

REVIEW OF COMMON AGENCY AND NON-AGENCY ISSUES

The topic of agency is one that never goes away in the life of a REALTOR®. Every half dozen years or so, MAR revisits the topic in an effort to make certain that REALTORS® have a working knowledge of the topic. These agency issues discussed below have been selected based upon the number of times they have been raised on the MAR Legal Hotline or with MAR's legal counsel. REALTORS® should keep in mind that with many of these questions, the correct answer may depend on whether the firm practices designated agency or traditional agency.

A. CREATION OF AGENCY RELATIONSHIPS

Hypothetical:

Salesperson Smith meets Buyer Green at an open house on one of his listings. Over the next week, Salesperson Smith shows Buyer Green ten different houses in the area, introduces him to a mortgage broker for pre-qualification and, at Buyer Green's request, supplies information on several different school districts in the area. Salesperson Smith consistently refers to Green as "his Buyer" or "his client." No buyer agency contract is ever signed; in fact, Salesperson Smith never even gets around to discussing agency with Buyer Green.

Questions:

1. Is Salesperson Smith Buyer Green's agent?

Unclear. Buyer Green may later argue that Salesperson Smith was his agent. As a matter of law, you do not need a written agreement to establish an agency relationship – an agency relationship may be created through your words and actions. The written agreement is only necessary if you want to enforce a contractual right to be paid for assuming agency responsibilities.

2. Has Salesperson Smith violated the agency disclosure law and, if so, what are the consequences?

Technically, the Michigan agency disclosure law requires only that the form be given "prior to disclosure of confidential information." If Buyer Green never discloses any confidential information to Salesperson Smith, technically there has been no violation of the statute.

A violation of the agency disclosure law is a violation of the Occupational Code, for which there are the same penalties as with any other license law violation (suspension or revocation of license, civil fine, and/or probation).

3. If, after buying a house through Salesperson Smith, Buyer Green sues Salesperson Smith for failing to disclose the fact that the roof leaks, can Salesperson Smith get the case thrown out before trial?

Salesperson Smith should be able to get his case summarily dismissed before trial IF he was not Buyer Green's agent. In Michigan, sellers' agents owe no duty to buyers to volunteer information about a property. This is not true of buyers' agents. Without a signed agency disclosure form, Salesperson Smith may have a hard time establishing that he was not Buyer Green's agent, at least without a long, expensive trial.

4. If, after looking at these ten different houses, Buyer Green goes back to Salesperson Smith's listing and puts in an offer, what is Salesperson Smith's role in this transaction?

Again, because Salesperson Smith never clarified his role with Buyer Green, the answer to this question is unclear. Salesperson Smith is only a dual agent if he was working with Buyer Green as a client. If Salesperson Smith proceeds forward as if he were the Seller's agent only, and it is later established that he was also a buyer's agent, then Salesperson Smith has an undisclosed dual agency problem.

5. If, after working with Salesperson Smith for ten days, Buyer Green signs a buyer agency contract with someone else and then puts in an offer on Salesperson Smith's listing, does Salesperson Smith have any claim to the selling agent's portion of the commission?

If Salesperson Smith is a REALTOR®, then his entitlement to a commission depends on whether a hearing panel would deem him to be the "procuring cause" of the sale. A buyer's agency contract is only one of many factors to be considered in a procuring cause arbitration.

Hypothetical:

REALTOR® Brown is contacted by Bob and Mary White. The Whites were referred to REALTOR® Brown by Brown's cousin. The Whites explain to REALTOR® Brown that they are looking to buy their first home and that they are aware of at least three FSBOs which, in each case, have a mortgage that far exceeds the value the home. The Whites have heard that you can get a great deal in this situation. However, they need someone with the professional experience in making the introductions and getting the process started. REALTOR® Brown has serious reservations about the likelihood of any success in a situation where FSBO sellers will be dealing with first-time buyers in attempting to complete a short sale. Ultimately, he explains to the Whites that he shall act as a transaction coordinator for a fixed fee of \$500. He will introduce the Whites to the respective sellers, provide them with a form of purchase agreement and keep the parties pointed in the right direction. REALTOR® Brown takes comfort in the fact that, as a transaction coordinator, he is not an agent for either the Whites or any of the FSBO sellers.

