



# Who Is My Client?

## A REALTORS® Guide to Compliance with the Law of Agency



**WHO IS MY CLIENT?**

**A REALTORS® GUIDE TO  
COMPLIANCE WITH  
THE LAW OF AGENCY**

**First Edition  
November 1986**

## TABLE OF CONTENTS

I.	Introduction.....	1
II.	What Is an Agent?.....	2
III.	How Are Agency Relationships Created?.....	3
IV.	Duties Owed by an Agent to His Principal .....	4
V.	What Is a Subagent? .....	7
VI.	Undisclosed Dual Agency: A Breach of an Agent's Duty of Loyalty.....	9
VII.	Remedies for an Agent's Breach of Fiduciary Duty .....	10
VIII.	How Dual Agencies Can Result by "Accident"	
	A. A Broker Purchasing Property Listed with His Firm .....	11
	B. A Seller's Agent Accepting Future Employment from a Buyer.....	12
	C. A Broker Representing the Buyer Seeking Compensation from the Seller.....	13
	D. The Seller's Agent Leads the Buyer to Believe the Agent Is Representing the Buyer .....	13
IX.	The Alternatives to Dual Agency: Single Agency or Subagency	
	A. Single Agency .....	15
	B. Subagency .....	19
X.	Conclusion .....	20
	Sample Notice to Prospective Real Estate Purchasers	

## PREFACE

There are certain legal concepts with which every practicing real estate broker, appraiser and manager must be thoroughly familiar. These legal concepts establish the transactional framework within which he must function and the limits beyond which he cannot go without serious risk to himself and those he serves.

These legal concepts include, of course, antitrust with its mandate of a competitive marketplace. They also include fair housing with its requirement of a housing market to which all persons have access regardless of their race, color, religion, sex or national origin.

The legal concept of "Agency" with which this booklet is concerned is, however, beyond question the most fundamental of all the legal concepts applicable to the real estate profession and professional. It is the very nature and function of the real estate broker, appraiser and manager to be an agent. The law of agency literally defines the "species" and gives real estate practitioners their identity.

This booklet is one component of a comprehensive effort by the National Association to assure that every REALTOR® understands the Agency relationships available to him and those he seeks to serve. It is an effort overdue but never too late as long as REALTORS® seek to serve others rather than themselves.

—William D. North  
Executive Vice President  
NATIONAL ASSOCIATION OF REALTORS®

## I. INTRODUCTION

The concept of an agency relationship began when men agreed to act on behalf of one another. Agency relationships are as diverse as the myriad occasions when we employ the services of another, and can be as complex as the nature and scope of the services that are performed in today's economy and society.

The agency relationship between a real estate broker and sellers and buyers of real estate is not new. One of the reasons that the NATIONAL ASSOCIATION OF REALTORS® was formed at the turn of the century was to enhance the professionalism of real estate brokers by recognizing an agency relationship between the broker and his client, and also by imposing a more general duty on a real estate broker to treat all persons, clients and customers alike, fairly and honestly.

Given the constantly changing needs of sellers and buyers for real estate services, and the resulting change in brokers' capacity to satisfy those needs, there is a crucial need for clarification of traditional agency concepts and assumptions. Many real estate brokers in today's market are experiencing a fundamental "identity crisis" in their relationships with sellers and buyers. This identity crisis results from many factors, including, but by no means limited to:

- The consumer protection movement, which has severely limited the *caveat emptor* ("buyer beware") principle of the early common law and imposed new duties of discovery and disclosure on real estate brokers.
- The increasing complexity of real estate transactions, which has increased the need of sellers and buyers for specialized knowledge and advice.
- The changing perception of a home as an investment as well as a means of shelter.
- The increasing number of marketing systems, arrangements, and services that have a fundamental impact on a broker's involvement with his prospects.

The result of these developments in the real estate market has been a growing confusion of roles, functions, loyalties, responsibilities, and relationships. On some occasions, brokers confuse their function with that of a lawyer, banker, engineer, or architect. On other occasions, brokers confuse the

relationships created by exclusive agency, subagency, and buyer agency. In still other instances, brokers confuse fiduciary duties with general duties of honesty and fairness and a duty not to misrepresent a property's condition.

A broker who is confused about his role, function, or loyalty will inevitably transmit that confusion to the public with whom he deals. Public confusion in turn breeds mistrust and frustration, which eventually results in increased litigation, liability, and regulation.

This Handbook is designed to assist real estate brokers and salespeople in understanding the common law of agency that applies to their dealings with sellers and buyers, and the consequences that can beset a real estate broker who breaches his agency duties, either accidentally or by design. By understanding clearly their agency obligations, brokers will be better able to serve the general public and enhance their own professionalism.

