



# RI 501

# AGENCY IN VIRGINIA

## STUDENT GUIDE



Presented by the REALTOR® Institute of Virginia

This course and workbook are designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the Virginia REALTORS® and its instructors are not engaged in rendering legal, financial, tax or other similarly related advice or services.

In accordance with federal law, ideas regarding fees and compensation models covered are at random, solely for example purposes.

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Presented by the REALTOR® Institute of Virginia



NATIONAL  
ASSOCIATION *of*  
REALTORS®  
*Official Designation*



GRADUATE,  
REALTOR®  
INSTITUTE

## VIRGINIA REALTOR® INSTITUTE PROGRAM

The Virginia REALTOR® Institute program is composed of 60 hours of instruction, divided across ten courses. A portion of the total program is based on objectives mandated by the NATIONAL ASSOCIATION OF REALTORS® for inclusion in each state's curriculum. The curriculum of the remaining portion of the program has been developed to respond specifically to the educational needs of Virginia REALTORS®. Special care is taken to see that each subject has practical application and will present new ideas for increased earning potential and professional growth.

The Virginia REALTOR® Institute is the second oldest of the institutes currently operated in the United States. In late 1966, when the NATIONAL ASSOCIATION OF REALTORS® adopted a program leading to the GRI designation, the Virginia Institute was one of only eight that immediately met the standards for this program. As of the end of 2019, the Virginia REALTOR® Institute has been successfully completed by over 12,000 graduates.



An Educational Program of the  
VIRGINIA REALTORS®

# IMPORTANT INFORMATION:

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## **CERTIFICATION CREDIT**

The highest honor that a person who attends the REALTOR® Institute can achieve is that of earning the national designation, Graduate, REALTOR® Institute (GRI).

In order to receive the GRI certificate and designation from Virginia, a student must successfully complete ten modules (or approved equivalent credit), meet minimum class attendance requirements, pass the examinations accompanying each module, and complete the GRI Designation Application. The GRI designation is awarded only to REALTOR® members.

Students wishing to obtain credit for GRI courses taken in another state will be handled on a case-by-case basis.

## **CLASS SCHEDULES**

Please note the following:

- ♦ An exam will be given at the end of each module day.
- ♦ You may miss **no more** than 15 minutes of class time during any module.

Instructors have been asked to start promptly, as scheduled. **Students are requested to be in their seats by the scheduled starting time.**

## **BREAKS**

Breaks during class hours are determined by the individual instructor. Students are asked to strictly adhere to the times indicated for breaks, and to return promptly to their seats, as directed by the instructor.

A lunch break will be provided for students. The exact time is determined by the instructor and/or local association.

## **CLASSROOM RESTRICTIONS**

- Recording of any part of the presentation is prohibited.
- Do Not Use cell phones during class unless specifically instructed to do so. Please set all mobile phones to "vibrate."
- Use of technology to take notes is acceptable as long as you are considerate of those seated around you. Be aware that your typing may be distracting to others in the classroom and act to minimize that distraction accordingly.

## **NOTIFICATIONS**

All notifications, in regards to class details and exam results, will be delivered via e-mail from VAR.

## **EXAMINATION**

An examination is given at the end of each day. All students seeking the GRI designation must pass the examination and meet class attendance requirements. Exams will be administered in the classroom. Each student is allowed one retake of the examination. If a student fails the second examination, they must retake the course and pass the exam.

Students are on their honor to complete the examination without the aid of others.

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## COURSE OBJECTIVES

The Agent will:

1. Know why we have our current agency laws.
2. Define and create different agency relationships and disclose appropriately.
3. Explain advantages and disadvantages of the different agency relationships to clients and customers.
4. Demonstrate the proper way to act as a dual or designated Agent in in-house transactions.
5. Define and illustrate the importance of confidentiality and disclosures.
6. Recognize the importance of a written representation agreement.
7. Apply the Code of Ethics in daily business regarding clients and customers.
8. Properly explain and fill out Brokerage Agreements for Buyers and Sellers.

## INTRODUCTION

Name:

Company:

Years in Business:

What one question would you ask today concerning agency?

Jot down other issues or questions as they come to you for discussion for the review at the end of class.

# CHAPTER 1: A BRIEF HISTORY OF REAL ESTATE BROKERAGE

## CHAPTER 1 OBJECTIVES

The Agent will:

1. Briefly track the historical progression of real estate brokerage over time, recognizing the reasons for needed change.
2. Recognize the importance of the NAR Code of Ethics, Agency Law and MLS policies in evolving to today's real estate brokerage relationships.
3. Describe the impact of the evolution of real estate brokerage upon relationships between Agents and between Agents and the public.

### **Lesson 1: "Curbstone" Brokers – Street Transactions**

In the days before the Code of Ethics (prior to 1913), land salesmen would list property and then stand on the curb shouting out the properties they had for sale. If they told a Seller the property would yield \$1,000, they could have sold it for \$5,000. Who kept the overage? Today that would be called a net listing. They were self-dealing and on a scale lower than a used buggy salesmen. They did not co-operate with other salespersons as they did not want to share their profit.

### **Lesson 2: Development of NAR Code of Ethics 1913**

The Code of Ethics of the National Association of REALTORS® was first adopted on July 29, 1913, at the sixth Annual Convention of the National Association of Real Estate Boards (NAREB). The Code was first adopted as "Rules of Conduct" to be recommended to real estate boards for voluntary adoption. Compliance with the Code was made a mandatory condition of membership in the National Association in 1924 and has remained so to date.

After the code was adopted, primary duties were owed to the client. Cooperation with others was encouraged and commissions were disclosed. It was no longer self-dealing and net listings!

## CODE OF ETHICS ARTICLE 1

*When representing a Buyer, Seller, landlord, tenant, or other client as an Agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a Buyer, Seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. (Amended 1/01)*

A non-Agent is an Agent who has no agency relationship. An example would be an Agent working with a “customer” where no agency relationship exists, or an independent contractor who is working as a representative of the client as opposed to an Agent of the client.

## CODE OF ETHICS ARTICLE 3

*REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)*

Article 1 made the client primary, not the sales person.

Article 3 allowed co-operation and compensation, changing the whole landscape.

### **Lesson 3: Subagency**

Before the advent of Buyer Brokerage, all salespersons worked for the Seller. The theory was that we worked for the one paying us (NOT TRUE TODAY). If one Agent had a listing and another Agent (from another firm) sold it, **everyone** worked for the Seller. The Agent from the firm who sold it was called a **subagent**. The Seller was always the CLIENT. The Buyer was nothing but a **consumer**.

MLS ONLY allowed compensation to SUBAGENTS. You thought you had a Buyer Agent, but all worked for the Seller.

Confidential information of the Buyer could be shared with the Seller. There were virtually no consumer protections. Today, subagency options have been removed from some Multiple Listing Services. Subagency created liability. If an Agent told you something incorrectly and you innocently repeated that to the other party, you both could be held responsible for the misrepresentation. This is called **vicarious liability**, much of which is abrogated by today's agency law.

#### **Lesson 4: Buyer Agency**

Buyer Agency began to be practiced in the mid-to-late 1980s in Virginia. **You could be paid by the Seller but you could work for the Buyer.** Confidential information was protected and the Buyer became a CLIENT with full protections from the Agent. Buyer Brokerage is the new normal and all MLSs have added that as a field for compensation.

## CHAPTER 2: VIRGINIA'S AGENCY LAW

### CHAPTER 2 OBJECTIVES

The Agent will:

1. Apply the correct terminologies associated with today's brokerage relationships.
2. Identify the current types of Agency.
3. Describe the preconditions of brokerage relationships.
4. Contrast between actions that constitute establishment of a brokerage relationship and actions that do not.
5. Define the conditions that terminate brokerage relationships and the penalties for breach of statutory duty.
6. Identify the statutory duties of Agents in various brokerage relationships.
7. Identify the confidentiality requirements of Virginia's Agency Law and the warning flags for unintentional disclosure.

### Lesson 1: Terminology

The law states that "**AGENCY**" means every relationship in which a real estate licensee acts for or represents a person by that person's express authority in a real estate transaction, unless a different legal relationship is intended and is agreed to as part of the brokerage agreement. A licensee and a client can agree to a different brokerage relationship than one of "agency" as it is defined in the law -- but that different agreement must be in writing. Agency includes representation of a client as a standard Agent or a limited service Agent. § 54.1-2130.

A "**BROKERAGE AGREEMENT**" is the written agreement by which a brokerage relationship is created between a real estate licensee and a client. The brokerage agreement should state whether the real estate licensee will represent the client as an agent or an independent contractor. § 54.1-2130.

A **"BROKERAGE RELATIONSHIP"** is a "contractual relationship between a client and a real estate licensee who has been engaged by such client for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate on behalf of that client." § 54.1-2130

A **"CUSTOMER"** is a party for whom a licensee performs only ministerial acts in a real estate transaction but has no brokerage relationship with the REALTOR® or REALTOR® firm. § 54.1-2130.

A **"CLIENT"** is a person who has entered into a brokerage relationship with the real estate licensee. It can be a Seller, Buyer, landlord or tenant. § 54.1-2130.

A **"PROSPECT"** is someone who is not yet involved in a relationship or a transaction. Hopefully, the prospect will turn into a client.

A **"COMMON SOURCE INFORMATION COMPANY"** refers to "any person, firm, or corporation that is a source, compiler, or supplier of information regarding real estate for sale or lease and other data and includes, but is not limited to, multiple listing services." § 54.1-2130

## **Lesson 2: Types of Agency**

A “**DESIGNATED AGENT**” or “**DESIGNATED REPRESENTATIVE**” is a “licensee who has been assigned by a principal or supervising broker to represent a client when a different client is also represented by such principal or broker in the same transaction.” §54.1-2130

A “**DUAL AGENT**” or “**DUAL REPRESENTATIVE**” is a licensee who has a brokerage relationship with both Seller and Buyer, or both landlord and tenant, in the same transaction. § 54.1-2130.

A “**LIMITED SERVICE AGENT**” or “**LIMITED SERVICE REPRESENTATIVE**” is a licensee who represents a client with respect to real property containing one to four residential units, pursuant to a brokerage agreement that provides that the limited service Agent will NOT provide one or more of the duties set forth in subdivision A2 of §§ 54.1-2131-2134. The licensee’s obligations are limited to what is set out in the brokerage agreement, except that the limited service Agent shall provide client with copies of any/all legally required disclosures in writing including Virginia Residential Property Disclosure, Condominium resale certificate, and Property Owners’ Association Act if applicable. (Added in 2007). § 54.1-2130.

A “**LIMITED SERVICE BROKERAGE AGREEMENT**” is a written agreement showing a list of duties NOT provided and a list of duties TO BE provided to the client. § 54.1-2130.

