Practical Application of New Agency Law

Review of Key Points in VREB Guidance Document

Review of 1995 Imputed Liability Code § 54.1-2142

Sub Agency= Yes or NO: Pro & Con

Helpful Links:

http://www.varealtor.com/agency#VREB

http://varbuzz.com/ - Read the "Open House What If Scenario" Discuss with Broker, Consult Co. Policy.

http://www.varealtor.com/sites/default/files/Your_Realtors_Role_2012.pdf

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Purpose: To highlight Some Key "Practical Applications" that the Changes to Agency Law may impact. Highlight Items that did not Change. There are numerous courses available that instruct on the letter of the law. In this program we will discuss a few Real World issues to help members comply while providing value to consumers.

Key Points:

- **Why the Code was Changed…**
- **All Agency Relationship Disclosures & Brokerage Agreements must be in writing.**
- **Agents must be clear about the definition of Brokerage Services & Ministerial Acts.**
- **The VAR Flyer "Your Realtors Role" Can Be Very Helpful in Educating a Prospect about Their Rights & The Law**
- **Sub Agency Authorization is Always the Seller's Choice**
- **Homes That Are Easier to Access & Show Sell Faster & Potentially for More Money**
- **Showing a "No Sub Agency" Home to an "Unrepresented Party" Creates an Issue under the New Code.**
- **Be Aware: Approx. 72% of Listed Homes In Rein Do Not Authorize Sub Agency.**

Guidance Document on Necessity for Brokerage Agreements

As a means of providing information or guidance of general applicability to the public, the Real Estate Board is issuing this guidance document in order to assist its licensees in understanding the requirements of § 54.12137 of the Code of Virginia.

To ensure that the Real Estate Board's broker and salesperson licensees comply with **§ 54.1-2137. Commencement and termination of brokerage relationships**, the Board directs licensees to review the following information.

The following are relevant excerpts from the Code of Virginia:

§ 54.12137. Commencement and termination of brokerage relationships.

B. **Brokerage agreements shall be in writing** and shall:

1 Have a definite termination date; however, if a brokerage agreement does not specify a definite termination date, the brokerage agreement shall terminate 90 days after the date of the brokerage agreement;

2 State the amount of the brokerage fees and how and when such fees are to be paid;

3 State the services to be rendered by the licensee;

4 Include such other terms of the brokerage relationship as have been agreed to by the client and the licensee; and

5 In the case of brokerage agreements entered into in conjunction with the client's

consent to a dual representation, the disclosures set out in subsection A of § 54.12139. ….

§ 54.12137. Commencement and termination of brokerage relationships.

A. The brokerage relationships set forth in this article shall commence at the time that a client engages a licensee and shall continue until (i) completion of performance in accordance with the brokerage agreement or (ii) the earlier of (a) any date of expiration agreed upon by the parties as part of the brokerage agreement or in any amendments thereto, (b) any mutually agreed upon termination of the brokerage agreement, (c) a default by any party under the terms of the brokerage agreement, or (d) a termination as set forth in subsection F of § 54.12139.

§ 54.12130. Definitions.

As used in this article: …
"Brokerage agreement" means the written agreement creating a brokerage relationship between a client and a licensee. The brokerage agreement shall state whether the real estate licensee will represent the client as an agent or an independent contractor.
"Brokerage relationship" means the contractual relationship between a client and a real estate licensee who has been engaged by such client for the purpose of procuring a seller,

buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate on behalf of a client.

"Client" means a person who has entered into a brokerage relationship with a licensee.

"Customer" means a person who has not entered into a brokerage relationship with a licensee but for whom a licensee performs ministerial acts in a real estate transaction.

Unless a licensee enters into a brokerage relationship with such person, it shall be presumed that such person is a customer of the licensee rather than a client.

….

"Ministerial acts" means those routine acts which a licensee can perform for a person which do not involve discretion or the exercise of the licensee's own judgment.

The Code of Virginia requires a written brokerage agreement when a brokerage relationship, as defined in § 54.12130, is created. **When a customer becomes a client is based upon the party's intent. A licensee needs to use his judgment based upon a customer's words and actions to make a determination as to when the intent to enter into a brokerage relationship is established and therefore, requires a brokerage agreement.**

Is the party looking for the licensee to provide advice and counsel requiring the licensee to exercise his judgment or discretion for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate? If so, this would require a written brokerage agreement as these acts don't fall within the definition of ministerial acts. **Has the party engaged the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate? If yes, then a brokerage relationship is established and this requires a written brokerage agreement.**

Below are some examples of situations which require the licensee to use his judgment to determine the party's intent:

- **Many acts may be ministerial or could require a written brokerage agreement depending on the party making the request and his intent.** For example, showing a house may be ministerial if the licensee takesthe party to see what the typical features are in homes in the market area or to gather information on the market or area. However, **if the party asks the licensee to show him real estate because**

his intent is to have the licensee procure someone who is ready, able and willing to sell, buy, option, exchange, or rent real estate then a brokerage relationship exists requiring a written brokerage agreement.

- Another example relates to a **request for a multiple listing service (MLS) search.** If a party requests a licensee to provide MLS search results without the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate then a written brokerage agreement is not necessary. However, **if a party requests MLS search results having the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate then a written brokerage agreement is necessary.**

- If a party asks the licensee for **general information about items such as tax rates, HOA dues, schools or typical features of property** in the area, these acts appear to be ministerial. However, **if the party asks these questions about specific property because his intent is to have the licensee procure someone who is ready, able and willing to sell, buy,** option, exchange, or rent real estate, or if he asks the licensee to provide the licensee's opinion as to those features or properties that have those features, then **a brokerage relationship exists requiring a written brokerage agreement.**

Many licensees may perform marketing activities in order to induce a party to engage them for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate. For instance, if a party asks the licensee to provide him with a valuation or analysis of real estate or an MLS search for informational purposes and does not yet intend to engage the licensee to procure a buyer or seller for the real estate, a written brokerage agreement is not necessary. However, if at the time the party asks the licensee to provide the valuation and the party intends to use the valuation or analysis of the real estate for the purpose of having that licensee procure a buyer for the real estate, then a written brokerage agreement is needed.

