

dual agency's demise



In a crashing economy, where everyone is trying to earn a buck on someone else's back, it's most important to know that your representative truly has unfettered allegiance to your best interest. Does a seller really want his agent telling the buyer that he would accept \$50,000 less than he is listing his home for? Or, does a buyer want her broker sharing the fact that she recently inherited \$1,000,000 and has a gaping hole in her pocket, plus her kids have already picked their rooms in their new house? These types of situations happen all of the time in residential real estate transactions, where a broker puts their personal desire to 'close' as many transactions as possible ahead of their fiduciary duty to provide a consumer with the best representation possible. The thought goes like this – why only represent the seller when you can also represent the buyer? In fact, many brokerage firms are known to only push their own deals.

Did you know that this situation, called a Dual Agency, is permitted by the NY Real Property Law? According to the Department of State's Counsel's Office "Dual agency arises when a real estate broker or salesperson represents adverse parties (e.g., a buyer and seller) in the same transaction". In fact, this activity is so widespread that there is even a modified type of dual agency available called a "designated sales agent" where a smokescreen of allegiance is offered to both the buyer and seller. In this situation, a brokerage firm will assign different salespeople to represent the seller and the buyer. Yet, both salespeople work at the same firm for the same broker. If this situation exists, the broker's fiduciary duty goes out the window. No longer can a seller or buyer rely on their agent's undivided loyalty. Instead, they are paying a great deal of money while being stabbed in the back throughout the process. You see, a broker can make double the money and close a transaction faster when they are on both sides of the negotiation.

This is where information becomes power for consumers. Where knowing is the whole battle. It's a time for consumers to open their eyes and for the law to protect. Thankfully, the law recently became a little stronger in this area. Just this past month, the NY legislature saw fit to protect consumers. Starting on January 1, 2011, an amendment to §443 of the NY Real Property Law "will allow consumers to select and allow a "dual agency" relationship in advance of it actually occurring". The new amendment will permit general consent by sellers and buyers to any potential dual agency situation prior to one presenting itself during the transaction solicitation process. This should provide for greater clarity to consumers who are traditionally ill informed about the dual agency relationship having only previously engaged in a few, if any, real estate transactions.

Before this law takes effect, agents only have to address a dual agency situation with consumers as it emerges, on a given showing, by requiring the buyer and seller to each sign a new disclosure form on the fly. Now, under the new amendment, brokers can obtain consent from buyers and sellers in advance and avoid a recurring nuisance in the process. Furthermore, by executing an advanced disclosure form, brokers can avoid sanctions by the Department of State from failing to immediately provide the form to each consumer prior to such a showing. To illustrate the importance of complying with the agency disclosure rules, in 2007 a broker was sanctioned \$2,000 for delaying a few days before he provided copies of an agency disclosure form, which ambiguously stated that the broker was the agent of both the seller and the buyer, instead of using the term dual agency.

In addition, the amendment extends the requirement of written disclosure concerning dual agency from residential transactions, where written disclosure forms have been required for years, to condominiums and cooperative apartments, which previously only required verbal disclosure. This is an important change because condominiums and cooperatives are an ever increasing choice by consumers, especially in 55+ communities.

During the next few months it's imperative that brokers provide training to their agents on compliance with the new amendment and on the terms and affects of different types of agency. It's important to create uniformity in the process at each firm and for brokers to use the amendment as an opportunity to heighten their respect for the concept of a fiduciary relationship. It's time for the emergence of an independent seller's and buyer's broker with unfettered loyalty in representation. It's time for the demise of dual agency.



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