LAW OF AGENCY – COURSE OUTLINE – AGENCY BASICS

QUIZ 1

SOURCES OF AGENCY LAW:
- Common Law - Agency law & Contract law
- Statutory Law - The Texas Real Estate License Act
- STATUTE: A law
- ACT: A comprehensive law dealing with one subject - T RELA
- CODE: A compilation of related statutes / acts – Occupation Code
  Occupation Code Chapter 1101  (1101.803)
- Texas Administrative Code (TAC) - How to pass regulations and a
  compilations of regulations Real Estate is Chapter 22  (22TAC535.2)

AGENCY IS A LEGAL RELATIONSHIP WHERE ONE PERSON IS AUTHORIZED TO
ACT FOR (REPRESENT) ANOTHER INVOLVING:
- Third Party
- Discretion / Judgment
- Money / Property
- Knowledge / Ability

AGENCY IS A FIDUCIARY RELATIONSHIP- BASED ON TRUST & CONFIDENCE:
- All agents are fiduciaries
- Not all fiduciaries are agents – doctors, lawyers, trustee (these may
  also be agents)

AGENCY IS A PERSONAL NON-ASSIGNABLE OBLIGATION

PARTIES TO AN AGENCY AGREEMENT:
- Principal – the person who delegates authority – also called the Client
- Agent – the person who accepts authority and acts on behalf of the Principal
- Third Party – the person whom the agent deals with on behalf of the
  Principal – also called the Customer

TYPES OF AGENCY BASED ON AUTHORITY DELEGATED:
- UNIVERSAL AGENCY – the broadest and most general scope of authority –
  ongoing in nature – the agent can bind the Principal if authorized to do so
- GENERAL AGENCY – narrower, more specific range of activities – ongoing in
  nature – the agent can bind the Principal if authorized to do so
- SPECIAL AGENCY - limited scope of authority to single act – not ongoing
  - the agent can bind the Principal if authorized to do so

REAL ESTATE TRANSACTIONS WHERE THE BROKER REPRESENTS THE SELLER OR
BUYER USUALLY DO NOT ALLOW THE AGENT TO CONTRACT FOR THE PRINCIPAL
(THE SELLER OR BUYER). A SEPARATE POWER OF ATTORNEY WOULD BE
REQUIRED.
REAL ESTATE AGENCY RELATIONSHIPS
- Broker and sales associates (Sales & Broker Associates)
- The Broker and the buyer / seller
- The Broker and other brokers – subagency

REAL ESTATE TRANSACTIONS
- IN HOUSE TRANSACTION – One company
- COOPERATING BROKERS – Two companies

SUBAGENT
“…. a license holder who:
(A) Represents a principal through cooperation with and the consent of the broker representing the principal; and
(B) Is not sponsored by or associated with the principal broker”. TRELA 1101.002(1)(B)

AGENT’S FIDUCIARY DUTIES TO THE PRINCIPAL / CLIENT:
- OBEDIENCE
- LOYALTY
- DISCLOSURE
- CONFIDENTIALITY
- ACCOUNTING
- REASONABLE CARE AND DILIGENCE

PRINCIPAL / CLIENT’S DUTIES TO THE AGENT:
- COMPENSATION - if agreed to
- INFORMATION
- INDEMNIFICATION
- AVAILABILITY

AGENT’S DUTIES TO THIRD PARTIES / CUSTOMERS:
- HONESTY
- FAIRNESS
- DISCLOSURE OF KNOWN AND MATERIAL PROPERTY CONDITIONS
- COMPETENCE
- FOLLOW THE LAWS – Fair Housing, Disclosure, etc.

SERVICES THAT MAY BE PROVIDED TO A CUSTOMER:
- Provide access to listed and MLS properties
- Find property that fits the customer’s needs
- Show properties
- Property information
- Describe amenities
- Describe services available
- Disclose material defects
- Complete offer and counter offers
- Submit offers and counter offers
- Honesty, fairness and integrity
- Follow all laws – fair housing, etc.

