

1

Agency Relationships

Wis. Stats. 452.01, 452.03, 452.133-138, 452.14, 452.17
REEB 17, 24.03, 24.05, 24.075, 24.17

Chapter Overview *This chapter introduces the concepts of agency law and how it is functions in a real estate transaction. Agency law creates a real estate licensee's legal obligations to the parties in a real estate transaction.*

Important Terminology

agency
agent
broker
business sale
buyer's agent
buyer's broker
client
cooperating brokers
customer
exchange
fiduciary
licensee
listing agent
listing broker
material adverse fact
multiple representation
multiple representation
with designated agency
multiple representation
without designated agency
option to purchase
principal broker
salesperson
selling agent
selling broker
single agency
subagent

THE NATURE OF THE AGENCY

Agency is the foundation upon which real estate brokerage is practiced. Agency describes a legal and ethical relationship between a real estate licensee and a party to a transaction that may include a buyer, a seller, a rental property owner, or a tenant. The agency relationship governs the day-to-day actions of every real estate licensee. This agency relationship is complex and often creates confusion for the public. The challenge comes from understanding the role of the licensee and the party a licensee represents in the transaction. Because the concept is complex and can be confusing, Wisconsin developed strict agency disclosure laws to protect consumers in a real estate transaction. The laws help to ensure that real estate licensees explain agency relationships and the legal obligations they create to buyers, sellers, tenants, and rental property owners.

Wisconsin real estate licensees owe specific duties to all parties in a transaction and additional duties to the clients that licensees represent. Before learning about these duties, an overview of agency terminology will provide the basis for understanding the duties and legal obligations of the agency relationship.

AGENCY TERMINOLOGY

Licensee

Licensee is the term the Wisconsin Department of Safety and Professional Services (DSPS) uses to describe any person licensed or registered under state law to practice real estate. A licensee is anyone holding a broker license, salesperson license, or is registered as a time-share salesperson.

Broker

The definition of **broker** is expansive and encompasses the many different services a Wisconsin real estate broker can provide in a real estate transaction. The definition of broker is from Real Estate Practice, which is Chapter 452 of the Wisconsin State Statutes. To access real estate related rules and statutes, go to wra.org, click on the Legal tab, then click on Code Book.

Negotiation

A broker is a person that, for another person, and for commission, money or other thing of value, negotiates or offers or attempts to negotiate a sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest or estate in real estate, a time-share, or a business or its goodwill, inventory, or fixtures, whether or not the business includes real property.

Negotiate has its own expansive and encompassing definition. Negotiate means to provide assistance within the scope of the knowledge, skills, and training required under Wisconsin Statutes, Chapter 452, Real Estate Practice in developing a proposal or agreement relating to a transaction, including any of the following:

- a) Acting as an intermediary by facilitating or participating in communications between parties related to the parties' interests in a transaction;
- b) Completing, when requested by a party, appropriate department-approved forms or other writings to document the party's proposal consistent with the party's intent; or
- c) Presenting to a party the proposals of other parties to the transaction and giving the party a general explanation of the provisions of the proposal.

A person is negotiating when acting as an intermediary, completing forms for parties, or presenting proposals. Just providing information or showing a property is not acting as an intermediary and does not constitute negotiations. Determining when a person moves from just providing information about a property to acting as an intermediary is not always clear.

Pattern of Sales

A broker is also a person who wholly or in part, is in the business of selling or exchanging interests or estates in real estate or business, including businesses' goodwill, inventory or fixtures whether or not the business includes real property, to the extent that a pattern of sales or exchanges is established, whether or not the person owns the real estate. Five sales or exchanges in one year or ten sales or exchanges in five years is presumptive evidence of a pattern of sales or exchanges.

If a builder sells seven newly constructed homes in one year, the builder creates a pattern of sales. The first four sales do not establish a pattern of sales but to sell the additional three homes, the builder must obtain a broker license or hire a broker to represent the builder for the additional sales.

Shows Property

A broker is a person who for commission, money, or other thing of value, shows real estate or a business or its inventory of fixtures, whether or not the business includes real property, except that it does not include a person showing rental properties.

If a property owner pays someone to show the person's home to potential buyers, the person who is showing the home needs to have a broker license. If a rental property owner hires a person to show rental properties to prospective tenants, the person showing the properties does not need to have a broker license.

Advertises Property

Lastly, a broker is a person who for commission, money, or other thing of value, promotes the sale, exchange, purchase, option, rental, or leasing of real estate, a time share, or a business or its goodwill, inventory, or fixtures, whether or not the business includes real property. This does not include publishing or disseminating verbatim information provided by another person.

If a property owner pays a person to advertise a property, the advertiser needs a broker license. If a property owner writes an advertisement for property and pays a newspaper to run the advertisement, the newspaper does not need a broker license.

Sales of real property will probably make up the largest part of a broker's real estate practice but brokers can also assist parties in other transactions.

1. Exchange

An **exchange** is tax planning tool for a property owner to exchange one property for another and defer payment of the tax on income earned on the transfer. The exchange must involve a transfer of the same kind or class of property such as real estate for real estate. To be eligible for an exchange, the property must be held for productive use in a trade, a business, or as an investment.

Jane sells her apartment building and realizes a \$400,000 gain on the sale. If she correctly plans the transfer, she can invest the sale proceeds in a new property, such as a warehouse, and defer payment of the capital gains tax on the \$400,000 she earned when she sold the apartment building.

Exchanges can be complicated and the tax consequences for a property owner who incorrectly exchanges property could be significant. Consumers with questions about exchanges as a tax planning strategy should consult a tax professional. Licensees cannot provide legal or tax advice and cannot practice beyond the scope of their real estate license.

2. Option to Purchase

An **option to purchase** is an agreement to keep open, for a period of time, an offer to sell or lease real property. An option gives a buyer time to resolve questions of financing, title, or zoning before committing to purchase the property. A buyer may use an option to collect several parcels of land for development.

Tom want to acquire several parcels of adjoining property to create a subdivision. He begins purchasing options from the property owners. Once he collects as many parcels as he needs for his development, he can exercise his options and the property owners must sell the parcels to him at that time. When collecting the parcels, if Tom found out that the local zoning board was not going to grant approval of his development, he would choose to not exercise his options and he is not obligated to purchase any of the optioned parcels.

The seller, called the optionor, is bound by the option agreement, which means that if the buyer, called the optionee, chooses to exercise the option, the seller must sell the property to the buyer. The buyer, however, does not have to exercise the option. For an option, a buyer pays the seller an option fee for the right to prevent the seller from selling the property to any other buyer during the term of the option. The option fee is usually not refundable though the parties could negotiate other terms. The optionor can sell property subject to an option. This means that a buyer could purchase an option from a property owner and the property owner could sell the parcel to a new owner. The new owner is now bound by the terms of the option. To permit the sale of the property subject to the option, the parties would include those terms in the option agreement, which should also address other terms such as the purchase price, the length of the option and which party is responsible for recording the documents. The state-approved Option to Purchase form (WB-24) is discussed in a later chapter.

3. Business Sale

A **business sale** is any type of business that is for sale including the goodwill of an existing business and all the assets. A business sale does not necessarily include the building in which the business is located.

