

Modern Real Estate Practice in Illinois, 6th Edition
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Chapter 4: Real Estate Agency

Learning Objectives

After reading this chapter, students should be able to:

- Identify the various types of agency relationships common in the real estate profession and the characteristics of each.
- Describe the fiduciary duties involved in an agency relationship.
- Explain the process by which agency is created and terminated and the role of disclosure in agency relationships.
- Distinguish the duties owed by an agent to his or her client from those owed to customers.
- Define the following key terms: agency; agency coupled with an interest; agent; Article 15 of the Real Estate License Act of 2000; brokerage agreement; buyer agency; buyer agency agreement; client; commingling; confidentiality; co-op commission; consumer; customers; designated agent; dual agency; express agency; express agreement; fiduciary relationship; fraud; general agency; general agent; gratuitous agency; implied agency; implied agreement; latent defect; law of agency; listing agreement; material fact; Megan's Law; ministerial acts; negligent misrepresentation; principal; puffing; ready, willing, and able buyer; seller disclosure form; single agency brokerage; special agent; subagent; and universal agent.

Why Learn About Agency?

An agent is one who claims he or she is a person of expertise. The principal employs the agent to act on his or her behalf. The key to successful and effective agency is to focus on the consumer. In today's world, consumers are increasingly knowledgeable, and many have access to information that was formerly obtainable only through real estate professionals. Because of this, the emphasis on the licensee's activity is to become the most effective representatives of their clients: they must provide a valuable service.

But there's an even more important reason to understand agency relationships. Agency is governed by state laws, which establish the duties, responsibilities, and acceptable activities for agents in their relationships with clients, customers, and the general public. Adherence to these expectations is not just a matter of good business practice (which of course it is); it places agents at financial risk if they breach their agency duties, and it subjects them to disciplinary proceedings, which could result in revocation of their licenses.

Suggested Items to Bring To Class

1. Newspaper articles and periodical articles on stigmatized properties, particularly if they relate to how the values of such properties were affected or how transactions were terminated because of such stigmas. For instance, such issues have arisen with regard to Nicole Brown Simpson's home, or the property occupied by the Heaven's Gate community, or the Brown's Chicken restaurant in Palatine, Illinois.
2. Bring newspaper articles about real estate personnel being accused of criminal activity related to civil rights law violations or predatory lending practices.

Lecture Outline

I. Introduction to Real Estate Agency

- *Agency* describes the special relationship between a real estate licensee and the person he or she represents.
- Agency is governed by *common law* (the rules of a society established by tradition and court decisions) and statutory law (the laws, rules and regulations enacted by legislatures and other governing bodies). Common law agency was based on the principal-agent relationship evolved from the master-servant relationship under English law.

II. Law of Agency

IN ILLINOIS . . .*Common law agency still exists in most commercial activity but has been superseded by statutory agency law in the area of real estate broker-client relations.*

A. Definitions (Statutory)

IN ILLINOIS . . .*real estate agency relationships are governed by the Agency Relationships article of the Real Estate License Act of 2000 (225 ILCS 454/ Art. 15.), which specifically abrogates the common law of agency. The general terms of agency under the Illinois statute are:*

- *Agency: a relationship, either express or implied, in which a real estate broker or licensee, enters into an agreement with a consumer to represent that consumer in a real property transaction*
- *Brokerage agreement: written or oral agreement for brokerage services to be provided to a consumer in return for compensation or the right to receive compensation from another*
- *Client: a person who is being represented by a licensee*
- *Consumer: a person or entity who seeks or receives real estate brokerage services*

- Customer: *a consumer who is not being represented by a licensee, but for whom the licensee is performing ministerial acts*
- Ministerial acts: *acts that a licensee may perform for a consumer that are informative in nature and do not rise to the level of active representation on behalf of a consumer*

B. Client v. Customer Services

- The client is the principal to whom the agent gives advice and counsel. The agent is entrusted with certain confidential information and has fiduciary responsibilities. The agent is an advocate for the principal, not for the customer.
- The customer is entitled to factual information and fair and honest dealings as a consumer, but does not receive advice and counsel or confidential information about the principal.
- The agent works for the client (principal) and with the customer.
 1. The relationship between the principal and agent must be consensual. An agent may be authorized by the principal to use the assistance of others.
 2. The principal has responsibilities to the agent: to comply with the agreement and cooperate with the agent in good faith. The principal must compensate the agent according to the agreement.

