

## CHAPTER 2 - AGENCY LAW

(Including *Colorado Brokerage Relationships*)

### INTRODUCTION

**Notes:**

This chapter describes three distinct *versions* of the Law of Agency:

- I. The Common Law agency principals;
- II. Colorado rules, (effective 1994) which significantly alter the common law rules – adding Transaction Brokerage;
- III. The *new* Colorado changes to agency (effective 2003) – adding Designated Brokerage.

**NOTE: The Uniform portion of the exam will only ask about the Uniform rules, (number 1, above) and the Colorado exam should only ask about the Colorado laws (numbers 2 and 3, above).**

### I. COMMON LAW OF AGENCY



Agency is a legal relationship resulting from an agreement that one person, called the **agent**, shall act for and be subject to the control of another person, called the **principal**. Agents can be classified generally into three categories: universal agents, general agents and special agents.

A **universal agent** has *unlimited* authority to perform *any* act on behalf of the principal.



A **general agent** is one who has wide authority to conduct a series of transactions of a continuous nature on behalf of the agent's principal.

**Example:** *a manager of a store who has authority to hire and fire employees, to buy and sell goods, to contract for maintenance repairs, etc.*

A **special agent** is one who has only limited authority to conduct usually a single transaction for the special agent's principal.

**Example:** *an attorney at law or a real estate broker.*

(In real estate, a **single agent** – is different. It means a broker who is engaged by and represents only one party in a transaction.)

### CREATION OF THE AGENCY RELATIONSHIP



The fact that a real estate agent performs some act for a purchaser or seller in a transaction does not by itself create the agency relationship. The relationship depends on consent and control. In addition, the agreement involves the expectation that a party will represent another party's interests, i.e., the purchase or sale of real estate. Agency is generally created by a contract - which is the employment agreement between the principal and agent. In the case of the real estate broker, this is usually the listing contract, in which the property owner lists property for sale with the broker or the buyer agrees to be represented in the purchase of property.

**NOTE:** Because of the **Statute of Frauds**, a contract between the buyer and seller must be in writing – since it involves an interest in real property. However, the contract between a broker and either buyer or seller, like any other employment contract, need not be in writing. (Except, by law, a **Colorado** real estate agency contract between broker and either seller or buyer - must be in writing.)

## AUTHORITY OF THE AGENT

The authority of the agent to act for the agent's principal is usually given by the terms of the agency agreement. The agent's authority may be of two major types: actual authority and apparent authority. Actual authority, which is by far the more common, in turn may consist of express and implied authority.

1. **Actual Authority.** The agent's actual authority is that authority given either expressly or impliedly by the agent's principal.

a. **Express Authority.** The agent's express authority is that authority given the agent in writing or orally or by the conduct of the principal.

**Example:** 1) Ann and Broker execute a written listing to sell Ann's house;  
2) Barbara and Broker meet on the street and discuss Barbara's desire to buy a house. Broker verbally agrees to represent Barbara's interests in the purchase, and Barbara agrees to pay Broker a specific commission at closing.

b. **Implied Authority.** The agent's implied authority is that authority which is reasonably needed to perform the agent's express authority.

**Example:** a person may have been hired to manage a store. Although not expressly told, the agent could hire and fire employees - the agent has the implied authority to do so.



Generally, an agent may delegate authority to a *subagent*. But a real estate broker has the implied authority to delegate authority to the broker's employed licensees. (In Colorado, this would be the Associate Brokers.) This implied authority of the real estate broker arises out of custom and usage because the nature of the business is such that it is presumed that the principal (seller) contemplated that the authority given to the agent (broker) would be exercised through other licensees employed by the broker and the broker's company.

2. **Apparent Authority.** When third parties reasonably believe an individual has authority to act and bind the principal – based upon the *principal's* words or conduct. Third persons who were aware of the principal's words or conduct and who rely on this apparent authority may hold the principal liable for the acts of the apparent agent, whether the agent truly has such authority.

**Example:** Carr, the seller of a house, tells Davis, a potential buyer, that when selling property Carr always uses Broker and Davis should deal only with Broker. Even if Broker was, at that time, unaware of Carr's desire to

*sell that specific house, if Davis approaches Broker then both Davis and Broker are legally entitled to rely on Carr's assertions of Broker's authority. (In Colorado, real estate law specifically states that any agency relationship between the broker and the principal must be created by a written agreement.)*

## **DUTIES AND LIABILITIES ARISING OUT OF AGENCY**

1. **Principal to Agent.** The principal owes four basic duties to the principal's agent:

- (1) to perform the agency contract;
- (2) to compensate the agent;
- (3) to reimburse the agent for expenses; and
- (4) to indemnify the agent for loss suffered because of the agency.

The principal has the duty to abide by the terms of the agency contract. If the principal wrongfully breaks the contract, the agency is terminated but the principal will be liable in damages to the agent. If the agent is not performing according to the agreement or is guilty of wrongdoing, then the principal may justifiably terminate the agency with no liability on the principal's part.

**Example:** 1) *Earnhart, the seller, refuses to abide by the valid sales contract to Finch. Since Broker has found Earnhart a "ready, willing and able" buyer, Earnhart is liable to Broker for payment of commission.*

2) *Broker fails to aggressively market Gerald's property as promised. Gerald may fire broker and pursue an agency agreement with another broker if he wishes.*

When the agent has performed the agent's part of the agreement, the principal has the duty to pay the agent the amount of money agreed upon. If no amount of compensation is agreed to or stated, the principal must pay the agent the current market rate for such services in that locality.

If the agent incurs expenses in performing authorized acts for the principal, the principal has the duty to reimburse the agent for all reasonable expenses so incurred. In the ordinary *real estate* agency situation, the principal has no such duty to reimburse the broker. By the terms of the usual listing agreement and also by custom, the *broker's sole compensation is the commission* (usually a percentage of the selling price) and it is understood that the real estate broker will pay her own expenses out of the commission.

