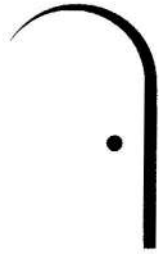


Agency

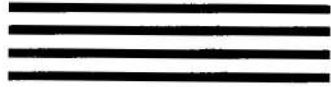
*Choices, Challenges
& Opportunities*



A G E N T ' S G U I D E



Agency: Choices, Challenges & Opportunities



Agent's Guide

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Throughout the NAR Agency: Choices, Challenges & Opportunities Agent's Guide, feminine pronouns are used to refer to individuals, regardless of gender, for the sake of consistency. Use of feminine pronouns does not imply that any or all of the person to whom they refer are or should be female, or that the text of this guide is meant to be gender specific.

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CHAPTER 1

Introduction

Agency relationships make up the foundation of the real estate industry. Indeed, one reason why the NATIONAL ASSOCIATION OF REALTORS® (NAR) was formed at the turn of the century was to enhance the professionalism of real estate brokers by recognizing an agency relationship between the broker and her client, and educating all parties about the duties imposed by the relationship.

Given the current evolution of differing agency practices, there is a crucial need for clarification of agency concepts and assumptions for all parties -- the broker, the seller and the buyer. A broker who is confused about her role, or loyalty, inevitably send signals about that confusion to the public. Such confusion breeds mistrust and frustration among members of the public and results in increased litigation, liability, and regulation for the real estate broker.

NAR is working to educate its members about various types of agency relationships available in the marketplace today and the basic duties involved in each type of relationship. Education is the key to elevating real estate brokers and salespeople to the highest level of professional conduct. It is also the key to allowing a consumer the freedom to choose an agency relationship that will best serve her needs. Freedom of choice is meaningless unless a consumer is knowledgeable about all types of agency relationships. Until a broker has outlined all types of agency relationships to the public, she cannot be sure that consumers are knowledgeable enough to give **informed**"consent.

The NAR *Agent's Guide* is designed to help real estate brokers and salespeople understand the common law of agency and the different types of agency relationships practiced today. It provides guidelines for a broker or salesperson to follow when required to relay information about agency relationships to consumers. It includes a glossary of terms relative to agency relationships (Appendix A). Brokers can use the Guide when developing written office policies on agency practices. By using the Guide, real estate professionals will better understand agency obligations and be able to serve the general public better.

CHAPTER 2

The Law of Agency

Every state licenses real estate brokers and salespeople. In almost every situation, someone who wishes to act on behalf of others in selling or buying real estate must first secure a real estate license. Under every state's common law, a person who acts on behalf of others is also deemed to be an agent.

An agency relationship is *the fiduciary relationship resulting when one person, called the agent, represents the interests of another person, called the principal, in dealings with others*. In a real estate sales transaction, an agency relationship is formed between the brokerage firm (including all its licensees) and the principal, also known as the client. Attorneys, engineers, accountants, and architects are examples of other licensed professionals who act as agents of their clients.

How Are Agency Relationships Created?

An agency relationship is a consensual relationship. All that is necessary to create such a relationship is the principal's **delegation** to the agent of authority to act and the agent's **consent** to act. Formalities are not required to create an agency relationship. As a general matter, written agreements are not necessary to create agency relationships. An agency relationship may be established by the words, acts, or deeds of the parties.

An agency relationship need not be a contract with the elements of offer, acceptance, and consideration. Such relationships can be gratuitous, with no obligation on the principal's part to pay the agent. Conversely, compensation paid by one party to another does not necessarily create or confirm an agency relationship.

An agency relationship is created when:

- the principal *delegates* authority to the agent to perform acts on behalf of the principal
- the agent *consents* to the delegation

An agency relationship does *not* require:

- a written document
- a contract
- compensation paid by the principal to the agent.

Because formalities are not required to create an agency relationship, one can be implied from the **conduct** of the parties toward each other, regardless of each party's intent, or label used to describe their relationship. The conduct of each party can create an agency relationship **even if** each has signed an acknowledgment form denying the existence of such a relationship. Thus, agency relationships can result *unintentionally, accidentally, or inadvertently*.

An *implied* agency relationship is dangerous when created as the duties and obligations of agency arise -- usually without the agent's knowledge. In today's real estate transactions, implied agency relationships most often are created when a subagent of a seller, who does not make the proper disclosures, works too closely with a buyer customer. The buyer may presume from the conduct of the subagent that the subagent is working on her behalf, thus, an agent. In such a situation, the subagent has created an undisclosed dual agency arrangement that is **illegal** in all states.

Role Of The Real Estate Salesperson

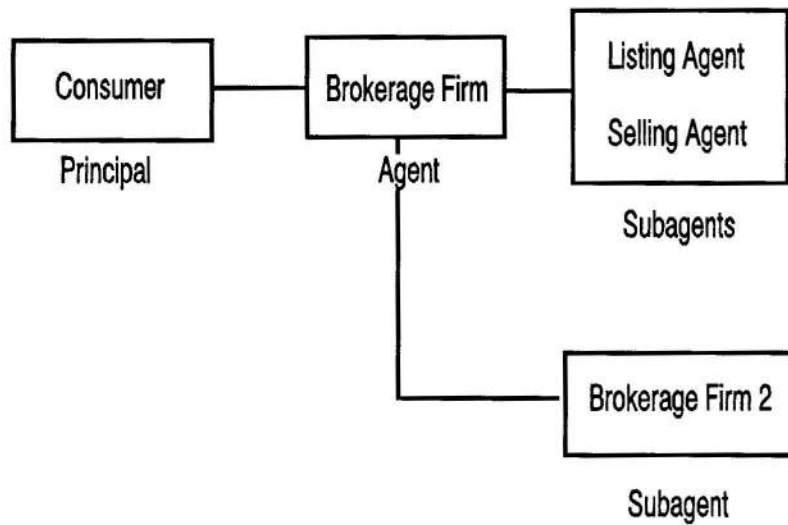
Under the real estate license laws of every state, a real estate salesperson does not have the authority to act independent of her broker. A real estate salesperson can function only if **licensed with** a real estate broker or brokerage firm. In other words, a real estate salesperson is an *agent of an agent*. She is an agent of the real estate broker, who, in turn, is licensed to act as an agent for the general public in matters relative to real estate.

