

AGENCY RELATIONSHIPS

CLIENT VS CUSTOMER

- A client is one who engages the professional advice and services of a licensee as his agent.
- A customer is a person who is not being represented by a licensee but for whom the licensee is performing ministerial acts.

MINISTERIAL ACTS

- Ministerial acts are those acts that a licensee may perform for a person that are informative in nature.
- Ministerial acts do not form a brokerage agreement with the customer.

EXAMPLES OF MINISTERIAL ACTS

- Responding to phone
- Setting an appointment to view property.
- Conducting an open house
- Giving factual information such as sale price

DEFINITIONS

- **Agent:** the individual who is authorized and consents to represents the interests of another person. The sales associate is a representative of the sponsoring broker. The broker shares the responsibility to the client with the sales agent.
- **Subagent:** the agent of an agent. The agent is the subagent of the broker. A selling agent may be a subagent of the listing broker.
- **Principal:** the party who hires the agent, normally the buyer or the seller or the landlord or tenant. The principal delegates to the agent the responsibility of representing the principal's interests.

- **Agency:** the fiduciary relationship between the principal and the agent in which the agent represents the principal in a transaction.
- **Client:** the principal in a real estate transaction who is being represented by an agent.
- **Customer:** the third party, that is, the party in the transaction whom the agent does not represent. The customer may be represented by a separate agent.
- **Co-operating broker:** the broker who finds the buyer

- **Nonagent** – someone who assists the buyer and seller, or landlord and tenant, in a transaction without representing either party, also known as a facilitator. A broker is sometimes considered a nonagent when assisting a customer.
- **Single agency** – The agent represents only one of the parties to a transaction. The agent gives advice to the client and owes fiduciary duties to the client only.

LAW OF AGENCY

- **1. universal agency:** authorizes an agent to handle matters of *all* types for the principal. This type of agency requires a power of attorney. A court appointed guardian would be an example of universal agency.
- **2. general agency:** authorizes an agent to transact a broad range of matters concerning a specific area of business for the principal, for example, managing several investment rental properties. A property manager is an example of a general agent.
- **3. special agency:** authorizes an agent to perform a specific act or to handle a specific business matter for the client.

CREATION OF AGENCY

- **Express agency:** based on a formal agreement between the parties in which the parties express the establishment of an agency and state the terms and conditions, for example, a listing agreement. Express agency may be either written or oral
- **Implied agency:** occurs when the parties act in such a way as to indicate that they have agreed to an agency. Implied agency occurs when the parties behave as though there is an agency agreement.

FIDUCIARY DUTIES TO CLIENTS

- Obedience
- Loyalty
- Disclosure
- Confidentiality
- Accountability
- Reasonable Care

EXCEPTIONS TO DISCLOSURE

- The client permits the disclosure or the disclosure is required by law or would reveal serious defect.
- The information becomes public from another source.
- Confidential information does not include material information about the physical condition of the property.
- A Designated Agent can disclose confidential information to the employing broker for the purpose of seeking advice or assistance for a client.
- A licensee shall not be liable to a client for providing false information to the client if the false information was provided to the licensee by a customer unless the licensee knew or should have known the information was false.

AGENCY TERMINATION

- Death or incapacity of either party
- Destruction or condemnation (expropriation) of the property
- Expiration of the terms of the agency
- By mutual agreement
- Renunciation by the agent or revocation by the principal
- Bankruptcy of the principal
- Fulfillment of the purpose for which the agency was created

AGENCY COUPLED WITH AN INTEREST

- An agency relationship in which the agent is given an interest in the subject of the agency, such as the property being sold.
- An agency coupled with an interest is a non-revocable agency.
- An agency coupled with an interest cannot be revoked by the principal alone and is not terminated upon the death of the principal.

SUBAGENCY (COMMON LAW OF AGENCY)

- Salespersons are general agents of the broker, and therefore owe fiduciary duties to the broker.
- Because the broker is an agent of the principal, and the salesperson is an agent of the broker, the salesperson is considered a *subagent* of the principal.
- A co-operating broker may also be a subagent of a listing broker.
- Many states no longer operate under subagency, but have adopted “Designated Agency”.

DESIGNATED AGENCY

- Designated agency agreements create a contract between Broker and client where one or more licensees is appointed as agent of the client.
- A Designated Agent is a licensee named by a Broker as the agent of a client.
- Many states have instituted designated agency to replace subagency to clarify who is being represented in a transaction and who is not.

DUAL AGENCY

- Dual agency is the act of representing two principals to a transaction at the same time and requires equal loyalty to both.
- Loyalty would be the most difficult fiduciary duty for a dual agent to perform since he is obligated to get the highest price for the seller and the lowest price for the buyer – two conflicting obligations!
- Dual agency is a violation of a fiduciary relationship *unless* both buyer and seller are informed of the dual agency *and* both agree to it in writing.

A DUAL AGENT MUST *NOT* DISCLOSE:

- Confidential information that the licensee may know about either client, without permission.
- The price or terms the seller or landlord will take other than the listing price without permission of the seller or landlord.
- The price or terms the buyer or tenant is willing to accept without permission of the buyer or tenant.

