

A GUIDE TO TENNESSEE'S AGENCY LAW

**FOR REAL ESTATE LICENSEES,
BROKERS, AND INSTRUCTORS**



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INTRODUCTION

Why does someone obtain a real estate license? The answer really has nothing to do with the right to buy or sell real estate. Anyone with enough money or financing can do that! A real estate license is all about **representation**. The license permits someone to represent another party in the purchase or sale of real estate, to safeguard their interests, to treat them honestly, to serve them with professionalism.

This relationship – between a real estate client and the licensed professional representing the client – is what agency is all about. To become someone's agent imposes several duties on the real estate professional, above and beyond expectations of fairness and basic competence. A consumer can and should have higher expectations of a licensed professional when that professional becomes the consumer's agent. Among other things, the consumer may give instructions to his or her agent, expecting them (as long as those instructions are legal) to be carried out faithfully.

Bill Tune – a former REALTOR, instructor, and respected Chairman of the Tennessee Real Estate Commission – used to begin discussions of agency by noting that, in Western law, the legal concept of agency has its origins in the King-messenger relationship from medieval times. **The client is King**, and the agent is the King's messenger; the messenger is to act at the direction of (and in the best interests of) the client.

The legal and fiduciary nature of this relationship is too often forgotten. Some real estate licensees see themselves as salespeople, but – if they become the agent of a buyer or seller – the law sees them quite differently. The man or woman who sells you a car, a piece of jewelry, a new suit of clothes, or a vacation in the Bahamas usually has no legal relationship to you. That man or woman is a salesperson, hopefully a good one, but still a salesperson. The real estate professional, however, who becomes a consumer's agent assumes a legally-defined role and a position of trust, in service to his/her "king," the client. It's not a relationship to be treated lightly, or terminated easily.

It was my pleasure in 1994 and early 1995 to serve as staff to the Tennessee Association of REALTORS[®], Presidential Advisory Group on Agency Law. PAG members included both attorneys and REALTORS[®]. The PAG had several goals, one of which was to eliminate the possibility of accidental or unintended agency, whereby – solely through his/her behavior or a casual statement – a licensee might unwittingly become a consumer's agent. Accidental or implied agency created excessive liability for both licensees and their brokers (and even consumers), and it opened the door to unintended and undisclosed dual agency.

Another goal was to recognize and accommodate the growing practice of buyer agency, ensuring that buyer-clients are better informed and protected. As the PAG examined agency laws as well as proposed legislation in other states, the concept of designated agency was also explored and included (in amended form) in the PAG's legislative recommendations.

I drafted what subsequently became Tennessee's agency law on behalf of, and at the direction of, this PAG. Tennessee's law was not modeled after any other state's approach to this subject. Instead, Tennessee's law "borrowed" – with changes – from multiple sources: a

legislative proposal that the Wisconsin REALTORS® Association had developed, an agency law that Ohio had passed, agency law in Colorado, and others. Parts of Tennessee's law are also unique to Tennessee.

The Tennessee Association of REALTORS® also engaged me as a lobbyist in 1995, so that I might answer any questions and participate in discussions with various legislators in order to pass this legislation. The TAR-endorsed bill passed almost unanimously in 1995 and took effect on January 1, 1996, as sections 62-13-401 through 62-13-408 of the Tennessee Code Annotated.

Tennessee's agency law has been amended twice since then, in the spring of 1996 and again in 2006. It was my privilege, on behalf of the Tennessee Association of REALTORS®, to author both of the legislative proposals that amended Tennessee's law.

Agency at its heart is not a difficult or complex concept. It's all about representing a consumer conscientiously, doing so with the consumer's understanding and written agreement, steering clear of any conflicts of interest, and ensuring that – at any time in the transaction – everybody in the transaction knows whom the licensee does and doesn't represent.

The following Guide takes you through a number of common misconceptions about agency law in Tennessee, as well as a section-by-section presentation of the law itself with a brief commentary on each section.

Several attorneys reviewed this document prior to its publication, to ensure that the agency statute and its intent are faithfully and accurately explained. We're very grateful for their suggestions and improvements.

This Guide is not intended to be a lengthy, in-depth thesis on the law. Instead, it's provided as a reference and guide for real estate licensees in Tennessee, their brokers, and their instructors. I hope it proves helpful.

