Lesson Eight: Clarifying Agency Relationships

Lesson Topics
This lesson focuses on the following topics:

- Agency Relationships
- Disclosure Policy
- Understanding the Broker’s Office Policy

Lesson Learning Objectives
At the conclusion of this lesson you will be able to:

- Describe your relationship with your broker.
- Identify at least three things that must be disclosed to buyer’s and seller’s.
- Recognize the need for you to read and understand your broker’s office policy.

Agency Relationships
In the previous chapter we listed the different types of agency relationships that can and do exist. In real estate you will primarily have agency representations, which we will list, that you will be dealing with every day you are active in the real estate business. The other types of agency are really determined by a court of law or a judge. Depending on the lawsuit, the decisions can be costly and effects your business and reputation. If you follow and educate yourself in the following agency representations, you will reduce your liability to some degree and enhance your services to your clients.

There are many license holders who do not know the difference between a client and a customer. They also think they can practice real estate anyway they want to when sponsored by a broker. Those license holders are walking time bombs for a major lawsuit to be served upon them.
Daily agency relationships that you will be practicing and need to understand and practice include the following:

- Broker
- Seller
- Buyer
- Landlord
- Tenant

Review your broker’s policy and procedure manual as well.

**Broker**

When you get your license and a broker agrees to sponsor you by a written agreement this establishes your first agency relationship as you start your real estate career... This type of agency is called “general agency”. So there is no confusion on your part, this agreement should establish the following:

**Exclusive Association**

Sales agent or broker associate will perform the services contemplated by the independent contractor agreement exclusively for the Broker who sponsored you.

Sales agent or broker associate may not engage in the brokerage of businesses or in the management of property without the broker’s knowledge and written consent. In other words you cannot have separate real estate business, services without your broker’s written permission

You also cannot have a property management company without your broker’s permission. If you want to have a property management company, your broker would need to be the broker for the management company if you do not have a broker’s license.
You represent the broker in every transaction and the law of agency “general agency” allows you to conduct business in your broker's name only.

- Agreements
- Contracts
- Listing agreements
- Referrals
- Commissions
- Addenda's
- Emails
- Social networks
- Texts
- Business cards
- Stationary and envelopes
- Marketing material
- Mailing material
- All real estate signs
- Websites
- All advertising

Your broker will have a policy and procedure manual on how the broker wants you to handle each situation. The sales agent or broker associate never transacts real estate business any other way than what the broker has authorized—both by training and in the policy and procedure manual.

Your agency agreement does not create a partnership between you and your broker. You never commit your broker financially to anything without his or her permission.

Neither broker or sales agent or broker associate is liable to the other party for any expense or obligation incurred by the other party.
Sales Agent or Broker Associates Authority
Sales agents or broker associates can sign listing agreements, buyer or tenant representation agreements on the broker’s behalf provided sales agent and broker associate comply with broker’s policy and procedure.

All listings, representation agreements, and other agreements for brokerage services that sales agent procures or signs must be taken in the broker’s name and must be submitted to broker upon completion of all required paper work.

Cancellations or Termination of Brokerage Service Agreements may not be cancelled or terminated without the broker’s approval.

Seller, Buyer, Tenant or Landlord Agency
The relationship between the principal and license holder holds special legal significance. It is a fiduciary relationship involving great trust and confidence with the agent in the role of a fiduciary.

The Canons of the Texas Real Estate Commission rules are Fidelity, Integrity, Competency, Consumer Information, Discriminatory Practices and Information about Brokerage Services.

A real estate broker or salesperson, while acting as an agent for another, is a fiduciary. Special obligations are imposed when such fiduciary relationships are created. They demand:

(1) that the primary duty of the real estate agent is to represent the interests of the agent's client, and the agent's position, in this respect, should be clear to all parties concerned in a real estate transaction; that, however, the agent, in performing duties to the client, shall treat other parties to a transaction fairly;
(2) that the real estate agent be faithful and observant to trust placed in the agent, and be scrupulous and meticulous in performing the agent's functions; and

(3) that the real estate agent place no personal interest above that of the agent's client.