The term “**MINISTERIAL ACTS**” means “those routine acts which a licensee can perform for a person which do not involve discretion or the exercise of the licensee’s own judgment.” § 54.1-2130.

The “**STANDARD AGENCY**” relationship is presumed to be your brokerage relationship under the law. If you do not specify otherwise, in a written agreement signed by you and your client, then you will be a "standard Agent" when you practice real estate in Virginia.

An “**INDEPENDENT CONTRACTOR**” means a real estate licensee who:

1. enters into a brokerage relationship based upon a brokerage agreement that specifically states that the real estate licensee is acting as an independent contractor and not as an Agent;
2. has the obligations agreed to by the parties listed in the brokerage agreement;
3. is required to:
  - a. maintain client confidentiality;
  - b. exercise ordinary care;
  - c. account for a client’s money and property;
  - d. disclose material facts to the client regarding the property and/or the transaction, and disclose material adverse facts/ (including defective drywall) to prospective purchasers or tenants;
  - e. treat all parties honestly;
  - f. disclose the brokerage relationship to all parties;
4. does not have any other duties of a standard Agent under §§ 54.1-2131 through 54.1-2135.

### **Lesson 3: Creation of Brokerage Relationships**

#### **Preconditions to Brokerage Relationships**

Before entering into any brokerage relationship, Virginia’s law requires Agents to discuss two very important topics with a potential client. The law states:

#### **§ 54.1-2136. Preconditions to Brokerage Relationship.**

*Prior to entering into any brokerage relationship provided for in this article, a licensee shall advise the prospective client of (i) the type of brokerage relationship proposed by the broker and (ii) the broker's compensation and whether the broker will share such salary or compensation with another broker who may have a brokerage relationship with another party to the transaction.*

### Before a Brokerage Relationship

Section 54.1-2136 of the law explains that you must discuss three things before you enter into a brokerage relationship. In your discussions with a potential client, you need to cover three things.

Tell your potential client:

1. The exact **relationship** you are proposing.
2. Whether and how you will be **compensated**.
3. How you will **share** this compensation with cooperating firms that may be representing another party to the transaction.

### The Code of Ethics

The Code of Ethics also requires this “agency discussion” prior to entering into a brokerage relationship with a Buyer or Seller.

**COE Standard of Practice 1-12**

*When entering into listing contracts, REALTORS® must advise Sellers/landlords of:*

- 1. the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, Buyer/tenant Agents, and/or brokers acting in legally recognized non-agency capacities;*
- 2. the fact that Buyer/tenant Agents or brokers, even if compensated by listing brokers, or by Sellers/landlords may represent the interests of Buyers/tenants; and*
- 3. any potential for listing brokers to act as disclosed dual Agents, e.g. Buyer/tenant Agents. (Amended 1/03)*

**CASE SCENARIO: “Living the Code”**

In his rush to take a listing, Agent Accurio fails to discuss his company’s agency policy with Seller O’Laughlin. O’Laughlin’s house was previously listed with another company and he believes that a pending sale fell because the dual Agent failed to disclose information to him about the borrower’s financial situation. O’Laughlin wants no part of dual agency yet fails to mention it to Agent Accurio. When the Agent brings in an offer from his Buyer/client, O’Laughlin hits the roof and threatens to cancel the listing.

**QUESTION:**

Is Accurio potentially in violation of the Code of Ethics? What solutions would you recommend to help solve the problem at this point?

**COE Standard of Practice 1-13**

*When entering into Buyer/tenant agreements, REALTORS® must advise potential clients of:*

- 1. the REALTOR®'s company policies regarding cooperation;*
- 2. the amount of compensation to be paid by the client;*
- 3. the potential for additional or offsetting compensation from other brokers, from the Seller or landlord, or from other parties;*
- 4. any potential for the Buyer/tenant representative to act as a disclosed dual Agent, e.g., listing broker, subagent, landlord's Agent, etc., and*
- 5. the possibility that Sellers or Sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Amended 1/06)*

**Under Virginia's Law, Brokerage Relationships MAY BE Created by...**

- **WRITTEN AGREEMENTS** - The safest way to create a brokerage relationship is by entering into a written agreement such as a listing agreement or Buyer representation agreement. (Prior to 2012, Buyer Agreements did not have to be in writing. They are now required.) They are statutory. Article 9 of the Code of Ethics requires brokerage agreements to be in writing whenever possible. Written agreements are also required under the Statute of Frauds § 54.1-2137.
- **ORAL CONTRACTS** - You may also create a brokerage relationship by what you say. Oral contracts are legal in Virginia (but the statute of frauds requires brokerage agreements to be in writing to be enforceable). However, the Virginia statute requires brokerage agreements to be in writing as of July 2012.

**CASE SCENARIO: Establishing an Agency Relationship**

Jose is the listing Agent and has taken care of all the necessary paperwork. He, of course, has a signed listing agreement with the Sellers and has entered the property in the regional MLS. The Sellers are very pleased with Jose. He was highly recommended by their neighbors and has been a successful Agent for 13 years.

On Friday, the Chans call Jose and say they want to see the house. At the showing, the Chans ask Jose to evaluate the cash flow that they could generate if they purchased the property as a rental unit.

The next day, Jose calls the Chans and tells them that it is his opinion that the property could easily generate a positive cash flow as a rental property. The Chans are impressed with Jose's work and ask if he will act as their leasing Agent once the sale is complete. Jose agrees.

**QUESTION 1:**

Did Jose comply with his duties to his listing client?

ANSWER 1:

**QUESTION 2:**

Is Jose an undisclosed dual Agent? Why or why not?

ANSWER 2:

**QUESTION 3:**

What would you say if the Chans had asked you to analyze the cash flow of renting the property?

ANSWER 3:

**Brokerage Relationships Are Not Created by...**

Virginia's agency law specifically mentions three things that do not create a brokerage relationship.

You are not assumed to be an Agent solely because you...

1. Participate in a MLS.
  - Not too many years ago, everyone who participated in the MLS was generally regarded as a subagent of the listing broker. Today, you must declare whom you represent in a transaction.
2. Accept the promise of or actual compensation from a party.
  - Agency law makes it clear that representation and compensation are not related. You may get paid by someone who is not your client. Your client, of course, should be informed as to how you will be paid.
  - Similarly, compensation is not required for there to be a valid agency relationship.
3. Perform ministerial acts.
  - "Ministerial Acts", as defined earlier, are services you perform for someone who is not your client. These are acts that are routine in nature and do not involve the exercise of your judgment. Virginia's agency law clearly states that performing these acts does not create an agency relationship.

**EXERCISE: Ministerial Acts**

List five examples of a ministerial act:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

**Lesson 4: Termination and Penalties for Breach**

Termination of Relationships:

- Satisfaction
- Expiration
- Mutual agreement
- Operation of law
- Revocation
- Renunciation
- Breach
- Death of either party
- Destruction

Penalties for breach of statutory duty:

- Rescission
- Damages (actual and punitive)
- Loss of commission
- Possible loss of license (remedy only available to license authority)

## **Lesson 5: Statutory Duties of Agents**

### **Duties are Statutory**

As a real estate salesperson or broker, you have specific duties that you owe to your client.

Real estate Agents in Virginia have the STATUTORY DUTIES, which are the duties listed in the statute.

### **Duties of a Standard Agent to a Client (See Appendix 1: § 54.1 – 2130):**

1. Perform to contract.
  - Your duties start with a duty to DO what you have agreed to do in your agreement with your client.
  
2. Promote client's interest.
  - Promoting the client's interest means:
    - a. Seeking a transaction at acceptable terms. A transaction at acceptable terms means that the terms are acceptable to your client.
    - b. Assisting in drafting and negotiating all offers, counteroffers, and amendments to the real estate contract.
    - c. Timely presenting all written offers. Remember, the Code of Ethics still requires presentation of all offers, even oral offers.
    - d. Providing reasonable assistance to your client to satisfy his contract obligations and facilitate settlement.
  
3. Maintain confidential information.
  - You have a duty of confidentiality to your clients. The rules governing confidentiality will be discussed shortly.
  
4. Exercise ordinary care.
  - You are expected to provide a level of care and service in line with industry standards in your area.

5. Provide financial accounting. You must provide timely accounting for all money and property received from your client or in which your client may have an interest.
  
6. Disclose material facts related to the property or concerning the transaction of which you have actual knowledge.
  
7. Obey laws and regulations.
  - You are required to obey this and all other applicable laws and regulations. The agency section of the law specifically mentions that Fair Housing and Residential Property Disclosure laws still apply.

**Duties of a Standard Agent to a Customer:**

Because real estate transactions are so complicated, involve so much money and are entered into by most people only a few times in their lifetimes, we as real estate licensees have some specific statutory duties to consumers (customers) even though they are not our "clients."

Your duties to a customer are as follows:

1. You must be honest.
2. You may not intentionally give them false information.
3. You must still make certain disclosures to your customers.
  - a. You must still disclose your agency relationship if they are not already represented by another Agent.
  - b. You must disclose KNOWN material, adverse information about the physical condition of the property.
4. You must have reasonable skills.
5. You must have accounting skills.

## Duties of a Limited Service Agent to a Client:

### Limited Service Agency:

*A licensee may act as a limited service Agent only pursuant to a written brokerage agreement in which the limited service Agent (i) discloses that the licensee is acting as a limited service Agent; (ii) provides a list of the specific services that the licensee will provide to the client; and (iii) provides a list of the specific duties of a standard Agent set out in subdivision A 2 of § 54.1-2131, subdivision A 2 of § 54.1-2132, subdivision A 2 of § 54.1-2133, or subdivision A 2 of § 54.1-2134, as applicable, that the limited service Agent will not provide to the client. Such disclosure shall be conspicuous and printed either in bold lettering or all capitals, and shall be underlined or in a separate box. In addition, a disclosure that contains language that complies substantially in effect with the following shall be deemed in compliance with this disclosure requirement:*

*DISCLOSURE: "By entering into this brokerage agreement, the undersigned do hereby acknowledge their informed consent to the limited service Agent by the licensee and do further acknowledge that neither the other party to the transaction nor any real estate licensee representing the other party is under any legal obligation to assist the undersigned with the performance of any duties and responsibilities of the undersigned not performed by the limited service Agent."*  
(§ 54.1-2138.1)

*A. A limited service Agent shall have the obligations set out in the brokerage agreement, except that a limited service Agent shall provide the client, at the time of entering the brokerage agreement, copies of any and all disclosures required by the federal or state law, or local disclosures expressly authorized by state law, and shall disclose to the client the following in writing:*

- 1. The rights and obligations of the client under the Virginia Residential Property Disclosure Act (§ 55.1-700 et seq.);*
- 2. If the client is selling a condominium, the rights and obligations of the client to deliver to the purchasers, or to receive as purchaser, the condominium resale certificate required by § 55.1-1990;*

3. *If the client is selling a property subject to the Property Owner's Association Act (§55.1-1800 et seq.), the rights and obligations of the client to deliver to the purchasers, or to receive as purchaser, the association disclosure packet required by § 55.1-1808.*

## **Lesson 6: Confidentialities**

Confidentiality is a key factor in Virginia's agency law. The law is very clear on what you need to keep confidential and for how long.