C. Fiduciary/Statutory Responsibilities

1. Care

The agent should know all facts pertinent to the principals' affairs.

2. Obedience

The agent must act in good faith at all times, obeying the principal's instructions in accordance with the contract.

- The agent may not obey unlawful or unethical instructions.

3. Loyalty

The duty of loyalty requires the agent to place the principal's interests above those of all other.

IN ILLINOIS . . . *an agent may not disclose personal information about his or her principal but must disclose known material facts about the property's condition.*

4. Disclosure

It is the agent's duty to keep the principal informed of all facts or information that could affect a transaction. The agent may be held liable for damages for failing to disclose facts that a reasonable

person would feel are important in choosing to go forward with a transaction.

5. Accounting

Most state license laws require agents to report the status of all funds or property received, give accurate copies of all documents to all parties and keep copies on file.

6. Confidentiality

Confidentiality about the principal's personal affairs is key. An agent may not disclose personal, confidential information about his or her principal.

IN ILLINOIS . . . *brokers are required to deliver true copies of all documents to the people who signed them within 24 hours. All funds entrusted to a broker must be deposited in a special escrow account by the next business day following the signing of a sales contract or lease. Commingling such monies with the broker's personal or general business funds is illegal. Records of escrow account transactions must be retained for five years, during which the records must be kept at the broker's place of business for the first two years.*

D. Opinion versus Fact

Brokers, salespersons and other staff members must be sure that the customer understands whether the licensee's statement is an opinion or a fact.

1. Statements of opinion are permissible only as long as they are offered as opinions and without any intention to deceive.
2. Statements of fact must be accurate.
3. Exaggeration of a property's benefits is called *puffing*. While puffing is legal, licensees must ensure that none of their statements can be interpreted as fraudulent.
4. Fraud is the intentional misrepresentation of a material fact in such a way as to harm or take advantage of another person, including making false statements or intentionally concealing or failing to disclose important facts.
5. Negligence
 - a. A negligent misrepresentation occurs when the broker should have known that a statement about a material fact was false. If the buyer relies on the broker's statement, the broker is liable for any damages that result.

- b. If a broker accidentally fails to perform some act, the broker may be liable for damages from such a negligent omission.
- c. If a contract to purchase real estate is obtained as a result of fraudulent misstatements, the contract may be disaffirmed or renounced by the purchaser. The broker can be liable for damages if either party suffers loss.
 - If the licensee's misstatements were based on the owner's inaccurate statements and the licensee had no independent duty to investigate their accuracy, the broker may be entitled to a commission, even if the buyer rescinds the sales contract.

IN ILLINOIS . . . *a licensee may be held liable to a buyer-customer under the Illinois Consumer Fraud and Deceptive Practices Act. Licensees found in violation of this act may be required to pay the plaintiff's attorney's fees and court costs in addition to damages. The act prohibits the use, within a trade or profession, of any deception, fraud, false promise, misrepresentation or concealment, suppression or omission of any material fact with the intent that others rely on it. A real estate brokerage business clearly fits within the meaning of the act, and the courts of Illinois have ruled accordingly.*

E. Latent Defects

A latent defect is a hidden structural defect that would not be discovered by ordinary inspection. Buyers have been able to either rescind the sales contract or receive damages when a seller fails to reveal known latent defects.

IN ILLINOIS . . . *The Illinois Appellate Court, in Munjal v. Baird & Warner, Inc. et al., 2nd District C (1985), held that a broker or salesperson has no duty to discover "latent material defects" in a property if a seller has not disclosed these defects to him or her prior to sale.*

F. Stigmatized Properties

At the state level, Megan's Law is a general name for laws requiring law enforcement authorities to make information available to the public regarding registered sex offenders. At the federal level, Megan's Law requires persons convicted of sex crimes against children to notify local law enforcement if any change of address of employment after released from custody.

