



Agency: Video™

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Introduction to Agency

Authority to represent others

An **agent** is described as “One who is authorized to act for or in place of another; a representative...” [Black’s Law Dictionary, Eleventh Edition (2019)]

agent

One who is authorized to represent another, such as a broker and client, or sales agent and their broker.

An **agency relationship** exists between principal and agent, and employer and employee.

The California **Department of Real Estate (DRE)** was created to oversee licensing and police a minimum level of *professional competency* for individuals desiring to represent others as *real estate agents*. This mandate is pursued through the education of individuals seeking an original broker or salesperson license. It is also pursued on the renewal of an existing license, known as *continuing education*. The education is offered in the private and public sectors under government certification.

Department of Real Estate (DRE)

A government agency which oversees, regulates, administers and enforces California real estate law as practiced by licensees.

Agency in real estate related transactions includes relationships between:

- *brokers* and members of the public (clients or third parties); and
- licensed *sales agents* and their brokers.

The extent of representation owed to a client by the broker and their agents depends on the *scope of authority* the client gives the broker. Authority is given:

- orally;
- in writing; or
- through the client's conduct with the broker.

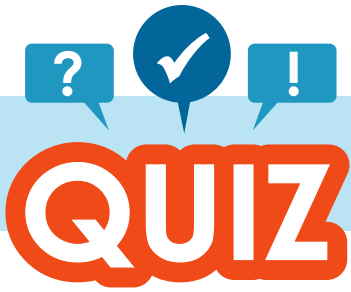
Agency and *representation* are synonymous in real estate transactions.

A broker, by accepting an exclusive employment from a client, undertakes the task of aggressively using **due diligence** to represent the client and attain their objectives. Alternatively, an open listing only imposes a *best efforts* standard of representation until a match is located and negotiations begin, which imposes the due diligence standard for the duration of negotiations.

An agent is an individual or corporation who represents another, called the **principal**, in dealings with third persons. Thus, a *principal can never be their own agent*. A *principal acts for their own account, not on behalf of another*.

principal

A person, individual or entity acting as a buyer or seller, and represented by a broker and their agents.



QUIZ

1. Agency and _____ are synonymous in real estate transactions.
 - a. independence
 - b. representation
 - c. self-interest

2. A broker, by accepting an exclusive employment from a client, undertakes the task of using _____ to represent the client and attain their objectives.
 - a. due diligence
 - b. only the minimal effort needed
 - c. due deceit



Three Parties Under Agency Law

- Principal
- Agent
- Third Persons

Who is an Agent Under Agency Law?

The representation of others

The representation of others undertaken by a real estate broker is called an agency.

Three parties are referred to in agency law: a principal, an agent and third persons. [Calif. Civil Code §2295]

In real estate transactions:

- the *agent* is the real estate broker retained to represent a client for the purposes hired;
- the *principal* is the client, such as a seller, buyer, landlord, tenant, lender or borrower, who has retained a broker to sell or lease property, locate a buyer or tenant, or arrange a mortgage with other persons; and
- *third persons* are individuals or associations (corporations, limited partnerships and limited liability companies) other than the broker's client, with whom the broker has contact as an agent acting on behalf of their client.

Real estate jargon

Real estate jargon used by brokers and agents tends to create confusion among

the public.

When the jargon is used in legislative schemes, it adds statutory chaos, academic discussion and consternation among brokers and agents over the duties of the real estate licensee.

For example, the words “real estate agent,” as used in the brokerage industry, mean a *real estate salesperson employed by and representing a real estate broker*. Interestingly, real estate salespersons rarely refer to themselves as *sales agents*; a broker never does. Instead, agents frequently call themselves “broker-associates,” or “Realtors,” especially if they are affiliated with a local trade union. The public calls licensees “realtors,” the generic term for the trade, much like the term “Kleenex.”

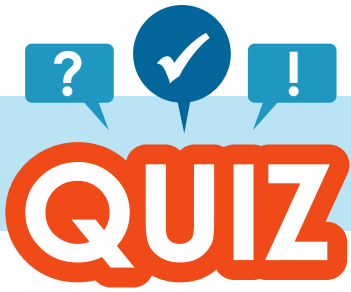
Legally, a client's real estate agent is defined as a *real estate broker who undertakes representation of a client in a real estate transaction*. Thus, a salesperson is legally an *agent of the agent (their broker)*.

Fundamental to a real estate agency are the **primary duties** a broker and their agents owe the principal. These duties are distinct from the **general duties** owed by brokers and agents to all other parties involved in a transaction.

Subagency” jargon

The word “subagency” suffers from even greater contrasts. *Subagency* serves both as:

- jargon for fee-splitting agreements between Multiple Listing Service (MLS) member brokers in some areas of the state; and
- a legal principle for the authorization given to the third broker by the seller's broker or buyer's agent to also act as an agent on behalf of the client, sometimes called a *broker-to-broker arrangement*.



QUIZ

1. A salesperson is legally an agent of:
 - a. the client.
 - b. the customer.
 - c. their broker.

Knowledge and Ability



Primary Duties Owed

The highest good faith

Primary duties owed to a client in a real estate transaction include:

- a *due diligence investigation* into the subject property;
- *evaluating* the financial impact of the proposed transaction;
- *advising* on the legal consequences of documents which affect the client;
- *considering* the tax aspects of the transfer; and
- *reviewing* the suitability of the client's exposure to a risk of loss.

To care for and protect both their clients and themselves, all real estate licensees need to:

- *know* the scope of authority given to them by the employment agreement;
- *document* the agency tasks undertaken; and
- *possess* sufficient knowledge, ability and determination to perform the agency tasks undertaken.

Collectively, these are known as **fiduciary duties**. Fiduciary duties are the duties owed by an agent to act in the highest good faith toward the principal and not to obtain any advantage over their principal by the slightest misrepresentation, concealment, duress or undue influence. Again, these are the highest standards owed to the principal the broker represents.

Alternatively, the broker owes a limited, non-client **general duty** to voluntarily provide critical factual information to the opposing party in a transaction.


A licensee needs to conduct themselves at or above the minimum acceptable levels of competency to avoid liability to the client or disciplinary action by the DRE.

Creation of the agency relationship

An agency relationship is created in a real estate transaction when a *principal* employs a broker to act on their behalf. [CC §2307]

A broker's representation of a client, such as a buyer or seller, is properly undertaken on a written employment agreement signed by both the client and the broker. A written employment agreement is necessary for the broker to have an enforceable *fee agreement*. This employment contract is loosely referred to in the real estate industry as a "listing agreement." [**Phillippe v. Shapell Industries, Inc.** (1987) 43 C3d 1247] [See **RPI** Forms 102 and 103]

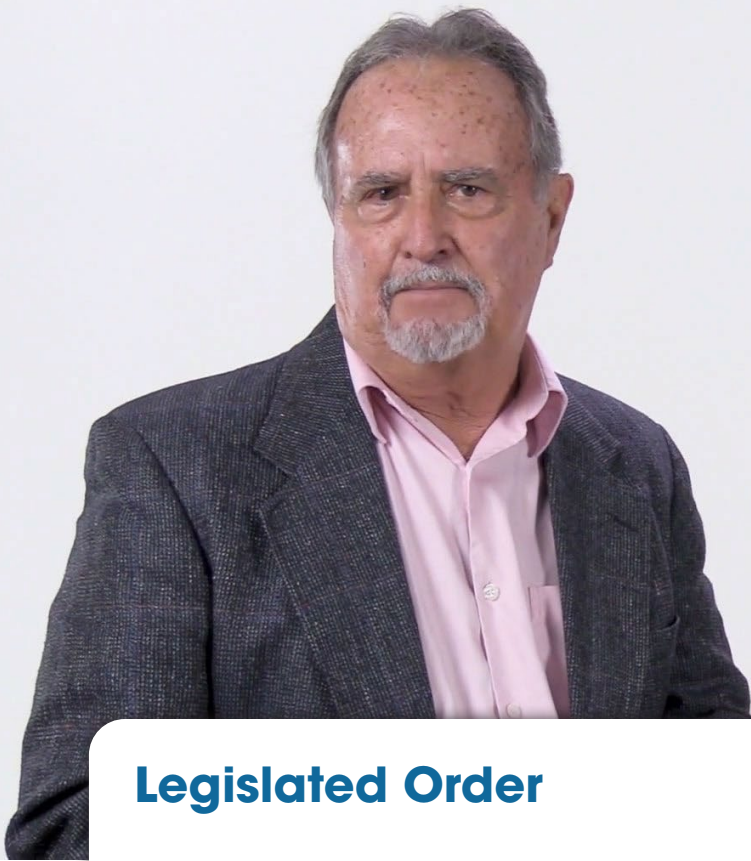
The broker's agency can also be created by an oral agreement or conduct of the client with the broker or other individuals. However, fee arrangements are unenforceable if no written agreement exists.



QUIZ

1. The primary duties owed to a client in a real estate transaction are collectively known as:
 - a. general duties.
 - b. fiduciary duties.
 - c. limited duties.

2. A written employment agreement is necessary for:
 - a. the broker to have an enforceable fee agreement.
 - b. a valid agency to be created.
 - c. Both a. and b.



