Modern Real Estate Practice in Illinois Ninth Edition

Unit 4: Real Estate Agency
Agency Law

• Agency describes the special relationship between real estate licensees and the people they represent.
• Fiduciary – a relationship of trust between agent and principal.
• Fiduciary Duties
  – Common Law
  – Statutory Law ✓
  – Agency is defined in Article 15 of the Real Estate License Act of 2000 acts
Statutory Definitions

- **Consumer**
  - person or entity seeking or receiving licensed activities
- **Client**
  - person who is represented by a licensee
- **Customer**
  - consumer not represented by a licensee, but for whom the licensee is performing ministerial acts
- **Compensation**
  - valuable consideration given by one person or entity to another in exchange for the performance of some activity or service
Statutory

• Agency
  – a relationship, either express or implied, in which a real estate brokerage or licensee enters into an agreement with a consumer to represent that consumer in a real property transaction

• Brokerage agreement
  – written or oral agreement for brokerage services to be provided to a consumer in return for compensation or the right to receive compensation from another
Statutory Definitions

Ministerial Acts
- acts that a licensee may perform for a consumer that are informative or clerical in nature and do not rise to the level of active representation on behalf of a consumer

Confidential information
- information obtained by a licensee from a client during the term of a brokerage agreement that was made confidential by the written request or instruction of the client, deals with the negotiating position of the client, or is information that could materially harm the negotiating position of the client if disclosed unless the client permits the disclosure, it is required by law, or the information becomes public from a source other than the licensee
Client v. Customer Services

• The client is the principal to whom the agent gives advice and counsel. The agent is entrusted with certain confidential information and has fiduciary responsibilities. The agent is an advocate for the principal, not for the customer.
Client v. Customer Services

• The customer is entitled to factual information and fair and honest dealings as a consumer but does not receive advice and counsel or confidential information about the principal.

• The agent works for the client (principal) and with the customer.
Fiduciary Responsibilities (Common Law)

• Six Duties
  – Care
  – Obedience
  – Loyalty
  – Disclosure
  – Accounting
  – Confidentiality
Fiduciary Responsibilities

• Care
  – agent should know all facts pertinent to the principal’s affairs

• Obedience
  – agent must act in good faith at all times, obeying the principal’s instructions in accordance with the contract
Fiduciary Responsibilities

• Loyalty
  – requires the agent to place the principal’s interests above those of all others
Fiduciary Responsibilities

• Disclosure
  – agent’s duty to keep the principal informed of all facts or information that could affect a transaction. The agent may be held liable for damages for failing to disclose facts that a reasonable person would feel are important in choosing to go forward with a transaction.
Fiduciary Responsibilities

• Accounting
  – Illinois license law requires agents to report the status of all funds or property received, give accurate copies of all documents to all parties, and keep copies on file.
Fiduciary Responsibilities

• Confidentiality
  – agents may not disclose personal and confidential information about their principals, though material facts about a property’s physical condition must always be disclosed

• Material Facts
  – fact that, if known, might reasonably be expected to affect the course of events

• Illinois Residential Property Disclosure form
Fiduciary Responsibilities- Illinois

• Licensees are required to deliver copies of all documents to the people who signed them within 24 hours.
• All funds entrusted to a sponsoring broker must be deposited in a special escrow account by the next business day following the signing of a sale contract or lease.
• **Commingling** such monies with the sponsoring broker’s personal or general business funds is illegal.
• **Conversion** – theft of the earnest money
• Records of escrow account transactions must be retained for five years, during which the records must be kept at the sponsoring broker’s place of business for the first two years.
Opinion v. Fact

• Statements of opinion are permissible only as long as they are offered as opinions and without any intention to deceive.
• Statements of fact must be accurate.
• Exaggeration of a property’s benefits is called puffing. While puffing is legal, licensees must ensure that none of their statements can be interpreted as fraudulent.
Opinion v. Fact