Confidentiality is one of the most important concepts in Virginia's agency law. It is not a new concept, but it is more important today because of the variety of agency relationships available.

**During** a brokerage relationship you...

- Must maintain ALL personal and financial information received in confidence.
- Must maintain other information the client requests to be kept confidential.

You may release confidential information only if required by law or with the written permission of your client.

**After** the relationship ends...

- Ditto! You must maintain all previously confidential information forever unless your client gives you written permission to release it or you are otherwise required by law to release it.

## Confidentiality in the Office

It is recommended that Agents not discuss confidential information with anyone, even their spouse.

It is important to remember that information that is confidential as required by this law should not be discussed with anyone outside your agency relationship. Unless your company only practices one type of agency, you should not even discuss confidential information with other Agents in your firm. You may discuss confidential information with your broker when necessary, but the best rule is to keep confidential information confidential - forever (or until your client gives you written permission to disclose).

Inter-office discussions such as presentations at sales meetings need to focus on the aspects of the property and not on things such as the Seller's motivation, or how much money the Buyer has to spend.

***\*Confidential information needs to be kept confidential. \****



**EXERCISE: Unintentional Disclosure**

**WARNING:** The following are typical places where confidential information about a client may unintentionally be disclosed:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_
7. \_\_\_\_\_

**EXERCISE: Confidentiality Checklist**

Indicate which of the following items must, can, or cannot be disclosed to your customers, your broker, or to other sales Agents in your firm. Put the following letters in the blanks to indicate your answer:

Y = Yes, you must disclose

N = No, you cannot disclose\*

M= You may disclose

**\*unless client gives written permission to disclose**

When representing a Buyer, should you disclose that...?

1. Your client has bad credit?

The Sellers

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

2. Your client has \$100,000 available for a cash down payment?

The Sellers

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

3. Your client is HIV positive?

The Sellers

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

## CHAPTER 3: IN-HOUSE TRANSACTIONS

### CHAPTER 3 OBJECTIVES

The Agent will:

1. Distinguish between the two general categories of in-house transactions.
2. Define dual representation and the duties of the dual Agent.
3. Define the designated agency relationship and how it works.

In-house transactions fall into one of two general categories:

1. involving only one client (*i.e., the Seller is the client and the Buyer is a customer*)
2. involving two clients (*both Seller and Buyer have hired the broker to represent them.*)

These are the most typical situations in the marketplace today when dealing with in-house transactions. The actual number of salespersons involved may vary under each scenario and additional behavioral guidelines or limitations may be dictated by office policy. It is critical that firms have formal, documented policies on how to handle in-house sales, particularly when the firm is representing two clients in the same transaction and is acting in the capacity of a dual Agent.

## Dual Agency

Dual Agency arises when two clients, represented by the same agent, become involved in the same transaction. Dual agency places limits on the level of representation provided -- the Agent may not give an advantage to one client over the other; however, the duty of confidentiality stays intact.

## Designated Agency

Designated Agency is a statutory alternative to dual agency that is available for firms to elect to use. In designated agency, there must be two salespersons in the transaction, each working under the same broker umbrella, and hired to represent their own client. Here, the principal broker remains a dual Agent, complete with the limitations associated with that level of representation; however, the salespersons' roles are unchanged. They continue to fully represent their clients.

Firms who elect to use designated agency must be sure there are policies and procedures established to prohibit the sharing of confidential information or in any other way jeopardizing the client's bargaining position.

## Lesson 1: Dual Agency

### **Disclosed Dual Representation**

Dual agency is when both the Buyer and Seller (or the landlord and tenant) have the same firm representing them in the same transaction. Remember, one or two Agents might be involved.

### **When Dual Agency Starts**

It exists only when there is one transaction in which the firm represents both sides.

It is important to remember that legally permissible dual agency does not exist simply because your firm, at times, represents both Buyers and Sellers. The Buyers and Sellers must be participating in the same transaction.

If your firm represents a Buyer looking for a 4-bedroom colonial and your firm has a 4-bedroom colonial listed for sale, dual agency **does not** automatically exist. However, if the Buyer client wants to write an offer on your firm's listing, a dual agency situation arises and both the Buyer and Seller must give their written consent. In the alternative, if your Firm allows designated agency, all parties can agree to a designated agency brokerage relationship.

## Duties of a Dual Agent

Dual agency places serious limitations on your duties to your clients. When you and your firm represent both parties in a transaction, performing a duty to one client may be limited by your duty to the other client.

Specifically, once dual agency occurs, and is agreed to in writing by all parties, you cannot:

1. Advise either party as to the terms to offer or accept in any offer or counteroffer
2. Advise the Buyer client as to the suitability of the property, its condition (other than to make any disclosures as required by law of any licensee representing a Seller), and cannot advise either party as to what repairs of the property to make or request
3. Advise either party in any dispute that arises relating to the transaction
4. Tell the Buyer that the Seller will accept a price lower than the listing price, nor tell the Seller that the Buyer will pay a price higher than the price offered

Example: In a standard agency relationship, you have a duty to both clients to keep personal and financial information confidential (unless the client gives written permission to release the information). If your Seller clients tell you they are facing bankruptcy if they do not sell quickly, you must keep this information confidential. This duty of confidentiality supersedes your duty to tell your other client everything you know. Thus, in a dual agency situation, confidential information from one party cannot be shared with the other.

An exception is if the dual Agent has actual knowledge of a material adverse fact pertaining to the physical condition of the property. This knowledge must be disclosed to the Buyer under statute.



### CASE SCENARIO

Joe is the listing Agent for a beautiful 4-bedroom Colonial that has a spectacular view of the Shenandoah Valley. Joe works for Hilltop Realty. Hilltop's company policy permits its Agents to represent both Buyers and Sellers. Jeremy, an unrepresented prospective buyer, sees Joe's listing and contacts him to set up a meeting to learn more about the property.

Joe meets with Jeremy and shows him the property. During the showing, Jeremy expresses his interest in the house because it has the view that he wants. Jeremy also stated that he felt that this particular home was "the perfect home" and that he felt comfortable working with Joe.

Two days later, after a couple more conversations, Jeremy tells Joe that he wants to make an offer on the Colonial Joe has listed, and would prefer that Joe write the offer himself. Joe writes up an offer and presents it to Sellers.

### **QUESTIONS:**

1. When did dual agency start?

2. Which of the following were designated agents?

Seller's Agent (Joe)	_____	Yes	_____	No
Jeremy	_____	Yes	_____	No
Hilltop Broker	_____	Yes	_____	No



### EXERCISE: Dual Agency Confidentiality Checklist

When representing the Sellers and the Buyers as a disclosed dual Agent, should you disclose that...?

Y = Yes, you must disclose

N = No, you can not disclose\*

M= You may disclose

**\*unless client gives written permission to disclose**

1. The Sellers say the property will go to foreclosure in 30 days?

Other Client

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

2. The Sellers say the furnace doesn't work?

Other Client

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

3. The Buyers plan to use the house as a rental property?

Other Client

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

4. You read in the newspaper that a new highway has been approved to be built 100 feet from the property? (Extra Credit)

Other Client

Agents in Office

\_\_\_\_\_

\_\_\_\_\_

## **Lesson 2: Designated Agency**

Designated Agency allows *both* clients to receive the *full benefits* of representation even if the transaction involves an in-house listing. Just as in dual agency, designated agency is not present until an actual transaction is started that involves a Buyer-client and Seller-client of the same firm.

### **What is Designated Agency?**

Designated agency is an optional procedure in the law that allows a principal or supervising broker to designate one (or more) of the Agents in the firm to represent the Seller/landlord and another Agent (or Agents) to represent the Buyer/tenant. The two designated Agents are allowed to fully represent their clients without the limitations of dual agency. If a firm chooses to use this form of agency, then the only person in the firm who remains a traditional dual Agent is the designating broker.

## How Does Designated Agency Work?

When a Buyer-client decides he wants to buy from one of the firm's Seller-clients, the principal broker becomes an undisclosed dual Agent because she has a brokerage relationship with both parties. In a traditional agency situation, this decision by a Buyer-client to purchase a company listing would signal the start of a dual agency relationship. If a firm offers designated agency, all parties have the option to agree in writing to designated agency instead of dual. In the case of designated agency, the supervising broker functions as a dual Agent, because she is potentially privy to confidential information from both clients. However, each of the individual designated Agents is not legally considered to be a dual Agent, and they are not limited in their ability to fully represent their specific client in the transaction.

## Confidentiality

As a practical matter, a critical difference between dual agency and designated agency is how confidential information is handled.

## Dual Agency Confidentiality

In a dual agency relationship, confidential information can be discussed with other Agents in the office because every Agent is prohibited from sharing any of that information with one client of the firm at the expense of another client of the firm.

### Designated Agency

In a designated agency relationship, confidential information may be shared with *nobody except the broker*. Since another designated Agent in the firm fully represents the other party, you have to be very careful not to discuss confidential information around the office.



### **CASE SCENARIO**

Joe is the listing Agent for a beautiful 4-bedroom Colonial that has a spectacular view of the Shenandoah Valley. Joe works for Hilltop Realty. Hilltop's company policy permits its Agents to represent both Buyers and Sellers. Jane, another Hilltop Agent, has a Buyer client who is looking for a Colonial that has a view of the valley. Jane is familiar with Joe's listing from the presentation he made at a sales meeting.

Jane talks to Joe and sets up an appointment to show the Colonial to her clients. During the showing, the Buyers express their interest in the house because it has the view they want, but they are concerned about the size of the bedrooms. They decide to look at other properties.

The Sellers have informed Joe that they have a pending bankruptcy. The Buyers have informed Jane that they plan to use the property as a rental unit. Each Agent discusses his or her client's situation with the designating broker.

Two days later, after several other showings, the Buyers tell Jane they want to make an offer on the Colonial Joe has listed. Jane writes up an offer and presents it to Joe. Both the Sellers and the Buyers have agreed to accept designated agency if the situation occurs. When does designated agency begin in the scenario?

1. When does designated agency begin in the scenario?
2. Can Joe or his broker discuss the Sellers' pending bankruptcy with Jane under designated agency?

