

Kansas Real Estate Brokers and Salespersons CONTINUING EDUCATION

Salesperson & Broker Core: Brokerage Relationships & Misrepresentation

PDH Academy Course Approval #M16688 | 3 CE HOURS

PDH Real Estate

HOW DOES THIS COURSE WORK?

Begin by reading through the course material. Next, answer the final exam questions on the answer sheet found at the beginning of this book. When you have completed the answer sheet you can email, fax, or mail the sheet to us with payment.

You need a 90% or greater to pass the exam. If you pass the exam, you will receive your certificate of completion within 2 business days via email or within 10 business days via first-class mail.

If you fail the exam, you can retake the exam at no charge.

COURSE INTRODUCTION

Welcome to the PDH Academy course *Kansas Salesperson & Broker Core: Brokerage Relationships and Misrepresentation*. This course is designed for real estate brokers and salespersons to review knowledge of brokerage relationships and misrepresentations. The last 30 questions of this course will be the final exam. The final exam will cover the following topics:

1. Brokerage Relationships
 - Seller Agency
 - Buyer Agency
 - Transaction Broker
2. Misrepresentation
 - Innocent Misrepresentation
 - Negligent Misrepresentation
 - Fraudulent (Intentional) Misrepresentation

Please be aware that this course is approved Kansas Real Estate Commission until 12/31/2016.

For questions or concerns contact PDH Academy at (888)564-9098 or at pdhacademy@gmail.com

Salesperson and Broker Core: Brokerage Relationships & Misrepresentation Final Exam (3 CE Hours)

The following 30 questions will be a final exam based on the content from this course. These questions will be graded. A score of 90% will be needed in order to receive credit for this course. If needed, retakes are free of charge.

1. Which of the following is not one of the 6 duties required by the common law of fiduciary:
 - a. Loyalty
 - b. Confidentiality
 - c. Disclosure
 - d. Savings
2. A broker is permitted to represent both the seller and the buyer in the same transaction when:
 - a. The principals are not aware of such action
 - b. The broker is a subagent rather than the agent of the seller
 - c. Commissions are collected from both parties
 - d. Both parties have been informed and agree in writing to the transaction broker representation
3. Which of the following is NOT a type of Agency relationship:
 - a. Seller Agency
 - b. Transaction Broker
 - c. Buyer Agency
 - d. None of the Above
4. A real estate broker's responsibility to keep the principal informed of known material facts about the transaction is the duty of:
 - a. Care
 - b. Disclosure
 - c. Obedience
 - d. Accounting
5. Which of the following applies to a real estate broker acting as the agent of the seller:
 - a. Must promote and safeguard the seller's best interests
 - b. Can disclose the seller's minimum price
 - c. Can accept an offer on the seller's behalf
 - d. Should present to the seller only the highest offer
6. Which of the following applies to a real estate broker acting as the agent of the buyer:
 - a. Must disclose buyer's top price they will pay for property
 - b. Must disclose defects to all parties about buyer's ability to purchase
 - c. Must disclose only material defects the buyer inquires about
 - d. Must only write offers that are full price
7. Disclosure may include:
 - a. Material defects
 - b. Market value
 - c. Deficiencies of buyer's financing
 - d. All of the above
8. How many types of misrepresentation are there?
 - a. 1
 - b. 2
 - c. 3
 - d. 4
9. What is misrepresentation?
 - a. A false statement or nondisclosure of material fact made with the intention of inducing some action by another party.
 - b. An advertisement that does not disclose the brokerage an agent is affiliated with
 - c. An advertisement that does not disclose who the agent is
 - d. Enticement or inducement
10. What is innocent misrepresentation?
 - a. Enticement or inducement
 - b. A representation of a material fact that the real estate agent didn't know to be true or false
 - c. A failure to use reasonable care when ascertaining the truth of a material defect
 - d. Intentionally misleading the party to induce them into a contract
11. What is negligent misrepresentation?
 - a. Enticement or inducement
 - b. A representation of a material fact that the real estate agent didn't know to be true or false
 - c. A failure to use reasonable care when ascertaining the truth of a material defect
 - d. Intentionally misleading the party to induce them into a contract
12. Which of the following is NOT a form of misrepresentation:
 - a. Innocent
 - b. Applied
 - c. Negligent
 - d. Fraudulent

13. What is fraudulent misrepresentation?
- Enticement or inducement
 - A representation of a material fact that the real estate agent didn't know to be true or false
 - A failure to use reasonable care when ascertaining the truth of a material defect
 - Intentionally misleading the party to induce them into a contract
14. Which of the following must occur to prove intentional misrepresentation?
- The representation was made
 - The representation was false
 - The purchaser did not know it to be false
 - All of the above
15. Which of the following must be disclosed during a transaction?
- Any material defect known about the property involved in the transaction
 - Deficiencies in sales contract provisions, buyer's financing that may affect the ability for the buyer to purchase
 - An incorrect market value of the property, any interest or prospective interest the agent has in the buyer of the buyer's business
 - All of the above
16. How many elements make up intentional fraudulent misrepresentation:
- 6
 - 9
 - 5
 - 8
17. If a real estate agent makes a false statement of material fact, this is called _____.
- Discrimination
 - Inducement
 - Enticement
 - Misrepresentation
18. Which of the following does NOT need to be disclosed?
- Incorrect market value of the property, any interest or prospective interest the agent has in the buyer of the buyer's business
 - Any material defect known about the property involved in the transaction
 - The religion of the current owners of the property
 - Deficiencies in sales contract provisions, buyer's financing that may affect the ability for the buyer to purchase
19. True or false? If an agent is aware of rotting in the foundation of the property, the agent is NOT required to disclose this information.
- True
 - False
20. True or false? Under most state laws the real estate agent is obligated to discover facts regardless of whether those facts are favorable or unfavorable to the client's position.
- True
 - False
21. Which of the following is not a reason for termination of Agency:
- Mutual agreement by all parties to terminate
 - Death or incapacitation of one of the parties
 - Imprisonment of one of the parties
 - Expiration of agreement
22. Agency may be terminated for which of the following reasons:
- Death or incapacitation of one of the parties
 - Expiration of Agreement
 - By Court Order
 - All of the Above
23. True or false? A broker is permitted to represent both the seller and the buyer in the same transaction so long as the principals are not aware.
- True
 - False
24. The requirement for a real estate agent to disclose which party they represent is known as _____.
- Expressed agency
 - Implied agency
 - Agency disclosure
 - Subagency
25. When should agency be disclosed?
- At the contract signing
 - At the earliest convenience
 - During the first showing
 - During the listing appointment
26. True or false? Implied agency is always beneficial for a real estate agent.
- True
 - False
27. Which of the following must a buyer's agent do?
- Follow the buyer's lawful instructions
 - Promote the buyer's best interests
 - Disclose material facts to the buyer
 - All of the above
28. _____ means a license holder who represents the principal through cooperation with and consent of a broker representing the principal.
- Subagent
 - Transaction Broker
 - Seller Agent
 - Buyer Agent
29. In Seller Agency the agent is representing the:
- Neither Seller or Buyer
 - Seller
 - Both Buyer and Seller
 - Acting as a Neutral Party
30. In Buyer agency the agent is representing the:
- Both Parties
 - Seller
 - Buyer
 - Neither Seller or Buyer

