



# AGENCY BOOK

*Duties of Fair and Honest Dealing*

**ADHI Schools**



## Table of Contents

<i>What is agency?</i> .....	03
<i>History of Agency Relationships</i> .....	03
<i>Why Agents Are Used</i> .....	04
<i>Benefits of Having a Real Estate Agent Involved</i> .....	05
<i>Parties to the Agency Relationship</i> .....	06
<i>Who is the Agent?</i> .....	06
<i>Who Is the Principal?</i> .....	07
<i>Fair and Honest Dealing as a Real Estate Professional</i> .....	09
<i>Duty of Disclosure</i> .....	09
<i>Power of attorney</i> .....	10
<i>Termination of agency relationships</i> .....	10
<i>Special vs. general agents</i> .....	16
<i>Brokers Must Supervise</i> .....	22
<i>Essential elements of a basic listing contract</i> .....	24
<i>The Negotiability of Real Estate Commissions</i> .....	25
<i>MLS Misrepresentations</i> .....	27



## What is agency?

An agency relationship in real estate is a legal relationship between a real estate broker (the “agent”) and a client (the “principal”). The agent acts on behalf of the principal in transactions related to real estate, such as buying or selling property, negotiating deals, or managing property.

The nature of the agency relationship is defined by the laws of the state where the agent operates. In California and other states, the agent owes a fiduciary duty to the principal, which means the agent is obligated to act in the principal's best interests, maintain confidentiality, and disclose all material facts related to the transaction. The agent's duty includes obedience, loyalty, and accountability to the principal.

Understanding agency relationships is essential for real estate professionals because it affects their legal obligations and potential liability. They need to be aware of their duties and responsibilities to their clients and ensure they fulfill them. For example, if an agent has a conflict of interest or fails to disclose all material information to the principal, they may be liable for breach of fiduciary duty.

Furthermore, real estate professionals must communicate their agency relationship with their clients and avoid any confusion that could lead to legal disputes or misunderstandings. By understanding the legal framework of agency relationships, real estate professionals can provide better service to their clients and protect themselves from legal risks.

## History of Agency Relationships

There are various forms of agency, but a universal element defining the connection between the agent and the principal prevails, regardless of the



transaction. In real estate the commonality is that the licensed broker is considered the agent of record and represents either the buyer or the seller - or in some cases, both. A salesperson frequently works directly with a buyer or seller and, as such, serves as the agent of the broker, a good example of the different levels of agency relationships.

In a transaction involving a single property, multiple agents may be involved. And that often leads to confusion. It is important to remember that the primary or governing agency relationship in every real estate transaction is between the principal – buyer or seller – and a broker, no matter how many other actors are involved during contract negotiation.

Until updates to the California Civil Code were enacted in 1988, both real estate agents typically owed allegiance to the seller, even one worked directly with buyers.

Changes to the law came about partly due to legislation and court decisions arising from previous conflicts and misunderstandings over agency relationships. Those agency relationships are now clearly defined by the current California Civil Code, and all parties are expected to understand and subscribe to the legal stipulations and restrictions. Real estate agency relationships are typically presented in writing, with signatures required by both principal and agent.

## Why Agents Are Used

Agents exist in many fields because of the need for experience, expertise, and specialized knowledge. Travel agents, shipping agents, and talent agents - to name a few - act as experts, enabling individuals to seek sensible options and make more informed decisions. Selecting an agent helps to provide order for otherwise complicated transactions and to simplify multiple tasks for people who

need to be better-versed regarding necessary procedures, which is especially important in real estate transactions.

While it is possible to buy or sell a home or a business property without a real estate agent, the majority of such transactions are completed successfully because of the special training that agents receive, the legal protections offered by written agency agreements, and the realization that high-dollar financial transactions can be risky without professional advice.

## Benefits of Having a Real Estate Agent Involved

Real estate transactions can be complicated and stressful, and most people hire a real estate agent to help them navigate the process. There are several benefits to using a real estate agent when buying or selling a property, including their expertise, market knowledge, and ability to handle negotiations and paperwork.

Firstly, a real estate agent has specialized knowledge and experience in the industry. They are familiar with the local market and can provide valuable insights into property values, market trends, and potential issues to look out for. Agents have access to multiple listing services, giving them access to a broader range of properties than publicly available. This expertise can help buyers find the right property at the right price, help sellers price their property accurately, and attract the right buyers.

Secondly, experienced real estate agents are skilled negotiators. They can help clients navigate the negotiation process and achieve the best possible outcome. Agents are trained to handle complex negotiations and can help their clients avoid common pitfalls. They can also help buyers and sellers understand the terms of a contract and ensure that both parties are satisfied with the final agreement.

Thirdly, real estate agents can handle many paperwork and administrative tasks associated with buying or selling a property. This can be a significant time-saver for clients needing more time or expertise to handle these tasks themselves. Agents can help clients understand complex contracts and ensure all necessary documents are filed correctly and on time.

