Learning Objectives

Upon completion of this section you should:

- Define the terms agency and brokerage relationships and name the involved parties.
- Describe real estate agency and what is meant by a fiduciary relationship.
- Describe fiduciary duties and the consequences for breaching them.
- Define who is a principal and discuss the differences between clients and customers.
- Define and give examples of the different types of agency brokerage relationships including: Buyer agency, Implied (buyer) agency, Seller agency, Consensual dual agency, Split or assigned or designated/appointed agency, Sub-agency, Non-agency (facilitation), Cooperation and compensation, Tenant representation, Landlord representation, Be able to describe the use and liabilities of each type of relationship.
- Describe the creation and termination of agency in real estate.
- List and describe agent responsibilities to principal and third parties.
- Describe the licensees’ requirements regarding presentation of written offers, counteroffers, and addenda.
- Discuss agency disclosure requirements identified in the Revised Code of Washington and the Washington Administrative Code.
- Describe the role of multiple listing associations and cooperative brokerage agreements.
- Explain the reasons for antitrust laws, how they affect real estate brokers and licensees, and the penalties for violating them.
- Explain in which cases would you as a real estate licensee, might need to involve another “practitioner” rather than perform the function yourself (e.g. to avoid Dual Agency, CMA vs. Appraiser; Home Inspections).
Agency Law

As a real estate broker you work on behalf of others. The laws regarding a broker's duties to their client are of critical importance and are known as agency law. Agency describes the relationship between a principal and an agent. Agency law is the laws which govern this relationship and the requirements of the agent.

That’s a mouthful, so first let’s define what an agent is. When a person acts on behalf of another, that person is known as an agent. The agent, in our case a real estate broker, is acting on behalf of a client. The other party in the relationship is the client. The client who has an agent acting on their behalf is known as a principal. A principal is also referred to as a client, which means there is an agency relationship. On the other hand, the term customer is a relationship where one person is assisting another, and is usually not an agency relationship.

Agency doesn’t just apply to clients and brokers, it also exists between the broker and their firm. The agency relationship between the firm and the affiliated licensee’s carries responsibilities for both the designated broker and the licensee. An affiliated licensee is another term for a broker or managing broker working for a brokerage firm. Licensees are considered subagents for their designated broker. A subagent is an agent of another agent, such as a real estate broker is a subagent of the real estate firm or designated broker, who is the agent of a client. The licensee is referred to as having a subagency relationship with the brokerage firm and is considered to be a general agent.

Importance of Agency Relationships
The following are some basic reasons why real estate professionals should have a clear understanding about agency relationships:

- Agency laws deal with the legal rights of the public in dealing with brokers.
- Washington state has very specific laws and statutes regarding the responsibilities and duties of real estate licensees when they enter into an agency relationship. These laws are strictly enforced; penalties and fines can be imposed.
- These laws often define the duties of a licensee, the duration of an agency relationship, how notices should be handled, vicarious liability and dual agency. They also define the duties that a broker has to their principal.
Mastering the laws relating to agency can reduce misunderstandings and litigation, especially in the areas of commissions through something called procuring cause, conflicts of interest and representation.

The Creation and Termination of Agency in Real Estate

Let's look at some ways in which agencies might be formed.

**Express Agency**
Express agency is created by either an oral or a written agreement between the principal and the broker. It indicates their express intent for this representational status. In real estate, agency is normally created by either a written listing agreement or purchase and sale agreement, both of which include contractual language to create agency representation. There is also a specific contract for buyers to create an agency relationship, known as the buyer agency agreement.

An agency relationship, that is created after the fact when the principal agrees to be bound by the actions of another person who was acting without authority, is known as an agency by ratification and is a type of express agency.

**Implied Agency**
It is also possible to create an agency relationship by the actions of the parties, known as implied agency. If a real estate broker takes on responsibilities with a buyer that are normally those of a broker, but hasn't signed a buyer agency agreement, he/she may still be considered an agent via implied buyer agency. By the same token, if the customer asks the broker for advice or actions that are normally part of an agency relationship, then an implied agency could be created. Implied seller agency can also be created through the actions of a seller and broker.

Let's look at an example of implied agency.

**Example:** Jose asks Pete to draw up a purchase and sale agreement and represent him on a property that Jose is interested in purchasing. Pete attempts to draw up the contract, which is an implied agency.

**Agency by Estoppel**
An agency relationship created by the actions, behavior or statements of the principal and/or the broker upon which a third party relies is agency by estoppel. An agency
relationship can exist even without a written contract because of the appearance of the
agency relationship. If another party was lead to believe by the actions of the agent and
the principal that an agency relationship existed, it create agency by estoppel. The
principal would be estopped (prohibited) from denying the agency if the third party had
relied on the statements or actions of the agent.

**Apparent Authority**
A broker may have **apparent authority** if a reasonable person would believe the agent
had authority to act on behalf of the principal, making the agent an apparent agent (also
known as an **ostensible agent**). In the case of apparent authority, the principal must
take some action or make a purposeful exclusion to create apparent authority. If a
broker acts on their own to deceive a third party that an agency relationship exists
without the knowledge of the principal, than the principal isn’t bound by the actions of
the broker. An example of apparent authority would be a broker acting as the principal’s
agent in their presence, and the principal not saying anything to clarify to the third party
that they are not their agent.

**Actual authority** is different because it is expressly given to the agent either orally or in
writing. Actual authority can be broad or specific, depending on the granting of authority
by the principal. It is also known as **express authority**.

