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Professional Duties Under the Law of Agency: A Comparison of Duties of Brokers and Lawyers

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Introduction:

Most articles that we see dealing with lawyer professional duties and most of the CLE on "ethics" that are available to us are aimed at the ethical rules for and issues faced by litigators and not transactional lawyers. Those rules in the "Texas Disciplinary Rules of Professional Conduct" (called in this paper the "Rules") which do apply to transactional attorney behavior, are very similar to, and seem to be based on, the law of agency.

Research in the law reviews on the application of the law of agency to transactional lawyers is again somewhat frustrating in that for the most part, the writings apply the agency law to litigation related questions such as when a client is bound by a procedural mistake made by the lawyer, when notice of a setting to the lawyer is notice to the client, or when is the client bound by a settlement reached by the lawyer which the client does not approve.

In an effort to better understand the application of the Rules to the activities of transactional lawyers, it seems that a review of the law of agency and the cases which have applied that law to lawyer behavior would be illuminating, and certainly more appropriate to a meeting of real estate lawyers than a normal recitation of the application of the Rules to litigators.

The concept that a lawyer's relationship with a client is one of agent and principal is well established, but not always strictly applied in the litigation context. The rule that a lawyer is an agent of the client goes back to England as early as Bygot v. Belet, 3 Edw. II, Folio 43a (1310), and in the US, the Supreme Court has recognized this rule in Link v. Wabash Railroad Co., 370 U. S. 626 (1962). For a Texas case, see Bar Assn. of Dallas v. Hexter Title & Abstract Co., 175 SW 2d 108 (Tex Civ. App. – Fort Worth 1943) aff'd 179 SW 2d 946 (Tex. Sup. 1944).

The law of agency is also applicable to the relationship of broker and client. A look at those rules may also be instructive in understanding proper behaviors by lawyers involved in real estate transactions.

So let us take a look at the law of agency as it applies to lawyers and brokers in real estate transactions – a hopefully entertaining and educational study in comparison and contrast.

I. Governing Law

A. **Lawyers**.

1. Common law
2. Texas Disciplinary Rules of Professional Conduct ("Rules")

B. **Brokers**.

1. Common law
2. Texas Real Estate License Act ("TRELA")
3. Rules of the Texas Real Estate Commission ("TREC Rules")

II. Formation of the Agency Relationship

A. Formation

1. **Lawyers**. No writing is necessary for the formation of the lawyer/client relationship. The Preamble to the Rules says that "individual circumstances and principals of law external to these rules determine whether an attorney-client relationship exists". Generally that means there is consent of the attorney and client, but that consent may be inferred from circumstances and is a fact issue if contested. For advice on dealing with questions about formation of the lawyer/client relationship, see the two short articles from the Texas Bar Journal attached to this paper as Attachment 1. There is case law to the effect that an attorney may be a "mere scrivener" if he/she just writes down what two parties have agreed to, but we can not advise reliance on such a reading of the law. See In re Blevins, 162 SW3d 415 (Tex. App. Waco 2005). If a lawyer/client relationship is intended, it is best to document that relationship. If the lawyer does not wish to enter into a lawyer/client relationship with someone, it is best to document that non-relationship. Forms for these tasks are part of the State Bar Forms Manual. An index to those forms is attached to this paper as Attachment 2.

2. **Brokers**. No writing is necessary for the formation of the broker/client relationship. The same basic rules with respect to formation of the agency relationship apply to brokers as to lawyers.

B. Rules on Getting Paid

1. **Lawyers.** The Rule on getting paid does not require that a compensation arrangement be in writing, only that the fee not be unconscionable. Rule 1.04(a). The basis of the fee is to be communicated to the client and a statement is made that this will preferably be in writing, but no writing is required. A fee contingent on an outcome must be in writing. Rule 1.04(d). A client's consent to a fee division between lawyers who are not in the same firm must be in writing, but the arrangement itself is not required to be in writing. Rule 1.04(f).

Title search: Professional Duties under the Law of Agency: A Comparison of Duties of Lawyers and Brokers

Also available as part of the eCourse
Professional Duties under Law of Agency: A Comparison of Duties for Lawyers and Brokers; plus Ethics of Negotiation: Are There Any?

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