



Agency: authority to represent others

Agency Chapter 1

After reading this chapter, you will be able to:

- understand the variations of the agency relationship;
- determine how agency relationships are created and the primary duties owed; and
- discuss why real estate licensing is necessary to protect the licensees and their clients.

agency

Bureau of Real Estate (BRE)

principal

Learning Objectives

Key Terms

An **agent** is described as “One who is authorized to act for or in place of another; a representative...”¹

An **agency relationship** exists between principal and agent, master and servant, and employer and employee.

The **Bureau of Real Estate (BRE)** was created to oversee licensing and police a minimum level of *professional competency* for individuals desiring to represent others as *real estate agents*. This mandate is pursued through the education of individuals seeking an original broker or salesperson license. It is also pursued on the renewal of an existing license, known as *continuing education*. The education is offered in the private and public sectors under government certification.

Agency in real estate related transactions includes relationships between:

- *brokers* and members of the public (clients or third parties);

Introduction to agency

agent

One who is authorized to represent another, such as a broker and client or sales agent and their broker.

¹ Black's Law Dictionary, Ninth Edition (2009)

Bureau of Real Estate (BRE)

Government agency designated to protect the public through real estate licensure, regulation, education and enforcement.

- licensed *sales agents* and their brokers; and
- *finders* and their brokers or principals.

The extent of representation owed to a client by the broker and their agents depends on the *scope of authority* the client gives the broker. Authority is given orally, in writing or through the client’s conduct with the broker.

Agency and *representation* are synonymous in real estate transactions. A broker, by accepting an exclusive employment from a client, undertakes the task of aggressively using **due diligence** to represent the client and attain their objectives. Alternatively, an open listing only imposes a *best efforts* standard of representation until a match is located and negotiations begin which imposes the due diligence standard for the duration of negotiations.

What is an agent?

An agent is an individual or corporation who represents another, called the **principal**, in dealings with third persons. Thus, a principal can never be his own agent. A principal acts for his own account, not on behalf of another.

principal

An individual, such as a buyer or seller, represented by a broker or agent.

The representation of others undertaken by a real estate broker is called an *agency*. Three parties are referred to in agency law: a principal, an agent and third persons.²

In real estate transactions:

- the *agent* is the real estate broker retained to represent a client for the purposes hired;
- the *principal* is the client, such as a seller, buyer, landlord, tenant, lender or borrower, who has retained a broker to sell or lease property, locate a buyer or tenant, or arrange a real estate loan with other persons; and
- *third persons* are individuals, or associations (corporations, limited partnerships and limited liability companies) other than the broker’s client, with whom the broker has contact as an agent acting on behalf of his client.

Real estate jargon

Real estate jargon used by brokers and agents tends to create confusion among the public. When the jargon is used in legislative schemes, it adds statutory chaos, academic discussion and consternation among brokers and agents over the duties of the real estate licensee.

For example, the words real estate agent, as used in the brokerage industry, mean a *real estate salesperson employed by and representing a real estate broker*. Interestingly, real estate salespersons rarely refer to themselves as *sales agents*; a broker never does. Instead, they frequently call themselves “broker associates,” or “realtors,” especially if they are affiliated with a local trade union. The public calls licensees “realtors,” the generic term for the trade, much like the term “Kleenex.”

² Calif. Civil Code §2295

Legally, a client's real estate agent is defined as a *real estate broker who undertakes representation of a client in a real estate transaction*. Thus, a salesperson is legally *an agent of the agent*.

The word "subagency" suffers from even greater contrasts. *Subagency* serves both as:

- jargon for fee-splitting agreements between Multiple Listing Service (MLS) member brokers in some areas of the state; and
- a legal principle for the authorization given to the third broker by the seller's broker or buyer's agent to also act as an agent on behalf of the client, sometimes called a *broker-to-broker arrangement*.

Fundamental to a real estate agency are the **primary duties** a broker and their agents owe the principal. These duties are distinct from the **general duties** owed by brokers and agents to all other parties involved in a transaction.

Primary duties owed to a client in a real estate transaction include

- a *due diligence investigation* into the subject property;
- *evaluating* the financial impact of the proposed transaction;
- *advising* on the legal consequences of documents which affect the client;
- *considering* the tax aspects of the transfer; and
- *reviewing* the suitability of the client's exposure to a risk of loss.