Agency Law Disclosure

AGENCY LAW DISCLOSURE			
Disclosure Regarding Real Estate Agency Relationships For Negotiating the Sale or Exchange of Real Estate			
Prepared by: Agent		Phone	
Broker		Email	

NOTE: This form is used by agents as an attachment when preparing a listing agreement, purchase agreement or a counteroffer on the sale or exchange of residential property, commercial property, raw land or mobilehome(s). To comply with agency disclosure law controlling the conduct of real estate licensees when in agency relationships. (Calif. Civil Code §§2079 et seq.)

DATE: _____, 20____ at _____, California.

TO THE SELLER AND THE BUYER:

- FACTS:** When you enter into a discussion with a real estate agent regarding a real estate transaction, you should first understand what type of agency relationship or representation you wish to have with the agent in the transaction.
- SELLER'S AGENT:** A Seller's Agent under a listing agreement with the Seller acts as the Agent for the Seller only. A Seller's Agent or a Subagent of that Agent has the following affirmative obligations:
 - To the Seller:
 - A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Seller.
 - To the Buyer and the Seller:
 - Diligent exercise of reasonable skill and care in performance of the Agent's duties.
 - A duty of honest and fair dealing and good faith.
 - A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of the parties.
- BUYER'S AGENT:** A Buyer's Agent can, with a Buyer's consent, agree to act as the Agent for the Buyer only. In these situations, the Agent is not the Seller's Agent, even if by agreement the Agent may receive compensation for services rendered, either in full or in part, from the Seller. An Agent acting only for a Buyer has the following affirmative obligations:
 - To the Buyer:
 - A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Buyer.
 - To the Buyer and the Seller:
 - Diligent exercise of reasonable skill and care in performance of the Agent's duties.
 - A duty of honest and fair dealing and good faith.
 - A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of the parties. An Agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above.
- AGENT REPRESENTING BOTH THE SELLER AND THE BUYER:** A Real Estate Agent, either acting directly or through one or more salespersons and broker associates, can legally be the Agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.
 - In a dual agency situation, the Agent has the following affirmative obligations to both the Seller and the Buyer:
 - A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
 - Other duties to the Seller and the Buyer as stated above in their respective sections.
 - In representing both Seller and Buyer, a dual agent may not, without the express permission of the respective party, disclose to the other party confidential information, including, but not limited to, facts relating to either the Buyer's or Seller's financial position, motivations, bargaining position or other personal information that may impact price, including the Seller's willingness to accept a price less than the listing price or the Buyer's willingness to pay a price greater than the price offered.
- SELLER AND BUYER RESPONSIBILITIES:** Either the purchase agreement or a separate document will contain a confirmation of which party is representing you and whether that agent is representing you exclusively in the transaction or acting as a dual agent. Please pay attention to that confirmation to make sure it accurately reflects your understanding of your agent's role.
- Both the Seller and the Buyer in a real estate transaction do not relieve a Seller or a Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately protect your understanding of the transaction. A Real Estate Agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.
- If you are a Buyer, you have the duty to exercise reasonable care to protect yourself, including as to those facts about the property which are known to you or within your diligent attention and observation.
- Both Seller and Buyer in a real estate transaction may receive more than one disclosure form, depending upon the number of Agents assisting in the transaction. The law requires each Agent with whom you have more than a casual relationship to present you with this disclosure form. You should read it carefully each time it is presented to you, considering the relationship between you and the Real Estate Agent in your specific transaction.
- This disclosure form includes the provisions of §§2079.13 to §§2079.24, inclusive, of the Calif. Civil Code set forth on the reverse hereof. Read it carefully.

(Buyer's Broker)	Date	(Buyer's Signature)	Date
(Signature of Salesperson or Broker-Associate, if any)	Date	(Buyer's Signature)	Date
(Seller's Broker)	Date	(Seller's Signature)	Date
(Signature of Salesperson or Broker-Associate, if any)	Date	(Seller's Signature)	Date

Legislated Order

The agency law disclosure

As real estate practice matures in California, rules and regulations need to be created to protect society from harm while allowing transactions to be economically beneficial for all involved. However, when professional misconduct of real estate licensees is mishandled by the brokerage community and related trade groups, legislative and judicial forces are compelled to intervene.

As a result of licensee misconceptions about the duties they owe to members of the public and the public's lack of awareness, the California legislature enacted the **agency disclosure law**. The goal is to better inform the public (and licensees) in an effort to eliminate some of these deficiencies.

The real estate agency disclosure law addresses two separate sets of agency-related matters on real estate transactions:

- an **Agency Law Disclosure**, also known as the **Disclosure Regarding Real Estate Agency Relationships**, setting out the "rules of agency" which control the conduct of real estate licensees when dealing with the public in an agency capacity [See **RPI Forms 305-1 and 550-1**]; and
- an **agency confirmation provision**, contained in documents signed by principals used to negotiate the purchase or leasing of real estate and lease agreements with a term exceeding one year, declaring the agency relationships undertaken by each of the brokers with the participants in the transaction. [See **RPI Form 150**]

agency confirmation provision

A provision in all purchase agreements and counteroffers disclosing the agency of each broker in the transaction.

*Editor's note — Two identical versions of the agency disclosure exist for leasing as part of both the "disclosure" and "property management" series of RPI forms. Either may be used when negotiating a listing, offer/letter of intent (LOI) or agreement for the lease of real estate for a period greater than one year. [See **RPI Forms 305-1 and 550-2**]*

In creating an agency scheme, the California legislature established uniform real estate terminology and brokerage conduct covering **targeted transactions**, as specified later in this section.

This agency law disclosure is presented in a two-page form. The exact wording of its content is dictated by statute. [CC §2079.16] [See **RPI Forms 305, 305-1 and 550-2**]

Targeted by law vs. recommended as best practice

The real estate agency disclosure law previously applied only to one-to-four unit residential sales and leases for greater than one year. It has since been expanded to include more diverse types of property.

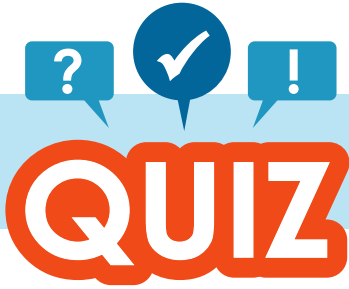
The **Agency Law Disclosure** needs to be presented to all parties when listing, selling, buying, exchanging or leasing for a term greater than one year:

Agency Law Disclosure

Restatement of agency codes and cases which establish the conduct of real estate licensees. It is delivered to all parties in targeted sales and leasing transactions.

- single family residential property;
- multi-unit residential property with more than four dwelling units;
- commercial property;
- vacant land;
- a ground lease coupled with improvements; or
- manufactured homes. [Calif. Civil Code §§2079.13(k), 2079.14]

At its core, the Agency Law Disclosure form is a restatement of pre-existing agency codes and case law on agency relationships in all real estate transactions. [See **RPI Forms 305, 305-1 and 550-2**]



QUIZ

1. Agency Law Disclosure sets out the rules of agency which control the conduct of:
 - a. real estate licensees when acting as a principal.
 - b. real estate licensees when dealing with the public in an agency capacity.
 - c. real estate principals with dealing with licensees.



AGENCY LAW DISCLOSURE

Disclosure Regarding Real Estate Agency Relationships
For Negotiating the Sale or Exchange of Real Estate

Prepared by: Agent _____

Phone _____

2. SELLER'S AGENT: A S

NOTE: This disclosure is required by law for all real estate agents and brokers who are acting as a Seller's Agent or a Buyer's Agent in a real estate transaction. This disclosure is required by law for all real estate agents and brokers who are acting as a Seller's Agent or a Buyer's Agent in a real estate transaction. This disclosure is required by law for all real estate agents and brokers who are acting as a Seller's Agent or a Buyer's Agent in a real estate transaction. [Cal. Civ. Code §§2079 et seq.]

DATE: _____, 20____ at _____, California.

TO THE SELLER AND THE BUYER:

1. **FACTS:** When you enter into a discussion with a real estate agent regarding a real estate transaction, you should from the outset understand what type of agency relationship or representation you wish to have with the agent in the transaction.

2. **SELLER'S AGENT:** A Seller's Agent under a listing agreement with the Seller acts as the Agent for the Seller only. A Seller's Agent or a subagent of that Agent has the following affirmative obligations:

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3. BUYER'S AGENT: A Bu

The Uniform Jargon of Agency Law

Uniform jargon and agency law

The Agency Law Disclosure was created for use by brokers and their agents to educate and familiarize principals with:

- a uniform jargon for real estate transactions; and
- the various agency roles licensees undertake on behalf of their principals and other parties in a real estate transaction.

The Agency Law Disclosure defines and explains the words and phrases commonly used in the real estate industry.

These industry terms are used to express:

- the *agency relationships* of brokers to the parties in the transaction;
- *broker-to-broker* relationships; and
- the *employment relationship* between brokers and their agents.

A **buyer's agent** and **seller's agent** are mentioned but not defined. Legally, the agent in a real estate transaction is the licensed real estate broker. Thus, the word "agent" used in the disclosure is not a reference to the broker's agents but to the broker, who is always by law an agent when using their license to represent a client and earn a fee. Ironically, a broker rarely refers to themselves as an agent — in practice, the term is used to refer to a broker's employed sales agents.

buyer's agent

An agent representing the buyer. Also known as a selling agent.

seller's agent

An agent representing the seller. Also known as a listing agent.

Two sections on the face of the Agency Law Disclosure, entitled “seller’s agent” and “buyer’s agent,” address the duties owed to the seller and buyer in a real estate transaction by these otherwise undefined brokers.

