

11 National Agency

The Agency Relationship
Fiduciary Duties
Forms of Real Estate Agency
Agency Disclosure Rules

THE AGENCY RELATIONSHIP

Basic roles
Types of agency
Creating an agency relationship
Terminating an agency relationship

The most primary of relationships in real estate brokerage is that between broker and client, the relationship known in law as the **agency relationship**. In every state, a body of law, generally called the **law of agency**, defines and regulates the legal roles of this relationship. The parties to the relationship are the **principal** (a client), the **agent** (a broker), and the **customer** (a third party).

The laws of agency are distinct from laws of contracts, although the two groups of laws interact with each other. For example, the listing agreement -- a contract -- establishes an agency relationship. Thus the relationship is subject to contract law. However, agency law dictates how the relationship will achieve its purposes, regardless of what the listing contract states.

The essence of the agency relationship is *trust, confidence, and mutual good faith*. The principal trusts the agent to exercise the utmost skill and care in fulfilling the authorized activity, and to promote the principal's best interests. The agent undertakes to strive in good faith to achieve the desired objective, and to fulfill the fiduciary duties.

It is important to understand that the agency relationship does *not* require compensation or any form of consideration. Nor does compensation define an agency relationship: a party other than the principal may compensate the agent.

Basic roles

In an agency relationship, a principal hires an agent as a *fiduciary* to perform a desired service on the principal's behalf. As a fiduciary, the agent has a legal obligation to fulfill specific *fiduciary duties* throughout the term of the relationship.

The **principal**, or **client**, is the party who hires the agent. The agent works *for* the client. The principal may be a seller, a buyer, a landlord, or a tenant.

The **agent** is the fiduciary of the principal, hired to perform the authorized work and bound to fulfill fiduciary duties. In real estate brokerage the agent *must* be a licensed broker.

The **customer** or **prospect** is a third party in the transaction whom the agent does not represent. The agent works *with* a customer in fulfilling the client's objectives. A seller, buyer, landlord, or tenant may be a customer. A third party who is a potential customer is a **prospect**.

Types of agency

According to the level of authority delegated to the agent, there are three types of agency: *universal, general, and special*.

Universal agency. In a universal agency relationship, the principal empowers the agent to perform any and all actions that may be legally delegated to an agency representative. The instrument of authorization is the power of attorney.

General agency. In a general agency, the principal delegates to the agent ongoing tasks and duties within a particular business or enterprise. Such delegation may include the authority to enter into contracts.

Special, or limited, agency. Under a special agency agreement, the principal delegates authority to conduct a specific activity, after which the agency relationship terminates. In most cases, the special agent *may not* bind the principal to a contract.

In most instances, real estate brokerage is based on a special agency. The principal hires a licensed broker to procure a ready, willing, and able buyer or seller. When the objective is achieved, the relationship terminates, although certain fiduciary duties survive the relationship.

Creating an agency relationship

An agency relationship may arise from an express oral or written agreement between the principal and the agent, or from the actions of the parties by implication.

Written or oral listing agreement. The most common way of creating an agency relationship is by listing agreement, which may be oral or written. The agreement sets forth the various authorizations and duties, as well as requirements for compensation. A listing agreement establishes an agency for a specified transaction and has a stated expiration.

Implied agency. An agency relationship can arise by implication, intentionally or unintentionally. Implication means that the parties act *as if* there were an agreement. For example, if an agent promises a buyer to do everything possible to find a property at the lowest possible price, and the buyer accepts the proposition, there may be an implied agency relationship even though there is no specific agreement. Even if the agent does not wish to establish an agency relationship, the agent's actions may be construed to imply a relationship.

Whether intended or accidental, the creation of implied agency obligates the agent to fiduciary duties and professional standards of care. If these are not fulfilled, the agent may be held liable

Terminating an agency relationship

Full performance of all obligations by the parties terminates an agency relationship. In addition, the parties may terminate the relationship at any time by *mutual agreement*. Thirdly, the agency relationship automatically terminates on the *expiration* date, whether the obligations were performed or not.

Involuntary termination. An agency relationship may terminate contrary to the wishes of the parties by reason of:

- ▶ death or incapacity of either party
- ▶ abandonment by the agent
- ▶ condemnation or destruction of the property
- ▶ renunciation
- ▶ breach
- ▶ bankruptcy
- ▶ revocation of the agent's license

Involuntary termination of the relationship may create legal and financial liability for a party who defaults or cancels. For example, a client may renounce an agreement but then be held liable for the agent's expenses or commission.

FIDUCIARY DUTIES

Agent's duties to the client
Agent's duties to the customer
Principal's duties
Breach of duty

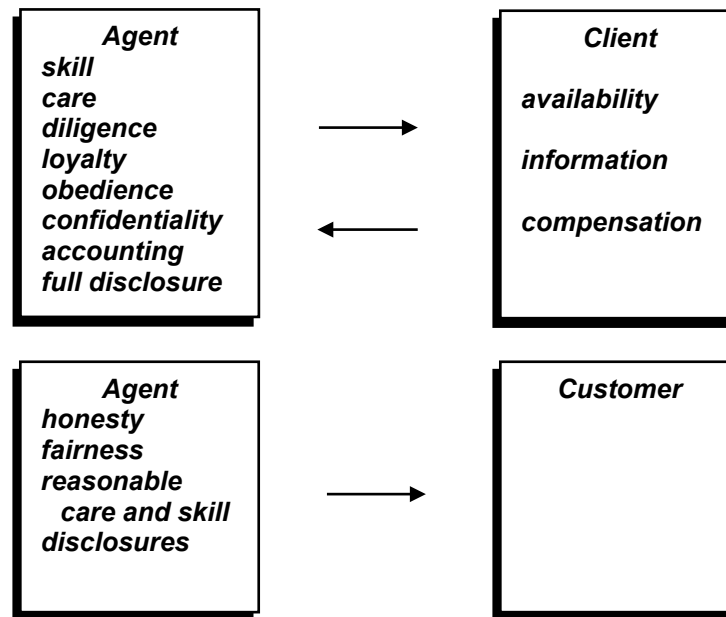
The agency relationship imposes fiduciary duties on the client and agent, but particularly on the agent. An agent must also observe certain standards of conduct in dealing with customers and other outside parties.

Agent's duties to the client

Skill, care, and diligence. The agent is hired to do a job, and is therefore expected to do it with diligence and reasonable competence. Competence is generally defined as a level of real estate marketing skills and knowledge comparable to those of other practitioners in the area.

The notion of care extends to observing the limited scope of authority granted to the agent. A conventional listing agreement does not authorize an agent to obligate the client to contracts, and it does not allow the agent to conceal offers to buy, sell, or lease coming from a customer or another agent. Further, since a client relies on a broker's representations, a broker must exercise care not to offer advice outside of his or her field of expertise. Violations of this standard may expose the agent to liability for the unlicensed practice of a profession such as law, engineering, or accounting.

Exhibit 11.1 Fiduciary Duties



Loyalty. The duty of loyalty requires the agent to place the interests of the client above those of all others, particularly the agent's own. This standard is particularly relevant whenever an agent discusses transaction terms with a prospect.

Obedience. An agent must comply with the client's directions and instructions, *provided they are legal*. An agent who cannot obey a legal directive, for whatever reason, must withdraw from the relationship. If the directive is illegal, the agent must also immediately withdraw.

Confidentiality. An agent must hold in confidence any personal or business information received from the client during the term of employment. An agent may not disclose any information that would harm the client's interests or bargaining position, or anything else the client wishes to keep secret.

The confidentiality standard is one of the duties that extends *beyond the termination of the listing*: at *no time* in the future may the agent disclose confidential information.