Ann owns a building where she operates a restaurant. She sells the restaurant, including the restaurant's goodwill, the name, and all the inventory but not the building. The new owner purchases the business and executes a lease with Ann for the space in the building.

Exceptions: Who Does Not Need a Broker License?

1. Receivers, trustees, personal representatives, guardians, or other persons appointed by or acting under a judgment or order of the court.

A personal representative of an estate sells eight properties in one year according to the terms of the decedent's will. By selling more than five properties in one year, the personal representative establishes a pattern of sales but does not need to have a broker's license or hire a broker to sell the properties because personal representatives are statutorily exempt from needing a broker license even when engaging in activities that are part of the broker definition.

2. Public officers while performing official duties.

A sheriff often engages in the sale of real property when selling foreclosed properties. When doing so, a sheriff could quickly develop a pattern of sales by selling more than five properties in one year. Even though acting as a broker according to the definition, the sheriff does not need a broker license.

3. Any custodian, janitor, employee or agent of the owner or manager of a residential building who shows a residential unit to prospective tenants, accepts applications for leases and furnishes prospective tenants with information about the rental of the unit, lease terms and conditions, or other similar information. This exemption covers property managers who show units and provide information. If a property manager can sign leases on behalf of a rental property owner or can negotiate lease terms on behalf of the rental property owner, the property manager must have a license.

4. Attorneys licensed to practice in the state of Wisconsin while acting within the scope of an attorney's license.

An attorney drafting a contract for a client in a real estate transaction is acting within the scope of the attorney's license and does not need a broker license but if the attorney wants to act in a transaction and receive a commission from listing a property or acting as a buyer's agent, the attorney needs to have a real estate license.

Salesperson

A **salesperson** is any person other than a broker or time-share salesperson who is employed by a broker. A salesperson holds a real estate license and practices under the supervision of the broker. A salesperson is a legal extension of the broker and acts as an agent of the broker in real estate transactions.

A salesperson must be employed by a broker to practice real estate. An employing broker can limit the transactions in which the salesperson participates. If a salesperson's employing broker loses the broker's license, temporarily or permanently, the salesperson cannot engage in any real estate transactions until employed by a new broker. There is not a grace period and the salesperson must not participate in any more transactions until employed by a licensed broker. A salesperson can only work for one broker-employer at a time.

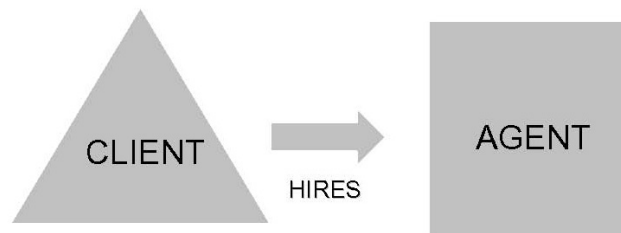
Agent

An **agent** acts on behalf of a principal and carries out the directions of the principal. A seller or a buyer hires a broker to act as the seller's or the buyer's agent in a real estate transaction. A broker hires a salesperson to act as an agent of the broker.

A buyer hires a broker to negotiate on the buyer's behalf in the purchase of a property. The broker is the agent of the buyer, who is the principal in the relationship.

A seller hires a broker to list a property for sale. The broker is the agent of the seller and the seller is the principal.

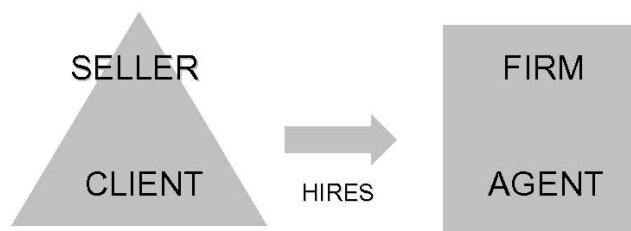
A broker hires salespeople to act for the broker when working with or representing buyers and sellers. The salespeople are agents of the broker.



Client

A **client** is a party to a transaction who has an agency agreement, such as a listing contract or a buyer agency agreement, with a broker for brokerage services. The client is the party who hires the agent to represent the client's interests. When a seller signs a listing contract, the seller is the client and the broker is the seller's agent. A buyer who signs a buyer agency agreement is a client and the broker is the buyer's agent.

A seller hires a real estate broker to list a property. The seller is the client and the broker is the seller's agent. A salesperson is the broker's agent, which is why salespeople are often called simply real estate agents.



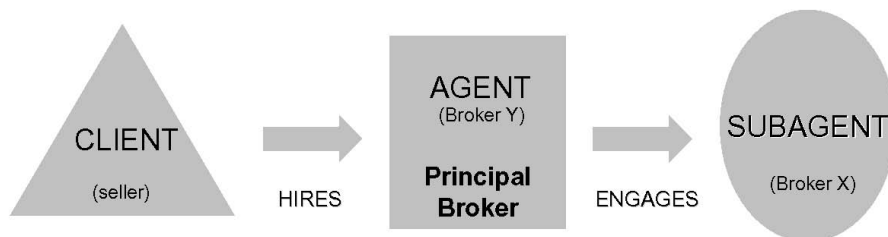
Principal Broker

A **principal broker** is a broker who engages a subagent to provide brokerage services in a transaction. In many transactions, the principal broker is the listing broker. A subagent is the agent of the principal broker.

Subagent

A **subagent** is an agent who works under another agent. A subagent is a broker engaged by another broker to provide brokerage services in a transaction, but is not the other broker's employee. A subagent may write an offer for a buyer-customer on a property listed with another broker. A client must consent to the client's broker using an employee of another broker as a subagent to provide services in a transaction. A client gives or withholds consent in the agency agreement. Subagents are employees of one broker who assist the principal broker in a transaction. Traditionally, the listing broker is the principal broker and the subagent is a co-broker working with a buyer-customer.

A seller hires Broker Y to list a property. The seller is the client and Broker Y is the principal broker and the seller's agent. A buyer asks Broker X to write an offer on the seller's property but the buyer does not sign a buyer agency agreement with Broker X. The buyer is Broker X's customer and Broker X is Broker Y's subagent.



Customer

A **customer** is a party to a transaction who receives brokerage services, such as drafting an offer to purchase, from a broker but who is not the broker's client. A customer does not enter into an agency agreement. The customer receives services given on behalf of and for the benefit of another. If the buyer asks a listing broker to write an offer but does not sign an agency agreement, the buyer is the broker's customer, not the client, and the broker is providing brokerage services to the buyer on behalf of the seller. If a buyer asks a broker other than the listing broker to write an offer on a property and the buyer does not sign an agency agreement, the buyer is that broker's customer and that broker is a subagent of the listing broker, who is the principal broker. The terms client and customer are not interchangeable.

A buyer calls a broker and asks to look at houses. The broker shows the buyer several of the broker's listings. The buyer does not sign an agency agreement. The buyer is the broker's customer and the broker is providing brokerage services, writing offers, and providing market information on behalf of the broker's client.

