Agency

2nd Edition

First 15 pages only.

3 B.R.E. Approved Credit Hours
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PREFACE:

This is the textbook for our course, Agency, 2nd Edition. It is one of the five, three-hour courses required by the California Bureau of Real Estate (BRE). We call these the “Five Mandatory Courses”:

1. **Ethics**: Describes the real estate license law enforced by the BRE and the *Code of Ethics and Professional Conduct* as practiced by members of the National Association of REALTORS®

2. **Agency**: Explains the common law of agency as applied to California real estate brokerage.

3. **Trust Funds**: Details the fiduciary responsibilities of brokers when acting as escrows for their clients’ real estate transactions.

4. **Fair Housing**: Describes the federal and California fair housing and lending laws.

5. **Risk Management**: Provides licensees with the knowledge needed to avoid costly disputes with their clients arising from professional errors and omissions in the performance of their duties.

To save space and make the text more readable, we use the following abbreviations and terms:

- **BPC**: The *Business and Professional Code* of California.
- **BRE**: Bureau of Real Estate (starting June 2013, the Department will be called the Bureau of Real Estate).
- **CC**: The *Civil Code* of California.

You can find the complete California codes at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html). Unless otherwise stated, all cases are California cases. In citing cases, we specify only the names of the litigants and the year of the decision.

The forms cited in this course are from the California Association of REALTORS®.

In addition to the above terms and abbreviations, we also follow a few typographic conventions.

We use margin notes to provide definitions and short footnotes. We use the symbol `полнение` to direct your attention to an adjacent margin note.

Side bars like this one are used for long notes. Content in the margin notes, side bars, and in the appendices is not tested in the final exam.
First 15 pages only.
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EDITOR’S INTRODUCTION

With the exceptions of this section, the margin notes, sidebars, and forms, the text for this course is from the “Agency” chapter of BRE’s Reference Book, 2000.

This is a sidebar. Sidebars are used for long notes which elaborate on the adjacent text.

1.1 PREFACE

If you are charged with wrongdoing by a fellow REALTOR®, a grievance committee will determine if you violated NAR®’s Code of Ethics. If the committee finds that you have, the worst penalty the committee can impose is revocation of your membership.

If you are charged with wrongdoing by the BRE, the BRE will determine if you violated the Real Estate Law. If the BRE finds that you have, the worst penalty the BRE can impose is revocation of your real estate license or a fine of no more than $2,500.

But, if you are charged with wrongdoing by your client, and your client sues claiming he suffered considerable damage as a result of your failure to provide your agency duties, and if a court finds you liable; you may lose your net worth, your membership as a REALTOR®, and your real estate license.

Clearly the consequences for failing to perform your agency duties can be expensive even personally catastrophic. For this reason it behooves you to know the Law of Agency; the subject of this course.

1.2 LAW OF AGENCY

The “Law of Agency” is not, as you might think, a single document. Rather it is found in various places within the California state codes and corresponding BRE regulations, and it is derived from the vast historical collection of appellate court decisions known as “case law.”

For the convenience of legal professionals, the case law relating to agency has been organized and summarized into a two-volume work, Restatement of the Law of Agency (3rd Edition, published in 2006 by the American Law Institute). This is not a book you would normally want to read (unless you’re an attorney) but you should know of its existence since it is regularly cited by judges and attorneys in their decisions and legal briefs.

The most relevant body of agency law, and principle subject of this course, is the law of real estate agency as codified in Chapter 1 of Title 9 of the Civil Code (CC §§ 2295-2357). From these statutes the BRE has written regulations to enable its enforcement.
The primary purpose of this section is to provide a general understanding of the concepts of *agency* and *fiduciary* duty so that real estate licensees may better fulfill their responsibilities to the public.

The concepts of agency and fiduciary duty are quite old, being derived from common law. According to CC § 2295 (enacted in 1872), “An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.” In an agency relationship, the principal delegates to the agent the right to act on his or her behalf and to exercise some degree of discretion while so acting.
A principal and agent can create an agency relationship by:

- an agreement between them;
- by estoppel; or
- as the result of the conduct of the parties and the agent’s inherent relationship with third parties (i.e., ostensible or implied agency).

Most often, a real estate broker and a principal in a real property or real-property-secured transaction place the broker in the capacity of agent by an express agreement. This is called an actual agency (CC §2299).

A broker has a duty to know and understand the agency relationship being constructed. The broker must be certain that the employment agreement with the principal (typically termed a “listing”) is in a correct form and is constructed according to the circumstances and in a fair manner.