INTRODUCTION STATEMENT

The 30 questions found at the beginning of this course make up the final exam. The final exam covers the following topics::

- Brokerage Relationships
 - Seller Agency
 - Buyer Agency
 - Transaction Broker
- Misrepresentation
 - Innocent misrepresentation
 - Negligent misrepresentation
 - Fraudulent (intentional) misrepresentation

You need a 90% or greater to pass the exam. If necessary, retakes are free of charge.

BROKERAGE RELATIONSHIPS

In the state of Kansas there are different types of agency. These include:

- Seller agency
- Buyer agency
- Transaction broker (not technically a type of agency)

AGENT RELATIONSHIPS

The Kansas Real Estate Commission has adopted a rule and regulation that prescribes the language describing a seller's agent, a buyer's agent and a transaction broker. This is to be included in a brochure entitled "real estate brokerage relationships."

Each brokerage firm may either obtain a copy of this brochure from the Kansa Real Estate Commission for reproduction and use by its affiliated licensees, or design a brochure that contains the minimum information contained in subsections (a), (b), (c), and (d). If a brokerage firm designs its own "Real estate brokerage relationships" brochure, the brochure may be in a format determined by the brokerage firm and may include the company name, company logo, and an explanation of the firm's brokerage relationships policy.

(a) Seller's agent.

The seller's agent represents the seller only, so the buyer may be either unrepresented or represented by another agent. The seller's agent is responsible for performing the following duties:

- Promoting the interests of the seller with the utmost good faith, loyalty and fidelity;
- Protecting the seller's confidences, unless disclosure is required;
- Presenting all offers in a timely manner;
- Advising the seller to obtain expert advice;
- Accounting for all money and property received;
- Disclosing to the seller all adverse material facts about the buyer that the agent knows; and
- Disclosing to the buyer all adverse material facts actually known by the agent, including the following:
 - Environmental hazards affecting the property that are required to be disclosed;
 - The physical condition of the property;
 - Any material defects in the property or in the title to the property; and
 - Any material limitation on the seller's ability to complete the contract.

The seller's agent has no duty to perform the following:

- Conduct an independent inspection of the property for the benefit of the buyer; or
- Independently verify the accuracy or completeness of any statement by the seller or any qualified third party.

(b) Buyer's agent.

The buyer's agent represents the buyer only, so the seller may be either unrepresented or represented by another agent. The buyer's agent is responsible for performing the following duties:

- Promoting the interests of the buyer with the utmost good faith, loyalty, and fidelity;
- Protecting the buyer's confidences, unless disclosure is required;
- Presenting all offers in a timely manner;
- Advising the buyer to obtain expert advice;
- Accounting for all money and property received;
- Disclosing to the buyer all adverse material facts that the agent knows; and
- Disclosing to the seller all adverse material facts actually known by the agent, including all material facts concerning the buyer's financial ability to perform the terms of the transaction.

The buyer's agent has no duty to perform the following:

- Conduct an independent investigation of the buyer's financial condition for the benefit of the seller; or
- Independently verify the accuracy or completeness of statements made by the buyer or any qualified third party.

(c) Transaction broker.

The transaction broker is not an agent for either party, so the transaction broker does not advocate the interests of either party. The transaction broker is responsible for performing the following duties:

Protecting the confidences of both parties, including the following information:

- The fact that a buyer is willing to pay more;
- The fact that a seller is willing to accept less;
- The factors that are motivating any party;
- The fact that a party will agree to different financing terms; and
- Any information or personal confidences about a party that might place the other party at an advantage;

- Exercising reasonable skill and care;
- Presenting all offers in a timely manner;
- Advising the parties regarding the transaction;
- Suggesting that the parties obtain expert advice;
- Accounting for all money and property received;
- Keeping the parties fully informed;
- Assisting the parties in closing the transaction;
- Disclosing to the buyer all adverse material facts actually known by the transaction broker, including the following:
 - Environmental hazards affecting the property that are required to be disclosed;
 - The physical condition of the property;
 - Any material defects in the property or in the title to the property; and
 - Any material limitation on the seller's ability to complete the contract; and
 - Disclosing to the seller all adverse material facts actually known by the transaction broker, including all material facts concerning the buyer's financial ability to perform the terms of the transaction.

The transaction broker has no duty to perform any of the following:

- Conduct an independent inspection of the property for the benefit of any party;
- Conduct an independent investigation of the buyer's financial condition; or
- Independently verify the accuracy or completeness of statements by the seller, buyer, or any qualified third party.

(d) Statement of representation.

The following statement, in bold-faced type, shall be included in the brochure:

"Do not assume that an agent is acting on your behalf, unless you have signed a contract with the agent's firm to represent you. As a customer, you represent yourself. Any information that you, the customer, disclose to the agent representing another party will be disclosed to that other party. Even though licensees may be representing other parties, they are obligated to treat you honestly, give you accurate information, and disclose all known adverse material facts."