**Examples:** 1) *Harry, a clothing designer, must reimburse Isadore, Harry's fabric buyer, for any fabric purchases she made on his behalf while on a buying trip to Morocco;*

2) *Broker must bear the cost of printing flyers to promote Jennifer's open house, because Broker's only payment is to be the commission upon sale of the house.*

2. **Agent to Principal.** The agent also owes four basic duties to the agent's principal ("COAL-D"):

a) **Care.** The agent has the duty to use reasonable care in the performance of the agency. The agent can be held liable to the principal for any loss caused by lack of care. An agent holding out to the public as possessing certain abilities and skills has the duty to use such abilities or skills. Thus a real estate licensee must have and use the care and skill usually possessed by a competent real estate broker in that locality. The agent cannot escape responsibility for negligence or lack of ability by pleading ignorance.

***Example:** Broker must know and understand the basic differences in the types of loans currently available, but is not required to know the specific rates and terms of every lender's products.*

b) **Obedience.** The agent has the duty to perform according to the terms of the employment contract. If the agent wrongfully breaks the contract, the agency relationship is terminated but the agent can be held liable to the principal for such breach. If the principal is not performing the principal's part or is guilty of wrongdoing, the agent may justifiably terminate the agency without liability. The agent has the duty to obey all reasonable instructions of the performance of the agency and can be held responsible for any loss caused by disobedience.

***Example:** If Kelly states that she will not sell for under \$200,000, Broker is not allowed to negotiate for \$190,000 with Harry.*

c) **Accounting.** The agent has the duty to make an accounting to the principal for all money or other valuable consideration which is received in the course of the agency. The agent should keep accurate records and accounts of all transactions. The agent must keep the funds and property of the principal separate from the agent's own. Thus a real estate broker must deposit in a separate trust account funds received from the buyer as part payment on the purchase of the real estate.

***Example:** Broker must keep Mary's earnest money deposit in an escrow account, and provide some documentation at closing as to interest earned.*

d) **Loyalty.** The agent owes a duty of undivided loyalty and trust to the agent's principal. The agent may not personally profit from the agency relationship except by the agreed upon compensation. The agent has the duty not to disclose, both during and after the agency relationship, confidential information obtained as a result of the agency if such disclosure would be to the principal's disadvantage or prejudice. An agent may not have interests adverse or opposed to those of the agent's principal; nor may the agent represent another who has adverse or opposed interests.

Thus a real estate agent should not purchase property from principal without the principal's full knowledge and consent. Nor should the agent also represent the buyer without the seller's permission. The broker should not withhold any offers to purchase because of fears that the new offer, which may be only slightly

higher, might upset a current deal. The agent must use the his or her best efforts to obtain the best deal for the principal.

**Example:** 1) Oscar is selling his property, and has contracted with Broker to be his listing agent. Broker may not tell Nancy, the buyer, that Oscar is desperate to sell because he is in a nasty divorce;

2) Paul comes to broker to list Paul's house. Broker has secret information that Paul's property will become extremely valuable because the city will be placing the new highway through Paul's neighborhood. Broker takes the listing, but fails to market the property. Instead, without telling Paul of the city's plans, Broker buys it herself and soon sells it at a huge profit.

e) **Disclosure.** The agent has the duty to keep the agent's principal fully informed of material facts that may affect the subject matter of the agency. If the agent fails to inform the principal, the agent might be responsible for the loss resulting to the principal. (NOTE: "Disclosure" does *not* mean that an agent should not "disclose aspects of the principal's contract to a third party." If the agent did this without the principal's consent, this would be a violation of the duty of *loyalty*, and not of disclosure)

**Example:** Broker should inform the seller of a zoning change or proposed change that might enhance the value of the property so that the seller may profit from the increased value.

The above discussion of the duties and responsibilities of the principal to the agent and of the agent to the principal applies to the employed licensees as well as to the broker. The broker is the agent of the property owner or buyer; the employed licensee is the agent of the broker (*not* a subagent!).

**3. Duties and Liabilities Between Agent and Third Party.** If the agent has authority to enter into a contract with a third party on behalf of the principal, the agent has no personal responsibility to perform such contract. Only the principal and the third person are parties to that contract. If the principal fails or refuses to perform, the agent cannot be held liable for the principal's non-performance. But if the agent enters into a contract for the principal without, in some way, revealing the agency relationship, the agent can be held personally liable for the performance of the contract by the third party. In this latter situation, the agent may also hold the third party responsible for performance.



Normally, a real estate broker has no authority to sign a contract for the purchase or sale of real estate. An agent's authority is usually interpreted as being only to find a ready, willing and able purchaser to buy on the terms set forth by the seller or to find a property which is acceptable to a buyer. If the owner or buyer fails or refuses to perform the contract of sale, the broker is not liable to the buyer.

If a person claims to be an agent for another, that person impliedly warrants or guarantees that they have such authority. A person can be held liable to the third

party for any loss caused for breach of such warranty, if – in fact – that person has no real authority to act as agent.

An agent is also personally responsible to the third party for any **tort** (civil wrong, such as fraud) which the agent might commit whether with or without the principal's permission. If a real estate licensee knowingly misrepresents a material fact concerning the property for the purpose of inducing the prospect to purchase and the prospect purchases, relying on the misrepresentation, the agent is responsible for the tort of fraud or deceit. The same principle applies if a broker representing a buyer misrepresents that buyer's financial qualifications to induce an owner to sell. If the agent acted with the principal's consent, or within the scope of this authority, the third party has the choice of recovering any loss from the agent, the principal or both. In turn, a third party is liable to the agent for any tort the third party may commit against the agent.

**Example:** *Listing Broker knowingly misrepresents the age of a house to Ray, who purchases it based on that assertion. Although Broker represents the seller, he will still be liable to the buyer, Ray, for fraud.*

**4. Duties and Liabilities Between Principal and Third Party.** The principal owes the duty to the third person of performing contracts made by the principal's authorized agent. If the principal does not perform, the third party may hold the principal liable for breach of contract. Likewise, the third party is responsible to the principal for performing contracts made with the agent. However, in the usual real estate transaction, the buyer and the seller personally sign the contract and the question of liability by the authorized agent does not arise. The real estate agent usually signs the contract only as an agent and as receipting for any earnest money deposit.