Weeks later, REALTOR® Brown is contacted by the Whites who are extremely frustrated. They have made an offer to one of the FSBO Sellers which was rejected. The FSBO Seller has made a counteroffer, but the Whites are uncertain about whether they

should accept and pay the amount demanded by the FSBO Seller. REALTOR® Brown, in an effort to move things forward, provides the Whites with some comparable sales information and indicates to them that they should counter the Sellers' counter at a reduced price.

Questions:

1. As a general matter, can REALTOR® Brown act as a non-agent in this type of a transaction?

REALTOR® Brown can maintain his non-agency status with the Whites and any FSBO seller so long as he stays with his plan: *i.e.*, he introduces the Whites to the FSBO sellers, provides them with forms and indicates that he remains available to answer any questions as to how to fill out the forms or how to seek the FSBO seller's lender's approval of the short sale.

2. As this particular transaction has progressed, is REALTOR® Brown still a non-agent?

This hypothetical shows the difficulty of representing real estate novices in a non-agency capacity. A transaction coordinator does not act as an advocate for either party or lend his or her professional expertise to either party. REALTOR® Brown, in providing the comparables and advising the Whites with respect to an appropriate counter to the Seller's counter, has arguably given up his non-agency status. While, presumably REALTOR® Brown was simply trying to move the transaction forward, by doing so, he jeopardized his non-agency status.

Hypothetical:

Ms. Green is going to list her property with Acme Realty. Ms. Green meets with Salesperson Jones who explains that Acme Realty practices designated agency. Salesperson Jones advises that Ms. Green will need to designate in writing that Salesperson Jones is her agent, along with a supervisory broker. Salesperson Jones advises Ms. Green that no other agents of Acme Realty will be representing her. A few weeks later, Salesperson Jones is hosting an open house for Ms. Green's home. Salesperson Smith, another Acme Realty

agent, brings a prospective Buyer to the open house and introduces the Buyer to Salesperson Jones as Salesperson Smith's client. Salesperson Smith then submits an offer on behalf of her Buyer. Salesperson Smith has not yet taken the time to have this Buyer enter into a Designated Buyer's Agency Agreement with him.

Question:

1. Is there an agency problem in this situation?

It would appear that Salesperson Smith has agreed that he and Acme Realty will act as a Buyer's Agent for the prospective Buyer without entering into a written agreement specifically designating Salesperson Smith and a supervisory broker as the only agents of the prospective Buyer. Because of this failure to enter into a designated agency agreement, arguably every agent of Acme Realty represents prospective Buyer. When Salesperson Smith submitted the offer on behalf of the prospective Buyer, a strong claim could be made that all of Acme Realty's agents were acting as dual agents, *i.e.*, Salesperson Jones was representing the prospective Buyer without even knowing she was doing so.

B. FIDUCIARY DUTIES

Hypothetical:

Listing Agent Jones knows Buyer Blue has been told that he will be laid off from his job next month.

Questions:

1. Should Listing Agent Jones tell the Seller, who has just received an offer from Buyer Blue, about Buyer Blue's impending layoff?

As a matter of agency law, an agent has a duty to disclose to his or her client all material information relevant to the transaction. Presumably, Buyer Blue's impending layoff would be material information to the Seller, at least in the case of a land contract sale or a cash transaction that is contingent upon Buyer Blue obtaining financing.

2. Is the answer any different if Listing Agent Jones learned the information about the layoff from Buyer Blue when he listed Buyer Blue's home for sale?

An agent is prohibited from disclosing any confidential information learned in an agency relationship. Thus, assuming the layoff information is in fact "confidential information," Listing Agent Jones would owe a duty to Buyer Blue to keep that information confidential. Obviously, this fiduciary duty is going to directly conflict with Listing Agent Jones' duty to the Seller to disclose all "material" information. The fact that the information was learned through another agency relationship is not necessarily a defense to the Seller's claim that a disclosure should have been made. To address this issue, all agency contracts, both listing agreements and buyer's agency contracts, should contain a specific provision requiring clients to acknowledge that despite your duty of full disclosure, you are not going to disclose any confidential information learned through another agency relationship.