4. Can Jane or her broker discuss the Buyers' intent to use the property as a rental unit with Joe?

5. Which of the following were designated representatives?

Seller's Agent (Joe)                    \_\_\_\_\_ Yes                    \_\_\_\_\_ No

Buyer's Agent (Jane)                    \_\_\_\_\_ Yes                    \_\_\_\_\_ No

Hilltop Broker                    \_\_\_\_\_ Yes                    \_\_\_\_\_ No

### Dual Agency Summary

Key points:

- Dual agency (selling an in-house listing while representing a Buyer) is allowed.
- Virginia's agency law creates an alternative to dual agency called "designated agency" (one Agent in a firm as the Seller's Agent and another as the Buyer's Agent).
- In designated agency, only the designating broker is a dual Agent, but the designated Agents representing each side are not dual Agents.
- **A key difference between dual and designated agency is how confidential information is handled.**
- **In a dual agency situation, Agents are permitted to discuss confidential information about their clients with other Agents in the firm, but this should be strongly discouraged.**
- **In a designated agency situation, confidential information may only be disclosed to the designating broker because all other Agents could potentially represent the other party.**

## CHAPTER 4: DISCLOSURES

### CHAPTER 4 OBJECTIVES

The Agent will:

1. Identify the statutory requirements related to disclosure of the brokerage relationship in sales and rental transactions.
2. Describe why we have agency disclosure.
3. Recognize when, how and what to disclose.

### Lesson 1: Agency Disclosure

For the purpose of this section, use the following definitions of Client and Customer:

**Client** - The party you represent.

**Customer** - The party you **do not** represent.

The law states:

#### **§ 54.1-2138. Disclosure of brokerage relationship.**

*Upon having a substantive discussion about a specific property or properties with an actual or prospective Buyer or Seller who is not the client of the licensee **and who is not represented by another licensee**, a licensee shall disclose any broker relationship the licensee has with another party to the transaction. Further, except as provided in § 54.1-2139 or 54.1-2139.1, such disclosure shall be made in writing at the earliest practical time, but in no event later than the time when specific real estate assistance is first provided. Such disclosure may be given in combination with other disclosures or provided with other information, but if so, the disclosure must be conspicuous, printed in bold lettering, all capitals, underlined, or within a separate box. Any disclosure which complies substantially in effect with the following shall be deemed in compliance with this disclosure requirement.*

## Why Do We Have Agency Disclosure?

Disclosure of whom you represent in a transaction has been required since 1989. A customer or “unrepresented party,” who is not represented by another Agent, has not been informed about the duties of a real estate Agent. Such a customer has the right to know that you are not working for him/her. An unrepresented customer needs to know that, although you may treat them honestly, your duty is to represent the best interest of the other party.

### **Lesson 2: When to Disclose**

NOTE: Agency law was amended in 2011-2012 to clarify that agency disclosure is not necessary if another Agent already represents a non-client. Firms may choose to disclose to all customers as they did in the past.

Disclosure of Brokerage Relationships (§ 54.1-2138):

- Virginia law requires disclosure of a brokerage relationship in sales and lease transactions.

Sales Transactions (§ 54.1-2138 A): Upon having a substantive discussion about a specific property or properties with an actual or prospective Buyer or Seller who is not the client of the licensee and who is not represented by another licensee, a licensee shall disclose any broker relationship the licensee has with another party to the transaction. Further, except as provided in § 54.1-2139 or 54.1-2139.1, such disclosure shall be made in writing at the earliest practical time, but in no event later than the time when specific real estate assistance is first provided. Such disclosure may be given in combination with other disclosures or provided with other information, but if so, the disclosure must be conspicuous, printed in bold lettering, all capitals, underlined, or within a separate box.

Lease Transactions (§ 54.1-2138 B): A licensee shall disclose to an actual or prospective landlord or tenant, who is not the client of the licensee and who is not represented by another licensee, that the licensee has a brokerage relationship with another party or parties to the transaction. Such disclosure shall be in writing and included in all applications for lease or in the lease itself, whichever occurs first. If the terms of the lease do not provide for such disclosure, disclosure shall be made in writing no later than the signing of the lease. Such disclosure requirement shall not apply to lessors or lessees in single or multifamily residential units for lease terms of less than two months.

Change in Relationship (§ 54.1-2138 C): If a licensee's relationship to a client or customer changes, the licensee shall disclose that fact in writing to all clients and customers already involved in the specific contemplated transaction.

Recordkeeping Requirement (§ 54.1-2138 D): Copies of any disclosures relative to fully executed purchase contracts shall be kept by the licensee for a period of three years as proof of having made such disclosure, whether or not such disclosure is acknowledged in writing by the party to whom such disclosure was shown or given.

**EXERCISE: Optional Role Play**

As instructor, take on the role of the customer. Role play situations such as a phone call on a listing, a visit to an open house and a general inquiry about obtaining a Buyer Agent and have students raise their hand when they sense an agency disclosure trigger.

**CASE SCENARIO A**

Consider the following three scenarios to help you understand what is substantive.

Joe is the listing Agent for a condominium in Reston. He has it listed for sale in the MLS and has taken out an ad in a local real estate magazine. Betty, a potential Buyer, calls Joe one day and says she saw his ad for the condo in a magazine and has a few questions.

Which of the following questions would trigger agency disclosure because they are “substantive” in nature and pertain to this particular property?

**Betty’s Questions:**

1. “Which schools serve this neighborhood?”

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

2. “Will the owner consider financing options?”

\_\_\_\_\_ Yes                      \_\_\_\_\_ No

**CASE SCENARIO B**

Joe has several houses listed for sale in Prince William County. He receives a call one day from Betty who wants to buy a house in Prince William County. She tells Joe that one of her neighbors had told her that Joe was the best Agent in the area to help her find a home. Joe asks Betty what style of home she is looking for and in what price range she wants to look. They make an appointment for the next day to meet at Joe's office.

1. Does Joe need to disclose his agency status while he is talking to Betty on the phone?

\_\_\_\_\_ Yes

\_\_\_\_\_ No

2. Why or why not?



### CASE SCENARIO C

Joe is a listing Agent in Roanoke. Sue, a Buyer's Agent who wants to show her clients one of Joe's listings, contacts him. Joe meets Sue and her clients at the property and shows them around. The Buyers are interested and start asking substantive questions about the property.

1. Does Joe need to disclose his agency status to the potential Buyers when they first enter the property?
2. After the potential Buyers start to ask substantive questions about the property, does Joe need to perform agency disclosure?

### **Lesson 3: Written Confirmation of Agency Disclosure**

After you have orally disclosed to a non-client who is not represented by another Agent that you represent another party in a transaction, you are required to present a written confirmation of this disclosure at *the earliest practical time*.

Earliest practical time will vary in each case. In one situation it may involve emailing the confirmation at the same time you email other material, and in another situation, it may be when you first meet the customer face-to-face.

If the customer refuses to sign the written confirmation, then you should note on the form that they refused to sign, give them a copy and keep a copy for your records.

“Earliest practical time” does not mean “as soon as humanly possible.” The initial oral disclosure is important because it gives a “heads-up” to the non-client who is not represented. The written confirmation is simply that - a written confirmation of something you have already told this non-client.

### **Lesson 4: Disclosure in Rental Transactions**

In the case of a rental transaction, the written disclosure must be included in the application or the lease, whichever is executed first. This has been the requirement for rental transactions since 1992.

In rental transactions, disclosure is a one-step process.

### **Lesson 5: Disclosure of Material Facts**

There is a significant difference between what is to be disclosed to customers and clients.

#### **Adverse Material Facts**

Customers must be told about known adverse material facts that pertain to the physical condition of the property.

Clients must be told about **all** known material facts that pertain to the property or the transaction.

With agency disclosure, you are only required to disclose to parties that are not your client and who are not already represented by another Agent. With disclosure of material facts, you have two different requirements, depending if you are dealing with a client or a customer.

### **To your customer:**

Agency law requires that you disclose to your customers adverse material facts if:

- They pertain to the physical condition of the property.
- You have actual knowledge of them.

### **To your clients:**

Agency law requires that you disclose to your clients all material facts if:

- They pertain to the physical condition of the property.
- They pertain to the transaction.
- You have actual knowledge of them.

While these are the only criteria under which disclosure is required, other facts may be disclosed if your client approves.

## **Physical Condition of the Property**

Virginia's agency law requires that you disclose adverse material facts that you know about the physical condition of the property (defined by statute in §54.1-2131B) to both your clients and customers. This requirement makes it clear what is required to be disclosed and what is optional (based on the consent of the client).

Items you are required to disclose are items that have a physical adverse effect on the land or the improvements. Leaky roofs and wet basements are examples of things that must be disclosed to both your clients and customers.

## Material Facts about the Transaction

You are required to disclose all material facts about the transaction to your clients.

Items that are required to be disclosed to your client are facts you know such as if the other party is getting divorced or has a previous bankruptcy.

## Extra Disclosure for Buyer Agents

If you are acting as the Agent of a residential Buyer, you must disclose to the Seller (your customer) whether or not the Buyer intends to occupy the property as a principal residence. §54.1-2132B

## Disclose Only If You Have Actual Knowledge

If you are working as a Seller's Agent, you have to disclose to the Buyer customer all material adverse facts about the physical condition of property that you know.

Virginia's agency law also specifically states that you may rely on the information provided to you by the Seller unless you know the information is false, or you act in reckless disregard of the truth.



**EXERCISE: Disclosure Requirements Part 1**

Indicate what disclosure requirement is present for each of the items listed below:

- R = required by law
- O = optional, may be disclosed with client’s consent
- C = confidential, may only be disclosed with the written consent of the client

When you are representing a Seller, how do you treat the following items (if you have actual knowledge) when disclosing to a Buyer customer?

- \_\_\_\_\_ The roof leaks.
- \_\_\_\_\_ A landfill is being built nearby.
- \_\_\_\_\_ The septic system floods on rainy days.
- \_\_\_\_\_ There is a lien on the house.
- \_\_\_\_\_ A motorcycle gang lives next door.
- \_\_\_\_\_ The basement flooded, but the condition was corrected.



**EXERCISE: Disclosure Requirements Part 2**

Indicate what disclosure requirement is present for each of the items listed below:

R = required by law

O = optional, may be disclosed with client’s consent

C = confidential, may only be disclosed with the written consent of the client

When you are representing a Buyer, how do you treat the following items (if you have actual knowledge) when disclosing to a Seller customer?

\_\_\_\_\_ The Buyer has bad credit.

\_\_\_\_\_ The Buyer’s house probably won’t sell (contingency on purchase contract) because it is in an environmental hazard area.

\_\_\_\_\_ The Buyer intends to use the house as a non-owner rental unit.

\_\_\_\_\_ The Buyers are getting laid off next month.

**Case Scenarios:**

How would you handle these situations?

