

## Unintended Dual Agency



**By Brian Madigan LL.B.**

Buyer's agency was popularized as a partial solution to the problems and issues presented by sub-agency.

You might recall that in a sub-agency situation, two agents both act for the seller, the listing agent, as well as the selling agent. While buyer agency came into play in order to alleviate the issue that the seller had two agents and the buyer had none; it fostered its own problem: dual agency.

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

The other important concept to remember is that it is the brokerage that will actually be the agent, not the individual sales representative.

### **1) One sales representative acting for the buyer and seller**

This is the real problem! This is not imaginary in any way. One person cannot serve two masters equally. The salesperson will possess confidential information. The agency duties require the client to be placed first in all situations and that is impossible with two clients. Somebody has to come in second. There is an obligation to act in the best interest of the client, but with two, someone's interests will be second best.

So, no matter what, you can leave this issue for first year philosophy students to debate. There is no resolution.

Some brokerages will offer a partial solution to this problem: designated agency. The broker will appoint a chosen sales representative in the office to act for one of the parties (presumably the buyer). That means that each party will have their own sales representative.

However, they still have the same agent, and that means following the dual agency rules.

### **2) One brokerage acting for the buyer and seller (with two sales representatives)**

This is a common circumstance and occurs quite frequently. You have a large brokerage with two hundred or more agents all trading in the same geographic area. You are bound to have numerous situations where the buyer and the seller are represented by two different sales representatives, but the both work for the same broker, and that means following the dual agency rules.

### **3) 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**

Here the circumstance is simple. There is a good house, it just came on the market. There is plenty of interest and two sales representatives from the same brokerage act for buyers who want to put in offers.

The illustration could be one step more complicated, if the same brokerage also had the listing, such that it was acting as agent for the seller as well. Again, that means following the dual agency rules.

### **Unintended Dual Agency**

So, what's unintended about our three situations? In the **first case**, there is absolutely nothing "unintended". If the same sales representative acts for the seller and the buyer, this was clearly intentional. It must be explained, disclosed, and the informed consent of the parties documented.

Sometimes, this example is used as a case of unintended dual agency from the perspective of the brokerage. Certainly, it wasn't planned by the brokerage; it just happened. You might appreciate that is a very weak explanation. Many brokers will have an internal designated agency policy that is followed.

Nevertheless, there still is a potential issue. Some sales representatives are better than others. This means that the broker can oftentimes influence the result by reason of the selection of a particular sales representative. So, it's buyer beware!

The **second scenario** is often a technical, legal dual agency conflict. If the two sales representatives were from different offices, everything would be fine. The fact that they have the same broker makes it a dual agency issue.

This arises just by coincidence. This is a good example of something unintentional.

Many sales representatives who are vocal in their advocacy against dual agency will go along with this situation. It now makes no difference, they will argue. The mere fact that they are technically in dual agency does not matter. They will still act in the best interests of their clients.

This **third scenario** is even more remote, and hence less “intended”, or correspondingly more “unintended”. Two clients submitting offers in a bidding war, what’s the problem with that?

And, what if the brokerage represents the seller, and even worse, what if the selling representative also has a potential buyer in the mix. Somebody has “inside information”, and somebody else doesn’t.

### **The Dual Agency Rules**

The difficulty with all of these conflicts of interest is that they arise in the first place. It makes little or no difference how they arise. It doesn’t matter whether they were “intended” or “unintended”. It is not a matter of determining fault. It is not relevant.

Once the dual agency circumstances arise, they must be dealt with. The important issue is how.

Here are the rules, the agent must not:

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

As a necessary consequence, there is a change in the role of the agent. Originally, a negotiator acting in the best interest of the client, now the agent, compromised by dual agency rules is either a messenger or at best a mediator.

Although it is an often discussed issue in real estate practice, unintended dual agency is basically irrelevant. What is relevant is the agent’s response when it arises.

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