

Agency Plus Relationships

Introduction

Buying or selling a property is probably one of the most important financial decisions average consumers will make in their lifetime. It is a good idea to take a moment to consider the type of relationship you might be entering into with a REALTOR. The more you know, the more you will be satisfied with the results.

This guide is intended to help you and your REALTOR discuss the information you need to make an informed decision about your relationship.

What Is Agency?

Agency is a relationship established when two parties agree to have one party act on behalf of the other. The example discussed in this guide will be the real estate brokerage acting on behalf of a buyer or a seller.

The agency relationship exists between the Client (buyer or seller) and the Agent (the brokerage, including its broker, associate brokers and associates). Brokerage service agreements, which describe in detail the duties of each party, are the means by which buyers and sellers become fully informed about the prospective relationship with the brokerage and expressly consent to it.

It is important to note that an agency relationship can be created if either party acts in a manner that implies that such a relationship exists. For example, an unintentional agency relationship may be created if the buyer or seller provides confidential information to the REALTOR®, or asks the REALTOR® for advice about a possible purchase or sale. Buyers and sellers should be careful not to form this relationship until they have made a conscious decision to have the brokerage act on their behalf and have consented to the agency relationship in writing.

Agency Duties

The essence of the agency relationship is that the Agent has authority to represent the Client in a real estate transaction. The complex and important nature of a real estate transaction requires the Agent to exercise discretion and judgment when carrying out duties on behalf of the Client, which means that in common law the Agent is also a fiduciary.

Fiduciaries are obligated to protect and promote the interests of their clients as they would their own. Specifically, the Agent has the following fiduciary obligations:

Undivided Loyalty

The Agent must act solely in the best interests of the Client, must always put the interests of the Client above the Agent's own interests and above the interests of other parties. Among other things, this means avoiding conflicts of interest and protecting the Client's negotiating position at all times.

Confidentiality

The Agent has a duty to keep the confidences of the Client. Confidential information includes any information concerning the Client, the property or the transaction that is not required by law to be disclosed, but which, if disclosed, could be used by another party to the disadvantage of the Client. It is important to note that the duty of confidentiality continues even after the agency relationship ends.

Full disclosure

The Agent must inform the Client of all facts known to the Agent that might affect their relationship or influence the Client's decision in a real estate transaction. This includes any conflicts of interest they might have in the course of providing services to the Client.

The Agent should not decide for the Client whether the information is important to the Client, and is therefore obligated to disclose all relevant information. The decision is always the Client's. An exception to full disclosure is confidential information learned in a previous agency relationship.

Confidential information of a previous client will not be disclosed as long as the new client agrees to this in writing. The brokerage agreements produced by the Alberta Real Estate Association contain a standard clause to assist the parties to come to this decision.

Other more general obligations in common law include:**Obedience**

As long as instructions are reasonable and ordinary under the circumstances, the Agent must obey all lawful instructions of the Client. If the Client asks the Agent to do something unlawful, the Agent would be obliged to terminate the relationship and any existing service agreement.

Reasonable Care and Skill

The Agent must exercise reasonable care and skill in performing all assigned duties. The Agent is expected to meet the standard of care that a reasonable and competent person would exercise in a similar situation.

Full Accounting

The Agent must account for all money and property placed in the Agent's hands while acting for the Client.

As licensed professionals, real estate industry members are further bound by statutory obligations that are set out in the Real Estate Act (Ontario) and its Rules. These obligations reinforce the common law duties described above. All told, you are entitled to, and should expect, competent service from your Agent, knowing that the brokerage and its representatives are bound by ethics and the law to be honest in every real estate transaction. This approach is reflected in the standard real estate service agreements produced by OREA.

Please feel free to ask the brokerage representative to show you the agreements appropriate to the transaction you are considering.

The Client, as well, has duties towards the Agent. You have the duty to:

compensate the Agent for the expenses that the Agent incurs as a result of carrying out its responsibilities as requested on your behalf;

pay any agreed-upon remuneration or compensation as outlined in the signed service agreement;

disclose to the Agent matters that could affect a transaction, including material facts that must be passed on to the third party in the real estate transaction.

You should also consider it your responsibility to read carefully all documents and understand what you are signing. If you need specialized advice, seek other professionals such as lawyers, accountants and inspectors.

