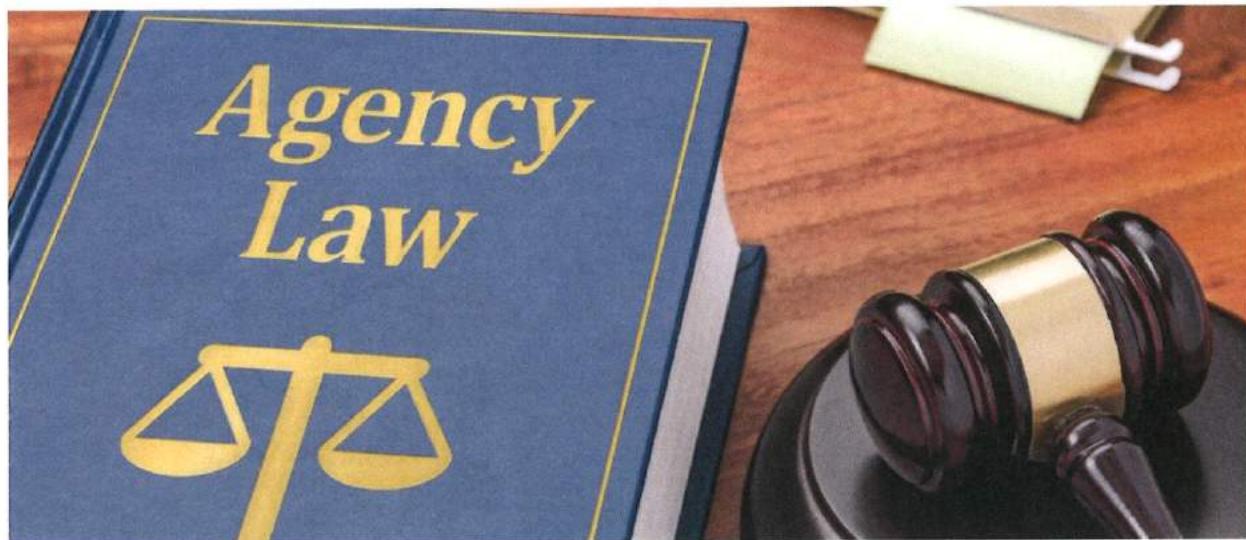


Chapter 2



Agency Law

Chapter 2 Goals:

- Understand the role of the agent, principal, and the agency dynamic
- Recognize the different types of agents
- How agencies are created
- Learn about the agency disclosure forms
- Learn about the fiduciary duties of the agent
- Learn about the liabilities of agents and principals
- How to terminate an agency

Chapter 2: Agency Law

This chapter is all about agents: the different types, what they do, and how they are licensed. It will also explore the concept of agency, including the different types that exist and the types of authority these agreements grant agents.

Key Terms

agency	dual agency	ostensible agency
agency agreement	employee	power of attorney
agency by estoppel	equal-dignities rule	Prepaid Rental Listing Service (PRLS) license
agency coupled with an interest	estoppel	principal
agent	express agency	ratification
broker	express authority	respondeat superior
broker's license	general agent	restricted license
consumer recovery fund	implied agency	special agent
customary authority	implied authority	
	independent contractor	subagent

Agents

An Introduction

An **agent** is a licensed professional who has the legal right to represent a principal in real estate transactions (California Civil Code 2295). A **principal**, or client, is any party that uses an agent in his or her negotiations with a third party. Agents can represent buyers, sellers, and renters in the buying, selling, transferring, or renting of real estate in return for a commission.

General Agent

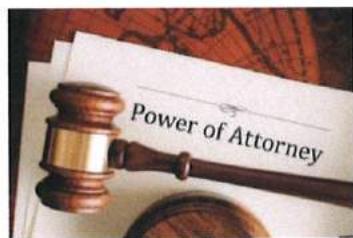
A **general agent** is the most common type of real estate agent and makes up the bulk of real estate agent representation. General agents represent the principal in real estate transactions such as buying, selling, and renting property. They can deal in any type of property, be it residential, commercial, industrial, or mixed use buildings, and do not require a special license.

The duties of a general agent include: drafting real estate paperwork, showing properties, and closing transactions. They have the legal authority to perform any acts required to buy and sale real estate within the confines of the law.

Special Agent

A **special agent**, also known as a specific agent, is a real estate agent who handles specific transactions within an agency agreement. For example, a principal may designate a specific agent to assist with the purchase of a probate. Once the special agent has completed the specific task laid out in the agency agreement, the agreement is terminated. A real estate broker is also considered a special agent.

Power of Attorney



Power of attorney is a legal document that allows one person to give another person the authority to act on their behalf in specified matters. An **attorney-in-fact** is the party given authority by a power of attorney. A power of attorney agreement must be signed in the presence of a notary public or two verified witnesses (California Civil Code 4121 (b)).

The responsibilities and limits of the power of attorney agreement are specified by the creator. The creator may grant a general power of attorney that bestows broad decision-making power upon the attorney-in-fact and allows them to conduct any activity on the creator's behalf. This may include the right to sign, make payments, and accept money on behalf of the creator. Alternatively, the creator may only grant specific power (California Civil Code 4123 (a)). Specific power means that the attorney-in-fact only has the right to perform only activities designated within the power of attorney agreement.

California Civil Code 4127 states: "Unless a power of attorney states a time of terminating, the authority of the attorney-in-fact is exercisable notwithstanding any lapse of time since execution of the power of attorney." Otherwise, the agreement terminates upon the creator's death.

Granting a power of attorney offers a few key benefits that include: saving time for the principal, reducing stress, and having the ability to divert financial responsibilities when the principal is busy or otherwise incapacitated.

In the context of real estate, a client may grant power of attorney to their real estate agent in order for that agent to conduct real estate transactions on their behalf. This is often granted to a real estate agent who has worked with the principal in the past; who is the principal's family member; or when the principal is simply too busy to conduct their own transactions.

Typically, most real estate power of attorneys fulfill a specific, temporary role. For example, if a property owner goes out of town while their property is being sold, they

may grant their real estate agent power of attorney so that the agent may accept an offer and/or sign closing documents on the client's behalf.

When a property is bought or sold by an agent who has power of attorney, the county recorder's office requires a copy of the agreement to verify its accuracy. Much like a standard real estate agreement, power of attorney implies a fiduciary duty on behalf of the agent to act in good faith.

