

AGENCY RELATIONSHIP AND BROKER RESPONSIBILITIES

Like every other profession, real estate is governed by a body of laws and customs which determine its professional standards and the ways in which its members may do business. Although the basic legal principles pertaining to the real estate business are the same throughout the country, each state has particular laws which regulate the profession.

AGENCY is defined as that condition which legally exists when a principal contracts with an agent to perform on his behalf. It is the broker's function to bring together buyers and sellers in order to negotiate property transactions. The broker acts on the principal's behalf to buy, sell, exchange, rent, appraise, auction or lease real property. The relationship between the agent and the consumer may not necessarily be an agency relationship.

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: A licensee may assist a customer by performing ministerial acts. Performing ministerial acts does not violate a brokerage agreement with the client. Ministerial acts do not form a brokerage agreement with the customer. Ministerial acts are those acts that a licensee may perform for a person that are informative in nature.

Examples include but are not limited to:

- Responding to phone inquiries by persons as to the availability and pricing of brokerage services.
- Responding to phone inquiries from a person concerning the price or location of property.
- Conducting an open house and responding to questions about the property from a person.
- Setting an appointment to view property.
- Responding to questions from persons walking into a licensee's office concerning brokerage services offered or particular properties.
- Accompanying an appraiser, inspector, contractor, or similar third party on a visit to a property.
- Describing a property or the property's condition in response to a person's inquiry.
- Completing business or factual information for a person represented by another licensee on an offer or contract to purchase.
- Showing a person through a property being sold by an owner on his or her own behalf.
- Referral to another broker or service provider.

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.

An agent works **FOR** a client giving **ADVICE**, and **WITH** a customer giving only **INFORMATION**.

THE LAW OF AGENCY

The relationship between agent and principal is governed by a body of laws and customs known as THE LAW OF AGENCY. Legally, agency is said to exist whenever a principal contracts with an agent to act on his behalf. There are three types 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 principal, for example, finding a buyer for a specific piece of property. A real estate broker is usually a special agent. The special agent does not have the power to bind the principal to a contract.

In the strict legal sense, the agent in a fiduciary principal-agent relationship is the real estate broker. The salesperson represents the broker. However, it is customary for anyone with a real estate license to be referred to as an agent.

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. A listing agreement is an express agreement between a real estate broker and a seller in which the seller hires the broker to find a buyer/tenant for his property. An express agency relationship can also be created between a broker and a buyer and is known as a **buyer representation agreement**.

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. Agency can be created inadvertently or accidentally, without intention, by the parties' actions. The licensee may be held liable for his or her actions if it can be shown that an implied agency existed. The licensee may also be denied compensation because there was no written agreement as required by law.

For these reasons, as well as to be in compliance with the law, it is imperative that licensees have all parties sign an agency disclosure form. Buyers who have asked to see a house may assume that they are being represented when they are not. Consumers cannot be expected to be familiar with all the laws regulating agency relationships, therefore it is up to the licensee to establish whether or not there is an agency relationship and to inform the client or customer.

The principal-agent relationship is a **fiduciary relationship**, that is, a relationship based on trust and confidence. A fiduciary relationship can also be formed by the principal giving power of attorney to the agent. **Power of attorney** is a document that gives another person the power to act on one's behalf. The person to whom power of attorney is given is called an **attorney-in-fact**.

FIDUCIARY RESPONSIBILITIES

Duties To Clients

A licensee's duties when representing clients include performing the terms of the brokerage agreement between a broker and the client.

Licensee should further promote the best interests of the client by:

- Seeking a transaction at the price and terms stated in the brokerage agreement or at a price and upon terms otherwise acceptable to the client.
- Timely presenting all offers to and from the client.
- Timely accounting for all money and property received in which the client has, may have, or should have had an interest.

The fiduciary character of the agency relationship demands of the agent the following duties to the principal. We use the acronym "**OLD CAR**" to remember them.

1. **Obedience:** The broker obeys all the legitimate instructions of the principal, for example, when he may show the property. The agent must represent the client in good faith to the best of his abilities at all times. However, the agent may NOT obey the client when the instructions are illegal or unethical.

