

DIVIDED LOYALTIES

One of the primary fiduciary duties owed by real estate agents to their clients is the duty of loyalty. If an agent's loyalties are divided due to their own personal interests or their representation of multiple parties, the agent must obtain their client's informed consent. It is not enough to just disclose the fact that the agent's loyalties are divided; rather, the agent must disclose all relevant facts and circumstances behind the agent's divided loyalties.

A. Dual Agency

Perhaps, the most common conflict of interest involves a dual agency situation – *i.e.*, where the same agent represents both the seller and the buyer. Many agents are under the mistaken impression that a consensual dual agency relationship eliminates all fiduciary responsibilities. This is not true. It is certainly true that a dual agent cannot disclose confidential information about one client to the other client. However, if there is material information that is not confidential, the agent has a duty to disclose that information even if the other party would prefer that the agent does not. If, for example, a broker is aware that the school district is considering closing the neighborhood school, the broker is obligated to disclose that information to the buyer. This information is not confidential. Withholding this type of information from a buyer would not likely be perceived as a neutral position, but rather an action for the benefit of the seller-client.

An Ohio case involving the listing of a single-family home provides a useful illustration as to a dual agent's continuing fiduciary responsibilities.¹ In that case, the first purchase contract on the home had fallen through after the inspection showed numerous structural and foundational defects in the home. The sellers then performed some repair work and the listing agent continued

¹ *Hubbard Family Trust v TNT Land Holdings, LLC*, 9 NE3d 411 (Ohio App, 2014).

to list the home for sale. A second purchaser put an offer on the home which was accepted by the sellers. The listing agent acted as a dual agent in this second transaction. Although the second purchase contract also called for an inspection, it never took place. After the transaction closed, the purchaser discovered numerous defects in the home and filed a lawsuit against the real estate agent in which she alleged that she had breached her fiduciary duties by failing to disclose known defects.

The Ohio court found that in her dual agency capacity the agent owed a duty to disclose to each client “all non-confidential information material to the transaction.” The Court went on to find that since the agent knew about the numerous structural and foundation concerns raised in the first inspection, she should have told the second purchaser that a prior purchaser had raised “critical concerns regarding the structural and foundational integrity of the home.” Critical to the holding in the Ohio case was the finding that the information from the earlier inspection was not “confidential information.” The fact that the sellers may not have wanted the agent to share this information with the second purchaser did not mean that the information was “confidential.” While it was information learned in the course of an agency relationship, it was not information the agent learned from her seller-clients, but rather from the first purchaser.

B. Competing Purchasers

A second type of conflict of interest arises when one agent represents two buyers who are interested in the same property. This was the situation in a Michigan case brought by an unsuccessful purchaser of real property, Abdel-Hak, who claimed that but for the actions of his buyer’s agent, he would have been able to purchase property worth \$700,000 for only \$500,000.² It turned out that the successful purchaser of the property had been represented by the same buyer’s

² *Abdel-Hak v Saad (In re Saad)*, 319 BR 147 (ED Mich, 2004).

agent. Moreover, this second buyer worked in the same office as, and was allegedly related to, the buyer's agent. Abdel-Hak had not known that his buyer's agent was representing another potential buyer of the property until after his offer had been rejected. Abdel-Hak was also upset because it appeared that the competing buyer may have been aware of the terms of Abdel-Hak's offer at the time he submitted his own offer.

The Court found that the real estate agent's failure to disclose that he would not be acting solely as Abdel-Hak's agent for purposes of presenting an offer on the property was a material misrepresentation. The Court noted that under longstanding Michigan law, "a real estate agent is a fiduciary and it is not permissible for him to act in opposition to his principal."

Many, if not most, buyer's agency forms used in Michigan give the buyer's agent the authority to represent two buyers who are interested in the same property. Realtors® who find themselves preparing offers for two buyer-clients who are interested in the same home should not rely solely on this clause. Instead, both buyers should be advised of the current situation so that they understand that they cannot rely on the buyer's agent to advise them as to the appropriate terms of their offer. It is not enough for the buyers to know of the possibility of a conflict of interest. They must also be made aware when such a conflict actually exists so that they can adjust their conduct accordingly.