Agents as Employees

Employee of a Broker

An **employee** is an individual who works for, and under the supervision of, an employer in return for a salary, hourly wage, or commission.

From a liability standpoint, real estate agents are considered employees of a broker/brokerage. This is because agents technically work under a broker's supervision. Agents use a broker's office, contracts, and resources to execute real estate transactions, and brokers verify that agents follow all procedures properly.

However, agents render services on behalf of their principals, not their brokers. Agents create their own business and company policy, and manage their clients and schedules as they wish. Thus, brokers have no say in how an agent conducts himself or herself (as long as an agent's actions are legal or ethical).

That is why for tax purposes, agents are characterized as self-employed independent contractors.

Independent Contractor

An **independent contractor** is an individual, business, or corporation that provides goods or services to another party on a per job basis, or when required. The terms of an independent contractor's work are based on a verbal or written agreement, and are subject to the law of agency.

Three main criteria determine whether a real estate agent is an independent contractor:

1. the agent is licensed
2. the agent is paid commissions in place of an hourly wage or a salary
3. the agent has a written agreement with a broker indicating the agent's independent contractor status

If all of these criteria apply, the IRS will tax the agent as an independent contractor.

A broker must indicate an agent's status as an independent contractor. This allows an agent to avoid paying federal withholding taxes, and to contribute to such things as mandatory employee social security tax and worker's compensation coverage.

An agent's independent contractor status precludes him or her from claiming unemployment insurance. California's Unemployment Insurance Act currently bars commission-based workers from receiving unemployment benefits.

Broker's Responsibility to Agents

Section 101777 (h) of the Business and Professions Code states that the most important duty of a broker is to supervise agents.

In the past, brokers would use an agent's independent contractor status as a way of avoiding any liability for negligence on the part of that agent. However, the law has been recently expanding to recognize a broker's responsibility.

Respondeat superior establishes that the "superior" party in a relationship -- in this case, the broker -- can be held liable for the actions of their "inferiors". Although a broker cannot supervise everything an agent does, the broker does have a duty to verify deals that the agent submits to the broker's office. This means checking for the presence of legal disputes, as well as any negligence on the part of the agent. It also means assisting agents with complex real estate provisions, such as seller carry back clauses.

If a broker discovers that his or her agent is engaging in illegal or unethical activity, the broker has a duty to intervene. He or she must take appropriate steps to end the agent's misconduct, which may include informing the authorities, contacting the Department of Real Estate, and/or informing the violated party of the agent's misconduct. Typically, brokers are not liable for an agent's intentional torts or criminal misconduct. An exception arises if the broker was aware of the misconduct and failed to reasonably prevent it from continuing. In this case, the broker could be held liable.

The roles within a broker/agent agency should be clearly defined so as to prevent potential liability for either party. However, legal action against an agent and/or a broker may still arise despite a broker's best intentions and meticulous precautions. Consequently, a broker is advised to purchase general liability insurance and errors and omissions coverage to avoid the damaging losses that can result from an agent's negligence. (These kinds of coverage do not cover intentional fraud.)

It is also advisable for brokers (even those in small offices) to hold California worker's compensation. Although not required by law, worker's compensation can prevent substantial losses in the event of an agent's negligence or misconduct.

Case Review: *Barry v. Raskov (1991)*

The case, *Barry v. Raskov* (1991) 232 Cal.App.3d 447., involved a novice investor lender who brought action against a loan broker, alleging fraud and misrepresentation.

Barry was a retired person with a large savings account however had no investment experience. A mortgage loan broker (Raskov) told Barry about the benefits of investing in home loans. His company provided borrowers who could not obtain loans from banks or other loan institutions due to poor credit with a high interest loan. Raskov said that any investment Barry made would be guaranteed "one hundred per cent" and that he "would not lose one cent".

Raskov said Barry could invest \$55,000 into a borrower's second mortgage that had a first trust deed of \$100,000 and earn 23% on the investment, plus more over time. Raskov hired an appraiser who valued the borrower's property at \$400,000. Raskov told Barry that his investment would be protected as the property's value was significantly higher than the totaling loan amounts. Barry agreed to invest the \$55,000, and Raskov made \$30,000 in commission.

However, the borrower immediately defaulted on the loan, and Barry began losing his promised monthly earnings. Upon further inspection, Raskov learned that the borrower's property value was actually only \$98,000, not the appraised value of \$400,000. Barry filed suit against Raskov.

The Superior Court ruled in favor of Barry, but did not hold Raskov liable for punitive damages. Upon appeal, the Court of Appeals did rule that Raskov was liable to Barry for fraud and negligence in his failure to independently verify the appraiser's property report. The court determined that the employer of an independent contractor -- in this situation, Raskov employed the appraiser -- will be liable for the contractor's torts.

Real Estate Licensing

An Introduction

According to the California Department of Real Estate: “*protection of the public shall be the highest priority for the Department of Real Estate in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount*” (Division 4, Real Estate, Part 1).

One of the ways in which The Department of Real Estate protects the public -- or principals -- is through licensing.

Section 10130 of the California Real Estate Legal Handbook indicates that it is unlawful for a broker or agent to represent the interests of a principal in real estate without proper licensing. Actions that require licensing include:

- Buying, selling, or offering to buy or sell property on behalf of a principal, including mobile homes.
- Renting, or offering to rent, property for a principal
- Representing a principal in a search to locate property for purchase or lease
- Securing a loan for a principal. (An unlicensed agent has the ability to find a loan for a principal, but he or she cannot represent the principal in a loan transaction.)
- Representing the sale or purchase of a real estate contract or promissory note
- Issuing, selling, exchanging, or negotiating the transfer of securities
- Collecting an advance fee for the promotion of a property

There are, however, exemptions from license requirements. Section 10133 of the California Real Estate Legal Handbook does not require the following individuals to have a license:

- “*(1) A regular officer of a corporation, or a general partner of a partnership, with respect to real property owned or leased by the corporation or partnership, respectively, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, respectively, if the acts are not performed by the officer or partner in expectation of special compensation.*
- *(2) A person holding a duly executed power of attorney from the owner of the real property with respect to which the acts are performed.*
- *(3) An attorney at law in rendering legal services to a client.*
- *(4) A receiver, trustee in bankruptcy or other person acting under order of a court of competent jurisdiction.*

- *(5) A trustee for the beneficiary of a deed of trust when selling under authority of that deed of trust."*

Case Review: Sheetz v. Edmonds (1988)

In the case, *Sheetz v. Edmonds* (1988) 201 Cal.3d 1432., a property manager was found to be operating without a license.

