

A few issues with dual agency

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Dual agency has been around long enough now that we see how it is working and whether it's causing hardships for those who practice it. Here are few tips regarding dual agency issues that are either overlooked or not handled cleanly enough.

The law requires that buyers and sellers consent to dual agency before it may be practiced. The consent is given when the seller signs a PAR standard listing agreement and when the buyer signs a standard PAR buyer agency agreement. Both have provisions stating that the client authorizes the brokerage to engage in dual agency. Another dual agency disclosure is satisfied by the agreement of sale. The agreement indicates the agency relationship of the parties on page 1 of the agreement.

There is, however, an additional disclosure for which a form has not been provided. This disclosure covers the inception of the dual agency relationship at the time a buyer represented by Broker X is being taken to a home listed with Broker X. Both the buyer and seller are to be put on notice that the other side of the potential transaction is also a client of Broker X and that Broker X is engaging in dual agency. If there are separate designated licensees involved, then the notice is that the broker alone is acting as a dual agent, but that each side has their own separately designated licensee who will act solely in the client's best interest.

There is no requirement that this disclosure be made in writing or that it be signed by the parties. A simple email to a buyer client advising that the property they are about to be exposed to is also listed with the brokerage (and/or the individual licensee) is sufficient. You could certainly remind the buyer client that when they signed their buyer agency contract they authorized the broker and salespeople to engage in a dual agency relationship and this is just one of those occasions where it is actually happening. A notice to the seller would be to the same affect.

This disclosure is rarely made and, thankfully enough, rarely a problem. If a transaction, however, comes under scrutiny by the Real Estate Commission, it would be nice to have something that corroborates that the client was put on notice that they were entering into a dual agency relationship.

The other problem that this article explores is one that affects dual agency relationships when a single salesperson is representing both seller and buyer. Generally, there are two types of dual agency: 1) where the same licensee represents the buyer and the seller in the same transaction and, 2) where the same brokerage represents buyer and seller in the same transaction, but where the parties are represented by different designated licensees within the office. It is the first type of dual agency that I am addressing.

The Real Estate Licensing and Registration Act provides that licensees, regardless of their agency relationship are, among other duties, required to keep the clients current on the status

of the transaction. So, for example, when buyer fails to make a mortgage application within the prescribed time, a listing agent should know that is so. Further, the listing agent should notify the seller that the time for making the mortgage application has passed and that the buyer is technically in default. Lastly, the agent should inform the seller that the seller may have the right to terminate the agreement and retain the deposit. This type of information should always go with the advisement that the seller consult counsel before availing himself of this remedy.

Now imagine that you are dual agent involved in a transaction recently executed. You've notified the buyer of the importance of making a mortgage application timely (for that matter you've advised the buyer to handle all of their obligations in a timely manner). When you follow-up on the last day for making the application and learn that the buyer has not done so, how do you tell the buyer that you are now going to inform the seller? As a buyer agent it is not your responsibility to call the listing agent and rat out your client. Certainly if the listing agent calls, you've got to be honest in your response, but it is not up to you to initiate the process. As a dual agent, however, you've got two clients and thus you are duty-bound to keep both informed on the status. I don't see how you avoid telling the seller of your buyer client's breach.

Fortunately, sellers don't seek to terminate agreements of sale simply because a buyer is a day or two late in making the mortgage application. But don't count on having such an easy seller. Further, other obligations are not so easily overlooked.

The time to inform your client of the conflicts of interest of dual agency is at the onset or at least at the time that you introduce your buyer to your seller client's property. You've got to make clear that nearly everything you learn will be available to both sides and the importance of having each party client stick to the letter of the agreement.

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