Chapter 11 Summary
Intermediary Brokerage: Essentials of Intermediary Brokerage

Texas Law of Agency

Beginning in September of 2005, TRELA no longer permitted brokers to act as common law dual agents. Brokers are now required to act as intermediaries when representing more than one party.

To better understand the intermediary duties of a broker, we must first review some common law, subagency, and dual agency history.

Common law systems are the foundation for business and commercial enterprises in the United States. As such, real estate transactions are heavily based on common law and practices.

A subagent is a licensee who provides services to a buyer but actually represents the seller.

As an agent, you must obey a client's instructions. That's only if their instructions are legal and are in accordance with the contract.

An exclusive buyer firm is a broker that represents only buyers of real estate. Exclusive buyer firms never take listings and never represent the seller in a real estate transaction.

A transaction brokerage is one that provides third-party real estate services to buyers and sellers. A transaction broker must remain legally neutral, but can assist the buyer and the seller in a transaction. The transaction broker might be described as a professional coordinator.

Transaction brokers have no fiduciary responsibility towards either party in a transaction.

Transaction brokers have a duty to disclose all known facts that materially affect the value of a property that are not readily observable to the buyer, and must present all offers and counteroffers "in a timely manner."

Texas eventually replaced dual agency with another statutory law that ushered in intermediary relationships.

Section 1101.559(a) of the Texas Real Estate License Act provides that a broker may act as an intermediary between parties to a real estate transaction as long as the broker has the written consent from each of the parties and that written consent states who will pay the broker.

The benefit of intermediary relationships comes when the broker appoints at least one salesperson to represent the seller and another (or other) salesperson to represent the buyer. This is called intermediary with appointments.

The broker may appoint one or more agents to represent the seller and one or more agents to represent the buyer, but normally there is one on each side of the transaction.

An Intermediary Relationship Notice will inform clients that this intermediary relationship is occurring.

There is one restriction to intermediary with appointments. It is about confidentiality. In many cases, neither one of the agents will have information about the seller's lowest selling price or the buyer's highest offer price, but if they do, it must not be shared.

If a licensee has some doubt as to what is confidential and what is not, what can be shared and what cannot be shared, the licensee must go to the broker. This way, the broker, the sales person, and the client will all be on the same page, or at least will be able to find a way to solve the differences that they have in the thought process.
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The broker may not be available when the appointment process needs to take place. If that is the case, the salesperson working with both the buyer and the seller would have to avoid giving advice and opinions until the broker can make appointments.

When intermediary became law it was decided that when appointments took place that the broker could never be one of the people that would be appointed. The reason for this is that the broker would be favoring one side over the other if he or she was on only one side of the transaction. Therefore, the broker stays on both sides of the transaction by not giving advice and opinions to either party.

Some brokers have decided that intermediary relationships are just too complicated for them, so they have decided to try to practice non-agency. The problem that they have is that no laws have been passed in Texas yet that allows this type of real estate practice. The Texas Real Estate Commission has decided that the license act is agency law and someone has to be represented.

This intermediary relationship has affected brokers more than it has anyone else with a real estate license. This is especially true of those brokers who have small offices. The broker may feel that he or she needs to continue to practice real estate on a day-to-day basis so that the broker can be sure that the income will be high enough to cover the overhead of the office.