

Real Estate Principles of Georgia

Lesson 8: Real Estate Agency Law

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Definitions

Agency relationship:
One person authorizes
another to represent
her in dealings with
other people (third
parties).



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Definitions

- Person authorizing another to represent her: **principal**.
- Person authorized to act as principal's representative: **agent**.



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Definitions

- ▶ Agency between seller and listing broker:
 - Broker is seller's agent
 - Seller is principal, and is broker's **client**
 - Potential buyers are typically broker's **customers**



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Definitions

- ▶ Agency between buyer and selling broker:
 - Broker is buyer's agent
 - Buyer is principal, and is broker's **client**
 - Potential sellers are typically broker's **customers**



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Definitions

- ▶ Agency relationship also exists between brokers and salespersons
 - Broker is salesperson's principal
 - Salesperson is broker's agent



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Agency Relationship

Real estate agency



Seller or buyer hires a broker to act as representative (agent) in transaction.

Real estate salesperson not licensed to represent seller or buyer directly.

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Agency Relationship

Real estate agency

Transactions may involve more than one agency:

- each party may have own agent
- salespersons are agents for their brokers



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Agency Law

Consequences of agency relationship:

- Dealing with agent may be legally equivalent to dealing with principal.
- Agent owes principal certain legal duties.



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Agency Law

- Real estate agency law is two-part:
- general agency law (common law)
- Brokerage Relationships in Real Estate Transactions Act (BRRETA)



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Agency Law General agency law

General agency law governs agency relationships and establishes agent's powers and duties.

Applies to agency relationships between:

- lawyer and client
- trustee and beneficiary
- real estate agent and seller or buyer

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Creating an Agency

Under general agency law, creating a relationship simply requires consent of both parties.



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Creating an Agency

Under general agency law, agency created by:

- express agreement
- ratification
- estoppel
- Implication
- ostensible



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Creating an Agency Express agreement

Principal appoints someone to act as his agent, and agent accepts appointment.

- Examples:
 - listing agreement
 - buyer agency agreement
 - power of attorney



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Creating an Agency Ratification

Ratification: Principal gives approval—after the fact—to acts performed by:

- person without authority to act for principal, or
- agent whose actions exceeded authority granted by principal.



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Creating an Agency Ratification



- Principal may ratify agency by:
- expressly approving unauthorized acts, or
 - accepting benefits of unauthorized acts.

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Creating an Agency Estoppel

Doctrine of estoppel:
A person cannot take a position contradicting previous conduct, if someone else has relied on the previous conduct.



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Creating an Agency Estoppel



- Agency is created by estoppel when it would be unfair to deny agent's authority (because principal allowed third party to believe agency existed).

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Creating an Agency Implication

One person's behavior implies that he's acting as another person's agent.

- If person believes someone is acting as her agent, and he fails to correct that impression, he may in fact owe agency duties.



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Creating an Agency BRRETA

- ▶ Under BRRETA, a written brokerage engagement is required.

Written brokerage engagement:
A contract in which a seller, buyer, landlord, or tenant becomes a client and agrees to pay for broker's services (for example, a listing agreement or buyer brokerage agreement).

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Creating an Agency BRRETA

- ▶ A real estate licensee may provide services to someone without creating an agency relationship.



- If so, the other person is only a customer, not a client or principal.



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Summary

Creating an Agency Relationship

- ▶ Agency
- ▶ Express agreement
- ▶ Ratification
- ▶ Estoppel
- ▶ Implication
- ▶ Creation by statute (BRRETA)

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Legal Effects of Agency

Dealing with agent can be the legal equivalent of dealing with principal:

- agent's actions may be binding on principal
- principal may be held liable for agent's mistakes/misconduct
- principal may be held to know information known by agent

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Legal Effects of Agency

Agent's actions bind principal

General rule: Authorized acts performed by agent are legally binding on principal, as if principal had performed acts himself.

- Acts must be within **scope of authority** granted by principal.



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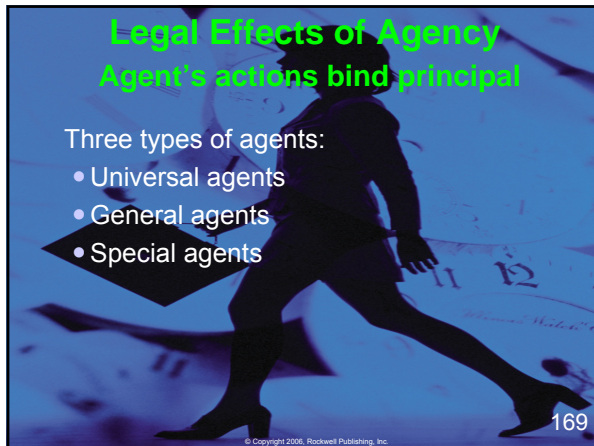
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Legal Effects of Agency

Agent's actions bind principal

Three types of agents:

- Universal agents
- General agents
- Special agents



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Agent's Authority

Universal agent

Universal agent: Agent authorized to do anything that can be lawfully delegated to a representative.

