

In this very important chapter, we will explore the different aspects of agency and agency relationships, including:

- **Agency and Non-Agency Relationships**
- **Creation of Agency Relationships**
- **Categories of Agency Relationships**
- **Listing Contracts with Sellers**
- **Agency Agreements with Buyers**
- **Disclosure and Termination**

INSTRUCTOR'S NOTE:

**Chapter 9: General Principles of Agency is a crucial chapter.
One the state licensing exam, thirteen questions are drawn from this chapter.**

Be sure to study this chapter carefully!



Agency and Non-Agency Relationships

When dealing with real estate transactions, **AGENCY means the two R's: Relationship & Representation.**

Agency occurs when one individual hires another to represent their best interests.

The word "hire" is not being used to describe the typical employer (boss) and employee (worker) relationship. It is more like when a person "hires" a lawyer or selects a doctor to provide care.

Agency exists in many forms in real estate. For example, an agency relationship exists between a broker and a salesperson, a broker and a seller, a broker and a buyer and a property owner and a licensee acting as a property manager. In all of these examples, one is representing the other's best interest.

Before we learn more about agency relationships, let's learn the roles that each individual can play in those relationships.

Types of Agents and Agencies

Each party involved in a real estate transaction has specific roles and responsibilities:

- **Licensee:** An individual with a real estate license, either a salesperson or a broker.
- **Consumer:** A member of the general public that does not have a real estate license.
- **Agent:** The term used to refer to a licensee (either a broker or a salesperson) that has been hired via a written service agreement to act on another's behalf in a real estate transaction. *An agent works FOR A CLIENT.*
- **Client/Principal:** An individual that hires a licensee to represent him for a specific task via a written service agreement.
- **Transaction Broker (also called a Non-agent, Facilitator, Intermediary):** A licensee (either a broker or a salesperson) that is working with a customer that did not wish to sign a written service agreement but still wanted guidance from the licensee. The licensee's role is like that of a consultant. *A transaction broker works WITH a customer.*
- **Customer:** An individual that needs the services of a licensee but does not wish to sign a written service agreement.

In the next few pages, we will discuss how the agency relationships are created and how these individuals play each of these roles and what their duties are in the real estate transaction.

How agency relationships are created

While there are various ways to create an agency relationship between a broker and a salesperson, a broker and a seller, a broker and a buyer, or between any other parties, the most common way is with a **written service agreement**, which is a contract between the two parties that outlines the duties and expectations of each side, plus the compensation to be paid. The type of compensation paid depends on what type of agency relationship is being created.

We will learn about three other ways that agency relationships can be created, but for now we are only going to focus on **written service agreements**.

Types of Written Service Agreements

We know that a **written service agreement** is a written contract between the two parties that outlines the duties and expectations of each side, plus the compensation to be paid. Basically, this is the document that is used by one party to hire the other party to complete a specific task or set of tasks. Let's take a look at the types of written service contracts used in different real estate situations and transactions.

Between Brokers and Salespeople

When a salesperson passes the state licensing exam and wishes to practice real estate, most states require that the new salesperson works under the guidance of a qualifying broker. The qualifying broker is basically the manager of the real estate company and is responsible for the actions of all the licensees at the company.

(Please note that while the term “qualifying broker” is used in Alabama, the position may be called another term in other states such as supervising broker, managing broker, head broker, etc.)

When a salesperson and qualifying broker choose to work together, their relationship will not be a normal “employer/employee” relationship. Most likely the salesperson will be working as an independent contractor. We will learn more about that type of relationship in Chapter 14.

The qualifying broker and the salesperson will sign a type of written service agreement called an **independent contractor agreement**. *This agreement creates the agency relationship between the broker and the salesperson.*



Broker Earl
Qualifying Broker



Salesperson Amy

Between Sellers and Brokers (Salespersons)

When an individual wishes to sell property, the property owner signs a **listing agreement** hiring a broker (via the salesperson) as his agent with the task of selling the property. (“Agreement” is another way of saying “contract.”) The goal of the listing agreement is to procure a ready, willing and able buyer and must be in writing to be enforceable.

This agreement creates the agency relationship between the broker and the seller.

There are different types of listing agreements, and we will learn about these in chapter 10.



Broker Earl
via Salesperson Amy



Samantha Seller

Between Buyers and Brokers (Salespersons)

When an individual decides to buy a home and decides to use the services of a real estate agent, the buyer and the broker (via the salesperson) will sign a **buyer agency agreement**. The licensee is working for the buyer-client for a specific task which is to locate a suitable property (i.e., house) at the lowest price possible with the best terms.

This agreement creates the agency relationship between the broker and the seller.

There are different types of buyer agency agreements, and we will learn about these in chapter 10.



Broker Earl
via Salesperson Amy



Betty Buyer

What does “via the salesperson” mean?

This is where understanding **agency** can be a little confusing at first. In the real world, the salesperson is most likely the licensee that will be working directly with a seller or a buyer, not the broker. The seller or buyer may never meet the broker throughout the entire transaction (unless there is a major problem!) However, keep in mind that the salesperson is working as an agent of the broker to represent his or her best interests. Hence, the phrase “via the salesperson.”

So, when a seller signs a listing agreement or a buyer signs a buyer agency agreement, they are actually signing an agreement with the broker, NOT the salesperson.

This means that all listings and all buyer agency agreements belong to the broker, not the salesperson.

When are the terms Client, Agent, Customer and Transaction Broker used?

Now that we know the roles that used in real estate transactions and the types of listing that create agency relationships, let’s learn how and when the terms **client**, **agent**, **customer**, and **transaction broker** are used.

When a broker or a salesperson is initially discussing a real estate transaction with a seller or buyer and *BEFORE any agreements have been signed*, the broker or the salesperson is playing the role of a **licensee**, an individual with a license, and the seller is referred to as a **consumer**, a member of the public without a license.

If the seller decided to hire the broker to list their home and both parties sign a listing agreement, *then an agency relationship has been created and the roles change*. Now the broker will be referred to as an **agent**, a licensee that has been hired via a written service agreement to act on another’s behalf in a real estate transaction, and the seller is referred to as a **client**, an individual that hires a licensee to represent him for a specific task via a written service agreement.