Rose Sheetz was employed by the Lein family to manage twenty-three of their residential and commercial properties. Sheetz solicited tenants, negotiated leases, and collected rents. However, Sheetz was not a licensed real estate professional.

When this information was brought to the attention of the Real Estate Commissioner, James Edmonds, he issued Sheetz with a warning to desist her managerial duties. Sheetz was a friend of the Leins, and they signed a power of attorney to empower Sheetz to continue managing their properties.

An administrative law judge subsequently ruled that Sheetz could be subject to fines, penalties, and possible jail time if she failed to stop managerial duties on the Leins' properties. In response, Sheetz sued Edmonds.

Sheetz contended that the power of attorney agreement sanctioned her to continue her managerial activities. The Superior Court disagreed, saying that Sheetz had instead used the power of attorney to evade the real estate license requirements. Sheetz appealed. The Court of Appeals affirmed the lower court's ruling. The appellate court claimed that power of attorney only applied to isolated transactions, not multiple properties on an ongoing basis. It ruled that Sheetz could not act as a real estate agent without the proper licensing.

Real Estate Agent License

The requirements needed to obtain a real estate agent license are as follows:

- Must be a U.S. citizen, or legally reside in the United States
- Must be at least 18 years old
- Must be fingerprinted
- Must be honest with application
- Must complete three college-equivalent real estate courses, including:
 - real estate principles
 - real estate practice
 - a third course from a Department of Real Estate-approved list

- Must pass the real estate exam
- Must apply for real estate license within one year of passing the real estate exam
- Must pay applicable application fees

The Real Estate Commissioner will waive the above requirements in the following circumstances:



- An applicant is a member of the State Bar of California.
- An applicant has qualified to take the examination for an original real estate broker license by satisfying the requirements of Section 10153.2

Broker's License

The requirements needed to obtain a real estate broker's license are as follows:

- Must be a U.S. citizen, or legally reside in the United States
- Must be at least 18 years old
- Must be fingerprinted
- Must be honest
- Must have a minimum of two years real estate experience as a real estate agent or other real estate professional
- Must complete eight college-level real estate related courses, including:
 - real estate practice
 - legal aspects of real estate
 - real estate finance
 - real estate appraisal
 - economics or accounting
 - three additional courses from a Department of Real Estate-approved list
- Must pass the broker's examination
- Must pay required licensing fee

License Renewals

Agent and broker's licenses are valid for four years. It is recommended that a licensee renew his or her license prior to its expiration date to prevent it from becoming temporarily invalid.

To renew an agent's license, an agent must submit RE Form 209 and complete a total of 15 hours of continuing education. This includes three, five-hour courses in ethics, fair housing, and risk management.

To renew a broker's license, a broker must complete 45 hours of continuing education.

One exception is the 70/30 Continuing Education Exemption. Business and Professions (B&P) Code Section 10170.8 stipulates that the renewal provisions "shall not apply to any real estate licensee who submits proof satisfactory to the commissioner that he or she has been a real estate licensee in good standing for 30 continuous years in this state and is 70 years of age or older."

A licensee in good standing is considered "one who holds an active license which has not been suspended, revoked, or restricted at any point unless in error".

The Department of Real Estate can withhold the issuance of a license renewal to any licensees who are delinquent in child or spousal support payments. If a licensee's license is frozen, the licensee must update his or her records and/or fix compliance issues within 150 days.

Real Estate Coursework		
Courses	Agent	Broker
Real Estate Principles	<i>Required</i>	<i>Elective</i>
Real Estate Practice	<i>Required</i>	<i>Required</i>
Legal Aspects of Real Estate	<i>Elective</i>	<i>Required</i>
Real Estate Appraisal	<i>Elective</i>	<i>Required</i>
Real Estate Finance	<i>Elective</i>	<i>Required</i>
Real Estate Economics	<i>Elective</i>	<i>Required</i>
Business Law	<i>Elective</i>	<i>Elective</i>
Common Interest Developments & Computer Applications in Real Estate	<i>Elective</i> <i>Elective</i>	<i>Elective</i> <i>Elective</i>
Escrows	<i>Elective</i>	<i>Elective</i>
Mortgage Loan Brokering / Lending	<i>Elective</i>	<i>Elective</i>
Property Management	<i>Elective</i>	<i>Elective</i>
Real Estate Office Administration	<i>Elective</i>	<i>Elective</i>
Advanced Legal Aspects of Real Estate	<i>Not allowed</i>	<i>Elective</i>

Advanced Real Estate Appraisal	<i>Not allowed</i>	<i>Elective</i>
Advanced Real Estate Finance	<i>Not allowed</i>	<i>Elective</i>

Additional information regarding licensing requirements and exemptions can be found at: www.dre.ca.gov.

Prepaid Rental Listing Service License

In some cases, an agent may collect an advance fee from a prospective tenant prior to locating properties. To do so, agents are required to hold an additional license called a **Prepaid Rental Listing Service (PRLS) license**.

According to the California Department of Real Estate, a PRLS refers to:

“the business of supplying prospective tenants with listings of residential real properties for tenancy, by publication or otherwise, pursuant to an arrangement under which the prospective tenants are required to pay a fee in advance of, or contemporaneously with, the supplying of the listings, but which does not otherwise involve the negotiation of rentals by the person conducting the service.”

An agent is required to give a prospective tenant a written contract indicating the terms of his or her services. After the contract has been approved by both parties, the agent has a maximum of five business days to provide the prospective tenant with a list of potential properties. Should the agent fail to do so within that time period, or if his or her services do not lead to the prospective tenant finding a suitable unit, the agent must refund the original amount paid by the prospective tenant.

An agent must disclose all known information about each property and cannot mislead a prospective tenant about the details of a property. An agent also cannot refer a tenant to a property that is not available, or to a unit that does not fit the agreed-upon conditions of a potential unit.

Unlike a standard real estate license, a prospective PRLS agent is not required to take and pass an exam. Instead, he or she must:

- submit an individual license application (RE 271), or a corporation license application (RE 272)
- submit fingerprints at a live scan company
- submit a signed state public benefits statement (RE 205)
- purchase a surety bond of \$10,000 for each physical location of business
- pay licensing fees

PRLS licenses are issued for a two-year period. Additionally, the same PRLS license does not apply to every location of the business; each location must have a separate license.

