

Guidance Document on necessity for brokerage agreements

As a means of providing information or guidance of general applicability to the public, the Real Estate Board is issuing this guidance document in order to assist its licensees in understanding the requirements of § 54.1-2137 of the *Code of Virginia*.

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

The following are relevant excerpts from the *Code of Virginia*:

§ 54.1-2137. Commencement and termination of brokerage relationships.

....

B. Brokerage agreements shall be in writing and shall:

1. Have a definite termination date; however, if a brokerage agreement does not specify a definite termination date, the brokerage agreement shall terminate 90 days after the date of the brokerage agreement;
2. State the amount of the brokerage fees and how and when such fees are to be paid;
3. State the services to be rendered by the licensee;
4. Include such other terms of the brokerage relationship as have been agreed to by the client and the licensee; and
5. In the case of brokerage agreements entered into in conjunction with the client's consent to a dual representation, the disclosures set out in subsection A of § 54.1-2139.

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§ 54.1-2137. Commencement and termination of brokerage relationships.

A. The brokerage relationships set forth in this article shall commence at the time that a client engages a licensee and shall continue until (i) completion of performance in accordance with the brokerage agreement or (ii) the earlier of (a) any date of expiration agreed upon by the parties as part of the brokerage agreement or in any amendments thereto, (b) any mutually agreed upon termination of the brokerage agreement, (c) a default by any party under the terms of the brokerage agreement, or (d) a termination as set forth in subsection F of § 54.1-2139.

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§ 54.1-2130. Definitions.

As used in this article: ...

"Brokerage agreement" means the written agreement creating a brokerage relationship between a client and a licensee. The brokerage agreement shall state whether the real estate licensee will represent the client as an agent or an independent contractor.

"Brokerage relationship" means the contractual relationship between a client and a real estate licensee who has been engaged by such client for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate on behalf of a client.

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

....

"Customer" means a person who has not entered into a brokerage relationship with a licensee but for whom a licensee performs ministerial acts in a real estate transaction. Unless a licensee enters into a brokerage relationship with such person, it shall be presumed that such person is a customer of the licensee rather than a client.

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

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The Code of Virginia requires a written brokerage agreement when a brokerage relationship, as defined in § 54.1-2130, is created. When a customer becomes a client is based upon the party's intent. A licensee needs to use his judgment based upon a customer's words and actions to make a determination as to when the intent to enter into a brokerage relationship is established and therefore, requires a brokerage agreement. Is the party looking for the licensee to provide advice and counsel requiring the licensee to exercise his judgment or discretion for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate? If so, this would require a written brokerage agreement as these acts don't fall within the definition of ministerial acts. Has the party engaged the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate? If yes, then a brokerage relationship is established and this requires a written brokerage agreement.

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

- Many acts may be ministerial or could require a written brokerage agreement depending on the party making the request and his intent. For example, showing a house may be ministerial if the licensee takes the party to see what the typical features are in homes in the market area or to gather information on the market or area. However, if the party asks the licensee to show him real estate because his intent is to have the licensee procure someone who is ready, able and willing to sell, buy, option, exchange, or rent real estate then a brokerage relationship exists requiring a written brokerage agreement.
 - Another example relates to a request for a multiple listing service (MLS) search. If a party requests a licensee to provide MLS search results without the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option, exchange, or rent real estate then a written brokerage agreement is not necessary. However, if a party requests MLS search results having the intent to engage the licensee for the purpose of procuring a seller, buyer, option, tenant or landlord ready, able and willing to sell, buy, option,

exchange, or rent real estate then a written brokerage agreement is necessary.

- If a party asks the licensee for general information about items such as tax rates, HOA dues, schools or typical features of property in the area, these acts appear to be ministerial. However, if the party asks these questions about specific property because his intent is to have the licensee procure someone who is ready, able and willing to sell, buy, option, exchange, or rent real estate, or if he asks the licensee to provide the licensee's opinion as to those features or properties that have those features, then a brokerage relationship exists requiring a written brokerage agreement.
- Many licensees may perform marketing activities in order to induce a party to engage them for the purpose of procuring a seller, buyer, option, tenant, or landlord ready, able, and willing to sell, buy, option, exchange or rent real estate. For instance, if a party asks the licensee to provide him with a valuation or analysis of real estate or an MLS search for informational purposes and does not yet intend to engage the licensee to procure a buyer or seller for the real estate, a written brokerage agreement is not necessary. However, if at the time the party asks the licensee to provide the valuation and the party intends to use the valuation or analysis of the real estate for the purpose of having that licensee procure a buyer for the real estate, then a written brokerage agreement is needed.
 - As a further example, a licensee may provide marketing materials and a competitive market analysis to a prospective seller who is interviewing for the purpose of retaining a licensee to sell their property, without the necessity of a written brokerage agreement.

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