• Fraud is the intentional misrepresentation of a material fact in such a way as to harm or take advantage of another person, including making false statements or intentionally concealing or failing to disclose important facts

• Negligence
  – broker should have known statement about a material fact was false
Fiduciary Responsibilities

• Latent Defects
  – hidden structural defect that would not be discovered by ordinary inspection
  – seller must disclose any that threaten structural soundness or personal safety
Fiduciary Responsibilities

• Stigmatized Properties
  – properties that society has branded undesirable because of events that occurred there (e.g., homicide, illegal drug manufacturing, gang-related activities, tragedies, etc.)
  – because of potential liability to a licensee for inadequate research and disclosure of material facts concerning a property’s condition, licensees should seek competent counsel when dealing with stigmatized property
Fiduciary Responsibilities

• In Illinois
  – Under Article 15 of the Real Estate License Act, “No cause of action shall arise against a licensee for the failure to disclose than an occupant of the property was afflicted with HIV or any other medical condition or that the property was the site of an act of occurrence which had no effect of the physical condition of the property or its environment or the structures located thereon”
Fiduciary Responsibilities

• In Illinois
  – under Article 15 of the Real Estate License Act, “no cause of action shall arise against a licensee for the failure to disclose...fact situations on property that is not the subject of transaction...”
  – listing agents have no legal duty to disclose that a known sex offender resides in a property near a listed home, but skilled buyer’s agents should be watchful of signals of hard-to-identify issues
Creation of Agency

• Express agency – written or oral
  – intention is specific
• Implied agency
  – created by actions
• Compensation
  – The source of compensation does not determine agency in Illinois
Creation of Agency

• In Illinois
  – The Real Estate License Act of 2000 requires all exclusive brokerage agreements to be in writing.
Creation of Agency

• In Illinois
  – under Article 15 of the Real Estate License Act, the licensee is presumed to be the agent of the consumer with whom the licensee is working unless performing ministerial acts

• Ministerial Acts
  – Acts that are informative in nature but do not rise to the level of active representation
Creation of Agency

• Ministerial Acts include:
  – Responding to phone inquiries
  – Attending an open house
  – Setting an appointment to view property
  – Responding to questions
  – Accompanying an appraiser, inspector, or similar third party on a visit to the property
  – Completing business/factual information
  – Showing a FSBO to a client.
  – Referral to another broker/service provider
Termination of Agency

• Death or incapacity of either the client or the sponsoring broker (Signatories)
• Destruction of condemnation of the property
• Expiration of the terms of the agency
• Mutual agreement by all parties to the contract
• Breach
• By operation of law, as in bankruptcy
• Completion, performance, or fulfillment
Termination of Agency

• In Illinois
  – a definite termination date must be included in an agency agreement. Automatic extension clauses are illegal
Agency Coupled with an Interest

• Agency relationship in which the agent has an interest in the property being sold
Types of Agency Relationships

• Limitations on an Agent’s Authority
  – Universal Agent
    • a person empowered through a written power of attorney to do anything the principal could do personally
  – General Agent
    • may represent the principal in a broad range of matters related to a particular business or activity
    • usually an ongoing aspect to this type of agency, such as a property management function
Types of Agency Relationships

• Limitations on an Agent’s Authority
  – Special Agent
    • authorized to represent the principal in one specific act or business transaction only, under detailed instructions
    • real estate brokers are usually special agents
  – Designated Agent
    • a licensee authorized by the sponsoring broker to act as the agent of a specific principal
Single Agency

- the agent and the entire firm represents only one party in any single transaction
- the agent and the entire firm owe fiduciary and statutory duties exclusively to one principal who may be either:
  - seller as principal
  - buyer as principal
  - landlord as principal
  - tenant as principal
Dual Agency

• A single licensee represents both buyer and seller or lessor or lessee in the same transaction.

• Licensee must have consent and confirmation in writing from both.
Customer-Level Services

• Honest and fair dealing
• Disclosure of material adverse facts about the physical condition of the property
• Disclosure of agency relationships