Restricted Licenses

The Real Estate Commissioner may temporarily suspend, or permanently revoke, the license of a real estate licensee for a violation of any of the provisions of California Code Business and Professions Code, Sections 10160, 10161.8, 10162, 10163, or subdivision (b) of Section 10164. (The specific types of agent violations will be explored further in Chapter 3.)

A **restricted license** is enforced for a time period congruent with the severity of a licensee's violation and the opinion of the Commissioner.

Suspension of a licensee's license may occur at any time, even before a defendant's court appearance. A licensee who has his or her license suspended must comply with specific conditions in order to have the license reinstated.

The Department of Real Estate must hold a formal hearing in order to revoke a licensee's license. If his or her license is revoked, a licensee possesses no right to get it reinstated; renewal is at the discretion of the Department of Real Estate.

Department of Real Estate Frequently Asked Questions

The California Bureau of Real Estate (“CalBRE” or “the Bureau”) frequently receives questions from consumers, applicants, licensees, other government agencies, the legislature, and members of the media, regarding the extent of “background” reviews and screenings for the issuance of licenses by the Bureau, and whether certain events (such as an arrest, indictment, a plea of guilty, and related matters) can be used as the basis for the denial of and/or discipline against a license.

In addition to providing the FAQs, you will also find hyperlinks. If materials below are shown in blue and underlined, you can click on those materials for easy access.

FAQs

LICENSING STANDARDS/APPLICANT QUESTIONS:

1. Q - Does the Bureau of Real Estate (CalBRE) screen real estate license applicants for criminal records prior to licensure?

A – Yes. Prior to the issuance of a real estate license, CalBRE conducts a detailed background investigation check on all license applicants, which includes mandatory fingerprinting. An original applicant for a real estate license must submit one set of classifiable fingerprints, acceptable to the State Department of Justice (DOJ). The DOJ then notifies CalBRE of past arrests and criminal convictions. After a license is issued to an applicant, the licensee’s fingerprints remain in the DOJ’s database, which allows the DOJ to notify the CalBRE of a licensee’s subsequent arrest by a State or local law enforcement agency.

2. Q - Does CalBRE automatically deny the issuance of a license to an applicant with a criminal record?

A - CalBRE may deny the issuance of a license to an applicant if he or she has been convicted of a substantially related crime. The same applies to the issuance of a license to a corporation, if an officer, director, or person owning or controlling 10 percent or more of the corporation’s stock has been convicted of a substantially related crime. CalBRE uses Criteria of Substantial Relationship to determine if a crime is substantially related to the qualifications, functions, and duties of a real estate licensee. As part of the CalBRE’s background investigation of applicants, the Bureau reviews all applicants’ criminal histories and determines if the applicant has committed any substantially related crime(s) which would serve as a basis for denial of the license. Additionally, pursuant to Section 485 of the Business and Professions Code, the bureau may deny an application for a license without first filing a Statement of Issues. However, when this occurs the applicant has 60 days from the date of the denial to request a hearing to contest the bureau’s denial.

*Please note that because of Constitutional rights relating to due process, the Real Estate Commissioner cannot deny the issuance of a license to an applicant who has only been arrested and/or charged – via an indictment, arraignment, or similar charging procedure (even if those charges are still pending at the time of application) -- with a crime. Pursuant to Business and Professions Code section 10177(b), only criminal convictions that are final, meaning the time for appeal has lapsed or the conviction has been affirmed on appeal, can be used as a basis for license denial or license disciplinary action.

3. Q - What prior criminal activity and license discipline must an applicant disclose on his or her real estate application?

A - An applicant for a real estate license is required to fully disclose any misdemeanor or felony criminal conviction(s). Additionally, an applicant must disclose if he or she has ever had a license in California or any other State denied, suspended, restricted or revoked, along with any pending criminal charges against them. More importantly, the failure to disclose any convictions on a real estate application may be considered an attempt to obtain a license by fraud or misrepresentation, and can result in the denial of a real estate license.

An applicant for a real estate license is not required to disclose any Juvenile Court adjudication, any conviction sealed under Penal Code section 1203.45 or Welfare and Institutions Code section 781, and any conviction under Health and Safety Code section 11357(b), (c), (d), or (e), or Health and Safety Code section 11360(b) after at least two years have passed since the date of the conviction.

4. Q - Does CalBRE issue real estate licenses to individuals who are required to register as sex offenders?

A - While there is no specific law that prohibits CalBRE from licensing an individual who is required to register as a sex offender, CalBRE must and will consider whether a license should be denied, suspended or revoked on the basis of a conviction that involves sexual conduct. Part of CalBRE's consideration is whether the crime is substantially related. The Bureau's regulations provide that any crime involving sexually related conduct affecting a person who is an observer or non-consenting participant in the conduct, or convictions which require registration pursuant to the provisions of Section 290 of the Penal Code, are substantially related and may be the basis of denial of a real estate license.

LICENSEE QUESTIONS/INVESTIGATIVE PROCESS:

5. Q - How does the CalBRE learn of an arrest and/or conviction of a real estate licensee?

A - All licensees have fingerprints on file with the DOJ by virtue of having been fingerprinted during the license application process. If a licensee is arrested, charged and/or convicted of a crime, the DOJ notifies CalBRE electronically, and the Bureau immediately begins a screening process to determine if the crime is "substantially related" and merits further investigation and/or possible discipline. Sections 480 and 490 of the Business and Professions Code define the term "substantially related" as an act that may be deemed substantially related to the qualifications, functions or duties of a real estate licensee. Additionally, pursuant to B&P Code Section 10186.2, a licensee is required to report to the Bureau in writing within 30 days from the date of the bringing of an indictment or the charging of a felony, a conviction, or disciplinary action. Failure to make a report required by this section shall constitute a cause for license discipline.

6. Q - Why is someone who has been arrested or formally charged with a crime still licensed and allowed to conduct real estate activities?

A - Under the United States Constitution, a person is presumed innocent until proven guilty and is entitled to due process. Many people who are arrested and charged are either released without a trial or ultimately found to be "not guilty". Therefore, CalBRE can only take disciplinary action against a licensee if there has been a conviction, the appeal process has elapsed or the judgment of conviction has been affirmed on appeal, and the person has been sentenced for the crime. The Bureau may then proceed with an administrative hearing to determine if disciplinary action can be taken against the licensee based on Section 10177(b) of the Business and Professions Code. However, under Business and Professions Code 10186.1, the bureau can automatically suspend a license during any time that the licensee is incarcerated after conviction of a felony, regardless of whether that conviction has been appealed. When this occurs, the Bureau is required to notify the licensee of the suspension and of his or her right to elect to have the issue of penalty heard by hearing.

