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You can't serve two masters. Unless you're a Realtor.

BY DOUG MILLER

The Minnesota Association of Realtors is lobbying for a new law that will allow brokers to conceal their dual agency status from consumers.

Hogger" is the celebratory term used by Realtors[1] to describe a transaction in which one agent or one broker "represents" both the buyer and seller—an arrangement known as dual agency. When this happens, agents and their brokers[2] reap a double fee as a sort of perverse reward for abandoning fiduciary duty. Their clients experience a fundamental degradation in service. It is the worst form of bait-and-switch, using pledges of undivided loyalty as the bait and, when dual agency arises, providing no such thing. Dual agency is illegal in every fiduciary profession where competing interests are involved—except for Realtors.

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Real estate licensees already enjoy special legislative protections written into consumer protection licensing laws. The current licensing statute misrepresents dual agency conflicts and their ramifications and obliterates the informed consent requirements found in common law. Worse, the licensing law serves to exonerate Realtors from civil liability if they comply with those minimal and incomplete disclosures.[3]

A new piece of dual agency legislation introduced this year in Minnesota (H.F. 1112, S.F. 1020) would rename the practice *designated agency* and allow dual agent brokers to represent themselves as exclusive agents while concealing their dual agency status and financial interest in the transaction. For brokers, dual agency transactions mean that they don't have to share the commission with outside brokerage firms. In other words, brokers are incentivized to engineer dual agency transactions in which they abandon their clients. If designated agency is passed, as it has been in 34 other states, we will have legalized fraud in a fiduciary relationship.

Dual agency is bad. Now throw in a double fee.

Brokers love dual agency. And they should, since they get paid double. As a result, dual agency encourages really bad practices like reverse marketing. *Reverse marketing* is when brokers intentionally limit the marketing of their clients' homes. Instead of charging consumers 6 percent and trying to sell their clients' homes for the highest price and in the shortest time possible, brokers act on the almost irresistible temptation to severely limit the marketing of their clients' homes to try to engineer a double fee by finding a buyer who is represented by the same brokerage. Reverse marketing already is rampant in our market, despite

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the fact that it flies in the face of why consumers hire brokers in the first place.

Pocket listings are a particular kind of reverse marketing in which brokers tell clients that they want to "test market" their homes to get feedback from agents within a brokerage firm. They are also called "pre-MLS listings." Brokers typically keep the home off the MLS for a couple of weeks (the highest interest in homes just listed typically occurs in the first two weeks) and intensely market the potential hogger to agents within the brokerage. These homes often hit the MLS with an accepted offer without ever experiencing the full market exposure the properties deserved.

Brokerages also offer financial incentives to agents and managers who betray their clients into dual agency transactions. There is a class action going on in New York right now alleging:

> "Since at least January 1, 2011, Houlihan Lawrence has operated a bait-and-switch scheme to lure thousands of homebuyers and sellers into dual-agent transactions…. To induce its 1,300 agents to participate in the scheme, Houlihan Lawrence pays secret kickbacks to the sales agents who secure double commissions through dual-agent transactions. These kickbacks encourage Houlihan Lawrence agents to put their personal interest in a bigger commission check ahead of the interests of their clients by incentivizing them to steer clients into dual-agent transactions."[4]

Some years ago, Edina Realty made national real estate industry news by removing their clients' listings from two of the most buyer-frequented websites in the country at the time: Trulia and Realtor.com. As reported at the time by the industry publication Inman News,[5] a representative from Edina said that one of the reasons that they did this was to increase the search engine optimization of their firm's website. In other words, they wanted consumers to find properties on their firm's website, which would likely increase the chances of collecting a double fee and imposing dual agency on their clients. If there were no such thing as a "hogger," would this ever have happened? (In 2014, Edina Realty did an about-face and began sharing its listings with those sites and with Zillow, with which they had not previously listed.[6])

Agents derive their agency relationship from their brokers

Even though most consumers believe that they are hiring an individual Realtor when they engage one to buy or sell a house, they are really hiring the brokerage firm. Consumers can *only* hire the broker and never the salesperson (also known as an "agent"). Realtors are authorized to represent clients only on behalf of their brokers. If the agent leaves the firm, the broker gets to keep the client. It's not the agent's client. All contracts are with the broker, and only the broker can handle the money. It is the broker who must supervise the agents. It is the broker who is responsible for the acts of the agents.

In Minnesota, when a buyer and seller hire the same broker in the same transaction, the broker is engaging in dual agency. And because agents derive their authority from their supervising brokers, all the agents also become dual agents. An agent's authority cannot exceed the authority of their broker. However, the concept of designated agency changes all that.

