

## Dual Agency and Sub-Agency



**By Brian Madigan LL.B.**

In order to properly understand the concept of dual agency it is necessary to view it from an historical perspective.

In the 60's, 70's and 80's all agents represented the seller, no one acted for the buyer. During this period, buyer's agency was rare and existed to a limited extent in the commercial real estate market.

Why did all agents represent the seller? The answer was quite clear: it was the seller who was paying the commission. So, just as the old adage goes "he who pays the piper calls the tune..." both agents in a real estate transaction acted for the seller, were paid by the seller and accordingly owed their loyalty to the seller.

The reason was based in part on the concept of **sub-agency**. In effect, it is exactly what it says: an agent of an agent, that is, a sub-agent. The listing agent would offer to split the commission with any member of a multiple listing service who might bring a buyer. The offer was clear to the other agent:

- You will bring a buyer
- You will be our sub-agent
- You will act for the seller (just as we do)
- Your loyalties, duties and obligations will be owed to the seller
- You will receive one half of the commission from the seller through us

Consequently, this arrangement ensured that sellers were looked after very well. The seller had two agents and the buyer had none. In fact, the agent who brought the buyer might be the brother, sister, business associate or close friend of the buyer. But, it mattered not what the relationship might be. All duties were owed to the seller. After all, it was only the seller who was paying a commission.

By the early 1980's, the real estate industry began to undergo a change. Buyers were puzzled as to why their best friend was acting for the seller rather than acting for them in a deal.

Issues commonly arose through annoyance. A property might be listed for \$300,000. The buyer might say to “his own agent” I will go as high as \$290,000, but let’s try an offer at \$275,000 and see what happens. The agent prepares the offer at \$275,000 as directed and then attends at the seller’s residence to present offer to the seller in the presence of the listing agent. Then, the listing agent says “how high will the buyer go”. Now, this is the real difficulty. Although, the agent who drew up the offer is a close friend, maybe even a relative of the buyer, the fiduciary duties including loyalty and disclosure are owed to the seller.

As a result, the agent must say “the buyer told me he would go as high as \$290,000”. So much for the lowball offer! And, a very interesting signback. If the signback is \$290,000 the buyer will know that something is up. The result is that the signback will be suggested at \$295,000. That will be brought to the buyer. The buyer may ask the question “how much lower will the seller go”. The answer here will be “I can’t really answer that, I’m acting for the seller....put in your best offer and I’ll see what I can do”.

You will note that this fosters “**gamesmanship**” and is likely to bring the real estate industry into disrepute. Basically, no one could trust a real estate agent, and could you blame them?

In the early 1980’s, there were several organizations in the United States which investigated the matter and issued position papers including the Federal Trade Commission, The Association of Real Estate License Law Officials and the National Association of Realtors. There were some noteworthy observations:

- Buyers were confused about agency
- No one was acting for buyers
- Two agents often acted for the sellers

Further, there were some recommendations. New legislation was enacted by the early 1990’s. Sub-agency was replaced by cooperation and compensation agreements. This indicated that the seller was willing to provide a commission to a cooperating agent. This agent could select to be either:

- Sub-agent for the seller,or
- Buyer’s agent for the buyer.

What this really meant was that the issue of payment of **compensation** and **agency appointment** were **separated**. By the late 1990’s most jurisdictions had enacted legislation which indicated a presumption in favour of buyer’s agency, unless it was otherwise agreed. This is the case in Ontario.

And, this was the same time that dual agency was created. One agent, but divided loyalties! This could certainly arise in cases where the listing agent met a prospective buyer at an open house or in response to an advertisement and decided to act for the two opposing parties in the same deal.

You will probably recall that **dual agency** arises in the following **circumstances**:

- One sales representative acting for the buyer and seller
- One brokerage acting for the buyer and seller (with two sales representatives)
- One brokerage acting for more than one party in a proposed transaction (multiple representation), two buyers competing with or without the brokerage representing the seller

Dual agency, in effect, has arrived on the real estate scene as a partial solution to sub-agency. Really, it's a good thing because sub-agency was worse.

However, we now have conflict of interest issues that need to be resolved in the dual agency context. That's the next step. Until, those issues are resolved the real estate agents will be part of an industry rather than a profession.

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