A licensee shall furnish a prospective buyer or seller with the brochure at the first practical opportunity. A licensee is not required to provide a copy of the brochure to a prospective buyer or seller in the following instances:

COURSE INTRODUCTION

The purpose of this course is to teach the ins and outs of brokerage relationships and misrepresentation.

The following topics will be covered:

- Understanding of the different agency relationships and the duties within each
- How your real estate business can avoid the pitfalls of misrepresentation

IMPLIED VS. EXPRESSED AGENCY

When agency is created either through verbal or written agreement, it is called expressed agency. An agency relationship may also exist due to the actions or the behavior of parties involved. This is called implied agency.

Example: Implied agency could be as simple as a customer walking into a brokerage to view a property listed by another brokerage. An agent drives the prospective buyer to see a home. Without having anything in writing, the actions of the parties involved implies agency.

Implied agency can lead to a losing situation for the agent. If an agency relationship can be shown to be intended, then legal responsibilities may be imposed on the real estate professional even without a written agency agreement. This means the agent holds liability without an agreement of compensation or loyalty from the client. The real estate professional may be denied compensation if there is no written agreement.

- The licensee is acting solely as a principal and not as an agent for another;
- The communication from the licensee is a solicitation of business;
- The transaction is regarding the sale of commercial property or the sale of residential property of more than four units;
- The transaction is regarding the sale of property by public auction;
- The licensee is only performing ministerial acts; or
- The customer or client has already received the brochure from the licensee's brokerage firm.

Acknowledgment of receipt of the brochure by the seller and buyer shall be included in any contract for sale. Except for instances when:

- A licensee is providing information through an advertisement or other form of public notice of the licensee's representation of a client,
- A licensee representing a client in a proposed real estate transaction shall disclose the representation at the time of the initial contact with another licensee representing the other party. The disclosure may be made orally or in writing.

Each time a licensee is contacted by another licensee who requests permission to show property to a prospective buyer, the licensee shall inquire whether or not the licensee represents the buyer.

The disclosure of the brokerage relationship between all licensees involved and the seller and buyer shall be included in any contract for sale and in any lot reservation agreement.

Agency Disclosure:

Real estate agents are required to disclose which parties they represent. This is known as agency disclosure. When the client understands the duties associated with each type of agency, this helps them to determine whether to seek their own representation. Mandatory disclosure is not required in every state. However, in the state of Kansas it is required that agency is disclosed at the earliest convenience.

TRANSACTION BROKER

A broker engaged as a transaction broker shall not act as an agent for either party. A transaction broker shall have the following obligations and responsibilities:

- To perform the terms of any written or oral agreement made with any party to the transaction;
- To exercise reasonable skill and care as a transaction broker, including, but not limited to:
 - Presenting all offers and counteroffers in a timely

manner, even when the property is subject to a contract of sale;

- Advising the parties regarding the transaction and suggesting that such parties obtain expert advice as to material matters about which the transaction broker knows but the specifics of which are beyond the expertise of the licensee;
- Accounting in a timely manner for all money and property received;
- Keeping the parties fully informed regarding the transaction;
- Assisting the parties in complying with the terms and conditions of any contract including closing the transaction;
- Disclosing to all prospective buyers or tenants all adverse material facts actually known by the transaction broker, including but not limited to:
 - Any environmental hazards affecting the property which are required by law to be disclosed;
 - The physical condition of the property;
 - Any material defects in the property;
 - Any material defects in the title to the property; or
 - Any material limitation on the seller's or landlord's ability to perform under the terms of the contract; and
- Disclosing to any prospective seller or landlord all adverse material facts actually known by the transaction broker, including but not limited to material facts concerning the buyer's or tenant's financial ability to perform the terms of the transaction;
- Comply with all requirements of this act and rules and regulations adopted hereunder; and
- Comply with any applicable federal, state and local laws, rules and regulations and ordinances, including fair housing and civil rights and rules and regulations.

The transaction broker is not required to disclose to any party to the transaction information relating to the physical condition of the property if a written report regarding the physical condition of the property has been prepared by a qualified third party and provided to the party.

A transaction broker shall disclose to the party any facts actually known by the transaction broker that were omitted from or contradict any information included in a written report described above.

If the transaction broker advised the parties to obtain expert advice as to material matters about which the

transaction broker knows but the specifics of which are beyond the expertise of the transaction broker, no cause of action for any person shall arise against the transaction broker pertaining to such material matters.

In any transaction regarding the sale or lease of real estate other than commercial property or residential property of more than four units, the following information shall not be disclosed by a transaction broker without the consent of all parties:

- That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
- That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
- What the motivating factors are for any party buying, selling, or leasing the property;
- That a seller, buyer, landlord or tenant will agree to financing terms other than those offered; or
- Any information or personal confidences about a party to the transaction which might place the other party at an advantage over the party unless the disclosure is required by law or failure to disclose such information would constitute fraudulent misrepresentation.

In any transaction regarding the sale or lease of commercial property or residential property of more than four units, the following information may be disclosed by a transaction broker unless prohibited by the parties:

- That a buyer or tenant is willing to pay more than the purchase price or lease rate offered for the property;
- That a seller or landlord is willing to accept less than the asking price or lease rate for the property;
- What the motivating factors are for any party buying, selling or leasing the property; or
- That a seller, buyer, landlord or tenant will agree to financing terms other than those offered.

Any information or personal confidences about a party to the transaction which might place the other party at an advantage over the party shall not be disclosed unless the disclosure is required by law or failure to disclose such information would constitute fraudulent misrepresentation.

A transaction broker has no duty to conduct an independent inspection of the property for the benefit of any party to the transaction and has no duty to independently verify the accuracy or completeness of statements made by the seller, landlord, buyer, tenant or qualified third party inspectors.

A transaction broker has no duty to conduct an independent investigation of the buyer's or tenant's

financial condition or to verify the accuracy or completeness of any statement made by the buyer or tenant.

