Module Six

Brokerage Relationships & Disclosures

Student Learning Objectives

After completing this module you should be able to:

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• describe provisions of the Brokerage Relationship Disclosure Act and recite exemptions from the Act;
• distinguish between transaction broker, single agency and no brokerage relationship;
• be familiar with the concept of “designated sales associate” in nonresidential sales and the requirements for establishing the status;
• describe agency relationships and understand fiduciary duties; and
• describe the required content and format of the various disclosure documents;

History & Purpose

In 1993 by the Florida Legislature passed the Brokerage Relationship Disclosure Act which requires specific disclosures be provided to members of the public. Incorporated into Chapter 475, F.S. and specified by rules of the Florida Real Estate Commission, the relationship between a broker and a broker’s employer in both residential and non-residential real estate transactions has been defined. Alternative relationships are allowed when providing brokerage services and the law specifies appropriate disclosures that must be utilized when the broker is operating under each alternative.

Definitions

Chapter 475 defines the following terms:

• A transaction broker is a broker who provides limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent. [475.01(1)(l), F.S.]
• A single agent is a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction. [475.01(1)(k), F.S.]
• A principal is the party with whom a real estate broker has entered into a single agent relationship. [475.01 (l)(h), F.S.]
• A customer is a member of the public, either a buyer or seller of real property, who is not a principal as defined above. Nothing in Florida law states that a customer must be represented by a real estate licensee. Customers may represent themselves, if so desired. Anyone not represented in a single agency relationship is a customer. [475.01(1)(d), F.S.]

Notice requirements

All residential transactions must include use of the disclosure forms specified in Chapter 475, F.S. Disclosures serve to notify consumers of the role of the broker.

A residential transaction is defined as:
• The sale of any improved residential property of four units or less;
• Unimproved property intended for four units or less;
• Agricultural properties of 10 acres or less;
• Leases with options to purchase all or a portion of improved property of four or fewer residential units; and
• Dispositions of business interests involving property of four or fewer residential units.

Disclosure requirements do not apply when:
1. A licensee knows that a potential seller or buyer is represented by another broker acting as either a transaction broker or as a single agent; or
2. When an owner is selling new residential construction units built by the developer and the circumstances or setting should reasonably inform the potential buyer that the licensee is acting on behalf of the owner. A potential buyer visiting a model home center and discussing homes for sale with an on-site sales representative would be an example.

A written disclosure specifying the nature of the relationship a broker has with a member of the public, and the duties inherent, is required when a broker is acting either as a single agent or is working with a customer that has refused representation.

Written disclosures are not required in nonresidential real estate transactions. Disclosure is required but may be provided verbally or in writing at the option of the broker.

Disclosure exemptions

The following situations are exempt from written disclosure requirements:
• Nonresidential transactions;
• The rental or leasing of real property, unless an option to purchase all or a portion of the property improved with four or fewer units is given;
• A bona fide “open house” or model home showing that does not involve eliciting confidential information, the execution of a contractual offer or an agreement for representation, or negotiations concerning price terms, or conditions of a potential sale;
• Unanticipated casual conversations between a licensee and a seller or buyer which do not involve eliciting confidential information, the execution of a contractual offer or agreement for representation, or negotiations concerning price, terms, or conditions of a potential sale;
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- Responding to general factual questions from a potential buyer or seller concerning properties that have been advertised for sale;
- Situations in which a licensee’s communications with a potential buyer or seller are limited to providing general factual information, oral or written, about the qualifications, background, and services of the licensee or the licensee’s brokerage firm;
- Auctions;
- Appraisals;
- Dispositions of any interest in business enterprises or business opportunities, except for property with four or fewer residential units.

A potential customer can choose representation and establish an authorized brokerage relationship by executing a separate and distinct disclosure document, the “Single Agent Notice.” This disclosure notice can be included as part of another document such as a listing agreement or agreement for representation. A customer may choose not to be represented, in which case the broker must provide the customer with a separate “No Brokerage Relationship” disclosure form.

If a brokerage firm elects to incorporate the “Single Agent Notice” or the “No Brokerage Relationship” form into listing or representation agreements, the law requires specific language and formatting for each of the required disclosures. The brokerage firm must ensure that all such documents conform to requirements of the disclosure law.

Authorized brokerage relationships

**Transaction broker** – Chapter 475, F.S. presumes a broker is acting as a transaction broker therefore no written disclosure is required. If a member of the public wishes to be represented, or refuses representation, disclosure as discussed previously would be required.

**Caution:** A specific relationship cannot be imposed on a customer! If a customer demands service or representation beyond that offered, and the licensee cannot comply due to policies of the brokerage firm, the licensee must withdraw from the transaction! For example, if a brokerage firm’s policy is to act solely as a transaction broker, and a customer demands representation as a single agent, the licensee must withdraw from the transaction.

The role of a transaction broker is to provide limited representation to a buyer, a seller, or both in a real estate transaction. Limited representation allows a licensee to facilitate a real estate transaction by working with both the buyer and the seller equally.