To care for and protect both their clients and themselves, all real estate licensees must:

- *know* the scope of authority given to them by the employment agreement;
- *document* the agency tasks undertaken; and
- *possess* sufficient knowledge, ability and determination to perform the agency tasks undertaken.

A licensee must conduct himself at or above the minimum acceptable levels of competency to avoid liability to the client or disciplinary action by the BRE.

An agency relationship is created in a real estate transaction when a *principal* employs a broker to act on his behalf.³

A broker's representation of a client, such as a buyer or seller, is properly undertaken on a written employment agreement signed by both the client and the broker. A written employment agreement is necessary for the broker to have an enforceable *fee agreement*. This employment contract is loosely referred to in the real estate industry as a "listing agreement."⁴ [See **first tuesday** Form 102 and 103]

Creation of the agency relationship

³ CC §2307

⁴ *Phillippe v. Shapell Industries, Inc.* (1987) 43 C3d 1247

The broker's agency can also be created by an oral agreement or conduct of the client with the broker or other individuals. However, fee arrangements are unenforceable if no written agreement exists.

**Agency
Chapter 1
Summary**

An agent is an individual who represents another in dealings with third persons. The representation of others undertaken by a real estate broker or agent is called agency. Agency in real estate related transactions includes relationships between brokers and members of the public, licensed sales agents and their brokers, and finders and their brokers or principals.

The primary duties a broker owes his client includes evaluating the financial impact, legal consequences, tax aspects and exposure to risk of loss inherent in all transactions.

The agency relationship is created when a client employs a broker to act on his behalf. This relationship is best undertaken with a signed written employment agreement containing a fee provision.

The Bureau of Real Estate (BRE) was created to oversee licensing and establish a minimum level of professional competency in real estate transactions.

**Agency
Chapter 1
Key Terms**

agency pg. 1
Bureau of Real Estate (BRE) pg. 2
principal pg. 2



The agency law disclosure

Agency Chapter 2

After reading this chapter, you will be able to:

- understand the origin and necessity of the statutorily-mandated Agency Law Disclosure;
- know the roles and obligations of all parties involved in a real estate transactions; and
- identify when the agency law disclosure is required.

agency confirmation provision
Agency Law Disclosure
buyer's agent

exclusive agent
fiduciary duty
seller's agent

Learning Objectives

Key Terms

As real estate practice matures in California, rules and regulations need to be created to protect society from harm while allowing transactions to be economically beneficial for all involved. However, when professional misconduct of real estate licensees is mishandled by the brokerage community and related trade groups, legislative and judicial forces are compelled to intervene.

As a result of licensee misconceptions about the duties they owe to members of the public and the public's lack of awareness, the California legislature enacted the **agency disclosure law**. The goal is to better inform the public (and licensees) in an effort to eliminate some of these deficiencies.

The real estate agency law requires two different sets of agency-related disclosures:

Legislated order

Agency Law Disclosure

Restatement of agency codes and cases which establish the conduct of real estate licensees. It is delivered to all parties in targeted transactions.

agency confirmation provision

A provision in all purchase agreements and counteroffers disclosing the agency of each broker in the transaction.

- an Agency Law Disclosure form setting out the “rules of agency” which controls the conduct of real estate licensees [See **first tuesday** Form 305 accompanying this chapter]; and
- an **agency confirmation provision** in purchase agreements disclosing the agency of each broker in the transaction.

In creating an agency scheme, the California legislature established uniform real estate terminology and brokerage conduct covering targeted transactions. In general, agency rules are the same for all types of real estate transactions.

The **Agency Law Disclosure** must be presented to all parties when listing, selling, buying or leasing for one year or more property containing:

- one-to-four residential units; or
- mobilehomes.¹

The Agency Law Disclosure form is a succinct restatement of existing agency codes and case law on agency relationships in these targeted real estate transactions. [See Form 305]

Uniform jargon and agency law

The Agency Law Disclosure was created for use by brokers and their agents to educate and familiarize clientele with:

- a uniform jargon for real estate transactions; and
- the various agency roles licensees undertake on behalf of their principals and other parties in a real estate transaction.

This information is presented in a two-page form, sometimes referred to as the *Rules of Agency or the Agency Law Disclosure*. The exact wording of its content is dictated by statute.² [See Form 305]

The Agency Law Disclosure defines and explains the words and phrases commonly used in the real estate industry. These industry terms are used to express:

- the *agency relationships* of brokers to the parties in the transaction;
- *broker-to-broker relationships*; and
- the *employment relationship* between brokers and their agents.