## II. WHAT IS AN AGENT?

Every state in the Union licenses real estate brokers and salespeople. A person who acts on behalf of others in selling, buying, or leasing real estate must first secure a real estate license. A person who performs acts on behalf of others is also deemed to be an agent under the common law of every state. An agency relationship is defined under the common law as follows:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is taken is the principal.
- (3) The one who is to act is the agent.\*

Attorneys, engineers, accountants, and architects are but a few examples of other licensed professionals who act as agents of their clients.

The ability to buy, sell, or rent real estate freely is the linchpin of the American economy and our

democratic form of government. Real estate can be bought and sold freely in this country in large measure because real estate brokers and salespeople are available to act as agents to perform for others the often complex and time-consuming function of marketing and conveying interests in real estate.

## III. HOW ARE AGENCY RELATIONSHIPS CREATED?

An agency relationship is, first and foremost, a "consensual" relationship. All that is necessary to create an agency relationship is the principal's delegation to the agent of authority to act and the agent's consent to act. Formalities are not required to create an agency relationship. As a general matter, a writing is not necessary to create an agency relationship, though many states do require listing agreements between real estate brokers and sellers to be in writing.

An agency relationship also need not be a contract, with the elements of offer, acceptance, and consideration. Agency relationships can be gratuitous, without any obligation on the principal's part to pay the agent. By the same token, compensation paid by one party to another party does not necessarily create or confirm an agency relationship. On the other hand, when a judge or a jury is asked to determine whether an agency relationship existed between two parties, whether compensation was paid by the alleged principal to the alleged agent will be given considerable weight, particularly if the party who paid the compensation is asserting that an agency relationship was created.

The elements necessary to create an agency relationship are defined by law. Thus, if a relationship between two parties satisfies the elements of an agency relationship, it will be treated as such, regardless of the label the parties use to describe their relationship. Likewise, simply because the parties call their relationship an agency does not make it one if the relationship does not otherwise satisfy the legal elements of an agency.

Whether the relationship between two parties satisfies the prerequisite of an agency relationship is a question of fact for a judge or jury to decide. Because formalities are not required to create an agency relationship, one can be implied from the conduct of the parties toward each other. This inference of an agency relationship from the conduct of the parties is per-

\* Restatement (Second) of Agency §1 (1958).

missible whether or not the parties consciously set out to create one. Likewise, the conduct of the parties can create an agency relationship even if the parties have signed acknowledgment forms denying the existence of an agency. By the same token, the conduct of the parties can defeat the existence of an agency relationship even if the parties have signed documents purporting to create an agency relationship.

To summarize, an agency relationship is created when:

- the principal *delegates* authority to the agent to perform acts on behalf of the principal;
- the agent *consents* to the delegation.

An agency relationship does *not* require:

- a writing
- a contract
- compensation paid by the principal to the agent.

An agency can also be created by the *conduct* of the parties toward each other regardless of what label the parties use, or do not use, to describe their relationship. Thus, agency relationships can result *unintentionally, accidentally, or inadvertently*.

#### IV. DUTIES OWED BY AN AGENT TO HIS PRINCIPAL

A real estate broker who becomes an agent of a seller or buyer, either intentionally through the execution of a written agreement, or unintentionally by a course of conduct, will be deemed to be a *fiduciary*. Fiduciary duties are the highest duties known to the law. Classic examples of fiduciaries are trustees, executors, and guardians. As a fiduciary, a real estate broker will be held under the law to owe certain specific duties to his principal, in addition to any duties or obligations set forth in a listing agreement or other contract of employment. These specific fiduciary duties include:

- Loyalty
- Obedience
- Disclosure

- Confidentiality
- Reasonable care and diligence
- Accounting

1. *Loyalty*—A duty of loyalty is one of the most fundamental fiduciary duties owed by an agent to his principal. This duty obligates a real estate broker to act at all times solely in the best interests of his principal to the exclusion of all other interests, including the broker's own self-interest. A corollary of this duty of loyalty is a duty to avoid steadfastly any conflicts of interest that might compromise or dilute the broker's undivided loyalty to his principal's interests. Thus, a real estate broker's duty of loyalty prohibits him from accepting employment from any person whose interests compete with, or are adverse to, his principal's interests.

A classic example of breach of this duty of loyalty by a real estate broker is a broker who purchases property listed with his firm and then immediately resells it at a profit. Such conduct ordinarily is perfectly appropriate and lawful by persons acting "at arms length." But a fiduciary will be deemed to have "stolen" a profit opportunity rightfully belonging to his principal and thus to have breached his duty of loyalty.

2. *Obedience*—An agent is obligated to obey promptly and efficiently all lawful instructions of his principal. However, this duty plainly does not include an obligation to obey any unlawful instructions; for example, an instruction not to market the property to minorities or to misrepresent the condition of the property. Compliance with instructions the agent knows to be unlawful could constitute a breach of an agent's duty of loyalty.