Agent’s Duties to Clients

Fiduciary Responsibilities & COLD AC

As soon as the licensee becomes an agent of the consumer, she also becomes something else that is very important. The licensee is now considered to be a **fiduciary** of the client.

- A **fiduciary** is one whom trust and confidence has been placed and is expected to be extremely loyal to the client, putting the interests of his client above his own interest. Being a fiduciary is like being your client’s BFF, best friend forever.
- A fiduciary has specific responsibilities to his client that can be remembered with the acronym: **COLD AC**

Fiduciary Responsibilities as “COLD AC”	
Care	Possess skill and expertise in real estate matters superior to that of the average person.
Obedience	Must obey all LEGAL instructions from the principal.
Loyalty	Must place his client’s interests above everyone else’s, including his own.
Disclosure	Disclose all material facts that would be adverse or detrimental to the client’s interest.
Accountability	Return all property coming into his possession within a reasonable time period.
Confidentiality	Keep confidential any information given in confidence.



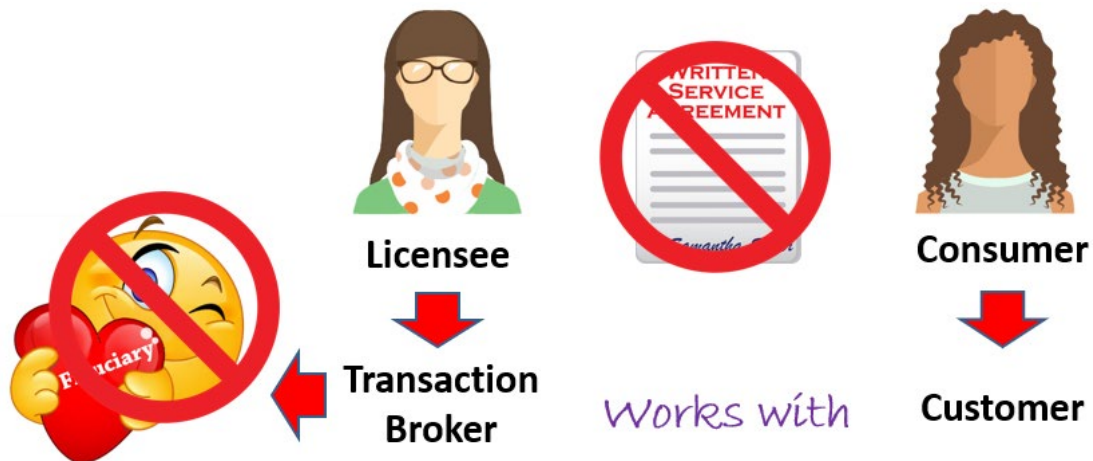
Non-Agency Relationships

Sometimes, though, a consumer will want a little help from a licensee but will not want the licensee to represent him or her in a transaction. The consumer just wants to work with the licensee, meaning to be able to ask the licensee questions and have the licensee receive and complete paperwork.

If the licensee agrees to work together with the consumer, then the licensee will be serving as a **transaction broker** (not an agent) and the consumer will be referred to as a **customer** (not a client).

Licensees working as a transaction broker may still receive a percentage of the contract price as compensation for their services or may receive a flat rate. It just depends on the arrangement the licensee and the consumer have agreed upon and what the real estate law in their state will allow.

When a licensee is serving as a transaction broker, she is NOT A FIDUCIARY of the customer and DOES NOT OWE THE CUSTOMER ANY “COLD AC” OBLIGATIONS.



Creation of an Agency Relationship

The agency relationships can be created in different ways. While the most common way is through an **express agreement**, it can also be created through an **implied agreement, ratification** and **estoppel**.

Express agreement

Express agreement: An agency relationship that has been created between a licensee and a consumer via either a **written service agreement** or oral service agreement. The agreement outlines the duties and expectations of both sides and the compensation to be paid to the licensee.

- **This is the most common form of agency creation.** It is called “express” because each side has expressed (made known) their obligations and expectations.
- While express agreements CAN be created with an oral agreement, most states do not recognize oral agreements and require the agreements to be in writing to be enforceable in court.

Implied agreement

Implied agreement: An agency relationship that has been formed based on the conduct of the licensee and the consumer. It is not an agreement that the two have made orally or in writing, but instead was formed by their conduct. For example, if a potential buyer rides in the licensee’s car to look at houses, then an agency relationship has been implied and thus created.

- Not all states recognize implied agency and instead, require that an agency must have an express agreement to exist. This is because it may be difficult for a real estate agent to collect a commission on sales that result from implied agencies since there is no written agreement addressing compensation for services.

Ratification

Ratification: An agency representation agreement that was created AFTER a licensee did something on the consumer’s behalf without the consumer’s permission, but since the consumer is OK with what the licensee has done or has committed him to do, he accepts the actions done on his behalf. All parties involved pretend to go back in time and agree that the licensee was effectively acting as an agent at the time the act was committed.

When a licensee has been hired to complete a task on behalf of a consumer, he becomes an agent and typically has the authority to act on someone else’s behalf within agreed upon limits. For example, let’s say a real estate investor called Mr. Johnson hires a licensee named Anne to locate and bid on rental properties within certain sizes, conditions and price ranges on his behalf. Anne, his agent, locates a suitable property and makes an offer on the investor’s behalf. If the offer is accepted, the investor is obligated to purchase the property.

On the other hand, let's say the investor has not hired the licensee and has not given her permission to make offers on his behalf, but has described in detail what types of properties he would like to purchase and has asked the licensee to let him know if she discovers any properties that fits his needs. If Anne locates a suitable property and makes an offer without the investor's consent, signing the offer as "Anne, agent for Mr. Johnson," he would not be obligated to go through with the transaction. However, if the investor DID like the property and wished to go through the deal, his approval of Anne's transaction with the seller creates a relationship of agency by ratification. All parties involved pretend to go back in time and agree that the licensee was effectively acting as an agent at the time the act was committed.

Estoppel

Estoppel An agency relationship that was created when the licensee was acting on the consumer's behalf without the consumer's direct consent, but to the consumer's benefit. Basically, the consumer is trying to benefit from the licensee's efforts without having an actual agency relationship in place. Agency by estoppel in real estate is best explained through an example.

