
What are the Triggers of Agency?

When Should the Representation Agreement be Signed?

Most REALTORS® have no problem understanding when to get a Seller Representation Agreement signed. It's typically signed before you start advising the client or marketing the property. However, with the Rule 43 change that requires written service agreements with all clients, there are questions about what triggers agency with a buyer and when the Exclusive Buyer Representation Agreement (EBRA) should be discussed and signed. For example:

"I've got an appointment with a potential buyer client. Do I have to have an EBRA signed before showing a property?"

The short answer is no! Read on to understand the reasons why and which situations do signal the need for the EBRA.

It is often easier to understand what does NOT trigger agency than to decide those situations where the agency line may be unintentionally crossed. Examples:

- At a trade show booth, you describe to a consumer which elements in a condominium complex are common property. This is information – not agency.
- A consumer calls you about a listing and asks questions that require factual answers (price, age, number of bedrooms). Again, this is the provision of information - not agency.
- At a buyer information session, you speak on wise buying tips and answer questions from the audience. You are not creating agency relationships with the people attending your session.
- A seller or buyer wants to know what is happening in a certain market area. You agree to provide a CMA that shows activity in the neighbourhood. This is information – not agency.
- A consumer drops into an open house you are holding on your listing. They are not interested in this particular house, so you mention a few other possibilities. This is not agency.

The trigger for an agent/client relationship (and for getting the EBRA signed) is when agency duties take over from an informal and casual information exchange. This includes situations where the buyer begins to share information that is confidential or you start to offer advice specific to the buyer's needs. In both cases, you are taking on agency duties.

Understanding the difference between an agent's duties to a client compared to responsibilities owed to a customer will help you recognize when a relationship with a buyer is moving from customer to client. Some examples are undivided loyalty, confidentiality and full disclosure.

Undivided loyalty is an obligation owed by an agent to a client. This requires a REALTOR® to act in the client's best interests above all other parties. If you have a customer relationship with a buyer, you may notice signals that the buyer is expecting you to act in their best interests. Quite often a buyer who is a customer actually expects agency representation and will demonstrate that in their requests.

Scenario:

You are known to specialize in a specific neighbourhood and receive a call from potential buyers who are aware that you are active in the area. You agree to show them a property, hoping to establish a rapport that may lead to a buyer consultation meeting and a signed EBRA. They like the property but need their parent's approval. They say, *"Don't show this to anyone else until our folks can see it."* The consumers are unaware of the impact of this request, but it tells you they are expecting you to hold their interests above that of others. This means they are asking for agency duties and have opened the door for you to discuss the EBRA and how it will establish an agency relationship.

Confidentiality is an important fiduciary obligation of an agent to a client. It means the agent has a duty to maintain client confidentiality and not share a client's confidential information with anyone without their permission. This duty is so important that it continues even after the agency relationship ends. This means you may never divulge confidential information such as the client's financial position, family makeup, motivation, personal contact information, etc. Consumers can be unaware of what the real estate industry considers confidential and can blurt out such information in the most casual of conversations.

Scenario:

While at the pub with your brother, you meet your brother's co-worker, Ben. Ben tells you he is excited about his recent job promotion because now the household income has reached \$120,000 per year – the amount the family has needed to buy in their dream neighbourhood. You recognize that this is confidential information. Your best course of action is to advise Ben that you'd like to discuss his dream home with him, but he should not tell you his confidential information until you both agree that you will represent him. Agency representation means you are obligated to keep his confidences.

Full disclosure is an agent's requirement to inform the client of information relevant to the client's decisions or to the relationship between the agent and client, such as any conflicts of interest you may have. The exception to this is the disclosure of confidential information from another client or past client, which must always be kept confidential.

Scenario:

Ben is not your client but has told you confidential information. You may be required to disclose Ben's information to one of your clients if it is relevant to that client. This is called full disclosure, another duty of an agent to a client.

Consider the situation where Ben becomes interested in one of your listings or is competing with one of your buyer clients. If being aware of Ben's information will further your client's interests, your agency responsibilities will require you to tell your client Ben's information.

This illustrates a key benefit of the Exclusive Buyer Representation Agreement to a buyer who becomes a client. As a client, they will:

- 1) Have the opportunity to learn relevant information the REALTOR® is not obligated to disclose if they are a customer and not a client.
- 2) Benefit from an agent's obligation not to disclose their own confidential information.
- 3) Benefit from you providing the duties of agency.

Customer Status obligations as described in RECA's Customer Acknowledgement form illustrate how few obligations a REALTOR® has to a customer. Obligations to the Customer are limited to:

- (a) exercising reasonable care and skill in relation to the activities outlined in clause 6 (*note: this clause refers to other services offered, but those services are optional*);
- (b) not negligently or knowingly providing the customer with false or misleading information;
- (c) holding all monies received in respect of the transaction in trust in accordance with the provisions of the Real Estate Act; and,
- (d) complying with the provisions of the Real Estate Act and its regulations, and the rules and bylaws of the Real Estate Council of Alberta

Scenario:

You are working with a buyer, Annie, who is reluctant to make any kind of commitment to you. You have reviewed the Consumer Relationships Guide and Annie has chosen to sign the Customer Acknowledgement form. This means you must be honest in your communications, do a reasonable job and comply with provincial regulations. That's it. Any other services you choose to offer Annie are at your option. If you find that Annie is asking for services that come under agency duties, review the Consumer Relationships Guide again and tell Annie that that if she want those types of services, it is time to discuss the EBRA.

Caution: Actions speak louder than words. If you are working with a customer and your actions are those of an agent, you cannot later claim that the buyer was just a customer and not a client. You may be just as accountable as you would be if you formalized the relationship through an Exclusive Buyer Representation Agreement. This is implied agency and you will not be able to claim that the absence of a formal agreement means you were not acting as an agent.

Implied Agency:

While written service agreements with clients are required (as of July 1, 2014), it is not necessarily the piece of paper that creates agency. Implied agency is one where the actions of the parties create the relationship. Implied agency can occur unintentionally or accidentally.

Most people will agree that real estate is a “people business” and most REALTORS® like working with people and helping them reach their real estate dreams. This willingness to help can often lead to implied agency.

Scenario

A consumer calls you on a property posted on your company website and asks questions that require factual answers (price, age, number of bedrooms). (Again, this is the provision of information - not agency.) You want to get a face-to-face appointment with this consumer and begin to help the caller by giving advice as to how their offer should be written or on what offering price they should start with. The buyer could reasonably think that your advice means you are acting in their interests. To act in someone’s interests is to demonstrate loyalty. Loyalty is an agency duty, therefore this is implied agency.

Triggers for the timing of the Exclusive Buyer Representation Agreement are not so difficult if you think about the types of things you would willingly do for a loyal client. When a relationship with a buyer has progressed to the point where you want to offer those services and know they would benefit from the services, bring forward a discussion on agency with the buyer. Another indication that agency should be discussed comes from the requests the buyer is making. If you need to increase your service levels and act as an agent to satisfy those requests, then the timing is right for the Exclusive Buyer Representation Agreement.
