

# "MREC Agency-Commercial"

(MD Course #065-2634-H)

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## MREC AGENCY – COMMERCIAL

### I. INTRODUCTION

**A. Common Law Agency** - An agency relationship is defined by the Restatement (Second) of Agency as follows:

1. Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.
2. The one for whom action is taken is the principal (client).
3. The one who is to act on behalf of the principal or client is the agent.  
Client can be seller, buyer or both.

An agency relationship is, therefore, a "consensual" relationship. The principal authorizes the agent to act on his behalf and the agent agrees to so act. The scope of the agent's authority is determined by the nature of the authority granted to the agent by the principals.

### B. How Agency Relationship is Created

#### 1. Express Agency

An agency relationship normally is created by the express agreement between the principal and the agent: This expressed agency can be created by a writing or orally.

a) Oral expression

b) Written expression (e.g Exclusive Agency Agreement).

1) A writing is not required by common law to create or establish an agency relationship.

2) A writing is required by license law in most states as to residential property but an oral agency agreement is, nevertheless, enforceable to establish an agency relationship.

#### 2. Intentional implied agency.

An agency relationship created by the words and conduct of the parties;  
Nevertheless, the parties intended to create the agency relationship.

#### 3. Accidental or unintentional creation of agency.

a) By the conduct of the parties and by the words of the parties, an agency relationship may be deemed to exist.

b) The test as to whether an agency relationship exists is, did the parties have reasonable basis to believe and did they, in fact, believe that an agency relationship existed?

#### 4. Types of Agency – general and special

- a) General agency is the express or implied authority to represent the principal in broad, general matters. Examples include a guardian, personal representative or parent.
- b) A special agency is an express or implied agency for a specified purpose only. A real estate licensee who undertakes to represent an owner of real property or a prospective purchaser or lessee of real property is a special agent who has been employed for a particular purpose.

#### C. Compensation.

- 1. A gratuitous agent is an agent who undertakes to represent a principal for no compensation. Nevertheless, an agency relationship will exist.
- 2. Payment of compensation alone is not controlling as to whether an agency relationship exists
  - a) Compensation is a factor to be considered, however, the mere payment of compensation is not, by itself, conclusive evidence of an agency

## II. AGENT'S DUTIES TO PRINCIPAL

### A. An agent assumes a fiduciary relationship to the client.

The duties owed to a principal by an agent are deemed to be among the highest forms of duty owed by one person to another. The duties owed to the client will depend upon whom the agent represents, either buyer or seller. In either event, the duties owed are the same. In the case of disclosed dual agency, the duties will be owed to both buyer and seller and such duty will be in strict accordance with the written authority of both clients.

### B. Types of duties owed by an agent to a principal.

- 1. Common law duties.
  - a) Loyalty.
  - b) Obedience.
  - c) Disclosure
  - d) Confidentiality
  - e) Promote and protect the client's interest (reasonable care and diligence).
  - f) Accounting.
  - g) Failure by an agent to discharge these duties constitute a breach of fiduciary duties to the client.

### C. Loyalty.



A duty of loyalty is one of the most fundamental fiduciary duties owed by an agent to his principal. This duty obligates a real estate broker to act at all times solely in the best interest of his principal to the exclusion of all other interests, including the broker's own self-interest. A corollary of this duty of loyalty is a duty to avoid steadfastly any conflicts of interest that might compromise or dilute the broker's undivided loyalty to the principal's interests. Thus, a real estate broker's duty to loyalty prohibits the broker from accepting employment from any person whose interests compete with, or are adverse to, the principal's interests,

A classic example of breach of this duty of loyalty by a real estate broker is a broker who purchases property listed with the broker's firm and then immediately resells it at a profit. Such conduct ordinarily is perfectly appropriate and lawful by persons acting "at arms length." But a fiduciary will be, deemed to have "stolen" a profit opportunity rightfully belonging to the principal and thus to have breached a duty of loyalty.