An agent must exercise care in fulfilling this duty: if confidentiality conflicts with the agent's legal requirements to disclose material facts, the agent must inform the client of this obligation and make the required disclosures. If such a conflict cannot be resolved, the agent must withdraw from the relationship.

Accounting. An agent must safeguard and account for all monies, documents, and other property received from a client or customer. State license laws regulate the broker's accounting obligations and escrow practices.

Full disclosure. An agent has the duty to inform the client of all material facts, reports, and rumors that might affect the client's interests in the property transaction.

In recent years, the disclosure standard has been raised to require an agent to disclose items that a practicing agent *should know*, whether the agent actually had the knowledge or not, and regardless of whether the disclosure furthers or impedes the progress of the transaction.

The most obvious example of a "should have known" disclosure is a property defect, such as an inoperative central air conditioner, that the agent failed to notice. If the air conditioner becomes a problem, the agent may be held liable for failing to disclose a material fact if a court rules that the typical agent in that area would detect and recognize a faulty air conditioner.

There is no obligation to obtain or disclose information related to a customer's race, creed, color, religion, sex or national origin: anti-discrimination laws hold such information to be immaterial to the transaction.

Some states have recently enacted laws requiring a seller to make a written disclosure about property condition to a prospective buyer. This seller disclosure may or may not relieve the agent of some liabilities for disclosure.

Exhibit 11.2 Disclosure of Material Facts

Critical material facts for disclosure include:

- the agent's opinion of the property's condition
- information about the buyer's motivations and financial qualifications
- discussions between agent and buyer regarding the possibility of the agent's representing the buyer in another transaction.
- adverse material facts, including property condition, title defects, environmental hazards, and property defects

Agent's duties to the customer

The traditional notion of *caveat emptor*-- let the buyer beware-- no longer applies unequivocally to real estate transactions. Agents *do* have certain obligations to customers, even though they do not represent them. In general, they owe a third party:

- ▶ honesty and fair dealing
- ▶ reasonable care and skill
- ▶ proper disclosure

An agent has a duty to deal fairly and honestly with a customer. Thus, an agent may not deceive, defraud, or otherwise take advantage of a customer.

"Reasonable care and skill" means that an agent will be held to the standards of knowledge, expertise, and ethics that are commonly maintained by other agents in the area.

Proper disclosure primarily concerns disclosure of agency, property condition, and environmental hazards.

An agent who fails to live up to prevailing standards may be held liable for negligence, fraud, or violation of state real estate license laws and regulations. Agents should be particularly careful about misrepresenting and offering inappropriate expert advice when working with customers.

Intentional misrepresentation. An agent may intentionally or unintentionally defraud a buyer by misrepresenting or concealing facts. While it is acceptable to promote the features of a property to a buyer or the virtues of a buyer to a seller, it is a fine line that divides promotion from misrepresentation. Silent misrepresentation, which is intentionally failing to reveal a material fact, is just as fraudulent as a false statement.

Negligent misrepresentation. An agent can be held liable for failure to disclose facts the agent was not aware of if it can be demonstrated that the agent *should have known* such facts. For example, if it is a common standard that agents inspect property, then an agent can be held liable for failing to disclose a leaky roof that was not inspected.

Misrepresentation of expertise. An agent should not act or speak outside the agent's area of expertise. A customer may rely on anything an agent says, and the agent will be held accountable. For example, an agent represents that a property will appreciate. The buyer interprets this as expert investment advice and buys the property. If the property does not appreciate, the buyer may hold the agent liable.

Principal's duties

The obligations of a principal in an agency relationship concern the following:

Availability. In a special agency, the power and decision-making authority of the agent are limited. Therefore, the principal must be available for consultation, direction, and decision-making. Otherwise the agent cannot complete the job.

Information. The principal must provide the agent with a sufficient amount of information to complete the desired activity. This may include property data, financial data, and the client's timing requirements.

Compensation. If an agreement includes a provision for compensating the agent and the agent performs in accordance with the agreement, the client is obligated to compensate the agent. As indicated earlier, however, the agency relationship does not necessarily include compensation.

Breach of duty

An agent is liable for a breach of duty to client or customer. Since clients and customers rely on the expertise and actions of agents performing within the scope of their authority, regulatory agencies and courts aggressively enforce agency laws, standards, and regulations.

A breach of duty may result in:

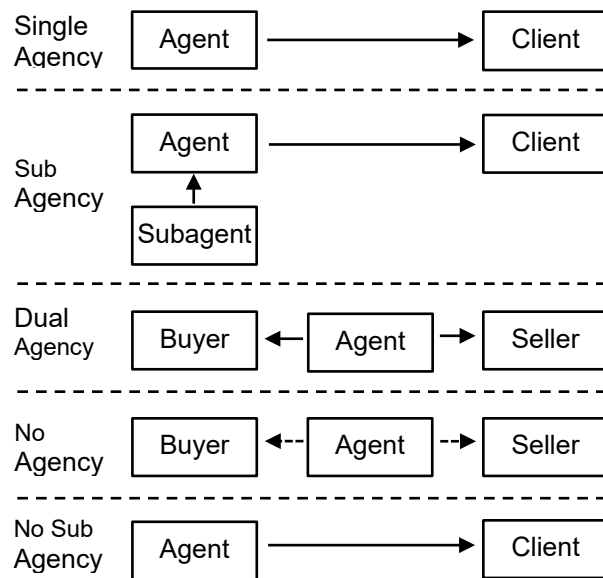
- ▶ rescission of the listing agreement (causing a loss of a potential commission)
- ▶ forfeiture of any compensation that may have already been earned
- ▶ disciplinary action by state license law authorities, including license suspension or revocation
- ▶ suit for damages in court

FORMS OF REAL ESTATE AGENCY

Single agency
Subagency
Dual agency
Designated agency
No agency
No subagency

The primary forms of agency relationship between brokers and principals are: *single agency*, *dual agency*, and *subagency*. In a fourth kind of relationship, referred to as *transaction brokerage*, no agency relationship exists in the transaction. Finally, some states are beginning to disallow subagency altogether. Students are advised to ascertain which agency relationships are allowed and practiced in their particular state.

Exhibit 11.3 Forms of Agency and No Agency in Real Estate Brokerage



Single agency

The agent represents one party in a transaction. The client may be either seller or buyer.

Seller agency. In the traditional situation, a seller or landlord is the agent's client. A buyer or tenant is the customer.

Buyer agency. Recently, it has become common for an agent to represent a buyer or tenant. In this relationship, the property buyer or tenant is the client and the property owner is the customer.

Real estate vernacular calls an agent of the seller or owner the **listing broker**. An agent who works for the listing broker and who obtained the listing is the **listing agent**. A broker who represents a buyer is the **buyer's broker**. One who does this as a specialization is a **buyer broker**. A broker or salesperson who represents tenants is a **tenant representative**.

Subagency

In a subagency, a broker or licensed salesperson works as the agent of a broker who is the agent of a client. Subagents might include a cooperating licensed broker, that broker's licensed salespeople, and the listing broker's licensed salespeople, all of whom agree to work for the listing broker on behalf of the client. In effect, a subagent is an agent of the broker who is agent of the client. The subagent owes the same duties to the agent as the agent owes to the client. By extension, a subagent owes all the fiduciary duties to the client.

Outside "co-brokers" and agents. It is common practice for brokers and salespersons to "cooperate" with a listing broker in finding buyers or tenants. A listing broker, in return, agrees to share the commission with a cooperating broker.

It is cooperating brokers who form multiple listing services to facilitate the process of bringing together buyers and sellers.

