include the asbestos-based National Emission Standards for Hazardous Air Pollutants at 40 C.F.R. pt. 61,
 5. the Endangered Species Act, 16 U.S.C. §§ 1531–1544;
 6. the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§ 2641–2656, and regulations, 40 C.F.R. pt. 763;
 7. asbestos regulations under the Occupational Safety and Health Act, 29 C.F.R. § 1910.1001 (general industry standard), and 29 C.F.R. § 1926.1101 (construction standard);
 8. the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X of the Housing and Community Development Act (42 U.S.C. §§ 4851–4856) (see the section titled “Lead-Based Paint Disclosures” below);
 9. the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j–26; and
 10. the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2695d, regulating polychlorinated biphenyls and other substances.

Important state environmental statutes and regulations include—

1. the Solid Waste Disposal Act, Tex. Health & Safety Code ch. 361 (concerns the disposal of hazardous and certain nonhazardous wastes), including the statute regulating developments over abandoned landfills, Tex. Health & Safety Code §§ 361.531–.539 (see the separate discussion of this statute under the section titled “Landfills’ below), and the voluntary cleanup program (also known as a Brownfields statute), Tex. Health & Safety Code §§ 361.601–.613 (see the section titled ‘Voluntary Cleanup Program’ below);
2. the Texas Clean Air Act, Tex. Health & Safety Code ch. 382, requiring air permits for many types of industrial and construction operations and regulating air emissions and various other hazardous substances and activities;
3. the Texas Hazardous Substances Spill Prevention and Control Act, Tex. Water Code §§ 26.261–.267;
4. the Texas Underground and Aboveground Storage Act, as amended, Tex. Water Code §§ 26.341–.367 (see also the section titled ‘Underground and Aboveground Storage Tanks’ below);
5. the Coastal Public Lands Management Act of 1973, as amended, Tex. Nat. Res. Code ch. 33, and regulations at 31 Tex. Admin. Code chs. 501–506 (see also the section titled ‘Coastal Properties’ above);
6. the Texas Environmental, Health, and Safety Audit Privilege Act, Tex. Rev. Civ. Stat. art. 4447cc;
7. the Texas Asbestos Health Protection Act, Tex. Occ. Code ch. 1954;
8. the Texas Railroad Commission’s Operator Cleanup Program and regu-

lations at 16 Tex. Admin. Code § 3.91, and

9. Tex. Agric. Code ch. 63, providing enhanced safety oversight and inspections of ammonium nitrate storage facilities by permitting entry by local or state fire authorities and providing enhanced storage requirements.

In addition, there are numerous environmental provisions that bear on the ownership, operation, and development of real estate properties in the Texas Health and Safety Code, the Texas Natural Resources Code, the Texas Parks and Wildlife Code, and the Texas Water Code.

§ 2.83 Equal Credit Opportunity

The Equal Credit Opportunity Act, implemented by Regulation B, 12 C.F.R. § 202.16, provides a cause of action against a creditor who discriminates against an applicant for credit (1) on the basis of the applicant's race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to enter into a binding contract), (2) because all or part of the applicant's income derives from any public assistance program, or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. *See* 15 U.S.C. §§ 1691–1691f. Regulation B also establishes rules for a creditor's collection, evaluation, and use of information in connection with a credit application and requires a creditor to notify applicants of action taken on their applications concerning the creditor's approval of, counter-offer to, or denial of credit generally within thirty days after receiving a completed application. Proper use of sample notification forms set out in Appendix C of Regulation B constitutes full compliance with various requirements of the Act. Effective July 21, 2011, model forms C1 through C5 were revised to include a notice that a credit score was used to make an adverse credit decision and to include certain informa-

tion about credit scores to comply with amended content requirements of the Fair Credit Reporting Act. Notifications must be in writing and contain a statement of specific reasons for any adverse action taken on the credit application and a statutory notice set forth in section 701(a) of the Act. Creditors furthermore must provide consumers with a copy of any property appraisal report used to evaluate an application for credit that is to be secured by a lien on a dwelling. *See* 12 C.F.R. § 202.14.

§ 2.84 Equal Housing Opportunity

See the sections titled "Affordable Housing Investments" above and "Fair Housing" below.

§ 2.85 Escheat

Escheat of real and personal property to the state is governed by Tex. Prop. Code ch. 71. See also the section titled "Abandonment" above.

§ 2.86 Estate Tax Liens

An unpaid federal estate tax becomes a lien on the gross estate of the decedent. 26 U.S.C. § 6324(a)(1).

§ 2.87 Eviction

Eviction actions (also known as forcible-entry-and-detainer actions) are governed by Tex. Prop. Code ch. 24 and Tex. R. Civ. P. 500–507, 510.1–.13. Substantial changes were made to the Texas Rules of Civil Procedure in 2013, including changing references in the rules from forcible entry and detainer to eviction.

§ 2.88 Excavators

See the section titled "Underground Facility Damage Prevention and Safety Act" below.

§ 2.89 Exempt Property and Liens

See the section titled “Bankruptcy” above.

§ 2.90 Extraterritorial Jurisdiction

The extraterritorial jurisdiction of municipalities is governed by Tex. Loc. Gov’t Code ch. 42. See also the section titled “Disclosures and Notices” above.

§ 2.91 Failed Depository Institutions

If a bank, savings and loan association, or other depository institution is placed in receivership or conservatorship, one may record at any time an affidavit or memorandum of a sale, transfer, purchase, or acquisition agreement between the receiver or conservator and another depository institution. If the transfer involves an interest in land or in a mortgage vested according to the real property records in the failed depository institution, a recorded affidavit or memorandum is constructive notice of the transfer. Tex. Prop. Code § 12.018.

§ 2.92 Fair Credit Reporting Act

The federal Fair Credit Reporting Act has been amended to require any financial institution that (1) extends credit to an individual and (2) regularly and in the ordinary course of business reports negative information to a credit bureau to give a clear and conspicuous written notice to its individual customers about reporting negative information.

The term *financial institution* is broadly defined to include ‘any institution the business of which is engaging in financial activities as described in section 4(k)’ of the Bank Holding Company Act of 1956, whether affiliated with a bank or not. 15 U.S.C. § 6809(3)(a). Thus the term *financial institution* includes not only institutions regulated by federal banking agencies but also other

entities, such as merchant creditors and debt collectors, that extend credit to individuals and report negative information. See 16 C.F.R. § 313.3(k).

A financial institution must give the required notice to an individual customer before, or no later than thirty days after, reporting the negative information to a credit bureau. After giving the notice, the institution may report additional negative information to a credit bureau for the same transaction, extension of credit, account, or customer without giving additional notice. If a financial institution gives a customer a notice before reporting negative information, the institution is not required to actually report negative information about the customer to a credit bureau. A financial institution generally may give the notice about reporting negative information on or with any notice of default, billing statement, or other material provided to an individual customer as long as the notice is clear and conspicuous. The notice may not be included in the initial disclosures required to be given by section 127(a) of the federal Truth in Lending Act (15 U.S.C. § 1637(a)).

A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. The format of a model notice may be rearranged. For model notices, see clauses 14-7-2 and 14-7-3 in this manual.

Creditors also are required to give a ‘risk-based pricing’ notice when, based on the consumer’s credit report, the creditor provides credit to the consumer on materially less favorable terms than terms available to a substantial proportion of consumers through that creditor. Creditors who conduct periodic reviews of existing accounts and increase the annual percentage rate of interest charged consumers based on findings of a deteriorated consumer credit report must also provide the consumer with an account

review risk-based pricing notice. Effective July 21, 2011, the notices must contain the credit score of the consumer and certain information about credit scores if a credit score of the consumer is used in setting the material terms of the credit. Model forms in appendix H to 12 C.F.R. pt. 222 may be used for compliance with risk-based pricing and credit score disclosure requirements. Consumers who receive a risk-based pricing notice must be informed that they are entitled to a free consumer credit report to confirm the report's accuracy or to dispute the accuracy or completeness of any information in the report. As an alternative to providing a risk-based pricing notice, creditors instead may provide all credit applicants with a free credit score and certain required information about credit scores.

§ 2.93 Fair Debt Collection Practices

The federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Practices Act (Tex. Fin. Code §§ 392.001–.404) regulate efforts to collect debts from consumers. Each act requires collection notices to contain information about the debt and how to dispute it. Attorneys are subject to most provisions of each act. However, an attorney collecting a debt on behalf of a client is not considered a “third-party debt collector” under the Texas Debt Collection Practices Act unless the attorney employs nonattorneys who regularly solicit debts for collection or make frequent contact with debtors to collect or adjust debts. Tex. Fin. Code § 392.001(7). Each act also prohibits types of communications that might be considered harassment. Creditors and debt collectors usually have the right to collect on a debt from the assets of a decedent's estate but, effective August 29, 2011, are prohibited from contacting relatives of a deceased debtor, other than a spouse or legal representative of the estate, who may lack either the authority to pay the debt from the decedent's estate or the legal

obligation to pay the debt. *See* 76 Fed. Reg. 44,915 (July 27, 2011). Trustees and substitute trustees are not considered debt collectors. Tex. Prop. Code § 51.0075(b).

§ 2.94 Fair Housing

The federal Fair Housing Act (42 U.S.C. §§ 3601–3631) and the Texas Fair Housing Act (Tex. Prop. Code §§ 301.001–.171) forbid (1) discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, national origin, sex, handicap, or familial status; (2) the refusal to permit modifications of existing premises at the expense of the handicapped person or reasonable accommodations in rules, policies, practices, or services, if necessary to afford handicapped persons equal opportunity for, or full enjoyment of, the use of the premises; and (3) the failure to make special accommodations for handicapped persons in certain multifamily dwellings designed and constructed for first occupancy after March 13, 1991. Regulations setting out the particular handicapped access requirements for new multifamily housing structures can be found at 24 C.F.R. § 100.205. Municipalities may also adopt fair housing ordinances, which may have enforcement procedures and remedies that vary from state and federal law. Tex. Loc. Gov't Code § 214.903.

The Texas Fair Housing Act and the federal Fair Housing Act both prohibit housing that is limited specifically to the elderly and that excludes families and young children, unless certain minimum design and eligibility requirements are met. The state requirements can be found in 40 Tex. Admin. Code §§ 819.121–.135. The federal requirements can be found at 24 C.F.R. §§ 100.300–.308 and 42 U.S.C. § 3607(b)(2).

§ 2.95 Family Law

The Texas Family Code has several provisions that relate to real property transfers, including

enforcement of a division of property (Tex. Fam. Code §§ 9.006–.014); right to future property (Tex. Fam. Code § 9.011); division of property following a decree of divorce (Tex. Fam. Code §§ 9.201–.205); the Uniform Premarital Agreement Act (Tex. Fam. Code §§ 4.001–.010); partition or exchange of community property (Tex. Fam. Code §§ 4.101–.106); rules of marital property liability (Tex. Fam. Code §§ 3.201–.203); homestead rights (Tex. Fam. Code §§ 5.001–.108); child support liens (Tex. Fam. Code §§ 157.311–.331); and prohibition by a temporary restraining order of the transfer, assignment, mortgage, encumbrance, or alienation of any real property of the parties to a dissolution of marriage without the prior authorization of the court (Tex. Fam. Code § 6.501(a)). The Texas Constitution also addresses the issue of separate and community property between spouses. Tex. Const. art. XVI, § 15.

§ 2.96 Federal Lien Registration Act

Texas has adopted the Uniform Federal Lien Registration Act, Tex. Prop. Code §§ 14.001–.007, which governs the procedures for filing notices of federal liens, including tax liens, against real property. See also the section titled “Federal Tax Liens” below.

§ 2.97 Federal Tax Liens

If notice of a junior federal tax lien has been filed at least thirty days before a scheduled foreclosure sale, written notice of the sale under a deed of trust, forfeiture under a contract for deed, or receipt of a deed in lieu of foreclosure must be given, by registered or certified mail or by personal service, to the Internal Revenue Service at least twenty-five days before the transfer. Without this notice, the transfer will be made subject to the federal tax lien. If proper notice is given, the United States is limited to a right to redeem the property within 120 days after the

date of sale. See 26 U.S.C. § 7425(d)(1); 26 C.F.R. §§ 301.7425–1 to –4. See the form of notice to the IRS of nonjudicial sale in chapter 14 in this manual.

§ 2.98 Fences and Gates

The Texas Agriculture Code sets out certain requirements for cleared and cultivated lands, including the maintenance of fences of adequate substance and size, the minimum interspersing and sizes of gates located in such fence lines, and the removal of boundary line fences or damages to them. Tex. Agric. Code ch. 143.

The Texas Transportation Code regulates fence setback, height, and visibility requirements for fences located on land adjacent to a road or highway in the state highway system and in certain municipalities. Tex. Transp. Code § 250.001.

The Texas Local Government Code requires emergency gate access in multiunit housing complexes located outside municipal boundaries. Tex. Loc. Gov’t Code §§ 352.1145–.115. A county may also require a multiunit housing project within its jurisdiction to have easily identifiable addresses on each building. Tex. Loc. Gov’t Code § 352.116.

§ 2.99 Financing Statement, Fraudulent Filing

The circumstances under which a party is considered to have fraudulently filed a financing statement and the penalties for doing so are addressed in Tex. Bus. & Com. Code § 9.5185. See also the section titled “Fraudulent Filings” below.

Certain financing statements filed by an inmate or inmate’s representative are presumptively fraudulent. For restrictions on filing financing statements by such parties, refer to Tex. Civ.

Prac. & Rem. Code §§ 12.001–.007 and Tex. Gov't Code §§ 51.901, 405.021.

§ 2.100 Fixtures

A record of a mortgage or other interest in real property is effective as a financing statement against fixtures if the requirements of Tex. Bus. & Com. Code § 9.502(c) are met. The priority of fixture filings is addressed in Tex. Bus. & Com. Code § 9.334. There is also an interaction between personal property leases and fixtures that should be noted. *See* Tex. Bus. & Com. Code § 2A.309. Mechanic's and materialman's liens on removable improvements, including fixtures, take priority over a deed-of-trust lien even if the deed of trust was recorded before the inception of such liens. *See* Tex. Prop. Code § 53.123; *see also First National Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974).

§ 2.101 Flood Insurance

The National Flood Insurance Act of 1968, the Flood Disaster Protection Act of 1973, and the National Flood Insurance Reform Act of 1994, 42 U.S.C. §§ 4001–4129, provide flood, mudslide, and flood-related erosion insurance protection to property owners. In specified flood-prone areas, local governments are required to enforce special land use and building restrictions to minimize flood damage. If a loan secured by improved real estate in such an area is made, increased, extended, or renewed by a federally insured or federally regulated lender, the buyer must be notified in writing of the flood hazards a reasonable time before closing. 42 U.S.C. § 4104a. Regulations implementing the flood insurance program are found at 44 C.F.R. pts. 59–78. *See also* Tex. Loc. Gov't Code § 561.001 (county's power affecting flood control); Tex. Loc. Gov't Code § 240.901 (participation in federal flood insurance policy); Tex. Water Code ch. 16, subch. I (Flood Control and Insurance Act).

§ 2.102 Forced Sale of Co-Owner's Interest

The forced sale of a co-owner's interest in real property for reimbursement of property taxes is subject to the provisions of Tex. Prop. Code ch. 29.

§ 2.103 Forcible Entry and Detainer

See the section titled 'Eviction' above.

§ 2.104 Foreclosure

Nonjudicial foreclosure sales of real property are governed by Tex. Prop. Code §§ 51.001–.002, 51.0021, 51.0025, 51.0075, 51.009. If a security agreement covers both real and personal property, the personal property may be foreclosed under the Uniform Commercial Code, or both the real and personal property may be foreclosed in accordance with the procedures applicable to the real property. Tex. Bus. & Com. Code § 9.604(a). Certain redemption rights apply to the foreclosure of a condominium unit for failure to pay assessments (*see* Tex. Prop. Code § 82.113(g)), to foreclosures by a property owners association (Tex. Prop. Code ch. 209), to tax foreclosures (Tex. Tax Code §§ 32.06, 34.21), and to foreclosures of property subject to a federal tax lien (26 U.S.C. § 7425(d)). See the section titled 'Federal Tax Liens' above.

Deficiency litigation brought after a nonjudicial foreclosure sale must be filed within two years and is governed by the provisions of Tex. Prop. Code § 51.003. Deficiency litigation brought after a judicial foreclosure sale must be filed within ninety days and is governed by the provisions of Tex. Prop. Code § 51.004. A guarantor may institute litigation to contest the deficiency amount remaining after a judicial or nonjudicial foreclosure sale within ninety days after the later of the date of the foreclosure sale or receipt of actual notice of the foreclosure sale. Tex. Prop.

Code § 51.005. Evictions after a foreclosure sale should be instituted in accordance with Tex. Prop. Code §§ 24.005, 24.0051 and Tex. R. Civ. P. 500-507, 510.1-13.

A deed-of-trust foreclosure may also be permitted under limited circumstances after a deed in lieu of foreclosure has been accepted by the lienholder. Tex. Prop. Code § 51.006.

Litigation against the trustee named in a deed of trust, contract lien, or security instrument is subject to the procedures and defenses in Tex. Prop. Code § 51.007.

Home equity loan foreclosures are governed by Tex. R. Civ. P. 735, 736. The Texas Supreme Court has issued model forms for these foreclosures. See section 14.2:9 in this manual. Expedited foreclosure proceedings may be available to allow the foreclosure of a contract lien under Tex. R. Civ. P. 736. See Tex. Civ. Prac. & Rem. Code § 17.031. In these expedited proceedings, the court has the ability to order mediation before foreclosure. See Tex. Civ. Prac. & Rem. Code § 154.028.

A foreclosure may be subject to the preference provisions of federal bankruptcy law. See 11 U.S.C. § 547(b).

See also the sections titled "Child Support Liens," "Coastal Properties," "Deficiency Litigation after Foreclosure," "Federal Lien Registration Act," and "Federal Tax Liens" above and "Hazardous Waste Liens" and "IRS Information Return (Foreclosures)" below.

§ 2.105 Foreclosure Limitations Concerning FDIC Interests

If the Federal Deposit Insurance Corporation (FDIC) has a property interest, including a security interest, lien, or mortgage interest, in property that would be extinguished through foreclosure, condemnation, partition, or suit to quiet title, foreclosure must be by judicial sale if

the United States is to be a named party or, if the sale is under a junior lien, the government's consent is required to eliminate that interest, with the government having a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien. See 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c). The holder of a superior lien may make a written request to have a junior lien, other than a tax lien, in favor of the United States extinguished if it appears that the sale proceeds will be insufficient to satisfy the government's lien or that the lien has been satisfied by lapse of time or has otherwise become unenforceable. 28 U.S.C. § 2410(e).

§ 2.106 Foreign Entities

Foreign entities are governed by the Texas Business Organizations Code.

§ 2.107 Foreign Ownership of Real Property

Numerous federal and state laws affect real estate conveyances involving foreigners. Tex. Prop. Code § 5.005 provides that aliens have the same real and personal property rights as United States citizens. Land owned by nonresident aliens or foreign governments may not be eligible under some circumstances for appraisal as open-space land or qualified timberland. Tex. Tax Code §§ 23.56, 23.77. The International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101-3108) and the Agricultural Foreign Investment Disclosure Act of 1978 (7 U.S.C. §§ 3501-3508) also affect these types of transactions. Statutes requiring financial institutions to keep records and reports on monetary transactions are at 31 U.S.C. §§ 5311-5332. Internal Revenue Service requirements for submitting returns, as applied to foreigners with "direct investments" in real property interests in the United States, are at 26 U.S.C. § 6039C. Anyone purchasing realty in the United States from a foreign individual or entity must, with few exceptions, withhold 10 percent of the sales

price and report and pay it over to the IRS within twenty days of the date of transfer. *See* 26 U.S.C. § 1445; 26 C.F.R. §§ 1.1445-1 to -11T. A form of nonforeign affidavit addressing the requirements of section 1445 is included in chapter 26 of this manual. See also the section titled 'North American Free Trade Agreement (NAFTA)' below.

§ 2.108 Forfeiture Laws

Real property may be subject to forfeiture if associated with criminal activities under the Controlled Substances Act. *See* 21 U.S.C. § 881(7). The Texas Controlled Substances Act (Tex. Health & Safety Code §§ 481.001-.205) and the Code of Criminal Procedure provisions relating to forfeiture of contraband (Tex. Code Crim. Proc. arts. 59.01-.14) may also apply to such cases. Real property is also subject to forfeiture under the Racketeer Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1963(b)(1).

§ 2.109 Franchising

The Business Opportunity Act applies to the sale of franchises. Tex. Bus. & Com. Code ch. 51.

§ 2.110 Fraudulent Filings

A person commits a criminal offense if, with intent to harm or defraud, he holds a purported lien against real or personal property that is fraudulent and fails to release the lien. Tex. Penal Code § 32.49. Knowingly presenting for filing a financing statement that is forged, contains a material false statement, or is groundless is also a criminal offense. Tex. Penal Code § 37.101. Actions on fraudulent liens can be found in Tex. Gov't Code §§ 51.902, 51.903. Liability and causes of action for fraudulent liens can be found in Tex. Civ. Prac. & Rem. Code ch. 12. Tex. Civ. Prac. & Rem. Code § 12.002(c) provides that mechanic's lien claim-

ants under chapter 53 of the Texas Property Code are not liable under this section unless they act with intent to defraud.

A person commits a criminal offense if he knowingly or intentionally signs and presents for filing or causes to be presented for filing an assumed name certificate if the document indicates that the person signing the document has the authority to act on behalf of the entity for which the document is presented and the person does not have that authority, if the document contains a materially false statement, or if the document is forged. Tex. Bus. & Com. Code § 71.203. See also the section titled "Assumed Names" above.

Certain filings by inmates and their representatives are presumptively fraudulent. For restrictions on filings by such parties, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001-.007 and Tex. Gov't Code §§ 51.901, 405.022.

§ 2.111 Fraudulent Representations and Promises

A person who makes a material false representation or false promise in a transaction involving real property is liable to the person defrauded for actual (and perhaps punitive) damages, attorney's fees, and court and other costs. Tex. Bus. & Com. Code § 27.01. A violation of section 27.01 that relates to the transfer of title to real estate is a false, misleading, or deceptive act or practice as defined by Tex. Bus. & Com. Code § 17.46(b), and any public remedy under Tex. Bus. & Com. Code ch. 17, subch. E, is available for a violation of that section.

§ 2.112 Fraudulent Transfers

Texas has adopted the Uniform Fraudulent Transfer Act in Tex. Bus. & Com. Code ch. 24. The fraudulent conveyance section of federal bankruptcy law is found at 11 U.S.C. § 548.

§ 2.113 **FTC Anti-Holder-in-Due-Course Rule**

Certain consumer credit contracts must comply with the notice requirements of 16 C.F.R. pt. 433. A copy of the relevant notice is included in chapter 20 in this manual.

§ 2.114 **Future Estates**

Future estates are governed by Tex. Prop. Code §§ 5.041–.043.

§ 2.115 **Gifts to Minors Act**

See the section titled “Uniform Transfers to Minors Act” below.

§ 2.116 **Good Faith and Fair Dealing**

No statute or common law imposes a duty of good faith and fair dealing in contracts in Texas, *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983), but contracts governed by the Uniform Commercial Code (UCC) must comply with the good-faith obligation of Tex. Bus. & Com. Code § 1.304. In addition, the obligation of good faith under the UCC cannot be disclaimed by agreement, but contracting parties can define the standards by which the performance of good faith is to be measured, as long as the standards are not manifestly unreasonable. Tex. Bus. & Com. Code § 1.302(b).

§ 2.117 **Grantee’s Address**

No instrument may be recorded unless it contains the mailing address of each grantee or a penalty is paid. Tex. Prop. Code § 11.003(a). However, the failure to comply with this provision will not invalidate the instrument as between the parties, and acceptance by the clerk creates a presumption that the law was satisfied. Tex. Prop. Code § 11.003(b), (c). See the section titled “Recording” below.

§ 2.118 **Group Homes**

See the section titled “Community Homes; Group Homes” above.

§ 2.119 **Guarantors**

A guarantor of a debt has certain rights if a deficiency judgment is obtained after a foreclosure under Tex. Prop. Code § 51.005. Subrogation rights of a surety, including a guarantor, are addressed in Tex. Civ. Prac. & Rem. Code § 43.004.

§ 2.120 **Handicapped Parking**

See the section titled “Americans with Disabilities Act and Related Statutes” above.

§ 2.121 **Hart-Scott-Rodino Antitrust Improvements Act**

Certain large transactions may require advance approval from the Federal Trade Commission under the terms of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

§ 2.122 **Hazardous Waste Liens**

A lien is created in favor of the state under Tex. Health & Safety Code § 361.194 on real property that is the subject of hazardous waste cleanup actions by the state. A federal lien also arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *See* 42 U.S.C. § 9607(l).

§ 2.123 **Historic Structures**

The Texas Historical Commission regulates the listing and preservation of historic structures in the state under the provisions of Tex. Gov’t Code ch. 442. Counties also have certain rights and responsibilities regarding historic structures, sites, and resources. Tex. Loc. Gov’t Code

ch. 318. Liability for adversely affecting historic structures is addressed in Tex. Gov't Code § 442.016. Many counties and local municipalities also have historic or landmark commissions that regulate historic structures in their jurisdiction.

§ 2.124 Home Equity Lending

The homestead may be used to secure 'equity' loans, including equity loans with line of credit terms, reverse mortgages, and the conversion and refinancing of a personal property lien on a manufactured home. Tex. Const. art. XVI, § 50. Section 50(f) permits the refinancing of a home equity loan only with another equity loan or a reverse mortgage. Section 50(a)(6)(F) allows for a home equity line of credit with certain limitations. Equity loans may be made for any purpose and must meet a number of constitutional and statutory requirements. Reverse mortgages must also satisfy the constitutional definition. A lien that does not satisfy a definition under section 50 is not valid against the homestead. Home equity documents for secondary mortgage loans are regulated by the Office of Consumer Credit Commissioner and must be in plain language. Tex. Fin. Code § 341.502. See also the section titled 'Loan Documents' below.

For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

§ 2.125 Home Improvement Contracts

There are notice requirements for home improvement contracts on homestead property (Tex. Prop. Code §§ 53.255, 53.256) and for liens claimed under these contracts (Tex. Prop. Code § 53.254). See the sections titled 'Mechanic's Liens' and 'Residential Construction Liability' below.

§ 2.126 Home Mortgage Disclosure Act of 1975

Financial institutions that make federally related home mortgage loans must compile and make available information to enable citizens and government agencies to determine whether the institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located. *See* 12 U.S.C. §§ 2801–2810; 12 C.F.R. pt. 203.

§ 2.127 Home Solicitations

The Texas Home Solicitations Transaction Act may apply if the consumer's obligation is entered into at a location other than the contractor's place of business. If the Act applies, certain notices are required. Tex. Bus. & Com. Code ch. 601. See form 4-4 in this manual.

§ 2.128 Homesteads

Homestead rights are generally addressed in Tex. Prop. Code ch. 41, § 53.254, and Tex. Const. art. XVI, §§ 50, 51. A homestead can be encumbered only by a purchase-money lien, a lien for improvements (mechanic's lien contracts), equity loans, reverse mortgages, property taxes, owelty rights, the conversion and refinancing of a personal property lien on a manufactured home, and the refinance of a homestead lien, including a federal tax lien. The amount of land that may be claimed as homestead depends on whether it is urban or rural and, if rural, whether it is claimed by a family or a single person. *See* Tex. Prop. Code § 41.002. Absent unusual circumstances or a judicial declaration that one spouse is incapacitated, the consent of both spouses is required if a homestead is sold or encumbered, regardless of whether it is characterized as community or separate property. Tex. Fam. Code §§ 5.001–.102.

Tex. Prop. Code § 41.005 provides for the voluntary designation of a homestead. This section

and Tex. Tax Code §§ 11.13, 11.131, 11.135, 11.41, 11.43(j) set forth the requirements for making such a designation.

Under certain circumstances a lien to recover remediation costs may attach to a homestead. Tex. Health & Safety Code §§ 361.194, 361.197.

The state may be able to recover the costs of nursing home care paid by Medicaid from the homestead of the patient unless certain criteria are met. Tex. Gov't Code § 531.077.

Federal laws may preempt these statutes.

See also the section titled "Home Equity Lending" above, chapter 11 in this manual, and section 20.1:2.

§ 2.129 Hotel Occupancy Taxes

The requirements and parameters of hotel occupancy taxes in the state are described in Tex. Tax Code chs. 156, 351, 352 and Tex. Loc. Gov't Code chs. 334, 335.

§ 2.130 House Trailers

See the section titled "Manufactured Housing" below.

§ 2.131 Impact Fees

The imposition of impact fees is governed by Tex. Loc. Gov't Code ch. 395.

§ 2.132 Implied Title Covenants

Use of the word *grant* or *convey* in a deed creates certain implied warranties unless the deed expressly provides otherwise. Tex. Prop. Code § 5.023.

§ 2.133 Indemnity Agreements

Texas law limits the validity of indemnity agreements in certain situations, including in construction contracts and certain indemnities by a contractor with respect to an architect's negligence and by an architect with respect to an owner's negligence. See section 17.2:4 in this manual.

§ 2.134 Innocent-Purchaser Defense

The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 establishes an innocent-landowner defense to environmental liability under certain circumstances, provided a purchaser has exercised 'all appropriate inquiry' in its investigation of the property. See 42 U.S.C. §§ 9601(35), 9607(b).

§ 2.135 Insurance Claims

A lender must either endorse an insurance claim payment concerning personal property or provide a written statement of the reason it refuses to endorse within fourteen business days after receiving a request for the endorsement. Tex. Ins. Code ch. 557.

§ 2.136 Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act requires filings and disclosures in some circumstances if there are sales or leases of twenty-five or more lots as part of a common promotional plan in interstate commerce or by use of the mail. See 15 U.S.C. §§ 1701-1720. Regulations promulgated under the Act can be found at 24 C.F.R. pts. 1710-1720.

§ 2.137 IRS Information Return (Foreclosures)

Under certain circumstances persons who lend money secured by property and who later

acquire an interest in the property in satisfaction of the debt or have reason to know that the property has been abandoned must file an information return with the Internal Revenue Service and send a statement to the debtor. The information return must be filed by February 28, and the statement to the debtor provided by January 31, of the year following the calendar year in which the lender acquires the property or knows or has reason to know of the abandonment. *See* 26 U.S.C. § 6050J; 26 C.F.R. § 1.6050J-1T.

§ 2.138 Joint Tenancy with Right of Survivorship

A joint tenancy with the right of survivorship may be created by written agreement of property owners. Tex. Est. Code § 111.001. However, a joint tenancy between spouses concerning community property is governed by different statutory requirements. See the section titled "Community Property with Right of Survivorship" above. For both types of property on the death of any cotenant, the practitioner should determine if title companies will accept the result of the joint tenancy agreement or if court adjudication and confirmation of the result is necessary. Adjudication or confirmation of joint tenancy with right of survivorship in community property is discussed at Tex. Est. Code §§ 112.101-106.

§ 2.139 Judgment Liens

A recorded and properly indexed abstract of judgment constitutes a lien on the defendant's real property (including after-acquired property) located in the county in which the abstract is recorded and indexed. Tex. Prop. Code § 52.001. The lien continues for ten years after the abstract is recorded and indexed, but if the judgment becomes dormant during that period for lack of a writ of execution, the lien ceases to exist. Tex. Prop. Code § 52.006. Dormancy and revival of judgments are controlled by Tex. Civ. Prac. & Rem. Code § 34.001. But see the special

provisions for the duration and revival of judgment liens in favor of the state or a state agency at Tex. Prop. Code § 52.006.

Texas has adopted the Uniform Enforcement of Foreign Judgments Act (Tex. Civ. Prac. & Rem. Code ch. 35) and the Uniform Federal Lien Registration Act (Tex. Prop. Code ch. 14). Generally, federal judgments and those of other states are treated like Texas judgments. *See* Tex. Civ. Prac. & Rem. Code ch. 35; Tex. Prop. Code §§ 14.002, 52.007; 28 U.S.C. § 1962. Texas has also adopted the Uniform Foreign Country Money-Judgment Recognition Act, Tex. Civ. Prac. & Rem. Code ch. 36.

An abstract of judgment generally does not constitute a lien against a homestead at the time the abstract is recorded and indexed. Tex. Const. art. XVI, § 50. For special procedures for effecting a release of a judgment lien against the homestead by statutory affidavit by the judgment debtor, refer to Tex. Prop. Code § 52.0012.

For special restrictions on the filing of abstracts of judgment by inmates or their representatives, refer to Tex. Civ. Prac. & Rem. Code §§ 12.001-.007.

§ 2.140 Landfills

An owner or lessee must obtain a permit before development of a tract located over a closed municipal solid waste landfill, file a notice of the former use in the real property records, and give notice to prospective buyers or lessees. Tex. Health & Safety Code §§ 361.531-.539. The statute also requires that certain soil testing be conducted of any tract of one acre or more to determine whether it is located over a closed landfill. Tex. Health & Safety Code § 361.538.

§ 2.141 Landlord-Tenant Liens

There are two types of commercial landlord's liens. One is statutory, arising by operation of

law. The other is contractual, created by agreement of the parties as a provision of the lease. The contractual landlord's lien constitutes a security agreement under article 9 of the Uniform Commercial Code. Tex. Bus. & Com. Code § 9.109(a)(1). The statutory landlord's lien gives the landlord a preference lien on the property of the tenant or subtenant in the building for rent that is due and for rent that is to become due during the current twelve-month period succeeding the date of the beginning of the rental agreement or an anniversary of that date. Tex. Prop. Code § 54.021. The lien is unenforceable for rent on a commercial building that is more than six months past due unless a lien statement is filed with the county clerk. Tex. Prop. Code § 54.022. The statutory lien can be foreclosed only through judicial proceedings; the contractual lien, depending on its terms, may be foreclosed through either judicial or nonjudicial proceedings.

A residential landlord's lien against a tenant's nonexempt personal property is provided in Tex. Prop. Code §§ 54.041–.048. An agricultural landlord's lien is available in Tex. Prop. Code §§ 54.001–.007.

§ 2.142 Landlord-Tenant Relationship

The landlord-tenant relationship is subject to the Texas Property Code. Chapter 91 contains provisions generally applicable to landlords and tenants. Chapter 92 covers residential tenancies. Chapter 93 covers commercial tenancies. Chapter 94 covers manufactured home community tenancies. If a tenant holds over after termination of a lease, the landlord's remedies include, among others, filing a forcible detainer action (Tex. Prop. Code ch. 24) and enforcing a lien against the tenant's property (Tex. Prop. Code chs. 54, 59). Other landlord-tenant related provisions to note are the prohibition against subletting and assignment (Tex. Prop. Code §§ 91.005, 94.057); landlord's duty to mitigate

damages (Tex. Prop. Code §§ 91.006, 94.202); repair provisions (Tex. Prop. Code §§ 92.051–.061, 94.153–.154); landlord's duty to provide a complete copy of the lease (Tex. Prop. Code §§ 92.024, 94.053(b)); security deposits (Tex. Prop. Code §§ 92.101–.110, 93.004–.009, 94.101–.107); late fees (Tex. Prop. Code §§ 92.019, 94.054); rental applications (Tex. Prop. Code §§ 92.351–.355); lockout (Tex. Prop. Code §§ 92.0081, 92.009, 93.002–.003); and utility interruptions (Tex. Prop. Code §§ 92.008, 92.0091, 93.002).

The Texas Property Code addresses the liability of a residential landlord for failure to install smoke alarms (Tex. Prop. Code §§ 92.251–.262) and security devices (Tex. Prop. Code §§ 92.151–.170).

See the sections titled “Abandonment,” “Ad Valorem Taxes,” “Criminal Record Checks of Employees,” and “Landlord-Tenant Liens” above and “Lockouts” and “State of Texas Leases” below. See also chapter 25 in this manual.

§ 2.143 Landowner Liability

Several statutory provisions address landowner liability in different contexts. The Comprehensive Environmental Response, Compensation, and Liability Act governs owner liability for hazardous substances. *See* 42 U.S.C. § 9607. Other state and federal statutes have similar provisions. Statutes concerning limitations on a landowner's liability include Tex. Civ. Prac. & Rem. Code ch. 75 (liability for recreational use, such as hunting and community gardens); Tex. Civ. Prac. & Rem. Code ch. 95 (liability to a contractor); and Tex. Civ. Prac. & Rem. Code § 101.022 (liability of governmental units).

§ 2.144 Landowner's Bill of Rights

The Landowner's Bill of Rights, prepared by the Office of the Attorney General of Texas, is a

statement of the rights a real property owner has if condemnation of his real property is sought. The statement may be viewed at the Attorney General's website at https://www.texasattorneygeneral.gov/files/agency/landowners_billofrights.pdf. The Texas Property Code requires a governmental or private entity with eminent domain authority to provide the Landowner's Bill of Rights statement to the property owner as part of the condemnation process. Tex. Prop. Code § 21.0112. See also the section titled "Condemnation and Eminent Domain" above.

§ 2.145 Landscape Architecture

The business of landscape architecture is regulated under Tex. Occ. Code ch. 1052. The lien of a person who provides landscaping services is addressed in Tex. Prop. Code § 53.021(d).

§ 2.146 Lead-Based Paint Disclosures

In 1992, Congress adopted the Residential Lead-Based Paint Hazard Reduction Act, also known as Title X of the Housing and Community Development Act. The lead-based paint provisions are codified at 42 U.S.C. §§ 4851–4856 (the regulations are published in 40 C.F.R. pt. 745). Sellers and landlords must provide purchasers and tenants of residential properties constructed before 1978 with a "Lead Warning Statement," in the form provided in 42 U.S.C. § 4852d, in large type and on a separate sheet of paper from the contract. The required warning statements, prescribed in 40 C.F.R. § 745.113, are included in chapters 4 (for sales) and 25 (for leases) in this manual. The related state statute is found at Tex. Occ. Code ch. 1955. This law applies to all "child-occupied facilities, including day-care centers and preschool and kindergarten classrooms, occupied by the same child, six years of age or younger, for three hours or more, twice a week.

§ 2.147 Legal Incapacity

A person may lack legal capacity to contract for and deal with real property without the supervision of a guardian appointed under the Texas guardianship statutes, Texas Estates Code title 3, sections 1001.001 to 1356.056. In dealing with a guardian in a real estate transaction, the attorney should carefully review the guardianship order. An incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian. Tex. Est. Code § 1151.001. Additionally, there must be an annual determination whether the guardianship should be continued, modified, or terminated. Tex. Est. Code §§ 1201.051–.054. Tex. Prop. Code ch. 142 addresses the management of property recovered on behalf of a minor or incapacitated person through a suit by a next friend. See also the section titled "Minors" below.

§ 2.148 Letters of Credit

Letters of credit are governed by the provisions of Tex. Bus. & Com. Code ch. 5.

§ 2.149 Libraries

Public libraries are exempt from attachment, execution, or forced sale. Tex. Prop. Code § 43.001.

§ 2.150 License to Carry Handguns

Individuals may obtain a license to carry a handgun. Tex. Gov't Code ch. 411, subch. H. Signs indicating that handguns are prohibited on site are required for certain alcoholic beverage establishments, hospitals, and nursing homes. Tex. Gov't Code § 411.204. Handguns are prohibited as a matter of law for certain other types of private and public properties, including schools, polling places, government offices, racetracks, and secured areas of airports. Tex.

Penal Code § 46.03. The statute does not affect the right of an employer to prohibit handguns on the premises of the business (Tex. Gov't Code § 411.203).

§ 2.151 Life Tenants

The duties of a life tenant of real property are set out in Tex. Prop. Code § 5.009.

§ 2.152 Limitations

An action to recover real property conveyed by an instrument containing certain technical defects must be brought within two years of the recordation of the instrument. Tex. Civ. Prac. & Rem. Code § 16.033(a). An action to foreclose a real property vendor's lien or deed-of-trust lien must be brought and a nonjudicial sale must be completed within four years after the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035. A suit to foreclose a mechanic's lien must be commenced within two years after the last day for filing the affidavit or one year after completion, termination, or abandonment of the work under the original contract, whichever is later. For a claim arising from a residential construction project, suit must be commenced within one year after the last day for filing the lien affidavit or within one year after completion, termination, or abandonment of the work under the original contract, whichever is later. Tex. Prop. Code § 53.158. A suit on a deficiency judgment after a real property foreclosure must be brought within two years of the foreclosure sale. Tex. Prop. Code § 51.003.

The limitations periods on actions on negotiable instruments are governed by Tex. Bus. & Com. Code § 3.118. The limitations periods on actions on nonnegotiable instruments are governed by Tex. Civ. Prac. & Rem. Code §§ 16.003(a), 16.004(a)(3).

See also the section titled "Adverse Possession" above.

§ 2.153 Limited Liability Companies

Limited liability companies are governed by the Texas Business Organizations Code generally and by title 3 more specifically. Tex. Bus. Orgs. Code §§ 101.001–.622. See also the sections titled "Business Organizations Code," "Corporations," and "Foreign Entities" above and "Nonprofit Corporations" and "Partnerships" below.

§ 2.154 Limited Liability Partnerships

Limited liability partnerships are governed by the Texas Business Organizations Code generally and by title 4 more specifically. *See* Tex. Bus. Orgs. Code §§ 152.801, 153.351. In Texas, a limited liability partnership is either a preexisting general partnership or a preexisting limited partnership that registers with the secretary of state as a limited liability partnership and complies with other statutory requirements.

Foreign limited liability partnerships are governed by Tex. Bus. Orgs. Code § 152.901 and are subject to Tex. Bus. Orgs. Code § 2.101. Texas law does not define what constitutes "transacting business in Texas" for the purposes of the requirement of Tex. Bus. Orgs. Code § 152.905 that "[b]efore transacting business in this state, a foreign limited liability partnership must file an application for registration in accordance with this section and Chapters 4 and 9." Tex. Bus. Orgs. Code § 9.251, however, does contain a list of activities not constituting transacting business in Texas. *See also* Tex. Bus. Orgs. Code § 153.103. See the section titled "Foreign Entities" above.

§ 2.155 Liquidated Damages Clauses

Liquidated damages provisions regarding the sale of goods must comply with the requirements of Tex. Bus. & Com. Code § 2.718.

§ 2.156 Lis Pendens

A party seeking affirmative relief in an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property may file notice of the pending action with the clerk of the county in which the land is located.

A form of lis pendens is available as form 26-35 in this manual. The person filing such a notice must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice no later than three days after the notice is filed. Tex. Prop. Code § 12.007(d). Under certain conditions and on motion of a party, the court may cancel the lis pendens anytime during the proceeding. Tex. Prop. Code § 12.008. Under certain other conditions for lis pendens filed after September 1, 2009, and on motion of a party, the court must expunge the notice of lis pendens. Tex. Prop. Code § 12.0071. A recorded lis pendens for which no certified copy of an order expunging the notice of lis pendens has been recorded constitutes notice of the litigation. Tex. Prop. Code § 13.004.

§ 2.157 Loan Documents

Tex. Bus. & Com. Code § 26.02 requires a financial institution to give a statute-of-frauds type of notice for loans exceeding \$50,000 and to post notices informing borrowers of the provisions of section 26.02. Construction mortgages should clearly identify that they are securing a construction loan to take advantage of the priority provisions of Tex. Bus. & Com. Code § 9.334(h). See also Tex. Gov't Code ch. 83, which prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other documents affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or is qualified under one of the other listed exemptions. See also the section titled 'Unauthorized Preparation of Real Estate Documents' below.

The Texas Finance Code provides rules relating to loan documents used in home equity loans, which are administered by the Office of Consumer Credit Commissioner. Tex. Fin. Code § 341.502. For a more extensive discussion of the issues in home equity lending, see chapter 11 in this manual.

The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58.

Certain loan documents transferring an interest in real property to or from an individual are required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

Several other sections also address the preparation of loan documents, including 'Deeds of Trust' and 'Foreclosure' above and 'Master Form Mortgage,' 'Mechanic's Liens,' 'Truth in Lending,' and 'Usury' below.

§ 2.158 Lockouts

Lockouts of residential tenants are governed by Tex. Prop. Code §§ 92.0081, 92.009. Commercial tenant lockouts are governed by Tex. Prop. Code §§ 93.002–.003.

§ 2.159 Lost or Found Property

See the sections titled 'Abandonment' and 'Escheat' above.

§ 2.160 Low-Income Affordable Housing Tax Credits

See the section titled 'Affordable Housing Investments' above.

§ 2.161 **Manufactured Housing**

The Texas Manufactured Housing Standards Act (TMHSA) regulates manufactured housing through the Texas Department of Housing and Community Affairs. Tex. Occ. Code ch. 1201. Title to manufactured homes, the perfection and release of manufactured housing liens, and the cancellation of manufactured housing titles are governed by the TMHSA. Both the TMHSA and the Texas Property Code address the question of when a manufactured home is personal property and when it is real property. Tex. Prop. Code § 2.001, Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222. For a more extensive discussion of manufactured housing, see section 5.15:6 in this manual.

Property Code chapter 63 clarifies the status of a lien on a manufactured home when the manufactured home is converted to real property. Tex. Prop. Code ch. 63. Property Code chapter 94 regulates lease agreements in manufactured-home communities entered into on or after April 1, 2002. Tex. Prop. Code ch. 94.

§ 2.162 **Master Form Mortgage**

Texas permits the filing of a master form mortgage under Tex. Prop. Code § 12.009. A master assignment of financing statements is permitted under the terms of Tex. Bus. & Com. Code § 9.514(d).

§ 2.163 **Mechanic's Liens**

Mechanic's liens, which may arise in favor of a variety of contractors, workers, and those providing material for construction or for improvements to property, may be either constitutional or statutory. The constitutional lien derives from Tex. Const. art. XVI, § 37. Statutory liens derive from Tex. Prop. Code ch. 53. See chapters 20 and 21 in this manual.

The mechanic's lien procedures and rights may also apply to persons who perform labor or materials for the demolition of a structure under a written contract. Tex. Prop. Code § 53.021(e).

On public construction projects, a mechanic's lien cannot be established against public buildings, structures, or grounds, but subcontractors may have a lien on money, bonds, or warrants due the contractor for the improvements if the prime contract does not exceed \$25,000 if with a governmental entity other than a municipality or joint board created under the Transportation Code or \$50,000 if with a municipality or joint board. Tex. Prop. Code § 53.231. The McGregor Act, Tex. Gov't Code ch. 2253, establishes procedures for the protection of performance- and payment-bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor on a public construction project. The Miller Act, as amended by the Construction Industry Payment Act of 1999, pertains to bonding requirements for construction, alteration, or repair of federal works. 40 U.S.C. §§ 3131–3134.

Certain mechanic's lien documents transferring an interest in real property to or from an individual may be required to include the confidentiality notice set out in Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 2.164 **Military Installations**

See the section titled 'Outdoor Lighting' below.

§ 2.165 **Military Personnel**

The Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act) requires that, under some circumstances, enforcement of certain civil liabilities and legal proceedings, including foreclosures, be suspended while armed forces personnel are on active duty. 50 U.S.C. §§ 3901–4043. Delin-

quency dates for property taxes may also be extended. Tex. Tax Code § 31.02.

Texas Property Code section 51.015 also affords certain protections to military servicemembers—during active duty military service and during the nine months thereafter—against collection actions for enforcement of real estate loans secured by the servicemember's dwelling and made to that servicemember before his or her active duty military service commenced. Tex. Prop. Code § 51.015.

Notices of special rights afforded servicemembers are required in suits to evict (Tex. Prop. Code § 24.0051(d)), in the sale of real property under a power of sale or other contractual lien (Tex. Prop. Code § 51.002(i)), and in the notice that must be provided before certain enforcement actions by property owners associations (Tex. Prop. Code § 209.006(b)). Leases that do not contain notice of a servicemember's right to terminate may lead to the release of liability for unpaid rent. Tex. Prop. Code § 92.017(g).

§ 2.166 Mineral Rights

Chapter 92 of the Texas Natural Resources Code provides procedures to designate drill sites on land proposed to be subdivided. Tex. Nat. Res. Code §§ 92.001–.007. Tex. Nat. Res. Code § 81.0523 preempts the regulation of oil and gas operations by municipalities and other political subdivisions. A municipality or other political subdivision may not enact or enforce an ordinance that bans, limits, or otherwise regulates oil and gas operations within the boundaries or extraterritorial jurisdiction of the municipality or other political subdivision, except for an ordinance that (1) regulates only aboveground activities, (2) is commercially reasonable, (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator, and (4) is not otherwise preempted by state or federal law. Tex. Nat. Res. Code § 81.0523(b), (c). An ordinance is considered *prima facie* to be

commercially reasonable if the ordinance has been in effect for at least five years and has allowed oil and gas operations to continue during that time period. Tex. Nat. Res. Code § 81.0523(d).

§ 2.167 Mini-Storage Warehouses

See the section titled 'Self-Service Storage Facilities' below.

§ 2.168 Minors

Minors do not have the legal capacity to enter into contracts. The age of majority is eighteen years. Tex. Civ. Prac. & Rem. Code §§ 129.001, 129.002. Marriage removes the disabilities of minority. Tex. Fam. Code § 1.104. Under certain circumstances, the disabilities can be judicially removed. Tex. Fam. Code ch. 31. Unless the disability is removed by marriage or by court decree, a guardian must be appointed under terms of the Texas Estates Code to administer real property owned by the minor. Tex. Est. Code §§ 1001.001–.056. Under certain conditions, a parent may petition the court for an order to sell the minor's property instead of having a guardian appointed. Tex. Est. Code § 1351.001. A next friend may also manage property of a minor recovered in a lawsuit if the minor has no guardian. Tex. Prop. Code § 142.001. See also the sections titled "Legal Incapacity" above and "Uniform Transfers to Minors Act" below.

§ 2.169 Mobile Homes

See the section titled 'Manufactured Housing' above.

§ 2.170 Mold Assessors and Remediators

Mold remediation and other activities that affect indoor air quality, such as mold assessments, are

governed by chapter 1958 of the Texas Occupations Code. Tex. Occ. Code ch. 1958.

Sections 544.301–.305 of the Insurance Code prohibit certain underwriting decisions based on previous mold claims or damages and applies to any insurer that writes residential property insurance in Texas. Tex. Ins. Code §§ 544.301–.305. An insurer may not make an underwriting decision based on previous mold claims or damages if mold remediation was performed on the property and either a certificate of mold remediation was issued or a subsequent inspection by an independent assessor or adjustor revealed no evidence of mold damage. Tex. Ins. Code § 544.303.

§ 2.171 Money Laundering

See the section titled ‘Cash Proceeds’ above.

§ 2.172 Mortgage Electronic Registration Systems (MERS)

For all practical purposes, Mortgage Electronic Registration Systems, Inc. (MERS) is nothing more than a “book entry system” or “utility” for the real estate finance industry that is intended to eliminate the need for executing and recording assignments when mortgage loans and related servicing rights are sold in the secondary market. MERS is an electronic registration system that tracks the bundle of rights that are transferred when the various beneficial interests associated with real estate loans are bought and sold on the secondary market like stocks and bonds and commodities like coffee, gold, and oil futures.

To invoke the protections of the real property recording statutes in the official land title records, MERS acts as the mortgagee of record for each security instrument that secures a loan registered on the MERS System. Security instruments must contain particular language naming

MERS as original mortgagee. MERS maintains a web-based, electronic book entry registration system that tracks the beneficial ownership and servicing rights associated with any registered real estate loan. The mortgage servicer, who is responsible for all the daily administrative details required to service a borrower’s loan, inputs all loan level data and changes into MERS.

MERS does not buy, sell, transfer, or assign real estate loans and is not the owner, holder, or servicer of the beneficial ownership and servicing rights associated with loans registered on MERS. As long as a loan is registered on the MERS System, MERS is the mortgagee of record in the real property records, and no assignment or transfer of lien is necessary, regardless of the number of times a registered loan is bought or sold.

MERSCORP, Inc., is a private corporation owned and sponsored by the Mortgage Bankers Association of America; the American Land Title Association; the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; the Department of Veterans Affairs; the U.S. Department of Housing and Urban Development; nearly every Tier-1 lender; the major title insurance underwriters; and the three major rating agencies for mortgage-backed securities, Standard & Poor’s, Moody’s Investors Service, and Fitch Ratings.

§ 2.173 Mortgage Fraud

Intentionally or knowingly making a materially false or misleading written statement to obtain a mortgage loan is a violation of section 32.32 of the Texas Penal Code. Punishment ranges from a class C misdemeanor to a first-degree felony. Intentionally or knowingly making a materially false or misleading written statement in providing an appraisal of real property for compensation also violates section 32.32 of the Texas Penal Code and is subject to the same range of

punishment. Tex. Penal Code § 32.32(b-1). Venue for prosecution for mortgage fraud is governed by Tex. Code Crim. Proc. art. 13.271.

Lenders, mortgage bankers, and licensed mortgage brokers must provide all applicants for a home loan a written notice of penalties for making false or misleading written statements containing the promulgated language set out in section 343.105 of the Texas Finance Code, or substantially similar language, at the time of loan closing. See form 10-19 in this manual. The notice must be a separate document in at least a fourteen-point typeface. Borrowers must sign the notice and verify that all statements and representations contained in their written loan applications regarding their identity, employment, annual income, and intent to occupy the residential real property securing the home loan are true and correct as of the date of loan closing. The failure to provide the notice in compliance with the statute expressly does not affect the validity of the home loan or its enforceability by any holder.

§ 2.174 Mortgage Loan Originators

Use of the term *mortgage broker* has been discontinued for purposes of state licensing and registration of mortgage loan originators to conform to terminology established by the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180. Companies engaged in or conducting the business of originating residential mortgage loans (mortgage companies) must be licensed under and comply with the Residential Mortgage Loan Company Licensing and Registration Act while individuals must be licensed under and comply with the Mortgage Banker Registration and Residential Mortgage Loan Originator License Act, administered by the Department of Savings and Mortgage Lending. Tex. Fin. Code chs. 156, 157. An applicant must designate an individual licensed as a residential mortgage loan originator under chapter 157 of the Texas Finance Code

as the company's qualifying individual as required by sections 156.2041 through 156.2044 of the Texas Finance Code.

An individual licensed under chapter 157 may not be licensed or act as a residential loan originator unless the individual enrolls in the Nationwide Mortgage Licensing System and Registry (or is sponsored by an appropriate entity), obtains a valid unique identifier under that system, and otherwise complies with the applicable requirements of chapter 180 of the Texas Finance Code and rules adopted thereunder by the Texas Finance Commission to carry out the intent of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101-5116.

A licensed residential mortgage loan originator is not required to obtain a regulated loan license under chapter 342 of the Texas Finance Code to make, negotiate, or transact a secondary mortgage loan subject to that chapter. Tex. Fin. Code § 342.051. Mortgage bankers, as defined in section 156.002(8) of the Texas Finance Code, are exempt from chapter 156 if registered under chapter 157. Depository institutions, their regulated subsidiaries, and entities regulated by the Farm Credit Administration are exempt from chapter 156. Tex. Fin. Code § 156.202.

Residential mortgage loan originator compensation, including the practice by creditors of paying mortgage loan originators a yield-spread premium based on the interest rate of a residential mortgage loan or paying compensation based on loan terms other than the principal loan amount, is restricted under amendments to Regulation Z, 12 C.F.R. § 226.36 (Truth in Lending).

Entities and individuals exempt from the licensing requirement are listed in Tex. Fin. Code §§ 156.202(a-1), 157.0121, 180.003(a).

Residential mortgage companies and loan originators must comply with rules and regulations

adopted by the Finance Commission. 7 Tex. Admin. Code ch. 80. The commissioner is authorized to enforce compliance with the subject licensing regulations through powers granted under chapters 156 and 157 of the Texas Finance Code. Unlicensed activity is punishable as a class B misdemeanor.

§ 2.175 **Municipal Utility Districts (MUDs)**

Municipal utility districts are governed by the provisions of Tex. Water Code chs. 49, 54, 59. See also the section titled "Utility District Disclosures" below.

§ 2.176 **Naturally Occurring Radioactive Materials (NORM)**

The Texas Railroad Commission regulates NORM waste resulting from oil and gas operations. Tex. Health & Safety Code § 401.415.

§ 2.177 **Navigable Streams**

Survey lines may not cross navigable streams, which are defined as those retaining "an average width of 30 feet from the mouth up." Tex. Nat. Res. Code §§ 21.001(3), 21.012(b). See also Tex. Rev. Civ. Stat. art. 5414a, which controls the validity of patents to and awards of land lying across or partly across watercourses, navigable streams, beds, and abandoned beds of watercourses. See also the section titled "Watercourse Forming County Boundary" below.

§ 2.178 **Nonprofit Corporations**

Nonprofit corporations are governed by the Texas Business Organizations Code generally and by chapter 22 more specifically. Tex. Bus. Orgs. Code §§ 22.001–.409. The sale, lease, exchange, or mortgage of property belonging to a domestic entity is controlled by Tex. Bus.

Orgs. Code § 10.251. Most property owners associations that are incorporated are organized as nonprofit organizations. See Tex. Prop. Code chs. 81, 82. See also the sections titled "Business Organizations Code," "Corporations," "Foreign Entities," and "Limited Liability Companies" above and "Partnerships" and "Uniform Unincorporated Nonprofit Association Act" below.

§ 2.179 **Non-Real Estate Taxes Affecting Real Estate**

The purchaser of a business or stock of goods must withhold from the purchase price adequate funds to pay taxes that may be owed by the seller (for example, unpaid hotel, parking revenue, sales, and corporate franchise taxes of the seller) until the seller provides a receipt of payment from the comptroller. Tex. Tax Code § 111.020. See also the section titled "Hotel Occupancy Taxes" above.

§ 2.180 **North American Free Trade Agreement (NAFTA)**

Certain provisions of the North American Free Trade Agreement (NAFTA) may affect real property and finance transactions. The text of NAFTA is available on the NAFTA Secretariat's website at <https://www.nafta-sec-alena.org>. Article 1105 of NAFTA requires that each treaty party provide "fair and equitable treatment and full protection and security" to investments of investors from the other party countries. See also the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in scattered sections of U.S.C.). See also the section titled "Foreign Ownership of Real Property" above.

§ 2.181 **Notarial Seals, Out-of-State**

The failure of a non-Texas notary public to attach an official seal to a document will not render the document invalid if a seal is not

required in the jurisdiction in which the document is acknowledged. Tex. Prop. Code § 12.001, Tex. Civ. Prac. & Rem. Code § 121.004. The secretary of state annually compiles a list of states that require notarial seals to validate the certificate of acknowledgment and will make the list available to all county clerks by January 1 of each year. Tex. Gov't Code § 405.019. See also the section titled "Acknowledgments" above.

§ 2.182 Notaries Public

Notary qualifications and requirements are found in Tex. Gov't Code ch. 406. Notaries may not represent or imply that they are attorneys. Tex. Gov't Code § 406.017. The notary's book is public information and must be available for inspection at reasonable times. Tex. Gov't Code § 406.014(b). By administrative rule, however, notaries public may not record in the public record the identification number on the signer's identification card used. 1 Tex. Admin. Code § 87.40. Notaries may certify copies of documents not recordable in the public records and may take depositions. Tex. Gov't Code § 406.016. Application of a printed seal by a notary public is not required on an electronically transmitted certificate of acknowledgment if the same information as contained in the seal is set forth. Tex. Civ. Prac. & Rem. Code § 121.004(d); Tex. Gov't Code § 406.013(d). See the section titled "Acknowledgments" above.

§ 2.183 Nuisance

Statutory provisions relating to common and public nuisances are in Tex. Civ. Prac. & Rem. Code ch. 125, Tex. Loc. Gov't Code ch. 214, and Tex. Health & Safety Code chs. 342, 343. Many municipalities have local ordinances relating to nuisances.

§ 2.184 Open-Space Exemption

The law governing the appraisal of "qualified open-space land" for ad valorem taxes is found in Tex. Tax Code §§ 23.51–.59. The Texas Tax Code prohibits a lender from requiring a borrower to waive its right to an agricultural or open-space tax exemption as a condition to a loan or to agree to pay the lender for any losses suffered by the lender due to change of use and loss of this exemption. Tex. Tax Code §§ 23.47, 23.58. See also the section titled "Ad Valorem Taxes" above.

§ 2.185 Outdoor Lighting

Astronomical Observatories: The commissioners court of a county within fifty-seven miles of the McDonald Observatory must adopt orders regulating the installation and use of outdoor lighting in any unincorporated territory and adopt orders establishing standards relating to outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. The commissioners court of a county within five miles of the George Observatory or the Stephen F. Austin Observatory may restrict artificial outdoor lighting in any unincorporated territory of the county and establish standards relating to artificial outdoor lighting in proposed subdivisions to minimize the interference with observatory activities. Tex. Loc. Gov't Code §§ 240.031–.035. A municipality must regulate by ordinance the installation and use of outdoor lighting to protect against its use in a way that interferes with scientific astronomical research of an observatory. Tex. Loc. Gov't Code §§ 229.051–.053. A municipality must by ordinance establish standards relating to proposed subdivisions to minimize interference with observatory activities. Tex. Loc. Gov't Code §§ 229.054–.055.

Military Installations: Sections 240.032 and 240.0325 of the Texas Local Government Code authorize the commissioners court of a county

with a population of more than one million that has at least five United States military bases and any county adjacent to that county that is within five miles of a United States Army installation, base, or camp, on request of the commanding officer, to adopt orders regulating the installation and use of outdoor lighting within five miles of the installation, base, or camp in unincorporated territory of the county. There are exceptions for installations in place before the effective date of the order for electric utilities, electric cooperatives, gas utilities, surface coal mining, telecommunications providers, and manufacturing facilities required by the Texas Commission on Environmental Quality to hold a permit and for tracts of land used as a single residence outside the boundaries of a private subdivision, tracts of land maintained for agricultural use, activity that takes place on a tract of land maintained for agricultural use, structures or related improvements located on a tract of land maintained for agricultural use, or a correctional facility operated by or under a contract with the Texas Department of Criminal Justice. Tex. Loc. Gov't Code §§ 240.032, 240.0325.