Types of Agency Relationships

Sole Agency

Sole Agency occurs when one brokerage, its broker, associate brokers and associates (the Seller's Agent) represent the seller in a real estate transaction and another brokerage, its broker, associate brokers and associates (the Buyer's Agent) represent the buyer. Each Agent owes its Client the duties described above.

In addition, depending on whether you are a buyer or a seller, there are specific statutory obligations listed in the brokerage service agreement that will be presented to you if you choose to enter into an agency relationship with the brokerage.

Dual Agency

Dual Agency arises when one brokerage represents both the buyer and seller in a transaction. Dual Agency occurs whether one individual in the brokerage is working for both the buyer and the seller or different representatives from the same brokerage are working for the buyer and the seller. The brokerage, including its broker and all its associate brokers and associates, is the Dual Agent.

Dual Agency makes it difficult for the brokerage to discharge the fiduciary obligations owed to the buyer and the seller respectively, in particular the obligations of::

utmost loyalty to the buyer and to the seller (acting solely in the best interests of the buyer and of the seller; and avoiding conflicts of interests that may arise between the buyer and the seller);

confidentiality of information obtained from the buyer or from the seller; and

full disclosure of all facts that may influence the decisions of the buyer or the seller.

Because the fiduciary obligations must be limited, by law Dual Agency is only permitted with the fully informed and voluntary consent of both the buyer and the seller. Once you have read this guide, you can, if you wish, agree in principle to dual agency representation. However, the Agent must obtain your written consent before an offer is made, at a time when the identity of the other party and circumstances of the transaction are known to you.

The Dual Agent will assist the buyer and the seller with the transaction, but the Dual Agent is limited to providing services that do not require:

exercising discretion or judgment;

giving confidential information or advice; or

advocating on behalf of either party.

Moreover, the limitations mean that the brokerage, including all its representatives cannot disclose:

that the buyer may be prepared to offer a higher price or terms other than those contained in the offer to purchase;

that the seller may be prepared to accept a lower price or terms other than those contained in the Seller Brokerage Agreement;

the motivation of the buyer or the seller wishing to purchase or sell the property; and

personal information relating to the buyer or the seller and other information disclosed at any time in confidence by either party to the Dual Agent.

What will be disclosed, however, are material facts known to the Dual Agent. The Dual Agent will disclose:

to the buyer any material latent defects affecting the property;

to the seller any material facts relevant to the buyer's ability to purchase the property.

Finally, the Dual Agent will fulfill all other obligations to each Client if they do not conflict with the other Client's interests.

Customer Status

A buyer or seller who is not in an agency relationship with a brokerage is a customer. Members of the public at first point of contact with a brokerage representative (e.g., attending an open house, asking about or arranging to view a listed property) are customers. Customers may eventually want to enter into an agency relationship with a brokerage. Until they do they are customers, not clients.

Even at the point of an offer on a property, the buyer or seller might be in a customer status relationship. For example:

If a buyer client wants to negotiate with an owner selling his or her own property, the seller will be a customer.

When an agent is representing a seller with whom the agent has a long-standing relationship (e.g. a developer, a relative), the buyer should be in a customer relationship with the agent. (Such buyers always have the option of choosing another brokerage to represent them, however.)

Customer status may also be required when existing clients are faced with a dual agency transaction and Dual Agency is not an acceptable option.

Customers are entitled to know that the brokerage is not their agent and does not owe any fiduciary duties to them. The brokerage will perform services needed to assist the customer to complete a transaction as long as the services do not require the exercise of discretion or judgment, the giving of confidential advice or advocating on behalf of the customer.

Related Terminology

The terms Seller and Buyer can be replaced by Landlord and Tenant, in which case selling becomes leasing and offer to purchase becomes offer to lease.

The Client is also known as the Principal.

A customer may also be the third party in an agreement.

Sole Agency is also known as Single Agency.

A service agreement is a written contract that establishes the relationship between the parties as to the services to be performed by the brokerage. In Alberta, these contracts are known as the Seller Brokerage Agreement and the Buyer Brokerage Agreement. A brokerage is a real estate office licensed under the Real Estate Act. Reference to the brokerage includes the broker and all its associate brokers and associates.

A REALTOR is a broker, associate broker or associate belonging to the local real estate board, and its provincial and national associations, which enforce a strict REALTOR Code of Ethics and Standards of Business Practice.

We hope this information on Agency Relationships will assist you.