

BROKERAGE RELATIONSHIPS CHAPTER



Before you begin this chapter, please read the following notes:

- o **SOURCES:** Please use both this text “book” and your Kansas license law pamphlet that you have received from the Kansas Real Estate Commission. You will generally receive this pamphlet as a new licensee or during your pre-license course. **If you do not have the booklet**, you may find the law on the Kansas Real Estate Commission web site. To find the site, do a www.google.com search.
- o **BRRETA:** When you see the acronym “BRRETA” used in the course, the workbook, or the exam, it stands for **BROKERAGE RELATIONSHIPS in REAL ESTATE TRANSACTIONS ACT.**

o **Kansas & Missouri brokerage relationships information:** Many of our students hold both Kansas and Missouri real estate licenses, therefore this section mentions both Kansas and Missouri license law as it relates to brokerage relationships. If you are not licensed in Missouri, simply disregard the Missouri information.

Prior to passage of BRRETA, the only way for a broker or agent to be “up to date” concerning what he could or could not do in his agency relationships, he had to read case law! Brokerage relationships “Rules” were determined by “**common law**” or **court decisions**. Needless to say, most agents looked to their firm, to board courses, or to association newsletters to keep them practicing correctly.

Today, Kansas license law (specifically BRRETA--Brokerage Relationships in Real Estate Transactions Act) defines agency relationships. Therefore, the options available to sellers, buyers, and real estate agents are clearly defined and readily available in statutes. That is why today’s relationships are considered to be **statutory** rather than **common or case law** defined relationships.

In many states, including both Kansas and Missouri, license law covers all real estate transactions whether they are residential or commercial transactions. All property is covered including sales and leases, new and resale residential properties, investment properties, as well as commercial and industrial and vacant land.

There are some differences in brokerage relationship practice between residential and commercial transactions. In Kansas **commercial transactions, NO Broker Disclosure Brochure is required** to be presented to the seller or landlord, nor is the buyer or tenant required to receive a Broker Disclosure Brochure. For purposes of agency law, “commercial” includes typical commercial and industrial properties as well as multifamily residential of more than four units such as an eight-plex apartment building. However, this does not affect the need for all the other agency documentation such as listing agreements, contract disclosures, and Transaction Broker Addenda.

DISCLOSED DUAL AGENCY¹ is not available as a possible brokerage relationship in Kansas! **UNDISCLOSED DUAL AGENCY** is illegal in all states. This is the agency relationship created inadvertently when agents make statements that they shouldn’t! For example, undisclosed dual agency is created when a seller’s agent tells a buyer customer (not a buyer client!) that he will take care of everything for the buyer. This type of comment leads the buyer to believe that he is being represented and thus creates undisclosed dual agency.

¹ Disclosed Dual Agency is still a legal option in Missouri. So if you are licensed in both Kansas and Missouri, keep this very clearly separated in your thinking, your presentations, and your documentation.

Corky Hyatt Seminars
30-Hour Post License Course by Correspondence
Introduction: Brokerage Relationships