**Termination of the Agency Relationship**
The agency relationships start at the time that the broker begins to provide real estate
brokerage services to a principal and continues until:

- Completion of performance by the broker
- Expiration of the term agreed upon by the parties
- Termination of the relationship by mutual agreement of the parties
- Termination of the relationship by notice from either party to the other
- Death, incapacity, or bankruptcy of either the agent or principal.
- The property is destroyed

If termination occurs before the expiration of an agency contract the party who was
discharged their duties may be able to sue for breach of contract. The breach is most
often resolved not through performance (forcing the other party complete the
contractual duties), but through the payment of monetary damages.

A broker owes no further duty after termination of the agency relationship, other than
the duties of accounting for all monies and property received during the relationship and
not disclosing confidential information. This means you must keep your files so you have a record of all accounting during the relationship and your confidentiality requirement never expires.

Types of Agency

There are three types of agents:

1. Universal Agency
2. General Agency
3. Special Agency

A universal agent is granted the power to handle all of the affairs of the principal. The best example of this would be a broker who represents a professional athlete and has the permission to handle all of the athlete’s affairs (which would include such things as finances, purchasing real property, negotiating contracts, negotiating compensation for promotional advertisements, etc.) The universal broker has the broadest range of authority to represent their client.

A general agent has the authority to represent many of the affairs of the principal, but not all of them. The relationship between the brokerage firm and their affiliated licensee is the best example of this general agency. The licensee has the authority to act for the brokerage firm in many aspects such as, obtaining listings, completing contracts for the purchase of a property, providing real estate information to the public, providing leasing or rental services, and handling of earnest monies.

A special agent usually has the authority to represent their client in only one “specific” area. The best example of this would be a licensee who has taken a listing for a seller. The licensee has the authority to represent the client for just a specific parcel of property. A special agent has authority that is limited to work on behalf of their client. A broker is essentially a special agent since they act only within the bounds of a specific transaction or to accomplish a specific goal (finding and purchasing a home).

Vicarious Liability

A principal is not liable for an act, error, or omission by an agent or subagent of the principal arising out of an agency relationship. The principal can be liable if the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the agent or subagent and the principal participated in or authorized
the act, error, or omission; or the principal benefited from the act, error, or omission. What is intended with **vicarious liability** is a principal has limited liability for the acts of an agent on their behalf unless the principal participated in the act. The other portion of this is that the principal can be liable if they benefited from an illegal act and the other party would be unable to receive compensation from the agent.

In addition to the limitation of liability of a principal when an agent is acting on their behalf, a licensee also has some protection regarding subagents (agent of an agent). A broker is not liable for an act, error, or omission of a subagent, unless that broker participated in or authorized the act, error or omission. Very important note regarding the limitation of liability of a broker and their subagent is it does not limit the liability of a firm for an act, error, or omission by a broker affiliated with the firm. The firm still maintains responsibility for the brokers under their supervision.

**Imputed Knowledge**

The concept of **imputed knowledge** says that a person should know what another knows because of their relationship. Impute means to assign knowledge by inference from the knowledge of another. In an agency context this would mean that a principal would or should know what the agent who is working on their behalf knows and vice versa. In Washington state law it is expressly written that this does not exist in a real estate agency relationship. A principal is not liable for what they do not know but is known to the agent as well as the other way around.

**Requirements of Agency**

**Fiduciary Relationship**

Prior to 1996, in Washington State, real estate brokers when acting as agents on behalf of a principal were bound by a fiduciary relationship. A **fiduciary relationship** is when the principal places trust and confidence in the agent acting on their behalf and grants broad responsibilities to the agent. As of 1996, Washington State passed a law outlining agency relationships and their limitations in real estate. Because it is a written law, the responsibilities are known as **statutory responsibilities**. The change was designed to be more specific to real estate brokerages. The change is written in RCW 18.86.110.

"The duties under this chapter are statutory duties and not fiduciary duties. This chapter supersedes the fiduciary duties of an agent to a principal under the common law. The common law continues to apply to the parties in all other respects. This chapter does not affect the duties of a broker while engaging in
the authorized or unauthorized practice of law as determined by the courts of this state."

Next, let’s go through the statutory responsibilities (laws) that govern the real estate brokerage in Washington State.

Duties of a Broker to all Parties

In Washington, regardless of whether a broker is an agent, the broker owes to all parties they provide real estate brokerage services the following duties:

- To exercise reasonable skill and care.
- To deal honestly and in good faith.
- To present all written communications to and from either party.
- To disclose all existing material facts.
- To account in a timely manner for all money and property.
- To provide a pamphlet on the law of real estate agency.
- Disclose who the broker represents.

Reasonable Skill and Care
Reasonable skill and care indicates the obligation of the broker to perform their duties as an agent with the competence expected of someone in the real estate brokerage profession. This also means they must perform their duties with reasonable caution (care). The broker cannot claim to have exercised reasonable skill and care if they are doing something that a real estate broker would not do given the skills and qualifications of a real estate broker.

Judgment is a large part of the real estate profession. Reasonable skill and care is not intended to mean that the broker cannot exercise judgment, only they must not be negligent and irresponsible. For example, if a broker makes a judgment by giving an opinion of value on a property to be $550,000 and the property sells for $575,000 this would not violate the duty of reasonable skill and care. The opinion of value is within the bounds of the broker’s duty and could be made by a number of qualified real estate professionals. If however, a broker urges a seller to enter into a contract for a property that should be worth $550,000 and the contract offer is for $275,000 this would not be an example of exercising reasonable skill and care.
Deal Honestly and in Good Faith
Dealing honestly is easy enough. If you deal honestly while acting on behalf of a principal you’re halfway there. Dealing honestly doesn’t imply that you mustn’t give opinions, but you cannot misrepresent facts. The other part of this requires that an agent operate in good faith, which means being open, fair and sincere. An agent cannot be duplicitous or deceitful. Having an ulterior motive that is not known to the principal would be an example of violating this principle. This duty applies to all parties in a transaction, not just the principal the agent represents.

