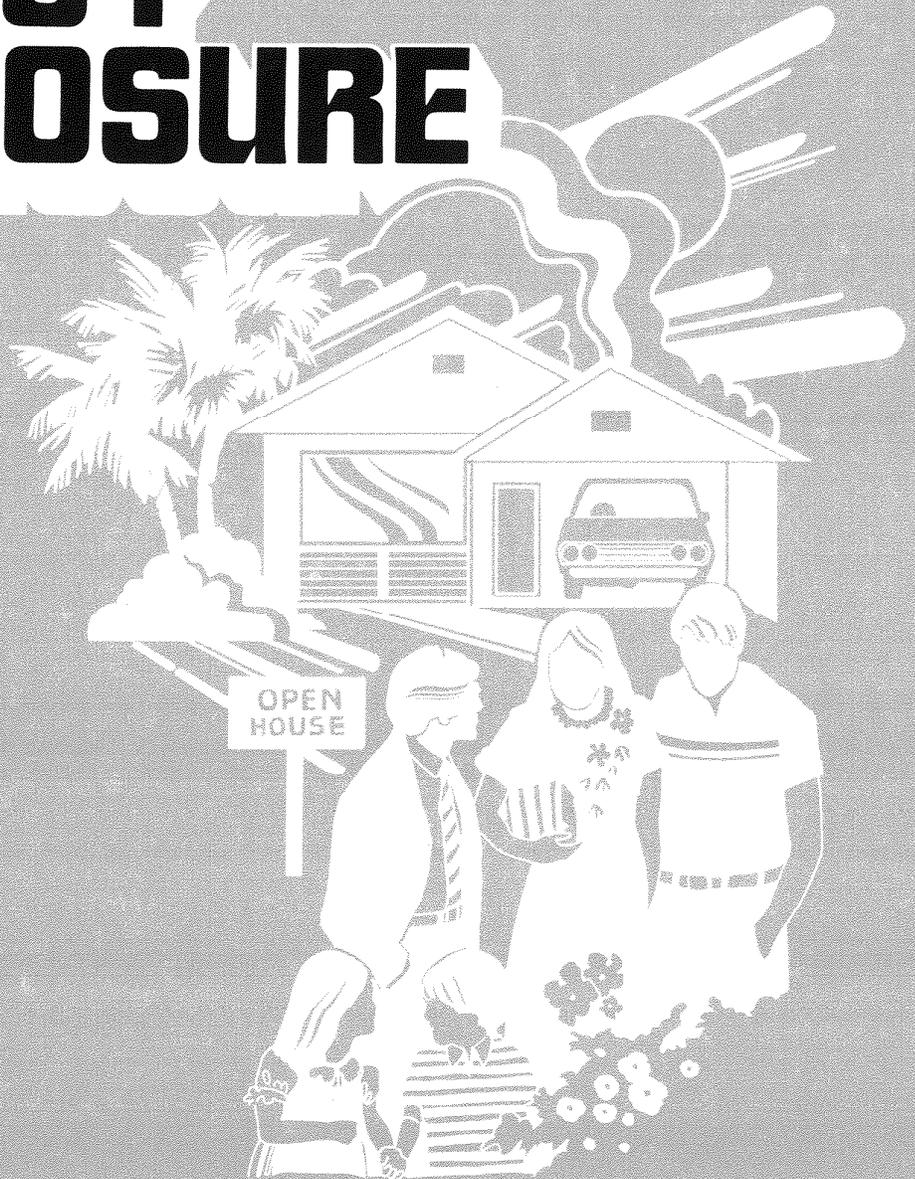


SOCIETY OF
REAL ESTATE BRANCH
PVE DCCA
STATE OF HAWAII

UNDERSTANDING AGENCY DISCLOSURE



A GUIDEBOOK FOR REAL ESTATE PROFESSIONALS

Important information about compliance with Hawaii's agency disclosure law in an interesting, easy-to-use format.

Published by the

HAWAII REAL ESTATE COMMISSION

HAWAII AGENCY DISCLOSURE GUIDEBOOK

LIST OF TOPICS COVERED

TOPIC

PART I	PAGE
REVIEW OF AGENCY LAW	1
OVERVIEW OF HAWAII'S AGENCY DISCLOSURE LAW	2
DETAILS OF REQUIRED DISCLOSURES	3
OTHER PROVISIONS	5
SUMMARY CHART	5A

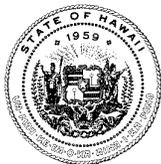
PART II	
THE LISTING PRESENTATION	6
THE OPEN HOUSE	6
THE COOPERATIVE SALE	6
THE TURNAROUND SALE AND DUAL AGENCY	7
BUYING FOR OWN ACCOUNT	7
THE REPRESENTATION OF BUYERS	8
SUGGESTED ANSWERS	8-15

The initial printing and production costs of this publication were paid by the Hawaii State Real Estate Commission from the Real Estate Education Fund as a public service.

Copyright July 1987 by the Real Estate Commission, State of Hawaii.

All rights reserved. The text of this publication, or any part thereof, may not be reproduced in any manner whatsoever without the written permission from the Real Estate Commission, State of Hawaii.

JOHN WAIHEE
GOVERNOR



ROBERT A. ALM
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

REAL ESTATE COMMISSION

STATE OF HAWAII

PROFESSIONAL & VOCATIONAL LICENSING DIVISION

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

P. O. BOX 3469
HONOLULU, HAWAII 96801

July 1, 1987

Dear Licensee:

For more than four years, the Hawaii Real Estate Commission has studied the complex legal and practical issues concerning agency relationships in real estate transactions. These studies eventually resulted in the Commission sponsoring legislation and adopting regulations that have been signed into law by the Governor of Hawaii.

Chapter 467-14(12) Hawaii Revised Statutes and Chapter 16-99-3.1 Hawaii Administrative Rules became respectively effective July 1, 1987 and July 11, 1987. This new agency disclosure law applies to nearly every real estate transaction conducted through a real estate licensee in the State of Hawaii. In general, the law requires one acting as a licensee to make early disclosure of whom it is that the broker represents and to obtain confirmation on the contract between the parties that this earlier disclosure was made. In addition, the listing broker must inquire whether the seller authorizes the use of subagents and the sharing of commissions with the seller's subagent or the buyer's agent.

This Guidebook is divided into two Parts. Part I covers the details of the recent disclosure law and explains how real estate licensees should proceed to ensure compliance. Part II contains discussion questions concerning common agency situations that arise in your everyday practice. These situations track well with the Commission's 30-minute training video entitled "Understanding Agency Disclosure: The Year One A.D. (After Disclosure)." To maximize your understanding of the new requirements, we recommend you use this Guidebook in conjunction with viewing the videotape. These materials, as well as consumer brochures on agency relationships, have been developed and paid for from the Real Estate Education Fund. A portion of your license fee, renewals and interests from the recovery fund comprises the education fund.

The Commission has prepared these materials to assist you in complying with the agency disclosure law. Many of the questions you may have about agency relationships and proper disclosure are discussed in this Guidebook. Please take the time to review this important information.

G. A. "RED" MORRIS
Immediate Past Chairman
Hawaii Real Estate Commission

Special Assistant on
Real Estate to Department
of Commerce & Consumer Affairs

Sincerely,

GLORIA J. DAMRON
Chairman
Hawaii Real Estate Commission

SELF-ASSESSMENT QUIZ

BEFORE READING THIS GUIDEBOOK, PLEASE COMPLETE THIS QUIZ AND THE WARM-UP EXERCISE.

