

Designated Dual Agency



By Brian Madigan LL.B.

Sometimes, this is shortened to “designated agency”. Let’s use an example to appreciate the distinctions.

Bill is a broker and runs a large brokerage in a small town. Sally and Bob both work as sales representatives. Sally lists John’s house, and Bob’s client Mary is interested in the property.

Ordinarily, you would not see anything wrong with this. Technically, Bill is the agent because he is THE broker and has the agent-principal relationship directly with John and Mary. So far, so good; this is an example of dual agency.

The technical conflict arises because it is Bill who is the agent at law, and how can he treat two masters equally. Will he not be favouring one over the other?

Now, let’s assume that John’s house is still available, but this time, one of Sally’s own buyer clients, Richard is anxious to put in an offer. Now, we have an inherent conflict of interest. Sally is acting for both the seller Sally and Richard in the same deal. That could be a problem, in terms of a conflict of interest. Bill being a responsible broker appoints Paul to look after Richard. So, in essence Richard has his own realtor just protecting his interests. Well, not quite!

This is technically a designated agency, but in law it’s still dual agency. Bill is the single agent acting for both Sally and Richard, even though they may both have separate advisors.

So, remember the legal restrictions and limitations, there must be:

- An explanation
- Full disclosure
- Informed consent

Once that is in place, the new “advisors”, cannot disclose:

- Personal information
- Motivation
- Other offers
- Price

That means to some extent, their hands are tied. Rather than act truly as negotiators they must assume some other role to get any deal done.

And, what if Mary resurfaces and wants to put in an offer as well on the same house?

This time, it's even more complicated. Bill, the broker is the technical agent for John (the seller) Mary, and Richard. As a broker he is acting in a dual agency relationship with everyone. Not only are the seller and the buyer in conflict, but the two buyers are competing against one another.

Just to summarize, the realtors acting as advisors in some capacity are:

Sally for John (seller)
Bob for Mary (buyer 1)
Paul for Richard (buyer 2, Sally's original client)

Has Bill the broker done enough to make the conflicting representations by his office fair to all the clients? Let's have a look at Sally's motivation. I know we are not to talk about the clients' motivation, but what about Sally herself?

The listed property is \$500,000.00 and carries a 5% commission distributed equally between the listing and buying sides of the deal. Sally will get one half of the commission or \$12,500.00 if it sells to anybody.

However, if it sells to Richard, she will also get a 25% referral fee from Paul. This means an additional \$3,125.00 on this deal.

Obviously, Sally should work hard to persuade John to accept Richard's offer? Maybe not! Consider, what would happen if Richard's offer happens to come in second.

Richard is back in the market. He goes back to Sally and puts in an offer on another \$500,000.00 home. This time Sally picks up the full buying side of the commission or another \$12,500.00.

Paul, the designated agent for Richard is only getting 75% of the commission although he is doing all the work. Yet, if this particular deal does not go through, Richard will go back to Sally. Obviously, he is motivated. But, could he be too

motivated? This is a one-shot deal from his point of view. Let's pull out all the stops and get Richard to come in first with the best offer.

When we go back to Bill the broker, we do have a somewhat neutral party. He wins all around. He picks up the broker's portion of both the listing and buying sides no matter who buys.

Designated agency was dreamt up to be the "be all and end all" solution to conflict of interest issues. It helps, but it's far from perfect.

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Royal LePage Innovators Realty
905-796-8888
www.OntarioRealEstateSource.com*