Present Communications
To present all written offers, written notices and other written communications to and from either party in a timely manner, regardless of whether the property is subject to an existing contract for sale or the buyer is already a party to an existing contract to purchase. The long and short of this duty is that you need to make sure as a broker, that all written information is quickly given and presented to your client. There’s no situation where you can hold an offer so another can get signed. Hardest is the obligation to remember you need to present all communications and offers from any party even if you have a transaction that is under contract. As a broker keeping the files and communications relating to a transaction is critical, this is an important practice to demonstrate that you have fulfilled your duty to present all communications, in case you are ever questioned about a transaction. Noting the time and date you received each communication is extremely helpful if there are questions. Email is especially helpful since the timestamp is included.

Disclosure of Facts
To disclose all existing material facts known by the broker and not apparent or readily ascertainable to a party; not be construed to imply any duty to investigate matters that the broker has not agreed to investigate. A material fact is anything that if it were known, may result in a different decision. While this is rather broad, it is best to consider anything affecting the value of the real property as a material fact. What this means is, if as a broker you have knowledge of a fact pertaining to the property it needs to be disclosed to every party involved. Even a broker who represents the seller must disclose material facts to a buyer regardless if it is detrimental to the seller. This means that if there was a leak in the bathroom that was covered with drywall and not visible, the broker would be required to disclose that information to the buyer. This situation is an example of what is called a latent defect. Latent defects are issues with the property that are not discoverable by the standard inspection.
One type of disclosure that comes up is stigmatized property. A **stigmatized property** has had a bad event occur there, such as a drug deal, crime, or suicide. Negative events are not by their nature physical defects and therefore don’t constitute material facts. A stigmatized property doesn’t need to be disclosed during the sale of the property.

**Account for all Money and Property**

To account in a timely manner for all money and property received from or on behalf of either party. This particularly applies to earnest money. Earnest money has strict rules regarding its handling. Rules are in place in order to ensure proper accounting. The accounting for all money and property also means that the broker must establish a chain of custody over a client's property or money. A chain of custody is an accounting that keeps a record of who has money or property at any given time. So if a broker receives money at 9:00 a.m. on a Monday and delivers the earnest money to the party set forth in the agreement at 1:00 p.m. on Monday, they will need to keep a proper accounting of who had possession of the money, dates and time. When a buyer presents an earnest money check or cash to a real estate broker there are strict trust and legal requirements that control how the funds will be handled.

**Provide Agency Pamphlet**

Broker’s should provide a pamphlet explaining the law of real estate agency to all parties to whom the broker renders real estate brokerage services, before the party signs an agency agreement with the broker, signs an offer in a real estate transaction handled by the broker, consents to dual agency, or waives any rights, whichever occurs earliest. The Multiple Listing Service that you belong to in Washington state will have many preprinted forms that you will use to write transactions, and one of the forms they provide is a pamphlet on the law of real estate agency. The pamphlet lays out the items that must be communicated to the broker’s clients as required by Washington State law. A good rule of thumb is to give the pamphlet to any clients the first time you meet with them. Be sure to do so even if the client has worked with another broker and received a pamphlet from them.

**Disclose Representation**

Brokers should disclose in writing to all parties he/she provides real estate brokerage services, before the party signs an offer in a real estate transaction handled by the broker, whether the broker represents the buyer, the seller, both parties, or neither party. The disclosure must be in a separate paragraph entitled "Agency Disclosure" in the agreement between the buyer and seller or in a separate document entitled "Agency Disclosure." This requirement is intended to clearly establish who is representing whom.
There are times when this is particularly important, for example, when a listing broker writes up a transaction for a buyer on the property and is not going to be a dual agent (representing both parties). The buyer would need to know they are not being represented in the transaction.

**Not a Required Duty**
Unless otherwise agreed, a broker owes no duty to conduct an independent inspection of the property or to conduct an independent investigation of either party's financial condition, and owes no duty to independently verify the accuracy or completeness of any statement made by either party or by any source reasonably believed by the broker to be reliable. This provides brokers a limit to the amount of knowledge they should have about a property. What would happen without this exception is the broker would essentially have no limit to the amount of knowledge they should have about a property.

**Agency Duties Owed to Clients**

When a broker is acting on behalf of a buyer, seller, or acting as a dual agent, the broker owes additional duties to their clients (principals). They are in addition to duties we just discussed that are owed to all parties. They are:

- Loyalty
- Disclosure of any conflicts of interest
- Advise they seek expert advice outside the broker's area of expertise
- Confidentiality

**Loyalty**
To be loyal means, taking no action that is adverse or detrimental to the client's interest in a transaction.

**Conflicts of Interest**
To timely disclose any conflicts of interest.

**Expert Advice**
To advise the client(s) seek expert advice on matters relating to the transaction that are beyond the agent's expertise. This is an important duty to uphold and one mentioned many times in state law and is a common legal issue. A broker should never operate outside their area of expertise. This includes appraisal, law, home inspections,
mortgages etc. There are even times when another broker should be brought in for assistance to ensure as an agent you provide expert advice to clients (short sales, dual agency, property management). Protecting the public from poor representation is the crux of license law and agency law. Therefore, brokers must take care to refer clients when appropriate or seek assistance.

