Chapter 4
Agency

LECTURE OUTLINE:

I. Introduction to Real Estate Agency
   A. History of the nature of real estate services and common misconceptions the
      public has had regarding who the broker represents
   B. Sources of law
      1. Common law: rules of society established by tradition
      2. Statutory law: enacted by legislatures and other governing bodies

II. Law of Agency—defines the rights and duties of the principal, the agent and the
     customer
   A. Definitions in the law of agency
      1. Agent—the individual who is authorized and consents to represent the
         interests of another person. In real estate, the broker of the firm is the
         agent and shares this responsibility with the licensees who work for the
         firm.
      2. Principal—the individual who hires and delegates to the agent the
         responsibility of representing his or her interests. This may be the buyer,
         seller, owner, landlord, or tenant.
      3. Agency—the fiduciary relationship between the principal and the agent
      4. Fiduciary—the relationship in which the agent is held in a position of
         special trust and confidence by the principal
      5. Client—the principal
      6. Customer—the third party or nonrepresented consumer for whom some
         level of service is provided and who is entitled to fairness and honesty
      7. Nonagent—facilitator, transaction broker, etc. An intermediary who
         assists one or both parties to a transaction without representing either
         party’s interests.
      8. Consensual agreement—the principal delegates and the agent consents to
         act.
   B. Creation of agency
      1. Express agency
         a. The parties state the terms of the agreement and express their
intentions either orally or in writing.

b. In real estate, generally written agreements rather than oral; either a listing agreement or buyer agency agreement

2. Implied agency
   a. Actions of the parties indicate they have mutually consented to an agency
   b. In real estate, the actions of the parties may create an agency relationship unintentionally, inadvertently, or accidentally where none was intended, leading to an undisclosed dual agency.
   c. Despite the disclosure of agency relationships, customers may assume that a licensee is representing them.

3. Compensation—because a person pays the compensation to the agent does not mean that person is the principal. A gratuitous agency exists when no fee is involved.

C. Fiduciary responsibilities

1. A fiduciary relationship is one of trust and confidence between employer (principal) and employee (agent).

2. Differences between agent responsibilities when acting as seller’s broker or buyer’s broker (See Table 4.1)

3. Common law of agency duties include the following six duties as a minimum:
   a. Care: The agent must exercise reasonable degree of care; liability can result from negligence or carelessness.
   b. Obedience: The agent must act in good faith and according to the principal's instructions (as long as those instructions are legal and relative to the terms of the contract).
   c. Loyalty: The principal's interests must come before the agent's; 100 percent loyalty is required; agent must inform the principal when purchasing the property for himself or herself or when selling his or her own property to the principal.
   d. Disclosure: The agent must keep the principal fully informed of all facts, including those required by the duty of discovery.

(1) Agent for seller
   (a) All offers
   (b) Identity of prospective buyers and agent’s relationship to them
   (c) Ability of buyer to complete sale; offer a higher price
   (d) Agent’s interest, if any
   (e) Buyer’s intention to resell property for profit.
   (e) An incorrect market value of the property

(2) Agent for buyer
   (a) Property deficiencies
   (b) Unsuitable contract provisions and financing
(c) Suggest lowest price to offer
(d) Length of time property on market
(e) Reason owner is selling
e. Accounting: The agent must account for all pertinent funds and documents placed in his or her care. Commingling or conversion of funds is illegal.
f. Confidentiality: The agent must keep information about the principal’s personal affairs, such as financial condition, confidential. However, agents must disclose material facts about the property itself.