SELLER'S AGENT	BUYER'S AGENT	TRANSACTION BROKER
<p>The seller's agent represents the seller only, so the buyer may be either unrepresented or represented by another agent.</p> <p>The seller's agent is responsible for performing the following duties:</p> <ul style="list-style-type: none"> • promoting the interests of the seller with the utmost good faith, loyalty, and fidelity • protecting the seller's confidences, unless disclosure is required • presenting all offers in a timely manner • advising the seller to obtain expert advice • accounting for all money and property received • disclosing to the seller all adverse material facts about the buyer that the agent knows • disclosing to the buyer all adverse material facts actually known by the agent, including the following: <ul style="list-style-type: none"> > environmental hazards affecting the property that are required to be disclosed > the physical condition of the property > any material defects in the property or in the title to the property > any material limitation on the seller's ability to complete the contract <p>The seller's agent has no duty to:</p> <ul style="list-style-type: none"> • conduct an independent inspection of the property for the benefit of the buyer • independently verify the accuracy or completeness of any statement by the seller or any qualified third party. 	<p>The buyer's agent represents the buyer only, so the seller may be either unrepresented or represented by another agent.</p> <p>The buyer's agent is responsible for performing the following duties:</p> <ul style="list-style-type: none"> • promoting the interests of the buyer with the utmost good faith, loyalty and fidelity • protecting the buyer's confidences, unless disclosure is required • presenting all offers in a timely manner • advising the buyer to obtain expert advice • accounting for all money and property received • disclosing to the buyer all adverse material facts that the agent knows • disclosing to the seller all adverse material facts actually known by the agent, including all material facts concerning the buyer's financial ability to perform the terms of the transaction. <p>The buyer's agent has no duty to:</p> <ul style="list-style-type: none"> • conduct an independent investigation of the buyer's financial condition for the benefit of the seller • independently verify the accuracy or completeness of statements made by the buyer or any qualified third party. 	<p>The transaction broker is not an agent for either party, so the transaction broker does not advocate the interests of either party.</p> <p>The transaction broker is responsible for performing the following duties:</p> <ul style="list-style-type: none"> • protecting the confidences of both parties, including the following information: <ul style="list-style-type: none"> > the fact that a buyer is willing to pay more > the fact that a seller is willing to accept less > factors that are motivating any party > the fact that a party will agree to different financing terms > any information or personal confidences about a party that might place the other party at an advantage • exercising reasonable skill and care • presenting all offers in a timely manner • advising the parties regarding the transaction • suggesting that the parties obtain expert advice • accounting for all money and property received • keeping the parties fully informed • assisting the parties in closing the transaction • disclosing to the buyer all adverse material facts actually known by the transaction broker, including: <ul style="list-style-type: none"> > environmental hazards affecting the property that are required to be disclosed > the physical condition of the property > any material defects in the property or in the title to the property > any material limitation on the seller's ability to complete the contract • disclosing to the seller all adverse material facts actually known by the transaction broker, including all material facts concerning the buyer's financial ability to perform the terms of the transaction. <p>The transaction broker has no duty to:</p> <ul style="list-style-type: none"> • conduct an independent inspection of the property for the benefit of any party • conduct an independent investigation of the buyer's financial condition • independently verify the accuracy or completeness of statements made by the seller, buyer, or any qualified third party.
<p>STATEMENT OF REPRESENTATION</p> <p>Do not assume that an agent is acting on your behalf, unless you have signed a contract with the agent's firm to represent you. As a customer, you represent yourself. Any information that you, the customer, disclose to the agent representing another party will be disclosed to that other party. Even though licensees may be representing other parties, they are obligated to treat you honestly, give you accurate information, and disclose all known adverse material facts.</p>		

Perform the terms of your brokerage relationships agreement by promoting your client's interests through each of the following responsibilities:

- ▶ Timely offer presentations
- ▶ Disclose adverse material facts
- ▶ Advise client to obtain expert advice
- ▶ Timely accounting of all property and money
- ▶ Comply with all laws
- ▶ Not disclose confidential information
- ▶ Disclose facts actually known that were omitted from or contradict expert's report
- ▶ May show competing

properties

- ▶ Not refuse permission to show or receive and transmit offer unless seller instructs in writing

Read the description of each of the following agency relationships in the broker disclosure brochure pictured here:

Using the disclosure brochure, practice explaining each of the following brokerage relationship options to the potential buyer or seller, being sure that you can explain each of the following brokerage relationships in terms which the consumer will understand.

1. Seller's agent
2. Buyer's agent
3. Sub-agent
4. Designated seller's agent
5. Designated buyer's agent
6. Disclosed dual agent (Missouri properties only!)
7. Transaction broker

The brochure includes the duties of each of the legal relationships. For example, the duties and responsibilities of the buyer agent to his or her buyer or tenant include the following:

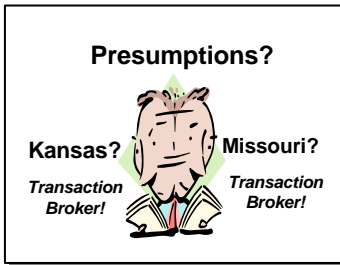
- ❖ Performing the terms of the buyer agency contract or agreement
- ❖ Promoting the interest of your buyer client
- ❖ Timely presentation of all offers and counter offers
- ❖ Disclosing all material facts and defects
- ❖ Advising the client to obtain the advice of experts or what the law refers to as "qualified third parties"
- ❖ Account for money and property in a timely fashion
- ❖ Comply with all regulations and laws including local, state, and federal, specifically including fair housing legislation

These duties and obligations are also listed, per license law requirement, in the Exclusive Buyer Agency Contract. Read the attached buyer agency agreement and see the list of duties and obligations! If you do

Introduction: Brokerage Relationships

not have a copy of a buyer agency contract, you may find one on the Kansas Real Estate Commission web site. (See footnote below for directions to that site.)

