

# Agency & The Intermediary Relationship



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# Introduction

- Law of agency governs the fiduciary relationship between you and your client.
- In the context of fiduciary relationships, the principal is the client.
- In this principal/agent fiduciary relationship, you owe certain duties to your client.
- The most common duty is to act in the principal's best interest.
- The fiduciary relationship also includes the duties of loyalty, full disclosure, and confidentiality.

# Agency

- The Real Estate License Act (“RELA”) requires licensees to provide a specific written statement about agency relationships to a party to a real estate transaction at the time you have the first substantive dialogue with that party. The *Information about Brokerage Services* form (TAR 2501, TREC OP-K) contains the statement you are required to provide.
- “Substantive dialogue” means a meeting or written communication involving a substantive discussion relating to specific real property.
- This requirement applies to all real estate transactions, unless:
  1. The meeting or written communication about the property occurs after the parties to a transaction have signed a contract or lease;
  2. The proposed transaction is for a residential lease of less than one year and no sale is being considered;
  3. You meet someone at an open house; or
  4. You meet someone who is represented by another licensee.

# Agency Notices

- *Information about Brokerage Services* form (TAR 2501, TREC OP-K) contains the statement you are required to provide.
- Written consent, which states the source of compensation and broker's obligations as intermediary under the Texas Real Estate License Act, is required from all parties before a broker can serve as an intermediary. The *Residential Real Estate Listing Agreement, Exclusive Right to Sell* (TAR 1101) and the *Residential Buyer/Tenant Representation Agreement* (TAR 1501) satisfy these requirements.
- The broker should notify the buyer and seller of whether the broker will appoint licensed associates to provide advice and opinion to each of the parties during negotiations by providing the *Intermediary Relationship Notice* (TAR 1409). The broker would then appoint a sponsored license holder to the buyer and a different sponsored licensed holder to the seller.

# Statutory Authority

- The intermediary relationship was first recognized by statute in 1996.
- The purpose behind recognizing the relationship was an acknowledgement that in certain situations, a broker can assist two principals in one transaction.
- Section 1101.559 of the Texas Real Estate License Act provides that a broker must act as an intermediary if the broker represents the buyer and the seller in the same transaction.

# Statutory Authority

- Section 1101.559 further provides that a broker may act as an intermediary between parties to a real estate transaction if:
  - (1) The broker obtains written consent from each party for the broker to act as an intermediary in the transaction; and
  - (2) The written consent of the parties states the source of any expected compensation to the broker.

# Obligations & Duties

- Any broker acting as an intermediary must treat each party fairly, honestly, and impartially and otherwise comply with the requirements of the act.
- Additionally: 1. The broker may not disclose any confidential information obtained from one party without the written instructions of that party unless disclosure is required by the act or a court order, or unless the information materially relates to the condition of the property. 2. The broker may not disclose without written authorization that the seller will accept less than the asking price or that the buyer will pay more than the price submitted in a written offer.