1. Buyer comes into your open house (your listing). After some discussion, you ask Buyer if he has an Agent, to which he replies he does not. He then says he is interested in making an offer and asks how he can do that and if you will represent him. Your broker has cautioned you not to get involved in a dual agency situation. How do you respond?
2. You represent a Seller who is your best friend. You also have a Buyer Agreement with your high school sweetheart. Your Buyer wants to put an offer on the listing of your best friend. How do you handle this?
3. Your Buyer Client wants to see a For Sale by Owner. If he is interested in making an offer, how do you proceed? Do you sign a listing with the Seller?

4. A buyer purchases her first home in March of 2017. The property listing describes the basement as “a great party room.” During the walkthrough, the buyer asks her agent about flooding in the basement. The buyer’s agent truthfully and honestly stated that she had no knowledge of flooding in the property’s basement. The agent was, however, aware that all of the neighbors on the same street had dealt with flooding issues in their basements after the last two hurricane seasons. Three years later the buyer began renovations in the basement and discovered rotting and termite damage in vertical support beams in the basement under her kitchen. She also found cracks in her foundation. Did the agent breach her duty to her client?
  
5. Broker Tom has a small firm with only one Agent, Agent Sue.
  - a. Broker Tom has a listing and Agent Sue has a Buyer client. The buyer client informs Agent Sue that she is interested in purchasing Broker Tom’s listing. Has Agent Sue breached any duty to the Buyer Client up to this point?
  
  - b. Broker Tom has a listing and Agent Sue has a Buyer client who would like to put an offer on Tom’s listing. Tom decides Sue will be a designated Agent. Is this a good decision, why or why not?
  
  - c. How should they proceed?

**IT IS ABSOLUTELY IMPERATIVE THAT YOU SEEK YOUR BROKER’S ADVICE WHEN DEALING WITH AN IN-HOUSE TRANSACTION.**

# CHAPTER 5: AGENCY AND THE CODE OF ETHICS

## CHAPTER 5 OBJECTIVES

The Agent will:

1. Recognize how the REALTOR® Code of Ethics guides agency disclosure in representing a Buyer, Seller, landlord, tenant, or other client.
2. Recognize how the REALTOR® Code of Ethics guides Agents when they are dealing with each other in brokerage transactions.

The other great source of guidance for REALTORS® on agency is the Code of Ethics. Several Articles of the Code establish specific agency duties that REALTORS® need to follow in order to perform ethically.

### Lesson 1: Code of Ethics Article 1

*When representing a Buyer, Seller, landlord, tenant, or other client as an Agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a Buyer, Seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. (Amended 1/01)*

### **COE Standard of Practice 1-2**

*The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.*

*The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as Agents or in legally recognized non-agency capacities except that any duty imposed exclusively on Agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities.*

*As used in this Code of Ethics, “client” means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®’s firm has an agency or legally recognized non-agency relationship; “customer” means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®’s firm; “prospect” means a purchaser, Seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or REALTOR®’s firm; “Agent” means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and “broker” means a real estate licensee (including brokers and sales associates) acting as an Agent or in a legally recognized non-agency capacity. (Amended 1/07)*

### **COE Standard of Practice 1-5 (Informed Consent)**

*REALTORS® may represent the Seller/landlord and Buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties. (Adopted 1/93)*

### **COE Standard of Practice 1-12**

*When entering into listing contracts, REALTORS® must advise Sellers/landlords of:*

- 1. the REALTOR®’s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, Buyer/tenant Agents, and/or brokers acting in legally recognized non-agency capacities;*
- 2. the fact that Buyer/tenant Agents or brokers, even if compensated by listing brokers, or by the Sellers/landlords may represent the interests of Buyers/tenants; and*
- 3. any potential for listing brokers to act as disclosed dual Agents, e.g. Buyer/tenant Agents. (Amended 1/03)*

**COE Standard of Practice 1-13**

*When entering into Buyer/tenant agreements, REALTORS® must advise potential clients of:*

- 1. the REALTOR®'s company policies regarding cooperation;*
- 2. the amount of compensation to be paid by the client;*
- 3. the potential for additional or offsetting compensation from other brokers, from the Seller or landlord, or from other parties;*
- 4. any potential for the Buyer/tenant representative to act as a disclosed dual Agent, e.g. listing broker, subagent, landlord's Agent, etc., and*
- 5. the possibility that Sellers or Sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Amended 1/06)*

**Lesson 2: Code of Ethics Article 16**

*REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with their clients. (Amended 1/04)*

**COE Standard of Practice 16-9:**

*REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. (Amended 1/04)*

**COE Standard of Practice 16-10**

*REALTORS® acting as Buyer or tenant representatives or brokers, shall disclose that relationship to the Seller/landlord's representative or broker at first contact and shall provide written confirmation of that disclosure to the Seller/landlord's Agent or broker not later than execution of a purchase agreement or lease. (Amended 1/04)*

**COE Standard of Practice 16-11**

*On unlisted property, REALTORS® acting as Buyer/tenant representatives or brokers shall disclose that relationship to the Seller/landlord at first contact for that Buyer/tenant and shall provide written confirmation of such disclosure to the Seller/landlord not later than execution of any purchase or lease agreement. (Amended 1/04)*

*REALTORS® shall make any request for anticipated compensation from the Seller/landlord at first contact. (Amended 1/98)*

**COE Standard of Practice 16-12**

*REALTORS®, acting as representatives or brokers of Sellers/landlords or as subagents of listing brokers, shall disclose that relationship to Buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to Buyers/tenants not later than execution of any purchase or lease agreement. (Amended 1/04)*

# CHAPTER 6: REPRESENTING BUYERS AND SELLERS IN BROKERAGE RELATIONSHIPS

## CHAPTER 6 OBJECTIVES

The Agent will:

1. Properly articulate the role as a Buyer's representative, as well as the benefits of Buyer representation.
2. Correctly complete the Exclusive Right to Represent Buyer Agreement (Standard Agency).
3. Properly articulate the role as a Seller's representative, as well as the benefits of Seller representation.
4. Correctly complete the Exclusive Authorization to Sell form.
5. Identify electronic signature applications available in today's market.
6. Correctly complete the following forms: Disclosure of Brokerage Relationship for Unrepresented Party/ies, Disclosure of Designated Agency or Representation, and Disclosure of Dual Agency or Dual Representation in a Residential Real Estate Transaction.

## Lesson 1: Discussing Your Job as a Buyer's Representative

Agency options must be discussed, according to Virginia law, before we have "substantive discussions about specific properties". From a practical perspective, the earlier you approach representational status, the better.

Types of Buyers who should be represented include:

- Buyers about whom the Agent knows a great deal, and who assume that they are being represented by the Agent, such as:
  - relatives
  - close friends
  - business associates or partners
  - former clients and customers
- Buyers who need advice or advocacy, such as:
  - out-of-town Buyers
  - first-time Buyers
- Buyers who simply want to be represented by a Buyer's Agent.

## **Lesson 2: Discussing the Benefits of Buyer Representation**

1. Exclusive representation by an Agent dedicated solely to protecting the Buyer's best interest.
2. Advice and recommendations as to the best course of action to pursue in locating and purchasing real estate.
3. Negotiating expertise in the form of a skilled, experienced negotiator.
4. Exposure to all available markets, including listed property through the multiple listing service database, For Sale By Owners, expired or off-market properties and lender repossessions.
5. Dedicated follow-up after a purchase agreement is executed, including advice and recommendations to aid you in obtaining the best available legal representation, financing and insurance protection.
6. The benefit of an up-to-date working knowledge of the entire process from finding property to the closing table.

Be sure to get a Buyer agreement signed to document what services you are promising to deliver to the Buyer-client. Disclosure is not a contract for services. Documenting the arrangement between you and the Buyer-client serves to clarify mutual expectations and place a value or price on your services.

One of your statutory duties is to make sure the Buyer-client has advanced notice of any compensation that could be required and whether such compensation will be shared with another broker who may have a brokerage relationship with another party to the transaction. This includes disclosing any potential commission liability on the Buyers' part because the Seller is unwilling to pay any or only part of the fee referenced in the Buyer brokerage agreement.

**VAR Form 450: Exclusive Right to Represent Buyer Agreement (Standard Agency)**

If you have any questions concerning who must sign the Buyer agreement, and when, please refer to the Appendix 2 DPOR Guidance Document. Of course, your Broker may have stricter or other requirements regarding Buyer broker agreements, so always consult with your Broker.



**VIRGINIA REALTORS®**  
**EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT**  
**(Standard Agency)**



(This is a legally binding contract; if not understood, seek competent advice before signing.)

This AGREEMENT made as of \_\_\_\_\_, by and between \_\_\_\_\_  
 ("Buyer"); and \_\_\_\_\_ ("Broker"), provides:

1. In consideration of the mutual covenants contained in this Agreement, Buyer hereby appoints Broker to represent Buyer in the acquisition of real property. As used in this Agreement, "acquisition of real property" shall include any purchase, option, exchange or lease of property or an agreement to do so. Buyer is retaining Broker to acquire the following specific property or type of property: \_\_\_\_\_.

2. **TERM:** This Agreement shall commence on \_\_\_\_\_ and terminate at midnight on \_\_\_\_\_.

3. **BROKER'S DUTIES:** Broker shall represent Buyer as a standard agent in this brokerage relationship and represent Buyer in a diligent and effective manner to locate property available for purchase and suitable to Buyer. Unless otherwise provided by law or Buyer consents in writing to the release of information, Broker shall maintain the confidentiality of personal information, financial information and other matters identified as confidential by Buyer that is received from Buyer in the course of the brokerage relationship. If Broker is not the listing firm of the seller (the "Listing Firm"), Broker shall represent solely the interest of Buyer in all negotiations and transactions regarding the acquisition of real property, and shall repudiate any agency relationship with the seller unless consented to in writing by Buyer. Broker shall have no obligation to search out such properties beyond those that come to the attention of Broker in the ordinary course of Broker's business. Broker may represent other buyers who may be interested in the same property as Buyer.

4. **BUYER'S DUTIES:** Buyer shall: work exclusively with Broker during the term of this Agreement; comply with the reasonable requests of Broker to supply any pertinent information or personal data needed to fulfill the terms of this Agreement; pay Broker the compensation set forth below; be available during Broker's regular working hours to view properties; consult with Broker before visiting any resale or new homes or contacting any other real estate licensees or property owners to avoid confusion over the brokerage relationships and liability for payment of the compensation due to Broker; and inform all sellers and licensees whom Buyer contacts of Buyer's brokerage relationship with Broker.

5. **COMPENSATION:** Broker is authorized to receive the compensation offered by the Listing Firm to a buyer's broker or paid by a seller, which compensation will be credited against the Fee (defined below) due by Buyer to Broker. For the services rendered by Broker, Buyer agrees to pay Broker a fee (the "Fee") equal to:

- \_\_\_\_\_ % of the gross purchase price of the property acquired by Buyer; **AND/OR**  
 the compensation offered by the Listing Firm or by a seller to a buyer's broker on property acquired by Buyer, but such compensation shall not be less than \_\_\_\_\_; **AND/OR**  
 the sum of \$ \_\_\_\_\_.