– Charles “Pug” Scoville, 2009

NOTE: The term ‘Licensee’ is used throughout this Guide since agency law applies to all real estate licensees in Tennessee, not just REALTORS®.

Things You Should Know About Agency in Tennessee

1. An agency relationship in Tennessee is not implied or created by a licensee's actions, behavior or even his/her statements. It cannot be created accidentally.
2. A licensee is always a facilitator by default and remains a facilitator until a bilateral written agency agreement has been negotiated with a consumer and signed by both parties.
3. A licensee's delivery of a written disclosure, or confirmation of agency status, saying that he/she is an agent does not make the licensee an agent. [A unilateral disclosure is not a bilateral agreement.]
4. Tennessee's agency law supersedes what is known as the common law of agency.
5. A traditional (non-designated) agency relationship obligates everyone in the office to an agency relationship with that buyer or seller.
6. Designated agency establishes an agency relationship between only one real estate licensee in the office (to the exclusion of everyone else in the office, including the managing broker) and a buyer or seller.
7. An office policy of designated agency from the outset – in all transactions (whether in-house or not) – is a common and perfectly legitimate agency office policy in Tennessee.
8. Every change in agency status during the course of working with a consumer must be fully disclosed to the consumer at the time status is changed and should be documented, even if the consumer gave prior consent to changes of status should they occur.
9. An agency relationship is not required in order for a licensee to receive a commission; a facilitator may usually receive a commission as easily as a buyer's agent. [*The listing agent's payment of a commission to a selling agent compensates the selling agent for procuring a willing and able buyer, not for his/her agency representation of the buyer.*]
10. Every real estate office in Tennessee should have a written agency office policy.
11. Subagency is still legal in Tennessee but is rarely offered. In actual practice, a subagent generally has little or no true allegiance or loyalty to the client or client's best interests.
12. Dual agency is still legal in Tennessee (if it is fully disclosed to both parties and both parties consent to it). Disclosed dual agency, however, is rarely practiced. Most legal experts still believe that it greatly increases legal liability for both the licensee and his/her firm and the potential for complaints to the Tennessee Real Estate Commission.

Common Myths & Misconceptions About Agency in Tennessee

MYTH: An agency relationship can be “implied”, created “accidentally”, or created simply by a licensee’s actions, statements, or behavior.

This may have been true in Tennessee prior to 1996, but it has not been true since then! Moreover, even if a licensee completes a written disclosure form – such as the commonly used “Confirmation of Agency Status” – the licensee does NOT become an agent. Agency law in Tennessee states that an agency relationship does not exist without a **bilateral, written agency agreement** between the licensee and the buyer or seller. An agency disclosure form, or confirmation of agency status, is NOT an agreement!

To represent a seller, a “bilateral, written agency agreement” would be the listing agreement: an Exclusive Right to Sell listing or an Exclusive Agency listing. [These two types of listing agreements have served as a bilateral written agreement to establish an agency relationship since 2006. Other types of listing agreements (e.g., open listings) may *also* establish an agency relationship with the seller, although these are not specified in the agency law itself.]

To represent a buyer, a “bilateral, written agency agreement” would be a Buyer Representation Agreement, a negotiated contract for agency representation.

If a licensee simply “declares” (*to a consumer or to another licensee*) that he or she represents a buyer or is a buyer’s “agent”, but has not negotiated and signed a written buyer agency agreement with that buyer, then this licensee is NOT a Buyer’s Agent. This licensee is still a Facilitator (or Transaction Broker) regardless of what he or she says; to represent himself or herself as a buyer’s agent is **misrepresentation**! It’s still misrepresentation *even if the licensee gives somebody a disclosure form that says he/she is a buyer’s agent*, but the licensee hasn’t negotiated an actual buyer representation agreement that the buyer has signed.

Until an actual buyer agency agreement is signed, it’s appropriate for a licensee to tell others (including other companies when he/she is setting up showings, etc.) that the licensee is “working with” a buyer ...but the licensee should refrain from saying that he/she represents the buyer or is a buyer’s agent until this is actually true. The *intent* to get an agreement signed doesn’t make a licensee someone’s agent!

The law is very clear: an agency relationship can be created in only one way – through a written agency agreement with a consumer. The law states very clearly that an “agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship.” The law ALSO states – very clearly – that “the disclosure of agency or facilitator status ...shall not be construed as, or be considered a substitute for, a written

agreement to establish an agency relationship between the broker and a party to a transaction....”