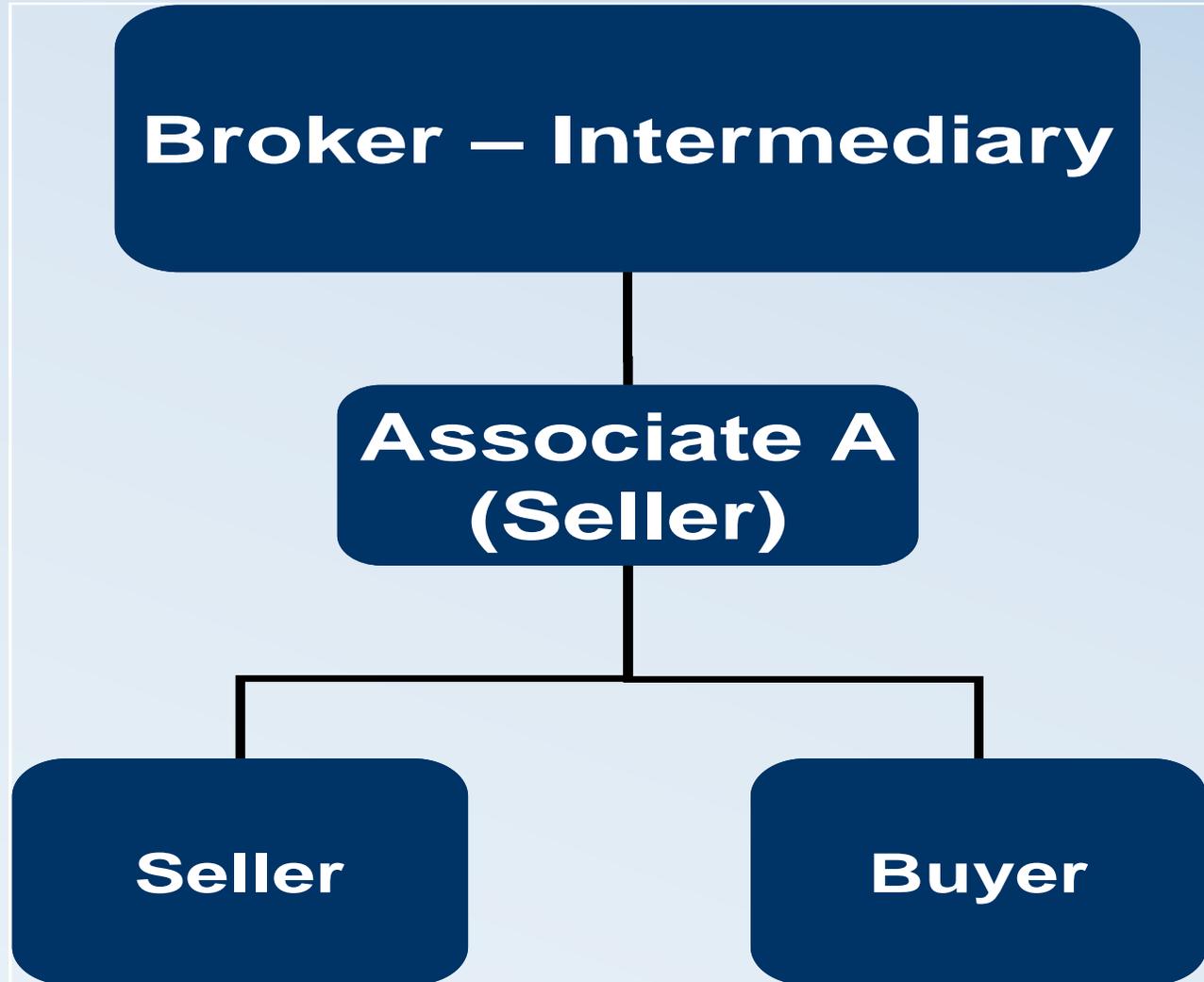
# Intermediary Option One

- The brokerage firm, acting through the salesperson, could represent one of the parties (usually the seller) and work with the other party (usually the buyer) as a mere customer, rather than representing the buyer as a client. If this option is selected, it would require terminating the buyer representation agreement.

# Example Number One

- Agent A is a listing agent for a Pebble Beach Street property. Agent A and seller have been neighbors for years and their children both attend Yeager Elementary. An unrepresented Georgia buyer contacts Agent A and requests a showing of the property. Georgia buyer views the property, expresses an interest and signs a buyer's representation agreement. With the documents all signed, Agent A is appointed as an Associate Intermediary. Agent A cannot provide opinions or advice to either party during the negotiations.