1. A statement in the DROA that the broker represents both buyer and seller is sufficient notice of dual agency. T F
2. If you show a buyer a property listed by another firm in MLS, you automatically represent the seller. T F
3. When buying property for your own account, you must disclose to the seller or listing broker before negotiations are initiated that you are a licensee participating as the buyer. T F
4. If you are the buyer's agent, you can present the offer directly to the seller without contacting the listing broker. T F
5. Prior to presenting the offer, the listing broker must tell the seller whom it is that the selling broker represents. T F
6. Prior to presenting an offer to an unlisted owner (FSBO), the broker must disclose to the seller whether the broker represents the seller or the buyer. T F
7. The salesperson is authorized to make the required disclosures on behalf of the broker. T F
8. At the listing presentation, the listing broker should disclose to the seller whether the seller authorizes the use of subagents and the sharing of commissions with seller's subagents or buyer's agents. T F
9. The agency disclosure law applies to commercial, residential, project sales, time share, leases over one year, and residential transactions, including options. T F
10. If you act as a selling broker in a transaction in which the seller has not authorized the listing broker to offer subagency, you must be the buyer's agent. T F
11. A subagent owes to the seller the identical fiduciary duties as does the listing agent. T F
12. A listing broker owes less legal duties to a buyer when the buyer is represented by a buyer's agent. T F

10. F 11. T 12. F
1. F 2. F 3. T 4. F 5. T 6. T 7. T 8. T 9. T

WARM-UP EXERCISE

1. Assume a buyer wants to negotiate the seller down in price by ten percent and needs confidential assistance in developing the best

negotiating strategy. Who is in the best position to help the buyer?

- a. listing broker
 - b. another salesperson in listing broker's office
 - c. cooperating broker acting as subagent
 - d. cooperating broker acting as buyer's broker
2. In deciding on the most effective working relationship with a consumer, the real estate broker can choose from which of the following relationships:
 - a. agent for either buyer or seller (single agency)
 - b. agent for both buyer and seller (dual agency)
 - c. agent for another agent, who is working for either buyer or seller (subagency)
 - d. not an agent, for neither buyer nor seller (finder or consultant)
 - e. any of the above

1. d 2. e

HAWAII AGENCY DISCLOSURE GUIDEBOOK

Review of Agency Law

QUESTION 1:

Under existing Hawaii law, what is an agent?

ANSWER:

An agent is one who acts on behalf of another (the "principal") in dealings with third persons. When you are an agent, you speak for the principal, you listen for the principal, and you act for the principal. In effect, you are a substitute for the principal. A real estate licensee, who acts on behalf of others in selling, buying, exchanging, or leasing real estate, is an agent in the legal sense.

QUESTION 2:

How is an agency relationship created?

ANSWER:

The best way is by a written or oral agency agreement. The worst way is by implication from words or conduct. It is always better to knowingly create an agency relationship through a clear expression of agreement between agent and principal. Whether an agency exists is typically a question of fact; formalities such as contract or payment of a fee are not required.

Watch your language! Based on the listing broker's words and conduct, the buyer may be misled into believing the broker represents the buyer when, in fact, the broker is already the agent of the seller.

QUESTION 3:

In general, what duties are owed by agents to their principals?

ANSWER:

Because a principal is bound by and responsible for the acts of the agent, the law imposes numerous duties on the agent, far beyond matching up a buyer with a seller. Once an agency relationship is created, it becomes a fiduciary relationship. A fiduciary relationship creates the highest duties known under the law owed by the agent to the principal. This obligation of diligent and faithful service is the same as that of a trustee or a guardian. Specific duties include loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting.

QUESTION 4:

What is a dual agent?

ANSWER:

A dual agent is an agent for two principals. A real estate broker, acting directly or indirectly through salespeople in the firm, sometimes represents both the buyer and the seller (or the lessee and the lessor). Such dual representation is not illegal **provided full disclosure** has been made to both and their consent has been obtained. If the broker has **not given full disclosure** and obtained the informed consent of the principals involved to act as a dual agent, serious liability and risks occur, including possible rescission of the contract, forfeiture of commission, **loss of license**, and actual money damages. In this situation the broker becomes an "undisclosed" dual agent and thus breaches the agent's duty of undivided loyalty to the principal. Hawaii law specifically prohibits brokers from acting as undisclosed dual agents (HRS 467-14[4]). One of the main purposes of the new agency disclosure law is to help consumers and licensees avoid undisclosed and, in many cases, unintended dual agency relationships.

Overview of Hawaii's Agency Disclosure Law

QUESTION 5:

What is the need and purpose of the agency disclosure law?

ANSWER:

The agency disclosure law is designed to:

- Further the awareness of consumers and licensees on the variety of working relationships which may occur in real estate transactions.
- Require disclosures to the buyer and seller of whom it is that the "selling broker" represents (the broker working with the buyer).

These disclosures will help the real estate licensee avoid undisclosed dual agent status and other unintended or accidental agency relationships. Proper documentation of the required disclosures should reduce significantly potential problems and liability for the licensee.

The law does not create any new agency relationships. It merely confirms the existing common law of agency and requires disclosure of the material fact of whom it is that the selling broker represents.

QUESTION 6:

What is the substance of the agency law?

ANSWER:

In essence, the law requires the listing and selling brokers to make two disclosures of agency representation to the buyer and the seller. The first disclosure may be oral or written and is made at any time prior to the signing of documents. The second disclosure must be in writing at the time documents are signed. It confirms simply that earlier disclosure was made.

QUESTION 7:

Does the agency law apply to all real property transactions?

ANSWER:

Yes, it applies to fee simple and leasehold transactions, except for leases of one year or less duration. It covers residential, co-operative, project sales, timeshare, industrial or commercial transactions, and includes sales, exchanges, options and leases.

QUESTION 8:

Must both the buyer and the seller have their own agent in every real property transaction?

ANSWER:

No, not necessarily. Listing brokers will continue to be able to sell their own listings. The law does not compel any particular agency relationship, nor compel agency at all. Listing brokers will have to explain their agency relationship with the seller and their **working** relationship with prospective buyers. Merely showing a buyer a property, answering questions about the property, and transmitting the offer will not normally create an agency relationship with the buyer, **provided the listing broker makes it clear that these acts are performed on behalf of the seller, the listing broker's client.**

No matter who the licensee represents, the licensee owes general obligations of fairness and honesty to the buyer and to the seller. The licensee must service the interests of both as best as possible.

QUESTION 9:

Are salespeople covered by the agency law?

ANSWER:

Yes, failure to make the required disclosures or to obtain written confirmation on contracts subjects

both brokers and salespeople to disciplinary action by the Real Estate Commission. Unless specifically restricted by the broker in writing, any salesperson can make the disclosure on behalf of the broker.

Details of Required Disclosures

QUESTION 10:

What are the disclosures necessary for compliance with the agency disclosure law?

ANSWER:

The law requires two basic disclosures. The first is a written or oral disclosure of whom it is that the selling broker, listing broker and buyer's agent represents. The second is the mandatory confirmation in writing of whom it is that the selling broker, listing broker and buyer's agent represents.

QUESTION 11:

What if there is no selling broker?

ANSWER:

If the listing broker is the only broker involved ("in-house" sale), then the listing broker must disclose whom it is that the broker represents. In the usual case, this means the seller; in a rare case, this means both the seller and buyer as a dual agent.