The broker's salespersons. All of the listing broker's salespeople who have agreed to work for the broker to find a customer are subagents of the listing broker and owe the fiduciary duties to the broker and, by extension, to the broker's client.

Dual agency

Dual agency means representing both principal parties to a transaction. The agent represents both buyer and seller or tenant and owner. For instance, if a salesperson completes a buyer agency agreement with a party on behalf of a broker, and the party then becomes interested in a property listed by the broker, the broker becomes a dual agent.

Dual agency has become increasingly prevalent with the advent of buyer and tenant representation. Dual agency may arise from voluntary, specific agreement between the principal parties or from the parties' actions, much like implied single agency.

Conflict of interest. Dual agency contains an inherent conflict of interest. Since many of an agent's fiduciary duties can only be rendered to one party, dual agency is, by definition, difficult, if not impossible.

Written, informed consent. In states that permit dual agency, the agent must meet strict disclosure requirements, and principals must agree *in writing* to proceed with the dual agency relationship.

Disclosed (voluntary) dual agency. The parties to a transaction may create a dual agency by giving written consent in disclosure forms, confirmation forms, and sale contract forms. For example, an agent represents a buyer who becomes interested in a property that the agent has listed with the seller. The agent then discloses the relationship with the principals to both principals, and the principals agree in writing to move ahead. A disclosed dual agency is thus voluntarily created.

Implied and undisclosed dual agency. If a broker or agent acts in any way that leads a customer to believe that the agent is representing the customer, a dual agency has potentially been created. For example, a buyer makes confidential disclosures to the agent who works for the seller and exhorts the agent to keep them confidential. The buyer wants the house but knows he is going to lose his job in a month and probably will not qualify for financing. If the agent agrees to keep the information confidential, the agent has not only created an agency relationship with the buyer, but is now in a dual agency situation. Moreover, if the agent fails to disclose the buyer's confidence to the seller, the agent has violated fiduciary duty to the seller.

Duties of a disclosed dual agent. A dual agent's first duty is to disclose the agency relationship to both principal parties or to withdraw from one side of the duality. After disclosing, the agent must obtain the written consent of both parties.

If both parties accept the dual agency, the agent owes all the fiduciary duties to both parties except full disclosure, undivided loyalty, and exclusive representation of one principal's interests.

Designated agency

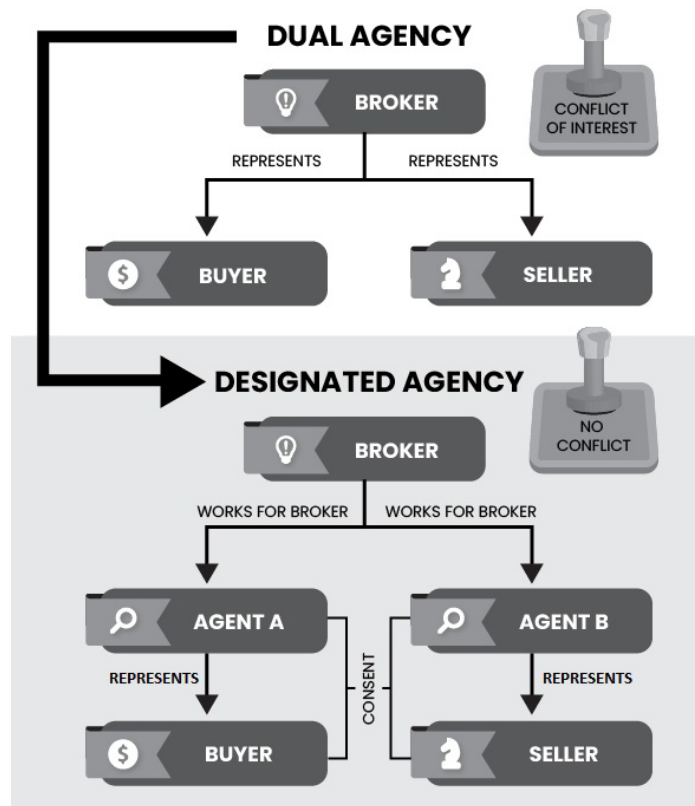
A designated agent is a salesperson or an associate broker selected by the broker and client as the client's legal agent pursuant to a designated agency agreement. Under a designated agency agreement, the client has no agency relationship with any licensee other than those specified in the designated agency agreement. Absent such an agreement, the client has an agency relationship with the broker and all affiliated licensees in the brokerage firm. The designated agency agreement allows a broker to select a salesperson and associate brokers to act as the client's agent.

A designated agency agreement must contain the name of all associate brokers who are authorized to act as supervisory brokers. A listing agreement or a buyer's agency agreement may be amended to establish a designated agency relationship, to change a designated agent, or to change supervisory brokers at any time pursuant to a written addendum.

The designated agent's knowledge of a client's confidential information is not imputed to any affiliated licensee not having an agency relationship with that client. A designated agent cannot disclose a client's confidential information to any licensee, whether or not an affiliated licensee, except that a designated agent may disclose to any supervisory broker confidential information of a client for purposes of seeking advice or assistance for the benefit of the client. A licensee who represents a client in an agency capacity does not breach any duty or obligation owed to that client by failing to disclose to that client information obtained through a present or prior agency relationship.

Two designated agents may each represent a different party in the same transaction and will not be considered dual agents. For example, one designated agent can represent the buyer and another designated agent can represent the seller in the same transaction, and neither is a dual agent. The broker and all supervisory brokers are considered disclosed consensual dual agents for that real estate transaction. Before an offer is made or presented, designated agents representing different parties in the same transaction must notify their clients that their broker represents both buyer and seller.

Exhibit 11.4 Dual vs. Designated Agency



No agency

In recent years, the brokerage industry has striven to clear up the question of who works for whom, and who owes fiduciary duties to whom. A recent solution allows a broker to represent *no one* in a transaction. That is, the broker acts as a **transaction broker**, or **facilitator**, and is not an agent of either the buyer or seller. In this relationship, the facilitator does not advocate the interests of either party.

Duties of the transaction broker, or facilitator. In the role of transaction broker, the broker's duties and standards of conduct are to

- ▶ account for all money and property received or handled
- ▶ exercise reasonable skill and care
- ▶ provide honesty and fair dealing
- ▶ present all offers in a timely fashion
- ▶ assist the parties in closing the transaction
- ▶ keep the parties fully informed
- ▶ advise the parties to obtain expert advice or counsel
- ▶ disclose to both parties in residential sale transactions all material facts affecting the property's value
- ▶ protect the confidences of both parties in matters that would materially disadvantage one party over the other.

Duties not imposed on the transaction broker. Since there are no fiduciary duties binding the transaction broker, the broker is held to standards for dealing with customers as opposed to clients. These include honesty, fair dealing, and reasonable care. The transaction broker is under no obligation to inspect the property for the benefit of a party or verify the accuracy of statements made by a party.

No subagency

As state regulatory authorities formalize the facilitator role, it is expected that brokers will have to obtain written consent from the principal parties, just as in the case of dual agency.

As another response to the problem of ‘who works for whom,’ some states have recently moved in the direction of disallowing subagency. In this scenario, subagency is replaced by buyer agency and seller agency only. In other words, an agent either represents the buyer directly, or the seller directly. An agent who shows a buyer a property either represents the buyer, or is in fact the listing agent. Note that this arrangement need not change traditional compensation structures: an agent may represent a buyer and still receive a portion of the commission paid by the seller.

AGENCY DISCLOSURE RULES

Objectives of disclosure

Seller agent disclosures

Buyer agent disclosures

Dual agent disclosures

Facilitator disclosures

Objectives of disclosure

Traditionally, brokers and agents have disclosed to customers whose interests it is that they are serving. This traditional ethic is now, in many states, required by law. Agents must know what agency disclosures they have to make, to whom, and when in the business relationship they must make them.

