

Why Real Estate Agency Laws Need an Update

By Richard Stanley

When I began my career in the 1980s, the real estate business was relatively unregulated. Amazingly, at that time, buyers did not have exclusive representatives. All brokers and their agents were “sub-agents” of the sellers. Because of a lack of understanding of real estate jargon and roles—and much litigation, in part, as a result of having sub-agents’ representations binding upon sellers—the California legislature enacted an agency law disclosure in the late ‘80s. This law remains in effect, and is essentially unchanged.

First, the law defines **terminology**. “Agent” means the brokerage—to most people, a company headed by a person with a broker’s license. An agent may have “sub-agents of the agent”—what most people call realtors, or persons with real estate sales persons’ licenses who must work under the supervision of a broker—a function that has blurred in recent years as mini-companies designed to create special branding within brokerages have proliferated.

Second, the agency law defined the **roles** agents (brokerages) may play in representing the public. An agent may represent a seller exclusively, a buyer exclusively or both parties in what is called a “dual agency”. The law further states that a prescribed form, the Disclosure Regarding Real Estate Agency Relationships, must be signed by parties represented by agents. The underlying statute, in its entirety, is attached to this disclosure.

So what’s the problem? Dual agency is the problem. Done fairly and ethically, dual agency can work well for both “sides” of a transaction. Usually dual agency occurs when two realtors within one brokerage each represent one side of a transaction. Problems arise when more than one offer is on the table and one of the offers is from the listing brokerage. Obvious incentives exist—or may **appear** to exist—to steer the seller toward selecting the in-house offer. Situations get even murkier when one realtor represents both the buyer and the seller in a transaction. Conflicts of interest are patently obvious. How can one realtor negotiate the highest sale price for the seller, while at the same time negotiating the lowest purchase price for the buyer? Further, how can one realtor serve two masters during the escrow—a time that can be contentious? The best position a realtor can achieve is to become a mediator who never divulges confidences and produces an outcome that each side is pleased with—not an easy task—and one that relies on the personal integrity of the realtor and the trust of the parties.

Abuses, however, abound—especially during times, such as now, when business is lean and realtor integrity often tarnishes. Some realtors deliberately withhold listings from the Multiple Listing Service to allow them time to hold a Sunday open house. This way, they have a better chance of “double-ending” the deal (representing both seller and buyer) before competition from other realtors’ clients arrives. They also have a chance to “poach” another realtor’s client, who may wonder why they weren’t apprised of the new listing. That the listing realtor’s seller might realize a higher sale price from more and better marketing is not of concern.

What can be done? First, to protect the interests of the parties from predatory realtors, urge your state representatives to ban dual agency as it pertains to single realtor, simultaneous representation of both sides in a real estate transaction. This rule change should also apply to partnerships and should ban all forms of compensation to a single realtor, or partnership, from more than one side of a transaction. Many states already have such laws. California needs to catch up on this point. The real estate community cannot be relied upon to self-police. If you are a buyer or a seller, ask a prospective realtor how many times in the past year or so they have double-ended deals. If they answer affirmatively, and more than once or twice, run the other way. This kind of realtor is a professional double-ender who is more likely to be looking out for a commission than the interests of one principal—you. Ask about a brokerage's procedures regarding the supervision of multiple offers and double-ended deals. If the procedures do not seem highly protective of your interests, move onto another realtor and brokerage. Also, don't be shy about asking a prospective realtor how many times they have been a defendant in an arbitration proceeding. The professional double-enders often produce unhappy clients and/or realtor colleagues who complain.

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