

## Dual Agency: Concerns and Issues



**By Brian Madigan LL.B.**

The entire matter of dual agency in real estate practice remains problematic. How can an agent have two masters? It just doesn't work!

In some ways, the real estate industry has brought the controversy upon itself. Why? It won't give up agency.

The broker or the brokerage is considered to be the agent of the client at law. This is designed to keep the brokerages in control. This is not a benefit to the realtors who work for them, or the clients they serve. Most of the problems could probably be eliminated if the realtor rather than the brokerage were to be the agent.

It is simply impossible to place the interests of two separate and distinct parties first in the same transaction. Obviously, someone is going to come in second.

Advising and negotiating for two parties in the same deal presents a problem for other professions as well. Real estate agents are not the only "agents". The law of agency applies to lawyers, and the response by the legal profession is quite clear: *just don't do it.*

The solution is that either one or both clients will be referred to other counsel. Presumably, the lawyer will still have some work to do on some other files to earn a living in the meantime. With realtors, the situation is a little different. The commission is substantially higher and the deals are far less frequent. This encourages the agent to find some way to hold onto the deal, in fact, both sides of it.

The first solution that comes to mind would be to refer the buyer or the seller to another office. This is common in the legal profession, but very uncommon for realtors.

The issue frequently presents itself when the realtor secures a listing for the brokerage and acts on the sale for the vendor of either a property or a business.

As a result of the advertising undertaken, the listing agent is contacted by an unrepresented individual. Now, this is the dilemma! The listing agent has some choices to propose to the prospective buyer:

- Let me show you the property
- Contact another agent from another brokerage to show you the property
- My broker will designate another agent in our office to work for you

Well, 99% of the time, the first alternative will be selected. The reason is quite simple, that portion of the commission offered to the buyer's agent can be picked up on this same deal.

Assuming, that the buyer shows some interest following inspection, there are still some choices available to the listing agent:

- The buyer could still be referred
- The buyer could be a client
- The buyer could be a customer

Certainly, by this time there is no question that the first option is ruled out. That leaves us simply with the proposition that the realtor will seek to act for the buyer either in the capacity of an agent where the buyer is a client or non-agency where the buyer is a customer.

In the first case, there is a Buyer Representation Agreement (BRA) or in the second a Customer Service Agreement. The unsophisticated consumer is likely to choose the client relationship, since that imposes the greatest degree of duties, obligations and responsibilities upon the agent.

Consequently, we now have a substantial conflict of interest, and the agent is following two masters (referred to as "principals"). This really cannot be done. So, most jurisdictions impose a limitation upon the realtor in this new relationship:

- Don't disclose motivation
- Don't disclose the price
- Don't disclose other offers

These limitations are designed, in part, to maintain "fairness", but what they really do is simply pit the seller against the buyer. The better negotiator ends up the better deal. The realtor provides less service and oftentimes simply ends up assisting with the typing of the documents and acting as a messenger between the two parties.

And here, you might think there should be a discount in the price for the services? No, not at all, in fact, the realtor ends up with double the amount of the commission.

This would seem like a very hard sell, and you would be tempted to think that it never happens, but it occurs every day!

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