A **buyer’s agent** and **seller’s agent** are mentioned but not defined. Legally, an agent is a licensed real estate broker. Thus, the word “agent,” when used in the disclosure, is not a reference to the broker’s agents. Ironically, a broker rarely refers to themselves as an agent, which in law, they always are when using their license to earn a fee.

Two sections on the face of the Agency Law Disclosure, entitled “seller’s agent” and “buyer’s agent,” address the duties owed to the seller and buyer in a real estate transaction by these otherwise undefined brokers.

buyer’s agent

An agent representing the buyer. Also known as a selling agent.

seller’s agent

An agent representing the seller. Also known as a listing agent.

¹ Calif. Civil Code §§2079.13(j), 2079.14

² CC §2079.16

The seller's broker is correctly noted as being an agent for the seller, and is also known within the trade as a *listing broker* or *listing office*. The buyer's broker is known as a buyer's agent. However, peculiar to real estate brokerage, the buyer's broker is also known as the *selling agent*.

One then wonders who is the "buying agent" — an unmentioned phrase, but one plainly descriptive of the activities undertaken by a broker acting on behalf of the buyer. They are selling nothing; they are locating property and negotiating to buy suitable property on behalf of their buyer client.

The Agency Law Disclosure does not mention, much less define, the broker's role as an **exclusive agent** for either the buyer or seller. Yet the separate agency confirmation provision included in all purchase agreements used on targeted transactions calls for the broker to make this distinction known to all the parties involved. The mandated provision requires the broker to characterize their conduct with the parties as the agent of the "seller exclusively" or the "buyer exclusively."

These exclusive characterizations of agency conduct have no relationship to employment under exclusive listings to sell or buy property. The seller's agent with an exclusive right-to-sell listing understands the prospective buyer may turn out to be one of their buyer clients. This representation of opposing parties makes the broker a "non-exclusive" **dual agent**.

The Agency Law Disclosure states the generally accepted principles of law governing the conduct of brokers who are acting as agents solely for a seller or a buyer.

Two categories of **broker obligations** arise in a sales transaction, including:

- the *special* or *primary agency duties* of an agent which are owed by a broker and their agents to their client, known as **fiduciary duties**; and
- the *general duties* owed by each broker to all parties in the transaction, requiring them to be honest and avoid deceitful conduct.

A separate **agency confirmation provision** is mandated for inclusion in purchase agreement forms used to memorialize targeted transactions. [See **first tuesday** Form 150]

The *agency confirmation provision* advises the buyer and seller of any agency relationships each broker has with the parties in the transaction. As the provision is included in the purchase agreement, this relationship is confirmed at the time the parties sign the purchase agreement or its counteroffer.

The Agency Law Disclosure contains the wording for the agency confirmation provision to be included in purchase agreements. However, the provision in the Agency Law Disclosure is not filled out or used in lieu of the agency confirmation provision contained in a purchase agreement.

exclusive agent

An agent who is acting exclusively on behalf of one party in a transaction, unlike a dual agent.

The parties, their brokers and duties owed

Agencies confirmed in the purchase agreement

fiduciary duty

The licensee's obligation to act with the utmost good faith and diligence for the benefit of their principal, also called a client.

Form 305
Agency Law
Disclosure
Page 1 of 2



AGENCY LAW DISCLOSURE

Disclosure Regarding Real Estate Agency Relationships

Prepared by: Agent _____
 Broker _____

Phone _____
 Email _____

NOTE: This agency disclosure complies with agency disclosures required with property listings and offers to buy, sell, exchange or lease one-to-four residential units and mobile homes. [Calif. Civil Code §§2079 et seq.]

DATE: _____, 20____, at _____, California.

