

Dual Agency: Use It When Needed, Avoid It When Possible

By Douglas K. Marsico, Esquire

It has been almost 17 years since Act 112 of 1998 became law authorizing real estate licensees to act as dual agents in a real estate transaction. During that time, I have consistently heard real estate licensees tell me that they *must* become a dual agent when an unrepresented buyer wishes to make an offer on one of their listings. The ensuing exchange usually goes like this:

Act I, Scene I. (Marsico on phone with Hotline caller)

Hotline Caller: I so since the buyer was unrepresented, I had him sign a buyer agency contract which made me a dual agent!

Marsico: Wait, why would you do that?

Hotline Caller: Because the buyer needs representation.

Marsico: Why do you think the buyer needs representation? And why do you think you have to be their agent? The buyer can have representation, just not from you. You already represent the seller.

Hotline Caller: But if I am a dual agent, I can represent both.

Marsico: That's not really giving the buyer representation, is it? And do you think your seller will be happy now that you have to give him less of your advice and expertise? After all, your seller did hire you to represent him.

Hotline Caller: But who is going to represent the Buyer?

Marsico: The Consumer Notice explains that the buyer can hire another real estate licensee to act as his buyer's agent or choose to deal directly with you knowing that you represent the seller.

Hotline Caller: But if the buyer hires a buyer agent, then I have to split the commission.

Marsico: Maybe yes, maybe no. The right to representation is independent from the right to compensation. The obligation to pay a cooperating fee to a buyer's agent is determined by whether the buyer agent's efforts were instrumental, or the procuring cause for a successful

transaction. A buyer's agent who is hired after the buyer tells you that he wishes to make an offer on your listing will still have to earn his fee if he wants to receive the co-op fee.

Hotline Caller: It would just be easier if I acted as a dual agent.

Marsico: Dual agency is a conflict of interest. Conflicts of interest are best avoided. Why create a conflict of interest when it does not exist?

Hotline Caller: Because both consumers need representation.

Marsico: Why do you think the buyer needs to be represented? If that were true, wouldn't it mean the buyer needs to have his own agent? Look, the buyer can choose to work with you as an unrepresented party. Keep in mind that, although your duties of confidentiality and loyalty lie with the seller, as a real estate licensee, you still have duties to all consumers regardless of the nature of your relationship. Even if you don't represent the buyer, you still have to perform the various duties that are explained on the consumer notice. For example, you still have a duty to exercise reasonable professional skill and care; to deal honestly and in good faith; to provide assistance to all parties with document preparation; to advise on need to obtain expert services, etc.

Hotline Caller: Well, I always have the buyer sign a buyer agency agreement and then I become a dual agent.

Marsico: Now, think about that for a second. You are asking the buyer to sign a contract for you to become a buyer's agent when in fact you cannot be a buyer's agent. The moment the buyer signs the "buyer agency contract" you are in fact a dual agent because you already represent the seller. Not only are you not a buyer's agent, but now you are no longer a seller's agent either! Do you feel comfortable having the consumer sign a contract in which you promise to perform a service that you cannot provide?

Hotline Caller: No, but how else would I become a dual agent?

Marsico: You absolutely understand how to make yourself a dual agent. But why do you want to do that? It's one thing when you have a *preexisting relationship* with both the buyer and seller, and then they come together in one transaction. It's another thing altogether to actively try to be a dual agent. There is no "dual agency contract" for a reason. It was never the intent of the law for licensees to permit dual agency relationships by contracting with consumers as we just discussed.

Hotline Caller: Ok, I think I understand now. Thank you for your time. I better discuss this with my broker.

(Marsico and Hotline caller hang up the phone).

(Marsico checks Hotline messages).

Voice Mail: "You have 20 new messages."

Act II, Scene 1. Hotline caller enters broker's office to discuss dual agency.
(fade to black).

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Mr. Marsico is an attorney with Caldwell & Kearns which serves as general counsel to PAR. A portion of his practice is dedicated to providing advice and counsel to real estate licensees and representing and defending real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. He routinely counsels employers on employee relations issues as one of the voices of the PAR Legal Hotline.