Without an agency relationship to either the seller or to a prospective buyer for the seller’s property, a licensee is a facilitator, pure and simple, and represents nobody in the prospective transaction.

With the above myth, many people falsely believe that a licensee cannot give advice to a consumer unless the licensee represents that consumer as an agent. Nothing in Tennessee law requires facilitators to remain “on the sidelines, offering no advice.” Giving advice does not create an agency relationship. As the legal definition of facilitator states: “A **facilitator may advise either or both of the parties** to a transaction but cannot be considered a representative or advocate of either party.” [emphasis added]

While professional advice is always permitted, if a licensee is the sole licensee in a transaction, serving as a facilitator between an unrepresented seller and an unrepresented buyer, the licensee should be extremely careful not to promote or advocate one party’s interests over the other’s.

MYTH: You can be a seller’s agent (the listing agent) and a facilitator for the buyer at the same time.

Wrong! A licensee can only wear one “agency hat” at a time in a given transaction. A licensee **cannot** be working as a seller’s agent for a seller whose property the licensee has listed and simultaneously represent himself/herself as a facilitator to an unrepresented buyer who might like to purchase that property! At best, this practice is deceptive and an obvious effort to gain or keep everyone’s trust without telling them the truth. A licensee has only **one agency status at a time** in a transaction.

If the licensee is the listing agent, for example, and a buyer approaches the licensee regarding this property, then normally the licensee would disclose to this buyer that he/she represents the seller. There is nothing in Tennessee law that prevents a seller’s agent from assisting this buyer, completing an offer to purchase for the buyer (if that’s what the buyer wants to do), presenting that offer, etc., while the licensee remains a seller’s agent ...as long as the buyer knows that the licensee represents the seller and is going to promote the seller's best interests.

Some Tennessee firms have adopted office policies that call for their salespeople to default to facilitator status automatically if they have listed a property and an unrepresented buyer approaches them regarding their listing. The listing agreement used by these offices typically includes language by which the seller gives prior consent for their listing agent’s default to facilitator status if an unrepresented buyer comes along. If a licensee’s office policy dictates this kind of action, the licensee is **STILL** obligated to

go back to the seller at the time he/she defaults to facilitator and communicate to the seller that the licensee no longer represents him/her (confirming this subsequent disclosure in writing).

Once a licensee tells *any party or prospective party to a transaction* that the licensee is a facilitator, the licensee is saying, “*I don’t represent anybody – seller or buyer – as an agent in this transaction!*”

“Facilitator” status is not a type of agency status or agency relationship; it’s the *lack* of an agency relationship. At one time, some people in Tennessee believed that a licensee needed to have agency relationships with both seller and buyer before the licensee could legally default to facilitator. This is not true. With their attorney’s support, the Tennessee Real Estate Commission voted 9 to 0 in December of 2005 **“that Tennessee Code Annotated §62-13-102(9)(B) does not require a written agency relationship with both parties prior to default to facilitator status.”**

If a licensee has represented either a buyer or a seller and subsequently defaults to facilitator status in the transaction, this licensee is simply terminating the agency relationship with his/her client ...**with the client’s permission of course.**

MYTH: If you’re not sure what your agency status is at the time you submit a written confirmation of agency status, then it’s probably safest to check several boxes ...since one of them is sure to be correct!

Wrong! Since a licensee can only wear one agency hat at a time in a transaction, then checking more than one box on a confirmation of agency status means that only one box is correct. [We’re hoping, of course, that one of the boxes checked represents the licensee’s true agency status.] Anything else that is checked constitutes a false statement. It may be done in ignorance – which doesn’t speak well for the licensee’s professionalism – but it is still a misrepresentation of facts.

Similarly, if a licensee is the only licensee in the transaction, then checking one status on the “buyer side” of the confirmation of agency status form and checking a *different* status on the “seller side” of that form is also incorrect and an indicator of misrepresentation.

MYTH: You can’t sell your own listing without changing your agency status in the transaction (to facilitator).

While this restriction may be true according to some office policies (and **every licensee should be familiar with and abide by his/her office policies**), **nothing** in Tennessee law or the REALTOR Code of Ethics **requires** a change of status in this situation.