Finally, real estate agents can offer peace of mind to their clients. Buying or selling a property can be stressful, and having an experienced professional to guide you through the process can be reassuring. Agents can help their clients navigate the emotional aspects of buying or selling a home and can provide support throughout the entire process.

## Parties to the Agency Relationship

Two main parties exist in every agency relationship: The agent and the principal. In real estate transactions, the agency can be multi-level. As mentioned, the licensed real estate broker is always considered an agent of the principal, either the seller or the buyer. A salesperson may act as an agent for a broker, whether they are an employee of the broker or an independent contractor.

## Who is the Agent?

When a seller signs a listing agreement, an agency is established between the property owner and the broker, regardless of whether another salesperson is involved. If a real estate salesperson is involved, that person acts as an agent for the broker, and specific duties accrue to each party.

When a prospective buyer contacts a real estate agent, it is common practice for the salesperson to explain how a “buyer’s agency” is established and sometimes



request that such an agreement be executed. It is an advantage to both the prospective buyer and the salesperson, whether associated with the listing broker or another real estate brokerage. A signed agency agreement protects all parties.

Again, remember that the licensed broker is the agent. Even in offices with many licensed associates – and all real estate agents in California must be licensed – an agency agreement is always between the designated broker and the principal.

## Who Is the Principal?

In real estate, the principal is almost always a seller or a buyer, although if a real estate agent is conducting property management, it could be a landlord or tenant also. The principal retains the right to make decisions, in terms of executing contracts, agreeing to financial terms, the duration of the agency relationship, details of that agreement, and specific performance under it. Both listing agreements and buyer's agency are typically written for a defined term. They may be amended, extended, or terminated under certain conditions.

Again, the principal always retains discretionary authority and may override or question the recommendations made by the agent.

## Single Agency vs. Dual Agency

A single agency, in the context of real estate, is a type of agency relationship between a real estate agent and a client. It occurs when the agent represents only one party in a real estate transaction, either the buyer or the seller, but not both.

When an agent works as a single agent for a buyer, they owe their full fiduciary duty to that buyer. This means that the agent has a legal obligation to act in the buyer's best interest and provide them with undivided loyalty, confidentiality, and full disclosure of all material facts.



Similarly, when an agent works as a single agent for a seller, they owe their whole fiduciary duty to that seller. This means that the agent has a legal obligation to act in the seller's best interest and provide them with undivided loyalty, confidentiality, and full disclosure of all material facts.

Single agency differs from dual agency. Dual agency occurs when a given broker represents both the buyer and seller in a transaction. Dual agency is often considered a conflict of interest, as the agent may find it challenging to provide undivided loyalty to both parties. In some states, dual agency is not permitted, while in others, it is allowed only with the informed consent of both parties.

An argument can be made that single agency assures clients that their agent is acting in their best interest, without any conflicts of interest. This can help build trust and confidence in the agent, ultimately leading to a smoother and more successful real estate transaction.

Remember that in a dual agency relationship, the agent has a legal obligation to act in the best interests of both parties, which can create conflicts of interest. For example, suppose the buyer wants to purchase the property for the lowest price possible, but the seller wants to sell the property for the highest price possible. In that case, the agent may find themselves in a difficult position.

Dual agency can occur in several ways. For example, if agents from the same brokerage firm represent the buyer and seller, the agents may work as dual agents. Similarly, if the buyer is interested in a property listed by the seller's agent, the agent may offer to work as a dual agent.

### **Two common scenarios result in Dual Agency:**

- The listing agent, through personal efforts or because a potential buyer contacts them directly, may secure a potential buyer for the property;

- A licensed associate in the same brokerage firm shows the listed property to a potential buyer interested in submitting an offer.

Either occurrence results in Dual Agency.

## Fair and Honest Dealing as a Real Estate Professional

In real estate transactions, brokers play a pivotal role in ensuring that both parties are well-informed and protected. One of the key responsibilities of a real estate broker is to uphold the duty of fair and honest dealing, which encompasses a wide range of obligations, such as full disclosure of all material facts.

The duty of fair and honest dealing requires real estate brokers to act with integrity and transparency towards all parties involved in a real estate transaction. This includes the broker's principal and the other principal in the transaction. As established in *Lingsch v. Savage* (1963), this duty exists by virtue of the agent's status as a real estate broker, regardless of whether the broker has a fiduciary relationship with the principal to whom the disclosures are being made.

## Duty of Disclosure

Real estate brokers must disclose all material facts related to a property, whether they represent the buyer or the seller. This means they cannot withhold or misrepresent any information that could influence the other party's decision or affect the property's value. For instance, a broker representing a seller must inform prospective buyers of any issues with the property that they are aware of or should be aware of.

## Power of attorney

A power of attorney is a legal document that allows someone (the agent) to act on behalf of another person (the principal). The agent is also known as an "attorney in fact." There are two types of power of attorney: special and general. A special power of attorney lets the agent perform specific tasks for the principal, while a general power of attorney allows the agent to manage all of the principal's affairs.