A transaction broker may do the following without breaching any obligation or responsibility:

- Show alternative properties not owned by the seller or landlord to a prospective buyer or tenant;
- List competing properties for sale or lease;
- Show properties in which the buyer or tenant is interested to other prospective buyers or tenants; and
- Serve as a single agent or subagent for the same or for different parties in other real estate transactions.

Information known to a transaction broker shall not be imputed to any party to the transaction or to any licensee within the brokerage firm engaged as a transaction broker.

A transaction broker may cooperate with other brokers or cooperate and pay compensation to other brokers but shall not engage any subagents.

Each broker shall use a transaction broker addendum form (TBA-RES) approved by the Kansas Real Estate Commission to obtain the informed consent of a seller client and a buyer client for the broker to act as a transaction broker, on a contemplated transaction between the buyer and the seller, for the sale or lease of:

- A residential property of four or fewer units.
- Commercial property
- Residential property of more than four units.
- Agricultural land.

Each broker shall use a transaction broker addendum form (TBA-DA) to obtain the informed consent of a seller client and a buyer client for a designated agent to act as a transaction broker, on a contemplated transaction between the buyer and seller.

SUBAGENCY

In rare circumstances, a listing broker may offer "subagency" to other brokerages, which would also represent the seller's interests and owe the seller these same duties. Subagents are obligated to provide the same fiduciary duties to a client as the agent.

A "Subagent" means a license holder who represents a principal through cooperation with and consent of a broker representing the principal. The subagent is not sponsored by or associated with the principal's broker. Subagency is less common today than in previous years. It would commonly occur when a buyer was not represented, but utilized the services of a broker who sold or leased to the buyer a property that was listed by another brokerage firm. It is akin to the contractor-

subcontractor relationship. The subagent acts for the listing broker and, therefore, indirectly for the seller's interest. While a subagent is considered an agent of the principal, the subagent should obtain the consent of the listing agent before attempting to negotiate directly with the principal. Any broker who acts as a subagent should exercise caution so that the buyer is aware of the relationship and is not confused.

Brokerage firm acting as a transaction broker; affiliated licensees; designated agents; rules and regulations.

In the absence of designated agents, a brokerage firm may act as a transaction broker on an in-house transaction with the informed consent of the seller client and the buyer client. The informed consent shall be evidenced by a transaction broker addendum to the agency agreements that shall be signed by the buyer prior to writing the offer and signed by the seller prior to signing the contract.

1. A broker may personally, or through the broker's duly authorized licensed representative, specifically designate, in a written agency agreement one or more affiliated licensees who will be acting as legal agent of the buyer client or seller client to the exclusion of all other affiliated licensees.
2. If a buyer client of a designated agent wants to see a property which was personally listed by the broker, the broker, with the written consent of the seller, may specifically designate an affiliated licensee who will act as legal agent of the seller client to the exclusion of all other affiliated licensees. The written consent of the seller shall contain the name of the prospective buyer and shall acknowledge that the broker shall act as a transaction broker regarding any transaction with the buyer. The written consent of the seller shall be signed prior to presentation of any offer.
3. A designated agent of a seller client shall have the duties and obligations set forth in brokerage relationships brochure. A designated agent of a buyer client shall have the duties and obligations set forth in brokerage relationships brochure.
4. In any transaction involving a designated agent, the supervising broker of the designated agent shall act as a transaction broker unless both buyer and seller are represented by designated agents and the designated agents are supervised by the same branch broker. In that case, the branch broker shall act as a transaction broker. The supervising broker, or branch broker if applicable, may appoint an affiliated licensee to act in the transaction as a transaction broker.
5. A designated agent may disclose to the designated agent's supervising broker, or branch broker if

applicable, and to an affiliated licensee appointed as a transaction broker, confidential information of a client for the purpose of seeking advice or assistance for the benefit of the client in regard to a transaction.

6. If a buyer client of a designated agent wants to see a property owned by a seller client of the designated agent, the designated agent may act as a transaction broker with the informed consent of the seller client and buyer client. The informed consent shall be evidenced by a transaction broker addendum to the agency agreements and shall be signed by the buyer prior to writing the offer and by the seller prior to signing the contract.

TERMINATION OF RELATIONSHIPS

Agency relationships shall commence at the time that the client engages the broker, and shall continue until:

- A transaction is closed according to the agreement of the parties; or
- If a transaction is not closed according to the agreement of the parties, the earlier of:
 - Any date of expiration agreed upon by the parties in the agency agreement or in any amendments thereto; or
 - Any authorized termination of the relationship.

The following reasons may be cause for the termination of an agency relationship:

- Mutual agreement by all parties to cancel the contract
- Death or incapacitation of one of the parties
- Completion or fulfillment of the purpose of the agreement that was created
- Breach by either party
- Expiration of agreement
- By court order ex. Bankruptcy

Except as otherwise agreed in writing, a broker owes no further duties to the client after termination, expiration, or the closing of a transaction according to the agreement of the parties, except:

- To account for all moneys and property relating to the engagement; and
- To keep confidential all confidential information received during the course of the engagement unless:
 - The client permits the disclosure by subsequent word or conduct;
 - Such disclosure is required by law; or
 - The information becomes public from a source other than the broker.

The relationship between a transaction broker and a seller, landlord, buyer or tenant shall terminate when:

- A transaction is closed according to the agreement of the parties; or
- If a transaction is not closed according to the agreement of the parties, the earlier of:
 - Any date of expiration agreed upon by the parties; or
 - Any authorized termination of the relationship.

Except as otherwise agreed in writing, a transaction broker owes no further duties to any party to the transaction after termination, expiration or the closing of a transaction according to the agreement of the parties, except:

- To account for all moneys and property relating to the engagement; and
- To keep confidential all information received during the course of the engagement which was made confidential by request of any party to the transaction, unless:
 - The party permits the disclosure by subsequent word or conduct;
 - Such disclosure is required by law; or
 - The information becomes public from a source other than the transaction broker.