- Greatest degree of authority.
- Much less common than other types of agents.



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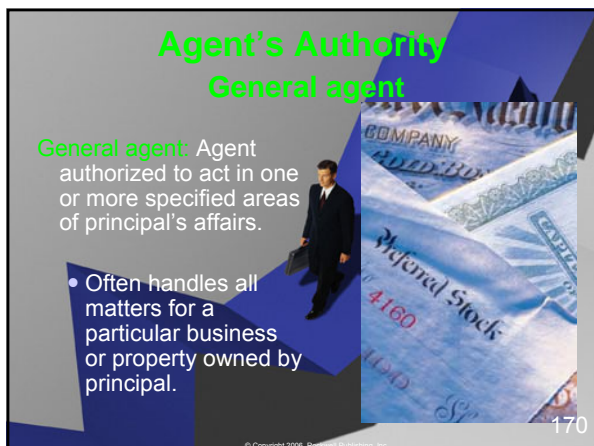
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Agent's Authority

General agent

General agent: Agent authorized to act in one or more specified areas of principal's affairs.

- Often handles all matters for a particular business or property owned by principal.



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Agent's Authority Special agent



Special agent: Agent authorized to do only a specific thing or conduct a specific transaction.

- Broker typically authorized to represent seller/buyer only in single transaction.

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Summary Scope and Types of Authority

- ▶ Universal agent
- ▶ General agent
- ▶ Special agent
- ▶ Scope of authority
- ▶ Actual authority
- ▶ Apparent authority
- ▶ Ostensible agent

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Duties in Agency Relationship

BRRETA imposes legal duties (standards of conduct) on agent.

Three broad categories:



- duties agent owes to clients
- duties agent owes to customers
- duties principal owes to agent

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Duties to the Principal

Fiduciary: Someone who acts for the benefit of another in a relationship founded on trust and confidence.



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Duties to the Principal



Under general agency law, an agency relationship is a fiduciary relationship, and the agent must put the principal's interests above everyone else's.

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Duties to the Client

- ▶ Under BRRETA, a broker is NOT deemed to have a fiduciary relationship with any party.
- ▶ The broker's duties and obligations are limited to those set forth in BRRETA, unless the parties agree otherwise in writing.



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Duties to the Client

► Under BRRETA, a broker owes five duties to a client:

► 1. performance of brokerage agreement's terms



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Duties to the Client

► 2. promoting client's interests by:

- A. seeking buyer, tenant, or property
- B. presenting all offers in timely manner
- C. disclosing to client any adverse material facts
- D. advising client to obtain expert advice
- E. accounting for all funds received



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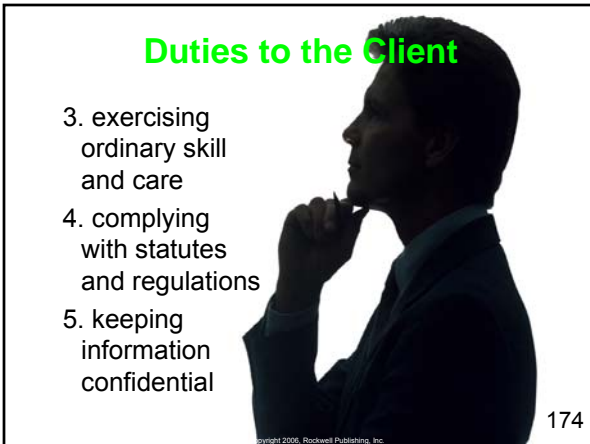
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Duties to the Client

3. exercising ordinary skill and care

4. complying with statutes and regulations

5. keeping information confidential



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Duties to Client Promoting client's interests



- ▶ The broker must make an affirmative effort to help fulfill client's fundamental goal—
 - If seller: finding a buyer who will buy for an acceptable price and terms
 - If buyer: finding a property at price and terms that are acceptable

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Duties to Client Presenting all offers

- ▶ A broker must present all offers to client, regardless of how unacceptable an offer may seem.



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Duties to Client Presenting all offers



- ▶ Offers should be presented even if it would mean a lower commission for the broker.