The power of attorney document must be carefully interpreted because it limits what the agent can do. If the document has both general and specific instructions, the general instructions only cover what's necessary to complete the specific tasks mentioned.

Real estate brokers are rarely given power of attorney.

## Termination of agency relationships

Generally, an agency may be terminated in the following ways:

- a. The expiration of its term.
- b. The extinction of the subject matter
- c. The death of the agent.
- d. The agent's renunciation of the agency.
- e. The incapacity of the agent to act as such. Civil Code § 2355.

### Expiration of term:

In real estate transactions, the agency relationship between a client (the principal) and their real estate broker or agent is governed by a contract, which establishes the terms and conditions of their relationship, but this relationship is only for a specified period of time.

In the context of a real estate listing agreement, the expiration of the term stated in the contract between the principal and the agent signifies the natural end of the agency relationship. Once the term expires, the agent's authority and responsibilities towards the principal cease, and the agent is no longer obligated to perform any tasks on behalf of the principal.

### Example: Listing Agreement Expiration

**Story:** John hired a real estate agent, Sarah, to help sell his house. They signed a listing agreement with a term of six months. The house remained unsold at the end of the six months despite Sarah's marketing efforts.

**Discussion:** In this example, the agency relationship between John and Sarah was terminated due to the expiration of the listing agreement's term. Once the six months were up, Sarah was no longer obligated to market John's house, and John was free to either renew the agreement with Sarah, find a new broker, or take the property off the market altogether.

### Extinction of the subject matter

In real estate transactions, the agency relationship between a client (the principal) and their real estate broker or agent is often based on a specific subject matter, such as selling or purchasing a specific property. The extinction of this subject matter can lead to the termination of the agency relationship.

In real estate, the extinction of the subject matter occurs when the property or transaction that the agency relationship is based upon is no longer relevant or available. This can happen for various reasons, such as the property being destroyed. Once the subject matter is extinct, the agency relationship is considered terminated, as the agent has no further obligations or authority in relation to the principal.

## Example: Property Destruction

**Story:** Jane hired a real estate agent, Mark, to help her sell her commercial property. However, a fire broke out before the property could be sold and destroyed the building.

**Discussion:** In this example, the extinction of the subject matter occurred due to the destruction of the property. Since the property no longer exists, the agency relationship between Jane and Mark is terminated. Mark is no longer obligated to market the property or find potential buyers, and Jane is no longer bound to compensate Mark for his services.

## Death of the Agent as a Termination of Agency Relationship

In real estate transactions, the agency relationship between a client (the principal) and their real estate broker or agent is founded on the mutual understanding that the agent will perform specific tasks on behalf of the principal. However, the agent's death can lead to the termination of the agency relationship. Upon the agent's death, their authority to act on behalf of the principal ceases, and the principal is released from any further obligations toward the deceased agent. The principal must find a new agent representing their interests in the real estate transaction.

Agency relationships can be terminated due to the agent's death, yet in real estate, the agent is the broker, not the individual salesperson. Therefore, if a salesperson dies, this occurrence does not impact the agency.

Further, suppose the broker, who serves as the designated officer for a corporation, passes away. In that case, it also doesn't affect the listings or other agency agreements, given that the 'broker' in this scenario is technically a corporation.

However, if a broker who is a sole proprietor dies, all the listings will be terminated because the broker operates as a sole proprietor. This implies that the broker, being the sole owner, is crucial to maintaining the listings and the agency relationship.

### Example: Agent's Death Before Property Sale

**Story:** Alice hired a real estate broker, Bob, to help her sell her house. They signed a listing agreement and began marketing the property. Tragically, Bob died suddenly in an accident before the house was sold.

**Discussion:** In this example, the agency relationship between Alice and Bob is terminated due to Bob's death. As a result, Alice is no longer obligated to work with Bob's agency and is free to find another agent to help her sell her property. Bob's estate will not be entitled to any commission from the future sale of Alice's house, as the agency relationship has been terminated.

Renunciation of Agency by the Agent as a Termination of Agency Relationship in Real Estate

In real estate transactions, the agency relationship between a client (the principal) and



their real estate broker or agent is established through a contractual agreement. However, the agent may choose to voluntarily renounce or terminate the agency relationship.

The agent's renunciation of the agency refers to a situation where the agent voluntarily relinquishes their authority to act on behalf of the principal. In such a scenario, the agency relationship is terminated, and the agent is no longer bound to fulfill duties or obligations towards the principal. This could happen due to various reasons, such as a conflict of interest, personal reasons, or an inability to perform the agreed-upon tasks.

### **Example: Renunciation By the Principal**

A principal can also terminate an agency relationship. This is called "revocation of agency." The principal, who has given the agent authority to act on their behalf, has the right to revoke this authority at any point. However, it's important to note that this must be done in accordance with any terms outlined in the agency agreement to avoid potential legal implications. This may include providing appropriate notice and potentially compensating the agent for work performed up to the point of termination.

