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Designated Dual Agency is Worse than Dual Agency

Dual agency is illegal in every other profession when competing interests are involved. Designated Dual Agency allows dual agent brokers with terrible financial conflicts of interests to pose as exclusive agents. Misleading consumers about who their broker represents is a fraud that has criminal implications. It is a bait and switch of the worst kind. We should not be considering legalizing this relationship like many other states have done.

Agents derive their authority from brokers. It is not possible legally or logically possible for the agent to possess more authority than their supervising broker. But that is exactly what Designated Dual Agency does. In addition, Minnesota dual agency licensing law absolves brokers from liability if they hand out "disclosures" that are incomplete and misleading. And Minnesota law allows Realtors to conceal from consumers their immensely material conflict that brokers receive a double fee ONLY if they can engineer a dual agency.

In Minnesota, we have legalized dual agency only for brokers. Instead of making dual agency worse by adding a worse designated dual agency "choice" for consumers, we should reverse the current law on dual agency and eliminate dual agency as an option.

Dual Agency and Designated Dual Agency Encourage Reverse Marketing

The dual agency/double fee conflict has caused many brokers to reward managers with bonuses whose offices generate dual agency transactions. As a result, practices like reverse marketing that are in direct violation of their clients' best interests have arisen in the industry. Reverse marketing is when brokers intentionally limit the marketing of their clients' homes. Instead of trying to sell their clients' homes for the highest price and in the shortest time possible, brokers have an almost irresistible temptation to limit the marketing ONLY to the broker's licensees who work for them.

There is one large brokerage firm in Minnesota that made national news for intentionally removing their clients' listings from the most buyer frequented websites in the country; Zillow, Trulia and Realtor.com. At one point, a representative from this company admitted that they did this to increase the SEO of their firm's website. In other words, they wanted consumers to find properties on their firm's website, instead of the other portals, to increase the chances of collecting a double fee. The current Minnesota licensing law absolved them of any civil liability for this betrayal. That may be why there was no lawsuit. This industry has not seen lawsuits in decades because the Realtor Association used their immense lobbying power to legislate away the consumers' right to sue when they have been wronged. I am not familiar with any other licensing laws for any other profession that has been used to harm consumers instead of protecting them. Factor in the misleading arbitration agreements that strip consumers of their ability to engage in discovery and limits their statute of limitations down to two years and you have created a vulnerable consumer relying upon fiduciaries who are free to engage in malfeasance with almost zero accountability.

Realtors are given special treatment under licensing law that unfairly exonerates them from liability

Prior to 1994, Minnesota licensing law specifically preserved the consumer's right to redress. However, the National Association of Realtors ("NAR") pursued a legislative lobbying effort in 1992 to change laws nationwide to eliminate private causes of action for consumers. That lobbying effort resulted in the current licensing language: Minn. Stat. 82.67 Subd 2:

> "*Disclosures made in accordance with the requirements for disclosure of agency relationships set forth in this chapter are sufficient to* ***satisfy common law disclosure requirements***." (emphasis added).

Here is how the licensing law used to read:

> "*The requirements for disclosure of agency relationships set forth in this chapter are intended only to* ***establish a minimum standard for regulatory purposes, and are not intended to abrogate common law***." (emphasis added).

An Analysis of New York's Designated Agency statute as compared to Minnesota's licensing law

New York licensing law preserves the consumers' right to a private cause of action. Minnesota licensing law deprives consumers of that right.

New York has a designated dual agency statute (click here). It's better than what the Minnesota Association of Realtors (MNAR) is proposing. However, New York does not have a Single Agency option and there are other serious deficiencies. Minnesota is very different from New York licensing law in that Minnesota licensing law eliminates the consumers' right to a private cause of action. That difference requires a very different analysis of Designated Dual Agency and the disclosures necessary to render it legal or even remotely reasonable. The elimination of redress for consumers who have been wronged is an extremely serious penalty to impose on consumers simply because they chose to use a licensed provider. Just because consumers use a licensee, do we really want them to lose their right to seek compensation when they are betrayed? Licensing laws should not be protecting licensees from consumers, it should be the other way around. New York doesn't have a provision like that and consumers are free to sue their brokers when they are wronged just like with every other profession. In fact, a class action is ongoing in New York because a brokerage firm was encouraging dual agency/double fee transactions by incentivizing managers and agents for those types of transactions. A lawsuit like that probably could not happen here because our licensing law protects Realtors from such actions.

