

Designated Agency: a Short Reprieve for Double Dipping



By Brian Madigan LL.B.

Under discussion at the moment is the matter of designated agency. It is being suggested as a possible solution to some current agency problems.

Before we look at it designated agency, let's understand the context.

A brokerage firm is entitled to act as an agent for both buyers and sellers under the *Real Estate and Business Brokers Act*. The specific **duties** owed to a client at **common law** are:

- Disclosure
- Competence
- Obedience
- Accounting
- Confidentiality
- Loyalty

Those obligations apply to all agents, no matter who they may be, ie. attorneys (acting under a power of attorney), trustees, lawyers, corporate directors etc.

Should these same rules that apply to absolutely everyone, also apply to real estate agents too? Well, don't jump to conclusions. There are a lot of real estate agents and they have a very powerful "lobby".

When it suits them, you can basically throw all those rules out the window.

Real estate agents like to "**double dip**"! If they can, they like to act for both sides in a real estate transaction. Why? They get paid twice for the same deal. It's that simple. And, if you can get paid twice, why not? It's a lot easier than having to go out and find another client. What lawyer do you know who acts for both the plaintiff and the defendant in the course of the same trial. Now, that would be a little awkward, wouldn't you think?

Just have a look at all those common law duties once more. Can Bob the attorney properly represent his client Jane who was injured in an automobile accident and is suing her insurance company, The No Name Insurance Company of America, when Bob regularly and routinely acts for that company and has done so for years? Not really, and the more you think about it, not by any stretch of one's imagination.

So, why do real estate agents act for both sides? Because they can! There is no law

to prevent them. So, they just do. The answer should be more sophisticated than that, but it isn't.

In many jurisdictions there are special rules that must be followed when agents act for both sides. Disclosure and confidentiality are the first to go. All information is suddenly "on the table". There are no more secrets. Loyalty and obedience are obviously out the window.

Actually, competence is also out. You may have retained your real estate agent because you thought that they would be a good negotiator. Well, no longer; now, rather than negotiate the best price for you, they will be mediating messages between the two parties. How good is that? And, is that why you hired them?

One matter is leftover and that is accounting. That still continues, because the agent is obligated to disclose commissions and other payments. But, is that enough, just one item out of the six on the list. Listen, those original agency rules go back to the marketplace in Babylon over 5,000 years ago. The organized real estate industry has only evolved within the last 100 years.

The standard listing agreement permits what is known in most jurisdictions as "dual agency" and in Ontario as "**multiple representation**". So, now that the agent is acting for both sides, the agent really can't properly represent either. But, some agents will argue, "who knows the property better than I".

Designated agency is a small attempt to level the playing field. The brokerage firm will appoint another agent (who still works for the same firm) to represent the buyer. Now, both agents will continue to **negotiate rather than mediate**. The seller's agent acts solely for the seller, and the buyer's agent acts solely for the buyer. The brokerage firm still retains both clients and all the commission.

It doesn't work for law firms, but it's probably a step forward and better than the present practice.

In my view, designated agency is still wrought with inherent conflicts of interest, and the real estate industry will never become a truly "professional" organization until this practice comes to an end.

So, if you're going to hire an agent, **say no to double dipping!**

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