**Story:** Consider a homeowner, John, who decides to sell his property. He signs an agreement with a real estate brokerage run by Maria, thereby making her his agent.

However, after a few weeks, John becomes dissatisfied with Maria's efforts. Despite the bustling real estate market, Maria has been unable to attract good offers for John's property. After careful consideration, John decides to revoke the agency given to Maria.

John, in accordance with the terms of their agreement, serves Maria a notice of termination, thus initiating the revocation of agency. John may owe Maria



reimbursement for her time and expenses in connection with the revocation. If a ready, willing and able buyer were to have been found, he may also be liable for the full commission.

**Discussion:** This real estate example illustrates the principal's right to revoke an agency relationship if they're unsatisfied with the agent's performance. John's decision to revoke Maria's agency aligns with the legal concept of revocation of agency. Notably, the principal must follow the terms agreed upon in the contract, including serving the appropriate notice to avoid potential legal implications.

### Example: Conflict of Interest

**Story:** Mary hired a real estate agent, John, to help her purchase a new home. However, after a few weeks, John informed Mary that he had also been hired by the seller of the property that Mary was interested in buying. This made John uncomfortable and he spoke to his broker who agreed.

**Discussion:** In this example, the agency relationship between Mary and John is terminated due to John's renunciation of the agency, with the approval of John's broker. John's decision to work for both the buyer and seller created a conflict of interest, and he could no longer fulfill his duties to Mary as her agent. John's renunciation of the agency allowed Mary to find another agent who could represent her interests exclusively.

### Incapacity of the Agent as a Termination of Agency Relationship in Real Estate

In real estate transactions, the agency relationship between a client (the principal) and their real estate broker or agent is based on the agent's ability to perform the agreed-upon tasks. However, the agency relationship can be terminated if the agent becomes incapacitated and cannot act as such.

Under Civil Code § 2355, the agency relationship is terminated if an agent becomes incapacitated and cannot act. Incapacity can result from various reasons, such as illness, injury, or mental incapacity, preventing the agent from performing their duties and obligations towards the principal. In such a scenario, the principal is no longer bound to compensate the agent or follow their advice and may need to find a new agent to represent their interests.

### Example: Illness

**Story:** Suppose you hire a real estate broker, Mr. Smith, to sell your house. The agreement you sign creates an agency relationship, where Mr. Smith is the agent acting on your behalf to find a buyer for your property.

A few weeks into the process, Mr. Smith suffers a severe car accident, leading to long-term physical incapacity. He is unable to continue his duties as a real estate broker, unable to show your property to prospective buyers, or negotiate sale terms.

**Discussion:** Under Civil Code § 2355, Mr. Smith's incapacity would effectively terminate your agency agreement with him. His inability to perform his broker duties due to his physical condition would free you from your obligation to pay him a commission or heed his professional advice.

As a result, you would need to seek out and hire a new real estate broker, creating a new agency relationship, to continue selling your house.

## Special vs. general agents

In real estate, an agency relationship is formed when a client (the principal) hires a real estate broker or agent to represent them. There are two types of agents in

real estate: general and special.

## General Agents

A general agent is an individual who is authorized to conduct a series of transactions that often involve continuity of service. They are an integral part of a business enterprise and do not require additional authorization for each transaction they conduct on their principal's behalf. For example, a branch manager of a company may have general authority to transact the branch's business on behalf of the company and is a general agent to that extent. General agents have the authority to enter into agreements on behalf of their principal without seeking further approval.

Real estate agents are rarely, if ever, general agents.

## Special Agents

A special agent is an individual who conducts a single transaction or series of transactions that do not involve continuity of service. They are typically hired to perform a specific task or transaction for their principal. For instance, a real estate broker is usually a special agent hired to solicit and negotiate on behalf of their principal. Still, they are not authorized to enter into contracts or agreements on behalf of their principal. Real estate brokers and associate licensees are licensed and regulated as special agents to carry out certain defined activities for compensation or expectation of compensation in real property and real property secured transactions.

## Differences between General and Special Agents

The main difference between a general agent and a special agent is the extent of their authority. General agents have broader authority to act on behalf

of their principal and do not require specific authorization for each transaction they conduct. On the other hand, special agents have limited authority and are typically hired to perform a specific task or transaction for their principal. Real estate brokers, in particular, are special agents who solicit and negotiate on behalf of their clients but need to have the authority to enter into agreements on their behalf without seeking ratification.

The differences between general and special agents in real estate are significant. While general agents have broad authority to act on behalf of their principals, special agents are limited to specific tasks or transactions. Real estate brokers, in particular, are typically special agents who solicit and negotiate on behalf of their clients but need to have the authority to enter into agreements on their behalf without seeking ratification. Understanding these differences is important when determining the extent of an agent's authority to bind the principal to arrangements made by the agent with third parties and when defining the course and scope of the agency relationship.