Importantly, *the principal is personally liable for the acts of the principal's agent*, if the principal authorized the agent to do the wrongful act or if the act was within the scope of the agent's employment. This is called **vicarious liability**. Thus, a seller of real estate is liable to the buyer for the false representation as to material facts about the property made by the broker or the broker's employed licensees which induced the purchaser to buy, even if the representation was made without the seller's knowledge and consent. Obviously, this is something many principals in real estate transactions are not aware of.

**Example:** *Sally, the seller, misrepresents the soil quality to Broker, who repeats that information to Tom. Relying on that erroneous information, Tom buys the property. If Tom later sues Broker for those statements, Broker will not be liable. (But Sally will.)*

### **TERMINATION OF THE AGENCY RELATIONSHIP**

The agency relationship can be terminated by the acts of the parties and operation of law.

1. **Acts of the Parties.** The parties to the agency agreement, by either their rightful or wrongful action, may voluntarily terminate the agency.

a. **Mutual consent.** The principal and the agent may by mutual agreement put an end to the agency relationship at any time.

b. **Terms of the agency contract.** The agency agreement itself usually sets the time of termination. If the agreement calls for the accomplishment of a particular object, the agency ends when the object has been accomplished.

***Example:** The agency authorizing a real estate broker to sell a piece of property will end when the property is sold.*

If the agency is for a definite period of time, such as ninety days or a year, the relationship terminates when the specified time has elapsed. If no time is specified, it is generally implied that the agency is for a reasonable period of time under the circumstances. However, by rule of the Commission, a real estate licensee must provide for a definite termination date in the listing contract.

c. **Revocation by the principal.** The principal generally may, at any time, revoke or cancel the agency agreement. But in so doing, unless the principal has justified grounds, the principal can be held liable to the agent for breach of contract.

d. **Renunciation by the agent.** The agent also may, at any time, renounce or cancel the agency agreement. Again, in so doing, the agent may be held liable to the principal for breach of contract unless the agent can show good reason to support the renunciation.

2. **Operation of Law.** It is a principal of law that the agency will be automatically terminated by the law upon the happening of an event which makes the agency relationship impossible or impractical.



a. **Death.** - Generally the death of the principal or the agent will automatically cancel the agency relationship. Notice of the death of one party to the agency to the other party is not required.

b. **Insanity.** - Generally the insanity of either party to the agency will automatically terminate the relationship. Again, notice to the principal or the agent of the other's insanity is not required.

c. **Bankruptcy.** - By the general rule, the bankruptcy of either party will terminate the agency, unless the bankruptcy has no affect upon the agency or its purpose.

d. **Change of law.** - A change of law causing the purpose of the agency to become illegal will cancel the relationship.

***Example:** An agency to sell liquor in an area which passes a dry law will automatically be terminated.*



e. **Destruction of the subject matter.** - The destruction or loss of the subject matter of the agency will automatically end the agency.

**Example:** *The destruction of a house by fire terminates the real estate broker's agency to sell the property.*

## II. COLORADO'S BROKERAGE RELATIONSHIPS ACT – or THE NEW COLORADO LAW OF AGENCY

***The following information will be tested on the Colorado final- and prep-exams. Please carefully review the Instructions booklet for more details.***



Prior to this 1994 legislation, licensees and the public were governed by the common law of agency, that is, legal relationships developed from case law and judicial interpretation. (This is what you have just learned in Section I, above.) An act went into effect *in Colorado* on January 1, 1994 entitled "Brokerage Relationships in Real Estate". The act was a major accomplishment by those in Colorado who have wanted to see codification of legal principles relating to brokers' duties and obligations to the public. Primary to the legislation is the fact that the public and real estate licensees had a clearer road map to govern their transaction as well as a variety of choices in determining their working relationship, depending upon a particular transaction.

In addition to codifying the law of agency, a new, *non-agency* concept was created called the Transaction-Broker, which did the following:

1. Clarified confusing case law and misunderstood liability. (Stortroen v. Beneficial Finance; Little v. Rohauer; vicarious liability cases.)

- a. No longer a "presumption" that all brokers work for the seller.
- b. Buyer agency specifically recognized and defined.
- c. Buyer, seller, landlord or tenant relieved of liability for acts of a transaction- broker (misrepresentation, negligence).

2. Established a uniform set of legal standards to be applied by the Real Estate Commission, attorneys, court and juries.

3. Offers choices to buyers, sellers, landlords, tenants and licensees as to their legal and working relationship.

4. Addressed the expectations of some parties based on the "setting" of a particular real estate transaction (other company sales vs. "in-company", sales; rural transactions).

5. Requires significant, timely disclosure of the broker's obligations and duties to buyers, sellers, landlords and tenants, whether the broker is acting as an agent or not.

6. Requires timely disclosure of alternative types of relationships available to the public.

7. Requires that an agency relationship be entered into voluntarily and knowingly, with both the advantages (fiduciary duty to one party) and disadvantages (liability for agent's acts) explained to the client principal.



Colorado Revised Statutes (C.R.S.) 12-61-802 through 807 sets forth the duties and responsibilities owed to principals by:

- 1) single agents engaged by the seller or landlord;
- 2) single agents engaged by the buyer or tenant; and
- 3) transaction brokers

**Seller's (or Landlord's) agent.** The broker, acting as either a transaction-broker or a seller-agent, shall perform the following *uniform duties* when working with seller (or landlord).

- 1) Exercise reasonable skill and care on behalf of the seller;
- 2) Promote the seller's interests with the utmost good faith, loyalty and fidelity;
- 3) Disclose to the seller "known" adverse material facts;
- 4) Counsel seller as to those benefits and risks of the transaction *actually known by the broker*;
- 5) Advise the seller to seek expert assistance where needed;
- 6) Account in a timely manner for money and property; and
- 7) NOT disclose to the other party without the seller's consent that:
  - a) the seller would accept a lower price;
  - b) the seller's motivations; and
  - c) sellers would agree to other financing terms; or
  - d) material information about the seller.
- 8) Inform buyer of *adverse material facts actually known* pertaining to physical condition of the property, title and environmental hazards.