Example of breach: If your seller client asked for no open house, you would breach that duty if

you went ahead and advertised an open house.

2. **Loyalty:** The broker is faithful to his principal and works for no other interested party without the principal's knowledge or permission. The agent must put the client's interests above his own and must be careful to avoid situations that might involve a conflict of interest.

For example, Broker Jones has listed Smith's property. A third party offers Broker Jones \$1,000 to persuade Smith to lower his price by \$3,000. If Broker Jones accepts this offer without the informed consent of Smith, he is in violation of the fiduciary relationship.

Example of breach: If your seller client set a price below market value and you bought it at that price rather than advising him to raise the price, you would be disloyal.

3. **Disclosure:** The agent must disclose any relevant information to the client that might affect the transaction. The duty of disclosure involves disclosure of material facts as well as non-material information. The seller's agent is required by law to disclose any material defects in the property even though such disclosure may seem to violate the duty of loyalty to the client. Any information obtained by the seller's agent as to the buyer's ability to qualify for the loan or complete the sale should be disclosed to the seller by the seller's agent.

The duty of disclosure obligates a real estate broker representing a seller to reveal to the seller:

- All offers to purchase the seller's property.
- The identity of all potential purchasers.
- Any facts affecting the value of the property.
- Information concerning the ability or willingness of the buyer to complete the sale or to offer a higher price.
- The broker's relationship to, or interest in, a prospective buyer.
- A buyer's intention to subdivide or resell the property for a profit.
- Any other information that might affect the seller's ability to obtain the highest price and best terms in the sale of his property.

A real estate broker representing a buyer is obligated to reveal to the buyer:

- The willingness of the seller to accept a lower price.
- Any facts relating to the urgency of the seller's need to dispose of the property.
- The broker's relationship to, or interest in, the seller of the property for sale.
- Any facts affecting the value of the property.
- The length of time the property has been on the market and any other offers or counteroffers that have been made relating to the property.
- Any other information that would affect the buyer's ability to obtain the property at the lowest price and on the most favorable terms.

Exceptions to disclosure include:

- 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 Agency 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.

Example of breach: If a buyer says to his agent, "I am only offering \$130,000 but will go up to \$135,000", the agent would be breaching his responsibility if he disclosed that information to the seller.

4. **Confidentiality:** The agent is bound to keep any personal information which the client discloses to him confidential, for example, that the client is getting a divorce and must sell quickly. Even if the agency relationship is terminated, the fiduciary duty of confidentiality is never terminated and extends beyond the agency relationship.

Confidential information can only be disclosed to others if:

- The client permits the disclosure by word or conduct.
- The disclosure is required by law or would reveal serious defect.
- The information becomes public from a source other than the licensee.

Example of breach: If a seller client confides to you that he is desperate to sell because he is getting a divorce and being transferred, you would breach that confidence by sharing it with anyone.

Exceptions to confidentiality:

An agent can disclose confidential information if required by:

- court order
- knowledge of client's intent to commit a crime
- client authorizes disclosure
- defense of a lawsuit - if client sues and it is necessary to disclose information to defend that lawsuit.

5. **Accountability:** The broker is strictly accountable for any of the principal's assets coming into his hands and must take care to handle them responsibly. For example, using a client's deposit for personal needs would be a violation. **Commingling** these funds with the broker's personal or business funds is illegal. **Conversion** is the practice of using commingled funds as the broker's own money.

Example of breach: You receive a deposit from a client with a purchase offer. Rather than put it into an escrow account, you commingle it with the general operating funds of your real estate agency.

6. **Reasonable Care:** The broker is always mindful of the principal's interests and concerns, for example, acting to secure the highest possible price for his client's property.

Example of breach: As a seller's agent you fail to ask a buyer's mortgage ability and accept an offer contingent upon obtaining a mortgage. Or, as a buyer's agent you fail to look into the mortgage ability of a home for the offered price. The broker must notify the principal within a reasonable period of

time of any information he may receive concerning his property or interests. For example, a client tells a broker that he wants to sell his house for \$40,000. The broker knows that the house is really worth \$60,000, but does not inform the client. The real estate business is a service industry, and emphasis should be on service to the client and to the public.