IN ILLINOIS . . . *the License Act states that no cause of action shall arise against a licensee for the failure to disclose that an occupant of that property was inflicted with HIV or any other medical condition or that the property was the site of an act or occurrence that had no effect on the physical condition of the property or its environment or the structures located thereon or that other property has physical conditions that do not impact adversely on the subject property. Article 15, section 15-*

20 states, “No course of action shall arise against a licensee for the failure to disclose...fact situations on property that is not the subject of the transaction.”

G. Statutory Duties

IN ILLINOIS . . . *The agent’s fiduciary relationship of trust and confidence with the principal mandates that the broker owes the principal certain specific duties. These duties, based on (but replacing) common law agency, are set forth in Article XV of the Illinois Real Estate License Act. According to this statute, the agent must*

- *perform the terms of the brokerage agreement.*
- *promote the best interests of the client by:*
 - *seeking a transaction at the price and terms stated in the brokerage agreement or otherwise acceptable to the client.*
 - *presenting all offers to and from the client in a timely way, unless the client waives this duty.*
 - *disclosing to the client known material facts concerning the transaction, unless that information is confidential.*
 - *accounting in a timely way for all money and property received in which the client has, may have, or should have an interest in a timely manner.*
 - *obeying specific directions of the client that are not otherwise contrary to applicable statutes, ordinances, or rules.*
 - *acting in a manner consistent with promoting the client’s best interests as opposed to any other person’s.*
- *exercise reasonable skill and care in the performance of brokerage services.*
- *keep confidential all confidential information received from the client.*
- *comply with all the requirements of the law.*

H. Creation of Agency

1. Express agency (created either in written or oral form)

An agency relationship between a principal and a broker is generally created by a written employment contract (express agreement).

- A listing agreement authorizes the broker to find a buyer or tenant for the owner's property.
- An express agency relationship between a buyer and a broker is created with a buyer agency agreement that authorized the broker to find property for the buyer or tenant.

IN ILLINOIS . . . *exclusive listing agreements must be in writing in order to be enforced.*

2. Implied agency

This occurs when the actions of the parties indicate that they have mutually consented to an agency. Implied agency can result unintentionally, inadvertently or accidentally by the parties' actions.

IN ILLINOIS . . . *under Article XV of the Real Estate License Act, the licensee is presumed to be the agent of the consumer with whom the licensee is working unless:*

- *there is a written agreement between the broker and the consumer providing for a different relationship, or*
- *the licensee is performing only ministerial acts on behalf of the consumer.*

(Ministerial acts are informative in nature; that is, they do not rise to the level of active representation. They are identified in the definition section of Article I of the License Act of 2000.)

3. Compensation

- a. The source of compensation does not determine agency.
- b. Agency can exist even if no fee is involved (gratuitous agency).

I. Termination of Agency

- Death or incapacity of either party (notice of death is not necessary)
- Destruction or condemnation of the property
- Expiration of the terms of the agency
- Mutual agreement by all parties to the contract
- Breach
- By operation of law, as in bankruptcy
- Completion, performance or fulfillment

IN ILLINOIS . . . *a definite termination date must be included in an agency agreement. Automatic extension clauses are illegal.*

J. Agency Coupled with an Interest

- Agency relationship in which the agent has an interest in the property being sold
- Cannot be revoked by the principal or terminated upon the principal's death

III. Types of Agency Relationships

A. Limitations on an Agent's Authority

- A universal agent is a person empowered through a written power of attorney to do anything the principal could do personally.
- A general agent may represent the principal in a broad range of matters related to a particular business or activity. There is usually an ongoing aspect to this type of agency, such as a property management function.
- A special agent is authorized to represent the principal in one specific act or business transaction only, under detailed instructions. A real estate broker is usually a special agent.
- A designated agent is a person authorized by the broker to act as the agent of a specific principal.

IN ILLINOIS . . . *Designated agency is permitted and standard in Illinois. A sponsoring broker, by his or her signature, "designates" a salesperson or associate broker within the firm as the exclusive agent of a client.*

B. Single agency

- In single agency, the agent represents only one party in any single transaction.

C. Buyer agency is established in the same way as any other agency relationship: by either oral or written contract.

- The buyer's agent may receive a fee and/or a share of the commission paid by the seller.