BROKERAGE RELATIONSHIPS CASE STUDY

Knowledge of the duties required within each type of agency is crucial. Without a clear understanding, there is a risk that the agency relationship may be violated. When agency relationships are violated legal action may be taken against the agent and brokerage.

The following case study demonstrates an agency violation.

Columbus v. Mehner: Salesperson Who Acted as Undisclosed Dual Agent Settles Lawsuit for \$200,000

August 1, 2002

An Alaskan court has considered whether a real estate salesperson breached her duty to her client by acting as an undisclosed dual agent.

Bonnie Mehner ("Salesperson") has worked as a real estate salesperson in Anchorage, Alaska for 27 years and currently works at the Prudential Jack White Company, a real estate brokerage. The Salesperson was the listing agent for a home owned by Frank Brown ("Owner"). The Owner was selling his home because his company was relocating him and the company had a relocation agreement with the Owner.

In July 1999, Joseph Columbus ("Buyer") contacted the Salesperson about property which she had listed for sale. Columbus had been working with Chris McAlpine ("Buyer's Representative") of McAlpine Investments in his search for property, but the Buyer's Representative was out-of-town when the Buyer saw the "for sale" sign containing the Salesperson's name. The Buyer arrived at the property with the Buyer's Representative's business card in hand and told the Salesperson that he was working with the Buyer's Representative. The Salesperson agreed to show the Buyer the property, although she said she didn't usually show homes to other people's clients. After viewing the property, the Buyer stated that he didn't like the location and the Salesperson offered to show him other listings she had available.

The following day, the Buyer viewed the same property again in the company of an architect and the Salesperson also showed him other properties, including the Owner's home. The Salesperson never informed the Buyer that she was the listing agent for at least two of the homes they saw that day. After viewing the Owner's house a second time a few days later and after being told that there were other offers pending for the property, the Buyer decided to make an offer. Because the Buyer's Representative was still out-of-town, he contacted another salesperson in the same office, who helped him prepare an offer and then called the Salesperson to present the offer to her. The offer was well below the original listing price. The Salesperson responded by saying that the offer "would not fly" and was also unhappy that the Buyer was still working with the Buyer's Representative's firm, as she testified that she thought the Buyer had become her client by this point.

The Salesperson then called the Buyer directly. The Buyer testified that she was "very angry, scolding," and told him that she expected to receive both sides of the commission from the sale of the Owner's home. The Buyer testified that he had the impression that to make a successful offer for the Owner's property, he would need to make this offer through the Salesperson. The Salesperson also informed the Buyer that the Owner did not have to negotiate the property's sale price, because his employer would make up any difference between the listing price and the sale price, which was not accurate. The Buyer asked the Salesperson how much he should offer for the property, and he was told that the Salesperson could not give him a specific number but that an acceptable bid would be near the full price. The Salesperson also brought up the signing of a dual agency disclosure form for the first time, which the Buyer signed. The Buyer proceeded to make a full-price offer for the property, which the Owner accepted. Eventually, the Buyer and the Buyer's Representative brought a lawsuit against the Salesperson, claiming that she had breached her fiduciary duty to the Buyer and also intentionally interfered with the contract between the Buyer's Representative's and the Buyer.

Following a bench trial, the trial court ruled in favor of the Buyer and the Buyer's Representative, awarding damages to each party. The court first considered when an agency relationship arose between the Buyer and the Salesperson. The court ruled that the Salesperson became the Buyer's agent when he called her on the second day. The court found three separate legal reasons that supported the finding of an agency relationship: implied agency, based on the Buyer's conduct with the Salesperson, even though he did not realize he was creating an agency relationship; the doctrine of apparent authority, because it would appear to a third party that an agency relationship existed, even though the parties had not acknowledged such a relationship; and equitable estoppel, which is a doctrine that disallowed the Salesperson from now denying an agency relationship existed when she testified earlier that she believed an agency relationship was created when the Buyer called her a second time.

Since the court found that an agency relationship existed, the court next looked to see if the Salesperson breached her fiduciary duties to the Buyer. An agency relationship is a fiduciary relationship (or, one with heightened responsibility) that is created when one person (the agent) represents the interests of another person (the principal) in dealings with others. The court made a long list of breaches of fiduciary duties by the Salesperson.

What went wrong?

The most serious breach in this case was the Salesperson's failure to disclose that she was a dual agent (meaning that she was serving as an agent for both sides of the transaction). Because of her failure to disclose this information to the Buyer, he did not know there was certain information she could choose not to reveal to him. Furthermore, the Buyer was unaware that the Seller was responsible for compensating her. Thus, the court ruled that the Salesperson had breached her fiduciary duty to the Buyer.

The court's final decision:

The court also ruled that the Salesperson had violated the Alaskan dual agency disclosure laws. In Alaska, a real estate licensee can only serve as a dual agent after he or she has fully disclosed his or her dual agency status to both parties. The court found that the rationale for this was to help people who were not familiar with a real estate transaction decide whether they were comfortable with the potential conflicts that arise in a dual agency situation. The Salesperson had testified that "it was not practical" to obtain the Buyer's signature on the dual agency disclosure form before showing him every house where she was also listing agent, and waiting until submitting the offer to have the client sign the dual agency disclosure form was the "everyday business" of real estate professionals. The court rejected this argument, stating that the

Alaska statute made it clear that a dual agency must be disclosed at the outset. Because of the conflicts that can arise in a dual agency situation, the court stated that the strict terms of the statute must be followed by the licensee to avoid violating the statute. Since the Salesperson did not come close to satisfying the terms of the statute, the court ruled that the dual agency statute was violated by the Salesperson. Based on the Salesperson's breach of her fiduciary duties to the Buyer and her violation of the dual agency disclosure laws, the court ruled that the Buyer was entitled to recover whatever excessive amount he paid for the property. The court determined this amount to be \$8,760 and so awarded him that amount.

Applying this to your practice:

In some states, dual agency is illegal. In this instance the buyer would have to either be unrepresented or both the buyer and seller would need to sign a Transaction Broker Addendum. This would allow the agent to act as a neutral party on both sides of the transaction.