TO THE SELLER AND THE BUYER:

1. **FACTS:** When you enter into a discussion with a real estate agent regarding a real estate transaction, you should, from the outset, understand what type of agency relationship or representation you wish to have with the agent in the transaction.
2. **SELLER'S AGENT:** A Seller's Agent under a listing agreement with the Seller acts as the Agent for the Seller only. A Seller's Agent or a subagent of that Agent has the following affirmative obligations:
 - 2.1 To the Seller:
 - a. A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Seller.
 - 2.2 To the Seller and the Buyer:
 - a. Diligent exercise of reasonable skill and care in performance of the Agent's duties.
 - b. A duty of honest and fair dealing and good faith.
 - c. A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of the parties.
 - 2.3 An Agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.
3. **BUYER'S AGENT:** A Selling Agent can, with a Buyer's consent, agree to act as the Agent for the Buyer only. In these situations, the Agent is not the Seller's Agent, even if by agreement the Agent may receive compensation for services rendered, either in full or in part, from the Seller. An Agent acting only for a Buyer has the following affirmative obligations:
 - 3.1 To the Buyer:
 - a. A fiduciary duty of utmost care, integrity, honesty and loyalty in dealings with the Buyer.
 - 3.2 To the Seller and the Buyer:
 - a. Diligent exercise of reasonable skill and care in performance of the Agent's duties.
 - b. A duty of honest and fair dealing and good faith.
 - c. A duty to disclose all facts known to the Agent materially affecting the value or desirability of the property that are not known to or within the diligent attention and observation of the parties. An Agent is not obligated to reveal to either party any confidential information obtained from the other party which does not involve the affirmative duties set forth above.
4. **AGENT REPRESENTING BOTH THE SELLER AND THE BUYER:** A Real Estate Agent, either acting directly or through one or more associate licensees, can legally be the Agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer.
 - 4.1 In a dual agency situation, the Agent has the following affirmative obligations to both the Seller and the Buyer:
 - a. A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
 - b. Other duties to the Seller and the Buyer as stated above in their respective sections.
 - 4.2 In representing both the Seller and the Buyer, the Agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.
5. The above duties of the Agent in a real estate transaction do not relieve a Seller or a Buyer from the responsibility to protect their own interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. A Real Estate Agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional.
6. Throughout your real property transaction, you may receive more than one disclosure form depending upon the number of Agents assisting in the transaction. The law requires each Agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the Real Estate Agent in your specific transaction.
7. This disclosure form includes the provisions of §2079.13 to §2079.24, inclusive, of the Calif. Civil Code set forth on the reverse hereof. Read it carefully.

(Buyer's Broker)	Date
(Associate Licensee's Signature)	Date
(Seller's Broker)	Date
(Associate Licensee's Signature)	Date

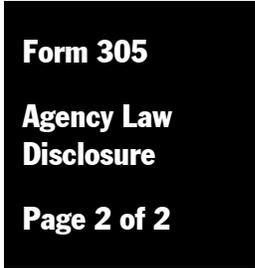
(Buyer's Signature)	Date
(Buyer's Signature)	Date
(Seller's Signature)	Date
(Seller's Signature)	Date

----- PAGE ONE OF TWO --- FORM 305 -----

The agencies to be confirmed by each broker in the purchase agreement provisions are not known at the time of the initial employment when the agency Law Disclosure is first presented to the client. Thus, the agency in a potential future sales transaction cannot be determined, much less confirmed at the time the broker firsts presents their seller with the Agency Law Disclosure form.³

The agency confirmation provision in a purchase agreement discloses each broker's actual agency relationship. It formalizes the relationship

³ CC §2079.17(d)



§2079.13. As used in Sections 2079.14 to 2079.24, inclusive, the following terms have the following meanings:

- (a) "Agent" means a person acting under provisions of Title 9 (commencing with Section 2295) in a real property transaction, and includes a person who is licensed as a real estate broker under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code, and under whose license a listing is executed or an offer to purchase is obtained.
- (b) "Associate licensee" means a person who is licensed as a real estate broker or salesperson under Chapter 3 (commencing with Section 10130) of Part 1 of Division 4 of the Business and Professions Code and who is either licensed under a broker or has entered into a written contract with a broker to act as the broker's agent in connection with acts requiring a real estate license and to function under the broker's supervision in the capacity of an associate licensee.
The agent in the real property transaction bears responsibility for his or her associate licensees who perform as agents of the agent. When an associate licensee owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions.
- (c) "Buyer" means a transferee in a real property transaction, and includes a person who executes an offer to purchase real property from a seller through an agent, or who seeks the services of an agent in more than a casual, transitory, or preliminary manner, with the object of entering into a real property transaction. "Buyer" includes vendee or lessee.
- (d) "Dual agent" means an agent acting, either directly or through an associate licensee, as agent for both the seller and the buyer in a real property transaction.
- (e) "Listing agreement" means a contract between an owner of real property and an agent, by which the agent has been authorized to sell the real property or to find or obtain a buyer.
- (f) "Listing agent" means a person who has obtained a listing of real property to act as an agent for compensation.
- (g) "Listing price" is the amount expressed in dollars specified in the listing for which the seller is willing to sell the real property through the listing agent.
- (h) "Offering price" is the amount expressed in dollars specified in an offer to purchase for which the buyer is willing to buy the real property.
- (i) "Offer to purchase" means a written contract executed by a buyer acting through a selling agent which becomes the contract for the sale of the real property upon acceptance by the seller.
- (j) "Real property" means any estate specified by subdivision (1) or (2) of Section 761 in property which constitutes or is improved with one to four dwelling units, any leasehold in this type of property exceeding one year's duration, and mobilehomes, when offered for sale or sold through an agent pursuant to the authority contained in Section 10131.6 of the Business and Professions Code.
- (k) "Real property transaction" means a transaction for the sale of real property in which an agent is employed by one or more of the principals to act in that transaction, and includes a listing or an offer to purchase.
- (l) "Sell," "sale," or "sold" refers to a transaction for the transfer of real property from the seller to the buyer, and includes exchanges of real property between the seller and buyer, transactions for the creation of real property sales contract within the meaning of Section 2985, and transactions for the creation of a leasehold exceeding one year's duration.
- (m) "Seller" means the transferor in a real property transaction, and includes an owner who lists real property with an agent, whether or not a transfer results, or who receives an offer to purchase real property of which he or she is the owner from an agent on behalf of another. "Seller" includes both a vendor and a lessor.
- (n) "Selling agent" means a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller.
- (o) "Subagent" means a person to whom an agent delegates agency powers as provided in Article 5 (commencing with Section 2349) of Chapter 1 of Title 9. However, "subagent" does not include an associate licensee who is acting under the supervision of an agent in a real property transaction.

§2079.14. Listing agents and selling agents shall provide the seller and buyer in a real property transaction with a copy of the disclosure form specified in Section 2079.16, and, except as provided in subdivision (c), shall obtain a signed acknowledgment of receipt from that seller or buyer, except as provided in this section or Section 2079.15, as follows:

- (a) The listing agent, if any, shall provide the disclosure form to the seller prior to entering into the listing agreement.
- (b) The selling agent shall provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form pursuant to subdivision (a).

- (c) Where the selling agent does not deal on a face-to-face basis with the seller, the disclosure form prepared by the selling agent may be furnished to the seller (and acknowledgment of receipt obtained for the selling agent from the seller) by the listing agent, or the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required.
- (d) The selling agent shall provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent shall present the disclosure form to the buyer not later than the next business day after the selling agent receives the offer to purchase from the buyer.

§2079.15. In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt pursuant to Section 2079.14, the agent, or an associate licensee acting for an agent, shall set forth, sign, and date a written declaration of the facts of the refusal.

§2079.17. (a) As soon as practicable, the selling agent shall disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident with execution of that contract by the buyer and the seller, respectively.

- (b) As soon as practicable, the listing agent shall disclose to the seller whether the listing agent is acting in the real property transaction exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. This relationship shall be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller and the listing agent prior to or coincident with the execution of that contract by the seller.

(c) The confirmation required by subdivisions (a) and (b) shall be in the following form:

[Do not fill out] _____ is the agent of (check one):
(Name of Listing Agent)

the seller exclusively; or
 both the buyer and seller.

[Do not fill out] _____ is the agent of (check one):
(Name of Selling Agent if not same as the Listing Agent)

the buyer exclusively;
 the seller exclusively; or
 both the buyer and seller.

(d) The disclosures and confirmation required by this section shall be in addition to the disclosure required by Section 2079.14.

§2079.18. No selling agent in a real property transaction may act as an agent for the buyer only, when the selling agent is also acting as the listing agent in the transaction.

§2079.19. The payment of compensation or the obligation to pay compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. A listing agent and a selling agent may agree to share any compensation or commission paid, or any right to any compensation or commission for which an obligation arises as the result of a real estate transaction, and the terms of any such agreement shall not necessarily be determinative of a particular relationship.