The seller’s broker is correctly noted as being an agent for the seller, and is also known within the trade as a *listing broker* or *listing office*. The buyer’s broker is known as a *buyer’s agent*. However, peculiar to real estate brokerage, the buyer’s broker is also known as the *selling agent*, a term the Agency Law Disclosure used prior to 2019.

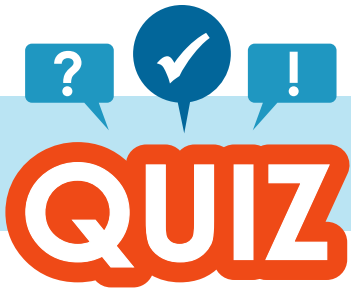
Yet, they are selling nothing; they are locating property and negotiating to buy suitable property on behalf of their buyer client.

The Agency Law Disclosure does not mention, much less define, the broker’s role as an **exclusive agent** for either the buyer or seller. However, the separate agency confirmation provision included in all targeted transactions calls for the broker to make this distinction known to all the parties involved. The mandated provision requires the broker to characterize their conduct with the parties as the agent of the seller or buyer exclusively, or both as a dual agent.

exclusive agent

An agent who is acting exclusively on behalf of only one party in a transaction.

These exclusive characterizations of agency conduct have no relationship to employment under exclusive listings to sell or buy property. The seller’s agent with an exclusive right-to-sell listing understands the prospective buyer may turn out to be one of their buyer clients. This representation of opposing parties makes the broker a non-exclusive **dual agent**.



QUIZ

1. A seller's agent representing the seller is also known as a(n):
 - a. selling agent.
 - b. listing agent.
 - c. dual agent.

2. An agent who is acting exclusively on behalf of only one party in a transaction is known as a(n):
 - a. exclusive agent.
 - b. dual agent.
 - c. transaction agent.

Fiduciary Duties

SELLER'S AGENT

- 2.1 a. A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Seller.

BUYER'S AGENT

- 3.1 a. A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Buyer.

The Participants, their Brokers and the Duties Owed

Broker obligations

The Agency Law Disclosure states the generally accepted principles of law governing the conduct of brokers who are acting as agents solely for a seller or a buyer.

Two categories of **broker obligations** arise in a transaction, including:

- the *special* or *primary agency duties* of an agent which are owed by a broker and their agents to their principal, known as **fiduciary duties**; and
- the *general duties* owed by each broker to all parties in the transaction, requiring them to be honest and avoid deceitful conduct, known as **general duties**.

fiduciary duty

The duty owed by an agent to act in the highest good faith toward the principal and not to obtain any advantage over their principal by the slightest misrepresentation, concealment, duress or undue influence.

In addition to the use requirements for the Agency Law Disclosure form, a separate, long-mandated **agency confirmation provision** is also required on all targeted transactions. [See RPI Form 150]

The *agency confirmation* provision declares the agency relationships each broker may have with the principals in the specific transaction underway. With the agency confirmation included in written negotiations to purchase, this relationship is consented to by all parties when they sign the documents.

The agency confirmation provision discloses each broker's actual agency relationship presently existing with the participants. Further, it memorializes the relationship established by the broker's and their agents' conduct with the principals in a transaction. The agency relationship confirmed is the broker's legal determination of the actual agency created by their prior and present conduct with the parties.

Other agency related conflicts may exist for the broker or agent with other parties or service providers in a transaction, such as a dual agency relationship or conflict of interest. These are set out and disclosed in other forms. [See **RPI Form 117 and 527**]

The Agency Law Disclosure form contains the wording for the agency confirmation provision to be included in targeted transactions. However, the confirmation provision in the Agency Law Disclosure form is not filled out or used in lieu of the agency confirmation provision contained in a document such as a purchase agreement.

The agencies to be confirmed by each broker in the purchase agreement are not known at the time of the initial employment when the Agency Law Disclosure is first presented to the principal. For example, the agency in a potential future sales transaction cannot be determined, much less confirmed, at the time the broker firsts presents their seller with the Agency Law Disclosure form. [CC §2079.17(d)]

When two brokers are involved in a targeted transaction, each broker needs to disclose whether they are acting as the agent for the buyer or the seller. Alternatively, when only one broker is involved, they need to confirm whether they and their agents are acting as the *exclusive agent* for one party or as a dual agent for both the buyer and seller.

Written disclosures tend to eliminate later disputes over agency duties. Agency conflicts discovered when in escrow often become the basis for cancelling a transaction, the payment of a brokerage fee, or both. [**L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corporation** (1991) 1 CA4th 300]

What is targeted?

The Agency Law Disclosure needs to be presented to all parties in **targeted transactions**. However, not all transactions are targeted. For example, targeted transactions do not include arranging the secured interests of lenders and

borrowers under trust deeds or collateral loans.

The sale, exchange or creation of interests in transactions targeted by the agency disclosure law include transfers of:


- fee simple estates in real estate or registered ownerships for mobilehomes;
- life estates;
- existing leaseholds with more than one term remaining, such as ground leases coupled with improvements; and
- multi-unit residential property with more than four dwelling units; and
- leases created for more than one year. [CC §2079.13(m)]

The Agency Law Disclosure needs to be attached to the following documents and signed by all parties in targeted transactions:

- a seller's listing [See **RPI** Form 102];
- a buyer's listing [See **RPI** Form 103];
- a purchase agreement [See **RPI** Form 150 and 159];
- an option to purchase [See **RPI** Form 161 and 161-1]
- an exchange agreement [See **RPI** Form 171];
- a counteroffer, by attachment or by reference, to a purchase agreement containing the disclosure as an attachment [See **RPI** Form 180];
- any letter of intent (LOI) prepared and submitted on behalf of a buyer [See **RPI** Form 185];
- a residential or commercial lease agreement for a term exceeding one year [See **RPI** Form 550 and 552 –552-8]; and
- an offer to lease. [See **RPI** Form 556]

However, there are exceptions. The Agency Law Disclosure is not required on negotiations and agreements concerning:

- property management;
- financing arrangements; and
- month-to-month rental agreements.



QUIZ

1. The Agency Law Disclosure is not required on negotiations and agreements concerning:
 - a. a month-to-month rental agreement.
 - b. a purchase agreement for one-to-four unit residential property.
 - c. a residential or commercial lease agreement for a term exceeding one year.



AGENCY LAW DISCLOSURE

Disclosure Regarding Real Estate Agency Relationships
For Negotiating the Sale or Exchange of Real Estate

Prepared by: Agent _____
Broker _____

Phone _____
Email _____

Seller acknowledges receipt:

- at the listing stage, as an addendum to the listing
- on presentation of a buyer's offer, as an addendum to the purchase agreement

...ing a listing agreement, purchase agreement or a
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- Diligent exercise of reasonable skill and care in performance of t
- A duty of honest and fair dealing and good faith.
- A duty to disclose all facts known to the Agent materially affecti...ability of the property

Agency Rules for a Seller's Listing

Agency rules for a seller's listing

Consider a seller's listing, open or exclusive, employing a broker and their agents to sell a targeted property. Here, the Agency Law Disclosure is required as an addendum to the seller's listing agreement. [CC §2079.14(a)]

Failure of the seller's agent to provide the seller with the Agency Law Disclosure prior to entering into the listing agreement is a violation of disclosure laws. As a consequence of this upfront failure, the broker will lose the fee on a sale if challenged by the seller. The loss of the fee is not avoided by a later disclosure made as an addendum to a purchase agreement or escrow instructions. [**Huijers v. DeMarrais** (1992) 11 CA4th 676]

The **Agency Law Disclosure** is also required when listing and submitting offers on a long-term ground lease on a property coupled with improvements that is being conveyed to a buyer and will be security for any purchase-assist financing. [CC §§2079.13(k), 2079.13(m), 2079.14]

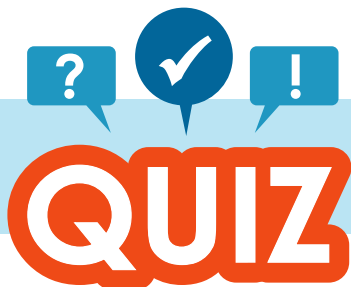
The seller's signature acknowledges receipt of the Agency Law Disclosure at both:

- the listing stage, as an addendum to the listing; and
- on presentation of a buyer's offer, as an addendum to the purchase agreement. [CC §2079.14]

Thus, the Agency Law Disclosure is treated by the seller's agent as a *preliminary*

and compulsory listing event, if the listing broker expects to enforce collection of a brokerage fee on a later sale of the property. The Agency Law Disclosure is signed by the seller and handed back to the broker or their agent before settling down to finalize the listing to which it will be attached.

Further, when the broker or their sales agent fails to hand the seller the Agency Law Disclosure at the listing stage, the listing, and thus the agency, can be cancelled by the seller at any time. When the Agency Law Disclosure is not delivered up front with the listing, the seller may cancel payment of the fee due their broker after the transaction is in escrow and the brokerage fee has been further agreed to.



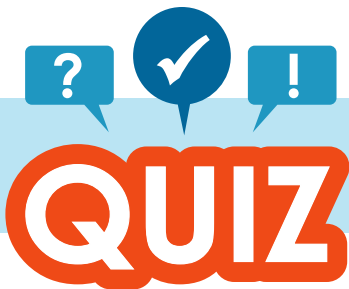
1. The seller's signature acknowledges receipt of the Agency Law Disclosure:
 - a. at the listing stage as an addendum to the listing.
 - b. on presentation of a buyer's offer as an addendum to the purchase agreement.
 - c. Both a. and b.

to the buyer's purchase agreement offer submitted to the seller.