A seller’s agent can assist and even advise a prospective buyer in almost every way,

throughout a transaction, to help that buyer purchase the agent's listing ... as long as the seller's agent remains loyal to the seller and does not compromise or ever work against his/her seller-client's best interests. The buyer, of course, needs to be told that the seller's agent represents the seller and is bound to promote the seller's interests.

MYTH: Designated agency is intended solely for in-house transactions.

Wrong again. Before explaining why this is untrue, it's important to understand traditional (i.e., non-designated) agency. In the absence of designated agency, any agency relationship that one person in an office establishes – with either a buyer or seller – **makes every licensee in the office an agent of that buyer or seller** ... even if they never have any contact with, or even know the name of that buyer or seller. Unintended dual agency and rampant conflicts of interest can therefore occur. Designated agency changes this. **With designated agency, the agency relationship exists solely between the licensee and his/her client, to the exclusion of all other licensees in his/her office.**

Designated agency was created simply to accommodate a quite proper practice that reflects the real-world operation of most real estate transactions ... in which an individual agent (and **not** usually an entire office or company) functions as the advocate for his/her client, *regardless of whether the other party in the transaction is represented by someone in another firm or someone in the same firm.*

From the earliest discussion of the designated agent status, to its implementation in law, **there was never any assumption or intent that it would only be used for in-house transactions.** That's the primary reason for the language "or by written company policy" in 62-13-406(a). It was the intent from the original crafting of the legislation that many firms would implement company policies calling for the practice of designated agency from the outset, for both buyers and sellers, regardless of whether or not the transaction ever involved an in-house showing or sale.

To illustrate why this practice has been so popular with companies:

Assume that a licensee has entered into a buyer agency agreement with a prospective buyer – **but NOT as a designated buyer's agent.** The licensee then makes a list of ten properties to show that client, and sets up appointments to do so. Properties number 3, 5, and 8 on that list are actually listed by members of the licensee's own firm ... and this means that the buyer's agent is also an agent of the seller. Conflict of interest! Therefore, before showing each of these particular properties, the licensee changes his/her agency status and notifies the buyer of the changed status, because the licensee **ALSO** represents the seller on those properties! Then, after showing those properties, the licensee changes status again, back to a buyer's agent, to show properties listed by other firms. The Tennessee Real Estate Commission wants to see written documentation of any change in agency status ... and this licensee may need to change agency status multiple times in a single day of property showings. This situation makes little sense, and will

frustrate both the licensee and his/her buyer-client. Members of the firm could avoid it altogether with the use of designated agency status from the outset, for both buyers and sellers.

MYTH: The managing broker remains a dual agent even if the buyer and seller are each represented by different designated agents in the broker's office.

This too is incorrect. Some other states with a designated agency provision in their laws make the managing broker of the office a dual agent in this situation. There is no national, standardized definition of designated agency. NAR, the "Internet," and other states may choose to define it in any way they wish, but their definition is neither binding nor (in this case) applicable to Tennessee.

The designated agency provision in Tennessee's law was drafted specifically to protect the managing broker and avoid any unnecessary liability for the broker or the firm. That's the reason for the following provision: "A managing broker ...shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction." The law also states that there **"shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation."**

MYTH: An office-wide agency policy is unnecessary. Each licensee should just select the type of agency (or non-agency) relationship that works best for him or her.

This is extremely dangerous from a legal standpoint. The possibilities for unintended misrepresentations and conflicts of interest in this situation are almost endless. Consider just one example:

Any traditional, non-designated agency relationship with a buyer or seller actually obligates everyone in the office to represent that buyer or seller, *whether the other licensees in the office realize it or not*. Let's assume that one of the licensees in the office has negotiated a listing agreement as a **non-designated agent**. Another licensee in the office then tells a potential buyer that he/she is a facilitator in a transaction *when in fact the licensee unknowingly represents the seller whose property this buyer wants to purchase*. This is misrepresentation. [Even if it never gets to the point of a contract to purchase, misrepresentations of agency status can occur simply in showing properties when agency relationships are chosen at licensees' individual discretion.]

If each of the licensees in the office simply "does his or her own thing" in regard to agency, the managing broker and the licensees in that office are all risking legal problems and their reputations unnecessarily. **Every real estate office in Tennessee should have a**

written, clear, and consistent agency policy for the entire office, with periodic training for everyone to ensure that they understand and follow the policy.