## Multiple Listing Service

The Multiple Listing Service (MLS) is a critical tool used in real estate for buying and selling properties. It is an essential resource that helps real estate agents, and brokers access a comprehensive database of properties listed for sale. In this essay, we will discuss the MLS, its history, why it is used, and the benefits of putting property in this database.

### What is the MLS?

The Multiple Listing Service (MLS) is an online database of properties listed for sale. It is a system that enables real estate agents and brokers to share information about properties with one another. The MLS is designed to make it easier for agents to find properties for their clients and to connect with other agents who

may have potential buyers for their listings. The MLS provides agents with a centralized platform to access property information that is accurate, up-to-date, and comprehensive.

## History of the MLS

The MLS was established in the late 1800s by real estate agents who wanted to share property information. The MLS started as a printed book distributed to agents and brokers. In the 1960s, the MLS became computerized, which made it easier for agents to access property information. Today, the MLS is an online database accessible to agents and brokers across the United States and Canada.

## Why is the MLS Used?

The MLS is used to help real estate agents, and brokers find properties for their clients. It is a centralized platform that provides agents with access to property information that is accurate, up-to-date, and comprehensive. The MLS is also used to market properties to potential buyers. By listing a property on the MLS, agents, and brokers can expose it to a large network of other agents who may have potential buyers for their listings.

## Benefits of Putting a Property in the MLS

There are many benefits to putting a property in the MLS. One of the main benefits is that it provides exposure to an extensive network of agents and brokers who may have potential buyers for the property. The MLS also provides accurate and up-to-date information about the property, which can help potential buyers make informed decisions about whether to view or purchase the property. Additionally, the MLS is a tool that can help sellers get the best possible price for their property, as it enables agents and brokers to market the property to a wide audience of potential buyers.

The Multiple Listing Service (MLS) is a critical tool used in real estate for buying and selling properties. The MLS online database provides agents and brokers with access to comprehensive property information. The MLS was established in the late 1800s and has become an essential resource for agents and brokers across the United States and Canada. By listing a property on the MLS, sellers can expose it to an extensive network of agents and brokers who may have potential buyers for their listings. The MLS provides many benefits to sellers and buyers, making it an essential resource in the real estate industry.

### **IDX feeds and the Internet**

Properties for sale that are uploaded to the MLS generally make their way onto a whole host of other websites through a system called IDX.

IDX stands for "Internet Data Exchange," a policy that allows real estate professionals to share comprehensive and detailed listings. IDX systems facilitate the sharing and promoting of listings from the Multiple Listing Service (MLS) onto individual agents' or brokers' websites.

An MLS IDX feed is, therefore, a data feed provided by the MLS that allows real estate agents, brokers, and other authorized parties to display MLS listing data on their websites. The data is updated regularly, ensuring that viewers of these websites can see the most accurate and up-to-date property listing information.

Using an IDX feed allows real estate professionals to provide valuable content to potential buyers browsing their websites, thereby increasing the chance of attracting and capturing leads. It can display all the listed properties in an MLS, not just the ones listed by the agent or broker who owns the website.

This technology dramatically aids in the online marketing efforts of real estate agents and brokers, allowing for greater exposure of property listings to the

public and enabling potential buyers to search for and view property details from anywhere, anytime.

However, it's important to note that not all information from the MLS database is included in an IDX feed due to privacy considerations. Sensitive data like the seller's contact information and confidential remarks are typically excluded.

Please note that the use of MLS IDX data is regulated and usually requires approval from the respective MLS and adherence to specific rules and standards to ensure that data is used appropriately and ethically.

### Disclosure of Conflicts and Profits by the Broker as a Special Agent

As a special agent in real estate, brokers have a fiduciary duty to act in their client's best interests and avoid conflicts of interest. This duty includes disclosing any conflicts or profits arising from their involvement in a transaction. This essay will discuss the duty of disclosure, as outlined in The Restatement of Agency, and the importance of full disclosure to avoid violating fiduciary duties and obligations owed to the principal.

### **Duty of Disclosure**

According to The Restatement of Agency, a special agent must fully and completely disclose all relevant facts to the principal before dealing with them on their own account. Relevant facts are those that the agent should realize would likely affect the principal's judgment in consenting to the transaction on specified terms. This disclosure must include not only the fact that the agent is acting on their own account but also all other facts that may impact the transaction's desirability from the principal's viewpoint.

In real estate, this duty of disclosure is particularly important when combining listings, options, and guaranteed sale agreements. Brokers must exercise the utmost caution to avoid violating their fiduciary duties and obligations owed to the principal.

### Importance of Full Disclosure

The Real Estate Law and general principles of agency require that brokers make full disclosure to the principal of any compensation, commission, or profit claimed or taken by the licensee concerning the transaction. Failure to disclose fully can lead to a violation of fiduciary duties and obligations owed to the principal, which can result in legal consequences.