Designated agency, transaction brokerage, and disclosed dual agency (Available to Missouri brokers and licensees only) are brokerage relationships available to all real estate brokers. However, the offering of each of these relationships is voluntary on the part of the broker.



Each broker decides for his firm which relationships will be offered. A very small firm might not offer designated agency because the small number of agents have knowledge of all the firm's clients and their situations. A large firm might offer all of the potential relationships.

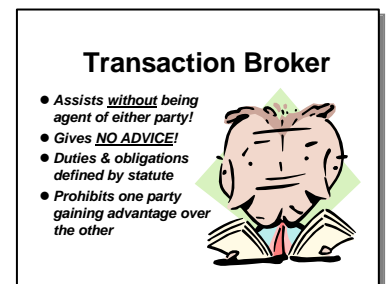
Despite the size or location of a real estate firm, the broker/owner decides the agency policy for the entire firm and publishes those decisions in the company policy manual. Consult your firm's manual to determine what brokerage relationships are chosen for you to offer to consumers.

Remember, no matter what your personal opinion is about the available, you may only legally provide the options that are (1) legal in your state and (2) selected by your broker for offered by your firm!

Transaction brokerage is a **non-agency** relationship!

- ▶ As a transaction broker you **assist** the consumer with the transaction. You do not represent the consumer!
- ▶ You may **not give advice** as a transaction broker!
- ▶ You may not allow your actions or statements to place one party at an advantage over the other! You are mandated to maintain a "level playing field" for the seller and the buyer, never making statements that "load the gun" of either party!

You may work with a consumer as a Transaction Broker without any written agreement or with a written agreement. You may cooperate with other firms to show their listings to the consumer with whom you work as a Transaction Broker. A cooperating agent may show a property which you market as the Transaction Broker for the seller. You may also compensate, share commission, with a cooperating agent when you work with the seller as a Transaction Broker. You may not cooperate with a "sub-agent" because you are not an agent! A non-agent can not, by definition, have a sub-agent!



Kansas PRESUMES or ASSUMES that you are a Transaction Broker²!

You begin working with all sellers and buyers as a Transaction Broker, unless you meet a buyer while you are holding your personal listing open. If you are holding your own listing open, you are there as a seller's agent or designated seller's agent! (The determination of whether you are a seller's agent or a designated seller's agent is your firm's brokerage relationship policy. If your firm practices single agency, you are a seller's agent. If your firm practices designated agency, you are a designated seller's agent when holding your own clients home open.)

You begin as a transaction broker (except for the open house situation defined above). Once a listing agreement has been signed, you become a seller's (or designated seller's) agent or a buyer's (or designated buyer's) agent. As an agent, you may cooperate with sub-agents if your company policy allows sub-agency. Many firms have disallowed sub-agency because of the liabilities it brings through "vicarious liability" which simply means that a client and his broker are both liable for incorrect statements made by a subagent. For

² If you are also licensed in Missouri, the presumption or assumption is the same, Transaction Broker!

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example, your seller tells you, the listing agent, that he has had water in the basement but has corrected the situation through a new sump pump and new footing drains. He indicates this on his Seller's Statement of Condition. The subagent shows the property to a buyer and says "This basement has always been dry." Despite the sellers and your efforts to communicate the correct information, you are both liable vicariously for the misstatement of the subagent!



Because your company policy determines whether you are a seller's agent or a designated seller's agent, you must correctly complete your listing contracts to fit your company's policy. If your listing agreement specifies that you are the designated agent of your seller or buyer, then you become a designated agent whether the transaction is an in-house (your firm's seller-client and your firm's buyer or buyer client) or a cooperative (coop) transaction (your firm's listing and the other firm's buyer or vice versa). Some agents believe that they can be a seller's agent for one transaction and a designated seller's agent for another and this is incorrect. The determination of your role as a single agent or a designated agent is determined by your company's policy.

When your firm offers designated agency, your branch broker or supervision broker acts as a transaction broker or a disclosed dual agent (Missouri ONLY!). Because the broker becomes a Transaction Broker, you as a designated agent may discuss questions and problems with your broker and he may not disclose confidential information about your client to any other agent or client.