# Example Number One



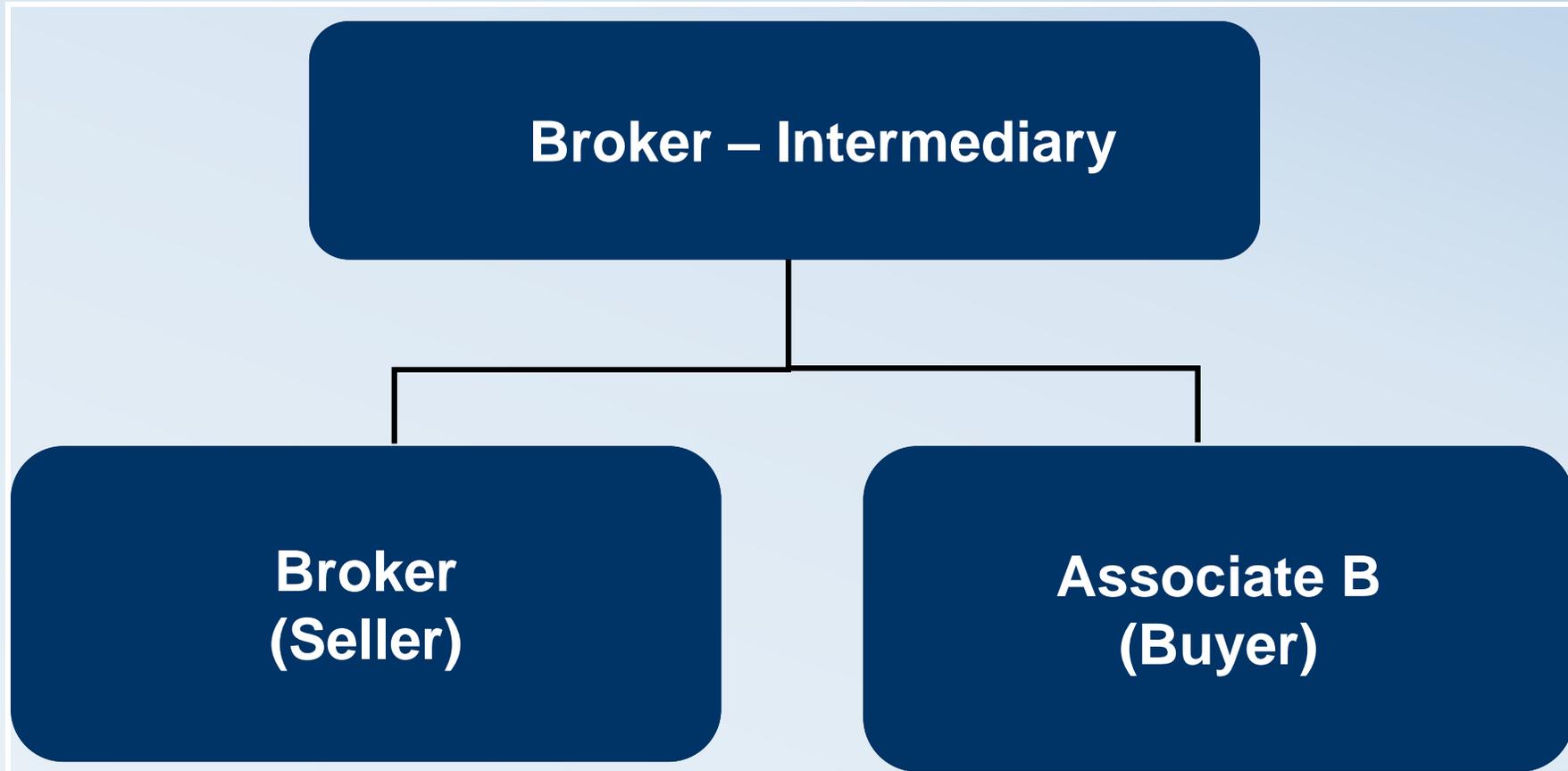
## Intermediary Option Two

- If the brokerage firm has obtained permission in writing from both parties to be an intermediary and to appoint salespersons to work with the parties, a salesperson could be appointed by the intermediary to work with each party.

## Example Number Two

- When a broker owns a small brokerage and personally lists and sells property, may the broker appoint himself or herself to one of the parties? Yes, as long as (1) the broker treats the party it does not represent as a mere customer, and (2) if a buyer representation agreement is in place, it is terminated.