However, the buyer's broker might erroneously agree to let the seller's broker receive the entire fee from the seller. Under this risky arrangement, the seller's broker pays the buyer's broker a share of the fee under their separate *fee-sharing agreement*.



However, when the seller's broker fails to obtain a signed Agency Law Disclosure as an addendum to the listing, the seller may legally avoid paying their broker their fee. Thus, when the seller has not agreed to directly pay the buyer's broker, a risk for the buyer's broker is created. If the seller refuses to pay their broker the entire fee for lack of disclosure, the buyer's broker is left without a fee as agreed from the seller's broker.

For the buyer's broker to protect their fee, the seller needs to agree in the body of the purchase agreement that the seller will pay both brokers themselves.



1. The buyer's agent provides the Agency Law Disclosure form to the buyer:
 - a. prior to their signing any writing that initiates negotiations contemplating a sale.
 - b. after signing any writing that initiates negotiations contemplating a sale.
 - c. anytime as an addendum prior the close of escrow.

Purchase Agreement

Seller's Broker: _____ Broker's DRE #: _____  <input type="checkbox"/> Seller <input type="checkbox"/> both Buyer and Seller (dual agent)	Buyer's Broker: _____ Broker's DRE #: _____ is the broker for: <input type="checkbox"/> Buyer  <input type="checkbox"/> both Buyer and Seller (dual agent)
Seller's Agent: _____ Agent's DRE #: _____ is <input type="checkbox"/> Seller's agent (salesperson or broker-associate) <input type="checkbox"/> both Buyer's and Seller's agent (dual agent)	Buyer's Agent: _____ Agent's DRE #: _____ is <input type="checkbox"/> Buyer's agent (salesperson or broker-associate) <input type="checkbox"/> both Buyer's and Seller's agent (dual agent)
Signature: _____ Address: _____ Phone: _____ Cell: _____ Email: _____	Signature: _____ Address: _____ Phone: _____ Cell: _____ Email: _____
I agree to the terms stated above. <input type="checkbox"/> See attached Signature Page Addendum. [RPI Form 251] Date: _____, 20____ Buyer: _____	I agree to the terms stated above. <input type="checkbox"/> See attached Signature Page Addendum. [RPI Form 251] Date: _____, 20____ Seller: _____

Agency Confirmation Provision

150]

Mandated for purchase agreements

The agency relationship of brokers and their agents to their principals is required to be disclosed to all parties in *targeted transactions*. This includes the sale, exchange or long-term lease of a one-to-four unit residential property, commercial property or mobilehome. [Calif. Civil Code §2079.17(d)]

This relationship is disclosed in the **agency confirmation provision** located in all written negotiations to purchase or lease, and lease agreements. [CC §2079.17]

agency confirmation provision

A provision in all purchase agreements and counteroffers disclosing the agency of each broker in the transaction.

The *agency confirmation provision* states the existence or nonexistence of each broker's *fiduciary agency* with the various parties to the transaction. Each broker identifies the party they are acting on behalf of as their agent in the transaction. Thus, one broker does not state the agency relationship of any other broker involved in the transaction. For example, the buyer's broker does not include the seller's broker's agency in the agency confirmation and broker identification provisions in the purchase agreement form. [CC §2079.17(a); see **RPI Form 150**]

Further, an *Agency Law Disclosure* is provided each time any broker prepares a purchase agreement. The separate disclosure confirms the broker's specific agency in the transaction, and is attached as a referenced addendum.

The Agency Law Disclosure is an explanation of the duties owed to each party in a transaction by the broker and agents involved. [CC §2079.17(d)]

The Agency Law Disclosure is signed by the buyer, then signed by the seller on an acceptance of the offer or submission of a counteroffer.

Editor's note — This is discussed primarily in the context of an agent representing a buyer or seller. However, the same rules of conduct apply for an agent of a tenant or landlord.

Statutory jargon

The contents of the agency confirmation provision require the broker and their agents to first understand the statutory definitions of:

- agent;
- seller's agent, also referred to as a **listing agent**;
- buyer's agent, also referred to as a **selling agent**;
- subagent; and
- dual agent.

The statutory definitions of these agency terms and their meanings are oftentimes different from the jargon used among brokers and agents in the multiple listing service (MLS) environment.

For example, by statutory definition, an agent retained by a client is always a broker. This broker is usually represented through the efforts of licensed sales agents employed by the broker. In the jargon of the real estate industry, a sales agent employed by the broker is always called an "agent." In practice, a licensed broker never refers to themselves or other brokers as agents.

By statute, the agent employed by a broker is defined as an **associate licensee** — an *agent of the agent*, not an agent of the client. [CC §2079.13(a), 2079.13(b)]

associate licensee

A sales agent employed by a broker.

Only the broker can be an agent of a client. Sales agents are not permitted to have clients. Sales agents are always employees of the *client's agent* — the broker.

However, for income tax purposes, agents may be classified in employment contracts with their broker as independent contractors. [Calif. Business and Professions Code §10132] [See **RPI** Form 506]

Use of the agency confirmation provision

Both the agency confirmation provision and the separate Agency Law Disclosure are required to be part of a purchase agreement on all offers and acceptances negotiated by brokers on targeted transactions.


In practice, the buyer's agent is the broker who prepares and presents a purchase agreement to the buyer for their signature.

Thus, the buyer's broker or their agent will:

- attach the Agency Law Disclosure as an addendum to the purchase agreement;
- fill out the buyer's agent's agency confirmation provision in the purchase agreement; and
- obtain the buyer's signature on the agency law disclosure and the purchase agreement.

Before submitting the buyer's purchase agreement to the seller, the seller's broker confirms their agency with the seller. The seller's broker does so by filling out the seller's broker confirmation, noting the agency relationship established by their conduct with the seller.

Consider a seller's **counteroffer** which incorporates all the provisions of the buyer's offer, as most do. Here, the seller has signed a writing which includes by reference the confirmation of the broker's agency. All the seller needs to sign is the counteroffer and the Agency Law Disclosure.



QUIZ

1. The agency confirmation provision states the existence or nonexistence of each broker's _____ with the various parties to the transaction.
 - a. general agency.
 - b. fiduciary agency
 - c. subagency status



Dual Agency as an Authorized Practice

Simultaneous representation

A **dual agent** is a broker who simultaneously represents the best interest of *opposing parties* in a transaction, e.g., both the buyer and the seller. [Calif. Civil Code §2079.13(e); see **RPI** Form 117]

dual agency

The agency relationship that results when a broker represents both the buyer and the seller in a real estate transaction.

Dual agency has always been proper brokerage practice. It is a situation that arises naturally in the course of representing buyers and sellers. However, the existence of a dual agency needs to be promptly disclosed to each client. [CC §2079.17]

A broker who fails to promptly disclose their dual agency at the moment it arises is subject to:

- the loss of their brokerage fee;
- liability for their principals' money losses; and
- disciplinary action by the California Department of Real Estate (DRE). [Calif. Business and Professions Code §10176(d)]

For example, a broker locates property sought by a buyer the broker has been working with. On determining the property is one the buyer is interested in purchasing, the broker solicits and receives a written listing agreement from the owner selling the property. The broker does not disclose their present agency relationship with the buyer to the seller. The buyer makes an offer to purchase the property which is accepted by the seller. Under the fee provision in the buyer's offer, the seller agrees to pay the broker a fee.

Before closing, the seller discovers the broker's working relationship with the buyer to locate property, and the seller cancels the escrow instructions. The broker demands payment of their fee for locating the buyer.

Can the broker recover their fee?

No! The broker failed to disclose their dual agency to the seller when it arose, i.e., at the time the broker entered into the listing with the seller. [**L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corporation** (1991) 1 CA4th 300]

Dual agency and conflict of interest

A **conflict of interest** exists for a broker when:

- the broker has a positive or negative *bias* toward the opposing party in a transaction or a person indirectly involved in the client's transaction; and
- that *bias* may compromise the broker's ability to freely recommend action or provide guidance to the party they agreed to represent.

conflict of interest

When a broker or agent has a positive or negative bias toward a party in a transaction which is incompatible with the duties owed to their client.

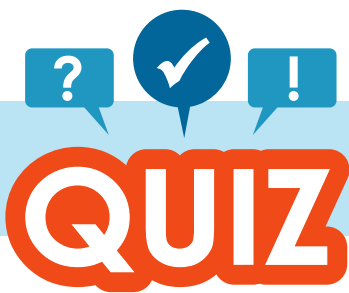
Viewed another way, a *conflict of interest* arises when:

- a broker or their agent, acting on behalf of a client, has a competing professional or personal bias; and
- the bias hinders the broker or agent's ability to unreservedly fulfill the fiduciary duties they have undertaken to advise and act on behalf of the client.