Let's say a consumer wished to sell his home and consciously allows a licensee to purport (falsely claim) that he is an agent of the consumer. The licensee secures a buyer for the home and the buyer is relying on the word of the licensee, who says that he represents the owner. The buyer secures a mortgage loan to purchase the home.

If the consumer refuses to sell to the potential buyer by saying that the licensee is not actually his agent, the consumer could be found at fault in a court of law. This is because the consumer consciously allowed the licensee to purport to be his agent, even though no formal agency contract or agreement was ever made between the licensee and the consumer. So, an agency relationship was assumed although there was no formal contract and the seller may owe the agent a commission.

Types of Agency Relationships

The type of relationship that is in place between the licensee and the consumer depends on the specific situation. While not all states participate in each type, we must understand the definition of each and how each works. **These types of agency relationships typically must be created via a written service agreement between the licensee and the consumer.**

- **Single Agency:** A “one-on-one” agency relationship in which the licensee represents only one side of the real estate transaction, either the buyer or the seller. The licensee owes all COLD AC fiduciary obligations to his client.
- **Dual Agency:** A situation where the licensee represents both sides of a transaction, the buyer and seller OR where different licensees from the SAME brokerage each represent the buyer and the seller. In the states where it is allowed, dual agency must be disclosed to both the buyer and the seller and each side must consent to the dual agency situation in writing before the transaction may proceed.

Dual agency relationships restrict the traditional fiduciary duties of COLD AC that a licensee can offer to clients. Since a licensee is looking out for the best interests of each side, the licensee must remain neutral to each party. Specifically remaining neutral means the licensee can’t advise either side how to respond to the demands and offers of the other side. So, basically the fiduciary responsibility of LOYALTY is replaced with NEUTRALITY.

- **Designated Agency:** Some states do not participate in dual agency but do allow designated agency, which is a situation where the broker appoints one licensee to represent the seller and another licensee to represent the buyer in the same transaction. While both agents work for the broker, each licensee works exclusively for his client as his agent keeping the COLD AC fiduciary obligations intact, meaning loyalty is not replaced with neutrality like it would be in dual agency.
- **Subagency:** A type of representation that occurs when a cooperating sales associate from another brokerage, who is not the buyer’s agent, shows property to a buyer that is listed by another brokerage. A subagent owes the same COLD AC fiduciary duties to the listing agent’s client as the listing agent does. Subagency is an antiquated type of representation that was used before true buyer’s agency representation was available.

In subagency, the relationship between the licensee and the buyer is one of a transaction broker and a customer. The subagent works with the buyer-customer to show the property but owes fiduciary duties to the listing broker and the seller.

Although a subagent cannot assist the buyer in any way that would be detrimental to the seller, a buyer customer can expect to be treated honestly by the subagent. (See “Subagency Explained... hopefully!”)



Key Point: An agency is formed whenever one party gives someone else the right to act on his or her behalf in certain matters. A licensee who is representing an owner by managing the owner's property is also in an agency relationship.

Subagency explained... hopefully!

“Subagency” is a real estate topic that is very confusing for most students, but a brief history lesson about the beginning of buyer’s agency will shed some light on this mysterious subject.

Today in real estate everyone is familiar with “buyer agency” and “seller agency”. A buyer hires a licensee via a written service agreement to help him find a house to buy in exchange for a commission. A seller hires a licensee via a written service agreement to list their house in hope of attracting a buyer in exchange for a commission. When either licensee is hired, he or she becomes an agent of the client and owes the client the six fiduciary responsibilities known as COLD AC (confidentiality, obedience, loyalty, disclosure, accountability and care.). Pretty simple, huh?

However, before the mid 1990’s there was *only* “seller agency.” What is known today as “buyer agency” did not exist yet. So, the seller could hire a licensee to be his agent and protect his interests. Now, the listing agent needs a suitable buyer to purchase the home, but it wasn’t realistic to count on the listing agent to be able to attract a buyer in addition to listing the house. This is where sub-agency comes into the picture.

Although licensees from other brokerages could work with buyers, it wasn’t possible to create a true “buyer’s agency” at the time because it didn’t exist. Since this didn’t exist, there was no promise of commission to be paid either. So, if a buyer wanted to make an offer on a house that was not listed by the licensee that was helping him and the licensee wanted to earn a commission, the licensee would have to agree to be a sub-agent of the listing agent. But remember what happens when an individual becomes an agent of someone? He owes his client (the listing agent) the six fiduciary responsibilities known as COLD AC. So, if the licensee has become a sub-agent of the listing agent, who is looking out for the buyer’s best interest? That’s right... NO ONE!

It’s easy to say, “Well, why can’t the buyer just pay the commission in order to get buyer representation?” For starters, mortgage interest rates in 1985 averaged 12.5% and buyers were expected to produce a sizeable down payment of 20% on average. Not a lot of room to add on 3% for the cost of home as commission, is it?

Eventually consumer advocates and regulators questioned the fairness of subagency, which was historically based on local custom and MLS and REALTOR® association rules. This led to states introducing legislation to create true buyer agency and Alabama’s RECAD was passed in 1996.

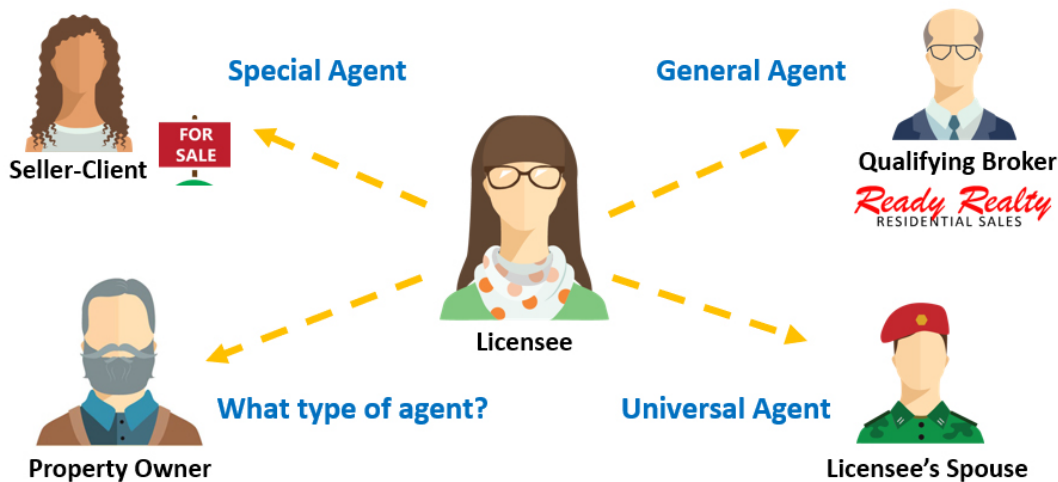
Today subagency is rarely used in transactions today, but real estate students still need to understand the concept because it still a legal form of representation in Alabama. When students become licensees, they will need to be able to fully explain subagency when presenting the require RECAD disclosure to consumers (whether their brokerage offers it or not).