§ 2.186 Outdoor Signs

The Civil Practice and Remedies Code addresses the subject of trespass by outdoor signs in Tex. Civ. Prac. & Rem. Code §§ 80.001–.003. Municipalities are authorized to relocate, reconstruct, and remove signs under Tex. Loc. Gov't Code ch. 216. The owner of a sign may be entitled to be compensated for the costs associated with the relocation, reconstruction, or removal. Tex. Loc. Gov't Code § 216.003. However, a municipality cannot regulate a private landowner's right to put political signage on the landowner's property. Tex. Loc. Gov't Code § 216.903. The Texas Highway Commission regulates highway signs under Tex. Transp. Code chs. 391–395, while recognizing the authority of cities and counties to regulate highway signs in certain circumstances.

§ 2.187 Parking

A neighborhood may petition a county or municipality to post signs prohibiting the overnight parking of commercial vehicles by complying with Tex. Transp. Code § 545.307. See the section titled 'Towing of Motor Vehicles' below.

§ 2.188 Parks and Recreational Projects

Cities and towns are restricted in certain instances from selling or encumbering parks and other recreational projects without authorization by a majority vote of qualified voters. Tex. Gov't Code §§ 1508.001–.010.

§ 2.189 Partition

Partition of real property is permitted under Tex. Prop. Code ch. 23 and Tex. R. Civ. P. 756–771. Unless waived by the parties, a nonexclusive access easement shall be granted on partition of property under chapter 23. Tex. Prop. Code § 23.006.

§ 2.190 Partnerships

Partnerships are governed generally by title 4 of the Texas Business Organizations Code. Chapters 151 and 154 apply to both general and limited partnerships. Chapter 152 applies to general partnerships, and chapter 153 applies to limited partnerships.

The sale, lease, exchange, or mortgage of property belonging to a domestic entity is controlled by Tex. Bus. Orgs. Code § 10.251. Every partner is an agent for the partnership, and any act done in the usual course of business, including the execution of instruments, binds the partnership and the partners. Tex. Bus. Orgs. Code §§ 152.301–.302.

If a partner conveys partnership real property without authority and the transaction is not in the usual course of business, the partnership may recover the property from the grantee but not from a bona fide purchaser from the grantee for value without knowledge of the lack of authority. Tex. Bus. Orgs. Code § 152.302(c).

Title to partnership property for general partnerships is governed by Tex. Bus. Orgs. Code § 152.102.

See also the sections titled 'Business Organizations Code, 'Corporations, 'Foreign Entities,' "Limited Liability Companies," and "Nonprofit Corporations' above.

§ 2.191 Personal Property Leases

Personal property leases are governed by the provisions of Tex. Bus. & Com. Code ch. 2A. In addition, Tex. Bus. & Com. Code ch. 92 addresses rental-purchase agreements of consumer personal property.

§ 2.192 Pest Control

The Texas Structural Pest Control Act is found in Tex. Occ. Code ch. 1951.

§ 2.193 Pipeline Easements

See the section titled "Easements, Pipeline" above.

§ 2.194 Plats

See the section titled 'Subdivisions' below.

§ 2.195 Pool-Yard Enclosures

Pools in multifamily residential projects must have enclosures that comply with Tex. Health & Safety Code ch. 757. Municipalities also may adopt ordinances governing pool enclosures. Tex. Loc. Gov't Code § 214.101.

§ 2.196 Powers of Attorney

See the section titled 'Durable Powers of Attorney' above.

§ 2.197 Private Mortgage Insurance Notice

Lenders that require borrowers to purchase mortgage guaranty insurance must provide annually a prescribed statutory notice about the right to cancel. Tex. Ins. Code § 3502.201.

§ 2.198 Private Property Rights

Private real property owners have certain rights under state law to challenge state and local regulations and governmental actions that result in a taking of their property. Tex. Gov't Code ch. 2007. Governmental entities are required to prepare a written takings impact assessment of proposed governmental action that may result in a taking. Failure to do so may render the action void. Tex. Gov't Code ch. 2007. Private real property owners have certain rights to reacquire property taken through eminent domain. Tex. Prop. Code § 21.023. Before a governmental entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must provide a landowner's bill of rights statement provided by Tex. Gov't Code § 402.031. Tex. Prop. Code § 21.0112.

See also the sections titled 'Condemnation and Eminent Domain' and 'Landowner's Bill of Rights' above and 'Vested Land Use Rights' below.

§ 2.199 Property Inspection

The licensing of property inspectors is addressed in the Real Estate License Act. Tex. Occ. Code ch. 1102. Property inspections may be conducted, in part, by electricians, plumbers,

carpenters, and others, such as engineers, in their respective fields.

§ 2.200 Property Owners Associations

The Texas Residential Property Owners Protection Act applies to residential subdivisions that are subject to restrictions that authorize a property owners association to collect regular or special assessments and that require mandatory membership in the association. Tex. Prop. Code ch. 209. The Act also regulates the foreclosure of an assessment lien and provides a right of redemption after foreclosure. Tex. Prop. Code §§ 209.009–.011. In addition, the Property Code affords certain rights to property owners associations in cities or counties that meet various specified minimum population requirements to amend, extend, or supplement deed restrictions and to establish assessment lien mechanisms. Tex. Prop. Code chs. 201, 204–206. The statute also sets out certain other statutory powers of property owners associations. Property owners associations are subject to the state open meetings and open records laws in very limited circumstances. Tex. Gov't Code §§ 551.0015, 552.0036. Property owners associations are required to deliver a resale certificate to owners, purchasers of a property in a subdivision, or title companies on demand. The resale certificate must include information relevant to the specific property as well as to the subdivision as a whole. Tex. Prop. Code ch. 207.

Condominium property owners associations are not governed by chapters 207 and 209; rather, condominiums formed after December 31, 1993, are governed by Texas Property Code chapter 82. Condominiums formed before January 1, 1994, are generally governed by Texas Property Code chapter 81 and selected provisions of chapter 82 set forth in section 82.002(c), unless they amend the condominium declaration and elect to be governed solely by all of chapter 82.

§ 2.201 Property Tax Consultants

Chapter 1152 of the Texas Occupations Code provides for the registration of property tax consultants. A property tax consultant is a person who performs or supervises the performance of property tax consulting services for compensation. Property tax consulting services means preparing for another person a rendition statement or property record, representing another person in a property tax protest, consulting or advising another person concerning the preparation of a rendition statement or property report or acting on behalf of another person in a protest under the Tax Code, negotiating or entering into an agreement with an appraisal district on behalf of another person, or acting as the agent of a property owner in connection with certain property tax matters. Tex. Occ. Code §§ 1152.001–.251.

§ 2.202 Property Tax Loans

With certain exceptions, a person engaging in the business of making, transacting, or negotiating property tax loans, or a person making property tax loans who contracts for, charges, or receives, directly or indirectly, a charge, including interest, compensation, consideration, or any other amount authorized under the statute, must be licensed by the Texas Consumer Credit Commissioner. Tex. Fin. Code ch. 351. The lender must provide the commission records to investigate compliance with the laws, an audit of net assets, and access to the lender's place of business for inspection. The commission is also authorized to prescribe filing documents necessary when a property tax lender pays property taxes for another person. Tex. Tax Code § 32.06.

§ 2.203 Racial Discrimination

See the sections titled "Discrimination" and 'Fair Housing' above.

§ 2.204 Real Estate Appraisers

See the section titled 'Appraisers' above.

§ 2.205 Real Estate Investment Trusts (REITs)

Real estate investment trusts are governed by the Texas Business Organizations Code generally and by title 5 more specifically. Tex. Bus. Orgs. Code §§ 200.001–.503.

§ 2.206 Real Estate License Act

The Real Estate License Act, Tex. Occ. Code ch. 1101, authorizes the Texas Real Estate Commission to regulate the actions of brokers, salespersons, real estate inspectors and appraisers, and others. It also contains numerous other provisions relating to real estate transactions involving brokers or salespersons.

§ 2.207 Real Estate Settlement Procedures Act (RESPA)

The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, and its implementing Regulation X, 12 C.F.R. pt. 1024, apply to mortgage loan transactions that are secured by a lien on residential real property designed principally for occupancy by one to four families and that otherwise meet the definition of a 'federally related mortgage loan' set out in 12 C.F.R. § 1024.2. Certain loans such as business purpose loans and various construction loans with a term of less than two years are exempt from coverage. 12 C.F.R. § 1024.5. On July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203, 124 Stat. 1376) mandated that all rulemaking and enforcement authority for RESPA and Regulation X be transferred to, and consolidated within, the Consumer Financial Protection Bureau (CFPB). In accordance with the Dodd-Frank Act, and in an attempt to provide clear and accurate disclosures to consum-

ers, the CFPB combined the disclosure requirements of RESPA and TILA into new forms for certain loan transactions (TILA-RESPA Integrated Disclosures or 'TRID'), effective on October 3, 2015. See the final rule on the TRID, 78 Fed. Reg. 79,730 (Dec. 31, 2013). The initial truth-in-lending disclosure and RESPA good-faith estimate (GFE) forms have combined into the new loan estimate (LE) form that must (1) provide the applicant with a good-faith estimate of credit costs and transaction terms, (2) be in writing and contain the prescribed information in 12 C.F.R. § 1026.37 and appendix H-24, and (3) satisfy timing and delivery requirements. The final truth-in-lending disclosure and RESPA HUD-1 have now been combined into the new closing disclosure (CD) and must (1) provide generally the actual terms and costs of the transaction, (2) be in writing containing the prescribed information in 12 C.F.R. § 1026.38 and appendix H-25, and (3) satisfy timing and delivery requirements as set out in this rule. The integrated disclosures are subject to certain timing, tolerance, or variance requirements for accuracy. See 12 C.F.R. pts. 1024, 1026.

Section 8 of RESPA prohibits kickbacks, referral fees, and unearned fees in connection with federally related mortgage loans. Violators of section 8 may be found civilly liable for treble damages to persons charged for settlement services involved in the violation and criminally liable for both a statutory fine and imprisonment. Referrals of settlement services to affiliates are permitted as an exception to the section 8 prohibitions under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15. Sample forms of required consumer disclosures are illustrated in appendix H to Regulation Z, in public guidance documents published in the Federal Register from time to time by the Department of Housing and Urban Development, and as published by the CFPB. See also the discussion in chapter 12 in this manual.

§ 2.208 Recording

The Property Code addresses the recording of instruments used in property transactions. Tex. Prop. Code chs. 11–13. The rerecording of instruments is permitted under the terms of Tex. Civ. Prac. & Rem. Code § 19.008 if the record was lost, destroyed, or removed and is effective from the date of original recordation. See also the section titled ‘Deeds’ above.

§ 2.209 Record Retention

Various federal laws and regulations, including Internal Revenue Service regulations, require the retention of records that affect or involve realty. Records that must be retained under state law may be destroyed after three years, unless otherwise provided. Tex. Bus. & Com. Code § 72.002.

§ 2.210 Recreational Projects and Recreational Use

See the sections titled ‘Camping Resorts,’ ‘Landowner Liability,’ and ‘Parks and Recreational Projects’ above and ‘Timeshares’ below.

§ 2.211 Redemption Rights

After foreclosure of an assessment lien, condominium unit owners and residential property owners have rights of redemption. See Tex. Prop. Code § 82.113(g) (condominium unit owners); Tex. Prop. Code ch. 209 (residential property owners). Redemption rights after a tax foreclosure sale are governed by Tex. Tax Code §§ 34.21–23. A certificate of redemption properly issued by the United States may be recorded. Tex. Prop. Code § 12.011.

§ 2.212 Registered Mail

If a contract or statute requires that notice be delivered by registered mail, certified mail will

also suffice unless registered mail is required by law to provide insurance against loss. Tex. Civ. Prac. & Rem. Code § 136.001.

§ 2.213 Release of Lien by Affidavit

If a mortgagee holds a mortgage on one-to-four-family residential property, or on other real property where the original face amount of the debt is less than \$1.5 million, and the mortgagee or its mortgage servicer fails to execute a release of the mortgage, an authorized officer of a title insurance company or a title insurance agent may execute and record an affidavit in a form substantially similar to the affidavit prescribed by Tex. Prop. Code § 12.017. An uncontroverted affidavit, executed and recorded as provided in the statute, operates as a release of the mortgage. Tex. Prop. Code § 12.017.

§ 2.214 Release of Lien by Attorney or Others

Tex. Prop. Code § 52.005 allows the agent or attorney of record to release an abstract of judgment by recording a return or copy of the return on an execution issued on the judgment that is certified by the officer making the return and that complies with the requirements of section 52.005 or a receipt, acknowledgement, or release signed by the party (or his agent or attorney of record) entitled to receive payment of the judgment and that is acknowledged or otherwise proven for record. Tex. Prop. Code § 52.021 allows a release by discharge under bankruptcy laws. Tex. Civ. Prac. & Rem. Code § 31.008 authorizes judges to release liens when the amount due is paid to the court. If a judgment creditor refuses to accept payment of a judgment or refuses to execute a release of judgment after accepting payment, the court may hold a hearing to determine whether a release should be issued. Tex. Civ. Prac. & Rem. Code § 31.008(g). Tex. Prop. Code § 12.017 permits authorized title insurance companies and title insurance agents to file affidavits of record as a substitute for an

executed release by the lienholder under certain circumstances. See also the sections titled "Abstracts of Judgment" and "Judgment Liens" above.

§ 2.215 Republic of Texas Liens

See the section titled "Fraudulent Filings" above.

§ 2.216 Residential Construction Liability

Liability for damages arising out of defects in residential construction projects is addressed in the Residential Construction Liability Act (Tex. Prop. Code ch. 27).

§ 2.217 Residential Rental Locators

The Real Estate License Act requires that residential rental locators be licensed as brokers or salespersons, with certain exceptions. Tex. Occ. Code §§ 1101.002, 1101.151, 1101.351, 1101.553, 1101.757.

§ 2.218 Restrictive Covenants

Any clause not in contravention of law may be inserted into an instrument of conveyance. Tex. Prop. Code § 5.022(c). Restrictive covenants that require the use of wood shingles for structures on residential properties or that are discriminatory on the basis of race, color, religion, or national origin are void. Tex. Prop. Code §§ 5.025, 5.026. Restrictive covenants that are at odds with certain water conservation initiatives are void. Tex. Prop. Code § 202.007. In an action based on breach of a restrictive covenant, the prevailing party who asserted the action may recover attorney's fees in addition to the party's costs and claim. Tex. Prop. Code § 5.006.

The governing body of a municipality that does not have zoning ordinances or that has a population of 1.5 million or more may elect application of Tex. Loc. Gov't Code §§ 212.151–157 ("Enforcement of Land Use Restrictions Contained in Plats and Other Instruments") for enforcement of restrictive covenants. The municipality may require any person who sells or conveys restricted property located within the municipality first to give the purchaser written notice of the restrictions and of the municipality's right to enforce them. Tex. Loc. Gov't Code § 212.155. A municipal utility district may enforce restrictive covenants. Tex. Water Code § 54.237.

Tex. Gov't Code § 27.034 permits enforcement of certain restrictive covenants in a justice court, although a justice court is prohibited from granting a writ of injunction.

See also the sections titled "Community Homes; Group Homes" and "Property Owners Associations" above.

§ 2.219 Reverse Mortgages

A reverse mortgage is a type of home equity loan authorized by the Texas Constitution that permits homeowners, age sixty-two or older, to borrow without recourse, based on the equity in their homesteads. Tex. Const. art. XVI, § 50(a)(7), (k)–(p), (v).

See the section titled "Home Equity Lending" above.

§ 2.220 Right of Rescission

In a credit transaction that involves a principal residence and that is subject to the Truth in Lending Act, the consumer may have a right to rescind the transaction within a certain period. The consumer must be notified of this right. 12 C.F.R. § 226.23.

§ 2.221 Risk of Loss

See the section titled "Uniform Vendor and Purchaser Risk Act" below.

§ 2.222 Roadway Forming County Boundary

Tex. Civ. Prac. & Rem. Code § 15.065 confers concurrent jurisdiction over roadways forming a common county boundary.

§ 2.223 Rule against Perpetuities

Tex. Const. art. I, § 26, provides that perpetuities are not allowed. The principal statutory provision incorporating the rule against perpetuities is found in Tex. Prop. Code § 5.043. The rule as applied to trusts is addressed in Tex. Prop. Code § 112.036.

§ 2.224 Sale of Trust Property to Governmental Entities

A governmental entity may not purchase real property held in trust unless the trustee submits to the governing body of the governmental entity a copy of the trust agreement identifying the true owner of the property. Tex. Gov. Code § 2252.092. See also the section titled "Disclosure of Interested Parties When Contracting with Governmental Entities" above.

§ 2.225 Sculptures

See the section titled "Copyrights" above.

§ 2.226 Securities Acts

The Securities Act of 1933 (15 U.S.C. §§ 77a–77aa) and the Texas Securities Act (Tex. Rev. Civ. Stat. arts. 581–1 to –43) may apply to group ownership of real estate in which passive investors furnish capital and rely on a promoter to make the investment successful. These statutes

generally require certain disclosures to the passive investors and prohibit the use of fraudulent devices or schemes in connection with the sale of securities.

§ 2.227 Security Deposits

The Texas Property Code addresses the rights and requirements associated with security deposits in residential leases (Tex. Prop. Code §§ 92.101–.109) and in commercial leases (Tex. Prop. Code §§ 93.004–.012).

§ 2.228 Security Interests

Security interests in many categories of personal property are governed by Tex. Bus. & Com. Code ch. 9. For a more extensive discussion of security interests, see chapter 9 in this manual.

§ 2.229 Self-Service Storage Facilities

The Texas Property Code governs the creation and perfection of liens against property held in self-service storage facilities or mini-warehouse facilities. Tex. Prop. Code §§ 59.001–.046.

§ 2.230 Seller's Disclosure of Property Condition

See the section titled "Disclosures and Notices" above.

§ 2.231 Sewer Service

The sale of sewer service to the public is regulated under Tex. Water Code ch. 13. No retail utility may provide sewer service to the public without first receiving a certificate of convenience and necessity (CCN) from the Texas Commission on Environmental Quality (TCEQ), with the exception of municipalities (which may provide retail service to areas within their corporate limits without a CCN, provided such areas are not within the certifi-

cated area of another retail utility provider). Tex. Water Code § 13.242.

Certain owners with property within a proposed service area will receive notice of new applications for certificates and amendments to existing certificate applications. Tex. Water Code § 13.246. Certain owners may “opt out” or exclude their property from the CCN application. Tex. Water Code § 13.246. Certain owners may petition the TCEQ for a release from a CCN if they can demonstrate that the certificate holder conditions the provision of service on the payment of costs not properly allocable directly to the petitioner’s service request. Tex. Water Code § 13.254. Each certificate holder must record a map and a boundary description of the certificated area in the real property records of each applicable county. Tex. Water Code § 13.257.

§ 2.232 Sex Offenders

Convicted sex offenders must register their residences with, and certain notices must be provided to, law enforcement authorities. Tex. Code Crim. Proc. ch. 62.

A convicted sex offender may not own an interest in, be employed by, be an independent contractor for, or be an officer or director of a sexually oriented business. Tex. Bus. & Com. Code ch. 102.

§ 2.233 Shopping Center Stores, Open on Sundays

A clause in a shopping center lease that requires a store to be open when another store in the center is open does not apply on Sundays unless the lease expressly states that it applies on Sundays. Tex. Bus. & Com. Code § 53.001.

§ 2.234 Smoke Alarms

A landlord’s obligation to install smoke alarms in residential leased premises is governed by Tex. Prop. Code §§ 92.251–.262.

§ 2.235 Soldiers’ and Sailors’ Civil Relief Act

The Soldiers’ and Sailors’ Civil Relief Act has been renamed the Servicemembers Civil Relief Act. See the section titled “Military Personnel” above.

§ 2.236 Special Districts

Numerous special districts created by state statutes affect real estate transactions. Among the most important are conservation districts, drainage districts, fresh water supply districts, hospital districts, irrigation districts, levee improvement districts, municipal management districts, municipal utility districts, navigation districts, utility and reclamation districts, and water control and improvement districts. Statutes creating and governing special districts can be found in the Texas Local Government Code, Texas Health & Safety Code, and the Texas Water Code. The 2003 Texas legislature created a Special District Local Laws Code, organized so that each special district’s local law is contained in a single, separate chapter. The Code is a revision of Texas statutes compiled only to make special district laws more accessible and understandable.

§ 2.237 State of Texas Leases

Real property leases between state entities and private parties are governed by the requirements of Tex. Gov’t Code chs. 2165, 2167 and 1 Tex. Admin. Code ch. 115.

§ 2.238 Statute of Frauds

To be enforceable, the following types of transactions, among others, must be in writing: contracts for the sale of real estate; conveyances of an interest in land, including an estate of inheritance, a freehold interest, and an estate for a term longer than one year; agreements to pay a commission for certain real property transactions; and agreements that will not be performed within one year from the date they are made. Tex. Prop. Code § 5.021, Tex. Bus. & Com. Code § 26.01. See also the section titled "Loan Documents" above, relating to a notice that must be given to claim a statute-of-frauds defense in connection with a loan.

See chapter 3 in this manual for comments and suggestions relating to the preparation of documents used in any conveyance of real property.

§ 2.239 Statute of Limitations

See the section titled 'Limitations' above.

§ 2.240 Statutes of Repose

The ten-year statute of repose for registered or licensed architects, engineers, interior designers, and landscape architects is found at Tex. Civ. Prac. & Rem. Code § 16.008; for persons who construct or repair improvements to real property, at Tex. Civ. Prac. & Rem. Code § 16.009; and for surveyors, at Tex. Civ. Prac. & Rem. Code § 16.011.

§ 2.241 Stormwater Permits

Construction sites of five acres or more must comply with the general stormwater permit requirements found in 57 Fed. Reg. 41,176–41,190 (1992). See 40 C.F.R. pt. 122. Construction sites of between one and five acres are addressed by the rules published in 64 Fed. Reg. 68,722 (1999). The general permits for industrial activities were published in 57 Fed. Reg.

41,236 (1992). A new multisector permit for industrial activities was published in 65 Fed. Reg. 64,746 (2000) as corrected in 66 Fed. Reg. 1675 and 16,233 (2001). Certain industrial and other uses may have other stormwater permit requirements under the National Pollutant Discharge Elimination System permit program under the Clean Water Act. Certain large metropolitan areas may implement stormwater permitting programs in compliance with the Clean Water Act. Tex. Loc. Gov't Code ch. 573. See the section titled 'Environmental Laws' above.

§ 2.242 Streets and Roads

Cities have the authority to assess landowners for the costs to improve streets and sidewalks. Tex. Transp. Code §§ 311.091–.096. Cities may grant the use of streets for private purposes under the provisions of Tex. Transp. Code ch. 316. Suits for relief from street closings are regulated by Tex. Civ. Prac. & Rem. Code §§ 16.005, 65.015. Tex. Transp. Code ch. 203 authorizes the Texas Transportation Commission to construct and maintain state highways. Tex. Transp. Code ch. 311 applies to municipalities. Tex. Transp. Code chs. 251–286 address various aspects of county roads, including the ability of a county road supervisor to limit or prohibit the use of certain county roads by vehicles that may damage the road. Tex. Transp. Code § 251.157. County roads may be abandoned in some cases in which the use becomes infrequent and one of the adjoining property owners has fenced the property for a continuous period of more than twenty years. Tex. Transp. Code § 251.057.

§ 2.243 Subdivisions

Counties may establish substantive requirements for subdivision plats for tracts outside the extraterritorial jurisdiction of municipalities. Tex. Loc. Gov't Code §§ 232.001–.010, 232.0034, 242.001. Cities have the same power over subdivisions within their corporate limits.

Tex. Loc. Gov't Code §§ 212.001–.018. Generally, counties and cities are required to enter into a written agreement that identifies the entity authorized to regulate subdivision plats in the city's extraterritorial jurisdiction. Tex. Loc. Gov't Code § 242.001. If counties and cities do not enter into a written agreement before the dates specified in Tex. Loc. Gov't Code § 242.0015(a), the parties must arbitrate the disputed issues. Tex. Loc. Gov't Code § 242.0015.

Special subdivision requirements apply to populous counties (Tex. Loc. Gov't Code §§ 212.0146, 232.006, 242.002), counties near the Mexican border (Tex. Loc. Gov't Code §§ 232.021–.043), and to certain economically distressed counties (Tex. Loc. Gov't Code §§ 232.071–.080). See also the sections titled 'Colonias' and 'Contracts for Deed' above.

Special subdivision requirements also apply to replats of golf courses in certain counties. Tex. Loc. Gov't Code § 212.0155.

A subdivision plat, replat, or amended plat or replat may not be recorded unless (1) it is approved by the entity authorized to regulate subdivisions, (2) it has attached to it an original tax certificate from each taxing unit with jurisdiction over the tract indicating that no delinquent ad valorem taxes are owed on the tract, and (3) it has attached to it the documents required by Tex. Loc. Gov't Code § 212.0105 or Tex. Loc. Gov't Code § 232.023, if applicable. Tex. Prop. Code § 12.002. If the subdivision plat, replat, or amended plat or replat is filed after September 1 of a year, the plat, replat, or amended plat or replat must also have attached to it a tax receipt from each taxing unit with jurisdiction over the tract indicating that taxes for the current year have been paid or a statement from the collector indicating that taxes for the current year have not been calculated. Tex. Prop. Code § 12.002(e). The tax collector is required, on request, to give the property owner or his agent a statement indicating that taxes for

the current year have not been calculated. Tex. Tax Code § 31.075.

Note that tracts within the extraterritorial jurisdiction of a city may require approval from both the city and the county. See Tex. Loc. Gov't Code § 242.001. The cancellation and revision of certain subdivision plats are governed by Tex. Loc. Gov't Code §§ 212.013–.016, 232.008–.009. County-approved subdivision plats terminate on January 1 of the fifty-first year after the year approved if none of the platted land has been sold by that date. Tex. Loc. Gov't Code § 232.002(c).

A property description based on a pending but unrecorded subdivision plat may be used in a sales contract, contract for deed, or deed only if certain conditions are met. Tex. Prop. Code § 12.002.

In counties with populations of 65,000 or more, if all or part of a subdivision plat is revised to provide for another subdivision within all or part of the earlier subdivision, the restrictions that apply to the earlier subdivision apply to the newly created subdivision. Tex. Prop. Code § 205.003.

Municipalities and counties are authorized to require as a condition of platting that a registered engineer certify the adequacy of groundwater. Tex. Loc. Gov't Code §§ 212.0101, 232.0032.

Counties may require that plat applications include a digital map meeting certain criteria, provided that the necessary "digital mapping technology" is 'reasonably accessible. Tex. Loc. Gov't Code §§ 232.001, 232.023, 232.072.

§ 2.244 Subletting or Assignment

Subletting or assignment of leased premises is prohibited without the prior consent of a landlord. Tex. Prop. Code § 91.005.

§ 2.245 Submetering

See the section titled “Utility Submetering and Nonmetering” below.

§ 2.246 Surety

Legal obligations between principals and sureties are governed by the provisions of Tex. Civ. Prac. & Rem. Code ch. 43. The Insurance Code governs construction payment bonds issued by surety companies. *See* Tex. Ins. Code §§ 3503.051–.057. Performance and payment bonds are governed by Tex. Gov’t Code ch. 2253 and Tex. Prop. Code §§ 53.201–.239.

§ 2.247 Surveyors

The Professional Land Surveying Practices Act is contained in Tex. Occ. Code ch. 1071. Regulations under the Act are in 22 Tex. Admin. Code chs. 661, 663, 664, 665.

The circumstances under which a surveyor’s lien attaches to real estate are addressed in Tex. Prop. Code § 53.021(c).

§ 2.248 Survival of Representations and Warranties

Contracts that purport to limit the time in which to bring suit on the contract to less than two years are void. The provision does not apply to transactions of more than \$500,000 by business entities. Tex. Civ. Prac. & Rem. Code § 16.070.

§ 2.249 Surviving Spouse of Mortgagor

Chapter 343 of the Texas Finance Code requires a residential mortgage servicer to provide to the surviving spouse of the mortgagor the loan number, the current balance, whether any amounts are delinquent, and what amount, if any, is held in escrow, within thirty days of receiving a request for the loan information. A request from

a surviving spouse must include statutory language, a death certificate of the mortgagor, an affidavit from a disinterested party in a form similar to an affidavit of heirship as set forth in Tex. Est. Code § 203.002, and an affidavit from the surviving spouse stating the property is the surviving spouse’s primary residence.

§ 2.250 Swimming Pools

See the section titled ‘Pool-Yard Enclosures’ above.

§ 2.251 Taxes

The Property Redevelopment and Tax Abatement Act permits tax abatements in reinvestment zones. Tex. Tax Code ch. 312. See also the sections titled ‘Ad Valorem Taxes,’ ‘Hotel Occupancy Taxes,’ ‘Non-Real Estate Taxes Affecting Real Estate,’ and ‘Open-Space Exemption’ above.

§ 2.252 Telecommunications

Telecommunications companies have certain rights of access to private commercial buildings under the Texas Utilities Code. See especially Tex. Util. Code chs. 51, 54. A telecommunications provider is defined as a person who has been issued a certificate of convenience and necessity or certificate of operating authority by the Public Utility Commission. Tex. Util. Code § 51.002(10).

§ 2.253 Terrorism Regulation

Federal law prohibits transactions with persons who commit, threaten to commit, or support terrorism. *See* Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). Additional terrorism regulations are governed by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. 31 C.F.R. pts. 595–597. Prohibited transactions include those with spe-

cially designated terrorists (31 C.F.R. pt. 595), terrorism list governments (31 C.F.R. pt. 596), and foreign terrorist organizations (31 C.F.R. pt. 597). A list of "Specially Designated Nationals and Blocked Persons" is administered by OFAC and is accessible online at <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

§ 2.254 Texas Department of Housing and Community Affairs

The Texas Department of Housing and Community Affairs is the principal agency in the state that administers programs of housing assistance and development for individuals and families of low, very low, and extremely low income and families with moderate income. Its general enabling statute can be found at Tex. Gov't Code ch. 2306.

§ 2.255 Texas General Land Office

Use of evidence to demonstrate superior title to land based on records filed in the General Land Office is addressed in Tex. Prop. Code § 12.003.

§ 2.256 Timber Production

See the section titled 'Ad Valorem Taxes' above.

§ 2.257 Timeshares

Timeshare projects coming into existence on or after August 26, 1985, must comply with the terms of the Texas Timeshare Act, Tex. Prop. Code ch. 221.

§ 2.258 Title Insurance

The business of title insurance is governed by the Texas Title Insurance Act, Texas Insurance Code chapters 2501–2704. Insuring forms, rate rules, procedural rules, administrative rules, and

claims handling principles and procedures are set out in the 'Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas' promulgated by the Texas Department of Insurance in accordance with Texas Insurance Code title 11.

§ 2.259 Towing of Motor Vehicles

Tex. Occ. Code ch. 2308 governs the removal of unauthorized vehicles from a parking facility or public roadway, the establishment of reserved parking spaces, the enforcement of parking restrictions in parking lots and garages, the towing of unauthorized vehicles from private property, and the regulation of towing companies and parking-facility owners.

§ 2.260 Trademark and Trade-Name Rights

Trademark and trade-name rights are addressed in the provisions of Tex. Bus. & Com. Code ch. 16. The Lanham Act, 15 U.S.C. §§ 1051–1127, is the primary federal trademark statute.

§ 2.261 Transfer on Death Deed

The Texas Real Property Transfer on Death Act, Tex. Est. Code ch. 114, authorizes an individual to make a revocable transfer to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death, by executing and recording a transfer on death deed. During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property; vest any legal or equitable title in a designated beneficiary; or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recording of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. A transfer on death deed does not

affect the rights of creditors of the transferor, secured or unsecured, nor does it trigger any due-on-sale clause. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. See form 5-25.

§ 2.262 Transportation

Certain adjacent counties are authorized to create a regional county transportation authority. Tex. Transp. Code ch. 460.

§ 2.263 Trespass to Try Title

Trespass to try title is a statutory action to establish title to real property. Tex. Prop. Code ch. 22; Tex. R. Civ. P. 783–809. A declaratory judgment action can be maintained if the sole title issue is the determination of the boundary between adjoining properties. Tex. Civ. Prac. & Rem. Code § 37.004(c).

§ 2.264 Trust Code

The Texas Trust Code, Tex. Prop. Code §§ 111.001–115.017, governs express trusts. If the Trust Code and the terms of a trust conflict, the trust controls, “except the settlor may not relieve a corporate trustee from the duties, restrictions, and liabilities under Section 113.052 or 113.053” (relating to loans of trust funds to, and purchase or sale of trust property by, the trustee). Tex. Prop. Code § 111.002(a). Trustees have certain management rights if environmental problems arise on properties held in trust under Tex. Prop. Code §§ 113.025, 114.001 even if the trust instrument does not expressly authorize such actions. See also the section titled ‘Blind Trusts and Undisclosed Beneficiaries’ above.

§ 2.265 Truth in Lending

The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its implementing Regulation Z, 12 C.F.R. pt. 226, promote the informed use of consumer credit by requiring disclosures about the terms and cost of credit transactions. The Act applies to credit transactions, including mortgage credit secured by a lien on real property, if the credit is regularly extended by a creditor to natural persons primarily for personal, family, or household purposes and is subject to a finance charge or payable by a written agreement in more than four installments. See 12 C.F.R. §§ 226.1(c), 226.3. Creditors subject to the Act generally are persons who regularly extend such credit and to whom the credit obligation is initially payable. Creditors must make written disclosures for each credit transaction before consummation that reflect the terms of the actual legal obligation between the parties and show the calculated annual percentage rate, finance charge, and other material disclosures of the cost of credit within permitted tolerances for accuracy. Additional written disclosures are required at the time of application for variable rate transactions in which the annual percentage rate may increase after loan consummation. Certain credit transactions secured by a lien on a consumer’s principal dwelling are subject to rescission, and creditors must provide consumers written notices of their rights of rescission of those transactions at consummation. Special disclosure rules and limitations on permitted terms apply to certain home mortgage transactions secured by a consumer’s principal dwelling in which the annual percentage rate or total points and fees charged the consumer exceed standards set out in the Act. Advertising rules intended to ensure that advertisements promoting credit provide accurate and balanced information about rates, payments, and other loan features apply to all home mortgage loans subject to the Act. Sample forms of various required consumer disclosures are illustrated in appendix H to Regulation Z. Creditors failing to comply with

requirements of the Act may be subject to civil liability, administrative penalties, and, in the case of willful and knowing violations; criminal liability. Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (Pub. L. No. 111-203, 124 Stat. 1376), enacted July 21, 2010, which may be cited by its short title as the Mortgage Reform and Anti-Predatory Lending Act, contains extensive reform measures amending the Truth in Lending Act to regulate residential mortgage loan origination, underwriting, and servicing practices. See 15 U.S.C. §§ 1607, 1611, 1640. See also chapter 12 in this manual.

The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Act. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the CFPB as of July 21, 2011. The CFPB is required to adopt new mortgage finance regulations to implement and interpret the extensive reform measures of the Dodd-Frank Act. To date, the CFPB has under consideration seven proposed rules, which have been published in the Federal Register for public comment. The CFPB expects to adopt final rules during calendar year 2013. In an effort to coordinate the effective dates of these expected final rules, the CFPB gave notice in November, 2012, that it is amending Regulation Z (Truth in Lending) to effectively delay implementation of rules and forms required by Title XIV of the Dodd-Frank Act that otherwise would have automatically taken effect on January 21, 2013. See 77 Fed. Reg. 70,105 (Nov. 23, 2012). The CFPB intends to implement these Title XIV consumer disclosures as part of rulemaking in which mortgage disclosure forms that consumers receive under

the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan will be integrated into a single set of disclosures as required by Title X of the Dodd-Frank Act. By delaying the implementation of the Title XIV disclosure rules to coincide with the integrated RESPA and Truth in Lending Act disclosure rules, the CFPB hopes to reduce the consumer confusion and compliance burden on the industry caused by a trickling down of multiple new rule releases over the coming months. Because of the continuing rule-making process, practitioners should check the CFPB website found at www.consumerfinance.gov for current regulations.

§ 2.266 Unauthorized Preparation of Real Estate Documents

The Texas Government Code prohibits the preparation of deeds, deeds of trust, notes, mortgages, and other instruments affecting title to real property for compensation unless the preparer is an attorney licensed in Texas or qualifies under one of the other listed exemptions. Tex. Gov’t Code ch. 83. Texas law broadly construes the meaning of a charge of compensation for this purpose. See *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 952 (Tex. 1944); Tex. Att’y Gen. Op. No. JM-943 (1988). Written materials, books, printed forms, Internet sites, computer software, and similar products are excluded from the definition of the unauthorized practice of law if the items clearly and conspicuously state that the products are not a substitute for the advice of an attorney licensed to practice law in Texas. Tex. Gov’t Code § 81.101(c). However, this exclusion does not affect the applicability or enforceability of chapter 83 and such products or similar media expressly cannot be used in violation of the prohibitions of that chapter against the unauthorized preparation of real estate documents.

§ 2.267 Unclaimed Property

See the sections titled “Abandonment” and “Escheat” above.

§ 2.268 Underground and Aboveground Storage Tanks

Underground storage tanks and certain aboveground tanks must be registered with the Texas Commission on Environmental Quality. *See* 30 Tex. Admin. Code § 334.7; Tex. Water Code §§ 26.341–.367. Underground tanks must also meet certain technical specifications under the provisions of 40 C.F.R. pt. 280. In Texas, an owner of land having an underground storage tank must disclose the existence of the tank to prospective purchasers. 30 Tex. Admin. Code § 334.9. Section 26.342 of the Water Code defines the owner of an underground storage tank for liability purposes. Tex. Water Code § 26.342.

§ 2.269 Underground Facility Damage Prevention and Safety Act

The Underground Facility Damage Prevention and Safety Act, Tex. Util. Code ch. 251, provides for a “one-call” statewide notification service for the location of underground facilities. All excavators in Texas must notify the notification center of their intention to excavate or be subject to penalties.

§ 2.270 Uniform Commercial Code

The Texas version of the Uniform Commercial Code can be found in chapters 1 through 9 of the Texas Business and Commerce Code.

§ 2.271 Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act, Tex. Bus. & Com. Code ch. 322, establishes the

enforceability of electronic records and signatures in electronic transactions.

§ 2.272 Uniform Principal and Income Act

The Uniform Principal and Income Act, Tex. Prop. Code ch. 116, determines the allocation of principal and income for trusts.

§ 2.273 Uniform Transfers to Minors Act

Texas has adopted the Uniform Transfers to Minors Act, Tex. Prop. Code §§ 141.001–.025. The Act establishes the terms, conditions, manner, and effect of making transfers to minors.

§ 2.274 Uniform Unincorporated Nonprofit Association Act

Unincorporated nonprofit organizations in Texas are governed by the Texas Business Organizations Code generally and chapter 252 of that code more specifically. *See* Tex. Bus. Orgs. Code §§ 252.001–.017.

An “association” is defined as an entity governed as a cooperative association, an unincorporated nonprofit association, or a for-profit professional association. Tex. Bus. Orgs. Code § 1.002(3).

A ‘nonprofit association’ is defined as an unincorporated organization, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose. A form of joint tenancy, tenancy in common, or tenancy by the entirety does not by itself establish a nonprofit association, regardless of whether the co-owners share use of the property for a nonprofit purpose. Tex. Bus. Orgs. Code § 252.001(2).

§ 2.275 Uniform Vendor and Purchaser Risk Act

Tex. Prop. Code § 5.007 adopts the Uniform Vendor and Purchaser Risk Act and allocates responsibility for risk of loss between buyers and sellers, depending on whether legal title and possession have been transferred. However, the parties may by contract allocate the risk differently. Tex. Prop. Code § 5.007(a).

§ 2.276 Usury

When using any document that extends credit, attorneys should consider the implications of state and federal usury laws. *See* 12 U.S.C. § 1735f-7; Tex. Fin. Code chs. 301-349. See the section titled “Variable Interest Rates” below.

§ 2.277 Utility District Disclosures

Any person selling or transferring property located in a water, sewer, or other district with taxing authority must give a prospective purchaser notice of the current tax rate and amount of authorized bonded indebtedness and whether the property is located in a municipality’s extra-territorial jurisdiction before or at the time of the execution of the contract. A separate copy of the notice must be executed at closing and recorded. Tex. Water Code § 49.452. See the form of utility district disclosure in chapter 4 in this manual. See also the sections titled “Disclosures and Notices” and “Municipal Utility Districts (MUDs)” above.

§ 2.278 Utility Submetering and Nonmetering

The Texas Water Code requires that multiunit facilities built after January 1, 2003, be submetered or individually metered and imposes certain requirements before conversion of an existing facility to submetering or allocated billing. Tex. Water Code §§ 13.502, 13.506. The Water Code also limits the right of certain land-

lords of apartments and manufactured-home rental communities to charge tenants for utility expenses without proper evidence to show how the utility expenses were calculated. These provisions also limit rent increases before the installation of submeters and provide tenants means of enforcement. Tex. Water Code §§ 13.501-.506.

Utility disconnections by landlords are also limited under the provisions of Tex. Prop. Code § 92.008.

§ 2.279 Variable Interest Rates

The Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-3806, was enacted to give nonfederally chartered housing creditors the same ability to devise alternatives to fixed-rate financing as federal institutions have. It permits nonfederally chartered lenders to make, purchase, and enforce certain mortgage transactions in which the interest rate can change as long as the transactions comply with federal regulations. See also the section titled “Usury” above.

§ 2.280 Vendor and Purchaser Risk Act

See the section titled “Uniform Vendor and Purchaser Risk Act” above.

§ 2.281 Venue

Venue for ‘major transactions’ (in which the consideration is more than \$1 million) may be determined by the parties. Tex. Civ. Prac. & Rem. Code § 15.020. Venue for actions for the recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property is in the county in which all or a part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.011.

Venue for most suits between landlord and tenant is in the county in which all or part of the property is located. Tex. Civ. Prac. & Rem. Code § 15.0115. Venue for trust-related actions is governed by Tex. Prop. Code § 115.002. Venue provisions are addressed generally in chapter 15 of the Civil Practice and Remedies Code. The Property Code contains venue provisions for suits alleging a breach of fiduciary duty by a fiduciary or managerial agent of a charitable trust (Tex. Prop. Code § 123.005); actions to enforce rights or obligations under condominium association declarations, bylaws, or rules (Tex. Prop. Code § 82.008); condemnation proceedings (Tex. Prop. Code § 21.013); and partition actions (Tex. Prop. Code § 23.002).

§ 2.282 Vested Land Use Rights

Chapter 245 of the Local Government Code regulates the issuance of local permits and provides that, if a series of permits is required for a project, the rules, regulations, and other requirements in effect at the time the application for the first permit is filed shall be the sole basis for considering all subsequent permits to complete the project. Tex. Loc. Gov't Code § 245.002(b). Permit holders may take advantage of new rules or changes to the law that enhance a project. Tex. Loc. Gov't Code § 245.002(d). A municipality may adopt a moratorium on the development of residential or commercial property only if it finds a need to prevent a shortage of essential public facilities or that the moratorium is justified because existing commercial development laws are inadequate to protect the public health, safety, or welfare of its residents. Notice and hearing procedures are required. Tex. Loc. Gov't Code §§ 212.131–.136. Certain types of regulations are exempt from the application of chapter 245. *See* Tex. Loc. Gov't Code § 245.004.

After annexing an area, a municipality may not prohibit a person from (1) continuing to use land

in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time or (2) beginning to use land in the area in the manner that was planned for the land before the ninetieth day before the effective date of the annexation if certain conditions are met. Tex. Loc. Gov't Code § 43.002. These prohibitions also apply to municipalities incorporated after September 1, 2003. Tex. Loc. Gov't Code § 211.016. *See* also the section titled "Private Property Rights" above.

§ 2.283 Visual Arts

The Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, protects the reputations of certain visual artists and the works of art they create. With numerous exceptions, VARA grants three rights: the right of attribution; the right of integrity; and in the case of works of visual art of "recognized stature, the right to prevent destruction. 17 U.S.C. § 106A.

§ 2.284 Voluntary Cleanup Program

Texas has a voluntary cleanup statute, also known as a Brownfields statute, in Tex. Health & Safety Code §§ 361.601–.613. Regulations for the voluntary cleanup program are published at 30 Tex. Admin. Code ch. 333.

§ 2.285 Wage Liens

Under chapter 61 of the Texas Labor Code and chapter 113 of the Texas Tax Code, if the Texas Workforce Commission (TWC) determines that an employer owes unpaid wages to an employee, the TWC is authorized to file an administrative lien against the employer's property to secure the payment of the unpaid wages. *See* Tex. Lab. Code §§ 61.081–.085. Section 61.0825 of the Texas Labor Code provides that such wage liens have priority over all other liens against the same property, except for a lien

securing the payment of ad valorem taxes. *See* Tex. Lab. Code § 61.0825.

§ 2.286 Warehouseman's Liens

A warehouseman's lien for property removed from a tenant's premises is governed by Tex. Prop. Code § 24.0062. See also the section titled 'Self-Service Storage Facilities' above.

§ 2.287 Water

Groundwater districts and water rights are subject to the Texas Water Code. A district has the authority to collect assessments, pursuant to Tex. Water Code ch. 51, including the ability to place a lien on real and personal property. Tex. Water Code § 51.309. As a condition of service, a water district may require a service applicant or developer to grant permanent recorded easements for the construction and maintenance of the facilities necessary for service. Tex. Water Code § 49.218. Under certain circumstances, a landowner can petition a water district board to have his property deannexed from a water district. Tex. Water Code §§ 49.3075–.3077. See also the section titled "Utility District Disclosures" above.

§ 2.288 Watercourse Forming County Boundary

Tex. Civ. Prac. & Rem. Code § 15.065 provides concurrent jurisdiction over a watercourse that forms a county boundary.

§ 2.289 Water Service

The sale of potable water to the public is regulated under Tex. Water Code ch. 13. See also the section titled 'Sewer Service' above.

§ 2.290 Water Wells

Water-well drillers are regulated under Tex. Occ. Code ch. 1901, and water-well pump installers are regulated under Tex. Occ. Code ch. 1902.

Counties with populations of 1.8 million or more may adopt rules to regulate the placement of private water wells in unincorporated areas of the county. *See* Tex. Loc. Gov't Code §§ 240.041–.048.

§ 2.291 Weeds

It is a public nuisance in the unincorporated area of a county to allow weeds to grow within three hundred feet of another residence or commercial establishment. Tex. Health & Safety Code § 343.011. Municipalities may require property owners to keep property free from weeds. Tex. Health & Safety Code §§ 342.004, 342.008.

§ 2.292 Wetlands

Wetlands are regulated under section 404 of the Clean Water Act, codified at 33 U.S.C. § 1344. Under section 1344, dredging and filling activities in wetlands are prohibited unless a permit is obtained from the Army Corps of Engineers or other statutory exceptions apply.

§ 2.293 Wills and Estates

A will may be admitted to probate as a muniment of title if the court is satisfied that there are no unpaid debts, excluding debts secured by liens on real estate. Tex. Est. Code § 257.001. Title to real estate can be transferred by a duly probated will. Tex. Est. Code §§ 251.002, 256.001. Subject to the payment of certain debts, the estate devised or bequeathed in a lawful will vests immediately in the devisees or legatees when the testator dies. Tex. Est. Code § 101.001. See also the section titled 'Affidavits of Heirship' above.

§ 2.294 Windstorm Inspection

Completed structures in coastal counties are required to comply with the state windstorm building specifications and inspection program to qualify for windstorm and hail insurance through the Texas Windstorm Insurance Association. This program is administered by the State Board of Insurance. After January 1, 2004, notice of a windstorm inspection must be submitted before beginning construction, repairs, or remodeling of a structure. Tex. Ins. Code § 2210.251(c). See also the section titled 'Building Codes' above.

§ 2.295 Wood Shingles

A restrictive covenant that requires the use of wood shingles on a residential building is void under Texas law. Tex. Prop. Code § 5.025.

§ 2.296 Zoning

The authority of municipalities to establish and regulate zoning in their territorial jurisdictions is governed by the provisions of Tex. Loc. Gov't Code ch. 211. Certain counties also have limited authority to impose zoning regulations in unincorporated areas. Tex. Loc. Gov't Code ch. 231.

The authority of municipalities and other political subdivisions to regulate oil and gas operations within the state is expressly preempted in favor of the state's authority to regulate all such operations. Such operations include exploration and production, processing, drilling, hydraulic fracturing, transporting (including by pipelines), disposal, plugging of wells, and remediation activities. Commercially reasonable regulation by municipalities and other political subdivisions of aboveground activities, such as fire safety regulations, emergency response, and traffic control measures that would not prohibit operations by a reasonably prudent operator are permitted. Tex. Nat. Res. Code § 81.0523.

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[Reserved]

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Chapter 3

Preparation, Execution, Proof, and Recording of Documents

Texas statutes require that a real property conveyance of an estate of more than one year must be in writing, subscribed, and delivered by the grantor or by the grantor's agent authorized in writing. Tex. Prop. Code § 5.021. The following comments and suggestions relate to the preparation of documents used in any conveyance of real property.

§ 3.1 Amounts

No particular form is required for writing the amount of the transaction; it may be spelled out, written numerically, or both. Many attorneys prefer to write the amount in capital letters immediately followed by the numerical amount in parentheses—for example, ONE THOUSAND AND NO/100 DOLLARS (\$1,000.00) or ONE THOUSAND, TWO HUNDRED AND FIFTY AND 10/100 DOLLARS (\$1,250.10). If there is a variance between unambiguous written words and figures, the written words control. *Guthrie v. National Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1965). See also Tex. Bus. & Com. Code § 3.114.

§ 3.2 Captions

Instruments have traditionally commenced with these captions, to indicate the county in which the instrument is to be recorded:

THE STATE OF TEXAS)
) KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF _____)

These captions are not required in modern conveyancing documents and are omitted from the forms in this manual. Even though instruments no longer need a caption, certificates of acknowledgment, which are the written record of the acknowledgment ceremony made by the presiding officer and appended to many real

estate instruments, require a caption showing where the acknowledgment ceremony occurred. Captions are therefore included in the certificate of acknowledgment forms contained in this manual. See Tex. Civ. Prac. & Rem. Code § 121.007.

§ 3.3 Dates in Instruments

When a transaction requires more than one instrument (such as a deed, a note, and a deed of trust, or a note and a mechanic's lien contract), all instruments should bear the same date. Arbitrary dating of all instruments at the time of preparation will make all copies, including file copies, reflect the same date. Conveyances can commence on a future date (Tex. Prop. Code § 5.041); thus, the effective date of an instrument can be different from the date of signing. Because instruments are adequately referred to by date, the expression "Executed this _____ day of _____" is unnecessary. Also, as a practical matter, all file copies should show the actual date of the original document to facilitate subsequent amendment of the document or reference to it in other documents relating to the transaction. When the deed has been dated one date and acknowledged on another, absent evidence regarding the actual date of delivery of the deed, the presumption arises that delivery occurred on the date of the deed, not the date of the acknowledgment. *Bell v. Smith*, 532 S.W.2d 680, 685 (Tex. Civ. App.—Fort Worth 1976, no writ).

§ 3.4 Headings

Each instrument to be recorded should have a heading clearly identifying it at the top of the first page. Tex. Loc. Gov't Code § 191.007(c).

§ 3.5 Mailing Address of Grantee

The grantee's mailing address should be shown on instruments conveying an interest in real property, such as deeds, deeds of trust, assignments of leases, and transfers of liens. Preferably, the address should appear in the instrument; it may also be given in a separate, signed writing attached to the instrument. For failure to show the address, the county clerk may assess a penalty filing fee equal to the greater of \$25 or twice the statutory recording fee. Tex. Prop. Code § 11.003.

Forms in this manual considered to be conveyances provide for the grantee's address. Some county clerks may require the grantee's address on other documents as well.

§ 3.6 Preparer of Instrument

Although not required, including the preparer's name and address may be useful for the parties and the public generally. Additionally, any document being recorded should be labeled "Record and return to:" with the address of the designated recipient added.

§ 3.7 Property Description

§ 3.7:1 Specificity of Description

An accurate property description is essential to a valid conveyance. The property must be described with enough certainty that it can be readily identified from the description. The description should include the city, county, and state in which the property is located, and courses and distances in metes-and-bounds descriptions must be unambiguous. If a deed

conveys only part of a tract of land and does not designate which part, for example, the description may be insufficient to convey title. *See De Martinez v. De Vidaurri*, 219 S.W.2d 823, 826 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.). If the property has been described in a filed plat, the plat reference to the lot and block of the property should be used.

§ 3.7:2 General Instructions

The property description can include references to other recorded instruments, such as other deeds, but to depend solely on this reference as the entire description poses the danger that it may not match the intended description exactly or that it may be inaccurate or invalid. Conversely, if the metes-and-bounds description of the property is defective, but reference is made to another recorded document that contains a proper legal description of the property, the conveyance will probably be enforceable. *Sorsby v. State*, 624 S.W.2d 227, 232 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

The description should be identical in all documents relating to the same transaction, such as a deed and a deed of trust.

If the description is too long to fit the space provided in the form, it may be attached to the instrument and incorporated in it by a simple statement in the space provided for the description. An example of typical language for this purpose is "Two hundred acres of the Travis tract, out of the Domingo Losoya Survey No. 4, Abstract No. 10, Sunshine County, Texas, more particularly described in Exhibit A attached to this deed and by this reference incorporated in it. This should be the identical language used as the caption or "lead-in" on the description attached as an exhibit. In this case the attorney must make certain that the exhibit is actually attached and properly identified as the referenced exhibit.

The attorney should consider adding the phrase *more or less* to references to the quantity of property being conveyed. By doing this, the grantor may be relieved of liability arising from minor shortages. *See Wooten v. State*, 177 S.W.2d 56, 58 (Tex. 1944). This is the case whether the property has recently been surveyed or not, because there typically are minor variations between surveys concerning measurements and area computations.

If included in the body of the form, the description should be indented and set out in block form, to make it easily identifiable in the instrument.

§ 3.7:3 Description of Platted Property

Traditionally the lot, block, and addition or subdivision numbers designating the property are used for describing platted property. A typical description using lot, block, and addition numbers takes this form:

Lot _____, Block _____, _____
Addition, [city], [county] County,
Texas, according to the map or plat
thereof recorded in Volume _____,
Page _____, of the real property
records of [county] County, Texas.

§ 3.7:4 Description by Metes and Bounds

Metes-and-bounds descriptions are the most common type used for property outside urban areas and for unplatted urban land. These descriptions have been a steady source of litigation. Metes-and-bounds descriptions, as well as other types of legal descriptions, have been liberally construed by the courts. When obvious errors have occurred in a legal description, courts will generally attempt to find and correct the error, so as to give effect to the conveyance. *See Poitevent v. Scarborough*, 124 S.W. 87 (Tex.

1910). Calls of distance have been held to be the weakest, and calls of distance and quantity must yield to well-established corners. *Warren v. Swanzy*, 361 S.W.2d 479, 484 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.). A missing call in a metes-and-bounds description may be supplied when the omitted call was the only logical one that would make the description close. *See Mansel v. Castles*, 55 S.W. 559 (Tex. 1900).

§ 3.7:5 Recording Reference

It is common to refer to recorded instruments in descriptions, subrogation clauses, releases, transfers, and the like. The reference consists of volume and page recording information or a particular record of the appropriate county. From the earliest days, the particular records were named after the instruments themselves—that is, deed records, deed-of-trust records, mechanic's lien records, and so on—and the reference would be, for example: 'recorded in Volume _____, Page _____, Deed of Trust Records of _____ County, Texas.

The Texas Local Government Code authorizes microfilming of public records by county clerks. *See* Tex. Loc. Gov't Code § 204.002. Microfilm records are referred to by volume and page numbers in some counties, by film code numbers in other counties, and by county clerk file numbers or other means peculiar to specific microfilming systems in still other counties. In counties employing microfilming, instruments relating to real property are in 'Official Public Records of Real Property of _____ County, Texas. Tex. Loc. Gov't Code § 193.008.

Instruments filed with a county clerk under the microfilm system will be assigned both a file number and, on recording, volume and page numbers, film code numbers, or other applicable identification data. An instrument recorded under the microfilm system may be referred to as: 'recorded in Film Code No. _____ through

_____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____), Official Public Records of Real Property of _____ County, Texas.”

Section 11.007 of the Texas Property Code provides a uniform system of references to be used in every county whether a microfilm system is in effect or not. A reference in an instrument to the volume and page number, film code number, or county clerk file number of the “real property records” (or words of similar import) for a particular county is equivalent to a reference to deed records, deed-of-trust records, or other specific records to provide effective notice to all persons of the existence of the referenced instrument. Tex. Prop. Code § 11.007. Uniform references for all recorded instruments can be in the following manner: ‘recorded in Film Code No. _____ through _____ (or Volume _____, Page _____ or County Clerk File No. _____ or Instrument No. _____) of the real property records of _____ County, Texas.

In various Texas counties there may be nonstatutory variations in indexing real property records, which the practitioner should identify before referring back to a previously recorded instrument in a new instrument.

§ 3.8 Signatures

§ 3.8:1 Beneath Signature Lines

If names are not legibly typed or printed under each signature, the county clerk may double the filing fee for every nonconforming page. Tex. Loc. Gov’t Code § 191.007(e), (h). If there are no printed signature lines, they should be added below the text of the instrument, unless an instrument is promulgated by the Texas legislature and contains text below the proposed signature space. See, for example, the statutory durable power of attorney (Tex. Est. Code § 752.051) and the directive to physicians (Tex. Health & Safety Code § 166.032).

§ 3.8:2 Person with Physical Disability

If an individual who is physically unable to sign or to make a mark on a document presented for notarization so directs, a notary public may sign the individual’s name, in the presence of a witness who has no legal or equitable interest in any property that is the subject of the document. The notary public must require identification of the witness in the same manner as from an acknowledging person under section 121.005 of the Texas Civil Practice and Remedies Code. The notary should then write the following beneath the signature: ‘Signature affixed by notary in the presence of (name of witness), a disinterested witness, under section 406.0165 of the Texas Government Code.’ Tex. Gov’t Code § 406.0165(b).

§ 3.8:3 Signing with Mark

If the person signing cannot sign his or her name, but can only make a mark, an “X” should be marked in place of the signature, with the signatory’s name typed beneath the mark, followed by , his/her mark.

§ 3.8:4 Original Signatures for Paper Documents

A paper document concerning real or personal property may not be recorded or serve as notice of the paper document unless the paper document contains an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. A paper document can instead be attached as an exhibit to a paper affidavit or other document that has an original signature or signatures that are acknowledged, sworn to with a proper jurat, or proved according to law. An original signature is not required for an electronic instrument or other document that complies with chapter 15 of the Texas Property Code, chapter 195 of the Texas Local Government Code, chapter 43 of

the Texas Business and Commerce Code, or other applicable law. A “paper document” means a document that is not electronic received by a county clerk. *See* Tex. Prop. Code § 12.0011.

§ 3.9 Names

The parties’ names in the text of an instrument should be followed by their status—for example, “John J. Doe and Jane R. Doe, spouses.” Use an individual’s middle name or middle initial to help avoid confusion with other individuals with similar names. For a married woman or widow, a name such as ‘Mrs. John Doe’ should never be used.

Ordinarily, titles showing a person’s rank or profession, such as “Captain John J. Doe” or ‘John J. Doe, M.D.,’ should not be used unless they are part of the legal name. Use the labels ‘Sr.’ and ‘Jr.’ in appropriate instances to distinguish between the ancestor and the legally named ‘Jr.’

Whenever possible, to maintain uniformity of names in the chain of title, all legal instruments to be filed should use precisely the same name for an individual as that used in instruments already recorded. If the party’s legal name changes between conveyances, the change should be explained in a note following the name. For example, if title has been conveyed to Helen J. Doe, a single woman, and she later conveys title as Helen D. Jones, the fact that she was formerly known as Helen J. Doe or was conveyed title as Helen J. Doe should be noted.

If the property being conveyed or encumbered is homestead property, the record title holder’s spouse is required to join in any conveyance or encumbrance. *See* Tex. Fam. Code § 5.001.

If the grantor or grantee is a legal entity rather than a person, it should be specifically identified.

A description usually follows the name of a financial institution but may be unnecessary if the name adequately describes the institution—for example, “First National Bank of Sunshine,” “Sunshine Federal Credit Union,” or “Sunshine Federal Land Bank Association.

A deed by a corporation, if signed by an officer when recorded, constitutes prima facie evidence that execution was authorized by appropriate resolution of the board of directors; if the deed is executed by anyone other than an officer, it should be accompanied with a certified copy of the board of directors’ resolution. Before August 28, 1989, the deed had to be executed by the president or a vice-president to constitute that prima facie evidence. Filing a certified copy of the appropriate resolution provides an additional safeguard to establish the validity of the corporate conveyance. Neither a corporate seal nor attestation by the corporate secretary is required in Texas, unless required by the bylaws of the corporation.

§ 3.10 Acknowledgments

§ 3.10:1 Necessity for Acknowledgment

Instruments may be recorded only if they have been acknowledged, proved, or sworn to according to law. *See* Tex. Prop. Code §§ 11.004(a)(1), 12.001, 12.0011. County clerks may record an instrument only if it contains original signatures that are duly acknowledged, sworn to with a proper jurat, or otherwise proved in compliance with applicable law. The recordation of an instrument not duly acknowledged, otherwise proved, or sworn is a nullity and is not constructive notice of its contents. *See, e.g., Sanchez v. Telles*, 960 S.W.2d 762, 767 (Tex. App.—El Paso 1997, writ denied); *Reserve Petroleum Co. v. Hutcheson*, 254 S.W.2d 802, 806 (Tex. Civ. App.—Amarillo, 1952, writ ref’d n.r.e.). An instrument filed after September 1, 2007, containing a defective acknowledgment is consid-

ered lawfully recorded and is constructive notice of its contents after it has been of record for two years. Tex. Civ. Prac. & Rem. Code § 16.033(c).