In this case, the court considered whether the Salesperson intentionally interfered with the contract between the Buyer's Representative and the Buyer. To claim intentional interference with a contract, the following must happen:

- (1) a party must allege that a party knew a valid contract existed between two parties;
- (2) the other party intended to induce the breach of the contract;
- (3) the contract was breached because of the other party's conduct;
- (4) breach caused damage

Here, the Salesperson was clearly told by the Buyer of his relationship with the Buyer's Representative. The Salesperson's conduct when the Buyer made an offer through the Buyer's Representative's firm evidenced an intention by the Salesperson to interfere with the relationship and to cause him to make all offers through her. Even though the Salesperson was motivated by her own economic advantage (a defense to these allegations), she could not use this as a defense because her motives were for an improper objective. The Salesperson knew of the existing relationship with the Buyer and the Buyer's Representative and still tried to capture the full commission. Thus, the court ruled that the Salesperson intentionally interfered with the contract between the Buyer and the Buyer's Representative, and awarded the Buyer's Representative half of the commission that the Salesperson had received from the transaction, which was \$17,520.

When a buyer says they have a buyer agency with another agent, it is mandatory to:

- Disclose you are working for the seller

- Not interfere with that relationship in any way

Finally, the court considered whether the Salesperson was liable for punitive damages. Punitive damages can be awarded when it is proved that a person's conduct "was outrageous, including acts done with malice or bad motives." The court found that while the Buyer's Representative was not entitled to punitive damages, the Buyer was because the Salesperson had acted solely with her own economic interests in mind and not those of her client. The court scheduled a hearing for a determination on the amount of punitive damages that the Buyer was entitled to receive.

MISREPRESENTATION

In this section we will discuss misrepresentation: a common violation that occurs among real estate agents. Misrepresentation can be broken into three categories, which will be elaborated upon in the following sections.

Misrepresentation is a false statement or nondisclosure of material fact made with the intention of inducing some action by another party. Misrepresentation could be as simple as an affirmative statement: "the house does not have termites." To a concealment of facts that is not reasonably attainable knowledge of the other party.

There are 3 types of misrepresentation that will be discussed in the following sections:

- (1) Innocent Misrepresentation
- (2) Negligent Misrepresentation
- (3) Intentional or Fraudulent Misrepresentation

IMPUTED KNOWLEDGE

Before delving into the different types of misrepresentation, it is important to discuss where liability lies in cases of imputed knowledge (the presumption that what one individual within a company knows, everyone within a company knows):

- (1) A client or customer shall not be liable for a misrepresentation or omission by the client's statutory agent or the transaction broker arising out of the agency or transaction broker agreement unless the client or customer knew of the misrepresentation or omission.
- (2) A statutory agent or transaction broker shall not be liable for a misrepresentation or omission by the agent's client or the transaction broker's customer arising out of the agency or transaction broker agreement unless the licensee knew of the misrepresentation or omission.
- (3) A statutory agent or transaction broker shall not be liable for an innocent or negligent

misrepresentation in information provided to the seller or landlord or to the buyer or tenant if the licensee does not have personal knowledge of the error, inaccuracy or omission that is the basis for the claim of misrepresentation.

INNOCENT MISREPRESENTATION

Innocent Misrepresentation - the real estate agent made a representation of a material fact that he/she didn't know to be true or false. The agent had the ability to verify the statement, and the other party suffered damages due to the agent's statement

Example: The agent states: "The fence around the property is the property line." Without verification of this, the agent cannot truly know that to be fact.

INNOCENT MISREPRESENTATION CASE STUDY

Bortz v. Noon: Listing Broker Not Liable for Sales Associate's Misrepresentation to Buyer

May 1, 1999

An April, 1999 decision of the Pennsylvania Supreme Court, Bortz v. Noon, addressed the issue of misrepresentation in the context of a licensee acting as an innocent conduit of information from a third party.

In 1986, Albert Bortz (the "Buyer") entered into a contract with Mr. and Mrs. Noon (the "Sellers") to purchase their home located in Pittsburgh. A salesperson (the "Sales Associate") affiliated with the listing broker, Coldwell Banker Real Estate (the "Listing Broker"), was the selling licensee. The Buyer's lender required that the home's septic system pass a dye test before the closing. The Sales Associate referred the Buyer to a contractor who performed the test. He told the Sales Associate that system failed the test, and she informed the Buyer. Under the contract, the Sellers had the option of repairing the septic system, which they elected to do. They chose another contractor to do the work. After the contractor's work was done, an employee of the title insurance company told the Sales Associate that the system passed the dye test. She conveyed this information to the Buyer and the closing was scheduled.

After the closing, the Buyer learned that the septic system had not passed a dye test; in fact the title company had forgotten to have it tested. Testing revealed that the system could not be repaired. The property had to be connected to the public sewer system, at a cost of over \$15,000. In an equity proceeding, the Buyer sued the Listing Broker, the title company and the Sellers, seeking monetary damages and rescission of the sale. Finding the Listing Broker liable for the Sales Associate's misrepresentation, the

Chancellor ruled in favor of the Buyer, but declined to rescind the sale. The Sellers appealed to the Superior Court, which upheld the lower court decision. Neither of these courts specified on which theory of misrepresentation their finding of liability was based.

Applying this to your practice:

It is important to not rely on any third parties to verify facts, or to verify that work has been completed and is functioning. The agent representing the client needs to do this.

On appeal to the Pennsylvania Supreme Court, the issue was whether the Sales Associate had a duty to ascertain whether the septic system actually had passed a dye test and whether her failure to do so constituted a misrepresentation to the Buyer. The court reviewed Pennsylvania law regarding liability for misrepresentation in-depth, and explained the theories of intentional misrepresentation, negligent misrepresentation, and innocent misrepresentation. It found no evidence that the Sales Associate intentionally misrepresented any facts to the Buyer, nor that she intended to deceive the Buyer by not providing him with copies of the reports, when she herself did not have copies of the reports. While she made an affirmative misrepresentation with respect to the dye test, she did so not knowing the information was false.