PRINCIPAL / CLIENT                             THIRD PARTY / CUSTOMER
Works for
Client controls agent
Must do
Gives advise
Negotiates for

Works with
Customer does not
Can do
Gives information
Transmits offers

VIOLATION OF FIDUCIARY DUTIES
• Loss of commission
• Loss of license
• Damages
• Recission of contract

CREATION OF AGENCY:
• NOT NEEDED TO CREATE AGENCY –
  Written consent / contract
  Compensation

METHODS OF CREATING AGENCY:
• Express Agreement – specifically agreed to orally or in writing
• Implied Agreement – created by words or actions of the parties
• Agency by Estoppel / Ostensible Agency – when the Principal leads a third party to believe a person is the agent, then the principal cannot deny the agency relationship
• Agency by Ratification – when the Principal accepts an unauthorized act of an agent after the fact and accepts the benefits

IMPLIED AGENCY
• Relationship of the parties – friends, relatives, bosses, etc.
• Actions – acting like an agent, providing client level services
• Persons who should have representation – first time buyers, language, education problems

COMMON LAW AGENCY
• SINGLE AGENCY/REPRESENTATION – representing one party to the transaction
• DUAL AGENCY/REPRESENTATION – representing both parties to the transaction with informed consent of both parties
  Disclosed Common Law Dual Agency – Undisclosed Common Law Dual Agency ( was always wrong)

IN TEXAS SINCE 2005 – COMMON LAW DUAL AGENCY MAY NOT BE USED FOR REAL ESTATE TRANSACTIONS INTERMEDIARY IS THE ONLY ALLOWED FORM OF DUAL REPRESENTATION

TERMINATION OF AGENCY:
• COMPLETION OF AGENCY OBJECTIVE
• LAPSE OF TIME SPECIFIED IN THE AGREEMENT – TRELA requires a specific termination date for service contracts
• RECISSION – mutual agreement of the parties to terminate
• RENUNCIATION OF AUTHORITY BY THE AGENT
• REVOCATION OF AUTHORITY BY THE PRINCIPAL
• DESTRUCTION OR CONDEMNATION OF THE PROPERTY
• DEATH OR INCAPACITY OF THE PRINCIPAL OR AGENT
• BANKRUPTCY OF THE PRINCIPAL

LEGAL CONSEQUENCES OF THE AGENCY RELATIONSHIP:
• LIABILITY: Common law – the principal is responsible for the acts of the agent and sub-agent. TRELA – no liability for unknown misrepresentations – if a misrepresentation is discovered the principal must correct it
• NOTICE: Notice to the agent is notice to the Principal
• CONFIDENTIALITY: The duty of confidentiality continues even after the agency relationship terminates

MINIMUM SERVICE REQUIREMENT:

IF A BROKER REPRESENTS A SELLER UNDER AN EXCLUSIVE LISTING AGREEMENT THE BROKER MUST AT A MINIMUM PRESENT ANY OFFER AND ANSWER THE PARTY’S QUESTIONS

INTERMEDIARY PRACTICE – QUIZ 2

PROBLEMS WITH COMMON LAW AGENCY:

• Danger of undisclosed dual agency
• Low level of service to the customer

AGENCY HISTORY:

• Common Law Agency - single (still exists) and dual representation (gone) - Oral or written disclosure of representation is required
• Sept. 1 1988: Mandatory written disclosure of representation for prospective tenant or buyer
• April 1, 1989: Mandatory written disclosure of representation for prospective seller or landlord
• Sept. 1 1993: Statutory Dual Agency – Mandatory written disclosure of representation
• Jan. 1 1996: Intermediary Practice – IBS
• Sept. 1 2005: Common law dual agency no longer allowed for real estate transactions

INTERMEDIARY PRACTICE:

• Representation of both parties must be an Intermediary
  No more common law dual agency for real estate in Texas
• Intermediary is governed by TREA – not common law – it supersedes common law
• SB489 = TREA Sec. 15 C = Occupation Code 1101. ____
• Intermediary applies to In-house transactions only
• In-house transactions may be done by common law single agency representing
  the seller or by Intermediary
• An Intermediary is a BROKER who is employed to negotiate a transaction
  between the parties
• An Intermediary is an agent of both parties
• Intermediary must act fairly and impartially

IN HOUSE TRANSACTIONS

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<thead>
<tr>
<th>SELLER’S BROKER</th>
<th>INTERMEDIARY BROKER</th>
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<tr>
<td>LICENSEE</td>
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<td>SELLER</td>
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FIDUCIARY TO SELLER
CANNOT FAVOR EITHER PARTY
MAY PROVIDE OPINION /ADVICE DURING NEGOTIATIONS

ASSISTANCE / HONESTY TO THE BUYER

Cannot disclose lowest/highest price or other confidential information
Cannot disclose lowest/highest price or other confidential information
Must comply with TREA
Must comply with TREA
Treat all parties honestly
Treat all parties honestly

CONDUCT (AND PROHIBITED CONDUCT) OF THE INTERMEDIARY:

• Must act fairly and impartially
• Must **not** disclose that the seller will accept less (unless written authorization)
• Must **not** disclose that the buyer will pay more than the offer (unless authorized in writing)
• Must **not** disclose any confidential information or any information a party instructs
  the agent not to disclose (unless authorized in writing or required by a court order)
• Must disclose property condition
• Must treat parties honestly
• Must comply with TRELAs

APPOINTMENTS:

• The Intermediary Broker **MAY** appoint a licensee to each party to
  Communicate with and carry out the instructions of the party
  Provide opinions and advice during negotiations
• The Broker may not appoint himself to represent a party
• A single Broker can do Intermediary practice, but without appointments
• A Broker must have two sales associates in order to do appointments
• Appointments by the Broker are considered a fair and impartial act

CREATION OF INTERMEDIARY:

• Written consent of each party to Intermediary and appointments (if applicable)
• Written consent must state the source of any compensation
• The listing agreement or buyer representation agreement may be used if the
  prohibited conduct is specified in bold or underlined print
• If appointments are made, also required:
  The Broker must provide written notice of the appointments to
  all parties

THE IBS CANNOT BE USED TO CREATE INTERMEDIARY

LICENSEE TRANSACTIONS FOR THEIR OWN ACCOUNT

• In House – probable violation of fiduciary duties
  Broker should take precautions
• Must disclose in writing his position as seller or buyer
• Must disclose position if licensee owns more than 10% of a business entity

SUMMARY OF AGENCY RELATIONSHIPS:

• SINGLE AGENCY (Common Law):
  The broker represents only one party to the transaction. All fiduciary duties are
  owed to the party represented.
• SUBAGENCY (Common Law):
  A broker and his agents, not associated with the client’s /principal’s broker who
  represents the client through cooperation and consent of the broker who
  represents the client – usually the seller. All fiduciary duties owed to the seller /
  client.
• DUAL AGENCY (Common Law):
  **Disclosed Dual Agency:** The Broker represents both parties to the
  transaction with the full disclosure and consent of both parties – NO
  LONGER ALLOWED FOR REAL ESTATE TRANSACTIONS IN
  TEXAS
  **Undisclosed Dual Agency:** Representing both parties without
  their knowledge and consent - always illegal.
• STATUTORY DUAL AGENCY (Texas Statutory): The broker represents both
  parties by following the provisions of the former TRELAs Sec. 15 C. Authorized
• INTERMEDIARY REPRESENTATION (Teaxas Statutory – TRELÀ 1101.558) –
  Applies only to In-house transactions.
    With Appointments – Opinion and advice
    Without Appointments - Impartial (neutral)
• UNREPRESENTED CUSTOMER:
  Owed honesty, fairness, follow the law and disclose property condition
1. **DISCLOSURE OF REPRESENTATION IN A TRANSACTION**

**WHAT:** Disclose who you represent in a transaction

**TO WHO:** To another “party” or licensee in the transaction.
(Prospective buyer, seller, landlord, or tenant)

**WHEN:** At first contact

**HOW:** Orally or in writing  (There is no form for this)

2. **INFORMATION ABOUT BROKERAGE SERVICES**

**WHAT:** Provide the statutory written statement:
“Information About Brokerage Services”

**TO WHO:** To a “party” to a real estate transaction
(Prospective buyer, seller, landlord, or tenant)

**WHEN:** At the time of the first “substantive dialogue”
(a meeting or written communication that involves a substantive discussion relating to specific real property)

**Exceptions:**
1. Open house (not “substantive”)
2. After the sales contract has been signed
   (not “substantive”)
3. Residential lease – 1 year – no sale
4. Party represented by other licensee

**HOW:** In writing only. In any format so long as 10 pt type is used.

  Applies to internet.

Statute does not require signature, but there is a provision for signature acknowledging receipt of IBS which is your proof of compliance.
EMPLOYMENT, ADVERTISING AND COMMISSIONS – QUIZ 3

EMPLOYMENT
- Employee or Independent Contractor (status determined by IRS)
- Does not affect agency status

EMPLOYEE
- Control over how job is performed
- Can designate office hours, etc.
- Usually has benefits, insurance, retirement, etc.
- Income tax and SS are withheld
- Employer pays unemployment taxes for employee

INDEPENDENT CONTRACTOR
- Can be required to follow office policies
- IRS “Qualified Real Estate Agent”
  1. Current real estate license
  2. Written contract that states: “The salesperson will not be treated as an employee with respect to the services performed by such salesperson as a real estate agent for federal tax purposes.”
  3. 90% of income is based on production – not hours