QUESTION 12:

What disclosures are required at the listing presentation?

ANSWER:

At the time a broker obtains a listing, the listing broker must ascertain whether the seller authorizes the listing broker (1) to appoint seller's subagents through a multiple listing service (MLS) or otherwise, and (2) to share commissions with seller's subagents or buyer's brokers. Listing forms should cover these points.

It is extremely important that the seller makes an informed choice whether to have one agent (listing broker) or to have many agents (subagents). Subagents would owe the seller the fiduciary duties equal to those owed by the listing broker. Likewise, the seller may be bound by and responsible for the words and conduct of subagents.

Listing brokers should discuss the likely possibility that offers will be presented by other brokers who have found the buyer. Practically speaking, most sellers are not concerned that the selling fee portion of the commission is paid to an outside broker. This is true regardless of whether the broker is a subagent or a buyer's broker. The listing broker and the seller should clarify at the listing stage whether commission sharing is contemplated. In the usual case, the seller need not authorize the specific percentage of the split (unless, for example, it was so small a split that it adversely affected the marketing of the property).

QUESTION 13:

When does the initial disclosure of whom it is that the selling broker, listing broker and buyer's agent represents take place?

ANSWER:

This depends on whether the licensee is the listing broker, the selling broker, and the buyer's agent, and whether the disclosure is made to the buyer or to the seller. In general, disclosures are required "at least once" prior to preparation of the offer. This leaves the precise timing up to the discretion of the broker depending on the circumstances of each transaction. Disclosure should be made as soon as practicable so that the buyer does not put the broker in a difficult position by first revealing confidential bargaining information to a seller's broker. Some brokers hand the prospect a basic brochure about agency. This helps serve as a foundation for more meaningful discussions on the appropriate working relationship between the broker and the prospect.

It is recommended that the disclosure be made at the point in time when the licensee determines he or she is working with a serious buyer, not just a casual observer. The disclosure may be oral or written, although the cautious broker will obtain a receipt of written disclosure and maintain a file copy in the event it later becomes necessary to prove that disclosure was made. Another approach would be to send the buyer a follow-up letter summarizing prior discussion about the property and about agency representation.

QUESTION 14:

What agency disclosures must the listing broker make to the buyer when acting alone in an in-house sale?

ANSWER:

The listing broker must disclose to the buyer that the broker represents the seller. See question 19 when the listing broker is a dual agent.

QUESTION 15:

What agency disclosure must the selling broker make to the buyer?

ANSWER:

The selling broker, the one who acts in cooperation with a listing broker and who finds a buyer in a transaction, must disclose whom he or she represents in the transaction. Is the selling broker (the cooperating broker) a subagent of the seller or a buyer's broker? Although not required in the law, the listing broker and selling broker should discuss this point at the earliest practicable time, preferably at initial contact. Sometimes, the selling broker is uncertain whether to act as a subagent or as a buyer's broker with respect to a certain property or a certain buyer. The selling broker should point out this uncertainty so that the listing broker won't assume that a subagency relationship already exists.

QUESTION 16:

What if there is no listing broker?

ANSWER:

In that case, each licensee providing services to the buyer must disclose whether the licensee represents the buyer or the seller in the transaction.

QUESTION 17:

What disclosure must be made to the seller?

ANSWER:

The listing broker must disclose to the seller the fact of whom it is that the selling broker represents so that the seller knows whether the selling broker is one of the seller's subagents or a buyer's broker. If there is no listing broker, then each licensee must disclose to the seller whether they represent the buyer or the seller. Remember, agency is a consensual relationship. The unlisted seller must agree to any attempted representation of the seller by the licensee.

QUESTION 18:

What is the second disclosure required under the law?

ANSWER:

The oral or written disclosure of whom it is that the selling broker represents must be confirmed in writing on the "contract between the buyer and seller" (defined as a DROA, option, offer to purchase, sales contract, offer to lease, or lease). Buyers and sellers need to know which licensees are seller's brokers, which are buyer's brokers, and which are acting as dual agents for both. The title "Agency Disclosure" shall be in no less than ten-point bold print. While no particular disclosure language is required, to assist licensees the Commission approves the following language: "AGENCY DISCLOSURE(S):

_____, and all licensees
(Print name of Selling Broker—NOT the salesperson) (or Listing Broker if acting alone) employed by or associated with the broker, represents the ("Buyer" or "Seller"). By initialling below, the Buyer and Seller confirm that oral or written disclosure of such representation was provided to them before the signing of this contract."

Since the law requires written confirmation, most licensees will want to disclose their working relationship as early as practicable in the transaction. Early disclosure will help avoid allegations by the buyer or seller that the selling broker acted one way but later disclosed, and attempted to confirm, an inconsistent agency status. Principal brokers are advised to adopt a company policy of agent representation that can only be changed by the salesperson with the principal broker's written approval.

QUESTION 19:

What disclosure must be provided when the listing broker is a dual agent?

ANSWER:

In addition to the two disclosures discussed above, a dual agent must obtain the written consent of both the buyer and the seller. The written consent must state that the licensee has made a full disclosure of the type of representation the licensee will provide, i.e., will the broker act as a mere conduit of information or will the broker actively negotiate for both sides? Will the broker maintain or reveal confidential information such as price, terms, personal motivation and financial matters? A one-line statement that the broker is agent for both is not sufficient.

QUESTION 20:

Isn't the best solution simply to decide on dual agency and obtain standard form consents?

ANSWER:

No; like any business decision, there are risks to be evaluated. Even though it is possible to act as a dual agent after disclosure and consent, the process of making the disclosure and obtaining the consent is full of pitfalls. Was the disclosure adequate? Was some material fact overlooked? Will the attorney for the unhappy buyer or seller be able to think of some additional disclosure that the broker should have made but didn't? Was the consent fully informed and freely given? The disclosures and consents necessary to proceed as a dual agent are so comprehensive and so specific that a typical real estate broker cannot make them as a matter of routine. It is recommended that dual agent consents be obtained by special letter agreement rather than by a boilerplate form. The principal broker should be consulted in every case in which a dual agency consent is sought.

Even with disclosure and written consent, the dual agent must be comfortable with defining the proper scope of the dual agent's duty since the interests of the buyer and seller are so clearly in conflict.

QUESTION 21:

What disclosures must a buyer's broker provide?

ANSWER:

A buyer's broker must disclose such agency to the seller, or the listing broker if there is one, orally or in writing, **before negotiations are initiated**. At this time, the brokers can discuss how to handle payment of the buyer's broker's fee. This early disclosure is needed to avoid allegations that the seller or listing broker revealed confidential information under the mistaken assumption that the broker was a subagent. In this regard, listing brokers should not reveal any data in the multiple listing card that they do not want the buyer to receive.

QUESTION 22:

What if the licensee is also the buyer?

ANSWER:

Licenses can buy property whether listed with the firm, listed with another broker, or unlisted. The law requires that before negotiations are initiated, the licensee disclose to the seller, or the listing broker if there is one, the fact of whether the licensee is, or intends to be, the buyer.

Other Provisions

QUESTION 23:

After an agency relationship has been confirmed, may the agency relationship be changed?