The Fee shall be due during the term of this Agreement if Buyer enters into a contract to acquire a property of the type described above through services of Broker or otherwise, or the material conditions of such contract are subsequently met. The Fee shall also be due to Broker if the real property is shown or described to Buyer by Broker during the term of this Agreement and Buyer obtains title thereto within \_\_\_\_\_ days after the expiration of this Agreement unless Buyer has entered into a subsequent buyer brokerage agreement with another real estate brokerage firm. The Fee shall be payable to Broker on the earlier of transfer of title or any action or default by Buyer which results in Buyer's not obtaining title to the property after the material conditions of the contract for the acquisition of the real property are met. Buyer's obligation to pay the Fee shall survive the termination of this Agreement. Any compensation received by Broker from the Listing Firm or seller (including any selling bonus) in excess of the Fee shall be paid to and retained by Broker even though said amount may exceed the Fee. Broker shall promptly disclose any selling bonus to Buyer, but in all events prior to contract ratification. After crediting any compensation received by Broker from the Listing Firm or the seller, Buyer shall be responsible for the balance of the Fee due to Broker. Buyer shall not modify Broker's Fee in any real estate purchase contract.

6. **DUAL/DESIGNATED AGENTS:** Buyer acknowledges that Broker may represent sellers of property as a listing agent, and certain properties listed by Broker may be of interest to Buyer. Buyer authorizes Broker to bring to Buyer's attention any properties listed by Broker which may suit Buyer's needs and hereby instructs Broker to inform Buyer at the time of its representation of the seller. If Buyer elects to view or consider property listed by Broker and to make an offer on such property, then dual agency by the Broker will exist, and Broker must either obtain the written consent of Buyer and Broker's seller client to: (i) assign different licensees of Broker as designated agents to represent Buyer and seller; or (b) act as a dual agent for Buyer and seller in the same transaction. Under Virginia law, designated agents shall not be considered dual agents and shall not be limited in their ability to represent the client to whom they are designated in the transaction. The principal or supervising broker who is supervising the transaction is considered a dual agent of both Buyer and seller, and such broker's ability to represent both clients will be limited. Broker shall not disclose to either client or such client's designated agent any information that has been given to Broker by the other client within the confidence and trust of the brokerage relationship, unless the disclosure is required by law or consented to in writing by the affected party. In dual agency, there is a limitation on Broker's ability to represent either Buyer or seller fully and exclusively. Paragraph 7 of this Agreement contains a disclosure explaining more fully the roles and responsibilities of Buyer, a seller and the agent in a dual agency. Broker shall request Buyer's consent to act as a dual agent if Buyer desires to make an offer on a property listed by Broker and Buyer agrees that before making an offer on any property listed by Broker, Buyer will enter into a written consent to a dual agency on the part of Broker.

**7. DISCLOSURE REGARDING DUAL AGENCY:** If Buyer is shown a property listed by Broker and/or makes an offer on such property, and Broker has not designated agents to represent Buyer and the seller, Broker and all of Broker's licensees will be acting as the agent for both the seller and Buyer in the transaction. In such a transaction, Broker will remain impartial to the seller and Buyer. Buyer agrees that Broker shall not be liable to either party for refusing or failing to disclose information which, in the sole discretion of Broker, would harm one party's bargaining position and would benefit the other party. Broker cannot disclose or advise either Buyer or seller as to (i) the terms to offer or accept in any offer or counteroffer; (ii) the suitability of the property, its condition (other than to make any disclosures as required by law of any licensee representing a seller), or the repairs to make or request; or (iii) any dispute that arises relating to the transaction. If the seller and Buyer do not enter into an agreement for the purchase of the seller's property, such dual agency shall terminate. Buyer acknowledges the implications of Broker's dual agency, including the limitation on Broker's ability to represent the seller or Buyer fully and exclusively. Buyer understands that Buyer may seek independent legal counsel or engage another real estate licensee at Buyer's sole expense in order to assist with any matter relating to a purchase agreement or to the transaction that is the subject matter of a purchase agreement. If Buyer engages legal counsel and/or another real estate licensee, Broker shall: (i) continue to act as a dual agent with the consent of Buyer; or (ii) terminate Broker's representation of Buyer by written notice to Buyer only with respect to the property listed by Broker in which Buyer has made an offer, but in either choice of (i) or (ii) above, Broker shall be entitled to the Fee set forth in Paragraph 5 unless otherwise agreed to by Broker. Provided Broker has acted in accordance with its obligations under this Agreement, Broker shall not be liable for any claims, damages, losses, expenses or liabilities arising from Broker's role as dual agent. Buyer shall have a duty to protect its own interests and should read any purchase agreement carefully to insure that it accurately sets forth terms Buyer wants included in the purchase agreement. If acting as a dual agent, Broker will: treat the seller and Buyer honestly; disclose material facts about the property that are known to Broker as required by law; assist in the preparation of the purchase agreement; work diligently to facilitate the sale and work with the seller and Buyer's settlement agent/attorney to facilitate closing. Broker may also assist Buyer to arrange property inspections, help Buyer compare financing alternatives, and provide information about comparable properties so the seller and Buyer may make an educated decision about the price to be contained in the purchase agreement.

**8. RECORDINGS WITHIN THE PROPERTY:** Prior to photographing, videographing or videotelephoning the property without prior written permission of the owner, Buyer should speak with an attorney. Buyer should be aware that the seller may have a security system that records or allows for remote monitoring of the property, including recording or broadcasting audio. Sellers may be able to listen to conversations in their properties and Buyer should be aware that any discussions of negotiation strategies held in the property may not be confidential. Buyer hereby releases Broker, buyer agent and employees from any liability which may result from any recording in the property.

**9. MISCELLANEOUS:** Buyer acknowledges that Broker is being retained solely as a real estate agent and is not an attorney, tax advisor, lender, appraiser, surveyor, structural engineer, home inspector or other service provider. Buyer has been advised to seek professional advice for any such matters. This Agreement may not be modified or changed except by written instrument executed by the parties, and it shall be construed, interpreted, and applied according to the laws of the Commonwealth of Virginia.

**10. ELECTRONIC SIGNATURES:** \_\_\_\_\_ / \_\_\_\_\_ If this paragraph is initialed by both parties, then in accordance with the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act, or E-Sign, regarding electronic signatures and transactions, the parties do hereby expressly authorize and agree to the use of electronic signatures as an additional method of signing and/or initialing this Agreement. The parties hereby agree that either party may sign electronically by utilizing an electronic signature service.

**11. WIRE FRAUD ALERT.** Criminals are hacking email accounts of real estate agents, title companies, settlement attorneys, and others, resulting in fraudulent wire instructions being used to divert funds to the account of the criminal. Buyer is advised to not wire any funds without personally speaking with the intended recipient of the wire to confirm the routing number and the account number. Buyer should not send personal information such as Social Security numbers, bank account numbers, and credit card numbers except through secured email or personal delivery to the intended recipient.

**12. OTHER TERMS:** \_\_\_\_\_

**BUYER**  
 \_\_\_\_\_  
 Date Buyer  
 \_\_\_\_\_  
 Date Buyer  
 \_\_\_\_\_  
 Date Buyer  
 \_\_\_\_\_  
 Date Buyer

**BROKER**  
 \_\_\_\_\_  
 \_\_\_\_\_  
 By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Date: \_\_\_\_\_  
 Supervising Broker Name: \_\_\_\_\_  
 Supervising Broker Contact Information: \_\_\_\_\_

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**EXERCISE: Buyer Agency Role Play - The Right Way**

Agent Bee Liever: (Strong Voice, standing straight, eyes focused) – So now that you have an idea of how the buying process works and what I can do for you to save you time and energy, let's talk about the Buyer agreement. It lists my duties and obligations to you. It also imposes some obligations for you so that we both have a commitment to making this a smooth process. Did you look it over last night?

Buyer Hugh Hesitant: Yes, but I have a few concerns. What if I feel you are not working for me and I want to terminate this agreement?

Agent: I would hope that if you are not happy with my efforts, that you would let me know so that I could try to correct whatever it is that you feel I am not doing for you. I will do everything in my power to make this a good experience for you.

Buyer: Okay, that was a good answer. How about the fact that I don't want to pay any commission and I do not want to have to pay any differential in commission should the Seller offer less than your required fee. I don't want to come out pocket for this fee.

Agent: You can authorize me to show only those properties where my fee is paid in full by the listing Agent or the Seller.

Buyer: But what about new construction? I know they pay less because I used to work for a builder and they are pretty tight nowadays.

Agent: I can always negotiate for you on the base price to cover any differential. My broker also allows me some flexibility where new construction is concerned if necessary. Do you have any other concerns?

Buyer: No, let's sign and get to work.

Agent: Here is a pen.... And I will make a copy for your records.



## **CASE SCENARIOS FOR BUYER REPRESENTATION**

Read the following case studies and answer the questions about agency relationships and responsibilities following each one. Prepare to share your answers with the rest of the class.

### **CASE #1**

A prospect walks into my open house and is very interested in the property. Once we start to discuss specifics of the house and I learn he does not have an Agent working for him, I have him sign a non-client disclosure stating that I work for the Seller. He is considering making an offer, but he would like to see the two other homes (listed with other firms) that are for sale in the neighborhood for comparison purposes only (or so I believe).

#### **Case 1 Question:**

1. Can I show without a Buyer agreement?

### **CASE #2**

The offer is accepted for the neighbor's house and inspections are performed. Many problems are discovered, and the Seller is unwilling to credit or fix anything. The purchaser decides to terminate the contract. He now decides that he wants to write an offer on my listing where we first met.

#### **Case 2 Questions:**

1. How do I handle this, who am I, and what do I need to have him sign?
2. Can I convert him back to customer?
3. Am I in a dual and what should I do prior to writing an offer? What form do I use?
4. Can I designate someone? Who? And what becomes of the confidential information that I have about both parties?

**CASE #3:**

Buyer would like to put an offer on my listing which he saw at an open house. When I ask if he is represented, he states that his Buyer Agent has never done anything for him and that he has sent a letter to her broker asking for a release due to the fact that she had not performed any services since he signed an agreement with her. He stated that he had found my listing by driving around, found his own financing, and has no real relationship with his "Agent." My Seller is quite anxious to sell.

**Case #3 Questions:**

1. Can I go forward and write the contract for the Buyer knowing that he has sent a letter asking for the termination?
2. If the Agent has breached her duties, can he unilaterally terminate the agreement?
3. Must he wait until it terminates if there is no response from the broker?