**Buyer's (or Tenant's) Agent.** The buyer's agent has the same duties and responsibilities as the seller's agent (above). In addition, buyer's agent shall:

- 1) Disclose facts "actually known";
- 2) Inform buyer or tenant that the buyer or tenant shall not be vicariously liable for the acts of such buyer's or tenant's agent that are not approved, directed, or ratified by such buyer or tenant; and
- 3) Inform the seller of adverse facts concerning the buyer's financial ability to perform.

A broker acting as a buyer's or tenant's agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and owes no duty to independently verify the accuracy or completeness of statements of the seller, landlord, or independent inspectors. However, nothing shall be construed to limit the broker's responsibility to promote the interest of the buyer or tenant with the utmost good faith, loyalty and fidelity.

A broker acting as a buyer's or tenant's agent may cooperate with other brokers, but *may not create subagency*.

NOTE: Commission Rule E-33 sets forth various "ministerial" acts which a broker may perform for the other party without creating an agency relationship with the

other party (i.e., showing property, conveying offers, providing information on professional and community services).



**Dual Agent.** The 2003 legislation *eliminated* the concept of dual agency in real estate. (“Dual Agency” is where the broker represents both the buyer and seller in a single transaction.)

### TRANSACTION-BROKER



The 1994 legislation *in Colorado* established the transaction-broker as a new, *non-agent* relationship. *In Colorado* the *broker is presumed to be a transaction-broker* unless a single (seller/buyer) agency relationship is established through a written agreement between the broker and the principal. A licensee *intending* to act as a transaction broker must provide a Commission-approved disclosure form to a prospective seller, landlord, buyer or tenant.

A transaction-broker is defined as “A broker who *assists* one or more parties throughout a contemplated real estate transaction with communication, interposition, advisement, negotiation, contract terms, and the closing of such real estate transaction *without being an agent* or advocate for the interests of any party to such transaction”.

The transaction-broker thus works for the transaction without being an agent or advocate for the parties involved. The principals are relieved from vicarious liability for any misrepresentation or negligence committed by the transaction-broker. At the same time, however, the transaction broker does not have the duties of “utmost good faith, loyalty, and fidelity” to either party.

The transaction-broker has the following obligations and responsibilities:

- 1) to perform the terms of any written or oral agreement;
- 2) to exercise reasonable skill and care as a transaction-broker;
- 3) to present all offers and counteroffers in a timely manner regardless of whether the property is subject to a contract for sale or lease or letter of intent;
- 4) to advise the parties regarding the transaction;
- 5) to account for all money and property received;
- 6) to keep the parties fully informed regarding the transaction;
- 7) to assist the parties in complying with the terms and conditions of any contract including closing the transaction.

A transaction-broker may not disclose the following information without the informed consent of all parties:

- 1) that a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
- 2) that a seller or landlord is willing to accept less than the asking price or lease rate for the property;
- 3) what the motivating factors are for any party buying, selling, or leasing the property;

4) that a seller, buyer, landlord, or tenant will agree to financing terms other than those offered.

Some licensees mistakenly believe that removing certain fiduciary duties will somehow eliminate legal exposure. It must be clearly understood that, from the Commission's view, a licensee would not be relieved of liability for misconduct under the license law nor from civil wrongdoing. Licensees still remain responsible for their acts.

No actions would be tolerated which would compromise a licensee's duties to account for funds, present offers, act honestly and competently and not misrepresent or engage in fraud. Licensees would still be responsible for disclosing material adverse facts about the property. Confidentiality of personal matters, such as price, terms and motivation would be maintained, as agreed to by contract. The relationship and the duties and responsibilities of the parties would be disclosed and agreed to in writing.

### **OTHER IMPORTANT PROVISIONS**

There are other important provisions in the Brokerage Relationship Act all licensees should know and understand:

**Written Office Policy.** All brokers must adopt a written office policy that identifies and describes the relationships that the broker will enter into with the public. This applies to a single person office as well as large companies. It is the right of any broker to decide on a policy that best suits the broker's practice. Commission Rule E-39 provides:

"Pursuant to 12-61-808 C.R.S., a broker shall adopt a written office policy which identifies and describes the relationships in which such broker and any employed licensee may engage with any seller, landlord, buyer or tenant as part of any real estate brokerage activities. A broker may adopt any policy suitable to the broker's business, subject to the following:

- a. an office policy shall apply to all licensees in the office;
- b. an office policy shall be given and explained to each licensee and shall be read, agreed to, and signed by each licensee;
- c. An office policy shall, in a manner compliant with Commission Rule E-38, identify the procedures for the designation of brokers who are to work with a seller, landlord, buyer or tenant pursuant to 12-61-803(6) C.R.S., except office policies of real estate brokerage firms that consist of only one licensed natural person.
- d. An office policy shall identify and provide adequate means and procedures for the maintenance and protection of confidential information that:
  - (1) The seller or landlord is willing to accept less;
  - (2) The buyer or tenant is willing to pay more;
  - (3) Information regarding motivating factors for the parties;
  - (4) Information that a party will agree to other financing terms;



- (5) Material information about a party not required by law to be disclosed;
  - (6) Facts or suspicions which may psychologically impact or stigmatize a property;
  - (7) All information required to be kept confidential pursuant to section 12-61-804(2), 12-61-805(2) and 12-61-807(3), C.R.S.
- e. An office policy may permit an employing broker to supervise a transaction and to participate in the same transaction as a designated broker.”

**Written Disclosures and Agreements.** Written agency agreements are required to be used and brokers must disclose their duties and obligations to a party prior to engaging in acts that require a license. Transaction-broker relationships as well as relationships in which a broker is working with a buyer but representing the seller as the seller's agent require a written disclosure. These disclosures must also be made prior to engaging in acts that require a license. Rule E-35 states:

"Written disclosures pursuant to C.R.S. 12-61-808 shall be made to a buyer or tenant prior to engaging in activities enumerated in C.R.S. 12-61-101 (2) and (3):

- a. For purposes of this rule, such activities occur when a licensee elicits or accepts confidential information from a buyer or tenant concerning the buyer's or tenant's real estate needs, motivation, or financial qualifications.
- b. Such activities do not include a bona fide 'open house' showing, preliminary conversations or 'small talk' concerning price range, location and property styles, or responding to general factual questions from a potential buyer or tenant concerning properties which have been advertised for sale or lease."