**D. Obedience.**

An agent is obligated to obey promptly and efficiently all reasonable and lawful instructions of his principal. However, this duty plainly does not include an obligation to obey any unlawful instructions; for example, an instruction not to market the property to minorities or to misrepresent the condition of the property. Compliance with instructions that agent knows to be unlawful could constitute a breach of an agent's duty of loyalty, by facilitating the unlawful conduct.

**E. Disclosure.**

Disclosure - An agent is obligated to disclose to the principal all relevant and material information that the agent knows and that pertains to the scope of the agency. This duty specifically obligates a real estate broker representing a seller to reveal to the seller:

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

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

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

**CAVEAT:** An agent's duty of disclosure to the principal must not be confused with a real estate broker's duty to disclose to non-principals any known material facts concerning the property. This duty to disclose known material facts is based upon a real estate broker's duty to treat all persons honestly and fairly. This duty of honesty and fairness does not depend upon the existence of an agency relationship and is imposed under the Maryland real estate license law.

#### **F. Confidentiality.**

An agent is obligated to safeguard the principal's confidences and secrets. A real estate broker, therefore, must keep confidential any information that might weaken the principal's bargaining position if it were revealed. This duty of confidentiality precludes a broker representing a seller from disclosing to a buyer that the seller will sell their property below the listed price.

**CAVEAT:** This duty of confidentiality plainly does not include any obligation on a broker representing a seller to withhold from a buyer known material facts concerning the condition of the seller's property. To do so would constitute misrepresentation and would impose liability on both the broker and the seller.

#### **G. Reasonable Care And Diligence.**

An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs. The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. By reason of their license, a real estate broker is deemed to have skill and expertise in real estate matters superior to that of the average person. As an agent representing others in their real estate dealings, a broker or salesperson is under a duty to use their superior skill and knowledge while pursuing the principal's affairs. This duty includes an obligation to affirmatively discover facts relating to



the principal's affairs that a reasonable and prudent real estate broker would be expected to investigate. Simply put, this is the same duty any professional, such as a doctor or lawyer, owes to a patient or client. Included in this broad category is the obligation of the agent to deal with the client in good faith and to be honest at all times. The cornerstone of this obligation is the promotion and protection of the client's interests.

#### **H. Accounting.**

An agent is obligated to account for all money or property belonging to the principal that is entrusted to the agent. This duty compels a real estate broker to safeguard any money, deeds or other documents entrusted to them that relate to the client's transactions or affairs.

### **III. WHAT IS A SUB-AGENT?**

#### **A. A Sub-Agent is an Agent of an Agent.**

1. How created?
  - a) By expressed or implied consent.

#### **B. Duties Owed**

1. The duties owed by a sub-agent to the primary agent and principal are identical to those owed by the primary agent to the principal.

#### **C. To Whom Duties Are Owed.**

1. The primary agent. The sub-agent's duties are owed to the primary agent who is also the broker of the sub-agent
2. Principal (client-seller, purchaser, or both, as a disclosed dual agent)  
Since the primary agent's principal is either the seller or purchaser, the sub-agent, as an agent of the agent; also owes fiduciary duties to the seller or purchaser.

#### **D. Types Of Sub-Agents**

1. Associates in broker's office
  - a) Usually have two clients: the broker and the owner of the property listed with the broker or, in the case of buyer, a prospective purchaser or lessee of property.

2. Seller's Agent/Cooperating Agent

- a) Usually have three clients: the broker, the listing broker and the owner of property listed with the broker, or in the case of buyer agency, a prospective purchaser or lessee of property.

**IV. DISCLOSED DUAL AGENCY**

**A. Defined**

- 1. Acting for two parties in the same transaction at the same time.
- 2. Contrast with single agency (acting for only one of the parties in the transactions).

**B. Permitted Under the Real Estate Law, IF:**

- 1. Disclosed to all parties, and
- 2. Consented to by all parties with informed consent.
- 3. Necessity for each broker to have a policy regarding the in-house sale and possible dual agency.