3. *Disclosure*—An agent is obligated to disclose to his principal all relevant and material information that the agent knows and that pertains to the scope of the agency. This duty specifically obligates a real estate broker representing a seller to reveal to the seller:

- all offers to purchase the seller's property.
- the identity of all potential purchasers.
- any facts affecting the value of the property.
- information concerning the ability or willingness of the buyer to complete the sale or to offer a higher price.

- the broker's relationship to, or interest in, a prospective buyer.
- a buyer's intention to subdivide or resell the property for a profit.
- any other information that might affect the seller's ability to obtain the highest price and best terms in the sale of his property.

Likewise, a real estate broker representing a buyer is obligated to reveal to the buyer:

- the willingness of the seller to accept a lower price.
- any facts relating to the urgency of the seller's need to dispose of the property.
- the broker's relationship to, or interest in, the seller or the property for sale.
- any facts affecting the value of the property.
- the length of time the property has been on the market and any other offers or counteroffers that have been made relating to the property.
- any other information that would affect the buyer's ability to obtain the property at the lowest price and on the most favorable terms.

**CAVEAT:** An agent's duty of disclosure to his principal must not be confused with a real estate broker's duty to disclose to nonprincipals any known material facts concerning the value of the property. This duty to disclose known material facts is based upon a real estate broker's duty to treat all persons honestly and fairly. This duty of honesty and fairness does not depend on the existence of an agency relationship.

4. *Confidentiality*—An agent is obligated to safeguard his principal's confidence and secrets. A real estate broker, therefore, must keep confidential any information that might weaken his principal's bargaining position if it were revealed. This duty of confidentiality precludes a broker representing a seller from disclosing to a buyer that the seller can, or must, sell his property below the listed price. Conversely, a broker representing a buyer is prohibited from disclosing to a seller that the buyer can, or will,

pay more for a property than has been offered.

**CAVEAT:** This duty of confidentiality plainly does not include any obligation on a broker representing a seller to withhold from a buyer known material facts concerning the condition of the seller's property or to misrepresent the condition of the property. To do so would constitute misrepresentation and would impose liability on both the broker and the seller.

5. *Reasonable care and diligence*—An agent is obligated to use reasonable care and diligence in pursuing the principal's affairs. The standard of care expected of a real estate broker representing a seller or buyer is that of a competent real estate professional. By reason of his license, a real estate broker is deemed to have skill and expertise in real estate matters superior to that of the average person. As an agent representing others in their real estate dealings, a broker or salesperson is under a duty to use his superior skill and knowledge while pursuing his principal's affairs. This duty includes an obligation to affirmatively discover facts relating to his principal's affairs that a reasonable and prudent real estate broker would be expected to investigate. Simply put, this is the same duty any professional, such as a doctor or lawyer, owes to his patient or client.

6. *Accounting*—An agent is obligated to account for all money or property belonging to his principal that is entrusted to him. This duty compels a real estate broker to safeguard any money, deeds, or other documents entrusted to him that relate to his client's transactions or affairs.

## V. WHAT IS A SUBAGENT?

Under the real estate license laws of every state, a real estate salesperson does not have any authority to act independently of his broker. Real estate salespeople can function only if they are licensed with a real estate broker or brokerage firm. As such, real estate salespeople are "agents of an agent." They are agents of the real estate broker, who, in turn, is licensed to act as an agent of the general public in matters relating to real estate.

An agent of an agent is called a subagent. A subagent has been defined under the common law as follows:

A subagent is an agent of an agent employed to act for the agent in performing functions undertaken by the agent for his principal, and for whose conduct the agent agrees to be responsible to his principal.\*

A subagency relationship results when it is understood by the principal that an agent may delegate the performance of some or all of the work to be performed for the principal to the agent's agents. This understanding may be expressed or implied.

Because subagents are agents of an agent, they owe the same fiduciary duties to the broker's principal as does the broker himself. Salespeople are also agents of their broker. Thus, salespeople as subagents owe fiduciary duties to two principals: their broker and their broker's principal.

By the same token, subagents, where properly appointed, have authority to bind the broker's principal to the same extent as the broker himself. The broker is also liable to his principal for any wrongful conduct committed by any of his salespeople as subagents.

In the real estate brokerage industry, subagents are used routinely to market a seller's property. Most active real estate brokers have one or more salespeople affiliated with them, who act as subagents on behalf of the broker's principals. It is also common for real estate listing contracts to authorize the listing broker to appoint as subagents brokers and salespeople in other real estate firms to sell the listed property. This is particularly true when a multiple listing service (MLS) operates in the marketplace and current listing information is systematically shared among MLS participants. Under the Multiple Listing Policy of the NATIONAL ASSOCIATION OF REALTORS®, an MLS is specifically defined as a vehicle through which listing brokers make unilateral subagency offers on a blanket basis to all other MLS participants.\*

The practical effect of an MLS operated by a Board of REALTORS® is to increase the number of subagents available to market the seller's property beyond just those salespeople in the listing broker's firm to include all the other MLS participants and their salespeople. These MLS participants and their salespeople, however, stand in exactly the same relation to the seller as do the broker's own salespeople:

\* Seavey, Agency §7 (1964).