MYTH: Licensees in Tennessee are still subject to the common law of agency.

Prior to 1996, application of the common law of agency – which embodies a set of general principles rather than specific guidance – led to both licensee confusion and even inconsistent rulings in various court cases in Tennessee. “Common law” represents the accumulation of court cases across the nation, not all of which ever agree. Since decisions in those cases have not always been consistent, clear answers to some licensee questions about agency were impossible. Tennessee’s law, however, now specifies that it **“shall supersede common law to the extent common law is inconsistent with the provisions of this part.”**

Instead of a very general list of fiduciary duties to clients, Tennessee’s law was drafted with a more specific list of duties to all parties, as well as a few specific duties to clients. Also, in lieu of the accidental agency relationships so prevalent under common law, Tennessee’s law ensures that these relationships are intentional, with all parties fully informed and protected.

A major goal in supporting enactment of Tennessee’s agency law was to implement agency *by statute* so that everyone can reference one set of guidelines for most situations.

TENNESSEE'S AGENCY LAW SECTION BY SECTION

Creating an Agency Relationship

62-13-401. Creation.

A real estate licensee may provide real estate services to any party in a prospective transaction, with or without an agency relationship to one (1) or more parties to the transaction. Until such time as a licensee enters into a specific written agreement to establish an agency relationship with one (1) or more parties to a transaction, such licensee shall be considered a facilitator and shall not be considered an agent or advocate of any party to the transaction. An agency or subagency relationship shall not be assumed, implied or created without a written bilateral agreement that establishes the terms and conditions of such agency or subagency relationship. The negotiation and execution of either an exclusive agency listing agreement or an exclusive right to sell listing agreement with a prospective seller shall establish an agency relationship with the seller.

[Acts 1995, ch. 246, § 3; 1996, ch. 772, § 4; 2006, ch. 738, § 1.]

COMMENT: Before 1996, a real estate licensee could create an agency relationship *accidentally*, by saying or doing something that led a buyer or seller to believe that the licensee represented them. Now, to prevent an “accidental” or implied – or a relationship created without the consent of both agent and client – **Tennessee law provides that such a relationship cannot be created or implied by word or action alone, but *only by a specific written agency agreement*.** A disclosure or confirmation form alone is not an agreement.

In some states, a real estate licensee may still become an agent of a buyer simply by his/her conduct or by something that he or she says ...even accidentally. **Again, this is NOT the case in Tennessee.** An actual written agency contract between a buyer or seller and the licensee is required in order for the licensee to become that consumer’s agent.

With sellers, an Exclusive Right to Sell Listing agreement or an Exclusive Agency Listing agreement automatically establishes an agency relationship with the seller. [As noted previously, other types of listing agreements such as open listings may also establish an agency relationship with the seller.]

With buyers, an Exclusive or Non-Exclusive Representation agreement must be signed by both the licensee and the buyer in order for an agency relationship to be established. If a licensee signs a disclosure form – such as a Confirmation of Agency Status – indicating that he/she is a buyer’s agent, **BUT** the licensee has not yet negotiated a buyer representation agreement with the buyer, ***then the licensee has just misrepresented his/her status*** ...in violation of both Tennessee license law and the REALTOR® Code of Ethics.

The licensee’s commission may also be better protected when working with a buyer under an actual buyer agency agreement that spells out the commission arrangements.

If NO Agency Agreement Is Signed...

62-13-102 (9) “Facilitator” means any licensee:

(A) Who assists one (1) or more parties to a transaction who has not entered into a specific written agency agreement representing one (1) or more of the parties; or
(B) Whose specific written agency agreement provides that if the licensee or someone associated with the licensee also represents another party to the same transaction, such licensee shall be deemed to be a facilitator and not a dual agent; provided, that notice of assumption of facilitator status is provided to the buyer and seller immediately upon such assumption of facilitator status, to be confirmed in writing prior to execution of the contract. A facilitator may advise either or both of the parties to a transaction but cannot be considered a representative or advocate of either party. “Transaction broker” may be used synonymously with, or in lieu of, “facilitator” as used in any disclosures, forms or agreements under this chapter;...