ANSWER:

Yes. Under Section 3.1(i), "if any change occurs in a transaction which makes a prior written or oral disclosure required by this section incomplete, misleading, or inaccurate, the licensee shall promptly make a revised written disclosure if the prior disclosure was in writing, or a revised oral disclosure if the prior disclosure was made orally, to the buyer or seller or both, as the case may be. Any revised written disclosure shall include the date of the revised disclosure and be acknowledged separately by the signature of the buyer or seller, or both, as the case may be."

Consider this possibility: You have been working with a buyer as a customer on one of your in-house listings. Several offers have been countered and negotiations break down. You and the buyer then decide to work on an exclusive agency basis on other properties. Later the buyer decides to make an offer on that particular in-house listing. You, the seller and the buyer agree on a dual agency arrangement. You must confirm the changed agency relationship in writing with both the buyer and the seller.

QUESTION 24:

If the seller pays the commission, must the licensee represent the seller?

ANSWER:

Not necessarily. Existing case law is confirmed in that the agency disclosure law states "the obligation of either the seller or buyer to pay compensation to a broker is not determinative of the agency relationship."

QUESTION 25:

What are the penalties for failure to comply with the agency disclosure law?

ANSWER:

Failure to comply with the law can result in suspension or revocation of the broker's and the salesperson's license. However, a violation, by itself, will not affect the validity of title to the real property being transferred.

QUESTION 26:

If a broker exclusively represents the buyer, can the broker present the offer directly to the seller?

ANSWER:

No. The broker must transmit immediately all written offers in any real estate transaction to the listing broker who has a written unexpired exclusive listing contract covering the property.

QUESTION 27:

If a broker makes the disclosures required under this law, will that ensure the broker against any legal action based on agency?

ANSWER:

No; compliance with agency law requires more than technical disclosure. The broker and salesperson must act consistent with their disclosed agency. Consider this situation: a broker obtains a power of attorney from a mainland buyer client. The broker, acting on behalf of the buyer, negotiates a "hard bargain" on a new listing from a branch office on the other side of the Island. The broker fills out the confirmation form that the selling broker represents the seller. The actual conduct of the broker, however, is that of a buyer's agent. There is an undisclosed dual agency problem in this situation. The broker must not only choose the role to play—the broker must actually play that role.

QUESTION 28:

How can the agency disclosure laws be summarized?

ANSWER:

Think of three steps: disclose the choices of working relationships available; choose the appropriate relationship; and confirm on the contract whom it is that the selling broker represents. Ask these two questions: (1) Who is my client and what services MUST I perform? (2) Who is my customer and what services CAN I perform? See Figure 1 for a handy summary of the law.

HAWAII AGENCY DISCLOSURE REGULATION

DISCLOSURE REQUIRED	TO WHOM	BY WHOM	WHEN AND HOW
1. Whether Seller authorizes Listing Broker to use subagents through MLS or otherwise and to split fees	Seller	Listing Broker ¹	At time of listing (signed writing, dated)
2. Who the licensee represents	Buyer	Listing Broker, only if acting alone and providing services to Buyer OR If no Listing Broker, each licensee providing services to Buyer	At least once prior to preparing "contract" ² (in writing or orally)
3. Who the Selling Broker represents	Seller	Listing Broker OR If no Listing Broker, each licensee shall disclose whether represents Buyer or Seller	At least once prior to presenting contract (in writing or orally)
4. The licensee represents the Buyer	Listing Broker; if none, to Seller	Buyer's Broker	Before negotiations are initiated (in writing or orally)
5. The licensee is, or intends to be, the Buyer	Listing Broker; if not, Seller	Licensee-Buyer	Before negotiations are initiated (in writing or orally)
6. If dual agency is intended, make full disclosure of the type of representation to be provided Buyer and Seller. A one-line statement that the licensee represents both Buyer and Seller is not sufficient	Buyer and Seller	Broker	Before negotiations are initiated
7. Confirmation of who the Selling Broker represents, or who the Listing Broker represents if acting alone	Buyer and Seller	Listing Broker, Selling Broker, Buyer's Broker	On contract between Buyer and Seller (DROA) in separate titled paragraph. Regulation gives suggested language
8. Revised disclosure if any changes occur making prior disclosure inaccurate, incomplete or misleading	Buyer, or Seller, or both as the case may be	Licensee who made prior disclosure	Promptly after the change; written (if prior disclosure written); (dated and acknowledged)
9. Transmit written offer	Listing Broker (unexpired exclusive listing)	Licensee transmitting offer	Immediately upon receiving offer from Buyer

¹Unless specifically restricted, the Salesperson is authorized to make the required disclosure on behalf of the Broker.

²Contract includes DROA, option, offer to lease covering residential, timeshare, industrial, or commercial real property, except for leases of one year or less.

PART II

Part II of the Guidebook is a classroom workbook especially useful after viewing the Commission's 30-minute video "Understanding Agency Relationships: Year One A.D. (After Disclosure)." For those readers who have not viewed the video, the scenes are summarized below at the start of each major situation. Read the summary of the scene and then answer the questions in the space provided. Suggested answers are found at the end.

This part of the Guidebook is designed to help you become more aware of agency and other working relationships as they arise in everyday practice. The major situations discussed are (1) the listing presentation, (2) the open house, (3) the cooperative sale, (4) the turnaround sale and dual agency, (5) the buying for your own account, and (6) the representation of buyers.

A. THE LISTING PRESENTATION

Scene: Sally Vierra, a salesperson for Paradise Realty, has inspected the home of George and Mary Kane, the sellers. They've named their price and Sally is ready for them to sign the listing contract.

1. Besides Sally, who else will represent the Kanes in the sale of their home?

2. If Paradise Realty is a member of the local MLS, what should Sally tell the Kanes about MLS?

3. Should the Kanes offer subagency? Explain.

4. Why might a seller decide not to offer subagency?

5. If the buyer is procured by a buyer's broker, should the seller authorize Paradise Realty to share commissions? Explain.

6. Why should Sally obtain a signed property condition report?

B. THE OPEN HOUSE

Scene: Sally holds her first Open House in the Kane's house. Dave and Donna show up for a tour and find out from Sally that the seller is asking \$275,000. They ask Sally if the sellers will take less.

1. Sally knows the Kanes will take \$270,000. What should she tell Dave and Donna?

2. When is the best time for Sally to tell Dave and Donna that she represents the seller?

3. What types of customer level services can Sally render to Dave and Donna without necessarily becoming their agent? List at least five.

4. What type of conduct on Sally's part could be interpreted by Dave and Donna to create an implied agency with them?

5. Must Sally advise Dave and Donna to obtain their own broker? Explain.

C. THE COOPERATIVE SALE

Scene: Sally receives a call from Tom Nakagawa of Mango Realty in response to Sally's listing in MLS. Tom has a "client," Alice, who is interested in the Kane's Pearl Harbor house. Tom wants to show the house.

1. Whom do Tom and Mango Realty represent? Explain.

2. What do the local MLS rules state regarding the presumption of subagency?

3. Can Tom reject the MLS offer of subagency and still participate in a share of the listing commission? Explain.

4. Is Tom more effective as the agent of Alice or as the subagent of the Kaness? Explain.

b. George's offer is unsound because of the low deposit and proposed down payment, and because the contingency clause puts the seller at a disadvantage?

c. George has an option on the adjoining parcel, has a resale buyer in the wings, and has a higher back-up offer already prepared?

If the seller is asked to carry back financing, how does Sally handle discussions concerning the due on sale clause, prepayment, interest rate, term, etc.?