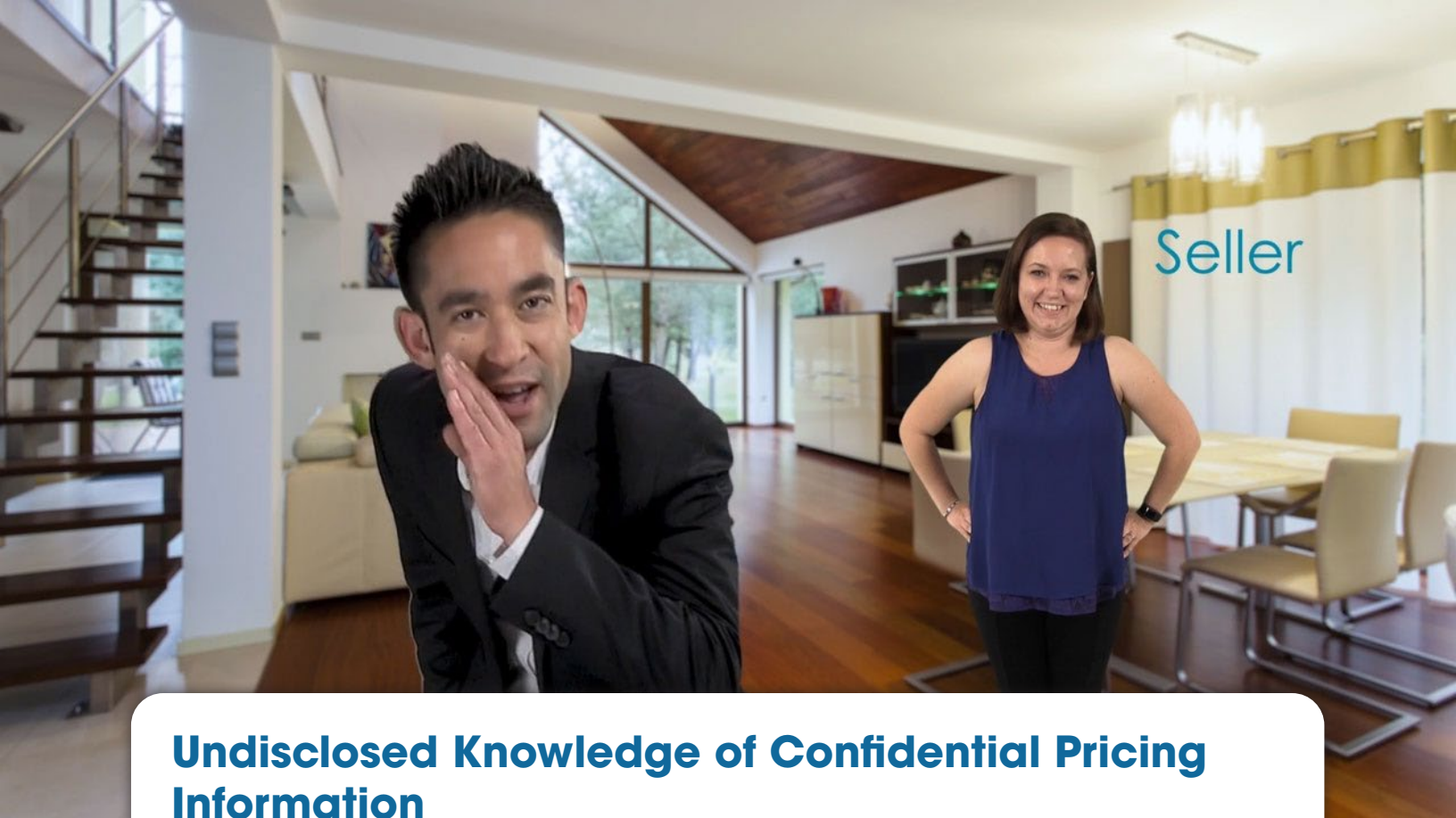
The *conflict of interest* which exists when acting as a dual agent is handled by timely disclosure to all parties. Disclosure is made prior to providing a buyer with information on a property listed with the broker, or taking a listing from a seller when the broker already represents a buyer who will make an offer. [See **RPI Form 527**]

Disclosure of a conflict, such as a dual agency situation, allows the principals to take the disclosed bias into consideration in further discussion with the broker and in negotiations with the opposing party.

The disclosure and consent to the dual agency does not neutralize the bias disclosed. However, it does neutralize the element of deceit which, if left undisclosed, is a breach of the broker's fiduciary duty.



1. The agency relationship that results when a broker represents both the buyer and seller in a real estate transaction is known as a:
 - a. secret agency.
 - b. dual agency.
 - c. Either a. or b.



Undisclosed Knowledge of Confidential Pricing Information

Both clients are entitled to advice

When a dual agency is established in a one-to-four unit residential sales transaction, and both parties are represented by the same broker, the broker may not pass on **confidential pricing** information to the opposing parties. For example, when the broker is a dual agent, the broker and their agents may not tell the seller the price the buyer is willing to pay, or tell the buyer the price the seller is willing to accept.

Confidential pricing information needs to remain the undisclosed knowledge of the dual agent, unless authorized to release the information in a writing signed by the principal in question. [CC §2079.21]

The decision by the broker not to release pricing information needs to be made and maintained from the moment the dual agency arises, the same moment the dual agency is disclosed.

The dual agency conflict typically arises when the buyer is an existing client who has received property information from the broker and is now exposed to or expresses an interest in property listed by the broker. This conflict of dual agency occurs before the purchase agreement is prepared, including its agency confirmation provision.

Dual agency and diminished benefits

A broker owes their client the duty to pursue the *best business advantage* legally and ethically obtainable. However, by nature, the dual agent is prevented from actively achieving this advantage for either client. The dual agent cannot take sides with one or the other during negotiations. Here, a natural inability exists to negotiate the highest and best price for the seller, while also negotiating the lowest and best price for the buyer.

Generally, clients of a dual agent do not receive the full range of benefits available from an exclusive agent. This holds true even when different agents employed by the same broker each work with different parties to the same transaction.

Remember: the *legal agent* for a buyer or seller in a transaction is the broker who employs the agents involved handling negotiations. It is not the broker's agents who are under contract with the clients, but their employing broker.

In-house transactions which involve the broker as a dual agent make it particularly difficult for the broker to **oversee and supervise** dual agency negotiations.

Typically, one agent employed by the broker enters into an exclusive sales listing with a seller. At the same time, another agent in the broker's employment works separately with a buyer to locate qualifying properties listed with other brokers.

The broker only becomes a dual agent if the buyer decides to buy an in-house listing after reviewing other brokers' listings. The buyer's exposure to properties beyond those listed with the broker creates an agency relationship between the buyer's agent and the buyer. This in turn creates a dual agency situation for the broker when the buyer later purchases an in-house listing. Here, the agent of the seller and the agent of the buyer are employed by the same broker, who is now a legal agent of both the seller and buyer concurrently.

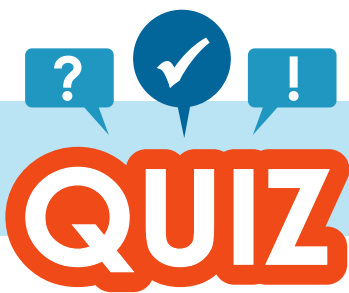
However, there is an improper tendency in transactions involving only one broker and two of their agents to automatically designate the broker as a dual agent. In this instance, the buyer may be a party to whom only *general duties* regarding property disclosures are owed by the broker and their agents. Thus, no specific agency duties are owed the buyer and a dual agency does not arise.

For example, consider a buyer who simply responds to the broker's "For Sale" sign, open house or marketing ads. Without being shown unlisted properties or properties listed with other brokers, the buyer directly makes an offer on a property listed "in-house" with the same broker.

The buyer's inquiry and review of properties is limited to properties listed with the broker. Further, the agent who merely receives the buyer's offer does not negotiate on behalf of the buyer or engage in other advisory conduct that then

imposes an agency duty. Thus, the resulting sales transaction is on a property listed with the broker to a buyer who has only been shown properties listed with the broker, conduct that does not create an agency relationship with the buyer. [Price v. Eisan (1961) 194 CA2d 363]

However, there remains, as always, the listing broker's *general nonfiduciary duty* owed to all other parties in the transaction who are not the broker's clients, including the non-client buyer.



1. When a dual agency is established in a one-to-four unit residential sales transaction and both parties are represented by the same broker, the broker may not:
 - a. encourage the seller to hire a home inspector.
 - b. discuss general financing options to the buyer.
 - c. pass on confidential pricing information to the opposing parties.



Subagency

Agency and fee sharing concepts

The *agency relationship* of the buyer's broker is determined by the conduct of the brokers and their agents, not by the seller's payment of a broker fee to the broker. Nor is it determined by splitting the fee received by the seller's broker.

Thus, neither a **subagency** duty owed the seller, nor a *dual agency* relationship with the buyer and seller, is imposed on the buyer's broker simply because the seller pays the buyer's broker a fee. This fee-agency rule applies whether the seller pays the fee directly to the buyer's broker, or indirectly when the seller's broker initially receives the entire fee. [Calif. Civil Code §2079.19]

subagent

An individual who has been delegated agency duties by the primary agent of the client, not the client themselves.

Brokers and agents working for buyers to locate suitable property are not considered agents of the seller simply because they show their buyers properties listed with other brokers. Buyer's brokers do not typically conduct themselves as subagents of the seller or as dual agents representing both seller and buyer.

Subagent vs. fee-sharing buyer's broker

A seller's **listing agreement** authorizes the listing broker to cooperate with other brokers. Thus, the seller's broker may share property information with other brokers and share any brokerage fee due from the seller. [See **RPI Form 102 §4.2**]

Listing agreements do not authorize the seller's broker to delegate to other brokers the authority to also act on behalf of the seller to **locate buyers** and obtain offers to purchase as the seller's agent.