Disclosure removes confusion about who an agent is working for. It may prevent complaints arising from customers and clients who feel they have been deceived.

Specifically, the requirement to disclose aims to:

- ▶ notify clients and customers about whom the agent represents
- ▶ inform clients and customers of the fiduciary duties and standards of care the agent owes them
- ▶ inform prospective clients and customers that they have a choice in how they are represented
- ▶ obtain acknowledgement and acceptance of the disclosure from the principal parties

Recent legislation requires an agent to disclose to all parties the fact that the agent represents one party and does not represent the other. In other words, an agent must inform client and customer that the agent represents the client and

Seller agent disclosures

does not represent the customer (unless it is a dual agency). An agent must disclose agency relationships whenever there is a transfer of a real estate interest, whether the interest is a fee, partial fee, exchange, leasehold, sublease, assignment, air right or subsurface right.

Client disclosure. Depending on state regulations, an agent who intends to represent a seller or owner must disclose the import of the proposed agency relationship in writing before the listing agreement is executed. The agent must inform the seller or landlord in writing that the agent will be representing the client's interests as a fiduciary, and will not be representing the interests of any potential buyer. Any subsequent sale or lease contract with a customer should confirm this disclosure.

Customer disclosure. A listing agent must disclose in writing to a buyer or tenant that the agent represents the owner in the transaction. This disclosure must occur before or at the first "substantive contact" with the customer prospect. The disclosure must also be confirmed in any subsequent sale or lease contract.

Substantive contact. Subject to variations in state regulation, "substantive contact" between listing agent and customer occurs whenever the agent is:

- ▶ showing the prospect a property
- ▶ eliciting confidential information from a prospect regarding needs, motivation, or financial qualification
- ▶ executing a contractual offer to sell or lease

Exclusions. Interaction between a seller's agent and a customer is not always substantive. Possible instances that might be excluded from the requirement of disclosure are:

- ▶ attendance at, or supervision of, an open house, providing the agent does not engage in any of the contacts described above
- ▶ preliminary "small talk" concerning price ranges, locations, and architectural styles
- ▶ responding to questions of fact regarding advertised properties

Oral disclosure. If an agent becomes involved in a substantive contact over the phone or in a such way that it is not feasible to make written disclosure, the agent must make the disclosure orally and follow up with a written disclosure at the first face-to-face meeting.

Buyer agent disclosures

Client disclosure. An agent who plans to represent a buyer or tenant must disclose the import of the proposed agency relationship in writing before the representation agreement is executed.

Customer disclosure. A buyer agent must disclose the agency relationship to the seller or seller's agent on first contact. Substantive contact is assumed.

Dual agent disclosures

Informed written consent. An agent who desires to operate in a dual agency capacity must obtain the informed written consent of all parties. Subsequent contracts should confirm the disclosure. "Informed written consent" means both parties have read, understood, and signed an acceptable disclosure form.

Prohibited disclosures. State regulations prohibit a dual agent from making certain disclosures. For instance, a dual agent, unless expressly instructed by the relevant party, usually cannot disclose:

- ▶ to the buyer that the seller will accept less than the listed price
- ▶ to the seller that the buyer will pay more than the price submitted in a written offer to the seller
- ▶ the motivation of any party concerning the transaction
- ▶ that a seller or buyer will agree to financing terms other than those offered

Facilitator disclosures

Rules for disclosing a transaction broker's status of non-agency are similar to those of dual agency. The agent must provide written notice to all parties or their agents on first becoming a transaction broker or on the first substantive contact, whichever comes first.

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National Agency Snapshot Review

THE AGENCY RELATIONSHIP

Basic roles

- principal, or client, hires agent (broker) to find a ready, willing, and able customer (buyer, seller, tenant); client-agent fiduciary foundations: trust, confidence, good faith

Types of agency

- universal: represent in business and personal matters; can contract for principal
- general: represent in business matters; agent can contract for principal
- special: represent in single business transaction; normally agent cannot contract for principal; the brokerage relationship is usually special agency

Creating an agency relationship

- created by express written or oral agreement or as an implied agreement by actions of either party

Terminating an agency relationship

- causes: fulfillment; expiration; mutual agreement; incapacity; abandonment; or destruction of property; renunciation; breach; bankruptcy; revocation of license

FIDUCIARY DUTIES

Agent's duties to the client

- skill, care, diligence; loyalty; obedience; confidentiality; disclosure; accounting

Agent's duties to the customer

- honesty and fair dealing; exercise of reasonable care and skill; proper disclosures; danger areas: misrepresentation; advising beyond expertise

Principal's duties

- availability; provide information; compensation

Breach of duty

- liabilities: loss of listing, compensation, license; suit for damages

FORMS OF REAL ESTATE AGENCY

Single agency

- seller agency; buyer agency; tenant representation

Subagency

- outside brokers and agents who help listing agent; listing broker's own agents

Dual agency

- representing both sides; potential conflict of interest; must disclose, obtain written consent; types: voluntary by consent; involuntary by actions of parties (implied agency); duties: all but full disclosure and loyalty

Designated agency

- an agent is designated to represent a client exclusively; no other licensees in the firm have any agency relationship with the client unless named in the agreement

No agency

- "facilitator" or "transaction broker"; representing neither party in the transaction; duties to both parties: accounting; skill, care and diligence; honesty and fair dealing; disclosures affecting property value

AGENCY DISCLOSURE

Objectives of disclosure

- declare; explain; offer choice; obtain documented consent

Seller agent disclosures

- to client: in writing on or before listing is executed; to customer: prior to substantive contact, in writing; oral permitted but must have written follow-up

Buyer agent disclosures

- in writing; upon first contact with listing agent or seller

Dual agent disclosures

- "informed, written consent"; may not disclose: price or financing positions or motivations unless authorized

Facilitator disclosures

- on becoming transaction broker or on substantive contact whichever is first

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Listing Agreements: An Overview

Review of Legal Foundations
Types of Listing Agreement
Fulfillment and Termination
Agreement Clauses

REVIEW OF LEGAL FOUNDATIONS

Agency law
Contract law

A listing agreement, the document that puts an agent or broker in business, is a legally enforceable real estate agency agreement between a real estate broker and a client, authorizing the broker to perform a stated service for compensation. The unique characteristic of a listing agreement is that it is governed both by agency law and by contract law.

Agency law

The cornerstones of agency law in the context of a listing agreement are:

- ▶ definition of the roles of parties involved
- ▶ fiduciary duties of the agent
- ▶ agent's scope of authority

Parties. The principal parties to the contract are the **listing broker** and the **client**. The client may be buyer, seller, landlord or tenant in the proposed transaction. Legally, the broker is the client's **agent**. The principal party on the other side of the transaction is a **customer** or a potential customer, called a **prospect**. A broker or salesperson who assists the listing broker in finding a customer is an **agent** of the listing broker and a **subagent** of the client. A broker who represents the party on the other side of the transaction is an agent of that party, and not an agent of the listing broker, unless a dual agency arrangement is specifically allowed.

Fiduciary duties. A listing agreement establishes an agency relationship between agent and client that commits the agent to the full complement of fiduciary duties to the client in fulfilling the agreement.

Scope of authority. Customarily, a listing is a *special agency*, or *limited agency*, agreement. Special agency *limits* the scope of the broker's authority to specific activities, generally those which generate customers and catalyze the transaction. A special agency agreement usually *does not* authorize a broker to obligate the client to a contract as a principal party, unless the agreement expressly grants such authorization or the client has granted power of attorney to the broker. For example, a listing broker may not tell a buyer that the seller will accept an offer

regardless of its terms. Telling the offeror that the offer *is* accepted would be an even more serious breach of the agreement.

