

Agency

By **Brian Madigan**

Sometimes it is very easy to get caught up with the law of agency as it applies to the real estate industry while forgetting the fact that it applies in many other situations as well, and often with much different results than expected.



The law of agency has developed over the last 4,000 years and most of it can now be found in the common law. Its origins appear to come from the marketplace in Persia.

A principal is the “actual contracting party” and the agent is the “principal’s delegate” who locates, negotiates with or signs the final contract with the other party.

Just exactly what role will the agent have? This depends upon the agency contract itself. And, the agency contract may arise by written agreement, verbal authorization, or by acts towards third parties by either the principal or the agent. These activities are to be interpreted from the third party’s perspective. What does it look like to a reasonable man? Basically, does it appear that the agent is acting for the principal? If so, then both the principal and the agent will not be able to deny this later. So, if the principal (Bob) gives the impression that the agent (Linda) is acting for him in certain circumstances, then, in law, she is. Bob will be prevented (estopped) from denying this agency later. Similarly, if Bob is prepared to accept the benefits of a deal that Linda has negotiated, then this agency arrangement is created through ratification.

The duties and obligations of agents to their principals as set out in the common law are:

- disclosure
- competence
- obedience
- accounting
- confidentiality
- loyalty

Each of these duties are separate and distinct obligations and vary somewhat in their application and interpretation depending on the nature of the agent's profession and the actual agency agreement.

Common agency arrangements today include attorneys, trustees, solicitors, barristers, doctors, accountants, financial agents and real estate agents.

You might select an individual to act as your "attorney" pursuant to a power of attorney. This person may have full discretion or no discretion whatsoever when it comes to executing documents on your behalf. The authority of the attorney depends upon whatever was specified in the written document. You might appoint an Estate Trustee (executor) who has full authority to make any decision that you could have made, but this authority doesn't begin until you are dead. A solicitor might be authorized to communicate on your behalf in certain commercial dealings, and a barrister might speak for you in Court. Your doctor may be authorized to negotiate replacement organs for you, accountants might deal with the Canada Customs & Revenue Agency, financial agents might deal with your investment portfolio while your real estate agent deals with your property.

Nevertheless, the common law will apply to all these agency relationships. However, each agent who is also a member of a profession will be obligated to follow the code of ethics of that particular profession, and may be subject to certain statutory laws as well.

Let's look at a few examples to determine who is truly the driving force behind the transactions. In some cases, it will be the principal and in others the regulated agent will be restricted by professional standards.

Heart Transplant

In this situation, the doctor is agent for the patient and promotes the best interests of the patient in securing an appropriate donor/transplant. The doctor is restrained by legal obligations to the medical profession and by other laws from simply acting solely in the interests of the patient to the exclusion of all others.

Criminal Trial

In this case, assume that a client admits responsibility for a criminal act. It wouldn't be a very good system, if the lawyer was obligated to pass the confession

along to the authorities. Here, the matter of confidentiality (solicitor-client privilege) becomes paramount. This obligation is one of the cornerstones of the system of justice.

Sports Agents

This area is rather free-wheeling. These agents are governed by the common law, but are usually not regulated by any other standards. These agency agreements are as close to freely negotiated and unrestricted as one would find. Even here, you will find that some sports leagues have adopted a code of ethics that they expect to be honoured.

The Real Estate Industry

This industry is highly regulated. So, in addition to the common law rules, certain other statutes apply, in particular the *Real Estate and Business Brokers Act*. The Real Estate Council of Ontario (RECO) administers the Act on behalf of the Province, registers brokers (agents), registers sales representatives (broker's agents) and passes rules regulating agency relationships.

The Broker-Client Relationship

This is the first agency agreement that RECO regulates. According to the Act, this agreement is to be reduced to writing as soon as possible after it begins. Furthermore, if it is not in writing, no commission may be charged. A vendor-client is to sign a "listing agreement" with the agent (only the broker) and a purchaser-client is to sign a "buyers representation agreement" with the agent (again, only the broker).

Broker-Sales Representative Relationship

This is a secondary agency relationship regulated by RECO. While it is not particularly consumer driven, there are some implications for the public. The broker is the principal in this case, and the sales representative is the agent. Brokers are made legally responsible for the conduct of their sales representatives. This is not necessarily the case at common law.

The Sale of Real Estate

Once we have an actual trade in real estate, we are likely to have two agency

relationships. The buyer will have signed a buyers representation agreement with his broker, and the seller a listing agreement with his agent. Both contracting parties will sign an agreement of purchase and sale as “principals”. They will have delegated limited authority to communicate certain information to their agents (the brokerage firms). These brokers will authorize their agents (sales representatives) to handle these responsibilities on their behalf.

Agents on Completion

In order to complete the transaction the vendor may contract two further agents on his behalf. First, he retains a solicitor to handle the sale. The solicitor will be governed by the same common law rules of agency as apply to other agents together with other statutory rules imposed by reason of his profession. Assuming the vendor expects to be out of the country while the actual documents are to be signed, he then instructs his solicitor to prepare a power of attorney in favour of a business associate. This time, the common law applies, as do some statutes of general application (*Trustee Act*), but this is not a regulated profession, so just like the sports agent, there are no professional rules or codes of ethics.

Interesting Question

So, who has authority to extend the closing date: 1) the real estate agent, 2) the solicitor, or 3) the attorney?

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