When another broker acts on behalf of a seller at the request of the seller's broker, a subagency with the seller has been established by the brokers. Further, the broker acting as the subagent is not employed by the seller's brokers as a *broker-associate*.

However, a provision in a listing agreement may authorize the seller's broker to create a subagency between their seller and another broker. With authority, the seller's broker, acting on behalf of the seller, may employ another brokerage office as a subagent to also act on behalf of the seller to market the property.

Subagency: MLS membership myth

The membership of a buyer's broker in a **multiple listing service (MLS)** is not conduct that creates a dual agency or subagency relationship with any seller whose property is listed for sale with another broker who is a member of the MLS.

multiple listing service (MLS)

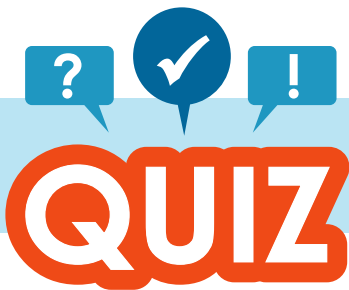
An association of real estate agents pooling and publishing the availability of their listing properties.

Agency, whatever the type, is created either by *contract* or by the *conduct of a broker* when interacting with a buyer or seller. Agency is not established by entering into trade memberships or by receipt of a fee paid by the seller. [CC §2307]

Subagency duties differ greatly from those misleading subagency concepts often generated at the MLS level. The claimed "MLS subagency" arose out of erroneous notions held about the nature of *cooperation* between brokers in fee-sharing arrangements.

The focus within the MLS for determining agency relationships in the past was improperly placed on the relationship between the MLS brokers. The analysis overlooked the relationship each broker had with their client in a sales transaction.

For a broker to become a subagent appointed by the seller's broker, the broker needs to be in contact with the buyer but conduct themselves solely as the seller's representative throughout all negotiations with the buyer.



QUIZ

1. An individual who has been delegated agency duties by the primary agent of the client, not the client themselves, is referred to as a(n):
 - a. dual agent.
 - b. free agent.
 - c. subagent.

buyer's
agent



buyer



When an Opinion Becomes a Guarantee

Representing future events to buyers

Occasionally, a buyer will ask the seller's agent or their own agent what they "believe, contemplate, anticipate or foresee" will occur in the future regarding ownership of a particular property.

An honest response to such a question is naturally limited to the agent's knowledge and expertise on the subject. The opinion given in response will always be **speculation**, based on the observations, knowledge and beliefs of the agent about the likelihood an event or condition will occur in the future. Thus, statements by the buyer's agent will be either:

- couched in words such as "anticipation," "estimation," "prediction" or "projection," denoting their statement is an **opinion** about an uncertain future event; or

opinion

A statement by an agent concerning an event or condition which has not yet occurred based on readily available facts.

- worded as an *assurance* the events and conditions, as presented, will occur, a response reaching the level of a **guarantee**.

The difference between the wording used by an agent to express an opinion or a guarantee exposes the agent to liability when:

- the buyer acts in reliance on the information by making an offer or eliminating a contingency to acquire property; and
- the event or condition fails to occur.

An opinion is a statement by a broker or their agent concerning an event or condition which has not yet occurred. To be classified as an opinion, the statement developed by the agent needs to be based on readily available facts and their knowledge on the subject. However, it is the nature of an opinion that the event or conditions speculated to come about may not actually occur.

In an opinion, the event or condition expressed is not a factual representation. The event or condition expressed has not occurred and does not exist at the time the opinion is given.

Alternatively, a **fact** is an existing condition, presently known or knowable by the agent, due to the ready availability of data or information. Facts are the subject of disclosure rules, not the rules of opinion. However, “guesstimates” and wishful assumptions are not opinion.

fact

An existing condition which is presently known or readily knowable by the agent.

Special circumstances may impose liability

An *opinion* is a belief that is honestly held. It is based on a reasonable, although sometimes faulty, analysis by the agent giving the opinion of property information known or readily available. The opinion does not by itself create any liability if the event does not occur.

However, several **special circumstances** may surround an agent's giving of an opinion which creates an environment raising their statement to the status of a *misrepresentation*.

If *special circumstances* exist, the broker and their agent are *exposed to liability* for the losses caused by the failure of the predicted event, activity or condition to occur.

Special circumstances which may cause a failed prediction to be an actionable misrepresentation include:

- an opinion given by an agent to a person they owe a fiduciary duty, such

as between the seller's agent and the seller or the buyer's agent and the buyer [**Ford v. Cournale** (1973) 36 CA3d 172];

- an opinion given to a buyer by a seller's agent who holds themselves out as **specially qualified** or possessing expertise about the subject matter of the transaction [**Pacesetter Homes, Inc. v. Brodtkin** (1970) 5 CA3d 206];
- an opinion given by a seller's agent or seller who has superior knowledge on the subject matter, implying they have inside information not available to the buyer [**Borba v. Thomas** (1977) 70 CA3d 144]; or
- an opinion given to a buyer by a seller's agent who could not honestly hold or reasonably believe the truth of their opinion due to facts known or readily available to them. [**Cooper v. Jevne** (1976) 56 CA3d 860]

An opinion based on facts and conditional opinions

Consider a prospective buyer interested in acquiring a lot within a subdivision and constructing a home on it.

The subdivider's agent, based on subdivision maps and discussions with the subdivider, advises the buyer all the lots are going to be the same size and subject to the same use restrictions. Further, all homes built on the lots are to be worth at least \$400,000.

The buyer purchases the lot and builds their home in accordance with the use restrictions.

Due to an economic downturn at the end of the current business cycle, the subdivider resubdivides the remaining unsold lots and removes the use restrictions. The resubdividing is intended to increase the marketability of the unsold lots in the tract.

The buyer now seeks to rescind the purchase and recover their entire investment, claiming the subdivider's agent made false representations about the subdivision on which the buyer relied.

The subdivider's agent claims they honestly believed their representations that the subdivider will not alter the lots remaining to be sold.

Here, the agent's representations about the lot size were made truthfully. There was no intent to deceive the buyer. Both the agent and the subdivider had a reasonable basis for believing changes were

not necessary at the time of the purchase. However, a later shift in the economy warranted the changes as necessary to prevent the tract from deteriorating in its marketability.

The seller's agent's statements about the future were honest at the time they were made. Thus, their statements qualify as an expression of their opinion.

Further, the buyer did not require the deed from the seller to include a grant of the promised rights that all the lots will be the same size with the same restrictions on minimum value. Thus, the buyer did not take proper action in reliance on the seller's agent's opinion when they agreed to purchase the property. [**Meehan v. Huntington Land & Improvement Co.** (1940) 39 CA2d 349]

Conditional opinions

Consider a developer of a residential duplex subdivision who provides their seller's agent with a schedule of **projected rents**. The agent is instructed to inform prospective buyers these rents are estimates of the amounts obtainable from the duplexes should they buy one.

The developer has not developed properties in the area prior to this project. Also, they have no actual knowledge of the rents a comparable duplex might obtain in the area.

A buyer with minimal investment property experience contacts the agent asking for more information.

The buyer is advised by the agent that "if you receive the rents we contemplate, it will be a good investment."

The buyer purchases a duplex, but is unable to locate tenants willing to pay the rental amounts represented in the agent's opinion. Ultimately, the buyer loses the property to foreclosure.

The buyer makes a demand on the agent for the loss of their invested funds. The buyer claims the agent's statements about the property's future rental income were misrepresentations since the buyer relied on their *superior knowledge* about rental conditions in the area when purchasing the duplex.

The agent claims the statement was a mere opinion since it conditioned the investor's success on collecting the represented rent amounts.

Here, the agent's statement was only an estimate or opinion held about future anticipated rental income. As no operating history existed to draw on when making the projections, the agent's opinion was based on all *readily available information*.

Further, the developer's lack of prior rental experience in the area or knowledge of rents actually attainable by the duplexes made the statement an opinion. Thus, the buyer may not rely on the rent projections given by the adversarial seller's agent as a fact which might reasonably motivate their decision to buy. [Pacesetter Homes, Inc., *supra*]

Conclusions drawn from opinions

An opinion given by a seller's agent predicting the future occurrence of an event does not impose liability on the seller's agent for erroneous conclusions if the buyer is aware of the relevant facts on which the agent's opinion is based.

A buyer who has *knowledge of and equal access to the same information* relied on by the seller's agent cannot later claim they acted in reliance on the seller's agent's opinion. This is especially true when the buyer has sufficient time to conduct their own independent investigation to ascertain the accuracy of the agent's opinion.

Thus, the buyer cannot ignore their own knowledge of the same facts used by the seller's agent to develop an opinion, and then claim they relied on the seller's agent's opinion as an assurance the prediction will occur.

Consider a leasing agent acting on behalf of a prospective commercial tenant in percentage rent lease negotiations. The commercial landlord is experienced and has not retained the services of a real estate agent.

