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## **Dual agency and *double-dipping* still risky business**

### ***Beyond Dual Agency: Part 1***

**BY MATT CARTER**

*Editor's note: This article is part of a series, "Beyond Dual Agency: Many forms of real estate double-dipping," highlighting the history, regulations, and debate over dual agency and other real estate practices in which the same real estate professional, or professionals from the same office, work with both the buyer and seller in the same real estate transaction.*

Despite more than two decades of tinkering with the laws, regulations, customs and practices governing Realtor-client relationships, real estate brokers still view agency issues as their single greatest potential legal liability.

Realtor associations have lobbied for and won numerous changes to state laws and regulations, largely aimed at reducing their legal exposure while preserving their ability to earn commission on both the buyer and seller sides of a real estate transaction.

But brokers are double-ending fewer deals than a decade ago in several large markets examined by Inman News, despite the fact that laws in all 50 states and Washington, D.C., still provide avenues for them to do so.

Not only can representing both sides in a transaction be fraught with risk, but the rise of third-party listing portals like Realtor.com, Zillow.com and Trulia makes it easier for buyers to research homes and find an agent themselves.

Some Realtors, particularly those who represent buyers exclusively, view that trend as a positive one. They say consumers may be shortchanged when a listing agent working for the seller also attempts to represent the buyer's interests, a practice known as "dual agency."

Even in instances when the buyer and seller are represented by different agents who work at the same brokerage company -- a practice often referred to as "designated agency" -- critics say there's a danger that confidential information will be disclosed, hurting the negotiating position of one or both parties.

But others say dual and designated agency can also benefit consumers, and that it would be impractical for buyers and sellers to always be represented by agents who work at different brokerages or offices.

As long as agency relationships are disclosed and agents fulfill their duties to their clients, defenders say, the interests of both buyer and seller can be served.

Agents and brokers surveyed by Inman News about the prevalence and acceptability of more than three dozen controversial real estate practices were less concerned about designated agency than dual agency.

Among more than 500 agents and brokers surveyed, three out of four said it's acceptable (67.1 percent) or even desirable (7.6 percent) for two agents from the same office to represent the buyer and seller in the same transaction.

A slim majority objected to a single agent representing both the buyer and the seller, with 25.9 percent viewing the practice as "unacceptable" and 32.4 percent calling it "not desirable."

Nearly three out of four agents and brokers surveyed said it's "common" for two agents from the same office to represent the buyer and seller in a single real estate transaction. And 41 percent said it was common for individual agents to double-end a deal, working with both the buyer and seller in the same real estate transaction.

The fact remains that when agency representation disclosures aren't provided -- or when agents breach the fiduciary duties they owe to their clients -- brokers may find themselves in court.

The National Association of Realtors surveys real estate brokers, agents, attorneys and educators every other year to identify legal issues of concern. Problems that can arise from agency representation issues -- including breaches of fiduciary duty, dual agency, and agency disclosure and buyer representation -- remained the top-ranked issue in NAR's [2011 Legal Scan](#).

Agency representation outranked property disclosures, ethics, fair housing laws and the Real Estate Settlement Procedures Act (RESPA) as legal issues of concern.

More than 57 percent of those surveyed said dual agency is the basis for a significant number of legal disputes, and 83 percent placed it among their top three current issues.

Many of the nearly 400 respondents to NAR's survey said agents and even some brokers don't seem to understand dual agency, can't explain it to their clients, and don't make the required disclosures.

A growing number of states now allow "transaction brokerage," an approach developed by real estate industry lawyers to limit brokers' legal liabilities in working with buyers and sellers in the same transaction by doing away with agency representation altogether.

Although NAR has never endorsed transaction brokerage, Florida, Georgia, Texas, Pennsylvania, Massachusetts, Michigan, Colorado and 18 other states now permit Realtors to act merely as deal facilitators, providing services to buyers and sellers without representing them in a true agency capacity.

In Florida, brokers and their sales associates are presumed to be providing services as transaction brokers and, since 2006, are no longer required to provide consumers with disclosures informing them of that fact. Only brokers and agents who wish to represent clients in a "single agency" relationship are required to provide agency disclosures.

