

Dual agency . . . again!

By James L. Goldsmith, Esq.

Dual agency has been lawful in Pennsylvania for 16 years. I, therefore, have had considerable time to make observations and reach some conclusions about the practice. My top two conclusions are (1) too many licensees know too little about it and (2) too often licensees rush into dual agency when they should not have. There are plenty of examples from which one can draw both conclusions.

Consider the listing agent who endeavors to sign any interested buyer who approaches a listing unaccompanied by an agent. What relationship is to exist between the buyer and the listing agent? When I ask this question when speaking to groups on the subject of agency, all too often I get the wrong answer.

There is no requirement that a buyer have a buyer agent. There is no requirement that the listing agent also represents the unaccompanied, unrepresented buyer and thereby become a dual agent. Why do it?

There are reasons to be a dual agent and reasons not to. The amount of the commission to be earned by the listing agent does not change if the buyer remains unrepresented or if the listing agent assumes the dual agency role. The fact of the matter is that the seller is paying the listing brokerage a commission that is to be split (not necessarily equally) with the selling agent, should there be one. If the buyer is not working with an agent, there is no one to whom a cooperative split is due.

Since the fee is the same, what is wrong with being a dual agent? My answer is that there may be nothing wrong with assuming the dual agency role, but the chances of a claim of impropriety of some sort are increased at least tenfold, in my humble opinion. The buyer's desire to get the best property for the lowest price is to some extent mutually exclusive to the seller's desire to sell the property in present condition for the highest price. And it is not simply a matter of pricing. One has to consider that most transactions involve negotiations on several fronts, including the corrective proposals that inspections are likely to generate.

The good reason for taking on the buyer as a client is that, in the event the buyer is not happy with the listed property, the listing agent may go on to sell that buyer a property listed with another brokerage. We all like to list buyers and sellers and let none slip through our fingers! Is the added risk of being a dual agent worth it? I won't answer that question directly, but will suggest that it may not be necessary to sign a prospective buyer to a buyer agency contract when that buyer first looks at a property listed with that same agent. The buyer may decide to proceed with the purchase unrepresented, in which case as I've noted, a full commission is earned. In the event the buyer wants representation, then talk to your company about its policy about having a single agent represent both buyer and seller in the same transaction.

Now, if you've been reading my articles for the past umpteen years, you've no doubt heard this message umpteen times. So why repeat? Maybe it was this morning's HotLine call about an agent who rushed into dual agency only to find that the buyer side is playing fast and loose with

the law. The facts are detailed, but let's say that the buyer wants to put the property in the name of his adult children who aren't available to sign seller disclosure, agency contract, or consumer notice and for whom a power-of-attorney does not exist; and the property is being sold for cash (I mean cash, dollar bills, dinero). Smell bad? You bet and now that our agent has stepped into a fiduciary relationship, how does he deal with it? The message is not so much about how you deal with a crooked client, but rather why take on a relationship so quickly that you haven't even had a chance to assess the apparent character and nature of the buyer? Why work in a fiduciary relationship when you don't need to, especially when the recipient of your duty is . . . let's just say a little off.

Happy hunting and best to all. Go to those agency classes!

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