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Duties to Client Disclosing material facts

- ▶ BRRETA defines a **material fact** as any fact that a party:
 - does not know,
 - could not reasonably discover, and
 - would reasonably want to know.



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Duties to Client Disclosing material facts

- ▶ A broker should disclose any relationship with another party in the transaction (friend, relative, business associate).



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Duties to Client Disclosing material facts

- ▶ Any compensation a broker receives in connection with a transaction should be disclosed (no **secret profits**).



- ▶ However, a broker doesn't have to seek out information on a client's behalf.

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Duties to Client Recommending expert advice

- ▶ A broker must recommend expert advice on matters outside the broker's expertise.
- Questions about structural soundness should be referred to a home inspector, for instance.



Duties to Client Accounting

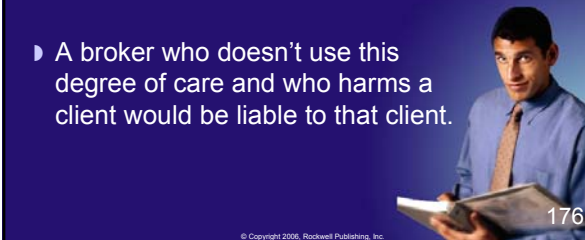


- ▶ If a broker receives money or property that a client has an interest in, the broker must account for it.
- ▶ Money received from clients or customers must be placed in special trust or escrow accounts.



Duties to Client Skill and care

- ▶ A broker must use level of skill expected of a competent real estate broker.
- ▶ A broker who doesn't use this degree of care and who harms a client would be liable to that client.



Duties to Client Confidentiality

- ▶ A broker must not disclose information to third parties that a client has requested be kept confidential.

- Exception: information that the broker is required by law to disclose (such as latent defects).



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Client Duties To Agent

- ▶ Performance
 - Make property easily accessible for showing
 - Keep property well-staged and clean
 - Compensate agent according to terms of contract
- ▶ Indemnify agent
- ▶ Reimburse agent per agreement; does not apply to typical marketing expenses

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Summary Duties to Client

- ▶ Perform terms of agreement
- ▶ Promote client's interests
- ▶ Exercise skill and care
- ▶ Comply with laws
- ▶ Protect confidential information
- ▶ Client Duties to Agent

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Duties to Customer

- ▶ Under BRRETA, a broker's duties to customers are more limited.
- ▶ A customer is any person not being represented by the broker in an agency capacity.



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Duties to Customers Ministerial acts

- ▶ Brokers may perform “ministerial acts” to customers, such as:
 - identifying property for sale
 - providing information on properties
 - providing pre-printed real estate forms
 - acting as scribe in preparation of forms
 - locating lenders or attorneys



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Duties to Customers

- ▶ Under BRRETA, a broker has two main duties to customers:
 - disclosing adverse material facts
 - avoiding misrepresentations



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Duties to Customers Disclosure of material facts

- ▶ Both the seller and seller's agent must disclose latent defects to prospective buyers.
- ▶ **Latent defects** are hidden defects that are not discoverable by ordinary inspection.



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Duties to Customers Disclosure of material facts

- ▶ Broker must disclose:
 - adverse facts concerning physical condition of property, like latent defects and environmental contamination
 - adverse conditions in immediate neighborhood (i.e., within one mile of property)



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Duties to Customers Disclosure of material facts



- ▶ Adverse facts must be disclosed only if the information:
 - is actually known to the broker, and
 - could not be discovered by buyer through reasonably diligent inspection of property

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Duties to Customer Disclosure of material facts

- ▶ Under BRRETA, a broker does not have a duty to look for and discover material facts concerning property or neighborhood.



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Duties to Customer Disclosure of material facts

- ▶ The buyer is obligated to protect his interests by inspecting the property and neighborhood.



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Duties to Customer Disclosure of material facts

- ▶ Under the Georgia Stigmatized Property Act, broker is not required to disclose:

- The property was occupied by person infected with a disease unlikely to be transmitted through occupancy of the property.
- The property was the site of a homicide, other felony, suicide, or other death.



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Duties to Customer Disclosure of material facts

- ▶ A buyer's agent must disclose:
 - any adverse material facts known to broker concerning buyer's financial ability to complete the sale
 - in a residential transaction, whether buyer intends to occupy the property as a principal residence



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Duties to Customer Avoiding misrepresentation

- ▶ Misrepresentation is a false or misleading statement, whether intentional or unintentional.