The broker has no fiduciary duties to either party and neither the buyer nor the seller is responsible for the actions of the broker. When customers accept the broker’s role as a transaction broker, they give up the right to the broker’s undivided loyalty. However, the transaction broker may not represent one party to the detriment of the other.

A transaction broker has a duty not to discuss price other than the price quoted in a listing, motivation of either party to the other, financing terms, or other information a party deems confidential which may harm that party’s bargaining position. [475.278 (2)(a), F.S.]
CAUTION: Civil law allows a member of the public to assume the role a professional is in based on his or her words and actions, rather than on the strength of any disclosure or forms that may have been used or discussed. A transaction broker must speak and act in a way that maintains a careful balance between the parties to avoid any impression that a single agency has been created.

Single agent – An agency relationship is created when a broker accepts employment under a single agency agreement. The single agency relationship must be disclosed in a written agreement. In a single agency relationship, the employer becomes the principal, who authorizes the broker as agent to perform certain services on his or her behalf. A sales associate or broker associate is registered with the broker as the broker’s agent and is never an agent of the broker’s principal.

The party the broker does not represent as an agent, and with whom the broker attempts to be successful in achieving the purpose of his or her employment, is the broker’s customer.

A broker may represent a seller or a buyer. As an agent of the principal, the broker is obligated to attempt to obtain the best price and terms possible for the principal. If the broker represents a seller, the broker must attempt to obtain the highest price possible; if the broker represents a buyer, he or she must attempt to obtain the lowest price possible. Any attempt to represent both parties to a transaction would create an illegal dual agency. [95.11, F.S.][475.01, F.S.]

The single agency relationship is the only one that establishes a fiduciary relationship. The fiduciary relationship legally allows the seller or buyer as principal to place trust and confidence in the broker as his or her agent. An agent has fiduciary duties to his or her principal imposed by law; these duties are not a matter of contract or compensation. [475.01(1)(f), F.S.]

The fiduciary duties owed by a broker to the principal are:

- **Obedience** — An agent must obey all legal instructions of the principal. If an agent cannot comply with the legal instructions of the principal, the agent must withdraw from the relationship. If a principal gives an illegal instruction, the agent should advise the principal that he or she is unwilling to proceed. The agent must withdraw from the transaction if the principal persists.
- **Loyalty** — An agent is required to act in the best interest of the principal. An agent cannot place the interests of anyone above those of the principal. A broker has a duty to obtain the most favorable price and terms on behalf of his or her principal.
- **Disclosure** — An agent is required to report any fact, report or rumor to the principal that may affect his or her decision. The principal does not have to verify statements made by the broker. The principal may rely upon all material statements made by the broker.
- **Confidentiality** — An agent is required to keep confidential any harmful information received from the principal. Any such information the broker learns about the principal may not be disclosed, even after the relationship ends. Confidential information obtained by an agent must remain so for the life of the agent. However, information obtained during an agency relationship may be used for the broker’s benefit if no harm results to the principal. Only personal information about the principal is confidential. Material defects in a property are not confidential and must be disclosed to all parties.
• **Accountability** — An agent is required to account for all money and property that the agent comes into possession of. An agent must account for all documents such as deeds, title policies, abstracts, and mortgages belonging to others.

• **Reasonable care, skill, and diligence** — Licensed professionals are held to a higher standard of conduct than members of the public. Licensees must investigate all aspects of a transaction before allowing a principal to proceed.

If an agent breaches fiduciary duties owed to his or her principal, the principal can bring civil action against the agent for damages. Such violation may also be seen as a criminal violation of F.S. 475 and bring an action by the state’s attorney general. The licensee is also subject to potential disciplinary action by the FREC.

A form, titled “Single Agent Notice,” must be completed before, or at the time of, entering into a listing agreement or agreement for representation.

When incorporated into other documents the required notice must be of the same size type or larger as other provisions of the document. It must be conspicuous in its placement so as to advise customers of the duties of a single agent, except that the first sentence of information must be printed in uppercase and bold type. Duties of a single agent must be fully described and disclosed in writing either as a separate and distinct disclosure document or included as part of another document such as a listing agreement or other agreement for representation. [475.278 (3)(b)(1), F.S.]

It is not necessary to list the names of every associate on the Single Agent Notice form; instead, you may use the words, “and its’ Associates.” [475.278 (3)(b)(1), F.S.] (See Single Agent Notice form, Chapter One, Page 21)

**Transition to transaction broker** – Transition from one role to another may become necessary when a broker has been employed as a single agent by a seller and is subsequently employed by buyer as a single agent. If the buyer becomes interested in the seller’s property the broker would have two principals, which would be an illegal dual agency. A broker can both list and sell a property in what is called an “in-house transaction.” The broker cannot, however, be an agent for both parties. Transition from single agent to transaction broker would resolve this conflict.

The authorization to change roles can be obtained early in the transaction and is not required to be repeated at the point an in-house transaction seems possible. Both seller and buyer could be alerted to this possibility at the time they enter into a single agency relationship with the broker. If the parties agree, they may sign or initial the “Consent to Transition to Transaction Broker” form at that time, allowing the broker to transition in the relationship should this situation develop.

