

Common law agency—seller and buyer agency



About common law agency

In common law agency, the agency is between the client and the brokerage. Under common law agency, all licensees within the brokerage are deemed to know all relevant transaction information about principals (buyers and sellers with whom the brokerage has an agency relationship).

As a result, when any licensee engaged by a brokerage takes a listing (signs a Seller Brokerage Agreement), every licensee engaged by the brokerage is immediately considered to be a representative of that seller and therefore owes that seller undivided loyalty, advice and advocacy.

Agency obligations to a client

Whether the brokerage client is a buyer or a seller, all licensees at the brokerage are obligated to provide the following duties and services:

Undivided loyalty: you must act solely in the client's best interests, placing their interests above your own interests and above the interests of other parties. This means avoiding conflicts of interest and protecting the client's negotiating position at all times.

Confidentiality: you have a duty to keep the client's confidences. Confidential information includes any information about the client, the property, or the transaction that is not required by law to be disclosed.

Full disclosure: you must inform the client of all facts of which you know that might affect the relationship with the client or influence the client's decision in the transaction. This includes any conflicts of interest you might have. You are not to decide if information is important to the client, rather, you are obligated to disclose all relevant information to the client and they can make their own decisions.

Obedience: You must obey all of the client's lawful instructions. If the client insists you do something unlawful, you are obliged to refuse and consider terminating the relationship.

Reasonable care and skill: You must exercise reasonable care and skill in performing all assigned duties. You are expected to meet the standard of care of a reasonable and competent licensee. However, if you claim expertise in any area of practice, you will be held to a higher standard.

Full accounting: You must account for all money and property placed in your hands while acting on the client's behalf.

Seller agency

The seller brokerage and all licensees in its employ promote the listing, seek qualified buyers, and use their professional negotiation skills to advance the seller's interests.

Seller agency best practices

- Ensure listing information is accurate; never rely on old listing cuts to create new ones
- Ensure PDS, if applicable is completed to the best of the seller's ability and only by the seller
- Disclose stigmas when asked
- Disclose any known material defects
- Disclose your role as the seller's licensee to all potential buyers
- Do not accept or submit paperwork that cannot be read
- Deliver all offers and counter offers in a timely manner, even if the property is subject to an Agreement of Purchase and Sale
- Ensure paperwork is completed properly
- Do not present any documentation you do not understand (non-standard forms)
- Ensure the documentation clearly reflects the seller's wishes regarding chattels and leased equipment
- Do not entertain verbal offers; contracts must be in writing
- Advise your client to seek expert advice where needed
- Monitor all dates, events, and requirements (fulfillment of conditions)
- Keep seller informed

Buyer agency

The buyer brokerage and all licensees in its employ promote the buyer's interests, locate suitable properties, and use their professional negotiation skills to advance the buyer's interests.

In common law brokerage, a licensee cannot be an "exclusive buyer's agent" because all licensees engaged by the brokerage owe agency obligation to any sellers under contract.

- Verify listing information yourself
- Ensure the property zoning meets the needs of the client
- Ask buyer about any stigmas with which they may have an issue so questions can be posed to the seller or seller's licensee in writing
- Ensure the client knows their right to a building inspection, even on new construction
- Do not make verbal offers, contracts must be in writing
- Ensure paperwork is completed properly and delivered promptly
- Do not present any documentation you do not understand (non-standard forms)
- Ensure buyer is aware of timelines for financing, insurance home inspections, and lawyer review
- Ensure the documentation clearly reflects the buyer's wishes regarding chattels and leased equipment
- Disclose your role as the buyer's licensee to sellers
- Disclose any known competing offers
- Keep buyer informed

Common law agency—transaction brokerage and customer status

Transaction brokerage

Transaction brokerage is an option when a brokerage has agency relationships with a seller and a buyer and the buyer is interested in purchasing the seller's property. In transaction brokerage, the brokerage and its licensees must treat both parties to the transaction in an even-handed, objective and impartial manner. Licensees cannot use discretion or judgment that benefits one client to the prejudice of the other client. Both the buyer and the seller have the right to refuse to enter into a transaction brokerage relationship and seek alternate representation.

Your duties to both parties are:

- disclose conflict of interest, and obtain informed consent and agreement to transaction brokerage in writing
- assist the buyer and seller in negotiating a mutually acceptable agreement
- provide any advice or information given to one party to the other party
- provide information and advice to assist the parties in addressing issues of mutual interest to both parties
- keep confidential the motivation of the buyer or seller
- keep confidential the price a seller may be prepared to accept or a buyer is maybe willing to pay
- disclose material latent defects concerning the property or the financial ability of the buyer to complete the transaction

- prepare all necessary documents in accordance with the instructions of the buyer or the seller
- exercise reasonable care and skill in the provision of services.

The services you provide are:

- provide real estate statistics and other information through listing services or other local databases
- assist the buyer and seller in negotiating a mutually acceptable agreement
- provide standard form agreements of purchase and sale, lease and other relevant documents
- prepare documents with the instructions of the client(s)
- provide the names of appraisers, mortgage brokers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and so on, but not recommend any particular professional (must recommend a minimum of three professionals per specialty)
- present in a timely manner, all offers and counter-offers to and from the client(s) regardless of whether the property is already the subject of a contract
- convey to the client(s) in a timely manner all information that either wishes to have communicated to the other
- keep client(s) informed regarding the progress of the transaction; and,
- comply with the Real Estate Trading Act and Bylaw

When to avoid transaction brokerage

It is highly inappropriate for licensees to enter into transaction brokerage under the following circumstances.

Family, colleagues, and self

If you represent a family member or a business associate, the personal relationship you have with that person may cause others to question your ability to be impartial. Likewise, you cannot represent yourself impartially. Regardless of how well you handle a transaction brokerage situation, a personal relationship with one party of the transaction or self representation leaves you and your conduct open to speculation by the other party.

Ongoing agency relationship

Any time you have an ongoing agency relationship with a client; you should not enter into a transaction brokerage relationship with them. For example, if you have an agency relationship with a builder, a developer, or a repeat seller, you cannot be perceived to act impartially towards opposing parties to a transaction.

Novice seller or buyer

When representing an inexperienced seller or a first-time home buyer, entering into a transaction brokerage agreement is doing a huge disservice to that person. Novice sellers and buyers need unencumbered representation—they need your help, advice and support— services that cannot be provided under transaction brokerage.

Customer status

In a no agency relationship, the licensee represents either the buyer or the seller in a single agency relationship. The party that is not represented is the customer, for whom the licensee performs customer services.

If a buyer or seller chooses customer status, the brokerage does not represent the customer. The brokerage is not the customer's agent and does not owe the customer fiduciary duties. The brokerage will not provide the customer any services that require the exercise of discretion or judgment, the giving of confidential advice or advocating on the customer's behalf.

The services a licensee can provide to a customer are:

- exercise reasonable skill and care
- not negligently provide false or misleading information
- present all offers and counter offers in a timely fashion
- convey all information that the customer wants to have communicated to the client in a timely fashion
- keep the customer informed regarding the progress of the transaction
- hold all monies in trust with respect to the transaction in accordance with the Act and Bylaw
- comply with the Act and Bylaw
- licensees must ensure any person who is considering customer status is fully aware of their option to choose another brokerage to represent them rather than agreeing to customer status.