Generally, the absence of an acknowledgment will not affect the validity of a deed, mortgage, or conveyance between the parties or affect the instrument as a conveyance. *See, e.g., Haile v. Holtzclaw*, 414 S.W.2d 916, 928 (Tex. 1967). However, by statute, certain instruments must include an acknowledgment. These include subdivision plats, powers of attorney, extensions of real estate lien debt, and management certificates by property owners associations. *See* Tex. Loc. Gov't Code § 212.004(c); Tex. Est. Code § 751.002; Tex. Civ. Prac. & Rem. Code § 16.036; Tex. Prop. Code § 209.004. Failure of the acknowledgment may render the instrument a nullity, even between the parties to the instrument.

§ 3.10:2 Distinguishing Acknowledgment and Certificate of Acknowledgment

Though used interchangeably, the terms *acknowledgment* and *certificate of acknowledgment* refer to two different concepts. An acknowledgment is the statutory ceremony in which a person who has executed an instrument appears before a competent officer and declares the instrument to be that person's act and deed. A certificate of acknowledgment is the written record of that proceeding made by the officer and appended to the instrument. To effect a valid acknowledgment, there must be both a valid ceremony of acknowledgment and a valid certificate of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code § 121.004; *Punchard v. Masterson*, 101 S.W. 204 (Tex. 1907).

§ 3.10:3 Short-Form Certificate of Acknowledgment

Many practitioners prefer to use the short-form certificate of acknowledgment when the acknowledgment is taken in Texas and if the acknowledger is within one of the five categories of persons or entities specified by statute. Those categories are—

1. natural persons;
2. natural persons acting by attorneys-in-fact;
3. partnerships;
4. corporations; and
5. public officers, trustees, executors, administrators, guardians, or other representative signers.

Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.10:4 Ordinary (Long-Form) Certificate of Acknowledgment

The ordinary, or long-form, certificate should be used if documents are to be executed outside Texas or in instances in which the acknowledger does not fall within one of the five categories for which short-form certificates may be used.

Some practitioners have adapted various short-form certificates for use in Texas that do not fit the literal definition of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code § 121.008. The practitioner should use the long-form certificate in all instances in which the acknowledger is not within one of the classes specified by the statute.

§ 3.11 Requirements of Valid Ceremony of Acknowledgment

A valid ceremony of acknowledgment requires—

1. a competent officer to take the acknowledgment (*see* Tex. Civ. Prac. & Rem. Code § 121.001);
2. a personal appearance by the acknowledger before the officer (*see* Tex. Civ. Prac. & Rem. Code § 121.004(a));
3. the identification of the acknowledger by the officer (*see* Tex. Civ. Prac. & Rem. Code § 121.005); and
4. a statement by the acknowledger that the acknowledger has executed the instrument for the purposes and consideration stated in the instrument (*see* Tex. Civ. Prac. & Rem. Code § 121.004(a)).

§ 3.11:1 Competent Officer to Take Acknowledgment

Acknowledgments Taken within Texas:

Acknowledgments taken in Texas may be made before—

1. a notary public;
2. a clerk of a district court (or deputy district clerk);
3. a judge of a county court;
4. a clerk of a county court (or deputy county clerk);
5. a federal judge, justice, or magistrate; or
6. certain other public officers for specific statutory instruments.

28 U.S.C. §§ 459, 636(a)(2); Tex. Civ. Prac. & Rem. Code § 121.001(a).

Acknowledgments Taken outside Texas but inside United States or Its Territories:

Acknowledgments taken outside Texas but inside the United States or its territories may be made before—

1. a notary public;
 2. a clerk of a court of record having a seal;
 3. a commissioner of deeds appointed under the laws of Texas; or
 4. a federal judge, justice, or magistrate.
- 28 U.S.C. §§ 459, 636(a)(2); Tex. Civ. Prac. & Rem. Code § 121.001(b).

Acknowledgments Taken outside United States or Its Territories: Acknowledgments taken outside the United States or its territories may be made before—

1. a minister, commissioner, or chargé d'affaires of the United States who is a resident of and is accredited in the country in which the acknowledgment is taken;
2. a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country in which the acknowledgment is taken; or
3. a notary public or other official authorized to administer oaths in the jurisdiction in which the acknowledgment or proof by affidavit is taken.

Tex. Civ. Prac. & Rem. Code § 121.001(c).

The preferred method of taking an acknowledgment outside the United States is to use a U.S. foreign service officer authorized in item 1 or 2 above. A form for acknowledgment by a foreign service officer of the United States is included as form 3-30 in this chapter.

If an acknowledgment is taken before a foreign notary public or any other official authorized to administer oaths in the jurisdiction in which the acknowledgment is taken as authorized in Texas Civil Practice and Remedies Code section 121.001(c)(3), it is advisable for the attorney to

comply with the Hague Convention on Legalization of Foreign Public Documents, if the instrument is executed in a country that has adopted the Hague Convention, and to seek certification and authentication of the document through an embassy or consular office for a country that has not adopted it. For additional information, see <https://www.hcch.net>, <https://travel.state.gov>, and, more specifically, <https://travel.state.gov/content/travel/en/legal-considerations/judicial/authentication-of-documents.html>.

Acknowledgments Taken of Military

Personnel and Their Spouses: A commissioned officer of the United States Armed Forces or of a United States Armed Forces auxiliary may take an acknowledgment of a written instrument of a member of the armed forces, a member of an armed forces auxiliary, or a member's spouse. Tex. Civ. Prac. & Rem. Code § 121.001(d). A form for a military acknowledgment is included as form 3-31.

Territorial Limitations on Officer's

Authority: Texas notaries may take an acknowledgment anywhere in the state but not outside the boundaries of Texas. Tex. Gov't Code § 406.003.

Time Limitations on Officer's Authority:

The term of a notary's appointment is four years. Tex. Gov't Code § 406.002. Reapplication may be made for successive terms. Tex. Gov't Code § 406.011. Texas law requires that the expiration date of the notary's commission appear as part of the notary's seal. *See* Tex. Gov't Code § 406.013(a).

The authority of other intrastate officers is limited to the terms of their offices.

Interested Officers Disqualified to Take

Acknowledgment: A party to an instrument may not take an acknowledgment for that instrument because one who is financially or beneficially interested in a transaction is disqualified

from taking an acknowledgment concerning the transaction. *Dyson Descendant Corp. v. Sonat Exploration Co.*, 861 S.W.2d 942, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ).

A beneficiary or trustee of a trust may not take an acknowledgment of an instrument to which the trust is a party. Nor may a trustee of a deed of trust take an acknowledgment for that instrument. *See Rothschild v. Dougher*, 20 S.W. 142 (Tex. 1892).

Generally, an agent of a party to an instrument is also disqualified to take an acknowledgment if that agency appears on the face of the instrument. To be disqualified, however, the agent must have discretionary authority to negotiate the terms of a particular transaction for the principal. *See Sample v. Irwin*, 45 Tex. 567 (1876); *Uvalde Rock Asphalt Co. v. Warren*, 59 S.W.2d 272 (Tex. Civ. App.—Galveston 1933), *aff'd*, 91 S.W.2d 321 (Tex. 1936). But if the agent is a mere salaried employee of a party to an instrument, the agent is not disqualified from taking an acknowledgment of that instrument. *Director, Dallas County Child Welfare v. Thompson*, 667 S.W.2d 282 (Tex. App.—Dallas 1984, no writ); *Anderson v. Pioneer Building & Loan Ass'n*, 163 S.W.2d 421, 425 (Tex. Civ. App.—Waco 1942, writ ref'd w.o.m.).

An officer or director of a corporation may not take an acknowledgment of an instrument to which the corporation is a party. A shareholder of a corporation is likewise disqualified if the corporation has one thousand or fewer stockholders and the officer taking the acknowledgment owns more than one-tenth of one percent of the issued and outstanding stock. Tex. Civ. Prac. & Rem. Code § 121.002(b).

Generally, an acknowledgment taken by an interested officer is void and may not be reformed or corrected. However, effect will be given to such an acknowledgment to protect an innocent purchaser who relies on the instrument as constructive notice and having no knowledge

of the disqualifying interest of the officer. To render an acknowledgment ineffective by reason of a disqualifying interest of the notary, the officer's financial or beneficial interest must appear on the face of the instrument or be otherwise known to the party relying on the instrument. Constructive notice of the disqualifying interest may come from a prior recorded instrument. See, e.g., *Gulf Production Co. v. Continental Oil Co.*, 164 S.W.2d 488, 493-94 (Tex. 1942); *Dyson Descendant Corp.*, 861 S.W.2d at 948.

§ 3.11:2 Personal Appearance before Officer

An acknowledgment is invalid unless the acknowledger personally appears before the competent officer. Tex. Civ. Prac. & Rem. Code § 121.004(a). An acknowledgment taken over the telephone or otherwise made without personal contact with the acknowledger fails to satisfy the statutory requirements of an acknowledgment ceremony.

§ 3.11:3 Acknowledger Must Be Identified by Officer

An officer may not take an acknowledgment unless the officer knows the acknowledger or has satisfactory evidence that the acknowledging person is the same person who executed the instrument. Tex. Civ. Prac. & Rem. Code § 121.005(a).

The law does not prescribe the extent of acquaintance necessary for the acknowledger to be known to the officer. The acquaintance may be of one year or one hour. However, mere introduction by another may be insufficient for the acknowledger to be known to the officer.

Satisfactory evidence of the identity of an acknowledger not known to the officer may be made only by the oath of a credible witness personally known to the officer, by a current identification card or other document issued by the

federal government or any state government that contains the photograph and signature of the acknowledging person, or, in the case of a deed or other instrument relating to a residential real estate transaction, by a current passport issued by a foreign country. Tex. Civ. Prac. & Rem. Code § 121.005(a). The most common examples seen are driver's licenses and passports. However, the form provided in Texas Civil Practice and Remedies Code section 121.010 provides for identification only by personal knowledge or oath of a witness.

§ 3.11:4 Acknowledger Must Acknowledge Signature before Officer

An officer may not take a valid acknowledgment by simply sitting in mute observation of a person signing the instrument. To effect a valid ceremony of acknowledgment, the acknowledger must state to the officer that the acknowledger executed the instrument in the capacity and for the purposes and consideration stated in the instrument. The officer should treat the acknowledgment as a scripted ceremony and obtain from the acknowledger, as applicable, the following declarations.

1. Individual Acknowledgment. A natural person must acknowledge to the officer that the acknowledger executed the instrument for the purposes and consideration expressed in the instrument.
2. Attorney-in-Fact. An acknowledger executing an instrument as attorney-in-fact for a principal must acknowledge that the acknowledger executed the instrument as the act of the principal for the purposes and consideration expressed in the instrument.
3. Partnership. An acknowledger executing a document on behalf of a partnership must acknowledge that the

acknowledger executed the instrument as the act of the partnership for the purposes and consideration expressed in the instrument.

4. **Corporate Acknowledgment.** A corporate officer or agent must acknowledge that the acknowledger executed the instrument in the capacity stated, as the act of the corporation, for the purposes and consideration expressed in the instrument.
5. **Public Officer, Trustee, Executor or Administrator of an Estate, Guardian, or Other Representative Signer.** An acknowledger executing a document as a public officer, trustee, executor or administrator of an estate, or guardian or in another representative capacity must acknowledge that the acknowledger executed the instrument by proper authority in the capacity stated and for the purposes and consideration expressed in the instrument.

Tex. Civ. Prac. & Rem. Code § 121.006(b).

§ 3.12 Requirements for Valid Certificate of Acknowledgment

A valid certificate of acknowledgment must—

1. be in English;
2. contain a caption showing where the acknowledgment was taken;
3. recite the official capacity of the officer taking the acknowledgment;
4. recite a personal appearance before the officer;
5. recite that the acknowledger was identified by the officer;
6. recite that the acknowledger acknowledged the instrument;

7. identify the acknowledger;
8. recite the date of the acknowledgment;
9. bear the signature of the officer; and
10. bear the official seal of the officer.

See sections 3.12:1 through 3.12:11 below for more detailed information.

The legislature has prescribed statutory forms for an ordinary (long-form) certificate of acknowledgment and for certain short-form certificates of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008. The short-form certificates of acknowledgment are preferred for acknowledgments taken within Texas. Short-form certificates of acknowledgment should not be used for acknowledgments taken outside the state of Texas. This chapter includes examples of both ordinary and short-form certificates of acknowledgment. Short-form certificates of acknowledgment are shown in this chapter for acknowledgers falling within the classes identified in Texas Civil Practice and Remedies Code section 121.008.

Ordinary (long-form) certificates of acknowledgment are shown in this chapter for all acknowledgers, and a separate form is included as form 3-29 in this chapter.

Short-form certificates of acknowledgment do not require that the certificate state how the officer identified the acknowledger. In all other respects, short-form certificates of acknowledgment must contain all essential elements of a certificate of acknowledgment. For an ordinary, or long-form, certificate, it is necessary that the officer state in the certificate either that the officer personally knows the acknowledger or that evidence of a witness or an identification card or other document was used to identify the acknowledger. Tex. Civ. Prac. & Rem. Code § 121.005(b).

There are statutory requirements for the ordinary, or long-form, certificate of acknowledgment.

ment, and there are different statutory requirements for the short-form certificate of acknowledgment; in either case, substantial compliance with the statutory forms is all that is required. Literal compliance is not essential as long as, on balance, the certificate shows that substantially all things required by law to be done have been done. *See Williams v. Cruse*, 130 S.W.2d 908 (Tex. Civ. App.—Beaumont 1939, writ ref'd) (construing an ordinary certificate of acknowledgment).

§ 3.12:1 Certificate Must Be in English

The certificate of acknowledgment and the remainder of the instrument may not be recorded unless they are in English or comply with Tex. Prop. Code § 11.002. For those illiterate in English, no special form of certificate of acknowledgment is specified. However, prudence may dictate that an affidavit of interpreter be executed and attached to the instrument. An affidavit of interpreter is included as form 3-36 in this chapter.

An instrument acknowledged outside the United States or its territories in accordance with Texas Civil Practice and Remedies Code section 121.001(c)(3) that contains a certificate, stamp, or seal of a notary public or other official before whom the acknowledgment was taken or an apostille relating to the acknowledgment, any portion of which is not in English, may be recorded and operate as constructive notice from the date of filing if—

1. a correct English translation of any non-English portion of the certificate, stamp, seal, or apostille is recorded with the original instrument;
2. the accuracy of the translation is sworn to before an officer authorized to administer oaths; and

3. any apostille relating to the acknowledgment complies with the Hague Convention dated October 5, 1961, entitled “Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, a copy of which can be obtained online at <https://www.hcch.net/>.

Tex. Prop. Code § 11.002(c).

§ 3.12:2 Certificate Must Identify Location of Acknowledgment

Each separate certificate of acknowledgment must bear a caption or other indication of where the acknowledgment was taken so that it can be determined that the officer taking the acknowledgment acted within the scope of the officer’s geographic authority. Each separate certificate of acknowledgment must contain its own caption. *See Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.*

§ 3.12:3 Certificate Must Recite Capacity of Officer

It is not enough that the officer taking the acknowledgment take it correctly within the officer’s official capacity. The certificate of acknowledgment must recite the official capacity of the officer on the instrument. *See Gulf, Colorado & Santa Fe Railway Co. v. Carter*, 24 S.W. 1083 (Tex. Civ. App.—Dallas 1893, no writ).

§ 3.12:4 Certificate Must Recite Personal Appearance by Acknowledger before Officer

The certificate of acknowledgment must state that the acknowledger made a personal appearance before the officer. Statutory short forms for certificates of acknowledgment accomplish this by stating that the acknowledgment was taken

'before me. See Tex. Civ. Prac. & Rem. Code §§ 121.006–.008.

§ 3.12:5 Certificate Must Recite That Acknowledger Was Identified by Officer

For an ordinary, or long-form, certificate of acknowledgment, the certificate must recite how the officer identified the acknowledger by the accepted statutory methods. The certificate of acknowledgment must state that the acknowledger was—

1. known to the officer;
2. identified to the officer by the oath of a credible witness personally known to the officer;
3. identified by a current identification card or other document issued by the federal government or any state government that contains the photograph and signature of the acknowledging person; or
4. in the case of a deed or other instrument relating to a residential real estate transaction, identified by a current passport issued by a foreign country.

This requirement does not apply to short-form certificates of acknowledgment.

Tex. Civ. Prac. & Rem. Code § 121.005.

§ 3.12:6 Certificate Must Recite That Signatory Acknowledged Instrument

The certificate of acknowledgment must recite that the signatory acknowledged the execution of the instrument. Failure to state this essential fact renders the certificate fatally defective. See Tex. Civ. Prac. & Rem. Code §§ 121.007, 121.008.

A long-form certificate of acknowledgment should contain all the components required for a valid ceremony of acknowledgment. See section 3.11 above.

Short-form certificates of acknowledgment require only an abbreviated statement of acknowledgment. Generally, each short-form certificate of acknowledgment requires only a statement that the instrument was “acknowledged. However, short-form certificates of acknowledgment for attorneys-in-fact, partnerships, and corporations must additionally state that the instrument was acknowledged “on behalf of” the principal, partnership, or corporation. The short-form certificate of acknowledgment for a public officer, trustee, executor, administrator, guardian, or other representative signer must state that the instrument was acknowledged by the representative signer ‘as (title of representative) of (name of entity or person represented). Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.12:7 Certificate Must Identify Acknowledger

The certificate of acknowledgment must show that the person acknowledging the instrument is the same person who signed it. A slight variance between the name of the person shown to have signed and the name of the person shown to have acknowledged the instrument may, but will not necessarily, invalidate the certificate. See, e.g., *Cheek v. Herndon*, 17 S.W. 763 (Tex. 1891).

Pronouns may be employed in certificates of acknowledgment as a substitute for the name of the acknowledger given elsewhere in the certificate. As with the names for which they substitute, errors in the use of pronouns may, but will not necessarily, have the effect of invalidating the certificate. *Cheek*, 17 S.W. at 764.

§ 3.12:8 Certificate Must Recite Date of Acknowledgment

All statutory forms for certificates of acknowledgment provide for the certificate to be dated. The date must be the date on which the instrument was acknowledged. The date of the acknowledgment must not be earlier than the date of execution of the instrument; otherwise, the notary would appear to have taken the acknowledgment before the document was actually executed, giving rise to an ineffective acknowledgment. However, an instrument may be dated to become effective on some future date while the acknowledgment is taken and dated with a current date.

§ 3.12:9 Certificate Must Bear Signature of Officer

The officer taking the acknowledgment must sign the certificate. Tex. Civ. Prac. & Rem. Code § 121.004(b)(2).

§ 3.12:10 Certificate Must Bear Official Seal of Officer

The officer taking the acknowledgment of an instrument must affix the officer's official seal of office. Tex. Civ. Prac. & Rem. Code § 121.004(b)(3). An acknowledgment without a seal or containing the wrong seal is generally, but not always, fatally defective. *See McDonald v. Stanfield*, 197 S.W. 892, 893–94 (Tex. Civ. App.—Beaumont 1917, writ ref'd). *But see* Tex. Civ. Prac. & Rem. Code § 121.001(d) (failure to attach seal does not invalidate acknowledgment taken by officer of armed forces); Tex. Civ. Prac. & Rem. Code § 121.004(c); Tex. Prop. Code § 12.001(d) (failure to attach seal invalidates acknowledgment only if taken in jurisdiction that requires seal).

The notary must use a seal of office that clearly shows, when embossed, stamped, or printed on a document, the words 'Notary Public, State of

Texas' around a star of five points, the notary's name, and the date the notary's commission expires. For notaries commissioned or reappointed on or after January 1, 2016, the seal of office must also show the notary's identification number assigned by the secretary of state. The seal may be in a circular form not more than two inches in diameter or a rectangular form not more than one inch in width and two and one-half inches in length; must have a serrated or milled-edge border; and must be affixed by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of a seal under photographic methods. An indelible ink pad must be used for the stamp. Tex. Gov't Code § 406.013.

Documents notarized before September 1, 1989, are valid if the seal used contained the words 'Notary Public, State of Texas' or 'Notary Public' and the name of the county but did not have the notary's name and commission expiration date. Continued use of previously authorized forms of seals is not authorized after August 31, 1989.

The notary's seal should not cover or obscure signatures or text.

The ordinary, or long-form, certificate of acknowledgment includes the language above the signature of the officer that the certificate is 'given under my hand and seal of office.' Tex. Civ. Prac. & Rem. Code § 121.007. However, the presence or absence of these words does not affect the validity of the certificate. The phrase has been eliminated from short-form certificates of acknowledgment. *See* Tex. Civ. Prac. & Rem. Code § 121.008.

§ 3.12:11 Officer Required to Keep Record of Acknowledgments Taken

Unless specifically excused by statute, each officer authorized to take acknowledgments of

instruments must enter in a 'well-bound book' and officially sign a short statement of each acknowledgment taken. There are general requirements of the information to be recorded in the book, such as the date of the instrument, the date the acknowledgment or proof was taken, the name and residence of the acknowledger, information about how the acknowledger was identified, the name of the grantee of the land, the county in which the land is located, and a brief description of the instrument. *See* Tex. Civ. Prac. & Rem. Code § 121.012. Books suitable for this purpose are available commercially.

No penalty is prescribed for the failure of an officer to maintain a well-bound book or to make entries of acknowledgments taken. The failure to make the entry does not affect the validity of the instrument or prove that the acknowledgment was not taken. *See Martin v. Bane*, 450 S.W.2d 142, 144 (Tex. Civ. App.—Dallas 1969, no writ).

§ 3.13 Alternative Methods of Proving Instruments

Notwithstanding that an instrument may not contain a valid acknowledgment, it may nevertheless be recorded if proved by alternative methods. The alternative methods of proving a document for recordation include proof by jurat, proof by subscribing witness, acknowledgment by handwriting, proof by suit, and proof by an unsworn declaration.

See sections 3.13:1 through 3.13:5 below for more detailed information.

§ 3.13:1 Proof by Jurat

Jurats are ordinarily used only for affidavits. However, since September 1, 1989, instruments that are only sworn to and not acknowledged or otherwise proved are eligible for recordation. *See* Tex. Prop. Code § 12.001. Affidavits recorded before September 1, 1989, must have

been accompanied by an acknowledgment. Any affidavit recorded without an acknowledgment before that date may not constitute constructive notice.

As with acknowledgments, an officer cannot take a valid affidavit by simply sitting in mute observation of the affiant signing the instrument. The officer taking the affidavit should place the affiant under oath or receive the affiant's declaration that the statements contained in the affidavit are true and correct. Failure to attend to these formalities may render the affidavit ineffective. *See* Tex. Gov't Code § 312.011(1). A sample oath for the officer to administer to the affiant is: 'Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth?' The affiant must answer 'yes' before signing the sworn document.

Affidavits in this manual contain a statement similar to the following: "Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant. Although the statement is not required by statute, the Supreme Court of Texas has held that an affidavit is insufficient unless the allegations contained in it are direct and unequivocal and perjury can be assigned to them. This requires that the affidavit positively and unqualifiably represent that the facts disclosed in the affidavit are true and within the personal knowledge of the affiant. *Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984).

The persons before whom oaths, affidavits, and affirmations may be made include—

1. a notary public;
2. a judge, retired judge, or clerk of a municipal court, in a matter pertaining to a duty of the court;
3. a judge, retired judge, senior judge, clerk, or commissioner of a court of record;

4. a justice of the peace or a clerk of a justice court;
5. a member of a board or commission created by a law of this state, in a matter pertaining to a duty of the board or commission;
6. a person employed by the Texas Ethics Commission who has a duty related to a report required by title 15 of the Texas Election Code in a matter pertaining to that duty;
7. a county tax assessor-collector or an employee of the county tax assessor-collector if the oath relates to a document that is required or authorized to be filed in the office of the county tax assessor-collector;
8. the secretary of state or a former secretary of state;
9. an employee of a personal bond office, or an employee of a county, who is employed to obtain information required to be obtained under oath if the oath is required or authorized by article 17.04 or article 26.04(n) or (o) of the Texas Code of Criminal Procedure;
10. the lieutenant governor or a former lieutenant governor;
11. the speaker of the house of representatives or a former speaker of the house of representatives;
12. the governor or a former governor;
13. a legislator or retired legislator;
14. the attorney general or a former attorney general;
15. the secretary or clerk of a municipality in a matter pertaining to the official business of the municipality;
16. a peace officer described by article 2.12 of the Texas Code of Criminal

Procedure if the oath is administered when the officer is engaged in the performance of the officer's duties and the administration of the oath relates to the officer's duties; or

17. an associate judge, magistrate, master, referee, or criminal law hearing officer.

Tex. Gov't Code § 602.002.

§ 3.13:2 Proof by Subscribing Witness

In some cases, an instrument cannot be proved by acknowledgment or jurat because a signatory is dead, unavailable, incompetent, or uncooperative. Proof by subscribing witness may be used if there is a credible witness who saw the signatory sign the instrument or in whose presence the signatory acknowledged the signature. The requirements of proof of an instrument by a subscribing witness are set out in Tex. Civ. Prac. & Rem. Code §§ 121.009, 121.010. Proofs of an instrument by a subscribing witness are included in forms 3-32 and 3-33 in this chapter.

§ 3.13:3 Acknowledgment by Handwriting

In certain limited instances in which neither a standard acknowledgment nor an acknowledgment by witness is available, an instrument may be proved by an acknowledgment by handwriting. The execution of an instrument may be established for recording by proof of the handwriting of persons who signed the instrument only if—

1. the grantor of the instrument and all the witnesses are dead;
2. the grantor and all the witnesses are not residents of Texas;
3. the residences of the grantor and the witnesses are unknown to the person

seeking to prove the instrument and cannot be ascertained;

4. the witnesses have become legally incompetent to testify; or
5. the grantor of the instrument refuses to acknowledge the execution of the instrument and all the witnesses are dead, not residents of Texas, or legally incompetent or their places of residence are unknown.

Tex. Civ. Prac. & Rem. Code § 121.011.

§ 3.13:4 Proof by Suit

Any person having an interest in an instrument may bring an action in state district court for a judgment proving the instrument. Tex. Prop. Code § 11.005(a). Once a judgment in the action is obtained, a certified copy of it may be attached to the instrument; the instrument may then be recorded as if it contained a proper certificate of acknowledgment. Tex. Prop. Code § 11.005(c). This statute provides an alternative for making an instrument recordable; it does not cure those instruments missing an acknowledgment that require an acknowledgment for their validity. *See McCracken v. Sullivan*, 221 S.W. 336 (Tex. Civ. App.—San Antonio 1920, no writ).

§ 3.13:5 Proof by Unsworn Declaration

Chapter 132 of the Texas Civil Practices and Remedies Code provides that an unsworn declaration made under penalty of perjury may be used in lieu of some declarations, verifications, certifications, oaths, or affidavits required by law to be taken before a notary public. Tex. Civ. Prac. & Rem. Code § 132.001. Under this statute it may be possible for an instrument to be proved by an unsworn declaration of either the signatories to the instrument, the subscribing witnesses, or persons authorized to give evi-

dence of handwriting. To be effective, unsworn declarations must substantially comply with the statutory forms. Tex. Civ. Prac. & Rem. Code § 132.001(d)–(f). This statute does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk, or an oath of office or an oath required to be taken before a specified official other than a notary public. Tex. Civ. Prac. & Rem. Code § 132.001(b).

§ 3.14 Filing of Documents

Texas is a race-notice state, and all real property conveyance instruments should be filed in the real property records (also referred to as the official public records, deed records, or deed-of-trust records, depending on the county) of the county in which the property is located as soon as possible after the transaction is complete. Powers of attorney and other authority documents requiring recordation used in connection with a sale or loan secured by real estate should be recorded before the conveyance or loan documents so that the proper authority is in place for the conveyance. Powers of attorney used for real property transactions must be recorded no later than thirty days after the recordation of the instrument signed by the agent. Tex. Est. Code § 751.151.

Some county clerks have filing requirements and fees unique to their county. Contacting the clerk for the specific guidelines before sending documents to be filed of record may prevent the return of unrecorded documents.

Attorneys, licensed lenders, title companies, federal agencies and lenders, and state agencies may file documents electronically with county clerks. Tex. Loc. Gov't Code § 195.003. Rules for electronic filing have been adopted by the Texas State Library and Archives Commission and are found at 13 Tex. Admin. Code §§ 7.141–

.145. *See* Tex. Loc. Gov't Code § 191.009. *See generally* Tex. Loc. Gov't Code ch. 195.

§ 3.15 Filing Fees

Filing fees of county clerks are usually computed per page. *See* Tex. Loc. Gov't Code § 118.011. The per-page filing fee is twice the usual amount if the first page of the document has no identifying heading, the page is not legible, any signature on a page appears without having the name legibly typed or printed beneath it, or a page is oversized. A page must be printed in type no smaller than eight point. However, failure to meet the type-size requirement does not result in a fee increase or invalidate the recordation of the document. *See* Tex. Loc. Gov't Code §§ 118.0525, 191.007.

If a manuscript cover with legible marks (for example, the name of the attorney preparing the document) is affixed to a document delivered for recording, the clerk is authorized to charge the usual recording fee for the page. *See* Tex. Loc. Gov't Code § 118.011(a)(2).

Filing fees for a low- or moderate-income person buying or improving the person's residence with federal or state assistance may be waived on the county clerk's receipt of a commissioners court directive to waive such fees. A county clerk may have a list of approved grant or aid programs issued by that county's commissioners court, which provides the authorization for waiver of these fees. Tex. Loc. Gov't Code § 118.0135.

No additional fee may be charged for electronic filing. Tex. Loc. Gov't Code § 195.006. A county clerk may not impose requirements or fees for filing or recording a legal paper in addition to those prescribed by statute. Tex. Loc. Gov't Code § 191.007(a). Attorneys should consult, in advance, with the county clerk's office or website to determine applicable fee policies for the instrument(s) at issue.

§ 3.16 Confidentiality Notice

Section 11.008 of the Texas Property Code provides that an individual's Social Security number is not required and should not be included in a document presented for recording in the county clerk's office and that the county clerk does not obtain or maintain the Social Security numbers of individuals. *See* Tex. Prop. Code § 11.008(b). An instrument transferring an interest in real property to or from an individual, regardless of whether the document contains an individual's Social Security number or driver's license number, must include a notice that appears on the top of the first page of the instrument in twelve-point bold-faced type or twelve-point uppercase letters and reads substantially as follows:

**Notice of confidentiality rights:
If you are a natural person, you
may remove or strike any or all
of the following information
from any instrument that trans-
fers an interest in real property
before it is filed for record in the
public records: your Social
Security number or your
driver's license number.**

Tex. Prop. Code § 11.008(c).

An "instrument" is "a deed or deed of trust." Tex. Prop. Code § 11.008(a). Even though this statute requires the confidentiality notice only on a deed or deed of trust, it is recommended that the notice be added to any instrument, to be recorded in the public records, transferring an interest in real estate to or from an individual. For example, see the sections titled 'Contracts for Deed' and 'Mechanic's Liens' in chapter 2 of this manual, section 25.2, and section 10.3:2.

'The validity of an instrument as between the parties to the instrument and the notice provided by the instrument are not affected by the party's

failure to include the notice required under Sub-section (c).” Tex. Prop. Code § 11.008(d).

Additional Resources

Haley, Steven C. "Material Alteration of Documents." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Melamed, Richard, and James N. Johnson. "Execution of Documents." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.

Schiess, Wayne. "Some Things Every Legal Drafter Should Know." In *Advanced Real*

Estate Drafting Course, 2007. Austin: State Bar of Texas, 2007.

Tarver, Lewis T., Jr. "Writing for the Times." In *Advanced Real Estate Drafting Course, 2001*. Austin: State Bar of Texas, 2001.

Weller, Philip D. "Drafting 1.01." In *Advanced Real Estate Drafting Course, 2002*. Austin: State Bar of Texas, 2002.

———. "Perfect Notice." In *Advanced Real Estate Drafting Course, 2007*. Austin: State Bar of Texas, 2007.

[Reserved]

Form 3-1

Document Components: Single Person

1. Party Designation

[Name], a single person,

2. Signature Block

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument

and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-2

Document Components: Spouses

1. Party Designation

[Name of spouse A] and [name of spouse B], spouses,

2. Signature Block

[Name of spouse A]

[Name of spouse B]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of spouse A] and [name of spouse B].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of spouse A] and [name of spouse B], [known to me/proved to me on

the oath of [**name of witness**]/proved to me through [**description of identity card[s] or other document[s]**] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [**specify**] day of [**month**],
[**year**].

[SEAL]

[**Title of officer**]

My commission expires: [**date**]

Form 3-3

Document Components: Natural Person—Nonhomestead

1. Party Designation

[Name], owning, occupying, and claiming other property as homestead,

2. Signature Block

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument

and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-4

Document Components: Multiple Persons—Nonhomestead

1. Party Designation

[Name] and [name], each owning, occupying, and claiming other property as homestead,

2. Signature Block

[Name]

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name[s]].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name[s] of acknowledger[s]], [known to me/proved to me on the oath of

[name of witness]/proved to me through [description of identity card[s] or other document[s]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-5

Document Components: Spouses—Nonhomestead

1. Party Designation

[Name of spouse A] and [name of spouse B], spouses, owning, occupying, and claiming other property as homestead,

2. Signature Block

[Name of spouse A]

[Name of spouse B]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of spouse A] and [name of spouse B].

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of spouse A] and [name of spouse B], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-6

Document Components: Married Person—Separate Property

1. Party Designation

[Name], spouse of [name], dealing with [include if applicable: nonhome-
stead] separate property,

2. Signature Block

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument

and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-7

Document Components: Natural Person—Assumed Name

1. Party Designation

[Name], d/b/a [assumed name],

2. Signature Block

[Name]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name] doing business as [assumed name].

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument

and acknowledged to me that [he/she] does business as [assumed name] and executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-8

Document Components: Natural Person by Attorney-in-Fact

1. Party Designation

[Name of principal], acting by [name of attorney-in-fact],
attorney-in-fact,

2. Signature Block

[Name of principal]

[Name of attorney-in-fact], attorney-in-fact

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of attorney-in-fact] as attorney-in-fact on behalf of [name of principal].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of attorney-in-fact], [known to me/proved to me on the oath of [name of

witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of principal] as attorney-in-fact of [name of principal] for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-9

Document Components: General Partnership—Individual Partner

1. Party Designation

[Name of partnership], a [state of formation] general partnership,

2. Signature Block

[Name of partnership]

By _____
[Name of partner], partner

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of acknowledging partner], partner, on behalf of [name of partnership], a [state of formation] general partnership.

[SEAL]

[Title of officer]
My commission expires: [date]

**3.B. Ordinary Certificate of
Acknowledgment**

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledging partner], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of partnership], a [state of formation] general partnership, as partner, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month],
[year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-10

Document Components: General Partnership—Composition of Partners

1. Party Designation

[Name of partnership], a [state of formation] general partnership composed of [names],

2. Signature Block

[Name of partnership]

By _____
[Name of partner], partner

By _____
[Name of partner], partner

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name[s] of acknowledging partner[s]], partner[s], on behalf of [name of partnership], a [state of formation] general partnership.

[SEAL]

[Title of officer]
My commission expires: [date]

**3.B. Ordinary Certificate of
Acknowledgment**

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name[s] of acknowledging partner[s]], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the person[s] whose name[s] [is/are] subscribed to the foregoing instrument and acknowledged to me that [he/she/they] executed the same as partner[s] as the act of [name of partnership], a [state of formation] general partnership, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month],
[year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-11

Document Components: Limited Partnership—Individual General Partner

1. Party Designation

[Name of limited partnership], a [state of formation] limited partnership,

2. Signature Block

[Name of limited partnership]

By _____
[Name of partner], general partner of
[name of limited partnership]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of general partner], general partner, on behalf of [name of limited partnership], a [state of formation] limited partnership.

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of general partner], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of limited partnership], a [state of formation] limited partnership, as its general partner, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-12

Document Components: Limited Partnership—Entity General Partner

1. Party Designation

[Name of limited partnership], a [state of formation] limited partnership,

2. Signature Block

[Name of limited partnership]

By _____

[Name and title of officer or agent for
general partner]

**3. Certificate of
Acknowledgment**

**3.A. Short-Form Certificate of
Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of
acknowledger], [title] of [name of general partner], a [state of formation] [type
of entity] general partner, on behalf of [name of limited partnership], a [state of
formation] limited partnership.

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledged], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as [title] of [name of general partner], a [state of formation] [type of entity] general partner, as the act of [name of limited partnership], a [state of formation] limited partnership, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-13

Document Components: Joint Venture—Individual Venturer

1. Party Designation

[Name of venture], a [state of formation] joint venture,

2. Signature Block

[Name of venture]

By _____
[Name of venturer], joint venturer

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of acknowledging venturer], joint venturer, on behalf of [name of venture], a [state of formation] joint venture.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of acknowledging venturer], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of venture], a [state of formation] joint venture, as joint venturer, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-14

Document Components: Joint Venture—Composition of Venturers

1. Party Designation

[Name of venture], a [state of formation] joint venture composed of
[names of joint venturers],

2. Signature Block

[Name of venture]

By _____
[Name of joint venturer], joint venturer

By _____
[Name of joint venturer], joint venturer

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name[s] of venturer[s]], joint venturer[s], on behalf of [name of venture], a [state of formation] joint venture.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name[s] of joint venturer[s]], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the person[s] whose name[s] [is/are] subscribed to the foregoing instrument and acknowledged to me that [he/she/they] executed the same as the act of [name of venture], a [state of formation] joint venture, as joint venturer[s], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-15

Document Components: Corporation

1. Party Designation

[Name of corporation], a [state of formation] corporation,

2. Signature Block

[Name of corporation]

By _____
[Name and title of corporate officer or agent]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of corporate officer or agent], as the [title of corporate officer or agent] of [name of corporation], a [state of formation] corporation, on behalf of said corporation.

[SEAL]

[Title of officer]

My commission expires: [date]

**3.B. Ordinary Certificate of
Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of corporate officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of corporation], a [state of formation] corporation, as its [title of corporate officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-16

Document Components: Nonprofit Corporation

1. Party Designation

[Name of corporation], a [state of formation] nonprofit corporation,

2. Signature Block

[Name of corporation]

By _____
[Name and title of corporate officer or agent]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name and title of corporate officer or agent], of [name of corporation], a [state of formation] nonprofit corporation, on behalf of said nonprofit corporation.

[SEAL]

[Title of officer]
My commission expires: [date]

**3.B. Ordinary Certificate of
Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of corporate officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of corporation], a [state of formation] nonprofit corporation, as its [title of corporate officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-17

Document Components: Trustee—Individual

1. Party Designation

[Name of trustee], trustee of the [name of trust] trust under an instrument dated [date], recorded in [recording data of trust] of the real property records of [county] County, Texas,

2. Signature Block

[Name of trustee], trustee of the [name of trust] trust

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of trustee], as trustee of [name of trust].

[SEAL]

[Title of officer]
My commission expires: [date]

**3.B. Ordinary Certificate of
Acknowledgment**

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of trustee], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same by proper authority as trustee of [name of trust], on behalf of said trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-18

Document Components: Trustee—Entity

1. Party Designation

[Name of trustee], a [state of formation] [type of entity], as trustee for the [name of trust] trust under an instrument dated [date], recorded in [recording data of trust] of the real property records of [county] County, Texas,

2. Signature Block

[Name of trust]

By _____
[Name and title of trustee's agent]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of trustee's agent], as [title of trustee's agent] of [name of trustee], a [state of formation] [type of entity], as the trustee of [name of trust].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of trustee's agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as [title of trustee's agent] of [name of trustee], a [state of formation] [type of entity], by proper authority as the trustee of [name of trust], on behalf of said trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-19

Document Components: Trustee—Testamentary

1. Party Designation

[Name of individual trustee] and [name of bank trustee], testamentary trustees under the will of [name of decedent], probated in [county] County, Texas,

2. Signature Block

[Name of individual trustee], testamentary trustee under the will of [name of decedent], probated in [county] County, Texas

[Name of bank officer], as [title of bank officer] of [name of bank trustee], testamentary trustee under the will of [name of decedent], probated in [county] County, Texas

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of individual trustee] and [name of bank officer], as [title of bank officer] of [name of bank trustee], the testamentary trustees under the will of [name of decedent], probated in [county] County, Texas.

[SEAL]

[Title of officer]

My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of individual trustee] and [name of bank officer], as [title of bank officer] of [name of bank trustee], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same by proper authority as testamentary trustees under the will of [name of decedent], probated in [county] County, Texas, on behalf of said testamentary trust, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-20

Document Components: Decedent's Estate—Personal Representative

1. Party Designation

[Name of personal representative], [title of personal representative] of
the estate of [name of decedent], deceased,

2. Signature Block

[Name of personal representative], [title of
personal representative] of the estate of
[name of decedent], deceased

**3. Certificate of
Acknowledgment**

**3.A. Short-Form Certificate of
Acknowledgment**

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of per-
sonal representative], as [title of personal representative] of the estate of [name
of decedent], deceased.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of personal representative], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same by proper authority as [title of personal representative], on behalf of the estate of [name of decedent], deceased, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-21

Document Components: Decedent's Estate by Personal Representative Also Signing Individually

1. Party Designation

[Name of personal representative], individually and as [title of personal representative] of the estate of [name of decedent], deceased,

2. Signature Block

[Name of personal representative],
individually and as [title of personal representative] of the estate of [name of decedent], deceased

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of personal representative], individually and as [title of personal representative] for the estate of [name of decedent], deceased.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of personal representative], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same individually and by proper authority as [title of personal representative], on behalf of the estate of [name of decedent], deceased, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-22

Document Components: Guardian for Ward

1. Party Designation

[Name of guardian], guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person,

2. Signature Block

[Name of guardian], guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of guardian] as guardian of the [include if applicable: person and] estate of [name of ward], an incapacitated person.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of guardian], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of ward], an incapacitated person, as guardian of the [include if applicable: person and] estate of [name of ward], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-23

Document Components: Custodian for Minor under Uniform Transfers to Minors Act

1. Party Designation

[Name of custodian], custodian for [name of minor], a minor, under the Texas Uniform Transfers to Minors Act,

2. Signature Block

[Name of custodian], custodian for
[name of minor]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of custodian] as custodian for [name of minor], a minor, under the Texas Uniform Transfers to Minors Act.

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of custodian], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same on behalf of [name of minor], a minor, as custodian under the Texas Uniform Transfers to Minors Act, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-24

Document Components: Entity

1. Party Designation

[Name of entity], a [state of formation] [type of entity],

2. Signature Block

[Name of entity]

By _____
[Name and title of officer or agent]

3. Certificate of Acknowledgment

No short-form certificate of acknowledgment is provided by statute for entities other than corporations or partnerships. The following is the ordinary certificate of acknowledgment modified for other types of entities.

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of entity's officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of entity], a [state of formation] [type of entity], as its [title of entity's officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-25

Document Components: Entity with Assumed Name

1. Party Designation

[Name of entity], a [state of formation] [type of entity], d/b/a [assumed name],

2. Signature Block

[Name of entity]

By _____
[Name and title of entity's officer or agent]

3. Certificate of Acknowledgment

3.A. Short-Form Certificate of Acknowledgment

By statute, a short-form certificate of acknowledgment can be used only if the entity is a corporation or partnership.

STATE OF TEXAS
COUNTY OF [county]

This instrument was acknowledged before me on [date] by [name of entity's officer or agent] as [title of entity's officer or agent] of [name of entity], a [state of formation] [corporation/partnership], d/b/a [assumed name], on behalf of said [corporation/partnership].

[SEAL]

[Title of officer]
My commission expires: [date]

3.B. Ordinary Certificate of Acknowledgment

STATE OF TEXAS
COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of entity's officer or agent], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of entity], a [state of formation] [type of entity], d/b/a [assumed name], as its [title of entity's officer or agent], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]
My commission expires: [date]

Form 3-26

Document Components: Cooperative

1. Party Designation

[Name of cooperative], a [state of formation] cooperative association,

2. Signature Block

[Name of cooperative]

By _____

[Name and title of officer]

3. Certificate of Acknowledgment

No short-form certificate of acknowledgment is provided by statute for a cooperative. The following is the ordinary certificate of acknowledgment modified for a cooperative.

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of officer of cooperative], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of cooperative], a [state of formation] cooperative association, as its [title of officer of cooperative], for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-27

Document Components: Unincorporated Association—Statement of Authority

1. Party Designation

[Name of association], an unincorporated association, by and through [name of authorized person], acting under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas,

2. Signature Block

[Name of association]

By _____
[Name of authorized person], acting under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas

3. Signature Block

[Name of association], an unincorporated association,

4. Certificate of Acknowledgment

No short-form certificate of acknowledgment is provided by statute for an unincorporated association. The following is the ordinary certificate of acknowledgment modified for an unincorporated association.

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of authorized person], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same as the act of [name of association], an unincorporated association, under the statement of authority recorded in [recording data] of the real property records of [county] County, Texas, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-28

Document Components: Unincorporated Association—Trustees

1. Party Designation

[Names of trustees], trustees for [name of association], an unincorporated association,

2. Signature Block

[Name of association], an unincorporated association,

[Name of trustee], trustee

[Name of trustee], trustee

3. Certificate of Acknowledgment

No short-form certificate of acknowledgment is provided by statute for an unincorporated association. The following is the ordinary certificate of acknowledgment modified for an unincorporated association.

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [names of trustees], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card[s] or other document[s]] to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same as the act of [name of association], an unincorporated association, as its trustees, for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month],
[year].

[SEAL]

[Title of officer]

My commission expires: [date]

Form 3-29

Statutory Form for Ordinary Certificate of Acknowledgment

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of
acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me
through [description of identity card or other document]] to be the person whose name is sub-
scribed to the foregoing instrument and acknowledged to me that [he/she] executed the same
for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

[Reserved]

Form 3-30

Acknowledgment by Foreign Service Officer

[Name of country]

[County and/or other political subdivision]

[City and/or other political subdivision]

[Name of foreign service office]

Before me, [name, rank, and title of foreign service officer], of the United States of America at [city and country], duly commissioned and qualified and a resident of [city and country], on this day personally appeared [name of acknowledger], [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Name, rank, and title of foreign service officer]

[Reserved]

Form 3-31

Military Acknowledgment

IN THE ARMED FORCES OF THE UNITED STATES OF AMERICA with the [branch of military] at [name of base or post], [include if applicable: [city and state],] [country].

Before me, [name, rank, branch, and serial number of officer in U.S. armed forces], a duly commissioned officer in [the Armed Forces/[specify auxiliary to armed forces]] of the United States of America at [city and country], on this day personally appeared [name of acknowledger], [include if applicable: the [husband/wife] of [name, rank, branch, and serial number of military personnel]], [known to me/proved to me on the oath of [name, rank, branch, and serial number of witness], a member of [the Armed Forces/[specify auxiliary to armed forces]] of the United States of America/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that [he/she] executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

 [Name, rank, branch, and serial number of officer]

[Reserved]

Form 3-32

Statement of Subscribing Witness in Presence of Subscriber

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer taking proof], on this day personally appeared [name of subscribing witness], [known to me/proved to me on the oath of [name of witness]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [he/she] saw [name], the [grantor/person who executed the foregoing instrument], subscribe the same and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

[Reserved]

Form 3-33

Statement of Subscribing Witness on Acknowledgment by Subscriber

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of subscribing witness], [known to me/proved to me on the oath of [name of witness]] to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that [name], the [grantor/person who executed the foregoing instrument], acknowledged in [his/her] presence that the [grantor/person who executed same] had executed the same for the purposes and consideration expressed therein and that [he/she] had signed the same as a witness at the request of the [grantor/person who executed same].

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

[Reserved]

Form 3-34

Acknowledgment of Signature Affixed at Direction of Person with Disability

STATE OF TEXAS

COUNTY OF [county]

Before me, [name and title of officer], on this day personally appeared [name of person with disability], a person having a physical impairment that impedes [his/her] ability to sign the foregoing instrument, [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]] to be the person whose name is subscribed to the foregoing instrument and directed me to affix [his/her] signature to the foregoing instrument in the presence of [name of disinterested witness], a person having no legal or equitable interest in any real or personal property that is the subject of or is affected by the foregoing instrument and whose identity is [known to me/proved to me on the oath of [name of witness]/proved to me through [description of identity card or other document]], and [name of person with disability] directed me to execute the foregoing instrument on [his/her] behalf for the purposes and consideration therein expressed.

Given under my hand and seal of office this [specify] day of [month], [year].

[SEAL]

[Title of officer]

My commission expires: [date]

[Reserved]

Form 3-35

Jurat

SUBSCRIBED AND SWORN TO before me on _____ by **[name of affiant]**.

Notary Public, State of Texas

[Reserved]

Form 3-36

Affidavit of Interpreter

Date:

Affiant: [name of interpreter]

Date of Interpretation:

Item Interpreted: [describe instrument interpreted]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

“I, the undersigned interpreter, am well versed in and competent to speak the [Spanish/[other language]] and the English languages, and on the date of interpretation I gave a true and faithful interpretation of the item interpreted in [Spanish/[other language]], which is understood by [name].”

[Name of interpreter]

Sworn to and subscribed before me on [date] by [name of interpreter].

[SEAL]

[Title of officer administering oath]
My commission expires: [date]

[Reserved]

Chapter 4

Sales Contracts and Transaction Guide

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[Reserved]

Chapter 4

Sales Contracts and Transaction Guide

§ 4.1 General Considerations

The real estate sales contract, form 4-1 in this chapter, is drafted as a neutral form of contract, intending to favor neither the buyer nor the seller. The basic elements of the transaction are stated in the sections to be completed at the beginning of the form. The general terms that follow may be used without change for many transactions. Terms that generally vary are located in the exhibits. Contracts for the purchase and sale of real estate are as diverse as their subject matter, and additional drafting will likely be necessary to tailor the form to the transaction.

§ 4.2 Real Estate Sales Contract

The following sections describe the provisions of the real estate sales contract and include considerations for the attorney in drafting or reviewing a contract, assisting the client during investigation of the property, and closing the transaction. This commentary is organized in the same order as the sections of the contract.

§ 4.3 Introductory Paragraph: Offer and Acceptance

The introductory paragraph of the contract states what the parties must do to form the contract of purchase and sale. If the buyer's earnest money cannot be collected, the buyer will be in default.

§ 4.4 Defined Terms

§ 4.4:1 Seller and Buyer

There are sections for the names and other information concerning the seller, the buyer, and their respective attorneys and brokers. Proper identification of the parties is important, and the seller and the buyer should be identified as fully as possible. Capacity and authority should be considered, especially if a party is not an individual acting on his or her own behalf. See chapter 3 in this manual for a discussion of party designations.

§ 4.4:2 Property

The real and personal property are described in exhibit A. The contract should describe the real and personal property with legal specificity. If the property is not described sufficiently, the contract may be unenforceable because of vagueness. See chapter 3 in this manual for a discussion of property descriptions. Attention should also be given to the conveyance of appurtenant rights, such as permits, licenses, access easements, access to utilities, and similar rights.

§ 4.4:3 Escrow Agent

The contract designates an escrow and closing agent. The escrow agent will be responsible for closing the transaction and receiving and disbursing funds under the terms of the contract. Form 4-2 in this chapter is the escrow agent receipt and escrow agreement, which defines the rights and duties of the escrow agent and is to be

signed by the buyer, the seller, and the escrow agent's representative.

The escrow agent's representative should sign the receipt on the last page of the contract and acknowledge the deposit of the earnest money with the escrow agent.

§ 4.4:4 Consideration

The contract provides for a purchase price that is a stated sum, but the price may be determined by a formula based on the gross or net area of the land or by other methods devised by the parties. The net area is typically computed by deducting from the gross area any portion of the land within roadways, floodplains, or other areas where rights are restricted, as shown on the survey. If this method is used, the purchase price cannot be calculated until after the survey is delivered, so applying a minimum and maximum price to the formula should be considered.

The contract provides for several payment options: the total consideration may be paid in cash at closing, or all or a portion of the purchase price may be financed.

At closing in the typical seller-financed transaction, the buyer delivers the cash portion of the purchase price, signs and delivers a promissory note payable to the seller, and also usually signs and delivers a deed of trust encumbering the property as security for the debt.

If the transaction is to be contingent on the buyer's obtaining third-party financing, the buyer has two options. The buyer can apply for the financing early enough to know before the end of the inspection period if the loan application has been accepted. Alternatively, the buyer can negotiate a right to terminate the contract after the end of the inspection period if the buyer is unable to obtain third-party financing. The parties may negotiate time limits within which the buyer must separately apply for and obtain

third-party financing. The parties may also agree to limit or share the expenses of obtaining the financing.

See chapters 6 and 8 in this manual for further discussion of financing.

If the contract terminates before closing, and the buyer is otherwise entitled to have the earnest money returned, the contract provides that a stated amount (\$100) not be returned to the buyer but be paid to the seller, because that amount is the independent consideration to the seller for the buyer's right to terminate the contract.

§ 4.4:5 Earnest Money

The amount of earnest money is negotiable and depends on several factors, including the purchase price, the type of financing, and the relative financial strengths of the parties.

§ 4.4:6 Buyer's and Seller's Additional Liquidated Damages

These sections are provided so that the parties can agree on additional liquidated damages to be paid by the defaulting party to the nondefaulting party on default.

§ 4.4:7 County for Performance

This section permits the parties to designate the county in which litigation arising from the contract must be filed except as otherwise provided by applicable law.

§ 4.5 Deadlines

Section A of the contract groups most of the deadlines for ease of reference and provides two alternate ways to determine most of the deadlines: either a stated date or a specified number of days after the effective date of the contract or

another milestone. The contract provides that time is of the essence. The contract provides that closing will occur at a certain time on a certain date, but closing may also be scheduled to occur a certain number of days following a stated event—for example, forty-five days after approval by the buyer's lender. The closing date may also be specified as "on or before" a certain date or event.

§ 4.6 Closing Documents

Section B of the contract lists the documents to be signed and delivered to close the transaction and serves as a checklist to prepare for closing.

§ 4.6:1 Exhibit B—Representations; Environmental Matters

Exhibit B contains the parties' representations. These items are always negotiated by the parties and will vary from transaction to transaction. See section 4.10 below for further discussion of representations.

§ 4.6:2 Exhibit C—Seller's Records

Exhibit C is a list of the seller's records of the property that will be delivered or made available to the buyer for review during the inspection period and also delivered to the buyer at closing.

§ 4.6:3 Exhibit D—Notices, Statements, and Certificates

Exhibit D lists notices, statements, and certificates required by federal and state laws and regulations to be delivered when common real estate contracts are executed. The items applicable to a specific transaction should be selected. See chapter 2 in this manual for a brief discussion of each law and regulation and for references to other laws and regulations that require notices, statements, and certificates for less common transactions.

§ 4.6:4 Exhibit E—Seller Financing Addendum

This addendum is for use only in situations in which the seller is providing the financing. If obtaining third-party financing is a condition to the buyer's obligations, that fact and the terms of the complying financing may need to be addressed in the contract.

§ 4.7 Investment of Earnest Money

The contract provides that the buyer may direct the escrow agent to invest the earnest money in an interest-bearing account in a federally insured financial institution. If the earnest money is to be invested, the escrow agent will require the buyer's tax identification or Social Security number so that accrued interest may be reported to the Internal Revenue Service. Form 4-2 (escrow agent receipt and escrow agreement) in this chapter provides that the buyer pays the fees charged by the financial institution.

§ 4.8 Title and Survey

The contract incorporates the statutory notice that the Texas Real Estate License Act requires real estate brokers and real estate salespersons to give to a buyer, advising that the buyer should either have title examined by an attorney or obtain a title insurance policy. Tex. Occ. Code § 1101.652(b)(29). If a broker or salesperson is not involved, the paragraph may be deleted.

The contract requires that the seller provide to the buyer by the deadlines stated in the contract the title commitment, the survey, the UCC search, and legible copies of each document referred to in these instruments.

The contract provides a typical procedure under which the buyer reviews the title commitment, the survey, and the UCC search and notifies the seller of any objections. After notice, the seller

may elect to cure the buyer's objections but is not required to do so. If the seller does not agree to cure, the buyer may either proceed to close the transaction and accept the property subject to the uncured matters or terminate the contract. The seller is obligated to cure title matters that arise by, through, or under the seller after the contract is signed.

§ 4.8:1 Review of Title Commitment

The contract provides that the condition of title will be established by the title commitment and that the seller will pay for an owner title policy for the buyer at closing.

An essential reference on title insurance is the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available from the Texas Department of Insurance at <https://www.tdi.texas.gov/title/titleman.html>. The manual contains Texas rate and procedural rules; the text of title 11 of the Texas Insurance Code, relating to title insurance; and various bulletins of the Texas State Board of Insurance dealing with title insurance practices.

The attorney should review the signature and effective date of the commitment.

Schedule A: The attorney should confirm that the proposed insured parties are correctly named, the amounts of insurance are correctly stated, and the correct estate is insured—for example, fee simple, easement, or leasehold. Record title should be vested in the seller. The attorney should confirm that the property description is correct and conforms to the description in the survey (if applicable).

Schedule B: The attorney should review the following matters:

Item 1, relating to covenants and restrictions, should be noted as either “Covenants, conditions, and restrictions (other than any

restrictions indicating preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin) as set forth in [recording data] of the real property records of [county] County, Texas” or “Item 1 of schedule B is hereby deleted in its entirety.”

Item 2, relating to the standard survey exception, may be amended and partially deleted to read “any shortages in area” if a current survey approved by the title company is obtained. An additional 5 percent premium is charged to amend the owner policy for a residential transaction; an additional 15 percent premium is charged to amend the owner policy for a commercial transaction. No additional premium is required to amend the loan policy. The responsibility for paying the extra premium for the survey modification in the owner policy of title insurance is often negotiated between the parties, although the pertinent provision in the contract form provides for the extra premium to be paid by the buyer.

Item 3, relating to homestead or community property or survivorship rights, and paragraph 4, relating to tidelines, lands comprising the shores and beds of waterways, lands beyond the line of the harbor or bulkhead lines, filled-in lands, artificial islands, statutory water rights, and areas extending from the line of mean low tide to the line of vegetation, apply only to the owner policy and cannot be deleted or amended.

Paragraph 5, relating to property taxes, should be reviewed for the status of tax payments and the existence of rollback taxes. In the title policy, the exception for taxes should be restricted to taxes for the year in which the closing occurs (unless paid at or before closing), taxes for subsequent years, and rollback taxes for prior years.

Paragraph 6, relating to the terms and conditions of the documents creating the

insured's interest in the land, cannot be revised but will not appear on the title policy. The referenced documents should, however, be reviewed.

Paragraph 7, relating to materialman's and mechanic's liens, applies only to mortgagee policies on interim construction loans and may be deleted if satisfactory evidence is furnished to the title company.

- Paragraph 8, relating to subordinate liens and leases, applies only to the mortgagee policy.

Paragraph 9, relating to existing liens, should show only liens permitted by the contract. Copies of all lien documents should be reviewed with regard to due-on-sale provisions; dragnet clauses relating to other debt; condemnation provisions; notice, cure, and default provisions; and subordinate financing. A superior lienholder's estoppel agreement should be obtained from any lienholder whose note and lien are being either assumed or taken "subject to." All other special exceptions, such as easements, mineral interests, leases, or matters shown on a current survey, should be listed specifically and carefully reviewed to determine if they affect the buyer's intended use of the property.

Schedule C: The attorney should ensure that the seller has complied with the contract by curing and effectively removing all matters appearing on schedule C at or before closing. Schedule C matters may require obtaining releases of liens, settling specific claims or lawsuits affecting title to the property, furnishing evidence of good standing and authority (corporate resolution or partnership agreement), and obtaining proof of property settlement and divorce, proof of heirship or probate of a particular estate, or evidence relating to a bankruptcy. From the buyer's perspective, curative matters appearing on schedule C should be attended to by either the seller or the title company. The buyer should

object to all schedule C items in the commitment to ensure that they are not added to schedule B of the title policy.

Note: Endorsements providing additional coverage may be available on request, subject to payment of the applicable additional premium. The *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* should be consulted for the eligibility, cost, and use of these endorsements and policy.

§ 4.8:2 Review of Survey

The contract requires that the seller provide a current survey of the property. Different types of surveys and survey certifications are available, depending on the nature of the property and the requirements of the parties. An excellent resource on surveys is the *Manual of Practice for Land Surveying in the State of Texas* ("Texas Standards"), published by the Texas Society of Professional Surveyors. It describes the various categories and conditions for surveys in Texas, the level of accuracy required for each category of survey, matters to be depicted on the survey, and the nature of certificates. In some cases the lender or buyer may require the surveyor to comply with the most recent Minimum Standard Detail Requirements and Accuracy Standards for ALTA/ACSM Land Title Surveys ("ALTA"), as adopted by the American Land Title Association and the National Society of Professional Surveyors. See www.alta.org/publications/#policy.

The attorney should keep the following points in mind when reviewing the survey:

The survey should bear a recent date and should conform to, as applicable, ALTA or the required category and condition under the Texas Standards for the type of survey specified in the contract and location of the property.

The certificate should be sealed and signed and should conform to any certificate specified in the contract.

There should be a north compass bearing on the survey.

The attorney should observe the system of reference used for the survey, locate the beginning point, and determine that it is monumented and locatable.

The survey, particularly all course and distance notations, should be compared to the legal description either appearing on or attached to the survey. This description then should be compared to the one appearing in the contract and the title commitment or title opinion.

All recorded easements appearing in the title commitment should be located and noted on the survey with the appropriate recording data. Conversely, the attorney should examine the survey for any matters (such as easements) not appearing in the title commitment.