- The broker must represent the interest of the client as his or her primary duty. When you represent a client through mutual consent and in a written agreement, one of the duties is the clients’ interests. This takes in many examples of “interest of client”: keeping confidential information of your client to yourself, being available at all times when the client needs you, advising your client of negative feedback as to the marketing and selling of the property, advising a buyer what they need to complete to buy or rent property in detail communication.

- The broker must be faithful to the client and be observant of the duty of trust. This is a relationship you have with the client. The client should be able to trust you in your daily dealings and to know you are faithful to him or her at all times.

- The broker may not place his or her personal interest above the client's interest.

  The client’s opinions are first and yours are second unless the opinions of the clients are legally liable. Than you have a duty to be honest and explain to the client why his or her opinion is not appropriate.

- The broker must disclose to his or her client any conflict of interest or any matter that would materially affect the client’s decision in a transaction.

  If you are related to a buyer, landlord or tenant or seller this could be a conflict of interest. You must disclose the relationship and if the client gives you permission to proceed in writing than you can proceed.

- The broker must be clear to all parties in a transaction whom the broker represents.

  When speaking with a consumer at any time about your broker’s listing you must disclose you represent the seller(s), when you are showing property or going through an open house, you must disclose that you represent the
buyer, (if you do) and same for a tenant or landlord. You need to disclose to tenants that you do not represent them you represent the landlord. If you receive a property call on your broker’s listings, you must disclose that you are the agent of the seller.

- When performing brokerage duties, the broker is to act meticulously and scrupulously.

You must be sure contracts, leases, listing agreements are filled out in detail with accurate information. In other words, no blanks if they are applicable to transaction. Legal names not pen names, correct legal description verified by you, the sales agent, or broker associate. Be cautious with the information you use and not use it if you do not verify the information first.

- The broker must keep the client informed of material information related to a transaction, including but not limited to the receipt of any offer.

All activity must be communicated to the client. Never withhold information no matter what it is. All offers are to be presented until the last signature and date is completed. The Texas Real Estate License Act is very specific about this.

- The broker must be available to answer the client’s questions. Return all telephone calls, texts, emails timely to your client, but to all as well.

- The broker must give the client a proper accounting of all funds received in the transaction.

When you receive the earnest money and the option money for the buyer, you must communicate this to both the buyer and seller. When leasing property, you want to communicate to the tenant and landlord all deposits, rental monies and any additional monies given to you in the transaction.
• The broker may not commingle any funds held for another with the broker's own funds.

If the broker and you have a property management company, the funds for rental properties and the broker's business operating account or personal checking account may not be commingled. You must have separate accounts for management of client’s properties.

These duties apply to all sales agents and broker associates since you do business in the name of the broker and represent the broker in all transactions as well as the license holder’s professional conduct.

The REALTOR® Code of Ethics Article One applies to your duties to your client.

**Article 1**
When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.

**Standard of Practice 1-1**
REALTORS®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics.

**Standard of Practice 1-2**
The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means. The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of
Ethics on REALTORS® acting in non-agency capacities. As used in this Code of Ethics, “client” means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®’s firm has an agency or legally recognized non-agency relationship; “customer” means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®’s firm; “prospect” means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or Realtor®’s firm; “agent” means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and “broker” means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity.

**Standard of Practice 1-3**
REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

**Standard of Practice 1-4**
REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the REALTOR®’s services.

**Standard of Practice 1-5**
REALTORS® may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties.

**Standard of Practice 1-6**
Realors® shall submit offers and counter-offers objectively and as quickly as possible.

**Standard of Practice 1-7**
When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. REALTORS® shall not be
obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease.