DISCLOSURE OF MATERIAL FACTS AND DEFECTS

- An agent must fully disclose to a prospective buyer all pertinent material facts and defects that he knows to be present in the property that he is showing.
- When representing the seller, the agent should inform his principal of the importance of disclosing any defects in the property he is offering for sale.

- **Latent Defect** is a hidden structural defect that would not be discovered by ordinary inspection. Failing to disclose a known defect is a violation of the fiduciary relationship.
- **Caveat Emptor:** The common law doctrine meaning “let the buyer beware” and was the rule in the past.

MEGAN'S LAW

- A federal law which establishes a statewide registry containing information on sex offenders.
- Many states require real estate agents to provide buyers and lessees with the website which provides information on sex offenders and where they live.
- The website, www.fbi.gov/scams-safety/registry provides access to every state's offender registry.

BUYER'S AGENCY

- **Exclusive buyer agency agreement:** The buyer is obligated to compensate the agent whenever the buyer purchases a property of the type agreed upon in the contract.
- **Exclusive agency buyer agency agreement:** The broker is entitled to payment only if he or she locates the property the buyer ultimately purchases.
- **Open buyer agency agreement:** This agreement is nonexclusive and allows the buyer to employ an unlimited number of brokers. The buyer compensates only the broker who actually locates the property purchased.

PROCURING CAUSE

- The procuring cause is considered to be the person whose actions are the primary reason for a sale taking place
- Courts have generally considered the one who actually secures the buyer's signature on the sales contract to be the procuring cause.
- Once a seller accepts a **ready, willing, and able buyer**, the broker is entitled to a commission.

COMMISSIONS

- The broker's compensation for a sale generally takes the form of a commission.
- A commission is a percentage of the total sales price of a property, usually paid by the principal to the broker after the sale has been made.
- Commissions are *always* negotiable.
- The exact rate of commission, generally specified in the listing agreement, is determined by mutual agreement.
- No local boards or government agencies may set commission rates.

PRICE FIXING

- Collusion among brokers or real estate boards in the fixing of commission rates
- Price fixing is illegal

BROKER COOPERATION

- When a commission is shared between the listing broker and the selling broker this is known as **broker cooperation**
- The selling broker is known as the **cooperating broker**.
- All payments of any kind to an agent must be made through the sponsoring broker; this includes gifts or fees for services in addition to the commission.
- Any fees paid to an agent for services must be paid to the broker and disclosed to all parties to the transaction.

PRESENTATION OF OFFERS

- The listing agent is obligated to present all offers to purchase to the seller as soon as possible.
- If more than one offer is received by the agent, they should all be presented as soon as possible, and at the same time.
- In Common Law states (all states except Louisiana), an offer is revocable by the offeror until it is signed and accepted by the offeree.

MISREPRESENTATION

- Giving false information about a property, whether intentionally or unintentionally is **misrepresentation**.
- **Fraud** is the *intentional* misrepresentation of a material fact. Fraud includes making false statements and withholding pertinent information.
- **Negligent misrepresentation** occurs when the agent should have known that a statement about a material fact was false. Ignorance is no excuse.
- **Negligent omission** occurs when the agent accidentally fails to perform some act, such as delivering a counteroffer.
- **Puffing** is exaggerating a property's benefits such as views or landscaping. Puffing is always an opinion.

EMPLOYEE VS. INDEPENDENT CONTRACTOR

- The salesperson may be either an employee of the broker or **independent contractor**.
- As an employee the agent may be required to keep certain hours, attend sales meetings, meet quotas, etc. The broker is required to withhold Social Security tax and income tax from wages.
- As an independent contractor the broker has less control over the agent, and the agent has more independence in setting his hours and how he conducts business.
- The broker cannot require the agent to keep regular hours or attend sales meetings, and the agent is responsible for paying his own taxes including Social Security.

ENVIRONMENTAL HAZARDS

- **Encapsulation** of asbestos is often safer than removal.
- **Radon** is a colorless and odorless radioactive gas that is produced by the natural decay of other radioactive substances.
- **Lead Based Paint** was used before 1978 and is often found in older houses. It was banned in 1978.
- **Asbestos** is a naturally occurring material that was once widely used in building materials because it is fire-resistant and has some insulating properties.
- **Abatement** is the method by which an environmental hazard is reduced.

SUMMARY OF DISCLOSURES

MUST DISCLOSE:

- Material facts and defects that are known to exist in the property being shown
- Dual agency
- Agent has an ownership interest in the property
- Environmental hazards including the presence of radon, lead based paint, or asbestos
- Website for listed sex offenders must be included in all written purchase agreements and leases
- Website for mold disclosure

MUST NOT DISCLOSE:

Confidential information unless:

- Permission is given by the client
- The information becomes public knowledge by another source

Anything related to the seven protected classes under the Federal Fair Housing Laws

NOT REQUIRED TO DISCLOSE

- Psychologically impacted property such as a murder or suicide on the property, or property is thought to be haunted
- There was a burglary on the property
- These MAY be disclosed but you need written permission if you represent the seller or are a dual agent