An agency agreement must be in writing for the agent to enforce a commission claim based upon a breach of contract (CC §1624(d)).

### 3.1 Elements of an Agency Agreement

An agency agreement/listing typically includes:

1. the names of the parties;
2. effective identification of the property;
3. terms and conditions of the anticipated sale, lease or loan;
4. the amount of commission or other compensation to be paid;
5. the expiration date of the agency (an exclusive listing must include a definite, specified date of final and complete termination.); and
6. the signatures of the parties to the listing.

In addition, an agency agreement/listing concerning the sale of residential property of one to four units, or a mobile home, must contain, immediately before the commission clause, a statement in ten point boldface type or larger that commission amounts are not set by law but are negotiable between seller and broker. BPC §10147.5 sets forth the exact wording which must be used. A real estate broker may deem it prudent to include such a statement in all transactions where the broker is acting within the course and scope of the real estate license.
3.2 TYPES OF LISTING AGREEMENTS

The four kinds of listing agreements most commonly used are the:

1. open listing;
2. exclusive agency listing;
3. exclusive right-to-sell listing; and
4. net listing.

3.2.1 OPEN LISTING

An open listing is the least restrictive of the four principal kinds of listing agreements and is distinguished by the fact that the owner retains the right to revoke the listing at any time, to sell the property him or herself, or to list the property with another broker. Open listings often generate questions regarding a real estate broker’s claim to a commission because the sale of the property by either the owner or any subsequently hired agent could defeat the original broker’s right to a commission.

3.2.2 EXCLUSIVE AGENCY

An exclusive agency is an agreement by which the owner agrees to employ a particular real estate broker to solicit prospective buyers, tenants/lessees, and lenders. Under an exclusive agency listing, the broker’s right to a commission is protected against other brokers for the duration of the listing agreement. However, under an exclusive agency agreement the owner retains the right-to-sell, encumber, or rent/lease the property on his or her own and, in that event, the owner can terminate the agency agreement and the broker has no claim to a commission or other compensation.

3.2.3 EXCLUSIVE RIGHT-TO-SELL

The exclusive right-to-sell listing affords a real estate broker the greatest protection and makes him or her the sole agent for the sale of the property. The broker is entitled to a commission provided only that the property is sold during the listing period, regardless of who procures the buyer. Under an exclusive right-to-sell agreement, the owner relinquishes both the right to list the property with other agents and the right to defeat the broker’s claim for a commission by selling the property him or herself. An exclusive right listing may also be used in a rental or loan transaction.

3.2.4 NET LISTING

A net listing is one which contemplates the seller realizing certain net proceeds. The real estate broker’s commission is any sum received in excess of the seller’s net. For example, if the seller enters into a net listing with a broker for a $100,000 net, the broker would receive no commission if
the net proceeds of the sale are $100,000 or less. On the other hand, if the net proceeds of the sale are $125,000, the broker is entitled to a commission of $25,000. This type of listing has more to do with the type of compensation than with whether it is exclusive or not.

### 3.2.5 Unilateral and Bilateral Agreements

An agreement can be classified as either unilateral or bilateral. A unilateral agreement is one in which one party makes a promise to induce some act or performance by the other party, but the latter can act or not act as he chooses. For example, in an open listing the seller agrees to pay compensation to a real estate broker who procures a buyer, but there is no obligation on the part of any broker to do so.

A bilateral agreement is one in which a promise by one party is given in exchange for a promise by the other party. For example, an exclusive right-to-sell listing includes a broker’s promise to use due diligence in attempting to find a buyer. In exchange, the seller promises to pay the broker a commission if the broker is successful.

### 3.3 Multiple Listing

A multiple listing service (MLS) is a means by which information concerning individual listings is distributed to all participants and subscribers of the service. For example, assume a seller lists property for sale with a broker. Pursuant to the listing, the seller transmits to the MLS information about the property which includes information such as the type of property, its size, location, listed price and other relevant information as well as the compensation offered to other brokers who procure a buyer. The MLS publishes the information in a database and sometimes in book format. Other brokers throughout the region are thereby made aware of the listing and can show the property and contact the listing agent on behalf of prospective buyers.

When a resultant sale closes, the listing broker makes good on his unilateral offer to split the commission with the selling broker.

### 3.4 Ostensible or Implied Agency

An agency relationship can result from the conduct of the parties even though there is no express employment agreement and regardless of the source of compensation. Agency relationships created from the actions or conduct of the parties are known as ostensible or implied agencies.