**Standard of Practice 1-8**

REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a Pre-existing contract has been terminated. The obligation of REALTORS® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. REALTORS® shall not knowingly, during or following the termination of professional relationships with their clients:

1) reveal confidential information of clients; or

2) use confidential information of clients to the disadvantage of clients; or

3) use confidential information of clients for the REALTOR®’s advantage or the advantage of third parties unless:
   a) clients consent after full disclosure; or
   b) REALTORS® are required by court order; or
   c) it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or
   d) it is necessary to defend a REALTOR® or the REALTOR®’s employees or associates against an accusation of wrongful conduct.

Information concerning latent material defects is not considered confidential information under this Code of Ethics.
Standard of Practice 1-10
REALTORS® shall, consistent with the terms and conditions of their real estate licensure and their property management agreement, competently manage the property of clients with due regard for the rights, safety and health of tenants and others lawfully on the premises.

Standard of Practice 1-11
REALTORS® who are employed to maintain or manage a client’s property shall exercise due diligence and make reasonable efforts to protect it against reasonably foreseeable contingencies and losses.

Standard of Practice 1-12
When entering into listing contracts, REALTORS® must advise sellers/landlords of:
1) the REALTOR®’s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities.
2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
3) any potential for listing brokers to act as disclosed dual agents, e.g. buyer/tenant agents.

Standard of Practice 1-13
When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:
1) the REALTOR®’s company policies regarding cooperation;
2) the amount of compensation to be paid by the client;
3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord’s agent, etc., and
5) the possibility that sellers or sellers’ representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties.

**Standard of Practice 1-14**
Fees for preparing appraisals or other valuations shall not be contingent upon the amount of the appraisal or valuation.

**Standard of Practice 1-15**
REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers’ approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker.

**Standard of Practice 1-16**
REALTORS® shall not access or use, or permit or enable others to access or use, listed or managed property on terms or conditions other than those authorized by the owner or seller.

**Disclosure Policy**
**What Can Happen**
Buyer B attended an open house and discussed the property with Salesperson C. The next day, Buyer B came to Salesperson C’s office, and they talked about Buyer B’s price range and needs. Buyer B decided that the property he had seen the day before was out of his price range, but Salesperson C quickly mentioned that she would be happy to help Buyer B find a property. Buyer B agreed to this, and Salesperson C located three suitable properties, owned by sellers that Salesperson C represents.
What has Salesperson C done wrong?
Salesperson C did not tell the buyer that she is a seller’s agent. Therefore, it is possible that this buyer was under the impression that Salesperson C was acting in his interests, when in fact the salesperson was acting in the sellers’ interests.

An implied agency relationship arises when a party assumes consent to the relationship based solely upon inferences formed from communication with the other party—from a party’s actions, conduct or words. In the previous example, neither party explicitly stated the nature or terms of the relationship, but it is possible that the salesperson would be held to the duties of an agency relationship.

The concept of implied agency is especially relevant to the real estate industry, where sellers’ agents commonly provide helpful services for buyers. If a buyer encounters an agent who engages him or her in friendly conversation, asks about his or her price range, takes him or her to look at properties and even helps him or her obtain financing, how is that buyer to know that the agent is not representing his or her interests?

To prevent implied agency, it is vital that all real estate professionals disclose agency relationships to all potential customers. The agent must give oral disclosure of agency representation upon initial contact with a party; written disclosure is required upon substantive discussion.

It is easy to see how important it is to make sure everyone in the transaction understands whom the broker is working for.

Following the agency disclosure laws and letting everyone know at first contact when the agent is representing anyone, is a big step in risk management for the sales agent and the broker. The broker’s agency policy should make it clear this is expected of all sales agents.
Handing out the Information About Brokerage Services (IABS) form to all unrepresented customers at the first substantive dialog should also be a requirement of the broker’s agency policy. Many brokers require sales agent to attend training classes that help them understand the IABS form and know how to explain it to a customer.