3. What if Listing Agent Jones' agency relationship with Buyer Blue ended months ago?

The fact that the agency relationship with Buyer Blue was previously terminated will not affect Listing Agent Jones' duty of confidentiality owed to Buyer Blue. The duty of confidentiality survives the termination of an agency relationship.

4. Assume that Listing Agent Jones does not disclose the pending layoff information, the Seller accepts the offer from Buyer Blue and after months and months, Buyer Blue is somehow able to get financing and the sale closes. If the Seller later sues Listing Agent Jones for failing to disclose Buyer Blue's job woes, does Seller have to show that he would not have accepted the offer from Buyer Blue had he been told?

No. The Seller would have to show only that Listing Agent breached his duty of disclosure. Establishing that there has been a breach of fiduciary duty will deprive Listing Agent Jones of his commission, even if there is no evidence that Seller-client would have behaved any differently had he known the information about Buyer Blue's impending layoff.

Hypothetical:

At the time his house is listed, Seller tells Listing Agent that his roof has leaked in the past, that Seller thinks that he has fixed the problem, and that Listing Agent should not tell any potential purchaser about the prior roof problem. Arguably, the Seller answers the Seller's disclosure form honestly in that he believes that the roof currently does not leak.

Questions:

1. If the roof leaks three months after Buyer purchases the home, can Buyer sue Listing Agent for failing to disclose the fact that there had been a prior roof problem?

No. Ordinarily, a seller's agent is not liable for failing to volunteer information to a buyer.

2. Is the answer any different if, before he signed an offer, Buyer had specifically asked Listing Agent if he knew of any past problem with the roof?

Yes, a seller's agent may be liable for responding falsely or evasively to a direct question presented by a buyer.

3. Is the answer any different if Listing Agent was acting as a dual agent?

A buyer's agent DOES owe a duty to his buyer-client to disclose material information relevant to the transaction. At the same time, in a dual agency situation, Listing Agent would owe a duty to keep Seller's confidences. Again, the only way to avoid this conflict is to address the potential problem in agency contract forms.

4. Is the fact that Seller had specifically advised Listing Agent not to disclose the prior problem with the roof relevant in the analysis of any of the above questions?

No. It is not a defense to a fraud claim that the Seller ordered the Listing Agent to commit the fraud.

Hypothetical:

Listing Agent works diligently for three months to procure a buyer for his client's home, without success. At some point, Listing Agent offers to purchase the home from the Seller and the Seller accepts that offer.

Questions:

1. Is Listing Agent protected if the purchase price equals the listing price less the commission that would have been paid had Listing Agent found a buyer?

Not necessarily. While the law does not prohibit an agent from buying his client's home, the law imposes a fiduciary duty on an agent not to take advantage of his client. A judge or jury may be easily convinced that, in this instance, the Listing Agent was not looking out for his client's best interests. Remember that the listing price was likely set by the Listing Agent in the first place.

2. Does it matter whether Listing Agent buys the house for his own residence or quickly flips it?

No, not as a matter of law; however, as a practical matter, a judge or jury may be more likely to conclude that a listing agent was acting in bad faith if he quickly resold the property for a profit.

3. What if Listing Agent is only a minority shareholder in an entity that purchases Seller's home at the listing price but Listing Agent fails to disclose his involvement?

In this situation, it is likely that the Listing Agent would be deemed to have violated both the Occupational Code and his fiduciary duty of full disclosure.

4. Is the analysis of any of these questions any different if Seller was facing a foreclosure sale?

Not necessarily. A judge or jury could easily conclude that the pending foreclosure sale simply made it easier for the Listing Agent to take advantage of his client.