Written disclosures must contain a signature block for acknowledgment. If the party to whom the disclosure is given chooses not to sign the acknowledgment, the broker must note that fact on a copy of the disclosures and retain the copy. Written disclosures and agreements must also contain a statement that "DIFFERENT BROKERAGE RELATIONSHIPS ARE AVAILABLE WHICH INCLUDE BUYER AGENCY, SELLER AGENCY, OR STATUS AS A TRANSACTION-BROKER". If a party asks questions concerning a relationship that the broker does not offer, the broker must provide the party with a written definition of that relationship on a Commission approved form.

**Commission Approved Forms.** The law specifically states that licensees, no matter what type of relationship they choose, must complete the required standard forms provided by the Real Estate Commission. They must also advise the parties as to the effects of the forms. Finally, brokers must advise the parties that the forms have important legal consequences and that the parties should consult legal counsel before signing.

**Compensation.** Compensation may be paid by any party to the transaction or by any third party. Payment of compensation does not establish an agency relationship between a broker and the payer. Sellers, buyers, landlords or

tenants may agree that transaction-brokers or single agents may share compensation with one another. The law requires disclosure of the identity of persons paying compensation to brokers be made prior to entering into a brokerage or listing agreement or a contract to buy, sell or lease.

**Enforcement.** The Real Estate Commission is charged with enforcement of the Brokerage Relationships Act. The Commission may investigate complaints from the public or may investigate on its own motion. The Commission may take disciplinary action for violation of the statute or any rule or regulation.

### **THEORY OF REAL ESTATE REGULATION THROUGH LICENSING AND THE LAW OF AGENCY**

The broker, in brokerage activities, may employ other licensees to aid in servicing the client. The licensing method used to regulate the real estate industry is found in Chapter 14 (License Law) which must be read in context with this law of agency. Here are some things you will need to keep in mind about Colorado's Agency Rules, when you get to Chapter 14, the "Colorado" materials, and Colorado exams:

1. The broker must maintain a place of business as reflected by the Commission's records.

2. If the broker changes the business address, the broker must notify the Commission in writing and pay the appropriate fee. If a broker fails to do this or fails to maintain a place of business, the license is automatically canceled until a new address is provided.

3. A broker registered in the Commission office as in the employ of another broker is an *agent of that employing broker*. The Commission's records of this licensee will disclose the name and address of the employing broker.

4. An employed licensee is an agent of the broker and the Commission's records will disclose the address, and the name of the broker who employs the services of the employed licensee and such broker has the care and custody of their license.

5. The termination of employment between broker and an employed licensee must be disclosed in writing to the Commission by the employing broker or the employee and each has a duty to notify the other of the termination. Upon such notice the Commission's records, in the absence of written notice and payment of a transfer fee to any new employing broker to whom the employee may wish to transfer, will reflect that the employed licensee is inactive. Therefore, the Commission may always locate the employed licensee through the employing broker who has responsibilities concerning supervision over licensed employees.

6. A broker operates under an employment contract and this contract is not transferable, except by the consent of both the broker and the buyer or seller, landlord or tenant.

7. An employed licensee registered in the Commission office as in the employ of a broker acts as agent of the broker and may only contract in the name of the employing broker



8. An employed licensee of a broker may not accept compensation for performing brokerage services except from the licensed employing broker.

9. The employing broker is required to maintain a separate trust account for “money belonging to others” whether such money is collected by such broker or by such broker's agents (Associate Brokers). This requirement enforces loyalty of the agent to the principal (employing broker) and the location of the entrusted money is known to the Commission.

Independent brokers may also work together, with one broker becoming the agent of the other in a particular real estate transaction.

### USING THE POWER OF ATTORNEY

As previously stated, a real estate broker's authority is usually limited to a particular transaction or series of transactions. Even when acting as an agent, the right to bind a principal is very restricted. For example, some licensees believe incorrectly that the listing agreement gives them the right to sign other legal documents for the buyer or seller. *Not so:* Absent express written authority - a written *power of attorney* - a licensee cannot sign documents which bind parties to a real estate contract.

Here are some typical examples of *unauthorized* signings, on the part of the broker:

1. Seller(s) signatures on a listing agreement.
2. Seller(s) signatures on a sales contract, counter proposal and/or extension.
3. Purchaser(s) signatures on a sales contract.
4. Purchaser(s) signatures on a promissory note and deed of trust.
5. Seller(s) signature on a deed.
6. Signatures of purchaser(s) or seller(s) on any of the items in 1 through 5 above with statement "by agent" following.

Unless the broker is acting pursuant to a written *power of attorney* giving the authority to sign in place of the party, the broker may be subject to legal problems. In addition, the broker may be exposing the parties themselves to civil litigation. Under no circumstances should a broker assume the power to sign for another, even if the party is at the time unavailable.

Acting as **attorney-in-fact** (from the power of attorney) is sometimes necessary and certainly not improper. However, brokers should be extremely careful when using a power of attorney. Powers of attorney should be carefully read and understood by both parties before they are executed. Some powers of attorney are very limited in scope. Others grant broad powers.

In Colorado, a power of attorney must be recorded in the county in which the real property is located. (C.R.S. 38-30-123) This gives “constructive notice” that any

conveyance executed under such power of attorney is done with the consent of the grantor.

Commission financial examiners are instructed to ask for the written power of attorney in instances where a broker's signature appears in place of that of one of the principal parties.

### **Subagency with the Seller**

As mentioned above, Subagency occurs when one broker represents the Seller (the Listing agent), and a second broker (working with buyer) also represents the seller. This is the traditional (“Uniform”) model of real estate agency.

In the 2003 revision of the Colorado Brokerage Relationship Act, *subagency was abolished in Colorado*. A designated broker as a seller’s or landlord’s agent or a transaction broker may cooperate with other brokers but may not engage or create subagents. The second broker will be a designated agent of the buyer, either as a Buyer agent or a simply a Transaction broker working for the Buyer.

### **BUYER AGENCY**

Buyer agency comes into being when the licensee contractually represents the buyer in the real estate transaction. The broker receives compensation either directly from the buyer or more commonly - out of the proceeds of the transaction.