**V. UNDISCLOSED DUAL AGENCY**

**A. Defined**

- 1. Acting for both parties at the same time in the same transaction without the knowledge and consent of both parties

**B. Not Permitted by Law,**

- 1. An undisclosed dual agency is one of the most serious breaches of the law of agency.

**C. How Undisclosed Dual Agencies Are Created.**

- 1. Purchasing property listed by broker
- 2. Accepting future employment from the buyer
- 3. Representing the buyer while seeking compensation from the seller without first disclaiming any sub-agency.
- 4. Leading the buyer to believe that the agent is representing the buyer while legally acting as the agent of the seller.

5. Working for buyer rather than working with the buyer.
6. Can be implied from conduct and from the words spoken.
  - a) Examples of words or phrases often used by real estate brokers or licensees which can create an implied agency relationship with buyers are the following;
    - 1) "I'll take care of everything. I'll handle the sale for you."
    - 2) "This listing has been on the market for six months. That tells me it's overpriced. Let's offer \$80,000 and see what they say,"
    - 3) "Trust me, I'm sure the seller won't counter at that price"
    - 4) Referring to the buyer and selling agent as "we" and "us" while referring to the seller and the listing agent as "they" and "them".
    - 5) Referring to the buyer as the client either to the buyer or the third person.

**CAVEAT:** A real estate broker working with a buyer does not automatically become the buyer's agent. The courts have consistently acknowledged that real estate brokers routinely provide buyers with a variety of valuable services and information as a natural by-product of the broker's marketing function on behalf of the sellers. For example, it is clear that real estate brokers can do the following for buyers without creating an agency relationship.

- a) Show the buyer listed properties meeting the buyer's criteria concerning location, price and size.
- b) Describe a property's amenities and attributes and make factual representations about the property's condition and status.
- c) Transmit any offers made by the buyer to the seller or the listing broker on a timely basis.

Providing services like these to the buyer does not in and of itself, create an agency relationship with the buyer. But when a real estate broker does more than provide Market information or facilitates the completion of a transaction, and instead becomes an advocate or negotiator for the buyer, then the broker has probably created an implied agency with the buyer. This can result in an undisclosed *dual agency* if the broker is also the agent of the seller by reason of a listing agreement, or a sub-agent based upon an offer of sub-agency from the listing broker that was never expressly rejected.

**CAVEAT:** When acting as the agent of a seller while working with buyer, do not lead the buyer or seller to believe that you are acting as the buyer's advocate in negotiations with the seller.



## VI. REMEDIES FOR BREACH OF FIDUCIARY DUTY

### A. Remedies.

1. A real estate broker's principal has three primary remedies available if the broker or sub-agent has committed a breach of their fiduciary duty
  - a) Rescission.
  - b) Forfeiture of commission.
  - c) Damages.

Furthermore, these remedies are non-exclusive. A plaintiff can pursue one, two or three remedies in the same lawsuit

### B. Rescission

1. A principal has a right to rescind any transaction procured by reason of an agent's breach of fiduciary duty. Rescission is a legal remedy through which the court attempts to restore the parties to their original status before the transaction occurred. In a rescinded real estate transaction, the buyer deeds the property back to the seller, and the seller refunds the purchase price.

A real estate transaction "tainted" by an agent's breach of fiduciary duty is presumed to be unfair and a principal is entitled to rescind such a transaction without showing that transaction was, in fact, unfair in price or terms and that the agent involved acted in bad faith, in the case of an undisclosed dual agency, whether intentional or accidental, either the buyer or the seller need only establish the existence of the undisclosed dual agency to qualify for rescission.

### C. Forfeiture Of Commission.

1. An agent who breaches their fiduciary duty while procuring a transaction for a principal is deemed to have breached the implied terms and conditions of their employment. Fiduciary duties are imposed by implication upon an agent in addition to any express obligation set forth in an employment agreement. Consequently, an agent who breaches their fiduciary duties is not entitled to be paid and can be compelled to return any compensation received, including a real estate brokerage commission.