Confidentiality
Not to disclose any confidential information from or about the client(s), except under subpoena or court order, even after termination of the agency relationship. The duration of the confidentiality owed to the principal by a real estate broker does not have an expiration, it lasts forever.

Example: The listing broker knows that the lowest amount that the seller would be willing to accept is $729,000 for their home. During an open house, a potential buyer visits and asks the listing broker, “What is the lowest price that the seller will take for this home?” The broker replies that he represents the seller and that the person visiting the house should make a solid offer. This is a great example of effective representation and an example of confidentiality and acting in the best interest of a client.

Confidential information means information from or concerning a principal of a broker that:

- Was acquired by the broker during the course of an agency relationship with the principal;
- The principal reasonably expects to be kept confidential;
- The principal has not disclosed or authorized to be disclosed to third parties;
- If disclosed, would operate to the detriment of the principal; and
- The principal personally would not be obligated to disclose to the other party.

Exceptions and Allowable Actions
The following are exceptions and allowable actions for a broker who is representing the seller (seller agency).

- A broker that is a seller's agent is not obligated to seek additional offers to purchase the property while the property is subject to an existing contract for sale.
- The showing of properties not owned by the seller to prospective buyers or the listing of competing properties for sale by a seller's agent does not breach the duty of loyalty to the seller or create a conflict of interest.
The representation of more than one seller by different brokers within the same firm with transactions from the same buyer does not breach the duty of loyalty to the sellers or create a conflict of interest.

The following are exceptions and allowable actions for a broker who is representing the buyer (buyer agency).

- The representation of more than one buyer by different brokers with the same firm and involving the same property does not breach the duty of loyalty to the buyer or create a conflict of interest.
- A buyer's agent is not obligated to seek additional properties to purchase while the buyer is a party to an existing contract to purchase or show properties where there is no written agreement to pay compensation to the buyer's agent.
- The showing of property that a buyer is interested in to other prospective buyers by a buyer's agent does not breach the duty of loyalty to the buyer or create a conflict of interest.

\textit{Note: All of the listed exceptions and allowable actions for both the buyer and seller apply to a broker acting as a dual agent.}

The real estate agency pamphlet which is required to be given to all parties who receive real estate brokerage services will contain the laws that explicitly codify everything we have just discussed under the requirements of agency. It is important not only for you as a broker to be able to follow these laws, to have a thorough understanding of the laws, but also because you will most likely be answering questions from clients who will want to know the meaning of certain provisions in the law of agency pamphlet. The purpose of giving all clients the pamphlet and the clear disclosure of representation (who represents who) is aimed at transparency and clarity. The laws are designed to make the real estate profession and its required duties less esoteric and more public.

\textbf{Lawsuits}

A broker can be sued by a client for breaching a duty they are required to perform under agency law. They will also be subject to discipline by the department of licensing if they are found to have breached their duties as an agent. The department of licensing doesn’t need the client to sue or the court to rule in favor of the client in order to discipline the broker who breached their duties.
Types of Agency Brokerage Relationships

Brokerages and their affiliated licensees (brokers) enter into agency relationships all the time. It is essentially the basis of the brokerage business. There are multiple types of agency that the brokerage will enter into depending on who they represent in a particular transaction. It is interesting to note that the relationships formed under agency law are transaction based. This means in most cases a broker will enter into an agency agreement with a principal for a particular transaction and there is nothing precluding the principal from entering into another agency relationship with another broker or brokerage firm on a separate transaction.

Seller Agency
The relationship is between the broker and the seller (owner of the property). In this case where the broker represents the seller, the broker is known as the **listing broker**. You may also see this referred to on your exam and in other places as the **listing agent**. When a real estate broker is employed to act as an agent of the seller in a real estate transaction, this is referred to as seller agency. The broker has a statutory responsibility (legal) to the seller of confidentiality, loyalty, disclosure of any conflicts of interest and a duty to advise their client seek expert advice when outside the broker's area of expertise.

Let’s look at an example.

**Example:** John, a licensee with ABC Realty, has a listing with the Smiths’ and is the seller’s broker. John also has his own home listed for sale at the same time. John’s own home is very similar to the Smiths’. In the course of performing an open house for the Smiths’, John meets a potential buyer. John suggests to the buyer that he should view his home and tells them that it is a better value and in a nicer neighborhood. John puts his own best interests before that of the Smiths’ because he wanted to sell his own home first. The Smiths’ sued John for a conflict of interest.

Buyer Agency
The relationship is between the buyer (or potential buyer) and the broker (buyer’s broker). In this case where the broker represents the buyer, the broker is known as the **selling broker**. It looks like a misprint since the term is “selling” broker and we’re referring to the relationship with the buyer, but this is how it is known. The **selling agent**, another term for selling broker is the licensee representing the buyer in the transaction. The difference derives from the concept the listing broker, “lists” by putting
the property out to the public via the listing service and the buyer’s agent “sells” the property to them.

The real estate broker is employed by the buyer to act as an agent and has a statutory responsibility requiring confidentiality, loyalty, disclosure of any conflicts of interest and a duty to advise their client seek expert advice when outside the broker’s area of expertise. The buyer’s broker may be compensated by the buyer, the seller or both. The source of the compensation does not change the duties that the buyer’s agent has to the buyer.

An example would be a buyer agency agreement, which was signed by both the broker and the prospective buyer.

Let’s look at an example of a liability with buyer agency.

Example: Paige is a buyer’s broker for the Gilbersts. Paige takes a tour of a home with the Gilbersts that appears to match all of the Gilbersts’ criteria. The home also is priced well under market value. Paige discourages the Gilbersts from considering the home by telling them that it is in a heavy crime area. Paige later informs her brother that he should buy this home for an investment and that it is a great value. Paige was not loyal to her buyers and also did not disclose the conflict of interest.