The buyer's agent, like the seller's agent, must be careful to disclose the buyer's agent's relationship to the seller and the listing agent. Colorado's brokerage relationship statute requires that a buyer's agent disclose that relationship to the seller or listing agent at the earliest reasonable opportunity. Commission rule E-34 states as follows:

**Rule E-34.** A licensee must present all offers to purchase or lease to the owner's listing broker only if such owner has a written unexpired contract in connection with the sale or lease of real property which grants to the owner's listing broker an exclusive right to sell or lease.

Buyer's agents owe the same fiduciary duties to their principals (the buyers) as seller's agents. Complaints relating to buyer agency generally allege that buyer brokers are violating the license law by failing to provide competent service or properly explain the terms of the buyer agency contract to potential purchasers. The complaints often arise after a buyer has signed an exclusive buyer agency agreement and then views, or even contracts to buy a property, through a different broker. The buyer typically alleges that the broker has either failed to clearly explain the exclusive nature of the agreement or has been unavailable to assist the buyer in viewing specific properties at times chosen by the buyer. Providing a buyer with an MLS list or property fliers and advising them to contact



you when they've found a suitable property is clearly not buyer agency, much less customer service. If an offer ensues under these conditions, competing claims for commissions by the actual selling broker and the buyer broker may result in animosity or delays that can kill or seriously impair a sale, thus damaging both buyer and seller.

Buyer's agents are cautioned that the simple signing of an exclusive buyer agency contract does not automatically entitle the broker to a commission. The terms of the contract must be performed. Furthermore, buyer brokers must insure that buyers are informed of and fully understand the exclusive nature of the Commission-approved "Exclusive Right to Buy Contract." Buyer allegations of "abandonment" by buyer brokers failing to provide competent service have been the basis of valid complaints. The Commission will investigate all complaints that allege incompetence or unworthiness in the performance of a buyer agency agreement.

### **PAYMENT TO BUYER'S AGENT/TRANSACTION-BROKER**

A common misconception with regard to real estate transactions is that agency is determined by payment of a commission. Until recently, it was historically understood that if a licensee was receiving payment through the seller, this established an agent/principal relationship.

As stated above however, the agency relationship is a consensual, fiduciary one brought about by an agreement between the parties. The splitting of fees between brokers can be a factor in determining agency, especially in the absence of any written contract with the seller. But the *consensual agreement* is of primary importance. However, where purchaser and seller are each clearly represented by their own agent or the purchaser is being assisted by a Transaction-Broker, fee splitting can be simply another item of negotiations between the parties, no matter what the status of agency.

Here are some important points to remember as a broker, so that such provisions are properly handled and misunderstanding does not develop:

1. **Establishing the Brokerage Relationship.** It is essential that all parties to the transaction know who is representing or being assisted by whom. If a buyer is represented or assisted by a broker, Colorado law requires that the buyer's agent or transaction-broker notify the seller or seller's agent or transaction-broker of this fact at the earliest reasonable opportunity. In addition, the relationship must be disclosed in any buy/sell contract.

2. **Consent.** It is essential that written consent of the seller or seller's agent be obtained before payment of compensation is made to a buyer's agent or transaction-broker. This area has caused particular concern with respect to buyer's agents inasmuch as some listing agents feel that the buyer's agent is illegally demanding a commission while representing the other side to the transaction. Again, it should be emphasized that the payment of compensation

does not determine agency. Parties to the transaction are free to negotiate all aspects of the sale including payment of commissions. On the other hand, the listing agreement between the seller and listing company governs their relationship and determines the amount of commission for which the seller is liable. A buyer's agent may not interfere with the listing contract or the commission arrangement between listing company and seller.

**3. Listing Broker Responsibility.** Much of the confusion stems from the fact that many listing brokers do not adequately discuss commissions or commission split arrangements at the time the listing is taken. The seller, presented with a contract from a buyer requesting payment to the buyer's agent or transaction-broker, often has little understanding of the Multiple Listing Service and the traditional relationship between participants, let alone how to handle an offer from the buyer's agent or transaction-broker. Many sellers think any broker working with the buyer is the buyer's agent to begin with. Many listing brokers have not anticipated dealing with a buyer's broker at the time the listing is taken.

The Commission approved Listing Contracts can be very helpful in furthering the seller's understanding of commissions. Specifically, Paragraph 16 of the contract gives the listing broker an excellent opportunity to discuss commission arrangements early on. The Commission-approved Listing Contract states that the broker is free to seek assistance from and offer compensation to other brokers outside of the listing company, (such as "buyer agents" and "transaction-brokers").

This offers the seller several alternatives:

- a. The listing broker and seller may agree on a specific compensation and insert appropriate language into the blank space.
- b. The listing broker and seller may agree that compensation would be considered but not settle on any specific amount at the time. Language such as "to be adjusted at time contract is submitted" would acknowledge this fact.
- c. After discussion with the seller it may be decided that no commission split with a particular type of broker will be made.

By dealing up front with the commission issue the listing broker solves two problems. First, the seller has been given good basic information about commissions and how they work. Second, the listing broker and seller have come to an understanding as to how they will deal with a buyer's agent or transaction-broker should an offer be presented. Then, should a contract come in with the purchaser asking that a portion of the commission be paid to the broker working with the purchasers, there are no surprises. The listing broker can be confident that the listing agreement with the seller was definite and understood.

Buyer's agents and transaction-brokers can lessen the confusion through better communication with the listing broker. Both sides should try to avoid ugly

confrontations over commission arrangements by talking to each other in advance and discussing the offer before it is submitted.

The Real Estate Commission does not prefer one type of brokerage relationship over another, but acknowledges the fact that different options are available and will be used. The Commission desires to see that all licensees properly carry out the transactions and that the public interest continues to be protected through disclosure and consent.

### **III. THE NEWER COLORADO LAW OF AGENCY: DESIGNATED BROKERAGE**



In 2003 the Designated Brokerage Bill went into effect in the state of Colorado. This act amended the Brokerage Relationships Act and declared that individual *members of the public should not be held liable for the acts or omissions of real estate brokers that have not been approved, directed, or ratified by such individuals*. The bill limits the public's legal relationship with brokers to the individual broker they have engaged and requires the nature of the brokerage relationship to be disclosed in writing to the person engaging such broker.