D. Termination of agency—for any of the following reasons

1. Completion, performance, or fulfillment of the purpose for which the agency was created
2. Death or incapacity of either party
3. Destruction or condemnation of the property
4. Expiration of the terms of the agency
5. Mutual agreement to cancel the agency
6. Breach by one of the parties
7. By operation of law, as in a bankruptcy of the principal (since title to the property would be transferred to a court-appointed receiver)

III. Types of Agency Relationships

A. Limitations on an agent’s authority

1. Universal agent—no limits on authority; not typical for a real estate licensee
2. General agent—one who represents the principal in a range of matters related to a particular business or activity; receives power to enter into contracts on behalf of the principal within the agent's scope of authority.
3. Special agent—one who represents the principal in one specific transaction or one business activity only
   a. Such agency is created by the terms of the listing agreement or buyer-agency contract in the real estate business.
   b. The agent cannot enter into contracts on behalf of the principal and cannot bind the principal to any act.
4. Designated agent—one who is authorized by the broker to act as the agent of a specific principal
   a. Others in office free to act for another party in a transaction
   b. Broker may be in position of dual agent, so disclosure required
   c. Varies from state to state

B. Single agency: The broker represents either the seller or the buyer, not both in the same transaction; any third party is a customer (See Figure 4.1). Precludes the
sale of in-house listings to represented buyers.

1. Seller representation
   a. The broker becomes the agent of the seller.
   b. The relationship is established by a listing agreement.
   c. The broker may utilize the services of other brokers as buyer’s agents or nonagents.

2. Buyer representation
   a. The broker becomes the agent of the buyer.
   b. The relationship is established by a buyer-agency agreement.
   c. The broker becomes responsible to the buyer to locate real estate with certain specified characteristics.

3. Owner as principal
   a. The broker becomes the agent of the owner to manage or lease the owner's real estate.
   b. The relationship is established by a property management agreement.

C. Dual agency: The broker represents two principals in the same transaction (See Figure 4.2) (Consult state laws regarding the legal procedures for performing dual agency.)

1. Disclosed dual agency: Both principals must be informed and consent to the dual representation. Parties must understand how the dual representation could affect their respective interests when the agent is essentially trying to serve two principals.
2. Undisclosed dual agency—The actions of the parties can create an agency relationship where none was intended.

D. Disclosure of agency: Every state requires that licensees make certain disclosures (consult your state's laws). (See Figure 4.3)

1. Alternatives for the level of services
2. Who the licensee represents
3. Mandatory or voluntary disclosures

E. Nonagency: (transactional broker, facilitator, coordinator, or contract broker)

1. Helps both buyer and seller with paperwork and formalities in transferring property.
2. Responsible to both parties and must treat them honestly and competently.
3. Assists parties to arrive at mutually agreeable terms and helps with the closing. May not negotiate for parties or disclose confidential information.

F. Agency statutes: State legislatures are enacting agency reform legislation. Most require agents to:
1. exercise reasonable care and skill in performing duties.
2. obey client’s specific instructions.
3. account for all money and property received.
4. promote the client’s best interests (loyalty).
5. disclose material facts.
6. perform according to brokerage agreement terms.
7. keep confidential all confidential information received from client.
8. generally comply with terms of statute.

IV. Customer-Level Services

A. Duties to the third party include:
   1. reasonable care and skill in performance.
   2. honest and fair dealing.
   3. disclosure of all facts known (or that should be known) to the licensee that materially affect the value or desirability of the property.
      a. Use of property disclosure forms
      b. Use of prepurchase inspections (i.e., structure, termites, environmental hazards)

B. Disclosure of environmental hazards—which include lead paint, radon, asbestos, toxic waste, contaminated soil and water, or other hazards common in the area—may be required.

C. Opinion versus fact
   1. Opinions—must be stated as licensee's opinions with no intention to deceive
   2. Facts—must be accurate
      a. Fraud—intentional misrepresentation of material fact in a way so as to harm or take advantage of an individual
      b. Puffing—exaggeration of a property's benefits; legal as long as statements are not considered fraudulent
      c. Negligent misrepresentation—broker may be ignorant about a material fact but should have known; buyer relies on broker’s statement.

D. Property conditions—*latent defects* are hidden structural defects that would not be uncovered by ordinary inspection; seller has duty to discover any latent defects that threaten structural soundness or personal safety. Agent may have duty to conduct inspection of the property; must discover and disclose material facts that may affect property value or desirability.

E. Stigmatized properties—properties society has branded as undesirable because of
events that occurred there, such as criminal events or other tragedies such as suicide; residency of a sexual offender in the area may also stigmatize property (see state's laws and seek legal counsel for guidance about disclosure)