As far as negligent misrepresentation, the Pennsylvania Supreme Court stated that it has not recognized this cause of action in connection with a real estate licensee (although lower courts in the state have). It observed that courts in many other states recognize such a cause of action and have found liability where a real estate licensee fails to use reasonable care in ascertaining the veracity of a representation. Liability sometimes is found where a real estate licensee fails to independently verify a fact that the seller represents to the buyer, and which the licensee then passes on to the buyer.

The Bortz court noted that when the events took place, in 1986, the standard of care in the real estate brokerage business did not require a licensee to verify or disclose test results that were not ordered by the licensee and were not part of the sale contract. In this particular situation, the Sales Associate would not have had a reason to know that the title company failed to have the dye test performed. The court stated that the Sales Associate “was not acting as a source of information from the Sellers or other entity with whom she had an agency relationship and which might then trigger a duty to physically transfer the reports to the Buyer and verify the accuracy of statements that were material to the sale transaction.” Instead, she was acting as an “innocent conduit” of information from the title company, an apparently reliable source, to the Buyer. Nothing gave the Sales Associate notice that the information was false, and she did not have a duty to independently investigate.

The court stated that with these facts, imposing a duty on the Sales Associate to investigate the accuracy of the test would place too high a burden on real estate licensees. Therefore, it held that a real estate licensee does not have a duty to perform an independent investigation of a contractor's report, where the licensee did not have an agency or contractual relationship with the third party. The court reversed the lower court's decision, finding instead that the Listing Broker was not liable to the Buyer for the Sales Associate's affirmative misrepresentations.

Negligent Misrepresentation

Negligent Misrepresentation - the real estate agent failed to use reasonable care when ascertaining the truth of a material defect, and the agent has an agency relationship with the party that was harmed.

Example: An agent sells a house to a buyer who stresses their need for peace and quiet. The agent promises the house is very quiet. In reality, the house next door is undergoing extensive, very noisy renovations. Although the agent did not know this, the agent promised that the house was quiet was made without the agent having any reason to believe that this was not the case; the agent simply assumed. This is negligent misrepresentation. Had the agent known about the construction and lied about it however, it would become much more serious fraudulent misrepresentation.

NEGLIGENT MISREPRESENTATION CASE STUDY

Phillips v. Tyler

March 10, 2006

Facts

William L. and Jeanine L. Phillips purchased a house from G. Ronald Tyler and Linda S. Tyler in Wichita during October 1998. The Phillips sued the Tylers for negligent misrepresentation, negligent failure to repair, fraud, and nuisance in May 2003 because of the many defects they discovered in the house.

The defects were apparently from water infiltration in the roof and walls. When the house was constructed, no "kick-out flashings" were installed where the roof terminated against the house's exterior walls, thus allowing water to flow down into the exterior walls. The buyers' negligent failure to repair and nuisance claims were dismissed by the trial court by summary judgment, and the remaining claims were submitted to a jury.

For their negligent misrepresentation claim, the buyers alleged that the disclosure statement signed by the sellers was misleading because it was inconsistent when the sellers first indicated that the roof had

leaked during the Tylers' ownership of the house and that repairs were made but then the document also indicated that the roof had not been "replaced/ repaired" during the Tylers' ownership. In fact, the Tylers had three different roofers make repairs to the roof a total of 10 times between 1992 and when the Tylers sold the house to the Phillips.

The buyers sought damages for cost of repairs, cost to remove mold, and consequential damages for being required to maintain two residences. After finding the sellers at fault only on the negligent misrepresentation claim and no fraud, a jury awarded the buyers \$900,000 as repair costs and \$198,811.70 for the loss of use of their home.

The Tylers appeal, claiming, among other things, that summary judgment should have been granted on the negligent misrepresentation claim since that claim was barred by written contracts signed by the Phillips.

Review

The court found the buyers claim that the fact that repairs, which were required to be made under an amended sales contract, were not made somehow supports the negligent misrepresentation claim. The court also points to the agreement signed at closing requiring the defendants to ensure that repairs be made to the roof as evidence of negligent misrepresentation. But neither of these documents give support to a claim of negligent misrepresentation. Nothing in the documents negate the other provisions requiring the plaintiffs to rely on their own and their inspector's observations regarding the condition of the house.

While the buyers may have a breach of contract claim if the sellers failed to comply with their obligations under the contract, the purchase contract amendment and the contract for roof repairs do not support a finding of negligent misrepresentation.

The court also points out that the buyers' inspection of the roof revealed evidence of previous roof leaks and other water infiltration problems. While the Phillips may not have known the full extent of the previous roof leaks, their inspection did put them on notice that the roof had leaked in the past. Additionally, their inspector's report stated that the roof tiles “are installed such that flashing details are covered & not visible, therefore, inspection is limited.” Thus, the Phillips also knew that their expert's inspection was limited at the time they purchased the house.

The inspection report clearly advises that there is “(e)vidence of past leakage where roofs [sic] terminate against walls (no ‘kick-out’ at ends of flashings.)” And then again:

“11) Exterior insulation finish system (EIFS), also known as ‘synthetic stucco,’ has been installed as a ‘water-barrier’ system (intended to prevent leakage

behind siding). Most major manufactures [sic] now recognize that it is nearly impossible to prevent water from passing behind siding, and now recommended that EIFS be installed only as ‘water-managed’ systems (that allow water to drain out, if it gets behind siding). ‘Testing with an electronic wet-wall detector indicated possible moisture below all roof-to-wall joints and around or below most windows. Potential for hidden dry-rot exists Recommend have further evaluated and repairs made, if needed, by a qualified licensed contractor.’”

Thus, the Phillips knew that there were many potential problems with the house. The Phillips' decision to not require a more detailed test of the roof, coupled with their decision to allow the Tylers to contract for limited liability, prevents a claim for negligent misrepresentation.

Furthermore, while the disclosure statement made by the sellers may have been ambiguous, the disclosure statement did indicate that the roof had leaked and that repairs had been made. Apparently, the Phillips did not seek further information regarding the nature of the leaks or repairs.