As a further example, a licensee may provide marketing materials and a competitive market analysis to a prospective seller who is interviewing for the purpose of retaining a licensee to sell their property, without the necessity of a written brokerage agreement.

The party's intent can change during the performance of ministerial acts by the licensee. The licensee needs to be aware of when the intent of theparty changes from that of customer to client, and get th e party to sign a written brokerage agreement before performing any non-ministerial acts for that party. It is important for brokers to have policies in place to guide their licensees, based upon the firm's business practices, in determining when a written brokerage agreement is required and procedures for obtaining such agreements.

Sub Agency 1995

§ 54.1-2142. **Liability; knowledge not to be imputed.**

A. ***A client is not liable for*** **(i) a misrepresentation made by a licensee in connection with a brokerage relationship, unless the client knew or should have known of the misrepresentation and failed to take reasonable steps to correct the misrepresentation in a timely manner, or (ii) the negligence, gross negligence or intentional acts of any broker or broker's licensee.**

B. **A broker who has a brokerage relationship with a client and who engages another broker to assist in providing brokerage services to such client shall not be liable for** (i) a misrepresentation made by the other broker, unless the broker knew or should have known of the other broker's misrepresentation and failed to take reasonable steps to correct the misrepresentation in a timely manner, or (ii) the negligence, gross negligence or intentional acts of the assisting broker or assisting broker's licensee.

C. **Clients and licensees shall be deemed to possess actual knowledge and information only. Knowledge or information among or between clients and licensees shall not be imputed.**

D. Nothing in this article shall limit the liability between or among clients and licensees in all matters involving unlawful discriminatory housing practices.

E. Except as expressly set forth in this section, nothing in this article shall affect a person's right to rescind a real estate transaction or limit the liability of (i) a client for the misrepresentation, negligence, gross negligence or intentional acts of such client in connection with a real estate transaction, or (ii) a licensee for the misrepresentation, negligence, gross negligence or intentional acts of such licensee in connection with a real estate transaction.

(1995, cc. 741, 813.)

Ask NVAR: The Specifics of Sub-Agency

What is sub-agency?

Sub-agency is a type of brokerage relationship that was predominant until the mid 1990s.

A defining characteristic of sub-agency is that the listing firm, **with the permission of the seller**, has extended its agency relationship with the seller outside the firm's own agents and authorized other cooperating brokerage firms to represent the seller in a transaction. When this happens, the other cooperating broker becomes a "sub-agent" of the listing broker.

A sub-agent is a real estate licensee who provides real estate services to a buyer while actually representing the seller in a real estate transaction. It is important to note that sub-agency cannot take place within a firm. **For an agent to be a sub-agent, he or she must work for a different brokerage than the listing agent.**

Who represents the buyer when a sub-agent is involved in the real estate transaction?

When a buyer is working with a sub-agent he or she is not being represented by any of the real estate licensees involved in the transaction. **The listing agent and sub-agent both represent the seller**, while the buyer remains unrepresented in the real estate transaction.

Does the seller have to consent to sub-agency?

Yes. Agency relationships are consensual in nature and require the informed consent of the principal (i.e. seller). **The listing agent should discuss sub-agency with sellers when taking the listing to determine whether or not the seller will consent to sub-agency.** Agents should consult with their brokers about their firm's policies on offering and accepting offers of sub-agency.

Does the buyer have to consent to sub-agency?

Yes. Even though the sub-agent does not represent the buyer, the licensee must still discuss agency relationships as mandated by state law. The buyer may decline to work with a sub-agent if he or she prefers to work with a real estate licensee under a buyer agency or non-agency (i.e. transactional brokerage) relationship.

Failure to disclose the sub-agent's representational relationship with the seller to the buyer can create the potential for undisclosed dual agency which is a violation of state law. One contributing factor to the decline of sub-agency was the rapid increase in the number of lawsuits from buyers about undisclosed dual agency.

Why is a discussion of sub-agency important if it is so rarely used by real estate brokerage firms?

Many Realtors® misunderstand the meaning of the term "sub-agency." Those agents who do not understand the term cannot properly explain it to a seller when reviewing the listing agreement.

A few listing agents have mistakenly told their clients that "sub-agency" is the listing firms' share of the commission while "buyer-agency" is the buyer broker's share of the commission. This has also led to misunderstandings about how to input this information into the MRIS system, as explained below.

How can the listing agent avoid paying the "cooperative compensation" twice if compensation is offered to both sub-agents and buyer agents (or three times if cooperative compensation is offered to sub-agents, buyer agents and non-agents)?

This is one of those myths we are trying to debunk. **You do not have to pay the cooperative compensation to more than one cooperating firm.**

The offers of cooperative compensation that are created within MRIS are unilateral in nature. Entitlement to the compensation is determined by performance.

Therefore, **the firm that is the procuring cause of the sale would be entitled to the cooperative compensation for a property listed within MRIS; the other firms would not, because they did not procure the buyer.** The amounts in the buyer-agency, sub-agency and non-agency fields just determine how much the cooperating broker would receive if he or she were the procuring cause.

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