

AGENCY POLICY...

DEFINING THE SOLUTIONS

20 of the Most Frequently Asked Questions about Agency Representation and Disclosure

QUESTION 1:

If you do a market analysis for an owner prior to securing a signed listing agreement, should the addendum to listing agreement be signed?

ANSWER:

No, there is no client or customer relationship with the consumer at that point in time. The addendum must be signed at the time the listing agreement is signed.

QUESTION 2:

If the property is not currently residential property but is to be used as residential property, do you have to follow disclosure rules?

ANSWER:

Yes. If the property is occupied by or intended to be occupied by one to four families for residential purposes, you must follow the new statute on agency disclosure.

QUESTION 3:

If a company does not practice dual agency, must it still use the Addendum to Listing Agreement and the Addendum to Buyer Broker Agreement?

ANSWER:

The law requires that the licensee provide a clear and complete explanation of how the broker will represent the interests of the seller or buyer and, if the broker represents both buyers and sellers, an explanation of dual agency. If, however, the broker does not practice dual agency, the broker's responsibility is to explain the agency relationship that does exist, i.e., exclusive representation.

Wise practice would be to use those forms but cross out all provisions dealing with dual agency. As an alternative, you can type your own form including the first three sentences of the statutory addendum forms dealing with the fact that the licensee is entering into an agency relationship with the client involving fiduciary duties. Thereafter, type on the form, "This brokerage firm does not engage in dual agency."

QUESTION 4:

In what circumstances might there be more required than the statutory forms?

ANSWER:

Under unique situations such as representing a relative, a friend, a business associate, or representing yourself in the purchase of property, you should have more involved dual agency disclosures explaining with particularity the nature of the relationship. This disclosure should be made in the Agency Disclosure to Buyer and Seller at Time of Offer to Purchase form.

QUESTION 5:

When I am acting as a dual agent in a transaction and the client asks my opinion on value, what should my response be?

ANSWER:

Rather than, "my opinion is" or "you should do this," the licensee should attempt to deal in facts rather than opinions.

QUESTION 6:

Do the disclosures involved in the new statute have to be used with vacant land?

ANSWER:

If it is purely vacant land with no intent to use it for residential purposes, the disclosures are not required. If the property has been subdivided and/or improved and is intended to be used for residential purposes, the disclosures should be made. Whenever you have a situation between these two extremes, the most conservative course of action is to make the disclosures and use the statutory forms.

QUESTION 7:

What changes, if any, should a brokerage firm make in how it conducts sales meetings in light of the new agency law?

ANSWER:

Because many brokerage firms will have listing agents and buyers agents on the same transaction, all information deemed confidential by the client should not be disclosed at the sales meetings. It should be kept confidential by the individual agents. Information that would otherwise be considered confidential may be disclosed if the client has given written authorization to disclose it.

QUESTION 8:

When is the fourth disclosure, "Disclosure to Buyer and Seller at the Time of Offer to Purchase" made?

ANSWER:

This form is only used in a dual agency situation. The buyers should sign this disclosure form at the same time they sign the purchase agreement and the buyers' agent should submit the disclosure to the listing agent for execution by the seller before presentation of the offer.

QUESTION 9:

Is it true that an agent cannot collect a commission from two parties without the consent of both parties?

ANSWER:

Article 8 of the Code of Ethics prohibits acceptance of compensation from more than one party without the informed consent of both parties. Furthermore, to do so probably violates fiduciary duties to both parties. The appropriate procedure to minimize liability is as follows: the seller and buyer must authorize that the buyer's agent may collect a commission from the listing agent, and the buyer's agent must disclose the fee to the buyer before the purchase agreement is signed. The MAR standardized listing agreement and buyer broker contracts contain the necessary consents to seller payment of the buyer broker fee. The MAR buyer broker contracts require written notification to the buyer of the seller's payment of compensation. There is a standardized form available for this purpose entitled "Compensation Disclosure to Buyer".

QUESTION 10:

Must a dual agent disclose both the fact of the fee being received from the other party and amount of the fee?

ANSWER:

Yes, as a fiduciary, that information should be disclosed to both parties.

QUESTION 11:

If an agent is acting as a seller's subagent in showing properties to a potential buyer and then wants to show the buyer a property listed by a company which doesn't offer cooperation to subagents, what should the agent do?

ANSWER:

The agent has three options:

- i. ask the listing company to make an exception;
- ii. act as a buyer's agent for that property after filling out the required forms and making the necessary disclosures. (Thereafter, the safest thing for the agent to do is to remain a buyer's agent because of the considerable risks in going back to the role of subagent);
- iii. act as a non-agent (transaction broker) for that property after filling out the appropriate forms

and making the necessary disclosures.

QUESTION 12:

If a broker/agent had a listing which expired and was not renewed, what is the broker/agent's agency relationship when s/he brings a potential buyer to that property?