## Example Number Two



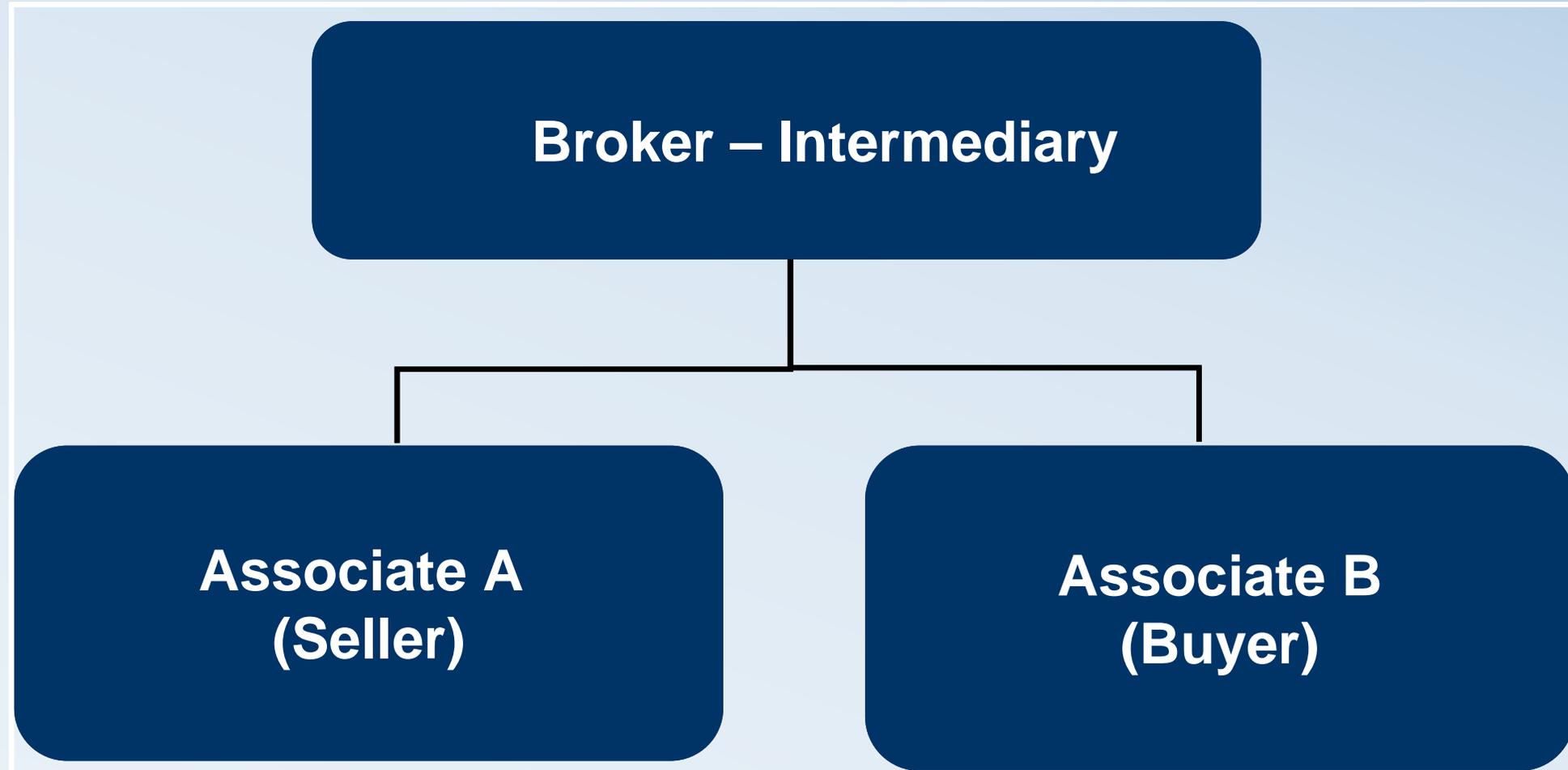
## Intermediary Option Three

- If the brokerage firm has obtained permission in writing from both parties to be an intermediary, but does not appoint different salespersons to work with the parties, the salesperson could function as a representative of the firm. Because the firm is the intermediary and the salesperson is acting as an “associate” intermediary, the salesperson would be subject to the requirement not to act so as to favor one party over the other.

## Example Number Three

- Agent A comes in with the Seller. Agent B comes in with the Buyer. The broker appoints Agent A to the seller and Agent B to the buyer. In this example, the broker does not provide opinions or advice to either party during the negotiations. Each associate, however, may provide opinions and advice to the parties to whom they are appointed.

## Example Number Three



# Considerations

- Written authorization from both parties to act as an intermediary (listing agreement and buyer rep agreement).
- Information About Brokerage Services form signed by the parties. It is even more helpful if the intermediary paragraph is circled and initialed by the parties.\*\*\*Remember, if you initially contemplated representing only the seller and your IABS reflects only this relationship, *you must* go back and change it prior to negotiating any offers\*\*\*.
- Language concerning the relationship of the parties in the special provisions section of the contract.
- Use the Intermediary Relationship Notice form (TAR 1409).
- Have the buyer and seller initial page 9 of the contract, where you identify whom each agent represents.

