

1 House, 2 Buyers and 1 Firm – What is This?

By Judith I. Johannsen

In today's residential real estate market where there are more buyers than available properties, competition is fierce – not only between the various sellers for the buyers, but also between buyers for the same properties.

When buyers or sellers wish to enter the real estate market, the perennial question arises as to whether they should sell the home they own first and then look for a property to purchase or find the home they want to purchase and then sell their present home. Another part of that question is can I have one real estate firm represent my interests as a seller and a buyer at the same time? While the answer to what buyers or sellers should do first may depend upon their circumstances, the answer to the second part is "yes".

The decision then is to decide which real estate firm to use. Before making that decision, one needs to know that different real estate firms have different policies regarding agency relationships. The way real estate firms represent people in real estate transactions has changed from when they traditionally represented only seller's interests. Now a real estate firm may offer Seller Agency exclusively, Buyer Agency exclusively, or Seller Agency and Buyer Agency, with disclosed Dual Agency for in-house sales.

The two fundamental types of available agency relationships are Seller Agency, which is where a real estate firm and all of its agents represents the seller's interests, and Buyer Agency, where a real estate firm and all of its agents represents the buyer's interests. The law requires that each of these relationships be evidenced by a written agreement. Therefore, when a real estate firm represents a seller, a Listing Agreement is entered into and, similarly, when a firm represents a buyer, a Buyer Representation Agreement is entered into. Each agreement provides that the real estate firm has an obligation to represent that person's interests.

Oftentimes the situation arises where a real estate firm represents a seller and, at the same time, represents a buyer who wishes to make an offer on the seller's property. If a firm has agreed to vigorously represent the seller's interests through a Listing Agreement and it has also agreed to vigorously represent a buyer's interests through a Buyer Representation Agreement, isn't it a conflict of interest for the firm to represent both of those parties in the same transaction? If both buyer and seller give their written informed consent, the firm may act as a fiduciary to both parties as a Disclosed Dual Agent. So, where a real estate firm is a Disclosed Dual Agent, the firm is representing two parties with *adverse* interests in the same transaction.

When a real estate firm represents a seller or a buyer, all of the licensees in that firm, as agents of the firm, also represent that seller or that buyer. When a firm is a Dual Agent representing both the seller and the buyer in the same transaction, the client may express concerns regarding confidentiality of information. To avoid breaching confidentiality, the firm may offer Designated Agency to the parties. Designated Agency is where one agent in particular is designated to represent the seller and one agent in particular is designated to represent the buyer. The real estate firm is still considered a Dual Agent as it represents both parties.

When a real estate firm practices Seller Agency and Buyer Agency with Disclosed Dual Agency for in-house sales, it is likely to have more than one seller client and more than one buyer client. Therefore, it is logical and probable that more than one buyer client could be interested in one or more of the same properties, especially in a market where buyers outnumber sellers.

What happens when a real estate firm represents two different buyers, each of whom are interested in making an offer on the same property? Is a written disclosure or agreement of the parties required? Is there a conflict of interests where a firm represents the interests of two buyers vying for the same property?

Unlike the situation where a firm represents the *conflicting* interests of a seller and a buyer in a Disclosed Dual Agency situation and the firm requires written consent before it can proceed with the transaction, the firm in this new situation represents buyers with *competing* interests.

An agent does not breach his duty by acting for competitors if the parties have reason to know that the agent believes he may do so. Essentially, then, no Dual Agency consent is required and a firm can represent both clients so long as the buyers were notified that the firm has the right to represent competing interests. Such a notice could be placed in a Buyer Representation Agreement or a Listing Agreement. Additionally, the firm should advise both buyers that they should each submit their best offer and that the seller would make the ultimate decision.

While real estate agents understand the various agency relationships a real estate firm can have with buyers and sellers, the general public can become confused with the different types of agency available to them and their legal requirements. Today's homebuyers need to understand that this real estate market is chock full of buyers all vying for the same properties. Furthermore, homebuyers need to recognize that the buyer competing against you for that perfect house may not be from the real estate firm across town but represented by the same firm as you, and that's okay.

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