Agency Models

When a consumer signs an agency agreement with a broker, the consumer becomes a client. Agency agreements are contracts between a client and a broker even though a salesperson working for a broker may be the person who signs the contract. Clients choose one of three agency models that will structure the agency relationship with the broker. The first is single agency. The second is multiple representation without designated agency, which involves limited negotiations by the broker on the client's behalf. The third option is multiple representation with designated agency, also referred to as designated agency. When a client chooses designated agency, the broker provides full negotiation services on the client's behalf.

Single Agency

Single agency is when a broker represents either the buyer or the seller as a client, but never both in the same transaction.

A seller lists a property with Earth Realty. A buyer-customer asks Fire Realty to write an offer on the seller's house. The seller is a client of Earth Realty with a single agency relationship because Earth only represents one party in this transaction. The buyer is a customer of Fire Realty, and Fire is a subagent of the principal broker Earth Realty.

Multiple Representation

A **multiple representation** relationship is when a broker represents two or more clients in the same transaction. If a buyer and seller are both clients of the same broker and they are participating in the same transaction, the broker is representing multiple parties in the transaction and it is a multiple representation relationship. The broker is the agent of both the seller and the buyer in the transaction.

Because of the potential conflicts, both parties in the transaction must consent to the relationship and receive full written disclosure from the broker that the broker is representing both parties. The disclosure to the parties must contain a statement of the broker's duties owed to clients and to non-clients and provide the clients the opportunity to consent to the broker providing services to more than one client in the transaction. Both the listing and buyer agency agreements contain the mandatory disclosure and provide clients the opportunity to consent to a multiple representation relationship. A client can withdraw consent to multiple representation relationships at any time.

There are two forms of multiple representation relationships:

- 1) **Multiple representation without designated agency;** or
- 2) **Multiple representation with designated agency.**

Multiple Representation without Designated Agency

In a multiple representation relationship without designated agency, a broker provides services as agreed to in the clients' agency agreements, but the broker must take a neutral position in the transaction negotiations. If clients choose multiple representation without designated agency, a broker and the broker's salespeople cannot place the interests of one client ahead of the interests of another client in the transaction.

If a broker has two clients who are going to be in the same transaction but the clients have chosen different agency models, the broker cannot represent both clients in the transaction. The broker can ask one or both clients to amend their agency agreements so that the agency models match or can offer to terminate one of the agency agreements to allow that former client to hire a new broker and resolve the conflict in agency choices.

The Adams sign a listing contract with ABC Realty to represent them in the sale of their home. The Adams are ABC's clients. The Lees sign a buyer agency agreement with ABC Realty to represent them in the purchase of a home. The Lees are ABC's clients. The Lees want to write an offer on the Adams' home. ABC is representing multiple parties in the transaction. Both the Lees and the Adams must consent to multiple representation and ABC must give written disclosure to both clients explaining multiple representation and the broker's role in multiple representation relationships. If the Lees had asked ABC to write an offer on a property listed with another broker, ABC has a single agency relationship with both the Lees and the Adams because even though they are both clients of ABC, they are not involved in the same transaction.

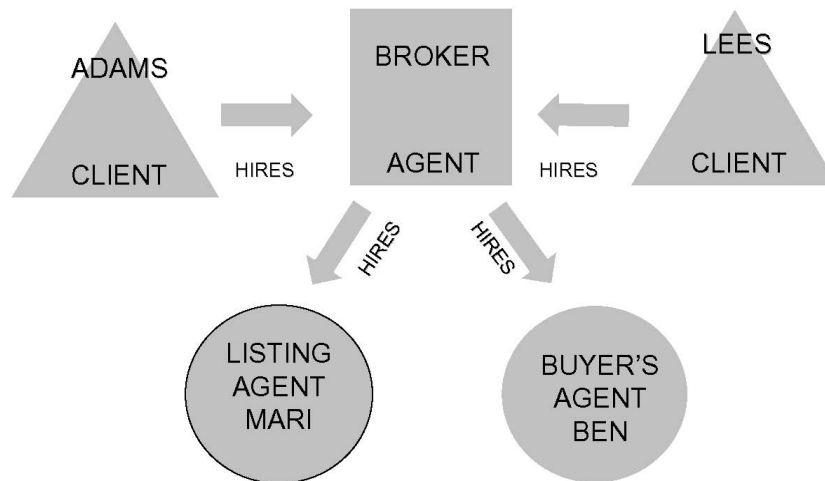


Multiple Representation with Designated Agency

When two of a broker’s clients are in the same transaction and the clients choose multiple representation with designated agency, the broker is representing multiple parties in the transaction but the broker designates an agent to each client and the designated agent does not have to remain neutral in the transaction. Each client receives full negotiation services from their designated agent, both of whom are employees of the same broker, even if the negotiation services place the interests of one of the broker’s clients ahead of the other. Because the agents may place their client’s interest ahead of the other, a broker must designate separate agents for each client in the transaction.

If a broker’s clients have not chosen matching agency models or if one party withdraws consent, the broker and the broker’s salespeople cannot place one client’s interests ahead of the other client’s interest and the broker must remain neutral. To remedy the mismatched agency model, the clients could amend their agency agreements or one client could terminate the agency agreement and be a customer of the broker or hire a different broker.

The Adams sign a listing contract with ABC Realty and the Lees sign a buyer agency agreement with ABC. The Lees decide to purchase the Adams’ home. Both have consented to designated agency. ABC assigns each client a designated agent who provides full negotiation services on behalf of their respective clients.



Fiduciary

A **fiduciary** is a person who is responsible for the property of another.

When the Lees hire ABC Realty to represent them, ABC Realty becomes the Lees’ fiduciary. ABC Realty becomes responsible for items such as the Lees’ earnest money payments and transaction documents; for example, sales contracts and inspection reports.

Cooperating Broker

Cooperating brokers are brokers who cooperate in one transaction. This can be when a seller lists a property with one broker and a buyer signs a buyer agency agreement with another broker, who writes the successful offer for the buyer on the other broker’s listing. There are also cooperating brokers in a transaction when a seller lists a property with one broker and a buyer has a different broker write a successful offer on the other broker’s listing but the buyer does not sign a buyer agency agreement so the buyer is a customer rather than a client of the broker who wrote the offer.

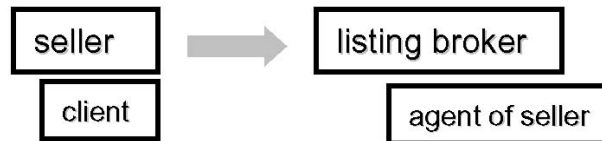
ABC Realty lists the seller’s home and XYZ Realty writes an offer for a buyer on the ABC listing. ABC and XYZ are cooperating brokers, also referred to as a co-brokers.

Brokers and their salespeople conduct different parts of a transaction depending on whether they are working with a seller, a buyer-customer, or a buyer-client. Labels help describe the role of an individual broker or salesperson in the transaction and how that party will be compensated for a successful transaction.

Listing Broker

When a seller signs a listing contract with a broker, that broker is the **listing broker**. The seller is the client of the listing broker and the listing broker is an agent of and represents the seller.