D. THE TURNAROUND SALE

Scene: George is very pleased with the great job Sally and Paradise Realty are doing in selling George's home. George has just found another house on the North Shore. Naturally, he wants Sally to represent him in buying the new home. The house is listed by Harry, a salesperson with Paradise Realty.

1. Is Sally prohibited from working with George because Paradise Realty has the listing? Explain.

2. Can Sally represent George and Harry represent the seller? Explain.

3. What are Sally's choices?

4. If George and the seller are both willing to consent to a dual agency, can Sally be a dual agent?

5. If Sally is an authorized dual agent, should she tell George that:

- a. the seller countered an offer last week at 10% below the listed price?
- b. there is a better property down the street offered by the owner (FSBO)?
- c. the seller is nearing bankruptcy, foreclosure, and divorce; and is leaving town next week for a new job and needs the money fast?

Should she tell the seller that:

- a. George defaulted under a similar contract last week and forfeited the \$100 deposit?

6. What are the main points to cover in a dual agency consent?

7. If George decided he wanted independent representation, would he have to pay for such services? Explain.

8. What are some other ways in which dual agency problems could arise for Sally?

E. BUYING FOR YOUR OWN ACCOUNT

Scene: George is impatient because his house is not selling; he needs funds to close the sale of his next purchase. Sally feels badly for George and suggests that she buy his house. Sally tells George that she can afford to hold on to the property longer than George wants to, that she has heard a new shopping center is planned that could favorably affect values, and that she may have a re-sale buyer interested in buying in a few months.

1. Can Sally legally buy her own listing? Explain.

2. What choices does Sally have?

3. What choices does Sally have if she were to buy a property listed through MLS?

4. What choices does Sally have in buying a property from an owner (FSBO)?

5. What choices does Sally have in selling a property she owns?

F. THE REPRESENTATION OF BUYERS

Scene: Sally has spent three days showing Dave available properties and discussing various working relationships. Dave is reluctant to commit to work with Sally exclusively, does not want to sign a written agency agreement, but still wants Sally to show him properties.

1. When and how should Sally determine what the working relationship will be?

2. Is it in Sally's best interest to work with Dave as his sole and exclusive agent? Explain.

3. Would Sally owe Dave the same duties if he were a customer that she would if he were a client? Explain.

4. In order for Sally to be a buyer's agent, must Dave pay a fee and sign a written agency contract? Explain.

5. What are some of the advantages of Sally representing Dave?

SUGGESTED ANSWERS TO PART II DISCUSSION QUESTIONS

A. THE LISTING PRESENTATION

Scene: Sally Vierra, a salesperson for Paradise Realty, has inspected the home of George and Mary Kane, the sellers. They've named their price and Sally is ready for them to sign the listing contract.

1. Besides Sally, who else will represent the Kanes in the sale of their home?
 - a. Other salespeople in Paradise Realty's office, including other branch offices even though located on another Island. The broker "owns the listing," even though the Kanes don't know the broker or anyone else in Paradise Realty besides Sally.
 - b. Any subagents, provided the Kanes authorized the use of subagents. Subagents could be other brokers with whom Paradise customarily cooperates. If a Multiple Listing Service (MLS) is used, any broker member is presumed to be a subagent. This presumption would not exist if either the seller did not offer subagency or the cooperating broker rejected the offer of subagency.
2. If Paradise Realty is a member of the local MLS, what should Sally tell the Kanes about MLS?

MLS offers a wide exposure of the seller's property. Under MLS rules, members of MLS must be Realtors. It is a system of offering subagency on a blanket basis to other cooperating brokers, in which those brokers accepting the offer of subagency would also represent the seller. The cooperating broker will share commissions with the listing broker. In some cases, the cooperating broker does not accept the offer of subagency and instead is the agent of the buyer.
3. Should the Kanes offer subagency? Explain.
 - a. Some advantages of subagency are:
 - (1) Wide exposure of properties to other brokers who will act as agents of the listing broker and subagents of the seller.
 - (2) If an MLS is used, a blanket offer of subagency is made to all MLS participants and fee sharing is conveniently arranged. These subagents accepting the offer of subagency will be subject to the same Code of Ethics and MLS rules as will the listing broker.
 - (3) The job of subagents is to find a qualified buyer on behalf of the seller and their incentive is a known commission split.
 - (4) Subagency could be appropriate when a previous listing broker finds a buyer for a property after the listing expires and the seller relists it with another broker.

- (5) Subagency may solve logistical problems if the property is located in an area or island apart from where the listing broker operates.
- b. Some disadvantages to subagency are:
- (1) The seller is bound by and responsible for the acts and representations (good and bad) of the subagent as well as the listing agent.
 - (2) Notice to the subagent is deemed to be notice to the seller even though the seller never receives actual notice.
4. Why might a seller decide not to offer subagency?
- a. Fear that seller may be liable for someone over whom the seller has no real control and does not know.
 - b. The seller has carefully selected the listing broker but does not know the subagents. In some cases, the seller may want to avoid creating subagency with a certain broker, or the seller may want to offer subagency to only a few specific brokers (selective subagency).
 - c. The seller may feel that, despite legal rules of subagency, the cooperating broker really works for the buyer anyway.
5. If the buyer is procured by a buyer's broker, should the seller authorize Paradise Realty to share commissions? Explain.
- a. Most sellers are interested in receiving maximum possible proceeds from a sale. They usually recognize that their listing broker receives 100% of the commission in an in-house sale and less than that if a cooperating broker finds the buyer. Sellers who receive offers on their property may not care whether the cooperating broker represents the seller or the buyer. Sellers do care if their listing broker's refusal to share the commission with a buyer's broker results in no offer or in lower net proceeds. The listing broker should, at the listing stage, clarify with the seller how fees are to be handled. The listing agreement should clarify whether the seller authorizes fee splitting with subagents and with buyer's brokers. Normally the seller is not entitled to know how much the cooperative split will be. However, assume the average split is 50-50, yet the listing broker will only split 95-5. Because this will result in few cooperating brokers being willing to work on showing the seller's property, the listing broker should tell the seller of this unusual arrangement.
6. Why should Sally obtain a signed property condition report?
- The report will help Sally and the Kanes address the negative as well as the positive aspects of the property. Often, Sally will be keyed into specific

problems that can be corrected or handled by other experts prior to marketing and other problems that can be handled by full disclosure to the buyer. Such disclosure will help protect Sally from subsequent allegations by an unhappy buyer that Sally and Paradise Realty misrepresented or concealed material facts about the property condition. Sally should verify from the public records as much of the information as is practicable.

B. THE OPEN HOUSE

Scene: Sally holds her first Open House in the Kane's house. Dave and Donna show up for a tour and find out from Sally that the seller is asking \$275,000. They ask Sally if the sellers will take less.