### D. Damages.

1. An agent can also be expected to pay any damages caused by their fiduciary breach. In a real estate transaction, such damages would include any difference between the sale price and the price specified in a higher offer the broker failed to reveal, or could include any profits made by a broker who purchased property from their seller-principal and then resold it at a higher price. Additionally, punitive as well as compensatory damages may be imposed in some states for breaches of fiduciary duties owed to a client by the agent.

### E. Loss Of License.

1. The real estate license laws of all states prohibit licensees from acting as undisclosed dual agents, and also prohibits many other forms of conduct that could constitute breaches of a licensee's

fiduciary duties to a principal. Thus, a licensee who violates these laws puts their brokerage license in jeopardy.

## **VII. OBLIGATIONS TO NON-PRINCIPALS**

### **A. Duty Of Fairness.**

### **B. Duty Of Disclosure Of Material Facts.**

### **C. Duty Of Honesty.**

### **D. Liability Of Non-Principals.**

#### **1. Fraud.**

a) Fraud is an act, omission or concealment involving a breach of a duty resulting in damage to another. In order for fraud to be actionable, it must be shown:

- 1) That a representation made was false.
- 2) That the falsity was known by the person making the representation or the representation was made with reckless disregard for the truth.
- 3) That the false representation was made for the purpose of misleading another person.
- 4) That the person to whom the false statement was made not only relied upon the statement but did so in the full belief that the statement made was true.
- 5) That, but for the false statement made, the individual would not have acted as he did had the truth been known.
- 6) That the person who relied upon the false statement suffered actual damages resulting from the making of the false statement.

#### **2. Negligence**

a) Negligence is the absence or failure to exercise such care as an ordinarily or reasonably prudent and careful person would exercise under similar circumstances. Negligence is any conduct which falls below the standards established by law for the protections of others against unreasonable risk to them. In order for negligence to be actionable, it must be shown:

- 1) There was a duty owed to another person.
- 2) One or more of the duties owed were breached, violated, neglected or undischarged by the person owing such duty.

3) The breach of the duty owed was the proximate cause of injury or harm to the person to whom the duty was owed.

4) Damages resulting from such breach.

### 3. Misrepresentation

- a) Misrepresentation is the making of a statement which is false or which constitutes a mis-statement of fact containing only a partial or fragmentary statement of fact. Misrepresentation can be either fraudulent (intentional) or negligent (unintentional).

## VIII. OBLIGATION OF PRINCIPAL TO AGENT

- A. Availability.
- B. Accuracy of Information.
- C. Reimbursement.

## IX. TERMINATION OF AGENCY

- A. When purpose of Agency has been fulfilled
- B. Unilateral Rescission by Owner or by Broker or by Mutual Consent
- C. Expiration of term of agency employment
- D. Death of the Owner or Broker – This is not normally what occurs as there is usually an assignment in the contract.
- E. Loss of license by Broker

## X. CONCLUSION

The information provided in this course outline is intended to reflect a summary of the subject matter required to be taught, as of August 2011, in a course approved by the Maryland Real Estate Commission. While the Maryland Real Estate Commission has made every attempt to ensure the accuracy, completeness, and timeliness of this course outline, the Maryland Real Estate Commission makes no guarantee or warranty, either expressed or implied, concerning the accuracy, completeness, or timeliness of the content of this course outline. The Maryland Real Estate Commission assumes no responsibility for use of, or reliance on, this course outline by the public or licensees of the MREC, in no event, shall be liable for any direct, indirect, incidental, special, exemplary, or consequential damages arising in any way from the use of this course outline. Course requirements, as reflected in this course outline, may change from time to time to reflect changes in Maryland real estate law and regulations. This course outline does not replace or amend any requirements of Maryland real estate law and regulations.

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