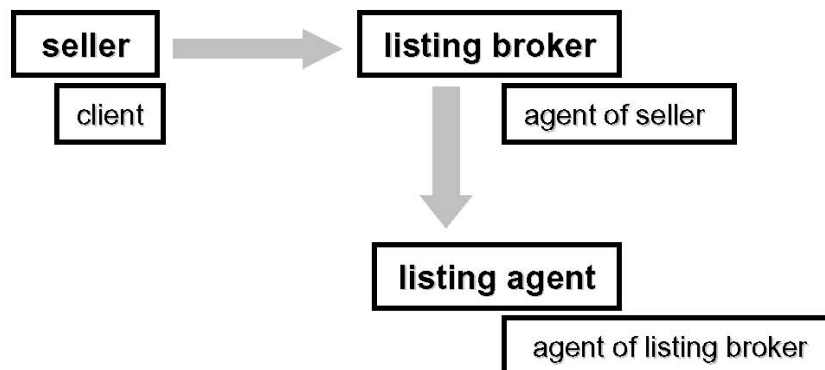
A seller lists a home with Smith Realty. Smith Realty is the listing broker and the seller is Smith Realty's client.



Listing Agent

The employee of the listing broker who actually secured the listing and executes the listing contract is the **listing agent**. The listing agent is the agent of the listing broker and also represents the seller.

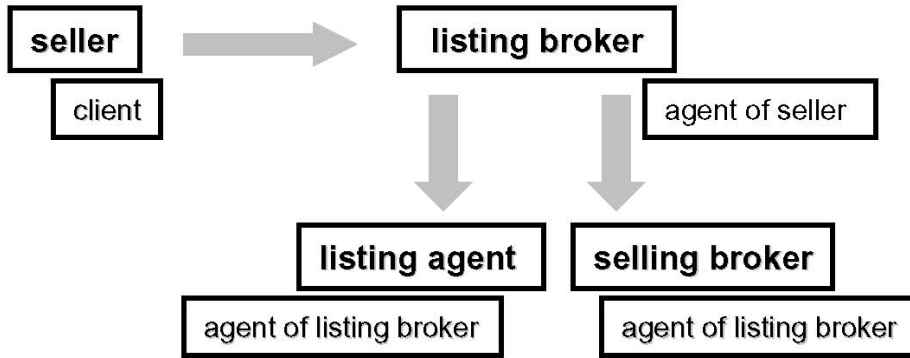
When the seller contacts Smith Realty to list the home, Lucy, who is salesperson working for Smith Realty, meets with the seller and signs the listing contract. Lucy is the listing agent.



Selling Broker

The **selling broker** is the broker that procures the buyer and writes the offer. A selling broker is a subagent of the listing broker.

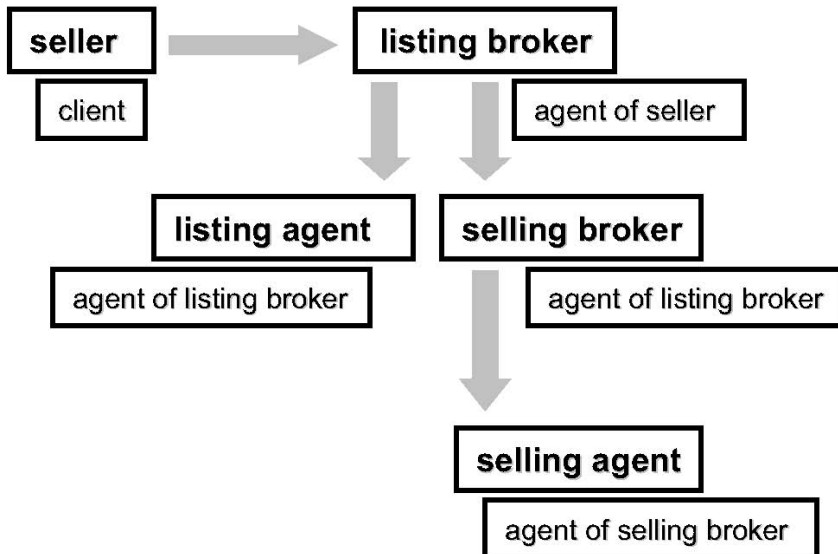
A buyer wants to write an offer on the property the seller listed with Smith Realty. The buyer contacts Nelson Real Estate Group to write the offer but the buyer does not sign a buyer agency agreement. Nelson Real Estate Group is the selling broker and a co-broker.



Selling Agent

The employee of the selling broker who procures the buyer and writes the offer is the **selling agent**. The selling agent is the agent of the selling broker.

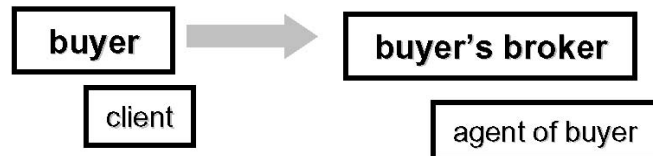
When the buyers contacted Nelson Real Estate Group to draft an offer, Kelly, who is a salesperson with the Nelson Real Estate Group, meets with the buyers and drafts the offer. Kelly is the selling agent for Nelson Real Estate Group, which is the selling broker, a subagent of the listing broker, and a cooperating broker, or co-broker.



Buyer's Broker

The **buyer's broker** is a broker that signs a buyer agency agreement with a buyer. The buyer is a client of the buyer's broker and the buyer's broker is an agent of the buyer.

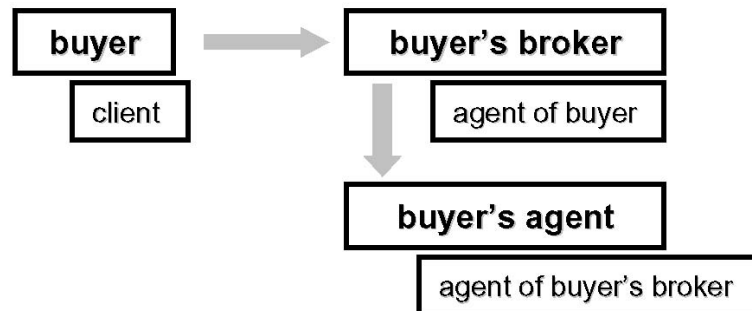
A seller lists a property with Smith Realty. Smith Realty is the listing broker. Lucy drafts the listing contract with the sellers. Lucy is the listing agent. A buyer, who has signed a buyer agency agreement with Smith Realty, wants to write an offer on the seller's house. In this case, Smith Realty is also the buyer's broker and has a multiple representation relationship with the buyer and the seller because Smith is representing two clients in the same transaction.