Aside from the buyer being left out in the cold, there is another major drawback to subagency. The listing agent is responsible for the sub agent’s actions since they have an agency agreement together. So, the listing agent is praying that the sub-agent, who is from another brokerage, is not going to do anything wrong during the course of the deal. *Fingers crossed!!!*

Categories of Agency Relationships

The following are general ways that agency relationships can be described or categorized. The main difference between these types of agency is the amount of power the agent has to bind his or her client to a contract or agreement. These descriptions can be applied to real estate agency relationships and non-real estate agency relationships.

- **Special agency (specific agency):** An agency relationship that gives the agent *no power* to bind the principle/client to a contract. The agent is authorized to perform a specific set of tasks for a specific amount of time but cannot agree to a contract on their client's behalf.
 - For example, if a homeowner agrees to list his home for sale with a licensee from Ready Realty, the licensee is now a special agent to the homeowner. The licensee has one job for the sellers, to list and sell the home. However, if the agent were to receive an offer to purchase from a buyer, the agent has no power to accept the offer on the seller's behalf.
- **General agency:** An agency relationship that gives the agent *limited power* to bind the principle/client to a contract. The agent is authorized by the client to perform several acts associated with the on-going operation of a single business.
 - For example, a salesperson in real estate brokerage is a general agent to the qualifying broker since the licensee will perform several tasks on behalf of the broker (procuring buyers and sellers, holding open houses, etc.) in the singular business of real estate. The salesperson has limited capacity to bind her qualifying broker to only very specific contracts (listing agreements, buyer agency agreements, property management agreements, etc.). A licensee hired to act as a property manager for a property owner could also be described as a general agent.
- **Universal agency:** Universal agency typically occurs when one person is holding a power-of-attorney over another person. In a universal agency situation, the agent-in-fact (the person holding the power of attorney) has *unlimited power* to bind and act in place of the principle/client and to perform ALL tasks as if her or she what that person. *A universal agent is considered to be the most powerful forms of representation.*
 - A **power of attorney** is a written instrument authorizing an individual, the attorney-in-fact, to act as the agent on behalf of another to the extent indicated in the instrument. This allows the attorney-in-fact to act in place of the client.
- **Ostensible Agent:** A person who has been given the appearance of being an agent (representative) for another (client), which would make anyone dealing with the ostensible agent reasonably believe he was an actual agent of the client. For example, if an unlicensed assistant is allowed to answer a tenant's questions about leasing contracts, then he is acting as an ostensible agent on behalf of the broker. If a brokerage allows an employee to act as an ostensible agent, the brokerage could be obligated to uphold any agreements created on their behalf by the employee. The brokerage could also be held responsible for damages or losses suffered by the tenant at the hands of the unlicensed assistant acting as an ostensible agent.



Powers of Attorney and Delegation of Authority

Power of Attorney

A **power of attorney** is a document, signed by a principal and typically notarized, that gives another person the power to make decisions on behalf of the principal in accordance with the terms of the document. The party being granted authority to act is commonly referred to as an “agent” or “attorney in fact.” However, the person taking responsibility of the agent isn’t required to be a lawyer. Any individual can become an “attorney in fact.”

- A **general power of attorney** allows the agent to undertake a range of activities on the principal’s behalf, such as managing the principal’s money and handling the principal’s real property.
- A **special power of attorney** is akin to the letter of authorization, spelling out just what the agent is authorized to do on the principal's behalf.
- A **durable power of attorney** stays in effect even if the principal becomes incapacitated because, otherwise, a principal who can't make decisions can't delegate powers to an agent.
- A **health care power of attorney** allows the agent make health care decisions on the principal’s behalf when the principal is too sick to make them himself.

Letter of Authorization

A **letter of authorization** is a document that gives another person, known as an “agent,” the authority to act on another person’s behalf, known as the “principal.” The letter spells out the *specific task* that the principal has assigned to the agent. The principal can be an individual, corporation or some other entity. The task can be picking up the principal’s dry cleaning, borrowing money on the principal’s behalf or negotiating a contract for the principal. Under agency law, the agent’s actions on the principal's behalf bind the principal. In other words, the agent steps into the principal’s shoes and the principal is responsible for the agent’s actions (and mistakes) undertaken on the principal's behalf.

Creation of Agency and Non-Agency Agreements

Listing Contracts with Sellers

When an individual wishes to sell property, the property owner signs a **listing agreement** hiring a licensee as his agent with the task of selling the property. The goal of the listing contract is to procure a ready, willing and able buyer and must be in writing to be enforceable.

The listing agreement must:

- Include the names of the owners and broker.
- State the percentage of commission or exact amount of commission to be earned by the broker.
- Specify a termination date for the contract.
- State the price of the real estate and the terms of the sale.
- Include a legal description of the property.
- Include signatures of all parties named in the contract.

Details of listing agreements

- The listing contract is between the homeowner and the broker who employs the salesperson, thus **the listing belongs to the broker, not the salesperson**. If the salesperson leaves the brokerage in the middle of the listing agreement, the listing stays with the brokerage. Nothing happens to the listing.
- In exchange for listing the property on a **multiple listing service (MLS)** and securing a suitable buyer, the seller will pay the broker a percentage of the sales price known as a **commission**. This percentage is stated in the listing agreement.
- The main purpose of the list agreement is to guarantee that the broker will receive the agreed-upon commission in exchange for all the work of the listing agent.
- Before agreeing to the listing, the licensee should confirm that the people who are listing the property are the actual owners of record. If they are not the owners of record, they do not have the right to sell the property.
- The broker has earned a commission when he has accomplished what he was hired to do. ***It doesn't matter whether the seller actually closes on the deal or not.*** If the broker produces a valid sales contract that EXACTLY matches the terms and conditions of the listing contract OR produces an offer that the seller finds acceptable, the broker is owed a commission.
- If the seller is unhappy about the outcome of the sale, he cannot lower the listing percentage paid to the agent as that would be change to the contract.
- The listing contract ends if the seller-client closes on the listed property, the property is destroyed, or if the contract expires or is terminated by either side.