§2079.20. Nothing in this article prevents an agent from selecting, as a condition of the agent's employment, a specific form of agency relationship not specifically prohibited by this article if the requirements of Section 2079.14 and Section 2079.17 are complied with.

§2079.21. A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the expressed written consent of the buyer.

This section does not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.

§2079.22. Nothing in this article precludes a listing agent from also being a selling agent, and the combination of these functions in one agent does not, of itself, make that agent a dual agent.

§2079.23. A contract between the principal and agent may be modified or altered to change the agency relationship at any time before the performance of the act which is the object of the agency with the written consent of the parties to the agency relationship.

§2079.24. Nothing in this article shall be construed to either diminish the duty of disclosure owed buyers and sellers by agents and their associate licensees, sub-agents, and employees or to relieve agents and their associate licensees, sub-agents, and employees from liability for their conduct in connection with acts governed by this article or for any breach of a fiduciary duty or a duty of disclosure.

established by the broker's conduct and the conduct of their agents with the buyer and/or seller. The agency relationship confirmed is the broker's **legal determination** of the actual agency created by prior conduct with the parties.

When two brokers are involved in a targeted transaction, each broker must disclose whether he is acting as the agent for the buyer or the seller.

Alternatively, when only one broker is involved, he must confirm whether he and his agents are acting as the *exclusive agent* for one party or as a dual agent for both the buyer and seller.

A broker and their agents prudently includes the agency confirmation provision and attach the Agency Law Disclosure to any purchase agreements used in the sale of any type of property, not just as mandated for use on targeted one-to-four unit residential sales or leases exceeding one year. Written disclosures tend to eliminate later disputes over agency. Agency conflicts discovered when in escrow often become the basis for cancelling a purchase agreement, the payment of a brokerage fee, or both.⁴

Use of the Agency Law Disclosure

The Agency Law Disclosure must be presented to all parties in **targeted** transitions. However, not all transactions involving one-to-four unit residential properties are targeted. Thus, they do not require the attachment of the Agency Law Disclosure or the inclusion of the agency confirmation provision in the purchase agreement.

For example, arranging the secured interests of lenders and borrowers under trust deeds or collateral loans, are not targeted transactions.

The sale, exchange or creation of interests in residential property transactions targeted by the agency disclosure law include transfers of:

- fee simple estates in real estate or registered ownerships for mobilehomes;
- life estates;
- existing leaseholds with more than one year remaining, such as ground leases; and
- leases created for more than one year.⁵

The Agency Law Disclosure must be attached to the following documents and signed by all parties in targeted transactions:

- a seller's listing [See **first tuesday** Form 102];
- a purchase agreement offer and acceptance [See **first tuesday** Form 150];
- an exchange agreement [See **first tuesday** Form 171];
- a counteroffer, by attachment or by reference, to a purchase agreement containing the disclosure as an attachment [See **first tuesday** Form 180];
- a landlord's authorization to a broker to lease property on his behalf for more than one year [See **first tuesday** Form 110]; and
- a residential lease agreement for a period exceeding one year.⁶ [See **first tuesday** Form 550]

⁴ L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corporation (1991) 1 CA4th 300

⁵ CC §2079.13(l)

⁶ CC §2079.14

However, there are exceptions. The Agency Law Disclosure is not required on negotiations and agreements on one-to-four residential units concerning:

- buyers' listings;
- property management;
- purchase options;
- financing arrangements;
- leases for one year or less; and
- month-to-month rental agreements.

The Agency Law Disclosure is to be handed to a buyer as an addendum to the buyer's purchase agreement offer.

A seller's listing, *open* or *exclusive*, employing a broker and their agents to sell a one-to-four unit residential property is a targeted transaction. Thus, the Agency Law Disclosure is required as an addendum to the seller's listing agreement.⁷

Agency rules for a seller's listing

Failure of the seller's agent to provide the seller with the Agency Law Disclosure prior to his entering into the listing agreement is a violation of disclosure laws. As a consequence of this up front failure, the broker will lose the fee on a sale, if challenged by the seller. The loss of the fee is not avoided by a later disclosure made as an addendum to a purchase agreement or escrow instructions.⁸

The **Agency Law Disclosure** is also required when listing and submitting offers on leasehold estates involving one-to-four unit residential property. These transactions occur when a long-term ground lease is being conveyed to a buyer and will be security for any purchase-assist financing.⁹

The seller's signature acknowledges receipt of the Agency Law Disclosure at both:

- the listing stage, as an addendum to the listing; and
- on presentation of a buyer's offer, as an addendum to the purchase agreement.¹⁰

Thus, the Agency Law Disclosure is treated by the seller's agent as a preliminary and compulsory listing event, if the listing broker expects to enforce collection of a brokerage fee on a later sale of the property. The Agency Law Disclosure is signed by the seller and handed back to the broker or his agent before settling down to finalize the listing to which it will be attached.