7. Q - Why doesn't CalBRE's on-line public information reveal that a licensee has been arrested or formally charged with a crime so that the public is aware of this information?

A - Because of the Constitutional protections for the rights of the accused, information on a licensee being arrested or charged with a crime is not always made available to the public. If a licensee is arrested or charged with a crime, CalBRE is notified by the DOJ and a CalBRE investigation will begin. However, information regarding investigations must remain confidential per Government Code 6254(f) and Evidence Code 1040 unless and until the Bureau files a formal pleading recommending that the license be disciplined. With the exception of suspending a license during the period of incarceration after conviction of a felony, regardless of whether that conviction has been appealed, the Bureau cannot take action against a licensee until there is a conviction and the licensee has been sentenced.

8. Q - If a real estate applicant or licensee has been convicted of a crime, how and when does the Bureau proceed with formal administrative licensing disciplinary action?

A - Once CalBRE is certain that an applicant or licensee has been convicted of a crime that is substantially related to the qualifications, functions or duties of a real estate licensee, and the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal, CalBRE can begin to obtain all the necessary evidence. Bureau investigators obtain copies of the reports generated from the arresting agencies and the certified records and pleadings of the subject court(s). These documents are necessary to prove up the crime and conviction at the Administrative Law Court proceedings. Once all documentation is received, CalBRE's Legal Section prepares and files a formal legal pleading called a **Statement of Issues** against a license applicant whom the Legal Section has determined should not receive a real estate license because of his or her crime. When a licensed broker or salesperson is convicted of a crime that is substantially related as identified above, CalBRE files an **Accusation** against his or her license. The applicant or licensee then has the option of proceeding to an administrative hearing where he or she can present a defense before an Administrative Law Judge (ALJ). With regard to a hearing based on criminal convictions, the ALJ will assess the nature, circumstances, and gravity of the crime or crimes for which the applicant or licensee was convicted, the time that has passed since the conviction and/or the completion of the sentence, and the rehabilitation efforts of the applicant or licensee.

After the hearing, the ALJ issues a proposed decision, which is subject to the Real Estate Commissioner's approval. Discipline can range from outright denial or revocation to suspension of license rights or the granting of a restricted license, depending on the severity of the crime and the rehabilitation efforts shown by the applicant or licensee.

For the same reasons stated above, the Bureau does not release information to the public on "complaints" or the "number of complaints" filed with CalBRE against a licensee. Such complaints are only "bald" allegations and they are not (prior to substantiation through the investigatory process) reliable indicators that a licensee has violated the law.

9. Q - Are all crimes committed by a real estate licensee within the jurisdiction of CalBRE?

A - All criminal convictions, whether State or federal, if committed by an applicant for a real estate license or by a real estate licensee, are subject to the Bureau's review for licensure, denial or discipline. Each and every conviction that the Bureau receives notice of is reviewed under criteria to determine the degree of materiality of the underlying crime and whether it is "substantially related to the qualifications, functions, or duties of a real estate licensee" *§ 10177(b) of the Business and Professions Code]. The criteria that have been established for determining substantially related crimes are extensive. Any crime of dishonesty or involving fraud or theft, whether a misdemeanor or a felony, is investigated and adjudicated at an administrative hearing or resolved via settlement for the voluntary surrender of or restriction of the convicted criminal's license.

DISCIPLINARY PROCESS:

10. Q - Can the Bureau immediately suspend or revoke the license of someone convicted of a crime when the crime clearly appears to be one which would qualify the licensee for discipline?

A – With the exception of automatically suspending a license during the period of incarceration after conviction of a felony, regardless of whether that conviction has been appealed, the Bureau must first file a formal accusation against the licensee which describes the acts or omissions which justify discipline [Government Code Section 11503]. The accusation must be served on the licensee who then has the option of defending against the charges in an administrative hearing before an ALJ [Government Code Section 11505]. At the time of the hearing the Bureau must prove the charges in the accusation by clear and convincing evidence. The only exception to this process is if a licensee holds a "restricted" license. When a licensee who holds a "restricted" license is convicted of a crime that is substantially related to the qualifications, functions, or duties of a real estate agent, the Bureau may issue an interim order, without a hearing, suspending the license rights of a restricted licensee if the terms and conditions of the "restricted" license are not met.

11. Q - If a licensee pleads guilty to a crime, can the Bureau use the admission of guilt to suspend or revoke their license?

A - No. The Bureau may only discipline a licensee once their guilty plea results in a qualifying conviction [Business and Professions Code Section 10177(b)].

12. Q - What happens to someone's license if he or she has been convicted of a crime but is appealing the conviction to a higher court?

A - Business and Professions Code 10186.1 allows the Bureau to automatically suspend a license during any time that the licensee is incarcerated after conviction of a felony, regardless of whether that conviction has been appealed. The Bureau shall notify the licensee of the suspension and of his or her right to elect to have the issue of penalty heard by hearing.

13. Q - Why would someone who has been convicted of a crime and is actually serving their sentence in prison still have an active real estate license?

A - With the exception of the bureau automatically suspending a license during the period of incarceration after conviction of a felony, regardless of whether that conviction has been appealed, a real estate license is not automatically suspended or revoked when a licensee is incarcerated. The same procedure that governs all criminal convictions as a basis for license discipline must be followed even in this circumstance. This means that the Bureau must first file an accusation against the individual.

14. Q - If a real estate broker or salesperson voluntarily surrenders his or her real estate license, or if his or her license is revoked in a disciplinary proceeding, can the former licensee ever obtain a CALBRE issued real estate license again?

A - Yes. If a real estate broker or salesperson voluntarily surrenders his or her real estate license, or the license is revoked after an administrative disciplinary proceeding, he or she has the right to petition the Bureau for reinstatement of license rights [Government Code §11522]. Unless a longer period of time is required pursuant to the Decision accepting the voluntary surrender of the license or revoking the license, the former licensee must wait at least one year from the effective date of the Decision to petition for reinstatement of the license that was revoked or surrendered. The purpose of the petition is to require the former licensee to demonstrate that it would not be against the public interest for the petitioner to hold a real estate license. In deciding whether or not to grant the petition the Bureau relies on its own background investigation of the former licensee as well as its evaluation of the steps the petitioner has taken toward achieving rehabilitation [Section 2911 of the Commissioner's Regulations]. The burden of proof lies with the petitioner to show that he or she is sufficiently rehabilitated to hold a real estate license.