\* NAR Handbook on Multiple Listing Policy, Section 1.20 (1980).

they are agents of the listing broker and owe fiduciary duties to the listing broker's principal, the seller.

Of course, MLS participants can, if they choose, reject the offers of subagency being made through the MLS and instead represent the buyer. If MLS participants do choose to represent the buyer, they must inform the listing broker that they are agents of the buyer before they attempt to show the listed property. This disclosure is necessary because the listing broker is entitled to know that the broker or salesperson showing the property has rejected the offer of subagency and therefore does not owe fiduciary obligations to the broker's principal. The listing broker can then determine whether further action is necessary to protect his principal's interest.

## VI. UNDISCLOSED DUAL AGENCY: A BREACH OF AN AGENT'S DUTY OF LOYALTY

An agent's duty of loyalty compels him to refuse to accept any employment that would require him to act contrary to, or in competition with, the interests of his principal. Buyers and sellers of real estate are deemed by law to "compete" with one another and to have "adverse" interests. Accordingly, a real estate broker who acts as an agent for both a buyer and a seller in the same real estate transaction is a dual agent. A real estate broker who acts for both the buyer and the seller and does not clearly disclose his status to both parties and receive their informed consent to the arrangement is an undisclosed dual agent. Undisclosed dual agency is universally considered to be a breach of an agent's duty of loyalty to his principal. It is also considered to be an act of fraud and is a violation of the real estate license law of many states.

Although disclosed dual agency relationships are technically lawful, there are compelling reasons real estate brokers should avoid creating them. Courts are very strict concerning the degree of disclosure necessary to make a real estate broker's dual agency lawful. For example, a lawful dual agent must explain carefully to both the buyer and the seller that he is also acting as a fiduciary for the other party and owes both of them the full range of fiduciary duties. The real estate broker must also ensure that both the buyer and the seller understand that by consenting to the dual agency arrangement, they each are forfeiting their right to receive their agent's undivided loyalty.



Without this comprehensive disclosure and each principal's informed, and preferably written, consent, the dual agency will still be deemed undisclosed and therefore unlawful.

Dual agency is a totally inappropriate agency relationship for real estate brokers to create as a matter of general business practice. Undisclosed dual agency is a clear breach of a broker's fiduciary duty to each of his principals and is generally viewed to be an act of fraud. The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine.

## VII. REMEDIES FOR AN AGENT'S BREACH OF FIDUCIARY DUTY

A real estate broker's principal has three primary remedies available to him if his broker committed a breach of his fiduciary duty.

- Rescission
- Forfeiture of commission
- Damages

Furthermore, these remedies are nonexclusive. A plaintiff can pursue one, two, or all three remedies in the same lawsuit.

1. *Rescission*—A principal has a right to rescind any transaction procured by reason of an agent's breach of fiduciary duty. Rescission is a legal remedy through which the court attempts to restore the parties to their original status before the transaction occurred. In a rescinded real estate transaction, the buyer deeds the property back to the seller, and the seller refunds the purchase price.

A real estate transaction "tainted" by an agent's breach of fiduciary duty is presumed to be unfair to the principal. Therefore, a principal is entitled to rescind such a transaction without showing that the transaction was, in fact, unfair in price or terms or that the agent involved acted in bad faith. In the case of an undisclosed dual agency, whether intentional or accidental, either the buyer or the seller need only establish the existence of the undisclosed dual agency to qualify for rescission.

2. *Forfeiture of commission*—An agent who breaches his fiduciary duty while procuring a transac-

tion for a principal is deemed to have breached the implied terms and conditions of his employment. Fiduciary duties are imposed by implication upon an agent in addition to any express obligations set forth in an employment agreement. Consequently, an agent who breaches his fiduciary duties is not entitled to be paid and can be compelled to return any compensation received, including a real estate brokerage commission.

3. *Damages*—An agent can also be expected to pay any damages caused by his fiduciary breach. In a real estate transaction, such damages would include any difference between the sales price and the price specified in a higher offer the broker failed to reveal, or could include any profits made by a broker who purchased property from his seller-principal and then resold it at a higher price.

The real estate license laws of many states prohibit licensees from acting as undisclosed dual agents, and also prohibit many other forms of conduct that could constitute breaches of a licensee's fiduciary duties to his principal. Thus, a broker who breaches his fiduciary duty also places his real estate brokerage license in jeopardy.