Types of Listing Contracts

There are different types of **listing contracts** divided into two categories, each with specific duties and responsibilities: **exclusive** and **non-exclusive**. type of listing contract and which party procured the buyer affects the broker's commission.

Exclusive listings:

Exclusive simply means the seller has listed the property with one broker.

- **Exclusive-Right-To-Sell:** The seller is legally obligated to pay the listing broker a commission when the sale of the listed property closes regardless of who finds the buyer. It doesn't matter who finds the buyer (It could be the listing broker or his agents, another company or the seller himself). As long as the house sells, the broker will receive a commission. *This type of listing provides the most protection of a commission to a listing broker.*
- **Exclusive Agency:** A type of property that listing provides that the broker is entitled to a commission if any agent sells the property, **HOWEVER**, if the owner sells the property by himself, he is not responsible to pay a commission to the listing broker. A listing commission paid to a broker is established by negotiation and not limited by law.

Non-exclusive listings:

Non-exclusive means the seller may enter into contracts with multiple listing brokers at the same time.

- **Open Listing:** The seller works with multiple brokerages to list the property and only pays a commission to the brokerage that procures the buyer that ultimately purchases the property.

Other types of listings:

- **Net Listing:** When a brokerage sells a property and gives the seller the amount he wished to net from the sale and keeps the rest of the profit as a commission. For example, an individual inherits a home located in another state and would like to sell it as soon as possible. Let's imagine the market value of the home is \$150,000, but the seller would be content to profit \$100,000. The seller and broker agree that the broker will keep any amount the home sells for over \$100,000. So, if the home sells for \$120,000, the seller will keep \$100,000 and the broker will receive \$20,000 in profit.
- **Flat Fee Listing:** The practice in the real estate industry of a seller entering into an "à la carte service agreement" with a real estate broker who accepts a flat fee rather than a percentage of the sale price for the listing side of the transaction. Consequently, this means there is no commission to share with a buyer's agent which could discourage buyer's agents from showing the listing. The seller is encouraged to offer some form of compensation to a buyer's agent.

Sales Commissions

When a seller agrees to hire a broker to sell his or her property, typically the seller will agree to compensate the broker with a percentage of the sales price. This compensation is commonly referred to as a **sales commission** or just **commission**.

The goal of the listing contract is to procure a ready, willing and able buyer and must be in writing to be enforceable.

Technically, the listing broker has earned a commission when he has accomplished what he was hired to do. *It doesn't matter whether the seller actually closes on the deal or not.*

If the broker produces a valid sales contract that EXACTLY matches the terms and conditions of the listing contract OR produces an offer that the seller finds acceptable, the broker is owed a commission.

If the listing broker procures the buyer during the listing period but the seller accepts the offer or negotiates the sale after the listing expires, the listing broker can receive a commission IF there is a **safety clause** in the listing.

A **safety clause** is a clause in a listing agreement that entitles the listing broker a commission after the listing expires or is canceled. A safety clause is designed to ensure that a broker receives fair compensation for their work and to prevent collusion between buyers and sellers. The safety clause, like all other items in the listing agreement, is negotiated between the broker and the seller. The length of the safety clause is not regulated by law or by the state real estate commission.

Safety clauses are also referred to as a **carryover clause**, **protection clause**, or **extender clause** depending on the state and local market.

Multiple Listing Service (MLS)

A **multiple listing service (MLS)** is a database established by cooperating real estate brokers to provide data about properties for sale. An MLS allows brokers to see one another's listings of properties for sale with the goal of connecting homebuyers to sellers. Under this arrangement, both the listing brokers and selling brokers (buyer's brokers) benefit by consolidating and sharing information and by sharing commissions.

Members of the MLS have a contractual obligation to notify the other members of their listings and share commissions accordingly. The listing broker will be paid a commission by the seller when the property is sold and will share the commission with the selling broker (buyer's broker) if that broker is also a member of the MLS.

Additionally, sellers benefit by increased exposure to their property. Buyers benefit because they can obtain information about all MLS-listed properties while working with only one broker.

Only real estate licensees (brokers and salespersons) may gain membership to a multiple listing service. Members of the general public with a real estate license cannot join an MLS, but may view a "public" version of the website.

Therefore, the term "multiple listing" refers to a listing for a property that is for sale on the MLS.

Agency Agreements with Buyers

When an individual decides to buy a home and employs the services of a licensee, a buyer's agreement is signed to create an agency relationship.

- Buyer agreements are employment contracts. The licensee is working for the buyer client for a specific task, to locate a suitable property (i.e., house) at the lowest price possible with the best terms.
- Once the agreement is signed, the buyer may only go through the broker to view properties, even if the properties are not the broker's listings.
- Buyer's agreements require an expiration date. The length of the agreement is negotiable between the buyer and the broker.
- The commission paid to the broker is negotiable and is not fixed by law or custom. It may be a flat fee or a percentage of the contract price.
- The broker may receive a commission exclusively from the buyer or from the seller's listing broker in the form of a shared commission. The buyer's agreement will stipulate how the commission is to be paid.
- The buyer's agreement contract terminates when the buyer closes on a property, if the contract expires or if the contract is terminated by either party.

Types of Buyer's Contracts

There are different types of buyer's contracts, each with specific duties and responsibilities. Each includes a buyer and a broker. The type of buyer's contract and who procured the buyer affects the broker's commission.