Buyer's Agent

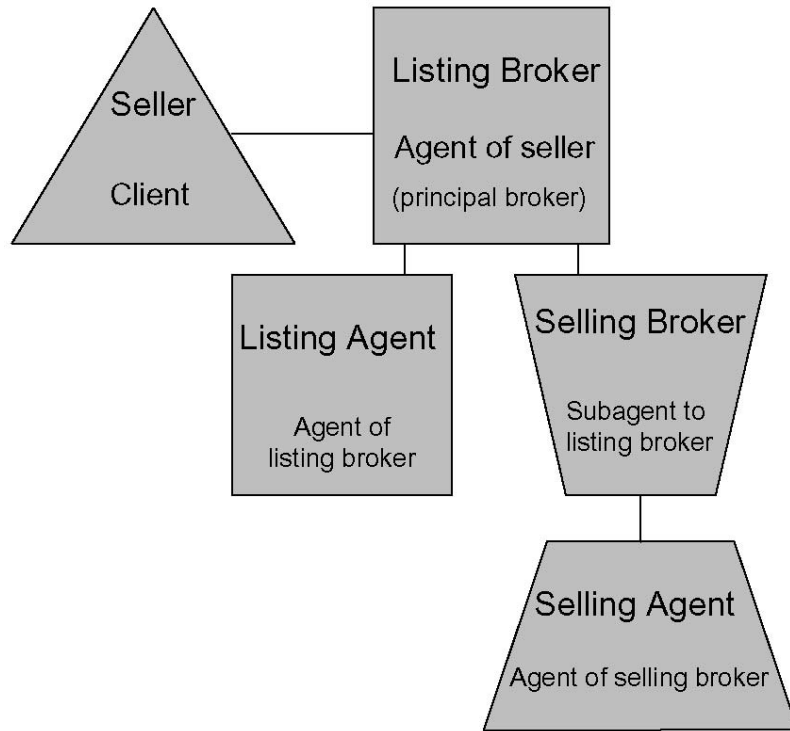
The employee of the buyer's broker who drafts the offer for the buyer-client is the **buyer's agent**. The buyer's agent is an agent of the buyer's broker.

When the buyer wants to draft an offer, Lucy, who took the listing and is the listing agent, also drafts the offer. Lucy is the listing agent and the buyer's agent. For Lucy to participate in this transaction, both the buyer and the seller must consent to multiple representation without designated agency. If the buyer and seller want multiple representation with designated agency, Smith Realty must assign someone other than Lucy to draft the buyer's offer and both the seller and the buyer receive individual agents to negotiate the transaction and the agents can place their client's interest ahead of the other.

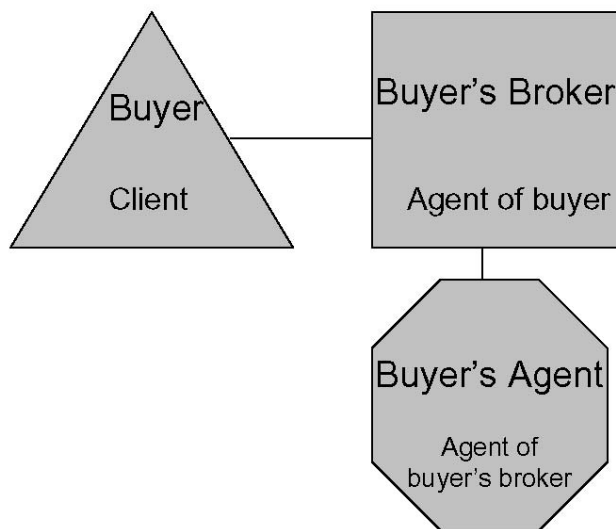


If the buyer contacts Nelson Real Estate Group rather than Smith Realty to write the offer and signs a buyer agency agreement with Nelson, Nelson is the buyer's broker. Kelly, who is a salesperson with Nelson, writes the offer for the buyer. Kelly is the buyer's agent. Because no broker represents both the seller and the buyer in the transaction, there are not multiple representation relationships. The seller is Smith's client and the buyer is Nelson's client. Smith and Nelson are co-brokers.

Seller Agency This diagram shows seller agency with cooperating brokers.



Buyer Agency



THE AGENT'S DUTIES

Duties to All Persons in a Transaction

Licensees owe legal duties to all parties in a transaction, regardless of the party the licensee represents. Both the buyer agency agreement and the listing contract list these duties.

1. **Safeguard** trust funds and other property held by the broker. Brokers must hold parties' property in compliance with state rules. A broker might hold property such as earnest money and transaction documents.
2. Licensees must provide brokerage services to all parties **honestly** and fairly.
3. When negotiating on behalf of a party, licensees have the duty to present contract proposals in an **objective** and unbiased manner and disclose the advantages and disadvantages of the proposals.
4. Licensees must keep **confidential** any information given to the broker, or any information obtained by the broker that a reasonable party would want to be kept confidential, unless the information must be disclosed by law or the person whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular information. A broker shall continue to keep the information confidential after the transaction is complete and after the broker is no longer providing brokerage services to the party. Confidentiality survives the transaction.

Louie is an agent of XYZ and is writing an offer for a buyer on a property listed by QRS at \$175,000. The buyer tells Louie that the buyer is willing to pay full price but wants to offer \$165,000. Louie cannot tell the buyer that Louie thinks the property is overpriced, because the buyer is a customer and Louie is a subagent of the principal broker QRS. Even though the buyer is Louie's customer and not a client, Louie cannot tell the seller or the listing agent that the buyer is willing to pay more because that information is confidential.

5. Provide **accurate** information about market conditions to any party who requests the information within a reasonable time of the request. Upon request, the licensee needs to provide information such as the sale price of properties, the list price, and how long properties have been on the market.
6. Provide brokerage services with **reasonable** skill and care. This also means that a licensee cannot discriminate against, deny equal services to, or be a party to any plan or agreement to discriminate against any person in an unlawful manner under federal, state, or local fair housing law.

Reasonable skill and care also refers to a licensee's competence to participate in a transaction. If a licensee is not competent to participate in a transaction, the licensee can engage the assistance of one who is competent, identify that person if the person works for a different broker, and describe that person's contribution.

A newly licensed salesperson might not be competent to take a listing for a strip mall that the seller wants to list for \$2,000,000. The licensee probably does not yet have the knowledge or experience to properly represent the seller. The licensee could get assistance from a more experienced colleague, refuse the listing, or employ the services of outside help, such as an attorney. If the licensee hires an attorney or a licensee from a different broker, the licensee must identify that person and describe the contribution.

Licensees must also protect the public against fraud, misrepresentation, and unethical practices. Licensees must be knowledgeable regarding laws, public policies, and current market conditions on real estate matters and assist, guide, and advise the buying or selling public based upon these factors.

7. **Disclose** to each party all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation in a timely manner, unless the disclosure is prohibited by law.

A **material adverse fact** is defined as an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or affects or would affect the party's decision about the terms of such a contract or agreement. A licensee must disclose all information that is important to a party, such as structural defects, as well as information that a party stated as important. Licensees have an obligation to disclose known material adverse facts but licensees do not have to investigate or go searching for material adverse facts. Licensees also must disclose information that suggests a material adverse fact.

A buyer with a severe cat allergy tells a licensee that the buyer does not want to look at or purchase a house where cats have lived. If the licensee knows that cats lived in a house or finds out that cats have lived in the house, the licensee must disclose this to the buyer. The licensee does not have a duty to investigate and determine whether there are, or have been, cats on the property.

Determining whether information is a material adverse fact or suggests a material adverse fact that a licensee must disclose can be difficult. Chapter 4 addresses a licensee's disclosure obligations, including material adverse facts.