ADVERTISING
- No deceptive or misleading advertising
- Ad must contain the broker’s name along with the salesperson’s
- Ad placed by a broker must be identified as placed by the broker
- Assumed names may be used but must be filed in the County where business is being conducted and with TREC

COMMISSIONS
- All commission are paid / received through the sponsoring broker
- Commissions from more than one party must have the knowledge and consent of all parties
- An agent may not receive an undisclosed commission or rebate on an expenditure made for a principal
- A commission may not be paid to or split with a person who does not have a Texas real estate licensee
  - Thank you gift up to $50 is LK to an unlicensed person
  - Referral fee to an out of state licensee is OK
  - Commission may be rebated to a principal (buyer /seller) with consent
  - No referral fee / commission split to an attorney unless the attorney has a Texas real estate license
  - An attorney may receive a commission directly from a buyer or seller
- A Broker may sue for a commission (joined by a licensee) if
  1. Licensed when services were commenced
  2. Agreement / memorandum in writing signed by the person who is to pay the commission
  3. Buyer was advised in writing to get a title policy or abstract of title
LISTING AGREEMENTS:

- A contract between the Broker / Seller
  Seller is the Principal - Broker (salespersons) is the agent
- The Broker’s agent signs for the Broker
- Creates a special agency
  Agent cannot bind the principal
  Market the property and find a buyer for it
- Needed to collect a commission
- Needed to create Intermediary
- TREL A – Must have an expiration date
- A Non-assignable obligation
  Terminates on Broker’s death – not the salesperson’s
- MLS rules to be followed
  Offer of cooperation and compensation
  Submit listing within time limits

TYPES OF LISTINGS:

Open Listing
Sold by owner or agent
If sold by owner – no commission
If sold by broker – selling commission (1/2)
No. MLS - No Co-broke

Exclusive Agency:
Listed with a single broker – Owner retains the right to sell
If sold by owner – no commission
If sold by broker – full commission to broker
Can list in MLS – Can Co-Broke

Exclusive Right to Sell:
Listed with a single broker
If sold by owner – full commission to broker
If sold by broker – full commission to broker
Can list in MLS – Can Co-Broke

ONE TIME SHOWING AGREEMENT:
- Does not create agency
- Needed to collect a commission

NET LISTING:
- Method of payment – not agency agreement
- What is left after costs and amount to seller
- Legal but not recommended – TAC: Listing agreement should limit commission amount

BUYER REPRESENTATION AGREEMENT:
- Same as a listing agreement - not placed in MLS
- Market Area: a defined geographical area (“Metroplex” has no geographic boundaries, “Plano” does)
- Can be as narrow or broad as desired: 915 Oak, Plano, Texas ----- The State of Texas
CONSUMER PROTECTION – QUIZ 5

Duties and Disclosures owed from the Seller to the Buyer

FRAUD:         MISREPRESENTATION:
    Deliberate intent to deceive   Wrong information – no intent to deceive
    Spoken or by silence           Spoken or by silence

LATENT:        PATENT:
    Hidden defect                  Open – not hidden

CONSUMER PROTECTION LAWS

COMMON LAW FRAUD
    • All persons
    • Fraud – intent to deceive required
    • Damages, rescission

FRAUD IN REAL ESTATE ( AND STOCK) TRANSACTIONS
    • All persons
    • Misrepresentation and Fraud
    • Damages, rescission, attorney fees & costs

TEXAS DECEPTIVE TRADE PRACTICES ACT
    • All persons
    • Misrepresentation and Fraud
    • Damages, double & treble damages, attorney fees & costs

PROPERTY CONDITION DISCLOSURE (Sec. 5.008 Property Code)
    • Sellers of single family residences only
    • Disclose knowledge of property condition
    • Right of contract rescission prior to closing

TEXAS REAL ESTATE LICENSE ACT
    • All licensees only
    • Fraud & Misrepresentation
    • Loss of license

SELLER’S DISCLOSURE OF PROPERTY CONDITION
    • Required as of January 1, 1994
    • Required to be given by all sellers of a single unit residential property, to the purchaser, unless there is a specific exception
    • Statute (TREC form) contains the minimum disclosures, there should be more
    • Must be signed and dated by the seller
    • Must be delivered on or before the effective date of the contract
    • Disclosure reflects the seller’s knowledge of the property rather than the actual condition of the property
PENALTY FOR UNTIMELY / FAILURE TO DISCLOSE:

- **Late delivery**: The buyer has 7 days from the date of delivery or closing (whichever comes first) to back out (rescind) of the contract.
- **Never delivered**: The buyer may back out of contract at any time up to closing.
- **After closing**: No penalty for closing without the Disclosure.
- **Incorrect information on the Disclosure**: May be the basis of a DTPA action after closing.