Under agency law, a client is liable for actions the broker performs that are within the scope of authority granted by the listing agreement. A client is *not liable* for acts of the broker which go beyond the stated or implied scope of authority.

Thus, in the previous example, the seller would not be liable for the broker's statements that the offer would be accepted or was accepted, since the broker did not have the authority to make such statements. A broker who exceeds the scope of authority in the listing agreement risks forfeiting compensation and perhaps even greater liabilities.

Contract law

Bilateral or unilateral agreement. Listings may be bilateral or unilateral, depending on the type of listing and the wording of the agreement. An open listing is a unilateral agreement in that the seller promises to pay a commission to any agent who produces a buyer but no agent promises or is obligated to take any action. On the other hand, most exclusive listings are bilateral agreements because of wording that promises the due diligence of the agent to procure a buyer in return for the seller's promise to pay a commission if a buyer is produced.

Validity. A listing agreement must meet the requirements for a valid contract to be enforceable.

Termination. A listing, like any contract, may terminate for any of the following causes: performance, infeasibility, mutual agreement, rescission, revocation, abandonment, lapse of time, invalidity, and breach.

Legal form. A valid listing may be oral or written. However, many states consider only a written listing to be enforceable, particularly an exclusive right-to-sell listing. In practice, a broker should get every listing in writing and make sure it clearly states what the broker is authorized to do and how the broker will be paid. An oral listing, even if enforceable, limits a broker's ability to remedy problems:

- ▶ a contested oral listing must be supported by considerable evidence to be enforced
- ▶ a broker may not be able to sue a principal for damages incurred under an oral lease
- ▶ if the client dies, the broker may not be able to obtain compensation for a successfully performed oral listing

An express listing, verbal or written, manifestly authorizes the broker to pursue certain actions for the client. Clients and agents may also create an *implied agency listing* based on substantive actions rather than on an express agreement. For example, if a seller allows a broker to undertake certain activities toward effecting a transaction without a specific authorization, but with full knowledge and consent, an implied agency may have been created. Consequently, if the principal proceeds with a customer procured in this manner, he or she may be

liable to the broker for compensation. Conversely, the agent may be held responsible for fulfilling fiduciary duties imposed by the implied agency. **Assignment.** Since a listing agreement is a personal service contract, it is *not assignable*. In particular, a broker cannot assign a listing to another broker.

TYPES OF LISTING AGREEMENT

Exclusive right-to-sell (or lease)
Exclusive agency
Open listing
Net listing
Buyer and tenant agency agreement
Transaction broker agreement
Multiple listing
Limited services agreement

A broker may represent any principal party of a transaction: seller, landlord, buyer, tenant. An **owner listing** authorizes a broker to represent an owner or landlord. There are three main types of owner listing agreement: *exclusive right-to-sell (or lease)*; *exclusive agency*; and *open listing*. Another type of listing, rarely used today and illegal in many states, is a *net listing*. The first three forms differ in their statement of conditions under which the broker will be paid. The net listing is a variation on how much the broker will be paid.

A **buyer agency** or **tenant representation agreement** authorizes a broker to represent a buyer or tenant. The most commonly used form is an *exclusive right-to-represent* agreement, the equivalent of an exclusive right-to-sell. However, exclusive agency and open types of agreement may be also used to secure a relationship on this side of a transaction.

Though not a distinct type of listing agreement, *multiple listing* is a significant feature of brokerage practice. Multiple listing is an authorization to enter a listing in a multiple listing service.

Exclusive right-to-sell (or lease)

The exclusive right-to-sell, also called **exclusive authorization-to-sell** and, simply, the **exclusive**, is the most widely used owner agreement. Under the terms of this listing, a seller contracts exclusively with a single broker to procure a buyer or effect a sale transaction. If a buyer is procured during the listing period, the broker is entitled to a commission, *regardless of who is procuring cause*. Thus, if anyone—the owner, another broker—sells the property, the owner must pay the listing broker the contracted commission.

The exclusive right-to-lease is a similar contract for a leasing transaction. Under the terms of this listing, the owner or landlord must pay the listing broker a commission if anyone procures a tenant for the named premises.

The exclusive listing gives the listing broker the greatest assurance of receiving compensation for marketing efforts.

In some states, an exclusive right-to-sell listing is enforceable only if it is in writing and has an expiration date. Some states do not require the agreement to be in writing, but if it is in writing, it must have an expiration date.

Exclusive agency

An exclusive agency listing authorizes a single broker to sell the property and earn a commission, but *leaves the owner the right to sell the property without the broker's assistance*, in which case no commission is owed. Thus, if any party other than the owner is procuring cause in a completed sale of the property, including another broker, the contracted broker has earned the commission. This arrangement may also be used in a leasing transaction: if any party other than the owner procures the tenant, the owner must compensate the listing broker.

An exclusive agency listing generally must have an expiration date. Most states allow either an oral or written agreement.

Open listing

An open listing, or, simply, **open**, is a *non-exclusive* authorization to sell or lease a property. The owner may offer such agreements to any number of brokers in the marketplace. With an open listing, the broker who is the first to perform under the terms of the listing is the sole party entitled to a commission. Performance usually consists of being the procuring cause in the finding of a ready, willing, and able customer. If the transaction occurs without a procuring broker, no commissions are payable.

Open listings are rare in residential brokerage. Brokers generally shy away from them because they offer no assurance of compensation for marketing efforts. In addition, open listings cause commission disputes. To avoid such disputes, a broker has to register prospects with the owner to provide evidence of procuring cause in case a transaction results.

An open listing may be oral or written.

Net listing

A net listing is one in which an owner sets a minimum acceptable amount to be received from the transaction and allows the broker to have any amount received in excess as a commission, assuming the broker has earned a commission according to the other terms of the agreement. The owner's "net" may or may not account for closing costs.

For example, a seller requires \$750,000 for a property. A broker sells the property for \$830,000 and receives the difference, \$80,000, as commission.

Net listings are generally regarded as unprofessional today, and many states have outlawed them. The argument against the net listing is that it creates a conflict of interest for the broker. It is in the broker's interest to encourage the owner to put the lowest possible acceptable price in the listing, regardless of market value. Thus the agent violates fiduciary duty by failing to place the client's interests above those of the agent.

Exhibit 12.1 Types of Listing

Exclusive Right	\$ → Broker	IF customer is procured
Exclusive Agency	\$ → Broker	IF customer is procured and client does not procure
Open	\$ → Broker	IF broker procures customer
Net	\$ → Broker	IF customer is due commission, receives proceeds over seller's minimum
"Multiple Listing"	\$ → Broker	Authority to enter listing in multiple listing service

Buyer and tenant agency agreements

Buyer and tenant agency agreements create a fiduciary relationship with the buyer or tenant just as seller listings create a fiduciary relationship with the seller. Generally, buyer and tenant representation agreements are subject to the same laws and regulations as those applying to owner listings. Thus:

- ▶ a representation agreement may be an exclusive, exclusive agency, or open listing. As with owner listings, the most widely used agreement is the exclusive. In this arrangement, the buyer agrees to only work with the buyer representative in procuring a property.
- ▶ an exclusive listing generally must have an expiration date along with other requirements of a valid listing.
- ▶ state laws require an exclusive authorization to be in writing

Duties of the Agent. At the formation of the relationship, the buyer agent has the duty to explain how buyer or tenant agency relationships work. This is culminated by a signed agreement where the principal understands and accepts these circumstances. During the listing term, the buyer or tenant agent's principal duties are to diligently locate a property that meets the principal's requirements. In addition, the agent must comply with his or her state agency-disclosure laws which may differ from those of traditional listing agents. This involves timely disclosures to prospective sellers and their agents, usually upon initial contact.

