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The Truth About Dual Agency

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Since the early 1990's many states have allowed buyer agency to thrive in their state. That is good. Once it became legal, buyer representation became the way agents worked for their buyers. Agents could now give full fiduciary duties to their buyers, viz., obedience, loyalty, disclosure, confidentiality, accounting, and reasonable care and diligence.

Importantly, these duties weren't owed by just the one agent the buyers worked with, but by all the agents in the whole company their agent worked for. For example, if Bob Broker owns BB Realty, then all his agents work for him, and all buyers and sellers that his agents bring to the office are his. The agents are listing and selling in the name of BB Realty. Betty, a buyer's agent working with John and Amy Byers, is actually working for Bob Broker's clients, and so are all the other agents that work for Bob Broker. This means that Sandy, a seller's agent in Bob's office, who is listing 123 Market St, not only represents the sellers, but also Betty's buyers. And Betty also represents Sandy's sellers. The agency relationship is created with the broker of record.

The result of the above example is that Bob Broker, and all his agents, represent all the buyers and all the sellers of his company. And when there is a showing of one of the seller clients' properties to one of the buyer clients, the result is dual representation, i.e., representing both the buyers and the sellers. Many real estate regulators allowed it in their enacting of agency disclosure regulations. However, stringent requirements came along with it.

They are:

1. A consumer must sign written authorization giving informed consent for the company who represents the consumer in a transaction to also represent another consumer in the same transaction.
2. The informed consent cannot be given solely through the distribution of an agency disclosure statement and the consumer's signature thereon.
3. That informed consent can only be given after the company has disclosed all the material facts that might have an impact on whether the party consents or not, including the conflicts of interest involved.
4. That informed consent can only be given after the company explains the specific ways 3 of the 6 fiduciary duties, viz., loyalty, disclosure and confidentiality, are limited.
5. In many states that informed consent can only be given after the company explains the other business relationships available and not available in the company, and the consumer's right to consult an attorney.

We can understand the fiduciary duty of loyalty better if we understand what it entails. In most real estate textbooks loyalty refers to working solely in the interests of one client. That means giving the client our allegiance. It means giving whatever professional advice we can give to advance their interests, and no one else's. It means advocating for their goals and interests. In dual agency, however, wherein two party's interests are in conflict, the agent cannot advise, advocate, or give allegiance to either one if it gives them an advantage over the other client.

As for confidentiality and disclosure, in single agency we would disclose anything we learned about the other party that would give our client an advantage. With dual agency we cannot disclose any confidential information of either party to the other.

What does this mean for the licensed real estate agent about to work in a dual agency situation, whether their buyer is buying a company listing, or their buyer is competing with another buyer the company represents buying any property? First, upon meeting the consumer the first time, make sure that they received and read the required agency disclosure document. Even if they did, make sure that they understand what an agent/representative is, viz., someone standing in their place, looking out solely for their interests. Explain that as a fiduciary, you owe them your company's loyalty, obedience to their wishes, your willingness to disclose any information that would help their interests, your willingness to hold confidential anything they tell you, your accounting of any money and papers given you, and your willingness to go the extra mile as you diligently go about filling their real estate needs.

However, you must make sure that they know that the company represents other buyer and seller clients too. That means that if there is a conflict between clients, you will ask them to allow you and the company to act in a dual agency posture, limiting your loyalty and disclosure to either party. You will ask them to sign a separate informed consent to dual agency now, and in the purchase contract, giving you permission to act as a dual agent.

Acting as an expert witness in several dual agency cases, I have observed the following: the agents involved did not know: 1) the regulation concerning the distribution of the agency disclosure document and the separate Informed Consent to Dual Agency, 2) what fiduciary duties were limited by dual agency,

3) what explanations had to be given, and when, to the consumer, and 4) how to explain the conflicts of interest sufficiently to allow the consumer to give or withhold informed consent. The harm caused to the consumer in the cases cost the agents and their companies not only a lot of money, but seriously harmed their reputation as well.

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About the Author: Joseph Marovich is the owner of Marovich Business Institute and regularly facilitates designation courses for the NAR's affiliates (ABR, GREEN, GRI, PMN, RSPS, SRES) as well as teaches workshops and seminars for Boards, Associations, and companies throughout New Jersey and nationally. Licensed for 37 years, he is recognized as an agency expert and often acts as an expert witness in agency and misrepresentation cases. You can access his course schedule at www.MarovichBusinessInstitute.com, or contact him at Joe@MarovichBusinessInstitute.com, or 732 961-9618