Designated agency

Instead of restricting dual agency further because of its problems, the Realtors are proposing a new law that sidesteps the stigma of dual agency by allowing agents from dual agency firms to pose as exclusive agents. The bill proposes to allow dual agent brokers to appoint one agent to represent a buyer and another agent to represent the seller in the same transaction and promote this form of "representation" as exclusive agency even though the broker is a dual agent. (The business model should be called designated *dual* agency.) The law, if passed in its current form, would conceal the dual agency and double-fee conflicts of the broker. Not only would this law be confusing for consumers; it would intentionally mislead them about the representation that they can expect to receive. This legislation proposes to legalize undisclosed dual agency. That's legalized fraud.

Realtors love dual agency but hate explaining it to clients, because when clients truly understand what it means, they won't agree to it. It is impossible for Realtors to satisfy the common law informed consent standard. That's why they changed the law. That's why they are proposing this new law. Instead of doing the proper thing and eliminating dual agency as an option, they're finding new ways to disguise it.

How can supervising brokers be neutral? They can't.

This new bill proposes that when a designated (dual) agency situation arises, supervising brokers are to remain neutral. But simply stipulating that a broker is neutral does not make it so. By definition, the broker is not neutral. And under the terms of the designated agency law, brokers would have a statutory duty to review confidential negotiating information collected by their agents. With a double commission (sometimes as high as six figures) riding on the deal staying in-house, brokers can't be trusted to be impartial with this information. What kind of supervision can be expected in this situation? What will go on behind closed doors?

It is the broker who has the most conflicts and the biggest financial temptations to access all the private confidential negotiating information of the buyers and sellers and to use that information to ensure the transaction takes place. Collecting the entire commission is not a minor incentive. Likewise, you cannot have multiple licensees of the same broker conducting negotiations and expect that they will receive unbiased supervision from that dual agent broker.

Consider, for instance, a multiple offer situation with agents from within and outside the firm. Consider agents from the same team within a brokerage negotiating against each other. Consider two brand new agents attempting to negotiate a complex transaction without the requisite skillset to negotiate without their broker. Consider the transaction in which the broker represents a developer with hundreds of houses and simultaneously represents a single buyer. It's easy to imagine countless situations in which the broker's ability to supervise becomes hopelessly compromised.

Yet the bill to legalize "designated agency" proposes to allow salespeople to do exactly what their supervising broker is prohibited from doing—negotiating price and terms. Designated agency makes brokers privy to private negotiating information that they otherwise would not have had. Instead of warning consumers not to divulge confidential negotiating information to brokers, this new law would encourage them to do so.

The proposed law would require no disclosures about the broker's inability to supervise their agents or the broker's access to confidential negotiating information and financial incentive to use that information against clients' interests. These are insurmountable conflicts that fiduciaries are supposed to avoid, not invite. Advocating agents are given nowhere to turn to seek needed negotiating advice. But the broker will

have access, even a duty, to see all the consumers' confidential negotiating strategies. There are no warnings to consumers not to disclose their negotiating information (such as how high a buyer or how low a seller is willing to go on price) to these tainted advisors.

Dual agency disguised as exclusive agency

Designated agency, as noted above, is promoted to consumers as exclusive representation. Even savvy consumers who don't like the idea of dual agency are likely to believe that designated agency is a legitimate choice. If you're an attorney who understands the intricacies of broker duties and how brokers are paid, not so much. Merely writing a law that says you are an exclusive buyer agent doesn't make it so. A dual agent broker is a dual agent broker.

Low entry standards for real estate licensing exacerbate the problem. This law proposes to allow agents to work completely free of the supervision of their brokers while negotiating on behalf of the broker's clients. That's a big problem when you look at the lowest common denominator—the green agent. Anyone can become a real estate agent. You don't even need a high school degree. Just take a 90-hour class and pass the exam and you become a real estate licensee. Before you can start work, however, you must find a broker who is willing to hold your license and supervise your activities. But under the terms proposed for designated agency, that supervision theoretically vanishes once you begin to advocate on behalf of your client. To whom does the new agent turn for advice? What happens when the new agent's qualifications are abysmally low? The designated agency bill offers no one for them to turn to. Attorneys are trained in the management of conflicts of interest; if any class of professionals could navigate something as complex as a dual agency relationship, it would be them. But a law firm cannot legally represent the buyer and seller in the negotiation of a real estate transaction. The disclosures and conflicts are so great that many believe that the relationship is non-consentable.[7]

Designated agency gives large brokerage firms an unfair marketing edge

Designated dual agency will allow large firm agents to legally misrepresent to the public that they provide the same level of fiduciary oversight that small firms provide. It's unfair to small brokers and to

consumers. Small brokers have a huge and legitimate marketing advantage over large firms: Small firms can completely avoid dual agency. Small brokers can offer pure fiduciary services in which neither they nor their agents engage in any form of dual agency. It is called single agency and is the best form of representation available today to consumers.