NAR's latest survey of members showed 18 percent of Realtors practiced transaction brokerage in 2010, up from 10 percent the year before. The percentage of Realtors practicing buyer and seller agency with disclosed dual agency dropped from 41 percent to 32 percent.

NAR's 2011 Member Profile also revealed that both of those groups were outnumbered by the 33 percent of Realtors who said they work with either buyers or sellers, but in "single agency" relationships.

That's up from the 29 percent of Realtors who identified themselves as practicing single agency in 2009.

Only 10 percent of Realtors identified themselves as working exclusively with buyers, while 7 percent said they enter into agency relationships only with sellers.

Many states allow real estate brokerages to provide "two-tiered" services to consumers, serving a seller as a represented "client" while providing more limited services to a buyer in the same transaction as an unrepresented "customer," for example.

If everybody agrees to such an arrangement, a lone agent can avoid splitting the commission paid by the seller with a cooperating broker, while still limiting exposure to any legal claims that the agent violated the fiduciary duties owed to a client.

### **Pitfalls of sub-agency**

The state laws and regulations governing real estate broker-client relationships today were all put in place after the industry practice that had prevailed for decades -- "sub-agency" -- came under fire from regulators and consumer groups.

Until 1993, when NAR amended the model rules governing Realtor-affiliated multiple listing services, many MLSs required that listing brokers make offers of compensation to cooperating brokers contingent on the cooperating broker acting as the listing broker's subagent.

In other words, not only were buyers technically unrepresented, but the agent they may have presumed was working on their behalf actually had a contractual obligation to the seller to help the listing broker obtain the best price for their property.

From the perspective of the broker and agent, one advantage of sub-agency was that if both agents involved in a transaction were working for the seller, they couldn't be accused of acting as undisclosed dual agents or breaching duties owed to the buyer -- or so they thought.

Regulators and consumer groups began casting sub-agency in an unfavorable light in the 1980s, and an explosion of lawsuits provided further motivation for the real estate industry to push for an overhaul of MLS rules and state laws governing agency.

State courts, applying common-law precedents, began to rule that the services cooperating brokers and their agents were providing for buyers -- such as representing them in negotiations -- created agency relationships between them.

That meant cooperating brokers and their agents could be liable to claims that they were acting as undisclosed dual agents of both the buyer and seller.

NAR and its member associations lobbied for state laws defining agency and non-agency roles for Realtors that would take precedence over common law. Under the patchwork of regulations that resulted, sub-agency is still allowed in many states.

And it's still possible to double-end deals in every U.S. state -- either by practicing disclosed dual agency, designated agency or transaction brokerage, or by providing "two-tiered" services to a buyer and seller.

### **Shrinking appetite for "double-dipping"**

Statistics suggest that despite the many permissible avenues for agents to "double-dip" (another term for taking a commission for both the buyer and seller sides of a real estate deal) brokerages are losing their appetite for such deals -- or are having a harder time guiding consumers down that path.

In order to attract more consumers to their Internet data exchange (IDX) websites, many brokers now advertise not only the homes they represent, but all of the listings in a given market.

That can help brokers land more clients. But by the time they pick up the phone, buyers may already have their heart set on a listing represented by another broker, reducing the likelihood that one office or agent will handle both ends of the deal.

Consumers are also able to begin the house-hunting process on third-party sites that run ads for buyer's agents alongside of listings, such as Zillow and Trulia. When buyers find a home they're interested in on a third-party website, they may end up contacting the agent whose ad appears next to the listing instead of the listing broker.

NAR's officially sanctioned listing portal, Realtor.com, this year has also been experimenting with running agent lead forms next to listings in test markets, and is now in the process of launching the ad program nationwide.

Whether the trend is driven by the fear of lawsuits or greater independence on the part of consumers, statistics compiled by four of the nation's largest MLSs show declines in same-broker or same-office transactions during the last decade.

At Phoenix-based Arizona Regional MLS, the proportion of same-office transactions has fallen by nearly 38 percent in the last decade, dipping from 22.6 percent in 2001 to 14.1 percent last year.