Is there a reason that Minnesota brokers need special protections from consumers and liability for their own wrongdoing? If Realtors are so sure these dual agency choices are good for consumers, , then make them demonstrate their confidence with laws that hold them accountable just like every other fiduciary. Dual agency is illegal for every other profession. If we're going to allow Realtors to do it, then the burden of be on them to make it good for consumers.

Common Law Disclosures MUST be Codified Into the Licensing Statute

If you're going to allow dual agency in any form, designated or otherwise, and protect consumers, then you must codify the common law disclosures and consents into the licensing law. Consumers would be far better off if we didn't use the licensing law to legislate unfair protections for Realtors. Consumers would be far better off with a free market approach in which Realtors were held accountable just like

other fiduciaries. If the broker wants to engage in something as bad as dual agency than let the broker beware, not the buyer. Shift the risk to the brokers. It is bad policy to encourage dual agency by allowing financial rewards for broker and by exonerating the expected betrayals that normally accompany dual agency. Dual agency should not be a fiduciary beware situation, not buyer beware.

Consumers should have the right to opt out when dual agency arises.

Common Law Duty to Withdraw when Conflicts Arise

Fiduciary common law provides the strongest protections to consumers compared to any other body of law. A fiduciary is supposed to be representing the clients' best interests above all others, especially they're own. There are multiple categories of duties, but the most important fiduciary duty is the duty of loyalty. Included in the duty of loyalty are many responsibilities. Foremost is that fiduciaries are charged with avoiding material conflicts of interests. If conflicts arise, the fiduciar is supposed to withdraw. In the alternative, there are circumstances in which the conflict can remain if the conflict is not too great and proper disclosures are made and informed consent is obtained. Under Minnesota licensing law not only is there no common law requirement for the dual agent broker to withdraw, the client isn't even allowed to opt out when the dual agency arises. That needs to change. The licensing law is unfairly protecting licensees and eliminating the consumer's ability to exit a fiduciary relationship when the services offered are withdrawn and the consumer is abandoned.

The Burden is on the Fiduciary to Prove Disclosures and Informed Consent

There are two essential parts to the common law disclosure requirements that must be fulfilled for a fiduciary to subject their client to any kind of conflictive situation. First, the fiduciary must disclose all the material conflicts and the consequences of those conflicts. Second, the fiduciary has the burden to prove that they obtained the informed consent of the client. If the fiduciary engages in dual agency, the disclosures are even more severe and, in many cases, the dual agency conflict is considered so severe that the dual agency is simply not legal under any circumstances. You have to prove that you disclosed every material conflict (known and unknown) and the consequences of those conflicts. That's almost an impossible standard. Worse, you have to prove that your client understood everything you told them and that they consented anyhow. The law abhors a dual agent is the adage that is still true today, except for Realtors.

The real estate industry abounds with situations in which brokers have exploited their fiduciary relationships for unfair profit. Instead of avoiding conflicts, they entertain them and routinely engage in self-dealing, self-serving advice and even abuse of the statutory duty to supervise licensees. Consider the practices of referring clients to in-house title firms and lenders and recommending one of the most complained about products in the nation – home warranties.

Title companies are supposed to be making independent title search, exam and closing decisions. The last person who should be making those determinations is someone who has a five figure commission riding on the outcome of those decisions. Yet brokers routinely pressure their agents and managers to steer clients into those firms. In any other fiduciary relationships, that would be illegal. The disclosures used and consents obtained do not remotely approach those necessary under the common law of agency.

Socialized real estate industry

Realtors have used licensing law to do away with common law consumer protections and insulate themselves from market forces and liability. They have used licensing law to make it possible for them to

subject their clients to a catastrophic degradation in the level of service (dual agency) and charge them double for it. It is a huge travesty of justice to use a licensing law to make it easier to rip off consumers.

The dual agency double fee is not worthy of legislative protection.

When did we determine that real estate brokers needed government protection to collect a double fee and subject clients to dual agency? Collecting a double fee is an unfair profit to begin with, yet Minnesota licensing law treats it as if it is a lofty and important consumer goal. Dual agency is not necessary to sell real estate. It just happens to be the most profitable. Robbing banks is also profitable.

Chris Galler claimed that the real estate industry has more disclosures than any other industry.