There is information that licensees cannot disclose because legal prohibitions prevent disclosure. For example, if a buyer or a seller asks about information that relates to a person's status as a member of a protected class under fair housing laws, a licensee cannot disclose this information. A licensee may not disclose information that constitutes unlawful discrimination, such as whether a particular buyer is a member of a certain ethnic or racial group. To disclose this information would be a violation of fair housing laws. Chapter 5 covers fair housing laws and a licensee's duties and obligations related to those laws.

Pre-agency Stage

A broker can provide some brokerage services before a consumer decides whether to be a client or a customer. This is pre-agency. A buyer may meet with a licensee to gather information about the marketplace or even to gather a list of available properties that might meet the buyer's needs. The buyer may not yet know whether the buyer wants to be a client or receive brokerage services as a customer. Brokers can provide information to consumers, including showing properties, while in the pre-agency stage. Negotiations of any form cannot occur during the pre-agency stage.

A buyer-customer looked at a few houses with a broker but has not written any offers. The licensee and buyer have not discussed whether the buyer will be a customer or a client and the broker and the buyer are in pre-agency. If the buyer asks the broker to write an offer or starts asking for the broker's opinions and advice on a property, before the broker can provide those services, which constitute negotiations, the buyer and the broker need to discuss agency and the buyer must decide whether to be a customer or a client.

In pre-agency, the broker and the broker's employees owe the duties owed to all persons. The broker may not provide any party in the transaction advice or opinions relating to the transaction that are contrary to the interests of any other party unless required by law. The broker remains neutral and provides information to the consumer without taking an agency or advocacy role for either party. A broker showing a listing to a buyer during the pre-agency stage cannot provide advice or opinions contrary to the seller's interests. The licensee is not acting as an agent for either party, but is simply providing information to the consumer.

Duties Owed to a Client

In addition to the duties owed to all persons, licensees owe additional duties to their clients. The duties owed to all persons supersede the duties owed to a client if there is ever a conflict, the broker observes the duties owed to all parties in a transaction. A client is a party who has signed a listing contract or buyer agency agreement.

1. Unless a client waives the duty, ***negotiate*** on behalf of the client.

Waiver of the Duty - A broker must observe all duties but a client can waive the duty of negotiation in part or in full if the client waives the duty expressly and in writing. When a client wants to waive a broker's duty of negotiation, the broker must provide to the client a written disclosure including:

- a) A copy of the text of what the client is waiving and a statement that, as a consequence of the client's waiver, the broker has no legal duty to perform the duty of negotiation; and
- b) A statement that as a consequence of the client's waiver, the client may require the assistance of an attorney or another service provider to fulfill the client's goals and contractual duties in the transaction.

The written disclosure serves to ensure the client understands the significance of waiving this service and to warn the client that, because of the waiver, the client may require the assistance of an attorney or another settlement service provider during the transaction.

2. Fulfill any ***obligation*** required by the agency agreement and any order of the client that is within the scope of the agency agreement and is consistent with other duties.
3. Represent the client's interests ***loyally*** by placing the client's interests ahead of the broker's interest. The broker may not, unless required by law, give information or advice to other parties who are not the broker's clients, if giving the information or advice is contrary to the client's interests.

Alfred is working with a buyer who is looking for waterfront property with 200 ft. of lake frontage with an existing home in good condition. The home must have at least 2,000 sq. ft. and the entire property cannot cost more than \$150,000. Alfred knows this will be almost impossible to find and if he did find this property, he would like to purchase it. Surprisingly, Alfred finds a listing that fits the buyer's requirements. If Alfred is a selling agent, working with a buyer-customer, Alfred can buy the property for himself. If Alfred is the buyer's agent, he must put the buyer's interest ahead of his own and tell the buyer about the property.

4. Provide, when requested by the client, ***information*** and advice to the client on matters that are material to the client's transaction and that are within the scope of the knowledge, skills, and training of a real estate licensee.
5. ***Disclose*** all material facts affecting the transaction, not just adverse facts. Material facts are facts that a broker knows, that are material to the transaction, and that the client does not know and could not discover through reasonably vigilant observation. Material facts do not include confidential information and that the broker cannot legally disclose. This disclosure duty is not the same as a broker's duty to disclose material adverse facts to all parties, which is disclosure of all the important and negative facts. The duty to disclose all material facts is the duty to disclose all important information that is both positive and negative.

A buyer's agent is writing an offer for a buyer-client. The agent discovers the zoning board decided to change the property's zoning classification, which will increase the property's market value. The buyer's agent must disclose this material fact to the buyer-client so the buyer can consider it when negotiating the offer. The buyer's agent does not have to disclose this to the seller of the listing broker because it is not adverse. The information is material but not adverse.

Duties for Subagents

A subagent is a broker engaged by a principal broker to provide brokerage services in a transaction but who is not the principal broker's employee. A subagent owes the duties to all persons as well as the duty of loyalty to the principal broker's client. Because a subagent is not a party to the agency agreement between the principal broker and the buyer or the seller, the agent is not subject to the provisions of the agency agreement.

A subagent of a listing broker drafting an offer for a buyer-customer on the listing broker's listing, cannot put the subagent's interest ahead of the seller's or provide the buyer advice or opinions contrary to the interests of the seller unless required by law. The subagent cannot give the buyer an opinion that the property is overpriced or advise the buyer to offer less than the list price. If the buyer wants this type of opinion or advice, a buyer must hire a broker with a buyer agency agreement and become a client rather than a customer.

A subagent may negotiate on behalf of a person who is not the broker's client if the principal broker engages the subagent with the client's consent. A subagent must provide agency disclosure that lists the broker's duties to the party with whom the subagent is working.

AGENCY DISCLOSURE OBLIGATIONS

Wisconsin statutes require real estate licensees to discuss agency relationships with buyers and sellers before providing brokerage services. The state requires that brokers provide disclosure using mandated plain-English language to customers and clients involved in real estate transactions. The state created the disclosure language to make sure consumers understand the agency relationship and a broker's duties to all parties in a transaction and the broker's additional duties to their clients.

Most of the state-approved agency agreements contain the mandated disclosure language. The Wisconsin REALTORS® Association (WRA) developed agency disclosure forms for licensees to use if they are using agency agreements that do not contain agency disclosure language. Licensees must inform the consumer of the disclosure obligations and any disclosure form a broker uses to meet the disclosure obligations must contain the state-mandated language.

Customer Agency Disclosure Obligations

A broker, either directly or by a licensee working for the broker, may not negotiate on behalf of a customer unless the broker provides the customer with the state-mandated disclosure statements. The written disclosure statements state that the recipient is a customer, rather than a client, of the broker. The statement informs the customer that the broker or salesperson for the broker may provide brokerage services to the customer.

The agency disclosure statement also contains a plain-language summary of the broker's duties to a customer. The Forms Appendix of this book contains the WRA Broker Disclosure to Customer form that a broker can use to provide disclosure to customers.