COMMENT: “Facilitator” is every licensee’s status *by default*, in the absence of any written bilateral agency agreement between the licensee and a consumer. “Facilitator” or “transaction broker” is the status for any licensee acting as neither agent of the buyer nor agent of the seller in a transaction. Simply put, **a Facilitator is a non-agent.**

This facilitator status doesn’t obligate or bind the licensee to represent either party. Remember, however, that a licensee’s statement that he/she is a facilitator means that *the licensee has no agency relationship with EITHER party in the transaction.* [One cannot be an agent for the seller, for example, while simultaneously telling the buyer that he/she is a facilitator!]

The Nature of the Agency Relationship

62-13-402. Limited agency.

(a) If a real estate licensee is engaged as an agent, such real estate licensee serves as a limited agent retained to provide real estate services to a client. Such licensee shall function as an intermediary in negotiations between the parties to a transaction unless such parties negotiate directly.

(b) A real estate licensee shall owe all parties to a transaction the duties enumerated in § 62-13-403. A licensee shall owe to such licensee's client the duties enumerated in § 62-13-404.

(c) Notwithstanding any provision of law to the contrary, the duties enumerated in §§ 62-13-403 and 62-13-404 shall supersede any fiduciary or common law duties owed by a licensee to such licensee's client on January 1, 1996.

[Acts 1995, ch. 246, § 4.]

COMMENT: There are really two purposes behind this section. First, it defines the agency relationship in real estate transactions as a "limited agency." It's not a boundless authorization for the real estate licensee to operate on behalf of a consumer, as a power of attorney might be.

The second purpose of this section is to emphasize that the duties to consumers and clients in Tennessee's agency law take precedence over the more general list of duties that have been taught for several decades as part of the "common law" of agency.

A Licensee's Duties To ALL Consumers (*with or without an agency relationship*)

62-13-403. Duty owed to all parties.

A licensee who provides real estate services in a real estate transaction shall owe all parties to such transaction the following duties, except as provided otherwise by § 62-13-405, in addition to other duties specifically set forth in this chapter or the rules of the commission:

(1) Diligently exercise reasonable skill and care in providing services to all parties to the transaction;

(2) Disclose to each party to the transaction any adverse facts of which licensee has actual notice or knowledge;

(3) Maintain for each party to a transaction the confidentiality of any information obtained by a licensee prior to disclosure to all parties of a written agency or subagency agreement entered into by the licensee to represent either or both of the parties in a transaction. This duty of confidentiality extends to any information which the party would reasonably expect to be held in confidence, except for information which the party has authorized for disclosure, information required to be disclosed under this part, and information otherwise required to be disclosed pursuant to this chapter. This duty survives both the subsequent establishment of an agency relationship and the closing of the transaction;

(4) Provide services to each party to the transaction with honesty and good faith;

(5) Disclose to each party to the transaction timely and accurate information regarding market conditions that might affect such transaction only when such information is available through public records and when such information is requested by a party.

(6) Timely account for trust fund deposits and all other property received from any party to the transaction; and

(7)(A) Not engage in self-dealing nor act on behalf of licensee's immediate family, or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of such interest and the timely written consent of all parties to the transaction; and

(B) Not recommend to any party to the transaction the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees to provide real estate services under the Tennessee Real Estate Broker License Act of 1973, without timely disclosing to the party who receives the referral, the licensee's interest in such referral or the fact that a referral fee may be received.

[Acts 1995, ch. 246, § 5; 1996, ch. 772, §§ 5, 6.]

COMMENT: To clarify every licensee's responsibilities in a transaction, Tennessee law provides a clear list of duties by every licensee to any consumer with whom they are working ...*regardless of* any agency relationships. Tennessee's agency law supersedes the "common law

of agency.” Rather than dealing with a list of (non-real-estate-specific) “fiduciary duties” that changes dramatically whenever an agency relationship is created or changed, both licensees and consumers can now look to one clear set of real-estate-specific guidelines.

The “adverse facts” that must be disclosed to all consumers are defined in Tennessee law as “conditions or occurrences generally recognized by competent licensees that have negative impact on the value of the real estate, significantly reduce the structural integrity of improvements to real property or present a significant health risk to occupants of the property.”