Transaction broker agreement

In terms of agency, a transaction broker is in a non-agency relationship with the seller or buyer. The agent is not bound by fiduciary duties to either party. Nevertheless, transaction brokers enter into binding agreements with buyers and sellers to complete transactions. Such agreements may be exclusive or non-exclusive. Like conventional listings, the transaction brokerage agreement binds the principal to a compensation agreement in the event the broker procures a property or a buyer. Typical agreements affirm the nature of the relationship,

contain expiration dates, and describe the terms of the agreement, such as the type of property desired or the price a seller deems acceptable.

Like other listing agreements, transaction broker agreements vary among the states where this form of relationship is practiced.

Multiple listing

A multiple listing is not a distinct listing contract but rather a provision in an exclusive listing authorizing the broker to place the listing into a multiple listing service.

A multiple listing service is an organization of member brokers who agree to cooperate in the sale of properties listed by other brokers in exchange for a share of the broker's resulting commission.

The authorization enables and requires the broker to disseminate the listing information in a timely fashion so that members in the organization can participate in the sale of the property as subagents.

Limited services agreement

Rather than provide the full services due a client under a standard listing agreement, a licensee may enter into an agreement to provide limited services selected by the client. The agreement must:

- ▶ be in writing
- ▶ disclose that the licensee is acting as a limited service representative
- ▶ list the specific services the licensee will provide
- ▶ state the duties of a standard agent that the limited service representative will not provide.

Some states require a limited service listing agreement to comply with minimum service requirements.

FULFILLMENT AND TERMINATION

Agent's performance Compensation Causes for termination Revoking a listing

A listing agreement may terminate in many ways. The only desirable and favorable way is by fulfillment of the contract. Fulfillment results when both parties have performed the actions they have promised to perform.

Agent's performance An agent performs a listing agreement by achieving the result specified in the agreement. When and if the result is achieved, the agent's performance is complete.

Find a customer or effect a transaction. A listing generally specifies the result to be either finding a customer or effecting a completed transaction.

Finding a customer means locating a party who is *ready, willing, and able* to transact under the client's terms. Effecting a completed transaction means finding a customer who is not only ready, willing, and able, but one who makes an acceptable offer.

A ready, willing, and able customer is one who is:

- ▶ amenable to the terms of the transaction (ready and willing)
- ▶ financially capable of paying the price and legally capable of completing the transaction (able)

Specific responsibilities. A listing agreement authorizes a broker to undertake actions relevant to achieving the performance objective. Authorized activities usually include the following:

- ▶ show or seek property
- ▶ locate buyer, seller, tenant, or landlord
- ▶ communicate the client's transaction terms
- ▶ promote features and advantages of the terms to customers
- ▶ assist in negotiating a meeting of the minds between parties

Due diligence. Due diligence in the listing context refers to verifying the accuracy of the statements in the listing regarding the property, the owner, and the owner's representations. Especially important facts for a broker or agent to verify are:

- ▶ the property condition
- ▶ ownership status
- ▶ the client's authority to act

Failure to perform a reasonable degree of due diligence may increase an agent's exposure to liability in the event that the property is not as represented or that the client cannot perform as promised.

Delegation of responsibilities. In the normal course of business, a listing broker *delegates* marketing responsibilities to salespeople. A salesperson may not, however, seek compensation directly from a client. Only the broker can obtain and disburse the compensation.

Compensation

The main item of performance for the client is payment of compensation, if the agreement calls for it. A broker's compensation is earned and payable when the broker has performed according to the agreement. The amount and structure of the compensation, potential disputes over who has earned compensation, and the client's liability for multiple commissions are other matters that a listing agreement should address.

Negotiated compensation. The amount of a broker's commission is whatever amount the client and broker have agreed to. Compensation may be in the form of a percentage of the sale or lease price, or a flat fee. In practice, commissions vary for different geographical areas, types of property and transaction, and services performed.

Procuring cause. Disputes often arise as to whether an agent is owed a commission. Many such disputes involve open listings where numerous agents are working to find customers for the principal, and none has a clear claim on a commission. In other cases, a client may claim to have found the customer alone and therefore to have no responsibility for paying a commission. There are also situations where cooperating brokers and subagents working under an exclusive listing dispute about which one(s) deserve a share of the listing broker's commission.

The concept that decides such disputes is that the party who was the "procuring cause" in finding the customer is entitled to the commission or commission share. The two principal determinants of procuring cause are:

- ▶ being first to find the customer
- ▶ being the one who induces the customer to complete the transaction

For example, Broker A and Broker B each have an open listing with a property owner. Broker A shows Joe the property on Monday. Broker B shows Joe the same property on Friday, and then Joe buys the property. Broker A will probably be deemed to be the procuring cause by virtue of having first introduced Joe to the property.

Compensation for buyer brokers. Buyer agency agreements stipulate how the agent will be compensated in the relationship. The compensation may be a client-paid retainer fee or a commission contingent upon a completed transaction or procured seller. It is common practice for the agent to be paid by the customer to the transaction, the seller, as opposed to the fiduciary principal, the buyer or tenant. In addition, the agent may be paid by the buyer in the event that the seller or listing agent refuses to offer any compensation to the buyer broker. This might occur, for example, in the case of a for-sale-by-owner transaction.

In addition to the form of compensation and the parties responsible for paying the agent, the buyer agency agreement defines when the compensation is in fact earned and will be paid. Customarily, the commission is earned when a sales contract is completed by the transacting parties. The agent may be entitled to compensation even if the buyer defaults on the terms of the sales contract. Normally, agents are paid at closing or upon the buyer's default.

Causes for termination

A listing may terminate on grounds of:

- ▶ *performance*: all parties perform; the intended outcome
- ▶ *infeasibility*: it is not possible to perform under the terms of the agreement
- ▶ *mutual agreement*: both parties agree to cancel the listing
- ▶ *revocation*: either party cancels the listing, with or without the right
- ▶ *abandonment*: the broker does not attempt to perform
- ▶ *breach*: the terms of the listing are violated
- ▶ *lapse of time*: the listing expires
- ▶ *invalidity of contract*: the listing does not meet the criteria for validity
- ▶ *incapacitation or death of either party*

- ▶ *involuntary title transfer*: condemnation, bankruptcy, foreclosure
- ▶ *destruction of the property*

Listing expiration regulations. In most states, open listings do not require a stated expiration date. Rather, they expire after a "reasonable" period of time as locally defined.

The other types of listing generally must specify a termination date and may not have an automatic renewal mechanism. Courts in many states construe any listing that has no expiration as an open listing. However, some states make these requirements only of written listings, and may not require exclusives to be in writing.

Revoking a listing

Power vs. right. Both principals to the listing agreement have the power to revoke the contract at any time. They do not, however, always have the right. That is, client or broker may cancel a listing but remain liable for damages to the other party.

Revocation by the client. If the client revokes the listing after the broker has already earned a commission, the client must pay the commission, no matter what type of listing it was.

If the broker has not fully performed prior to the revocation, the following guidelines apply:

- ▶ **exclusive right-to-sell:** if the property sells during the term of the revoked listing, the client is liable for the commission. If the property does not sell, the client is liable for the broker's actual costs.
- ▶ **exclusive agency:** if the property sells during the term of the revoked listing, the client is liable at least for the broker's costs and possibly for the commission. If the property does not sell during the term, the client is liable for the broker's costs.
- ▶ **open:** if revoked prior to performance, the client is generally not liable for any payment

Revocation by the broker. If the broker cancels the listing or otherwise defaults, the client may sue the broker for money damages.