ANSWER:

The broker/agent likely acquired confidential information from the seller when the prior agency relationship was created (in taking the listing). Therefore, the broker/agent should disclose the prior agency relationship to the buyer. The broker/agent may act as a seller's subagent, or as a buyer's agent if s/he has established an agency relationship with the buyer. It is legal for the agent to be a buyer agent, but s/he must act cautiously. The agent must not use confidential information about the seller against the seller (i.e. no disclosure to buyer of confidential information about price, terms or motivation).

QUESTION 13:

What are the penalties for non-compliance with the requirements of the 1993 agency law?

ANSWER:

Licensees who don't comply with the law put their licenses and their commissions at risk. Under the 1993 law, the Commissioner of Commerce may deny, suspend or revoke a real estate license, or censure a licensee, if s/he has acted on behalf of any party as a dual agent without the informed consent of the party. Also, a licensee cannot bring an action to collect a commission or fee with respect to a transaction unless there is a written agreement with the client or customer. Likewise, a licensee cannot bring an action to collect a commission or fee unless his/her agency relationship has been disclosed to the parties in accordance with the statute (i.e., getting all required agency forms signed in a timely manner).

QUESTION 14:

What problems arise in a guaranteed sale arrangement between a seller and a broker under the new agency law?

ANSWER:

The problem with a guaranteed sale is that the agent is representing the seller and is also the buyer in the same transaction, thus producing a dual agency. The listing agent must comply with the disclosure requirements using both the Agency Addendum to Listing Agreement and, at the time of pursuing the guaranteed sale, providing for execution of the Agency Disclosure to Buyer and Seller at Time of Offer to Purchase. In addition, we suggest that the following phrase be included in the Agency Disclosure to Buyer and Seller at the Time of Offer to Purchase:

"Because the listing agent is now the purchaser of the property, it is strongly recommended that the seller secure independent counsel prior to signing a guaranteed sale arrangement."

QUESTION 15:

If a REALTOR[®] calls a potential seller on a cold call in an effort to secure a listing, must s/he provide the customer with a disclosure or refrain from asking questions which might lead to confidential information?

ANSWER:

Because this is a cold call, the consumer should know there is no relationship with the agent as of yet. The agent is nothing more than a vendor trying to sell the relationship to the consumer. If the consumer discloses information that is confidential under these circumstances, the consumer must not consider it confidential or has waived it. At the same time, the REALTOR[®] should avoid asking leading questions which could lead to the disclosure of confidential information until an agency relationship has been established.

QUESTION 16:

What should an agent do when s/he is representing a buyer and the buyer becomes interested in a FSBO property?

ANSWER:

The agent should obtain an agreement with the property owner authorizing him/her to show the property and indicating that the agent represents the buyer. The agreement should also provide that the owner will pay a commission of a specified amount if the transaction is consummated.

QUESTION 17:

Can the listing agent refuse to pay a commission to a non-REALTOR[®] when property is on MLS?

ANSWER:

Yes, according to MLS rules.

QUESTION 18:

If a subagent or buyer broker failed to adequately complete the disclosure forms, does that foreclose the listing agent from collecting a fee?

ANSWER:

The statute requires that the licensee make adequate disclosure and if that licensee doesn't, s/he cannot collect the fee. Therefore, as long as the listing agent adequately completes disclosure forms and an in-house selling agent adequately completes the disclosure forms, the listing agent should be able to collect a commission. To the extent a cooperating subagent or a buyer's agent doesn't adequately complete the forms, that should not adversely affect a listing agent's collection of the fee. However, if an in-house salesperson acting as a seller's agent doesn't adequately prepare forms, the listing agent may well lose his/her commission because of the salesperson's lack of compliance.

QUESTION 19:

Must the seller sign an Agency Addendum to Listing Agreement at the time an one-time listing or showing agreement is signed?

ANSWER:

It depends on the nature of the agreement. If it is in the form of a listing agreement where an agency relationship is established with the seller, the Agency Addendum to Listing Agreement should be added. If the one-time showing agreement is in the form of a contract-to-pay-commission to an agent who is representing a buyer, but no agency relationship is established with the seller, then the Agency Addendum to Listing Agreement need not be added. However, this one-time showing agreement should very specifically state that the agent is not representing the seller, but is only being paid compensation for bringing a specific buyer to the seller with a proposed purchase agreement.

QUESTION 20:

Minnesota Rule 2805.1600 requires that all written offers to purchase or lease be promptly submitted to the seller or lessor. Does this prohibit a buyer broker from presenting one offer and holding a back-up offer that may or may not be submitted depending upon the circumstances?

ANSWER:

No. A buyer broker may present one offer and hold a back-up offer without submitting it at the same time. Rule 2805.1600 applies to listing agents, and prohibits them from delaying presentation of an offer to the owner in order to solicit an offer from another client of the listing agent.

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