Hypothetical:

REALTOR® Smith has listed the Jones' property. REALTOR® Smith has found a buyer for the Jones' property and is in the final stages of completing a short sale. The Jones' lender has provided its instruction letter which indicates that the Jones are not to leave closing with any cash. REALTOR® Smith then learns during a conversation with the Jones that the prospective Buyer is going to buy personal property from the Jones for \$3,000 cash. The personal property is the Jones' 7-year old Weber grill. REALTOR® Smith advises the Jones that this sale of personal property must be put in an addendum which will be signed by the parties and submitted to the lender and it must also appear on the HUD-1 statement at closing. The Jones indicate they will not do either of those things. REALTOR® Smith is seriously thinking about withdrawing from the transaction which, ultimately, could result in the Jones being unable to sell their property to prospective Buyer.

Questions:

1. If REALTOR® Smith refuses to follow the wishes of the Jones, can she withdraw from the transaction without breaching a fiduciary duty to the Jones?

It seems highly unlikely that a court would find REALTOR® Smith's withdrawal to constitute breach of fiduciary duty inasmuch as she was doing so to avoid a potential claim that she was acting as a co-conspirator or aiding and abetting in a fraud on the Jones' lender. An agent's duty of loyalty to a principal does not require that the agent join the principal in criminal acts.

2. Does REALTOR® Smith have a legal duty to contact the Jones' lender and advise that the Jones are selling personal property of dubious value to the prospective Buyer in exchange for the payment of \$3,000 cash at closing?

REALTOR® Smith is not required to act as a policeman for the lender. Hopefully, by withdrawing from the transaction, she will amply demonstrate that she neither conspired nor aided and abetted in the transaction.

Hypothetical:

REALTOR® Smith is representing the Johnsons in a listing which is a short sale. The Johnsons accept an offer which is then tendered to the Johnsons' lender for approval. The lender approves the short sale but does not provide any indication as to whether the Johnsons will be released from any further liability to the lender or whether the lender reserves the right to pursue the difference between the balance owed on the mortgage and the lesser amount it receives at closing.

Questions:

1. Does REALTOR® Smith have a duty to advise the Johnsons that they could be liable to the lender for the difference between the amount paid to the lender at closing and the balance of the loan?

As a general rule, a REALTOR® has no duty, fiduciary or otherwise, to provide legal advice to his or her clients. However, here a court could conclude that some material information about a potential deficiency was known or should have been known by REALTOR® Smith, particularly if REALTOR® Smith holds himself out as a short sale specialist. As a matter of best practices, REALTOR® Smith should advise the Johnsons that they should consult with an attorney with respect to their potential future liability to the lender. Further, this advice from REALTOR® Smith to the Johnsons should be set forth in either the listing agreement or the purchase agreement in order to demonstrate that the advice was actually given.

2. Six months after closing, the Johnsons received a summons and complaint in which the lender is pursuing them for the difference between the amount it received and the balance of the loan. Can the Johnsons sue REALTOR® Smith?

Anyone with the filing fee and a piece of paper can start a lawsuit. The question is whether the Johnsons can demonstrate that REALTOR® Smith owed them a duty to obtain a written release of liability from the lender or advise them that they could have future liability to the lender prior to their deciding to

complete the short sale. The chances of the Johnsons proving such a duty against REALTOR® Smith would be extremely diminished if in fact it can be shown that REALTOR® Smith advised them to seek legal advice with respect to any future liability to the lender and disclaimed any responsibility for obtaining a release from the lender.

C. DUAL AGENCY

Hypothetical:

Salesperson Jones is the Listing Agent for Seller's home and the list price is \$250,000. Seller has told Salesperson Jones that his "bottom line" price is \$238,000. When Salesperson Jones meets with Buyer-client to write up an offer, Buyer-client advises Salesperson Jones that he intends to start at \$235,000, but is prepared to go as high as \$242,000.

Questions:

1. Can Salesperson Jones tell Buyer-client that there is no use offering \$235,000, as Seller's bottom line is \$238,000?

Seller's bottom line price is clearly confidential information, which may not be disclosed by the Seller's agent without the Seller's permission.

2. Can Salesperson Jones make everyone happy by suggesting to Buyer-client that he offer \$240,000; thereby giving Seller more than his bottom line price while keeping Buyer-client below his maximum price?