Confidentiality is another important aspect of Tennessee agency law. The list of duties to all consumers in Tennessee law includes every licensee’s duty to **safeguard any confidential information from a consumer with whom the licensee is working, conveyed prior to that licensee’s disclosure of an agency relationship** ...to create a healthy “balance” between the client’s right to know and a customer’s expectations that a confidential information will be kept confidential.

The law strikes a fair balance between the client’s right to be fully informed of everything by his/her agent and the consumer’s expectation (being less informed about agency law) that confidential information that has been shared with that licensee – even if that licensee subsequently discloses that he or she is the agent of the other party in a transaction – will be kept confidential. Anything of a sensitive nature that a consumer tells or reveals to a licensee, prior to the licensee telling that consumer that the licensee is someone else’s agent, must still be held in confidence!

A Licensee's Duties To His/Her Client (*once an agency relationship has been established*)

62-13-404. Duty owed to licensee's client.

Any licensee who acts as an agent in a transaction regulated by the Tennessee Real Estate Broker License Act of 1973 owes to such licensee's client in that transaction the following duties, to:

(1) Obey all lawful instructions of the client when such instructions are within the scope of the agency agreement between licensee and licensee's client;

(2) Be loyal to the interests of the client. A licensee must place the interests of the client before all others in negotiation of a transaction and in other activities, except where such loyalty duty would violate licensee's duties to a customer under § 62-13-402 or a licensee's duties to another client in a dual agency; and

(3) (A) Unless the following duties are specifically and individually waived, in writing by a client, a licensee shall assist the client by:

(i) Scheduling all property showings on behalf of the client;

(ii) Receiving all offers and counter offers and forwarding them promptly to the client;

(iii) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the licensee's expertise; and

(iv) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.

(B) Upon waiver of any of the duties in subdivision (3)(A), a consumer shall be advised in writing by the consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of the duties in subdivision (3)(A).

[Acts 1995, ch. 246, § 6; 1996, ch. 772, § 7; 2006, ch. 738, § 2.]

COMMENT: A somewhat shorter list of duties to *clients* is prescribed if an agency relationship has been established. Understand, however, that the duties to all consumers *take precedence over* the duties to one's client, if a conflict exists between the two.

Section 62-13-404 was amended in 2006 to include items (3)(A) and (3)(B) because of the need to specify what real estate services a consumer should reasonably expect from the licensee with whom they are working.

Disclosing Agency (or Facilitator) Status

62-13-405. Written disclosure.

(a) If a licensee personally assists a prospective buyer or seller in the purchase or sale of a property, and such buyer or seller is not represented by this or any other licensee, the licensee shall verbally disclose to such buyer or seller the licensee's facilitator, agent, subagent or designated agent status in the transaction before any real estate services are provided. Known adverse facts about a property must also be disclosed under the Tennessee Residential Property Disclosure Act, title 66, chapter 5, part 2, but licensees shall not be obligated to discover or disclose latent defects in a property or to advise on matters outside the scope of their real estate license.

(b) The disclosure of agency status pursuant to subsection (a) must be confirmed in writing with an unrepresented buyer prior to the preparation of an offer to purchase. The disclosure of agency status must be confirmed in writing with an unrepresented seller prior to execution of a listing agreement or presentation of an offer to purchase, whichever comes first. Following delivery of the written disclosure, the licensee shall obtain a signed receipt for such disclosure from the party to whom it was provided. The signed receipt shall contain a statement acknowledging that the buyer or seller, as applicable, was informed that any complaints alleging a violation or violations of § 62-13-312 must be filed within the applicable statute of limitations for the violation set out in § 62-13-313(e). The acknowledgment shall also include the address and telephone number of the commission.

(c) The disclosure of agency or facilitator status, as provided in subdivision (a), shall not be construed as, or be considered a substitute for, a written agreement to establish an agency relationship between the broker and a party to a transaction as referenced in § 62-13-406.

(d) Upon initial contact with any other licensee involved in the same prospective transaction, the licensee shall immediately disclose such licensee's role in the transaction, including any agency relationship, to this other licensee. If the licensee's role changes at any subsequent date, such licensee shall immediately notify any other licensees and any parties to the transaction relative to such change in status.

(e) Real estate transactions involving the transfer or lease of commercial properties, the transfer of property by public auction, the transfer of residential properties of more than four (4) units, or the lease or rental of residential properties shall not be subject to the disclosure requirements of §§ 62-13-403, 62-13-404 and this section. [Acts 1995, ch. 246, § 7; 1996, ch. 772, §§ 8-11; 2006, ch. 776, § 3.]