The survey should be examined for the location of improvements: Do improvements protrude onto adjoining property or easement areas; are there encroachments of improvements from adjoining property onto the property; are there building setback line violations?

Any written notations on the survey, such as those relating to rights of parties in possession, should be reviewed to determine their effect on the property and its anticipated use.

The property should have legal and adequate access to public streets or roads.

The survey should show the existence and location of utilities.

The surveyor's certificate should indicate the location of the floodplain, if applicable.

§ 4.8:3 Review of UCC Search

The contract includes provisions for personal property and requires that the seller furnish UCC searches of appropriate records. The scope of the search would depend on the nature of the collateral. See sections 9.2 through 9.6 in this manual.

§ 4.9 Inspection Period

The inspection period is intended to give the buyer the opportunity to investigate the property and decide whether to close the transaction. The contract provides that the buyer may terminate the contract at any time before the end of the inspection period for any reason and have the earnest money returned, except for the \$100 independent consideration described above.

The contract provides for reasonable rules of entry and that the buyer will indemnify the seller for claims resulting from the buyer's inspection of the property. Except for the environmental indemnity stated in exhibit B in the contract, the indemnity provisions of the contract are not intended to shift risk from the indemnified party to the indemnitor for the indemnified party's own negligence. One consequence of this allocation of risk is that the indemnified party may not be able to recover the costs of defense from the indemnitor if the indemnified party is sued for the consequences of its alleged negligence. *See Fisk Electric Co. v. Constructors & Associates*, 888 S.W.2d 813 (Tex. 1994). The environmental indemnity shifts risk for the seller's own negligence from the seller to the buyer. It is unlikely, however, that the environmental indemnity will be effective to shift risk in the event of misrepresentation or fraud.

The contract provides that the earnest money will be deposited in one lump sum. The parties alternatively may agree that the buyer is obligated to deposit additional earnest money after agreed conditions have been satisfied—for

example, if the buyer decides not to terminate the contract at the end of the inspection period and to proceed to closing.

§ 4.10 Representations

Representations are negotiated by the parties with specific reference to the transaction. Representations may include such matters as ownership of the property; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations—for example, ‘as is’, presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken ‘subject to.

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller’s knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller’s representations, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller’s opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract.

The seller makes no representation that is not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation).

The following optional clauses are also provided:

The buyer agrees to accept the property in its “as is, where is” condition, investigate the property on the buyer’s own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.

The buyer waives its rights under the Texas Deceptive Trade Practices–Consumer Protection Act.

The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties’ representations are true and accurate when made and must be true and accurate at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and good standing from public officials, certified copies of organiza-

tional documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim after substantial obligations have been paid or incurred that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until before closing.

§ 4.11 Condition of Property until Closing; Cooperation; No Recording

The contract provides for the parties' obligations after signing the contract concerning maintenance and operation of the property, casualty damage, condemnation, claims, governmental proceedings, permits, licenses, and inspections. The contract also sets out the parties' agreement not to record the contract.

§ 4.12 Termination

The contract provides for disposition of the earnest money after termination and for post-termination obligations in certain events.

§ 4.13 Closing

The contract provides that, unless the parties agree otherwise before closing, certain closing documents will be on the forms contained in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas). This approach defers the time and expense of negotiating the closing documents until after the contract is signed, while providing certainty if the parties do not otherwise negotiate closing documents. Alternately, the closing documents can be negotiated before the contract is signed and, if so, should be attached as exhibits to the contract.

The contract allocates closing obligations and transaction costs between the parties and provides for proration of ad valorem taxes, income, and expenses and for postclosing adjustments.

The contract provides that the buyer acquires possession of the property at closing. The parties may agree, however, on earlier or later possession by the buyer. If the buyer takes possession before closing or the seller remains in possession after closing, a lease may be appropriate. See chapter 25 in this manual.

Real estate brokers and real estate salespersons must have a written commission agreement to enforce payment of a real estate commission. The commission may be payable on contract execution, when the contract closes, or as otherwise agreed by the parties. The contract provides that the commission agreement is a separate document between the broker and the party responsible for paying the commission. For applicable forms, see forms 26-29 through 26-31 in this manual. Alternately, the contract may include the commission agreement or restate its key terms. The parties indemnify each other against claims by brokers and finders arising by, through, or under the indemnifying party. The contract may state that there are no brokers, but there is no requirement to do so.

If either buyer or seller is licensed as a real estate salesperson or real estate broker and is acting as a broker in the transaction, a disclosure to that effect is required under the Real Estate License Act. Tex. Occ. Code § 1101.652(b)(16).

§ 4.14 Default and Remedies

The contract provides that each party may elect one of the following remedies for the other's default: termination (with disposition of the earnest money and payment of additional liquidated damages to the nondefaulting party) or specific performance. In addition, the buyer may terminate if the seller's representations are not

true and correct for a reason not the seller's fault. The parties may alternately agree to payment of actual damages and perhaps consequential damages. The contract is drafted to limit the parties' remedies, but remedies are often negotiated.

The contract provides that the party prevailing in litigation is entitled to recover attorney's fees and court and other costs.

§ 4.15 Assignment

The contract contains alternate clauses concerning assignment. The buyer either may not assign the contract or may assign the contract only to an entity controlled by the buyer.

If the contract provides that the buyer has the right to assign, the assignment provision should state whether the buyer is relieved from obligations under the contract after assignment.

§ 4.16 Closing Functions

The party handling the closing (in this instance, the escrow agent) commonly attends to the following matters.

§ 4.16:1 Payoff Information and Other Closing Expenses

Written request should be made to each lienholder for the lienholder's written payoff statement. The lienholder should be requested through an authorized representative to state the remaining principal balance due on the note, the accrued interest as of a certain date, a per diem amount of interest, and whether the lienholder will credit the amount held in the escrow account, if one exists, to the total due or, alternatively, refund the amount directly to the borrower. Closing must occur and payment be made to the lienholder before the release of lien will be signed.

Additionally, information concerning other matters requiring payment at closing should be obtained, such as payoff amounts for mechanic's lien claims, federal or state tax liens, property taxes, paving assessments, and abstracted judgments that affect the property.

The closing agent must also determine the amounts of closing costs, such as surveying expenses, attorney's fees, brokers' commissions, and loan fees.

§ 4.16:2 Prorations and Deposits

Unless otherwise provided in the contract, the buyer acquires both the monetary benefits and burdens of the property. Prorations are generally based on the settlement or closing date.

Tax Prorations: Tax prorations may be based on the most current property tax information available to the closing agent. The tax proration serves as a bookkeeping adjustment on the closing statement between the seller and the buyer relating to taxes. If taxes have not been paid for the current year, this adjustment involves the seller's being charged on the closing statement with property taxes for the period the seller owned the property. The buyer is then responsible for actual payment of taxes. The buyer receives a corresponding credit of the seller's prorated amount. The contract requires that the seller and the buyer reproporate taxes when actual tax statements become available after closing.

Insurance Prorations: If the seller assigns its fire and extended coverage to the buyer, the buyer should be charged the unearned portion of the prepaid premium. The seller should receive a corresponding credit.

Rent Prorations: If the property is income-producing, rents already received by the seller for the current rental period should be prorated. The seller should be charged the amount for the

prorated period, and the buyer should receive a corresponding credit.

Interest Prorations: If the sale is being financed through an assumption or 'subject to' transaction, interest becoming due at the next regular payment period should be prorated between the seller and the buyer, usually as of the closing date.

Security Deposits: Tenant security deposits that the seller is holding should be charged to the seller and credited to the buyer, because the buyer ultimately should be responsible for the refund of the deposits. The seller will remain liable to the tenants for security deposits received while the seller was the owner of the property, until the buyer delivers to the tenants a signed statement acknowledging that the buyer of the property has received and is responsible for the tenants' security deposits and setting forth the amount of each deposit. *See* Tex. Prop. Code §§ 92.105(b), 93.007. Additional drafting is required to obligate the buyer to deliver the signed statements.

§ 4.16:3 Preparation of Closing Documents

The closing agent may be expected to prepare several documents.

Closing Statements: Closing statements may be on either the federally prescribed HUD-1 settlement statement, the State Board of Insurance settlement statement, or a separate seller's, buyer's, or borrower's statement, depending on the nature of the transaction. The purpose of a closing statement is to assemble in one document all the pertinent financial features of the contract, including purchase price, loan amounts, costs and expenses of closing the transaction, and prorations. Execution of the statement evidences the parties' agreement with the numbers and computations appearing on the statement.

Affidavits: Affidavits concerning debts and liens, parties in possession, identity of the parties, leases, and marital status will likely be required at closing by the escrow agent.

Financing documents are typically prepared by the lender's attorney. Conveyancing and other closing documents may be prepared by the parties to the transaction, by their attorneys, or by an attorney for the closing agent.

§ 4.16:4 Funding

The closing agent typically disburses funds in connection with closing. Disbursements are made according to the closing statement, usually from funds paid by the buyer and its lenders.

Except in the case of certain nontaxable sales of principal residences, the person responsible for closing a real estate transaction is required to file an information return with the Internal Revenue Service relating to the transaction and is subject to penalties for failing to report. *See* 26 U.S.C. § 6045. This reporting requirement is often satisfied by the responsible person by delivering the seller's closing statement, together with an attachment of additional required information, to the IRS.

If funds will be disbursed at closing, payments must be made to the closing agent with 'good funds' as defined by the regulations of the Texas State Board of Insurance. *See* Procedural Rule P-27, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

If it is not necessary to disburse funds at closing, the parties need not comply with the 'good funds' rule, and payment may be made in other ways.

The attorney for each buyer and lender should consider obtaining an insured closing service letter from the title insurance underwriter whose policies are to be issued. This letter indemnifies

the lender for any fraudulent acts of the closing title insurance company or agency relating to the handling of closing funds. See forms T-50 and T-51, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. See <https://www.tdi.texas.gov/title/titlemm5.html>.

§ 4.16:5 Recording Documents

The closing agent is responsible for recording documents intended to be recorded. This responsibility extends to the recording of releases or transfers of liens for notes paid at closing. Each document should be checked before recording to ensure that exhibits referred to in the document are attached and the name and address of the person to whom the document is to be returned after recording is included.

§ 4.16:6 Closing Instructions

Attorneys for the buyer, the seller, and the lender may each prepare closing instructions for the closing agent. For applicable forms, see forms 26-15 through 26-18 in this manual. These instructions relate to the conditions precedent to closing, including the status of the title after closing, the title insurance policies to be issued, disposition of funds, and distribution of documents received by the closing agent.

§ 4.17 Additional Considerations

§ 4.17:1 Transactions Involving Foreign Persons

Buyer: If the buyer is a foreign person, certain disclosures and reports may be required under the Foreign Investment in Real Property Tax Act of 1980. See 26 U.S.C. § 6039C.

Seller: With certain exceptions, if the seller of real property located in the United States is a foreign person, the buyer must withhold 15 per-

cent of the price and remit the funds to the Internal Revenue Service within twenty days of the date of transfer. See 26 U.S.C. § 1445(a), (b).

The buyer should assume that the seller is a foreign person until the contrary is established, because buyers act at their own peril until they obtain a nonforeign affidavit. See 26 U.S.C. § 1445(b)(2). Forms 26-19 and 26-20 in this manual are suggested for use in all transactions.

§ 4.17:2 Other Requirements

Before closing, the buyer should arrange for Causes of Loss—Special Form property insurance coverage, liability, flood, and similar types of insurance for any required mortgagee endorsements. The buyer and seller should arrange for payment out of the closing proceeds of any accrued taxes even if the taxes will not be delinquent until after closing. The buyer should notify the tax appraisal district of any change in ownership.

§ 4.17:3 Closing Checklist

The attorney should prepare a closing checklist, itemizing the documents that will be required to close the transaction, including curative documents. The checklist should also refer to all other preclosing considerations relating to the transaction.

§ 4.17:4 Postclosing Considerations

After closing, recorded documents and relevant title insurance policies issued after closing should be reviewed for accuracy and compliance with the title commitment. The owner policy should be dated on or after the recording date of the deed conveying title to the buyer, and the mortgagee policy should be dated on or after the recording date of the deed of trust of the insured lien.

An original or escrow agent's certified copy of each executed document relating to the closing

should be provided to the seller and the buyer or the borrower by their attorneys. Generally, the

party benefiting from a document receives the original, and the other parties receive copies.

Additional Resources

- Barton, J. Cary. "Pitfalls of Statutory Notices—Or Lack Thereof." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.
- Baucum, Michael, and Kathryn E. Allen. "As-Is Update: 'Prudential 2012.'" In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.
- Becker, Douglas W., and Arturo Machado. "Thorny FIRPTA Withholding Issues Involving Foreign Sellers of Real Estate." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.
- Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.
- Dysart, Sara E. "Seller Should Provide Accurate Statutory Notices Incident to the Sale of Real Property." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.
- Howard, C. Elaine. "Miscellaneous Sections of a Contract." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.
- Mills, Ken. "Top Ten Issues When Negotiating Earnest Money Contracts." In *Advanced Real Estate Law Course, 2015*. Austin: State Bar of Texas, 2015.
- Newsome, Kent. "Drafting ROFO/Option Agreements: Key Issues and Sample Forms." In *Advanced Real Estate Drafting Course, 2016*. Austin: State Bar of Texas, 2016.
- . "Rights of First Refusal: What They Are, What They Aren't, and What They Can Do to Your Deal." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.
- Rider, Brian. "Allocation of Risks in Purchase Contracts for Improved Property (Risk Avoidance and Allocation Pre-Closing)." In *Advanced Real Estate Law Course, 2016*. Austin: State Bar of Texas, 2016.
- Tomek, David W. "From Ridiculous 'Asks' to Meaningful Compromise: Drafting and Negotiating Selected Aspects of Earnest Money Contracts for Income-Producing Commercial Properties." In *Advanced Real Estate Drafting Course, 2013*. Austin: State Bar of Texas, 2013.
- Weller, Philip D. "Drafting Confidentiality Agreements and Access Agreements." In *Advanced Real Estate Drafting Course, 2014*. Austin: State Bar of Texas, 2014.
- Whelan, Thomas M. "Scattershooting While Wondering Whatever Happened at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sales Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

Form 4-1

Real Estate Sales Contract

This contract to buy and sell real [**include if applicable:** and personal] property is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by Escrow Agent to acknowledge receipt of the [Initial] Earnest Money. Buyer must deliver the [Initial] Earnest Money to Escrow Agent and obtain Escrow Agent’s signature before the [Initial] Earnest Money Deadline provided in paragraph A.1. for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller’s Attorney:

Law firm:

Address:

Phone:

E-mail:

Seller’s Sales Agent:

Brokerage firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law firm:

Address:

Phone:

E-mail:

Buyer's Sales Agent:

Brokerage firm:

Address:

Phone:

E-mail:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit A (“Land”) [**include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary:** , together with improvements to the Land (“Improvements”), the leases associated with the Land and Improvements (“Leases”), and the personal property described in Exhibit A (“Personal Property”)].

Underwriter:

Escrow Agent:

Name of Closer:

Address:

Phone:

E-mail:

[**Include if applicable:** Estimated] Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

Payment schedule:

See exhibit E for additional terms and conditions.

Third-party-financed portion:

Total purchase price:

Earnest Money

[Initial Earnest Money:]

[Additional Earnest Money:]

Surveyor:

Survey Category:

Include the following if applicable.

Buyer's Liquidated Damages:

Include the following if applicable.

Seller's Additional Liquidated Damages:

Continue with the following.

County for Performance:

A. Deadlines and Other Dates

All deadlines in this contract expire at 5:00 P.M. local time where the Property is located. If a deadline falls on a Saturday, Sunday, or holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or holiday. A holiday is a day, other than a Saturday or Sunday, on which state or local governmental agencies and financial institutions are not generally open for business where the Property is located. Time is of the essence.

A.1. [Initial] Earnest Money Deadline: [date]

A.2. Delivery of Title Commitment: [[date]/[number] days after the Effective Date]

A.3. Delivery of Survey: [[date]/[number] days after the Effective Date]

A.4. Delivery of UCC Search: [[date]/[number] days after the Effective Date]

A.5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: [[date]/[number] days after the Effective Date]

A.6. Delivery of Title Objections: [[date]/[number] days after delivery of the last of the Title Commitment, Survey, and legible copies of the instruments referenced in them]

A.7. Delivery of Seller's records as specified in Exhibit C: [[date]/[number] days after the Effective Date]

Select one of the following.

A.8. End of Inspection Period: [[date]/[number] days after the Effective Date]

Or

A.8. End of Inspection Period: [[date]/[number] days after the latter of (a) the Effective Date or (b) the delivery of the Partial Release Agreement described in paragraph G.6.]

Include the following if applicable.

A.9. Additional Earnest Money Deadline: [[date]/[number] days after the end of the Inspection Period]

Continue with the following.

[A.9./A.10.] Closing Date: [[date]/[number] days after the end of the Inspection Period]

[A.10./A.11.] Closing Time: [time]

B. Closing Documents

B.1. At Closing, Seller will deliver the following items:

Select one of the following.

General Warranty Deed [**include if applicable:** with Vendor's Lien at Buyer's option]

Or

Special Warranty Deed [**include if applicable:** with Vendor's Lien at Buyer's option]

Continue with the following as applicable.

Bill of Sale and Assignment

IRS Nonforeign Person Affidavit

Evidence of Seller's authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Tenant Estoppel Certificate

B.2. At Closing, Buyer will deliver the following items:

Include all applicable items.

Balance of Purchase Price

Evidence of Buyer's authority to close this transaction

Deceptive Trade Practices Act waiver

Assignment and Assumption of Leases

Assignment and Assumption of Contracts

Acknowledgment(s) of receipt of notices, statements, and certificates as specified in Exhibit D

Seller-financing documents

Promissory Note

Deed of Trust

Deed of Trust to Secure Assumption

Security Agreement

Financing Statement

Loan Documents required by third-party lender

The documents listed in this section B. are collectively known as the "Closing Documents." Unless otherwise agreed by the parties before Closing, the Closing Documents for which forms exist in the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas) will be prepared using those forms.

C. Exhibits

The following are attached to and are a part of this contract:

Exhibit A—Description of the Land [**include if applicable:** and Personal Property]

Exhibit B—Representations; Environmental Matters

Exhibit C—Seller's Records

Exhibit D—Notices, Statements, and Certificates

[Include if applicable: Exhibit E—Seller Financing Addendum]

D. Purchase and Sale of Property

D.1. Purchase and Sale Agreement. Seller agrees to sell and convey the Property to Buyer, and Buyer agrees to buy and pay Seller for the Property. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

Include the following if applicable.

D.2. Adjusted Purchase Price. The Purchase Price will be adjusted on the basis of the Survey to be equal to the product of \$[amount] multiplied by the number of [net/gross] square feet of surface area of the Land disclosed by the Survey, subject to the following provisions:

D.2.a. If the adjusted Purchase Price based on the Survey exceeds an amount ("Maximum Adjusted Purchase Price") that is equal to [percent] percent of the [Estimated] Purchase Price, Buyer may terminate this contract and recover the Earnest Money by giving Seller Buyer's calculation of the adjusted Purchase Price and notice of termination within ten days after the Survey was delivered to both parties; provided, however, that Buyer's notice of termination will be automatically rescinded and the Purchase Price will be equal to the Maximum Adjusted Purchase Price if Seller gives Buyer notice within ten days after receiving Buyer's notice of termination that Seller has waived the right to receive the portion of the adjusted Purchase Price in excess of the Maximum Adjusted Purchase Price.

D.2.b. If the adjusted Purchase Price based on the Survey is less than an amount (“Minimum Adjusted Purchase Price”) that is equal to [percent] percent of the [Estimated] Purchase Price, Seller may terminate this contract by giving Buyer Seller’s calculation of the adjusted Purchase Price and notice of termination within ten days after the Survey was delivered to both parties; provided, however, that Seller’s notice of termination will be automatically rescinded if Buyer gives Seller notice within ten days after receiving Seller’s notice of termination that Buyer has waived the right to purchase the Property for an adjusted Purchase Price that is less than the Minimum Adjusted Purchase Price.

D.2.c. If the calculation of the adjusted Purchase Price is to be made on the basis of the net square feet of surface area disclosed by the Survey, the net square feet of surface area will be the gross square feet of surface area within the Land less any portion of the surface area of the Land that is within a flood plain as specified on the applicable current FEMA map and any portion of the surface area of the Land that is subject to a right-of-way or easement that serves any land other than the Land.

Continue with the following.

E. Interest on Earnest Money

Buyer may direct Escrow Agent to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to Escrow Agent and satisfying Escrow Agent’s requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will become part of the Earnest Money.

F. Title and Survey

F.1. Review of Title. The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should

either have the abstract covering the Property examined by an attorney of Buyer's own selection or be furnished with or obtain a policy of title insurance.

F.2. Title Commitment; Title Policy. "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Underwriter stating the condition of title to the Land. The "effective date" stated in the Title Commitment must be after the Effective Date of this contract. "Title Policy" means an Owner Policy of Title Insurance issued by Underwriter in conformity with the last Title Commitment delivered to and approved by Buyer.

Select one of the following.

F.3. Survey. "Survey" means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Underwriter, dated after the Effective Date, and certified to [**include as applicable:** Seller, Buyer, Underwriter, and any other person specified by Buyer] to comply with the current standards and specifications as published by the [American Land Title Association/Texas Society of Professional Surveyors] for the Survey Category.

Or

F.3. Survey. "Survey" means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Underwriter. Any existing survey delivered by Seller must be accompanied by an affidavit detailing any changes to the Property since the date of the Survey.

Select the following if personal property is involved in the sale.

F.4. UCC Search. "UCC Search" means written reports stating the instruments that are on file in the Texas secretary of state's UCC records, the UCC records of any other appropriate state, and the UCC records in the jurisdiction in which Seller is organized, show-

ing as debtor Seller and all other owners of the Personal Property during the five years before the Effective Date of this contract.

Continue with the following.

F.5. Delivery of Title Commitment, Survey, UCC Search, and Legible

Copies. Seller must deliver the Title Commitment to Buyer and Buyer's attorney by the deadline stated in paragraph A.2., the Survey by the deadline stated in paragraph A.3., the UCC Search by the deadline stated in paragraph A.4., and legible copies of the instruments referenced in the Title Commitment, Survey, and UCC Search by the deadline stated in paragraph A.5.

F.6. Title Objections. Buyer has until the deadline stated in paragraph A.6. ("Title Objection Deadline") to review the Survey, Title Commitment, UCC Search, and legible copies of the title instruments referenced in them and notify Seller of Buyer's objections to any of them ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the Survey, Title Commitment, and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five business days from receipt of Buyer's notice to notify Buyer whether Seller agrees to cure the Title Objections before Closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before Closing, Buyer may, within five business days after the deadline for the giving of Seller's Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller's obligations to remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after the Effective Date, and cure only any other Title Objections that Seller has agreed to cure in the Cure Notice. At or before Closing, Seller must remove all liquidated liens, remove all exceptions that arise by, through, or under Seller after

the Effective Date of this contract, and cure any other Title Objections that Seller has agreed to cure.

G. Inspection Period

G.1. Review of Seller's Records. Seller will deliver to Buyer copies of Seller's records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in paragraph A.7.

G.2. Entry onto the Property. Buyer may enter the Property before Closing to inspect it at Buyer's cost and risk, subject to the following:

G.2.a. Buyer must deliver evidence to Seller that Buyer has commercial general liability insurance, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

G.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Property.

G.2.c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests.

G.2.d. If the Property is physically altered because of Buyer's inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs.

G.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer receives from third-party consultants or contractors within three days after their preparation or receipt.

G.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.

G.3. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Property. Seller will provide, or will designate a person with knowledge of the use and condition of the Property to provide, information requested by Buyer or Buyer's agent or representative regarding the use and condition of the Property during the period of Seller's ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer or its agent or representative information regarding the use and condition of the Property before Seller's period of ownership to the extent that the information is within Seller's possession or control.

G.4. Buyer's Right to Terminate. Buyer may terminate this contract for any reason by notifying Seller of the termination before the end of the Inspection Period. If Buyer does not notify Seller of Buyer's termination of the contract before the end of the Inspection Period, Buyer waives the right to terminate this contract pursuant to this provision. [**Include if applicable:** If Buyer does not terminate this contract pursuant to this provision, Buyer must deposit the Additional Earnest Money with Escrow Agent on or before the deadline stated in paragraph A.9.]

G.5. Buyer's Indemnity and Release of Seller

G.5.a. Indemnity. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Property, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer's inspection. The obligations of Buyer under this provision will survive termination of this contract and Closing, any other provision of this contract to the contrary notwithstanding.

G.5.b. Release. **Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Property [include if applicable: ,**

including claims arising out of Seller's negligence, but not Seller's gross negligence or intentional misconduct].

Include the following if applicable.

G.6. Partial Release of Liens. If, as of the Effective Date, the Property is subject to any liens that secure indebtedness in excess of the estimated net proceeds of the Purchase Price after the satisfaction of brokers' commissions and other transaction costs for which Seller is responsible, then Seller promptly must obtain a written agreement or agreements (collectively, the "Partial Release Agreement") binding and enforceable against the holders of such liens ("Holders") for the benefit of Seller. The Partial Release Agreement must constitute an agreement to release all of such liens with respect to the Property on the payment to the Holders of an amount that does not exceed the net proceeds of the Purchase Price after the satisfaction of brokers' commissions and other transaction costs for which Seller is responsible. If Seller is required to provide a Partial Release Agreement, the Inspection Period will not commence until the executed Partial Release Agreement, in a form reasonably satisfactory to Buyer, is delivered to Buyer.

H. Representations [, As Is, Where Is Provision, and Environmental Matters]

The parties' representations stated in Sections A. and D. of Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date. A party who becomes aware that any of the representations of either party are not true and correct will promptly notify the other party. Unless a party notifies the other party to the contrary on or before the Closing Date, or a party has actual knowledge to the contrary as of the Closing Date, each party is entitled to presume that the representations of the other party in Exhibit B are true and correct as of the Closing Date.

Include the following if applicable.

The parties agree to the terms of Section B. (As Is, Where Is) and Section C. (Environmental Matters) in Exhibit B.

I. Condition of the Property until Closing; Cooperation; No Recording of Contract

1.1. Maintenance and Operation. Until Closing, Seller will (a) maintain the Property as it existed on the Effective Date, except for reasonable wear and tear and casualty damage; (b) use the Property in the same manner as it was used on the Effective Date; (c) comply with all Leases and other contracts of Seller pertaining to the Property in effect on the Effective Date and all laws and all governmental regulations affecting the Property; and (d) not encumber, transfer, or dispose of any of the Property [**include if applicable:** or Personal Property], except to sell inventory, replace equipment, and use supplies in the normal course of operating the Property. Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any Lease or other contract that affects the Property other than in the ordinary course of operating the Property and will promptly give notice to Buyer of each new, amended, or terminated Lease or other contract, including a copy of the Lease or other contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller's notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days. After the end of the Inspection Period, Seller may not enter into, amend, or terminate any Lease or other contract that affects the Property without first obtaining Buyer's written consent, which Buyer will have no obligation to grant and, if granted, may be conditioned in any manner Buyer in its sole discretion deems appropriate.

1.2. Casualty Damage. Seller will notify Buyer promptly after discovery of any casualty damage to the Property. Seller will have no obligation to repair or replace the Property if it is damaged by casualty before Closing. Buyer may terminate this contract if the casualty damage that occurs before Closing would materially affect Buyer's intended use of the Property, by giving notice to Seller within fifteen days after receipt of Seller's notice of the

casualty (or before Closing if Seller's notice of the casualty is received less than fifteen days before Closing). [**Include if applicable:** The casualty damage will be deemed to materially affect Buyer's intended use if the estimated amount of the damage exceeds [percent] percent of the Purchase Price.] If Buyer does not terminate this contract, Seller will (a) convey the Property to Buyer in its damaged condition, (b) assign to Buyer all of Seller's rights under any property insurance policies covering the Property, and (c) credit to Buyer the amount of the deductibles and coinsurance provisions under any insurance policies covering the Property, but not in excess of the cost to repair the casualty damage and less any amounts previously paid or incurred by Seller to repair the Property. If Seller has not insured the Property and Buyer does not elect to terminate this contract in accordance with this section, the Purchase Price will be reduced by the cost to repair the casualty damage less any amounts previously paid or incurred by Seller to repair the Property.

1.3. Condemnation. Seller will notify Buyer promptly after Seller receives notice that any part of the Property has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer's intended use of the Property by giving notice to Seller within fifteen days after receipt of Seller's notice to Buyer (or before Closing if Seller's notice is received less than fifteen days before Closing). The condemnation will be deemed to materially affect Buyer's intended use if [**specify reason, e.g.**, the condemnation would eliminate all curb cuts on Main Street]. If Buyer does not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Property in the condemnation proceedings, (b) any award in condemnation will be assigned to Buyer, (c) if the taking occurs before Closing, the description of the Property will be revised to delete the portion taken, and (d) no change in the Purchase Price will be made.

I.4. Claims; Hearings. Seller will notify Buyer promptly after Seller receives notice of any claim or administrative hearing that is threatened, filed, or initiated before Closing that involves or directly affects the Property.

I.5. Cooperation. Seller will cooperate with Buyer (a) before and after Closing, to transfer the applications, permits, and licenses held by Seller and used in the operation of the Property and to obtain any consents necessary for Buyer to operate the Property after Closing and (b) before Closing, with any reasonable evaluation, inspection, audit, or study of the Property prepared by, for, or at the request of Buyer.

I.6. No Recording. Buyer may not file this contract or any memorandum or notice of this contract in the real property records of any county. If Buyer records this contract or a memorandum or notice, Seller may terminate this contract and record a notice of termination.

J. Termination

J.1. Disposition of Earnest Money after Termination

J.1.a. To Buyer. If Buyer terminates this contract in accordance with Buyer's rights to terminate, Buyer will send a request for release of the Earnest Money to Seller, with a copy to Escrow Agent, to be signed by Seller. If Seller fails to deliver a signed release to Escrow Agent within five days after delivery of the request for release, Buyer may make a written demand on Escrow Agent for the Earnest Money, and Escrow Agent will promptly deliver a copy of the demand to Seller. Unless Seller delivers a written objection to Escrow Agent, within fifteen days after Escrow Agent delivers Buyer's written demand for the Earnest Money, Escrow Agent will, without any further authorization from Seller, deliver the Earnest Money to Buyer, less \$100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract.

J.1.b. To Seller. If Seller terminates this contract in accordance with Seller's rights to terminate, Seller will send a request for release of the Earnest Money to Buyer, with a copy to Escrow Agent, to be signed by Buyer. If Buyer fails to deliver a signed release to Escrow Agent within five days after delivery of the request for release, Seller may make a written demand on Escrow Agent for the Earnest Money, and Escrow Agent will promptly deliver a copy of the demand to Buyer. Unless Buyer delivers a written objection to Escrow Agent, within fifteen days after Escrow Agent delivers Seller's written demand for the Earnest Money, Escrow Agent will, without any further authorization from Buyer, deliver the Earnest Money to Seller.

J.2. Duties after Termination. If this contract is terminated, Buyer will promptly return to Seller all of Seller's records in Buyer's possession or control. After return of the records, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract or that expressly survive termination of this contract.

K. Closing

K.1. Conditions of Closing. Neither party will be obligated to close the sale and purchase of the Property unless the other party has satisfied the following conditions, any of which may be waived by the first party in its discretion:

K.1.a. Representations and Warranties. The representations and warranties of the other party must be true and correct at Closing.

K.1.b. Performance of Covenants and Agreements. The other party must have performed all covenants and agreements required to be performed at or before Closing by that party.

K.1.c. No Bankruptcy. No voluntary or involuntary proceeding in bankruptcy shall be pending with respect to that party.

K.2. Closing. This transaction will close (“Closing”) at Escrow Agent’s offices at the Closing Date and Closing Time. At Closing, the following will occur:

K.2.a. Closing Documents; Escrow Agent/Underwriter Documents. The parties will execute and deliver the Closing Documents and any documents required by Escrow Agent and Underwriter.

K.2.b. Payment of Purchase Price. Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to Escrow Agent in funds acceptable to Escrow Agent. The Earnest Money will be applied to the Purchase Price. [**Include if applicable:** Buyer will execute, acknowledge as required, and deliver the documents described in Exhibit E—Seller Financing Addendum.]

K.2.c. Disbursement of Funds; Recording; Copies. Escrow Agent will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties’ written instructions.

K.2.d. Delivery of Originals. Seller will deliver to Buyer the originals of Seller’s Records.

K.2.e. Possession. Seller will deliver possession of the Property to Buyer, subject to the Permitted Exceptions existing at Closing and any liens and security interests created at Closing to secure financing for the Purchase Price.

K.3. Transaction Costs

K.3.a. Seller's Costs. Seller will pay the basic charge for the Title Policy; one-half of the escrow fee; the costs to prepare the deed; the costs to obtain, deliver, and record releases of any liens required to be released in connection with the sale; the costs to record documents to cure Title Objections agreed or required to be cured by Seller and to resolve matters shown in Schedule C of the Title Commitment; [**include if applicable:** Escrow Agent's inspection fee to delete from the Title Policy the customary exception for rights of parties in possession;] the costs to obtain the [Survey, UCC Search, and] certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in paragraph A.5. and Seller's records; any other costs expressly required to be paid by Seller in this contract; and Seller's attorney's fees and expenses.

K.3.b. Buyer's Costs. Buyer will pay one-half of the escrow fee; the costs to obtain, deliver, and record all documents other than those to be obtained or recorded at Seller's expense; [**include if applicable:** the additional premium for the "survey/area and boundary deletion" in the Title Policy, if the deletion is requested by Buyer, as well as the cost of any other endorsements or modifications of the standard form of Title Policy requested by Buyer; the costs of work required by Buyer to have the Survey reflect matters other than those required under this contract except changes required for curative purposes;] the costs to obtain financing of the Purchase Price, including the incremental premium costs of the loan title policies and endorsements and deletions required by Buyer's lender; any other costs expressly required to be paid by Buyer in this contract; and Buyer's attorney's fees and expenses.

K.3.c. Ad Valorem Taxes. Except for subsequent assessments for prior years due to changes in use or ownership discussed below, ad valorem taxes on the Property for all periods before the period in which Closing occurs must be paid by Seller at or before Closing. Ad valorem taxes for the Property for the calendar year of Closing will be prorated between Buyer and Seller as of the Closing Date. Seller's portion of the prorated taxes will be paid to Buyer at Closing as a credit to the Purchase Price. Buyer will assume the obligation to pay,

and shall pay in full, such taxes for the year of Closing before delinquency. If the assessment for the calendar year of Closing is not known at the Closing Date, the proration will be based on tax rates for the previous tax year applied to the most current assessed value, and Buyer and Seller will adjust the prorations in cash within thirty days after the actual assessment and taxes are known. Seller will promptly notify Buyer of all notices of proposed or final tax valuations and assessments that Seller receives after the Effective Date and after Closing. All taxes (including any penalties, interest, and attorney's fees) due as of Closing will be paid at Closing.

Include the following if the property is not a single tax parcel.

K.3.c.i. Partial Tax Parcels. If the Property contains one or more unimproved partial tax parcels for the year of Closing, then the taxes and other assessments attributable to any such tax parcel for the year of Closing shall be allocated between the portion of such tax parcel that is within the Property and the portion of such tax parcel that is outside the Property on the basis of the respective percentages that the gross surface area of the portion of such tax parcel that is within the Property and the gross surface area of the portion of such tax parcel that is outside the Property represent of the total gross surface area of such tax parcel; provided, however, that the result of the foregoing computation shall be adjusted as applicable in order to reflect the taxable value of any improvements that have been constructed on either or both of the portions of such tax parcel. If the Property contains one or more partial tax parcels for the year of Closing, and all taxes and other assessments attributable to such tax parcel have not been paid in full at or prior to Closing, each of Seller and Buyer shall be obligated to pay the taxes and other assessments due with respect to their respective portions of such tax parcel for the entire year of Closing on or before the due date thereof and to indemnify, defend, and hold the other party harmless from and against any loss resulting from a failure to pay such taxes and assessments when they become due and payable.

Include the following if the property is subject to special valuations and reduced tax assessments.

K.3.c.ii. Special Valuations and Reduced Tax Valuations. If the Property has been the subject of special valuation and reduced tax assessments pursuant to the provisions of chapter 23, subchapter D, of the Texas Tax Code or under any other provision of law with respect to any period before the Closing, and if additional taxes, penalties, or interest are assessed pursuant to Code section 23.55 or under the other provision of law, the following will apply:

- (a) If Seller changes the use of the Property before Closing, resulting in the assessment of additional taxes for periods before Closing, Seller will pay the additional taxes.

Select one of the following.

- (b) If this sale or Buyer's use of the Property results in the assessment of additional taxes for periods before Closing, Buyer will pay the additional taxes.

Or

- (c) At Closing, the parties will determine the amount of deferred taxes payable if the sale of the Property as herein contemplated were deemed as of the Closing Date to constitute a change in the use of the Property that would result in the "roll-back" or recapture of deferred taxes for the current year and all preceding tax years for which the "roll-back" or recapture could be imposed ("Potential Roll-Back Amount"). Seller will pay at Closing an amount equal to the Potential Roll-Back Amount to all applicable taxing jurisdictions. On such payment, Seller will have no further liability for any further roll-back amounts and Buyer will assume any and all obligations for, and indemnify, defend, and hold Seller

harmless from and against, any liability for any further roll-back amounts.

Or

- (d) At Closing, the parties will determine the amount of deferred taxes payable if the sale of the Property as herein contemplated were deemed as of the Closing Date to constitute a change in the use of the Property that would result in the "roll-back" or recapture of deferred taxes for the current year and all preceding tax years for which the "roll-back" or recapture could be imposed ("Potential Roll-Back Amount") as of the Closing Date. Seller will deposit at Closing an amount equal to the Potential Roll-Back Amount with Escrow Agent, to be held in an interest-bearing escrow account in accordance with the terms and conditions hereinafter set forth ("Roll-Back Escrow Account"). If a subsequent change in the use of the Property results in a roll-back of deferred taxes, the portion of recaptured deferred taxes attributable to the period before the Closing, if any, will be paid from the Roll-Back Escrow Account and the portion of deferred taxes attributable to the period from and after the closing, if any, will be paid by Buyer (or its successors or assigns). On the earlier of (1) the date on which there is no longer any statutory basis for recapturing any deferred taxes attributable to the period before the Closing or (2) the date on which all taxes that may then potentially be recaptured for any period before the Closing have been recaptured, the remaining balance in the Roll-Back Escrow Account, if any, will be distributed to Seller.

Continue with the following.

K.3.d. Income and Expenses. Except as provided in paragraph K.3.c. above, income and expenses pertaining to operation of the Property will be prorated as of the Closing Date on an accrual basis and paid at Closing as a credit or debit adjustment to the Purchase Price. Invoices that are received after Closing for operating expenses incurred on or before the Closing Date and not adjusted at Closing will be prorated between the parties as of the Closing Date, and Seller will pay its share within ten days after receipt of Buyer's notice of the deficiency.

K.3.e. Postclosing Adjustments. If errors in the prorations made at Closing are identified within ninety days after Closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days after receipt of notice of the errors.

K.3.f. Brokers' Commissions. Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not. At Closing, each party will provide the other party with a release of broker's or appraiser's liens from all brokers or appraisers for which such party is responsible.

K.4. Issuance of Title Policy. Seller will cause Escrow Agent to issue the Title Policy to Buyer as soon as practicable after Closing.

L. Default and Remedies

L.1. Seller's Default; Remedies before Closing. If Seller fails to perform its obligations under this contract or if Seller's representations are not true and correct as of the Closing Date ("Seller's Default"), Buyer may elect one of the following as its sole and exclusive remedy before Closing:

If the buyer's liquidated damages equal \$0, modify paragraph L.1.a. as appropriate.

L.1.a. Termination; Liquidated Damages. Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less \$100 as described above, returned to Buyer. Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, if Seller's Default occurs after Buyer has incurred costs to investigate the Property after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer's actual out-of-pocket expenses incurred to investigate the Property after the Effective Date ("Buyer's Expenses") or the amount of Buyer's Liquidated Damages, within ten days after Seller's receipt of an invoice from Buyer stating the amount of Buyer's Expenses accompanied by reasonable evidence of Buyer's Expenses.

L.1.b. Specific Performance. Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, Buyer may enforce specific performance of Seller's obligations under this contract, but any such action must be initiated, if at all, within ninety days after the breach or alleged breach of this contract. If such action is not initiated within that period and this contract has not previously been terminated, Buyer will be deemed to have elected to terminate this contract as of the expiration of that period. If title to the Property is awarded to Buyer, the conveyance will be subject to the matters stated in the Title Commitment.

L.1.c. Actual Damages. If Seller conveys or encumbers any portion of the Property before Closing so that Buyer's ability to enforce specific performance of Seller's obligations under this contract is precluded or impaired, Buyer will be entitled to seek recovery from Seller for the actual damages sustained by Buyer by reason of Seller's Default, including attorney's fees and expenses and court costs.

L.2. Seller's Default; Remedies after Closing. If Seller's representations are not true and correct at Closing due to circumstances reasonably within Seller's control and Buyer does not become aware of the untruth or incorrectness of such representations until after Closing, Buyer will have all the rights and remedies available at law or in equity. If Seller fails to perform any of its obligations under this contract that survive Closing, Buyer will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

If the seller's additional liquidated damages equal \$0, modify paragraph L.3. as appropriate.

L.3. Buyer's Default; Remedies before Closing. If Buyer fails to perform any of its obligations under this contract ("Buyer's Default"), Seller may terminate this contract by giving notice to Buyer on or before Closing and have the Earnest Money paid to Seller. If Buyer's Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller's actual out-of-pocket expenses incurred after the Effective Date to perform its obligations under this contract ("Seller's Expenses") or the amount of Seller's Additional Liquidated Damages, within ten days after Buyer's receipt of an invoice from Seller stating the amount of Seller's Expenses accompanied by reasonable evidence of Seller's Expenses. The foregoing constitutes Seller's sole and exclusive remedies for a default by Buyer before Closing.

L.4. Buyer's Default; Remedies after Closing. If Buyer fails to perform any of its obligations under this contract that survive Closing, Seller will have all rights and remedies available at law or in equity unless otherwise provided by the Closing Documents.

L.5. Liquidated Damages. The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that Buyer's Liquidated Damages or the Earnest

Money and Seller's Additional Liquidated Damages are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

L.6. Attorney's Fees. If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

M. Miscellaneous Provisions

M.1. Notices. Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

M.2. Entire Agreement. This contract, its exhibits, and any Closing Documents delivered at Closing are the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no representations, warranties, agreements, or promises pertaining to the Property or the sale of the Property by Seller to Buyer, and Buyer is not relying on any statements or representations of Seller or any agent of Seller, that are not in those documents.

M.3. Amendment. This contract may be amended only by an instrument in writing signed by the parties.

Select one of the following.

M.4. Prohibition of Assignment. Buyer may not assign this contract or Buyer's rights under it without Seller's prior written consent, which Seller has no obligation to grant and which, if granted, may be conditioned in any manner Seller deems appropriate, and any attempted assignment without Seller's consent is void. The consent by Seller to any assignment by Buyer will not release Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of those obligations after any such assignment.

Or

M.4. Assignment. Buyer may assign this contract and Buyer's rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void. No such assignment will release Buyer of its obligations under this contract, and Buyer and the assignee will be jointly and severally liable for the performance of such obligations after any such assignment.

Continue with the following.

M.5. Survival. The provisions of this contract that expressly survive termination or Closing and other obligations of this contract that cannot be performed before termination of this contract or before Closing survive termination of this contract or Closing, and the legal doctrine of merger does not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents control. The representations made by the parties as of Closing survive Closing.

M.6. Choice of Law; Venue. THIS CONTRACT IS TO BE CONSTRUED UNDER THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CHOICE-OF-LAW RULES OF ANY JURISDICTION. VENUE IS IN THE COUNTY FOR PERFORMANCE.

M.7. Waiver of Default. Default is not waived if the nondefaulting party fails to declare a default immediately or delays taking any action with respect to the default.

M.8. No Third-Party Beneficiaries. There are no third-party beneficiaries of this contract.

M.9. Severability. If a provision in this contract is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this contract, and this contract is to be construed as if the unenforceable provision is not a part of the contract.

M.10. Ambiguities Not to Be Construed against Party Who Drafted Contract. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this contract.

M.11. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

M.12. Counterparts. If this contract is executed in multiple counterparts, all counterparts taken together constitute this contract. Copies of signatures to this contract are effective as original signatures.

M.13. Confidentiality. This contract, this transaction, and all information learned in the course of this transaction shall be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction. Remedies for violations of this provision

are limited to injunctions and no damages or rescission may be sought or recovered as a result of any such violations.

M.14. Binding Effect. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

Include the following only if the DTPA is applicable and if the buyer has agreed to waive its rights under the DTPA.

M.15. Waiver of Consumer Rights. BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

Include the following if applicable.

M.16. Waiver of Jury Trial. **Buyer and Seller, each after consultation with an attorney of its own selection (which counsel was not directly or indirectly identified, suggested, or selected by the other party), both voluntarily waive a trial by jury of any issue arising in an action or proceeding between the parties or their successors, under or connected with this contract or its provisions. Buyer and Seller acknowledge to each other that Buyer and Seller are not in significantly disparate bargaining positions.**

Continue with the following.

[Name and title of seller]
Date:

[Name and title of buyer]
Date:

Escrow Agent's Acceptance of Contract

Escrow Agent, by its execution and delivery of this Real Estate Sales Contract, acknowledges it is "the person responsible for closing" the transaction that is the subject of this contract pursuant to section 6045(e) of the Internal Revenue Code and to prepare and file all informational returns, including, without limitation, IRS Form 1099S, and to otherwise comply with the provisions of section 6045(e) of the Internal Revenue Code, and acknowledges receipt of a fully executed counterpart of this Real Estate Sales Contract on this ____ day of _____, 20__.

[Name of escrow agent]

By _____

Name:

Title:

Receipt for Initial Earnest Money Deposit

Escrow Agent acknowledges receipt of the Initial Earnest Money deposit of \$_____ required under this Real Estate Sales Contract on this ____ day of _____, 20__.

[Name of escrow agent]

By _____

Name:

Title:

Receipt for Additional Earnest Money Deposit

Escrow Agent acknowledges receipt of the Additional Earnest Money deposit of \$_____ required under this Real Estate Sales Contract on this ____ day of _____, 20__.

[Name of escrow agent]

By _____

Name:

Title:

Exhibit A

Description of the Land [and Personal Property]

Include legal description of the land.

Include one of the following if the transaction involves some personal property.

All personal property associated with the Land and Improvements, except the following: **[list exceptions]**.

Or

The following described personal property: **[describe property]**.

Exhibit B**Representations; Environmental Matters****A. Seller's Representations to Buyer**

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date, unless Seller has given Buyer notice of any changes prior to the Closing Date that such circumstances have changed due to causes not reasonably within Seller's control.

If the seller is an individual or is acting in a representative capacity, some of the items should be modified.

A.1. Authority. Seller is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Seller. This contract is, and all documents required by this contract to be executed and delivered to Buyer at Closing will be, duly authorized, executed, and delivered by Seller.

A.2. Litigation. Seller has not received written notice and has no actual knowledge of any litigation pending or threatened against the Property or Seller that might adversely affect the Property or Seller's ability to perform its obligations under this contract [**include if applicable**: , except: [**specify**]].

A.3. Violation of Governmental Requirements. Seller has not received written notice and has no actual knowledge of violation of any law, ordinance, regulation, restriction, or legal requirements affecting the Property or Seller's use of the Property [**include if applicable**: , except: [**specify**]].

A.4. Licenses, Permits, and Approvals. Seller has not received written notice and has no actual knowledge that any license, permit, or approval necessary to use the Property in

the manner in which it is currently being used has expired or will not be renewed on expiration or that any material condition will be imposed to use or renew the same [**include if applicable: , except: [specify]]**].

A.5. Condemnation; Zoning; Land Use; Hazardous Materials. Seller has not received written notice and has no actual knowledge of any condemnation, zoning, land-use, hazardous materials, or other proceedings affecting the Property or any written inquiries or notices by any governmental authority or third party with respect to condemnation, zoning, or other land-use regulations or the presence of hazardous materials affecting the Property [**include if applicable: , except: [specify]]**].

A.6. Terrorist Organizations Lists. Seller is not and Seller has no actual knowledge that its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

A.7. No Other Obligation to Sell the Property or Restriction against Sale. Seller is not obligated to sell any of the Property to any person other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or by which Seller or the Property is bound.

A.8. No Liens. On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature not arising by, through, or under Buyer except the Permitted Exceptions or liens to which Buyer has given its consent in writing, and no work or materials will have been furnished to the Property by Seller that might give rise to mechanic's, materialman's, or other liens against the Property other than work or materials to which Buyer has given its consent in writing.

A.9. Seller's Records. The records provided by Seller to Buyer for Buyer's inspections will be true, correct, and complete copies of the records in Seller's possession or control. The records that were prepared by or under Seller's supervision and control will be true, correct, and complete in all material respects. Unless Seller notifies Buyer to the contrary at the time of delivery of records provided by Seller to Buyer that were not prepared by or under Seller's supervision and control, Seller has no actual knowledge that such records are not true, correct, and complete in any material respect.

A.10. No Other Representation. Except as stated above or in the notices, statements, and certificates set forth in Exhibit D, Seller makes no representation with respect to the Property.

A.11. No Warranty. Except as set forth in this contract and in the Closing Documents, Seller has made no warranty in connection with this transaction.

Include the following if the conveyance is on an "as is" basis.

B. "As Is, Where Is"

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT THOSE IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

BUYER IS NOT RELYING ON ANY REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES OTHER THAN THOSE EXPRESSLY CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS. BUYER IS NOT RELYING ON ANY INFORMATION REGARDING THE PROPERTY PROVIDED BY ANY PERSON, OTHER THAN BUYER'S OWN INSPECTION AND THE REP-

REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS CONTRACT AND THE CLOSING DOCUMENTS.

The provisions of this section B. regarding the Property [will/will not] be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

Include the following if the seller retains no liability for environmental matters after closing.

C. Environmental Matters

AFTER CLOSING, BUYER RELEASES SELLER FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY **THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVE.**

The provisions of this section C. regarding the Property [will/will not] be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

D. Buyer's Representations to Seller

Buyer represents to Seller that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date, unless Buyer has given Seller notice of any changes prior to the Closing Date that such circumstances have changed due to causes not reasonably within Buyer's control.

If the buyer is an individual or is acting in a representative capacity, some of the items should be modified.

D.1. Authority. Buyer is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to perform its obligations under this contract. This contract is binding on Buyer. This contract is, and all documents required by this contract to be executed and delivered to Seller at Closing will be, duly authorized, executed, and delivered by Buyer.

D.2. Terrorist Organizations Lists. Buyer is not and Buyer has no actual knowledge that its partners, members, shareholders, owners, employees, officers, directors, representatives, or agents is a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control of the Department of the Treasury or under any statute, executive order, or other governmental action.

Include other representations from the buyer to the seller as needed.

Exhibit C
Seller's Records

To the extent that Seller has possession or control of the following items pertaining to and currently impacting the Property, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in paragraph A.7.

Select items as agreed by the parties.

Governmental

governmental licenses, certificates, permits, and approvals

tax statements for the current year and the last [number] years

notices of appraised value for the current year and the last [number] years

records of any tax exemption, special use, or other valuation or exemption applicable to the Property

records of regulatory proceedings or violations (for example, condemnation, environmental)

other: [specify]

Land

soil reports

environmental reports and other information regarding the environmental condition of the Property

water rights

engineering reports

prior surveys

site plans

other: [**specify**]

Facilities

as-built plans, specifications, and mechanical drawings for improvements

warranty agreements

management, employment, labor, service, equipment, supply, and maintenance agreements

insurance policies

ADA and other building inspection reports

engineering reports

environmental reports

operating and maintenance plans (for example, asbestos maintenance plans)

life-safety plans

other: [**specify**]

Financial

annual operating statements for the most recent [**number**] years of operation

monthly operating statements since the close of the last fiscal year

balance sheet as of [**date**]

books and records for the Property

utility bills for the most recent [number] months of operation

other: [specify]

Leases

Leases

commission and leasing agent agreements

rent roll setting forth for each Lease:

tenant's name

square footage leased

date of expiration of current and renewal terms

renewal options

basic rent and formula for any additional rents

amount of additional rent paid during the last [number] [months/years]

prepaid rent

delinquent rent

security deposit

current tenant or landlord defaults

options to purchase any portion of the Property

rights of first refusal to lease other space

rights to rent concessions, tenant improvements, or other allowances

unpaid or contingent brokerage commissions (including commission on renewals)

estoppel letters and/or subordination agreements

other: [specify]

Licenses, Agreements, and Encumbrances

all licenses, agreements, and encumbrances (including all amendments and exhibits)

affecting title to or use of the Property that have not been recorded in the real property records of the county or counties in which the Property is located

Exhibit D**Notices, Statements, and Certificates**

Certain notices must be contained in the contract and others must be provided as separate notices. Please refer to the statutory requirements for each notice.

The notices, statements, and certificates (arranged by their application to particular transactions) that are listed below are [included in the sales contract] [and] [attached for delivery to Buyer], and Buyer acknowledges receipt of the notices, statements, and certificates by executing this contract:

Include one or more of the following paragraphs as applicable and modify section headers and paragraph numbers as appropriate.

A. Consumer Notices

Notice of Cancellation. Notice concerning the purchaser's three-day right of rescission under a contract to purchase real property if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds \$100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property, as described in chapter 601 of the Texas Business and Commerce Code.

If applicable, attach form 4-4 in this chapter to the end of this exhibit D.

And/Or

B. Residential Transaction Notices

B.1. Seller's Disclosure of Property Condition. Seller's disclosure of the condition of residential property, described in section 5.008 of the Texas Property Code.

If applicable, attach form 4-22, with all relevant information filled in, to the end of this exhibit D.

And/Or

B.2. Notice of Membership in Property Owners Association. Notice concerning the sale of single-family residential property that is subject to membership in a property owners association, described in section 5.012 of the Texas Property Code.

If applicable, attach form 23-9 in this manual to the end of this exhibit D.

And/Or

B.3. Seller's Disclosure of Location of Conditions under Surface of Unimproved Real Property. Seller's disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.013 of the Texas Property Code. A seller of unimproved property to be used for residential purposes shall provide the purchaser written notice disclosing the location of any transportation pipeline to the best of the seller's belief and knowledge as of the date the notice is completed and signed by the seller. If the information required to be disclosed is not known by the seller, the seller shall indicate that fact in the notice. A seller is not required to give this notice if (a) the seller is obligated under the terms of the contract to furnish a title insurance commitment to the buyer before Closing and (b) the buyer is entitled to terminate the contract if the buyer's objections to title as permitted by the contract are not cured by the seller before Closing.

No form is provided, because the real estate sales contract portion of this form 4-1 satisfies the provisions for exemption from disclosure.

And/Or

B.4. Notice of Obligation to Pay Public Improvement District Assessment. Seller's disclosure that a single-family residential property is located within a public improvement district, described in section 5.014 of the Texas Property Code.

If applicable, attach form 4-5 to the end of this exhibit D.

And/Or

B.5. Residential Contracts for Deed. Notice regarding the sale of property used or to be used as the purchaser's residence if the contract does not provide for delivery of a deed from the seller to the purchaser within 180 days after the final execution of the contract.

See Tex. Prop. Code §§ 5.069-.074.

And/Or

B.6. Notice Regarding Insulation to Buyer of New Home. Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations.

If applicable, attach form 4-6 to the end of this exhibit D.

And/Or

B.7. Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. Lead-based paint warning statement, described in section 745.100 *et seq.* of title 40 of the Code of Federal Regulations.

If applicable, attach form 4-7 to the end of this exhibit D.

And/Or

B.8. Asbestos Disclosure Notice. Notice concerning asbestos, described in sections 1910.1001 and 1926.1101 of title 29 of the Code of Federal Regulations.

If applicable, attach form 4-8 to the end of this exhibit D.

And/Or

B.9. Notice Regarding Sale Subject to a Recorded Lien. Notice to the purchaser and each lienholder required under Texas Property Code section 5.016 that property being sold will be conveyed subject to a lien.

If applicable, attach form 4-9 to the end of this exhibit D.

And/Or

C. Condominium Transaction Notices

C.1. Acknowledgment of Receipt of Condominium Documents. Condominium declaration, bylaws, and association rules, described in section 82.156 of the Texas Property Code.

If applicable, attach form 24-8 to the end of this exhibit D.

And/Or

C.2. Condominium Resale Certificate. Resale certificate from the condominium owners association or waiver of resale certificate, described in section 82.157 of the Texas Property Code.

If applicable, attach condominium resale certificate promulgated by the Texas Real Estate Commission, available at <https://www.trec.texas.gov/pdf/contracts/32-4.pdf>, or form 24-7 (waiver of condominium resale certificate) to the end of this exhibit D.

And/Or

D. All Real Property Transaction Notices

D.1. Storage Tanks Disclosure Provider. Notice concerning underground storage tanks, described in section 334.9 of title 30 of the Texas Administrative Code.

If applicable, attach form 4-10 to the end of this exhibit D.

And/Or

D.2. *Notice to Purchaser Regarding Restrictive Covenants.* Notice of deed restrictions, described in section 212.155 of the Texas Local Government Code.

If applicable, attach form 4-11 to the end of this exhibit D.

And/Or

D.3. *Notice to Purchaser Regarding Coastal Area Property.* Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code.

If applicable, attach form 4-12 to the end of this exhibit D.

And/Or

D.4. *Notice to Purchaser of Property Seaward of Gulf Intracoastal Waterway.* Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code.

If applicable, attach form 4-13 to the end of this exhibit D.

And/Or

D.5. *Notice Regarding Possible Liability for Additional Taxes.* Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code.

If applicable, attach form 4-14 to the end of this exhibit D.

And/Or

D.6. Notice Regarding Possible Annexation. Notice concerning the sale of property located outside the limits of a municipality that may now or later be included in the extra-territorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality, described in section 5.011 of the Texas Property Code.

If applicable, attach form 4-15 to the end of this exhibit D.

And/Or

D.7. Notice for Unimproved Property in a Certificated Service Area of a Utility Service Provider. Notice for property in a certificated service area of a utility service provider, described in section 13.257 of the Texas Water Code.

If applicable, attach form 4-16 to the end of this exhibit D.

And/Or

D.8. Utility District Notice. Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in section 49.452 of the Texas Water Code, with the form of notice to be used being dependent on whether the property (a) is located in whole or in part within the extraterritorial jurisdiction of one or more home-rule municipalities but is not located within the corporate boundaries of a municipality, (b) is located in whole or in part within the corporate boundaries of a municipality, or (c) is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities.

If applicable, attach form 4-17 to the end of this exhibit D.

And/Or

D.9. Notice to Purchaser of Property Located in Certain Annexed Water Districts. Notice required by section 54.016(h)(4)(A) of the Texas Water Code when property being sold is in a water or sanitary sewer district that entered a contract with a city with a

population of 1.18 million or less under which the city is permitted to set rates in the district after annexation that are different from rates charged other residents of the city.

If applicable, attach form 4-18 to the end of this exhibit D.

And/Or

D.10. Notice to Purchaser that Property Is Located within the Area of the Alignment of a Transportation Project. Notice required under Texas Local Government Code section 232.0033 that all or part of the subdivision in which the property being sold is located is within the area of the alignment of a transportation project as shown in the final environmental decision document that is applicable to a future transportation corridor identified in a contract between the Texas Department of Transportation and a county under Texas Transportation Code section 201.619.

If applicable, attach form 4-19 to the end of this exhibit D.

And/Or

D.11. Certificates of Mold Remediation. Notice pursuant to section 1958.154 of the Texas Occupations Code, titled "Certificate of Mold Remediation; Duty of Property Owner," requiring a property owner who sells property that has been issued a certificate of mold remediation pursuant to this section to deliver copies to the purchaser of each certificate of mold remediation issued for the property within the preceding five years.

And/Or

D.12. Notice of Water Level Fluctuations. Notice to purchasers of real property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Texas Water Code chapter 11, that has storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, provided pursuant to section 5.019 of the Texas Property Code.

If applicable, attach form 4-20 to the end of this exhibit D.

E. Property Owners Association Disclosures

E.1. Resale Certificate. Resale certificate from a property owners association that is entitled to levy regular or special assessments as described in sections 207.002–.003 of the Texas Property Code. In contrast to the obligation of a condominium seller to provide the condominium governing documents and resale certificate under section 82.157 of the Texas Property Code, the obligation in chapter 207 is an obligation of the property owners association upon a request from an owner, purchaser, agent, title insurance company, or other interested party.

If applicable, attach form 23-10 to the end of this exhibit D.

Exhibit E**Seller Financing Addendum**

A. Promissory Note. The promissory note ("Note") will be payable by Buyer ("Maker") to the order of Seller ("Payee") at the place designated by Payee. The Note may be prepaid in whole or in part at any time without penalty, premium, or restriction of any kind. Any prepayments are to be applied to the payment of the installments of principal last maturing, and interest will immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in the contract. The Note will be payable as follows:

Select one of the following.

In one payment due [number] days after the date of the Note with interest payable [at maturity/monthly/quarterly/annually].

Or

In [number] installments of \$[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Interest only in [number] installments for the first [number] year[s] and thereafter in [number] installments of \$[amount] each [including interest/plus interest] beginning [number] days after the date of the Note and continuing at [monthly/quarterly/annual] intervals thereafter until [date], when the entire balance of the Note will be due and payable.

Or

Other: [specify].

Continue with the following.

B. Deed of Trust. The deed of trust ("Deed of Trust") securing the Note will provide for the following:

Select one of the following.

