

Dual Agency: Negotiator or Mediator

By **Brian Madigan LL.B.**



There is a basic presumption underlining the discussions of dual agency and that is, an agent should be a negotiator and not a mediator.

Maybe that's true, and maybe it's not! However, many agents are very, very poor negotiators. In fact, it's not taught as part of the program. Nor is it taught in Law school. So, why all

the fuss? What good is an agent-negotiator if they are not any good at it? In all fairness here, some agents have little or no experience and are poor negotiators. Ordinarily, I might point to the legal profession for some assistance but oftentimes they are just as inexperienced.

That does leave us with some excellent negotiators, and while some may be agents, and others may be lawyers, most are clients themselves. For some reason, great negotiators are people who are constantly negotiating in their lives. Their expertise is derived from experience, not books. And, when it comes to a real estate deal, they will excel. This is a good client to have, and an inexperienced agent can learn a lot.

Let's look at the dual agency limitations and restrictions and see if they have an impact?

Here are the rules, the agent must not:

- Reveal confidential information
- Reveal other offers
- Disclose price information
- Disclose motivation

Does this makes any real difference to the negotiating process? Remember, the agent knows the confidential information, they just can't tell. They can't say anything about other offers even though they know about them too. Further, they cannot mention the lowest price the vendor would accept, or the highest price the purchaser might offer, although they also know this, as well. If the seller needs to sell, or the buyer needs to buy, they can't pass any information along to the other party. However, if one party specifically wishes to disclose and volunteer such information then, that could be reported.

What this means is that some very important information is missing. The agent knows it, but the client does not. The clever client will obtain this information from another source. It may very well be in the public domain, or known to the neighbours.

The dual agency rules are designed to neutralize the agent's negotiating position/power. However, as I mentioned before, what if the agent is not a very good negotiator, what's the loss? Maybe, nothing!

Mediator/Messenger

There are two roles for our agent now limited by the dual agency rules. The agent can either be the mediator or the messenger. The first takes skill, experience and a degree of dexterity, the latter is simplistic, anyone can do it.

A skilled mediator can be more valuable in the proceedings than a skilled negotiator. Listen and hear both sides, then seek an acceptable compromise. You find this all the time in labour negotiations. The battling goes on for months back and forth between skilled and experienced labour negotiators without a successful conclusion. Then, a mediator is appointed who drives the deal home!

The right role here is mediation.

On the low end of the spectrum, we have agents who simply carry messages back and forth between the parties. I'm embarrassed to say that is what happens most of the time.

One side may be better at negotiating than the other, so they usually achieve a result closer to their initial position. At the same time, those less skilled, end up with a poor result. These clients are the ones who should complain. These clients did not get what they bargained for. These clients have nothing to show for the fact that they signed a representation agreement. They hired a negotiator and got a messenger. What was that all about?

In fact, the fees were the same. You might have thought that there would be a reduction. But, not at all....same fees.....less service. Also, the agent's liability was decreased from a legal perspective in this arrangement. You might wonder why?

COMMENT

1) messenger

Now, my point is this: hiring an agent and getting a messenger doesn't make any sense at all. If this is the case, then the consumer groups have it right. Dual agency is wrong. It should be abolished. It's simply unconscionable double-dipping by the real estate industry.

2) poor negotiators

My second point is that many agents are poor negotiators, so if this role is removed, what difference does it make. Perhaps, none!

3) mediator

My final point is mediation can and does work. A skilled mediator can bring an excellent result to both parties and achieve an agreement in circumstances in which negotiations would be fruitless. The result is that in some cases, dual agency with its inherent conflicts can produce a mediated result. That can be beneficial, and in that regard, there is a benefit in dual agency situations. It doesn't occur all the time, but it occurs frequently enough to warrant serious consideration.

The unintended result of dual agency can be a successful mediation.

So, while I'm philosophically opposed to dual agency, I have to admit with the right mediator, there can be a good and effective result for both parties.

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