For example, suppose a broker has a guaranteed sale agreement with a client that requires the broker to purchase the property if it does not sell within a specified timeframe. If the broker intends to sell the property to a third party for a profit, they must disclose this to the client before proceeding with the sale. Failure to make this disclosure would violate the duty of disclosure and potentially result in legal action.

As special agents in real estate, brokers must disclose any conflicts or profits that may arise from their involvement in a transaction. Failure to fully disclose can result in legal consequences and damage the broker's reputation. Therefore, brokers must exercise caution and fully disclose to avoid conflicts of interest and maintain their clients' trust.

## Brokers Must Supervise

A broker's duty to supervise the activities of salespersons and broker associates is a crucial aspect of the real estate industry. Although salespersons and broker



associates may be classified as independent contractors for tax and labor-related purposes, brokers are still responsible for their actions. It's essential to understand the nature of the broker's duty to supervise and the legal implications that arise from this responsibility.

In real estate, brokers are often held liable for the negligent conduct of their employees or agents, even if they are not personally at fault. This liability is particularly relevant in cases involving automobile accidents that occur while employees conduct business on their employer's behalf. To mitigate potential risks, brokers should consider carrying general liability and Errors and Omission insurance covering their salespersons, broker associates, and office personnel.

California courts have made it clear that, despite any contractual arrangements, salespersons and broker associates cannot be classified as independent contractors regarding their relationship with their supervising broker. The supervision duty extends to various situations, including principal transactions such as seller "carry back" financing and loan arrangements made through the supervising broker.

The legal basis for the broker's duty to supervise lies in the fact that salespersons and broker associates are considered agents of the broker employed by or licensed with. They do not have the authority to act independently and must act on behalf of the broker, who is the principal's agent. Recent developments have expanded the scope of civil liability for brokers regarding the negligent acts of salespersons and broker associates, regardless of their classification as employees or independent contractors.

The Department of Real Estate has established comprehensive regulations outlining the broker's duty to supervise independent contractors, mandating the implementation of policies, rules, procedures, and systems to monitor the conduct of broker and salesperson associates.

In summary, the duty of brokers to supervise their salespersons and broker associates is a crucial aspect of the real estate industry. The legal implications of this



responsibility necessitate brokers to establish policies and procedures to monitor the conduct of their associates, regardless of their classification as employees or independent contractors. Failure to adequately supervise may result in brokers being held liable for the negligent actions of their associates, further emphasizing the importance of understanding and adhering to these responsibilities.

## Essential elements of a basic listing contract

Agency listing agreements play a pivotal role in real estate transactions, outlining the terms and conditions between the property owner and the broker. Understanding the essential components of such agreements is crucial for both parties to establish a mutually beneficial relationship. This essay will discuss the key terms of an agency listing agreement and the importance of including a statement regarding the negotiability of commission amounts.

### Body:

The Department of Real Estate says that an agency listing agreement should typically consist of six primary elements:

1. **The names of the parties involved include the property owner and the real estate broker, establishing a clear relationship between them.**
2. **The identity of the property:** Providing accurate details about the property in question, such as its address and legal description, is crucial for the proper execution of the agreement.
3. **The terms and conditions of the anticipated sale, lease, or loan:** This section outlines the expectations and requirements for the transaction, such as the asking price, desired lease terms, or loan conditions.

4. **The amount of commission or other compensation to be paid:** The agreement must specify the broker's commission or any other form of payment for their services.
5. **The expiration date of the agency:** Stating a precise end date for the agreement helps both parties understand the timeframe in which the broker is expected to fulfill their duties.
6. **Signatures of all parties concerned:** The property owner and the broker must sign the agreement to acknowledge and accept its terms.

In addition to these fundamental elements, an agency agreement involving owner-occupied residential properties must contain a statement in a ten-point bold print or larger, acknowledging that commission amounts are negotiable and not set by law. Real estate brokers should include this statement in all transactions acting within the scope of their license and seeking compensation for their services.

An agency listing agreement is a crucial component of real estate transactions, serving as a binding contract between property owners and brokers. Both parties can establish a transparent and mutually beneficial relationship by ensuring that the agreement contains all the essential terms and a statement regarding the negotiability of commission amounts. Understanding and adhering to these elements is paramount for successful real estate transactions and maintaining trust between property owners and brokers.

## The Negotiability of Real Estate Commissions

In California, real estate commissions are not fixed by law, allowing for a more flexible and competitive market. This commission negotiability benefits property owners and real estate professionals, fostering a more dynamic and client-centered industry. This essay will discuss the reasons behind the negotiability of

real estate commissions in California and its advantages to all parties involved.