## VIII. HOW DUAL AGENCIES CAN RESULT BY "ACCIDENT"

### A. A Broker Purchasing Property Listed with His Firm

A real estate broker who purchases property listed with his firm is a classic dual agent. He has not merely undertaken to represent the buyer and the seller; he has become the buyer while representing the seller. Courts tend to view undisclosed dual agency as a form of self-dealing or fraud. Self-dealing is considered one of the capital offenses that a fiduciary can commit.

Thus, a real estate broker or salesperson should never purchase property listed with his firm unless the seller consents to the sale with full knowledge that the purchaser is the real estate broker or salesperson or an entity in which they have an interest. This same requirement of full disclosure and consent also applies if the broker is purchasing property listed by another firm, since brokers cooperating in the sale of other brokers' listings are subagents and owe the same fiduciary obligations to the seller as the listing broker.

The inherent conflicts presented by a real estate broker who attempts to purchase property listed with his firm have long been the object of Article 13 of the REALTORS® Code of Ethics, which provides in part that

The REALTOR® shall not acquire an interest in or buy for himself, any member of his immediate family, his firm or any member thereof, or any entity in which he has a substantial ownership interest, property listed with him, without making the true position known to the listing owner.

### **B. A Seller's Agent Accepting Future Employment from a Buyer**

A real estate broker need not purchase a seller's property himself in order to be accused of self-dealing or acting as an undisclosed dual agent. A broker can fall into the dual agency trap by accepting future employment from an actual or potential buyer of his principal's property. Courts may consider the opportunity for future employment by the buyer as a conflict of interest rendering the broker an undisclosed dual agent.

An example of an opportunity for future employment that could make a broker an undisclosed dual agent is an offer by a potential buyer to manage an apartment building currently listed for sale with the broker's firm. A broker who fails to disclose this employment offer to his seller risks being considered an undisclosed dual agent if the buyer ultimately purchases the property. The same result would occur if the buyer offered the broker an opportunity to list the property for resale.

In short, if a broker is offered any opportunity to profit from a sale to a particular buyer, the broker must disclose that profit opportunity to his principal, or the broker will, in all likelihood, be found to be an undisclosed dual agent if that buyer ultimately purchases the property.

On the other hand, a real estate broker can generally accept a listing on a prospective buyer's property, or can assist a client-seller in finding a suitable replacement property without creating a dual agency relationship. This is true so long as the broker clearly distinguishes between the owner's status as a principal under a listing agreement to sell his property and the owner's status as a prospect when seeking to purchase replacement property.

### **C. A Broker Representing the Buyer Seeking Compensation from the Seller**

Under industry custom, real estate brokers are compensated by commissions paid by sellers or by splits of such commissions paid by listing brokers to other brokers who have cooperated in the sale. Since real estate brokers are traditionally paid a commission by the seller, real estate brokers who arrange a sale are careful to ensure that the seller has agreed to pay a commission at closing, sometimes without any regard to whether the broker represented the seller or the buyer during the course of the transaction.

Dual agency becomes an issue when a real estate broker arranges a sale as an agent for the buyer but then seeks compensation from the seller by inducing the seller to sign a listing agreement or by requesting a commission split from the seller's agent. As discussed, the payment of compensation does not conclusively establish an agency relationship. But the payment of compensation is given considerable weight by a judge or jury when deciding whether an agency or dual agency relationship has been created. This is especially true when the party who paid the compensation is alleging that the agency or dual agency relationship was, in fact, created.

To avoid dual agency allegations based upon the source of a real estate broker's compensation, a broker should do the following:

- seek compensation only from his principal, either the buyer or the seller, or
- seek compensation from the nonprincipal or his agent if and only if the nonprincipal and his agent understand and agree in writing that the payment of compensation will not result in the broker's becoming the agent of the party paying his compensation.

### **D. The Seller's Agent Leads the Buyer to Believe the Agent Is Representing the Buyer**

Real estate brokers representing sellers cannot perform their obligation to procure a ready, willing, and able buyer for their client's property unless they seek out qualified buyers. A real estate transaction by definition requires a seller and a buyer. Thus, it is perfectly natural and necessary for real estate brokers representing sellers to do everything they can to

attract buyers. Buyers are attracted to brokers with whom they feel comfortable and are able to develop rapport and communication. This is no surprise because this is the essence of "selling."

Too often, however, brokers in their zeal to arrange a sale satisfactory to both parties encourage the buyer to believe that the broker is working "for" him rather than "with" him. Simply put, the broker allows or even induces the buyer to believe that he is the broker's client, when, in fact, the broker has already established a client relationship with the seller by executing a listing agreement or by acting as a subagent of a listing broker.

The broker who permits the buyer to believe he is acting as the buyer's agent when the broker has already formed an agency relationship with the seller is a classic example of the "accidental" dual agent. But he is a dual agent, nevertheless. As noted earlier, formalities are not required to create agency relationships. They can be created orally, or they can be implied from the conduct of the parties. The accidental dual agent creates an express agency with the seller by executing a listing agreement, and he creates an implied agency with the buyer by allowing him to believe the broker is acting on his behalf.