**CASE #4**

What if I as an Agent meet a potential Buyer who wants me to represent him, but refuses to sign any agreement because he's had a bad experience before? Can I continue to work with the Buyer? If so, how?

**Lesson 3: Discussing Your Job as A Seller's Representative**

Many salespersons are remiss in discussing agency options in a timely fashion. As with purchasers, Virginia law requires agency to be discussed before we have "substantive discussions about specific properties". (Va. Code Ann. § 54.1-2138) How often have we engaged in fairly specific discussions with a Seller regarding finances or personal property conveyances BEFORE OBTAINING THE LISTING? It is critical to engage the Seller in conversation about the concept of employing our services and whom we represent before the Seller ends up disclosing items that could work to their disadvantage should we not go to work for them.

**Lesson 4: Discussing the Benefits of Seller Representation**

1. Exclusive representation by an Agent dedicated solely to protecting the Seller's best interests.
2. Advice and recommendations as to the best course of action to pursue in pricing and marketing real estate.
3. Negotiating expertise in the form of a skilled, experienced negotiator.
4. Exposure to available Buyer resources, including relocating families, the military, renters, and people using the internet and print media.
5. Dedicated follow-up after a purchase agreement is executed, including advice and recommendations to aid you in obtaining the best available legal representation, resources for inspections, repairs, etc.
6. An up-to-date working knowledge of the entire process from finding property to the closing table.

**VAR Form 400: Exclusive Authorization to Sell**

Navigate to <https://www.virginiarealtors.org/for-members/legal/standard-forms/> and login to access a full PDF copy of VAR Form 400.

**VIRGINIA REALTORS®  
EXCLUSIVE AUTHORIZATION TO SELL****OWNER AUTHORIZATION REGARDING INTERNET**

Internet advertising is one of the ways information concerning real property offered for sale is disseminated to real estate agents and brokers as well as the general public. The property owner has the right to determine whether or not their property information is displayed on the Internet and if so the manner in which it is presented.

Section 7(f) of the Virginia REALTORS® Exclusive Authorization to Sell allows the property owner to authorize or prohibit the display of the property on the Internet. If authorized, it also permits the property owner to limit the display of property reviews and automated estimates of market value on the Internet.

**Owners must initial beside the appropriate responses in Section 7(f).** The OPT OUT OF THE INTERNET section should **only** be completed if the Owner does not wish to have their property address displayed on the Internet or does not wish to have ANY information concerning the property and it's availability for sale published on the Internet. **Otherwise Option A and B should be left blank.**

**Terms and Definitions:**

**Property Reviews/Blogging** – Some web sites allow third parties to publish public commentary or feedback related to a particular property. This type of public online journaling is sometimes referred to as a blog.

**Automated Estimate of Market Value** – Also known as AVM or Automated Valuation Model. An AVM is a computer generated estimate of residential property value that is calculated using computer software models and recent sales of similar homes.

## **Lesson 5: Electronic Signatures**

DocuSign, an electronic signature app, allows you to electronically send legal and secure documents and request a signature, which the signee chooses from a prepared list, without the need for scanning, then emailing or faxing. Once documents are signed and sent back to you, all parties are notified that your documents are securely stored in the cloud. The system also allows you to check document status and send reminders. DocuSign has several options specifically for REALTORS®. ZipForm, the official form software of the National Association of REALTORS®, also includes an electronic signature component. Another software option that is used in Virginia is Authentisign.

See example below of electronic signature option in VAR Form 400.

17. ELECTRONIC SIGNATURES. \_\_\_\_\_ / \_\_\_\_\_ If this paragraph is initialed by both parties, then in accordance with the Uniform Electronic Transactions Act (UETA) and the Electronic Signatures in Global and National Commerce Act, or E-Sign, regarding electronic signatures and transactions, the parties do hereby expressly authorize and agree to the use of electronic signatures as an additional method of signing and/or initialing this Agreement and any addenda or amendments. The parties hereby agree that either party may sign electronically by utilizing an electronic signature service.

**VAR Form 100: Disclosure of Brokerage Relationship for Unrepresented Party(ies)**



**VIRGINIA ASSOCIATION OF REALTORS®  
DISCLOSURE OF BROKERAGE RELATIONSHIP  
IN A RESIDENTIAL REAL ESTATE TRANSACTION  
FOR UNREPRESENTED PARTY(IES)**

Property Address (if applicable): \_\_\_\_\_  
\_\_\_\_\_

The undersigned unrepresented party(ies) do hereby acknowledge disclosure that the licensee \_\_\_\_\_ (Broker or Salesperson) associated with \_\_\_\_\_ (Brokerage Firm) represents only the following party in a residential real estate transaction:

- Seller(s)    **OR**     Landlord(s)
- Buyer(s)    **OR**     Tenant(s)

**SIGNATURE OF UNREPRESENTED PARTY**

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Date                      /                      Signature

**SIGNATURE OF UNREPRESENTED PARTY**

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Date                      /                      Signature

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VAR Form 100 Revised 07/16  
Reviewed 07/16

**VAR Form 103: Disclosure of Designated Agency or Representation**

**VIRGINIA ASSOCIATION OF REALTORS®  
DISCLOSURE OF DESIGNATED AGENCY OR REPRESENTATION\*  
IN RESIDENTIAL REAL ESTATE TRANSACTION**

**Property Address (if applicable):** \_\_\_\_\_  
\_\_\_\_\_

The undersigned do hereby acknowledge disclosure that \_\_\_\_\_  
(Brokerage Firm) represents more than one party in this residential real estate transaction:

Seller(s) and Buyer(s)                       Landlord(s) and Tenant(s)

The undersigned understand that the foregoing dual agent or representative (Broker) may not disclose to either client or such client's designated agent or representative any information that has been given to the dual agent or representative by the other client within the confidence and trust of the brokerage relationship except for that information which is otherwise required or permitted by Article 3 (§ 54.1-2130 et seq.) of Chapter 21 of Title 54.1 of the Code of Virginia to be disclosed.

**The principal or supervising broker has assigned \_\_\_\_\_ (Broker or Salesperson) to act as Designated Agent or Representative for the  Seller OR  Landlord as a (select one below):**

Standard Agent      OR       Limited Service Agent      OR       Independent Contractor

**The principal or supervising broker has assigned \_\_\_\_\_ (Broker or Salesperson) to act as Designated Agent or Representative for the  Buyer OR  Tenant as a (select one below):**

Standard Agent      OR       Limited Service Agent      OR       Independent Contractor

The undersigned by signing this notice do hereby acknowledge their consent to the disclosed designated representation by the licensee.

**SELLER/LANDLORD**

\_\_\_\_\_/\_\_\_\_\_  
Date                      Signature

**BUYER/TENANT**

\_\_\_\_\_/\_\_\_\_\_  
Date                      Signature

**SELLER/LANDLORD**

\_\_\_\_\_/\_\_\_\_\_  
Date                      Signature

**BUYER/TENANT**

\_\_\_\_\_/\_\_\_\_\_  
Date                      Signature

\*"Designated Agency" means representing a client as a standard agent or as a limited service agent. "Designated Representation" means representing a client as an independent contractor.

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VAR Form 103 Revised 07/16  
Revised 07/16

## VAR Form 101: Disclosure of Dual Agency or Dual Representation in a Residential Real Estate Transaction



### DISCLOSURE OF BROKERAGE RELATIONSHIP EXPLANATION TO CONSUMERS



Real estate licensees in Virginia are required by law to make prompt written disclosure of any brokerage relationship to members of the public who are unrepresented. Licensees must also make written disclosures and obtain timely written consents from their clients before entering into other brokerage relationships. The attached form is provided to you to satisfy these requirements and to help you understand the nature of the brokerage relationship of the licensee.

#### THE LICENSEE'S DUTIES

A licensee must have a written brokerage agreement to represent a client and a licensee owes his client certain duties. A licensee who is not representing you in a transaction can nonetheless provide you other valuable information and assistance. However, you should always keep in mind whom the licensee represents in your transaction, and thus to whom that licensee owes the duties described below.

#### WHOM DOES THE LICENSEE REPRESENT?

In any real estate transaction, a licensee may represent the seller, the buyer, or, under certain circumstances, both seller and buyer.

The Seller	A licensee represents a seller via a written brokerage agreement called a listing agreement, in which case the licensee owes his primary responsibilities to the seller. The licensee must disclose his relationship with the seller whenever dealing with an unrepresented buyer. The licensee is also allowed to assist an unrepresented buyer with ministerial duties – such as filling in the blanks of a contract and holding the escrow deposit.
The Buyer	If a buyer desires to be represented by a licensee, then the buyer and the licensee must enter into a written brokerage agreement by which the licensee agrees to represent the interests of the buyer. The licensee must disclose his relationship with the buyer whenever dealing with an unrepresented seller. Furthermore, the licensee may perform ministerial duties for an unrepresented seller – such as delivering offers and counteroffers.
The Buyer and The Seller	A licensee and his firm may represent both the buyer and the seller in a particular transaction, but only with the informed written consent of both the buyer and the seller. A licensee representing both the buyer and seller in a dual capacity is necessarily limited in his ability to represent either the buyer or seller fully and exclusively. The licensee must safeguard the confidentiality of any information obtained within the confidentiality and trust of the brokerage relationship, unless disclosure of such information is required by law. Specifically, the licensee must not tell the buyer that the seller will accept a price lower than the listing price, nor tell the seller that the buyer will pay a price higher than the price offered.
Designated Licensees	Virginia law also permits a principal or supervising broker to designate different licensees affiliated with the broker to represent different clients in the same transaction. Designated agency/representation requires informed written consent from both parties. Unlike the dual relationship discussed in the previous paragraph, these designated licensees represent only the interest of their respective clients, and may therefore represent those interests fully. The principal or supervising broker who is supervising the transaction will be considered dual broker of both seller and buyer. Designated licensees may not disclose, except to their broker, personal or financial information received from the clients during the brokerage relationship and any other information a client requests to be kept confidential, unless required by law to be disclosed or the client consents to its disclosure in writing.

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**VIRGINIA ASSOCIATION OF REALTORS®  
DISCLOSURE OF DUAL AGENCY OR DUAL REPRESENTATION\*  
IN A RESIDENTIAL REAL ESTATE TRANSACTION**

Property Address (if applicable): \_\_\_\_\_  
\_\_\_\_\_

The undersigned do hereby acknowledge disclosure that the licensee \_\_\_\_\_  
(Broker or Salesperson) associated with \_\_\_\_\_ (Brokerage  
Firm) represents more than one party in this residential real estate transaction as follows:

**A. The Licensee represents the**  **Seller** OR  **Landlord**  
as a (select one below):

Standard Agent OR  Limited Service Agent OR  Independent Contractor

**B. The Licensee represents the**  **Buyer** OR  **Tenant**  
as a (select one below):

Standard Agent OR  Limited Service Agent OR  Independent Contractor

\*"Dual Agency" means representing a client as a standard agent or as a limited service agent. "Dual Representation" means representing a client as an independent contractor.