Duties Owed to the Customer: The duties owed to the customer, the person you do not represent, by the agent are those of ***honesty*** and ***truthfulness***.

While there are confidences due a client, there are no confidences with a customer. There is no requirement of confidentiality. A licensee may assist a customer by performing ministerial acts.

Watch out for these signs of trouble when dealing with customers:

- Providing advice instead of information.
- Transferring loyalty from a client to a customer.
- Suggesting price or terms not authorized by the client.
- Requests relating to confidential information.
- Allowing an accidental or undisclosed Dual Agency to occur through conduct or otherwise.

TYPES OF AGENCY

An **agency coupled with an interest** is 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.

A **designated agent** is a person authorized by the broker to act as the agent of a specific principal. This agent is the only agent in the company who has fiduciary responsibilities to the principal. This makes other agents in the company free to act as agents for the other party in a transaction. Therefore, two salespersons from the same company can represent different parties in the same transaction. However, in this situation the broker may be considered a dual agent and disclosure is required. In Louisiana, if you have the listing you represent the seller. If someone else sponsored by the same broker shows the house, they represent the buyer and does not constitute a dual agency. In Mississippi, it would be considered dual agency.

Single Agency is one in which the agent represents only one party in any single transaction, and only owes fiduciary duties to that party, whether it is the buyer or the seller.

Seller as Principal: When a seller contracts with a broker to market the seller's property, the broker becomes an *agent of the seller* and the seller is said to be the *client or principal* of the broker. A *fiduciary relationship* is established.

Buyer as Principal: When a buyer contracts with a broker to find and purchase property, the buyer is the *principal or client* of the broker, and the broker is the *agent* of the buyer. The seller becomes the *customer*. There is a *fiduciary relationship* between the broker and the buyer.

Broker/Agent Relationship: An agency relationship also exists between the sponsoring broker and the sales associate. The associate is authorized to represent the broker in real estate transactions and owes the same fiduciary duties to the broker as to the client. The broker is therefore a principal of the sales associate.

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.

While the broker is an independent businessman, the salesperson is not. He works only under the supervision of a sponsoring broker, and only at those tasks to which he has been assigned. The salesperson may function either as an **employee** or as an **independent contractor** of the broker. As an employee, the salesperson may work on a commission basis or a salaried basis. As an employer, the broker must make the customary withholding deductions from the salesperson's salary or commissions. As an independent contractor, the salesperson enjoys a larger amount of freedom. Normally he works on commission and establishes his own working schedule and manner of doing business. However, he is still under the supervision of the broker. The independent contractor pays his own income tax and social security.

All listings remain the broker's exclusive property. If the salesperson is found guilty of fraud or some other form of professional misconduct, his own sales license, as well as the license of his sponsoring broker, may be subject to suspension or revocation. Brokers and salespersons alike are responsible for actions that are both *legal* and *ethical*.

DISCLOSURE OF AGENCY RELATIONSHIP

Disclosure statutes relating to agency relationships have been passed in many states in recent years. States differ somewhat in regard to this subject, but most require that agents give the customer and/or client some form of written disclosure stating whom they represent.

(In Louisiana, the law states that, unless there is a written agreement to the contrary, the agent represents the person he is with. An **agency disclosure brochure** must be signed by the client and the agent at the first substantive contact. "Substantive contact" means that point in any conversation where confidential information is solicited or received. This includes any specific financial qualifications of the consumer or the motives or objectives in which the consumer may divulge any confidential, personal, or financial information, which, if disclosed to the other party to the transaction, could harm the party's bargaining position. This includes any electronic contact, electronic mail, or any other form of electronic transmission.)*

DESIGNATED AGENCY

Designated agency agreements create a contract between Broker and client where one or more licensees is appointed as agent of the client. Further, 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.