Real estate commissions are the fees agents or brokers charge for their services in facilitating the sale, purchase, or leasing of properties. In California, these commissions are not regulated by law, enabling property owners and real estate professionals to negotiate the terms and conditions of their agreements freely. This approach offers several key benefits:

1. **Promotes competition:** The absence of fixed commission rates encourages real estate professionals to compete with one another, offering more attractive terms and services to clients. This competition can improve customer service, better marketing strategies, and more efficient transactions, benefiting property owners and professionals.
2. **Encourages customization:** With negotiable commissions, real estate professionals can tailor their services to meet the specific needs of their clients. This flexibility allows agents and brokers to offer a broader range of services based on the client's requirements and budget, such as staging, professional photography, or additional marketing efforts.

3. **Empowers property owners:** The ability to negotiate commission rates puts property owners in a stronger position when choosing a real estate professional. They can compare different offers, assess the services' value, and select the best fit for their needs and budget.
4. **Fosters transparency:** Since commissions are negotiable, property owners and real estate professionals are more likely to engage in open discussions about the value of services offered. This transparency can lead to a better understanding of the market, improved decision-making, and, ultimately, more successful transactions.
5. **Rewards high-performing agents:** Negotiable commissions enable top-performing agents and brokers to charge a premium for their expertise and track record, incentivizing them to provide exceptional service. This merit-based system encourages real estate professionals to improve their skills and services to remain competitive continuously.

The negotiability of real estate commissions in California fosters a more competitive and client-centric industry. This flexibility promotes competition, encourages customization, empowers property owners, fosters transparency, and rewards high-performing agents. As a result, the market benefits from a more dynamic environment where property owners and real estate professionals can thrive, ultimately leading to more successful transactions and greater satisfaction for all parties involved.

## MLS Misrepresentations

The Multiple Listing Service (MLS) is a vital tool in the real estate industry, providing a centralized database of properties for sale or lease. However, the information submitted to MLS can have legal ramifications if it is found to be

incorrect or misleading. This essay will explore a hypothetical example of an MLS misrepresentation and its potential consequences in a court of law.

### Example and Commentary:

Consider a scenario where a homeowner lists their property for sale on the MLS. The homeowner provides details about the property, including its square footage, which they mistakenly claimed was 2,500 square feet. In reality, the property is only 2,000 square feet. A buyer, relying on the MLS listing, purchases the property under the impression that it is more significant than it is.

Upon discovering the discrepancy in square footage, the buyer files a lawsuit against the seller, claiming misrepresentation. The buyer alleges they overpaid for the property based on incorrect information in the MLS profile.

In this case, the MLS profile containing the incorrect square footage may be admissible in court as evidence of misrepresentation. The court may consider several factors in determining whether the seller is liable for damages, such as:

1. **Materiality:** The court would assess whether the discrepancy in square footage was material to the buyer's decision to purchase the property. If the buyer can demonstrate that they relied on the misrepresented information and would not have bought the property at the agreed-upon price had they known the truth, the court may find the misrepresentation to be material.
2. **Intent:** The court would also examine whether the seller knowingly provided false information or if it was an honest mistake. If the seller deliberately misrepresented the property's square footage, they may be found to have acted fraudulently or in bad faith, which could lead to an unfavorable judgment.

3. **Damages:** If the court finds that the misrepresentation was material and the seller acted knowingly or negligently, it may award damages to the buyer. The damages could be calculated based on the difference between the price the buyer paid for the property and its actual value, considering its correct square footage.

The information submitted to MLS has significant legal implications and can be admissible in court if found to be incorrect or misleading. In the case of misrepresentation, such as providing incorrect property details, sellers may face legal consequences, including potential damages awarded to the buyer. To avoid potential disputes and liability, all parties involved in real estate transactions must ensure the accuracy of the information provided on MLS listings.

### Listing Contract Types

**EXCLUSIVE RIGHT TO SELL:** In an Exclusive Right to Sell agreement, the seller pledges to pay a commission to the broker who listed their property once it is sold. This commitment holds regardless of who eventually secures the buyer. In other words, the listing agent gets paid whether they find a buyer themselves, another broker finds the buyer or even if the seller finds their own buyer.

There might be specific exceptions, though, such as instances where the property owner had previously tried to sell the property independently and excluded that party from the listing agreement. The Exclusive Right to Sell agreement generally safeguards the interests of the listing agent. It ensures they are compensated for their efforts unless the sale is made under predefined exceptional circumstances.

For these reasons, this is the most common type of listing contract in California.

**EXCLUSIVE AGENCY:** An Exclusive Agency listing agreement is similar to the Exclusive Right to Sell but with a key difference: The property seller agrees to

pay the broker a commission only if the buyer is introduced via the broker's efforts or through another licensed broker. Should the property owner find their own buyer, the broker does not receive any commission. There can be some variations to this agreement where a reduced commission may be applied, but this clause must be clearly outlined in the listing document.

**OPEN LISTING:** In an Open Listing arrangement, a broker does not represent the property seller as an exclusive agent but instead works on their behalf. The broker is entitled to a commission only if the buyer is secured directly due to the broker's efforts. This type of listing allows flexibility for the seller, as they can potentially engage multiple brokers to increase the chances of finding a buyer. In an "Open Listing," the agent must prove that they were the "procuring cause" of the sale to be entitled to a commission.