Each party must understand the role of the broker. A party is entitled to a different level of representation when the broker is a single agent than when the licensee is a transaction broker. In this relationship, the principal has agreed to become a customer rather than a principal. It is not necessary for a licensee to remind the parties at the time of the transition from a single agent relationship to a transaction broker relationship. However, a verbal disclosure at the point of transition is recommended to avoid possible problems later.
Caution: A single agent that has come into possession of confidential information may not use or disclose this information to anyone for the rest of his or her life. Transition from one role to another does not remove the confidentiality created under the fiduciary relationship.

A single agent relationship may be changed to a transaction broker relationship at any time during the relationship between an agent and principal, provided the agent gives the disclosure required and the principal gives his or her consent before a change in the relationship occurs. This transition disclosure must be in writing to the principal either as a separate and distinct document or included as part of other documents such as a listing agreement or other agreement for representation. If the principal refuses to initial or sign the form consenting to the broker’s transition, the broker must continue to act as a single agent.

When incorporated into other documents the required notice must be of the same size type, or larger, as other provisions of the document. It must be conspicuous in its placement so as to advise customers of the duties of limited representation, except that the first sentence of the information must be printed in uppercase and bold type. [475.278 (3)(b)(2), F.S.] (See Consent to Transition to Transaction Broker Notice, Chapter One, Page 21)

No brokerage relationship – The duties a real estate licensee owes to a customer with whom the licensee has no brokerage relationship are:
- Dealing honestly and fairly,
- Disclosing all known facts materially affecting the value of the residential property which are not readily observable to the buyer, and
- Accounting for all funds entrusted to the licensee.

Duties of a licensee who has no brokerage relationship with a buyer or seller must be fully described and disclosed in writing before the showing of property. When incorporated into another document the notice must be of the same type size or larger as other provisions of the document. It must be conspicuous in its placement so as to advise customers of the duties of a licensee that has no brokerage relationship with them, except that the first sentence of information must be printed in uppercase and bold type.

When working in a no brokerage relationship, a broker may provide specified services for a fee. Care must be taken not to confuse or mislead the customer by inappropriate words or acts that could suggest the licensee has assumed a role different than that originally agreed to. A licensee can create an implied agency that would impose fiduciary duties on the broker and lead to potential civil damages.

The “No Brokerage Relationship” form is not required to be signed or initialed, although licensees should note the date, time and place at which the disclosure notification to the customer occurred. A copy of this disclosure form should then be retained in the broker’s transaction file as evidence that the disclosure was provided. (See No Brokerage Relationship form, Chapter One, Page 22)
Nonresidential sales

Licensees involved in nonresidential sales must choose to operate as a transaction broker, single agent, or with no brokerage relationship. A significant departure is allowed in the law for brokerage offices in nonresidential sales transactions.

If the seller and buyer each have assets of $1 million or more, the broker may, at the request of the parties, designate sales associates to act as single agents for the different customers in the same transaction. One or more sales associates, each titled “designated sales associate,” may be designated to act as agents for the seller, and one or more may be designated to act as agents of the buyer.

Although this is technically a dual agency that would otherwise be illegal, this is allowed in nonresidential transactions. The broker acts to assist the sales associates and be available to give advice. Any harmful information gained by the sales associates or the broker is considered confidential and may not be used to the detriment of either party.

This relationship must be disclosed in writing to both parties using specific language provided in the law describing the duties and obligations of the broker. Both parties must sign the disclosure and confirm their assets meet the required threshold. [475.272, F.S.]
Progress Questions: Module Six

1. Which activity is NOT exempt from the requirement to provide written disclosure?
   a. a nonresidential transaction
   b. showing property to a party that is not being represented
   c. a bona fide “open house” or model home showing that does not involve eliciting confidential information, the execution of a contractual offer or an agreement for representation, or negotiations concerning price terms, or conditions of a potential sale
   d. responding to general factual questions from a potential buyer or seller concerning properties that have been advertised for sale

2. A licensee working with a customer under a no brokerage relationship has the following duties with the EXCEPTION of
   a. Dealing honestly and fairly.
   b. Disclosing all known facts materially affecting the value of the residential property which are not readily observable to the buyer.
   c. Limited confidentiality.
   d. Accounting for all funds entrusted to the licensee.

3. A transaction broker
   a. is an agent of both parties.
   b. has fiduciary duties to the seller.
   c. has fiduciary duties to the buyer.
   d. provides limited representation to both parties.

4. Which fiduciary duty would a broker breach by failure to advise a principal regarding the value of the owner’s property prior to accepting a listing?
   a. disclosure
   b. loyalty
   c. accounting
   d. obedience

5. A broker has appointed two sales associates to act as agents in a nonresidential transaction, one for the seller and one for the buyer. Which is correct?
   a. This is an illegal dual agency.
   b. The sales associates are referred to as designated sales associates.
   c. Buyer and seller must have combined assets of $1 million.
   d. The FREC will revoke the licenses of the broker and both sales associates.