1. Sally knows the Kanes will take \$270,000. What should she tell Dave and Donna?
 - a. Sally must maintain undivided loyalty to her clients, the Kanes. By revealing the Kanes' bottom price without their prior approval for this strategy, Sally might cost them \$3,000 if the buyer would otherwise have offered \$273,000. Sally should encourage Dave and Donna to submit their best offer, pointing out that the seller's asking price is \$275,000 but that Sally must present any offer for the Kanes to consider. In this regard, Sally should not reveal the fact the Kanes' countered an offer last week at \$271,000. Nor should Sally be disclosing to other salespeople in the office the **amounts** of offers coming in from cooperating brokers—although it is permissible to mention that other offers have been received.
2. When is the best time for Sally to tell Dave and Donna that she represents the seller?
 - a. The earlier the better, once it appears that Dave and Donna are interested in the property or once they appear ready to reveal confidential bargaining information about themselves. It is not required that Sally greet them at the door with a warning sign that she represents the seller. Sally can show them the property, answer their general questions about the nearby schools, the taxes, utilities, the possible financing, etc. Sally should explain the distinction between assisting a customer and representing a client. Sally should develop and practice making basic but informative statements to prospects telling them how she can help service many of their needs in her capacity as agent or subagent of the seller. One of the first questions Sally should ask is whether they are working with another broker.
 - b. There are certain questions by the buyer that should trigger Sally making agency disclosures, for example: "How low will the seller go?," "How much is the property really worth?," "Is the seller really selling because

- they've already bought another house and need to close quickly?," "Has the seller made any prior counteroffers?," "What is the top offer so far?," "Will you let me know the amounts of other offers as they come into your office?"
- c. Buyers making a casual inspection of a property do not need or desire a long explanation of agency. The problem is to be sure Sally advises the buyer that she represents the seller BEFORE the buyer starts confiding key information such as how much money the buyer can put down and how high a price the buyer will pay. Sally will put herself in a difficult ethical dilemma once she receives this confidential information that she is then obligated to disclose to the seller. Sally should caution all buyer prospects not to disclose confidential bargaining information that the buyer wants withheld from the seller.
3. What types of customer level services can Sally render to Dave and Donna without necessarily becoming their agent? List at least five.
 - a. Provide them with ready access to information about available properties, sources of financing and loan qualification.
 - b. Explain standard forms, closing procedures, and estimated closing costs.
 - c. Assist them in submitting the offer to buy and facilitating communication with the seller.
 - d. Provide them with the sources for other professionals to consult (inspectors, architects, attorneys, accountants, and surveyors).
 - e. Provide information about applicable zoning, building permits, deed restrictions and municipal services.
 - f. Monitor closing and other deadlines in order to expedite the transaction in a nonadversarial environment.
 4. What type of conduct on Sally's part could be interpreted by Dave and Donna to create an implied agency with them?
 - a. Examples would be: Sally assures them she can convince the seller to lower the price and ease up on the terms; she will remind the seller about the poor location and if that doesn't work to lower the price, then Sally will help them make an offer on another property with a more realistic seller; she points out that since the property has been on the market for eight months, it must be overpriced, so Sally suggests they offer \$260,000 and see what the seller says.
 - b. While working with a buyer does not automatically create an agency relationship with the buyer, the broker should be careful that the buyer is not left with the impression that the broker is acting as the buyer's agent. Thus, a listing broker is on thin ice when the

broker provides more than market information and instead becomes a negotiator or advocate for the buyer.

5. Must Sally advise Dave and Donna to obtain their own broker? Explain.
 - a. Sally is not obligated to advise them to obtain their own broker. Note, however, that both the seller and Sally might be in a better legal position if Dave and Donna had their own agent since they ordinarily would not be liable for any negligence or misrepresentation of the buyer's agent.
 - b. The most common misconception regarding agency disclosure rules is the idea that listing brokers can't work with the buyer in selling their own listings. This is not true. The listing broker's job is to work with buyers, just as long as the broker does not act adversely to seller's best interest.

It is in the seller's best interest for the broker to help the buyer as much as possible. Sellers understand the listing broker will be meeting many buyers and showing them the seller's property as well as other properties. It is in the seller's best interest that the broker help the buyer with collecting key data about the property and the neighborhood, about financing and closing details, and about procedures in making offers.

It is adverse to the best interest of the seller for the broker to reveal confidential bargaining information (how low will the seller go; possible distress sale) and to conceal from the seller that the buyer is paying the broker a bonus and re-listing the property with the broker at a much higher price. While a broker cannot negotiate on the buyer's behalf against the seller, the broker can present any offer the buyer wants to make.

C. THE COOPERATIVE SALE

Scene: Sally receives a call from Tom Nakagawa of Mango Realty in response to Sally's listing in MLS. Tom has a "client," Alice, who is interested in the Kane's Pearl Harbor house. Tom wants to show the house.

1. Whom do Tom and Mango Realty represent? Explain.

On the facts given, the answer is ambiguous. Unless Tom, on behalf of Mango Realty, rejected the MLS offer of subagency, then Tom and Mango would be subagents of the seller. They likely also would be implied agents of Alice, who they refer to as their "client." This is a dangerous undisclosed, accidental dual agency that can best be avoided by awareness of the problem. As a matter of routine, Sally should ask each cooperative broker about their agency status.

2. What do the local MLS rules state regarding the presumption of subagency?

Most MLS rules state that the cooperating participant is presumed to be the subagent of the seller who offers subagency when listing with MLS. The participant can reject the offer of subagency, and, by agreement, can share in the listing broker's commission. It is extremely important that a cooperating broker who is the agent of the buyer notify the listing broker's office as early as practicable that the broker is not acting as the seller's subagent. Waiting until presentation of the DROA to disclose buyer agency can risk cancellation of the transaction itself, as well as violate the Commission's agency regulations.

3. Can Tom reject the MLS offer of subagency and still participate in a share of the listing commission? Explain.
- Yes. The policy rules of the MLS permit a participant to accept compensation normally offered to subagents provided all parties to the transaction authorize such a sharing. Many listing forms contain such an authorization by the seller.
4. Is Tom more effective as the agent of Alice or as the subagent of the Kanes? Explain.
- a. This is a question that the cooperating broker should ask in each transaction. The question has nothing to do with disclosure of pertinent facts about the condition of the property—these have to be disclosed regardless of agency status. The above scene indicates that Tom had worked with Alice before and therefore it is probable Tom would be more comfortable working with Alice on a client basis rather than on a customer basis.
- b. If Alice is Tom's client, Tom would have no hesitancy in pointing out the property is overpriced, the seller's terms are unreasonable, or there are certain negative features of the house. Tom would employ all his skills to negotiate the best purchase for Alice under the circumstances. Tom recognizes that whether Alice is a client or a customer, Tom owes her fair and honest treatment. Tom might also consider who needs his representation more, the Kanes or Alice.
- c. Often, the question is not so much "whom do you represent" as it is "whom do you want to represent" and "who needs your representation." Tom need not represent every buyer who walks in the door. But with an established client like Alice, Tom may be more comfortable continuing to look out for her best interests which, at times, might be in conflict with the seller's best interests.

D. THE TURNAROUND SALE

Scene: George is very pleased with the great job Sally and Paradise Realty are doing in selling George's home. George has just found another house on the North Shore. Naturally, he wants Sally to represent him in buying the new home. The house is listed by Harry, a salesperson with Paradise Realty.