Procuring cause in real estate refers to the series of events or actions by a real estate agent that directly leads to a property's successful sale or lease. In simple terms, it's the effort that results in finding a willing and able buyer for a property.

Understanding the concept of procuring cause is particularly important when settling disputes over commissions among real estate agents. If multiple agents were involved in the process, the commission is typically awarded to the agent who was the procuring cause of the sale. This means they were the primary catalyst that initiated an unbroken chain of events leading to the final transaction.

Determining who the procuring cause of a sale was can be complicated, especially in situations where several agents are involved. Factors considered often include the nature of the introduction to the buyer, the efforts made by the agent to keep the sale process ongoing, and whether the agent's actions directly led to the buyer's decision to purchase. It should be noted that the procuring cause is not necessarily the person who first introduced the buyer to the property or wrote the contract; it's about who ultimately caused the buyer to make the purchase.



The National Association of Realtors (NAR) provides guidance and procedures to help resolve procuring cause disputes among its members, including through arbitration hearings. However, the specifics can vary by state and local real estate board, so agents need to be aware of the rules and regulations in their area.

**NET LISTING:** Net Listing refers to a specific type of agreement where the property seller decides on a minimum or “bottom dollar” amount they want to receive from the sale. The broker can then accept any offer that exceeds this predetermined amount. While this agreement might be advantageous in specific scenarios, it is considered illegal in some states due to potential conflict of interest and risk to sellers. States where Net Listings are legal (like California) have stringent regulations to protect property sellers’ rights and interests.

Net listings can pose risks and ethical dilemmas, leading to their prohibition in some states and strict regulation in others. Here are a few reasons why Net Listings can be risky:

1. **Potential for Underpricing:** With a net listing, the real estate agent might be tempted to quickly sell the property at a price just above the “net” amount set by the seller to earn a commission, even if the market could bear a much higher price. This scenario could result in the seller not getting the full market value for their property.
2. **Conflict of Interest:** The real estate agent's interest (to maximize their commission) may not align with the seller's interest (to get the highest price possible for their property). This creates an inherent conflict of interest, where the agent might prioritize their profit over the seller's benefit.
3. **Legal and Ethical Issues:** Since the agent's commission is any amount above the net price, the agent might inflate the sale price to potential buyers to

increase their earnings, which could be considered unethical or potentially fraudulent.

4. **Unfairness to the Seller:** The seller might need to understand the implications of a net listing fully and might set their net price without a thorough understanding of the property's actual market value. This could result in them accepting a lower price than they could have received on the open market.

**OPTION LISTING:** In an Option Listing Agreement, the real estate agent has the exclusive right to sell the property (like in a standard listing agreement) combined with the option to buy the property themselves. The option to purchase the property is typically granted for a specific period and at a price agreed upon in the contract.

While extremely rare, under such an agreement, the real estate agent could either find a buyer for the property (and earn a commission in the process) or buy the property themselves. Suppose the real estate agent needs to exercise their option to buy the property within the timeframe specified in the agreement. In that case, the option expires, and they continue to have the exclusive right to sell the property on behalf of the homeowner.

This agreement can benefit the real estate agent by providing flexibility and potential profit. However, it could be a conflict of interest, as the agent may be motivated to avoid finding other buyers for the property if they intend to buy it themselves.

As always, because of the complexity of these agreements, it's important for all parties involved to consult with a real estate attorney or other professionals to ensure they fully understand the implications before entering into such an agreement.

In conclusion, the complexities of real estate agencies extend far beyond what meets the eye. As we've explored in this book, the relationship between the principal and agent is multi-dimensional, founded on trust, and governed by legal and ethical principles.

From the outset, the designation of an agency assigns responsibilities and sets expectations for both parties. It is within these relationships that the very foundations of real estate transactions are formed. Agents are entrusted with significant power and responsibility, making their role pivotal in the real estate process. Conversely, the principal must be informed, communicative, and proactive in their relationship with the agent.

We've delved into the mechanisms of creating, maintaining, and terminating these agency relationships, shedding light on both parties' rights, obligations, and limitations. We've seen how critical it is for both parties to adhere to the terms outlined in the agency agreement, especially when terminating the relationship. Furthermore, we've discussed the repercussions of failing to uphold these obligations, emphasizing the legal implications.

In the ever-changing landscape of real estate, understanding the intricate dynamics



of agency relationships is paramount. While this book offers a comprehensive overview, principals and agents must stay informed about evolving laws and industry practices. We've discovered that effective agency relationships can mean the difference between a smooth, successful real estate transaction and one fraught with confusion and potential legal hurdles.

As we move forward, let's understand that a real estate agency is more than just contracts and transactions—it's a partnership built on trust, professionalism, and mutual respect. A deeper understanding of these relationships can pave the way for more transparent, efficient, and rewarding real estate experiences.