Exclusive Buyer Agreements:

- **Exclusive-Buyer Agency Agreement (Exclusive Right to Represent):** Regardless of who discovers the suitable property that the buyer ultimately purchases, the buyer is legally obligated to pay a commission to the broker when the sale closes. This type of listing provides the most protection of commission to a broker.
- **Exclusive-Agency Buyer Agreement:** The broker will only receive a commission payment if he discovers the property that the buyer ultimately purchases. If the broker does not locate the property, then the broker is not owed a commission. (Not many brokers will offer this type of listing in the real world!)

Non-exclusive listings:

- **Open-Buyer Agency Agreement:** The buyer works with multiple brokerages to locate a suitable property and only pays a commission to the brokerage that discovers the property that the buyer ultimately purchases.

Disclosure of an Agency Relationship

Disclosure is the act of making it clear who an individual represents.

In all states, brokers are required to make known to all parties involved in a real estate transaction exactly who they are representing via agency relationship disclosures. For example, if a buyer calls the number listed on a for sale sign, the broker must make it clear that he represents the seller (and thus the seller's best interest). The broker cannot let the potential buyer assume that he is in buyer's corner.

While the details of how and when agency disclosures must be presented vary by state, most states do require that brokers inform consumers about the types of agency representation possible and answer all questions *before* the consumer makes a decision about representation and signs any type of agreement.

Licensees must take particular care in regards to these situations:

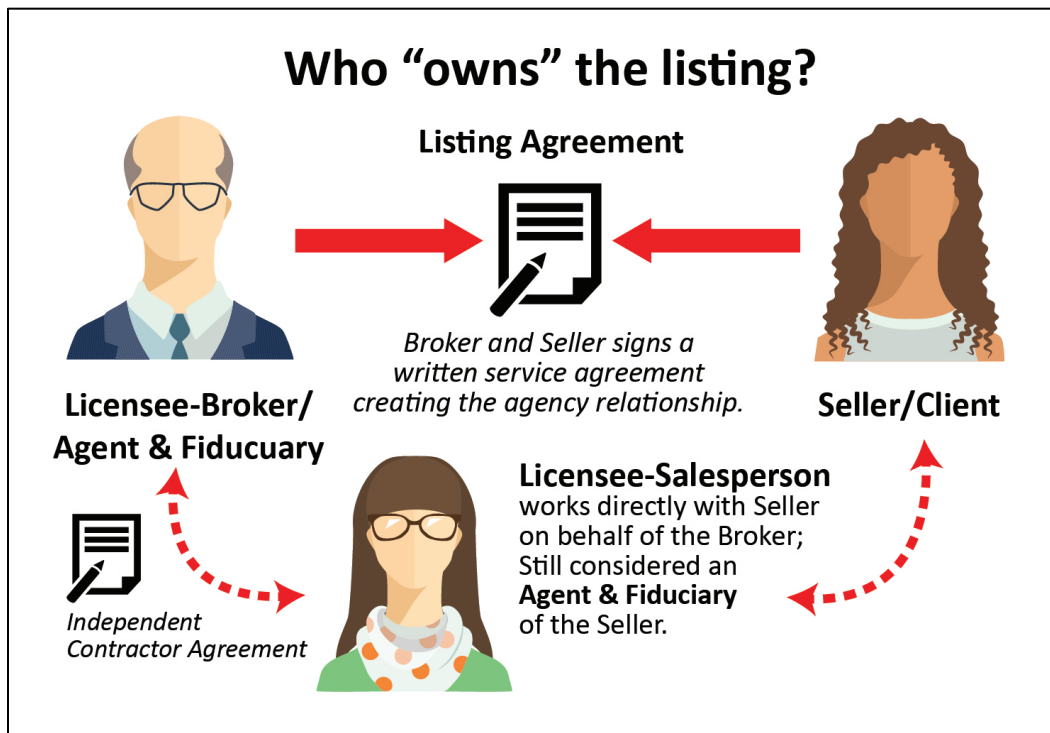
- **Conflict of interest:** A conflict of interest is a situation in which an individual or organization is involved in potentially competing interests creating a risk that one interest might unduly influence another interest. For example, if a licensee is representing both the seller and the buyer, there is great potential for a conflict of interest. While a licensee will earn a higher commission if the property sells for a higher price (which will also make his seller happy), his buyer-client wants to pay the lowest price possible. The licensee must put the needs of both of his clients above his own and not behave in way that could be interpreted as a conflict of interest.
- **Disclosure of a special relationship with either the buyer or the seller:** When any type of special relationship exists between the licensee and any party of the transaction, all parties to the transaction must be informed. While the requirements of disclosure vary per state laws, if the licensee is acting on behalf of an immediate family member, a close personal friend, a business associate, a business entity in which the licensee has a vested interest, or any other type of relationship that could be viewed as special or close, the licensee must disclose this connection to all parties involved. This disclosure is required because the possibility of exploiting other parties to the transaction using inside knowledge gained by a special relationship suggests the licensee is trying to deceive the other side and creates a conflict of interest. In other words, since it is not uncommon for licensees to represent family members and close friends, the licensee must disclose any close personal relationships to the other side to avoid the appearance of deception for personal gain.
- **A licensee acting solely as a client:** While the requirements of disclosure vary per state laws, if the licensee is acting solely as a client (meaning the licensee is the buyer or seller, thus is representing himself), it behooves the licensee to disclose this fact to all parties involved in the transaction. If a licensee does not reveal that he is a licensed real estate agent and problems arise after the transaction has closed, the other side may claim that they were taken advantage of by the licensee because his status as a licensee was never revealed.

Understanding the Broker/Salesperson Relationship

In the real world, most consumers deal directly with salespeople, not the actual broker of the real estate company. The broker is the individual that has a broker license, manages the real estate company and is responsible for everyone that works under him. Think of the broker as the general manager. The salesperson, on the other hand, also is licensed, but cannot own and operate a real estate company. The salesperson works for the broker to secure listings and buyers **on behalf** of the broker as his agent. **Any business that the salesperson brings into the brokerage, including listings and buyers, technically belongs to the broker, not the salesperson.**

The broker and salesperson typically split any commissions earned by the salesperson. The broker is providing the infrastructure and support via a real estate company from the which the salesperson can operate, and the salesperson is producing business and commissions which he will share with his broker to cover his costs of the company expenses.

Since the salesperson is working underneath the broker, there is *subagency-like* situation in effect, but it is NOT THE SAME as the subagency representation discussed earlier. Don't lump the two situations in the same pile.