Examples of words or phrases often used by real estate brokers or sellers that can create implied agency relationships with buyers are the following:

1. "I'll take care of everything. I'll handle the sale for you."
2. "This listing has been on the market for six months. That tells me it's overpriced. Let's offer \$80,000 and see what they say."
3. "Trust me. I'm sure the seller won't counter at that price."
4. "If the seller is going to insist on a full price sale, I think you should tell him no. Then we can try an offer on that Maple Street house your wife liked so much. I'm sure those sellers will be more realistic."
5. "If they insist on the full \$100,000, I'll remind them that the furnace is 15 years old and the carpet is fraying. That should justify at least a \$3,000 reduction."

**CAVEAT:** A real estate broker working with a buyer does not automatically become the buyer's agent. The courts have consistently acknowledged that real estate brokers routinely provide buyers with a variety of valuable services and information as a natural by-product of the brokers' marketing function

on behalf of sellers. For example, it is clear that real estate brokers can do the following for buyers without creating an agency relationship:

- show the buyer listed properties meeting the buyer's criteria concerning location, price, and size;
- describe a property's amenities and attributes and make factual representations about the property's condition and status;
- complete a standard "Offer to Purchase" form for the buyer by inserting the terms of the buyer's offer in the blank spaces on the form;
- transmit any offers made by the buyer to the seller or the listing broker on a timely basis;
- inform the buyer about the availability of financing, legal services, home inspection companies, title companies, or other related services desired or required by the buyer to complete the transaction.

The critical distinction is that the information and services described above are provided by brokers working with buyers in the broker's capacity as agent for the seller or as a subagent of the listing broker.

Providing services like these to the buyer does not, in and of itself, create an agency relationship with the buyer. But when a real estate broker does more than provide market information or facilitate the completion of a transaction, and instead becomes an advocate or negotiator for the buyer, then the broker has probably created an implied agency with the buyer. This can result in an undisclosed dual agency if the broker is also the agent of the seller by reason of a listing agreement, or a subagent based upon an offer of subagency from the listing broker that was never expressly rejected.

## **IX. THE ALTERNATIVES TO DUAL AGENCY: SINGLE AGENCY OR SUBAGENCY**

### **A. Single Agency**

As a practical matter, real estate brokers should avoid dual agency relationships. Creation of a lawful

disclosed dual agency relationship is so difficult that a real estate broker who attempts to conduct his day-to-day affairs as a disclosed dual agent is playing the professional equivalent of Russian roulette.

The obvious alternative to dual agency is single agency: A real estate broker should have one and only one principal per transaction; he should loyally and diligently pursue the legitimate interests of his principal; and he should scrupulously avoid accepting or exercising any authority on behalf of the other party to the transaction.

While a real estate broker should have one and only one principal per transaction, that principal can be the seller or the buyer. Of course, whenever a broker signs a listing agreement, he and each of his salespeople become the agent (or subagent) of the seller. The listing agreement is between the seller and the brokerage firm. Therefore, the agency relationship created by the agreement binds every licensee affiliated with the firm.

Consequently, it is impossible for Salesperson A in Firm X to represent the seller, and Salesperson B in Firm X to represent the buyer. Firm X can represent only the seller, or only the buyer, or act as a disclosed dual agent for both the buyer and the seller. Needless to say, this reality requires real estate brokers, especially those operating larger firms, to create internal management controls designed to keep all salespeople informed of the identity of the firm's clients (both buyers and sellers) so that potential conflicts can be minimized.

Real estate brokers are also legally capable of representing buyers, and many brokers do so regularly, especially in commercial or industrial transactions. More recently, certain brokers have begun to offer "client-level" agency services to residential buyers by forming express agency relationships with buyers.

If a real estate broker decides to form an express agency relationship with a buyer, the decision to do so should be made as soon as possible during the transactional process. This will permit the broker to make a timely disclosure of his agency status to brokers with listings on properties that his buyer-client is interested in inspecting. Timely disclosure will avoid any unintended dual agencies from being created because the broker representing the buyer also participates in an MLS. Prompt disclosure will also enable the buyer's agent to raise the issue of commission sharing sufficiently early to determine whether the listing broker or the seller is prepared to compensate

the buyer's agent. Finally, prompt disclosure will permit the listing broker to take appropriate action to ensure that the seller's interests will be represented in any presentation of the property to the prospective buyer.

The agency relationship between the broker and the buyer should be *in writing*. Just as written listing agreements avoid confusion and ambiguity, so does a written agency agreement between a broker and a buyer. Indeed, given the relative novelty of broker-buyer agency relationships, a written agency agreement between a broker and a buyer is even more appropriate to avoid confusion and misunderstanding.