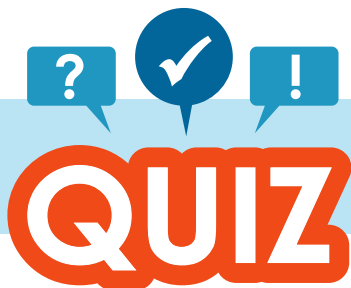
The leasing agent tells the landlord that "*in my opinion*" the tenant's annual gross sales receipts will be in excess of \$5,000,000. A lease agreement is entered into. The lease rent is a base monthly amount plus a percentage of annual gross sales receipts over \$5,000,000. The landlord pays the leasing agent's fee.

A dispute erupts between the landlord and the tenant. The landlord wants to recover the fee paid to the tenant's agent, claiming the agent represented the potential gross sales receipts as exceeding \$5,000,000, an amount much higher than the sales the tenant might ever experience during the leasing period.

Here, the tenant's agent prefaced their statements with the words "in my opinion." Also, a landlord cannot reasonably rely on the representation of future gross sales as a condition which will actually occur.

Thus, the landlord should have known the gross receipts prediction was just an estimate honestly made by the agent who represented the tenant. They cannot treat the estimates of the adversarial agent as fact.

Further, the landlord had ample time and the means to make their own inquiries and analyze their findings. Since the landlord was not represented by an agent, they needed to conduct their own due diligence investigation if they intended to eliminate the uncertainties of estimates made on behalf of the tenant by the tenant's agent. [**Foreman & Clark Corporation v. Fallon** (1971) 3 C3d 875]



1. Statements couched in words such as "anticipation," "estimation," "prediction" or "projection," denote the statement is a(n) _____ about an uncertain future event.
 - a. assurance
 - b. guarantee
 - c. opinion
2. Statements worded as an assurance that events and conditions will occur as presented reach the level of a(n):
 - a. guarantee.
 - b. prediction.
 - c. projection.



Opinions of the Buyer's Broker and Agent

Special fiduciary duty owed

A seller's broker and seller's agent have only a *general non-agency duty* to deal honestly and in good faith with a prospective buyer. As for a buyer, the seller's agent's opinions are those of an adversary.

Thus, a seller's agent's opinion cannot be reasonably relied upon by a prospective buyer as having a high probability of occurring, unless **special circumstances** exist.

In contrast, a buyer's broker and their agent have a special fiduciary duty to handle a buyer with the same level of care and protection a trustee exercises on behalf of their beneficiary.

This special **fiduciary duty** raises an opinion given to a buyer by the buyer's broker or their agent to a higher level of reliability than had the same opinion been expressed by a seller's agent acting solely on behalf of a seller. As a fiduciary, the opinion of the buyer's agent becomes an assurance the condition or event will occur, unless the buyer's agent conditionalizes their opinion.

fiduciary duty

The duty owed by an agent to act in the highest good faith toward the principal and not to obtain any advantage over their principal by the slightest misrepresentation, concealment, duress or undue influence.

For the buyer's agent to give their opinion to their buyer and keep it from rising to an *actionable assurance* when the predicted event fails to occur, the opinion will include a recommendation to investigate and expertly analyze relevant information to confirm the agent's opinion. Further, to mitigate risks, a *further-approval contingency* provision covering the condition or event that is the subject of the opinion needs to be included in any offer made by the buyer. [**Borba v. Thomas** (1977) 70 CA3d 144]

Assurance of suitability without a contingency

Consider a buyer's agent who represents a prospective buyer looking for rental income property.

The buyer's agent is aware the buyer's primary purpose for acquiring property is to receive spendable income from the investment.

The agent locates a multi-unit apartment complex. The agent assures the buyer:

- monthly vacancies will only be three or four units since the apartment complex is the only complex in the area which allows children and pets;
- the complex will require very little expense to maintain; and
- the buyer will receive the amount of spendable income sought from the investment.

Even though the seller's books and records are **readily available** for inspection on request, the buyer's agent does not verify the accuracy of the seller's projected income and expense statements, or confirm the maintenance costs. The agent fills out and hands their buyer an **Annual Property Operating Data (APOD)** sheet restating the representations already made to the buyer about the agent's projections of future income. [See **RPI Form 352**]

The buyer, in reliance on their agent's predictions about the property's future operations, enters into a purchase agreement with the seller. No contingency provisions are included to confirm the integrity of the improvements or to investigate the income and expenses experienced by the seller.

After the buyer acquires the property, the buyer encounters higher maintenance costs and significantly lower rental income than

represented by their agent. Also, the property has a high turnover rate and a large number of tenants are constantly delinquent in the payment of rent.

The buyer does not receive the sought-after spendable income projected by their agent. Soon, the property is lost to foreclosure.

The buyer makes a demand on their agent for their lost investment, claiming the agent misrepresented the operations of the property. The buyer's agent rejects the demand, claiming their comments on the property's performance were opinions, not guarantees.

Here, the buyer had the right to rely on their agent's unconditional statements of facts about the property. The buyer was further correct to treat the representations as true without concern for their verification as a fiduciary relationship existed between the buyer and their agent. Thus, the buyer's agent's predictions were **misrepresentations** since they did not come to be, and the basis for the buyer's recovery of the value of the lost investment. [**Ford v. Cournale** (1973) 36 CA3d 172]

Expertise of the broker or agent

Agents often hold themselves out as experts with **superior knowledge** about a particular type of transaction, such as high-end residential properties, apartment projects, industrial buildings or land. Agents often claim special knowledge for reason of an alphabet-soup-type certification attached to their name. Prospective buyers, aware of a seller's agent's specialty, often ask the agent for their opinion about some anticipated future use or operation of the property.

Due to an agent's experience, special training and education, seller's agents may find their opinion is given extra weight by a buyer. An agent's **special qualifications** suddenly become reasonable justification for the buyer to rely on their opinion as an **assurance** the predicted event, activity or condition will be experienced as stated. Thus, a risk averse agent will express their opinion as only a *belief or thought*.

Consider a developer who controls a homeowners' association (HOA) which governs a countryside subdivision of homes.

The developer and seller's agent hold themselves out as HOA experts when questions about HOA operations and the Covenants, Conditions and Restrictions (CC&Rs) are received from prospective buyers.

The seller's agent assures prospective buyers that the subdivision's CC&Rs protect the view from each lot, and that the architectural committee will not approve fences interfering with the view. The recorded CC&Rs contain provisions confirming the agent's statements.

However, an architectural committee is never setup. Further, all proposals for fences are reviewed and approved by the developer themselves. This fact is known to the agent, but not prospective buyers.

A prospective buyer pays a premium for a home with a view.

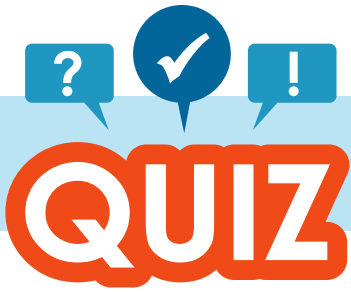
After acquiring the property, a neighbor erects a fence as approved by the developer. The fence blocks the buyer's view. The buyer makes a demand on the agent for their money losses brought about by a loss in value suffered by their property since the agent's statement on view rights failed to come true.

The seller's agent claims their statement about the view rights was their opinion which cannot be reasonably relied on by the buyer when making a decision to purchase the property.

In this instance, the agent held himself out as an expert on HOA and CC&Rs enforcement. The agent then stated the CC&Rs and architectural committee will maintain the view provided by the development. Further, the seller's agent knew the architectural committee had not been created and that the developer had full control.

Thus, the buyer may pursue the agent to recover their lost value, i.e., the view, due to the agent's false opinion about the HOA's ability to protect the buyer's view rights in the future, which was a misrepresentation.

When an agent holds themselves out to be *specially qualified* in the subject matter expressed in opinion, it becomes a *positive statement of truth* on which a buyer or seller of lesser knowledge can rely. [**Cohen v. S & S Construction Co.** (1983) 151 CA3d 941]



QUIZ

1. A buyer's broker and their agent have a(n) _____ to handle a buyer with the same level of care and protection a trustee exercises on behalf of their beneficiary.
 - a. limited general duty
 - b. special fiduciary duty
 - c. specialized binary duty

LIABILITY



FACT

Inducing Reliance by Assurances

Inducing reliance by assurances

All agents give opinions to buyers. However, when the opinion is coupled with advice expressing no further need for the buyer or others to investigate and confirm the prediction, the opinion is elevated to the level of a **guarantee**.

guarantee

An assurance that events and conditions will occur as presented by the agent.

The level of assurance equivalent to a *guarantee* also arises when the buyer indicates they are relying on the agent:

- to analyze a qualifying property to determine the property's ability to be used or operated as the buyer has indicated; and
- to advise on whether the property is suitable and will meet the buyer's expectations.

Further, any affirmative activities or statements of any agent designed to suppress the buyer's **inspection** of the property are considered assurances which make the conclusion drawn in the opinion the equivalent of a fact.

Facts not supporting the conclusion

An agent's opinion is to be **honestly held** by the agent if the agent is to avoid liability when the predicted event or condition does not occur.

For an agent to hold an honest belief, the opinion is to be based on a due diligence investigation and knowledge of all readily available facts which have a bearing on the probability of the event or condition occurring.

When facts affecting the conclusion drawn by the agent are known or readily available to the agent, the test of an *honestly held opinion* is whether the agent giving the opinion *should have known better* than to give such an opinion.

An agent who fails to conduct a due diligence investigation to determine the facts before expressing an opinion, which the investigation might have influenced, is liable for their opinion when the event fails to occur. The agent is liable no matter their wording to limit the prediction to a mere speculative opinion.