COMMENT: Many licensees assume that, because the disclosure doesn't have to be confirmed until the time of contract, that the disclosure can be safely delayed until then. This is incorrect!

In Tennessee, BEFORE providing any real estate brokerage services to a consumer (e.g., showing property), every licensee must disclose his/her agency or facilitator status in the transaction to that consumer.

This first disclosure of agency status before any services are provided can be either verbal or written ...***but it MUST be made prior to providing any real estate services! It must then be confirmed in writing prior to preparation of an offer.*** This early disclosure is much more in keeping with the REALTOR® Code of Ethics requirement, and it should reduce the number of arbitrations and procuring cause disputes that result from late disclosures.

Note also that the disclosure of agency status does not simply refer to the disclosures that licensees make to consumers. The law also requires disclosure of agency status to other licensees in the same prospective transaction.

This section of agency law also requires prompt disclosure of any and every change in agency status. The Tennessee Real Estate Commission has also said that **any such change in status must be documented when it occurs**, so that a Commission auditor can verify that in fact the change was disclosed.

Designated Agency

62-13-406. Designated broker – Managing broker.

(a) A licensee entering into a written agreement to represent any party in the buying, selling, exchanging, renting or leasing of real estate may be appointed as the designated and individual agent of this party by the licensee's managing broker, to the exclusion of all other licensees employed by or affiliated with such managing broker. A managing broker providing services under the provisions of the Tennessee Real Estate Broker License Act of 1973 shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction.

(b) The use of a designated agency does not abolish or diminish the managing broker's contractual rights to any listing or advertising agreement between the firm and a property owner, nor does this section lessen the managing broker's responsibilities to ensure that all licensees affiliated with or employed by such broker conduct business in accordance with appropriate laws, rules and regulations.

(c) There shall be no imputation of knowledge or information among or between clients, managing broker and any designated agent(s) in a designated agency situation.
[Acts 1995, ch. 246, § 8.]

COMMENT: With “designated agency” a managing broker may designate – by written office policy or by specific instruction – an individual licensee to be the individual agent of a seller or buyer client, to the exclusion of all other licensees in the same firm ...to preserve the consumer's right to an agent/advocate even with in-house sales.

This feature of the agency law is, for many, one of its most positive benefits. Much of the industry has never fully understood the fact that, under the common law of agency, the office (not the individual) is considered the agent, making ALL licensees in that office agents of any buyer-client or seller-client of anybody in the office! Dual agency is therefore created and has to be disclosed to all parties even when a transaction involves two different licensees with the same firm.

A firm's use of designated agency can greatly reduce occurrences of dual agency, disclosed or undisclosed. **Use of this option, nevertheless, should probably be accompanied by an office policy that prescribes, for example, what kinds of information may or may not be shared among sales associates.**

Limitations on Consumer Liability

62-13-407. Liability.

A client or other party to whom a real estate licensee provides services as an agent, subagent or facilitator shall not be liable for damages for the misrepresentations of the licensee arising out of such licensee's services unless the client or party knew, or had reason to know, of the misrepresentation. This section shall not limit the liability of a licensee's managing broker for the misrepresentations of the managing broker's licensees.

[Acts 1995, ch. 246, § 9; 1996, ch. 772, § 12.]

COMMENT: A client's liability for his/her agent is limited to those statements or actions (by the agent) for which the client/consumer may be directly responsible as well as any misrepresentations by an agent that the client knew about but did not correct.

This provision removes most of the drawbacks of an agency relationship for the consumer entering into an agency agreement with a licensee. A consumer does not have to accept unlimited liability or greater exposure if they become a real estate licensee's client. This provision may also "control" a broker's liability for the unintended actions or statements of any subagents, if subagency is even offered.

Tennessee Law versus Common Law

62-13-408. Application.

This part shall supersede common law to the extent common law is inconsistent with the provisions of this part.

[Acts 1995, ch. 246, § 10.]

COMMENT: Expanding upon the same idea in section 62-13-402(c), this conclusion of the agency law underscores the point that Tennessee law supersedes the common law of agency, taking precedence over common law if a conflict exists between this legislation and common law (especially since “common law” has not always been consistent when applied to real estate relationships).