An *agent of an agent* is a subagent. A subagent is employed to act for another agent by performing functions undertaken for a principal. The agent agrees to be responsible for the conduct of the subagent.

A subagency relationship exists when the principal expresses or implies that the principal's work may be delegated to the agent's agents. The understanding between the agent and principal includes the knowledge that a subagent has the same authority as the agent himself. The agent is liable to the principal for any wrongful conduct committed by any of the subagents. Conversely, the agent **and** principal may also be liable to third parties for any wrongful conduct of the subagents.

Because a subagent is an *agent of an agent*, she owes the same fiduciary duties to the agent's principal, as does the agent herself. In the real estate industry, a salesperson is an agent of her broker, and a subagent of the broker's principal. That salesperson owes fiduciary duties to two principals -- the broker and the broker's principal.

In addition, subagency is created when a broker accepts an offer of subagency through a multiple listing service or by a separate agreement. In this arrangement, the second broker owes fiduciary duties to the first broker and the principal. **And**, the first broker and principal may be liable for the wrongful acts of the second broker, the subagent.



Duties Owed By An Agent To Principal

A real estate broker who becomes an agent of a seller or buyer, either intentionally through the execution of a written agreement, or unintentionally by a course of conduct, is deemed a *fiduciary*. Traditional examples of fiduciaries are trustees, executors, and guardians.

As a fiduciary, a real estate broker is held by law to owe specific duties to her principal, **in addition** to duties or obligations set forth in a listing agreement, buyer representation agreement, or other contract of employment. Again, subagents of the broker also owe the same fiduciary duties to the broker's principal. These specific fiduciary duties include:

- loyalty
- obedience
- disclosure
- confidentiality
- reasonable care and diligence
- accounting

1. **Loyalty** -- One of the most fundamental fiduciary duties an agent owes to the principal. The duty obligates a real estate broker to act **at all times**, solely in the best interests of the principal, excluding all other interests, **including** that of the broker.

An example of breach of loyalty is when a broker purchases a property listed with her firm, and immediately resells it at a profit. Such conduct is usually considered appropriate and lawful by persons who act *at arms length*, but a fiduciary would be considered to have *stolen* an opportunity for profit that rightfully belongs to the principal.

2. **Obedience** -- An agent is obligated to promptly and efficiently obey all **lawful** instructions of her principal that conform to the purpose of the agency relationship. However, the duty does not include an obligation to obey unlawful instructions, such as instructions to not market a property to minorities or to misrepresent the condition of a property.

3. **Disclosure** -- An agent must disclose to the principal all known relevant and material information that pertains to the scope of the agency. The duty includes any facts affecting the value or desirability of the property, as well as any other relevant information pertaining to the transaction, such as the other party's bargaining position.

An agent's duty of disclosure to her principal must not be confused with a real estate broker's duty to disclose any known material facts about property value to nonprincipals. The duty to disclose known material facts is based on a real estate broker's duty to treat all persons honestly. The duty of honesty does not depend on the existence of an agency relationship.

4. **Confidentiality** -- An agent is obligated to safeguard her principal's lawful confidences and secrets. Therefore, a real estate broker must keep confidential any information that might weaken a principal's bargaining position. The duty of confidentiality precludes a broker who represents a seller from disclosing to a buyer that the seller can, or must, sell a property below the listed price. Conversely, a broker who represents a buyer is prohibited from disclosing to a seller that the buyer can, or will, pay more than what has been offered for a property.

The duty of confidentiality does **not** include an obligation by a broker who represents a seller to withhold known material facts about the condition of the seller's property from the buyer, or to misrepresent the property's condition. To do so constitutes misrepresentation and imposes liability on both the broker and the seller.

Article 7 of the NAR *Code of Ethics and Standard of Practice* 7-8, clarifies the obligation of REALTORS® to preserve confidential information provided by clients after the termination of the agency relationship (see Appendix B).

-
5. ***Reasonable care and diligence*** -- An agent is obligated to use reasonable care and diligence when pursuing the principal's affairs. The standard of care expected of a buyer's or seller's real estate broker is that of a competent real estate professional. By reason of her license, a broker is considered to have skill and expertise in real estate matters superior to that of the average person.

As an agent who represents others in their real estate dealings, a broker or salesperson is under a duty to use superior skill and knowledge while pursuing the principal's affairs. However, no broker is expected to perform tasks or know information outside the scope of her real estate license. Real estate licensees are not expected to perform services normally provided by engineers, lawyers, accountants, or other professionals. If concerns arise outside the scope of a broker's responsibility, the broker should acknowledge that and suggest that the principal seek assistance from a reliable outside source.

6. ***Accounting*** -- An agent is obligated to account for all money or property that belongs to her principal entrusted to that agent. The duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to her relative to her client's transactions or affairs.

Whether a principal is a buyer or seller, an agent always owes that person the above six fiduciary duties. These duties are inherent in all agency relationships and enforced by all courts of law in the United States.

Remedies For An Agent's Breach Of Fiduciary Duty

If an agent commits a breach of her fiduciary duty, there are three primary, nonexclusive remedies available to the principal:

1. Rescission
2. Forfeiture of commission
3. Damages

As a plaintiff, a principal can pursue one, two, or all three remedies for the same lawsuit.

A real estate agent cannot perform her duties without express knowledge of the laws regarding agency relationships. The six fiduciary duties and the remedies for breaches of them are applicable under the common law of agency to all types of agency relationships.

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

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

2. **Forfeiture of commission** -- An agent who breaches fiduciary duty while procuring a transaction for a principal is considered to have breached the implied terms and conditions of employment. Fiduciary duties are imposed on an agent by implication, **in addition** to any express obligations set forth in an employment agreement. Consequently, an agent who breaches fiduciary duties is not entitled to payment, and can be ordered to return any compensation received, including a real estate brokerage commission.
3. **Damages** -- An agent can also be expected to pay any damages caused by a fiduciary breach. Such damages in a real estate transaction include any difference between the sales price and the price of a higher offer the broker failed to reveal, or any profits earned by a broker who purchased property from her principal, then resold it at a higher price.