Remember, by being a transaction broker, your supervising or branch broker can give advice to both the designated seller's and designated buyer's agents. He or she is required by law to keep the confidences of either or both sides!

The Transaction Broker addendum is utilized when you are the transaction broker for the seller or the buyer. TB Addenda list those actions that the Transaction Broker may and may not do as well as his or her duties to their client. **Note: There are four possible Transaction Broker addendum forms:** TBA-Res is used by firms not offering designated agency; TBA-DA is used by firms offering designated agency; TBA-Comm is used for commercial properties; TBA-AG is used for agricultural properties.

License law requires that all listing agreements be written, except those for federally owned properties. The terms of the agency agreement must be spelled out in the listing as well as the other characteristics listed here. Seller agreements must be signed prior to performing any activities requiring licensure. Buyer contracts must be signed prior to signing a purchase contract. Follow your company policy because many firms required that you sign a buyer contract before performing any activities that require licensure. Check with your broker if you have questions about your firm's policies.

When you firm practices designated agency, it is the broker who designates the seller's or buyer's agent and this happens in the listing agreement or contract³.

In Kansas, the client must approve Transaction Brokerage and Designated Agency in "theory" in the listing agreement. The term "potential" means that there is the potential or possibility that the listing agent may become a transaction broker. Whether your firm's policy dictates single agency or designated agency, the client must approve the possibility of TB.

³ In Missouri, the broker/owner or broker/manager must pre-sign the listing agreement for sellers and buyers for the contract to be effective when signed by the client. Many brokers pre-sign these agreements and have them available to agents in their office's forms cabinet.

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License law requires that all listing agreements, seller or buyer, indicate that there is the “potential” for the listing agent or other agents in the firm to act as a designated agent, a transaction broker, or a disclosed dual agent (Missouri properties only).



Remember that disclosed dual agency is legal in Missouri but not in Kansas. If you sell a Missouri property belonging to your seller client to your buyer client, you may be either a Transaction Broker or a Disclosed Dual Agency. Like the Transaction Broker addendum, the Missouri property sale contract must include the correct verbiage disclosing what the DDA can and can not do or disclose.

Ministerial acts could also have been called “informational” acts because they involve providing information to the public. Ministerial acts are those actions which can be performed prior to presenting the Broker Disclosure Brochure. For example, at an open house you may disclose the price and discuss the material facts and defects of the property with a consumer without triggering presentation of the Broker Disclosure Brochure. If a consumer walks into your office, you can quote your firm’s listing commission and explain your marketing program without triggering the Broker Disclosure Brochure. You may refer a friend, neighbor, or past client to an agent in another city or state without triggering presentation of the brochure. You may open another agent’s listing for an appraiser, inspector, or contractor (obviously with the permission of the owner!) without triggering presentation of the brochure.

The purpose of the Broker Disclosure Brochure in both Kansas and Missouri is to provide the consumer with **their choices of brokerage relationships**. It is used to present the brokerage relationship options to the potential buyer or seller! Once you’ve passed the ministerial acts or informational acts and the potential seller or buyer begins to discuss personal information/substantive information, present the brochure and explain their brokerage relationship choices!

The purpose is to assist the consumer in making educated decisions. Therefore, do not simply hand the brochure to the consumer! Explain the options and answer all questions which the seller or buyer may ask so that they can make that educated decision!

Remember that if you ask the consumer to sign the “acknowledgement” section of the brochure, they are simply acknowledging receipt of the brochure not committing to work with you under any of the offered relationships!

The required elements of brokerage relationships which must be explained in the Broker disclosure brochure are described in the following quotation from Kansas statute 86-3-26: Real estate brokerage relationships brochure.⁴

As required by K.S.A. 58-30,110, and amendments thereto, each licensee shall give any prospective buyer or seller a brochure entitled “Real estate brokerage relationships.” Each brokerage firm may either obtain a copy of this brochure from the Commission for reproduction and use by its affiliated licensees or design a brochure that contains the minimum information contained in subsections (a), (b), (c), and (d). If a brokerage firm designs its own “Real estate brokerage relationships” brochure, the brochure may be in a format determined by the brokerage firm and may include the company name, company logo, and an explanation of the firm's brokerage relationships policy.