Without first having the facts on which to base an opinion, the agent's opinion is either an *unfounded guess* or an *unreasonable assumption*.

Consider a seller's agent for a condominium project who advertises "luxury" condos for sale. The agent knows the condos are poorly constructed and the defects are unobservable to someone not knowledgeable in the field of construction.

A buyer contacts the agent for more information.

The agent tells the buyer that the condos are an "outstanding" investment opportunity. Unaware of the defects, the buyer purchases a condo. The buyer soon discovers the condo is in danger of falling down.

Here, the seller's agent and their broker are guilty of both *affirmative* and *negative fraud*.

The agent could not have honestly believed the condo was an "outstanding" investment opportunity in light of their knowledge of the construction defects. Thus, the agent's representation is an **affirmative fraud**, also called an **intentional misrepresentation**.

affirmative fraud

Intentionally and knowingly misrepresenting information to someone.

Also, the significant defects in the "luxury" project were material facts since they adversely affected the present value and desirability of the condos. Accordingly,

the agent is liable for damages caused by their nondisclosure (omission) of the defects which were known to him, an example of **negative fraud**, also called deceit. [**Cooper v. Jevne** (1976) 56 CA3d 860]

negative fraud

Deceitfully withholding or failing to disclose information to someone.

Predicting the conduct of others

The transfer of real estate to a buyer typically involves **third parties** who are not principals or agents in the transaction. Some transactions require approval, consent, administrative review or similar conduct by others regarding some event or condition to occur before or after closing. This causes buyers to be concerned about whether the third party will respond favorably or act timely.

Thus, buyers frequently ask agents what they believe will be the reaction of others.

These third parties include an:

- HOA;
- water authority;
- landlord;
- contractor;
- lender;
- attorney;
- accountant;
- planning agency; or
- redevelopment agency.

Consider agricultural land listed for sale. For a buyer to receive water from the Bureau of Reclamation, the buyer is to first obtain approval of the purchase price from the Bureau.

The seller's agent locates a buyer.

A purchase agreement is drawn up contingent on the Bureau's

approval of the purchase price. The agent estimates the approval process will take 30 to 60 days.

The buyer, concerned with meeting the planting deadline for the season, asks the agent about the probability of the Bureau's approval.

The seller's agent consults with the seller as to whether the transaction will be approved by the Bureau since the seller has dealt with the Bureau over water issues before.

The seller says "he believes" it will be approved.


The agent tells the buyer of the seller's opinion. The buyer waives the Bureau-approval contingency, stating they will get the approval later. Escrow is closed.

The buyer files for Bureau approval. During the approval process period, the property's natural well caves in. The Bureau refuses to approve the transaction and will not provide water.

The buyer seeks to recover their losses from the seller, claiming the seller's prediction of a future event (approval by the Bureau) was a fact they relied on when they purchased the property.

However, nothing suggests the seller or their agent held themselves out to be *specialy qualified* on the subject of Bureau approval. Thus, the seller's erroneous prediction about the approval was not a misrepresentation of fact. Instead, it was an expression of opinion.

The seller's access to facts about the Bureau's approval process was equally available to the buyer. Furthermore, unless a *special prior relationship* exists between the seller and buyer, the buyer is not entitled to rely on the opinion of the seller (or the seller's agent) concerning the future decisions of a public body. [**Borba v. Thomas** (1977) 70 CA3d 144]



QUIZ

1. Any affirmative activities or statements of any agent designed to suppress the buyer's inspection of the property are considered _____ which make the conclusion drawn in the opinion the equivalent of a fact.
 - a. assurances
 - b. predictions
 - c. estimations



last
year

PROJECTION

Estimates as Projections or Forecasts

Nearly every transaction offers agents the opportunity to provide **estimates** for their clients or the other principals involved. Estimates include:

estimate

Prediction of future amounts which have not yet actually occurred.

- approximations;
- predictions;
- pro-forma statements;
- anticipated expenditures; and
- contemplated charges.

Estimates relate to income and/or expenditures, such as exist in:

- seller's net sheets [See **RPI** Form 310];
- buyer's cost sheets [See **RPI** Form 311];
- operating cost sheets for owner-occupied properties;
- APODs on income properties [See **RPI** Form 352];
- mortgage origination or assumption charges;

- lender impounds;
- rent schedules (rolls) [See **RPI** Form 352-1];
- repair costs for clearances; and
- any other like-type predictions of costs or charges.

Estimates by their nature are not facts. The amounts estimated have not yet actually occurred. The amount estimated will become certain only by its *occurrence in the future*. The amount actually experienced may or may not equal the amount estimated.

A document entitled an “estimate” is typically based on the actual amount currently experienced. Thus, estimates are expected to be fairly accurate in amount, not just guesswork. Words used in titles such as “contemplated,” “pro-forma,” “anticipated” or “predicted” indicate something less than an accurate estimate, and provide less basis for a buyer to rely.

Distinguish projection from forecasts

Opinions voiced by agents about an income property's future performance are either **projections** or **forecasts**.

projection

An opinion about an income property's future performance based on its performance during the preceding 12-month period, adjusted for presently known trends.

forecast

Analysis of anticipated changes in circumstances influencing the future income, expenses and use of a property.

A *projection* is prepared by a seller's agent on an income property to represent its annual operations. The data is set out in an APOD sheet handed to prospective buyers to induce them to purchase the property. The data entered on the APOD is a projection based exclusively on the income and expenses actually incurred by the owner/seller of the property during the preceding 12-month period. [See **RPI** Form 352]

The amounts experienced by the seller during the past year are *projected* to occur again over the next year. However these amounts are *adjusted* by the agent for any trends in income and expenses reflected by information currently available or known to the agent.

No estimations, contemplations or use of figures other than those experienced by

the owner are used as a basis to prepare the projection, except for adjustments to reflect changed conditions known (or should be known due to readily available facts).

A *forecast* requires the knowledge and analysis of an anticipated change in circumstances which will influence the future income, expenses and operations of a property. These anticipated changes are distinct from trend factors used for projections. Forecasts anticipate *future changes* in income and expense the preparer of the forecast believes will probably occur under new or developing circumstances.

Changes in circumstances

Changes in circumstances considered in a forecast include:

- new management;
- rent increases up to current market rates;
- elimination of deferred maintenance and replacement of obsolete fixtures/appliances;
- changes in rent control ordinances;
- new construction adding to the supply of competing income properties;
- foreclosures adding properties to an illiquid market;
- commodity market prices (natural gas, water, fuel oil, electricity, etc.);
- local and state government fiscal demands for revenue and services;
- federal monetary policy effects on short- and long-term rates;
- demographics of increasing/decreasing population density in the area immediately surrounding the property;
- traffic count changes anticipated;
- zoning changes reducing, altering or increasing the availability of comparable competitive properties;
- government condemnation, relocation or redevelopment actions;
- changes in the local employment base of employed individuals;

- on-site security measures to prevent crime;
- the age and condition of the major components of the structure;
- local socio-economic trends; and
- municipal improvement programs affecting the location of the property.



1. Opinions voiced by agents about an income property's future performance are:
 - a. projections.
 - b. forecasts.
 - c. Either a. or b.

Agency: Glossary

A

affirmative fraud..... 49

Intentionally and knowingly misrepresenting information to someone.

agency confirmation provision..... 11, 24

A provision in all purchase agreements and counteroffers disclosing the agency of each broker in the transaction.

Agency Law Disclosure..... 11

Restatement of agency codes and cases which establish the conduct of real estate licensees. It is delivered to all parties in targeted sales and leasing transactions.

agent..... 1

One who is authorized to represent another, such as a broker and client, or sales agent and their broker.

associate licensee..... 25

A sales agent employed by a broker.

B

buyer's agent..... 14

An agent representing the buyer. Also known as a selling agent.

C

conflict of interest..... 29

When a broker or agent has a positive or negative bias toward a party in a transaction which is incompatible with the duties owed to their client.

D

Department of Real Estate (DRE)..... 1

A government agency which oversees, regulates, administers and enforces California real estate law as practiced by licensees.

dual agency.....28

The agency relationship that results when a broker represents both the buyer and the seller in a real estate transaction.

E

estimate..... 53

Prediction of future amounts which have not yet actually occurred.

exclusive agent..... 14

An agent who is acting exclusively on behalf of only one party in a transaction.

F

fact 38

An existing condition which is presently known or readily knowable by the agent.

fiduciary duty16, 43

The duty owed by an agent to act in the highest good faith toward the principal and not to obtain any advantage over their principal by the slightest misrepresentation, concealment, duress or undue influence.

forecast 54

Analysis of anticipated changes in circumstances influencing the future income, expenses and use of a property.

G

guarantee 48

An assurance that events and conditions will occur as presented by the agent.

M

multiple listing service (MLS) 35

An association of real estate agents pooling and publishing the availability of their listing properties.

N

negative fraud 50

Deceitfully withholding or failing to disclose information to someone.

O

opinion 37

A statement by an agent concerning an event or condition which has not yet occurred based on readily available facts.

P

principal 2

A person, individual or entity acting as a buyer or seller, and represented by a broker and their agents.

projection 54

An opinion about an income property's future performance based on its performance during the preceding 12-month period, adjusted for presently known trends.

S

seller's agent..... **14**

An agent representing the seller. Also known as a listing agent.

subagent..... **34**

An individual who has been delegated agency duties by the primary agent of the client, not the client themselves.