Other penalties that a real estate licensee may face include:

- **Loss of license** -- Real estate license laws in most states prohibit licensees from acting as undisclosed dual agents, and also prohibit many other forms of conduct that could constitute breaches of a licensee's fiduciary duties to a principal. Thus, a broker who breaches her fiduciary duty places her real estate brokerage license in jeopardy.
- **Code of Ethics violations** -- In addition, any breach of a fiduciary duty may be a violation of NAR's *Code of Ethics and Standards of Practice*.

CHAPTER 3

Seller's Agents

Definition of the Agency Role

This chapter explains the role of a seller's agent, and describe the disclosures necessary in this type of agency relationship. A seller's agent is employed by and represents the seller in a real estate transaction. The agent is also known as a *listing agent*. She owes all fiduciary duties to the seller. The agency relationship is usually evidenced by a listing contract.

The three primary types of listing contracts are:

1. an exclusive right to sell listing
2. an exclusive agency listing
3. an open listing

An exclusive right to sell listing is one which provides that, if the listed property is sold during the term of the listing, the broker receives the negotiated commission, no matter who sells the property. An exclusive agency listing gives a broker the right to find a purchaser on behalf of the seller. However, in this type of listing arrangement, the broker will not receive a commission if the seller sells the property herself. In an open listing, a seller lists her property with one or more brokers, and agrees to pay a negotiated commission to the broker who actually produces a ready, willing, and able buyer.

Once a property is listed, the seller's agent can either try to sell it herself, or offer to cooperate with another agent (either a subagent or buyer's agent) who will find a purchaser for the property. As stated previously, the duties a subagent owes to the agent and principal are the same as those owed by the agent to the principal. Likewise, a subagent can create the same liabilities for the agent and principal as the agent can create for the principal.

A subagency relationship is usually created when a listing broker offers to cooperate with subagents through a multiple listing service. That typically takes the form of a blanket unilateral offer of subagency -- an offer made by a listing broker to all other participants of a multiple listing service for them to act as her agent in the sale of a listed property. The offer is accepted by performance, such as when an agent shows the listed property without rejecting the offer.

A subagent can work in the same firm as the listing broker (i.e. a salesperson), or in another firm. In either case, the subagent owes fiduciary duties to the listing broker and the seller, and works with a buyer as a customer.

A subagent's relationship with a buyer customer is probably most likely to be misunderstood by consumers. Because a subagent works closely with potential buyers, she must be careful not to do or say anything to a buyer that implies an agency relationship with the buyer. Such an action results in an undisclosed dual agency situation, and allows the buyer and seller to seek the remedies outlined in Chapter 2. To avoid such a precarious position, subagents should be extremely careful to make appropriate disclosures to potential buyers, in a timely fashion.

Actions a subagent should avoid in order to prevent an implied agency relationship are:

- referring to the buyer as the "client" or "my buyer"
- referring to the buyer and subagent as "we" or "us" and the seller and listing agent as "they" or "them"
- advising the buyer what to offer on the property or offering any advice on negotiation strategies
- providing the buyer with information on the seller's bargaining position

As a customer, a buyer is not represented by an agent but can expect the agent to treat her honestly. The agent will *work with* rather than *for* the buyer. However, the agent cannot assist the buyer in any manner that would be detrimental to the interests of her client. Therefore, the agent cannot negotiate on the buyer's behalf nor reveal to the buyer any confidences of the client.

Services which a seller's agent or a subagent *may* provide to a buyer without creating an agency relationship are:

- show the buyer listed properties meeting the buyer's criteria concerning location, price, and size
- describe a property's amenities and make factual representations about the property's condition and status
- transmit any offers made by the buyer to the seller or the listing broker
- inform the buyer about the availability of financing, legal services, home inspection companies, title companies or other related services

Disclosures To the Seller

As discussed above, a seller's agent and subagent owe all fiduciary duties to the seller. For the seller's agent, these duties arise immediately upon execution of the listing agreement. However, before entering into a listing agreement, an agent should make several disclosures to the seller. Primarily, she should disclose the broker's general company policy on agency relationships, (i.e. whether company policy permits cooperation with subagents, buyer agents, or both). Many agents also provide the seller with a brochure that describes all agency relationships available (see Appendix C).

The NAR *Code of Ethics and Standards of Practice* 9-10(a) require a REALTOR®, acting as a seller's agent, to make several additional disclosures (see Appendix B). Specifically, the agent must advise sellers of:

- the company's policy regarding cooperation with subagents, buyer's agents, or both
- the fact that a buyer's agent, even if compensated by the listing broker, or by the seller, will represent the interests of the buyer
- any potential for the listing broker to act as a disclosed dual agent.

Other disclosures arise, depending on the type of agency relationships practiced by a company. If a particular company allows for cooperation with subagents, the agent should outline potential liabilities involved with using subagents. An agent should also discuss whether a seller will permit her to make a blanket offer of subagency through the multiple listing service.

If a particular company's policy allows cooperation with buyers' agents, an agent should explain to the seller what the means, and obtain the sellers' permission to offer cooperation and/or compensation to buyers' agents through a multiple listing service or by separate agreement. The agent should make it clear to the seller that the buyer's agent will always work for the buyer, even if compensated by the listing agent.

If a company's policy is to represent both sellers and buyers, a seller's agent should disclose to the seller the possibility of a disclosed dual agency relationship and explain what that relationship means. A seller should consent to the possibility of disclosed dual agency when the seller executes the listing agreement.