LISTING AGREEMENT CLAUSES

Exclusive right-to-sell clauses

Exclusive buyer agency clauses

Transaction brokerage clauses

A written listing, particularly an exclusive, is a formal contract which contains the entirety of all agreements between the parties. If an agreement is left out, it is assumed not to exist. An agreement that is included is assumed to exist and is generally enforceable. If a written agreement contains mistakes, it is probably not

valid or enforceable. For these reasons, it is extremely important for a listing agreement to be accurate, error-free, and complete.

Students are cautioned to note that listing agreements vary in language and form from state to state. For that reason it is important to ascertain the legal requirements and required clauses for certain types of listings, particularly exclusive listings, in your state. In addition, some states require that if agents use pre-printed forms, such forms must contain certain provisions.

Exclusive right-to-sell clauses

Requirements for exclusive listing agreements vary from state to state. Generally, a written listing agreement requires as a minimum:

- ▶ names of all owners
- ▶ address or legal description of the listed property
- ▶ listing price
- ▶ expiration date
- ▶ commission terms
- ▶ authority granted

The following clause descriptions are found in a typical exclusive right-to-sell listing agreement.

Parties and authorization. The agreement should name all legal owners of the property, or duly authorized representatives of the owners, as the client party. It must also name the broker.

An authorization clause sets forth the nature of what the broker is allowed to do, i.e., the type of listing. Note that the phrase "right-to-sell" is a misnomer. A broker cannot legally sell the property without proper power of attorney. The usual right is to effect a sale or find a buyer.

Real Property. The real property description may include an address, but in some states it must include the *legal description*.

It is critical to identify both the real property and any personal property that are for sale and included in the listing price.

Fixtures. Typical agreements list what fixtures are included in the sale specifically, and "all other things attached or affixed to the property" generally. The seller must then enter which items are excluded from the sale.

Personal Property. The listing agreement should include all personal property that is to be included in the transaction and listing price.

Listing price. A clause usually sets forth the gross price for the property and possibly the financing terms the owner will accept, particularly if seller financing or assumption of the seller's loan is involved.

The listing price is the seller's asking price for the property. This may or may not be the price the seller ultimately accepts. The full listing price does not

have to be obtained for the broker to earn a commission. The listing price clause may also state the seller's agreement to pay customary closing costs.

Listing term. In most states, exclusive listings must have a specific beginning and ending date of the listing agreement. In many states, failure to name a termination date in a written listing is grounds for revocation of the real estate license. Any provision for renewal of the listing term should be very specific. Automatic renewals are illegal in many states.

To protect the broker, some listings contain a provision to extend the listing period in the event an expiration occurs during the period in which a sale contract is pending.

Agent's duties. This clause specifies the broker's responsibilities and authorization to carry out certain activities. These typically include marketing activities, multiple listing service activities, property access and showings, authority to allow other parties access, permission to inspect existing mortgage financing documents, and authority to accept deposits. Commonly, the clause specifically bars the broker from executing any contract on behalf of the owner.

Agent's compensation. A clause will identify the broker's fee and the necessary conditions for the fee to be earned. For instance, it may state that a commission is earned if a buyer is procured, a contract is executed, or the seller voluntarily transfers the property for any price during the listing period.

A fee clause usually provides for remedies in the event of default by the buyer or seller. In effect, if the seller breaches the listing without grounds after a buyer has been procured, the commission is payable. If the owner cannot sell the property for reasons beyond the owner's control, the owner is not liable for a commission. If the buyer breaches a sale contract, the owner and broker may split the buyer's earnest money deposit as liquidated damages, depending on state law.

Protection period. Many listings include a protection clause stating that, for a certain period after expiration, the owner is liable for the commission if the property sells to a party that the broker procured, unless the seller has since listed the property with another broker.

Multiple listing. This provision obtains the seller's consent to placing the listing in a multiple listing service and authorization to disseminate information about the listing to members.

Cooperation with other agents. This clause requires the seller to agree or refuse to cooperate with subagents or buyer agents in selling the property, under what terms, and whether the seller agrees to compensate these parties. Recent agreements stipulate that subagents and buyer agents must disclose their relationships to the buyer upon initial contact and subsequently in writing. There may also be a warning to the seller not to disclose confidential information to a buyer broker insofar as this agent is required to disclose all relevant information to the buyer.

Non-discrimination. Most exclusive listings contain an affirmation that the agent will conduct all affairs in compliance with state and federal fair housing and nondiscrimination laws.

Dual agency. In the absence of disclosure and consent, dual agency represents a conflict of interest for the broker. A good agreement specifically asks the owner to consent to or refuse to allow the broker's representation of both parties.

If the clause states that the owner refuses to accept dual agency, the broker agrees not to show the property to any buyers the broker represents.

If the seller accepts dual agency, the broker may represent both parties under the restrictions set forth in the listing. The restrictions are generally to protect the confidentialities of either party, particularly those relating to price and terms. Additionally, the broker covenants to deal honestly and impartially with the parties.

Other disclosures by agent. In addition to agency, other disclosures might be included to cover any direct or indirect interest the broker has in the transaction and special compensation the broker might be receiving from other parties connected with the transaction.

Seller's representations and promises. In this clause, the owner represents that he or she in fact owns the property in the manner stated in the listing, and is legally capable of delivering fee simple, marketable title.

The clause may further require the owner to warrant that he or she

- ▶ is not represented by another party and will not list the property elsewhere during the listing period
- ▶ will not lease the property during the listing period without approval
- ▶ agrees to provide necessary information
- ▶ will refer all prospects directly to the broker without prior direct negotiation
- ▶ has reviewed a sample "Offer to Purchase and Sell" contract
- ▶ will make the property presentable and available for showing at reasonable times upon notice by agent.

Seller's property condition disclosure. Most current listing forms require the seller to disclose the condition of the property to prospective buyers. New laws in most states allow buyers to cancel a sale contract if they have not received the seller's property condition disclosure before closing or occupancy or other deadline. In addition, the listing may include among the seller's duties the requirement to complete and provide the agent with a Lead Paint Hazard addendum. A copy of the required notice to buyers may be attached to the listing agreement as part of the agreement.

Seller's title and deed. A provision usually requires the owner to promise to deliver good and marketable title, title insurance, and to convey the property

using a general warranty deed to a buyer. Without this covenant, the broker has no assurance that a transaction will occur, and in turn that he or she will be paid for procuring a buyer.

Flood hazard insurance. This clause requires the seller to disclose whether he or she is required to or presently maintains flood insurance on the property.

Limitation of liability. There is often a clause requiring the owner to indemnify the broker against liability resulting from casualty, loss, and owner misrepresentation during the listing period.

In practice, liability and indemnification clauses do not necessarily absolve a broker from liability.

Escrow authorization. The seller authorizes escrow officers to disburse earned commission funds to the broker upon the broker's instructions to do so.

IRS requirements; alien seller withholding. A clause may state that the seller will comply with IRS requirements for providing tax-related information. This ensures that a seller who is an alien understands that a buyer will be required to withhold a percentage of the sale price for the IRS.