A significant aspect of the legislation is that it clarifies and simplifies the brokerage relationship by removing the employing broker and the brokerage company from the relationship. It also states that knowledge of a transaction is *not* imputed (assumed, attributed) from a designated broker to the managing broker or to other licensees within the brokerage company. The act eliminated and prohibits dual agency and subagency, allowing *only single agency and transaction brokerage* as legal brokerage relationships in the state of Colorado.

The 2003 legislation introduced a relationship referred to as "Designated Broker". "Designated Broker" is defined as an employing broker or employed broker who is designated in writing by an employing broker to serve as a single agent or transaction-broker for a seller, landlord, buyer or tenant in a real estate transaction. "Designated Broker" does not include a real estate brokerage firm that consists of only one licensed natural person. In addition, the legislation provided for the following:

1) If a real estate brokerage firm has more than one licensed natural person, the employing broker or an individual broker employed or engaged by that employing broker shall be designated to work with the seller, landlord, buyer, or tenant as a designated broker. The employing broker may designate more than one of its individual brokers to work with a seller, landlord, buyer or tenant.

b) The brokerage relationship established between the seller, landlord, buyer, or tenant and a designated broker, including the duties, obligations, and responsibilities of that relationship, shall not extend to the employing broker nor to any other broker employed or engaged by that employing broker who has not

been so designated and shall not extend to the firm, partnership, limited liability company, association, corporation, or other entity that employs such broker.

c) A real estate broker may have designated brokers working as single agents for a seller or landlord and a buyer or tenant in the same real estate transaction without creating dual agency for the employing real estate broker, or any broker employed or engaged by that employing real estate broker.

d) An individual may be designated to work for the seller or landlord treating the buyer or tenant as a customer, or as a single agent for a buyer or tenant treating the seller or landlord as a *customer* (defined below), but not as a single agent for both. The applicable designated broker relationship shall be disclosed in writing to the seller or landlord and buyer or tenant in a timely manner pursuant to rules promulgated by the real estate commission.

e) A designated broker may work with a seller or landlord in one transaction and work with a buyer or tenant in another transaction.

f) When a designated broker serves as a single agent pursuant to section 12-61-804 or -805, there shall be no imputation of knowledge to the employing or employed broker who has not been so designated.

g) The extent and limitation of the brokerage relationship with the designated broker shall be disclosed to the seller, landlord, buyer, or tenant working with the designated broker pursuant to section 12-61-808 regarding office and disclosure policies.

In addition, no seller, buyer, landlord, or tenant shall be vicariously liable for a broker's acts or omissions that have not been approved, directed, or ratified by such seller, buyer, landlord, or tenant. This should not be construed to limit the employing broker's or the firm's responsibility to supervise licensees employed by the broker or firm or to shield them from vicarious liability.

**Customer.** The 2003 legislation defines "Customer" to mean a party to a real estate transaction with whom the broker had no brokerage relationship because such party has not engaged or employed a broker.

*Example: Broker Clark is acting as a Buyer Agent and Clark contacts Homeowner Lois, asking if she is interested in selling. If Lois is not represented by another broker, Lois' relationship to Clark is as a customer.*



**Change of Status.** If a broker has an agency relationship with a seller and a separate agency relationship with a buyer, and brings those two parties together in the same real estate transaction, this would normally be considered **dual agency**, which is not permitted under Colorado real estate law. The broker must immediately ("mid-stream" in the transaction) provide the written Change of

Status – Transaction-Brokerage Disclosure form (Form CS23) to the seller and buyer, and begin working with *both* parties as a transaction broker.

## SUMMARY OF AGENCY PRINCIPLES

**I. Common Law of Agency (Applies to *all* agency/employment, not just real estate) *These concepts will be tested on the Uniform Final Exam and Uniform section of the License Exam (NOT the Colorado part.)***

### DEFINITIONS:

**Principal** – One who engages an agent to act on their behalf

**Agent** – One who acts on behalf of the principal

**Universal** – unlimited authority.

**General** – wide authority.

**Special** – limited authority, usually only one transaction.

### AUTHORITY

Created by Contract

Uniform – need not be in writing

Colorado – real estate agency agreements must be in writing  
(Listing Contract)

May be delegated to subagent (NOT in Colorado real estate agency)

*In real estate, the Listing Broker's subagent is the broker working with the buyer.*

The salesperson (Associate Broker) working *for* the Listing Broker is *not* a subagent! S/he is merely an employee of the employing broker

**Actual** – given by Principal to Agent

**Express** – given agent in writing/orally/conduct of principal

**Implied** – that which is needed to perform agent's express authority

**Apparent** – Principal has led others to believe the agent has this, whether or not the agent truly has this authority.

### DUTIES

#### Principal to Agent

*Perform* the contract

*Compensate* the agent

*Indemnify* the agent for loss suffered because of the agency

#### Agent to Principal ("COAL-D")

*Care*

*Obedience*

*Accounting*

*Loyalty* (only to agent's own principal)

*Disclosure* (keep principal informed)

#### Agent to Third Parties (Seller's agent to Buyer/Buyer's agent to Seller)

**Only Honesty and fair dealing** (don't misrepresent or cheat)

Agent *liable for torts* (i.e., misrepresentation)

#### Principal to Third Parties (Seller to Buyer/Buyer to Seller)

*Perform* as contracted

Principal *liable for acts of agent* (if in scope of agent's authority)

**TERMINATION OF AGENCY****Acts of the parties**

*Mutual Consent*  
*Terms of the agency agreement*  
 Principal *revokes* agent's authority  
 Agent *renounces*

**Operation of Law**

*Death* (either Principal or Agent)  
*Insanity* (either Principal or Agent)  
*Bankruptcy* (either Principal or Agent)  
*Change of Law* (causing purpose of agency to become illegal)  
*Destruction* of the subject matter

**REAL ESTATE AGENCY**

**All parties represent seller** (nobody represents buyer – believe it!)

**Listing broker** (agent working with seller to sell house)

**Selling broker** (*agent working with buyer* to buy house),

also called **Cooperating broker**

also called **Subagent**

(because they are *also working for seller*)