- a. **Seller's agent.** The seller's agent represents the seller only, so the buyer may be either unrepresented or represented by another agent.

⁴ The source of this information is the KREC website located currently at http://www.accesskansas.org/krec/rules_regs/86-3-26.html however if this link no longer works because of a moved page, you may search for the information at www.google.com by searching for the Kansas Real Estate Commission and then doing a site search for Brokerage Disclosure Brochure!

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1. The seller's agent is responsible for performing the following duties:
 - A. Promoting the interests of the seller with the utmost good faith, loyalty and fidelity;
 - B. Protecting the seller's confidences, unless disclosure is required;
 - C. Presenting all offers in a timely manner;
 - D. Advising the seller to obtain expert advice;
 - E. Accounting for all money and property received;
 - F. Disclosing to the seller all adverse material facts about the buyer that the agent knows; and
 - G. Disclosing to the buyer all adverse material facts actually known by the agent, including the following:
 - i. Environmental hazards affecting the property that are required to be disclosed;
 - ii. The physical condition of the property;
 - iii. Any material defects in the property or in the title to the property; and
 - iv. Any material limitation on the seller's ability to complete the contract.
2. The seller's agent has no duty to perform the following:
 - A. Conduct an independent inspection of the property for the benefit of the buyer; or
 - B. Independently verify the accuracy or completeness of any statement by the seller or any qualified third party.



- C. Presenting all offers in a timely manner;
- D. Advising the buyer to obtain expert advice;
- E. Accounting for all money and property received;

b. **Buyer's agent.** The buyer's agent represents the buyer only, so the seller may be either unrepresented or represented by another agent.

1. The buyer's agent is responsible for performing the following duties:
 - A. Promoting the interests of the buyer with the utmost good faith, loyalty, and fidelity;
 - B. Protecting the buyer's

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- F. Disclosing to the buyer all adverse material facts that the agent knows; and
- G. Disclosing to the seller all adverse material facts actually known by the agent, including all material facts concerning the buyer's financial ability to perform the terms of the transaction.
2. The buyer's agent has no duty to perform the following:
- A. Conduct an independent investigation of the buyer's financial condition for the benefit of the seller; or
 - B. Independently verify the accuracy or completeness of statements made by the buyer or any qualified third party.
- c. **Transaction broker.** The transaction broker is not an agent for either party, so the transaction broker does not advocate the interests of either party.
1. The transaction broker is responsible for performing the following duties:
- A. Protecting the confidences of both parties, including the following information:
 - i. the fact that a buyer is willing to pay more;
 - ii. the fact that a seller is willing to accept less;
 - iii. the factors that are motivating any party;
 - iv. the fact that a party will agree to different financing terms; and
 - v. any information or personal confidences about a party that might place the other party at an advantage;
 - B. Exercising reasonable skill and care;
 - C. Presenting all offers in a timely manner;
 - D. Advising the parties regarding the transaction;
 - E. Suggesting that the parties obtain expert advice;
 - F. Accounting for all money and property received;
 - G. Keeping the parties fully informed;
 - H. Assisting the parties in closing the transaction;
 - I. Disclosing to the buyer all adverse material facts actually known by the transaction broker, including the following:
 - i. Environmental hazards affecting the property that are required to be disclosed;
 - ii. The physical condition of the property;
 - iii. Any material defects in the property or in the title to the property; and



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- iv. Any material limitation on the seller's ability to complete the contract; and
 - J. Disclosing to the seller all adverse material facts actually known by the transaction broker, including all material facts concerning the buyer's financial ability to perform the terms of the transaction.
2. The transaction broker has no duty to perform any of the following:
- A. Conduct an independent inspection of the property for the benefit of any party;
 - B. Conduct an independent investigation of the buyer's financial condition; or
 - C. Independently verify the accuracy or completeness of statements by the seller, buyer, or any qualified third party.
- d. Statement of representation. The following statement, in bold-faced type, shall be included in the brochure. Do not assume that an agent is acting on your behalf, unless you have signed a contract with the agent's firm to represent you. As a customer, you represent yourself. Any information that you, the customer, disclose to the agent representing another party will be disclosed to that other party. Even though licensees may be representing other parties, they are obligated to treat you honestly, give you accurate information, and disclose all known adverse material facts."

Once the consumer has selected a property and made an offer as well as once the seller has received an offer to purchase his property, these disclosures must be included in the real estate sale contract!