Dual Agency
A broker may act as a dual agent only with the written consent of both parties to the transaction after the dual agent has provided a pamphlet on the law of real estate agency, to all parties. The written consent must include a statement of the terms of compensation.

Dual agency is when a broker represents both the buyer and seller in a transaction. This is legal in Washington state, while in other states it is prohibited. An often overlooked distinction is the Designated Broker or the appointed Managing Broker in charge of supervision is a dual agent even when a buyer and seller in a transaction are being represented by different brokers, if the brokers work for the same firm. The disclosure in this case would need to be made and both parties would be required to agree to the dual agency of the firm.

Since the broker has promised a duty of confidentiality, loyalty, disclosure of any conflicts of interest and a duty to advise to seek expert advice when outside their area of expertise to both parties at the same time, it is necessary to limit these duties in this
situation, if both parties agree. The dual agency relationship may have the following limitations:

- The broker must deal with the buyer and the seller impartially.
- The broker will have the duty to disclose conflicts of interest to both the buyer and the seller.
- The broker will not disclose confidential information about the buyer or the seller.
- The broker will not disclose what the buyer is willing to pay or the terms that they will agree to, and will not disclose what the seller is willing to accept or the terms that they will agree to.
- The broker will not disclose the motivation of the buyer or the seller unless authorized to do so in writing.

Let's look at an example.

**Example:** Maria has a listing with the Grimes. A buyer visits an open house that Maria is holding for the Grimes’ property and asks if Maria will represent them with the purchase of the property. Maria decides to represent both parties in the transaction. She is a dual agent.

Let's look at an example of liability with consensual dual agency.

**Example:** Jane is a listing broker for the Andersons. Jane advertised the Andersons’ property, from her advertisement Jane finds a buyer for the home. She has obtained written permission from both parties to act as a dual agent. After writing the contract and before presenting it to the Andersons, Jane learns that there is another offer that is very attractive. Jane hurries to the Anderson's home and advises them to sign the first offer where Jane was a dual agent, without presenting the other offer. Jane receives both sides of the commission, because she represented both parties. If she had presented the other offer from another broker, she would have only received the listing office portion of the commission. This was a violation of her duties to present all offers and a conflict of interest since she personally benefited from the signing of the transaction where she was the dual agent. The Andersons sued Jane for violation of agency law.

Acting as a dual agent is fraught with complication and possible ways to violate Washington state law since the broker has an obligation to both parties. Doing so should be done with extreme care. Many brokerage firms do not want their licensees to engage in dual agency because of the liability.
Non-Agency Definition
When a broker is working with a buyer or seller, but not representing them, this is referred to as non-agency. The broker is working with a “customer” and not a “client.” He/she is acting in the capacity of a facilitator, remaining a neutral party to the transaction and supporting everyone through unbiased communication.

Example: The Smiths approach Allen, who is a broker for ABC Realty. They have found a “For Sale by Owner” home that they want to purchase and would like Allen to write up a purchase and sale agreement. Allen decides not to represent either party and states this in the contract. Allen is a facilitator and does not represent either the seller or the purchaser.

Let’s look at an example of a liability with a non-agency situation.

Example: Maria is writing up an offer for the Gilberts. She has expressed that she is not representing the Gilberts, both verbally and in writing. Even though she has done this, the Gilberts really did not understand and thought that Maria was their broker and representing them. The Gilberts tried to bring suit upon Maria and her brokerage for not having representation.

Designated Agency
Within a brokerage, a situation may arise where one licensee that is affiliated with a brokerage is representing a seller and another licensee that is affiliated with the same brokerage is representing the buyer (in the same transaction). This situation is legal in Washington state, and the designated broker of the firm becomes a dual agent. In Washington it is dual agency, but it is sometimes referred to as split agency or designated agency.

In a transaction in which different brokers affiliated with the same firm represent different parties, the firm’s designated broker and any managing broker responsible for the supervision of both brokers is a dual agent and must obtain the written consent of both parties. In such a case, each of the brokers shall solely represent the party with whom the broker has an agency relationship, unless all parties agree in writing that the broker is a dual agent. In order for each of the affiliated licensees to work together, they must only discuss material facts so they do not breach their duty of confidentiality.

Example: John, an agent with XYZ Realty, has a listing. Peter, an agent with XYZ Realty, finds a buyer for this listing. Designated agency allows both John and Peter to represent their clients even though they work for the same brokerage.
Let's look at some potential liability with designated agency.

**Example**: Tom, a licensee with ABC Realty, has a listing. Pete, another licensee with ABC Realty, finds a buyer who would like to purchase this listing. Pete uses a conference room at the brokerage to write up the offer. While doing so, Tom listens in on the conversation that Pete is having with his clients. Tom learns about information which is considered confidential, such as the top price that the buyers are willing to pay. Tom relates this information to his sellers. A major conflict of interest exists here. The sellers relay this information to the buyers, and the buyers bring suit against Tom for unethical behavior.

**Tenant Representation**
This is an agency where a prospective tenant hires a broker as their agent to procure a rental or lease agreement for a property. The broker’s role may be providing market knowledge, helping locate a property that suits the tenant’s needs, negotiating the pricing and terms of the tenancy, and/or preparing documents such as a rental or lease agreement. All of these could be included in the representation provided by the broker.

