



Chapter 5 - Agency

Learning Goals:

- Define the terms agency, agent, principal, fiduciary, client and customer.
- Describe real estate agency and the meaning of fiduciary relationships.
- List the different types of agency relationships and define them.
- Describe the creation and the termination of agency relationships in the practice of real estate.
- List and describe fiduciary duties to the principal.
- Differentiate between client-level and customer-level services as they relate to the seller and the buyer.



VOCABULARY

Caveat Emptor

- ◆ let the buyer beware
- ◆ not used in Nevada - in Nevada we represent either the seller or buyer or both with written permission from both

Principal:

- ◆ one who appoints an agent to represent them

Fiduciary:

- ◆ a person placed in a position of trust

Subagent:

- * not used in Nevada but it could show up on a real estate exam.
- * created when a broker appoints other brokers to help perform client-based functions on the principal's behalf
- * may be created through the MLS in states that recognize it
- ◆ used in states where the Broker is the agent for the client or customer, and the licensee is the subagent for the Broker
- ◆ in some states - the buyers' agent is the subagent of the seller - not in Nevada

Dual Agency:

- ◆ representing both the seller and buyer in a single transaction
- ◆ term is not used in Nevada
- ◆ in Nevada, it is called 'multiple representation'.
- ◆ poses a potential conflict of interest for the agent
- ◆ It requires disclosure and written permission from the opposing parties.

Nonagent/Transactional Broker

- ◆ also called a facilitator, transactional broker, transactional coordinator or contract broker
- ◆ an intermediary between a buyer and seller who assists both parties with the transaction without representing either party's 'interests
- ◆ not an agent of either party
- ◆ helps both the buyer and seller with the paperwork involved in transferring ownership of real property
- ◆ often used in dual agency situations
- ◆ the buyer and seller negotiate the sale without representation
- ◆ Not used in Nevada.

Client:

- ◆ term used to represent the party a licensee in representing
- ◆ only term used in Nevada (Nevada does not use the term customer)

customer:

- ◆ a non-client
- ◆ represented by the opposing agent.
- ◆ term used to represent a person that the agent is not under contract with

Express agency:

- ◆ a relationship created by an oral or written agreement between a principal and an agent
- ◆ we have only expressed in Nevada - because a state mandated form must be presented and signed by the client and the agent when a brokerage agreement is entered in to

Implied agency:

- ◆ agency exists because of the conduct of the parties
- ◆ not possible in Nevada because of the required written disclosure forms.

Agency Disclosure Forms

- many states have enacted laws requiring disclosures
- disclosures help consumers make informed decisions
- many Brokers recommend bringing in experts to aid the consumer
- agency disclosures are provided by the state and are required to be used in Nevada



Agent Defined

An agent can be defined as “a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services.”⁴¹

There are many different types of agents. An agent may be a universal agent, a general agent, or a special agent; to name a few. Each type of agent has different levels of responsibility, accountability, representation, and authority.



Agency Disclosures

In the old days, real estate agents followed the agency concept, *caveat emptor*, which means *let the buyer beware*. Since sellers paid real estate agents for their services, sellers were the real estate agent's only concern. This concept is no longer valid.

Now agents can represent both sides of the transaction, buyers and sellers, and they owe all parties in the transaction certain duties such as honesty, disclosure and fairness. If there is a material defect in the property that the seller is familiar with, he is obligated to disclose it to other parties in the transaction. If a defect is obvious or the agent's expertise should make it obvious, even if the seller does not disclose it, the agent is obligated to disclose it to all parties. The agent and the seller can be held liable for actual damages if one or both does not disclose.

Agents are all never allowed to blindly obey their client. An agent must work within all laws and owe it to all parties to act honestly and competently. Many states, including Nevada, have enacted laws and regulations requiring agents to provide written agency disclosure forms to parties in a real estate transaction. These disclosure forms help consumers make informed decisions.

Caveat Emptor

- ◆ let the buyer beware
- ◆ not used in Nevada - in Nevada we represent either the seller or buyer or both with written permission from both

⁴¹ <http://www.lectlaw.com/def/a026.htm> Accessed 11/10/2008.