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Duties to Customer Avoiding misrepresentation

- ▶ Under BRRETA, a broker isn't liable for giving false information if the broker:
 - didn't actually know it was false, and
 - disclosed the source of information to customer



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Duties to Customer Avoiding misrepresentation



- ▶ Opinions, predictions, and "puffing" (nonfactual, exaggerated statements) cannot be the basis of a lawsuit.
- ▶ Agents should still avoid sales talk that might be taken as statement of fact by an unsophisticated customer.

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Duties to Customer Avoiding misrepresentation

- ▶ Agents should never guarantee future profits that will result from property's resale.
 - This is a specific violation of state license law.



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Breach of Duty License suspension or revocation

Agent's breach of duty is a violation of state real estate license law.

- May result in license suspension, revocation, or other disciplinary measures.



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Summary Duties to Customers


- ▶ Disclosing material facts
- ▶ Latent defects
- ▶ Misrepresentation
- ▶ Breach of duty

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Terminating an Agency

Termination of agency: agent no longer authorized to represent principal.

- Most agency duties and liabilities end.



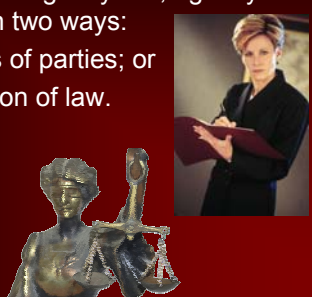
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Terminating an Agency

Under general agency law, agency terminates in two ways:

1. by actions of parties; or
2. by operation of law.



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Terminating an Agency Action of the parties



Agency can be terminated by:

- mutual agreement
- revocation by the principal
- renunciation by the agent

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Termination by the Parties Mutual agreement

Principal and agent can terminate agency by mutual agreement at any time.

- Get termination in writing, especially if agency is based on written contract.



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Termination by the Parties Principal revokes

Principal can fire agent for any (or no) reason.

- However, this revocation might breach contract.



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Termination by the Parties

Principal revokes

Exception: agency coupled with interest can't be revoked.

- **Agency coupled with interest:** agent has financial stake or other interest in agency subject matter.



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Termination by the Parties

Agent renounces

Agent may terminate agency at any time without principal's consent.

- Renunciation might breach contract.



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Termination by Operation of Law

Terminating events

Agency will terminate automatically if:

- agency term expires
- agency's purpose is fulfilled
- either party dies, becomes incompetent, or declares bankruptcy
- subject matter becomes extinct
- supervening illegality



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Terminating an Agency Under BRRETA



- ▶ In Georgia, an agency terminates upon completed performance of the brokerage engagement, or, failing that, upon the:
 - agreed-upon expiration date
 - authorized termination of the relationship, or
 - one year after beginning of the relationship

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Summary Terminating an Agency

- ▶ Termination by the parties
- ▶ Agency coupled with an interest
- ▶ Termination by operation of law
- ▶ Termination under BRRETA

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Real Estate Agency Relationships Typical residential transaction

Sale of home usually involves more than one real estate agent:

- listing broker
- listing salesperson
- selling broker
- selling salesperson
- other cooperating agents who showed home to other prospective buyers



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Real Estate Agency Relationships Terminology

- Real estate agent
 - Broker
 - Salesperson
 - Selling agent
 - Cooperating agent
 - Listing agent
- Client
- Customer



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Real Estate Agency Relationships Historical background

Previously: confusion as to whether agent represented buyer or seller.

- “Unilateral offer of subagency” provision used to provide that any cooperating MLS agent who found a buyer represented the *seller*.



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Real Estate Agency Relationships Historical background

- But many buyers thought the agent they were working with was representing them, not the seller.



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Real Estate Agency Relationships

Historical background



Inadvertent dual agency: agent accidentally ended up representing both buyer and seller, without their knowledge or consent.

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Real Estate Agency Relationships

Historical background

In 1990s: unilateral offer of subagency replaced with “cooperation and compensation” provision—other MLS members act as cooperating agents, not seller’s subagents.



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Historical Background

Disclosure laws

Many states have passed disclosure laws requiring agents to disclose to both buyer and seller which party they represent in a transaction.

Georgia adopted BRRETA in 1994 to clarify brokerage relationships as well as to require agency disclosures.



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Disclosure Laws BRRETA

▶ Under BRRETA, a real estate licensee must give a written agency disclosure to both buyer and seller in every transaction.

The disclosure must be made before any party makes an offer to purchase, sell, or lease a property.



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Disclosure Laws BRRETA



▶ The disclosure must state which:

- party or parties the licensee's firm is representing, and
- from which party or parties the licensee will receive compensation.

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Disclosure Laws BRRETA

▶ A licensee buying, selling, or leasing property must disclose her status to the other parties.