The customer is not represented by an agent in the transaction. If a customer begins asking questions and seeking advice that falls outside ministerial functions then the disclosure pamphlet must be given and the relationships explained to the customer at that time.

"Designated agency" means a contractual relationship between a broker and a client under which one or more licensees affiliated with the broker are designated as agents of the client the agency relationship that shall be presumed to exist when a licensee engaged in any real estate transaction, except as

otherwise provided in this Chapter, is working with a client, unless there is a written agreement providing for a different relationship.

"Designated agent" means a licensee named by a broker as who is the agent of a client

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. It is illegal for a broker to secretly act for more than one principal in the same transaction. It is virtually impossible for a broker to represent both buyer and seller at the same time and still obtain the best for both of them as far as securing the best price is concerned. For this reason dual agency is illegal in some states.

Undisclosed dual agency: representing two principals to a transaction without the knowledge and consent of both. Undisclosed dual agency is usually illegal. Undisclosed dual agency may occur *unintentionally* by either carelessness or misunderstanding. Giving the *customer* any specific advice on how much to offer can lead him to believe that the agent is representing his interests and acting as his agent, thereby creating an implied agency.

Disclosed dual agency: Representing both the buyer and the seller in the same transaction with the informed consent of both. Disclosure minimizes the risk to the broker and alerts the clients to the inherent dangers in dual representation. In a dual agency transaction the duties of disclosure and confidentiality may be limited or compromised.

Licensee obligations when acting as a dual agent:

- Treat all clients honestly.
- Provide information about the property to the buyer or tenant.
- Disclose all latent material defects in the property that are known to the licensee.
- Disclose financial qualifications of the buyer or tenant to the seller or landlord.
- Explain real estate terms.
- Help the buyer or tenant to arrange for property inspections.
- Explain closing costs and procedures.
- Help the buyer compare financing alternatives.
- Provide information about comparable properties that have sold so both clients may make educated decisions on what price to accept or offer.

A licensee must not disclose confidential information that the licensee may know about either client, without permission.

A licensee must not disclose the price or terms the seller or landlord will take other than the listing price without permission of the seller or landlord.

A licensee must not disclose the price or terms the buyer or tenant is willing to accept without permission of the buyer or tenant.

Watch for these trouble-signs in a Dual Agency relationship:

- One party thinks they are being represented exclusively.
- One party wants an unfair advantage over another party.
- An agent transfers allegiance to one party, rather than both.
- Making the representations of the buyer or seller those of the agent.
- Incomplete paper trail.
- Undisclosed, accidental or ostensible agency.
- Conduct in violation of any written agreement.

TERMINATION OF AGENCY

The creation of agency is *expressed*, either by a listing agreement or by power of attorney. The broker is employed by the principal. It is an agreement between two parties. This agreement may be terminated in various ways:

- 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

The reasons for terminating a listing agreement are essentially the same as those for terminating agency. While an open listing may have no specific expiration date, exclusive agency and exclusive right to sell agreements must. A listing is generally considered to have terminated automatically upon the arrival of the expiration date. However, a "safety clause" may be included which extends the broker's right to claim a commission for an additional period of time beyond the contract's term. The safety clause protects the broker's interests in the work he has expended on a listing. It prevents the owner's avoiding his commission obligations by deliberately waiting for the listing to expire before he sells his property.

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. A **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. He may also be liable for damages.

The common law doctrine of **caveat emptor** means "let the buyer beware" and was the rule in the past.

MEGAN'S LAW

Megan's Law is 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.

TYPES OF REAL ESTATE CONTRACTS

LISTING AGREEMENT: A listing agreement is the way in which the sellers of property furnish the real estate brokers and salespeople with their inventory. It is also an employment contract, that is, employment of the broker by the principal to find a ready, willing and able buyer for his property. The listing agreement forms a **special agency** relationship between the broker and seller in that it authorizes the broker to represent the principal's property for sale, solicit offers and submit the offers to the principal.