Agency Defined

Agency is the relationship, contract or fiduciary agreement created by an agent and a principal. It may be expressed, solidly created either in writing or oral; or implied, assumed because of the actions of the parties.

“A broker has a duty to know and understand the agency relationship being constructed. The broker must be certain that the employment agreement with the client is in a correct form and is constructed according to the circumstances and in a fair manner. An agency agreement must be in writing for the agent to enforce a commission claim based upon a breach of contract.

Principal:

- ◆ one who appoints an agent to represent them

Fiduciary:

- ◆ a person placed in a position of trust

Express agency:

- ◆ a relationship created by an oral or written agreement between a principal and an agent
- ◆ we have only expressed in Nevada - because a state mandated form must be presented and signed by the client and the agent when a brokerage agreement is entered in to

Implied agency:

- ◆ agency exists because of the conduct of the parties
- ◆ not possible in Nevada because of the required written disclosure forms.



How much authority is given to a licensee?

“If an agent acts in the name of the agent’s principal with authority given by the principal, the principal is bound by the agent’s act. When the agent acts without authority or in excess of the agent’s authority, the agent may be held liable for resulting damages for having breached the agent’s implied warranty of authority.



Types of Agency Relationships

Which hat will you wear? There are 4 major types of agency relationships; universal agent, general agent, special agent, and designated agent. The type of agency relationship is dictated by the level of authority over the client's decisions, and the legal document used to create the relationship. Whose decision would take precedent if different, the clients or the agents?



Universal Agent

The first type of agent, a universal agent, has the greatest amount of authority. Universal agency is created by a power of attorney, giving an agent (also called an attorney in fact) complete authority to act for his/her principal. The agent is someone authorized to transact every type of business for the principal. He is an attorney in fact. A mental affliction such as senility and/or Alzheimer's may prompt the courts to appoint or agree to an appointment of a universal agent. Usually a real estate does not hold this title as part of their agency agreement.



General Agent

The second type of agent, a general agent, has less authority than a universal agent, and does not own complete authority over a principals' decisions. A general agent may represent the principal in a broad range of matters related to a particular business or activity. He or she may bind the principal to a contract within the scope of that agents' authority. This type of agency can be created by a general power of attorney whereas the agent becomes an attorney-in-fact.

Many property managers usually fall under this category. A property manager may be able to contractually bind a client to matters that fall under his/her contractual duties. For example, if the electric unexpectedly fails in a building managed by a property manager, he/she may have the authority under the contractual agreement with the principal to rectify the problem and financially bind the principal to the charge incurred.



Special Agent

Third in line of authority, a special agent is authorized to represent the principal in only one specific act or business transaction and only under detailed instructions. A real estate broker or salesperson usually falls under this category. Responsibilities of the agent are very limited in scope. The agent cannot bind the principal to any contract. This type of agency relationship may be created by a contractual document, such as an agency disclosure form or a special power of attorney.



Designated or Assigned Agent

Last in line of authority, a designated agent (usually called an assigned agent in Nevada) is authorized to represent the principal by the appointment of the agent's broker. This authority makes the appointed agent a special agent for the client, at the direction of the broker. This type of agency is most often used when the office is involved in both sides of a transaction (multiple representation). Since both of the opposing parties must agree to the representation in writing, if one of the parties refused to agree, the broker may appoint another agent in the office to represent the refusing party. This new agent would be the assigned or designated agent for the client.



Client v Customer

Nevada law does not mention the term 'customer', but a real estate tester will probably see the term. A client is the party under an agency contract with a licensee. A customer is the opposing party who is under an agency contract with the opposing licensee. If licensee Ann has a listing agreement, representing seller Brook; and licensee Lee is representing buyer Anderson; Anderson is Ann's customer and Brook is Ann's client. Anderson is Lee's client and Brook is Lee's customer.