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Disclosure Laws BRRETA

- ▶ In a brokerage engagement contract, the broker must disclose:
 - the types of agency relationships available
 - relationships with other parties that may be conflicts of interest
 - broker's compensation
 - broker's obligation to keep information confidential if requested



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Disclosure Laws BRRETA



- ▶ Payment (or promise of payment) does not necessarily create a brokerage relationship between a broker and another party.
 - For instance, a commission split doesn't create an agency between a seller and a buyer's broker.

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Summary Real Estate Agency Relationships

- ▶ Listing agent
- ▶ Selling agent
- ▶ Cooperating agent
- ▶ Unilateral offer of subagency
- ▶ Inadvertent dual agency

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Types of Agency Relationships

Agency relationships in real estate transactions:

- seller agency
- subagency
- buyer agency
- dual agency
- designated agency
- transaction brokerage



Buyer agency now common, but seller agency still most common agency relationship.

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Seller Agency

Typically created with written listing agreement (employment contract):

Seller hires broker to find buyer for property. In exchange for broker's efforts, seller agrees to pay broker a commission under certain conditions.



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Seller Agency

Role of seller's agent

Promoting seller's interests: marketing property, finding buyer, and negotiating sale.



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Seller Agency

Role of seller's agent

May perform ministerial acts for buyers: filling out offer, helping buyer apply for financing.

- Helps sell property without violating agent's duties to seller.
- Should never give professional advice, such as suggesting how much to offer.



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Types of Agency Relationships

Subagency (Not a part of BRRETA)

Created by express consent of seller and seller's agent.

- Agents from other brokerage companies show seller's property as subagent of seller and listing broker (seller's agent)
- Subagent must promote best interests of seller, not buyer.

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Types of Agency Relationships

Buyer agency

Advantages of buyer agency:

- agent's loyalty and confidentiality
- agent's objective evaluation of property and advice on how much to offer
- help with negotiating the transaction
- access to more properties



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Buyer Agency Compensation

A buyer's agent may be compensated if the buyer purchases any home, even one that isn't listed with a broker.



This means the buyer may be shown a wider variety of properties, such as FSBOs, open listings, and foreclosures.

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Types of Agency Relationships Dual agency

Dual agency: Real estate agent represents both seller and buyer in same transaction.



- Only allowed in Georgia with written consent of both parties.
- Interests of parties usually conflict, so it is difficult to represent both fairly.

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Dual Agency Disclosure

Written consent to dual agency must state:

1. broker represents two clients whose interests may differ
2. broker will disclose material facts to all parties, except for confidential information



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Dual Agency Disclosure



3. broker will disclose nature of any material relationship to other parties to transaction
4. client does not have to consent to dual agency
5. client's consent has been voluntary

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Dual Agency Office Policy

- ▶ BRRETA requires all brokers to establish office policy regarding dual agency.
 - The policy must either permit or reject practice of disclosed dual agency.
 - The office's policy must be disclosed to prospective clients in every brokerage engagement contract.



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Designated Agency

Designated agency occurs when listing and selling agents work for same broker.

- Under general agency law, this would be considered dual agency.
- The imputed knowledge rule does not apply to designated agency (as with dual agency).
- Under BRRETA, broker appoints one (1) agent to exclusively represent seller's interest and another agent to exclusively represent buyer's interest.



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Designated Agency

In Georgia, designated agency is only permitted if:

- listing agent represents seller only, and
- selling agent represents buyer only.



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Designated Agency Office policy

As with dual agency, a brokerage must have an office policy as to whether designated agency is permitted.



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Designated Agency Confidentiality

- ▶ Designated agents generally may not disclose information that a client asked to keep confidential.
- ▶ Such information may be disclosed to the agent's broker, but the broker may not tell the other designated agent or anyone else.



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Transaction Brokerage

A **transaction broker** is a licensee involved in a transaction without a broker-client relationship with either party.

- Doesn't represent either party— simply assists with paperwork and closing.
- All parties are treated as customers, and the broker performs only ministerial acts on their behalf.



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Transaction Brokerage



A transaction broker must still :

- present all offers
- account for trust funds
- disclose material facts
- exercise ordinary care and skill

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Transaction Brokerage

A transaction broker does not have to:

- promote the customer's interests as he would promote a client's interests



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Transaction Brokerage

- ▶ A transaction broker may receive compensation from any party without creating a broker-client relationship or assuming agency duties.



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Summary Types of agency

- ▶ Seller agency
- ▶ Subagency
- ▶ Buyer agency
- ▶ Dual agency
- ▶ Designated agency
- ▶ Transaction brokerage

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