No. It would not be a defense to either client's breach of fiduciary duty claim that the disclosure of each side's confidential information "made everybody happy."

3. If Salesperson Jones knows Seller has received another offer at \$238,000, can he tell Buyer-client about this other offer?

Yes. The existence of another offer is not confidential information and is certainly information that the Buyer would find "material."

D. TERMINATION OF AGENCY RELATIONSHIPS

Hypothetical:

Seller signs a six-month listing agreement with Listing Agent. A dispute arises and Seller sends Listing Agent a written notice of termination three months prior to the stated expiration of the listing agreement (and prior to locating any buyer for the home).

Questions:

1. Is the agency relationship terminated, such that the Seller is free to list the home with another agent?

Yes. Agency relationships are service contracts that may be terminated by either party at will. The issue is not whether the Seller may terminate the listing agreement, but whether the Seller may terminate the listing agreement without penalty, or whether instead the Seller is liable for damages for breaching the contract.

2. Does Listing Agent have a claim for damages against Seller?

Maybe. Michigan courts have traditionally held that listing contracts can be terminated at will by the Seller without penalty prior to their expiration date, unless done in bad faith to avoid paying a commission or unless the listing agent has given "sufficient consideration." The question is typically whether the Listing Agent has spent enough money and/or time promoting the sale of the home that the contract should be binding on the Seller.

3. Can Listing Agent file a lien on Seller's property?

No. Ordinarily, even if entitled to damages, Listing Agent has no right to lien the Seller's property. The Listing Agent could only file a lien if the Seller's property was covered by the Commercial Broker's Lien Law.

4. If Seller does not terminate the listing agreement but instead dies, can Listing Agent enforce listing contract against Seller's estate?

Ordinarily, the Listing Agent will not be able to enforce the listing agreement against a Seller's estate.

5. If, prior to the termination of the listing agreement, Listing Agent dies, does the listing agreement automatically terminate?

Technically, since the listing agreement is with the broker, not the agent, the listing agreement will not automatically terminate upon the death of the Listing Agent.

Hypothetical:

REALTOR® Green takes the listing for the Browns' property. REALTOR® Green is aware of the fact that a bank is in the process of commencing foreclosure proceedings against the Browns' property. REALTOR® Green is successful in procuring a Buyer for the Browns' property. The Browns and the Buyer enter into a purchase agreement and began working towards a closing which they hope to hold within sixty (60) days.

Questions:

1. The redemption period on the foreclosure on the Browns' property expires 15 days prior to closing. Does the expiration of the redemption period terminate the agency relationship between REALTOR® Green and the Browns?

The expiration of the redemption period on the Browns' property does not necessarily terminate their agency relationship. However, it does terminate the purpose of the agency relationship as the Browns no longer have legal title to the property and cannot close the transaction.

2. The Browns panic and, despite the existence of the purchase agreement with the Buyer, accept a deal with the bank, accepting cash from the bank for their keys to the property and a deed in lieu of foreclosure. Has the agency relationship been terminated?

The agency relationship has been terminated as a result of the Browns' breach of their listing agreement with REALTOR® Green.

The Browns can no longer perform under the terms of the listing agreement with REALTOR® Green, *i.e.*, deliver fee title at closing.

3. Do the Browns owe REALTOR® Green a commission?

It would appear that the Browns would owe REALTOR® Green a commission where they voluntarily accepted cash from the bank in exchange for their keys and a deed in lieu of foreclosure. An argument could also be made that they owe REALTOR® Green a commission after he found a ready, willing and able buyer who would have purchased the property but for the expiration of the redemption period. All that being said, the Browns have lost their house in foreclosure and are highly unlikely to be collectible. As a practical matter, REALTOR® Green should probably just move on to the next listing.

E. COMPETITIVE BUYERS

Hypothetical:

123 Main Street is listed with Ace Brokerage Firm. Two different agents, Bob and Sue, both at Best Brokerage Firm, have buyer-clients who are interested in putting in offers on 123 Main Street. Best Brokerage Firm is not a designated agency firm.

Questions:

1. Is Best Brokerage Firm acting as a dual agent?

No. Representation of two buyers interested in the same property, although potentially problematic, is not dual agency.