A seller hires Smith Realty to list the seller's property. The seller is Smith Realty's client. A buyer wants Jones Realty to write an offer on the Smith Realty listing, but does not sign a buyer agency agreement with Jones Realty. The buyer is Jones Realty's customer, Jones Realty is a subagent of the principal broker, Smith Realty. Smith and Jones are co-brokers. Before writing the offer, Jones Realty must make the mandated agency disclosure to the buyer-customer. The disclosure serves to inform the buyer that the buyer is a customer and not a client of Jones Realty and that Jones owes the duties owed to all parties in a transaction to the buyer. To make this disclosure, Jones could use the WRA's Broker Disclosure to Customer form or another similar document that contains all of the state-mandated disclosure language.

Client Agency Disclosure Obligations

A broker, either directly or by a licensee working for the broker must provide the state-mandated written disclosure statements to a client no later than the time the broker enters into an agency agreement with the client.

Agency disclosure statements are contained in most of the state-approved agency agreements so when a broker is entering into an agency agreement with a client, the agency agreement will be how a broker complies with the disclosure obligations. If a broker is using an agency agreement that does not contain the mandated disclosure language, the broker must provide a separate document to achieve agency disclosure. To review the mandated-disclosure language, go to lines 86-163 of the WB-1 Residential Listing Contract in the Forms Appendix of this book.

The mandated client disclosure language lists the duties that a broker owes to all parties in a transaction and the additional duties a broker owes to a client. Agency disclosure to clients also includes descriptions of the agency relationships and how a broker's multiple representation of clients in a transaction will affect the broker's role in the transaction. It also includes an explanation of multiple representation with or without designated agency and that the legal disclosure obligations require a broker to disclose some information to all parties in a transaction even if a seller does not disclose or does not want the broker to disclose.

Client disclosure also serves to explain the three agency models and allows the client to select an agency models when executing the listing contract. This section of the agency agreement or separate client disclosure provides a space for the client to indicate the form of agency relationship the client wants with the broker. The client initials next to the form of agency relationship the client wants. There is also a statement informing the client that the client's agency choice can be withdrawn at anytime. A client must withdraw consent to the agency choice in writing.

INITIAL ONLY ONE OF THE THREE LINES BELOW:

_____ I consent to designated agency. A client who chooses multiple representation with designated agency initials this choice. This means the client consents to the broker representing another client in the transaction but the client wants the broker to designate an agent to act on behalf of the client.

_____ I consent to multiple representation relationships, but I do not consent to designated agency. A client who chooses multiple representation without designated agency initials this choice. This means the client consents to the broker representing another client in the transaction and does not want either party to have a designated agent.

_____ I reject multiple representation relationships. A client who initials this choice rejects multiple representation in all forms and consents only to single agency. This means the client does not consent to the broker representing another party in the transaction.

Licensees must be able to explain what these choices mean to clients. A client selects one option by initialling on the blank line. If a broker is executing an agency agreement with more than one client, such as when representing two property owners listing a property, all clients must agree on the agency model and should initial the selection.

The disclosure language requires a broker to disclose in the agency agreement the commission or fees the client may owe to the broker and directs a client to clarify any questions on fees or commissions before signing the agreement. It also informs a client that the broker or a salesperson can answer the client's questions about brokerage services but cannot provide legal advice. If the agency agreement is for providing brokerage services related to real estate primarily intended for use as a residential property containing one-to-four dwelling units, the broker shall request the client's signed acknowledgement that the client received the written disclosure statement. A client's signature on an agency agreement or on a separate disclosure document used with agency agreements that do not contain the mandated language serves as acknowledgment.

Providing Agency Disclosure

A licensee must provide agency disclosure in all transactions, not just residential transactions. This includes commercial, agricultural, business, vacant land, and property management transactions if the property manager is negotiating lease terms or signing leases on behalf of the rental property owners.

Acknowledgement of Agency Disclosure

Licensees must ask a party to acknowledge receipt of the agency disclosure in residential transactions involving one-to-four dwelling units. A customer acknowledges receipt of agency disclosure by signing a customer agency disclosure form or and a client acknowledges by signing the agency agreement.

Clients

Most of the state-approved agency agreements contain agency disclosure and licensees do not need supplemental disclosure documents. The WB-6 Business Listing Contract and the WB-8 Time Sharing Listing Contract do not contain agency disclosure and a licensee must use a separate broker disclosure to client form before executing the listing agreement.

Customers

Licensees must provide customers agency disclosure before negotiations. The WRA's Broker Disclosure to Customer form has spaces for a customer to sign, date, and print the customer's name to acknowledge receipt of the disclosure. Brokers can use other documents to provide disclosure to customers but the document must contain the state mandated disclosure to customer language. A broker's disclosure to a customer does not create any contractual or legal obligation for a buyer or a seller.

Licensees must ask for a party's acknowledgment of receipt of the broker's agency disclosure in residential transactions for properties with one-to-four dwelling units. A party does not have to sign the acknowledgment but a broker must ask for it. If a party will not sign a document acknowledging that the licensee provided agency disclosure, the licensee should document that in the party's file.

Additional Disclosure Obligation by Buyer's Broker

When a licensee is a buyer's broker and the buyer is looking for a residential property with one-to-four dwelling units, and the buyer's broker is negotiating directly with the seller or the listing broker, the broker must to disclose the buyer agency relationship to the seller or the listing broker at the earliest of:

1. The first contact with the seller or the listing broker where the parties exchange information about the transaction or the seller;
2. A showing of the property; or
3. Any other negotiations with the seller or listing broker.

To ensure compliance with this disclosure obligation, a licensee's best practice may be to disclose buyer agency at the first contact with the other party.

DISCLOSURE OF COMPENSATION AND INTERESTS

Agency law prohibits an agent from competing with a principal because a licensee cannot perform services on behalf the licensee's client with undivided loyalty if the licensee also has an interest in the transaction. Licensees can participate in transactions where the licensee also has an interest in limited situations where there is written disclosure of the licensee's interest and written consent from the parties to the transaction.

1. A licensee acting in a real estate transaction may not accept compensation related to the transaction from anyone other than the licensee's client, principal broker, or broker-employer without prior written consent from all parties in the transaction. A party can give consent in an agency agreement, an offer to purchase, or another written document.

A buyer hires Anne with a buyer agency agreement. The buyer wants the seller or the listing broker to pay the buyer's broker's fee. On line 32 of the WB-36 Buyer Agency Agreement, the buyer gives permission for Anne to receive compensation from other parties. Anne drafts the buyer's offer including a provision stating that the seller will pay Anne's 5% success fee at closing. If the seller accepts this offer, then the seller can pay Anne directly because the buyer consented to this in the buyer agency agreement.

2. Licensees acting as agents in a transaction cannot act on the licensee's own behalf and cannot act for a member of the licensee's immediate family. A licensee also cannot act on behalf of any firm, other organization, or business entity in which the licensee has an interest without the prior written consent of all parties to the transaction. The licensee shall obtain consent in an offer to purchase, option, lease, or other transaction document.

Todd writes an offer for his father. In the offer to purchase, Todd includes "Licensee drafting this offer is the son of Buyer" in the section for Additional Provisions. If the seller accepts this offer, the seller gives written consent to Todd's representation of an immediate family member.

Immediate family includes parents, stepparents, grandparents, foster parents, children, stepchildren, grandchildren, foster children, brothers and their spouses, sisters and their spouses of a licensee or a licensee's spouse, the spouse of a licensee, aunts, and uncles, sons-in-law or daughters-in-law of a licensee, or a licensee's spouse.