Lastly, if the company policy allows agents to represent either the buyer or seller, but never both in the same transaction, this single agency relationship should be discussed with the seller. Specifically, the seller's agent should disclose to the seller that the range of potential purchasers is limited, because buyer clients within the brokerage firm will not be shown listed properties in order to avoid dual agency situations. The seller should be told that if a buyer client decides to see a company listing, that buyer client may, depending upon the company policy, have the option to revert to customer status or be referred to another brokerage firm. The seller needs to understand that should the buyer revert to customer status, the agent, although now solely working on behalf of the seller, will not be able to reveal confidences of the buyer to the seller.

All disclosures can be contained in the body of the listing agreement, or as a separate agency disclosure notice to be executed at the same time as the listing agreement (see Appendix D).

Subagents generally have no agency disclosure requirements with regard to the seller. A subagent will accept subagency status in the manner set forth in the multiple listing service offer, or as otherwise offered. Only a few states require any notification to the seller as to the identification of the subagent.

Once an agency relationship is established, the seller's agent and subagents are responsible, under the fiduciary duty of disclosure, to disclose to the seller all relevant and material, non-confidential information the agent knows pertaining to the scope of the agency. Specifically, the following information should be revealed to the seller:

- all offers to purchase the seller's property
- the identity of all potential purchasers
- any facts affecting value or desirability of the property
- information concerning the ability or willingness of the buyer to complete the sale, or to offer a higher price
- a buyer's intent to subdivide or resell the property for a profit

The bottom line is that an agent who represents the seller should disclose to the seller any non-confidential information that might affect the seller's ability to obtain the highest price and best terms in the sale of the property.

Disclosures To the Buyer

Both the seller's agent and any subagents owe the same disclosure to the buyer -- that the agent works for the seller and owes absolute loyalty to her. The disclosure should be made as soon as possible, and written confirmation of such disclosure should be given to the buyer before a purchase agreement is executed (see Appendix E).

Article 21 of the NAR *Code of Ethics*, and specifically *Standard of Practice 21-14*, requires REALTORS®, acting as agents of sellers or as subagents of listing brokers, to disclose that relationship to buyers as soon as practicable and provide written confirmation of such disclosure to the buyers **not later** than execution of any purchase agreement (see Appendix B).

Disclosure to a buyer at the time the purchase agreement is signed is often too late. As a precaution, it is advisable that disclosure to the buyer that the agent is working for a seller be given to the buyer before any discussion about the buyer's property preferences or financial concerns. This helps to ensure that the buyer clearly understands her relationship to the agent as a customer, and helps alleviate the possibility of undisclosed dual agency.

CHAPTER 4

Buyer's Agents

Definition of Agency Role

As more states require agency disclosures, consumers are becoming more aware of who the real estate agent represents. Buyers may now choose to obtain a real estate agent who will represent their best interests -- buyers' agents. This chapter describes the role of a buyer's agent and the disclosures a buyer's agent must make to a buyer and seller.

A buyer's agent is a real estate agent who is employed by and represents the buyer in a real estate transaction, regardless of whether the agent is to be paid by the buyer, seller, or through a commission split with the listing agent. The buyer's agent owes all fiduciary duties to the buyer.

In addition to the buyer who specifically opts for buyer representation, there are many types of buyers who, because of relationships with agents and the likelihood of confidential exchanges, should consider buyer representation. These buyers are usually close friends, relatives, business associates, partners, and former clients and customers. Out-of-town and first-time buyers, not familiar with the area or the buying process, are also good candidates for buyer representation.

Moreover, there is one type of buyer who most definitely should be represented as a client, rather than a customer -- a buyer who requests anonymity. Any buyer who wants to remain anonymous must be represented by a buyer's agent, because the fiduciary duty of disclosure requires that any listing agent or subagent disclose a buyer's identity to the seller. Lastly, an agent must act as a buyer's agent and therefore disclose the status to the seller or seller's agent, when the agent is purchasing property on her own behalf.

The buyer agency relationship is usually evidenced by a written buyer representation agreement (see Appendix F). The agreement explains what a buyer expects of her agent during the period of representation (i.e., presentations and negotiations of offers and counteroffers, financing, and inspections).

It is also important that a buyer representation agreement state the amount of compensation, when compensation is to be earned by the agent, when it will be paid, and how. An agent may be paid directly by the buyer through a flat fee, hourly rate, retainer, or may receive a percentage of the listed or sales price of the property purchased. Or, an agent may accept an offer of compensation through a multiple listing service, and be paid by the listing agent. In addition, some buyer's agents may be paid directly by the seller. No matter what the arrangement, it should be completely outlined in the agreement.

The primary type of buyer representation agreement is the exclusive buyer agency agreement. An exclusive buyer agency agreement states that, if a buyer purchases a property during the term of the agreement, the broker receives the negotiated commission, no matter who showed the buyer the property.

Once a buyer representation agreement is signed, a buyer's agent needs to work with the buyer to determine her property requirements. A buyer's agent then seeks properties that fulfill the buyer's requirements. Properties to be considered include those listed with other real estate agents, those featured in a multiple listing service, and those that are offered for sale by owners. As an agent searches for suitable properties for a particular buyer, the agent thoroughly investigates each one so that she is in a position to advise the buyer about its physical features, taxes, value, zoning requirements, and other issues of importance to the buyer.

When helping a buyer prepare an offer, a buyer's agent can advise on what should be included in the offer, how much the property may be worth, and how to negotiate counteroffers. Even after an offer is accepted, the buyer's agent may still be obligated to assist the buyer in fulfilling the conditions and contingencies in the agreement. The agent should also help the buyer select other professionals, such as lenders, attorneys, or home inspectors, whose help is necessary to complete the homebuying process.

Disclosures To the Buyer

A buyer's agent owes all fiduciary duties to the buyer. She assumes these duties immediately upon execution of the buyer representation agreement. However, before entering into an agreement, an agent should make several disclosures to the buyer. Primarily, she should disclose the brokerage firm's general company policy on agency relationships, such as whether company policy allows the practice of dual agency. Many agents also provide buyers with a brochure that defines and describes all available agency relationships (see Appendix C).