**C. Brokerage Firm disclosure and client acknowledgement of the following (select one):**

**BOTH CLIENTS ARE EXISTING CLIENTS**

Brokerage Firm represents two existing clients in the transaction and the undersigned acknowledge the following:

The undersigned understand that the foregoing dual agent or dual representative may not disclose to either client any information that has been given to the dual agent or representative by the other client within the confidence and trust of the brokerage relationship except for that information which is otherwise required or permitted by § 54.1-2130 et seq. of the Code of Virginia to be disclosed.

OR

**ONE EXISTING CLIENT ONE NEW CLIENT**

Brokerage Firm represents one existing client and one new client in the transaction and the undersigned acknowledge the following:

The undersigned understand:

1. That following the commencement of dual agency or representation, the licensee cannot advise either party as to the terms to offer or accept in any offer or counteroffer; however, the licensee may have advised one party as to such terms prior to the commencement of dual agency or representation;

- 2. That the licensee cannot advise the buyer client as to the suitability of the property, its condition (other than to make any disclosures as required by law of any licensee representing a seller), and cannot advise either party as to what repairs of the property to make or request;
- 3. That the licensee cannot advise either party in any dispute that arises relating to the transaction;
- 4. That licensee may be acting without knowledge of the client's needs, client's knowledge of the market, or client's capabilities in dealing with the intricacies of real estate transactions; and
- 5. That either party may engage another licensee at additional cost to represent their respective interests.

The undersigned by signing this notice do hereby acknowledge their consent to the disclosed dual representation by the licensee.

**SELLER/LANDLORD**

**BUYER/TENANT**

\_\_\_\_\_/\_\_\_\_\_  
 Date      Signature

\_\_\_\_\_/\_\_\_\_\_  
 Date      Signature

**SELLER/LANDLORD**

**BUYER/TENANT**

\_\_\_\_\_/\_\_\_\_\_  
 Date      Signature

\_\_\_\_\_/\_\_\_\_\_  
 Date      Signature

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# REVIEW

In our first activity today, you were asked to write down questions or issues that you were interested in learning more about during the class. Where those questions answered throughout the day? If you need additional clarification about a subject or lesson, this is the time to bring them up to the instructor.

We covered a lot of material in today's class. Before we end, take a moment and write down at least three lessons that you will take back to your home or office.

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# APPENDICES

**Appendix 1: Online Access to the Code of Virginia**

To access the most up to date statutes in the Code of Virginia, visit <https://law.lis.virginia.gov/vacode>.

For statutes specifically addressing the Duties of Real Estate Brokers and Salespersons, visit <https://law.lis.virginia.gov/vacode/title54.1/chapter21/> and read sections 54.1-2130 to 54.1-2146.

This content consistently updated online by the Virginia Code Commission in collaboration with the Virginia General Assembly.

For the Virginia Real Estate Board Licensing Regulations for Real Estate licensees visit <https://law.lis.virginia.gov/admincode/title18/agency135/chapter20/>.

## Appendix 2: DPOR Guidance Document on Necessity for Brokerage Agreements

### Guidance Document on necessity for brokerage agreements

As a means of providing information or guidance of general applicability to the public, the Real Estate Board is issuing this guidance document in order to assist its licensees in understanding the requirements of § 54.1-2137 of the *Code of Virginia*.

To ensure that the Real Estate Board's broker and salesperson licensees comply with § 54.1-2137. **Commencement and termination of brokerage relationships**, the Board directs licensees to review the following information.

The following are relevant excerpts from the *Code of Virginia*:

#### **§ 54.1-2137. Commencement and termination of brokerage relationships.**

....

B. Brokerage agreements shall be in writing and shall:

1. Have a definite termination date; however, if a brokerage agreement does not specify a definite termination date, the brokerage agreement shall terminate 90 days after the date of the brokerage agreement;
2. State the amount of the brokerage fees and how and when such fees are to be paid;
3. State the services to be rendered by the licensee;
4. Include such other terms of the brokerage relationship as have been agreed to by the client and the licensee; and
5. In the case of brokerage agreements entered into in conjunction with the client's consent to a dual representation, the disclosures set out in subsection A of § 54.1-2139.

....

#### **§ 54.1-2137. Commencement and termination of brokerage relationships.**

A. The brokerage relationships set forth in this article shall commence at the time that a client engages a licensee and shall continue until (i) completion of performance in accordance with the brokerage agreement or (ii) the earlier of (a) any date of expiration agreed upon by the parties as part of the brokerage agreement or in any amendments thereto, (b) any mutually agreed upon termination of the brokerage agreement, (c) a default by any party under the terms of the brokerage agreement, or (d) a termination as set forth in subsection F of § 54.1-2139.

....

#### **§ 54.1-2130. Definitions.**

As used in this article: ...

"Brokerage agreement" means the written agreement creating a brokerage relationship between a client and a licensee. The brokerage agreement shall state whether the real estate licensee will represent the client as an agent or an independent contractor.

"Brokerage relationship" means the contractual relationship between a client and a real estate licensee who has been engaged by such client for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate on behalf of a client.

"Client" means a person who has entered into a brokerage relationship with a licensee.

....

"Customer" means a person who has not entered into a brokerage relationship with a licensee but for whom a licensee performs ministerial acts in a real estate transaction. Unless a licensee enters into a brokerage relationship with such person, it shall be presumed that such person is a customer of the licensee rather than a client.

....

"Ministerial acts" means those routine acts which a licensee can perform for a person which do not involve discretion or the exercise of the licensee's own judgment.

....

The Code of Virginia requires a written brokerage agreement when a brokerage relationship, as defined in § 54.1-2130, is created. When a customer becomes a client is based upon the party's intent. A licensee needs to use his judgment based upon a customer's words and actions to make a determination as to when the intent to enter into a brokerage relationship is established and therefore, requires a brokerage agreement. Is the party looking for the licensee to provide advice and counsel requiring the licensee to exercise his judgment or discretion for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate? If so, this would require a written brokerage agreement as these acts don't fall within the definition of ministerial acts. Has the party engaged the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate? If yes, then a brokerage relationship is established and this requires a written brokerage agreement.

Below are some examples of situations which require the licensee to use his judgment to determine the party's intent:

- Many acts may be ministerial or could require a written brokerage agreement depending on the party making the request and his intent. For example, showing a house may be ministerial if the licensee takes the party to see what the typical features are in homes in the market area or to gather information on the market or area. However, if the party asks the licensee to show him real estate because his intent is to have the licensee procure someone who is ready, able and willing to sell, buy, option, exchange, or rent real estate then a brokerage relationship exists requiring a written brokerage agreement.
  - Another example relates to a request for a multiple listing service (MLS) search. If a party requests a licensee to provide MLS search results without the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate then a written brokerage agreement is not necessary. However, if a party requests MLS search results having the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option,

exchange, or rent real estate then a written brokerage agreement is necessary.

- If a party asks the licensee for general information about items such as tax rates, HOA dues, schools or typical features of property in the area, these acts appear to be ministerial. However, if the party asks these questions about specific property because his intent is to have the licensee procure someone who is ready, able and willing to sell, buy, option, exchange, or rent real estate, or if he asks the licensee to provide the licensee's opinion as to those features or properties that have those features, then a brokerage relationship exists requiring a written brokerage agreement.
- Many licensees may perform marketing activities in order to induce a party to engage them for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate. For instance, if a party asks the licensee to provide him with a valuation or analysis of real estate or an MLS search for informational purposes and does not yet intend to engage the licensee to procure a buyer or seller for the real estate, a written brokerage agreement is not necessary. However, if at the time the party asks the licensee to provide the valuation and the party intends to use the valuation or analysis of the real estate for the purpose of having that licensee procure a buyer for the real estate, then a written brokerage agreement is needed.
  - As a further example, a licensee may provide marketing materials and a competitive market analysis to a prospective seller who is interviewing for the purpose of retaining a licensee to sell their property, without the necessity of a written brokerage agreement.

The party's intent can change during the performance of ministerial acts by the licensee. The licensee needs to be aware of when the intent of the party changes from that of customer to client, and get the party to sign a written brokerage agreement before performing any non-ministerial acts for that party. It is important for brokers to have policies in place to guide their licensees, based upon the firm's business practices, in determining when a written brokerage agreement is required and procedures for obtaining such agreements.

**Appendix 3: 2016 VREB Letter regarding “Showing Property”**

**COMMONWEALTH of VIRGINIA**  
 Department of Professional and Occupational Regulation

Terence R. McAuliffe  
 Governor

June 22, 2016

Maurice Jones  
 Secretary of  
 Commerce and Trade

Jay W. DeBoer  
 Director

Dear Licensee,

Two matters recently came to the attention of the Real Estate Board (the board) which it feels are important issues about which licensees need to know. As a result, the board asked staff to provide all licensees with the following information.

First, there seems to be confusion regarding a licensee’s ability to work when his license is expired because the License Look-up feature on the Department of Professional and Occupational Regulation’s (DPOR) website shows a person as active and expired for the first thirty days after license expiration. The board’s law and regulations make it clear a person shall not engage in real estate activities which require a license with an expired license. While a licensee has thirty days past license expiration to meet the renewal requirements without having to pay a reinstatement fee, the license is expired and an individual does not hold a valid current license. Regulation 18 VAC 135-20-140.D states “A licensee may not perform activities defined in §§ 54.1-2100 and 54.1-2101 of the *Code of Virginia* with an expired license. Any real estate activity conducted subsequent to the expiration may constitute unlicensed activity and be subject to prosecution.” (Also see §§ 54.1-2106.1 and 54.-2107 of the *Code of Virginia*) In short, there is NO grace period in which a licensee may practice real estate with an expired license.

Second, the 2016 General Assembly amended §§ 54.1-2132 and 54.1-2134 of the *Code of Virginia* by adding subsections clarifying the need for written brokerage agreements in order to just show properties. The new language states in part nothing in the chapter shall be construed to require a written agreement between a licensee and a prospective buyer/tenant to be executed prior to the licensee’s showing properties to the prospective buyer/tenant. The board wants to provide information on what showing properties may entail.

Showing properties to a prospective buyer/tenant is not merely opening the door and leaving the person(s) unsupervised in the property. Showing a property includes but is not limited to taking the prospective buyer/tenant to the property, walking the individual(s) through the property, and responding to questions or providing information that is of public record; or is included in the listing agreement or description of the property; or does not involve the opinion of, or the use of discretion or judgment by the licensee.

Sincerely,

Real Estate Board