3. Licensees acting as agents in transactions may not receive referral fees from individuals or entities for a referral, unless prior to or at the time of referral, the licensee discloses to the party in writing that the licensee might receive compensation for the referral or that the licensee has an interest in the person or entity providing services.

A licensee receives referral fees from a lawn maintenance company for every seller that hires the company. Before or at the time the licensee makes the referral, the licensee must disclose to the seller that the licensee may receive compensation in exchange for the referral.

Licensees do not need to disclose referral fees for real estate services between licensees.

Danny took a listing for sellers who are moving to Florida. He refers them to his friend Matt, who is a Florida licensee. The seller's hire Matt to help them find a house in Florida. When they purchase the house, Matt gives Danny a referral fee. Neither Matt nor Danny need to disclose the referral fee and do not need the seller's consent to pay or receive the fee.

4. A listing broker cannot pay compensation or an incentive to a licensee who is acting as a buyer in a transaction without prior written consent from the seller. When acting as principals in transactions rather than as agents, licensees cannot earn commissions. To address this, when purchasing property, licensees may include incentives in an offer to purchase requesting that the listing broker or the seller pay the licensee what the licensee would have earned if the licensee could earn a commission on the transaction.

Ethan has a Wisconsin real estate license and is purchasing a new residence. He cannot collect any compensation or incentive from the listing broker unless the seller consents. Ethan may include an incentive in his offer such as "The listing broker will pay Buyer 3% of the purchase price at closing."

5. A licensee acting as a principal in a real estate transaction shall disclose in writing the licensed status and intent to act in the transaction as a principal at the earliest of:
 - a) The first contact with the other party or an agent representing the other party where information regarding the other party or the transaction is being exchanged;
 - b) A showing of the property; or
 - c) Any other negotiation with the seller or the listing broker.

6. Licensees cannot enter into tie-in arrangements including:
- a) Selling real estate the licensee owns or controls to a buyer only if the buyer agrees to purchase another parcel of real estate;
 - b) Selling real estate the licensee owns or controls only if the buyer agrees to list a piece of property with the licensee; or
 - c) Selling vacant land the licensee owns or controls only if the buyer agrees to use one or more specific builders to develop it unless:
 - i) The builder owns a bona fide interest in the real estate and there is full disclosure; or
 - ii) The licensee is the builder or the builder owns the real estate, personally or by a commonly controlled corporation and whose business is selling improved property and not vacant land and there is full disclosure; or

ABC Builders buys 15 acres to develop a subdivision. ABC requires all buyers to agree to use ABC to construct the home on the currently vacant lot. ABC builds the home and sells both the lot and the home to the buyer in one transaction.

iii) The agreement to sell if the buyer uses one or more specific builders is a bona fide effort to maintain development quality or architectural uniformity and the licensee does not receive compensation from the contractor for the agreement.

Subdivision deed restrictions requires homeowners to use a certain builder for new construction and repairs to maintain architectural uniformity.

THE REAL ESTATE OFFICE

An employing broker may employ both licensed and unlicensed individuals in a real estate office. Licensed individuals, either brokers or salespersons, can participate in licensed real estate activities such as conducting open houses, negotiating on behalf of parties, and showing property to buyers. Employees who do not hold real estate licenses can provide administrative support to licensed individuals such as managing transaction paperwork, creating marketing or advertising materials, or filling in a contract at the direction of a licensed individual. An unlicensed employee cannot assist at an open house unless a licensee is there to provide direct on-site supervision and cannot provide any other licensed service. A person who engages in real estate practice without a license can be fined not more than \$1000 or imprisoned not more than 6 months or both. This penalty also applies to any person, licensed or unlicensed, who violates a provision of the state real estate statutes, such as failing to provide agency disclosure or receiving non-real estate referral fees without written consent from the parties in the transaction.

A licensed broker who works for another broker is a broker-employee. Broker-employees can provide brokerage services outside of the scope of their employment if the broker-employer gives written permission and the broker-employee avoids conflicts of interest.

Adam is a property manager but wants to learn more about commercial real estate transactions. He contacts a commercial broker who agrees to hire him as a broker-employee. Adam and the commercial broker execute an agreement stating that Adam can continue to manage property and that all earnings he receives from his property management business belong to him where fees he earns on commercial brokerage transactions belong to the commercial broker to be paid to Adam according to his independent contractor agreement.

Broker Supervision

A broker-employer shall supervise the activities of any licensee that the broker employs. Supervision includes, but is not limited to, the reasonable review of all listing contracts, offers to purchase, trust account records and other documents and records related to transactions and providing all licensees reasonable access to a supervising broker for purposes of consultation

regarding real estate practice issues. Broker-employers shall provide all licensed employees with a written statement of procedures under which the office and employees shall operate with respect to handling documents relating to a real estate transaction. The broker's supervision responsibilities consist of the preparation, custody, safety, and correctness of all entries on real estate forms, closing statements, and other records. A broker-employer can delegate supervision to another broker as long as the delegation is in writing, identifies the duty the broker delegated, and the delegated supervising broker signs it. Broker-employers must also ensure that all licensed employees are properly licensed. This refers to both original licenses and biennial renewals of licenses.

Personal Assistants

A real estate office may also employ personal assistants. A personal assistant helps a broker's salespeople or broker-employees with their real estate business. Personal assistants can be either licensed or unlicensed.

Unlicensed Personal Assistant

A unlicensed personal assistant does not have a real estate license or holds a real estate license but does not provide services that require a real estate license. A person with a real estate license may choose to work for a broker providing services that do not require a license because the licensee wants to handle administrative tasks but does not want to practice real estate. This may reduce an employing broker's employment costs for carrying insurance or paying annual membership dues based on the number of licensed employees.

Either a broker-employer or any other real estate licensee in the office can employ unlicensed personal assistants. Unlicensed personal assistants cannot receive payment based on production, such as a commission and they must be paid either hourly or salary wages.

Licensed Personal Assistant

A broker-employer must employ a licensed personal assistant directly because the personal assistant has the ability to practice real estate. The broker can pay a licensed personal assistant based on production, hourly, or with a salary.

Notifying the Department of Safety and Professional Services (DSPS)

Licensees must notify the DSPS if there are changes to their practice or changes affecting their license.

1. A licensee who want to engage in real estate practice as an employee of a broker-employer shall notify the DSPS of the name of the broker-employer on forms provided by the DSPS.
2. All licensees must notify the DSPS of their licensed status and any changes to their license.
3. A licensee must notify the DSPS of the licensee's employment before the licensee provides real estate services.
4. If the licensee transfers to another broker-employer, the licensee must notify the DSPS and pay a fee before the licensee provides real estate services under the new broker employer.
5. A licensee who terminates employment must notify the DSPS in writing within 10 days of terminating employment.
6. If a licensee is convicted of a crime, the licensee must send a copy of the complaint and the judgement to the Real Estate Examining Board within 48 hours of conviction. The Real Estate Examining Board reviews complaints, issues licenses, and administers discipline under the DSPS.