The NAR *Code of Ethics and Standards of Practice* 9-10(b) require a buyer's agent to make several additional disclosures (see Appendix B). Specifically, the agent must advise buyers about:

- the company policy regarding cooperation with other firms
- any potential for the buyer agent to act as a disclosed dual agent

At this point in the process, an agent should outline the company policy with respect to the agency options available to the buyer. If the company practices exclusive buyer agency, the agent should explain to the buyer that the company never takes a listing and works solely with buyer clients.

If company policy is to practice single agency, an agent must explain to the buyer that she will not show her any properties listed with the company. The agent should warn the buyer that if she becomes interested in a property listed with the company, the agent will have to treat the buyer as a customer, or refer her to another company. The buyer needs to understand that by switching to customer status, the agent will no longer negotiate offers on behalf of the buyer nor give the buyer advice that would be detrimental to the seller. The buyer should be assured, however, that confidential information learned prior to the change in status will not be shared with the seller. An agent should outline the particular approach in the buyer representation agreement.

If company policy permits the company to represent sellers as well as buyers, a buyer's agent should disclose the possibility that she may act as a disclosed dual agent and explain what that means. The buyer should consent to the potential disclosed dual agency relationship when the buyer executes the buyer representation agreement.

The disclosures described above can be contained in the body of the buyer representation agreement, or in a separate agency disclosure notice that is executed at the same time as the buyer representation agreement (see Appendix F).

Once an agency relationship is established, the buyer's agent is responsible, under the fiduciary duty of disclosure, to disclose to the buyer all relevant and material, non-confidential information the agent knows pertaining to the scope of the agency. Specifically, an agent should reveal the following to the buyer:

- the willingness of the seller to accept a lower price
- any facts relating to the urgency of the seller's need to dispose of the property
- the agent's relationship to, or interest in, the seller or the property for sale
- any facts affecting the value of the property
- the length of time the property has been on the market

In general terms, an agent representing a buyer should disclose to the buyer any non-confidential information that might affect the buyer's ability to obtain the property at the lowest price and on the most favorable terms.

Disclosures To the Seller or Listing Agent

If a property is listed through an agent, all disclosures should be made to the listing agent. Otherwise, disclosures should be made directly to the seller.

When a buyer's agent calls for information about a property or makes an appointment to show a listed property, she must immediately disclose to the listing agent that she represents the buyer. This also includes rejecting any offer of subagency made by the listing agent, and the acceptance of any offers of compensation to buyer's agents. It is a good practice to immediately confirm a verbal disclosure in writing (on a confirmation form) and to include the day and time it was made. The buyer's agent should keep a copy of the form and submit it with any purchase offer made on the property (see Appendix G).

The NAR *Code of Ethics and Standard of Practice* 21-12 requires a REALTOR®, who acts as a buyer's agent to disclose the relationship to the seller's agent at first contact and to provide written confirmation of that disclosure to the seller's agent no later than when a purchase agreement is executed (see Appendix B).

If a property is not listed, these disclosure and confirmation forms should be presented directly to the seller. In addition, a buyer's agent should ask the seller if the selling fee is included in the asking price, and if the seller is willing to pay it to a buyer's agent.

The NAR *Code of Ethics and Standard of Practice* 21-13 requires a REALTOR®, who acts as a buyer's agent to disclose the relationship to the seller at first contact for that client, and to provide written confirmation of such a disclosure to the seller no later than when a purchase agreement is executed. The Standard of Practice also directs REALTORS® to make requests for anticipated compensation from the seller at first contact (see Appendix B).

In either situation, it is good practice for an agent who is presenting an offer to attach a copy of the disclosure form to the offer, or include the disclosure in the body of the purchase agreement.

Buyer agency is a viable method of practicing real estate, but an agent should be cautious in her approach if she is not thoroughly knowledgeable about the entire process. Agents who are used to working with buyers as seller's subagents need to be aware of the new duties and potential liabilities of buyer's agents before changing the form of representation they offer.

CHAPTER 5

Disclosed Dual Agents

Definition of the Agency Role

Dual agency is an agency relationship in which the brokerage firm represents both the buyer and the seller in the same real estate transaction. This chapter will explain the role of a disclosed dual agent, and describe the disclosures necessary in this type of agency relationship.

There are two types of dual agency -- disclosed and undisclosed. Undisclosed dual agency is a dual agency relationship without the knowledge and informed consent of both parties. **It is always illegal.**

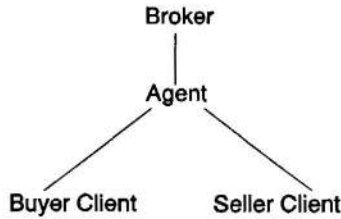
Disclosed dual agency is a relationship in which the brokerage firm, by written or oral means, discloses and receives informed consent from both the buyer and the seller to act as the agent of both. Disclosed dual agency is legal.

The concept of informed consent is central to disclosed dual agency. The buyer client and seller client have to understand the implications of consenting to be a party in a dual agency transaction. The primary implication is that the fiduciary duty of loyalty to a client is limited. The limitation focuses on confidentiality and the negotiation process. For example, in a dual agency situation, the agent should not, without the express written consent of the parties, disclose:

- to the buyer that the seller may be willing to accept less than listed price or less favorable terms than are found in the listing
- to the seller that the buyer would be willing to pay more than the offered price or accept less favorable terms than are contained in the listing

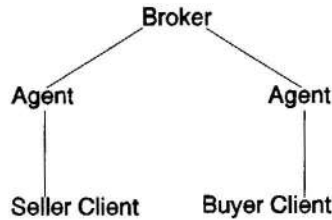
In other words, the agent should not disclose to one party any confidences shared by the other party that may place the disclosing party at a disadvantage.

There are two ways in which dual agency typically arises. One is when a listing agent sells her own listing to her own buyer client. No other agents are involved in this transaction (see illustration below). This kind of dual agency is problematic in that the confidences of both clients are placed with the same individual.

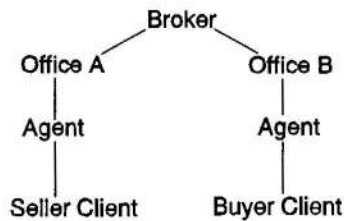


When a buyer client is interested in an agent's listing, the agent may become a dual agent, refer the buyer to another agent in the office (still considered dual agency), or refer the buyer to another brokerage firm altogether, thus eliminating the dual agency issue.