C. Self Dealing

A third type of conflict of interest arises when an agent has a personal interest in the transaction. In a North Carolina case, for example, a broker had told his buyer-client, Gosai, that he had a "friend" who owned a piece of property that was for sale.³ After Gosai viewed this property, he had his buyer's broker prepare an offer to purchase. The offer to purchase stated that

³ *Gosai v Abers Realty and Development Marketing, Inc*, 166 NC App 625 (2004).

the broker was acting as a dual agent. It was only after closing that Mr. Gosai discovered that the broker was the actual owner of the property.

In this case, the fact that the broker had described his role as a “dual agent” did not shield him from liability. The Court held that a broker can neither purchase from nor sell to his client unless the client consents “with full knowledge of all the facts and circumstances.” It was not enough for the broker to advise the buyer that he had divided loyalties. Instead, the buyer was entitled to know that the broker was, in fact, the seller. The Court held further that since the broker had sold the property to his client without the client’s informed consent, the transaction was presumed to be fraudulent. The buyer did not need to prove that fraud had occurred. Instead, the broker had the burden of showing that he had not taken advantage of his client and that he had acted throughout in a fair, open and honest manner. In this particular case, the broker could not meet that burden.

Obviously, Realtors® should never conceal their ownership interest in a property a client wishes to purchase. First of all, failing to disclose a direct or indirect ownership interest violates both the Occupational Code and the Code of Ethics. Secondly, a Realtor® cannot serve as a dual agent in a transaction in which the Realtor is either the buyer or the seller. Remember that entering into a dual agency relationship does not terminate all of a Realtor®’s fiduciary duties owed to a client. A Realtor® cannot satisfy those fiduciary obligations if he or she is also a party to the transaction.

A New York case provides a good example of how and when the relationship changes when a listing agent purchases her client’s property.⁴ The case involved a listing agent who entered into a contract to purchase her client’s cooperative apartment after several failed attempts

⁴*Dubbs v Stribling & Associates*, 712 NYS2d 19 (2000).

to sell it to third parties. At the time the apartment was initially listed, the sellers had told the listing agent that their preference would have been to buy the neighbor's unit and combine them. As it turned out, the former listing agent was able to buy the neighbor's apartment soon after she closed on her former clients' apartment. The former clients then sued her claiming that she had breached her fiduciary duties owed to them by failing to disclose the fact that the neighbor had changed her mind and was now willing to sell her apartment. The listing agent was able to convince the Court that she had not discovered that the neighbor had changed her mind about selling her apartment until after the purchase agreement with her former client had been signed (but before closing). The Court found that at the time the listing agent learned that the neighbor was willing to sell her apartment, she no longer owed her client any fiduciary duties.

The case would have come out differently if the listing agent had discovered that the neighbor was willing to sell even one minute prior to the signing of the purchase agreement. A listing agent who is considering the purchase of her client's home, but has not yet signed a purchase agreement, owes that seller-client the full range of fiduciary duties. Until the purchase agreement is signed, full and fair disclosure would require that the listing agent disclose the fact that the neighbor is now willing to sell the adjacent apartment. The fiduciary relationship terminates when the purchase agreement is signed. At that moment, the parties' relationship switches from principal/agent to seller/buyer. Should the sellers later decide they were taken advantage of, the burden will be on the listing agent to establish that she satisfied her fiduciary duty of loyalty (with full and fair disclosure) up until the moment the purchase agreement was signed.

D. Conclusion

A conflict of interest situation is not wholly resolved simply by signing a dual agency agreement or other waiver type instrument. Such an instrument is necessary, but it is only the start.

Realtors® must remember that a waiver is only enforceable if the Realtor® has made “full and fair disclosure” of all relevant information regarding the conflict. Moving forward, the Realtor® will continue to owe both clients a duty to disclose all material information that is not confidential information. A Realtor® cannot maintain an agency relationship with a client if the Realtor® themselves is competing with that client – for example, buying from the client, selling to the client or putting in an offer on the same property. Moreover, Realtors® should never try to maintain an agency relationship with two competing parties if they have a prior close personal or business relationship with one of the two parties.