

Just What Kind of Agent Are You, Anyway?

By: Peter Ruth, RAYAC Solicitor. November 2019

Several calls on the hotline these past few months have been in regard to one particular question: what kind of agency relationship exists between an agent and his or her client?

As peculiar (if not elementary) as that question sounds when read aloud, there are several Agreements of Sale that come across our desks that incorrectly identify the agency relationship between the agent and the buyer and/or seller. The key to properly identifying the agency relationship comes down to not only understanding the different types of agency relationships, but also the reasons those relationships exist.

“Buyer Agent” and “Seller Agent” - Assume an agent from Brokerage A represents a seller, and an agent from Brokerage B represents a potential buyer who just made an offer on the seller’s property. In this instance, the agent from Brokerage A is a “Seller Agent,” not a “Dual Agent” or “Seller Agent with Designated Agency.” Likewise, the agent from Brokerage B is a “Buyer Agent,” not a “Dual Agent” or a “Buyer Agent with Designated Agency.”

The reason for this is simple: the only way an agent becomes a Dual Agent is when either

- 1) the same agent is representing both the buyer and the seller, or
- 2) the agent representing the seller is in the same brokerage as the agent representing the buyer.

“Dual Agent” - Assume the example above, but instead the agent representing the seller is the same person as the agent representing the buyer. In this case, quite obviously, the agent is a “Dual Agent.”

However, assume the same example above, but instead the agent representing the seller is in the same brokerage as the agent representing the buyer. In this case, both agents are “Dual Agents” unless they have been designated to act exclusively for their respective buyer or seller. It’s important to remember that all agents owe fiduciary duties to his or her respective clients, such as exercising reasonable professional skill and care, and to deal honestly and in good faith.

In the first example of Dual Agency, one can easily imagine how difficult it could become for an agent representing both a buyer and seller in a transaction to advocate to the best of that agent’s abilities for either of his or her clients’ respective interests, especially when those interests are competing.

In the second example, even though the same agent is not representing both the buyer and seller, the law provides that each agent, as well as the broker and all other agents within that brokerage, are considered a “Dual Agent.” Although the conflict with separate agents is inherently different than the conflict that arises with the same agent representing both parties, more often than not consumers expect their agent to be THEIR agent, not another person’s agent.

The solution? Designated Agency. “Buyer Agent with Designated Agency” and “Seller Agent with Designated Agency” – **Designated agency can only occur when both the agent representing the seller and the agent representing the buyer are from the same brokerage.**

In such event, the broker can designate each agent to act on his or her respective clients' behalves to the exclusion of any other agent, including agents within the same brokerage who would otherwise be considered "Dual Agents."

In this case, the broker will be a Dual Agent, while one agent is designated for the seller, and one is designated for the buyer. The broker, a step removed from the day-to-day handling of the buyer or seller, must likewise undertake adequate efforts to ensure that each of the agents in the brokerage are able to independently advocate on behalf of the buyer and seller, and therefore preserve all required ethical and fiduciary duties owed. This includes implementing measures to limit access to confidential communications between the buyer, seller, and their respective designated agents. Given the additional level of responsibility imposed on a brokerage when agents become designated agents, it is imperative to properly identify the agency relationship when completing the Agreement of Sale. While not practical in all situations, designated agency - when used properly - especially in larger brokerages with several agents, can provide buyers and sellers comfort in knowing just what kind of agent you are.