At the Senate Committee hearing on March 6th, 2019 Chris Galler of the Minnesota Association of Realtors made the paraphrased statement: "The real estate industry are the most regulated industry in the nation and subject to more disclosure than any other industry." That's an untruth. An accurate statement would be that the Realtors are the most powerful industry lobby group and spend the most on lobbying than any industry and that they influence licensing laws, regulators and enforcement agencies more than any other industry. In the 2016 election, the Realtor Association claimed that 95% of the candidates they backed got elected. Many of those legislators are Realtors (evidenced at our most recent Committee hearing). It is considered political suicide for a legislator to oppose the Realtor Association. Do they own our government? How else could they accomplish such absurd legislative results?

The real estate industry enjoys more protections than any other licensed profession. They can engage in conflictive relationships that are illegal for every other profession, fail to disclose the most important conflicts and consequences of those relationships with no liability, fail to obtain the informed consent of clients and charge double for subjecting their clients to those actions. They enjoy standardized fee agreements that strip consumers of the ability to properly negotiate those fees and business practices that have fixed buyer brokerage fees for decades free of regulation. Their disclosure requirements are dismal at best and are designed to bait consumers with promises of representation and then switch to none. Many of the "disclosures" are misleading and serve as scare tactics to persuade consumers that they should agree to dual agency or risk not selling their homes.

How can a Supervising Broker be Neutral when they are Not?

This new bill proposes that when a designated dual agency situation arises that brokers are to remain neutral. Stating that a broker is neutral does not make it so. By definition, the broker is not neutral. It is the broker who has the most conflicts and the biggest financial temptations to access all the private confidential negotiating information of the buyers and sellers and use that information against them. The brokers are in a position to make a transaction occur that otherwise would not have happened. Collecting the entire commission is not a minor incentive. Financial and fiduciary interests are supposed to be aligned, not diametrically opposed. Worse, the licensing law requires brokers to access that information and "supervise" the agents. Even when it doesn't happen, the appearance of impropriety is so great that it results in a terrible erosion of the trust relationship that is expected in a fiduciary relationship. Brokers cannot be "neutral" in a dual agency situation and this requirement needs to be removed from the bill.

You can't have licensees negotiating and expect unbiased supervision from brokers.

Now consider how this same conflicted ("neutral") broker is going to supervise their licensees. Licensees can't be free agents with more authority than their brokers to negotiate and expect any kind of meaningful and unbiased supervision from brokers. This bill is ill conceived and won't work in many

routine circumstances. Consider the multiple offer situation with agents from within and outside the firm. Consider agents from the same team negotiating against each other. Consider two brand new agents attempting to negotiate a transaction with many complexities. Consider the transaction in which the broker represents a developer with hundreds of houses who also represents a single buyer. It is not hard to imagine hundreds of situations in which the broker's ability to supervise becomes hopelessly compromised.

Provide Consumers a Real Choice – Give them Single Agency

Dual agency is not necessary to sell real estate. There are hundreds of brokerages in Minnesota that already offer single agency to consumers who never engage in dual agency or charge double fees. But it is difficult for them to compete because the licensing law doesn't offer that form of representation in any of the forms or in the statute. Single agency is a form of exclusive representation that should be encouraged under the law. Instead of promoting single agency, the Realtors are pushing a Designated Dual Agency law that allows big broker dual agents to disguise themselves as single agents. This is unfair to both consumers and small brokers. Single agency really is exclusive agency. Why not promote that instead?

At the very least, Minnesota's licensing law needs a Single Agency option so that consumers can have real choices when they hire Realtors. That would be a meaningful "Consumer Choice." Single agency provides consumers with undivided loyalty in a transaction that is risky, complicated and being undertaken by licensees who may not even have a high school education and who are only required to take a 90 hour licensing class on how to pass the real estate licensing exam. At least single agency fulfills a promise to consumers of exclusive representation without the bait and switch that comes with Dual or Designated Dual Agency.

Designated Agency is Tantamount to Theft by Swindle

First, it is important to understand that representing a buyer and seller in the same transaction is illegal under the common law. The disclosures and consents for a dual agency relationship in an adversarial situation with competing interests are so overwhelming that the relationship is considered to be non-consentable for law firms. Even worse, the dual agent broker has a financial conflict of interest to encourage dual agency. Such a self-serving dual agency incentive is unheard of under fiduciary law. It's practically criminal and that is not an exaggeration. When self-dealing occurs in a fiduciary relationship it is tantamount to and often construed to be theft by swindle. We need to take this opportunity to not only consider the Designated Dual Agency law but to simultaneously revamp the entire dual agency section of the statute. I don't believe you can do one without the other.