However, Minnesota licensing law and the accompanying statutory disclosures do not provide for this type of representation, probably because big brokers are unable to provide this level of service.

Since small brokers rarely run into their own listings while representing buyers, they can easily avoid dual agency and practice single agency. This is a huge advantage to clients who desire true fiduciary services from their agent and broker. In the rare situation when a dual agency does arise, the broker withdraws and refers the clients to a competitor for a referral fee. When a small firm practicing single agency is a choice, there is no good reason to choose a large brokerage firm.

The Minnesota Association of Realtors is promoting "designated agency" to their membership with this tagline: "Is Dual Agency preventing you from fully representing your clients' best interests? If so, you are not alone!" But of course, their prescribed solution amounts to simply changing a name. Thirty-three years ago, in a guide released as part of the NAR's 1986 Legal Liability Series on agency law, Realtors sang a different tune: "Dual Agency is a totally inappropriate Agency relationship for real estate brokers to create as a matter of general business practice."[8]

Back then, the advice from NAR read like quotes taken from the Restatement of Agency.[9] The same document went on to say, "An agent's duty of loyalty compels him to refuse to accept any employment that would require him to act contrary to, or in competition with, the interests of his principal. Buyers and sellers of real estate are deemed by law to 'compete' with one another and to have 'adverse' interests…. A real estate broker who acts for both the buyer and the seller and does not clearly disclose his status to both parties and receive their informed consent is an undisclosed dual agent. Undisclosed dual agency is universally considered to be a breach of an agent's duty of loyalty to his principal. It is also considered to be an act of fraud…. The disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine."

Back then, too, Minnesota licensing law didn’t protect licensees from civil liability. Here’s how the old law used to read before the Realtors changed it: “The requirements for disclosure of agency relationships set forth in this chapter are intended only to *establish a minimum standard for regulatory purposes, and are not intended to abrogate common law.*” (Emphasis added.)

Conclusion

Realtors have used licensing law to do away with common law consumer protections and insulate themselves from market forces and liability. They have used licensing law to make it possible for them to subject their clients to a catastrophic degradation in the level of service (dual agency) and charge them double for it. It is a travesty of justice to use a licensing law to make it easier to deceive consumers.

The dual agency double fee is not worthy of legislative protection. When did we determine that real estate brokers needed government protection to collect a double fee and subject clients to dual agency and fiduciary abandonment? Collecting a double fee is an unfair profit to begin with, yet Minnesota licensing law treats it as if it were a lofty and important consumer goal. Dual agency is not necessary to sell real estate. It just happens to be the most profitable approach.

Notes

[1] A Realtor is a member of the Realtor Association, the trade association that controls the Multiple Listing Service (MLS). If salespeople don’t join the Realtor Association, they can’t have access to the MLS. This is why nearly every licensee is also a “Realtor.”

[2] Minnesota law creates a licensing hierarchy in which only brokers can contract with consumers and handle money, and brokers are further charged with supervising salespeople (agents). Agents can only work on behalf of brokers and do not have any direct contractual fee or agency relationships with consumers.

[3] Minn. Stat. 82.67 Subd 2 reads, “Disclosures made in accordance with the requirements for disclosure of agency relationships set forth in this chapter are sufficient to *satisfy common law disclosure requirements*.” (Emphasis added.)

[4] *Goldstein vs Houlihan Lawrence*, Supreme Court of the State of New York, County of Westchester, 60767/2018. *https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=F6GoWWSthHIOlDuLwceGQw==&system=prod*

[5] Inman News, "Minnesota broker will stop sending listings to Trulia, Realtor.com" (11/21/2011).

[6] Inman News, "Edina Realty does about-face, sends listings to Zillow, Trulia, Realtor.com" (9/30/2014).

[7] See Minnesota Rules of Professional Conduct rule 1.7 and comments 7 and 26-33.

[8] Who Is My Client? A Realtors Guide to Compliance with the Law of Agency. 1986

[9] Restatement Of the Law, Second, Agency 2d.

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