15. Q - Does a licensee have to disclose to a client or potential client if he or she has ever been subject to disciplinary action by the Bureau?

A - Licensees do not have any specific statutory obligation to disclose prior or pending disciplinary action to their clients. However, if formal disciplinary action against the licensee is pending, or the licensee has actually been disciplined by the Bureau, this information is a matter of public record and is noted at part of the individual's public license record. Where the Bureau is conducting an investigation of a licensee but has not yet filed formal disciplinary action, the existence of the investigation, as well as the information compiled during the course of the investigation, is confidential and no reference will be made to the existence of an investigation on the public website [Government Code Section 6254(f); Evidence Code 1040].

Consumer Recovery Fund

Twenty percent of total licensing fees are allotted to a **Consumer Recovery Fund**, or victim's fund. The purpose of the fund is to compensate victims of fraud committed by a licensed agent or broker. The fund allows the victims to recover at least some of his or her losses when a licensee has insufficient personal assets to pay for the loss.

If the Department of Real Estate pays out this type of compensation due to the negligent actions of an agent, the state will suspend the agent's license. The suspension will not be lifted until the agent repays the fund in full. Bankruptcy will not remove the violating party's obligation to pay off the debt.

Agencies

A client-agent relationship is called an **agency**. The term agency often refers to an actual business or organization established to provide a particular service. However, for the purposes of this textbook, agency will be used in terms of the established relationship between two parties by means of an agreement.

In an agency relationship, an agent has a fiduciary duty to act in good faith on behalf of his or her principal. This includes not disclosing confidential information that could jeopardize a transaction to other involved parties. However, agents do have the responsibility to act fairly and disclose vital information to other involved parties.

Agents have no authority to perform acts that go against the legal goals of the listing. An agent does, however, have the "power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal (Civil Code Section 2320).

A significant percentage of claims made against agents involve alleged negligence, misrepresentation, and breach of the agent's fiduciary duty.

Agency Agreements

Most agency relationships are established through agreements, either written or implied. Civil Code Section 2299 states that an agency relationship is created if an agent represents a principal in a transaction, regardless of whether there is a written agreement. However, it is the responsibility of the real estate agent to make sure that all parties are aware of the relationship dynamics. Furthermore, an agent cannot guarantee their commission unless an agency agreement is in writing (Civil Code

Section 1624 (d)).

Elements of a Standard Agency Agreement

- Names of parties
- Property address and description, ideally indicating property by parcel number and parameters
- Commission percentages
- Expiration date for the agency agreement
- Terms of the agreement and conditions of the sale
- Signatures of all parties

Types of Agencies

Express Agency

An **express agency** is an agency that authorizes an agent to act on behalf of a principal. The most common agency type, it is called an express agency because it expresses the relationship between both parties.

In this agreement, authority is directly granted to the principal; the authority of the agent extends only to powers granted in the agency agreement. **Express authority** refers to that authority granted to an agent to perform certain activities.

For example, a principal may grant an agent the right to purchase a property on his or her behalf, contingent on the fact that the loan utilized for the purchase is below 5%. If the loan retained by the agent is 5.7%, the agent does not have the authority to purchase the property.

Authorization of these specific activities must be in writing (as opposed to verbal conversation) otherwise they are not enforceable.

Implied Agency

An **implied agency** is present when an agent may reasonably assume to have legal permission from the principal to undertake certain actions.

It is nearly impossible for all the duties of the agency to be established in the agreement. Therefore, **implied authority** grants an agent the power to perform reasonably expected real estate duties without them being expressly stated in the agency agreement. In determining whether he or she has implied authority, an agent should

ask: "Is it reasonable for these actions to be performed for the success of the transaction?" (For legal purposes, however, it is advised that any action beyond what is described in the agreement be added to the agreement.)

For example, if a property owner wants to sell their property and grants an agent the right to represent their house, the seller is implying the existence of an agency relationship, even if it is not in writing.

Proving the existence of an implied agency is difficult. It involves an agent providing direct evidence of his or her time and effort in closing a transaction. When an agent's position and duties are not clearly defined, the agent runs the risk of not getting paid upon the close of a transaction. Consequently, an implied agency is not the preferred method for agents.

Agency Coupled with an Interest

An **agency coupled with an interest** refers to an agency agreement in which the agent has a financial interest in a property beyond a standard commission. An agent may have possession or control over a principal's property, and/or may possess a legal right against interference by third parties.

For example, if a real estate agent lends a buyer \$20,000 towards a down payment on a home, that agent now has a financial interest in the transaction. Consequently, it would be an agency coupled with an interest.

California Civil Code states that such an agency cannot be terminated unless both parties mutually agree to terminate the agreement, even in the case of incapacity or death.

Case Review: *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993)*

The case, *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993)* 19 Cal.4th 615., involved a hotel owner that brought legal suit against the firm that managed the hotel.

Pacific Landmark Hotel signed a 50-year management contract with Marriott Hotels. The hotel owner/management company relationship is considered akin to the agency between a principal/agent, wherein the hotel owner is the principal, and management company is the agent.

Marriott Hotels and its subsidiaries subsequently lent the Pacific Landmark

Hotel upwards of \$20 million dollars. In exchange for providing the loan, Marriott Hotels was given a 5 percent ownership stake in the hotel. The agreement between the two parties did not form a partnership or a joint venture, but did have the makings of an agency coupled with an interest.

Later, the Pacific Landmark Hotel sued Marriott Hotels for an alleged breach of contract. Despite Marriott Hotels' 5 percent stake in the hotel, Pacific Landmark Hotel contended that their agreement was not an agency coupled with an interest. Thus, it argued that it could terminate the contract without Marriott Hotels' consent.

The Superior Court disagreed. It ruled that Marriott Hotels was an agent coupled with an interest, and that the agreement could not be terminated unless the provisions within it were violated.

The Pacific Landmark Hotel appealed, and the Court of Appeals reversed the lower court's ruling. The court reasoned that the loan provided by Marriott was not provided by Marriott directly, but rather a subsidiary of Marriott. Therefore, Marriott did not have a direct interest in the Pacific Landmark Hotel. Thus, the court ruled that the Pacific Landmark Hotel had statutory power under California Civil Code, Section 2356, Subdivision (a)(1) to terminate Marriott Hotels as their agent.