Responsibilities of Licensee to Customers and Third Parties

When an agency agreement is not in place, the licensee is referred to as a **non-agent, transaction broker, facilitator** or **intermediary** (the particular term usage varies by state). The consumer is referred to as a customer. Basically, the licensee is acting like a consultant for the consumer.

In some states, the non-agent could assist both the buyer and the seller in the transaction without having an agency relationship with either side. However, the non-agent cannot disclose confidential information to either party nor negotiate or advocate for either side. The non-agent must remain completely neutral and merely facilitate the flow of information between both sides and monitor the progress of the transaction.

All licensees owe certain obligations to all customers even though an agency agreement has not been signed and the licensee does not represent the customer. When dealing with a customer or third party (such as a lender or an inspector), licensees must:

- **Disclosure of agency relationships:** While laws vary per state on the timing of the disclosure, licensees are required to disclose to all parties involved whom the licensee represents.
- **Disclosure of material facts:** A **material fact** is information that, if known, would be significant enough to influence an individual's decision as to whether to enter into a contract on the specified terms. Think of it as the "if I had only known that" fact. While laws vary per state regarding the extent of disclosure, licensees are responsible for disclosing material facts that have a bearing on the economic value and/or physical condition of the property.
- **Honesty:** Licensees are responsible for treating customers and/or third parties fairly and honestly despite the lack of representation by the licensee.
- **Integrity:** Licensees must behave in an ethical manner and not make false or misleading statements to customers and/or third parties.
- **Accounting for trust funds (money):** **Trust funds** are funds from parties in the contract that the licensee has been entrusted to keep safe until the completion of the contract. Examples of trust funds include earnest money checks and security deposits. Licensees are required to keep all trust funds safe and keep accurate records of trust fund escrow accounts. Trust funds should never be mixed with the licensee's personal funds which is called **commingling**.

Agency Termination

An agency relationship can be terminated in several ways:

- **Completion of the purpose** for which the agency was created, such as the sale of a property.
- **Expiration** of the term of the agency as all contracts are required to have an expiration date.
- **By Force of Law** in the following circumstances can end an agency relationship:
 - **Bankruptcy:** The trustee in the bankruptcy may choose to continue or terminate the agency relationship.
 - **Change in law:** If changes in the law would make the agent's duties illegal, the agency relationship would be terminated.
 - **Loss of license:** If the licensee loses a required license which is necessary to perform the tasks for which he was hired, the agency relationship would be terminated.
- **Death** or incapacity of either party.
- **Destruction** or condemnation of the property.
- **Mutual agreement** by all parties to the contract.

More About Mutual Agreement

In a listing agreement, no party can be forced to retain an agent he does not want or represent a seller he cannot perform loyally for.

Therefore, either the seller or the broker can terminate the listing agreement at any time.

However, *if cancelling the listing will cause the broker to suffer a financial loss (such as advertising expenses or other expenses related to the listing that the broker has paid for out-of-pocket), the broker could sue to recover damages (money) for his or her loss.*

This also applies to buyer agency agreements.

Chapter 9: Agency Exam

1. If an owner of an apartment complex hires a licensee to manage the property, what type of agency role is the licensee fulfilling?
 - A. Universal agent
 - B. General agent
 - C. Special agent
 - D. Expressed agent

2. If Tina was the only agent that listed a home and did not collect a commission after the home sold, what type of listing was it MOST LIKELY?
 - A. Exclusive right-to-sell listing agreement
 - B. Exclusive agency listing agreement
 - C. Open listing agreement
 - D. Net listing agreement

3. If Dewayne Wade of the Miami Heat pro basketball team is working with several agencies to find a suitable buyer for his 20-million-dollar home on Miami Beach, this BEST describes a(n) ...?
 - A. Exclusive agency listing agreement
 - B. Exclusive-agency buyer agency
 - C. Open buyer agency agreement
 - D. Open listing agreement

4. Which of the following does NOT create an agency relationship?
 - A. An exclusive right-to-sell listing agreement
 - B. A buyer-agency agreement
 - C. A purchase sales contract
 - D. An independent contractor agreement

5. If Tom was the only agent that listed a home and did collect a commission after the home sold, what type of listing was it MOST LIKELY?
 - A. Exclusive right-to-sell listing agreement
 - B. Exclusive agency listing agreement
 - C. Open listing agreement
 - D. Net listing agreement

6. If a buyer is very familiar with the home buying process, but did not wish to hire a licensee to represent his best interest, what type of agency representation would best fit the buyer's needs?
 - A. Single agency agreement
 - B. Sub-agency agreement
 - C. Non-agency agreement
 - D. Designated agency agreement

7. If a listing agent lost the seller's abstract, what fiduciary duty has the agent breached?
 - A. Disclosure
 - B. Obedience
 - C. Accountability
 - D. Confidentiality

8. Assuming it is allowed by state laws, if a licensee meets a potential buyer at her office, reviews listings with the buyer and then proceeds to show five homes to the buyer that afternoon, what type of agency has been created based on the actions of the licensee and the buyer?
 - A. An express agency
 - B. An implied agency
 - C. A non-agency
 - D. A single agency

9. Which of the following is NOT a responsibility of the agent when the agent is representing a buyer in a real estate transaction?
- A. To show properties that maximize the agent's commission when convenient to the licensee
 - B. To be fair and honest with the seller, but to protect the buyer's best interest at all times within the confines of the law
 - C. To explain the purpose of an earnest money deposit and its effect on an offer
 - D. To negotiate for the lowest possible contact price at the best possible terms
10. If a seller wished to work with several brokers to sell his home as quickly as possible, what type of listing would best fit his needs?
- A. Exclusive right-to-sell listing
 - B. Exclusive agency listing
 - C. Open listing
 - D. Net listing
11. A seller wanted to sell a property quickly and agreed to list the property for \$50,000. Since the listing agent already owned three rental houses and thought this was a good deal, he informed the seller in writing that he was interested in buying the house. A week later the listing agent learned that the value of the property was going to increase due to upcoming zoning changes but did not pass this information along to the seller. If the listing agent purchased the property the next day, did the licensee violate any of his fiduciary responsibilities?
- A. No, since he informed his client that he wished to purchase the property, he did not violate any fiduciary responsibilities.
 - B. No, if he paid full price, he did not violate any fiduciary responsibilities.
 - C. Yes, since he neglected to mention the zoning changes and its impact on the value of the property, he did violate his fiduciary responsibilities to his client.
 - D. Yes, since he is the listing agent, he cannot purchase the property.