B.1. Assumption without Consent. The Property may be sold, transferred, or conveyed without the consent of Payee, provided any subsequent buyer or transferee assumes in writing for the benefit of Payee the obligation to pay the Note and to perform the covenants and agreements in the Deed of Trust in accordance with the terms of those instruments. No such assumption will release Maker from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

Or

B.1. Prohibition on Transfer.

Include the following for a residential deed of trust if a due-on-sale clause is desired.

If Maker transfers any part of the Property without Payee's prior written consent, Payee may declare the Obligation immediately payable and invoke any remedies provided in the deed of trust for default. If the Property is residential real property containing fewer than five dwelling units or a residential manufactured home, this provision does not apply to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Maker; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Maker or between co-Makers; (f) transfer to a relative of Maker on Maker's death; (g) a transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or an

incidental property settlement agreement by which the spouse of Maker becomes an owner of the Property; or (h) transfer to an inter vivos trust in which Maker is and remains a beneficiary and occupant of the Property.

Include the following for a commercial deed of trust if a due-on-sale clause is desired.

Maker may not sell, transfer, or otherwise dispose of any Property, whether voluntarily or by operation of law, without the prior written consent of Payee. If granted, consent may be conditioned upon (a) the grantee's integrity, reputation, character, creditworthiness, and management ability being satisfactory to Payee; and (b) the grantee's executing, before such sale, transfer, or other disposition, a written assumption agreement containing any terms Payee may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, the Deed of Trust, or any other instruments evidencing or securing the Obligation.

Continue with the following.

B.2. Prohibition on Further Encumbrances. Maker may not cause or permit any Property to be encumbered by any liens, security interests, or encumbrances other than the liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable without the prior written consent of Payee. If granted, consent may be conditioned upon Maker's executing, before granting such lien, a written modification agreement containing any terms Payee may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, an approval fee, or any other modification of the Note, the Deed of Trust, or any other instruments evidencing or securing the Obligation.

Maker may not grant any lien, security interest, or other encumbrance ("Subordinate Instrument") covering the Property that is subordinate to the liens created by the Deed of

Trust without the prior written consent of Payee. If granted, consent may be conditioned upon the Subordinate Instrument's containing express covenants to the effect that—

- a. the Subordinate Instrument is unconditionally subordinate to the Deed of Trust;
- b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Payee, and that consent, if granted, may be conditioned in any manner Payee determines;
- c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Payee may determine, before being applied to any indebtedness secured by the Subordinate Instrument;
- d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise enforce the Subordinate Instrument must be given to Payee concurrently with or immediately after the occurrence of any such default or commencement; and
- e. in the event of the bankruptcy of Maker, all amounts due on or with respect to the Obligation and the Deed of Trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument and all decisions or elections in such proceedings affecting the Property will be made and controlled by Payee.

B.3. Prohibition on Transfer of Interests in Borrower. Maker may not cause or permit any of the following events to occur without the prior written consent of Payee: if

Maker is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership; (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner; (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests; or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned upon (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Maker (or security interest in such ownership) being satisfactory to Payee; and (b) the execution, before such event, by the person succeeding to the interest of Maker in the Property or ownership interest in Maker (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Payee may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, the Deed of Trust, or any other instruments evidencing or securing the Obligation.

Select one of the following.

B.4. Without Escrow. Maker will furnish to Payee annually, before the taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been paid. Maker will furnish to Payee annually evidence of current paid-up insurance naming Payee as an insured.

Or

B.4. With Escrow. Maker will, in addition to the principal and interest installments, deposit with Payee a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Maker must pay any deficiency within thirty days after notice from Payee. Maker's failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.

Continue with the following.

B.5. Cross-Default. Any act or occurrence that would constitute default under the terms of any lien superior to the lien securing the Note will constitute a default under the Deed of Trust securing the Note.

C. Recourse Provisions. The Note and Deed of Trust are subject to the following provisions:

Select one of the following.

Full Recourse. Maker will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Maker in the Deed of Trust.

Or

No Recourse. Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. The sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security

interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any deficiency judgment against Maker.

Or

Partial Recourse. Except as set forth below, Maker will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Maker in the Deed of Trust. Except as set forth below, the sole remedy of Payee or other holder of the Note in the event of a default by Maker under the Note or Deed of Trust will be to foreclose the liens and security interests granted in the Deed of Trust, and Payee or other holder of the Note will not be entitled to any personal judgment against Maker. Maker will have full recourse liability for any loss or damage actually suffered or incurred by Payee or other holder of the Note by reason of the following matters:

1. taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property that accrue before foreclosure;
2. unpaid premiums for insurance required hereunder that accrue before foreclosure;
3. damage to the Property to the extent such damage would be otherwise covered by insurance required hereunder that was not maintained;
4. all rents, issues, profits, and income derived from the Property, including forfeited security deposits, after a default occurs and not expended for debt service or operating expenses of the Property before foreclosure;
5. tenant security deposits for leases of the Property not forfeited by or refunded to the tenants;

6. any condemnation or insurance proceeds not paid or applied as required in the Deed of Trust;
7. damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Maker or the failure of Maker to keep the Property in good repair and condition;
8. the return of or reimbursement for personal property taken from the Property by or on behalf of Maker and not replaced with personal property of equal utility and value;
9. damages resulting from fraud or misrepresentation by Maker;
10. damages resulting from breach of any warranty of title by Maker;
11. interest on the Note from the date of default through foreclosure, payment, or settlement of the debt;
12. all interest on the Note during any bankruptcy proceeding of Maker and all reasonable attorney's fees and expenses incurred as a result of Maker's bankruptcy; and
13. all attorney's fees and expenses incurred by Payee to collect any of the foregoing amounts.

Continue with the following.

Buyer/Maker

Seller/Payee

Form 4-2

Escrow Agent Receipt and Escrow Agreement

Seller:

Buyer:

Date of Contract:

Property:

Earnest Money:

Underwriter:

Escrow Agent:

Escrow Agent Fee:

GF Number:

Escrow Agent acknowledges receipt of one or more fully executed counterparts of the Contract and the Earnest Money. All capitalized terms used in this Escrow Agent Receipt and Escrow Agreement and not otherwise defined herein have the same meanings as in the Contract.

1. *Duties.* Escrow Agent will—
 - a. hold and disburse all funds that it receives, as directed in the Contract;
 - b. if directed by Buyer, and after Buyer's compliance with Escrow Agent's requirements for investing the Earnest Money and agreement to pay the fees reasonably required for investing the Earnest Money, invest the Earnest

Money in an interest-bearing account in a federally insured financial institution, with Escrow Agent having sole signature authority over the account;

- c. use its best efforts to obtain from Underwriter the title commitment by the deadline stated in the Contract;
- d. obtain tax and other certificates as directed by the parties, at their expense;
- e. prepare the closing statement;
- f. if closing occurs, use its best efforts to obtain from Underwriter the Title Policy not more than fifteen days after closing, in accordance with the last title commitment delivered to and approved by the parties at or before closing;
- g. file for record the deed and other documents requested by the parties to be recorded;
- h. be the party responsible for complying with reporting requirements, if any, of the Internal Revenue Service, the U.S. Department of Housing and Urban Development, and any other governmental agencies, relying on information provided by Buyer and Seller; and
- i. except as required by law or court order, keep confidential the terms of the Contract and this transaction generally and not disclose information about them to anyone except its employees and agents who need to know the information to perform their assigned duties in connection with this transaction.

2. *Loss or Impairment of Earnest Money.* Buyer and Seller release Escrow Agent from liability for any loss or impairment of the Earnest Money when deposited in an account of a federally insured financial institution, if the loss or impairment results from the failure,

insolvency, or receivership of the financial institution in which the Earnest Money is deposited.

3. *Return of Earnest Money.* If either Buyer or Seller demands payment of the Earnest Money, Escrow Agent may either require, as a condition of disbursement, that all parties sign a directive to Escrow Agent to disburse the Earnest Money or notify the other party of the demand. If the other party does not object by notice to Escrow Agent within five days, Escrow Agent is authorized to disburse the Earnest Money to the party making the demand. Escrow Agent may, however, reimburse itself for its out-of-pocket expenses for long-distance calls, courier and delivery services, tax certificates, UCC searches, certified copies, the cost to obtain the survey, and other fees incurred in fulfilling its obligations as Escrow Agent and closing agent (collectively, "Escrow Agent Expenses"). If Escrow Agent determines that a dispute concerning the right to receive the Earnest Money is unlikely to be resolved within sixty days, Escrow Agent may interplead the Earnest Money into the registry of a court of competent jurisdiction in the county in which Escrow Agent is located and petition the court to assess its attorney's fees and court and other costs against the parties.

4. *Termination of Escrow Agent's Participation.* Buyer and Seller, acting together, may terminate Escrow Agent's role in this transaction by notice to Escrow Agent and payment of Escrow Agent Expenses. Escrow Agent may resign on ten days' notice to Buyer and Seller. Within five days after termination or on resignation, Escrow Agent will deliver to Seller all items Escrow Agent obtained from third parties in connection with this transaction, charge Escrow Agent Expenses against the Earnest Money, and disburse the remainder of the Earnest Money to the party jointly designated by Buyer and Seller.

5. *Fee and Expenses.* Escrow Agent's fee for acting as closing and escrow agent may not exceed the Escrow Agent Fee. In addition to the Escrow Agent Fee, Escrow Agent will be reimbursed for Escrow Agent Expenses. Buyer and Seller will pay the Escrow Agent Fee and Escrow Agent Expenses in accordance with the terms of the Contract. The Escrow

Agent Fee and Escrow Agent Expenses will be paid at closing or after termination or resignation as described above.

6. *Notices.* All notices must be in writing and delivered to Buyer, Seller, their respective attorneys, and Escrow Agent in the manner and at the addresses stated in the Contract. Each party may change its address for notice purposes by not less than ten days' prior notice to the other parties.

[Name and title of seller]

Date:

[Name and title of buyer]

Date:

[Name and title of escrow agent]

Date:

Form 4-3

Letter of Intent

[Date]

[Name and address of seller]

Re: Letter of Intent [describe transaction]

[describe property by address or lot and block number, city, county, state]

[Salutation]

The attached exhibits and this letter of intent (collectively, this "Letter") outline the business points under which [name of buyer] ("Buyer") will consider acquiring the property described above (the "Property") from [name of seller] ("Seller"). Buyer is interested in purchasing the Property on the general terms referenced in this Letter.

1. *Contract.* No right or obligation of either party, except those specifically set forth in the binding agreements relating to the proposed transaction listed in the attached Exhibit A, will arise until the execution of a real estate sales contract (the "Contract") incorporating the essential terms of this Letter and other terms and conditions satisfactory to both parties. Except as otherwise agreed by the parties, the Contract will be prepared on the most current form of real estate sales contract published by the State Bar of Texas in its *Texas Real Estate Forms Manual*. The initial draft of the Contract will be prepared by Seller's attorney within [number] days after the effective date of this Letter and distributed contemporaneously to all parties by [describe method of delivery].

2. *Payment of the Purchase Price.* The purchase price will be paid by wire transfer of immediately available funds to the escrow agent at closing.

3. *Title.* Title will be conveyed free and clear of all defects, liens, encumbrances, and easements, except as approved by Buyer during the title review period specified in the Contract.

4. *Effect.* Each party agrees that this Letter is intended only to set forth the discussions of the parties and will not constitute a complete statement of the agreement or be a legally binding or enforceable agreement or commitment on the part of either party with respect to the matters described herein (except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, which will be fully enforceable and will survive the termination of this Letter, the termination of the Contract, and the closing of any transaction). This Letter is not intended to impose on either party an enforceable duty or obligation to negotiate toward or conclude any such agreement or commitment. Each party acknowledges that, except with respect to the binding agreements relating to the proposed transaction listed in Exhibit A, in no event will any discussions, negotiations, or other communications between the parties regarding this Letter or the terms contained herein rise to the level of an oral or written agreement. The parties have no obligation of good faith and fair dealing. The parties' respective legal obligations will otherwise arise, if at all, solely from a fully executed Contract.

5. *Counterparts.* If this Letter is executed in multiple counterparts, all counterparts taken together will constitute this Letter.

6. *Exclusive Negotiations.* Until 5:00 P.M. on [date], Seller will negotiate only with Buyer for the sale of the Property.

Binding/Nonbinding Nature

SELLER AND BUYER ARE NOT LEGALLY BOUND TO ENTER INTO THE TRANSACTION DESCRIBED HEREIN UNLESS AND UNTIL THE CONTRACT IS EXECUTED BY BUYER. SELLER AND BUYER ARE BOUND TO COMPLY WITH THE PROVISIONS SPECIFICALLY LISTED AS BINDING

AGREEMENTS. SELLER AND BUYER EACH ACKNOWLEDGE RECEIPT OF \$10.00 AND OTHER VALUABLE CONSIDERATION, WHICH EACH SUCH PARTY ACCEPTS AS LEGALLY SUFFICIENT TO BIND SUCH PARTY TO PERFORM THE BINDING AGREEMENTS.

If the foregoing meets with your approval, please sign and return the enclosed duplicate copy of this Letter on or before 5:00 P.M. central [standard/daylight saving] time on [date]. An electronic copy of this Letter executed by you will be considered an original. This Letter is effective on the date of the last of the signatures by Seller and Buyer. We look forward to receiving your prompt response.

Sincerely,

[Name of buyer]
[a/an] [individual/partnership/limited partnership/corporation]

Include the following if applicable.

By:

[Name of representative]
[Title]

Continue with the following.

Agreed to and accepted on [date].

[Name of seller],
[a/an] [individual/partnership/limited partnership/corporation]

Include the following if applicable.

By:

Name of representative

Title

Attach exhibits.

Exhibit A

Nonbinding Terms of Proposed Transaction

Seller:

Address:

Phone:

E-mail:

Type of entity:

Seller's Attorney:

Law Firm:

Address:

Phone:

E-mail:

Seller's Sales Agent:

Brokerage Firm:

Address:

Phone:

E-mail:

Buyer:

Address:

Phone:

E-mail:

Type of entity:

Buyer's Attorney:

Law Firm:

Address:

Phone:

E-mail:

Buyer's Sales Agent:

Brokerage Firm:

Address:

Phone:

E-mail:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit B ("Land") [**include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary:** , together with improvements to the Land ("Improvements"), the leases associated with the Land and Improvements ("Leases"), and the personal property described in Exhibit B ("Personal Property")].

Underwriter:

Escrow Agent:

Address:

Phone:

E-mail:

[Include if applicable: Estimated] Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Third-party-financed portion:

Total purchase price:

Earnest Money

[Initial] Earnest Money:

[Additional Earnest Money:]

Deadlines and Closing Date:

1. [Initial] Earnest Money deadline: [**date**]
2. Delivery of Title Commitment: [[**date**]/[**number**] days after the Contract effective date]
3. Delivery of Survey: [[**date**]/[**number**] days after the Contract effective date]
4. Delivery of UCC Search: [[**date**]/[**number**] days after the Contract effective date]

5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: **[[date]/[number]** days after the Contract effective date]
6. Delivery of Title Objections: **[[date]/[number]** days after delivery of items 1.–5.]
7. Delivery of Seller's records as specified in the Contract: **[[date]/[number]** days after the Contract effective date]
8. End of Inspection Period: **[[date]/[number]** days after the Contract effective date]

Include the following if applicable.

9. Additional Earnest Money Deadline: **[[date]/[number]** days after the end of the Inspection Period]

Continue with the following.

[9./10.] Closing Date: **[[date]/[number]** days after the end of the Inspection Period]

[10./11.] Closing Time: **[time]**

Binding Agreements Relating to Proposed Transaction

1. If the Contract is not finally negotiated, signed by all parties, and tendered to Escrow Agent with the earnest money within **[number]** days of the effective date of this Letter, this Letter will terminate.
2. Seller agrees to abate all marketing efforts for the Property during the term of this Letter. Any existing signs may remain. Any ordered advertising will be canceled, if cancelable without penalty; otherwise ordered advertising may proceed, but no additional advertising may occur. Brokers and prospective buyers will not be shown the Property and may be given only currently available printed information about the Property prepared by Seller's Sales Agent.

3. Except as may be required by law or to its own attorney, advisors, and existing or prospective lenders or investors, no party to this Letter nor any affiliate will disclose the existence of this Letter, names of the parties, or the transaction contemplated herein; or issue any press release or make any other disclosure to a nonaffiliated third person concerning the existence of this Letter or the matters contained herein without the written consent of each party.

4. Each party will pay its own expenses related to this Letter and the Contract.

Insert any other applicable agreements.

5. Unless Seller agrees otherwise, Buyer is not permitted to enter into the Property for the purpose of inspecting it before the execution of the Contract. If Buyer is permitted by Seller to enter the Property for the purpose of inspecting it before the execution of the Contract, Buyer will indemnify, defend, and hold Seller harmless from and against any losses, damages, costs, expenses, or claims arising in connection with or out of such entry and inspection by Buyer.

Exhibit B

Description of the Land [and Personal Property]

Include legal description of the land.

That certain tract of land more particularly described as **[property]**.

Include one of the following if the transaction involves some personal property.

All personal property associated with the Land and Improvements, except the following: **[list exceptions]**.

Or

The following described personal property: **[describe property]**.

Form 4-4

A notice concerning the purchaser's three-day right of rescission under a contract to purchase real property must be given if (1) the seller or the seller's agent solicits the sale at a place other than the seller's place of business; (2) the purchaser submits the purchase contract to the seller or the seller's agent at a place other than the seller's place of business; and (3) the consideration payable under the purchase contract exceeds \$100; unless either (1) the purchaser is represented by a licensed attorney; (2) the transaction is negotiated by a licensed real estate broker; or (3) the transaction is negotiated at a place other than the purchaser's residence by the person who owns the property. Tex. Bus. & Com. Code § 601.002.

The notice of cancellation form must be easily detachable from the contract to which it is attached, must be in the same language as the contract, and must contain the following information and statements in ten-point bold-faced type. Tex. Bus. & Com. Code § 601.053.

Notice of Cancellation

[Date]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE MERCHANT OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL YOU MUST MAKE AVAILABLE TO THE MERCHANT AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE MERCHANT REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE MERCHANT'S EXPENSE AND RISK.

IF YOU DO NOT AGREE TO RETURN THE GOODS TO THE MERCHANT OR IF THE MERCHANT DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CAN-

CELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of merchant], AT [address of merchant's place of business] NOT LATER THAN MID-NIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

Dated: _____

[Name of purchaser]

In addition to giving the notice of cancellation separately, the seller must insert the following at the end of the contract to purchase above the buyer's signature. This must be in a minimum of ten-point bold-faced type.

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MID-NIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

[Name of buyer]

Form 4-5

A seller of residential property that is located in a public improvement district and that consists of not more than one dwelling unit must give the purchaser written notice that it will be obligated to pay assessments for an improvement project. Certain transactions are exempted. The notice must be given before the effective date of the executory contract. Notice may be given separately, as part of the contract, or as part of another notice and must be substantially similar to the prescribed form. If an executory contract is entered into without the notice having been given, the purchaser may, as its exclusive remedy, terminate the contract for any reason no later than the earlier of (1) the seventh day after the date the purchaser receives the notice or (2) the date the transfer occurs as provided by the executory contract. The requirement applies to an executory contract that is binding on a seller and purchaser on or after January 1, 2006. Tex. Prop. Code § 5.014.

**Notice of Obligation to Pay Public Improvement District
Assessment to [name of municipality or county levying assessment]
Concerning the Property at [street address]**

Seller[s]:

Purchaser[s]:

Real Property:

Date:

As a purchaser of this parcel of real property you are obligated to pay an assessment to a municipality or county for an improvement project undertaken by a public improvement district under chapter 372 of the Local Government Code. The assessment may be due annually or in periodic installments. More information concerning the amount of the assessment and the due dates of that assessment may be obtained from the municipality or county levying the assessment.

The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

[Name of purchaser]

Form 4-6

This form sets out the mandatory notice under 16 C.F.R. § 460.16. A new home seller must include in every sales contract the type, thickness, and R-value of the insulation that will be installed in each part of the house. The exception to this rule is that if the buyer signs a sales contract before the seller knows what type of insulation will be put in the house, or if there is a change in the contract, the seller can give the buyer a receipt stating this information as soon as the seller finds out the information. This regulation is enforceable by the Federal Trade Commission. The failure of the seller to provide this information does not appear to invalidate the contract or render the sale voidable but may subject the seller to a claim for damages.

Use this form when the information was not available to be included in the sales contract or the relevant information changed after the execution of the sales contract.

Notice Regarding Insulation to Buyer of New Home

Seller:

Address:

Buyer:

Address of Buyer's new home:

Description of type, thickness, and R-value of the insulation that will be installed in each part of the new house:

[Name of seller]

Date:

[Reserved]

Form 4-7

This disclosure is used to warn a buyer about potential risks associated with lead-based paint. The form is based on the notice requirements of 40 C.F.R. § 745.113 and the disclosure form suggested by the Department of Housing and Urban Development; the language should not be altered without a review of the applicable regulations. The heading and text of the notice are required by the regulations to be in bold-faced type.

**Disclosure of Information on Lead-Based Paint
and/or Lead-Based Paint Hazards**

[Sales]

Seller's Name and Address:

Buyer's Name and Address:

Description of Property:

Lead Warning Statement

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of

any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller's Disclosure

(a) Presence of lead-based paint and/or lead-based paint hazards (check (i) or (ii) below):

- (i) Known lead-based paint and/or lead-based paint hazards are present in the housing [explain, providing the basis for the determination that lead-based paint and/or lead-based paint hazards exist, its/their location[s] and condition[s], and any additional information about the lead-based paint or lead-based paint hazards (if known)].
- (ii) Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

(b) Records and reports available to Seller (check (i) or (ii) below):

- (i) Seller has provided Buyer with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below).
-
- (ii) Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Buyer's Acknowledgment (initial)

____ (c) Buyer has received copies of all information listed above.

____ (d) Buyer has received the lead hazard information pamphlet described in 15 U.S.C. section 2686.

____ (e) Buyer has (check (i) or (ii) below):

(i) received a ten-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards; or

(ii) waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment (initial)

____ (f) Agent has informed Seller of Seller's obligations under 42 U.S.C. section 4852d and is aware of his/her responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

Seller Date

Buyer Date

Agent Date

[Reserved]

Form 4-8

This form is used to confirm a seller's knowledge of the presence or absence of asbestos in the property being sold, as required by 29 C.F.R. §§ 1910.1001 *et seq.*, 1926.1101 *et seq.*

Asbestos Disclosure Notice
[Sales]

Date:

Seller's Name and Address:

Buyer's Name and Address:

Description of Property:

THIS ASBESTOS DISCLOSURE NOTICE ("NOTICE") IS A DISCLOSURE OF KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT MAY BE DESIRED. THIS NOTICE IS NOT A WARRANTY OF ANY KIND.

Seller's Disclosure

1. Presence of asbestos-containing or presumed asbestos-containing material (check one):

Known asbestos-containing material is present in the Property (explain).

The Property was constructed before 1981, and presumed asbestos-containing material is present in the Property (explain).

- The Property was constructed after 1980, and Seller has no knowledge of asbestos-containing material in the Property.
- 2. Records and reports available to Buyer (check one):
 - Seller has provided Buyer with all available records and reports pertaining to asbestos-containing material in the Property (list documents below).

 - Seller has no records or reports pertaining to asbestos-containing material in the Property.

3. Seller has no knowledge of other facts or records concerning the presence, location, or quantity of asbestos-containing or presumed asbestos-containing material in the property (including any data supporting any rebuttal of the presumption that a material contains asbestos).

Buyer's Acknowledgment

Buyer has received copies of all information listed above. Buyer is aware of Buyer's responsibility to ensure compliance with 15 U.S.C. sections 2641 through 2656 and 29 C.F.R. sections 1910.1001 *et seq.* and 1926.1101 *et seq.*

Seller Date

Buyer Date

Form 4-9

Under Tex. Prop. Code § 5.016, a person may not convey an interest in or enter into a contract to convey an interest in residential real property that will be encumbered by a recorded lien at the time the interest is conveyed unless, on or before the seventh day before the earlier of the effective date of the conveyance or the execution of an executory contract binding the purchaser to purchase the property, an option contract, or other contract, the person provides the purchaser and each lienholder a separate written disclosure statement in at least twelve-point type that provides the information set out in the form below.

A violation of this section does not invalidate a conveyance. Except for certain transactions exempted from the disclosure requirements, if a contract is entered into without the seller providing the notice, the purchaser may terminate the contract for any reason on or before the seventh day after the date the purchaser receives the notice in addition to other remedies provided by this section or other law. Tex. Prop. Code § 5.016(c) exempts a number of transfers from the disclosure requirements, including transfers in which the purchaser obtains a title insurance policy insuring the transfer of title to the real property and transfers to a person who has purchased, conveyed, or entered into contracts to purchase or convey an interest in real property four or more times in the preceding twelve months.

Under Tex. Prop. Code § 5.016(d), a violation of this section is not actionable if the person required to give notice reasonably believes and takes any necessary action to ensure that each lien for which notice was not provided will be released on or before the thirtieth day after the date on which title to the property is transferred.

WARNING: ONE OR MORE RECORDED LIENS HAVE BEEN FILED THAT MAKE A CLAIM AGAINST THIS PROPERTY AS LISTED BELOW IF A LIEN IS NOT RELEASED AND THE PROPERTY IS CONVEYED WITHOUT THE CONSENT OF THE LIENHOLDER, IT IS POSSIBLE THE LIENHOLDER COULD DEMAND FULL PAYMENT OF THE OUTSTANDING BALANCE OF THE LIEN IMMEDIATELY YOU MAY WISH TO CONTACT EACH LIENHOLDER FOR FURTHER INFORMATION AND DISCUSS THIS MATTER WITH AN ATTORNEY

Notice Regarding Sale Subject to a Recorded Lien

This notice is being provided pursuant to section 5.016 of the Texas Property Code.

Property: [identify the property]

Seller:

Seller's Address:

Buyer:

Buyer's Address:

[First] Recorded Lien

Lienholder:

Lienholder's address:

Lienholder's telephone number:

Amount of debt secured by this lien:

Interest rate:

Required periodic installments:

Account number:

Other terms:

Has lienholder consented to sale by Seller to Purchaser? Yes No

If there is more than one lien, repeat above information for each additional lien and designate as "First Recorded Lien, "Second Recorded Lien, etc. as applicable.

[First] Insurance Policy

Insurer:

Insured:

Amount for which property is insured:

Property insured:

If there is more than one insurance policy, repeat above information for each additional policy and designate as 'First Insurance Policy,' 'Second Insurance Policy,' etc. as applicable.

Amount of Any Property Taxes Due on Property:

[Name of seller]

Date:

[Name of buyer]

Date:

[Reserved]

Form 4-10

If the property contains an underground storage tank or tank system or an aboveground tank or tank system subject to regulation by the Texas Commission on Environmental Quality, the following notice is given by the seller to the purchaser pursuant to 30 Tex. Admin. Code § 334.9.

Storage Tanks Disclosure Provider

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Description of Property:

The number of tanks involved is [number].

Attached is a description of each tank (capacity, tank material, and product stored, if applicable).

The designated facility identification number (if the entire facility is being conveyed) is [number].

Include one or both of the following if applicable.

The underground storage tank[s] included in this conveyance [is/are] presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, compliance self-certification, construction notification, and other requirements found in chapter 334 of title 30 of the Texas Administrative Code.

And/Or

The aboveground storage tank[s] included in this conveyance [is/are] presumed to be regulated by the Texas Commission on Environmental Quality and may be subject to certain registration, delivery prohibition, installation notification, and other requirements found in chapter 334 of title 30 of the Texas Administrative Code.

[Name of seller]
Date:

[Name of buyer]
Date:

Form 4-11

Pursuant to Tex. Loc. Gov't Code § 212.155, if the governing body of a municipality has required any person who sells or conveys restricted property located within its jurisdiction to first give written notice to the purchaser of (1) the restrictions and (2) the municipality's right to enforce compliance with the restrictions, the following written notice must be given to the purchaser on or before the final closing, signed and acknowledged by both seller and purchaser, and recorded in the real property records in the county where the real property is located.

Notice to Purchaser Regarding Restrictive Covenants

STATE OF TEXAS)

COUNTY OF)

Buyer:

Seller:

Property: [include legal description and street address]

The Property is being purchased by Buyer and is subject to deed restrictions recorded in [recording data] of the Official Public Records of [county] County, Texas. THE RESTRICTIONS LIMIT THE BUYER'S USE OF THE PROPERTY THE CITY OF [city] IS AUTHORIZED BY STATUTE TO ENFORCE COMPLIANCE WITH CERTAIN DEED RESTRICTIONS. ANY PROVISIONS THAT RESTRICT THE SALE, RENTAL, OR USE OF THE REAL PROPERTY ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN ARE UNENFORCEABLE; however, the inclusion of such provisions does not render the remainder of the deed restrictions invalid.

Seller:

[Name of seller]

Date:

Include acknowledgment.

The undersigned hereby acknowledges receipt of the Notice to Purchaser Regarding Restrictive Covenants at or before closing the purchase of the Property.

Buyer:

[Name of buyer]

Date:

Include acknowledgment.

Form 4-12

This form sets out the mandatory notice under Tex. Nat. Res. Code § 33.135. The notice must be placed in a written executory contract for the sale, transfer, or conveyance of real property (other than a mineral, leasehold, or security interest) adjoining and abutting the tidally influenced waters of the State of Texas. Tex. Nat. Res. Code § 33.135(a). If the real property described in this section is sold, transferred, or conveyed without a written executory contract, this notice must be delivered to the grantee for execution and acknowledgment of receipt before the conveyance is recorded. Tex. Nat. Res. Code § 33.135(b). Failure to include this notice in a written executory contract is grounds for the purchaser to terminate the contract and have its earnest money returned. Tex. Nat. Res. Code § 33.135(c). Failure to provide this notice before closing, either in a written executory contract or in a separate written statement, is a deceptive act under Tex. Bus. & Com. Code § 17.46. Tex. Nat. Res. Code § 33.135(d).

Notice to Purchaser Regarding Coastal Area Property

(1) The real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.

NOTICE REGARDING COASTAL AREA PROPERTY

(2) The seller, transferor, or grantor has no knowledge of any prior fill as it relates to the property described in and subject to this contract.

(3) State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.

(4) The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the

applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin.

Form 4-13

This form sets out the mandatory notice under Tex. Nat. Res. Code § 61.025. The following notice must be placed in a written executory contract for the sale, transfer, or conveyance of real property (other than a mineral, leasehold, or security interest) located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. Tex. Nat. Res. Code § 61.025(a). If the real property described in this section is sold, transferred, or conveyed without a written executory contract, this notice must be delivered to the grantee for execution and acknowledgment of receipt not later than ten calendar days before closing of the transaction. Tex. Nat. Res. Code § 61.025(b). Failure to include this notice in a written executory contract is grounds for the purchaser to terminate the contract and have its earnest money returned. Tex. Nat. Res. Code § 61.025(c). Failure to provide this notice before closing, either in a written executory contract or in a separate written statement, is a deceptive act under Tex. Bus. & Com. Code § 17.46. Tex. Nat. Res. Code § 61.025(d).

**Notice to Purchaser of Property Seaward of Gulf Intracoastal
Waterway**

CONCERNING THE PROPERTY AT _____

**DISCLOSURE NOTICE CONCERNING LEGAL AND ECONOMIC RISKS OF
PURCHASING COASTAL REAL PROPERTY NEAR A BEACH**

**WARNING: THE FOLLOWING NOTICE OF POTENTIAL RISKS OF ECONOMIC
LOSS TO YOU AS THE PURCHASER OF COASTAL REAL PROPERTY IS REQUIRED
BY STATE LAW**

- **READ THIS NOTICE CAREFULLY DO NOT SIGN THIS CONTRACT UNTIL
YOU FULLY UNDERSTAND THE RISKS YOU ARE ASSUMING.**
- **BY PURCHASING THIS PROPERTY, YOU MAY BE ASSUMING ECONOMIC
RISKS OVER AND ABOVE THE RISKS INVOLVED IN PURCHASING INLAND REAL
PROPERTY**

- IF YOU OWN A STRUCTURE LOCATED ON COASTAL REAL PROPERTY NEAR A GULF COAST BEACH, IT MAY COME TO BE LOCATED ON THE PUBLIC BEACH BECAUSE OF COASTAL EROSION AND STORM EVENTS.

- AS THE OWNER OF A STRUCTURE LOCATED ON THE PUBLIC BEACH, YOU COULD BE SUED BY THE STATE OF TEXAS AND ORDERED TO REMOVE THE STRUCTURE.

- THE COSTS OF REMOVING A STRUCTURE FROM THE PUBLIC BEACH AND ANY OTHER ECONOMIC LOSS INCURRED BECAUSE OF A REMOVAL ORDER WOULD BE SOLELY YOUR RESPONSIBILITY

The real property described in this contract is located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel. If the property is in close proximity to a beach fronting the Gulf of Mexico, the purchaser is hereby advised that the public has acquired a right of use or easement to or over the area of any public beach by prescription, dedication, or presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

The extreme seaward boundary of natural vegetation that spreads continuously inland customarily marks the landward boundary of the public easement. If there is no clearly marked natural vegetation line, the landward boundary of the easement is as provided by Sections 61.016 and 61.017, Natural Resources Code.

Much of the Gulf of Mexico coastline is eroding at rates of more than five feet per year. Erosion rates for all Texas Gulf property subject to the open beaches act are available from the Texas General Land Office.

State law prohibits any obstruction, barrier, restraint, or interference with the use of the public easement, including the placement of structures seaward of the landward boundary of the easement. OWNERS OF STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES.

The purchaser is hereby notified that the purchaser should:

- (1) determine the rate of shoreline erosion in the vicinity of the real property; and
- (2) seek the advice of an attorney or other qualified person before executing this contract or instrument of conveyance as to the relevance of these statutes and facts to the value of the property the purchaser is hereby purchasing or contracting to purchase.

[Reserved]

Form 4-14

The following is the mandatory notice to be placed in bold-faced type in a contract for the sale and purchase of vacant land pursuant to Tex. Prop. Code § 5.010. This notice requirement does not apply to certain sellers or buyers, Tex. Prop. Code § 5.010(b), (c), or if the contract contains a separate paragraph providing for the payment of any additional ad valorem taxes and interest that become due as a penalty because of the transfer of the property or a subsequent change in use of the property. Tex. Prop. Code § 5.010(d). If the seller fails to include this notice in the contract, the purchaser is entitled to recover from the seller an amount equal to the amount of any additional taxes and interest incurred as a penalty because of the transfer of the land or a subsequent change in use of the land that occurs before the fifth anniversary of the date of the transfer. Tex. Prop. Code § 5.010(e).

**NOTICE REGARDING POSSIBLE LIABILITY FOR
ADDITIONAL TAXES**

If for the current ad valorem tax year the taxable value of the land that is the subject of this contract is determined by a special appraisal method that allows for appraisal of the land at less than its market value, the person to whom the land is transferred may not be allowed to qualify the land for that special appraisal in a subsequent tax year and the land may then be appraised at its full market value. In addition, the transfer of the land or a subsequent change in the use of the land may result in the imposition of an additional tax plus interest as a penalty for the transfer or the change in the use of the land. The taxable value of the land and the applicable method of appraisal for the current tax year is public information and may be obtained from the tax appraisal district established for the county in which the land is located.

[Reserved]

Form 4-15

A person who sells an interest in real property must give the purchaser a written notice substantially similar to the following unless the property is located wholly within a municipality's corporate boundaries. Exceptions exist for some types of transactions. Tex. Prop. Code § 5.011.

Notice Regarding Possible Annexation

If the property that is the subject of this contract is located outside the limits of a municipality, the property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the property for further information.

Dated: _____

[Name of purchaser]

[Reserved]

Form 4-16

This notice must be given to the purchaser of an unimproved property that has no existing water facilities and that is located in a certificated service area of a utility service provider. Tex. Water Code § 13.257. Refer to Tex. Water Code § 13.257(c) for types of sales that are excepted from the notice requirement. The seller must give a prospective purchaser this notice before or at the same time as the execution of the contract. At closing, the purchaser and seller must sign and acknowledge a separate copy of the notice with current information; that copy must be recorded. Tex. Water Code § 13.257(g). Each special utility district keeps a map of its service area; this information is also available from the Texas Commission on Environmental Quality.

**Notice for Unimproved Property in a Certificated Service Area
of a Utility Service Provider**

The real property, described below, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property.

The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in the notice or at closing of purchase of the real property.

Insert property description.

[Name of purchaser]

Date:

No signatures are required if the notice is an addendum to a signed purchase and sale contract. If the notice is separate from the purchase and sale contract, only the purchaser's signature is required. Both the purchaser and seller must sign the copy executed at the time of closing. Tex. Water Code § 13.257(g).

[Name of seller]

Date:

Except for notices included as an addendum to or paragraph of a purchase contract, the notice must be executed by the seller and purchaser, as indicated.

Include acknowledgments if the notice is signed at the time of closing.

Form 4-17

This form sets out the mandatory notice under Tex. Water Code § 49.452. The seller must give a prospective purchaser the notice before or at the same time as the execution of the contract. If the seller fails to provide the notice, the purchaser may cancel the contract. By accepting the notice, the purchaser waives its rights under section 49.452. Tex. Water Code § 49.452(f). A separate copy of the notice must be executed by the seller and the purchaser, acknowledged, and recorded with the deed for the transaction. Tex. Water Code § 49.452(h). This form does not detail the permissible modifications that may be necessary under different circumstances. See the section titled "Utility District Disclosures" in chapter 2 of this manual.

Utility District Notice

Seller[s]:

Purchaser[s]:

The real property, described below, that you are about to purchase is located in the [district] District. The district has taxing authority separate from any other taxing authority and may, subject to voter approval, issue an unlimited amount of bonds and levy an unlimited rate of tax in payment of such bonds. As of [this date/January 1, [year]], the rate of taxes levied by the district on real property located in the district is \$[amount] on each \$100 of assessed valuation. If the district has not yet levied taxes, the most recent projected rate of tax, as of [this date/January 1, [year]], is \$[amount] on each \$100 of assessed valuation. The total amount of bonds, excluding refunding bonds and any bonds or any portion of bonds issued that are payable solely from revenues received or expected to be received under a contract with a governmental entity, approved by the voters and which have been or may, at [this date/January 1, [year]], be issued is \$[amount], and the aggregate initial principal amounts of all bonds issued for one or more of the specified facilities of the district and payable in whole or in part from property taxes is \$[amount].

The district has the authority to adopt and impose a standby fee on property in the district that has water, sanitary sewer, or drainage facilities and services available but not con-

nected and which does not have a house, building, or other improvement located thereon and does not substantially utilize the utility capacity available to the property. The district may exercise the authority without holding an election on the matter. As of [this date/January 1, [year]], the most recent amount of the standby fee is \$[amount]. An unpaid standby fee is a personal obligation of the person that owned the property at the time of imposition and is secured by a lien on the property. Any person may request a certificate from the district stating the amount, if any, of unpaid standby fees on a tract of property in the district.

Select one of the following paragraphs if appropriate. Include the first paragraph if the property is in a district located in whole or in part in the extraterritorial jurisdiction of one or more home-rule municipalities and not located within the corporate boundaries of a municipality as defined by Tex. Water Code § 49.452(b). Include the second paragraph if the property is in a district located in whole or in part within the corporate boundaries of a municipality as defined by Tex. Water Code § 49.452(c). Do not include either paragraph if the property is in a district that is not located in whole or in part within the corporate boundaries of a municipality or the extraterritorial jurisdiction of one or more home-rule municipalities as defined by Tex. Water Code § 49.452(d).

The district is located in whole or in part in the extraterritorial jurisdiction of the city of [city]. By law, a district located in the extraterritorial jurisdiction of a municipality may be annexed without the consent of the district or the voters of the district. When a district is annexed, the district is dissolved.

Or

The district is located in whole or in part within the corporate boundaries of the city of [city]. The taxpayers of the district are subject to the taxes imposed by the municipality and by the district until the district is dissolved. By law, a district located within the corporate boundaries of a municipality may be dissolved by municipal ordinance without the consent of the district or the voters of the district.

Continue with the following.

The purpose of this district is to provide water, sewer, drainage, or flood control facilities and services within the district through the issuance of bonds payable in whole or in part from property taxes. The cost of these utility facilities is not included in the purchase price of your property, and these utility facilities are owned or to be owned by the district. The legal description of the property you are acquiring is as follows: [legal description].

[Name of seller]

Date:

Include acknowledgment.

PURCHASER IS ADVISED THAT THE INFORMATION SHOWN ON THIS FORM IS SUBJECT TO CHANGE BY THE DISTRICT AT ANY TIME. THE DISTRICT ROUTINELY ESTABLISHES TAX RATES DURING THE MONTHS OF SEPTEMBER THROUGH DECEMBER OF EACH YEAR, EFFECTIVE FOR THE YEAR IN WHICH THE TAX RATES ARE APPROVED BY THE DISTRICT. PURCHASER IS ADVISED TO CONTACT THE DISTRICT TO DETERMINE THE STATUS OF ANY CURRENT OR PROPOSED CHANGES TO THE INFORMATION SHOWN ON THIS FORM.

The undersigned purchaser[s] hereby acknowledge[s] receipt of the foregoing notice at or prior to execution of a binding contract for the purchase of the real property described in such notice or at closing of purchase of the real property.

[Name of purchaser]

Date:

Include acknowledgment.

[Reserved]

Form 4-18

This form sets out the mandatory notice under Tex. Water Code § 54.016(h)(4). If the real property is located in a water or sanitary sewer district that entered into a contract with a city, other than a city with a population of more than one million in a county of more than two million, that allows the city to set rates in the district after annexation that are different from rates charged to other residents of the city, the seller at or before closing must deliver a separate written notice, executed and acknowledged by the seller, containing the information in this notice. The purchaser must sign the notice to evidence receipt. Tex. Water Code § 49.452(g)-(p) applies to this notice provision, including the purchaser's right to seek damages if the sale or conveyance of the property is not made in compliance with this statute.

Notice to Purchaser of Property Located in Certain Annexed Water Districts

The real property that is being conveyed is subject to the following [water/sewer/water and sewer] rates and adjustments:

- 1. the basis on which the monthly [water/sewer/water and sewer] rate is to be charged under the contract stated as a percentage of the [water/sewer/water and sewer] rates of the city is [percent] percent;
2. length of time such rates will be in effect is [time period]; and
3. the time or conditions of annexation by the city implementing such rates are [describe conditions and period of annexation].

[Name of seller]

Date:

[Name of purchaser]

Date:

Include acknowledgment.

[Reserved]

Form 4-19

Pursuant to Tex. Loc. Gov't Code § 232.0033, a seller and subdivider of land located within the area of the alignment of a transportation project, as shown on the final environmental decision document applicable to the future transportation corridor identified in an agreement between the Texas Department of Transportation and the county under Tex. Transp. Code § 201.619, must provide the following conspicuous statement in the contract.

**Notice to Purchaser That Property Is Located within the Area of
the Alignment of a Transportation Project**

Property: [describe property]

THE PROPERTY IS LOCATED WITHIN THE AREA OF THE ALIGNMENT OF A
TRANSPORTATION PROJECT AS SHOWN ON A FINAL ENVIRONMENTAL DECISION
DOCUMENT THAT IS APPLICABLE TO THE FUTURE TRANSPORTATION
CORRIDOR IDENTIFIED IN AN AGREEMENT UNDER SECTION 201.619 OF THE
TEXAS TRANSPORTATION CODE.

[Reserved]

Form 4-20

A seller of residential or commercial property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under chapter 11 of the Texas Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level, must give the purchaser written notice in substantially the form prescribed by statute and as set forth below. The notice must be given on or before the effective date of the executory contract. If a contract is entered into without the seller giving the notice, the purchaser may terminate the contract for any reason within seven days after the purchaser receives the notice from the seller or a third party. After the date of the conveyance, the purchaser may bring an action for misrepresentation against the seller if the seller failed to give the notice prior to closing and had actual knowledge that the water level described in the statute fluctuates for various reasons, including the two reasons set out in the notice. The requirement applies to an executory contract entered into on or after September 1, 2015. Tex. Prop. Code § 5.019.

Notice of Water Level Fluctuations

Seller[s]:

Purchaser[s]:

Property: **[street address and city or legal description]**

The water level of the impoundment of water adjoining the Property fluctuates for various reasons, including as a result of

- (1) an entity lawfully exercising its right to use the water stored in the impoundment,
- or
- (2) drought or flood conditions.

[Name of purchaser[s]]

[Reserved]

Form 4-21

This form is used by a purchaser of real property to waive the consumer protection rights afforded by the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. The language of the waiver is based on that suggested in the statute and must be in at least ten-point, bold-faced type. See Tex. Bus. & Com. Code § 17.42.

Waiver of Consumer Rights

Date:

Contract

Date:

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Property:

WAIVER OF CONSUMER RIGHTS: IN CONNECTION WITH THE FOREGOING EARNEST MONEY CONTRACT, BUYER WAIVES BUYER'S RIGHTS UNDER THE DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ., TEXAS BUSINESS & COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF BUYER'S OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

[Name of buyer]

[Reserved]

Form 4-22

This form is based on the form found in Tex. Prop. Code § 5.008. Under section 5.008, a seller of not more than one dwelling unit of residential real property must provide a written notice substantially similar to this form.

Seller's Disclosure of Property Condition

Seller: _____

Property (address and city): _____

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER'S AGENTS.

Seller ___ is ___ is not occupying the Property.

If unoccupied, how long since Seller has occupied the Property? _____

1. The Property has the items checked below:

Write Yes (Y), No (N), or Unknown (U).

- | | | |
|--------------------------|------------------------------|---------------------|
| ___ Range | ___ Oven | ___ Microwave |
| ___ Dishwasher | ___ Trash Compactor | ___ Disposal |
| ___ Washer/Dryer Hookups | ___ Window Screens | ___ Rain Gutters |
| ___ Security System | ___ Fire Detection Equipment | ___ Intercom System |
| | ___ Smoke Detector | |

	<input type="checkbox"/> Smoke Detector- Hearing Impaired	
	<input type="checkbox"/> Carbon Monoxide Alarm	
	<input type="checkbox"/> Emergency Escape Ladder(s)	
<input type="checkbox"/> TV Antenna	<input type="checkbox"/> Cable TV Wiring	<input type="checkbox"/> Satellite Dish
<input type="checkbox"/> Ceiling Fan(s)	<input type="checkbox"/> Attic Fan(s)	<input type="checkbox"/> Exhaust Fan(s)
<input type="checkbox"/> Central A/C	<input type="checkbox"/> Central Heating	<input type="checkbox"/> Wall/Window Air Conditioning
<input type="checkbox"/> Plumbing System	<input type="checkbox"/> Septic System	<input type="checkbox"/> Public Sewer System
<input type="checkbox"/> Patio/Decking	<input type="checkbox"/> Outdoor Grill	<input type="checkbox"/> Fences
<input type="checkbox"/> Pool	<input type="checkbox"/> Sauna	<input type="checkbox"/> Spa <input type="checkbox"/> Hot Tub
<input type="checkbox"/> Pool Equipment	<input type="checkbox"/> Pool Heater	<input type="checkbox"/> Automatic Lawn Sprinkler System
<input type="checkbox"/> Fireplace(s) & Chimney (Woodburning)		<input type="checkbox"/> Fireplace(s) & Chimney (Mock)
<input type="checkbox"/> Natural Gas Lines		<input type="checkbox"/> Gas Fixtures
<input type="checkbox"/> Liquid Propane Gas:	<input type="checkbox"/> LP Community (Captive)	<input type="checkbox"/> LP on Property
Garage: <input type="checkbox"/> Attached	<input type="checkbox"/> Not Attached	<input type="checkbox"/> Carport
Garage Door Opener(s):	<input type="checkbox"/> Electronic	<input type="checkbox"/> Control(s)
Water Heater:	<input type="checkbox"/> Gas	<input type="checkbox"/> Electric
Water Supply: <input type="checkbox"/> City	<input type="checkbox"/> Well <input type="checkbox"/> MUD	<input type="checkbox"/> Co-op
Roof Type: _____	Age: _____	(approx)

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects or that are in need of repair? Yes No Unknown. If yes, then describe. (Attach additional sheets if necessary): _____

2. Does the property have working smoke detectors installed in accordance with the smoke detector requirements of chapter 766, Health and Safety Code?*

___ Yes ___ No ___ Unknown. If the answer to this question is no or unknown, explain. (Attach additional sheets if necessary): _____

* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information. A buyer may require a seller to install smoke detectors for the hearing impaired if: (1) the buyer or a member of the buyer's family who will reside in the dwelling is hearing impaired; (2) the buyer gives the seller written evidence of the hearing impairment from a licensed physician; and (3) within ten days after the effective date, the buyer makes a written request for the seller to install smoke detectors for the hearing impaired and specifies the locations for installation. The parties may agree who will bear the cost of installing the smoke detectors and which brand of smoke detectors to install.

3. Are you (Seller) aware of any known defects/malfunctions in any of the following?

Write Yes (Y) if you are aware; write No (N) if you are not aware.

- | | | |
|--------------------|------------------------|---------------|
| ___ Interior Walls | ___ Ceilings | ___ Floors |
| ___ Exterior Walls | ___ Doors | ___ Windows |
| ___ Roof | ___ Foundation/Slab(s) | ___ Basement |
| ___ Walls/Fences | ___ Driveways | ___ Sidewalks |

Plumbing/Sewers/Septics Electrical Systems Lighting Fixtures

Other Structural Components (Describe): _____

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

4. Are you (Seller) aware of any of the following conditions?

Write Yes (Y) if you are aware; write No (N) if you are not aware.

- | | |
|---|--|
| <input type="checkbox"/> Active Termites (includes wood-destroying insects) | <input type="checkbox"/> Previous Structural or Roof Repair |
| <input type="checkbox"/> Termite or Wood Rot Damage Needing Repair | <input type="checkbox"/> Hazardous or Toxic Waste |
| <input type="checkbox"/> Previous Termite Damage | <input type="checkbox"/> Asbestos Components |
| <input type="checkbox"/> Previous Termite Treatment | <input type="checkbox"/> Urea-Formaldehyde Insulation |
| <input type="checkbox"/> Previous Flooding | <input type="checkbox"/> Radon Gas |
| <input type="checkbox"/> Improper Drainage | <input type="checkbox"/> Lead Based Paint |
| <input type="checkbox"/> Water Penetration | <input type="checkbox"/> Aluminum Wiring |
| <input type="checkbox"/> Located in 100-Year Floodplain | <input type="checkbox"/> Previous Fires |
| <input type="checkbox"/> Present Flood Insurance Coverage | <input type="checkbox"/> Unplatted Easements |
| <input type="checkbox"/> Landfill, Settling, Soil Movement, Fault Lines | <input type="checkbox"/> Subsurface Structure or Pits |
| <input type="checkbox"/> Single Blockable Main Drain in Pool/Hot Tub/Spa* | <input type="checkbox"/> Previous Use of Premises for Manufacture of Methamphetamine |

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

* A single blockable main drain may cause a suction entrapment hazard for an individual.

5. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair? ___ Yes (if you are aware) ___ No (if you are not aware). If yes, explain. (Attach additional sheets if necessary): _____

6. Are you (Seller) aware of any of the following?

Write Yes (Y) if you are aware; write No (N) if you are not aware.

___ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

___ Homeowners' Association or maintenance fees or assessments.

___ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

___ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

___ Any lawsuits directly or indirectly affecting the Property.

___ Any condition on the Property which materially affects the physical health or safety of an individual.

___ Any rainwater harvesting system located on the property that is larger than 500 gallons and that uses a public water supply as an auxiliary water source.

___ Any portion of the Property that is located in a groundwater conservation district or a subsidence district.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

- 7. If the property is located in a coastal area that is seaward of the Gulf Intracoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

Signature of Seller

Date

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Signature of Buyer

Date

Form 4-23

Access and Due Diligence Agreement

Basic Information

Date:

Seller:

Seller's Mailing Address:

Buyer:

Buyer's Mailing Address:

Property:

A. Recitals

A.1. Seller is the owner of the Property.

A.2. Buyer is considering buying the Property from Seller, and Buyer and Seller are currently negotiating the terms of a possible purchase ("Possible Transaction").

A.3. In connection with the Possible Transaction, Buyer wants a license to enter the Property to examine, inspect, and perform tests on the Property to evaluate the physical and environmental condition of the Property and to perform other tests and inspections related to the Possible Transaction. Seller has agreed to grant Buyer the license to enter the Property for that purpose in accordance with the terms and conditions of this Agreement.

B. Agreement

For valuable consideration, the receipt and sufficiency of which is acknowledged, Buyer and Seller agree as follows:

B.1. Investigation Period. The "Investigation Period" means the period from the date of this Agreement until the earliest of (a) 5:00 P.M. local time where the Property is located on [date]; (b) receipt by Buyer of written notice from Seller terminating this Agreement, which termination may be made at Seller's sole discretion; or (c) the execution and delivery by Seller and Buyer of a purchase and sale agreement ("Sales Contract") for the Property.

B.2. Entry onto the Property. Buyer may enter the Property during the Investigation Period to inspect it at Buyer's cost and risk, subject to the following:

B.2.a. Buyer must deliver evidence to Seller that Buyer has liability insurance for its proposed inspection activities, with coverages and in amounts that are substantially the same as those maintained by Seller or with such lesser coverages and in such lesser amounts as are reasonably satisfactory to Seller.

B.2.b. Buyer may not interfere in any material manner with existing operations or occupants of the Property.

B.2.c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests.

B.2.d. If the Property is physically altered because of Buyer's inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs.

B.2.e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt.

B.2.f. Buyer must abide by any other reasonable entry rules imposed by Seller.

B.3. Environmental Assessment. Buyer has the right to conduct environmental assessments of the Property. Seller will provide, or will designate a person with knowledge of the use and condition of the Property to provide, information requested by Buyer or Buyer's agent or representative regarding the use and condition of the Property during the period of Seller's ownership of the Property. Seller will cooperate with Buyer in obtaining and providing to Buyer or its agent or representative information regarding the Property.

B.4. Property Documents. Seller has previously made, or will make, available to Buyer and Buyer's representatives for their review, certain items and information pertaining to the Property with the exception of any financially privileged documents pertaining to Seller (collectively referred to as the "Property Documents"). The Property Documents have been or will be made available to Buyer without representation or warranty by, or recourse against, Seller. Buyer will not rely on the Property Documents and will independently verify the truth, accuracy, and completeness of any information or items contained therein.

B.5. Buyer's Indemnity and Release of Seller. Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Property, except those arising out of the acts or omissions of Seller and those for repair or remediation of existing conditions discovered by Buyer's inspection. The obligations of Buyer under this provision will survive termination of this Agreement, the execution or termination of the Sales Contract, and closing. Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Property.

B.6. No Waiver. No waiver of default by any party to this Agreement may be implied from failure to take action by any other party to the Agreement, regardless of whether the default continues or is repeated. No express waiver of a default will affect any other default or cover any other period not specified in the express waiver. A waiver of any default in the performance of any provision contained in this Agreement will not be deemed to be a waiver of any subsequent default in the performance of the same provision or any other provision contained in this Agreement.

B.7. Assignment. The license granted to Buyer under the terms of this Agreement is personal to Buyer, and neither this Agreement nor the license may be transferred or assigned by Buyer.

B.8. Notices. Any notice required by or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received, provided that (a) any notice received on a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday and (b) any notice received after 5:00 P.M. local time at the place of delivery on a day that is not a Saturday, Sunday, or holiday will be deemed to have been received on the next day that is not a Saturday, Sunday, or holiday. Any address for notice may be changed by not less than ten days' prior written notice given as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

B.9. Amendment. This Agreement may be amended only by an instrument in writing signed by the parties.

B.10. Revocation. The license granted under this Agreement is revocable by Seller, at any time, for any reason or no reason, on receipt by Buyer from Seller of written notice of revocation.

B.11. Business Days; Holidays; Weekends. As used in this Agreement, the term *business day* means any day, other than a Saturday or Sunday, on which banks located in [city, state] are not required or authorized to close. If any notice or action required or permitted by this Agreement falls on a date that is not a business day, the date will be extended to the next business day.

B.12. Entire Agreement. This Agreement is the entire agreement between Seller and Buyer concerning Buyer's investigations, and no modification or subsequent agreement relative to the subject matter of this Agreement will be binding on either party unless reduced to writing and signed by the party to be bound.

B.13. No Third-Party Beneficiaries. There are no third-party beneficiaries of this Agreement.

B.14. Severability. If a provision in this Agreement is unenforceable for any reason, to the extent the unenforceability does not destroy the basis of the bargain among the parties, the unenforceability does not affect any other provision of this Agreement, and this Agreement is to be construed as if the unenforceable provision is not a part of the Agreement.

B.15. Ambiguities Not to Be Construed against Party Who Drafted Agreement. The rule of construction that ambiguities in a document are construed against the party who drafted it does not apply in interpreting this Agreement.

B.16. No Special Relationship. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partners, joint venturers, or any other special relationship.

B.17. Counterparts. If this Agreement is executed in multiple counterparts, all counterparts taken together constitute this Agreement. Copies of signatures to this Agreement are effective as original signatures.

B.18. Confidentiality. This Agreement, this transaction, and all information learned in the course of this transaction will be kept confidential, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction. Remedies for violations of this provision are limited to injunctions, and no damages or rescission may be sought or recovered as a result of any such violations.

B.19. Binding Effect. This Agreement binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

B.20. Time. Time is of the essence with respect to this Agreement.

B.21. Governing Law. This Agreement is to be construed and enforced in accordance with the laws of the state in which the Property is located.

B.22. No Obligation Regarding Possible Transaction. Notwithstanding the rights granted to Buyer under this Agreement, and notwithstanding any negotiations or other communications between Seller and Buyer, neither Seller nor Buyer has any obligation whatsoever to proceed with the Possible Transaction or otherwise enter into a Sales Contract or any other agreement concerning Seller's sale or Buyer's purchase of the Property or any portion thereof, or to otherwise negotiate for or consummate any transaction of any kind concerning the Property or any portion thereof. Neither Seller nor Buyer has any obligations whatsoever regarding the purchase and sale of the Property unless and until Seller and Buyer execute and enter into a binding Sales Contract, which either party may or may not do in its sole discretion.

Seller:

[Name of seller]

By _____
Name:
Title:

Buyer:

[Name of buyer]

By _____
Name:
Title:

[Reserved]

Form 4-24

Option to Purchase
[For Use with Real Estate Sales Contract]

Date:

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Property:

Option Fee:

Expiration Date:

Contract: The Real Estate Sales Contract attached as Exhibit [**exhibit number/letter**]

Purchase Price:

Underwriter:

Escrow Agent:

Escrow Agent's Address:

In consideration of the Option Fee, Seller grants to Buyer the exclusive and irrevocable option to purchase the Property on the following terms and conditions:

1. *Application of Option Fee.* The Option Fee [will/will not] be applied to the Purchase Price.
2. *Exercise of Option.* To exercise the option, Buyer must execute and deliver to Seller the Contract by the Expiration Date. Within three business days of receiving Buyer's signed Contract, Seller must execute and deliver the Contract to Escrow Agent.
3. *Termination of Option.* If Buyer does not exercise the option by the Expiration Date, the option terminates, Seller retains the Option Fee, and Buyer will execute and deliver to Seller a recordable release of the option.
4. *Seller's Default.* If Buyer exercises the option but Seller does not timely execute and deliver the Contract, Buyer has all applicable remedies, including specific performance.

Optionor/Seller:

[Name of seller]

Optionee/Buyer:

[Name of buyer]

Include acknowledgments at the election of the parties or if the buyer intends to file this option agreement in the public records.

Attach exhibit.

Form 4-25

Memorandum of Option

Date:

Seller:

Seller's Address:

Buyer:

Buyer's Address:

Property:

Expiration Date:

Seller has granted Buyer an option to purchase the Property. The option must be exercised by the Expiration Date.

Optionor/Seller:

[Name of seller]

Optionee/Buyer:

[Name of buyer]

Include acknowledgments.

[Reserved]

Form 4-26

Right of First Refusal Agreement

Basic Information

Date:

Grantor:

Grantor's Address:

Grantee:

Grantee's Address:

Property:

Term:

A. Grant

A.1. Grantor grants to Grantee a right of first offer to acquire the Property.

A.2. During the Term, if Grantor receives an offer for the sale or other transfer of the Property or any portion thereof or interest therein for any form of consideration that Grantor wishes to accept, Grantor agrees to notify Grantee in writing before accepting the offer. The notice will state the identity of the proposed transferee and the complete terms of the proposed transfer. If the proposed consideration for the transfer is other than cash, the notice will also state the cash equivalent reasonably determined by the Grantor for the noncash consideration.

A.3. Grantee will have the right to purchase the Property on the terms set forth in Grantor's notice by giving written notice to Grantor within [thirty/[number]] days following

the receipt of Grantor's notice. If Grantee affirmatively exercises such right, the Property will be transferred to Grantee, and Grantee will pay to Grantor the consideration on the terms set forth in the notice from Grantor.

A.4. If Grantee does not affirmatively exercise its right within the [thirty/[number]]-day period, Grantor may transfer the Property to the party and on the terms described in Grantor's notice to Grantee within the [180/[number]]-day period following the expiration of the [thirty/[number]]-day period. If a transfer is not consummated within the [180/[number]]-day period, Grantor may not transfer the Property without again complying with the provisions of this Agreement. If Grantor wishes to effect a transfer on terms that are less favorable to Grantor than those described in Grantor's notice, Grantor must repeat the process set forth in this Agreement by giving a new notice to Grantee setting forth the new terms. If Grantor timely consummates a transfer, this Agreement will automatically terminate when the Property is conveyed to the party named in Grantor's notice to Grantee.

A.5. If an offer received by Grantor calls for delivery of a promissory note or other deferred payment obligation, the promissory note or other deferred payment obligation of Grantee will be deemed equivalent to those offered.

