

## Dual Agency: Resolved



**By Brian Madigan LL.B.**

There are certainly some problems with dual agency, the most critical of which is the inherent unresolvable conflict of interest. But, even if it cannot be resolved, perhaps a suitable accommodation can be arranged.

Not every agent is a good negotiator, so the mediator role may work to the advantage of some clients. Frequently, both parties want a deal, particularly in a business situation. They want the deal done and here is where an effective mediator will outshine a negotiator any day. The parties are close but often too stubborn to give in, so the deal gets lost. With a good mediator these deals stay alive and get closed. Everyone is happy!

There are two extreme camps when it comes to dual agency:

- Those opposed, in all circumstances
- Those in favour, without serious reservations

### **Opposed**

To those always opposed, I would argue that there are many examples of successful dual agency outcomes. If there weren't, I wouldn't be writing this. The best philosophical argument is offered by those who are strongly opposed. They seem to have a better, moral and ethical foundation for their arguments.

The only problem that I have with that view is the simple, practical list of exceptions....a whole series of cases where BOTH clients were better served by having one agent, in fact, the same agent acting for both of them. The test question is client results and client satisfaction; and not the issue of whether the agent was only motivated because there was more money in the deal. I don't really know that for sure. What I do know, is that BOTH clients were very pleased and happy with the result. There was obviously some merit in the dual agency arrangement. The agent acted as a mediator and got the deal done. The clients wanted RESULTS, not more and more negotiations.

## **In favour**

It's easy to take on this group. There are many reasons why dual agency won't work. Often there is a substantial conflict of interest and this will not go away. Again, just the same as the firmly opposed group, the arguments of this group are just self-serving.

## **RESOLUTION**

Somewhere between the two extreme positions is a middle ground, and this is where I think the issue of dual agency should find resolution.

The consumer must be informed. The concept must be explained. And, as most legislation will require, the written informed consent of both parties should be documented.

In practice, it is the explanation that usually falls short of the mark. This is the area which must be fully explained. Both clients should understand and appreciate what they might be losing and what they might be gaining by adopting the dual agency environment.

Unfortunately, if the realtor wants to represent both parties they will often explain it in such a way that the client feels that it is quite a reasonable alternative. Actually, it can be explained appropriately, and the client may very well give the agent a chance to prove that they are an excellent mediator.

All too often, the client is misinformed on several key points because the agent fears the truth behind the explanation.

So, who is the agent? Right now, it is the brokerage. I would prefer the sales representative to be the agent. That would eliminate all the dual agency issues in the offices of a large, dominant, local brokerage. To some extent, these are technical dual agencies. But, the result is the same and the clients are asked to give up some rights. This doesn't make any sense. The principal-agent relationship should be between the client and the selected sales representative. The firm really has nothing to do with it. This approach would eliminate over 90% of the dual agency situations.

That leaves us with the same agent for both parties. There are two options here:

- Consent and go with dual agency
- Designated agency, and go with an appointed agent

Both of these alternatives represent reasonable options for consideration.

If the same agent acts for the seller and buyer, then the mediator route could work. Naturally, mediation will have to be within the skill set of the agent, and both parties must agree.

However, I do have a problem with two buyers both individually being represented by the same agent. Here we have a multiple offer situation. I think the only reasonable approach is to have one of the two buyers assisted by an agent designated specifically for the purpose of acting for them. This is much too dangerous a situation for the realtor. Simply from a liability perspective, I think the agent should avoid acting for both buyers in competition with one another.

In conclusion, dual agency is a fact of life. There is no firm answer: it is always right or it is always wrong. That is too simplistic!

Each such situation should be considered on its own merits. There should be a bias against dual agency. This acknowledges that there are problems and these problems require resolution.

If a suitable and acceptable accommodation can be made, then it would be appropriate to proceed, with caution.

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