The percentage of same-office transactions handled by ARMLS members actually peaked at the tail end of the boom, hitting 22.9 percent in 2007 as home sales bottomed out.

Same-agent transactions -- a subset of same-office transactions -- followed a similar pattern, peaking at 19.2 percent of closings by ARMLS members in 2007 before retreating to 9.4 percent last year.

There's been a similar trend at the largest MLS in the Northeast, Rockville, Md.- based Metropolitan Regional Information Systems Inc. (MRIS), where 21.7 percent of transactions in 2002 were handled by an agent or agents working out of the same office.

The percentage of same-office sales dropped to 15.8 percent in 2009, a low for the decade, before rebounding to 16.4 percent last year, MRIS reported.

The 24 percent decline in the rate of same-office transactions was eclipsed by an even steeper, 30 percent drop in the share of same agent transactions handled by MRIS members, which fell from 14.5 percent to 10.1 percent during the same period.

In the year 2000, 34.6 percent of transactions in the market served by the Houston Association of Realtors (HAR) were handled by agents at the same brokerage.

The rate fell steadily for 10 years, reaching a low of 15.1 percent last year -- a 56 percent reduction in the share of same-broker transactions. From 2000

through 2010, same-agent sales never accounted for more than 1 percent of transactions handled by HAR members.

(Although Texas has banned dual agency, brokers can act as an "intermediary" between a buyer and seller. Brokers acting as intermediaries may, but are not required to, appoint individual agents to carry out the instructions of the buyer and seller.)

The MLS for the metro Chicago market and surrounding areas, Midwest Real Estate Data LLC, (MRED), analyzed records going back to 2007 and found same-broker sales dropped from 22.3 percent in 2007 to 15.2 percent in 2009, and have stayed in that vicinity since then. MRED did not provide a further breakdown of same-agent sales.

(Note: "Same office" transaction data from ARMLS and MRIS does not include "same broker" transactions in which agents worked out of different offices. "Same broker" transaction data from MRED and HAR includes transactions in which agents did not work in same office.)

### **Profit motives**

For those who are comfortable with the potential ethical issues and legal complications, double-ending deals is a tempting shortcut to larger commission checks.

In transactions where the buyer and seller are each represented exclusively by a single agent employed by different brokers, the commission paid by the seller to the listing broker -- typically between 5 to 6 percent -- is split evenly between the listing broker and the cooperating broker.

When the buyer and seller are represented by a single dual agent -- or two designated agents at the same brokerage -- the seller may still pay the same commission, unless they have negotiated for a reduced "dual" or "variable" rate commission with their broker in advance.

The lone brokerage involved in a dual or designated agency transaction can stand to make twice as much, after paying its own agent or agents a commission split, as it would in representing just one side of a transaction.

Franchisors that collect commission-based royalties from their affiliated brokers benefit in much the same way when their brokers are able to handle both sides of a transaction.

Agents representing buyers as designated agents in a transaction that involves a listing represented by their own brokerage stand to make no more than they do when representing buyers as single or exclusive agents in transactions involving another broker's listing.

But when a single agent represents both the buyer and the seller -- or simply provides services to both as a transaction facilitator or non-agent -- that agent can make twice the money, a practice derided by critics as "hogging."

The commission generated by each sale -- which is paid by the seller out of sale proceeds -- doesn't increase. But there's no cooperating broker to share it with.

Some critics say buyers lose out in such situations, since their interests may not be represented as diligently as if they worked with an agent who represented them alone.

The California Association of Realtors, in soliciting contributions to its Realtor Action Fund, claims that the lobbying it has done to preserve dual agency in the state "saves" Realtors thousands of dollars each year.

The amount of savings claimed in pitches for political contributions varies from [\\$2,203](#) per year to [\\$4,058](#) per year, and [\\$3,439](#) is the figure cited most often.

CAR spokeswoman Lotus Lou said the group currently estimates that preserving dual agency generates \$1,873 in annual savings for the average agent and \$4,627 per brokerage, but was unable to provide specifics on how those estimates were derived.

"Each agent and firm makes that additional amount, respectively, because of dual agency," Lou said.