Other listing provisions. An exclusive listing might also provide for:

- ▶ *mediation*: in the event of a dispute, the owner agrees to arbitrate differences before filing a lawsuit
- ▶ *attorney fees*: the losing party in a lawsuit must pay court costs and attorney fees
- ▶ *acknowledgment*: the owner acknowledges reading and understanding the agreement
- ▶ *entire agreement*: the listing cannot be changed without written agreement; the listing sets forth all agreements made
- ▶ *binding effect*: listing is binding and enforceable
- ▶ *saving clause*: if a portion of the agreement is invalid or unenforceable, the balance of the agreement remains valid as permitted by law

Notices to owner. Some listing agreements include notices to the seller concerning:

- ▶ *fee negotiability*: the broker's fee is the result of negotiations with the seller
- ▶ *fair housing laws*: the broker and seller must comply with discrimination laws
- ▶ *keyboxes; security*: the seller should take prudent measures to protect personal property and remove dangerous items that could cause injury
- ▶ *legal advice disclaimer*: the broker cannot give legal advice

Signatures. All owners and the broker must sign the listing and indicate the date of signing.

Exclusive buyer agency clauses

The exclusive buyer agency agreement is very similar to the exclusive right-to-sell agreement, the only significant differences being the agent's objectives and the fact that the principal is the buyer instead of the seller. The notable exception is how the agent is paid, as previously discussed.

The clauses which are virtually identical to the exclusive right-to-sell are:

- ▶ the identity of the principal and the agent's authorized activity
- ▶ the description of the property desired in terms of location, price, size, etc.
- ▶ the term of the agreement and its automatic termination
- ▶ the buyer's agreement to work exclusively through the agent
- ▶ the agent's duties to locate a suitable property according to the buyer's specifications
- ▶ the non-discrimination clause
- ▶ signatures of the parties

The following clauses distinguish the buyer agency agreement from the exclusive right-to sell agreement.

Buyer's representation of exclusivity. Here the buyer affirms that he or she is not represented by another agent. In addition the buyer acknowledges an understanding of the agency relationship.

Agent compensation. This clause sets forth how the agent is to be paid, whether by retainer or commission, who is to pay the commission, and what the buyer owes the agent in the event the seller does not participate in the agent's compensation. Second, the clause establishes the circumstances under which the agent has earned the commission. This includes finding a property during the agreement term or the buyer contracting to buy a property shown by the agent within a stipulated period of time following expiration. In addition, the clause provides that the agent will be paid in the event the buyer defaults on a sale contract.

Other buyers acknowledged. In this provision, the buyer acknowledges that the agent is working with other buyers who may be in competition for any property the buyer is shown by the agent.

Transaction brokerage clauses

Transaction brokerage agreements vary greatly among the states where this brokerage relationship is practiced. The agreement may be exclusive or non-exclusive. Despite the lack of standardization and uniformity, these agreements contain the following principal provisions.

Parties and property identification. The agreement identifies the principals and if a seller, the description of the property to be sold, or if a buyer a description of the property desired.

Agent's authorized activity. This clause gives the agent the exclusive right and authority to sell or locate property for the principal.

Non-agency declaration. The agreement clearly sets forth that it is a non-agency personal services contract with a legally binding effect. This provision expressly states that the broker is not an agent of the buyer or seller and is not acting in a fiduciary capacity. In addition, the principal agrees that the agent is not working for the benefit of either party nor advocating the interests of either party. Usually this clause requires the principal's acknowledgment that he or she has read a state-level approved document describing and explaining the forms of agency or non-agency relationships practiced in that state.

Transaction broker duties. Like other listings, this clause defines what activities the agent will undertake to earn compensation. Key words are 'assist,' or 'offer information' or 'facilitate' as opposed to 'represent.' Activities include web searches, showings, advertising, etc.

Other buyers acknowledged. If a buyer agreement, the buyer will acknowledge that the agent is working with other buyers who may be in competition for any property the buyer is shown by the agent.

Compensation. This clause stipulates what the agent will be paid, by whom, and upon what circumstances, much like the buyer agency agreement. The clause will likely include that the compensation may be partially or wholly provided by the seller. In addition, the clause provides that, if the buyer purchases a property that was previously shown by the agent within a certain amount of time following the listing's expiration date, then the agent is owed the commission.

Buyer or seller duties. Here the agreement states what the buyer or seller commits to do during the listing term, most notably to compensate the agent for fulfilling the agreement. In addition, the seller typically agrees to show the property, and provide property condition disclosures. The buyer agrees to work exclusively with the agent (if an exclusive agreement) and provide information regarding the desired property and certain financial information.

Agreement term. Like other listings, the transaction agreement contains a beginning and ending date for the listing term. The term is extendable to closing if the principal buys or sells a property for which the settlement date is beyond the original expiration date.

Non-discrimination. The agreement affirms that the agent will conduct all affairs in compliance with state and federal fair housing and non-discrimination laws.

Signatures of parties. The signatures of the principal and agent affirm the agreement as well as acknowledge that the principal has received a copy of the agreement.

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Listing Agreements: An Overview Snapshot Review

REVIEW OF LEGAL FOUNDATIONS

Agency law

- listing: broker's enforceable contract of employment with client establishing special agency relationship to procure a customer
- parties: listing broker and client; broker's subagents; customers and prospects
- fiduciary duties: loyalty; obedience; disclosure; care; diligence; accounting
- scope of authority: listings are special or limited agency, not general agency agreements; broker may not contract for client unless specifically authorized; clients liable only for broker's acts within scope of authority

Contract law

- listings are unilateral contracts; listing must be valid to be enforceable; legal form: oral listings are valid and enforceable except, in many states, exclusive right-to-sell listings which must be written to be enforceable
- listings are not assignable since they are personal service contracts

TYPES OF LISTING AGREEMENT

Exclusive right-to-sell (or lease)

- most prevalent; given to one broker; must usually be written; must expire; broker gets commission if property transfers during period

Exclusive agency

- exclusive excepting owner; oral or written; must expire; broker gets commission unless owner sells

Open listing

- non-exclusive; oral or written; no stated expiration; procuring cause gets commission; no commission if client procures customer

Net listing

- all sale proceeds above a seller's minimum price go to the broker; discouraged, if not illegal

Buyer and tenant agency agreements

- open or exclusive listings with buyers or tenants to represent their interests compensation in form stipulated by agreement; may be paid by seller or landlord at closing; payable if buyer defaults; agent has fiduciary and disclosure duties

Transaction broker agreements

- non-agency; no fiduciary duties; agent does not work in the interests of or for the benefit of either party

Multiple listing

- listing placed in MLS; owners consent to rules and provisions of MLS

Limited services agreement

- agreement that commits licensee to provide a limited, specified list of services to a client instead of the full set due under a standard agreement

FULFILLMENT AND TERMINATION

Agent's performance

- based on results: find ready willing and able customer or effect a sale; may perform only authorized tasks to achieve result; must verify owner and property data; may delegate duties to salespeople and other brokers

Compensation

- negotiated; where disputed, procuring cause is owed commission

Causes for termination

- performance; infeasibility; mutual agreement; revocation; abandonment; breach; expiration; invalidity; incapacitation or death; involuntary transfer; destruction of property

Revoking a listing

- clients always have power to revoke during period, but may incur liability for commission or damages

LISTING AGREEMENT CLAUSES**Exclusive right-to-sell clauses**

- minimal requirements: broker's and owners' names; address and/or legal description; listing price; expiration date; agent's duties; compensation terms; authority granted; agency and non-agency disclosures: seller's representations and condition disclosures

Exclusive buyer agency clauses

- minimal requirements virtually identical to exclusive right-to-sell; distinguishing features: buyer's representation of exclusivity; agent compensation; buyer's acknowledgment of other buyers

Transaction broker clauses

- may be exclusive or non-exclusive; typical principle provisions: identification of parties and property; agent's authorized activity; declaration of non-agency; broker's duties; buyer's acknowledgment of other buyers; compensation; buyer or seller duties; expiration date