EXCEPTIONS TO GIVING THE DISCLOSURE:

1. Transfers pursuant to a court order or foreclosure sale
2. Transfers by a trustee in bankruptcy
3. Transfers to a mortgagee or beneficiary by the mortgagor (borrower back to the lender)
4. Transfers by a mortgagee or beneficiary under a deed of trust who had acquired the property by foreclosure
5. Transfers made by the fiduciary in the course of an administration of a decedent’s estate, guardianship, conservatorship, or trust
6. Transfers between co-owners
7. Transfers between spouses and family members in the lineal line of consanguinity (kids, parents)
8. Transfers between spouses resulting from a divorce, separation or property settlement agreement
9. Transfers to or from any governmental entity
10. Transfers of new homes, not previously occupied
11. Transfers where the value of the dwelling does not exceed 5% of total value

SPECIFIC DISCLOSURES:

A seller, or the seller’s agent, **has no duty** to disclose:

- death by natural causes, suicide, or accident unrelated to the condition of the property, which occurred on the property
- whether a previous occupant has or had AIDS, or HIV (federal law **prohibits** any disclosure of AIDS or HIV)

A seller **must** disclose:

- The existence of smoke detectors, carbon monoxide alarm and emergency escape ladders
  - A hearing impaired buyer may require the installation of smoke detectors for the hearing impaired
- Previous use of the premises for the manufacture of methamphetamines.
TEXAS DECEPTIVE TRADE PRACTICES ACT

“This law shall be liberally construed on behalf of the consumer.”

APPLIES TO ADVERTISING, SELLING AND LEASING OF:
Real Property
Personal Property
Services  -  EXCEPT IT DOES NOT APPLY TO

Professional services which involve advice, judgment, opinion or similar professional skills (doctors, lawyers, etc.)
Licensee services governed by TREA

DOLLAR LIMITS:
• Limited to transactions of no more than $500,000
• The limit is lowered to $100,000 if there is a written contract and the consumer is represented by an attorney
• THE PERSONAL RESIDENCE IS ALWAYS INCLUDED REGARDLESS OF PRICE

WAIVER OF DTPA RIGHTS:
DTPA rights may be waived by the consumer, including for the residence, If there is:  a written contract AND the consumer is represented by an attorney

DTPA PROHIBITS:
• Breach of Warranty
• False, misleading or deceptive business practices including the “laundry list” of 25 specific acts
• Unconscionable action
  “An act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly Unfair degree.”

DECEPTIVE ACTS (LAUNDRY LIST):
• Passing off goods or services as those of another
• Source, sponsorship, approval or certification
• Affiliation, connection with, or certification
• Geographic origin
• Standard, quality or grade
• Disparaging goods, services or business of another by false or misleading statements
• Advertising with intent not to sell as advertised
• Reasons for existence of, or amount of price reduction
• Agreement confers rights, remedies or obligations that it does not
• Authority of salesman or agent
• The failure to disclose information concerning goods or services which was Known at the time of the transaction, if such failure to disclose was intended to induce the consumer into a transaction which the consumer would not have entered into had the information been disclosed
• Price gouging for fuel, food or necessities during a disaster
DTPA DEFENSES:
- Did not say it or do it
- Did not disclose because it was unknown
- Information was not the producing cause of the damage
- Buyer did not rely on the information
- Consumer was informed in writing of reliance on an Official Government Record or any other written information (such as the Property Condition Disclosure)

DAMAGES:
- Double damages if done knowingly (actual awareness)
- Treble damages if done intentionally (intent to deceive)

NOTICE:
- Notice of intent to sue must be given 60 days before filing suit

MEDIATION:
- Court will order mediation if requested by either party

PROTECT YOURSELF:
- Always give the source of your information
- Owner’s Disclosure
- Accuracy
- Property Inspection --- YOU ARE NOT AN INSPECTOR

STIGMATIZED PROPERTY:
- Something other than the physical condition of the property which affects its value such as murder, etc. on the property

MEGAN’S LAW:
- Requires the registration of sex offenders
- Disclosure is not required by the seller, or either agent

‘AS IS’
- Property to be sold in its present condition
- All disclosures are required