

Unit 9: Real Estate Agency

LECTURE OUTLINE

I. History of Agency

- * Common law: rules of society established by tradition and court decisions
- * Statutory law: enacted by legislatures
- * Administrative law: rules and regulations created by real estate commissions and departments, as authorized by the legislature

A. Definitions in the law of agency

1. Agent—the individual who is authorized and consents to represent the interests of another person in dealings with a third person. In real estate, many different agency relationships are possible.
2. Principal—the individual who hires and delegates to the agent the responsibility of representing the principal's interests. In a real estate transaction in which an agency relationship is established, the principal is the buyer, seller, owner, landlord, or tenant. The broker is the principal in dealings with sales associates.
3. Agency—the fiduciary relationship between the principal and the agent.
4. Fiduciary—the relationship in which the agent is held in a position of special trust and confidence by the principal.
5. Client—the principal in a real estate transaction for whom the broker acts as agent.
6. Customer—the third party or nonrepresented consumer for whom some level of service is provided and who is entitled to fairness and honesty.
7. Nonagent—(referred to as a facilitator, intermediary, transactional broker, transaction coordinator, or contract broker) who assists one or both parties to a transaction without representing either party's interests.

B. Common law duties in an agency are usually incorporated within statutory law.

1. The client is the principal to whom the agent gives advice and counsel.
2. The agent is entrusted with confidential information and has fiduciary responsibilities to the principal.
3. The relationship between principal and agent must be consensual.
4. Agent owes duties to the principal, and principal has responsibilities toward the agent, including compensation by the terms of the agency agreement.

II. Creation of agency

1. Express agency
 - a. The parties state the terms of the agreement and express their intentions either orally or in writing.
 - b. In real estate, generally written agreements rather than oral.
2. Implied agency
 - a. *Actions* of the parties indicate they have mutually consented to an agency
 - b. In real estate, the actions of the parties may create an agency relationship *unintentionally, inadvertently, or accidentally* where none was intended, leading to an undisclosed dual agency.
 - c. Despite the disclosure of agency relationships, customers may assume that a licensee is representing them.
3. Compensation—because a party pays the compensation to the agent does not mean that party is the agent's principal. A *gratuitous agency* exists when no fee is involved, and still will impose agency obligations on the agent.

C. Fiduciary responsibilities

1. A fiduciary relationship is one of trust and confidence between employer (principal) and employee (agent).
2. Common law duties include the following six duties as a minimum (COLD-AC):
 - a. Care--agent must exercise reasonable degree of care; liability can result from negligence or carelessness.
 - b. Obedience--agent must act in good faith and according to the principal's instructions (as long as those instructions are legal and relate to the terms of the contract).
 - c. Loyalty--principal's interests must come before the agent's; 100 percent loyalty is required; agent must inform the principal when agent has a personal interest in a transaction.
 - d. Disclosure--agent must keep the principal fully informed of all facts, including those required by the duty of discovery.
 - (1) Agent for seller must disclose
 - (a) All offers
 - (b) Identity of prospective buyers and agent's relationship to them
 - (c) Ability of buyer to complete sale or offer a higher

- price
 - (d) Agent's interest, if any
 - (e) Buyer's intention to resell property for profit.
 - (f) An incorrect market value of the property
- (2) Agent for buyer's disclosures to client include:
 - (a) Property deficiencies
 - (b) Unsuitable contract provisions and financing
 - (c) Lowest price to offer
 - (d) Length of time property on market
 - (e) Reason owner is selling
- e. Accounting—agent must account for all pertinent funds and documents placed in the agent's care; commingling or conversion of funds is illegal.
- f. Confidentiality—agent must keep information about the principal's personal affairs, such as financial condition, confidential; however, agent must disclose material facts about the property itself.

III. Types of Agency Relationships

A. Limitations on an agent's authority

1. Universal agent—no limits on authority; not typical for a real estate licensee.
2. General agent—one who represents the principal in a range of matters related to a particular business or activity; receives power to enter into contracts on behalf of the principal within the agent's scope of authority.
3. Special agent—limited agent, one who represents the principal in one specific transaction or one business activity only.
 - a. Such agency is created by the terms of the agreement between agent and client.
 - b. Agent cannot enter into contracts on behalf of the principal and cannot bind the principal to any act.