Ostensible Agency

Agency relationships can either be "actual or ostensible" (California Civil Code 2298). In other words, an agency relationship is either established or not. California Civil Code 2300 defines an **ostensible agency** as when "the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

Ostensible authority (or apparent authority) occurs when the actions and words of a principal and an agent convince reasonable third parties to believe that an agency relationship exists between the agent and principal. The agent in this situation is known as an ostensible agent.

Ostensible authority cannot be based on an agent's conduct alone; there must also be evidence of conduct on the part of a principal that justifiably makes a third party believe that the agent is the principal's agent.

Case Review: *Kaplan v. Coldwell Banker (1997)*

The case, *Kaplan v. Coldwell Banker (1997)* 59 Cal.4th 741., involved an example of ostensible agency.

A Superior Court judge (Kaplan) purchased a property that he believed to contain a lemon grove. Afterwards, Kaplan realized that his agent had misrepresented the condition of the property, as well as the presence of a lemon grove.

Kaplan believed that the agency he had hired was Coldwell Banker. However, in reality, the real estate office hired by Kaplan was a privately owned entity called Coldwell Banker Citrus Valley Realtors. The company utilized Coldwell Banker's name, but was not managed by them directly. The plaintiff (Kaplan) filed suit against his agent for misrepresentation and breach of fiduciary duty.

The franchise agreement between the real estate agent (Marsh) and Coldwell Banker required Marsh to refer to the company as an "independently owned and operated member of Coldwell Banker." This disclaimer was labeled on Marsh's real estate forms and other printed material. However, the plaintiff testified that he believed he was working directly with Coldwell Banker. He claimed that he "placed a great deal of faith and trust in said defendants, partly because Marsh was part of the Coldwell Banker organization that had established trust, integrity, and expertise".

The Superior Court held Coldwell Banker liable because the franchise agreement gave "the franchisor the right of complete or substantial control over the franchisee" which proved that an agency relationship existed. Coldwell Banker appealed. The appellate court held that because Coldwell Banker received a royalty based on gross receipts, it did not establish a true agency relationship. Therefore, the burden shifted to the appellant to produce verifiable facts of an agency relationship.

The case was sent back to the lower court after it was deemed that the original procedures used in the case were inaccurate. The lower court again ruled in favor of the plaintiff because "an ordinary, reasonable person might also think that Marsh was an ostensible agent of Coldwell Banker". The court reasoned that an ostensible agency exists when the circumstances may be implied. Ultimately, Coldwell Banker was held liable.

Agency by Estoppel

An **estoppel** is a legal principle that prohibits an individual from asserting a specific claim that contradicts what his or her actions or words previously asserted, and that causes another party to make a decision on the basis of those assertions.

An agency by estoppel refers to a situation in which a principal does not stop a real estate agent from going beyond his or her duties, thus giving the impression that an agency relationship exists. An agency by estoppel involves the presence of an ostensible agent and/or agency.

For example, suppose a principal wishes to sell his house. An ostensible agency is created if the seller allows a real estate agent to execute agent duties without a formal agency agreement in place. An agency by estoppel occurs if that agent finds a buyer and, based on the agent's word that he represents the seller, the buyer borrows money to purchase the seller's home. At this point, if the seller refuses to sell to the buyer on the basis that the aforementioned agent did not have the authority to seek out potential buyers, it is the seller who is legally at fault. The seller would be at fault because the seller allowed the agent to purport to be his or her agent for the sale of the property. The agency was assumed therefore the seller would be held liable.

An agency by estoppel is rare.

Agency by Ratification

Ratification is the approval or authorization of an act. Agency by ratification occurs when an individual conducts unauthorized real estate activity on behalf of another party, but which the “principal” later accepts and recognizes. (Although the other party is technically not a principal until he or she accepts the agent's actions.)

If the principal does agree to an agency by ratification, all of the agent's actions are ratified, not just a portion of them. Furthermore, if the principal is informed of the unauthorized actions of the agent and fails to reject those actions, they enter into an agency by ratification by default.

Case Review: *Behniwal v. Mix (2005)*

In *Behniwal v. Mix (2005)* 133 Cal.4th 1027., a real estate buyer, Behniwal, brought legal suit against a seller, Mix, for specific performance and declaratory relief.

Mix's family residence was for sale. Mix's real estate agent allegedly signed

Mix's name on a counteroffer to a buyer (Behniwal) without Mix's permission. This led Behniwal to believe a sale would occur. Shortly thereafter, Mix provided Behniwal with all of the necessary closing documents, including: a disclosure statement, natural hazards disclosures, agent's disclosure, compliance statements, and water and heater compliance results.

Despite all appearances of a sales contract being in place, Mix ultimately decided to no longer sell his property. Behniwal filed suit against Mix for specific performance and declaratory relief.

The Superior Court ruled in favor of Mix. Behniwal appealed and the Court of Appeals reversed the lower court's decision. It granted Behniwal's request for specific performance. This required Mix to sell his house. It further ruled that the real estate agent was liable to pay damages to Behniwal.

Dual Agency

Dual agency is when a real estate agent represents both the buyer and seller in a real estate transaction.

A real estate agent is required to inform both the buyer and seller of the presence of a dual agency relationship prior to a transaction taking place. If either principal does not feel comfortable with the agent's dual representation, he or she has the right to deny the dual agency. As per California Civil Code Section 2375, the agent is required to provide a written agency disclosure form to both parties. If the agent fails to do so, the Real Estate Commissioner may prevent an agent from receiving a commission or even revoke the agent's license.

While working in a dual agency, the agent has a legal obligation to equally represent the interests of both parties. It is also illegal for an agent to disclose confidential information about either party's position to the opposing party without permission.

California Civil Code Section 2079.21 states: "A dual agent shall not disclose to the buyer that the seller is willing to sell the property at a price less than the listing price, without the express written consent of the seller. A dual agent shall not disclose to the seller that the buyer is willing to pay a price greater than the offering price, without the express written consent of the buyer."

The potential benefits of a dual agency are time and access. A single agent representing both the buyer and the seller can create a more streamlined process than when multiple agents are involved. Thus, a dual agency may be able to close transactions faster than a standard transaction. A dual agent may also be able to provide their clients with direct access to a local network of both sellers and buyers.

However, the process of balancing the interests of two different parties equally -- attempting to get the best offer for the seller, while simultaneously attempting to obtain the best sales price for the buyer -- is difficult. Potential problems arise in a dual agency when an agent is unable to represent the interests of both parties equally. Oftentimes, an agent cannot obtain the highest offer for his or her seller client while simultaneously getting the lowest price for the buyer client. In this case, the agent may have to make a determination that favors one client over the other. An agent's desire to earn the highest commission and/or double commission may also affect how he or she represent their client's interests.