12. A listing agent was hosting an open house and was approached by a potential buyer. After answering several of the buyer's questions, the buyer confessed in a moment of excitement that she was preapproved for far more than the listing price. If the buyer secures her own agent to represent her and proceeds to make an offer on the home, what should the seller's agent do?
- A. Keep the buyer's information confidential as she wouldn't want this information made public
 - B. Disclose to the seller that the buyer is pre-approved for more than the list price
 - C. Only tell the seller if the buyer's offer is 10% less than the list price
 - D. Ask her broker for advice on the situation
13. A listing agent knew that a seller had not serviced or cleaned the septic tank in over fifteen years despite the fact that septic tanks should be pumped and serviced every three to five years. If a customer directly asks, "When was the last time the septic tank was serviced," how should the listing agent respond?
- A. The listing agent should answer the customer's question honestly.
 - B. The listing agent should refer the buyer to the seller's property condition disclosure form.
 - C. The listing agent should say "I don't know, but I will ask the seller."
 - D. The listing agent should suggest the buyer gets a property inspection that includes the septic tank system.
14. A seller listed a property with a broker under an exclusive agency listing agreement. If the seller finds a ready, willing and able buyer, how much commission will he owe the listing broker?
- A. No commission
 - B. Partial commission
 - C. Full commission
 - D. Only reimbursement for the broker's marketing costs
15. If a licensee is working as a salesperson with his broker at Ready Realty, what type of agency role is the licensee fulfilling?
- A. Universal agent
 - B. General agent
 - C. Special agent
 - D. Ostensible agent

16. A real estate broker's responsibility to keep the principal informed of all the facts that might affect a transaction is which fiduciary obligation?
- A. Care
 - B. Disclosure
 - C. Obedience
 - D. Accounting
17. After an unsatisfactory home inspection that revealed the serious structural damage, a buyer refused to purchase the property. After reviewing the home inspection report, the listing broker advised the seller to conceal the damage and to sell the property "as is." Later, a second buyer made an offer on the property and her inspection did not reveal the damage. The second buyer then proceeded to purchase the property "as is." In a lawsuit against the listing broker for the cost of the required repairs, will the second buyer prevail (win)?
- A. Yes, because the broker must indemnify the second inspector because he was incompetent.
 - B. Yes, because the broker must disclose known material facts that are not disclosed by the seller.
 - C. No, because the listing broker was fulfilling his duty of loyalty and gave him good advice that helped the seller sell his house.
 - D. No, because the buyer purchased the property "as is."
18. While the qualifying was out of the office for lunch, a renter came into the office with several questions about his lease. Since there were no agents on duty, an unlicensed assistant was allowed to answer the renter's questions about leasing contracts. When the broker returned from lunch, the unlicensed assistant informed the broker about the renter's questions. Since the unlicensed assistant had answered all of the renter's questions correctly, the broker did not discipline the unlicensed assistant. If a broker continues to allow this employee to interact with other renters in the same manner, what type of agency relationship could be created?
- A. Dual agency
 - B. Agency by ratification
 - C. Ostensible agent
 - D. Universal agent

19. A licensee had a friend that was always complaining that he wanted to sell his house. One day he said to the licensee, "If someone paid me \$50,000 cash, I would sell my house today!" If the licensee took it upon himself to secure a cash buyer for his friend, but when presented with the offer, the friend refused to sell, what type of agency could be created if the friend is ordered to sell?
- A. Dual agency
 - B. Agency by ratification
 - C. Ostensible agent
 - D. Agency by estoppel
20. What would happen to a listing contract if the listing salesperson died?
- A. The seller would need to sign a new contract with another salesperson in the brokerage.
 - B. The seller would have 30 days to secure a new listing contract.
 - C. The buyer could legally withdraw from the sales contract in 30 days.
 - D. Nothing, the listing would continue.
21. If a licensee is working exclusively with a buyer to locate a suitable property, what type of agency role is the licensee fulfilling?
- A. Universal agent
 - B. General agent
 - C. Special agent
 - D. Ostensible agent
22. If a spouse holds power of attorney for her husband that is active duty and is deployed overseas, what role is she serving?
- A. Universal agent
 - B. General agent
 - C. Special agent
 - D. Ostensible agent

23. What type of agency relationship that has been created when both sides clearly understand the duties and expectations of both sides and the compensation to be paid?
- A. Express agency
 - B. Implied agency
 - C. Agency by ratification
 - D. Agency via estoppel
24. What type of agency relationship is created when different licensees from the same brokerage each represent the buyer and the seller in the same transaction?
- A. Single agency
 - B. Sub-agency
 - C. Dual agency
 - D. Designated agency
25. What type of representation occurs when a cooperating sales associate from another brokerage, who is not the buyer's agent, shows property to a buyer that is listed by another brokerage?
- A. Single agency
 - B. Subagency
 - C. Dual agency
 - D. Designated agency
26. What type of power of attorney allows the agent to undertake a range of activities on the principal's behalf, such as managing the principal's money and handling the principal's real property?
- A. General power of attorney
 - B. Special power of attorney
 - C. Durable power of attorney
 - D. Health care power of attorney

27. What is the main purpose of the listing contract between the homeowner and the listing brokerage?
- A. To create an agency relationship between the homeowner and the selling agent.
 - B. To guarantee that the broker will receive the agreed-upon commission in exchange for all the work of the listing agent.
 - C. To confirm that the people who are listing the property are the actual owners of record.
 - D. To invite other real estate agents in the area to submit offers from potential buyers.
28. If a sale fails to close because the seller's anticipated transfer to another city is postponed, is the listing licensee entitled to a commission?
- A. No, because the sale was not consummated.
 - B. No, because circumstances beyond the seller's control prevented the sale from being consummated.
 - C. Yes, because a seller who cannot deliver possession is considered to be in default.
 - D. Yes, unless the buyer and seller mutually agree to cancel the transaction.

Exam answers are located on page 383.