B. Disclosure of agency—Mandatory agency disclosure laws exist in every state

1. Alternatives for the level of services provided

2. Party the licensee represents
 3. Mandatory or voluntary disclosures
- C. Single agency: The broker represents either party, not both in the same transaction; any third party is a customer (See Figure 9.1). Precludes the sale of in-house listings to represented buyers.
1. Seller representation
 - a. The broker becomes the agent of the seller.
 - b. The relationship is established by a listing agreement.
 - c. The broker may utilize the services of other brokers as buyer's agents or nonagents.
 2. Buyer representation
 - a. The broker becomes the agent of the buyer.
 - b. The relationship is established by a buyer-agency agreement.
 - c. The broker becomes responsible to the buyer to locate real estate with certain specified characteristics.
 3. Property management
 - a. The broker becomes the agent of the owner to manage or lease the owner's real estate.
 - b. The relationship is established by a property management agreement.
- D. Dual agency: The broker represents two principals in the same transaction (See Figure 9.2) State laws stipulate legal requirements for performing dual agency, if it is permitted.
1. Disclosed dual agency—both principals must be *informed* and *consent to* the dual representation. Parties must understand how the dual representation could affect their respective interests when the agent is trying to serve two principals.
 2. Undisclosed dual agency—strictly prohibited, even if the actions of the parties create an agency relationship where none was intended.
 3. Designated agency—available in some states to accommodate an in-house sale in which two sales associates of the same broker are involved.

- E. Nonagency--nonagent may be called a transactional broker, intermediary, facilitator, transaction coordinator, or contract broker
 - 1. Helps both buyer and seller with paperwork and formalities in transferring property.
 - 2. Responsible to both parties and must treat them honestly and competently.
 - 3. Assists parties to arrive at mutually agreeable terms and helps with the closing. May not negotiate for parties or disclose confidential information.

- F. Termination of agency
 - 1. Completion, performance, or fulfillment of the purpose for which the agency was created
 - 2. Death or incapacity of either party
 - 3. Destruction or condemnation of the property
 - 4. Expiration of the terms of the agency
 - 5. Mutual agreement by all parties to cancel the agency
 - 6. Breach by one of the parties
 - 7. By operation of law, as in a bankruptcy of the principal, in which case the agency contract is terminated and title to the property is transferred to a court-appointed receiver

IV. Customer-Level Services—Duties to the third party include:

- * reasonable care and skill in performance.
- * honest and fair dealing.
- * disclosure of all facts known (or that should be known) to the licensee that materially affect the value or desirability of the property.

- A. Opinion versus fact
 - 1. Opinions must be stated as licensee's opinions with no intention to deceive.
 - 2. Facts must be accurate.

- a. Fraud—intentional misrepresentation of material fact to harm or take advantage of an individual.
 - b. Puffing—exaggeration of a property's benefits; legal as long as statements are not considered fraudulent.
 - c. Negligent misrepresentation—broker may be ignorant about a material fact but should have known; buyer relies on broker's statement.
- B. Disclosure of known adverse property conditions may be required, including
 - 1. Environmental hazards, such as lead paint, radon, asbestos, toxic waste, contaminated soil and water, or other hazards common in the area.
 - 2. Property conditions—*latent defects* are hidden structural defects that would not be uncovered by ordinary inspection; seller has duty to discover any latent defects that threaten structural soundness or personal safety. Agent may have duty to conduct inspection of the property; must discover and disclose material facts that may affect property value or desirability.
 - 3. Stigmatized properties—properties considered undesirable because of events that occurred there, such as criminal events or other tragedies; residency of a sexual offender in the area may also stigmatize property; licensee must consult state laws and seek legal counsel for guidance about disclosure.
 - 4. Megan's Law—federal law that promotes establishment of state registries on sexual offenders; accessible via FBI database.