INTENTIONAL OR FRAUDULENT MISREPRESENTATION

Intentional or Fraudulent Misrepresentation - the real estate agent intentionally misled the party to induce them into a contract.

There are nine elements that must have occurred to prove liability:

- That a representation was made
- The representation was false
- The representation was material to the transaction
- That the agent made the representation and knew it to be false or did not know it to be true
- That the agent intended the purchaser to rely on it
- The purchaser did not know it to be false
- That the purchaser relied on it as truth
- That the purchaser was reasonable in his reliance;
- That the purchaser reliance caused him injury *

**Fordham Urban Law Journal*

MISREPRESENTATION CASE STUDY

Bowman v. Presley

On 30 September 2005 Richard and Dana Bowman (Buyers) purchased a house in Shawnee, Oklahoma from Michael and Heidi Presley (Sellers) for \$145,000. Linda Presley (Realtor®), a Century 21 Bob Crothers Realty (Broker) sales associate and the mother of seller Michael Presley, acted as the listing and selling agent. The house sold to Buyers was represented as containing 2890 square feet. Buyers give a straightforward reason for buying the house: they wanted a larger home, and Sellers appeared to offer a residence more sizeable than that Buyers then occupied.

Buyers contend the represented square footage of the house not only spurred their desire to buy the home, but also served as the criterion for calculating the \$145,000 purchase price. The house's true size, and whether that size may have been misrepresented to Buyers by Realtor® and Sellers, lies at the very center of this litigation.

Buyers' satisfaction with their newly acquired house ended abruptly when shortly after closing on the home Buyers received a copy of a mortgage appraisal prepared by Grace and Sons Appraisal Service (Grace). The appraisal gave the actual size of the house not as 2890, but rather as 2187 square feet: a difference of 703 square feet below the size represented to Buyers. Following this discovery, Buyers obtained from Grace a copy of another appraisal made by them when seller Michael Presley first purchased the house in 2000. This appraisal also gave the home's size as 2187 square feet. Buyers brought suit against Broker, Realtor®, and Sellers for damages based on allegations of fraud, breach of implied contract and, as against Broker and Realtor®, for violation of the Oklahoma Real Estate License Code.

Broker and Realtor® moved for summary judgment and Sellers likewise sought that disposition shortly afterwards. Movants argued that Buyers' reliance on the representation of size was misplaced, urging instead that prior to purchase Buyers bore a duty independently to determine the property's correct size.

Movants also claimed that Buyers waived their right to sue by signing the purchase contract and closing agreement, the provisions of which are represented as precluding suit against movants. Finally, movants asserted that Buyers suffered no actual damages, regardless of whether the size was in fact misrepresented, because Buyers' mortgage appraisal ultimately valued the home at an amount greater than its purchase price despite the diminished size.

Movants argued that the alleged absence of damages should defeat Buyers' legal claim.

The trial court gave summary judgment to all defendants. The Court of Civil Appeals (COCA),

Division I, affirmed. We granted certiorari to clarify the relative duties of buyers and sellers of real estate and their agents when positive representations are made about the size of property.

The common law, which remains in force unless a legislative enactment expressly states otherwise, provides the elements of actionable fraud:

- A false material misrepresentation,
- Made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth,
- With the intention that it be acted upon, and
- Which is relied on by the other party to his (or her) own detriment.

Fraud is never presumed and each of its elements must be proved by clear and convincing evidence. Though correctly recognizing a genuine issue of fact concerning whether Buyers were deceived by appellees' misrepresentations, COCA erred in affirming summary judgment based upon a perceived lack of damages. Buyers have presented evidentiary materials sufficient to tender a disputed issue of fact with respect to damages.

Resolution:

Buyers of real property may rely on positive representations made by realtors and sellers about the property's size. Representations of the size of real property are statements of material fact, not expressions of opinion, and a buyer need not conduct a separate investigation to ascertain their truth. If the buyer later alleges fraudulent misrepresentation against the realtor or seller, questions of whether the buyer was in fact deceived and suffered detriment because of the misrepresentation must be decided by the trier of fact. A real estate licensee is in such instances also bound by a professional duty to treat all parties with honesty.

In this case the question of damages cannot be resolved based upon the estimations of value contained in the mortgage appraisal alone. An appraisal can give only an approximate value that is perceived by its author. Appraisals merely offer scenarios suggesting what a thing might be worth. The precise value of the thing in litigation must be determined by the trier of fact.

The jury is the sole and final arbiter. An appraisal that antedates the jury's verdict is but an item of evidence, the increased home value indicated by the mortgage appraisal, though probative of damages, is not dispositive of the issues. Neither are the appraisals of square footage in themselves conclusive evidence of damage. Buyers need not explicitly controvert the mortgage appraisal's value estimate to raise a conflicting inference as to damages. Inconsistent appraisals of square footage define this litigation. The fact that two conflicting appraisals emanate from the

same source - Grace, a professional appraiser - only clouds the issues to be considered.

The existence of significantly disparate appraisals of size raises a reasonable inference that appraisals of value might be similarly inconsistent, especially since no real certainty exists about the house's actual size, which will be linked inextricably to its value. Summary judgment is proper only when undisputed material facts support but a single inference that favors a movant's quest for relief. Amid a barrage of warring appraisals of size, appellees may not rely on a single assessment of value taken from a source that has only contributed to the uncertainty to prove Buyers have suffered no detriment.

The fact that Buyers purchased a house advertised as double the size of their former home raises a sufficient countervailing inference suggesting Buyers were at least in some part motivated to purchase Sellers' home because of its greater size. The extent to which this motivation possibly drove towards or even defined the bargain struck by Buyers and Sellers cannot be discerned from the record alone. The question must be resolved by the trier of fact.

COURSE REVIEW

In review, this course has gone through the various types of agency and the duties belonging to each role. You have witnessed the harmful effects of not following through on agency responsibilities. Then, the course walked through the different types of misrepresentation. You were provided with case studies to better understand how misrepresentation can play out in your day to day practice. These examples, guidelines, and principles will help you to run an effective and successful real estate practice.