D. Property management agency

An arrangement in which an owner employs a broker to market, lease, maintain or manage the owner's property is known as property management.

- The broker is the agent of the property owner.
- The broker has a fiduciary responsibility to the client-owner.

E. Dual Agency

The agent represents two parties in the same transaction, such as selling one's own listing.

1. **Disclosed dual agency.** Dual agency is permitted only if buyer and seller are informed and consent to the broker's representation of both in the same transaction.
2. **Undisclosed dual agency.** Problems in the area of undisclosed dual agency have been minimized with the prohibition against subagency.

IN ILLINOIS . . . *Article XV of the Real Estate License Law reduces the incidence of undisclosed dual agency by creating a statutory presumption that the licensee represents the party with whom he or she is working.*

F. Disclosure of Agency

IN ILLINOIS . . . *Licensees are presumed to represent the consumer with whom they are working as the consumer's designated agent, unless there is a written agreement between them specifying another relationship, or if the licensee is only performing ministerial acts on the consumer's behalf. If the other party is represented by another agent, no disclosures are necessary. A licensee who is acting as the designated agent of a party must disclose in writing to any customer that the agency relationship exists.*

Consumers must receive the following disclosures no later than the time when a brokerage agreement is entered into:

- *that a designated agency relationship will exist unless there is a written agreement providing otherwise.*
- *any other agency relationships available through the brokerage.*
- *the names of any designated agents.*
- *the amount and manner of the broker's compensation.*
- *whether or not the broker will share the compensation with brokers who represent other parties in a transaction and disclosure of the amount to be paid to the cooperating broker.*

A licensee must disclose to an unrepresented customer in writing that the licensee is not acting as the customer's agent. The disclosure must be made at a time intended to prevent disclosure of confidential information by the customer to the licensee, but the disclosure must be made no later than the preparation of an offer to purchase or lease real property.

A licensee may perform ministerial acts for a customer without violating any brokerage agreement with a client. Merely performing ministerial acts does not create a brokerage agreement.

IV. Customer-Level Services

IN ILLINOIS . . . *the courts have long held that the contractual principal-agent relationship as defined in the listing contract gives the seller a cause of action against the licensee who breaches his or her fiduciary duties. The courts have not demanded fiduciary duty to third parties. However, Illinois license law sets forth the duties that licensees owe to third-party customers (buyers or sellers). Licensees are to treat all customers honestly. They cannot negligently or knowingly give customers false information.*

Licensees must disclose to the customer all material adverse facts about the physical condition of the property that are actually known by the licensee and that could not be discovered by a reasonably diligent inspection of the property by the customer.

A licensee may be held liable to a seller or buyer if the licensee misrepresents material facts about a property and if the seller or buyer suffers monetary loss through reliance on these statements. The licensee's loyalty to the principal is no defense, even though the principal may have ordered the agent to misrepresent.

Licensees have a duty to prospective sellers and buyers to disclose all material information within their knowledge. If the licensee knowingly makes untrue statements, Illinois courts will have no difficulty in finding the licensee liable to the buyer or seller. Liability may be imposed when the licensee is aware of facts that tend to indicate that he or she is making a false statement.

In the Illinois Appellate Court case of Zimmerman v. Northfield Real Estate, Inc., 1st Dist. (1986), the court refused to enforce a waiver or exculpatory clause in a sales contract that attempted to release the broker of responsibility to inform the buyer of defects in the property, because such a clause clearly violated public policy as expressed in the Illinois license act and rules.

Discussion Questions

1. How often do you use the services of an agent?
2. Give examples in the last year when you have acted as either an agent or a principal employing an agent.
3. In a real estate transaction, who does the buyer believe represents him or her? (Since most buyers are not familiar with real estate law, the assumption is often that the real estate agent is representing the buyer.) How should a real estate agent deal with this situation?
4. What possible relationships exist in Illinois between licensees and the people they serve in the real estate industry?

Classroom Exercises

1. Have your students discuss the five common law obligations of an agent to a principal. Have them cite specific examples of how licensees should meet agency obligations. Have someone write these items on the board. Compare these with the obligations established in the Illinois agency statute.
2. What expectations do you think the public has regarding agency duties owed to a principal?