For instance, a couple, Bill and Sarah are looking at starting up a dry cleaning/laundry business. They have certain requirements for the space that they would like to lease. Since they are not familiar with commercial real estate, the use of a tenant representative can be very useful in obtaining favorable terms and in locating an ideal location. The duties the broker owes to the tenant are the same as those owed to a buyer since they are the ones “buying” the lease. An example of liability.

**Example**: Sam finds a suitable location and starts verbal negotiations with the owner. Sam tells the owner that they are desperate to lease something right away. Bill and Sarah bring suit against him for divulging confidential client information.

**Landlord Representation**
This is an agency where a property owner hires a broker to procure a tenant for their property. The broker’s role may be creating a market valuation analysis, developing and carrying out a marketing plan, negotiating the pricing and terms of the tenancy, and/or preparing documents such as a lease agreement. All of these could be included in the representation provided by the broker.

**Example**: Bob lives in Arizona and owns a single family home in Olympia. Bob doesn’t have the time to travel to Olympia to rent out his home. Bob hires Betty, a property management broker, to handle this for him. Betty is representing the landlord.
Let's look at some potential liability with landlord representation.

**Example:** Betty's brother, Hugo, would like to rent the home and only wants to pay $700 per month. Betty tells the seller, Bob, that this is the going rate and that Hugo would make a great tenant. She omits the fact that Hugo is her brother. Bob leases the home to Hugo. Bob later finds out that Hugo is her brother and that the going rate for comparable rentals is $900 – $1,000 per month in Olympia. Bob is threatening suit against Betty for misrepresentation.

**Agency Disclosure Agreements**

**Seller Agency**
The most common form of a seller agency disclosure would be in a listing agreement. The following is from the Exclusive Sale and Listing Agreement:

*Seller authorizes Firm to appoint ______________________________ as the Seller's Listing Broker. This Agreement creates an agency relationship with Listing Broker and any of the Firm's brokers who supervise Listing Broker's performance as Seller's agent ("Supervising Broker"). No other brokers affiliated with Firm are agents of Seller, except to the extent that Firm, in its discretion, appoints other brokers to act on Seller's behalf as and when needed. If the Property is sold to a buyer represented by one of Firm's brokers other than Listing Broker ("Buyer's Broker"), Seller consents to any Supervising Broker, who also supervises Buyer's Broker, acting as a dual agent. If the Property is sold to a buyer who Listing Broker also represents, Seller consents to Listing Broker and Supervising Broker acting as dual agents. If any of the Firm's brokers act as a dual agent, Firm shall be entitled to the entire commission payable under this Agreement plus any additional compensation Firm may have negotiated with the buyer. Seller acknowledges receipt of the pamphlet entitled "The Law of Real Estate Agency."*

This provision provides the necessary disclosure for the brokerage regarding their agency representation. It also provides a condition that the Supervising Broker can act as a dual agent if the property is sold by another broker affiliated with the firm. Note that the paragraph says that the Seller has received the Law of Real Estate Agency pamphlet. It is essential that it is provided prior to any principal signing a contract.
There is another agreement which explicitly states the agency representation called, Agency Disclosure.

The form explicitly states the agency relationship established between the broker and the principal. This agreement also states the principal has received a copy of the pamphlet on the Law of Real Estate Agency.

**Buyer Agency**
The most common form of a buyer agency agreement is the buyer agency contract. It is a sound practice for all brokers to secure this contract with all potential buyers.

When a potential buyer agrees to sign this document, they are stating their intentions of loyalty to their broker. In turn, the broker is stating their loyalties to the buyer. In the event that there is a dispute between brokers regarding procuring cause (who brought the buyer to the transaction), this agreement could be used as proof of representation.

There is also a built in disclosure in a standard purchase and sale agreement. Here is a look at the paragraph.

*Agency Disclosure*. Selling Firm, Selling Firm’s Designated Broker, Selling Broker’s Branch Manager (if any) and Selling Broker’s Managing Broker (if any) represent the same party that Selling Broker represents. Listing Firm, Listing Firm’s Designated Broker, Listing Broker’s Branch Manager (if any), and Listing Broker’s Managing Broker (if any) represent the same party that the Listing Broker represents. If Selling Broker and Listing Broker are different persons affiliated with the same Firm, then both Buyer and Seller confirm their consent to Designated Broker, Branch Manager (if any), and Managing Broker (if any) representing both parties as dual agents. If Selling Broker and Listing Broker are the same person representing both parties then both Buyer and Seller confirm their consent to that person and his/her Designated Broker, Branch Manager (if any), and Managing Broker (if any) representing both parties as dual agents. All parties acknowledge receipt of the pamphlet entitled “The Law of Real Estate Agency.”

What is provided for is dual agency by any supervising broker, so that they are making it clear they can act in that capacity if two affiliated brokers are working on the transaction together. It even allows for a broker to be a dual agent. The compensation needs to be written and acknowledged if that is the case.
Being a Dual Agent

In order to be a dual agent, representing both the buyer and seller, you must have two things:

- A signed agency agreement with the seller, which is typically addressed in your MLS listing agreement
- A signed buyer agency agreement with the buyer.

If you do not have a signed buyer agency agreement then you solely represent the seller even though you may have been working with the buyer for an extended period of time. In a normal circumstance where a broker isn’t representing the seller, a buyer’s agency is created by default when you were working a buyer even though you did not have a signed buyer’s agency agreement. However, when the broker represents the seller through a signed agency agreement, the agency relationship created through actions doesn’t matter. It’s important to have both elements in writing if you are acting as a dual agent.

State law makes it clear: without a buyer’s agency agreement, when you sell your own listing to the buyer you will solely represent the seller.