There are three main types of listing agreements:

1. **Open listing:** The seller retains the right to employ as many brokers as he wants to try to sell his property, but is only obligated to pay a commission to the one who actually finds a ready, willing and able buyer. If the seller sells his property himself, he is not obligated to pay a commission.
2. **Exclusive agency:** Only one broker is hired to act as the exclusive agent of the principal. The seller, however, can still sell his property himself and not pay a commission to the broker.
3. **Exclusive right to sell:** Only one broker is hired as the agent in this type of listing agreement and he is given the exclusive right to sell the property. Regardless of who actually sells the property, the seller must pay the broker a commission. This is the most common and popular type of listing agreement for brokers and sellers alike.

BUYER'S AGENCY

An agent working with a buyer can represent the buyer instead of the seller by rejecting the offer of subagency and notifying the listing agent of this. Normally, the agent must have a written agreement with the buyer and must inform the seller that he is representing the buyer. The fee or commission may be paid by either the buyer or the seller

There are three basic types of buyer agency agreements:

1. **Exclusive buyer agency agreement:** The buyer engages a single licensee to search for a suitable property, and the licensee is entitled to compensation no matter who finds the property, *including* the buyer.
2. **Exclusive-agency buyer agency agreement:** The buyer engages the licensee to search for a suitable property and that licensee is entitled to compensation if anyone *other than the* buyer finds a suitable property.
3. **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

When several brokers become involved in a sale, there is sometimes a question as to which of them has found the buyer, that is, which has been the procuring cause in the sale. In a real estate transaction, 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. Multiple listing services, on the other hand, sometimes regard the first agent to show the property to the eventual buyer as the procuring cause. Once a seller accepts a **ready, willing, and able buyer**, the broker is entitled to a commission. *Ready, willing, and able*, means a buyer

who is prepared to buy on the seller's terms and has the means.

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. In fact, the United States Department of Justice forbids any form of collusion among brokers or real estate boards in the fixing of commission rates of **price fixing**. The amount of a broker's commission is found by multiplying the sales price by the percentage charged for the commission. If there is a listing broker and a selling broker, the commission is usually shared between the two brokers. When a commission is shared between the listing broker and the selling broker, this is known as **broker cooperation** and 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.

Compensation does not determine agency! The licensee does not necessarily represent the person who is paying the commission. Any written agency agreement should state how the licensee is to be compensated, whether the agent is representing the buyer or the seller.

Any fees paid to an agent for services must be paid to the broker and disclosed to all parties to the transaction.

SHARING COMMISSIONS

The amount of compensation a salesperson receives is set by mutual agreement between the broker and the salesperson. Only the sponsoring broker can pay the salesperson. In cooperating sales where an agent from another brokerage company represents one party to the transaction, the fee must be paid from the listing broker to the cooperating broker who then pays his salesperson.

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.

In Louisiana, once an offer is made it is not revocable by the offeror and must remain until the time of expiration stated on the contract, or until rejected by the offeree.

RESPONSIBILITIES OF THE BROKER

The broker is responsible for negotiating a satisfactory agreement between the buyer and seller, for filling out routine sales contracts, etc. He is not able to give legal advice concerning the rights of buyers and sellers, or to prepare legal documents relating to property transactions. These should be performed by a competent attorney. A broker may not employ an attorney to represent either the buyer or the seller, however, he may recommend several lawyers if the client does not already have one.

MISREPRESENTATION

Giving false information about a property, whether intentionally or unintentionally is misrepresentation. If damages result from any type of misrepresentation, the agent may be held liable. **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. An example of puffing would be the statement, *"This is the most beautiful house in the city!"*

REAL ESTATE AGENTS – INDEPENDENT CONTRACTOR

The salesperson may be either an employee of the broker or **independent contractor**. The employment agreement between the broker and salesperson should specify whether the salesperson is an *employee* or an *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.

To qualify as an independent contractor in the eyes of the Internal Revenue Service the agent must be licensed, must have a written agreement with the broker specifying that the licensee is an independent contractor, and at least 90% of his income must be based on sales commissions.