For example, a listing broker can unintentionally become the agent of the other principal to a transaction by leading the buyer to believe they are negotiating on behalf of or advocating the interest of the buyer when presenting the offer to the seller, or when processing the transaction to close of escrow.
To act as an undisclosed agent of the other principal (i.e., without the informed consent of both parties), may subject the broker to administrative discipline and/or loss of commission, and may be grounds for rescission of the transaction (BPC §10176(a, d)).

3.5 COMPENSATION

**Gratuitous Agent:** A person who is bound to act in good faith and obey a principal’s instructions once he agrees to act as an agent even though he is not being paid.

Compensation is not essential to the creation of an agency. One may undertake to act gratuitously as an agent and still be held to certain standards demanded of an agent for compensation. Under the Real Estate Law, one who acts as a **gratuitous agent** does not need a real estate license. However, in any transaction subject to the Real Estate Law, and where there is an *expectation* of compensation, regardless of the form, time, or source of payment, a license is required (BPC §10130 et seq.).

Compensation, or the expectation of compensation, is viewed broadly. For instance, benefits arising out of a joint venture relationship, or even out of the sharing of overhead, have been held to be sufficient compensation to establish licensed activity.
4 AUTHORITY OF AGENT

An agent has authority to:

- Do everything necessary, proper, or usual in the ordinary course of business to effect the purpose of the agency; and
- Make representations as to facts, not including the terms of the agent’s authority, on which the agent’s right to use his or her authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is being made (CC §2319).

Actual authority is that authority a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe that he or she possesses (CC §2316). Ostensible authority is that authority a principal intentionally, or by want of ordinary care, causes or allows third persons to believe that the agent possesses (CC §2317). Ostensible authority is sometimes referred to as apparent or implied authority.

4.1 EXPRESS AUTHORITY

Express authority is created by a contract which completely and precisely delineates those activities the agent is authorized to undertake. For example, if the principal authorizes the agent to acquire a particular single-family residence for $100,000, the agent has express authority to do precisely that and nothing else. The agent would not have express authority to purchase the house for $105,000 or to purchase a different house.

4.2 IMPLIED AUTHORITY

Implied authority exists because it is often impractical or even impossible for the principal to specifically delineate every aspect of the agent’s authority. Implied authority may be derived from express authority and exists to the extent that it is reasonably necessary to accomplish the objectives of the agency. In the example above, the agent had express authority to purchase a particular property at a certain price. The agent might have implied authority to set time limits for performance of the agreement, receive notifications from the seller, waive conditions in the agreement, and possibly undertake efforts to obtain financing for the buyer.

Implied authority cannot conflict with express authority but it may exist where there is no relevant grant of express authority. The determination of whether implied authority has been given usually involves determining the custom and practice of the community and whether the specific act was
reasonably necessary for achieving the objectives for which the agency relationship was created.

4.3 APPARENT AUTHORITY

Apparent authority depends not upon the express or implied agreement between principal and agent, but upon the reasonable expectations of third parties who have been led to believe that the agent is authorized to act on behalf of the principal. Apparent authority is distinctly different from actual or express authority and is sometimes referred to as ostensible authority by estoppel. Ostensible authority by estoppel arises when the principal, by words or conduct, leads a third party to believe that another person is his agent.

In other words, apparent or ostensible authority will arise and the principal could be estopped to deny the existence of the agency, or the scope of the agent’s authority, when the principal’s actions have created the appearance of authority in the agent and a third party reasonably relies, to his/her detriment, upon this authority. The most common causes of questions concerning apparent authority are the principal’s placement of a limitation upon the normal and ordinary authority of the agent and failure to communicate this limitation to a third party dealing with the agent.

4.3.1 LIABILITY OF PRINCIPAL TO THIRD PARTIES

Vest: To give a person an immediate, fixed right of present or future enjoyment.

The principal is liable to persons who have sustained injury through a reasonable reliance upon the ostensible, whether implied or apparent, authority of an agent. The act of the agent can never alone establish ostensible authority, but silence upon the part of the principal who knows that an agent is holding himself or herself out as vested with certain authority may give rise to liability of the principal.

4.4 EMERGENCY BROADENS AUTHORITY

An agent has expanded authority in an emergency, including the power to disobey instructions where it is clearly in the interests of the principal, and where there is no time to obtain instructions from the principal. An example of this authority occurs in the relationship between a property manager and an owner when an immediate repair or replacement is required to protect the property and to provide necessary services to the tenant.

4.5 RESTRICTIONS ON AUTHORITY

Covenants: Agreements written into deeds and other instruments promising performance or nonperformance of certain acts or stipulating certain uses or non-