A.6. If any offer provides for noncash consideration, Grantee disputes Grantor's determination of the value of the noncash consideration set forth in Grantor's notice, and Grantor and Grantee cannot resolve the dispute within five business days after Grantee gives notice of the dispute to Grantor, the matter will be submitted to binding arbitration in [city], Texas, under the Commercial Arbitration Rules of the American Arbitration Association by a single arbitrator, and the determination of such arbitrator shall be binding on both parties. The [thirty/[number]]-day period for exercise of Grantee's rights will be tolled during the period the arbitration proceeding is pending.

A.7. The rights granted in this Agreement expire at the end of the Term.

B. Transfers by Gift, Devise, Descent, or Otherwise without Consideration

If the Property is transferred by gift, devise, descent, or another transaction that does not involve the payment of consideration in any form, the provisions of this Agreement will be fully binding on the person acquiring title to the Property in that transaction.

C. Recordation

Grantee may record this Agreement or a memorandum of this Agreement in the real property records of [county] County, Texas. Grantee will, on request, execute and record a release of this Agreement following its expiration or termination.

D. Assignment

Grantee [may/may not] assign its rights under this Agreement.

E. Notices

Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may be also given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

[Name of grantor]

[Name of grantee]

[Reserved]

Form 4-27

Right of First Offer Agreement

Basic Information

Date:

Grantor:

Grantor's Address:

Grantee:

Grantee's Address:

Property:

Term:

A. Grant

A.1. Grantor grants to Grantee a right of first offer to acquire the Property.

A.2. During the Term, if Grantor wishes to sell the Property or any portion thereof or interest therein for any form of consideration, Grantor must give written notice to Grantee stating the complete terms of the proposed transfer, including the consideration, which must be stated as a cash purchase price.

A.3. Grantee will have the right to purchase the Property on the terms set forth in Grantor's notice by giving written notice to Grantor within [thirty/[number]] days following the receipt of Grantor's notice. If Grantee affirmatively exercises that right, the Property will

be transferred to Grantee, and Grantee will pay to Grantor the consideration on the terms set forth in the notice from Grantor.

A.4. If Grantee does not affirmatively exercise its right within the [thirty/[number]]-day period, Grantor may transfer the Property to another party on the terms described in Grantor's notice to Grantee within the [270/[number]]-day period following the expiration of the [thirty/[number]]-day period. If a transfer is not consummated within the [270/[number]]-day period, Grantor may not transfer the Property without again complying with the provisions of this Agreement. If Grantor wishes to effect a transfer on terms that are less favorable to Grantor than those described in Grantor's notice, Grantor must repeat the process set forth in this Agreement by giving a new notice to Grantee setting forth the new terms. If Grantor timely consummates a transfer, this Agreement will automatically terminate when the Property is conveyed to another party.

A.5. The rights granted in this Agreement expire at the end of the Term.

B. Transfers by Gift, Devise, Descent, or Otherwise without Consideration

If the Property is transferred by gift, devise, descent, or another transaction that does not involve the payment of consideration in any form, the provisions of this Agreement will be fully binding on the person acquiring title to the Property in that transaction.

C. Recordation

Grantee may record this Agreement or a memorandum of this Agreement in the real property records of [county] County, Texas. Grantee will, on request, execute and record a release of this Agreement following its expiration or termination.

D. Assignment

Grantee [may/may not] assign its rights under this Agreement.

E. Notices

Any notice required or permitted under this Agreement must be in writing. Any notice required by this Agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this Agreement. Notice may be also given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

[Name of grantor]

[Name of grantee]

[Reserved]

Chapter 5

Deeds, Bills of Sale, and Other Transfers

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[Reserved]

Chapter 5

Deeds, Bills of Sale, and Other Transfers

§ 5.1 General Considerations for Deeds

Form 5-1 in this chapter, a general warranty deed, conveys to a grantee a fee simple estate in real property with a covenant of general warranty, subject to the reservations and exceptions stated in the deed.

The traditional deed clauses include the granting clause, the habendum clause, and the warranty clause. The customary granting clause includes the grant of the property with its related rights and appurtenances and begins with ‘grants, sells, and conveys. The customary habendum clause defines the extent of property ownership to be held by the grantee and begins with “to have and to hold. The customary warranty clause describes the warranty of title made by the grantor and begins with ‘Grantor binds.”

Two implied covenants, often called ‘warranties,” are given by stating that the deed “grants” or “conveys. By using either of those words, the grantor covenants that—

1. before the execution of the conveyance, the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and
2. at the time of the execution of the conveyance, the estate is free from encumbrances.

Tex. Prop. Code § 5.023.

Taxes, assessments, and liens on real property are included in the term *encumbrance*. Tex. Prop. Code § 5.024.

The general warranty of title obligates the grantor to indemnify the grantee against any loss resulting from a title defect or from any encumbrances that arose before the conveyance. The grantor warrants that he will restore the purchase price to the grantee if the property is lost. *City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947). However, the express covenant of warranty and the implied covenants are limited if exceptions, reservations, and encumbrances are excepted from those warranties by the terms of the deed. A reliable title examination is important to determine if title defects or encumbrances exist.

A deed must identify a grantor and a grantee, contain operative words or words of grant showing the intent of the grantor to convey title to a real property interest to the grantee, and contain an adequate description of the property that is sufficient to identify the subject matter of the grant. *Harlan v. Vetter*, 732 S.W.2d 390 (Tex. App.—Eastland 1987, writ ref’d n.r.e.). A description in a deed must furnish within itself or by reference to some other existing writing the means by which the land to be conveyed may be identified with reasonable certainty. *Morrow v. Shotwell*, 477 S.W.2d 538 (Tex. 1972). See section 3.7 in this manual for a discussion of property descriptions.

§ 5.1:1 Statutory Requirements

Although no particular form of warranty deed is required by statute, the Texas Property Code suggests a form and states that any form substantially the same “conveys a fee simple estate in real property with a covenant of general warranty.” Tex. Prop. Code § 5.022. The convey-

ance and warranty clauses in form 5-1 in this chapter are substantially the same as the statutory language. A deed does not have to include a warranty, and the parties may insert any clause or use any form not in contravention of law. Tex. Prop. Code § 5.022.

A deed must be in writing and must be subscribed and delivered by the grantor. Tex. Prop. Code § 5.021. A corporation may convey real property by a deed with or without its seal (subject to any approval required by the Texas Business Organizations Code or the governing documents of the corporation). Tex. Bus. Orgs. Code § 10.251. An unrecorded deed is binding on a party to the instrument, the party's heirs, and a subsequent purchaser who does not pay a valuable consideration or who has notice of the unrecorded deed, but it is void as to a creditor or subsequent purchaser for value without notice. Tex. Prop. Code § 13.001. If a party to a deed is an individual, the deed must contain the confidentiality rights notice required by Tex. Prop. Code § 11.008(c). See section 3.16 in this manual.

§ 5.1:2 Characterization of Marital Property

Texas follows the community system of property rights of spouses. Under the inception of title doctrine, the character of property, whether separate or community, is fixed at the time of acquisition. *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 430 (Tex. 1970).

Separate property consists of the property owned or claimed by a spouse before marriage; the property acquired by the spouse during marriage by gift, devise, or descent; and the recovery for personal injuries sustained by the spouse during the marriage, except any recovery for loss of earning capacity during marriage. Tex. Fam. Code § 3.001. Spouses may also set aside all or part of their community property as separate property by partition or exchange agree-

ment. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.102–.106. Although such property may undergo changes or mutations, as long as it can be traced and properly identified it will remain separate property. *McKinley v. McKinley*, 496 S.W.2d 540 (Tex. 1973).

Community property consists of the property, other than separate property, acquired by either spouse during marriage. Tex. Fam. Code § 3.002.

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property unless there is clear and convincing evidence that it is separate property. Tex. Fam. Code § 3.003. The presumption of community property may be rebutted and a separate-property presumption may arise if (1) one spouse is the grantor and the other spouse is the grantee (*Story v. Marshall*, 24 Tex. 305, 308 (1859)), (2) one spouse furnishes separate-property consideration and title is taken in the name of the other spouse (*Smith v. Strahan*, 16 Tex. 314 (1856)), or (3) the instrument of conveyance contains a “separate property recital” (for example, a statement that the property is conveyed to a spouse as that spouse’s separate property) (*Henry S. Miller Co.*, 452 S.W.2d at 431).

Control of marital property is a separate matter from ownership; it relates to who may sell and convey marital property. A spouse has sole control of his or her own separate property. Tex. Fam. Code § 3.101. However, if the property is homestead, both spouses must execute the conveyance. Tex. Const. art. XVI, § 50. The general rules governing control of community property are statutory. *See* Tex. Fam. Code § 3.102. Third parties are entitled to rely on certain evidence concerning control. *See* Tex. Fam. Code § 3.104. Rules of marital property liability are also governed by statute. *See* Tex. Fam. Code § 3.202.

§ 5.2 General Warranty Deed

§ 5.2:1 General Information

See chapter 3 in this manual for general information about designations of parties, addresses, and property descriptions.

§ 5.2:2 Consideration—Cash Sale

If the parties wish to show the actual amount of the consideration, they may use a description like the one in clause 5-6-6 in this chapter. If the parties prefer not to show the amount of cash paid in a document that will become a public record, the deed may recite as consideration ‘cash’ or a nominal amount and ‘other consideration.’ Suitable descriptions for this purpose are set out in clauses 5-6-4 and 5-6-5. Note, however, that the fictional recitation of a nominal amount may create rights in the grantee or other consequences that the parties do not intend. See *1464–Eight, Ltd. v. Joppich*, 154 S.W.3d 101 (Tex. 2004).

§ 5.2:3 Consideration—Assumption of Note

If the grantee assumes a note secured by one or more liens, the consideration description in the warranty deed should contain a recitation of any actual or nominal cash paid, a promise to assume and pay the unpaid principal and earned interest of the note, a promise to abide by all terms in all instruments securing the note, and an indemnity to protect the grantor from a breach by the grantee. For an example of such a clause, see clause 5-6-2 in this chapter.

Clause 5-6-2 can be adapted to fit any existing lien. This clause assigns to the grantee any escrow fund for payment of taxes and insurance. Because insurance is often not assumed, an assignment of it to the grantee might prevent the grantor from receiving unearned premiums on cancellation. The clause also states the unpaid

principal balance. If the parties do not want to state the unpaid principal balance, the recitation of that balance should be omitted. Most deeds with assumptions provide for a vendor’s lien and a deed of trust to secure assumption. It is important for the grantee to accept a deed with an assumption by signing either the deed or a separate acceptance document because the promises to pay the note and to perform the obligations under the deed of trust and the indemnity benefiting the grantor are contractual obligations of the grantee.

If the grantee assumes a note and the grantor wants to secure payment of the note with both a vendor’s lien in the deed and a deed of trust to secure assumption, the deed should provide for the vendor’s lien in the reservations description and refer to the deed of trust to secure assumption at the end of the deed. See clause 5-9-23. The deed should recite the assumption of the note in the consideration description. Of course, if only a vendor’s lien is retained, references to the deed of trust to secure assumption should be omitted.

§ 5.2:4 Consideration—Subject to Note That Grantee Does Not Assume

If the consideration is cash but the property is encumbered by a lien securing a note that the grantee does not assume, the deed should show that the conveyance is subject to that encumbrance. In this instance the consideration description in the deed will recite the cash consideration, and the exceptions description should show that the conveyance is subject to one or more liens and that the grantee does not assume the debt. See clause 5-8-39 in this chapter.

§ 5.2:5 Consideration—Separate Property of Grantee

If the property is conveyed as the grantee’s separate property, that fact should be recited in the

deed. There are two opportunities to characterize the property as separate. First, the description of consideration may state that it was paid from the grantee's separate property. See clauses 5-6-11 and 5-6-12 in this chapter. Second, the parties should insert a reference to the separate nature of the property in the space provided for miscellaneous clauses following the conveyance and warranty clause. For an example, see clause 5-9-16.

§ 5.2:6 Reservations from Conveyance

Properly used, a reservation creates a new severance in favor of the grantor. *Donnell v. Otts*, 230 S.W. 864, 865 (Tex. Civ. App.—Fort Worth 1921, no writ); *Klein v. Humble Oil & Refining Co.*, 67 S.W.2d 911, 915 (Tex. Civ. App.—Beaumont 1934), *aff'd*, 86 S.W.2d 1077 (Tex. 1935).

If the grantor wishes to reserve a property right from the conveyance, the reservation should be described under that heading in the deed. A reservation in favor of a third party is inoperative. *Little v. Linder*, 651 S.W.2d 895, 900–901 (Tex. App.—Tyler 1983, writ ref'd n.r.e.).

Examples of common reservations are found in form 5-7 in this chapter.

§ 5.2:7 Exceptions to Conveyance and Warranty

All encumbrances affecting the property, whether recorded or not, must be excepted to, or the grantor will breach the general warranty clause immediately on execution of the warranty deed. The items may be excepted to in broad, general terms or specifically itemized. The broad exceptions are more commonly preferred by sellers and the specific exceptions by buyers.

If specific exceptions are used, those suggested in form 5-8 in this chapter may be appropriate,

depending on the condition of title. If the parties have agreed not to examine title, the broadest possible exception will be appropriate. See clauses 5-8-1 and 5-8-2.

Properly used, an exception excludes an existing outstanding interest from the conveyance. *Donnell v. Otts*, 230 S.W. 864, 865 (Tex. Civ. App.—Fort Worth 1921, no writ). Exceptions should be drafted so as not to validate an instrument that is no longer in effect. *Morgan v. Fox*, 536 S.W.2d 644, 649–50 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

§ 5.3 General Warranty Deed with Vendor's Lien

The warranty deed with vendor's lien is designed for use anytime a portion of the purchase price is financed. This usually occurs when the note is to be executed either in favor of the grantor or a third-party mortgagee financing the grantee's purchase of the property. Other circumstances in which use of a warranty deed with vendor's lien is appropriate include the assumption of an existing first-lien note together with execution of a new second-lien note to the grantor or a third party, or execution of new first- and second-lien notes. See form 5-2 in this chapter.

§ 5.3:1 General Considerations

Anytime the entire purchase price is not paid to the grantor of real property, an implied vendor's lien arises in favor of the grantor, whether stated in the deed or not. *Briscoe v. Bronaugh*, 1 Tex. 326, 330 (1846); *Delley v. Unknown Stockholders of the Brotherly & Sisterly Club of Christ, Inc.*, 509 S.W.2d 709, 714 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.). A bona fide purchaser for value and without notice of the implied vendor's lien, however, takes title free from the implied lien. *Smith v. Price*, 230 S.W. 836, 838 (Tex. Civ. App.—Austin 1921, no

writ). Implied vendor's liens may arise in the following instances:

1. **Seller Financing.** An implied vendor's lien may arise in favor of a grantor who finances a portion of the conveyed property's purchase price. *Manz v. Johnson*, 531 S.W.2d 934, 936 (Tex. Civ. App.—Fort Worth 1976, no writ).
2. **Third-Party Lender—Assumption.** An implied vendor's lien may arise in favor of a third-party lender if part of the purchase price is the assumption of lien debt due the lender. *Etter v. Tuck*, 101 S.W.2d 843, 844 (Tex. Civ. App.—Dallas 1937, no writ).
3. **Exchange.** An implied vendor's lien may arise in the land conveyed and for the benefit of the party who received exchange property with a defective title. *White v. Street*, 2 S.W. 529, 531 (Tex. 1886); *Price*, 230 S.W. at 838.
4. **Spreading.** If a grantor conveys two tracts of land and receives the full purchase price for one but takes a note for the other, the grantor is entitled to an implied vendor's lien on both tracts. *Bielss v. Moeller*, 83 S.W.2d 1098, 1101 (Tex. Civ. App.—Austin 1935, no writ). Similarly, if one of the two tracts is encumbered by a lien that is assumed, the holder of the assumed debt is entitled to an implied vendor's lien on both tracts. *Fidelity Union Fire Insurance Co. v. Cain*, 28 S.W.2d 833, 836 (Tex. Civ. App.—Dallas 1930, no writ).

Although an express vendor's lien may be reserved in documents other than the deed, reserving it in the deed has the advantage of its being recorded for notice purposes. *See Simms v. Espindola*, 310 S.W.2d 364, 366–67 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

Texas courts have consistently held that a deed expressly retaining a vendor's lien is an executory contract as it applies to the grantor and grantee and those in privity with them, but it is executory only to the extent that superior title remains in the grantor and will be vested automatically in the grantee on payment of the purchase money. *See Zapata v. Torres*, 464 S.W.2d 926, 928–29 (Tex. Civ. App.—Dallas 1971, no writ). In all other respects affecting the parties and strangers to the transaction, the deed is an executed contract rather than an executory one. *See Babb v. McGee*, 507 S.W.2d 821, 823 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

The phrase *vendor's lien and superior title* is the conventional means of expressing the intention of the parties to make rescission available to the vendor's lien holder.

§ 5.3:2 Execution of Note to Grantor or Third Party

If the grantee in the deed gives the grantor a note for consideration, both a note and a deed of trust are ordinarily required. The note should contain a security clause such as clauses 6-5-1 through 6-5-4 in this manual. The deed of trust should contain a vendor's lien clause, such as clause 8-3-1.

The same documents are required when the note is to a third party, and the note should also have a security clause like that suggested for a note payable to the grantor. The deed of trust, however, should instead have a clause like clause 8-3-2. In this case, the vendor's lien is reserved in the deed and transferred to the third-party lender.

§ 5.3:3 Execution of First-Lien Note and Second-Lien Note

Two separate notes and two deeds of trust are necessary if the grantee in the deed is to execute a first-lien note payable to the grantor or a third

party and a second-lien note payable to the grantor or a third party. Each note is secured by a deed of trust in which each respective payee is the beneficiary. Each of the four documents should be identified as 'first-lien' or 'second-lien,' both in its title and in additional language.

§ 5.3:4 **Assumption of First-Lien Note and Execution of Second-Lien Note**

The grantee's assumption of a first-lien note is ordinarily accompanied by a deed of trust to secure assumption. The simultaneous execution of a second-lien note requires a note payable to the grantor or a third party and a deed of trust naming the grantor or the third party as beneficiary. These two documents should be identified as second-lien instruments both in their titles and in additional language. See the discussion at sections 5.2:3 above and 5.3:5 below and sections 8.6 and 8.7 in this manual.

§ 5.3:5 **Consideration and Miscellaneous Clauses**

Clauses 5-6-1, 5-6-2, 5-6-8, 5-6-13, and 5-6-14 in this chapter describe a variety of financing choices if the consideration involves a note, an assumption, or both.

Execution of Note to Grantor: A common transaction involving the warranty deed with vendor's lien is one in which the grantee executes a note in favor of the grantor. See clause 5-6-13. In addition to the deed provisions, the note should contain a security clause, such as clauses 6-5-1 through 6-5-4 in this manual. The deed of trust should contain a clause like clause 8-3-1.

Execution of Note to Third Party: If the note is in favor of a third party financing the grantee's purchase, the warranty deed with ven-

dor's lien should contain both a consideration clause like clause 5-6-13 and another clause noting that the lien is retained in favor of the third party. The second clause should appear in the space provided for additional clauses. See clause 5-9-8. Also, the note should contain a security clause like clauses 6-5-1 through 6-5-4, and the deed of trust should contain a clause like clause 8-3-2.

Execution of First-Lien Note to Third Party and Second-Lien Note to Grantor: If the grantee executes a first-lien note to a third party and a second-lien note to the grantor, appropriate clauses must be added to the consideration description and to the clause that retains the lien, as suggested at clause 5-6-8 and clause 5-9-9.

Assumption of First-Lien Note and Execution of Second-Lien Note to Grantor: If the grantee assumes an existing first-lien note and executes a second-lien note to the grantor, the grantor should provide that the vendor's lien secures both the second-lien note and the assumption. Clause 5-6-1 and clause 5-9-10 provide for this. When used with the second-lien clause in the note, which appears as clauses 6-6-1 and 6-6-2, they authorize maturity of the second-lien note if the grantee defaults on the note assumed. If the grantor is not released from liability for the assumed debt, the assumption is generally also secured by a deed of trust to secure assumption, form 8-2.

Assumption of First-Lien Note and Execution of Second-Lien Note to Third Party: If the grantee assumes an existing first-lien note and executes a second-lien note to a third party, the deed should provide that the vendor's lien secures both the second-lien note and the assumption. For this use clause 5-6-1 and clause 5-9-11. The assumption is generally also secured by a deed of trust to secure assumption, form 8-2.

§ 5.4 Special Warranty Deed

By converting the general warranty to a special warranty, the grantor warrants to defend the title conveyed to the grantee only to the extent that claims are made by, through, or under the grantor. The special warranty covers only title defects caused by the grantor, not those caused by the grantor's predecessors in title. Title insurance coverage for covenants of warranty on the insured's conveyance of title is available under an owner policy of title insurance; however, this coverage is limited to title defects that are covered by both the covenants of warranty and the title insurance policy. Because the owner policy purchased on acquisition of property covers only title defects caused before the purchase, and the special warranty warrants only against title defects caused after the purchase, the title insurance coverage for covenants of warranty provides no benefit under these circumstances.

See form 5-3 in this chapter for a special warranty deed.

§ 5.5 Deed without Warranty

A covenant of warranty is not required in a conveyance. Tex. Prop. Code § 5.022(b). The deed without warranty passes the grantor's title to the grantee with an express exclusion of warranties. This deed relieves the grantor of any warranty responsibility for title defects yet provides the grantee a true deed, as opposed to a mere quitclaim. See form 5-4 in this chapter.

§ 5.6 Quitclaim

A quitclaim conveys only the right, title, and interest that the grantor has in the property at the time the instrument is executed and delivered. It will not convey "after-acquired" title—that is, title acquired after the date of the execution and

delivery of the quitclaim deed. There is no recourse by the grantee or any subsequent owner of the property against the grantor. See form 5-5 in this chapter for an example of a quitclaim.

A quitclaim gives notice to the grantee that title to the property may not be clear, so the grantee is not a bona fide purchaser for value. Thus, if the grantor has title to the property but will not warrant title, a deed without warranty is preferable to a quitclaim. An adverse possessor cannot rely on a quitclaim as a basis for claiming title to property under the Texas five-year limitations statute, Tex. Civ. Prac. & Rem. Code § 16.025; *Porter v. Wilson*, 389 S.W.2d 650 (Tex. 1965).

§ 5.7 Bill of Sale

§ 5.7:1 Purpose and Effect

Some types of personal property are subject to statutory requirements for a bill of sale on transfer of title. A nonexclusive list includes (1) livestock (Tex. Agric. Code § 146.001), (2) trees or timber (Tex. Nat. Res. Code §§ 151.001–.006), and (3) used pipeline and oil and gas equipment (Tex. Nat. Res. Code §§ 112.011–.012).

For other types of property, recording is optional but useful for notifying third parties of the buyer's rights under a contract for sale. See Tex. Bus. & Com. Code § 2.107(c) (contract for sale of goods to be severed from realty).

The sale of a motor vehicle cannot occur unless the owner designated on the title submits a transfer of ownership of the title. Tex. Transp. Code § 501.071.

Caution: A transaction involving appliance warranties may be subject to the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312.

§ 5.7:2 Instructions for Completing Forms

The bill of sale, form 5-16 in this chapter, may be used to transfer title to most personal property. This form makes an express warranty of title, but that warranty and implied warranties may be excluded.

The blanket bill of sale, form 5-15, is used to ensure that the buyer has acquired ownership of the personal property assets that may be involved in a transaction if a specific listing of items is impractical.

If a blanket bill of sale is used, it is important that the seller specifically identify as excluded property anything that will not be transferred.

Generally, the description of the property should clearly identify the personal property sold and, if possible, should include a specific description, make, model, and identifying number.

See the discussion at section 5.12:2 below about the possibility of including the bill of sale in the deed itself.

§ 5.7:3 Warranties

The sale of goods creates three implied warranties under the Texas Uniform Commercial Code:

1. **Warranty of Title.** The seller warrants that at the time of conveyance the title conveyed is good, that its transfer is lawful, and that the title is free from encumbrances other than those known to the buyer. Tex. Bus. & Com. Code § 2.312. In addition to the implied warranty of title, the bill of sale forms (forms 5-15 and 5-16 in this chapter) contain an express warranty of title.
2. **Warranty of Merchantability.** If the seller is a merchant of goods of the kind sold, the sale creates an implied

warranty of merchantability for the goods. Tex. Bus. & Com. Code § 2.314(a). The UCC defines minimum standards of merchantability. Course of dealing or usage may imply other minimum standards.

3. **Warranty of Fitness.** If the seller has reason to know that the buyer is relying on the seller's skill or judgment in furnishing goods suitable for a particular purpose, a warranty of fitness for that purpose arises. Tex. Bus. & Com. Code § 2.315.

These warranties may be excluded or modified through revisions to the bill of sale. Any exclusion is subject to the provisions of Tex. Bus. & Com. Code § 2.316.

§ 5.8 Correction Deed

Correction deeds are generally used to accomplish amicably what would otherwise be done through a suit for reformation. Reformation is the equitable power of courts to correct a written instrument that due to mutual mistake fails to embody the actual agreement reached by the parties. *National Resort Communities, Inc. v. Cain*, 526 S.W.2d 510, 513-14 (Tex. 1975). Reformation will not go beyond the original agreement. *Southwest Savings Ass'n v. Dunagan*, 392 S.W.2d 761, 768 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

Types of mistakes subject to reformation include mistakes in descriptions (*Wilson v. Dearing, Inc.*, 415 S.W.2d 475, 476 (Tex. Civ. App.—Eastland 1967, no writ)); omissions and inclusions (*Parker v. McKinnon*, 353 S.W.2d 954, 955 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.)); scrivener's errors (*Fenn v. Boxwell*, 312 S.W.2d 536, 541 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.)); and mistakes of law (*Martin v. Snuggs*, 302 S.W.2d 676, 680 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.)). A grantor may not use a correction deed as a

unilateral attempt to add restrictive covenants to a deed. *Joe T. Garcia's Enterprises v. Snadon*, 751 S.W.2d 914, 916 (Tex. App.—Dallas 1988, writ denied).

As between the parties, a correction deed generally relates back to the date of the original incorrect deed. *Parker*, 353 S.W.2d at 956; *Buccaneer's Cove, Inc. v. Mainland Bank*, 831 S.W.2d 582, 584 (Tex. App.—Corpus Christi 1992, no writ). However, bankruptcy of an intervening bona fide purchaser for value will prevent the relation back. See *In re Jones*, 37 B.R. 969 (Bankr. N.D. Tex. 1984).

The consideration for the correction deed is the correction. *Tatum v. Blackstock*, 418 S.W.2d 269, 274 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.). Although the correction deed is considered a replacement for the original deed, the original deed will be used to determine the intention of the parties; further, the original deed may continue to be controlling with respect to matters outside of the stated purpose of the correction deed. *Parker*, 353 S.W.2d at 956.

The right to a correction deed and the right to reformation are subject to a four-year limitations period. *Barker v. Coastal Builders, Inc.*, 271 S.W.2d 798, 804 (Tex. 1954). Further, certain technical defects in instruments will be cured by statute unless suit is brought within two years of recording. Tex. Civ. Prac. & Rem. Code § 16.033.

While a correction deed replaces and is a substitute for the original instrument, a correction deed is not effective as to a bona fide purchaser. Tex. Prop. Code § 5.030(b), (c). A title search is suggested to determine whether any intervening bona fide purchasers exist.

Instruments that correct a conveyance of real property should comply with sections 5.027 through 5.031 of the Texas Property Code. Non-material corrections are subject to section 5.028,

and material corrections are subject to section 5.029.

Instruments that correct a material error must be, and instruments that correct a nonmaterial error may be, executed by each party to the conveyance or, if applicable, the parties' heirs, successors, or assigns. Tex. Prop. Code § 5.029(a). These instruments must be recorded. Tex. Prop. Code §§ 5.028(d)(1), 5.029(b)(2). Clause 5-9-5 may be inserted as the last paragraph in a restated deed executed by the original parties to the conveyance, or by their heirs, successors, or assigns, to correct a material or nonmaterial error.

A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from a clerical error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include correction of an inaccurate or incorrect element in a legal description, including a distance, angle, direction, bearing, or chord, a reference to a plat or other plat information, and other matters set forth in the statute; an addition, correction, or clarification of a party's name or marital status; the date on which the conveyance was executed; the recording data for an instrument referenced in the correction instrument; or a fact relating to the acknowledgment or authentication of the original conveyance. Tex. Prop. Code § 5.028(a). A correction instrument executed by a person with knowledge of the relevant facts may also provide an acknowledgment or authentication that was not included in the original conveyance.

A person who has personal knowledge of the relevant facts is authorized to execute a correction instrument to make a nonmaterial change that resulted from an inadvertent error, without the joinder of the original parties to the conveyance or their heirs, successors, or assigns. These changes include the addition, correction, or clar-

ification of a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted or an omitted call in a metes-and-bounds description that completes the legal description of the property. Tex. Prop. Code § 5.028(a-1).

The person executing the correction instrument must disclose in the instrument the basis for his knowledge of the relevant facts; send a copy of the correction instrument and notice by first class mail, e-mail, or other reasonable means to each party to the original conveyance and, if applicable, the parties' heirs, successors, and assigns; and record the correction instrument and evidence of notice. Tex. Prop. Code § 5.028(d)(2). Form 5-24 in this chapter is a form for making a nonmaterial correction by a person with knowledge of relevant facts.

In addition to nonmaterial corrections, including the corrections described by section 5.028 of the Property Code, the parties to the original transaction or their successors or assigns may execute a correction instrument to make a material correction to the recorded original instrument of conveyance. These material changes include adding a buyer's disclaimer of an interest in the property, a mortgagee's consent to or subordination to a recorded document, or land to a conveyance that correctly conveys other land; removing land from a conveyance that correctly conveys other land; and correcting a description of a lot or unit number or letter of property that is inaccurately identified as another lot or unit number or letter. Tex. Prop. Code § 5.029.

A correction instrument that complies with section 5.028 or 5.029 of the Property Code is (1) effective as of the effective date of the conveyance, (2) prima facie evidence of the facts stated in the correction instrument, and (3) notice to a subsequent buyer of the facts stated in the correction instrument. Tex. Prop. Code § 5.030.

Title companies may require a jurat as a prerequisite to acceptance.

See clause 5-9-5 and form 5-24 for correction deed language.

§ 5.9 Gift Deed

The essential elements of a gift made during a grantor's life are donative intent, delivery, and acceptance. *Gannon v. Baker*, 830 S.W.2d 706, 710 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

If the grantor desires to make a gift, the commonly understood terminology to evidence the donative interest, although not true consideration, is a recitation of "love and affection" as the consideration. However, other words and phrases that accomplish the same purpose are appropriate, especially when "love and affection" are not the grantor's motivation to make the gift. See clauses 5-6-9 and 5-6-10 in this chapter. Further, the deed should be titled "Gift Deed."

An essential characteristic of a gift is the absence of consideration paid by the donee to the donor. A deed by gift that otherwise satisfies the requirements for an effective conveyance will vest title in the grantee to the same extent as a deed with valuable consideration. *Woodworth v. Cortez*, 660 S.W.2d 561, 564 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

A gift is presumed if a parent purchases property in the name of a child. *Woodworth*, 660 S.W.2d at 564.

§ 5.10 Partition Deed

A partition is the act of dividing the undivided interests in property held by joint owners so each owns full title to a separate tract. The term *joint owner* includes ownership arrangements also sometimes known as tenants in common, cotenants, or joint tenants. Partitions may be either voluntary or involuntary. A voluntary partition is accomplished by a written instrument or

deed. *Houston Oil Co. of Texas v. Kirkindall*, 145 S.W.2d 1074, 1077 (Tex. 1941); *Chandler v. Hartt*, 467 S.W.2d 629, 634 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). An involuntary partition arises when a cotenant exercises the statutory right to compel a partition. See Tex. Prop. Code §§ 23.001–.004. If property is partitioned involuntarily, a nonexclusive access easement may be required in limited circumstances. See Tex. Prop. Code § 23.006. An express agreement among joint owners not to partition is enforceable. *Lichtenstein v. Lichtenstein Building Corp.*, 442 S.W.2d 765, 769 (Tex. Civ. App.—Corpus Christi 1969, no writ).

Form 5-23 in this chapter is a partition deed for effectuating a voluntary partition. Often partition deeds are executed by family members who have inherited the co-owned properties. In this situation, a special warranty of title ordinarily will be preferred by the parties. Often no title search is obtained, and a party usually will not want to be responsible for warranting title to the land partitioned to the other family members (except as to that party's own acts). Accordingly, form 5-23 contains a special warranty of title. If a general warranty of title or deed without warranty is desired, form 5-23 may be adapted to provide for this. If no title search is performed in connection with a partition deed, the other parties may be unaware that one party's acts have given rise to a lien, such as a federal tax lien or child support lien. Knowledge of the existence of a lien before the partition deed is executed is desirable so that the lien may be addressed, as this is preferable to a claim for breach of warranty of title, whether special or general.

Partitions are not subject to the statute of frauds, making oral partitions enforceable (*Houston Oil Co. of Texas*, 145 S.W.2d at 1077), and partitions do not alter the character of property as either separate or community (*Westhoff v. Reitz*, 554 S.W.2d 1 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.)).

Owely is the difference that is paid by one joint owner to another or a lien that arises for the purpose of equalizing the partition. In instances in which one joint owner is to receive owely from another, see the discussion of owely of partition in section 5.13:5 below.

If suit is filed to foreclose a tax lien, joint owners are entitled to partition their property and have the taxes apportioned pro rata. Tex. Tax Code § 33.46.

§ 5.11 Transfer on Death Deed

The Texas Real Property Transfer on Death Act authorizes an individual to execute and record a transfer on death deed to make a revocable transfer of the transferor's interest in real property to one or more designated beneficiaries, including alternate beneficiaries, effective at the transferor's death. See Tex. Est. Code ch. 114.

§ 5.11:1 Purpose and Effect

A transfer on death deed transfers a transferor's interest in real property to designated beneficiaries effective at the transferor's death. Tex. Est. Code § 114.051. As a transfer on death deed is nontestamentary, probate proceedings are not necessary to transfer the transferor's interest in the described real property to the designated beneficiaries. Tex. Est. Code § 114.053.

During the transferor's lifetime, a transfer on death deed does not affect any right, title, or interest of the transferor in the property, vest any legal or equitable title in a designated beneficiary, or subject the property to the claims of creditors of any designated beneficiary. Notwithstanding the recordation of a transfer on death deed, the transferor retains the right to transfer or encumber the property, any present or future homestead rights, and any present or future ad valorem tax exemptions to which the transferor is entitled. During the transferor's lifetime, a transfer on death deed does not affect

the rights of creditors of the transferor, secured or unsecured, and does not trigger any “due on sale” clause. Upon the death of the transferor a secured creditor’s rights are subject to the Texas Estates Code. A transfer on death deed does not affect the eligibility for public assistance of either the transferor or any designated beneficiary. Tex. Est. Code § 114.101.

At the death of the transferor, the transferor’s interest in the property is transferred to the designated beneficiaries in accordance with the deed. Tex. Est. Code § 114.103(a). A transfer under a transfer on death deed lapses as to a designated beneficiary that disclaims in the manner provided in chapter 122 of the Estates Code. Tex. Est. Code § 114.105. A transfer also lapses as to a designated beneficiary that does not survive the transferor by 120 hours. Lapsed transfers of concurrent interests pass in accordance with subchapter D of chapter 255 of the Estates Code. Except where chapter 255 applies, concurrent interests are transferred in equal, undivided interests with no right of survivorship. Tex. Est. Code § 114.103(a).

Even if the transfer on death deed provides otherwise, a transfer on death deed transfers title to a beneficiary without warranty of title. Tex. Est. Code § 114.103(d). A beneficiary under a transfer on death deed takes title to the property subject to all conveyances, liens, encumbrances and other rights enforceable against the property at the transferor’s death. Tex. Est. Code § 114.104. Although not considered a probate asset, claims against the transferor’s estate, expenses of administration, estate taxes, allowances in lieu of exempt property, and family allowances are enforceable against property transferred by a transfer on death deed. Tex. Est. Code § 114.106.

§ 5.11:2 Requirements Generally; Exceptions

A transfer on death deed must state that the transfer occurs at the transferor’s death, be properly executed by the transferor, be properly recorded before the transferor’s death, and contain the essential elements and formalities of deeds, except consideration, notice, delivery, or acceptance. Tex. Est. Code §§ 114.055, 114.056. No statutorily required notice or disclosure need be given in connection with a transfer on death deed. Tex. Est. Code § 114.101(6).

§ 5.11:3 Transferor Considerations

A transferor must have capacity to contract to make or revoke a transfer on death deed. Tex. Est. Code § 114.054(a). A transfer on death deed cannot be created under a power of attorney. Tex. Est. Code § 114.054(b).

§ 5.11:4 Proper Recordation

To be effective, a transfer on death deed must be recorded before the transferor’s death in the county where the property is located. Tex. Est. Code § 114.003. Likewise, an instrument revoking a transfer on death deed must be recorded before the transferor’s death. Tex. Est. Code § 114.057(a).

§ 5.11:5 Caution—Existing Rights of Survivorship

If a transferor is a joint owner with right of survivorship, a transfer on death deed will not be effective unless the transferor is the surviving joint owner. Tex. Est. Code § 114.103(b). A transfer on death deed made by joint owners with the right of survivorship can be revoked only by all living joint owners. Tex. Est. Code § 114.057(e).

§ 5.11:6 Revocation Generally

Even if the transfer on death deed provides otherwise, a transfer on death deed is revocable. Tex. Est. Code § 114.052. Revocation, in whole or in part, is effective upon the proper recordation before the transferor's death of a subsequent, inconsistent transfer on death deed, a subsequent instrument of revocation, a divorce decree dissolving the marital relationship between the transferor and a designated beneficiary, or a subsequent conveyance by the transferor. If the transfer on death deed is made by more than one transferor, a revocation is only effective as to the interest of the revoking transferor and does not affect the interests of the non-revoking transferors. Tex. Est. Code § 114.057.

§ 5.11:7 Revocation—Subsequent Transfer on Death Deed

A prior transfer on death deed is revoked on the recordation of a subsequently acknowledged transfer on death deed as to the interests that are expressly stated or are inconsistent with the subsequent deed. Tex. Est. Code § 114.057(a). Form 5-25 in this chapter provides optional clauses for revoking all or part of a prior transfer on death deed. Alternatively, form 5-26 or form 5-27 can be used to document the revocation of the prior transfer on death deed in whole or in part.

§ 5.11:8 Revocation—Subsequent Instrument of Revocation

A prior transfer on death deed is revoked upon the recordation of a subsequently acknowledged instrument of revocation, other than a will, that expressly revokes the prior deed, as to the beneficiaries and property designated in the instrument. Tex. Est. Code § 114.057(a). A subsequent will made by the transferor does not revoke nor supersede a transfer on death deed. Tex. Est. Code § 114.057(b).

Form 5-26 or form 5-27 in this chapter can be used to revoke a prior transfer on death deed in whole or in part.

§ 5.11:9 Revocation—Divorce

The recordation of a notice of a final decree of divorce dissolving the marital relationship between a transferor and a designated beneficiary revokes a transfer on death deed as to the divorced, designated beneficiary. Tex. Est. Code § 114.057(c).

§ 5.11:10 Revocation—Subsequent Conveyance; Protection of Purchasers

A subsequent, valid conveyance by the transferor during the transferor's lifetime renders a prior transfer on death deed void as to any interest in the property conveyed if the conveyancing instrument is properly recorded before the death of the transferor. Tex. Est. Code § 114.102.

Form 5-26 or form 5-27 in this chapter, as the circumstances dictate, will document the revocation of a prior transfer on death deed.

§ 5.11:11 Instructions for Completing Form

Form 5-25 in this chapter can be used to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor's interest in real property effective at death of the transferor.

If the transferor intends to transfer the transferor's community property interest in property to a surviving spouse, or to the transferor's children if the transferor's spouse predeceases the transferor, the transferor's spouse should be designated as the primary beneficiary and the children designated as the alternate beneficiaries.

As consideration is not required for the validity of a transfer on death deed, and to avoid uncertainty about whether consideration was exchanged, references to recitations and confessions of consideration are intentionally omitted in form 5-25.

As there are no warranties of title under a transfer on death deed and, at the death of the transferor, title passes subject to all present and subsequent conveyances, liens, and other encumbrances, references to exceptions to conveyance and warranties are intentionally omitted in form 5-25.

Any interest that the transferor intends to reserve from the transfer on death deed should be properly described in the heading "Reservations from Transfer." See section 5.2:6 above for a discussion of reservations. Examples of common reservations are found in form 5-7.

Form 5-26 revokes a prior transfer on death deed in its entirety.

Form 5-27, depending on the options clause selected, partially revokes a prior transfer on death deed as to the property described either to all beneficiaries or only as to specifically named beneficiaries.

§ 5.12 Additional Clauses

Provisions other than the consideration clause, property description, reservations, and exceptions may be called for in some deeds. These clauses may be located in several different places in the deed. Use of some of these provisions is discussed in this section, and sample language is found in form 5-9 in this chapter.

§ 5.12:1 Waiver of Implied Liens

The implied vendor's lien should be negated if its existence is not intended by the parties. If the

grantor who receives the full price for one parcel is to waive the implied lien on that parcel, the waiver in clause 5-9-24 in this chapter may be used. If an existing lien affects only a portion of the property conveyed by an assumption deed, the deed should contain an express waiver to avoid spreading the lien. Clause 5-9-25 is an example of an appropriate waiver for this purpose. If the parties exchanging property wish to waive the implied lien, the waiver in clause 5-6-7 may be used in the description of the consideration.

§ 5.12:2 Bill of Sale Combined

Many kinds of personal property, including items used in operating the improvements that can be removed without materially damaging the improvements, are often transferred as part of the sale of real property.

Personal property is not included in the real property description and thus is not transferred by the deed. Instead, personal property is transferred by bill of sale. The personal property transfer can be accomplished in a separate bill of sale or by including the bill of sale in the deed itself. A combined instrument has the benefit of reducing the number of documents to be signed at closing.

To add the personal property transfer to the deed, the drafter may use the clauses provided. See clauses 5-9-12 and 5-9-13 in this chapter.

§ 5.12:3 "As Is" Conveyance

If the conveyance is on an "as is" basis, the parties may evidence the basis of the bargain in the deed. See clause 5-9-1 in this chapter.

For a separate disclaimer form, see form 26-33 in this manual.

§ 5.12:4 Fee Simple Determinable

A fee simple determinable exists if a fee simple estate will terminate automatically and revert to the grantor on the occurrence of a stated event.

The phrase 'as long as' has been recognized as evidencing a fee simple determinable estate. *See Clark v. Perez*, 679 S.W.2d 710, 712 (Tex. App.—San Antonio 1984, no writ). In addition, it is prudent practice to state an intent to create a fee simple determinable because of the presumption that a conveyance is a fee simple absolute (*see* Tex. Prop. Code § 5.001(a)) and the rule of interpretation construing provisions as covenants rather than conditions. *Schwarz-Jordan, Inc. v. Delisle Construction Co.*, 569 S.W.2d 878, 881 (Tex. 1978). *See* clause 5-9-7 in this chapter.

In some cases the event that would cause the fee simple determinable condition to be satisfied is not evident from an inspection of the property, which creates uncertainty concerning title. In those situations, it is suggested that the condition language include a provision for recording a document that establishes with certainty the satisfaction of the condition. For example, the suggested clause at 5-9-6 includes a provision allowing an affidavit to serve as evidence of the satisfaction of the condition, unless contradicted by another affidavit.

§ 5.12:5 Strips and Gores

For public policy reasons, a deed may be construed as including a small parcel of land in the conveyance of the larger tract if it is shown that the small parcel to be included (1) is small in comparison to the land conveyed, (2) is adjacent to or surrounded by the land conveyed, (3) belonged to the grantor at the time of the conveyance, and (4) was of no benefit or importance to the grantor. *Alkas v. United Savings Ass'n of Texas*, 672 S.W.2d 852, 857 (Tex.

App.—Corpus Christi 1984, writ ref'd n.r.e.). This doctrine is called the "strip and gore doctrine." Including a strips-and-gores provision in the deed is intended to ensure that the principle is applied in the transaction without the necessity of supplying proof of these elements. *See* clause 5-9-17 in this chapter for an example.

Because of the strip and gore doctrine, a conveyance of land bounded by a public highway carries with it the fee to the center of the road as part and parcel of the grant, even if the deed describes the abutting land by metes and bounds extending only to the edge of the highway. *State v. Williams*, 335 S.W.2d 834, 836 (Tex. 1960); *Krenek v. Texstar North America, Inc.*, 787 S.W.2d 566, 568–69 (Tex. App.—Corpus Christi 1990, writ denied). The doctrine does not apply if the grantor owns land on both sides of the strip. *Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1086 (Tex. 1932). Nor does the doctrine apply if the strip is larger and more valuable than the conveyed tract. *Angelo v. Biscamp*, 441 S.W.2d 524, 527 (Tex. 1969).

The strips-and-gores provision should be included in a deed conveyance form rather than a quitclaim to avoid the concerns about quitclaims stated in the commentary at section 5.6 above; however, the warranties should be eliminated in case no strips or gores exist.

When using the strips-and-gores provision, the attorney should review other provisions of the deed that describe the property, because the strips and gores are discussed separately from the property. One suggestion is to add 'and all strips and gores and appurtenances thereto' to the references to the property, other than in the warranty clause. Another option is to include strips and gores as a defined term within the definition of the property, then except the strips and gores out of the warranty in the express exclusion of warranties provisions.

§ 5.12:6 Wraparound Lien

If the seller agrees to continue to service an existing lien debt while the buyer executes a new note that is not reduced by the amount of the preexisting lien debt (commonly known as a wraparound transaction), the deed should be written to take exception to the preexisting lien to avoid breaching the warranty concerning encumbrances. The buyer should take title “subject to, and without assuming, the preexisting lien debt.

See clause 5-9-26 in this chapter. See also section 6.4:2 in this manual and sections 8.3 through 8.5:3.

§ 5.12:7 Transfer of Escrow and Insurance Policy

Lenders often establish an escrow for the payment of taxes and insurance relating to the property securing the loan. The escrow arrangement generally seeks to ensure that sufficient funds exist in the escrow to pay all real property ad valorem taxes when they come due and to pay the annual hazard insurance premium on its anniversary date.

If real property is transferred with the assumption of an existing lien debt or subject to a preexisting lien debt, regardless of whether the insurance and taxes are being prorated to the date of closing, it is customary for the seller to transfer the entire escrow fund to the buyer. It is generally considered simpler to prorate the escrow balance to the date of closing through the closing settlement statement, rather than have the buyer send money to the lender and expect the lender to reimburse the seller for that exact amount out of the escrow. The transfer of the escrow fund is usually included in the deed, although this is not required. Additionally, some lenders require the signing of a separate transfer form before the escrow will be transferred to the buyer. The more cautious approach would be to

include the transfer both in the deed and in a separate document.

The transfer of escrow often includes a transfer of the insurance policy to the buyer, if the seller has agreed that the policy will be transferred. If the buyer will not assume the existing coverage, the seller should keep the policy in order to be entitled to the refund of unearned premiums when the buyer’s replacement policy is substituted for the seller’s policy coverage. Several aspects of insurance are regulated by statute, such as the fee for substitution of coverage and the kind of insurance binder a mortgage company must accept. The statutes governing prohibited practices relating to property insurance are found in chapter 549 of the Texas Insurance Code. *See* Tex. Ins. Code ch. 549. Unless the drafting attorney knows the agreement concerning the transfer of the insurance policy, it is suggested the deed include either nothing concerning the insurance or a statement that any transfer of insurance will be handled between the buyer and seller by separate instrument.

Form 5-17 in this chapter is provided to accomplish the transfer of escrow by separate instrument. Clause 5-9-22 may be used to incorporate the transfer of escrow in the deed.

§ 5.12:8 Assumption of Liability Agreements for VA-Guaranteed Loans

If a loan guaranteed by the Department of Veterans Affairs (VA) is assumed, the VA has a number of requirements for the new loan. *See* 38 U.S.C. § 3714; 38 C.F.R. §§ 36.4300–4393; U.S. Dep’t of Veterans Affairs, Veterans Benefits Administration, Lender’s Handbook: VA Pamphlet 26-7, available at http://benefits.va.gov/warms/pam26_7.asp. Clause 5-9-2 in this chapter is based on the sample indemnity liability assumption clause in chapter 9 of VA Pamphlet 26-7.

§ 5.12:9 Restrictive Covenants

To be enforceable, restrictive covenants imposed by grant must satisfy certain requirements: (1) there must be privity of estate between the parties to the contract; (2) the restrictive covenants must relate to something in existence, or assignees must be named if they are to be bound by the restrictive covenants; (3) the restrictive covenants must touch or concern the land (that is, enhance or benefit it) (*see Homsey v. University Gardens Racquet Club*, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref'd n.r.e.)); and (4) the original contracting parties must intend that the restrictive covenant run with the land. *Billington v. Riffe*, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ). Further, the restrictive covenant must furnish adequate notice to the property owner of the specific restriction sought to be enforced. *Davis v. Huey*, 620 S.W.2d 561, 566 (Tex. 1981).

The restrictive covenants should make clear which lands are benefited by the covenants and that the owners thereby have standing to enforce the restrictive covenants. See clauses 5-9-14 and 5-9-15 in this chapter.

§ 5.13 Additional Documents**§ 5.13:1 Acceptance of Deed**

Acceptance is necessary for a deed to be effective. *Robert Burns Concrete Contractors, Inc. v. Norman*, 561 S.W.2d 614, 618 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Traditionally, the grantee's acceptance is implied. *Martin v. Uvalde Savings & Loan Ass'n*, 773 S.W.2d 808 (Tex. App.—San Antonio 1989, no writ). However, the parties may want written confirmation of the grantee's acceptance of the deed as to matters of form, substance, or both. Evidence of the grantee's acceptance may be needed to enforce the grantor's obligations under a deed, such as the promise to pay and the

indemnity in the assumption or warranty deed. Confirmation can best be achieved by the grantee's signature on the deed, although a separate instrument may be used. See form 5-10 in this chapter.

§ 5.13:2 Deed in Lieu of Foreclosure

The term *deed in lieu of foreclosure* (or *deed in lieu*) describes a conveyance in which the consideration given by the grantee typically is the cancellation of the debt owed by the borrower, the release of the borrower from liability on the secured debt, and, in some cases, the release and discharge of the liens securing the debt. The deed in lieu does not have the same effect on title as a trustee's deed in a nonjudicial foreclosure because the deed in lieu does not relate back to the date the deed of trust was filed for record to extinguish exceptions or encumbrances filed after the deed of trust. Instead, the grantee takes the property subject to whatever encumbrances and other exceptions have been imposed on the property before the deed in lieu is recorded, as is the case with any other deed. *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 9 (Tex. 1987).

If a holder of a debt secured by a deed of trust accepts title by a deed in lieu and later discovers that an encumbrance that was unknown to the holder and not disclosed by the debtor existed before the deed in lieu, the holder has four years to void the deed in lieu; further, the lien is restored to its former priority, and the holder may proceed with a foreclosure under the deed of trust. *See* Tex. Prop. Code § 51.006.

See form 5-13 in this chapter for an example of a deed in lieu of foreclosure.

§ 5.13:3 Trustee's Deed in Nonjudicial Foreclosure

For commentary and a form, see section 14.6:4 and form 14-15 in this manual.

§ 5.13:4 Administration or Guardianship Deed

The Texas Estates Code governs the sale of property held by an estate. *See* Tex. Est. Code chs. 356, 1158. A court order is required for any sale of estate property unless otherwise provided by law. Tex. Est. Code §§ 356.001, 1158.001. Sales authorized by a will may be carried out by the executor without the need for a court order. Tex. Est. Code § 356.002. The administration or guardianship deed, form 5-14 in this chapter, is drafted to follow the format required by the Estates Code. *See* Tex. Est. Code §§ 356.557, 1158.557.

§ 5.13:5 Owelty of Partition Deed and Agreement

Owelty results from an unequal partition between joint owners of real property whether by court decree or contract. Because the tract partitioned does not lend itself to an equal division, the difference in value between the partitioned tracts is adjusted by payment from one joint owner to the other. This difference is known as owelty. Because owelty payments are in the nature of purchase money, a lien to secure a payment arises. Such a lien is a purchase-money lien and is valid against the homestead. *Sayers v. Pyland*, 161 S.W.2d 769, 772 (Tex. 1942).

In transactions in which one joint owner simply buys all of the interest of a fellow joint owner, the issue is less clear. Some decisions have determined that such a sale does not involve a true partition; therefore a lien securing the purchase may not encumber the entirety of the homestead. *In re Shults*, 97 B.R. 874 (Bankr. N.D. Tex. 1989). The Texas Constitution and the Texas Property Code provide that the homestead may be encumbered by 'an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one

spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding. Tex. Const. art. XVI, § 50(a)(3); Tex. Prop. Code § 41.001(b)(4). Even after this constitutional amendment, there has been question about whether the entirety of the homestead may be encumbered by an owelty lien in the absence of an actual partition in kind. Opinion predominates in favor of the validity of these liens to the extent that such liens are generally insurable encumbrances.

An owelty of partition transaction that is not based on a court order should be documented by both a deed and a separate written partition agreement (not by a purchase and sale agreement).

The owelty of partition deed, form 5-11 in this chapter, should refer either to the court order or to the separate agreement on which it is based. See form 5-12 for an owelty of partition agreement.

§ 5.13:6 Survivorship Agreement for Community and Noncommunity Property

Rights of survivorship will not be inferred from a joint tenancy in property that is not the community property of the tenants. Tex. Est. Code § 101.002. However, the joint tenants may agree in writing to implement rights of survivorship. Tex. Est. Code § 111.001. Spouses may agree between themselves that all or part of their community property, then existing or to be acquired, will be owned with rights of survivorship. Tex. Est. Code § 112.051.

Rights of survivorship in community property are treated differently from rights of survivorship in other property. *See* Tex. Est. Code §§ 111.002, 112.052. However, whether the property is community or not, the agreement must be in writing. In the case of community

property, both spouses must sign the agreement. Tex. Est. Code § 112.052. For property that is not community, it is suggested that all joint tenants sign the writing for it to qualify as an agreement that satisfies the statute. *See* Tex. Est. Code § 111.001(a). The phrases *with right of survivorship, will become the property of the survivor, will vest in and belong to the surviving spouse, or will pass to the surviving spouse* are suggested for inclusion in the agreement.

Rights of survivorship do not affect the community status of property or the rights of the spouses concerning management, control, and disposition, unless the agreement so provides. Tex. Est. Code § 112.151. On the death of a spouse, a transfer resulting from the right of survivorship is not considered a testamentary transfer. Tex. Est. Code § 112.052. An agreement between spouses may be revoked in accordance with the agreement's terms. If no provision is made for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. Tex. Est. Code § 112.054(b). The disposition of property by one or both spouses will also revoke the agreement as to that property if the disposition is not inconsistent with the terms of the agreement and applicable law. Tex. Est. Code § 112.054(c). Although an agreement between spouses creating rights of survivorship is effective without court adjudication, the surviving spouse may obtain such an adjudication by application to the court. *See* Tex. Est. Code §§ 112.053, 112.101. The agreement between spouses and any revocation should be recorded, and a copy provided to the personal representative of the deceased spouse's estate, to avoid the acquisition of good title by a buyer without actual notice of the agreement or the revocation under Tex. Est. Code §§ 112.201–.208. Community property subject to the sole or joint management, control, and disposition of a spouse during marriage con-

tinues to be subject to the liabilities of that spouse on death, regardless of the right of survivorship. *See* Tex. Est. Code §§ 112.251–.253.

See form 5-18 in this chapter for a survivorship agreement and form 5-19 for a survivorship agreement for community property.

§ 5.13:7 Community Interest Special Warranty Deed

The Texas Constitution and the Texas Family Code provide a method of converting title of real and personal property from separate to community property. *See* Tex. Const. art. XVI, § 15; Tex. Fam. Code §§ 4.201–.206. Before January 1, 2000, the effective date of these provisions, separate property could not be converted to community property because Texas is an inception of title state. The primary purpose of the community interest special warranty deed is to allow a surviving spouse, at the time of the other spouse's death, to obtain a nontaxable increase in the basis of the property for federal estate tax purposes. According to the Internal Revenue Code, all community property receives an increase in basis to the current market value at the death of the first spouse. *See* 26 U.S.C. § 1014(b)(6). Strict compliance with the provisions of the Family Code, including the use of bold-faced type, capital letters, or underlined warnings that must appear in the document, is necessary to convert the property to community property. *See* Tex. Fam. Code §§ 4.201–.206.

There are implications in this type of transaction for divorce, property management rights, and creditor claims, as described in section 4.205 of the Family Code. A separate agreement may be used to address personal-property or family-law issues. The form in this manual deals only with creating an effective conveyance of real property rights. See form 5-20 in this chapter for a community interest special warranty deed.

§ 5.13:8 Assignment and Assumption of Leases

The right to receive rent passes with title to real property, and the seller's tenant becomes the buyer's tenant as a matter of law. *Arredondo v. Mora*, 340 S.W.2d 322, 325 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.). Nevertheless, parties to a real estate sales contract often provide for a separate assignment and assumption agreement in which the seller assigns its rights in leases affecting the property and the buyer assumes the landlord's obligations under some or all of those leases. The assignment and assumption often contains indemnities by the parties covering their respective periods of responsibility for the landlord's obligations under the leases, including those for tenant improvements and brokerage commissions. The assignment and assumption of leases can be modified to include a general or special warranty of title. See form 5-21 in this chapter for an assignment and assumption of leases and form 5-22 for a notice of transfer of security deposit.

§ 5.14 General Considerations for Minerals

§ 5.14:1 Generally

Texas mineral law is complex and extensive, and a comprehensive review is beyond the scope of this manual. This commentary is intended to identify common conveyancing issues that arise in transactions in which the primary focus is the surface estate, not the mineral estate. Attorneys who are not experienced in mineral law are urged to exercise caution and seek appropriate counsel when mineral law issues arise.

In Texas, the mineral estate may be severed from the surface estate. The mineral estate is the dominant estate and has five essential attributes: the right to explore and develop (ingress and egress); the right to lease (the executive right);

the right to receive bonus payments; the right to receive delay rentals; and the right to receive royalty. *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 (Tex. 1990); *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). The mineral estate, and each of its five separate attributes, may be held in undivided interests.

Grants and reservations in Texas are commonly styled 'oil, gas, and other minerals' or 'all minerals in and under the land. Although the meanings of 'oil' and 'gas' are usually clear, adjudication has been required to determine what minerals are included in a conveyance of 'minerals. The Supreme Court of Texas has held that "a severance of minerals in an oil, gas and other minerals clause includes all substances within the ordinary and natural meaning of the word, whether their presence or value is known at the time of severance. *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984). The *Moser* decision confirmed the court's previous holdings that, as a matter of law, certain substances belong to the surface estate: building stone, limestone, caliche, surface shale, water, sand, gravel, and near-surface lignite, iron, and coal. *Moser*, 676 S.W.2d at 102.

According to the common-law 'greatest possible estate' rule, a conveyance will pass all of the estate owned by the grantor at the time of the conveyance unless the instrument states reservations that limit the estate being conveyed. *Cockrell v. Texas Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956). Thus, a conveyance without a specific reservation of the minerals will convey the grantor's entire mineral estate. *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943). A result of the "greatest possible estate" rule is found in the *Duhig* rule, which provides that an outstanding right in the mineral estate will be charged to the grantor's mineral estate reservation, unless a contrary intent is stated in the instrument. See *Duhig v. Peavy-Moore Lumber Co.* 144 S.W.2d 878, 880 (Tex. 1940).

§ 5.14:2 Royalty

Royalty is the nonpossessory right to receive a cost-free share of production. It may be reserved in a lease or severed from the fee in a grant or reservation in a deed. An “overriding royalty” or “override” is carved out of the lessee’s interest in the leasehold estate and, absent fraud, breach of fiduciary duty, or similar wrongdoing, terminates when the lease from which it was created terminates.

A royalty clause must be drafted carefully. For example, each of the following may have a different result: an undivided 1/8 royalty; an undivided 1/8 of the royalty; and an undivided 1/8 in a 1/8 royalty. *See, e.g. Winslow v. Acker*, 781 S.W.2d 322, 326–27 (Tex. App.—San Antonio 1989, writ denied); *Ray v. Truitt*, 751 S.W.2d 205, 207 (Tex. App.—El Paso 1988, no writ); *Tiller v. Tiller*, 685 S.W.2d 456, 458 (Tex. App.—Austin 1985, no writ); *Lane v. Elkins*, 441 S.W.2d 871, 874–75 (Tex. Civ. App.—Eastland 1969, writ ref’d n.r.e.).

§ 5.14:3 Surface Use

The right to develop the mineral estate includes the right to use the surface to the extent reasonably necessary for development purposes. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972).

The surface owner whose land is to be developed for mineral purposes should be aware of the line of Texas cases concerning surface damages that includes *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971), *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980), and *Moser v. U.S. Steel Corp.* 676 S.W.2d 99 (Tex. 1984). In *Moser*, the Supreme Court of Texas confirmed that the mineral owner has the right to use the surface to develop the minerals, but within certain guidelines. For instruments executed before June 8, 1983, the mineral owner is liable for destruction of the surface only if the destruction is negligently

inflicted, regardless of how the mineral is described in the severance. For instruments executed on or after June 8, 1983, however, the negligence rule applies only to minerals that are specifically conveyed or named in the instrument. If the mineral is not specifically conveyed or named in the instrument, the mineral owner must compensate the surface owner for surface destruction, whether the result of negligence or not. *Moser*, 676 S.W.2d at 103. In addition, the mineral owner must accommodate the surface owner’s use of the land to the extent described in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), and *Sun Oil Co.*, 483 S.W.2d at 810–11.