1. Is Sally prohibited from working with George because Paradise Realty has the listing? Explain.
- No, Sally can still work with George although she needs to clarify the extent of their working relationship. As to the North Shore house, George may find himself transformed from a listed client to an unlisted prospect. If Sally continues to represent George as a client, then there is a dual agency problem to handle.
2. Can Sally represent George and Harry represent the seller? Explain.
- No. In legal theory, only Paradise Realty is the agent. Through the conduct of Sally, Paradise is the agent of George, and through the conduct of Harry, Paradise is the agent of the seller. Paradise is therefore a dual agent, despite any notion that there is an internal wall set up between these two independent contractors that protects Paradise Realty from any dual agency claim.
3. What are Sally's choices?
- Sally's choices are either to disclose the dual agency and obtain written consents from George, the seller and Paradise Realty, or to disclaim any agency to George and clarify to George that she can work with him but only on a customer basis, as the agent of the seller. Sally would tell George that she could provide helpful service just as she did to the buyers looking at his house. She might point out that the seller listed with Paradise expecting the same undivided loyalty as George did when he listed his house with Paradise. Sally might suggest that if at any point she felt George needed his own representation that she would tell him to obtain another broker or consultant, perhaps on an hourly fee basis.
4. If George and the seller are both willing to consent to a dual agency, can Sally be a dual agent?
- Yes, Sally, on behalf of Paradise Realty, can be a dual agent provided both George and the seller give their informed consent. The problem is whether Sally can act effectively in the limited capacity of a facilitator or middleman.
5. If Sally is an authorized dual agent, should she tell George that:
- a. the seller countered an offer last week at ten percent below the listed price?
- b. there is a better property down the street offered by the owner (FSBO)?
- c. the seller is nearing bankruptcy, foreclosure, and divorce; and is leaving town next week for a new job and needs the money fast?

Should she tell the seller that:

- a. George defaulted under a similar contract last week and forfeited the \$100 deposit?
- b. George's offer is unsound because of the low deposit and proposed down payment, and because the contingency clause puts the seller at a disadvantage?
- c. George has an option on the adjoining parcel, has a resale buyer in the wings, and has a higher back-up offer already prepared?

If the seller is asked to carry back financing, how does Sally handle discussions concerning the due on sale clause, prepayment, interest rate, term, etc.?

There are no easy answers to these questions. But they do illustrate the practical problems the dual agent encounters at every stage of the transaction.

6. What are the main points to cover in a dual agency consent?

The consent should point out the limitations on the fiduciary role of the licensee. Since the licensee

has a duty to disclose pertinent facts to each client, the clients should be cautioned not to disclose confidential information they do not want the other side to know. If the dual agent is to act as a mere facilitator and not as an adviser and negotiator, then this should be stated. Rather than use a simple printed form, it is better in each dual agency transaction to prepare a custom consent letter tailored to the particular clients. Remember, the courts look at not only whether the buyer and seller signed their consent to one agent representing both, they look at whether each side gave their **informed** consent.

Suppose for example, that Sally had a buyer client who has a re-sale buyer lined up for \$325,000. Sally finds the ideal property, persuades the owner to list at \$300,000. She presents an offer from her buyer at \$295,000 and then obtains a dual agency consent from buyer and seller. The seller could likely challenge the consent on the basis Sally withheld a key fact about the re-sale buyer. Here is a sample dual agency disclosure letter sent by Sally:

"Dear George,

You and I have discussed my being the only agent in this transaction and representing both you and the seller. As a dual agent, I must be careful not to represent one side to the disadvantage of the other. I must also be careful, however, not to fail to do some task that you may expect of me. To ensure that we understand each other, this agreement sets out exactly what I will do for you. I will not be doing anything that is not written here. If you need any other services, you are to ask for those services in writing. If I can perform those services without violating my dual agency duties, I will agree to those additional services in writing. If I do not agree, you must assume that I cannot perform those services.

I am entering into the same agreement with the other side of this transaction. I mean to be fair and tully open with each of you as to what I can do. I look forward to your satisfying all of your questions and to the completion of a transaction satisfactory to both sides.

I WILL:

- (1) Transmit to the other side all information you tell me to transmit. To be safe, let's put all information to be transmitted in writing.
- (2) Transmit to you all information that the other side tells me to give you. Again, I will try to get it in writing.
- (3) Help you arrange for any inspections or analyses of the property or the transaction that you feel may assist you in your decision.
- (4) Show you other properties or transactions involving the same price or property type if you feel that will help you make a fully informed decision.

I WILL NOT:

- (1) Prepare a market analysis to give you ammunition in bargaining—as a dual agent, I cannot take sides.
- (2) Conduct an investigation of the property—which might be used as a bargaining tool. Let's use independent experts if you or the other side wants such investigation.
- (3) Disclose confidential information obtained from the other side—I will not disclose your confidential information nor can I disclose that of the other side.

If you are in agreement with how I intend to assist you in this transaction, please sign your consent in the space below."

7. If George decided he wanted independent representation, would he have to pay for such services? Explain.

George should clarify with his broker what the payment arrangements will be. In many instances, the buyer's broker will arrange with the listing broker to share in the listing commission (with the seller's prior authorization). In some instances, the buyer will want to pay the broker directly. So that extra commissions are not added to the transaction, the offer will usually be structured either (1) with the buyer reducing the offering price by an amount equal to the buyer's broker's commission (net offer) or (2) with the offer stating that the seller will credit the buyer at closing with an amount equal to the usual selling broker's commission split. In both cases, the listing broker and the seller need to agree on a reduction in the full listing commission. This usually is not a problem in that the listing broker is accustomed to sharing the selling fee portion of the commission when the sale is not "in-house."

8. What are some other ways in which dual agency problems could arise for Sally?
- In addition to the in-house sale with another agent and the turnaround sale, there is the common situation in which Sally "adopts" the buyer during escrow. After the DROA is signed, the buyer George asks Sally to handle the rental management on several properties. Suppose that George also lists his present home with Sally; note the first DROA was contingent on the sale of George's home. George asks Sally to find a re-sale buyer for the home in escrow. George requests that Sally obtain a 45-day extension on the first DROA so he can raise the funds for the down payment. Before advising the seller of his rights regarding the extension, Sally should carefully point out that she is now the agent for George on the other transaction, Sally would be wise to advise the seller in writing to seek the advice of an attorney on the extension request (i.e., the seller may want to demand a cash payment to extend).
 - Dual agency could arise if Sally works on a MLS listing for a buyer client without first rejecting the offer of subagency from the listing broker. Note that dual agency involves one agent working for two principals; subagency involves two agents working for one principal.
 - Sally represents Betty who is looking for a unique waterfront property. Sally finds the perfect property and it is not yet listed. Sally should avoid the dual agency trap of first obtaining the listing and then disclosing her dual agency when she presents the offer. Sally might consider having Betty pay her fee and offering the seller a net amount, the same

amount the seller would have netted from a higher offer had the seller been asked to pay the fee.

E. BUYING FOR YOUR OWN ACCOUNT

Scene: George is impatient that his house is not selling. George needs funds to close the sale of his next purchase. Sally feels badly for George and suggests that she buy his house. Sally tells George that she can afford to hold on to the property longer than George wants to, that she has heard a new shopping center is planned that could favorably affect values, and that she may have a re-sale buyer interested in buying in a few months.