LICENSING

Licensing requirements vary from state to state. Although brokers and salespersons must always be licensed, certain groups of people are exempt from licensing requirements. These most commonly are:

- anyone selling his own real property
- executors, administrators, guardians, and persons who have court authorization to sell a specific property.
- an attorney-at-law selling property as part of his professional duties
- authorized employees of lending institutions engaged in the sale of real estate contracts related to their institution's loans
- city, state, and federal officials selling real estate as part of their normal duties.
- appraisers, trustees, escrow clerks.

None of these unlicensed people may collect a commission on the property they sell.

DISCLOSURE OF ENVIRONMENTAL HAZARDS

Disclosure of environmental hazards, which can render properties not salable, may be required. Licensees should consult local authorities responsible for environmental regulation whenever toxic waste, contaminated soil or water, nearby chemical or nuclear facilities, radon, asbestos, lead-based paint or other health hazards are involved.

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. Radon can occur anywhere, but some areas are known to have unusually high amounts. When trapped in buildings in high concentration, it can cause serious health problems. It is often found in the soil and can enter buildings through the basement or flooring and become trapped in the building if there is poor ventilation.

Lead Based Paint was used before 1978 and is often found in older houses. It was banned in 1978 because of the danger of lead poisoning from peeling or flaking paint that small children may put in their mouths. Lead from paint or other sources can result in damage to the brain, nervous system, kidneys and blood. The results range from mental retardation to death. Purchasers must be informed of the dangers of lead-based paint and its possible presence in houses built before 1978. The **lead based paint disclosure addendum** allows for buyers to waive a lead-based paint inspection.

In 1996 the EPA and the Department of Housing and Urban Development (HUD) issued the final regulation on lead based paint. The regulation requires the disclosure of the presence of any known lead-based paint hazard to potential buyers or renters. There is no requirement in the federal law for testing for the presence of lead-based paint. Paint inspections are possible that identify the lead content of every different painted surface in a building.

Licensees must provide buyers and renters with the HUD pamphlet, "Protect Your Family from Lead in Your Home." Licensees must also disclose to renters or buyers any prior test results or knowledge of any lead paint products within a building. Only buyers' agents who are paid entirely by the buyer are exempt under the federal law. It is recommended that buyers' agents who are paid entirely by the buyers will make the same disclosures required of all other licensees.

Asbestos is a naturally occurring material that was once widely used in building materials because it is fire-resistant and has some insulating properties. It was a component of thousands of building materials found that were used in construction of residential structures. Because it is also relatively inexpensive, asbestos insulation, siding and roofing were very popular for residences and public buildings such as schools.

Asbestos is a highly friable material. This means that as it ages its fibers very easily break down into tiny filaments can appear to be dust and that are easily breathed into the lungs. The result is serious and deadly lung diseases that can take decades after the material is inhaled to appear.

Abatement is the method by which an environmental hazard is reduced.

Although not a hazard, land that is classified as "wetlands" should also be disclosed as such to any prospective buyer.

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 present the Louisiana Buyer Informational Brochure at the first substantive contact

MUST NOT DISCLOSE:

- Confidential information unless:
 - Permission is given by the client
 - The information becomes public knowledge by another source
- Anything related to the protected classes under the Federal Fair Housing laws, such as minorities living in the area, or it's a predominantly Hispanic neighborhood CANNOT be discussed.

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

CASE STUDIES

CASE 1

Agent Annie knows that a house she recently listed was built on a landfill. Other houses in the neighborhood have had foundation problems. Annie notices an uneven area in the floor and cracks along the corner of one wall. What are Annie's obligations in this situation?

- a. She should not mention this to prospective buyers because she owes a fiduciary duty to the seller and doing so might compromise the sale of the property.
- b. She is required by law to disclose any material defects to prospective buyers.

Answer, B.

CASE 2

When showing an average house to a potential buyer, the agent describes it as gorgeous and the best house in the neighborhood. What is this an example of?