# Frequently Asked Questions

Q: Can there be two intermediaries in the same transaction?

A: No

Q: May the same salesperson be appointed by the intermediary to work with both parties in the same transaction?

A: No, the law requires the intermediary to appoint different associated licensees/salespersons to work with each party.

# Frequently Asked Questions

Q: May more than one associated licensee be appointed by the intermediary to work with the same party?

A: Yes

Q: May a broker act as a dual agent?

A: A dual agent is a broker who represents two parties at the same time in accordance with common law obligations and duties. An intermediary is a broker who negotiates the transaction between the parties subject to the provisions of Section 1101.559 of The Real Estate License Act. Dual agency is not prohibited, but the broker who attempts to represent both parties may be subject to common law rules if the broker does not act as an intermediary. Brokers who do not wish to act as exclusive agents of one party should act as statutory intermediary as provided by 1101.558 and call themselves “intermediaries” rather than “dual agents”.

# Frequently Asked Questions

Q: Is disclosure of agency required to be in writing?

A: May be oral or in writing.

Q. Must the intermediary broker furnish written notice to each party to a transaction when the broker designates the appointed licensees?

A: Yes

# Frequently Asked Questions

Q: Must each party's identity be revealed to the other party before an intermediary transaction can occur?

A: Yes. If associates are going to be appointed by the intermediary, the law provides that the appointments are made by giving written notice to both parties. To give notice, the intermediary must identify the party and the associate(s) appointed to that party. The law does not require notice if no appointments are going to be made. The law provides that the listing contract and buyer representation agreement are sufficient to establish the written consent of the party if the obligations of the broker under 1101.651(d) are set forth in conspicuous bold or underlined print.

# Frequently Asked Questions

- Q: What is the difference between an appointed licensee working with a party and a licensee associated with the intermediary who has not been appointed to work with one party?
- A: During negotiations the appointed licensee may advise the person to whom the licensee has been appointed. An associated licensee who has not been appointed must act in the same manner as the intermediary, that is, not giving opinions and advice and not favoring one party over the other.

REMEMBER - Information about matters which do not constitute an opinion or advice may be supplied in response to a question from the client. For example, the intermediary could tell the buyer what the prevailing interest rate is without expressing an opinion or giving advice.

# Frequently Asked Questions

Q: What is the advantage for the broker in acting as an intermediary?

A: If the broker and associates are going to continue to work with parties they have been representing under listing contracts or buyer representation agreements, the intermediary role is the only statutorily addressed vehicle for handling "in-house" transactions, providing both parties the same level of service.

# Frequently Asked Questions

Q: Who decides whether a broker will act as an intermediary, the broker or the parties?

A: Initially, the broker, in determining the policy of the firm. If the broker does not wish to act as an intermediary, nothing requires the broker to do so. If the broker's policy is to offer services as an intermediary, both parties must authorize the broker in writing before the broker may act as an intermediary or appoint licensees to work with each of the parties.

# Frequently Asked Questions

Q: When must the intermediary appoint the licensees associated with the intermediary to work with the parties?

A: If appointments are going to be made, they should be made before the buyer begins to receive advice and opinions from an associated licensee in connection with the property listed with the broker. If the broker appoints the associates at the time the listing contract and buyer representation agreements are signed, it should be clear that the appointments are effective only when the intermediary relationship arises.

The intermediary relationship does not exist until the parties who have authorized it are beginning to deal with each other in a proposed real estate transaction; for example the buyer begins to negotiate to purchase the seller's property.

# Frequently Asked Questions

Prior to the creation of the intermediary relationship, the broker will typically be acting as an exclusive agent of each party. Both parties must be notified in writing of both appointments. If, for example, the listing agent is "appointed" at the time the listing is taken, care must be taken to ensure that the buyer is ultimately also given written notice of the appointment.

When a buyer client begins to show interest in a property listed with the firm and both parties have authorized the intermediary relationship, the seller must be notified in writing as to which associate has been appointed to work with the buyer.

# The End!

Please call and/or email us if you ever have any questions. We would love to help!