**What is “Substantive Dialogue”?**

The licensee has the obligation to give written disclosure of agency to all unrepresented parties. Section 1101.558 of the Real Estate License Act outlines when written disclosure of the agency relationship must be made. In this section, “substantive dialogue” means a meeting or written communication that involves a substantive discussion relating to specific real property. The term does not include:

- A meeting that occurs at a property that is held open for any prospective buyer or tenant; or
- A meeting or written communication that occurs after the parties to a real estate transaction have signed a contract to sell, buy, or lease the real property concerned.

A license holder shall provide to a party to a real estate transaction at the time of the first substantive dialogue with the party the written statement prescribed by Subsection (d) unless:

- The proposed transaction is for a residential lease for not more than one year and a sale is not being considered; or
- The license holder meets with a party who is represented by another license holder.

If a broker or salesperson is representing a party, he or she must disclose the agency relationship to potential or actual third parties. Oral or written disclosure of the relationship is acceptable upon initial contact with a third party. Upon substantive dialogue, the agent must give the third party a written statement that describes agency law.
Example
Salesperson A represents Seller B, and she is holding an open house for the seller’s property. She has a conversation with Buyer C, and she gives the buyer her card. At this point, Salesperson A is required to explain that she is the seller’s agent, but she is not required to disclose this in writing. The next day, Buyer C comes into the office where Salesperson A works, and they discuss the property. Now, the salesperson and the buyer are having “substantive dialogue”, and Salesperson A must give the buyer a written statement explaining agency law.

Understanding the Broker’s Office Policy
In the Texas Real Estate License Act in Chapters 1101 and 1102, it is provided that broker supervision issues such as planning and organization, occupational policies and procedures, recruitment and training of personnel, records and control, and real estate firm analysis and expansion be addressed by the broker. A broker is mandated to have a brokerage policy manual.

Brokers must ascertain that sales agents know the scope of their authorized activities.

Texas Real Estate Commission Rules §535.2 Broker Responsibility
(a) A broker is required to notify a sponsored sales agent in writing of the scope of the sales agent’s authorized activities under the Act. Unless such scope is limited or revoked in writing, a broker is responsible for the authorized acts of the broker’s sales agents, but the broker is not required to supervise the sales agents directly. If a broker permits a sponsored sales agent to conduct activities beyond the scope explicitly authorized by the broker, those are acts for which the broker is responsible.

(b) A broker owes the highest fiduciary obligation to the principal and is obliged to convey to the principal all information known to the agent which may affect the principal’s decision unless prohibited by other law.
(c) A broker is responsible for the proper handling of trust funds placed with the broker and must comply with §535.146 of this title.

(d) A broker is responsible for any property management activity by the broker's sponsored sales agent that requires a real estate license.

(e) A broker may delegate to another license holder the responsibility to assist in administering compliance with the Act and Rules, but the broker may not relinquish overall responsibility for the supervision of license holders sponsored by the broker. Any such delegation must be in writing. A broker shall provide the name of each delegated supervisor to the Commission on a form or through the online process approved by the Commission within 30 days of any such delegation that has lasted or is anticipated to last more than six months. The broker shall notify the Commission in the same manner within 30 days after the delegation of a supervisor has ended. It is the responsibility of the broker associate or newly licensed broker to notify the Commission in writing when they are no longer associated with the broker or no longer act as a delegated supervisor.

(f) Listings and other agreements for real estate brokerage services must be solicited and accepted in a broker's name.

(g) A broker is responsible to ensure that a sponsored sales agent's advertising complies with §535.154 of this title.

(h) Except for records destroyed by an "Act of God" such as a natural disaster or fire not intentionally caused by the broker, the broker must, at a minimum, maintain the following records in a format that is readily available to the Commission for at least four years from the date of closing, termination of the contract, or end of a real estate transaction:
   (1) disclosures;
(2) commission agreements such as listing agreements, buyer representation agreements, or other written agreements relied upon to claim compensation;
(3) work files;
(4) contracts and related addenda;
(5) receipts and disbursements of compensation for services subject to the Act;
(6) property management contracts;
(7) appraisals, broker price opinions, and comparative market analyses; and
(8) sponsorship agreements between the broker and sponsored sales agents.