As a solution you may want to:

- Have a discussion with the buyers at your original buyer’s consultation if you are considering being a dual agent as a general practice.
- Use a buyer’s agency agreement.
- Ensure you have your own firm-approved protocol in place for when you need to obtain a signed Buyer’s Agency Agreement before you show your listing.

It’s a requirement that when disclosing dual agency, a broker must state clearly in writing the compensation they will receive for their services and have it signed by the clients.

Cooperation Among Brokers

Multiple Listing Services have a lot of rules and regulations. Many of which deal with how brokers cooperate with, and compensate each other. The purpose of a Multiple Listing Service is cooperation among brokerages and their affiliated brokers, so it’s no
surprise the the rules they employ are designed around cooperation. The payment of a listing brokerage and its cooperating broker, the selling broker, when they participate in a transaction is what makes the real estate brokerage business run. Making sure there are strict rules regarding when and how payment should take place as well as the protection of the rights of each participating broker allows the industry to trust one another because not complying with the rules could result in expulsion from the Multiple Listing Service. The Multiple Listing Service is the main way brokers advertise and share their listings with one another so they can get shown and sold, it gives the MLS tremendous leverage to enforce rules given the fact that expulsion would essentially drive a brokerage out of business.

The rules typically provide that brokers must cooperate with any other members of the MLS to show or make offers on an property they have listed or are providing brokerage services to. They must also disclose all the information about the property to other members. Also detailed in the rules is usually a provision for the payment of the selling broker in the event they sell a cooperating broker’s listing. The listing has to detail the amount of commission paid to the selling brokerage and the listing broker has an obligation to disclose this information for other brokers to see.

Note: Many multiple listing services (MLS) have strict rules that prohibit the selling broker from negotiating the selling office commission amount. The selling broker must accept the amount posted on the listing.

If a broker has a client they are either unsuited to assist or do not have the time to work with the client, there is a legal alternative in Washington state. In Washington, it is legal to refer a client to another broker and receive a fee for that referral. The referral must be paid between brokerages as they are the only ones licensed to receive compensation for the brokerage services directly. They will then pay the affiliated licensee based on their employment agreement. Referring a client to another broker is a great tool to have when you encounter a client that is looking for assistance outside your area of expertise. For example, if you work in residential real estate and you have a client who is interested in commercial property, you and your client could be better off if you refer them to a broker who specializes in commercial real estate.

Antitrust Laws
While brokerages and brokers regularly cooperate with one another through Multiple Listing Services there is a risk in the real estate business of suppressing competition. Antitrust laws and fair business practices are designed to promote the policy and
practice of competition. Some of the symptoms of lack of competition are higher pricing and diminishing quality of a service or product.

Real estate brokers compete with one another to obtain listings for sale. At the same time, they often cooperate with one another to secure buyers for those listings. This dual situation of competition and cooperation, which is unique to the real estate industry, can present many opportunities for antitrust violations.

The foundation for federal antitrust laws is the Sherman Act of 1890. The act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The emphasis of this act is to prohibit the restraint of trade to allow for greater competition. There are three types of antitrust violations which are most important in the real estate industry.

1. Conspiracy to fix prices.
2. Imbalanced commission splits.
3. Conspiracy to boycott.

Conspiracy to Fix Prices
It is a violation of both State and Federal antitrust laws for there to be any agreement between competing real estate brokers to fix the prices that each will charge to a third party.

Let’s look at some examples regarding conspiracy to fix pricing, which are prohibited.

- Brokerage A and Brokerage B agreed to charge all their clients X% commission on all listings.
- Brokerage A, Brokerage B and Brokerage C agreed to pay a set amount to outside brokers for any referral.
A broker tells her clients that her brokerage charges 6% commission on all their listings and that all other brokers charge the same amount, as it is a “standard” in the industry.

**Imbalanced Commission Splits**

Brokers need to be especially careful of imbalanced exploitive splits when cooperating with others brokers on listings. An exploitive split is one that:

1. Minimizes the broker’s costs of cooperation with other agents.
2. Maximizes the broker’s commission because they sell their own listings.
3. Maximizes the broker’s commission when they sell other agents’ listings.

Here’s an example of an imbalanced commission split.

**Example:** A listing broker offers 1% to buyer’s brokers who sell his or her listings, when the listing is for a total commission of 6%. Yet the broker seeks 3% of the commission when he or she sells the listings of other brokers who have signed listings for a 6% total commission. This splitting structure discourages cooperation from other brokers and increases the likelihood that the broker can sell his or her own listing.

**Conspiracy to Boycott**

The conspiracy to boycott happens when a group of competitors agree not to deal with another firm or when brokers collectively decide not to deal with a third party to eliminate competition. Here’s an important distinction:

Individuals each have a right to choose who they will and will not do business with. It is the collective action of a group that is prohibited by antitrust laws.

Let’s look at an example of conspiracy to boycott.

**Example:** Over a lunch meeting, broker A from XYZ Realty and broker B from ABC Realty agree not to show the listings of Matt Realty. They further state that if no other brokers will show the Matt Realty listings, then Matt should be out of business in no time. This is a conspiracy to boycott to eliminate competition.

**Penalties and Enforcement**

Enforcement of antitrust violations falls to the Department of Justice. The U.S. Attorney General may enforce criminal or civil antitrust violations. Civil action may be investigated by the FBI, and criminal actions may be investigated through a grand jury
or the FBI. A complaint filed with the FTC could result in an extensive investigation, and a cease and desist order could be placed upon the person or firm in violation.

The fine for a corporation that is found guilty may be up to $10,000,000. An individual that is found guilty may be fined up to $350,000. Persons or firms that have been injured by antitrust violations may recover triple (three times) their actual damages and reasonable attorney’s fees.