2. What, if anything, should Bob and Sue tell their respective clients about the other offer?

Each of them owes conflicting duties of disclosure and confidentiality.

3. If Bob chooses to say nothing about the other offer to his buyer-client, does that buyer-client have a potential claim against Bob, Sue and/or Best Brokerage Firm?

Yes, Bob's client may sue Bob, Sue and Best Brokerage Firm for breaching their fiduciary duty to disclose all material information known to them.

4. If Bob chooses to tell his buyer-client about Sue's buyer-client's offer, does Sue's buyer-client have a potential claim against Bob, Sue and/or Best Brokerage Firm?

Yes, Sue's client may then sue Bob, Sue and Best Brokerage Firm for breaching their fiduciary duties of confidentiality.

5. How do Bob, Sue and Best Brokerage Firm protect themselves from this situation?

Best Brokerage Firm should require its agents to use buyer agency contracts which contain an express provision indicating that, despite their duty of disclosure, they will not disclose confidential information learned through another agency relationship.

F. DELIVERY ISSUES

Hypothetical:

Salesperson Smith has a client, Buyer White. Buyer White puts an offer in on 123 Main Street through Salesperson Smith. An acceptance back from Seller is delivered to Salesperson Smith's office at 12:00 noon. At 1:00 p.m., before Salesperson Smith has had a chance to forward this acceptance to Buyer White, Salesperson Smith receives a call from the Listing Agent advising him that the Seller is withdrawing his acceptance.

Questions:

1. Can Buyer White still enforce the contract?

Yes. Delivery to Salesperson Smith has the same legal effect as delivery to his buyer-client, Buyer White.

2. Does the analysis change if Salesperson Smith and Listing Agent are with the same firm – so that both are acting as dual agents?

No.

3. What if Seller had not accepted Buyer White's offer, but had delivered a counteroffer to Salesperson Smith? Could the Listing Agent call and revoke Seller's counteroffer before Salesperson Smith has a chance to deliver the counteroffer to his client?

Unlike a written acceptance, a counteroffer may be withdrawn, even verbally, at any time before it is accepted. In this instance, it would not matter if the written counteroffer had been delivered to Buyer White prior to the call to Salesperson Smith from Listing Agent -- it could still be revoked at any time before it was accepted.

Hypothetical:

Salesperson Smith has a client, Buyer White. Buyer White puts an offer in on 123 Main Street through Salesperson Smith. Salesperson Smith delivered the offer to the Listing Agent. Seller accepts the offer. Listing Agent then scans her Seller's acceptance and sends it to Salesperson Smith at Salesperson Smith's email address at 12:00 noon. At 1:00 p.m., before Salesperson Smith has had a chance to forward this acceptance to Buyer White, Salesperson Jones calls Salesperson Smith and advises him that the Seller is withdrawing his acceptance.

Questions:

1. Could Salesperson Jones deliver acceptance on behalf of the Seller to Buyer White by emailing it to Salesperson Smith?

If there is no written agreement in place between Buyer White and the Seller as to the delivery of offers, acceptances and notices via email, then the effectiveness of Salesperson Jones' delivery would be governed by the common law. The common law provides that if a purchase agreement is silent as to the method for deliveries of offers, acceptances, etc., then delivery of acceptance shall be

the same as delivery of the offer. In the hypothetical, Salesperson Smith physically delivered the offer to Salesperson Jones' office. On the other hand, if Buyer White and the Seller had a written agreement in place permitting electronic delivery of documents, then Salesperson Jones' e-delivery to Salesperson Smith would be effective.

2. Can Buyer White enforce the contract?

Yes, if Buyer White and the Seller had a written agreement permitting for e-delivery of the acceptance. Delivery to Salesperson Smith has the same legal effect as delivery to his client, Buyer White. If there was no written agreement authorizing e-delivery of the acceptance to Salesperson Smith, then there would be no contract to enforce unless the acceptance was physically delivered to Salesperson Smith prior to the Salesperson Jones advising Salesperson Smith that the Seller was withdrawing his acceptance.