

Dual Agents

By Brian Madigan



There is a substantial risk of a conflict of interest and the real estate profession has really not stepped up to the plate and recognized it, as have other professions.

We have already discussed the problems that can arise when two agents both represent the seller and no one acts for the buyer. But, this is a little different. Here, the same real estate agent acts for both the seller and the buyer. They are dual agents.

You would think that this could present a slight conflict of interest? Well, of course it could! The legal profession is prevented from acting for both sides in a transaction because of the potential for a conflict. This applies even when there are simply conveyancing documents to be prepared. Lawyers are clearly prevented from acting for both sides when there are “negotiations” or there is a lawsuit. The reason is simple: you can’t do the absolute best job for one client without sacrificing the other. Now, that seems to be common and well-intentioned advice.

Yet, when it comes to the real estate profession, the same conflict is thought to be absurd. I might choose to use the term “greedy”, but that might disclose my bias.

The negotiated compromise with the Real Estate Council of Ontario, the governing body for the real estate profession is to have the agent as a “mediator” rather than an advocate.

So, let’s consider an example. You go to an Open House hosted by the seller’s agent. You like the property and would like to submit an offer. What happens? The same agent will act for you too! And, what if the seller doesn’t like this new arrangement? Well, that’s too bad; they already agreed to it. Remember that caution about reading the fine print?

The standard listing agreement allows the agent to act for the buyer, but, now the roles have to change somewhat. The agent now has fiduciary duties

to the buyer. Those duties may conflict with the same duties owed to the seller. So far, so good! But, what's the solution?

As far as the real estate industry is concerned, the solution is to have the agent take off their hat as an advocate on behalf of the seller and put on a new hat as a mediator on behalf of both parties. And, yes they would keep the entire commission and get paid by both sides.

Now, what happens with other professions? In every other profession, where such a conflict arises, another professional is brought into the negotiations to advocate for the unrepresented party. When two parties are negotiating a commercial agreement, they each have lawyers, accountants and other consultants all acting for them and owing their loyalty, allegiance and advice to their clients as principals.

Not so, in the real estate business. The agent can just continue to act for both parties. No real problem here, and keep both parts of the commission.

There is a new Real Estate and Business Brokers Act coming into force in March. It hadn't been changed for over 40 years, so you might think it would address this issue. It actually does. The conflict is still permitted as long as everyone agrees.

Remember the listing agreement? It already said you agreed in advance to the mediator role. Buyer's agency agreements say the same thing. Do you really think that the agent seeking to act for both sides will truly offer independent advice on this point? I think they are going to push for the mediator role, and I think they will ask both sides to agree to it, in order to comply with the new Act.

The real estate industry must have a good lobbyist.

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