Dual Agency is fiduciary abandonment and should be illegal for real estate licensees.

The way real estate brokerage is practiced in Minnesota, when dual agency arises it becomes fiduciary abandonment by the broker (in both dual agency and designated dual agency). The fiduciary is prohibited from advocating for the client right when the client needs them most. And the way it is sprung on Minnesota real estate consumers can only be described as a bait and switch. Brokers advertise themselves as great negotiators and promise clients that they will receive great negotiating advice. However, when a dual agency arises, they switch to providing no advocacy services. Disclosures are not made, consumers are not allowed to opt out and fees charged by Realtors are not commensurate with the degradation in services provided. There is no good policy reason for any form of dual agency to be legalized in Minnesota.

"Dual Agency is a totally inappropriate Agency relationship for real estate brokers to create as a matter of general business practice[1]."

That is a quote from the National Association of Realtors ("NAR's") 1986 Legal Liability Series on agency law. They went on to say, "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…. 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 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…. 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."

Sampling of Disclosures that would be necessary under the Common Law

In Minnesota, the licensing law elimination of the private cause of action for consumers makes vital to include in the law as many common law disclosures as possible. You have no choice but to try and codify all conflicts of interests if you are going to even try and obtain the consumers' informed consent. Here are just some of the minimum disclosure and procedural requirements that need to be added to the current statute to bring it closer to compliance with the common law requirements:

1. Disclose that the broker may get a double fee if dual or designated dual agency arises. You have to be brutally accurate if we are to replace the common law. You need to include the disclosure for any type of dual agency transaction the disclosure that, "the broker often gets paid double in dual agency situations."
2. Define Reverse Marketing and Warn Consumers. Disclose the possible consequences of the brokers financial conflict of interests. Brokers Brokers may intentionally limit the marketing of a consumer's house in order to increase the likelihood that they will get a double fee and cause consumers to be subjected to dual agency. Brokers may recommend keeping a property off the open market or to refrain from marketing it on certain buyer frequented websites. Pocket listings and limiting market exposure from online buyer frequented websites is called reverse marketing.
3. Disclose that when dual agency or designated dual agency arises that consumers will suffer a catastrophic degradation in the level of representation. This is accurate and important information for the consumer.
4. Dual and designated dual agency disclosures must be identical in all instances and occur at important times in the transaction. Currently, they are not identical and are misleading.
5. Disclosures regarding dual agency cannot be worded in such a way that encourages dual agency as our current law does. Instead of warning sellers that the broker won't be able to show buyers their homes, they should be told that there are other brokers who don't engage in dual agency and who will not have this conflict.
6. Provide an OPT out option for consumers when dual agency arises. Consumers should not be forced to into any form of dual agency. Especially not a designated dual agency situation. When dual agency arises, consumers should be given the opportunity that the common law provides of an opt out option at no cost.

[1] Who Is My Client? A Realtors Guide to Compliance with the Law of Agency. 1986

7. Warn consumers not to divulge confidential negotiating information to any broker or agent who is or may become a dual agent or designated dual agent as the broker has a large financial incentive to use that information against the client.

Attempting to list all the conflicts of interests that can arise in a dual agency situation is nearly impossible. We will never reach that common law standard. However, the above is a good start.

Informed Consent is the Goal

If dual agency or designated dual agency were properly disclosed to consumers, consumers would never agree to it.

It is not fair to consumers to obliterate the informed consent protections included in the common law in something as important as conflicts of interests in fiduciary relationships. Especially not in the most important transaction of a lifetime. If dual or designated dual agency were properly disclosed to consumers, consumers would never agree to it. The act of digitally signing an agency disclosure form and a fee agreement at the same time the purchase agreement is signed (illegal but routine practice in Minnesota) doesn't cut it. We need to set up a task force of attorneys who are expert in fiduciary law, Realtors and consumers to determine what a true informed consent should look like. We should also do a deep dive into the licensing law and repair it so that it eliminates incentives to engage in anti-competitive activity, self-dealing and other client betrayals. Minnesota consumers have suffered through almost 30 years of a licensing law that serves no other purpose than to protect Realtors from consumers. It's time to fix it.