Dual agency also occurs when the buyer is represented by one sales agent in the brokerage firm, and the seller is represented by another agent in the same firm (see illustration below).



This form of dual agency arises whether or not the agents work together in the same office or in different offices of the same broker (see illustration below).



NOTE: THIS IS STILL DUAL AGENCY!

Agents need to recognize when dual agency situations arise. An agent must always be aware that in disclosed dual agency situations, she cannot negotiate on behalf of one client, because it would be a detriment to the other client, whom she may not know.

Disclosures

Disclosed dual agency is an option that is only offered by offices with a policy of representing both buyers and sellers in the same transaction. The NAR *Code of Ethics and Standard of Practice 7-7* states that a REALTOR® can only represent both parties in the same transaction after there has been full disclosure to and informed consent of both parties (see Appendix B). The disclosure consists of more than just a blanket agreement between the parties about the terminology. Each party must consciously consent to the relationship, after receiving a detailed explanation of what the relationship would entail.

The initial disclosure to a client should include a detailed explanation of the brokerage firm's general company policies with regard to cooperation, and an explanation of how disclosed dual agency works. Every seller's listing contract and every buyer's representation agreement should include a disclosure about the possibility of disclosed dual agency. The disclosure should state that the buyer and seller understand that because the company's policy is to list seller client properties and sell properties to buyer clients, a possibility exists that a buyer client may want to purchase a seller client's property. The disclosure should provide for the buyer or seller to agree, in concept, to participate in such a dual agency transaction if one occurs (see Appendices D and F).

Later, if a buyer client wants to inspect a company listing, she should be reminded that this may lead to a dual agency situation, as described in her buyer representation agreement. The buyer should be asked if she is still interested in viewing the property.

Once a buyer client becomes interested in an in-house listing, the broker should notify both the buyer and the seller that there is a dual agency situation, and obtain their consent for this particular dual agency transaction. The possibility of dual agency that was discussed during the listing stage has now become reality.

The final disclosure necessary in a disclosed dual agency transaction is to attach an addendum to the purchase agreement that reconfirms the dual agency agreement. This document may also take the form of a separate dual agency agreement which should be affixed to the purchase agreement.

In any form, the disclosure document again defines the elements of dual agency, and reviews the more limited roles of the broker and sales agents. The document should also reiterate that the broker and sales agents will neither disclose to the buyer the lowest price or terms the seller might be willing to accept, nor disclose to the seller the highest price or terms the buyer might be willing to offer. Signature lines should be available for sign-off by the parties to the purchase agreement (see Appendix H).

In review, dual agency disclosures take place several times in the transaction process:

- Consent to the possibility of disclosed dual agency in the listing agreement and buyer representation agreement
- Specific consent when dual agency arises
- Include signed dual agency agreement or addendum with purchase agreement.

CHAPTER 6

Office Policies on Agency

To reduce potential liabilities and to insure that all agents are informed about their agency alternatives, all offices should have a written company policy about agency. The *NAR Code of Ethics and Standards of Practice* 9-10(a) and 9-10(b) virtually require a company to detail its office policies on agency practices (see Appendix B).

Establishing a policy for agency relationships makes good business sense. An agency policy acts as a guide for agents in terms of who they represent, how representation is practiced, and when and how to disclose each type of representation. A written company policy clarifies agency relationships and encourages consistent office practices. It also protects agents by reducing their risk of noncompliance with agency laws.

Establishing a written company policy on agency need not be difficult. It is as simple as following the steps outlined on the next page.

1. Review the various agency alternatives available in the marketplace.
2. Review the pros and cons of each alternative.
3. Select the alternative(s) that are best for the company.
4. Draft a company policy that:
 - a. explains all available practices
 - b. outlines the practice(s) the office will follow
 - c. outlines the procedures a salesperson must follow and the documentation necessary

To encourage support for the position, a broker may also want to include a brief explanation about why she selected the policy(s).

5. Implement training and always uphold the policy.

Step 1: Review the various agency alternatives available in the marketplace.

The most prevalent forms of agency relationships practiced today are:

- exclusive seller agency
- exclusive buyer agency
- seller agency, buyer agency, with disclosed dual agency for in-house sales
- single agency

Exclusive seller agency -- The practice of representing only sellers, never buyers, in a transaction. Agents in the company that work with buyers act as subagents to the seller and treat the buyer as a customer.

Exclusive buyer agency -- The practice of representing only buyers and never sellers in a transaction. The company never lists a seller's property and thus never has a seller as a client. Agents never accept subagency that is offered by a seller's agent.

Seller agency and buyer agency, with disclosed dual agency for in-house sales -- The company represents sellers as clients and buyers as clients with the understanding that, for in-house sales, the practice will be a disclosed dual agency relationship.

Single agency -- The practice of representing either the buyer or the seller but never both in the same transaction. There is no opportunity for a disclosed dual agency relationship in this situation. Companies must decide what to do when a buyer client wants to see a seller client's property (i.e., refer the buyer client to another brokerage firm or treat the buyer client as a customer).

<p>Step 2: Review the pros and cons of each alternative.</p>

Exclusive seller agency

Advantages:

- A traditional practice that is more comfortable and familiar to most agents
- Provides for an historical method of compensation in cooperating sales
- Accommodates the sale of a company's own listings (in-house sale)
- Minimizes the possibility of undisclosed dual agency when the listing company only offers cooperation to buyer's agents
- Minimizes subagent liability when the listing company only offers cooperation to buyer's agents

Disadvantages:

- Does not meet the increased desire of consumers for buyer representation
- Places liability for a subagent's actions on the seller and seller's agent
- Creates a high potential for undisclosed dual agency, when offering subagency
- Results in an "unnatural" working relationship between a seller's subagent and buyer, when offering subagency
- Economic implications may arise if a listing company only cooperates with buyer's agents and does not offer subagency
- Economic implications may arise if a listing company only cooperates with subagents and not buyers' agents

Exclusive buyer agency

Advantages:

- Minimizes possibility of a dual agency conflict because agents who work with buyers normally have little, if any, interaction with the seller; this decreases the likelihood of accidental agency and undisclosed dual agency relationships
- Promotes a more natural relationship for agents working with buyers
- Insures a buyer's loyalty under an exclusive buyer's contract

Disadvantages:

- Creates a limited client base, because the company does not take listings
- Introduces compensation issues such as whether the seller or buyer pays the agent's fees, whether the listing agent shares compensation
- Causes a potential conflict when two clients make simultaneous offers on the same property
- Causes a potential conflict of interest for the broker when compensation is based on a percentage of the sales price

Seller agency, buyer agency with disclosed dual agency for in-house sales

Advantages:

- Reduces the possibility of undisclosed dual agency problems
- Causes less disruption in current practice

Disadvantages:

- The buyer and seller do not have the full range of agency representation
- There is a lack of available training and education on how to practice as a disclosed dual agent
- Potential inability to sell in-house listing to a buyer who wants representation but refuses to allow dual agency

Single agency, whether listing or selling

Advantages:

- Brokers can offer both seller and buyer agency
- Allows full representation of client

Disadvantages:

- A buyer cannot have agent representation when buying a company listing
- There is potential for having to refer a buyer to a competitor
- The potential for undisclosed dual agency exists when buyers are customers
- Difficult to move back from being a buyer's agent to a subagent
- Economic implications arise when a company adopts a policy to not show company listings to buyer clients

Step 3: Select the best alternative(s) for the company.

A broker may already have structured office procedures so that it predominantly practices only one type of agency relationship. If so, the next step is for the broker to decide if that type of practice will help a firm achieve its future goals. For example, if one of the main goals is to increase listings, then formally structuring the office as an exclusive seller agency practice will minimally affect the bottom line and direct the salespeople toward such goal achievement.

However, if an office does not have an established structure or company policy related to agency relationships, the broker should determine which agency representation practice will best help her achieve her business goals. There are several factors the broker can consider to determine what type of policy will be most effective:

- revenue sources
- agent training
- agent experience
- market opportunities
- consumer needs

A broker may want to involve her agents in the decision by asking them about agency preferences. Examples of questions include:

- What types of agency relationships are most familiar to them?
- What are they most comfortable practicing?
- What makes them uncomfortable about current agency practices?
- What are their goals relative to the future of the company?
- What are their personal goals?
- How much training have they had?
- What do they see as buyers' needs? sellers' needs?
- Do they believe a change in policy could bring more business?

Step 4: Draft a company policy.

Once a broker makes her decision about a company policy, it should be put in writing. Using seller agency, buyer agency with disclosed dual agency for in-house sales as an example, a sample statement of policy is:

The ABC Company will represent sellers in the sale of their homes and buyers in the purchase of homes. The ABC Company will also practice disclosed dual agency in the sale of in-house listings. This type of relationship will exist only after full disclosure is made to all the parties to the transaction and after obtaining their informed consent.

The policy should describe how the practice is implemented. For example, if a broker adopts the above policy, the policy manual should explain the practice of seller and buyer agency, as well as disclosed dual agency. (See the Glossary of Terms in Appendix A for assistance with this step.) The policy should also include a description of how an agent treats a seller(s) and a buyer(s) at all times, such as when it is necessary to make disclosures. Disclosure requirements could be written, as follows, using the exclusive buyer agency arrangement as an example.

Sample Disclosure Requirements

1. *At the earliest practical opportunity, you must disclose that you are representing the buyer. This usually takes place when you first call for information or set up appointments to show a property. A good practice is to say "Hello, this is Mary Smith. I am a buyer's agent calling about the property located at 131 Oak Street."*
2. *Follow up your verbal disclosure by filling out a "Confirmation" form that describes and defines buyer representation, describes the property in question, and confirms the date and time of the appointment, and date and time of the disclosure.*
3. *If a property is unlisted, the above disclosure should be made directly to the seller when the first call for information or the first appointment is made.*
4. *As a final safeguard, make sure that a copy of the agency disclosure confirmation form is attached to the purchase agreement, or is confirmed in the language of the agreement.*

There are exceptions to every rule. One exception is a situation in which a broker has opted for exclusive seller representation, and in which she is handling a transaction for a buyer who is also a close friend or relative. Should the broker allow for dual agency in this particular transaction or refer the friend or relative to another company? The company policy should outline how such exceptions will be handled. The broker might not allow for any exceptions, or may require an agent to discuss unique situations with her first. If enough exceptions arise, it might be time to change the policy.

With the written policy, a broker should include any standard disclosure forms agents are required to use. She should also specify the type of training each agent is expected to take before practicing each type of agency relationship.

It is customary and necessary to have the policy manual reviewed by an attorney. Most states have adopted laws or regulations about agency disclosure, so policies must conform to these laws, and the appropriate state-required disclosure forms must be used.

Step 5: Implement training and always uphold the policy.

Once a policy is final, it must be implemented. Agents in the firm must be trained in how their practices are affected by the new policy. This may take time, especially if the new policy brings about an entirely new direction of practice. Periodic review of the office policy is necessary in order to assess whether current laws, practices, and goals are consistent with its statements. Most importantly, it is the broker's job to insure that all agents act, at all times, in a manner consistent with the selected agency status. A policy is only as effective as the agents who practice it. Liability is best reduced if policies and actions go hand-in-hand.

CHAPTER 7

Conclusion

The NATIONAL ASSOCIATION OF REALTORS® (NAR) is a leader in the evolution of agency practices within the real estate industry. Traditional agency is now redesigned on a daily basis to accommodate changes within the marketplace and consumer demand. NAR is progressively meeting the new challenges through changes in its multiple listing policies and *Code of Ethics*, the availability of educational products and programs, legislative resources, and the cooperative efforts of its members.

This educational guide has been designed to provide a basic foundation on agency relationships to real estate agents. Each agent is encouraged to continue learning by participating in more advanced programs.