All of these instances can produce legal problems. In fact, dual agency claims are among the most common legal claims made against real estate agents.

Case Review: *Brown v. FSR Brokerage, Inc. (1998)*

The case, *Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.4th 766., provides an example of wrongful dual agency.

The plaintiff (Brown) hired a real estate agent (Kilbrick) to sell his home. Kilbrick advised Brown to reduce his home's listing price from \$2.7 million to \$2.4 million, as a buyer was interested in purchasing the property at that price. Brown said Kilbrick "was very convincing and told me in the course of the discussion that he was working exclusively for me and only had my interests in mind". Consequently, Brown authorized the price reduction on his home.

However, Kilbrick had failed to disclose that he possessed a dual agency relationship with Brown and the potential buyer until after the completion of the transaction. Upon this discovery, Brown filed a lawsuit against Kilbrick's company, FSR Brokerage, Inc.

Brown argued that Kilbrick's lack of disclosure of his dual agency led him to reveal both Brown's and the buyer's confidential positions in the transaction. Kilbrick informed the buyer of the lowest price at which Brown was willing to sell, while simultaneously informing Brown of the maximum price the buyer was willing to pay. Brown asserted that this behavior had violated Kilbrick's responsibilities as a real estate agent.

The Superior Court initially granted summary judgment (a ruling without a full trial) in favor of Kilbrick. Brown appealed and the Court of Appeal reversed the lower court's ruling. The appellate court determined that Kilbrick should have openly disclosed the presence of dual agency prior to the transaction taking place, and awarded Brown damages.

Case Review: *Huijers v. DeMarrais* (1993)

The case, *Huijers v. DeMarrais* (1993) 11 Cal.4th 676., involved a buyer and a dual agent who failed to disclose his dual agency with a seller.

The plaintiff, Huijers, filed a lawsuit against his real estate agent (DeMarrais) for the agent's failure to provide a disclosure statement regarding his dual agency prior to them signing a contract. Huijers argued that DeMarrais was not entitled to his commission on this basis, and sought specific performance for the purchase agreement and damages.

Initially, the trial court ruled in favor of DeMarrais. However, it reversed its decision on Huijers' appeal on the basis that a disclosure statement was not provided by DeMarrais prior to establishing the listing agreement. Consequently, it ruled that DeMarrais was not entitled to commission on the transaction.

Case Review: *Culver v. Jaoudi* (1991)

In *Culver v. Jaoudi* (1991) 1 Cal.App.4th 300., a buyer (Culver) hired a real estate agent (Jaoudi) to locate a property for purchase. After identifying a suitable property, Jaoudi showed Culver the listing and he agreed to purchase the property. However, when Culver became aware of Jaoudi's undisclosed dual agency with the property seller, Culver filed a lawsuit against him.

Culver contended that he should not be liable to pay Jaoudi any commission because of the agent's failure to disclose dual agency. The court agreed, concluding that Jaoudi's failure to disclose the agency relationship barred him from receiving any commission. Jaoudi appealed. The appellate court affirmed the trial court's ruling, indicating that "unless both principals know of the dual agency at the time of the transaction, the agent cannot recover from either." This meant that Jaoudi could not collect a commission from the buyer or the seller.

Authority of Agents

An agent's authority may be expressed through a written agreement or implied/assumed through words and actions. The **equal-dignities rule** is a legal doctrine that requires an agent to perform the acts they have been authorized to do by

the principal.

We have already discussed express authority, implied authority, and ostensible authority above. Below are further types of authority.

Customary Authority

Customary authority is the implied authority granted to an agent for standard acts that are necessary to fulfill the goals of the agency.

Delegating Authority

Delegating authority refers to an agent's ability to delegate power and/or professional duties to another party. The delegated duties may include creating advertisements, placing signs on a property, maintaining a property between showings, and/or performing specialty services like title or escrow.

An agent has no legal authority to delegate the duties of an agency agreement to a non-agent party. However, the primary agent may appoint another agent to assist in a transaction. This other agent is called a **subagent**. Civil Code Section 2349 states that an agent may only delegate his or her powers to a subagent when:

- the act to be done is purely mechanical
- such delegation is specifically authorized by the principal
- an action cannot be performed by the agent, but can legally be done so by a subagent

Conversely, the principal does not have the authority to delegate duties to other parties without the primary agent's permission, as such delegation can affect the work of the primary agent.

Agency agreements typically include a clause which gives an agent delegating authority. However, as per *respondeat superior*, a primary agent will be held liable for the actions of a subagent.

Case Review: *Preach v. Monter Rainbow* (1993)

In the case, *Preach v. Monter Rainbow* (1993) 12 Cal.4th 1441., a broker brought legal suit against the defendant, Rainbow, for breach of contract and fraud.

The broker (Preach) sold a property to a buyer (Monter Rainbow). Monter Rainbow promised to pay Preach's commission of \$300,000 once he leased the

property to a tenant. However, after the property was leased, Rainbow refused to pay. Preach sued.

In court, Monter Rainbow claimed that since Preach delegated negotiating duties to an unlicensed broker, he was not required to pay Preach's commissions. Preach argued that using an unlicensed individual should not prevent him from collecting commissions. The Superior Court ruled in favor of Monter Rainbow.

Preach appealed. The Court of Appeals reversed the initial ruling, but remanded the case back to the lower court. The lower court maintained its initial ruling, stating that unlicensed individuals who perform duties which require a broker's license cannot be paid commission.

Termination of Agency

An agency agreement can be terminated through the following ways:

- **The transaction is complete:** the goals around which the agreement was created have been met.
- **Expiration of an agreement's term:** The expiration date established in the agreement has passed.
- **Mutual agreement to terminate agreement:** Both the agent and the principal agree to terminate the agreement prior to its expiration date.
- **Extinction of the agreement's subject:** The property around which the agency agreement was created has been destroyed.
- **Incapacity of the agent to act.**
- **Agent's renunciation of its broker:** the agent leaves the broker of record on the transaction.
- **The death of the agent**
- **The death of the principal**

A principal can also be held liable if he or she terminates an agency agreement prior to its expiration date. If an agent performs his or her agreed-upon duties and the principal terminates the agreement early with no valid reason, the principal may be held liable for damages.