

Justification for Multiple Representation

LIMITED DUAL AGENCY

By Brian Madigan LL.B.

A colleague, Barry Bridges of Weichert Realtors Bridges & Co. serving the Roanoke valley from offices at Smith Mountain Lake and Salem Virginia posed the following question:

"I was very surprised by the answer given by Brian Madigan. I am not versed on Canadian courts so that may be the difference. I can not imagine a US attorney advising that dual agency is ever a good idea as there are alternatives that accomplish the same goal for the client.

There is one point though that I don't agree with regardless of country of origin. I can not see how you can be a good mediator if you are not a good negotiator so that part of the argument is lost on me.

With that said Brian has a very well thought out argument."

~~~~~

*Here is my reply, and for those unfamiliar with the original article, it is reproduced below.*

Barry

Thanks for your comments.

First, the law generally in Canada is no different here than it is in many of the States. Besides, the law of agency derived from the marketplace in Persia over 5,000 years ago, long before the beginnings of common law. The intention was to prevent the agent from cheating the principal. Today, the laws in common law jurisdictions and others are very much the same.

To be perfectly frank, I'm quite surprised by my own answer. I wrote and published articles against dual agency several years ago. However, at that time, it was based on theory not experience.

But, as time went by several real life situations developed. I found myself on both sides of the same transaction. No wanted to leave. Both the vendor and the purchaser demanded that I remain involved.

So, after a short stint of me sitting on the sidelines with a good philosophical argument, and with both the vendor and the purchaser now represented by their own agents, I received a phone call. To cut to the chase, both parties met with me

over lunch and effectively demanded that I do the deal. The instructions from both, in the presence of each were quite simple: "come up with something that is fair, and we'll sign it."

I agreed. There was a condition. I was not the legal agent for either. They would both have a free walk away, if their respective lawyers did not approve the deal. I wrote a long letter to each of their lawyers explaining my role and the very real conflict of interest that it presented. Both parties agreed, and so did their lawyers.

I have acted as an Arbitrator and as a Mediator in many legal cases. Both parties have their own counsel, and agree that I am to come up with a solution. This particular "dual agency" role is really just like non-binding arbitration or a mediated settlement.

Effectively, the vendor's agent wants "A". At the opposite end, the purchaser's agent wants "C". However, what they really know is that they are going to have to meet somewhere in the middle if they truly want a deal. So, I come up with "B". I say "B" is fair to both sides. They agree, and sign. Now, they have a two day cooling off period, to take it to their lawyers.

You also wondered about the mediator and negotiator comment. In fact, I agree with you if you aren't a good negotiator, you won't be a good mediator either. I suppose, I just don't come across that many good negotiators. They are relatively few and far between. Yet, in many cases they all seem to think of themselves as "wonderful". They advertise this "fact", and then, when the occasion presents itself they bail, become messengers back and forth and ask for double the commission. Now, that's just plain wrong!

I have a number of transactions where I have effectively worked on both sides of a deal. Just think of union and management negotiations. Sometimes I act for a union, in other cases I act for management, and now quite frequently I am approached by both sides to mediate a dispute. Here, I don't think there is that much difference compared with dual agency. It's much the same. Maintain confidences for both sides, don't reveal the other's bottom line and come up with a solution. Get both parties to agree.

There are however several interesting problems:

- 1) real estate agents are not trained as mediators, and
- 2) real estate agents are not trained as arbitrators.

So, if they are not trained and have no experience, the simplest solution to stay out of trouble is "just don't do it". *Brian Madigan*

*On the issue of whether dual agency should be permitted at all for real estate agents throughout North America, reproduced below are the original comments:*

In Ontario dual agency is permitted with proper disclosure and consent. Initially, I was opposed to it completely. The reason is that I practised law for 25 years. Then, several dual agency situations (called multiple representation here) occurred, and I found that it worked out. It was difficult, but it worked. Properly speaking the role of a mediator, arbitrator, or facilitator is quite different from that of a messenger. Besides, I haven't run into that many great negotiators out there.

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. *Brian Madigan*

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