In addition to fines, an injunction may be placed to prohibit further activities. An injunction is a court order to do or refrain from doing certain acts. In this case that means the end of a practice that is violating antitrust law. The courts may exercise the right to supervise the business that is in violation, for up to 10 years.

It is possible for a brokerage or an individual to lose their license to practice real estate if they are found guilty of violating antitrust laws. Adherence to these laws is critical for all brokers. This is not to suggest that other laws are not critical, but these laws are particularly important in real estate because of the numerous opportunities for violation. If you have an antitrust problem or complaint, you should contact the Federal Trade Commission.
Agency Law Key Terms

**Agency** - describes the relationship between a principal and an agent.

**Agent** - When a person acts on behalf of another, that person is known as an agent. The agent, in our case a real estate broker, is acting on behalf of a client. The other party in the relationship is the client.

**Principal** - The client who has an agent acting on their behalf is known as a principal. A principal is also referred to as a client, which means there is an agency relationship.

**Affiliated Licensee** - An affiliated licensee is another term for a broker or managing broker working for a brokerage firm.

**Subagent** - A subagent is an agent of another agent, such as a real estate broker is a subagent of the real estate firm or designated broker, who is the agent of a client.

**Agency by Ratification** - An agency relationship, that is created after the fact when the principal agrees to be bound by the actions of another person who was acting without authority, is known as an agency by ratification and is a type of express agency.

**Express Agency** - Express agency is created by either an oral or a written agreement between the principal and the broker. It indicates their express intent for this representational status.

**Implied Agency** - It is possible to create an agency relationship by the actions of the parties, known as implied agency. If a real estate broker takes on responsibilities with a buyer that are normally those of a broker, but hasn't signed a buyer agency agreement, he/she may still be considered an agent via implied agency.

**Agency by Estoppel** - Also known as ostensible agency. An agency relationship created by the actions, behavior or statements of the principal and/or the broker upon which a third party relies is agency by estoppel. Ostensible agency may be found by a court where no agency relationship was intended by the principal.
**Universal Agent** - A universal agent is granted the power to handle all of the affairs of the principal.

**General Agent** - A general agent has the authority to represent many of the affairs of the principal, but not all of them.

**Special Agent** - A special agent usually has the authority to represent their client in only one “specific” area.

**Vicarious Liability** - A principal is not liable for an act, error, or omission by an agent or subagent of the principal arising out of an agency relationship. The principal can be liable if the court determines that it is highly probable that the claimant would be unable to enforce a judgment against the agent or subagent and the principal participated in or authorized the act, error, or omission; or the principal benefited from the act, error, or omission. What is intended with vicarious liability is a principal has limited liability for the acts of an agent on their behalf unless the principal participated in the act. The other portion of this is that the principal can be liable if they benefited from an illegal act and the other party would be unable to receive compensation from the agent.

**Imputed Knowledge** - The concept of imputed knowledge says that a person should know what another knows because of their relationship.

**Fiduciary Relationship** - A fiduciary relationship is when the principal places trust and confidence in the agent acting on their behalf and grants broad responsibilities to the agent.

**Actual Authority** - is different because it is expressly given to the agent either orally or in writing. Actual authority can be broad or specific, depending on the granting of authority by the principal. It is also known as express authority.

**Material Fact** - is anything that if it were known, may result in a different decision.

**Latent Defect** - Latent defects are issues with the property that are not discoverable by the standard inspection.

**Stigmatized Property** - has had a bad event occur there, such as a drug deal, crime, or suicide.
**Seller Agency** - The relationship is between the broker (listing broker) and the seller (owner of the property). When a real estate broker is employed to act in the best interests of the seller in a real estate transaction, this is referred to as Seller Agency. The relationship is between the broker and the seller (owner of the property). In this case where the broker represents the seller, the broker is known as the listing broker. You may also see this referred to on your exam and in other places as the listing agent. When a real estate broker is employed to act as an agent of the seller in a real estate transaction, this is referred to as seller agency. The broker has a statutory responsibility (legal) to the seller of confidentiality, loyalty, disclosure of any conflicts of interest and a duty to advise their client seek expert advice when outside the broker's area of expertise.

**Buyer Agency** - The relationship is between the buyer (or potential buyer) and the broker (buyer’s broker). In this case where the broker represents the buyer, the broker is known as the selling broker. It looks like a misprint since the term is “selling” broker and we’re referring to the relationship with the buyer, but this is how it is known. The selling agent, another term for selling broker is the licensee representing the buyer in the transaction.

**Dual Agency** - is when a broker represents both the buyer and seller in a transaction. A broker may act as a dual agent only with the written consent of both parties to the transaction after the dual agent has provided a pamphlet on the law of real estate agency, to all parties.

**Non-Agency Definition** - When a broker is working with a buyer or seller, but not representing them, this is referred to as non-agency.

**Designated Agency** - Within a brokerage, a situation may arise where one licensee that is affiliated with a brokerage is representing a seller and another licensee that is affiliated with the same brokerage is representing the buyer (in the same transaction).

**Antitrust Laws** - While brokerages and brokers regularly cooperate with one another through Multiple Listing Services there is a risk in the real estate business of suppressing competition. Antitrust laws and fair business practices are designed to promote the policy and practice of competition. Some of the symptoms of lack of competition are higher pricing and diminishing quality of a service or product.
**Conspiracy to Boycott** - The conspiracy to boycott happens when a group of competitors agree not to deal with another firm or when brokers collectively decide not to deal with a third party to eliminate competition.