Salespeople (for either side)

merely employees, (even though they do all the work)

*not* a subagent

Buyer Broker – only if written agreement with buyer, then

Listing Broker (represents seller)

Buyer Broker (represents buyer)

Dual Agency –one broker has seller's Listing and also brings in buyer

**II. Colorado Law of Agency**

***These concepts will be tested on the Colorado Final Exam and Colorado section of the License Exam (NOT the Uniform part.)***

**SINGLE AGENCY** only

**SELLER'S AGENT** – *owes duties to Seller*

*Care*

*Loyalty*

*Disclosure* (adverse material facts “known” by broker)

*Counsel* (risks and benefits “known” by broker)

*Advise* (to seek experts when necessary)

*Accounting*

WILL **NOT** *disclose* to other party:

Seller will accept lower price

Seller's motivations for selling

Seller will agree to other financing terms

Other material info about seller

WILL *Inform buyer* of adverse material facts about property

**BUYER'S AGENT** – *owes duties to Buyer*

*Disclose facts actually known*

Buyer *not vicariously liable* for agent's acts if not *approved, directed or ratified by buyer*

Inform *seller* of adverse facts about B's *financial ability to buy*

NO duty to conduct independent inspection

NO duty to verify other's opinions or statements

### **TRANSACTION BROKER**

Automatic presumed to be (if no written contract for single agency)

Licensee must provide Disclosure form

Assists without "representing" (in the agency sense)

NO duty of Loyalty

Principals *not liable* for licensee's misrepresentation or negligence

Licensees still liable for their acts

Must still disclose adverse material facts

Must still maintain confidentiality

Licensee's Obligations

*Perform* the terms of the agreement

*Reasonable Care*

*Present all offers*

*Advise and Inform* the parties

*Accounting*

*Assist* parties in complying with contract and closing

May NOT Disclose

That Buyer would pay more

That Seller would accept less

Motivations of parties

That parties will accept other financing terms

**NO Subagents** (but MAY cooperate with agent for the other party)

**NO Dual Agents**

### **GENERAL COLORADO AGENCY PROVISIONS**

**Written Office Policy** – describing above relationships by broker

**Written Disclosures/Agency Contracts** – describing broker's duties

**Commission approved forms ONLY**

**Compensation**

May be paid by any party or third party

Payment does not establish agency relationship

May be shared with other brokers (but must disclose in Listing)

**Place of Business** - Broker must maintain

Notify commission if changes

Employed broker must disclose name of employing broker

Notify commission of termination of employment

If broker leaves, then contract may not be transferred to another broker without written consent of all parties

Employed licensee may only contract in Employing Brkr name

Employed broker may only be paid by the Employing Broker

Separate account for money belonging to others



**Power of Attorney**

Listing agreement does *not* give broker authority to sign on behalf of a party, so...

Broker must have written, *recorded* Power Of Attorney

**Fee Splitting**

Buyer broker/TB must notify Seller broker/TB in writing

Seller must give written consent before Buyer broker/TB paid

Listing Agreement presents options to seller

**DESIGNATED BROKERAGE:****Definitions:**

**Designated Broker** – Broker (either Employing or employed) designated in writing by the Employing Broker to serve as agent (either Transaction Broker or Single Agent) for a seller, buyer, landlord or tenant, in a real estate transaction.

**Customer** – Party to a real estate transaction with whom the broker has *no brokerage relationship* because he/she has not engaged or employed a broker.

**Clarifies:**

The brokerage relationship does not extend from the individual broker to the broker's employer.

A transaction–broker is not a dual agent.

A brokerage relationship may exist for only one transaction unless otherwise specifically agreed.

Duty of a buyer's or tenant's agent to inspect the property.

Does not increase Employed broker's liability (Employing Broker is still responsible for your actions).

Increases your responsibility for protecting *your* buyer or seller's confidential info.

Buyer Agent - *no duty to conduct independent inspection* for buyer.

*Contract explicitly informs principal: "I am not your inspector..."*

**Key points:**

Public (individual) enters a brokerage relationship *only* with the designated (individual) broker...

*Not* with the employing broker

*Not* with other brokers in the company

*Not* with the brokerage firm itself

*No imputed knowledge* of the transaction above Designated Broker

*Abolishes* Sub-Agency and Dual-Agency

Leaves *only two relationship options:*

**Single Agent****Transaction Broker**

Does not affect one-person brokerages (because there is no one to appoint *and* act as Designated Broker.)

*Reduced Vicarious Liability* of Public (individual)

Principal *not* liable unless acts or omissions *approved, directed or ratified* by the principal.

### **What Stays the Same:**

- Brokerage still *owns* the listing contracts
- Brokerage and Employing Broker still responsible for Designated Broker's acts/omissions
- Public (individual) still has right to choose either Agency or Transaction Brokerage
- Duty to Disclose the nature of the relationship
- Employing Broker supervision:
  - High level for less than 2 years experience (Rule E-32, Ch.16)
  - "Reasonable" level for 2 years or more (Rule E-31, Ch.16)
  - Supervision may still be delegated
  - If Employing Broker *is* the Designated Broker in a transaction:
    - must designate another supervisor, *or*
    - retain transaction supervision

### **How to Designate**

#### *In writing*

- By the employing broker
- Office policy + language in listing contracts
- Individual memo
- "**Teams**" may be designated
  - Then Team is the Designated Broker
  - If transaction involves a personal relationship of some sort between broker from Team and a party (i.e., family member), then broker must sever from team and designate individually
- May designate more than one broker (a "fallback")
  - Avoids necessity of coming back and trying to renegotiate with party (because they could always refuse and abrogate the contract)

#### **Change of Status form** (See Chapter 21):

- Not a contract.
- Simply a *reminder* of what you agreed in the Listing, etc.
- "Now, as you agreed before, I'm changing to a TB, since I just found a *buyer* for your listing with me."
- It is *only* for *this* buyer's offer (the buyer you bring in for your own listing). It won't change your status permanently (say, if this buyer's offer isn't accepted by your seller)