Further, when the broker or his sales agent fails to hand the seller the Agency Law Disclosure at the listing stage, the listing, and thus the agency, can be cancelled by the seller at any time. When the Agency Law Disclosure is not

⁷ CC §2079.14(a)

⁸ *Huijers v. DeMarrais* (1992) 11 CA4th 676

⁹ CC §§2079.13(j), 2079.13(l), 2079.14

¹⁰ CC §2079.14

delivered up front with the listing, the seller may cancel payment of the fee due their broker after the transaction is in escrow and the brokerage fee has been further agreed to.

For the buyer's broker to protect themselves against loss of the fee due to the seller's broker failure to timely disclose, the buyer's broker must *perfect* his right to collect his portion of any brokerage fee to be paid by the seller. Here, the buyer's broker's share of the fee to be paid by the seller must be agreed to be paid directly to the buyer's broker under the terms of the purchase agreement and escrow instructions.

Also, the Agency Law Disclosure form must be attached as a signed addendum to the buyer's purchase agreement offer submitted to the seller.

However, the buyer's broker might erroneously agree to let the seller's broker receive the entire fee from the seller. Under this risky arrangement, the seller's broker pays the buyer's broker a share of the fee under their separate *fee-sharing agreement*.

However, when the seller's broker fails to obtain a signed Agency Law Disclosure as an addendum to the listing, the seller may legally avoid paying the listing broker their fee. Thus, when the seller has not agreed to directly pay the buyer's broker, a risk for the buyer's broker is created. If the seller refuses to pay his broker the entire fee for lack of disclosure, the buyer's broker is left without a fee as agreed from the seller's broker.

For the buyer's broker to protect his fee, the seller must agree in the body of the purchase agreement that the seller will pay both brokers himself.

Documenting a refusal to sign

A seller may accept a purchase agreement offer or enter into a counteroffer and refuse to sign an Agency Law Disclosure. If the seller refuses to return a signed copy of the Agency Law Disclosure, the broker or his agent must document the refusal to preserve their right to receive a fee from the seller.¹¹

No particular method of documenting the refusal is given by legislation or regulations. However, the facts of the refusal are to be placed in writing, dated and signed by the broker or agent.

Documentation of the facts surrounding any refusal to sign a timely presented Agency Law Disclosure include:

- preparation of a memorandum stating the facts surrounding the refusal;
- mailing a copy of the memorandum to all parties together with a copy of the Agency Law Disclosure; and
- retaining a copy in the broker's records. [See **first tuesday** Form 525]

If a party claims they were never handed the Agency Law Disclosure, the broker's written documentation, created at the time of the refusal, would dispel such a claim. The written documentation would also preserve the fee.

¹¹ CC §2079.15

The Agency Law Disclosure was created by the California legislature to familiarize brokers, agents and their principals with the uniform industry jargon. It also reveals the duties owed by licensees in the sale or lease for one year or more of real estate involving one-to-four unit residential properties or mobilehomes, called targeted transactions.

The disclosure describes the various agency roles licensees undertake on behalf of their principals and other parties in a real estate related transaction. The Agency Law Disclosure must be presented to all parties when listing, selling, buying or leasing for one year or more of property in targeted transactions.

A separate agency confirmation provision is included in purchase agreements and counteroffers. It advises the buyer and seller of any agency relationships each broker has with the parties in the transaction.

If the seller refuses sign copy of the Agency Law Disclosure, the broker or agent must document the refusal to preserve their right to receive a fee.

agency confirmation provision	pg. 6
Agency Law Disclosure	pg. 5
buyer's agent	pg. 6
exclusive agent	pg. 7
fiduciary duty	pg. 7
seller's agent	pg. 6

Agency Chapter 2 Summary

Agency Chapter 2 Key Terms