- Both parties must acknowledge receipt of the Broker Disclosure Brochure.
- The agency disclosure addendum or required verbiage in a paragraph or section of the real estate sale contract must detail how the listing and selling agents are working with the seller and buyer as well as detailing who is paying the commission.
- These disclosures must also be included in lot reservation agreements frequently used in new home subdivisions to reserve a lot prior to commencement of construction.

A “Special Situation” Agency QUESTION:

What happens when a buyer client of another licensee wants to write an offer on a property which you have listed?

ANSWER! Kansas (but not Missouri) license law specifies what happens when a buyer wishes to make an offer in the absence of his/her buyer agent. The Kansas Real Estate Commission provides a form in which a buyer client may acknowledge that he has an agent and may be liable to pay that agent's commission but desires to write a purchase agreement with the sellers or builder's agent. This situation most frequently occurs in new home subdivisions when the buyer has been there a number of times without his agent and wants to proceed with his purchase. Kansas law, unlike Missouri license law, also provides that the buyer's agent may make an offer directly to the seller as long as the seller's agent is present.

Kansas license law requires showing agents to tell a cooperating company agent or cooperative showing firm's agent that he is a buyer's agent (reveal whatever his agency relationship is to the consumer to whom he's going to show the property.) The law also requires the agent who's setting up the showing for the seller to ASK what the relationship of the showing agent is to the buyer. The purpose of this provision is to put the seller on notice when a showing agent represents the buyer. Today most selling agents are buyer's agents but, unfortunately, the “asking” and “telling” are frequently omitted!

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Agency duties and obligations end when the transaction closes or (in the event there is no sale) at the expiration or authorized termination of that listing agreement. This is true for both seller and buyer listings. However, certain duties continue or “survive” the expiration of the listing contract. This is true both because of license law for all licensees and because of the Code of Ethics for REALTORS®. Both the license law and the Code require the survival of certain duties.

Which duties or responsibilities survive the closing of the transaction? You are responsible to **account** for any monies or properties that belong to your client. You must also continue to hold **confidential** any information learned during the term of your listing, until or unless **certain specific things occur!** These are the situations in which you are no longer required to keep confidences confidential:

- The client authorizes release of the information or makes the information public himself.
- Law requires disclosure of the information.
- The information becomes public through another source, whether that be through a neighbor, a newspaper, or a court action.

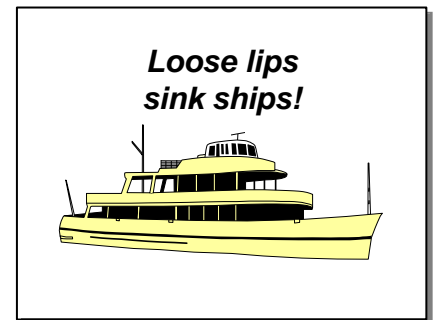
Compensation and brokerage relationships are two entirely different and separate issues! Many consumers have felt that if a buyer is represented the buyer must pay the buyer’s agent. This is not true. The seller may pay all agents or the buyer may pay all agents. A third party might pay the commissions such as a third party relocation company.

By license law, only the broker may pay agents licensed in his firm or office.

Confidential Information: When practicing designated agency in your firm, you must be sure to keep all confidential information confidential. You must not allow another agent in your firm to learn your client’s confidences because next week that agent could be a designated agent for buyer for your listing or for a property for your buyer. If you’ve allowed them to learn your seller’s or buyer’s secrets, then they must divulge those “secrets” to their new client. This would put their client at an advantage over your client and this is **NOT ALLOWED!**

When practicing designated agency, it is essential to keep clients’ confidences within your office by securing documents that might reveal these confidences. For example, keep the following secure:

- Limit access to client files to the broker and the listing agent, whether buyer or seller client.
- Don’t post sale prices until the sale closes.
- Limit access to incoming faxes so that confidential information isn’t disclosed such as offers and counter offers and price change or term change authorizations.



“Loose lips sink ships” or “Keep your mouth shut” are both good advice to protect the best interests of your client, whether you represent the seller or the buyer. Don’t allow loose conversation in your office or with other agents over lunch or on property tour to put your client at a disadvantage!

Even in firms practicing single agency where all the agents represent all seller and buyer clients, it is smart to protect your client’s confidential information because you can not ever assure that other agents will practice confidentiality correctly!