- a. intentional misrepresentation
- b. puffing

Answer B

CASE 3

Broker Bill lists a house on Easy Street. A prospective buyer, Polly, that Bill has been working with sees the sign and tells Bill she wants to make an offer. Polly is on a tight budget and asks Bill for advice on a likely price range. What are broker Bill's responsibilities to the seller and to the buyer. What is Bill's best course of action?

- a. Bill should take this opportunity to suggest a price to the buyer because not doing so might cause the seller to lose the sale.
- b. Bill represents the seller and cannot offer advice to the buyer without compromising the seller's position and risking becoming an undisclosed dual agent.

Answer B

CASE 4

Nancy tells her neighbor Bob, who is a real estate agent, that she is thinking about selling her house. Bob mentions the house to several buyers that he is working with and one of them immediately makes an offer on the house. Bob presents the offer to Nancy and she accepts. No formal agency agreement was entered into. What is Bob's relationship with the buyer and the seller?

- a. Bob cannot expect a commission on the sale because he did not have a listing agreement with the seller.
- b. By accepting the offer presented by Bob, the seller has created an implied agency relationship. However, any commission must be stated in the contract.

Answer B

CASE 5

A seller tells the listing agent that he does not want his house shown to any minorities. Under the fiduciary duty of obedience, is the agent required to follow the seller's instructions?

- a. Yes.
- b. No, because to do so would be a violation of the Fair Housing law.

Answer B

CASE 6

Bonnie Buyer submits an offer for \$150,000 through Agent Annie on a property listed by Agent Al. The seller counters at \$152,000. Bonnie accepts the counteroffer in the presence of Annie only. One hour later Al delivers to Betty a written revocation of the counteroffer, and the seller accepts an offer of \$155,000 from another buyer. Is the seller obligated to sell to Bonnie?

- a. Yes, always.
- b. No, (except for Louisiana). In the other 49 states an offer is revocable until it is accepted by the seller. In Louisiana, an offer is irrevocable until it is rejected by the seller, or the time expires.

Answer B

Terms and Concepts:

Agent
Principal

general agency
duties owed to customer

universal agency
special agency
procuring cause/buyer agency

subagency (created by contract)
dual agency

QUESTIONS

1. An owner agrees to pay a commission if his property is sold but doesn't want to sign a listing agreement. What type of contract is this?
 - a. express
 - b. implied
 - c. written
 - d. illegal
2. An agent tells a prospective buyer that a problem with the foundation has been corrected knowing that it has not. This would be an example of:
 - a. puffing
 - b. mistake of fact
 - c. misrepresentation
 - d. following the owner's instructions
3. Which of the following is an agent required to disclose to a potential buyer?
 - a. a person was murdered in the house.
 - b. a person living in the house has AIDS.
 - c. the property has been burglarized several times.
 - d. the property has contains asbestos insulation.
4. A vendor wants to give you, the agent, a gift for services. What should you do?
 - a. Accept it.
 - b. Not accept it.
 - c. Tell your broker.
 - d. Accept it, but disclose to the buyer.
5. A protection clause in a listing agreement allows for:
 - a. a 30 day extension on the listing if the property has not sold at the end of the contract term.
 - b. 2 weeks for the listing agent to sell without competition from other brokers.
 - c. payment of the commission if the buyer was secured by the broker even if the sale takes place after the expiration of the contract.
 - d. a six month minimum listing.
6. Under subagency, or common law agency, a salesperson working for the seller with a cooperating broker has a fiduciary relationship to all EXCEPT:
 - a. the seller
 - b. the buyer
 - c. the cooperating broker
 - d. the listing broker
7. An agent showing trust and confidentiality to the client is an example of what type of relationship?
 - a. brokerage
 - b. fiduciary
 - c. customer
 - d. special
8. All of the following are example of agency relationship EXCEPT:
 - a. listing agreement
 - b. purchase agreement
 - c. property management agreement
 - d. broker/salesperson agreement
9. Which duty is easiest to perform as a dual agent?
 - a. obedience
 - b. disclosure
 - c. loyalty
 - d. care

Answers: 1a, 2c, 3d, 4c, 5c, 6b, 7b, 8b, 9b