When a real estate broker creates an express agency relationship with a seller or buyer, he avoids dual agency relationships by carefully avoiding any agency relationship with the other party to the transaction or even the appearance of such a relationship. Keeping in mind that an agency is a consensual relationship, the best way to avoid the creation of an unintentional agency relationship is to eliminate any consent, or the appearance of any consent, to act for the person with whom an agency relationship is not intended. The best way to negate consent is to notify the party that authority to act on his behalf is not being accepted. This notice is most effective if *written disclosure* is given to the party sufficiently early in the transaction so that it cannot be said that an agency relationship has already been established. A suggested form of written disclosure developed by the NATIONAL ASSOCIATION OF REALTORS® Agency Task Force to be used by brokers who are representing sellers is attached as an Appendix to this Handbook.

Real estate brokers who have formed express agency relationships with sellers or buyers and disclosed their status to the other party can take additional steps to avoid dual agency claims by refraining from any act or function that is inconsistent with their duty of undivided loyalty to their client, whether the buyer or the seller. A common problem occurs when a real estate broker's buyer client seeks to purchase property listed with the broker's firm. A broker faced with this situation must act quickly and decisively if a dual agency situation is to be avoided.

1. The broker must *disclose* to both the seller and the buyer the existence of the conflict in the broker's fiduciary duties.

2. The broker should consider *renouncing* one agency relationship or the other. The choice of which relationship to renounce is often determined by re-

nouncing the relationship last created. The renunciation should be in writing signed by the former client.

3. If renunciation is not possible or desirable, the broker should secure clear and unambiguous *consents and waivers* from the buyer and the seller permitting the real estate broker to continue in a dual agency capacity. In short, the broker should attempt, as a last resort, to create a lawful disclosed dual agency, taking into account all the attendant difficulties.

Needless to say, the best way to deal with this type of conflict is to avoid it in the first place. This can be accomplished most effectively if a real estate broker elects to function at all times only as a seller's agent, or only as a buyer's agent. If this is not possible or desirable, brokers who act primarily as seller's agents should insist that their salespeople not create agency relationships with buyers without the express prior approval of the managing broker. The reverse, of course, would be true for brokers who act primarily as buyer's agents. They should insist on prior approval before any listing agreement is taken from a seller.

Another common dilemma for real estate brokers who have formed express agency relationships with buyers is the payment of compensation. While the payment of compensation is not necessarily conclusive concerning whether or not an agency relationship has been created, it is a highly significant fact. Thus, the safest course for a buyer's broker is to seek compensation solely from his principal, the buyer.

Brokers, however, are sometimes reluctant to seek compensation directly from buyer principals because of the strong industry tradition of real estate brokers being paid by sellers or through commission splits with listing brokers. Therefore, many brokers who form agency relationships with buyers nonetheless seek compensation in the "traditional" manner by requesting a share of the listing broker's commission.

To avoid dual agency implications, a broker representing a buyer but seeking compensation from the seller's broker should first secure the buyer's express written consent to that compensation arrangement. The buyer's agent should then disclose his agency status at the first encounter with the listing broker and advise the listing broker that he is seeking a share of the listing broker's commission.

If a listing broker agrees to share his commission with the buyer's agent, he has a right to demand proof from the buyer's agent that he has secured the buyer's consent to compensation from the seller, or the listing broker. The listing broker who agrees to share his

commission with a buyer's agent should also secure the seller's express written consent to the commission-sharing arrangement to avoid any later claim by the seller that he was victimized by an undisclosed dual agency by reason of the unauthorized payment to the buyer's agent.

## B. Subagency

Frequently, a real estate broker or salesperson has not sought, or received, any authority to act on behalf of a particular buyer who has contacted the broker's firm seeking to acquire a certain type of real estate. It is also common for the broker contacted by the buyer not to have any listings that satisfy the buyer's specific needs. A broker in this situation can, if he chooses, attempt to establish an express agency relationship with the buyer if the buyer is willing to accept such an arrangement.

An alternative for a broker in this situation who seeks to avoid dual agency implications is to act as a *subagent* for other listing brokers who may have properties listed that do meet the buyer's criteria. If the broker participates in an MLS operated by a Board of REALTORS®, the listing information disseminated through the MLS constitutes an offer of subagency to other participants qualified and capable of accepting it. If the offer of subagency is accepted by the production of a ready, willing, and able buyer, the listing broker is obligated to compensate the cooperating broker/subagent according to the subagency compensation shown in the MLS compilation or according to whatever other compensation arrangement may have been negotiated in advance between the two firms.