The surface owner may want to protect the surface by contractual restrictions on mineral operations. Such protections may include limitations on areas that may be used for mineral operations, such as designation of drill sites and pipeline and access easements; alternatively, the surface owner may contract with the mineral owner for a complete prohibition of use of the surface by the mineral owner (a surface-use waiver by the mineral owner).

§ 5.14:4 Existing Mineral Lease

There are special drafting considerations if the land being conveyed is subject to an existing mineral lease. For example, the grantor and the grantee should include in the deed their agreement on how to allocate the benefits of an undisputed existing lease between them.

§ 5.14:5 Life Tenant’s Right to Consume Royalty

Whether the life tenant, as the owner of a life estate, is entitled to consume the royalty from mineral production on the property depends on the circumstances. If, at the inception of the life estate, there exists either mineral production or a mineral lease, the ‘open mine’ doctrine entitles the life tenant to consume the royalties. *Thompson v. Thompson*, 236 S.W.2d 779, 786–87 (Tex.

1951); *Youngman v. Shular*, 281 S.W.2d 373, 375 (Tex. Civ. App.—San Antonio 1955), *aff'd*, 288 S.W.2d 495 (Tex. 1956). Otherwise, the life tenant is not entitled to consume the royalty and must account for it to the remainderman. *Swayne v. Lone Acre Oil Co.*, 86 S.W. 740, 742 (Tex. 1905).

§ 5.14:6 Special Problem Areas

Although a discussion of all areas of concern encountered with mineral interests is beyond the scope of this manual, special consideration should be given to—

land subject to the Texas Relinquishment Act, where the minerals are owned by the state of Texas and the surface owner acts as the agent for the state in leasing them (*see* Tex. Nat. Res. Code §§ 52.171–190);

exploration by the owners of the right to develop the minerals without executing a mineral lease;

- discrimination by the owner of the executive right (right to lease) among the owners of the right to royalty, the right to delay rentals, and the right to bonus payments;

ownership of mineral rights by more than one party; and

severance of the mineral estate, limited by depth of the minerals or duration of the severance.

See clauses 5-7-8 through 5-7-14 in this chapter for reservation of minerals and clauses 5-8-34 through 5-8-36 for exceptions of minerals.

§ 5.15 General Considerations for Other Forms of Real Property

§ 5.15:1 Timber

The right to harvest growing timber with the accompanying ingress and egress rights together constitutes an interest in real property, which must be conveyed by deed. *Burkitt v. Wynne*, 132 S.W. 816 (Tex. Civ. App. 1910, writ ref'd). See clause 5-9-18 in this chapter.

§ 5.15:2 Easements

An easement is an interest in real property. *Settegast v. Foley Bros. Dry Goods Co.*, 270 S.W. 1014, 1016 (Tex. 1925). It gives the holder the right to use another's land for a specific purpose. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.—Austin 1988, writ denied). See clauses 5-7-1 through 5-7-4 and 5-8-14 through 5-8-25 in this chapter.

§ 5.15:3 Condominiums

A description of a condominium unit constitutes a sufficient legal description of the unit and all rights, obligations, and interests appurtenant to the unit if the description contains (1) the name of the condominium; (2) the recording data for the declaration, including any amendments, plats, and plans; (3) the county in which the condominium is located; and (4) the identifying number of the unit. Tex. Prop. Code § 82.054. This requirement from the Texas Uniform Condominium Act (Texas Property Code chapter 82) applies to all condominiums. Tex. Prop. Code § 82.002(c).

Some pre-1994 condominium regimes describe apartments by reference to a unit number and building letter. *See* Tex. Prop. Code § 81.102(a)(2). It is suggested that condominiums operating under the prior Condominium

Act (Texas Property Code chapter 81) continue to include the building letter for description. As a practical matter, if condominiums recorded before January 1, 1994, use identifying numbers for apartments that are repeated in each of the buildings (for example, each building includes apartments 1 through 10), a reference to the building letter will be needed to distinguish between like-numbered apartments. See clause 5-8-13 in this chapter for an exception for use in a condominium deed and clause 5-9-3 for a condominium deed property description. See also chapter 24 in this manual for additional information on condominiums.

§ 5.15:4 **Townhouse and Planned Unit Development Properties**

The traditional townhouse project and planned unit developments (PUD) are similar in that both involve privately owned building sites with the common area owned by a separate association (usually a nonprofit corporation) whose members are the owners of the building sites. Easements are provided for access and utilities over the common area in both types of projects.

The description for a typical townhouse or lot within a PUD need not refer specifically to the common area if, as is customary, the common area is owned by the separate community association and ownership of the townhouses or lots in the PUD necessarily includes membership in the association and a pro rata ownership interest in the common area.

Deeds for either townhouses or PUD properties should except to the association restrictive covenants and the assessment lien. See clause 5-9-20 in this chapter for a property description and clause 5-9-21 for exceptions typical of a townhouse deed.

Townhouses generally involve building sites that are the outline or footprint of the separately owned townhouse unit's perimeter walls,

whereas PUDs usually involve one conventional city lot per unit, including a yard and other city lot features. Because townhouses are usually more limited in space, the concept of limited common area is popular for townhouses. Limited common area involves limited access areas, such as screened patios, that are part of the common area but that usually no other owners may trespass on.

§ 5.15:5 **Timeshare**

A 'timeshare estate' is an arrangement under which the purchaser receives the right to occupy a timeshare property and an estate interest in the real property. Tex. Prop. Code § 221.002(24). Once the timeshare plan is established, each timeshare interest may be separately conveyed or encumbered, and the title is recordable. Tex. Prop. Code § 221.012.

§ 5.15:6 **Manufactured Housing**

The Texas Department of Housing and Community Affairs (TDHCA) administers manufactured housing according to the Texas Manufactured Housing Standards Act. Tex. Occ. Code ch. 1201. Forms pertaining to manufactured housing can be obtained from the TDHCA. Regulations have been promulgated to administer and enforce the Act in title 10, chapter 80, of the Texas Administrative Code. Ownership of a manufactured home is evidenced by the filing of a statement of ownership and location issued by the TDHCA. Tex. Occ. Code §§ 1201.003(30)(A), 1201.205. At the sale or transfer of manufactured home, ownership does not pass or vest until a completed application for the issuance of a statement of ownership and location is filed with the TDHCA. Tex. Occ. Code § 1201.206(e).

A process exists that allows the owner of a manufactured home to elect to treat the home as real estate, making it a part of the real property. *See*

Tex. Occ. Code §§ 1201.2055, 1201.2075, 1201.222; Tex. Prop. Code § 2.001(b).

The Texas Certificate of Title Act (Tex. Transp. Code ch. 501) governs “house trailers. The Act does not contain a mechanism for converting house trailers to real estate by affixing them to the real estate. House trailers are generally defined as trailers designed for human habitation, and they are treated differently from manufactured housing. *See* Tex. Transp. Code § 501.002(9); Tex. Occ. Code § 1201.003(12), (18), (20).

If the owner of the manufactured home has elected to treat the home as real property, a certified copy of the statement of ownership and location must be recorded in the real property records of the county where the manufactured

home is located. Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b).

Texas statutes address when a manufactured home is personal property and when it is real property. *See* Tex. Occ. Code § 1201.222; Tex. Prop. Code § 2.001(b). Ordinarily, a manufactured home is personal property. However, if the statement of ownership and location issued by the TDHCA reflects that the owner had elected to treat the home as real property and a certified copy of the statement of ownership and location has been recorded in the real property records of the county where the home is located, the manufactured home will be real property. Property Code chapter 63 clarifies the status of a lien on a manufactured home when it converts to real property. *See* Tex. Prop. Code ch. 63.

Additional Resources

- Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2016.
- Boykin, Stephen A. "So You Don't Own the Minerals." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.
- . "Texas Oil and Gas Leasing: A Primer." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.
- Johnson, James N. "Modifying and Terminating Easements." In *Advanced Real Estate Drafting Course, 2008*. Austin: State Bar of Texas, 2008.
- Koppenheffer, Julie, and Grant Ellis. "Conservation Easements." In *Advanced Real Estate Law Course, 2008*. Austin: State Bar of Texas, 2008.
- Nickum, Ronald D. "The Role of Minerals in Real Estate Drafting: Ten Common Pitfalls Created by Mineral and Royalty Case Law." In *Advanced Real Estate Drafting Course, 2009*. Austin: State Bar of Texas, 2009.
- St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.
- Whelan, Thomas M. "Scattershooting While Wondering Whatever Happened at the Courthouse to Frequently Litigated Provisions in My Favorite Real Estate Sales Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.

[Reserved]

Form 5-1

General Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-2

Warranty Deed with Vendor's Lien

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

The vendor's lien against and superior title to the Property are retained until each note described is fully paid according to its terms, at which time this deed will become absolute.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-3

Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof when the claim is by, through, or under Grantor but not otherwise, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-4

Deed without Warranty

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Conveyance:

State "None" or, to create exceptions to conveyance, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever, without express or implied warranty. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded.

Include the following paragraph if applicable.

This conveyance is intended to include any property interests obtained by after-acquired title.

If the conveyance includes personal property, include clause 5-9-13, omitting the warranty in the first paragraph.

If appropriate, include additional clauses like those suggested in form 5-9.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-5

Quitclaim

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

For the Consideration, Grantor quitclaims to Grantee all of Grantor's right, title, and interest in and to the Property, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Neither Grantor nor Grantor's heirs, successors, or assigns will have, claim, or demand any right or title to the Property or any part of it.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the quitclaim imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-6

Consideration Clauses

Select only one consideration clause.

Assumption of First-Lien Note and Execution of Second-Lien Note to Grantor or Third Party

Clause 5-6-1

Use the following with the warranty deed with vendor's lien; also use clause 5-9-10 in this chapter if the second-lien note is payable to the grantor or clause 5-9-11 if the second-lien note is payable to a third party.

[Include if applicable: Cash and] Grantee's assumption and agreement to pay, according to the terms of the first-lien note, the unpaid principal and earned interest of [amount] DOLLARS (\$[amount]) with interest from [date] on the first-lien note, and a second-lien note of even date executed by Grantee. The first-lien note is dated [date], is executed by [name], and is payable to the order of [name] in the principal amount of [amount] DOLLARS (\$[amount]). The first-lien note is secured by the first and superior vendor's lien against, and superior title to, the Property retained in a deed dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. The first-lien note is also secured by a first-lien deed of trust of even date to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas. As further consideration Grantee promises to keep and perform all the covenants and obligations of the grantor[s] named in that deed of trust and to indemnify, defend, and hold Grantor harmless from any loss, attorney's fees, expenses, or claims attributable to breach or default of any provision of this assumption by Grantee. The second-lien note is payable to the order of [Grantor/[name of third party]] in the principal amount of

[amount] DOLLARS (\$[amount]). The second-lien note is secured by a second and inferior vendor's lien against, and superior title to, the Property retained in this deed [include if applicable: for the benefit of [name of third party]] and is also secured by a second-lien deed of trust of even date from Grantee to [name], trustee.

Assumption of Note Secured by Vendor's Lien and Deed of Trust

Clause 5-6-2

Use the following with clause 5-9-23.

[Include if applicable: Cash and] Grantee's assumption of and agreement to pay, according to the note's terms, the unpaid principal and earned interest of [amount] DOLLARS (\$[amount]) on the note in the original principal sum of [amount] DOLLARS (\$[amount]) dated [date], executed by [name], and payable to the order of [name]. The note is secured by an express vendor's lien and superior title retained in a deed dated [date], recorded in [recording data] of the real property records of [county] County, Texas, and additionally secured by a deed of trust dated [date], from [name] to [name], trustee, recorded in [recording data] of the real property records of [county] County, Texas. As further consideration Grantee promises to keep and perform all the covenants and obligations of the grantor[s] named in that deed of trust and to indemnify, defend, and hold Grantor harmless from any loss, attorney's fees, expenses, or claims attributable to a breach or default of any provision of this assumption by Grantee. Grantor assigns to Grantee any funds on deposit for payment of taxes and insurance premiums.

Capital Contribution

Clause 5-6-3

Use the following if the property is serving as a contribution to a legal entity.

[[**Number**] shares/[**describe other ownership interest**]] in [**name of legal entity**] [**include if applicable**: with a value of \$[**amount**]]. The Property is conveyed to Grantee for the purpose of contributing to the capital of [**name of entity**].

Cash

Clause 5-6-4

Cash and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

Or

Clause 5-6-5

[**amount**] DOLLARS (\$[**amount**]) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.

Or

Clause 5-6-6

[**amount**] DOLLARS (\$[**amount**]).

*Exchange of Property***Clause 5-6-7**

[Part cash and the/The] exchange of property, title to which is accepted by Grantor the same as if the consideration represented by the exchange were paid in cash. [Include if applicable: There is no lien, either expressed or implied, created by the exchange of property. Any such lien is waived and released by Grantor.]

*First-Lien Note to Third Party and Second-Lien Note to Grantor***Clause 5-6-8**

Use the following in the warranty deed with vendor's lien with clause 5-9-9.

[Cash and two/Two] notes of even date executed by Grantee and referred to as the first-lien note and the second-lien note. The first-lien note is payable to the order of [name of third party] in the principal amount of [amount] DOLLARS (\$[amount]). The first-lien note is secured by the first and superior vendor's lien against, and superior title to, the Property retained in this deed in favor of [name of third party] and is also secured by a first-lien deed of trust of even date from Grantee to [name], trustee. The second-lien note is payable to the order of Grantor in the principal amount of [amount] DOLLARS (\$[amount]). The second-lien note is secured by a second and inferior vendor's lien against, and superior title to, the Property retained in this deed and is also secured by a second-lien deed of trust of even date from Grantee to [name], trustee.

Gift

Clause 5-6-9

Love of, and affection for, Grantee.

Or

Clause 5-6-10

Grantor's intention to make a gift as a charitable contribution under applicable income tax laws and regulations.

Grantee's Separate Property

Clause 5-6-11

Cash and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, paid from Grantee's separate property.

Or

Clause 5-6-12

[describe consideration] and other good and valuable consideration paid from Grantee's separate property.

Note to Grantor or Third Party

Clause 5-6-13

Use the following in the warranty deed with vendor's lien; also use clause 5-9-8 if the note is executed in favor of a third party.

[Cash and a/A] note of even date executed by Grantee and payable to the order of [Grantor/[name of third party]] in the principal amount of [amount]

DOLLARS (\$[amount]). The note is secured by a first and superior vendor's lien and superior title retained in this deed [**include if applicable:** in favor of [name of third party]] and by a first-lien deed of trust of even date from Grantee to [name], trustee.

Wraparound Lien [Deed Subject to]

Clause 5-6-14

Use the following with clauses 5-8-51 and 5-9-26.

[Cash and a/A] wraparound note (“Wraparound Lien Debt”) of even date in the principal amount of [amount] DOLLARS (\$[amount]) executed by Grantee, payable to the order of Grantor. The note is secured by a vendor's lien retained in this deed and by a deed of trust of even date from Grantee to [name], trustee (collectively, the “Wraparound Lien”).

Form 5-7

If no reservations are to be made, as is most often the case, the word 'None' should be inserted in the deed; otherwise, use a specific reservation such as one of those set forth below.

Reservations from Conveyance

Easement

Clause 5-7-1

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of the free, uninterrupted, and perpetual use of, and a separate right to maintain, a nonexclusive easement over the passageway described in this paragraph and located on the Property. This easement is located [**describe, e.g.,** along the entire northern boundary of the Property as it exists at this time and is fifty feet in width].

Easement—Access

Clause 5-7-2

Include the following defined terms.

Dominant Estate Property (including any improvements):

Easement Property: [**Describe by metes and bounds the property serving as the easement, and include a drawing as an exhibit, if available.**]

Easement Purpose: To provide free and uninterrupted pedestrian and vehicular ingress and egress to and from the Dominant Estate Property, and portions thereof, to and from [**describe public thoroughfare**].

Clause 5-7-3

Include the following under reservations from conveyance.

For Grantor and Grantor's heirs, successors, and assigns, in common with Grantee and Grantee's heirs, successors, and assigns, a reservation of an easement over, on, and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property, and portions thereof, together with all and singular the rights and appurtenances thereto in any way belonging, in accordance with the terms and conditions set forth below.

Clause 5-7-4

Include the following at the end of the deed, immediately above the last paragraph, which states: "When the context requires, singular nouns and pronouns include the plural.

The following terms and conditions apply to the easement:

1. *Character of Easement.* The easement is appurtenant to and runs with the Dominant Estate Property and all portions of it, whether or not the easement is referenced in any conveyance of the Dominant Estate Property or any portion of it. The easement binds and inures to the benefit of Grantor and Grantee and their respective heirs, successors, and assigns.
2. *Duration of Easement.* The easement is [perpetual/[state limitation]].
3. *Exclusiveness of Easement.* The easement is nonexclusive, and Grantor reserves for Grantor and Grantor's heirs, successors, and assigns the right to convey the easement or other rights or easements to others.
4. *Secondary Easement.* In addition, the holder of the easement has the right to use as much of the surface of the property adjacent to the Easement

Property as may be reasonably necessary to construct and maintain a road reasonably suited for the Easement Purpose. However, the holder must promptly restore any adjacent property to its previous physical condition if changed by the use of the rights granted by this secondary easement.

5. *Maintenance.* Improvement and maintenance of the Easement Property will be at the sole expense of the holder of the easement. The holder has the right to eliminate any encroachments into the Easement Property. The holder of the easement will maintain the Easement Property in a neat and clean condition.

6. *Grantee's Rights.* Grantee and Grantee's heirs, successors, and assigns have the right to use the surface of the Easement Property for all purposes that do not unreasonably interfere with or interrupt the use of the easement.

7. *Indemnity by Easement Holder.* The holder of the easement agrees to indemnify, defend, and hold Grantee and Grantee's successors in interest harmless from any loss, attorney's fees, court and other costs, expenses, or claims attributable to breach or default of any provision of this easement by the holder.

Life Estate

Clause 5-7-5

For Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate.

*Life Estate with Power of Sale***Clause 5-7-6**

For Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate. Grantor retains complete power, without the joinder of any person, to mortgage, sell, and convey the Property and to spend any proceeds; to exchange it for other property; to lease the surface and subsurface of the Property; to execute and deliver oil, gas, and other mineral leases for any term of years and for a term based on the continuing production of oil, gas, or other minerals from the Property, ending either before or after Grantor's death; and to invest and reinvest all proceeds from the sale or other disposition of the Property. This life estate carries with it the right to possess and consume all bonuses, delay rentals, royalties, and other benefits payable on any mortgage, sale, or conveyance under oil, gas, and other mineral leases covering the Property at the inception of this life estate without any duty to the remainderman and without liability for waste.

*Life Estate with Right to Consume Corpus***Clause 5-7-7**

For Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, including the right to consume the corpus, whether by sale, conveyance, mortgage, mineral lease, or otherwise, without any duty to the remainderman and without liability for waste.

*Mineral Estate—Entirety***Clause 5-7-8**

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of all oil, gas, and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, this reservation includes the production, the lease, and all benefits from it.

*Mineral Estate—Fraction of Entirety***Clause 5-7-9**

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of an undivided [**fraction**] of all oil, gas, and other minerals in and under and that may be produced from the Property.

*Mineral Estate—Term Mineral Interest***Clause 5-7-10**

For Grantor and Grantor's heirs, successors, and assigns for the limited term described, a reservation of all oil, gas, and other minerals in and under and that may be produced from the Property [**include specific terms plus production tail, e.g., for a term of [number] years from this date, at which time this reservation will automatically terminate; except, however, if oil, gas, or other minerals are being produced from the Property at the end of the term of years, the term will extend for as long thereafter as oil, gas, or other minerals are being produced in paying quantities from the Property or land pooled with it**].

*Mineral Estate—Royalty***Clause 5-7-11**

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of an undivided [**fraction**] of the royalty under any any oil, gas, and mineral lease now or hereafter covering the Property or any portion of it; and the right to receive as a royalty an undivided [**fraction (ordinarily should not exceed one-fourth)**] [**include one of the following:** of all oil, gas, or other minerals now or hereafter produced from the Property without an oil, gas, or mineral lease/royalty on the oil, gas, and other minerals in and under and that may be produced from the Property].

*Mineral Estate—Prohibition against Exploration by Minerals' Owner***Clause 5-7-12**

As long as Grantor or Grantor's heirs, successors, and assigns own a fraction of the royalty that is severed from the ownership of the minerals, Grantee and Grantee's heirs, successors, and assigns are prohibited from exploring for, developing, or producing the oil, gas, and other minerals in and under, and that may be produced from, the Property; instead, these activities may be conducted only by a bona fide unrelated party, through a lease providing for a royalty equal to or greater than the customary royalty prevailing in the area at the time of the lease.

*Mineral Estate—Waiver of Surface Rights***Clause 5-7-13**

Grantor waives the right of ingress and egress to and from the surface of the Property relating to the portion of the mineral estate owned by Grantor.

Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by Grantor with land other than the Property; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that open on land other than the Property but enter or bottom under the Property, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Property.

*Mineral Estate—Waiver of Surface Rights; Reservation of Drill Site***Clause 5-7-14**

Include the following defined terms.

Drill Site:

Access Routes:

Include the following under reservations from conveyance.

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of a perpetual, exclusive easement in and to the free and uninterrupted use of the Drill Site to explore and produce the oil, gas, and other minerals in and under and that may be produced from the Property, together with access to and from the Drill Site over the Access Routes. Grantor waives the right to

explore and develop from the surface of the Property the portion of the mineral estate owned by Grantor, other than on or from the Drill Site.

Form 5-8

Exceptions to Conveyance and Warranty*Broad Exceptions***Clause 5-8-1**

Liens described as part of the Consideration and any other liens described in this deed as being either assumed or subject to which title is taken; validly existing easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing restrictions, reservations, covenants, conditions, oil and gas leases, mineral interests, and water interests outstanding in persons other than Grantor, and other instruments, other than conveyances of the surface fee estate, that affect the Property; validly existing rights of adjoining owners in any walls and fences situated on a common boundary; any discrepancies, conflicts, or shortages in area or boundary lines; any encroachments or overlapping of improvements; all rights, obligations, and other matters arising from and existing by reason of the [county] County [specify water improvement or other applicable governmental district, agency, authority, etc.]; and taxes for [current year], which Grantee assumes and agrees to pay [, and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes/but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Or

Clause 5-8-2

Liens described as part of the Consideration and any other liens described in this deed as being either assumed or subject to which title is taken; validly existing easements, rights-of-way, and prescriptive rights, whether of record or not; all presently recorded and validly existing instruments, other than conveyances of the surface fee estate, that affect the Property; and taxes for [current year], which Grantee assumes and agrees to pay [, and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes/but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Or

Clause 5-8-3

The following paragraph follows the exceptions called for by TREC no. 20-13 Rev. 11/15, "One to Four Family Residential Contract (Resale)", in conjunction with the title insurance forms, and it should be used when the contract for the transaction so provides. Always compare the contract and title insurance forms to confirm that changes have not been made since this clause was published.

Liens described as part of the Consideration and any other liens described in this deed as being either assumed by Grantee or subject to which title is taken by Grantee; validly existing restrictive covenants common to the platted subdivision in which the Property is located; standby fees, taxes, and assessments by any taxing authority for the year [**the first year for which taxes are not paid as part of the closing**] and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership; validly existing utility easements created by the dedication deed or plat of the subdivision in which the Property is located; [**describe**

validly existing reservations or exceptions approved in writing by the grantee and other matters waived by the grantee under the terms of the contract and described in schedule B of the owner policy of title insurance issued to the grantee as part of the transaction; if they are numerous or lengthy, reference to an exhibit is appropriate], recorded in [recording data] of the real property records of [county] County, Texas; any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements; homestead or community property or survivorship rights, if any, of any spouse of Grantee; and any validly existing titles or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to (1) tidelands or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs, or oceans, (2) lands beyond the line of the harbor or bulkhead lines as established or changed by any government, (3) filled-in lands or artificial islands, (4) water rights, including riparian rights, or (5) the area extending from the line of mean low tide to the line of vegetation or the right of access to that area or easement along and across that area.

Specific Exceptions

To create specific exceptions, include each of the following that applies. This is typically done with an introductory phrase such as "To the extent they validly exist: followed by numbered paragraphs.

Abstract of Judgment

Clause 5-8-4

Abstract of judgment dated [date], styled "[style of judgment]," filed for record, recorded in [recording data] of the real property records of [county]

County, Texas, in the amount of \$[amount], plus costs, interest, and attorney's fees.

Access Restrictions on Subdivision Plat

Clause 5-8-5

Limited, restricted, or nonaccess restrictions as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

Access Unavailable

Clause 5-8-6

Failure of the Property to have rights of ingress to and egress from a public thoroughfare.

Or

Clause 5-8-7

Failure of the Property to have the right of access to [specify thoroughfare].

Accretion

Clause 5-8-8

The rights of adjoining land owners in and to that part of the Property that may constitute accretion.

Areas and Boundaries

Clause 5-8-9

Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions or any overlapping of improvements.

Assignment of Lien

Clause 5-8-10

The note and deed of trust assigned to [name] by assignment of lien dated [date], recorded in [recording data] of the real property records of [county] County, Texas.

Building Setback Line

Clause 5-8-11

Building setback line [number] feet wide along [describe] property line as shown on [include if applicable: subdivision] plat recorded in [recording data] of the real property records of [county] County, Texas.

Cemetery

Clause 5-8-12

The dedication of a portion of the Property to and for use as a cemetery; the easements, privileges, and licenses existing in plot owners and their relatives in and to the cemetery portion, including the rights of burial, upkeep, ornamentation, and visitation; and the regulations and rules as established and amended by all cemetery owners covering the cemetery portion.

Implied easement for ingress and egress across the Property to and from the cemetery tract.

Condominiums

Clause 5-8-13

See also clause 5-8-31.

Terms, conditions, covenants, options, restrictions, bylaws, and easements contained in the declaration of condominium and bylaws executed by [name], dated [date], recorded in [recording data] of the real property records of [county] County, Texas, as the same have been amended, supplemented, and restated in the real property records of [county] County, Texas.

Contract for Deed

Clause 5-8-14

Terms of [include if applicable: unrecorded] contract for deed between [name] and [name], dated [date] [include if applicable: , recorded in [recording data] of the real property records of [county] County, Texas].

Cotenant Rights

Clause 5-8-15

Rights and claims of and against any and all cotenants in the Property such as partition, owelty, and contribution.

*Deed of Trust***Clause 5-8-16**

Deed of trust dated **[date]**, executed by **[name]** to **[name]**, trustee, recorded in **[recording data]** of the real property records of **[county]** County, Texas, securing the payment of a note of even date in the principal amount of **[\$amount]**.

*Deed of Trust to Secure Assumption***Clause 5-8-17**

Deed of trust to secure assumption dated **[date]**, executed by **[name]** to **[name]**, trustee, recorded in **[recording data]** of the real property records of **[county]** County, Texas, securing the assumption of the **[\$amount]** note described in the deed of trust recorded in **[recording data]** of the real property records of **[county]** County, Texas.

*Easement—Aerial***Clause 5-8-18**

An unobstructed aerial easement **[number]** feet wide from a plane **[number]** feet above the ground upward, along the property line[s], shown on subdivision plat recorded in **[recording data]** of the real property records of **[county]** County, Texas.

*Easement—Common Area Utility***Clause 5-8-19**

Easements affecting common areas for utility [**include if applicable:** or other] purposes such as public utilities and drainage, as shown on subdivision plat recorded in [**recording data**] of the real property records of [**county**] County, Texas.

*Easement—Flood Control***Clause 5-8-20**

[**County**] County flood control drainage easement, as shown on subdivision plat recorded in [**recording data**] of the real property records of [**county**] County, Texas.

*Easement—Pipeline***Clause 5-8-21**

Pipeline easement granted [across a specified area/as a blanket easement] to [**name**], executed by [**name**], in instrument dated [**date**], recorded in [**recording data**] of the real property records of [**county**] County, Texas.

*Easement—Reciprocal***Clause 5-8-22**

Reciprocal easement for [**specify**] in instrument dated [**date**] and recorded in [**recording data**] of the real property records of [**county**] County, Texas.

Easement—Specific

Clause 5-8-23

[Type] easement to [name], dated [date], executed by [name], recorded in [recording data] of the real property records of [county] County, Texas.

Easement—Zero Lot Line on Subdivision Plat

Clause 5-8-24

Easement [number] feet wide along side lot line[s] for encroachments caused by settling and overhang of adjacent structures and for construction, maintenance, and repair, as shown on subdivision plat recorded in [recording data] of the real property records of [county] County, Texas.

Easements—Unrecorded

Clause 5-8-25

Visible and apparent easements on or across the Property.

Electric Service Agreements

Clause 5-8-26

[Name of authority] agreement for underground extension of electrical service dated [date], recorded in [recording data] of the real property records of [county] County, Texas.

*Financing Statement (County Records)***Clause 5-8-27**

UCC1 financing statement executed by [name], debtor, to [name], secured party, recorded in [recording data] of the [specify] records of [county] County, Texas, on [date].

*General Restrictions***Clause 5-8-28**

Restrictions recorded in [recording data] of the real property records of [county] County, Texas.

*Lease Agreement***Clause 5-8-29**

[Unrecorded lease/Lease] agreement between [name], as lessor, and [name], as lessee, dated [date] [include if applicable: , recorded in [recording data] of the real property records of [county] County, Texas] [include if applicable: and assigned to [name] by instrument dated [date], recorded in [recording data] of the real property records of [county] County, Texas].

*Loan Modification***Clause 5-8-30**

The note and deed of trust modified by a modification agreement dated [date], executed by [name], owner, and [name], lender, recorded in [recording data] of the real property records of [county] County, Texas.

*Maintenance Assessment Exception (Property Owners Association)***Clause 5-8-31**

See also clause 5-8-13.

[Annual assessments/Current maintenance charges] for the year [year] and subsequent years not yet due and payable, secured by an inchoate lien, as set forth in the instrument dated [date] and recorded in [recording data] of the real property records of [county] County, Texas.

*Mechanic's Lien by Affidavit***Clause 5-8-32**

Claim of mechanic's lien by affidavit dated [date], executed by [name], recorded in [recording data] of the real property records of [county] County, Texas, claiming a lien in the amount of \$[amount].

*Mechanic's Lien Contract with Deed-of-Trust Provision***Clause 5-8-33**

Mechanic's lien contract dated [date], executed by [name] to [name], securing [name], payee, in the payment of one note of even date in the original principal amount of \$[amount], with a deed of trust to [name], trustee, incorporated therein, and assigned to [name] by assignment incorporated therein, recorded in [recording data] of the real property records of [county] County, Texas.

*Mineral Estate or Royalty Conveyed or Reserved***Clause 5-8-34**

A [mineral estate/right to royalty], together with all related rights, express or implied, as described in instrument executed by [name] to [name], dated [date], recorded in [recording data] of the real property records of [county] County, Texas [include if applicable: , as modified by waiver of surface rights in instrument dated [date], executed by [name], and recorded in [recording data] of the real property records of [county] County, Texas].

*Mineral Lease***Clause 5-8-35**

Oil, gas, or mineral lease dated [date], between [name] and [name], recorded in [recording data] of the real property records of [county] County, Texas.

*Mineral Reservation by Predecessor***Clause 5-8-36**

Reservation by [name] of the subsurface mineral estate, including oil, gas, and other minerals in and under the Property, including all easements owned or held by any lessee or mineral owner on, over, or across the Property for the purpose of producing or transporting any of the minerals together with the right of ingress and egress, in a deed recorded in [recording data] of the real property records of [county] County, Texas.

*Notice of Assessment***Clause 5-8-37**

Notice of assessment by [city of [city]/[county] County, Texas,] for [purpose] in the amount of \$[amount], and related charges, dated [date], recorded in [recording data] of the real property records of [county] County, Texas.

*Party Wall***Clause 5-8-38**

Party wall agreement dated [date] between [name] and [name], recorded in [recording data] of the real property records of [county] County, Texas.

*Property Encumbered by Lien Securing Note That Grantee Does Not Assume***Clause 5-8-39**

A lien securing a promissory note in the original principal amount of [amount] DOLLARS (\$[amount]), described in and secured by a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. Grantee does not assume payment of the note or liability under any instrument securing the note.

*Reinstatement of Accelerated Loan***Clause 5-8-40**

The note and deed of trust reinstated by reinstatement agreement dated [date], executed by [name], owner, and [name], lender, recorded in [recording data] of the real property records of [county] County, Texas.

*Riparian Rights***Clause 5-8-41**

Any title or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to any portions of the Property that may be within the bed of [specify].

*River Exception***Clause 5-8-42**

Past and future action of the [name of river] by means of accretion, erosion, or avulsion.

*Roadway***Clause 5-8-43**

Any portion of the Property within the limits or boundaries of any public or private roadway or highway.

*Taxes***Clause 5-8-44**

Standby fees, taxes, and assessments by any taxing authority for the year [year] and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership.

Or

Clause 5-8-45

Taxes for [current year], which Grantee assumes and agrees to pay, [and subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantee assumes/but not subsequent assessments for that and prior years due to change in land usage, ownership, or both, the payment of which Grantor assumes].

Tax Lien—Federal

Clause 5-8-46

Federal tax lien against [name], recorded in [recording data] of the real property records of [county] County, Texas, in the amount of \$[amount], plus penalty and interest.

Tax Lien—State

Clause 5-8-47

State tax lien against [name], recorded in [recording data] of the real property records of [county] County, Texas, in the amount of \$[amount], plus penalty and interest.

Tenant Possession Rights

Clause 5-8-48

Rights of tenants in possession under unrecorded leases.

*Tidelands***Clause 5-8-49**

Any titles or rights asserted by anyone, including but not limited to persons, the public, corporations, governments, or other entities, to (1) tidelands or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs, or oceans, (2) lands beyond the line of the harbor or bulkhead lines as established or changed by any government, (3) filled-in lands or artificial islands, (4) water rights, including riparian rights, or (5) the area extending from the line of mean low tide to the line of vegetation or the right of access to that area or easement along and across that area.

*Title Insurance Concurrent Exceptions***Clause 5-8-50**

Use the following clause to avoid warranty liability that is not covered by the owner policy of title insurance issued to the grantee.

Any law, ordinance, or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting, or relating to—

1. the occupancy, use, or enjoyment of the Property;
2. the character, dimensions, or location of any improvement now or hereafter erected on the Property;
3. a separation in ownership or a change in the dimensions or area of the Property or any parcel of which the Property is or was a part; or

4. environmental protection or the effect of any violation of these laws, ordinances, or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the Property has been recorded in the public records on or before this date.

Any governmental police power, except to the extent that a notice of the exercise thereof or a notice of defect, lien, or encumbrance resulting from a violation or alleged violation affecting the Property has been recorded in the public records on or before this date.

Rights of eminent domain unless notice of its exercise has been recorded in the public records on or before this date, but not excluding any taking that has occurred before this date that would be binding on the rights of a purchaser for value without knowledge.

The refusal of any person to purchase, lease, or lend money on the estate or property interest conveyed by this deed because of unmarketability of title.

Any claim that arises out of the transaction vesting in Grantee the estate or interest conveyed by this deed, by reason of the operation of federal bankruptcy, state insolvency, or other state or federal creditors' rights laws that is based on either (1) the transaction creating the estate or interest conveyed by this deed being deemed a fraudulent conveyance or fraudulent transfer or a voidable distribution or voidable dividend, (2) the subordination or recharacterization of the estate or interest conveyed by this deed as a result of the application of the doctrine of equitable subordination, or (3) the transaction creating the estate or property interest conveyed by this deed being deemed a preferential transfer.

*Vendor's Lien and Deed of Trust***Clause 5-8-51**

Vendor's lien and superior title retained in deed dated **[date]**, executed by **[name]** to **[name]**, recorded in **[recording data]** of the real property records of **[county]** County, Texas, securing the payment of a note of even date in the principal amount of **[\$amount]**, additionally secured by a deed of trust of even date to **[name]**, trustee, recorded in **[recording data]** of the real property records of **[county]** County, Texas.

Form 5-9

Additional Clauses for Deeds

*As Is Conveyance***Clause 5-9-1**

GRANTEE IS TAKING THE PROPERTY IN AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE CONSIDERATION WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS OR EXPRESS OR IMPLIED WARRANTIES [include if applicable: , EXCEPT THOSE CONTAINED IN THE PURCHASE CONTRACT, THIS DEED, AND THE OTHER CLOSING DOCUMENTS]. GRANTEE HAS NOT RELIED ON ANY INFORMATION OTHER THAN GRANTEE'S INSPECTION [include if applicable: AND THE REPRESENTATIONS AND WARRANTIES EXPRESSLY CONTAINED IN THE PURCHASE CONTRACT, THIS DEED, AND THE OTHER CLOSING DOCUMENTS].

Include the following if the grantor retains no liability for environmental matters after conveyance.

GRANTEE RELEASES GRANTOR FROM LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY (1) UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, AND THE TEXAS WATER CODE; OR (2) ARISING AS THE RESULT OF THEORIES OF PRODUCT

LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE OF THE PURCHASE CONTRACT THAT WOULD OTHERWISE IMPOSE ON GRANTORS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY **[Include if applicable: THIS RELEASE APPLIES EVEN WHEN THE ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY RESULT FROM GRANTOR'S OWN NEGLIGENCE OR THE NEGLIGENCE OF GRANTOR'S REPRESENTATIVE.]**

Assumption of Liability for VA-Guaranteed Loans

Clause 5-9-2

As part of the Consideration for this conveyance Grantee herein expressly assumes and agrees to pay the balance owing on the promissory note dated **[date]**, in the original principal amount of **[\$[amount]]**, secured by and fully described in the deed of trust of the same date recorded in **[recording data]** of the real property records of **[county]** County, Texas. Grantee hereby agrees to assume all of the obligations of **[name of the veteran and spouse if applicable]** under the terms of the instruments creating that loan. Grantee further agrees to indemnify the Department of Veterans Affairs to the extent of any claim payment arising from the guaranty or insurance of the indebtedness created by such instruments. This agreement of assumption is evidenced by Grantee's acceptance of this deed.

*Condominium Deed—Property Description***Clause 5-9-3**

Unit [identifying number] [include if applicable: building [building letter]], [name of condominium], a condominium regime located in [county] County, Texas, according to the [title of declaration], including any amendments, plats, and plans, dated [date], recorded [recording data for declaration, including any amendments, plats, and plans] (collectively, the “Declaration”), together with the appurtenant common elements described in the Declaration.

Clause 5-9-4 *reserved**Correction Deed—New Document***Clause 5-9-5**

An instrument correcting a material error should comply with the requirements of Tex. Prop. Code § 5.029. The correction instrument can be a restatement of the deed titled “Correction Instrument, and the instrument must be executed by each party to the deed or, if applicable, the parties’ heirs, successors, or assigns. The following paragraph should be included at the end of the restated text from the deed.

This deed is made as a correction deed in substitution of the deed titled “[title of original deed]” (“Corrected Deed”) dated [date] and recorded in [recording data] of the real property records of [county] County, Texas, to correct the following incorrect information: [state the incorrect information and the correction[s], e.g., the legal description incorrectly stated the acreage as “32 acres,” when it should have stated the acreage as “23 acres”]. Other than the stated correction, this deed is intended to restate in all respects the Corrected Deed, and the effective date of this correction deed relates back to the effective date of the Corrected Deed.

*Fee Simple Determinable***Clause 5-9-6**

Include the following defined term.

Fee Simple Determinable Condition: [**State the condition that will prevent reversion, e.g.**, The Property will be used as a motel with between fifty and one hundred separate operating motel rooms for a minimum of five years from the date of conveyance. An affidavit stating that the condition has been fulfilled, filed during the first six months of the sixth year, if not contradicted by a recorded statement filed within the same six months, is conclusive evidence that the condition has been satisfied, and Grantee and third parties may rely on it.]

Clause 5-9-7

Include the following provision with the granting provision of the deed in place of the word "forever."

for as long as the Fee Simple Determinable Condition is satisfied, and if the Fee Simple Determinable Condition is not satisfied, the Property will automatically revert to and be owned by Grantor without the necessity of any further act on the part of Grantor, it being Grantor's intent to convey a fee simple determinable estate to Grantee.

*For Use with Warranty Deed with Vendor's Lien***Clause 5-9-8**

Use the following with clause 5-6-13 in this chapter if the payee is a third party.

[**Name of third party**], at Grantee's request, has paid in cash to Grantor that portion of the purchase price of the Property that is evidenced by the note. The first and superior vendor's lien against and superior title to the Property

are retained for the benefit of [**name of third party**] and are transferred to [**name of third party**] without recourse against Grantor.

Clause 5-9-9

Use the following with clause 5-6-8.

[**Name of third party**], at Grantee's request, has paid in cash to Grantor that portion of the purchase price of the Property that is evidenced by the first-lien note. The first and superior vendor's lien against and superior title to the Property are retained for the benefit of [**name of third party**] and are transferred to [**name of third party**] without recourse on Grantor to secure the first-lien note. The second and inferior vendor's lien against and superior title to the Property are retained for the benefit of Grantor to secure the second-lien note. Grantor agrees that this second and inferior vendor's lien against and superior title to the Property are and will remain subordinate and inferior to all liens securing the first-lien note, regardless of the frequency or manner of renewal, extension, or alteration of any part of the first-lien note or the liens securing it.

Clause 5-9-10

Use the following with clause 5-6-1 if the second-lien note is payable to the grantor.

The second and inferior vendor's lien against and superior title to the Property are retained for the benefit of Grantor to secure both Grantee's assumption of the first-lien note and payment of the second-lien note to Grantor. Grantee's assumption of the first-lien note is also secured by a deed of trust to secure assumption of even date, from Grantee to [**name**], trustee. If Grantee defaults in payment of the assumed note or the second-lien note or in observance of any covenant or condition of any instrument securing their pay-

ment, Grantor will have the right to foreclose the vendor's lien reserved in this deed. Grantor assigns to Grantee all funds on deposit for payment of taxes and insurance premiums.

Clause 5-9-11

Use the following with clause 5-6-1 if the second-lien note is payable to a third party.

The first and superior vendor's lien against and superior title to the Property are retained in this deed for the benefit of the holders of the first-lien note and the second-lien note, to secure both Grantee's assumption of the first-lien note and payment of the second-lien note. Grantee's assumption of the first-lien note is also secured by a deed of trust to secure assumption of even date, from Grantee to **[name]**, trustee. The inferior vendor's lien is transferred to **[name of third party]** without recourse on Grantor. If Grantee defaults in payment of the assumed note or the second-lien note or in observance of any covenant or condition of any instrument securing their payment, both Grantor and **[name of third party]** will have the independent right to foreclose the vendor's lien. However, as between the two parties holding the vendor's lien retained in this deed, the rights, title, and interest of **[name of third party]** are subordinate to the rights, title, and interest of Grantor. Cancellation of the assumed note and release of the liens securing it will release the liens securing the assumption, including the vendor's lien and deed of trust to secure assumption, without specific reference to them or the joinder of Grantor. Grantor assigns to Grantee all funds on deposit for payment of taxes and insurance premiums.

*Personal Property***Clause 5-9-12**

Include the following defined term.

Personal Property: The property constituting personal property located in or on and used in the enjoyment of the Property [**include if applicable:** , including the items identified on the attached Personal Property Schedule, incorporated in this deed by reference].

Clause 5-9-13

Include the following paragraph after the granting, habendum, and warranty clauses.

For the same Consideration, Grantor sells, transfers, and delivers the Personal Property to Grantee and warrants and agrees to defend title to the Personal Property to Grantee and Grantee's successors and assigns against all lawful claims. Title in the Personal Property passes at the time this deed is delivered.

Include the following if applicable.

THE PERSONAL PROPERTY TRANSFERRED TO GRANTEE IS SOLD, TRANSFERRED, AND DELIVERED "AS IS" AND "WITH ALL FAULTS"; FURTHER, GRANTOR EXCLUDES ALL WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

*Restrictive Covenants***Clause 5-9-14**

Include the following defined terms.

Affected Property Owners: [e.g., All the owners of land in the Ranchette Estates Subdivision, as shown by plat recorded in [recording data] of the real property records of [county] County, Texas.]

Restrictions: [State enumerated restrictions.]

Clause 5-9-15

Include the following paragraph after the granting, habendum, and warranty clauses.

Grantor, as the fee simple owner of the Property, establishes the Restrictions as covenants, conditions, and restrictions, whether mandatory, prohibitive, permissive, or administrative, to regulate the structural integrity, appearance, and uses of the Property and the improvements placed on it. Grantor and Grantee stipulate that (1) the Restrictions touch and concern the Property; (2) privity of estate exists by reason of the ownership of the Property; (3) notice is given by filing this instrument in the real property records of the county in which the Property is situated; and (4) the Restrictions are reasonable, their purposes being for the common benefit of Grantor, Grantee, and the Affected Property Owners, who are affected by the structural integrity, appearance, and uses of the Property. The Restrictions run with the land making up the Property, are binding on Grantee and Grantee's successors and assigns forever, and inure to the benefit of Grantor, Grantee, Affected Property Owners, and their successors and assigns forever.

Separate Property

Clause 5-9-16

Grantor grants and conveys the Property to Grantee as separate property.

*Strips and Gores***Clause 5-9-17**

Grantor, for the same Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance [**include if applicable:** and Warranty], grants, sells, and conveys to Grantee, without express or implied warranty, the strips or gores, if any, between the Property and abutting properties and land lying in or under any public thoroughfare, opened or proposed, abutting or adjacent to the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. All warranties that might arise by common law as well as the warranties in section 5.023 of the Texas Property Code (or its successor) are excluded as to the property conveyed by this paragraph.

*Timber Deed—Property Description***Clause 5-9-18**

Easement for the purpose of cutting and removing timber from the Property created by easement agreement dated [**date**], between [**name**] and [**name**], recorded in [**recording data**] of the real property records of [**county**] County, Texas.

*Townhouse Deed***Clause 5-9-19**

Include the following defined term.

Building Site:

Clause 5-9-20

The common area is typically described as all lots in the subdivision, "SAVE AND EXCEPT the building sites within the lots. The following paragraph is an example of a legal description for a townhouse.

Building Site number [**identifying number**] in lot [**number**], block [**number**], [**subdivision name**], a subdivision recorded in volume [**number**], page [**number**], Map Records, [**county**] County, Texas, together with the easements, undivided interest in common area, and other rights, title, and interest that are appurtenant to ownership of the townhouse Property under the terms of the [**describe declaration**], as amended from time to time [**include if applicable**], and the plat of the subdivision].

Clause 5-9-21

Include the following with the exceptions section of the deed.

1. The rights of other townhouse owners within the common building of which this townhouse is a part, including reasonable rights of access for maintenance and repair in and to all structural elements that comprise any part of the overall structural unit of the building and all utility lines and facilities that comprise any part of the utility service to the entire building.
2. The rights given to, and obligations imposed on, each Building Site owner under the terms of the [**describe declaration**], as amended from time to time, such as assessments for maintenance of the common area secured by an inchoate lien against the townhouses, all of which are covenants running with the land and binding on any townhouse owner.

*Transfer of Escrow and Insurance Policy***Clause 5-9-22**

Include the following to incorporate the transfer of escrow in the deed.

Grantor assigns to Grantee all funds held in escrow for payment of taxes and insurance premiums. If the casualty insurance policy is to be assigned to Grantee, the transfer will be handled by separate instrument.

*Vendor's Lien and Deed of Trust to Secure Assumption***Clause 5-9-23**

Use the following with clause 5-6-2.

The first and superior vendor's lien against and superior title to the Property are retained in this deed to secure Grantee's assumption of the note. Grantee's assumption of the note is also secured by a deed of trust to secure assumption of even date, from Grantee to [name], trustee. If default occurs in payment of the assumed note or in observance of any covenant or condition of any instrument securing the assumed note, Grantor and the holder of the assumed note each have the independent right to foreclose the vendor's lien. However, as between the two holders of the vendor's lien, Grantor's rights, title, and interest are subordinate to the rights, title, and interest of the holder of the assumed note. Cancellation of the assumed note and release of the liens securing it will release the liens securing the assumption, including the vendor's lien and deed of trust to secure assumption, without specific reference to them or the joinder of Grantor.

*Waiver of Implied Liens***Clause 5-9-24**

Grantor has been paid in full for [**describe property, e.g.**, Parcel One], and any lien, expressed or implied, in favor of Grantor against [**describe property, e.g.**, Parcel One] is waived. Grantor's liens are against [**describe property, e.g.**, Parcel Two] only.

Or

Clause 5-9-25

Grantor waives any expressed or implied lien on [**describe property, e.g.**, Parcel One] arising by reason of Grantee's assumption of the note in the original principal amount of [**amount**] DOLLARS (\$[**amount**]).

*Wraparound Lien [Deed Subject to]***Clause 5-9-26**

Use the following with clauses 5-6-14 and 5-8-51.

This conveyance is made subject to the prior lien ("Underlying Lien") of a deed of trust recorded in [**recording data**] of the real property records of [**county**] County, Texas, to [**name**], trustee, which secures payment of a promissory note ("Underlying Lien Debt") in the principal amount of [**amount**] DOLLARS (\$[**amount**]). Grantee in this deed does not assume payment of that Underlying Lien Debt. As further consideration Grantor promises to keep and perform all the covenants and obligations of the grantor named in the Underlying Lien deed of trust and to indemnify, defend, and hold Grantee harmless against any damages caused by Grantor's breach of its obligations under the

Underlying Lien Debt and related documents, as long as Grantee is not in default on the Wraparound Lien Debt and documents relating to it.

[Reserved]

Form 5-10

Grantee's Acceptance of Deed

[Name], Grantee, accepts the attached deed and consents to its form and substance. Grantee acknowledges that the terms of the deed conform with Grantee's intent and that they will control in the event of any conflict with the contract Grantee signed regarding the Property described in the deed.

Include the following for an assumption transaction.

Grantee agrees to the obligations imposed on Grantee by the terms of the deed.

Continue with the following.

[Name of grantee]

Date:

[Reserved]

Form 5-11

The owely lien created in this form is against the entire property, including the share owned by the grantee before the partition.

Owely of Partition Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration: [Cash and a/A] note of even date executed by Grantee and payable to the order of [name of third party or grantor] in the principal amount of [amount] DOLLARS (\$[amount]). The note is secured by a first and superior vendor's lien, an owely lien, and superior title retained in this deed in favor of [name of third party or grantor] and by a first-lien deed of trust of even date from Grantee to [name], trustee.

Property (including any improvements): [Describe the entire property being partitioned.]

Property Portion Conveyed (including any improvements): [Describe the property being conveyed by this deed.]

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7 in this chapter.

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

The vendor's lien and owelty lien against, and superior title to, the Property are retained until the note described is fully paid according to its terms, at which time this deed becomes absolute.

Include the following if applicable.

[Name of third party], at Grantee's request, has paid in cash to Grantor that portion of the purchase price of the Property Portion Conveyed that is evidenced by the note described. The vendor's lien, owelty lien, and superior title to the Property are retained for the benefit of, and are transferred to, [name of third party] without recourse on Grantor.

Continue with the following.

Owely Recitals

For transactions as a consequence of divorce, choose the first alternative paragraph below. For transactions based on a separate agreement between the parties, choose the second alternative paragraph.

First. A divorce was granted terminating the marriage between Grantor and Grantee by divorce decree dated [date], rendered in Cause No. [number] in the [designation] Court of [county] County, Texas. An order partitioning the Property was entered [date] in the same cause and Court.

Or

First. Grantor and Grantee have agreed to the transfer of ownership and owely of partition effected by this deed by separate Owely of Partition Agreement dated [date], between Grantor and Grantee, as cotenants of the Property.

Continue with the following.

Second. Grantor and Grantee, owning the Property as tenants in common, desire to effect a partition of the Property in order that Grantee own 100 percent of the Property in fee simple. [Include if applicable: Grantee has arranged to borrow the amount of \$[amount] from [name of lender] ("Lender"), in order to acquire the Property Portion Conveyed in fee simple. Lender is willing to advance that amount provided that the indebtedness is secured by a first and superior vendor's lien, owely lien, superior title, and a deed-of-trust lien, all on the full fee simple title in and to 100 percent of the Property.]

Third. The Property is not susceptible to partition in kind and, for Grantee to acquire the full fee simple title in and to the Property Portion Conveyed, it is necessary to fix a lien on the entirety of the Property in the amount of \$[amount]. The lien represents an owely of partition and the necessary adjustment between the parties to carry out the purposes of the partition. Grantee acknowledges that the vendor's lien, owely lien or owely of partition, and

superior title are superior to Grantee's rights to use and occupy the Property as Grantee's homestead or otherwise as fully and completely as if the liens or owely of partition were fixed and judicially decreed in a partition suit between Grantor and Grantee.

Grantee joins in the execution of this deed and binds Grantee's heirs, successors, and assigns in acceptance of the delivery of the deed. Grantee stipulates to [Grantor and Grantor's/ Lender and Grantor and each of their respective] heirs, successors, and assigns the following: (1) the truth and correctness of the Recitals and the validity of the vendor's lien, owely lien, superior title, and deed-of-trust lien securing the payment of the indebtedness, on the entirety of the full fee simple title to the Property; (2) the vendor's lien, owely lien, superior title, and deed-of-trust lien are prior and superior to any right of use, occupancy, and homestead that Grantee may have or claim in and to the Property; [and] (3) the whole fee simple title to the Property is vested in Grantee under this deed [**include if applicable:** , and (4) Lender has advanced funds to Grantee in reliance on the stipulations and representations made and the facts stated in this deed].

[Name of grantor]

[Name of grantee]

Include acknowledgments.

Form 5-12

This form may be used with the owely of partition deed in fixing a lien on homestead property if appropriate under Tex. Prop. Code § 41.001(b)(4).

Owely of Partition Agreement

Date:

Selling Cotenant: [include address]

Purchasing Cotenant: [include address]

Property:

Consideration: Cash and the mutual covenants and agreements between the parties, the receipt and sufficiency of which are acknowledged and stipulated.

Selling Cotenant and Purchasing Cotenant are the owners, as tenants in common, of the Property. By this agreement, Selling Cotenant and Purchasing Cotenant (collectively, the "Parties") evidence an owely of partition by written agreement, including the creation of a debt of the Purchasing Cotenant in favor of the Selling Cotenant [include if applicable: as the result of the division or award of a family homestead in a divorce proceeding].

The Parties stipulate that the Property is not susceptible to partition in kind and, for Purchasing Cotenant to acquire the full fee simple title in the Property, it is necessary to fix a lien on the entirety of the Property in the amount of \$[amount].

To effectuate this agreement, Selling Cotenant will execute an owely of partition deed to Purchasing Cotenant in which a vendor's lien and owely lien in the above amount are reserved, and Purchasing Cotenant will execute a promissory note in the above amount

secured by a vendor's lien, superior title, an owelty lien, and a deed-of-trust lien describing the entirety of the Property.

[Name of selling cotenant]

[Name of purchasing cotenant]

Include acknowledgments.

Form 5-13

Deed in Lieu of Foreclosure

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor:

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Note:

Deed of Trust:

Consideration: [amount] DOLLARS (\$[amount]), the receipt and sufficiency of which are hereby acknowledged, and further the release of Grantor from all liability for the indebtedness and obligations under the Note and Deed of Trust, except that no release is given of any liens or warranties of title and further except that the indebtedness under the Note is not canceled or extinguished.

Property (including any improvements):

Exceptions to Conveyance and Warranty: The liens described in this deed and the exceptions to conveyance and warranty in the Deed of Trust.

Grantor, for the Consideration and subject to the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Exceptions to Conveyance and Warranty.

Conveyance in Lieu of Foreclosure

This deed and the conveyances being made are executed, delivered, and accepted in lieu of foreclosure and will be interpreted and construed the same as a foreclosure of the liens and as an absolute conveyance to Grantee of all right, title, and interest in and to the Property, including specifically but without limitation any equity or rights of redemption of Grantor in or to the Property.

Continuing Nature of Lien

Notwithstanding the release of Grantor from all liability for the indebtedness and obligations under the Note and Deed of Trust, the indebtedness has not been canceled or extinguished and the Property continues to be subject to the performance of the obligations under the Deed of Trust. The Deed of Trust lien is not released or relinquished in any manner, and the indebtedness, obligations, and lien will remain valid and continuous and in full force and effect, unless and until the indebtedness, obligations, and liens are expressly released by written instrument executed and delivered by the holder thereof, at the holder's sole discretion.

Nonmerger

Neither Grantor nor Grantee intend that there be, and there will never be, a merger of the Deed of Trust lien with the fee simple title or any other interest of Grantee in the Property by virtue of this conveyance, and the parties expressly provide that any interest in the Deed of Trust lien and fee simple title will be and remain at all times separate and distinct.

[Name of grantor]

[Name of grantee]

Include acknowledgments.

[Reserved]

Form 5-14

[Administration/Guardianship] Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor: The estate of [name of deceased or ward], [deceased/an incapacitated person].

Grantor's Mailing Address:

Grantee:

Grantee's Mailing Address:

Consideration:

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12 in this chapter.

Reservations from Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7.

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

By an order of the [designation] Court of [county] County, Texas, made on [date], directing the sale of the Property belonging to Grantor, which estate was then and is now pending in that court, I, [name], [executor/guardian] of the estate of [name of deceased or

ward], [deceased/an incapacitated person], sold on [date], by private sale in [city], [county] County, Texas, the Property to Grantee for the Consideration.

The report of the sale was filed on [date] and made to the Court, and the sale was confirmed by the decree of the Court by its Order Confirming Sale of Real Property, which is attached and incorporated herein by reference as Exhibit A.

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee's heirs, successors, and assigns forever. Grantor binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

If the conveyance includes personal property, include clause 5-9-13.

If appropriate, include additional clauses like those suggested in form 5-9.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

If the deed imposes contractual obligations on the grantee, include the following signature line.

[Name of grantee]

Include acknowledgments.

Form 5-15

Blanket Bill of Sale

Date:

Seller:

Seller's Mailing Address:

Buyer:

Buyer's Mailing Address:

Real Property (including improvements):

Transferred Properties:

All items of personal property, both tangible and intangible (excluding cash), affixed or attached to, or placed or situated on, or used or acquired in any way whatever in connection with the completion and comfortable use, enjoyment, occupancy, or operation of the Real Property, including, without limitation, the following:

1. All equipment, furniture, building supplies, appliances, and fixtures owned by Seller and located in or on or used in connection with the Real Property or the operations thereon.
2. All of Seller's interest in all use, occupancy, building, and operating permits, if any, and all licenses and approvals issued from time to time with respect to the Real Property or the Transferred Properties.

3. All of Seller's interest in all management, maintenance, service, supply, employment, and vending machine contracts, if any, relating to the Real Property or the Transferred Properties.

4. All of Seller's interest in and to all existing and assignable guarantees and warranties, express or implied, if any, issued in connection with the construction, alteration, and repair of the Real Property and the purchase, installation, and repair of the Transferred Properties, to the extent that such guarantees and warranties are known to and in the possession of Seller.

5. All rights Seller may have to use the trade name, or any similar name, it being understood that Seller covenants not to use the name.

6. All rights Seller may have, if any, to any trademarks, promotional material, tenant data, telephone numbers and listings, post office boxes, all master keys and keys to common areas, all goodwill, if any, and all other rights, privileges, and appurtenances owned by Seller and in any way related to or used in connection with the existing business operation of the Real Property.

7. All funds or reserve accounts deposited with any lienholder of the Real Property as an escrow fund or impound for the payment of taxes, assessments, and premiums for insurance pertaining to the Real Property.

8. All of Seller's right, title, and interest in and to the hazard insurance policy carried by Seller on the Transferred Properties.

Include the following if applicable.

9. All items identified on the itemized properties schedule attached and incorporated herein by reference as Exhibit [exhibit number/letter].

Continue with the following.

Exceptions to Transfer and Warranty:

[The Existing Lien and those/Those] exceptions contained in the warranty deed of even date conveying the Real Property from Seller to Buyer.

Trade Name:

Excluded Properties:

Consideration:

[Existing Lien:]

Seller is conveying the Real Property to Buyer by warranty deed. As part of this transaction, Seller desires to transfer all the Transferred Properties to Buyer.

For the Consideration, Seller transfers to Buyer the Transferred Properties, save and except the Excluded Properties, and subject to the Exceptions to Transfer and Warranty.

As a material part of the Consideration for this sale, Seller and Buyer agree that Buyer is taking the Transferred Properties "AS IS" and that there are no representations, disclosures, or express or implied warranties except those contained in the purchase contract and this bill of sale. Buyer has not relied on any information other than Buyer's inspection and the representations and warranties expressly contained in the purchase contract and this bill of sale.

To have and to hold the Transferred Properties to Buyer and Buyer's heirs, successors, and assigns forever. Seller binds Seller and Seller's heirs and successors to warrant and forever defend all and singular the Transferred Properties to Buyer and Buyer's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any

part thereof when the claim is by, through, or under Seller but not otherwise, subject to the Exceptions to Transfer and Warranty.

Seller appoints Buyer and Buyer's heirs, successors, and assigns as Seller's agent and attorney-in-fact to act for Seller in any lawful way in the exercise of the claims and litigation powers described in section 752.110 of the Texas Estates Code, or its successor, as amended, with respect to the Transferred Properties or the properties intended to be transferred by this bill of sale. This is a special power coupled with an interest and is irrevocable.

Seller agrees to execute and deliver any additional documents and to perform any additional acts reasonably necessary or appropriate to carry out the intent of this bill of sale in transferring the Transferred Properties to Buyer.

When the context requires, singular nouns and pronouns include the plural.

[Name of seller]

[Name of buyer]

Include acknowledgments. If applicable, attach the properties schedule as an exhibit.

Form 5-16

Bill of Sale

Date:

Seller:

Seller's Mailing Address:

Buyer:

Buyer's Mailing Address:

Consideration:

Transferred Properties:

Reservations from Transfer:

Exceptions to Transfer and Warranty:

Seller, for the Consideration and subject to the Reservations from Transfer and the Exceptions to Transfer and Warranty, sells, transfers, and delivers the Transferred Properties to Buyer, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer's heirs, successors, and assigns forever. Seller binds Seller and Seller's heirs and successors to warrant and forever defend all and singular the Transferred Properties to Buyer and Buyer's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof when the claim is by, through, or under Seller but not otherwise, except as to the Reservations from Transfer and the Exceptions to Transfer and Warranty.

As a material part of the Consideration for this sale, Seller and Buyer agree that Buyer is taking the Transferred Properties "AS IS" and that there are no representations, disclosures, or express or implied warranties except those contained in the purchase contract and this bill of sale. Buyer has not relied on any information other than Buyer's inspection and the representations and warranties expressly contained in the purchase contract and this bill of sale.

When the context requires, singular nouns and pronouns include the plural.

[Name of seller]

[Name of buyer]

Include acknowledgments.

Form 5-17

Transfer of Escrow Funds [and Hazard Insurance Policy]

Date:

Loan: Loan Number [number] held by [name] ("Lender"), under Seller's name as the current debtor.

Seller:

Seller's Mailing Address:

Buyer:

Buyer's Mailing Address:

For the sale consideration, Seller assigns and transfers to Buyer all the accumulated escrow deposits made under the provisions of the deed of trust securing the Loan [**include if applicable:** along with all of Seller's interest in and to the existing hazard insurance policy covering the improvements located on the real property securing the Loan. Seller authorizes and directs Lender and the hazard insurer to endorse and transfer the existing policy from Seller to Buyer].

[Name of seller]

[Reserved]

Form 5-18

A joint tenancy may be created by written agreement of property owners in compliance with statutory requirements. *See* Tex. Est. Code § 111.001. This agreement may be used to evidence a joint tenancy with right of survivorship. **Caution:** This form should not be used between spouses regarding community property. See form 5-19 in this chapter.

Survivorship Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Owners:

Property:

Owners own the Property jointly and for valuable consideration agree with each other as follows:

1. If no severance occurs before the death of [either/any] Owner, then on the death of [either/any] Owner, the interest of the joint Owner who dies will survive to the surviving joint Owner[s].
2. Owners will after this date own the Property in the same manner as joint tenants with right of survivorship.
3. This agreement may be revoked, and the joint tenancy of Owners in the Property may be severed, only by a written instrument signed by all Owners.
4. This agreement is binding on Owners and Owners' respective heirs and successors.

[Name of owner]

[Name of owner]

Include acknowledgments.

Form 5-19

This form is used to create a right of survivorship in community property as provided for by Tex. Est. Code §§ 112.051–.054. See the section titled ‘Community Property with Right of Survivorship’ in chapter 2 of this manual. When using this form, the attorney should review any wills or other estate planning instruments to avoid unintentional effects on the family’s estate plan.

Survivorship Agreement for Community Property

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Spouses:

Property:

Spouses own the Property jointly and for valuable consideration agree with each other as follows:

1. As long as the Property remains community property, on the death of either Spouse, the Property interest of the Spouse who dies will become the Property of the surviving Spouse and will not descend to or be vested in the heirs or devisees of the deceased Spouse.
2. Spouses will after this date own the Property in the same manner as joint tenants with right of survivorship.
3. This agreement may be revoked, and the joint tenancy of the Spouses may be severed, only by a written instrument signed by both Spouses [**include if applicable:** or by a written instrument signed by one Spouse and delivered to the other Spouse].

[Name of spouse A]

[Name of spouse B]

Include acknowledgments.

Form 5-20

Note that an agreement to convert separate property to community property is enforceable without consideration. Tex. Fam. Code § 4.203.

Community Interest Special Warranty Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Grantor: [name exactly as shown on prior deed]

Grantor's Mailing Address:

Grantee: [names of grantor and grantor's spouse], a married couple

Grantee's Mailing Address:

Consideration:

See form 5-6 in this chapter for consideration clauses.

Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Exceptions to Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

The following statements or substantially similar words must be prominently displayed in bold-faced type, capital letters, or underlined.

THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE:

EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.

LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER SPOUSE OR BY DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE.

Grantor, for the Consideration [**include if applicable:** and subject to the Exceptions to Conveyance and Warranty], grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, with the intent that the Property be converted to community property, to have and to hold it to Grantee and Grantee's heirs, executors, administrators, and assigns against every person whomsoever law-

fully claiming or to claim the same or any part thereof, by, through, or under Grantor, but not otherwise.

When the context requires, singular nouns and pronouns include the plural.

[Name of grantor]

This deed must include signature lines for both spouses.

[Name of grantee]

[Name of grantee]

Include acknowledgments.

[Reserved]

Form 5-21

Assignment and Assumption of Leases

Date:

Assignor:

Assignor's Mailing Address:

Assignee:

Assignee's Mailing Address:

Property (including any improvements):

Leases: All agreements under which any portion of the Property is used or occupied by anyone, other than Assignor, including those described as follows: [**describe leases or reference attached rent roll**].

Assumed Leases: The Leases described as follows: [**describe assumed leases or reference attached exhibit**].

Consideration:

Assignor is conveying the Property to Assignee by warranty deed dated this date.

Assignor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Leases, assigns to Assignee all of Assignor's right, title, and interest in and to the Leases. Assignor binds Assignor and Assignor's heirs and successors to warrant and forever defend all and singular the Leases to Assignee and Assignee's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof [**include**

if applicable: when the claim is by, through, or under Assignor but not otherwise], except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty in the warranty deed, to the extent they affect the Leases.

Assignee assumes and agrees to perform the landlord's obligations under the Assumed Leases arising after this date. The obligation to repay security and prepaid rental deposits to tenants under the Assumed Leases is limited to the amount of cash delivered or credited by Assignor to Assignee with respect to security and prepaid rental deposits. Assignee will indemnify, defend, and hold Assignor harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignee's failure to perform any of the obligations of the landlord under the Assumed Leases after this date.

Assignor will indemnify, defend, and hold Assignee harmless from any loss, attorney's fees, expenses, or claims arising out of or related to Assignor's failure to perform any of the obligations of the landlord under the Leases before this date.

When the context requires, singular nouns and pronouns include the plural.

[Name of assignor]

[Name of assignee]

Include acknowledgments. Attach exhibits.

Form 5-22

This form is to be used to notify a residential or commercial tenant that its security deposit has been transferred to a new owner in connection with a sale of the property, thereby releasing the former owner from liability to the tenant for the security deposit. *See* Tex. Prop. Code §§ 92.105, 93.007.

Notice of Transfer of Security Deposit

Date:

Lease

Date:

Former Landlord:

Tenant:

Tenant's Address:

Premises:

Security Deposit: \$[amount]

New Landlord:

New Landlord's Address:

Former Landlord sold the [Premises/the property in which the Premises are located] to New Landlord and assigned the Lease to New Landlord. Former Landlord also transferred or credited the Security Deposit to New Landlord. New Landlord has received the Security Deposit or a credit for the amount of the Security Deposit and is liable for the return of the Security Deposit.

Include the following if applicable.

All rent and other amounts payable by Tenant under the Lease after Tenant's receipt of this letter should be paid to or for the account of New Landlord at New Landlord's Address.

Continue with the following.

[Name of new landlord]

[Name of former landlord]

Form 5-23

Partition Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

First Party:

First Party's Mailing Address:

Second Party:

Second Party's Mailing Address:

Consideration: The partition effected hereby.

Partition of Share Number One

Share Number One Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12 in this chapter.

Reservations from Share Number One Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Share Number One Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

First Party shall have and possess in severalty the Share Number One Property, and Second Party, for the Consideration and subject to the Reservations from Share Number One Conveyance and the Exceptions to Share Number One Conveyance and Warranty, grants and conveys to First Party the Share Number One Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to First Party and First Party's heirs, successors, and assigns forever. Second Party binds Second Party and Second Party's heirs and successors to warrant and forever defend all and singular the Share Number One Property to First Party and First Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Share Number One Conveyance and the Exceptions to Share Number One Conveyance and Warranty.

Select one of the following.

First Party releases Second Party from any claim or lien for owelty.

Or

Inequality in the value of the shares partitioned hereby is being equalized by adjustment in the division of cash or other property from the estate of [name], deceased, in accordance with an agreement between First Party and Second Party; accordingly no lien on any of the property partitioned hereby arises.

Continue with the following.

Partition of Share Number Two

Share Number Two Property (including any improvements):

If the conveyance includes personal property, include the defined term from clause 5-9-12.

Reservations from Share Number Two Conveyance:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Exceptions to Share Number Two Conveyance and Warranty:

State "None" or, to create exceptions to conveyance and warranty, include the appropriate clauses from form 5-8.

Second Party shall have and possess in severalty the Share Number Two Property, and First Party, for the Consideration and subject to the Reservations from Share Number Two Conveyance and the Exceptions to Share Number Two Conveyance and Warranty, grants and conveys to Second Party the Share Number Two Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Second Party and Second Party's heirs, successors, and assigns forever. First Party binds First Party and First Party's heirs and successors to warrant and forever defend all and singular the Share Number Two Property to Second Party and Second Party's heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Share Number Two Conveyance and the Exceptions to Share Number Two Conveyance and Warranty.

Select one of the following.

Second Party releases First Party from any claim or lien for owelty.

Or

Inequality in the value of the shares partitioned hereby is being equalized by adjustment in the division of cash or other property from the estate of [name], deceased, in accordance with an agreement between First Party and Second Party; accordingly no lien on any of the property partitioned hereby arises.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of first party]

[Name of second party]

Include acknowledgments.

Form 5-24

Correction Instrument
[Nonmaterial Correction]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Person Executing Correction Instrument:

Mailing Address of Person Executing Correction Instrument:

Conveyance Being Corrected

Date:

Grantor:

Grantee:

Recording information:

Error Being Corrected:

Correction:

Facts Relevant to the Correction:

Basis for Personal Knowledge of Facts Relevant to the Correction:

Person Executing Correction Instrument changes the Conveyance by this Correction Instrument.

Person Executing Correction Instrument has personal knowledge of the Facts Relevant to the Correction.

I certify that I have given notice of this Correction Instrument to each party to the original instrument in accordance with provisions of section 5.028(d)(2) of the Texas Property Code.

Attach copies of transmittal letters and proof of mailing, copies of e-mails, or copies of other reasonable means of giving notice.

[Name]

Include acknowledgments.

Form 5-25

This form is provided pursuant to the Texas Real Property Transfer on Death Act enacted as chapter 114 of the Texas Estates Code to transfer to one or more designated beneficiaries, including alternative beneficiaries, the transferor's interest in real property effective at death of the transferor. To be effective, this deed must be properly recorded before the death of the transferor.

Revocable Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Transferor:

Transferor's Mailing Address:

Designated Beneficiary

Primary Beneficiary:

Primary Beneficiary's Mailing Address:

Include the following if applicable.

Designated Alternate Beneficiary

Alternate Beneficiary:

Alternate Beneficiary's Mailing Address:

Include the following if a prior transfer on death deed is being revoked in whole or in part.

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Continue with the following.

Property (including any improvements):

Reservations from Transfer:

State "None" or, to create reservations of title, include the appropriate clauses from form 5-7

Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the Property to Primary Beneficiary, to have and hold forever.

Include the following if an alternate beneficiary is designated.

If Transferor is not survived by any Primary Beneficiary, Transferor, subject to the Reservations from Transfer, at Transferor's death, grants and conveys the property to Alternate Beneficiary, to have and hold forever.

If a prior transfer on death deed is being revoked in whole, include the following.

Transferor revokes the Prior Transfer on Death Deed.

If a prior transfer on death deed is being revoked in part, include the following.

Transferor revokes the Prior Transfer on Death Deed as to all Beneficiaries but only to the Property.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of transferor]

Include acknowledgment.

[Reserved]

Form 5-26

Revocation of Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Transferor:

Transferor's Mailing Address:

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Property:

Recording Information:

Transferor revokes the Prior Transfer on Death Deed in its entirety.

[Name of transferor]

Include acknowledgment.

[Reserved]

Form 5-27

Partial Revocation of Transfer on Death Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Transferor:

Transferor's Mailing Address:

Prior Transfer on Death Deed

Date:

Transferor:

Primary Beneficiary:

Alternate Beneficiary:

Recording Information:

Revoked Property (including improvements):

Select one of the following. If revocation is to some designated beneficiaries, choose the first alternative clause below. If revocation is only of the described property, choose the second alternative clause.

Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to **[names of revoked designated beneficiaries]**.

Or

Transferor revokes the Prior Transfer on Death Deed as to the transfer of the Revoked Property to all Beneficiaries in the Prior Transfer on Death Deed.

[Name of transferor]

Include acknowledgment.

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Chapter 6

Promissory Notes

§ 6.1 General Considerations Concerning Loan Transactions

In many of the loan transactions that are the subject of this manual, a seller or third party (lender) lends a buyer (borrower) all or a portion of the purchase money for real or personal property. The borrower usually executes a note promising to pay the lender. In the case of real property, the borrower usually executes a deed of trust encumbering the real property to secure the loan. If the loan is secured by personal property only, a security agreement and financing statement typically are also executed. If the real estate includes fixtures and personal property, the lender may include a security agreement and financing statement in the deed of trust to protect its interest in all the property related to the real estate. The forms in this chapter are intended for transactions such as these, but they may be modified as appropriate to fit other types of loans.

For mechanic's lien transactions, the mechanic's lien note (form 20-2 in this manual) should be used. The mechanic's lien note is discussed in section 20.4:3.

For home equity loans, the home equity extension of credit (form 11-2) should be used instead of the note in this chapter.

The deed of trust to encumber real estate is discussed in chapter 8. The security agreement and financing statement are discussed in chapter 9, and modifications that may be made to the deed of trust to include a security agreement and financing statement are discussed in sections 8.11 through 8.11:2 and clause 8-9-10. In many

loan transactions, in addition to the promissory note, there will be a separate loan agreement that includes details of the transaction. Promissory notes frequently refer to a separate loan agreement. See clauses 6-6-10 and 6-6-11. A separate loan agreement is included in this manual. See form 10-17.

§ 6.1:1 Promissory Note

The standard form (form 6-1 in this chapter) contains provisions most commonly used in promissory notes: the borrower's unconditional promise to pay a sum certain to the lender; a description of events constituting defaults under the note and the lender's right to accelerate the balance of the note on the occurrence of a default; the borrower's waiver of the right to require the lender to give notices and demands otherwise required by law; a usury savings clause; and the borrower's agreement to pay costs and reasonable attorney's fees resulting from legal action seeking enforcement or payment. *See F.R. Hernandez Construction & Supply Co. v. National Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979) (contractual attorney's fees).

Texas law has long "held that an installment of interest past due becomes principal, and bears interest, without any express stipulation to that effect. *Bothwell v. Farmers' & Merchants' State Bank & Trust Co.* 30 S.W.2d 289, 291 (Tex. 1930); *see Bair Chase Property Co. v. S&K Development Co.* 260 S.W.3d 133, 142 n.5 (Tex. App.—Austin 2008, pet. denied). The language in form 6-1 matches the common law of Texas and provides that interest commences

and continues on any part of an installment that is not timely paid when due.

In a Chapter 13 bankruptcy, the word *maturity* may be limited to meaning only the last date to pay the entire obligation. *See Indian Cave Park Partnership v. Hence*, 255 F. App'x 28 (5th Cir. 2007). As a result, for a Chapter 13 debtor, a bankruptcy court may permit the debtor to stretch out (perhaps over the full five years of a plan) payment of the arrearage amount due on the date the bankruptcy case is filed. (The arrearage is the due and unpaid amount at the bankruptcy filing, other than that due because of acceleration.)

Although form 6-1 contains an express waiver of the borrower's right to notices and demands that might accompany default proceedings, many attorneys attempting to enforce or collect on notes choose to give written notice to borrowers of certain actions and intentions—for example, notice of default, notice of intention to accelerate maturity, and notice of acceleration of maturity. Even though they obtain a waiver, these attorneys do not rely on the waiver and instead view it more as a safeguard to protect lenders from the complications of minor technicalities than as a license to foreclose without notice or demand on borrowers who might be unaware of default proceedings. Notwithstanding any express waiver in the note or other security instruments, certain notices regarding foreclosure under a power of sale conferred by a deed of trust or other contractual lien must be served on the debtor. *See* Tex. Prop. Code § 51.002; Tex. Bus. & Com. Code §§ 9.601, 9.602, 9.604(c). The statute of limitations for enforcing the obligation to pay the note runs from the due date of any such payment or, if the due date is accelerated, from the accelerated due date. Tex. Bus. & Com. Code § 3.118.

A notice-of-default clause may be added to require the lender to give the borrower notice of default and allow the borrower a period of time

to cure the default. See clause 6-6-8 for an example of a notice-of-default clause.

Promises to pay, such as the standard promissory note, may constitute “negotiable instruments” as defined by the Texas Uniform Commercial Code. *See* Tex. Bus. & Com. Code § 3.104. Transferees of negotiable instruments enjoy many benefits, including the possibility of being deemed a ‘holder in due course.’ *See* Tex. Bus. & Com. Code § 3.302. Certain terms added to the note may render it nonnegotiable. Determining negotiability is beyond the scope of this manual. For provisions of the Texas Uniform Commercial Code affecting negotiability, see Tex. Bus. & Com. Code §§ 3.101–.207.

A promissory note is a component of a “loan agreement” as defined in the Texas Business and Commerce Code statute of frauds for loan documents and requires the notice prescribed therein. *See* Tex. Bus. & Com. Code § 26.02. The notice of final agreement, form 10-14, may be used to satisfy the statutory requirements.

§ 6.1:2 Note Secured by Real Property

Parties may wish to secure a loan with real estate, such as a loan to purchase real estate or a refinance of a real estate secured loan. In these instances the promissory note not only serves as evidence of the debt but also defines the terms of payment and, with the deed of trust, the rights and responsibilities of the parties. A deed of trust is usually used to document the lien on the real estate that secures the note. Security-for-payment clauses, used to describe the deed of trust, are found in form 6-5 in this chapter.

§ 6.1:3 Unsecured Note

An unsecured promissory note evidences a debt and the borrower's promise to pay the debt according to stated terms without collateral to secure the debt.

§ 6.1:4 Note Secured by Personal Property

If the note is secured by personal property only, a security agreement and financing statement usually are used to document and perfect the lien that secures the note. If the note is secured by a lien on real and personal property, the deed of trust may include a security agreement and financing statement. Security-for-payment clauses, used to describe the security agreement, are found in form 6-5 in this chapter.

§ 6.2 Cautions

§ 6.2:1 Usury

Texas usury law is complicated, technical, and beyond the scope of this manual. Most promissory notes contain a 'usury savings clause, and one is included in form 6-1 in this chapter. Such a clause is intended to protect against unintentional violations of usury law. However, a usury savings clause may not protect against all usury claims, such as where a note is usurious 'on its face.' See *Nevels v. Harris*, 102 S.W.2d 1046 (Tex. 1937).

§ 6.2:2 Truth in Lending

An extension of credit may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in chapter 12 in this manual. No forms are provided in the manual for variable-interest-rate loans.

§ 6.2:3 Imputed Interest

Interest may be imputed to a loan under provisions in the Internal Revenue Code if the interest rate chosen by the parties is lower than the minimum rate required by applicable provisions of the Code. See 26 U.S.C. § 7872.

§ 6.2:4 Negotiability

Certain terms added to the note may render it nonnegotiable. Determining negotiability is beyond the scope of this manual. For provisions of the Texas Uniform Commercial Code affecting negotiability, see Tex. Bus. & Com. Code §§ 3.101–.207.

§ 6.2:5 Unsecured Note

The borrower wishing to borrow under an unsecured note should be wary of future or other indebtedness clauses commonly used in deeds of trust, security agreements, and other collateral documents. If the borrower has executed loan documents with the same lender in the past, the lender might rely on any future and other indebtedness clauses in prior loan documents to secure a subsequent note.

§ 6.2:6 Consistency among Documents

Because several documents may be required for a loan transaction, provisions among the various documents must be consistent. See, e.g. *Mathis v. DCR Mortgage III Sub 1, LLC*, 389 S.W.3d 494 (Tex. App.—El Paso 2012, no pet.). For example, the promissory note and the deed of trust may both have an express waiver of notice of default, or a loan agreement and a promissory note may both address prepayment rights. The attorney should review all documents carefully to be sure the provisions are consistent. A 'conflicts' clause may be added to state which document will control if a conflict between provisions arises. See clause 6-6-12 in this chapter for an example of a conflicts clause.

§ 6.2:7 Consumer Loans under Texas Finance Code Chapter 342

Texas Finance Code chapter 342 regulates loans made by lenders in the business of making,

arranging, or negotiating loans subject to the chapter if the interest exceeds 10 percent per year; the loan is extended primarily for personal, family, or household use; and the loan either is not secured by a lien on real property or is a secondary mortgage loan secured by a lien on real property improved by a dwelling designed for occupancy by four or fewer families and is subject to one or more prior liens. Tex. Fin. Code § 342.005. A lender in the business of making, arranging, or negotiating loans regulated by chapter 342 must obtain a license from the Texas Office of Consumer Credit Commissioner (the OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under Finance Code chapter 156. Tex. Fin. Code §§ 124.005, 339.004, 341.103–.104, 342.051. Unless exempt under Finance Code section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must be individually licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.052, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180.

Finance Code section 341.502 provides that '[a] contract for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be written in plain language designed to be easily understood by the average consumer.' See Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after

the order takes effect. Tex. Fin. Code § 341.502(c). Plain-language model contracts and related rules for second-lien home improvement loans are codified at 7 Tex. Admin. Code §§ 90.601–.604.

The Texas attorney general has determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. Tex. Att'y Gen. Op. No. JC-0513 (2002). Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 'plain language' contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced policies of their respective regulatory agencies. See Tex. Fin. Code §§ 342.308, 342.502.

Before using the promissory note forms contained in this chapter of the manual for a loan subject to chapter 342 of the Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Finance Code section 341.502. The forms contained in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342 of the Finance Code, the forms still must be modified to comply with the requirements of that chapter. For example, there are limits on the enforcement

fees that may be collected from a borrower. *See* Tex. Fin. Code §§ 342.307, 342.502. The third paragraph of the note form, form 6-1 in this chapter, concerning attorney's fees should be replaced in its entirety with clause 6-6-14 for a loan under subchapter E of chapter 342 (that is, an installment loan not secured by a lien on real property) and replaced by clause 6-6-15 for a secondary mortgage loan subject to subchapter G of chapter 342.

§ 6.2:8 Cosigners

When the promissory note is signed by more than one party, the nature of the liability of the signers may be an issue. For example, a party who cosigns the promissory note as a maker but does not receive any of the proceeds of the loan is an 'accommodation party' and is primarily liable on the note as a borrower. *See* Tex. Bus. & Com. Code § 3.419(a), (b). The rights of an accommodation party, however, differ from those of a true comaker. *See, e.g.,* Tex. Bus. & Com. Code § 3.419(f). If a party signing the promissory note does not intend to have full liability as a comaker, the note should specifically so indicate. See section 6.4:4 below for language indicating an intent to be a guarantor.

§ 6.3 Instructions for Completing Form

§ 6.3:1 Borrower's Mailing Address

Under certain circumstances, the lender may be required to give certain notices to the borrower. As a result, the parties should confirm the exact address for mailing. This will eliminate the possibility that the borrower may not receive any notices and avoid questions about whether the lender properly gave any required notice.

§ 6.3:2 Place for Payment

The attorney may want to provide under 'Place for Payment' not only the address, city, county, and state stipulated by the lender but also the phrase 'or any other place that Lender may designate in writing. This phrase permits the lender to change the place of payment.

§ 6.3:3 Annual Interest Rate

If the parties intend that interest will begin accruing at a time different from the date of the note, they should modify the form accordingly. If, for example, the note will be funded after it has been signed, the heading 'Annual Interest Rate' could be modified to read 'Annual Interest Rate on Unpaid Principal from Date of Funding, which is [date].

Descriptions of variable interest rates necessarily include terms of payment that govern the conditions for changing the rates. The use of variable rates may require some modification of the note form. One suitable alteration for this purpose is to delete the heading for interest and modify the heading 'Terms of Payment' to read 'Terms of Payment, Including Variable Interest Rate on Unpaid Principal. Examples of variable rates appear as clauses 6-2-17 and 6-2-18 in this chapter.

A conspicuous variable-rate disclosure must be made if credit extended primarily for personal, family, or household use includes a variable interest rate and if federal truth-in-lending disclosures are not made because the amount of the credit exceeds \$25,000 and the credit is not secured either by personal property (for example, a manufactured home) used as the principal residence of the debtor or by real property. *See* Tex. Fin. Code § 303.015(c). See clause 6-6-16 for an example of the statutorily required variable-rate disclosure.

§ 6.3:4 Payment Clauses

The promissory note form may be adapted to variable-interest-rate loans, although only clauses 6-2-17 and 6-2-18 in this chapter are drafted for variable rates.

§ 6.3:5 Prepayment and Application of Prepayment Clauses

If the borrower will have the right to make prepayments on the note, a clause from form 6-3 in this chapter should be added to the note, and a clause from form 6-4 should be added to govern application of that prepayment. If the borrower will not have a right of prepayment at any time, clause 6-3-10 may be added after the payment clause to avoid controversy.

The purpose of the yield maintenance clause, clause 6-3-9, is to allow the lender or holder of the note, on prepayment of the note, to receive the same yield as provided in the note.

§ 6.3:6 Security for Payment

If security for the note consists of real property with an express vendor's lien retained in the deed and a deed of trust, the security clause should identify the relevant documents, name the trustee, and describe the property. An abbreviated legal description or the full legal description from the deed and deed of trust may be used. A suitable clause is a straightforward statement followed by the property description. See clause 6-5-1 in this chapter.

If the note is secured only by real property without a vendor's lien, the security clause should identify the deed of trust, name the trustee, and describe the property. See clause 6-5-2. If the borrower does not own the property, the security clause should not recite that "Borrower" has executed the deed of trust; rather it should identify by name the parties who are to sign that doc-

ument. See also the discussion in section 8.2:1 in this manual.

If the note is secured by both real property and personal property, the security clause should describe both types of security. If the deed of trust and security agreement are in separate documents, clause 6-5-4 should be used. If any borrowers shown on the note did not also execute the deed of trust or any separate security agreement, clause 6-5-4 should be modified as suggested in the preceding paragraph.

Clause 6-5-3 is appropriate if the deed of trust also includes the security agreement and the collateral consists of real property and other property, such as fixtures or personalty. If the deed of trust covers both real property and personal property, the lender may proceed against both the real and personal property by foreclosing on the deed of trust. Tex. Bus. & Com. Code § 9.604(a). For a discussion of corresponding provisions to be inserted in the deed of trust in this event, see sections 8.11 and 8.11:2 and the related clauses in form 8-9.

Clause 6-5-5 is appropriate if the security interest is created not in the deed of trust but in a separate security agreement. If the borrower defaults, the personal property collateral covered by the separate security agreement must be sold according to the terms of the security agreement and the Uniform Commercial Code rather than as part of the realty foreclosure sale administered by the trustee.

If another note serves as security, the clause should indicate whether that note is unsecured or secured by other liens described in the clause.

Caution: There is no requirement that the note include a description of the collateral securing the note. The practitioner should remember that the security-for-payment clauses do not, by themselves, create or perfect a lien or security interest. A lien must be created in a separate

document, such as a deed of trust or a security agreement.

Practitioners should also take care to use security-for-payment clauses consistently. The use of the clause in one transaction and the failure to use the clause in another transaction, both of which are intended to be secured, may cause an ambiguity or a conflict between the documents.

§ 6.4 Additional Clauses

Additional clauses that may be useful in the promissory note, such as second lien, wrap-around loan, late charge, guaranty, notice of default, nonrecourse, reamortization, conflicts, and choice-of-law clauses, appear in form 6-6 in this chapter.

§ 6.4:1 Second Lien

If the lien securing the note is subordinate to a lien in the real or personal property securing an earlier note, insert one of the optional clauses 6-6-1, 6-6-2, or 6-6-3 in this chapter. Additionally, if the loan is a secondary mortgage loan, the attorney's fee clause should be modified. See section 6.2:7 above and section 8.4 in this manual for a discussion of issues related to second liens.

§ 6.4:2 Wraparound Note

If the promissory note is part of a wraparound loan transaction, insert clause 6-6-4 in this chapter. The principal amount of the promissory note for a wraparound loan transaction will include the amount due under a prior note that will remain outstanding and secured by a first-lien mortgage. The borrower under the wraparound note makes one payment to the lender or the holder of the wraparound note. The lender or holder of the wraparound note continues to make the payments on the prior note, using part

of the payments received from the wraparound note.

The wraparound note should be structured so that the payments are due before payments are due on the prior note. The maturity date of the prior note should be before the maturity date of the wraparound note, so as to afford the borrower some degree of assurance that by the time the wraparound note is paid, the prior note will be paid and the lien securing the note will be released.

Caution: The borrower should be advised of risks associated with wraparound notes. Generally the borrower will not receive notice of a default under the first-lien mortgage before foreclosure by the lender or holder of the prior note.

A more detailed discussion of wraparound notes is beyond the scope of this manual. For a general discussion of wraparound loan transactions, see sections 8.3 through 8.5:3 in this manual.

§ 6.4:3 Late Charge

A late charge may be included, but it should be determined that it is not usurious. See Texas Finance Code chapters 302, 342, and 347 for usury provisions.

Texas courts have consistently held that whether a charge is actually interest is a fact question to be determined from all the circumstances. A late payment charge is generally considered interest, because it is a charge for "detention" of money. *See* Tex. Fin. Code § 301.002(a)(4); *see also* *Dixon v. Brooks*, 604 S.W.2d 330, 333 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). *But see* *RIMCO Enterprises, Inc. v. Texas Electric Service Co.*, 599 S.W.2d 362, 366 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.). A loan primarily for business, commercial, investment, agricultural, or other similar purposes is a commercial loan. Tex. Fin. Code § 306.001(5). For a commercial loan, a late

charge of up to 5 percent of the amount of an installment that is past due by not less than ten days may be assessed in addition to interest. Tex. Fin. Code § 306.006(1). Late charges for a secondary mortgage loan are authorized by Tex. Fin. Code § 342.302. If a late charge complies with either of these provisions of the Finance Code, the late charge is an authorized additional charge or additional interest that is not added to other interest for usury purposes. If a late charge does not comply with either of these provisions, it generally will be considered interest for usury purposes. *See Butler v. Holt Machinery Co.*, 741 S.W.2d 169 (Tex. App.—San Antonio 1987) (opinion corrected on denial of rehearing, 739 S.W.2d 958); *Talbert v. First National Bank*, 664 S.W.2d 126 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). Late charges for certain secondary mortgage loans may not exceed interest at the maximum contract rate for the period the installment is not paid. *See* Tex. Fin. Code § 342.305. See section 8.4 in this manual for a definition of a secondary mortgage loan and the requirements of such loans. A clause assessing a late charge should, therefore, be used cautiously. See clause 6-6-5. Late charges for first-lien residential real property loans that are subject to the federal preemption of state usury limitations are interest and therefore are also within the federal preemption and thus not subject to state usury limitations. Tex. Fin. Code § 302.103.

§ 6.4:4 Guaranty

If the parties wish to have a third party guarantee the promissory note and do not wish to execute a separate document, use clause 6-6-6 in this chapter. For a stand-alone guaranty form, see section 10.13 and form 10-15 in this manual. As a surety, a guarantor is entitled to certain notices and defenses. *See, e.g.*, Tex. Civ. Prac. & Rem. Code ch. 43. Clause 6-6-6 contains the same kinds of waivers as are found in the stand-alone guaranty form.

§ 6.4:5 Default

Alternative default clauses for secured notes and unsecured notes are found in form 6-1 in this chapter.

A time for cure is not included in the note at form 6-1. If the borrower desires to receive notice and opportunity to cure any default before the lender accelerates the debt, the second paragraph of the default clauses and the section titled 'Waivers' in form 6-1 should be replaced with clause 6-6-8.

§ 6.4:6 Nonrecourse

In a nonrecourse transaction, the lender's right to recover judgment against the borrower for the debt evidenced by the note is negated, and the lender may proceed only against the collateral. Notes executed in these transactions must include a nonrecourse provision. A note may also provide for partial recourse. See clauses 6-6-18, 6-6-19, and 6-6-20 in this chapter.

§ 6.4:7 Reamortization

The reamortization clause allows the unpaid principal balance to be reamortized if the proceeds of a casualty or condemnation are applied to prepay a portion of the unpaid principal balance. See clause 6-6-9 in this chapter.

§ 6.4:8 Conflicts

When the lender and the borrower execute a promissory note and a loan agreement, additional provisions may be necessary to harmonize the note with the loan agreement. A note may be one of several promissory notes executed under a loan agreement, or it may be desirable simply to recite that the note is executed under the loan agreement. In other cases, a "conflicts" clause may be necessary to address conflicting provisions of the note and loan agreement. This provision gives one instrument effect over the other

to the extent of the conflict. See clause 6-6-12 in this chapter.

§ 6.4:9 Choice of Law

A choice-of-law provision is found at clause 6-6-13 in this chapter.

§ 6.4:10 Fair Credit Reporting Act

Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. *See* 15 U.S.C. § 6809. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices: one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. *See* clauses 14-7-2 and 14-7-3 in this manual for examples of these notices. If the financial institution chooses to give the notice in its initial loan documentation or related communication, the first form of notice should be given. The model form may be included with the note. This form of notice is found in clause 6-6-17. *See* the section titled "Fair Credit Reporting Act" in chapter 2.

§ 6.4:11 Spreading

The concept of spreading allows for the calculation of interest for usury purposes to be made over the stated term of the loan, rather than at any particular point in time during the loan. *See, e.g.* Tex. Fin. Code § 302.004. In certain loans, this can mitigate the effect of fees and charges made or collected at the beginning of the loan term. Spreading is expressly authorized for commercial loans and for consumer loans secured by

real property. Tex. Fin. Code §§ 302.001, 302.004. Spreading is not statutorily permitted for consumer loans not secured by real property. A form of spreading provision is included as clause 6-6-21 in this chapter.

§ 6.5 Additional Forms

§ 6.5:1 Deed of Trust and Security Agreement

If the note is secured by a lien on real estate, a deed of trust, described in chapter 8 in this manual, or a security agreement and financing statement, described in chapter 9, or both, will be necessary. The deed of trust creates a lien on real property and enables the holder to enforce the lien by nonjudicial foreclosure. A security agreement is necessary to create or secure a lien against personal property and enable the holder to enforce the lien. *See* chapter 9 for a discussion of security agreements. The note may also be secured by a mechanic's lien. *See* form 20-1 for a mechanic's lien contract.

§ 6.5:2 Notice to Cosigner

By using form 6-7 in this chapter the lender discloses to a cosigner of a note the obligations the cosigner is assuming and the resulting potential liability. For consumer loans, banks (excluding savings banks that are members of the Federal Home Loan Bank System) must inform a cosigner of a note of the cosigner's liability on the note before the cosigner becomes obligated. *See* 12 C.F.R. § 227.14. The cosigner's execution of a disclosure statement substantially similar to form 6-7, in a separate document or included in the note, is sufficient to comply with this regulation, which prohibits unfair or deceptive acts or practices. *See* Unfair or Deceptive Acts or Practices (Regulation AA), 12 C.F.R. §§ 227.1–16. This regulation does not apply to real estate purchase-money loans but applies to other obligations secured by real estate.

Additional Resources

Nolan, John M., and Edward A. Peterson. 1
*Texas Annotated Real Estate Forms:
Promissory Note*. State Bar of Texas,
2015.

St. Claire, Frank A., and William V. Dorsaneo
III. *Texas Real Estate Guide*. New York:
Matthew Bender & Co., 2001.

Form 6-1

Promissory Note

Basic Information

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Place for Payment:

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): **[Insert clause from form 6-2 in this chapter.]**

Security for Payment: **[Insert clause from form 6-5; if note is unsecured, write "None."]**

Other Security for Payment:

Promise to Pay

Borrower promises to pay to the order of Lender the Principal Amount plus interest at the Annual Interest Rate. This note is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not

paid either when due under the Terms of Payment or on acceleration of maturity, Borrower promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

Defaults and Remedies

Select one of the following. For an unsecured note, use the first paragraph. For a secured note, use the second paragraph.

A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an "Other Obligated Party") fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party; (5) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (6) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; or (7) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party.

Or

A default exists under this note if (1) Borrower defaults in the payment of this note or in the performance of any obligation in any instrument securing or collateral to this note; (2) (a) Borrower or (b) any other person liable on any part of this note (an "Other Obligated Party") fails to timely pay or perform any obligation or covenant in any written agreement between Lender and Borrower or any Other Obligated Party other than as described in (1) above; (3) any representation in this note or in any other written agreement between Lender and Borrower or any Other Obligated Party is materially false when made; (4) a receiver is appointed for Borrower or an Other Obligated Party or any property on which a lien or security interest is created as security (the "Collateral Security") for any part of this note; (5) any Collateral Security is assigned for the benefit of creditors; (6) a bankruptcy or insolvency proceeding is commenced by Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; (7) (a) a bankruptcy or insolvency proceeding is commenced against Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party and (b) the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered; (8) Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party is terminated, begins to wind up its affairs, or is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of Borrower, a partnership of which Borrower is a general partner, or an Other Obligated Party; or (9) any Collateral Security is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral security of like kind and quality or restored to its former condition.

If the borrower desires to receive notice and opportunity to cure any default before the lender accelerates the debt, replace the following two paragraphs with clause 6-6-8. See section 6.4:5 in this chapter.

Upon the occurrence of a default under this note, Lender may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due, and may exercise all other rights and remedies available at law or in equity.

Waivers

Borrower waives, to the extent permitted by law, all (1) demand for payment, (2) presentation for payment, (3) notice of intention to accelerate maturity, (4) notice of acceleration of maturity, (5) protest, [and] (6) notice of protest [**include if applicable:** , and (7) rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code] [**include if applicable:** , and [(7)/(8)] rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code [and rule 31 of the Texas Rules of Civil Procedure]].

Attorney's Fees

The following paragraph concerning attorney's fees should be replaced in its entirety with clause 6-6-14 for a loan under subchapter E of chapter 342 and replaced by clause 6-6-15 for a secondary mortgage loan subject to subchapter G of chapter 342. See section 6.2:7

Borrower also promises to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the note. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the debt evidenced by the note and will be secured by any security for payment.

Insert appropriate prepayment clause(s) from form 6-3 and, if appropriate, an application-of-prepayment clause from form 6-4.

Usury Savings

Interest on the debt evidenced by this note will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount or, if the Principal Amount has been paid, refunded. This provision overrides any conflicting provisions in this note and all other instruments concerning the debt.

If the parties wish to include spreading, insert clause 6-6-21.
See section 6.4:11.

Other Clauses

Each Borrower is responsible for all obligations represented by this note.

When the context requires, singular nouns and pronouns include the plural.

If appropriate, include additional clauses, like those suggested
in form 6-6.

[Name of borrower]

If there is a guarantor and no separate guaranty, include
clause 6-6-6 with the signature of the guarantor.

[Reserved]

Form 6-2

Payment Clauses*Fixed Maturity—On a Certain Date***Clause 6-2-1**

The Principal Amount is due and payable on [date], and the interest is due and payable [at maturity/monthly as it accrues/quarterly as it accrues/semi-annually as it accrues/annually as it accrues/as follows: [specify]]. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Or

Clause 6-2-2

The Principal Amount is due and payable [number] days after the date of this note, and the interest is due and payable [at maturity/monthly as it accrues/quarterly as it accrues/semiannually as it accrues/annually as it accrues/as follows: [specify]]. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Monthly Installments, Including Interest, until Fully Paid***Clause 6-2-3**

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month, beginning [date] and continuing until the unpaid principal and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Monthly Installments, Including Interest, with Fixed Maturity and a Balloon Payment***Clause 6-2-4**

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month, beginning [date] and continuing until [the expiration of [number] years from the date of this note/[specify date]], when the entire amount of principal and accrued, unpaid interest will be payable in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Or

Clause 6-2-5

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), beginning [date], and thereafter on the [specify] day of each succeeding month through [date], and in one final installment on [date] in the amount of the unpaid principal and accrued, unpaid interest as of that date. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Monthly Installments, Including Interest, When Amount Changes at Certain Times***Clause 6-2-6**

The Principal Amount and interest are due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month, beginning [date] and continuing through [date]. After that date the unpaid principal balance and interest are payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month,

beginning [date] and continuing until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Initial Installments of Interest, Followed by Installments of Principal and Interest and a Balloon Payment

Clause 6-2-7

Interest only is due and payable monthly as it accrues on the [specify] day of each month, beginning [date] and continuing through [date]. After that date the unpaid principal balance and interest are due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month, beginning [date] and continuing until the expiration of [number] years from the date of this note. At that time the unpaid principal balance and accrued, unpaid interest will be payable in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Additional Installment to Be Paid on Principal within Certain Time

Clause 6-2-8

The following sentence should be added before the last sentence of the payment clause if an additional installment will be paid within a specified time.

An additional principal installment of [amount] DOLLARS (\$[amount]) is due and payable [[specify] days after the date of this note/on [date]].

*Monthly Installments of Principal, Plus Interest***Clause 6-2-9**

The Principal Amount is due and payable in equal monthly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of each month, beginning [date] and continuing until the Principal Amount has been paid in full. Interest computed on the unpaid principal balance is due and payable monthly as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Annual Installments, Including Interest***Clause 6-2-10**

The Principal Amount and interest are due and payable in equal annual installments of [amount] DOLLARS (\$[amount]), on [date] of each year, beginning [date] and continuing annually until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Annual Principal Installments, Plus Interest***Clause 6-2-11**

The Principal Amount is due and payable in equal annual installments of [amount] DOLLARS (\$[amount]), on [date] of each year, beginning [date] and continuing annually until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable annually as it accrues, on the same dates as and in addition to the installments of principal. Payments will

be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Or

Clause 6-2-12

The Principal Amount is due and payable in three annual installments, as follows:

the first, in the amount of [amount] DOLLARS (\$[amount]), on [date];

the second, in the amount of [amount] DOLLARS (\$[amount]), on [date];

the third, in the amount of [amount] DOLLARS (\$[amount]), on [date].

Interest on the unpaid principal balance is due and payable annually as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Semiannual Installments, Including Interest

Clause 6-2-13

The Principal Amount and interest are due and payable in equal semiannual installments of [amount] DOLLARS (\$[amount]). The first installment is payable on [date] and the others semiannually on the [specify] day of [month] and [month] of each year until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Semiannual Principal Installments, Plus Interest***Clause 6-2-14**

The Principal Amount is due and payable in equal semiannual installments of [amount] DOLLARS (\$[amount]), on the [specify] day of [month] and [month] of each year, beginning [date] and continuing semiannually until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable semiannually as it accrues, on the same dates as and in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Quarterly Installments, Including Interest***Clause 6-2-15**

The Principal Amount and interest are due and payable in equal quarterly installments of [amount] DOLLARS (\$[amount]). The first installment is payable on [date] and the others quarterly on the [specify] day of [month], [month], [month], and [month] of each year until the Principal Amount and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

*Quarterly Installments, Plus Interest***Clause 6-2-16**

The Principal Amount is due and payable in equal quarterly installments of [amount] DOLLARS (\$[amount]), on the [specify] day of [month], [month], [month], and [month] of each year, beginning [date] and continuing quarterly until the Principal Amount has been paid in full. Interest on the unpaid principal balance is due and payable quarterly as it accrues, on the same dates as and

in addition to the installments of principal. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Variable Rates—Commercial Transaction

Clause 6-2-17

Interest will accrue at the rate per year that will be the lesser of [percent] percent ([percent]%) in excess of the Prime Interest Rate, adjusted [daily/on the first day of each calendar month] based on the Prime Interest Rate then in effect, or the maximum nonusurious rate of interest permitted by applicable law. [Include if applicable: At no time will the interest rate be greater than [percent] percent ([percent]%) or less than [percent] percent ([percent]%).]

Select one of the following.

The Prime Interest Rate means the annual rate of interest announced from time to time by [financial institution] as its base or prime commercial lending rate. If that rate ceases to be available, the Prime Interest Rate will be a reasonably comparable rate to be determined by Lender.

Or

The Prime Interest Rate means the annual rate of interest identified as the "U.S. prime rate" in the "Money Rates" column published in the *Wall Street Journal*. If the published prime rate is expressed on the applicable date as a range, the prime rate for purposes of this note will be the average between the high and low of that range. If the *Wall Street Journal* ceases to publish a prime rate, Lender may refer to another similar source to identify the prime rate on corporate loans at large United States money center commercial banks and apply that rate.

Continue with the following.

Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

Variable Rates—Residential Transaction

Clause 6-2-18

The initial interest rate will be [percent] percent ([percent]%) per year, and it may change on the [specify] day of [month] [year] and on that day every [number] month[s] thereafter. Each date on which the interest rate could change is a “Change Date.”

Beginning with the first Change Date, the interest rate will be based on an index, which is [the weekly average yield on United States Treasury Securities adjusted to a constant maturity of one year as made available by the Federal Reserve Board/[state other index]].

The most recent index figure available as of the date forty-five days before each Change Date is the “Current Index.”

If the index is no longer available, a new index will be chosen by Lender on the basis of comparable information.

Before each Change Date, the new interest rate will be calculated by adding [number] percentage point[s] to the Current Index. The result of this addition will be rounded to the nearest one-eighth of 1 percent (0.125%). Subject to the limits stated below, this rounded amount will be the new interest rate until the next Change Date.

The amount of the monthly payment that would be sufficient to pay in full the Principal Amount remaining on the Change Date by the maturity date at the new interest rate, in substantially equal payments, will be calculated and will be the new amount of the monthly payment. Payments will be applied first to accrued interest and the remainder to reduction of the Principal Amount.

The interest will never be increased or decreased on any single Change Date by more than [number] percentage point[s] from the highest rate of interest that has been paid during the preceding twelve months.

The interest rate will never be greater than [percent] percent ([percent]%).

The new interest rate will become effective on each Change Date. The new monthly payment will be paid from the first monthly payment date after the Change Date until the amount of the monthly payment changes again.

Lender will notify Borrower of the new interest rate, new monthly payment amount, and due date of the first new monthly payment at least [number] days before the new monthly payment is due.

[Reserved]

Form 6-3

A clause from form 6-4 in this chapter should be added to a prepayment clause allowing partial prepayments if the prepayment clause does not specify how the prepayment will be applied. The attorney may wish to add clause 6-3-11 to a prepayment clause that includes a premium payment or a yield maintenance amount.

Prepayment Clauses*Prepayment***Clause 6-3-1**

Borrower may prepay this note in any amount at any time before the Maturity Date without penalty or premium.

Or

Clause 6-3-2

Borrower may prepay at any time before the Maturity Date the entire unpaid principal balance of this note with interest to the date of prepayment plus a premium of [percent] percent ([percent]%) of the amount of the principal balance.

Or

Clause 6-3-3

On or after [number] years after the date of this note, Borrower may prepay on any monthly installment date the entire unpaid principal balance, with interest to the date of prepayment, or any part of it in multiples of [amount] DOLLARS (\$[amount]), with interest to the date of prepayment, in addition to the monthly installment then payable.

Or

Clause 6-3-4

Borrower has the option at any time to pay [amount] DOLLARS (\$[amount]) or multiples of that amount on any installment date before the Maturity Date, but the total prepayments in any one year may not exceed [percent] percent ([percent]%) of the Principal Amount of this note. Before exercising this option, Borrower will give [number] days' written notice to Lender.

Or

Clause 6-3-5

Borrower has the option at any time to make prepayments on this note on any installment date before the Maturity Date, subject to these conditions: If the total prepayments during any one year do not exceed [percent] percent ([percent]%) of the Principal Amount of this note, no premium for prepayment will be due; if total prepayments during any one year exceed that amount, Borrower will pay a premium equal to [percent] percent ([percent]%) of the amount by which prepayments exceed the amount allowed without premium.

Or

Clause 6-3-6

Borrower may prepay on any monthly installment date before the Maturity Date all or any part of the unpaid principal balance plus accrued interest on the amount of principal prepaid, and Borrower agrees to pay a premium of [percent] percent ([percent]%) of any amount of principal prepaid.

Or

Clause 6-3-7

Borrower has the option at any time to prepay on any installment date before the Maturity Date all or any part of the unpaid principal balance plus accrued interest on the amount of principal prepaid, and Borrower agrees to pay a premium of [percent] percent ([percent]%) of the amount of principal prepaid; however, during the first three years of this note, prepayments of unpaid principal must be [amount] DOLLARS (\$[amount]) or multiples of that amount, and in each of those years total prepayments may not exceed [percent] percent ([percent]%) of the Principal Amount of this note.

Or

Clause 6-3-8

Borrower has the option at any time of doubling the regular principal payment payable on any principal payment date; however, all additional payments will be applied to the final maturing installment or installments of principal.

*Yield Maintenance Clause***Clause 6-3-9**

On or after [number] [years/months] following the date of this note and thirty days following Lender's receipt of written notice of Borrower's election to prepay, Borrower may prepay the entire unpaid principal balance plus all accrued interest plus the greater of the Yield Maintenance Amount or a premium of 1 percent (1%) of the unpaid principal balance.

The Yield Maintenance Amount is an amount, never less than zero, equal to the present value of a series of Monthly Amounts, assumed to be paid

at the end of each month remaining from the prepayment date through the Maturity Date, discounted at the U.S. Securities Rate.

The Monthly Amount is the Annual Interest Rate minus the yield (U.S. Securities Rate), as of the prepayment date, as published by the Federal Reserve System in its "Statistical Release H.15(519), Selected Interest Rates" under the caption "U.S. Government Securities/Treasury Constant Maturities," for a U.S. Government Security with a term equal to that remaining on this note on the prepayment date (which term may be obtained by interpolating between the yields published for specific whole years), divided by twelve and the quotient then multiplied by the amount prepaid on the prepayment date.

No Right of Prepayment

Clause 6-3-10

Borrower may not make any prepayments without the prior written consent of Lender.

Prepayment because of Casualty or Condemnation

Clause 6-3-11

If Borrower prepays this note because of a casualty or condemnation the [premium/Yield Maintenance Amount] will not apply.

Form 6-4

If the note allows partial prepayment, the prepayment clause (form 6-3 in this chapter) should specify how the prepayment will be applied. The following clauses suggest three possibilities; the appropriate clause should be added to the prepayment clause if the prepayment clause does not specify how the prepayment will be applied.

Application of Prepayment**Clause 6-4-1**

Prepayments will be applied to installments on the last maturing principal, and interest on that prepaid principal will immediately cease to accrue.

Or

Clause 6-4-2

Partial prepayments will be credited to principal; installments will continue as scheduled and interest on that prepaid principal will immediately cease to accrue.

Or

Clause 6-4-3

Prepayments will be applied first to accrued interest and the remainder to installments on principal in the inverse order of maturity so that they will be applied to the last maturing principal installments first. These prepayments will not reduce the amount or time of payment of the remaining installments, which will continue until the Principal Amount and all accrued interest are paid. Interest on the prepaid principal will immediately cease to accrue.

[Reserved]

Form 6-5

Security for Payment

*Note Secured by Real Property Only***Clause 6-5-1**

This note is secured by a vendor's lien [**include if applicable:** and superior title] retained in a deed from [**name**] to Borrower dated [**date**] and by a deed of trust of even date from [Borrower/[**name of grantor in deed of trust**]] to [**name of trustee**], trustee, both of which cover the following real property: [**property description**].

Or

Clause 6-5-2

This note is secured by a deed of trust dated [**date**] from [Borrower/[**name of grantor in deed of trust**]] to [**name of trustee**], trustee, which covers the following real property: [**property description**].

*Note Secured by Both Real Property and Personal Property***Clause 6-5-3**

This note is secured by a deed of trust and security agreement dated [**date**] from [Borrower/[**name of grantor in deed of trust and security agreement**]] to [**name of trustee**], trustee. The deed of trust contains a security agreement that covers the personal property described in the deed of trust and the following real property: [**property description**].

*Security Interest Is Created in a Deed of Trust and a Separate Security Agreement***Clause 6-5-4**

This note is secured by a deed of trust dated [date] from [Borrower/[name of grantor in deed of trust]] to [name of trustee], trustee, which covers the following real property: [property description]. This note is additionally secured by a security interest created in a security agreement that covers personal property and that is dated [date] and executed by [Borrower/[name of debtor in security agreement]] as the debtor in favor of Lender as the secured party.

*Note Secured by Personal Property Only***Clause 6-5-5**

This note is secured by a security interest created in a security agreement that covers [type of collateral] and that is dated [date] and executed by [Borrower/[name of debtor in security agreement]] as the debtor in favor of Lender as the secured party.

Form 6-6

Additional Clauses for Promissory Notes*Second Lien***Clause 6-6-1**

The lien[s] securing this note [is/are] subordinate to the lien securing another note in the original principal amount of [amount] DOLLARS (\$[amount]), dated [date], and executed by [name], payable to the order of [name].

Or

Clause 6-6-2

The lien securing this note is subordinate to the lien securing another note in the original principal amount of [amount] DOLLARS (\$[amount]), dated [date], and executed by [name], payable to the order of [name], and described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If there is a default in payment of any part of principal or interest of that \$[amount] note or a breach of any covenants contained in any instruments securing it, the debt evidenced by this note will immediately become payable at the option of Lender. If Borrower fails to perform any of Borrower's obligations in that \$[amount] note or in any instruments securing it, Lender may perform those obligations and be reimbursed by Borrower, on demand, at the Place for Payment for any amounts advanced, including attorney's fees, plus interest on those amounts from the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts. The amount to be reimbursed will be secured by all instruments securing this note.

Or

Clause 6-6-3

This note is the second of two notes that Borrower executed today in favor of Lender, and each lien securing payment of this note is and will remain subordinate to each lien securing payment of the first note in the original principal amount of **[amount]** DOLLARS (**[\$[amount]]**).

*Wraparound Lien***Clause 6-6-4**

The following paragraph is to be used for a wraparound loan transaction in conjunction with deed-of-trust forms, if modified as suggested in sections 8.3–8.5:3 in this manual.

The lien[s] securing this note [is/are] subordinate to the lien[s] securing payment of the unpaid balance of a prior note in the original principal amount of **[amount]** DOLLARS (**[\$[amount]]**), dated **[date]**, and executed by **[name]**, described in and secured by a deed of trust recorded in **[recording data]** of the real property records of **[county]** County, Texas. Borrower has not assumed payment of that prior note, but Lender is obligated to pay it according to its terms. If Lender defaults in payment of the prior note, Borrower has the right to cure the default and receive credit on this note. The subordinate lien[s] securing this note [is/are] also provided for in the warranty deed with vendor's lien and deed of trust described above, which this note incorporates and is subject to.

*Late Charge***Clause 6-6-5**

If any installment becomes overdue for more than [number] days, at Lender's option a late payment charge of \$[amount] may be charged in order to defray the expense of handling the delinquent payment.

*Guaranty of Payment***Clause 6-6-6**

For value received, [I/we], [name[s]], [jointly and severally,] absolutely, irrevocably, and unconditionally guarantee payment of this note according to its terms to the same extent as if [I/we] were Borrower[s] on this note. [I/We] [jointly and severally] waive all demands and all notices, including notice of intention to accelerate maturity, notice of acceleration of maturity, notice of nonpayment or default, presentment for payment, protest, notice of protest, suit, and diligence. [I/We] also [jointly and severally] waive any notice of and defense based on the extension of time of payment or change in methods of payment or the release of any collateral securing this note and consent to all renewals, extensions, and other adjustments in the manner of payment of this note and any transfer of this note to any third party. This is an unconditional guaranty of payment and performance, not of collection, and it is an agreement of guaranty, not of suretyship. [I/We] [jointly and severally] waive defenses based on suretyship or impairment of collateral and all requirements of law, if any, that any collection efforts be made against Borrower or that any action be brought against Borrower before resorting to this guaranty, including rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code and rule 31 of the Texas Rules of Civil Procedure.

[Name of guarantor]

Clause 6-6-7 reserved

Notice to Cure Default

Clause 6-6-8

Notwithstanding any other provision of this note, in the event of a default, before exercising any of Lender's remedies under this note or any [deed of trust/security agreement/instrument] securing [include if applicable: or collateral to] it, Lender will first give Borrower written notice of default and Borrower will have ten days after notice is given in which to cure the default. If the default is not cured ten days after notice, (1) Borrower and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law [include if applicable: , and rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code] [include if applicable: , and rights under section 17.001 and chapter 43 of the Texas Civil Practice and Remedies Code [and rule 31 of the Texas Rules of Civil Procedure]]; and (2) Lender may declare the unpaid principal balance, earned interest, and any other amounts owed on the note immediately due and may exercise all other rights and remedies available at law or in equity.

*Reamortization***Clause 6-6-9**

If the proceeds of a casualty or condemnation are applied to the Principal Amount of this note resulting in prepayment of more than 10 percent of the unpaid principal balance and more than one year remains until the Maturity Date, the unpaid principal balance will be reamortized over the remaining period of this note. The reamortization will be used to calculate the amount of the monthly payment that would be sufficient to pay in full the unpaid principal amount remaining on the prepayment date, plus interest, by the Maturity Date. The reduced payments of principal and interest to be made on this note as the result of the reamortization will be the new monthly amount, and the payments will begin the next month after the prepayment date.

*Loan Agreements***Clause 6-6-10**

This note is the [identify defined term from the loan agreement] note required under [specific provision] of a loan agreement of the same date as the note.

Or

Clause 6-6-11

The execution and delivery of this note are required under a loan agreement of the same date as the note.

*Conflicts***Clause 6-6-12**

If any provision of this note conflicts with any provision of a loan agreement, deed of trust, or security agreement of the same transaction between Lender and Borrower, the provisions of the [loan agreement/deed of trust/security agreement/note] will govern to the extent of the conflict.

*Choice of Law***Clause 6-6-13**

This note will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction.

Attorney's Fees (Consumer Loan under Texas Finance Code Chapter 342, Not Secured by a Lien on Real Estate)

Clause 6-6-14

Borrower also promises to pay court and other costs and attorney's fees assessed by a court if an attorney is retained to collect or enforce the note. Borrower will pay Lender these expenses on demand at the Place for Payment. These expenses will become part of the debt evidenced by the note and will be secured by any security for payment.

Attorney's Fees (Secondary Mortgage Loan under Texas Finance Code Chapter 342)

Clause 6-6-15

Borrower also promises to pay reasonable attorney's fees and court and other costs and fees incurred if an attorney is retained who is not an employee of Lender to collect or enforce the note. Borrower will pay Lender these

expenses on demand at the Place for Payment. These expenses will become part of the debt evidenced by the note and will be secured by any security for payment.

Variable-Rate Disclosure

Clause 6-6-16

NOTICE TO CONSUMER: UNDER TEXAS LAW, IF YOU CONSENT TO THIS AGREEMENT, YOU MAY BE SUBJECT TO A FUTURE RATE AS HIGH AS 24 PERCENT PER YEAR.

Fair Credit Reporting Act Notice

Clause 6-6-17

Lender may report information about Borrower's loan account to credit bureaus. Late payments, missed payments, or other defaults on this note may be reflected in your credit report.

Nonrecourse

Clause 6-6-18

Notwithstanding any other provision of this note, Lender may satisfy the debt evidenced by this note only by the enforcement of Lender's rights in the [identify collateral] pursuant to [identify collateral documents], and Borrower will not be liable for a money judgment in the event of a default under this note or the [identify collateral documents].

Or

Clause 6-6-19

Notwithstanding any other provision of this note, Lender may satisfy the debt evidenced by this note only by the enforcement of Lender's rights in the [identify collateral] pursuant to [identify collateral documents], and Borrower will not be liable for a money judgment in the event of a default in payment of the debt evidenced by this note; provided, however, Lender may recover against Borrower if Borrower defaults on Borrower's obligation to [describe obligations, e.g., pay ad valorem taxes owed on the collateral].

*Partial Recourse***Clause 6-6-20**

Borrower has no personal liability for the obligations under this note or under the Deed of Trust, and no personal judgment may be taken and no claim for personal liability may be made against Borrower. Lender's sole remedy for default under this note or the Deed of Trust is the foreclosure of the liens and security interests created hereunder. Exceptions to the foregoing provisions are limited to, and Borrower is liable for, the following: taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the collateral for this note; unpaid premiums for insurance required under the Deed of Trust; damage to the collateral for this note if any insurance required hereunder is not maintained; all rents, issues, profits, and income derived from the collateral for this note after a default occurs and not expended for operating expenses of the collateral for this note; tenant security deposits for leases of the collateral for this note; any condemnation or insurance proceeds not paid or applied as required hereunder; [include if applicable: damage to and depreciation of the collateral for this note beyond normal

wear and tear caused by the negligence of Borrower or the failure of Borrower to keep the collateral for this note in good repair and condition; the return of or reimbursement for all personal property taken from the collateral for this note by or on behalf of Borrower;] damages resulting from any fraud or misrepresentation by Borrower; damages resulting from any breach of any warranty of title; interest on the note from the date of default through foreclosure, payment, or settlement of the debt; all interest on the note during any bankruptcy proceeding of Borrower and all reasonable attorney's fees and expenses incurred as a result of Borrower's bankruptcy; and all attorney's fees and expenses incurred by Lender or other holder of the note to collect any of the foregoing amounts.

Spreading

Clause 6-6-21

All calculations of the rate of interest contracted for, charged, taken, reserved, or received in connection with this note that are made for the purpose of determining whether such rate exceeds the maximum nonusurious rate of interest permitted by law shall be made, to the extent permitted by applicable laws, by spreading, during the period of the full term of this note, all interest at any time contracted for, charged, taken, reserved, or received by Lender.

[Reserved]

Form 6-7

For consumer loans, execution of this disclosure notice before the cosigner becomes obligated will comply with the applicable federal regulation. 12 C.F.R. §§ 227.1-16.

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower does not pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase the amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, or the like. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

I HAVE READ AND UNDERSTAND THE FOREGOING NOTICE.

[Name of cosigner]

Date:

[Reserved]