Client:

- ◆ term used to represent the party a licensee is representing
- ◆ only term used in Nevada (Nevada does not use the term customer)

Customer:

- ◆ a non-client
- ◆ represented by the opposing agent.
- ◆ term used to represent a person that the agent is not under contract with



Types of Agency Relationships

Universal agency

- ◆ Created by a power of attorney.
- ◆ Agent is an attorney in fact.
- ◆ Gives the agent complete authority to act for his principal.
- ◆ person empowered to do anything the principal could do personally
- ◆ unlimited authority to act on behalf of the principal
- ◆ created by a power of attorney

General Agency

- ◆ may represent the principal in a broad range of matters related to a particular business or activity
- ◆ may bind the principal to a contract within the scope of the agents authority
- ◆ can be created by a general power of attorney where the agent becomes an attorney-in-fact
- ◆ property managers usually fall under this category

Special Agency

- ◆ authorized to represent the principal in one specific act or business transaction only under detailed instructions
- ◆ a Real Estate Broker or salesperson falls under this category
- ◆ very limited scope of responsibilities
- ◆ the agent cannot bind the principal to any contract
- ◆ can be created by a special power of attorney

Designated Agency

- ◆ a person authorized by a Broker to act for a specific principal
- ◆ only agent in the company that has a fiduciary responsibility to the principal
- ◆ in Nevada we call it Assigned Agency



How to Create an Agency Relationship

A principal (also called a client) and agent can create an agency relationship by:

- An agreement between them;
- Ratification; (adoption and/or communication of approval)
- Estoppel; (a decision of law) or
- As the result of the conduct of the parties and the agent's inherent relationship with third parties (i.e., ostensible or implied agency).

Agency agreements usually include names and signatures of the parties, identification of the business transaction, terms, and designated time frame. In Nevada, creation of an agency relationship must be expressly created by a state-created, written disclosure form.



When must the agency disclosure form be presented?

To provide an explanation of agency relationships and duties, the law requires that a listing agent must disclose to the seller whether the listing agent is acting exclusively as the seller's agent, or as a dual agent representing both the seller and the buyer (called multiple representation in Nevada). A selling agent must disclose to the buyer and seller whether the agent is acting exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. Exclusive representation does not prevent the listing broker from representing other sellers or the selling agent from representing other buyers. If representing opposing parties, the agent must have written permission from both parties.

The listing broker, or his or her agent, must deliver the form to the seller *before entering* into a listing agreement. The selling broker (or his or her agent) must provide the form to the seller *before presenting the offer*. In short, the agency disclosure cannot be made too soon, but it can be made too late. It must be made and signed before the signing of any other contracts. The disclosure form that is used is created by the state and its use is mandated by the state.

Disclosure of defects

Any defects of which the licensee is aware (especially latent defects) must be disclosed to all parties. A licensee is not obligated to be an 'inspector' (Nevada licenses inspectors), but he is legally liable if he hides a defect for the seller.

Latent defect

- ◆ hidden defect

Patent defect

- ◆ obvious defect



What duties are required of an agent?

In general, duties owed by a licensee are as follows:

- The duty of utmost care, integrity, honesty and loyalty in dealings with the agent's principal;
- The duty to exercise skill and care in performance of the services rendered by the agent;
- The duty to act honestly and without fraud or deceit and to act fairly and in good faith; and
- The duty to disclose all material facts known to or which should be known to the agent affecting the value or desirability of the property not known to or readily observable by the parties to the transaction.



Duties Owed to Principals

Agents are never allowed to blindly obey their client. They must work within all laws and owe it to all parties to act honestly and competently. An agency relationship creates a fiduciary duty owed by the agent to the principal within the course and scope of the agency and the authority granted by the principal. The fiduciary duty owed by real estate brokers to their principals has been compared by the courts to the duty owed to the beneficiaries by a trustee under a trust.

Fiduciary duties include: loyalty; confidentiality; the exercise of utmost care (and in certain fact situations, reasonable care); full and complete disclosure of all material facts; the obligation to account to the principal; the obligation to act fairly and honestly and without fraud or deceit; and the duty to “explain” and “counsel” about that which has been disclosed, thereby helping the principal make an informed and considered decision to buy, sell, lease, exchange, borrow or lend. A salesperson owes a duty to the principal equivalent to the duty owed by the real estate broker for whom the salesperson acts. Many states, including Nevada, have enacted laws and regulations requiring agents to provide written agency disclosure forms to parties in a real estate transaction. These disclosure forms help consumers make informed decisions.