Subagency status may well be preferable to an agency relationship with the buyer because it does not require the broker to negotiate an agency agreement with the buyer when none may be desired, either by the broker or the buyer. Subagency status also guarantees the broker's right to compensation from the listing broker if he finds the buyer for the listed property, because the listing broker participating in an MLS has expressly agreed to pay compensation for a broker's performance as a subagent. Furthermore, the payment of this compensation by the listing broker does not raise any dual agency issues because the subagent owes fiduciary duties to the listing broker and the seller, and not to the buyer.

But it is precisely because subagents owe fiduci-

ary duties to the listing broker and the seller that brokers who elect to act as subagents must be fully aware of the legal consequences of subagency status. *Subagents owe fiduciary duties to the seller.* Thus, real estate brokers acting as subagents of listing brokers must relate to buyers and sellers exactly as if the listing had been taken by the subagent's own firm. The full spectrum of fiduciary duties a listing broker owes to the seller are also owed by the subagent. By the same token, the subagent's power to bind the seller through factual representations and other commitments is the same as the listing broker's.

Admittedly, the full impact of a subagent's fiduciary duties to the seller may be difficult for some real estate brokers to comprehend because they are not accustomed psychologically to owing fiduciary duties to "someone else's seller" as opposed to "my buyer." But this psychological bias can easily be overcome through education and office management procedures designed to ensure that the agency responsibilities of the firm are clearly understood by all brokers and salespeople affiliated with it.

## X. CONCLUSION

Undisclosed dual agency can be devastating to the unwary real estate broker. A real estate broker who permits both a buyer and a seller to believe that he is serving as their agent makes it possible for either the buyer or the seller to rescind the transaction and compel the broker to return his commission. The risks posed by undisclosed dual agency are therefore simply intolerable for any real estate broker to ignore or attempt to assume.

Undisclosed dual agency is a condition created almost always by accident rather than design. These "accidents" can best be avoided if a real estate broker stays in control of the events surrounding a transaction. Control can be maintained by observing three rather simple guidelines:

1. A broker should decide as soon as possible who his principal is in any given transaction. As to those properties listed with the broker, the decision is made at the time of listing: The broker's principal is the seller. As to buyers who ask the broker to assist in procuring a property that is either unlisted or listed with another broker, the broker must decide on whose behalf he is going to act. Needless to say, whom the

broker expects to pay him should be a significant, if not conclusive, factor in reaching this decision.

2. The real estate broker should disclose whom he is representing to the other party as soon as it becomes apparent that serious negotiations are likely to begin that may lead to a contract of sale. This disclosure should be of a nature sufficient to eliminate any misunderstanding concerning whom the broker is, in fact, representing. If such disclosure is given soon enough, it should defeat any claim that the broker consented to act on behalf of the party to whom the disclosure was given.

3. The real estate broker should act at all times consistently with the agency status he has assumed. He should not undertake any efforts on behalf of the party whose interests are adverse to those of his principal that could be construed as creating an agency relationship with that party. Conduct to be avoided, or undertaken only with full and complete disclosure to the broker's principal, would include accepting an economic interest of any type in an entity seeking to acquire property listed with the broker or his firm, or accepting offers of future employment, or a future listing, from an entity acquiring property listed with the broker or his firm.

By applying these simple rules, accidental or inadvertent dual agency can be avoided, and the integrity of a real estate broker's transactions and his source of income will be preserved.

## **NOTICE TO PROSPECTIVE REAL ESTATE PURCHASERS**

### **As a prospective purchaser you should know that:**

- Generally, the listing and cooperating ("selling") brokers are the agents of the seller.
- Their fiduciary duties of loyalty and faithfulness are owed to their client (the seller).
- While neither broker is your agent, they are able to provide you with a variety of valuable market information and assistance in your decision-making process.

### **For example, a real estate broker representing the seller can:**

- Provide you with information about available properties and sources of financing.
- Show you available properties and describe their attributes and amenities.
- Assist you in submitting an offer to purchase.

### **Both the listing broker and the cooperating broker are obligated by law to treat you honestly and fairly. They must:**

- Present all offers to the seller promptly.
- Respond honestly and accurately to questions concerning the property.
- Disclose material facts the broker knows or reasonably should know about the property.
- Offer the property without regard to race, creed, sex, religion or national origin.

You can, if you feel it necessary, obtain agency representation of a lawyer or a real estate broker, or both.

### **If you choose to have a real estate broker represent you as your agent, you should:**

- Enter into a written contract that clearly establishes the obligations of both parties.
- Specify how your agent will be compensated.

If you have any questions regarding the roles and responsibilities of real estate brokers, please do not hesitate to ask.

I have received, read and understand the information in this "Notice to Prospective Real Estate Purchasers."

\_\_\_\_\_  
Name of Prospective Purchaser:

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Address:

\_\_\_\_\_  
Telephone:

\_\_\_\_\_  
Date:

I certify that I have provided the Prospective Purchaser named above with a copy of this "Notice to Prospective Purchasers."

\_\_\_\_\_  
Name of Broker or Sales Agent:

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Date: