

DUAL AGENCY – A REFRESHER

In the 1980s, REALTORS® throughout the nation were beset by claims of dual agency, *i.e.*, claims that the REALTOR® represented both the seller and buyer without the informed consent of both parties. Fortunately, Michigan REALTORS® were able to successfully fend off many dual agency claims during that period of time. Further, a set of procedures and forms were developed to make certain that dual agency claims did not become common in Michigan. However, in this very difficult real estate market, some REALTORS® are beginning to cut corners simply in an effort to survive. Unfortunately, cutting corners will ultimately result in the opposite result. Thus, we offer a brief refresher on dual agency and the procedures to handle it.

Under Michigan law, if a dual agency situation arises without the full knowledge and consent of the parties, the contract negotiated by the agent is voidable at the option of either buyer or seller who did not have knowledge of the dual agency. Almost 100-year old Michigan case law stands for the proposition, “a broker cannot act as the agent of both parties where their interests are conflicting.” Further, it is not even necessary for a party seeking to void a contract based on non-disclosed dual agency to show that any improper advantage has been gained or damage has been suffered by him. A party may repudiate the contract irrespective of any proof of active fraud. Further, a broker who has acted for both buyer and seller without the full knowledge of both is not allowed to recover compensation from either. Dual agency without informed consent is, among other things, a breach of an agent’s duty of good faith.

The Occupational Code also contains statutory prohibitions against undisclosed dual agency. In particular, MCL 339.2512(1) specifies that it is a violation of the Occupational Code when a licensee acts for more than one party in a transaction without the knowledge of the parties. The statutory provision subjects a licensee to various penalties for acting for more than one party in a transaction without the knowledge of the parties. A violation of this section subjects the licensee to the penalties listed in Article 6 of the Occupational Code, including: suspension of a license; denial of a license; denial of renewal of a license; revocation of a license; a civil fine not to exceed Ten Thousand Dollars (\$10,000.00); censure; probation and/or a requirement that restitution be made. These statutory penalties are in addition to and cumulative with any or whatever legal remedies are available to the buyer or the seller.

If a REALTOR® firm does not practice designated agency, but is also in the practice of representing buyers, then the firm’s listing agreement must have a provision dealing with dual agency. The provision would set forth the understanding and agreement of the seller that the REALTOR® represents buyers, and one or more of those buyers may become interested in buying the seller’s property. Further, this provision will also provide that the REALTOR® will preserve any confidential information learned during the agency relationship with the buyer and, further, that the REALTOR®’s failure to disclose the confidential information to the seller will not constitute a breach of fiduciary duty.

The MAR listing form contains the following dual agency provision:

SHOWING PROPERTY/DUAL AGENCY: Seller understands and agrees that REALTOR[®]/Broker can show Seller's property to, and obtain offers from, all prospective buyers, including buyers with whom REALTOR[®]/Broker has an agency relationship. In the event a buyer which REALTOR[®]/Broker has an agency relationship shall become interested in the Property, REALTOR[®]/Broker shall notify both the Seller and the buyer of its intention to represent both and obtain both parties' written consent to the dual agency. *REALTOR[®]/Broker will preserve any confidential information obtained during an agency relationship with a buyer and will not use such confidential information to the detriment of that buyer. Seller acknowledges and agrees that the preservation of this confidential information shall not constitute a breach of any fiduciary duty owed by REALTOR[®]/Broker to Seller.* Seller also understands and agrees that as part of marketing the Property, REALTOR[®]/Broker will show potential buyers properties other than Seller's and provide such buyers with information on the selling prices in the area.

The inclusion of this dual agency provision in the listing agreement is required for both a practical and a legal reason. As a practical matter, if a REALTOR[®] firm represents sellers and buyers, it is not likely that the REALTOR[®] firm will be able to obtain a separate, side agreement with the seller prior to the time that one of the firm's agents shows the seller's home to a buyer represented by the firm. Thus, obtaining the seller's consent to dual agency prior to it occurring is necessary. This of course does not eliminate the need to ultimately enter into a dual agency agreement or dual agency addendum once a buyer represented by the firm wishes to make an offer on the seller's listing.

The legal reason for including the dual agency provision in a listing agreement is to avoid breaching the respective fiduciary duties owed to both the seller and the buyer when the firm represents both parties. As an example, under common law, both the seller and the buyer are entitled to have all of their material information held completely confidential and to have all other material information disclosed to them. Thus, under the common law, the seller would be entitled to know any material information known by the REALTOR[®] firm about the buyer, but the REALTOR[®] firm in turn would have an obligation to the buyer to keep that information confidential. The only way to address this possible source of liability is through a dual agency provision in the listing agreement (and the buyer's agency agreement).

In a designated agency firm, the law in Michigan provides that it is not a dual agency situation where two different designated agents in the firm represent the buyer and seller. This does not mean that a dual agency situation can never arise in a designated agency firm. Where the buyer and seller are represented by the same designated agent, or have the same supervisory broker, those individuals are dual agents and the same conflicting fiduciary duties arise. Although it is less likely that a dual agency situation will arise in a designated agency office, the possibility certainly exists. For this reason, designated agency firms are also encouraged to include dual agency consent language in their listing agreements. A sample of a dual agency provision from a designated agency listing agreement is:

DUAL AGENCY: In the event a buyer who has an agency relationship with any of the designated agent(s) and/or supervisory broker(s) named above shall become interested in the Property, Seller consents to the dual agency status of such designated agent(s) and/or supervisory broker(s). *In this event, the dual agent(s) will preserve any confidential information obtained during the agency relationship with the buyer and will not use such confidential information to the detriment of that buyer. Seller acknowledges and agrees that the preservation of this confidential information shall not constitute a breach of any fiduciary duty owed to Seller.* Seller also understands and agrees that as part of marketing the Property, Seller's designated agent(s) may show potential buyers properties other than Seller's and provide such buyers with information on the selling prices in the area.

Remember that under the law, you do not have a designated agency arrangement with your seller unless the listing agreement expressly states that it is a designated agency listing. It is impossible to create a designated agency relationship without an agreement signed by the seller designating specific persons as the seller's agents.

Are All the Forms Necessary?

We are often asked why it is necessary for REALTORS® to have a separate dual agency agreement signed at the time the dual agency situation arises. If the REALTOR® simply relies upon the sellers' and buyers' consent at the beginning of their agency relationship, it could be argued that the seller or buyer did not fully understand that to which they were consenting, *i.e.*, limited representation. Moreover, buyers and/or sellers could argue that they were not only entitled to notice that a dual agency situation COULD arise, but also that a dual agency HAD ARISEN.

Certainly, an agency disclosure form, signed at the time the dual agency situation arises provides an opportunity to demonstrate that the seller and buyer were fully informed. However, MAR has always recommended a “belt and suspenders” approach to make certain that neither the sellers nor buyers can claim that they did not provide timely and fully informed consent to the dual agency situation. The use of a dual agency agreement signed at the time the dual agency situation actually arises that identifies real live buyers and sellers virtually eliminates any potential claim that the seller or buyer did not provide their full, informed consent to dual agency.

The clauses and the procedures described in this article are battle-tested. There is no reason not to use them.