

Agency Loyalty: Lawyer and Real Estate Agent



By Brian Madigan

You might question the matter of loyalty when it comes to your real estate agent.

The basic common law of agency is the same whether we are talking about lawyers or real estate agents, and the duty of **loyalty** is one of the **fundamental** principles.

However, you must understand that there is a difference in degree. Loyalty goes to the heart of the solicitor-client relationship. It is the most basic and fundamental obligation. Whether or not there is any payment for service, a solicitor must be loyal to his client. He cannot prefer the interest of another over that of his client, since that would amount to a breach of the duty of loyalty. Not only that, he cannot engage in a conflict of interest. But here, the obligation is disclosure, and with the client's full knowledge and informed consent, he might proceed. So, in part, conflicts of interest are somewhat negotiable. However, the duty of loyalty is not negotiable.

The same is not quite true when it comes to real estate agents. For the most part, real estate agents are expected to work for free. They get paid only when a deal is done.

So, in addition to the laws of agency, which include the concept of loyalty, there are other laws which apply as well. Some of these laws deal with the concept of "brokerage". While a broker is in effect just one category of agent, the laws related to brokerage are much looser than might otherwise be considered to apply. (Here I am simply referring to the common law and not any statutory laws)

A broker is an agent who is seeking a principal. That's the original common law definition. The broker already has the product, the service, or the property or other item which is to be sold. All the broker needs is a buyer. In that regard, the broker offers to represent just about anyone who will pay the price. The broker usually calls those individuals with whom he has had prior dealings. The item is offered, and if not accepted, the broker offers the item to the next individual on the call list. It would be rather foolhardy for anyone who might be called by the broker, to refuse the purchase, yet complain that the broker had breached his obligation of loyalty if he were to call someone else.

Sometimes, the rules related to agency are somewhat difficult in their application. In Ontario, the *Ontario Real Estate Association* has gone to great lengths to help clarify the situation.

Where there is clearly no principal-agent relationship, the broker can move on to the next prospect. You might find an analogy here with brokers in the financial services sector. If a broker were selling \$100 million in bonds today, he might start to call his client list. The first person who says “yes” gets the deal. Tomorrow, everyone will be called again. There is absolutely no expectation, once you have said “no” to the offering that the broker will either call you back or not offer it to someone else.

In circumstances in which the principal-agent relationship is documented, for example, by way of a **Buyer’s Representation Agreement**, then the duty of loyalty would be paramount. The agent cannot move on to the next prospect without running the risk of breaching the obligation of loyalty to the client.

There are two separate obligations:

- 1) the brokerage, and
- 2) the individual sales representative.

Although the brokerage can probably represent more than one client, a sales representative probably cannot. In fact, in the standard Buyer’s Representation Agreement (BRA), both the brokerage and the sales representative are permitted to act for more than one party. It seems reasonably fair when we are talking about the brokerage firm which may have several hundred agents, but it’s quite a different matter when it comes to **your “own” agent**.

The duty of loyalty arises at common law, and that obligation may still exist to some degree unless the client truly understands that it is not intended to apply. When agents explain the potential conflict of interest, they frequently refer to the brokerage firm and not themselves. The risk is that we may not have a truly informed client. If you remember the financial services analogy, all the participants were sophisticated and did business this way every day. When we are talking about a real estate transaction, frequently the purchaser will be a novice and have had no prior experience.

This duty of loyalty requires “disclosure” and that may come as a surprise to some agents. This duty arises in all (not just some) agency relationships.

So, what happens before the agent can move on to the next prospect:

- 1) the agency must be terminated,
- 2) the principal (client) must agree, or
- 3) the agency agreement must have contemplated multiple representation.

In my view, the simple “multiple representation” clause in the standard BRA is not sufficient for the sales representative. In most cases, it is sufficient for the brokerage, so why not the sales agent?

Let's consider a case where a multinational grocery store chain engages a national brokerage firm to represent its interests. It wants to make sure that the brokerage firm is loyal to it. Naturally, it expects "first call" with respect to any locations which are appropriate for its needs. This loyalty obligation would apply to the brokerage and any of its local agents who are engaged on the project.

Let's consider another case. This time a prospective buyer contacts an agent about a particular location. The agent knows nothing about this property. It is listed with another brokerage. But, on behalf of his client he makes some inquiries and soon becomes convinced that this is an absolutely terrific location. Can he take it to his other clients? No, he is under a duty of loyalty to his client. If the client does not want it or provides permission for the agent to market it to others, then the agent would be free to act. Otherwise, the duty of loyalty restricts the agent's options.

Let's consider one more situation. The agent is the first to discover the property. He offers or suggests it or even shows it to one of his clients. The first client demonstrates no interest, so he is free to move on. He is not under any obligation to seek this client's consent. In effect, he is an agent without a principal. In the previous example, the client was the principal and had already found the property.

In summary, the **rules** related to the loyalty obligation under the law of agency can at times be difficult to understand and apply. But, in most cases they do make **common sense**. They should, they arise out of the common law.

Confusing or not, it's not all bad, with **increased duties** and obligations comes **increased professionalism**.

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