(i) A broker who sponsors sales agents or is a designated broker for a business entity shall maintain, on a current basis, written policies and procedures to ensure that:

(1) Each sponsored sales agent is advised of the scope of the sales agent's authorized activities subject to the Act and is competent to conduct such activities.
(2) Each sponsored sales agent maintains their license in active status at all times while they are engaging in activities subject to the Act.
(3) Any and all compensation paid to a sponsored sales agent for acts or services subject to the Act is paid by, through, or with the written consent of the sponsoring broker.
(4) Each sponsored sales agent is provided on a timely basis, before the effective date of the change, notice of any change to the Act, Rules, or Commission promulgated contract forms.
(5) In addition to completing statutory minimum continuing education requirements, each sponsored sales agent receives such additional educational instruction the broker may deem necessary to obtain and maintain, on a current basis, competency in the scope of the sponsored sales agent's practice subject to the Act.
(6) Each sponsored sales agent complies with the Commission's advertising rules.
(7) All trust accounts, including but not limited to property management trust accounts, and other funds received from consumers are maintained by the broker with appropriate controls in compliance with §535.146.

(8) Records are properly maintained pursuant to subsection (h) of this section.

(j) A broker or supervisor delegated under subsection (e) of this section must respond to sponsored sales agents, clients, and license holders representing other parties in real estate transactions within three calendar days.

(k) A sponsoring broker or supervisor delegated under subsection (e) of this section shall deliver mail and other correspondence from the Commission to their sponsored sales agents within 10 calendar days after receipt.

(l) When the broker is a business entity, the designated broker is the person responsible for the broker responsibilities under this section.

(m) This section is not meant to create or require an employer/employee relationship between a broker and a sponsored sales agent.

**TREC Case Summaries**

Below is a sample of sanctions from recent TREC orders against brokers for failing to have required written policies. Agreed Orders were reached with the brokers following TREC’s receipt of complaints against their sponsored salespeople (mostly advertising violations).
Broker K – Reprimand and assessment of an administrative penalty of $4,000 for the following violations:

- Failing to advise a sponsored salesperson of the scope of the salesperson’s authorized activities (two counts) [TREC Rules §535.2(a)]
- Failing to ensure that a sponsored salesperson’s advertising complies with TREC Rule 535.154 (two counts) [TREC Rules §535.2(g)]
- Failing to maintain on a current basis required written policies and procedures (two counts) [TREC Rules §535.2(i)]

Broker L – Reprimand and assessment of an administrative penalty of $1,000 for the following violations:

- Failing to advise a sponsored salesperson of the scope of the salesperson’s authorized activities [TREC Rules §535.2(a)]
- Failing to maintain on a current basis required written policies and procedures [TREC Rules §535.2(i)]

Broker M – Reprimand and assessment of an administrative penalty of $1,000 for the following violations:

- Failing to maintain on a current basis required written policies and procedures [TREC Rules §535.2(i)]
- Placing an advertisement that in any way causes a member of the public to believe that a person not authorized to conduct real estate brokerage is personally engaged in real estate brokerage [TREC Rules §535.154(g)(2)]

(Source: TREC Broker Responsibility Course)

Lesson Summary

In lesson eight, more was learned about the broker’s role in a real estate office. The broker is the supervisor and responsible for the activities of all of the agents.

The broker has to ascertain that each agent is fully aware of the things they are authorized to do in regard to real estate.
The broker must develop systems where he is sure all of the agents in the firm have active, current licenses.

The broker must maintain a policy manual that address the brokers requirements on disclosures on agency, property condition, etc. The agents must know that some disclosures are required, some are optional and some are forbidden by law.

The Texas Real Estate License Act requires the broker to have an office policy manual for agents. Agents have the responsibility to read and comply with the broker’s polices.

*Please return to the course player to take the lesson quiz.*