1. Loyalty and Confidentiality

A real estate broker owes duties of loyalty and confidentiality to the broker's principal. The broker is prohibited from personally profiting by virtue of the agency relationship, except through receipt of compensation for services rendered by the broker in accordance with the terms of the employment agreement. This fiduciary duty is the most significant aspect of the agency relationship.

A broker may not unite his or her role as an *agent* with his or her *personal* objectives in a transaction without disclosure to, and consent from, the principal. The act of an agent within the course and scope of the agent's authority is the act of the principal. In exercising that authority, the agent is dealing with property or other matters of grave concern to the principal. As a fiduciary, a real estate broker performing as an *agent* is bound by law to exercise, among other duties, the utmost good faith, loyalty and honesty.

2. Fair and Honest Dealing

A real estate broker who is the agent of a principal owes a duty of fair and honest dealing to the other party to the transaction. This duty includes the obligation to make a complete and full disclosure of all material facts. A real estate broker owes this duty of full disclosure even though the broker is not the agent and fiduciary of the party to whom the disclosures are made. This is a duty which the courts have held to exist by reason of the agent's status as a real estate broker.⁴²

The duty of disclosure may also be found to exist by way of the agent's fiduciary obligation to the party on whose behalf the disclosures are being made. Any misrepresentation or material concealment on the part of the agent may afford the other party grounds for rescission or damages.

3. General Disclosure Duties

In a fiduciary relationship, it is the duty of the agent to make full disclosure of all material facts relating to the subject matter of the agency but the agent is required to keep personal information having to do personally with the client confidential. Duties owed to the client must be disclosed. The agent is required to disclose his licensing status, if selling or purchasing for himself.

4. Reasonable Care and Skill

An agent has a duty to use reasonable care and skill (and depending upon the fact situation, utmost care) to obey directions of the employer, to render an accounting to the principal and to exercise the utmost good faith in dealing with the principal.

5. Inspection and Disclosures

Listing and selling brokers have an affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale, and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.

⁴² *Lingsch v. Savage* 1963 213 Cal. App. 2d 729, 736



National Duties Owed (COALD)

Not considering any specific state rules, a licensee generally owes his or her client **care**, **obedience**, **accounting**, **loyalty** and **disclosure**; which first letters spell COALD.

Care includes a certain legal of competence, including skill and expertise in real estate matters superior to an average person and knowledge about the value and condition about the product being offered. **Obedience** is required, but ‘blind obedience’ is forbidden. The licensee must consider legal requirements and only obey the client within the framework of the law. If the client’s instructions are unlawful or unethical, the licensee must refuse to obey. **Accounting** is the third duty owed by all licensees. A licensee must use care when handling the client’s items of value. Any money or other items of value held by a licensee must be put into trust in a timely manner. The licensee must be **loyal** to his or her client, placing the clients interest above his self-interests and keep the client’s personal information confidential. All required **disclosures** must be made in a timely manner.



National Duties Owed (COALD)

Care:

- * skill and expertise in real estate matters superior to an average person
- * knowledgeable about the value of properties
- * E & O (Errors and omission) insurance may protect against errors and negligence

Obedience:

- * to obey the client within the law
- * obey unless the instructions are unlawful or unethical – NO BLIND OBEDIENCE!

Accounting:

- * deposit and report consideration in a timely manner

Loyalty:

- * place the clients interest above self-interests
- * keep confidential information confidential until 1-year following the termination or revocation of a contract

Disclosure:

- * all offers
- * sources of any personal income to be gained from the sale
- * the estimated value of the property
- * known material defects
- * if representing both sides in the transaction
- * Nevada requires Duties Owed Form, Seller’s Real Property Form, Consent to Act Form if Dual Agent, Common Interest Community Form if there is an Association of Homeowners, Lead Based Paint Disclosure if built before 1978, among others.