1. Can Sally legally buy her own listing? Explain.

There is no legal prohibition against Sally buying her own listing. But there are some legal and practical issues:

- Sally and Paradise Realty remain the agent of George unless there is a clear termination agreement. It is possible that George may later have second thoughts about the sale. George may allege that Sally concealed material facts that would have affected his decision to sell. This includes market value information (new shopping center planned nearby) or information about a re-sale buyer in the wings. These allegations may support a claim for rescission of the sale, forfeiture of commission, money damages, or disciplinary action by the Real Estate Commission.
 - Some firms have a company policy restricting the number of listed properties a salesperson can buy. Other firms prohibit such a purchase for fear of the appearance of impropriety when the market value quickly rises after closing or for fear of competing with buyer prospects. Still other firms restrict purchase until the property has been actively marketed for 45 days, in order to ascertain whether there are buyers willing to offer the seller better terms and price than Sally.
2. What choices does Sally have?
- Sally could remain George's agent and act as a dual agent in the purchase. She should take extra caution to fully disclose all market information and other pertinent facts. Sally should advise George to obtain expert assistance (attorney, accountant) if he has questions regarding her proposed purchase. Alternatively, Sally and Paradise could, with George's consent, terminate their agency as to this transaction. Sally could reduce her offer by the amount George would otherwise have paid her as a commission (this amount may still be taxable income to Sally).
3. What choices does Sally have if she were to buy a property listed through MLS?
- When buying a MLS listed property, Sally must disclose that she is licensed with Paradise Realty. She should be sure to disclaim any subagency to

the seller. In this way, the listing broker solely represents the seller and Sally represents herself. Sally and Paradise should decide on whether to ask for the amount of the fee split offered in the MLS or to reduce the offering price to reflect the fact that no commission share is involved.

4. What choices does Sally have in buying a property from an owner (FSBO)?

Sally must be careful to avoid an unintentional dual agency caused by the owner believing that Sally also represents the owner, especially when the owner is paying her a commission (the selling fee portion). Before negotiations are initiated, Sally must tell the owner that she is licensed with Paradise Realty and that she is the buyer. Sally should also clearly state that she is not the agent of the owner; that the owner is free to obtain independent advice; that Sally is buying for her own use, investment, or re-sale. Sally should be careful about encouraging the owner to rely on advice she gives on the market value of the property. With clear written disclosure and with no commission paid by the owner, Sally is in a better position to defend a later claim by an unhappy owner.

5. What choices does Sally have in selling a property she owns?

Sally must disclose to any buyer that she is licensed as a real estate salesperson with Paradise Realty. Sally should be careful to disclose that she is not acting as the buyer's agent and that the buyer is free to obtain independent representation.

F. THE REPRESENTATION OF BUYERS

Scene: Sally has spent three days showing Dave available properties and discussing various working relationships. Dave is reluctant to commit to work with Sally exclusively, does not want to sign a written agency agreement, but still wants Sally to show him properties.

1. When and how should Sally determine what the working relationship will be?
 - a. It is Sally's responsibility to help guide Dave toward the working relationship that best serves both Dave and Sally. This does not necessarily have to be an agency relationship, i.e., Sally could represent the seller as an agent or a subagent and still work with Dave on a customer basis. She doesn't have to represent Dave or, for that matter, every buyer who walks in her door.
 - b. Note that many buyers do not want an agency relationship. They may be perfectly content to

work with Sally even after Sally clarifies her role as a seller's agent or subagent. Many buyers can and do represent themselves and some prefer to work directly with the seller's agent.

- c. Sally may not want to represent Dave either because of company policy that favors seller agency, or pre-existing agency relationships with sellers, or because Sally doesn't feel comfortable being the agent of Dave. Sally might work with nine out of ten prospects like Dave on a customer basis and find that only with the tenth prospect is she comfortable working on a client-agent basis. The decision to represent Dave as a client is a serious one, since Sally will owe fiduciary duties to Dave and could even be legally bound by Dave's representations. Sally's decision of whether to work for Dave as an agent or work with Dave on a customer basis should be a careful, informed, conscious and intentional decision (not one that is accidental or implied).
 - d. **Sally should make her decision as early in the relationship as is possible.** Since agency is a consensual relationship, Dave must agree to the type of relationship Sally prefers. Again, remember, the question is not so much "Whom does Sally represent?" as "Whom does Sally **want** to represent?" and "Who wants (needs) Sally to represent them?" Once the mutual decision is made, it is best to confirm this agreement in writing even though the law permits oral disclosure and only requires written disclosure at the contract stage.
2. Is it in Sally's best interest to work with Dave as his sole and exclusive agent? Explain.
 - a. It depends. Dave does not appear willing to give Sally his total loyalty. Sally may find herself spending countless hours with Dave only to find him "wander off" to another broker or direct to an owner. This is comparable to an open listing situation.
 - b. Sally could decide to act as Dave's agent even though not on an exclusive basis. Sally might be reluctant to do this for reasons similar to her reluctance to work with sellers on an open listing basis.
 - c. Sally might feel more effective in working with Dave on a client basis as opposed to a customer basis, especially concerning properties not listed with Paradise Realty.
 3. Would Sally owe Dave the same duties if he were a customer than she would if he were a client? Explain.
 - a. No. Note we are talking about representation, not misrepresentation. Sally must be honest,

accurate, ethical and fair in her dealings with a customer. With a client, she owes additional duties. Sally can **assist** a customer but she must **represent** a client.

- b. **Disclosure.** To a customer Sally must disclose material facts affecting the property's value or condition which she knows or should know. To a client Sally must disclose all facts she knows which bear on the principal's decision in the transaction. For example, as the listing broker, Sally knows that the buyer has business problems, or has extra cash from a recent sale, or has asked her to line up a re-sale buyer. Sally has learned that a new company is relocating many employees to the area and home prices may increase. Sally must disclose this information to a client. In addition, Sally has a duty to investigate and discover facts a reasonable broker would to protect the best interest of the client. She does not have a like duty to a customer unless she has been specifically asked and has agreed to check out a certain fact.
 - c. **Reasonable skill and care.** To a customer Sally must be competent in rendering her services. To a client she must act as a professional and act to protect her client. This might require that she recommend the client obtain tax, legal, or construction expertise when appropriate.
 - d. To a customer Sally's job is to provide information and general assistance. This could include help in filling out the sales contract according to the customer's directions. To a client, Sally is expected to offer skillful advice and counsel and to participate in the negotiations with her client's best interest in mind. Some buyers need advice and counsel in the negotiations, something a listing broker or seller's subagent cannot give them.
4. In order for Sally to be a buyer's agent, must Dave pay a fee and sign a written agency contract? Explain.
- No. Sally can represent Dave even though Sally's agreement with Dave is oral and she will be paid by the seller or listing broker. It is preferable that Sally and Dave reduce their agreement to writing. It is probably in the buyer's best interest to agree to pay a fee on those properties in which Sally cannot receive compensation from the seller. In fact, some buyers want to pay the fee and do not want their broker to receive compensation from the seller. These buyers often reduce their offering price to reflect the fact they will be paying their

broker separately. Some even note this on the offer in the expectation that listing brokers will adjust their fee downward as is the case in a cooperative sale. Note that current VA regulations do not allow a veteran buyer to pay a real estate commission.

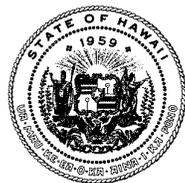
5. What are some of the advantages of Sally representing Dave?

To Sally, some of the advantages are:

- a. Protection of commission—she is paid regardless of the property bought. She is focusing her efforts less on selling a property than on servicing the needs of her client.
- b. Avoidance of conflicting loyalties to buyer and seller—Sally is loyal only to Dave, but she is fair and honest to the seller.
- c. No fear Dave will wander off—when Sally gives more loyalty, she gets more loyalty.
- d. Better control over Sally's time and effort.

To Dave, some of the advantages are:

- a. More services—Sally is assured of a commission and can afford to expend all her efforts to service Dave's needs.
- b. Wider marketplace—Sally will look at all properties, even properties not yet publicly for sale.
- c. Stronger negotiating position.
- d. More loyalty—no more conflict of interest with the seller's needs.



HAWAII REAL ESTATE COMMISSION