In addition, most states have passed legislation or enacted regulations addressing the issue of agency disclosures. Each real estate agent must be familiar with her own state requirements, practice disclosures that meet these requirements, and provide consumers with the information they need to make informed choices.

Through agency education and disclosures, the real estate professional will help consumers make **choices**, will help themselves face new **challenges**, and will help the real estate industry create new **opportunities** for the future.

APPENDICES

Agency: Choices, Challenges & Opportunities

Appendix A: Glossary

Appendix B: NATIONAL ASSOCIATION OF REALTORS®
Code of Ethics

Appendix C: Consumer Brochures

Appendix D: Listing Agreements

Appendix E: Disclosures To Buyers Regarding Subagency

Appendix F: Buyer Representation Agreements

Appendix G: Disclosures To Listing Agents/Sellers Regarding
Buyer Agency

Appendix H: Dual Agency Addendum To Purchase Agreement

***The sample forms in the NAR Agent's Guide
Appendices are provided for reference purposes only.
No endorsement by the NATIONAL ASSOCIATION OF
REALTORS® is intended or implied.***

APPENDIX A

Glossary

Agency Relationship - This is the fiduciary relationship resulting when one person, called the agent, represents the interests of another person, called the principal, in dealings with others. In a real estate sales transaction, an agency relationship is formed between the brokerage firm (including all its licensees) and the principal.

Blanket Unilateral Offer of Subagency - An offer made by a listing agent to all other participants of a multiple listing service for those participants to act as her agent in the sale of the listed property; the offer is accepted by performance, such as when an agent shows the listed property without rejecting the offer.

Buyer Agency - The agency relationship formed between a buyer principal and an agent.

Buyer's Agent - A real estate agent who represents only the buyer in a real estate transaction, regardless of whether the agent's compensation is paid by the buyer or by the seller or through a commission split with the listing agent.

Client - A buyer or seller who forms an agency relationship with a real estate broker; also called a principal.

Company Policy - Policies set by the principal broker as to how the company will be run; companies are encouraged to establish written policies that outline their agency practices.

Contingent fee - Any fee that is earned upon the occurrence of some specified event, such as a closing.

Cooperating Agent - (see Selling Agent)

Customer - A buyer who is working with an agent who represents the seller. Conversely, the term may also define a seller who is working with an agent who represents the buyer.

Disclosed Dual Agency - A dual agency relationship where the brokerage firm, by written or oral means, discloses and receives informed consent from both the buyer and the seller to act as the agent of both.

Disclosed Dual Agent - A real estate broker who has received informed consent from both a buyer and seller in a single transaction for the brokerage firm to act as the agent of both.

Dual Agency - An agency relationship where the brokerage firm represents both the buyer and the seller in the same real estate transaction.

Exclusive Buyer Agency - The practice of representing only buyers and never sellers in a transaction.

Exclusive Seller Agency - The practice of representing only sellers and never buyers in a transaction.

Facilitator - A person who assists the parties to a potential real estate transaction in communication, interposition and negotiation, between or among them, without being an advocate for any interest except the mutual interest of all parties to reach agreement. Also known as an **intermediary, transaction broker, mediator, or non-agent**.

Fiduciary duties are duties owed by an agent to the principal:

1. **Duty of Loyalty** - An agent must act at all times solely in the best interests of the principal to the exclusion of all other interests, including the agent's own self-interest.
2. **Duty of Obedience** - An agent is obligated to obey promptly and efficiently all lawful instructions of the principal.
3. **Duty of Disclosure** - An agent is obligated to disclose to the principal all relevant and material information, unless obtained through a previous fiduciary relationship, that the agent knows and that pertains to the scope of the agency.
4. **Duty of Confidentiality** - An agent is obligated to safeguard the principal's lawful confidences and secrets.

5. **Duty of Reasonable Care and Diligence** - An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs.
6. **Duty of Accounting** - An agent is obligated to account for all money or property belonging to the principal that is entrusted to the agent.

Implied Agency - Any agency relationship that is indicated by the words and/or actions of the agent or principal rather than by written agreement; also called **accidental agency**.

Informed Consent - A person's approval that is based on a full disclosure of facts needed to make the decision intelligently, i.e. knowledge of liability involved, alternatives, etc.

In-House Sale - A sale in which a brokerage firm, through one or more of its real estate licensees, acts as both the listing and selling agent.

Intermediary - (see Facilitator)

Limited Agency - A proposed form of agency relationship created by a buyer or seller, which would provide that, in the event of an in-house sale, the buyer/seller, with the agreement of the broker, would designate one licensee from the real estate brokerage firm to act as agent and knowingly waive the right to undivided loyalty from the brokerage firm and any of its other agents and employees.

Listing Agent - A real estate agent who markets the seller's property and represents the seller during the sale of the seller's property. Also known as the **seller's agent**.

Multiple Listing Service (MLS) - A system which disseminates information about listed properties and through which participants offer cooperation and compensation to other participants, i.e. subagents, buyer's agents; usually operated as a committee of a Board/Association of REALTORS® or a corporation owned by a Board/Association of REALTORS®, although some MLS's are privately owned.

Participating Agent - (see Selling Agent)

Seller's Agent - A real estate agent who is employed by and represents only the seller in a real estate transaction. Also known as the **listing agent**.

Selling Agent - A real estate agent who sells a property; the selling agent may be (1) the subagent or listing agent of the seller; (2) a buyer's agent; or (3) a dual agent. Also called a **cooperating agent or participating agent**.

Seller Agency - The agency relationship formed between a seller principal and an agent.

Single Agency - The practice of representing either the buyer or the seller but never both in the same transaction.

Subagent - An agent employed to act for another agent in performing functions undertaken for a principal. The subagent owes the same duties and responsibilities to the principal as the principal's agent. Correspondingly, the subagent can create the same liabilities for the agent and principal that the agent can create for the principal herself.

Undisclosed Dual Agency - A relationship in which the real estate agent is found to be the agent of both seller and buyer in a transaction, but without the knowledge and informed consent of both parties.